

**‘CONSENSUAL’ OR SUBMISSIVE RELATIONSHIPS:  
THE SECOND-BEST KEPT SECRET**

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*[T]hen she says (and this is what I live through  
over and over) –she says: I do not know  
if sex is an illusion  
I do not know  
who I was when I did those things  
or who I said I was  
or whether I willed to feel  
what I had read about  
or who in fact was there with me  
or whether I knew, even then  
that there was doubt about these things.  
“Dialogue”  
Adrienne Rich*

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In her groundbreaking book, *The Best Kept Secret*,<sup>1</sup> Florence Rush argued that child sexual abuse “is not a phenomenon that emerges from nowhere but is a legacy from the past which continues on in our everyday life.”<sup>2</sup> If child sex abuse is society’s “best kept secret,” the second most covert sexual offense is that which is euphemistically termed “consensual sex” in the workplace and academia. Like child sex abuse, it extends as far back as Biblical times when David the King misused his power to gain access to the wife of one of his soldiers.<sup>3</sup> Despite slow but steady progress in combating sexual offenses, it remains the most enigmatic and controversial behavior in a culture and legal system which too often dismiss it as a private matter between adults or minimize it by disbelieving or blaming the victim.

In 1976, when *Williams v. Saxbe*<sup>4</sup> laid the foundation for what would become known as quid pro quo sexual harassment (requests for sexual favors where submission to or rejection of the requests affects the terms or condition of employment),<sup>5</sup> there was reason to hope that all but the most misogynistic understood that employers should not condition job benefits and privileges on employees’ willingness to submit to sexual demands. Then in 1986, *Meritor Savings Bank v. Vinson*<sup>6</sup> established the concept of the “hostile” work-environment, and in rapid succession after it came the high visibility cases surrounding Clarence Thomas and Robert Packwood. Somehow eclipsed in subsequent discussions of *Meritor*, the first sexual harassment case ever to reach the Supreme Court, was the Court’s reaffirmation of plaintiff Mechelle Vinson’s argument that the hostile environment she experienced resulted from her being compelled to participate in sexual activity with her supervisor at Meritor Savings Bank.<sup>7</sup> Vinson contended that her so called ‘consensual’ relationship with her manager was, in reality, not voluntary at all.<sup>8</sup>

In the thirteen years following the *Meritor* decision, there has been considerable confusion and debate over how to define a hostile work environment. While total consensus has not yet emerged, the debate itself has increased understanding of the harassment dynamic. This has not, however, been the case with the issue of submissive sex, which has received less attention, but is an equally urgent problem. The task of unraveling its ambiguities fell to courts deciding case with few precedents.<sup>9</sup>

Americans might have remained blissfully unaware of the complexities in-

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1. FLORENCE RUSH, *THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN* (1980).

2. *Id.* at 15.

3. *See* 2 Samuel 11:1-26.

4. 413 F. Supp. 654 (D.D.C. 1976).

5. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

6. 477 U.S. 57 (1986).

7. *See id.* at 65-69.

8. *See id.* at 60.

9. *See generally id.* (refusing to hold that a relationship is voluntary and passes judicial muster absent an economic effect on complainant’s employment); *Franklin v. Gwinnet County Pub. Sch.*, 503 U.S. 60 (1992) (student sexually harassed by teacher; consensual nature of their intercourse was not subject to consideration); *Gebser & McCullough v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1988) (focusing on liability of educational institutions under Title IX rather than the consensual nature of the sexual intercourse between a teacher and student).

volved in "consent" had the enthusiastic libido of the forty-second President not become a national issue. It will take decades, perhaps longer, before the effects of the tumultuous sixth year of the Clinton presidency can be accurately assessed. But clearly 1998 will be remembered as a time during which new presidential privileges were asserted, affirmed, and denied; the concept of the Independent Prosecutor re-examined; the meanings of "perjury," "obstruction of justice," "high crimes and misdemeanors," and even "sexual relations," "is," and "alone" contextualized and debated.<sup>10</sup> Yet strangely absent from the passionate and seemingly endless rhetoric following Mr. Clinton's admission of an "inappropriate relationship" with a White House intern is any sustained media or public interest in the subject of 'consensual' sex, which was the origin of the quagmire in which the President was engulfed.

Regardless of one's politics, the Clinton-Lewinsky affair demonstrates the perils of 'consensual' relationships in the workplace and academia. Even those who share Mr. Clinton's political beliefs should be troubled by the ease with which Americans accepted his defenders' simplistic argument that it was a "private" matter between "consenting adults" when arguably the most powerful man on earth used the Oval Office for sexual activity with a lower echelon government employee half his age.<sup>11</sup>

In some respects, both the Clintonites, contending that a sexual affair did not warrant national attention, and the anti-Clintonites, arguing that the sex was insignificant compared to allegations of perjury and obstruction of justice, missed the point. The sex did matter. It mattered not simply because it was the impetus for a political crisis but because it exposed a fundamental reality with which Americans will have to cope long after Bill Clinton and Monica Lewinsky are footnotes in history. What this unseemly spectacle revealed is that despite two decades of litigation, media coverage, and attempts at education, many still do not grasp the most basic concepts involved in sexual harassment. They still do not understand that genuine consent cannot exist in conjunction with unequal distribution of authority, that power and status disparities place subordinates in untenable positions from which some lack the fortitude and support to extricate themselves, and that "amorous" relations between those with unequal power produce hostile work environments that intimidate and offend innocent third parties and create enormous risks for employers.

Part I of this paper examines the mixed public response to the issue of in-

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10. See generally KENNETH STARR, THE STARR REPORT: THE OFFICIAL REPORT OF THE INDEPENDENT COUNSEL'S INVESTIGATION OF THE PRESIDENT (Prima Publishing 1998); *Independent Counsel Investigation before the Grand Jury, Testimony of William J. Clinton* (Aug. 17, 1998) (visited Jan. 23, 1999) <[http://www.courtstv.com/casefiles/clintoncrisis/clinton\\_testimony](http://www.courtstv.com/casefiles/clintoncrisis/clinton_testimony)>.

11. The "what if" scenarios in this case are even more staggering than the turmoil which already exists. What if Monica Lewinsky had refused the gifts from Mr. Clinton and had instead taken herself and her navy blue dress to an attorney's office to complain about being transferred to the Pentagon and about the President's not keeping his alleged promise to bring her back to the White House to work? What if her mother had been less a "friend," as she has been described in the media, and had instead acted as a parent? What if, instead of concealing her daughter's story all those months, she had gone to an attorney and claimed Monica had standing to initiate a suit against the President? What if one of the more than two hundred other interns who were less enamored with Mr. Clinton had complained to an attorney about receiving no gifts from the President and no special help from his friend Vernon Jordan in finding a job?

appropriate consensual relationships. Part I.A., "Corporate Response," offers examples of workplace reactions to affairs between supervisors and subordinates and concludes with statistics from surveys which demonstrate that submissive relationships pose serious potential problems in the workplace. Part I.B., "Academic Response," describes academia's feeble efforts to deal with the problem. Part I.C., "America's Response," analyzes causes of American's confusion about acquiescent sex. Part II provides examples of cases in which judges were ill-informed about the "consent" dynamic and/or insensitive to victims. It traces the Supreme Court's rulings on harassment and discusses their implications for future cases. Finally, Part III identifies the challenges facing the courts as they attempt to deal with this complex issue.

## I. PUBLIC RESPONSE

### A. Corporate Response

As 1998 began, there was reason for both optimism and pessimism about Americans' understanding of the dangers of 'consensual' relationships.<sup>12</sup> In some instances corporate America had already demonstrated opposition to affairs between high visibility CEO's and their subordinates.<sup>13</sup> In 1980, when William Agee, Bendix Corporation's chairman and chief executive, was reported to be sexually involved with Mary Cunningham, a 29 year old-vice-president who had received two promotions in a matter of months, she resigned.<sup>14</sup> The two continued to deny the affair, although both divorced and married each other less than two years later.<sup>15</sup> There is no way to determine how Cunningham might have responded to the loss of her job if she had not remained friendly with her boss.<sup>16</sup> *Meritor* was still six years off, so there was no judicially recognized hostile environment claim upon which a co-worker of Cunningham who was equally able but uninvolved with Agee might base a suit. Moreover, quid pro quo was a relatively new concept in 1980. Cunningham wrote a book, the newlyweds went on to other corporate adventures,<sup>17</sup> and the story is remembered more as an anecdote demonstrating corporate bias against women than as a potentially spectacular lawsuit involving consensual sex.

Eleven years later both sexism and sexual harassment litigation were on the minds of General Public Utilities Corporation board members when they requested that fifty-nine year-old Standley H. Hoch, chairman, chief executive officer and president, resign because of a rumored affair with Susan Schepman, a vice-president, who reportedly chose to quit on her own shortly afterward.<sup>18</sup> A

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12. See *supra* text accompanying note 8; Lois Ramono, *Mary Cunningham Speaks Out: Talking about Fame, Pain and Mergers*, WASH. POST, October 26, 1982, at B1, B3; *Hoch/Schepman: The Story That Was Almost Too Hot for the Media to Handle*, J.R. O'DWYER PR SERVICES REP., Aug. 1991 [hereinafter *Hoch/Schepman*].

13. See Ramono, *supra* note 12, at B3; *Hoch/Schepman*, *supra* note 12.

14. See Ramono, *supra* note 12, at B1.

15. See *id.*

16. See *id.*

17. See *id.*

18. See *Hoch/Schepman*, *supra* note 12, at 11.

board member commented that Hoch's departure resulted from "a combination of the personal relationship and its impact on the business . . . . It was a question of how effective you can be and how well can you lead under the circumstances that existed."<sup>19</sup> In another highly publicized recent scandal, Martin Manaka, president of Staples, and his secretary, Cheryl Gordon, ultimately resigned after their romance soured.<sup>20</sup> When Gordon accused Manaka of assaulting her during an argument, Staples took little time to conclude that the two had violated its anti-fraternization policy prohibiting romantic relationships between managers and subordinates.<sup>21</sup>

Nevertheless, such public stories can be misleading. While high visibility cases like these suggest to casual observers that businesses, like the military, are adopting rigorous rules against fraternization, the reality is quite the contrary. In 1995, at the request of *Money* magazine, the AMA (American Management Association) queried nearly 500 AMA member companies on the subject of "office romance" and only 6 percent had formal written policies addressing questions of intraoffice dating.<sup>22</sup> In 1996, a similar AMA study revealed equally startling results. Although 89 percent of firms had formal policies and procedures to deal with sexual harassment complaints and 65 percent provided employee training on the issue, only 57 percent of respondents replied that their organizations actually forbid employees from dating superiors, and 61 percent responded that superiors were not permitted to date subordinates.<sup>23</sup> Twenty-seven percent reported having had romantic relationships with colleagues.<sup>24</sup> Of these, 27 percent described the "romantic partner" as a subordinate, seven percent as a superior, and five percent as the "boss."<sup>25</sup> Twenty-three percent replied that it is "okay" for an employee to date a superior, and 21 percent said that it is acceptable for a manager to date a subordinate.<sup>26</sup> Although 98 percent knew the definition of quid pro quo harassment, the survey results indicate that they apparently did not recognize any link between the theoretical definition and the volatile circumstances that exist when romantic relationships are ignored or tolerated.<sup>27</sup>

Even with the implementation of rigorous rules and training, "consent" remains a significant workplace problem. The U. S. Merit Systems Protection Board's "Sexual Harassment in the Federal Workplace," which is the largest survey of its kind, questioned federal workers about the effectiveness of prevention procedures.<sup>28</sup> Respondents were optimistic, observing that, to a great or moderate extent, training (63 percent agreement), agency policies (68 percent

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19. *Id.*

20. *See id.*

21. *See id.*

22. Eric Rolfe Greenberg, *The Libido and the Workplace*, AM. MANAGEMENT ASSOC. REV., May 1998, at 9.

23. *See id.*

24. *See id.*

25. *Id.*

26. *See id.*

27. *See id.*

28. *See* U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES 1994.

agreement), and public attention to the issue (76 percent agreement) were helping to change offensive behaviors and reduce harassment.<sup>29</sup> Ironically, however, the report concluded, "overall, the changes from previous surveys in the percentages of respondents reporting each form of harassment have been quite small, usually no more than two percentage points, if there is any change at all."<sup>30</sup>

### B. Academic Response

Interestingly, academia, which one would expect or hope to be the safest of all havens from destructive affairs between the young and older authority figures, has done less than the workplace to discourage them. A 1998 survey of universities' consensual relationship policies concluded that only about 17 percent of institutions have policies addressing faculty-student affairs.<sup>31</sup> This is the case despite the fact that 87 percent of male faculty in a large Eastern University surveyed in 1993 believed they could not "avoid professional conflicts of interest" when engaged in a "sexual relationship with a student" whom they teach, advise, or supervise,<sup>32</sup> and that 83 to 90 percent of male faculty and female graduate students in the survey thought that female students who become involved in consensual sex with professors are likely to suffer detrimental consequences.<sup>33</sup>

### C. America's Response

There are five reasons Americans misunderstand and oversimplify "consent." The first of these, demonstrated during the Clinton scandal, is lack of leadership from those who should be most concerned. If hypocrisy were a physical illness, 1998 would rate as an epidemic year in American history. Republicans underwent a conversion experience on sexual harassment. Democrats fell into amnesia. Then, sensing public ignorance about the issue in the polls, they seemed to have made a rare bipartisan decision to engage in moralistic sound bites about the President's behavior and to avoid complicated discussions about the White House as a workplace and Mr. Clinton as an employer. To their enormous discredit, most feminists not only concurred but did so publicly in convoluted statements that sent mixed messages to a public which appears to have adopted the simplistic view that 'consensual' sex in the workplace is always and only a private matter.<sup>34</sup> Having renounced the opportunity to engage

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29. See *id.* at 42.

30. *Id.* at 16.

31. See M.C. STITES, *University Consensual Relationship Policies*, in *SEXUAL HARASSMENT ON CAMPUSES: ABUSING THE IVORY POWER: SEXUAL HARASSMENT ON CAMPUS* 153 (M.A. Paludi ed., 1996) (citing D. LITTLE & J. THOMPSON, *Campus Policies, the Law, and Sexual Relationships*, in *THOUGHT AND ACTION* 17-24 (1989)).

32. STITES, *What's Wrong with Faculty-Student Consensual Relationships?*, in *SEXUAL HARASSMENT ON CAMPUSES: ABUSING THE IVORY POWER: SEXUAL HARASSMENT ON CAMPUS*, *supra* note 31, at 114, 120.

33. See *id.* at 131.

34. Gloria Steinem, *Feminists and the Clinton Question*, N.Y. TIMES, Mar. 22, 1998, at 15 (implying that the women with whom Clinton had sexual relations did so voluntarily, and thus the public has no reason to be confused about Clinton's favorable poll ratings).

the nation in a long overdue dialogue about this aspect of sexual harassment, no one seemed concerned about the future in which Americans will have to confront the effects of having minimized behavior that is by no means private.

The ruling in *Nichols v. Frank*<sup>35</sup> offers a chilling reminder of the need for stability and leadership on sexual harassment issues: "Public opinion can change rapidly. It is quite possible for conduct that is acceptable today to become unacceptable tomorrow ... There is no uniform attitude towards the role of sex nor any agreement on what is appropriate for inclusion in a code governing sexual conduct."<sup>36</sup> And it is also possible, even likely, that the message equivocating and evasive leaders have sent is that behavior unacceptable yesterday in the White House, factories, offices, and schools is no longer a 'big deal' but merely a matter of privacy and choice.

Members of the clergy added to the confusion by describing the President as the victim. A "spiritual advisor [was quoted as saying,] 'I wish he wouldn't walk with his head down. That only is a sign that the enemy is getting to you.'"<sup>37</sup> When Mr. Clinton attended Reverend Bennett Smith's church in Buffalo, New York,<sup>38</sup> his invocation combined the prayer of St. Francis of Assisi with *Isaiah* 54:17<sup>39</sup> and *Galation* 6:9.<sup>40</sup> The Reverend Billy Graham, a symbol of old-fashioned moral rectitude to Protestant Americans, sent a confusing and even dangerous message to his followers: "Certainly I forgive [President Clinton] because I know of the frailty of human nature. And I know how hard it is, and especially [for] a strong, vigorous young man like he is. And he—he has such a tremendous personality that I think the ladies just go wild over him."<sup>41</sup> One wonders if the assumption here is that access to women is the birthright of "strong, vigorous," charismatic men, and people should forgive them when they succumb to their sexual frailties.

Gender stereotyping underlies Reverend Graham's remarks and greatly influences Americans' confusion about 'consensual' relationships. According to the stereotype, 'normal' men are promiscuous, 'good' women tolerate their spouses' infidelities, and 'bad' women have affairs with married men. In the weeks following the first accusations, Hillary Clinton, never especially popular with the general public, began attracting admiration. In an April 1998 Gallup CNN, *USA Today* poll, Americans expressed approval of her "handling" of the controversy 70 percent to 25 percent.<sup>42</sup> The same poll found that 39 percent thought she should "publicly defend him to help protect his presidency," 30 percent thought that she should "stay with him in the marriage," only 19 percent thought that she should "leave him on the basis of infidelity."<sup>43</sup> By August,

35. 42 F.3d 503 (9th Cir. 1994).

36. *Id.* at 510.

37. Sonya Press, *Seeking Inward, Upward*, CINCINNATI ENQUIRER, Jan. 30, 1989, at A1.

38. *See id.* at A4.

39. "[N]o weapon that is formed against thee shall prosper."

40. "Let us not weary in well-doing, for in due season we shall reap if we faint not."

41. *Today* (NBC television broadcast, Mar. 5, 1998).

42. Gallup, CNN, U.S.A. Today, *Do You Approve or Disapprove of the Way Each of the Following Has Handled the Controversy Over (Bill) Clinton and Monica Lewinsky? How About . . . Hillary Clinton?* (released April 17, 1998) <wysiwyg://59/http://www.lexis.com/research/retrieve>.

43. *Id.*

Clinton had admitted the affair, and a *Newsweek* poll found that the public continued to believe by 44 percent to 27 percent that his wife should “stand by her man” and not consider divorce.<sup>44</sup>

Monica Lewinsky, on the other hand, did not fare so well in the eyes of the public.<sup>45</sup> After two decades of litigation and education about sexual harassment, relatively few took into consideration her age, subordinate position, or dysfunctional family background in assessing her share of responsibility for the relationship. Insisting that no one had suggested there was any sexual harassment on his part, the President ignored Ms. Lewinsky’s subordinate status in his testimony to the Grand Jury, although he appeared cognizant of her youth and vulnerability when he described her as a good girl burdened by some unfortunate conditions of her upbringing.<sup>46</sup> Indisputably guilty to some degree, Ms. Lewinsky nevertheless suffered disproportionately negative poll ratings when compared to Mr. Clinton. Polls after the President’s admission of guilt gave her 5 percent and 10 percent favorables versus 54 percent and 73 percent unfavorables.<sup>47</sup> Only 47 percent indicated that they were somewhat or seriously bothered about the relationship, and 66 percent said they did not believe “Clinton owe[d] Monica Lewinsky an apology.”<sup>48</sup>

The latter response should come as no surprise since prior to the confession, the public repeatedly indicated by numbers as high as 77-78 percent that it did not believe a consensual relationship would “constitute sexual harassment on the part of Clinton.”<sup>49</sup> Probably most disturbing of all were the results of a poll which asked, “If Monica Lewinsky and President Clinton did have a relationship, would it best be described as: sexual harassment of an employee by a boss, an affair between consenting adults, or the stalking of a famous person by a

44. See Princeton Survey Research Associates, *Newsweek, Now That Bill Clinton Has Admitted He Had an Improper Relationship with Monica Lewinsky, Do You Think His Wife, Hillary, Should Consider Divorcing Him, or Not?* (released August 22, 1998) <wysiwyg://112/http://www.lexis.com/research/retrieve>.

45. See CBS News, N.Y. Times, *Is Your Opinion of Monica Lewinsky Favorable, Not Favorable, Undecided, or Haven't You Heard Enough About Monica Lewinsky Yet to Have an Opinion?* (released September 1, 1998) <wysiwyg://68/http://www.lexis.com/research/retrieve>; Los Angeles Times, *What Is Your Impression of Monica Lewinsky? As of Today, Is It Very Favorable, Somewhat Favorable, Very Unfavorable, or Haven't You Heard About Her Yet to Say?* (released August 21, 1998) <wysiwyg://101/http://www.lexis.com/research/retrieve>; Opinion Dynamics, Fox News, *I'm Going to Read the Names of Some Prominent People. Please Tell Me Whether You Have a Generally Favorable or Unfavorable Opinion of Each One. If You've Never Heard of Someone, Please Just Say So . . . Monica Lewinsky.* (released July 2, 1998) <wysiwyg://741/http://www.lexis.com/research/retrieve>.

46. See *Independent Counsel Investigation before the Grand Jury, Testimony of William J. Clinton*, *supra* note 10.

47. See CBS News, N.Y. Times, *supra* note 45; LOS ANGELES TIMES, *supra* note 45.

48. See ABC News, Wash. Post, *Do You Think That (Bill) Clinton Owes Monica Lewinsky an Apology, or Not?* (released August 23, 1998) <wysiwyg://116/http://www.lexis.com/research/retrieve>.

49. See Yankelovich Partners, Time, CNN, *Suppose It Turns Out to Be True That Bill Clinton and Monica Lewinsky Had a Sexual Relationship and That Lewinsky Willingly Consented to the Relationship. Do You Think This Does or Does not Constitute Sexual Harassment on the Part of Clinton?* (released February 6, 1998) <wysiwyg://126/http://www.lexis.com/research/retrieve>; Yankelovich Partners, Time, CNN, *If he Allegations Involving Monica Lewinsky were True and She Willingly Consented to Have Sex with (Bill) Clinton, Would it Constitute Sexual Harassment?* (released March 20, 1998) <wysiwyg://130/http://www.lexis.com/research/retrieve>.



zealous fan?"<sup>50</sup> Sixty percent viewed such a relationship as consent, 11 percent as harassment, and 12 percent as stalking.<sup>51</sup> Publication of the Independent Counsel's report did little to alter public perception, despite the fact that the actions of the President and Ms. Lewinsky closely parallel those of the classic perpetrator and sexual harassment target.<sup>52</sup> When terminating the relationship, for instance, Mr. Clinton allegedly told of having had "hundreds of affairs;"<sup>53</sup> he alternately withheld and bestowed access and attention and, when confronted with the possibility of disclosure of the affair, allegedly countered with a threat of his own – "[I]t's illegal to threaten the President of the United States."<sup>54</sup>

Monica Lewinsky behaved as some harassment targets do when confronted with rejection. Unpredictable and alternately demanding and compliant, she demonstrated the dangers inherent for both parties in relationships that involve disparities in power, age, and experience.<sup>55</sup> In *The Starr Report*, she was both an hysterical woman scorned and a spoiled adolescent threatening to bring her parents into the situation.<sup>56</sup> But she was also compelling as a victim who, after being rejected, wrote to a boss old enough to be her father: "Please do not do this to me. I feel disposable, used and insignificant. . . . I just loved you – wanted to spend time with you, kiss you, listen to you laugh – and I wanted you to love me back."<sup>57</sup> While the public admired Mrs. Clinton for her marital steadfastness and politicians fought ad nauseam over the true identity of Mr. Clinton, no one needed to ask who Monica Lewinsky was.

Adhering perfectly to the old script on gender, a . . . female caller to C-SPAN identified [her] as 'a wannabe'. . . [and] explained that she meant the kind of female found in every office or school, the kind who will do anything to be the boss's or teacher's 'favorite.' One television commentator described [her] as a 'Valley girl,' another as 'every woman's nightmare.'<sup>58</sup>

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50. Opinion Dynamics, Fox News, *If Monica Lewinsky and President (Bill) Clinton Did Have a Relationship, Would It Best Be Described as : Sexual Harassment of an Employee by a Boss, an Affair Between Consenting Adults, or the Stalking of a Famous Person by a Zealous Fan?* (released July 2, 1998) <wysiwyg://134/http://www.lexis.com/research/retrieve>.

51. *See id.*

52. The most familiar sexual harassment scenario is one in which a perpetrator misuses authority over a subordinate to coerce sexual activity and/or to dissuade a victim from admitting or reporting the inappropriate behavior. Seminal studies like BILLIE WRIGHT DZIECH & LINDA WEINER, *THE LECHEROUS PROFESSOR* (1984) and BARBARA GUTER, *SEX AND THE WORKPLACE* (1985) provide insight into victim characteristics and behavior. Victims are characterized primarily by their vulnerability (e.g., economic, academic, psychological, etc.), but a number of other traits have been cited (e.g., youth, relationship orientation, etc.). Profiles of sexual harassers are based largely on anecdotal information, since few are likely to offer themselves for identification. In general, they tend to demonstrate extreme self-focus, indifference to effects of their behaviors, denial, etc. *See* John B. Pryor, et al., *A Social Psychological Model for Predicting Sexual Harassment*, 51 *J. OF SOCIAL ISSUES* 69 (1995) (developed a profile of men high in likelihood to sexually harass and found that individuals with proclivities to harass are likely to do so in settings that permit the behavior).

53. STARR, *supra* note 10, at 94.

54. *Id.* at 98.

55. *See, e.g., id.*

56. *See id.* at 97.

57. *Id.* at 96, 104.

58. Billie Wright Dziech, *The Abuse of Power in Intimate Relationships*, *CHRON. HIGHER EDUC.*, Mar. 20, 1998, at B4, B4.

The third reason for America's exacerbated confusion about 'consent' is the nomenclature employed to describe inappropriate sexual relationships. Most of the terminology used to describe them is not only inaccurate but also misleading. In Latin "consent" or "consentire" means "to feel with."<sup>59</sup> Since the subordinate in a relationship between unequals cannot "perceive with" the same status, authority, and knowledge as a manager or teacher, he or she cannot engage in genuinely consensual interactions. Nor is it accurate to argue, as some courts have, that an individual's "voluntariness" relieves a superior of responsibility. To "volunteer" means to enter into or offer oneself "for a service of [one's] own free will."<sup>60</sup> But even if a subordinate could be entirely free, it is nevertheless the authority figure who makes the decision to accept or reject an offer. Assuming 'consent' to mean 'consent' in its purest sense and voluntariness to be solely the province of the subordinate in a relationship, the public, and frequently the courts, are easily dissuaded from recognizing that greater responsibility and thus greater guilt lie with the authority figure who engages in offensive activities proscribed by policy or law. If more precise terminology were employed, there might be less confusion around relationships more properly described as 'submissive' or 'acquiescent,' as affairs in which one party succumbs to authority and then remains silent because he or she cannot consent or perceive it in precisely the same way as the superior.

The fourth reason people have difficulty comprehending the dynamics of 'consent' is that these dynamics are shrouded in secrecy, thus limiting the amount of statistical and anecdotal information necessary to paint a coherent and compelling portrait of the problem. Coercive sex creates fear, self-doubt, and shame in victims, so they are almost as unlikely to report it in surveys as they are to complain about it. In general, there is ambiguity about prevalence rates of sexual harassment.<sup>61</sup> While most accept as reliable the contentions that 20-30 percent of female college students and 40 percent of female workers are targets of harassment,<sup>62</sup> there are almost no surveys that attempt to measure the number who participate in 'consensual' relationships. Since the data on male victims is even more ambiguous (19 percent in the Merit Systems Protection Board survey<sup>63</sup> and 2-22 percent in various studies of college males<sup>64</sup>) reliable estimates of "consent" are highly unlikely.<sup>65</sup>

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59. WEBSTER'S NEW WORLD DICTIONARY, COLLEGE EDITION 312 (1962).

60. *Id.* at 2564.

61. See Richard D. Arvey & Marci A. Cavanaugh, *Using Surveys to Assess the Prevalence of Sexual Harassment: Some Methodology Problems*, J. SOC. ISSUES, Spring 1995, at 39 (discussing the problems associated with using surveys to develop estimates of rates of sexual harassment).

62. See Dana A. Charney & Ruth C. Russel, *An Overview of Sexual Harassment*, 151 AMERICAN J. OF PSYCHIATRY 10, 12, 16 (1994).

63. U.S. MERIT SYSTEMS PROTECTION BOARD, *supra* note 28, at vii, 14.

64. See BILLIE WRIGHT DZIECH & MICHAEL W. HAWKINS, *SEXUAL HARASSMENT IN HIGHER EDUCATION: REFLECTIONS AND NEW PERSPECTIVES* 86 (1998).

65. It is even more difficult to determine the number of males involved in acquiescent relationships since the data on male victims covers such a wide range and has been less studied. For example, 15 percent of men described themselves as targets in the Merit Systems Protection Board survey, while surveys of college males found a 2-22 percent range. See Miriam Komaromy, et al., *Sexual Harassment in Medical Training*, 328 NEW ENGLAND J. OF MED. 322, 323 (1993); De Witt C. Baldwin Jr. et al., *Student Perceptions of Mistreatment and Harassment during Medical School: A Survey of Ten*

A few studies have attempted to quantify frequency rates in academia.<sup>66</sup> In one study, 17 percent of former female graduate students indicated they had engaged in sexual activities with professors.<sup>67</sup> In the second study, 3 percent of males and 16½ percent of females admitted such encounters;<sup>68</sup> the study also included discussion of a college newspaper survey which reported that of the 25 percent of faculty who returned surveys, 25 percent had had sex with students.<sup>69</sup> A third survey found more than 26 percent of faculty acknowledging sex with students.<sup>70</sup> This information provides limited insight since most respondents were female graduate students in psychology programs. Moreover, it is impossible to assess the influence that unique campus cultures might have had upon faculty and student behaviors.

Although hard data and anecdotes on “consensual sex” are limited, an occasional case from the courts captures its reality. In *Nichols v. Frank*, Teri Nichols, a deaf and mute night-shift mail sorter, was coerced for six months into performing oral sex on her supervisor, Ron Francisco.<sup>71</sup> She did not report his behavior because she feared retaliation, and she did not tell her husband because she was afraid he would divorce her.<sup>72</sup> She described her emotions leading to a lawsuit against the U.S. Postal Services:

I tried to kill myself because I just didn't know how to tell my husband . . . what was going on . . . I was afraid that he would take my children and divorce me. And so I was just stuck. I was stuck between the two and there was no one I could talk to. I was afraid other people wouldn't believe me, so I was really stuck with both. . . [I]f I went and I told anybody on him, on the supervisor I would lose my job. My husband and I had just recently bought a house and that house depended on my earnings, and I didn't want to lose everything. And that job was so important to the support of my family, so I was just stuck with the two.<sup>73</sup>

The final reason “consent” is poorly understood is that, given limited factual information and few “real life” examples to provide insight, most judge only the overt behaviors involved in submissive affairs. They then generalize from their own experiences and assume simplistically that genuine choice underlies every action and that all reasonable and moral people make identical decisions in stressful situations. Upon hearing of a young hospital intern having an affair with the chief of staff or a secretary with the CEO of a large corpora-

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*United State Schools*, 155 WEST J. OF MED. 140, 143-44 (1991); Judith A. Richman et al., *Mental Health Consequences and Correlates of Reported Medical Student Abuse*, 267 JAMA 692, 693 (1992).

66. See Robert D. Glaser & Joseph S. Thorpe, *Unethical Intimacy: A Survey of Contact and Advances Between Psychology Educators and Female Graduate Students*, 41 AM. PSYCHOLOGIST 43 (1986); Kenneth S. Pope et al., *Sexual Intimacy in Psychology Training: Results and Implications of Two National Surveys*, 34 AM. PSYCHOLOGIST, 682; Louise F. Fitzgerald et al., *Academic Harassment: Sex and Denial in Scholarly Garb*, 12 PSYCHOL. WOMEN Q. 329 (1988).

67. See Glaser & Thorpe, *supra* note 66, at 45.

68. See Pope et al., *supra* note 66, at 682.

69. See *id.* at 687.

70. See Fitzgerald et al., *supra* note 66, at 335.

71. See *Nichols v. Frank*, 42 F.3d 503, 506-07 (9th Cir. 1994).

72. See *id.* at 507-08.

73. *Id.* at 507.

tion, a woman with a prosperous husband and a successful career may declare that she doesn't pity the other woman if she's fired because she herself 'would never do anything like that.' What she probably does not know is the kind of threats used to coerce the intern or the secretary and the personal circumstances that caused either to submit. Refusing a perpetrator may not be easy if the intern is the only female in her family ever to have 'made good' in a profession and is threatened with losing the benefits of her education and training, or if the secretary is a working mother who needs her salary to support three children.

Inability or refusal to assess circumstances from another's perspective lies at the center of misconceptions about those who unwisely submit to sex with superiors. They may be burdened by economic insecurity and significant responsibilities to others. Along with youth and inexperience, these contingencies are sometimes understood and given credence by courts. Much more difficult to explain and thus more vulnerable in litigation are those whose emotional instabilities and lack of self-esteem or ability lead them to acquiesce to the sexual demands of superiors. Since psychological deficiencies and personal limitations are not always readily observable, courts may be less sympathetic to these victims. Subordinates in inappropriate sexual relationships make unwise choices for reasons even they do not understand, and the mischief that is subsequently set in motion runs too deep for superficial observers to see.

If so many influences mitigate against greater understanding of the dynamics of "consent," is the issue doomed to remain ambiguous in the eyes of the public and the courts? Maybe not. While individual polls cannot be taken too seriously, it is nevertheless interesting to speculate on the one survey that queried respondents about the connection between "consent" and harassment and then provided age breakdowns as well as other information about those surveyed on the Clinton scandal.<sup>74</sup> This poll asked, "Suppose it turns out to be true that Bill Clinton and Monica Lewinsky had a sexual relationship and that Lewinsky consented to the relationship. Do you think this does or does not constitute sexual harassment on the part of Clinton?"<sup>75</sup> Affirmative responses for designated age groups were the following: 15 percent (ages 18-29), 17 percent (30-39), 10 percent (40-49), 20 percent (50-64), 17 percent (65 and over).<sup>76</sup> Here the 5-10 percent variation between the group composed primarily of "baby boomers" (40-49) and other ages was one of the most significant; the only other equally great discrepancy was that between Republicans and Democrats.<sup>77</sup>

Even if one feels that this particular relationship was entirely private and not at all relevant to harassment, these poll numbers are intriguing.<sup>78</sup> They may be a total anomaly, and the presence of several intervening variables makes it impossible to interpret the data definitively. Nevertheless, generational culture

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74. See Yankelovich Partners, CNN, Time, (Feb. 6, 1998), *supra* note 49.

75. *Id.*

76. *See id.*

77. *See id.* It should be noted, however, that an August survey by the Pew Research Center made no mention of significant variations among generations when it asked if the President's inappropriate relationship was "wrong because Monica Lewinsky was a 21-year old intern at the White House." Pew Research Center, *62% Dislike Clinton, 68% Like His Policies, Still the Economy they Say* (at question 34(B)) (August 24, 1998) <<http://www.people-press.org/lateaugque.htm>>.

78. See Yankelovich Partners, CNN, TIME, (Feb. 6, 1998), *supra* note 49.

may have influenced those who linked Clinton's behavior to sexual harassment. Most divergent from other groups are the baby boomers, many of whom, like the President, reflect the values of the 1960's counter culture, the 'if-it-feels-good, do-it' generation.<sup>79</sup> The older respondents, while often politically sympathetic to Mr. Clinton, may be assumed to be characterized by a conservative moral culture that influenced their more negative reactions to his affair. And what of the younger groups? These, especially the 18-19 year olds, are people for whom the concept of sexual harassment has always been a fact of life. They are the most likely to have been taught the ills of gender stereotyping and to have had formal prevention training. They have heard about harassment at home, at school, and in the media; therefore, it is possible that such experience has made at least a small portion of them cognizant of the dynamics and negative ramifications of coercive sexual relationships.

While the oldest age cohorts may have judged from a moral imperative, the younger respondents may have questioned the sexual behavior from a somewhat more informed legal and social perspective, and even the President's staunchest defenders would do well to hope that a new generation of Americans can be taught to approach the dangers of 'consent' with objectivity, reason, and compassion. This can happen only if the courts play an active role in the education process, so there is much to be learned from assessing their effectiveness thus far in clarifying sexual harassment law.

## II. THE ROLE OF THE COURTS

Prior to 1999, progress on addressing and resolving sexual harassment issues has been halting; at times it has seemed that for every step forward, the legal system takes two backward. This is especially true in the case of coercive sexual relationships, since the courts have been slow in recognizing the fears and pressures motivating women who are the primary targets or victims.<sup>80</sup> From a non-attorney's point of view, it appears that judges assume one or a combination of predictable approaches in dealing with those who bring complaints after involvement in affairs with superiors: (1) if the plaintiff said 'yes,' she must have welcomed the relationship; (2) if she is an adult, she should have known better; (3) if other women didn't succumb, neither should she; (4) if the affair ended in animosity, the plaintiff must be acting out of revenge or a need to alleviate her own guilt; (5) if she behaved immorally, she deserves what she gets.

An example of judicial insensitivity is contained in *Keppler v. Hinsdale Township High School*.<sup>81</sup> In this case, Keppler, the Coordinator of Educational Services, had an affair with a high school principal.<sup>82</sup> After the relationship soured, he continued to make advances, and when she rebuffed him, she was ultimately fired.<sup>83</sup> She sued, complaining that her termination was an act of retaliation.<sup>84</sup> In

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79. *See id.*

80. *See, e.g.,* Jones v. Clinton, 990 F. Supp. 657 (E.D. Ark. 1998); Campbell v. Masten, 955 F. Supp. 526 (D. Md. 1997); Keppler v. Hinsdale Township High Sch., 715 F. Supp. 862 (N.D. Ill. 1989).

81. 715 F. Supp. 862 (N.D. Ill. 1989).

82. *See id.* at 864.

83. *See id.* at 864-65.

84. *See id.* at 866.

responding to her complaint, the judge observed, “[s]he alleges sexual discrimination and due process violations, but what she really wants is to make others pay for her mistakes. She will not succeed here.”<sup>85</sup>

In examining whether sexual discrimination and due process violations under Title VII and Section 1983 had occurred, the court ruled that Keppler had failed to establish quid pro quo sexual harassment and that she did not have a constitutionally cognizable property right in an administrative position.<sup>86</sup> The court found that quid pro quo sexual harassment occurs when an employer expressly or implicitly uses sexual favors as conditions for an employee to receive or retain job benefits; that a single incident generally does not form the basis for a hostile work environment claim; and that a plaintiff can establish sexual discrimination only by proving that she was terminated for the relationship rather than for another reason.<sup>87</sup>

The decision in *Campbell v. Masten*<sup>88</sup> expressed even more disapprobation for the complainant, Susan Campbell, who maintained that her manager pressured her into a sexual relationship and then ended it when he married another woman.<sup>89</sup> Campbell argued that she was eventually fired because the manager feared his wife would learn about their previous involvement.<sup>90</sup> Dismissing all of Campbell’s claims, the judge used the *Keppler* case to explain his reasoning:

An employee who chooses to become involved in an intimate affair with her employer . . . removes an element of her employment relationship from the workplace, and in the realm of private affairs people do have the right to react to rejection, jealousy, and other emotions which Title VII says have no place in the employment setting.

Such an employee, of course, always has the right to terminate the relationship and to again sever private life from the workplace; when she does so, she has the right like any other worker to be free from a sexually abusive environment, and to reject her employer’s advances without threat of punishment. Yet, she cannot then expect that her employer will feel the same as he did about her before and during their private relationship. Feelings will be hurt, egos damaged or bruised. The consequences are the result not of sexual discrimination, but of responses to an individual . . . because of her intimate place in her employer’s life . . .<sup>91</sup>

Using parallel reasoning, the court in *Campbell* stated:

[The defendant] requested [that he and the plaintiff] resume their relationship, and became angry when she refused. Bearing a grudge, he then embarked on a campaign to denigrate her in the eyes of [her Superintendent] with the ultimate goal of having her removed from her administrative position. . . .

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85. *Id.* at 864.

86. *See id.* at 867, 871.

87. *See id.* at 867-68.

88. 955 F. Supp. 526 (D. Md. 1997).

89. *See id.* at 527-28.

90. *See id.* at 528.

91. *Id.* at 529.

[He] penalized her not because she was a woman, but instead because she was his former lover.<sup>92</sup>

Cases such as *Campbell* and *Kepler* also demonstrate the inability or refusal of some judges, as well as lay people, to comprehend the coercive nature of so-called 'consent' or 'voluntariness.' In each case, the fact that the plaintiff's relationship with the defendant arose because of her gender was conveniently overlooked. Had she not been a female, she would not have been the "former lover" who, based on these opinions, somehow merited the abuse that occurred as a result of the defendant's "right" to a "bruised ego," anger, and pursuit of a "grudge."<sup>93</sup> Although such unsympathetic and biased attitudes continue to be embraced by many courts, they are not inevitable since others have adopted more enlightened and empathetic approaches to those suffering retaliation. For example, the judge in *Babcock v. Frank*<sup>94</sup> rejected the *Kepler* analysis, declaring that "to assume as a matter of law that [conditioning benefits on continuing a romantic relationship] is discrimination predicated not on the basis of gender, but on the basis of the failed interpersonal relationship is as flawed a proposition under Title VII as the corollary that 'ordinary' sexual harassment does not violate Title VII when the employer's asserted purpose is the establishment of a new interpersonal relationship."<sup>95</sup>

Although 'consent' was not specifically involved in most of the sexual harassment cases making their way to the Supreme Court, many of the rulings it has handed down could affect victims of coerced sex or retaliation after an affair. While some judges found ways around it, *Meritor Savings Bank v. Vinson*<sup>96</sup> contributed at least minimal clarity to the predicament of workers and students targeted by amorous authority figures like the spurned lover in *Kepler*.<sup>97</sup> *Meritor* rejected a lower court's finding that the plaintiff, Mechelle Vinson, deserved no relief because of the "voluntariness" of her participation in an affair with her supervisor.<sup>98</sup> Focusing instead on the concept of "welcomeness," the Supreme Court declared that the "gravamen of any sexual harassment claim is that the sexual advances were 'unwelcome' . . . . The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."<sup>99</sup> By shifting the focus from the "voluntariness" of victims' responses to the "welcomeness" of alleged perpetrators' sexual advances, the Court drew a crucial distinction that allowed complainants, even those in long term coercive relationships, to seek legal redress if they could prove the sexual activities were

92. *Kepler v. Hinsdale Township High Sch.*, 715 F. Supp. 862, 869 (N.D. Ill. 1989).

93. See *Campbell*, 955 F. Supp. at 529; *Kepler*, 715 F. Supp. at 869.

94. 729 F. Supp. 279 (S.D.N.Y. 1990).

95. *Id.* at 288.

96. 477 U.S. 57 (1986).

97. See *Kepler*, 715 F. Supp. at 869-870 (holding that plaintiff could establish a claim only if she could rebut the presumption that defendant penalized her not because she was a woman but because she was his former lover); *Meritor*, 477 U.S. at 69 (holding that regardless of whether plaintiff's conduct is voluntary, the determination of law should be whether he or she found particular sexual advances unwelcome).

98. See *Meritor*, 477 U.S. at 68-69.

99. *Id.* at 68.

truly “unwelcome.”<sup>100</sup>

Such proof is, of course, difficult to demonstrate; and, while *Meritor* represented a significant advance, it was not, as the following suggest, without limitations in placing excessive demands and responsibility on the aggrieved party. The first difficulty was that *Meritor* seemingly required the victim to indicate to the perpetrator that sexual advances are “unwelcome,” regardless of the power disparity which forced her to acquiesce in the first place and of the losses she might suffer should she have refused.<sup>101</sup> Secondly, *Meritor* perpetuated a prejudice that had existed for years in rape cases by declaring, “[i]t does not follow that a complainant’s sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular advances unwelcome. To the contrary, such evidence is obviously relevant.”<sup>102</sup> Unmindful of the idiosyncratic tastes of perpetrators and of the verbal and behavioral restraints imposed on subordinates in coercive sexual relationships, the Court at this early stage appeared to assume that harassment would be curtailed if victims would accept responsibility for the feelings of individual harassers and determine the type of speech, clothing, and body language that would operate as “turnoffs” to each.

After *Meritor*, the Supreme Court in 1992 addressed sexual harassment in the academic setting. In *Franklin v. Gwinnet County Public Schools*,<sup>103</sup> the Court established that Title IX victims of coerced sex can receive monetary damages as well as equitable relief.<sup>104</sup> This was not a “submission” suit, as some ‘consensual’ cases are often called, but Christian Franklin brought the case against a teacher/coach whom she alleged subjected her to sexually oriented conversations and three times forced her to have intercourse.<sup>105</sup> She claimed school officials knew of the situation, took no action, and discouraged her from pressing charges against the teacher, who resigned on the condition that charges against him be dropped.<sup>106</sup> Lower courts dismissed Franklin’s complaint on the ground that Title IX did not authorize damages to complainants.<sup>107</sup> Thus, the issue before the Supreme Court was whether a damages remedy was available for an action brought to enforce Title IX. The Court held that “where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.”<sup>108</sup> Distinguishing between a right of action and permissible damages, the Court thus ruled that damages were proper remedies in Title IX actions.

The sexual harassment case following *Franklin* was an extremely significant but mixed victory for victims of coerced “consent.” *Harris v. Forklift Systems, Inc.*<sup>109</sup> did not involve submissive sex, but it did extend employers’ liability by

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100. *See id.*

101. *See id.* at 72.

102. *Id.* at 69.

103. 503 U.S. 60 (1992).

104. *See id.* at 75-76.

105. *See id.* at 63.

106. *See id.* at 63-64.

107. *See id.* at 64.

108. *Id.* at 66 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

109. 510 U.S. 17 (1993).



establishing that victims of hostile or abusive work environments need not prove inappropriate conduct causes tangible psychological injury.<sup>110</sup> In *Harris*, the Court also attempted for the first time to consider specific behaviors that constitute unlawful sexual harassment.<sup>111</sup> It did not provide a clear definition of the behavior, but defined the term broadly across a continuum of behaviors to include any conduct that would offend a “reasonable person” and be severe enough to cause that individual to view the workplace as abusive or hostile.<sup>112</sup> Writing for the Court, Justice O’Connor held:

Certainly Title VII bars conduct that would seriously affect a reasonable person’s psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.

This is not, and by its nature cannot be, a mathematically precise test. We need not answer today all the potential questions it raises.<sup>113</sup>

Herein lies the problem for those attempting to establish their own vulnerability and lack of choice in responding to demands for sexual favors. Circuit courts like the Sixth, Seventh, and Tenth have adopted restrictive readings of *Harris* and categorized a wide variety of sexual misconduct as merely vulgar and undeserving of a jury’s attention.<sup>114</sup> Decisions from these courts frequently question the rights of plaintiffs to complain about conduct that merely reflects contemporary cultural and moral standards.<sup>115</sup> In *Baskerville v. Culligan International Co.*,<sup>116</sup> for instance, the plaintiff was exposed to a litany of highly offensive gender-specific remarks by her supervisor.<sup>117</sup> In reversing the lower court’s finding of actionable sexual harassment, the Seventh Circuit reasoned that “the concept of sexual harassment . . . not designed to purge the workplace of vulgarity... [o]nly a woman of Victorian delicacy, a woman mysteriously aloof from contemporary American popular culture and all its sex saturated vulgarity would find [the supervisor’s] patten substantially more distressing than the heat and cigarette smoke of which the plaintiff does not complain.”<sup>118</sup> A similar thought would obviously apply to “consent” cases. If “Melrose Place” and Ma-

110. See *id.* at 23.

111. See *id.*

112. See *id.* at 21-22.

113. *Id.* at 22-23.

114. See, e.g., *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826-27 (6th Cir. 1997) (stating “the analysis in *Meritor* and the standard set forth in *Harris* support our finding that the record here does not establish an objectively hostile work environment.”); *Baskerville v. Culligan International Co.*, 50 F.3d 428 (7th Cir. 1995) (stating “we conclude that no reasonable jury could find that Hall’s remarks created a hostile working environment.”); *Gross v. Burggraf Construction Co.*, 53 F.3d 1531 (10th Cir. 1995) (stating that the plaintiff “has failed to establish that there is a genuine issue of material fact to establish gender based harassment that was pervasive and severe enough to alter the terms, conditions or privileges of employment.” (citation omitted)).

115. See *Gleason v. Mesirov Fin. Inc.*, 118 F.3d 1134, 1144 (7th Cir. 1997) (stating that “a certain amount of vulgar banter with sexual innuendo is inevitable in the modern workplace” (citation omitted)).

116. 50 F.3d 428 (7th Cir. 1995).

117. See *id.* at 430.

118. *Id.* at 430-31.

donna are the societal norm,<sup>119</sup> how could a “reasonable person” be so naive and vulnerable as to become entrapped in an unwelcome sexual affair?

The Second, Third, and Eighth Circuits, on the other hand, have taken a more expansive view of *Harris* and cautioned judges to focus on the difference between a supervisor’s treatment of male and female employees and against imposing the standards of popular culture on plaintiffs in harassment cases.<sup>120</sup> The most eloquent expression of this view is found in *Torres v. Pisano*.<sup>121</sup>

Judges should be careful to remember the American popular culture can, on occasion, be highly sexist and offensive. What *is*, is not always what is right, and reasonable people could take justifiable offense at comments that the vulgar among us, even if they are in the majority, would consider unacceptable . . . .

No principled argument supports the view that sex-based offensive behavior in the workplace is immune from remedy simply because it may be culturally tolerated outside of the workplace. The purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality of employment.<sup>122</sup>

Hence the *Torres* decision affirmed that it is not unreasonable for an individual to object to vulgar behavior that is sanctioned by the popular culture.

The concept of the “reasonable woman” standard further complicates the confusion. Following the Ninth Circuit Court of Appeal’s decision that “a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women,”<sup>123</sup> some federal circuits have adopted the “reasonable woman” standard.<sup>124</sup> Opponents argue that a male cannot reason like a woman without relying on stereotypes, and the truth is that in contemporary America, the sexual mores of either a “reasonable woman” or a “reasonable person” could derive from extraordinarily incompatible sources – everything from Hollywood life styles to the ethics of Orthodox Judaism and fundamentalist Christianity. The result of these ambiguities is that there is as of yet no “safe” way for plaintiffs in submission cases to ensure that their claims will be uniformly heard.

After the 1993 *Harris* ruling, the debate about definitions of “reasonable person” and “hostile environment” continued. However, no other harassment cases reached the Supreme Court until 1998, when four decisions demonstrated

119. “Melrose Place,” a sex saturated television drama, and Madonna, a provocative Hollywood entertainer, suggest a world view in diametrical opposition to the value system of traditionalists.

120. See, e.g., *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997) (affirming the district court’s grant of summary judgment for the defendants); *Hathaway v. Runyon*, 132 F.3d 1214 (8th Cir. 1997) (reversing district court’s judgment as a matter of law for the defendant); *Spain v. Gallegos*, 26 F.3d 439, 448 (3d Cir. 1994) (reversing the order of the district court dismissing the appellant’s sexual harassment and discrimination claims).

121. 116 F.3d 625 (2d Cir. 1997).

122. *Id.* at 633 n.7.

123. *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

124. See *Burns v. McGregory Elec. Indus. Inc.*, 989 F.2d 959, 964 (8th Cir. 1993); *Andres v. City of Philadelphia*, 895 F.2d 1469, 1482-83 (3rd Cir. 1990); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987). But see *Ellison*, 924 F.2d at 878.

the continuing need for clarification of the issue. *Oncale v. Sundowner Offshore Services*<sup>125</sup> provided an answer to the long-standing controversy over whether same-sex harassment is covered by Title VII. The plaintiff, Joseph Oncale, asserted that he was “forcibly subjected to sex-related, humiliating actions against him”<sup>126</sup> by his male co-workers. In ruling on his behalf, the Court established that same-sex sexual harassment is actionable under Title VII. The Court said, “Our holding that [Title VII] includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.”<sup>127</sup> Thus, in addition to reinforcing the “reasonable person” and “totality of circumstances” standards of judgment and arguing that Title VII does not dictate a “general civility code for the American workplace,”<sup>128</sup> *Oncale* laid the way for future litigation by gays and lesbians coerced into submissive relationships.

A second Title IX case involving “consent” came before the Court in 1998. In *Gebser & McCullough v. Lago Vista Independent School District*,<sup>129</sup> Alida Star Gebser claimed that she had had a relationship with Frank Waldrop, one of her high school teachers.<sup>130</sup> Gebser testified that although she knew the affair was improper, she did not know how to react and feared losing Waldrop as a teacher.<sup>131</sup> In a separate incident, the parents of two other students complained and met with the principal about sexually suggestive remarks Waldrop had made in class.<sup>132</sup> The principal advised the teacher to be careful but did not report the complaint to the district’s Title IX coordinator, who was also Lago Vista’s superintendent.<sup>133</sup> Shortly afterwards, a police officer discovered Gebser and Waldrop engaging in intercourse and arrested him.<sup>134</sup> He was subsequently fired.<sup>135</sup> During this time, Lago Vista had not distributed a formal anti-harassment policy or official grievance procedures.<sup>136</sup>

Reaffirming its ruling in *Franklin* that school districts can be held liable for monetary damages when teachers sexually harass students, the majority of the Court, nevertheless, rejected Gebser’s petition.<sup>137</sup> The Court stated:

No one questions that a student suffers extraordinary harm when subjected to sexual harassment and abuse by a teacher, and that the teacher’s conduct is reprehensible and undermines the basic purposes of the educational system. The issue in this case, however, is whether the independent misconduct of a teacher is attributable to the school district that employs him under a specific federal statute designed primarily to prevent recipients of federal financial assistance . . . from using the funds in a discriminatory manner . . . Until Congress

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125. 118 S. Ct. 998 (1998).

126. *Id.* at 1001.

127. *Id.* at 1002.

128. *Id.*

129. 118 S. Ct. 1989 (1998).

130. *See id.* at 1993.

131. *See id.*

132. *See id.*

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.*

137. *See id.* at 1994.

speaks directly on the subject, however, we will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference.<sup>138</sup>

Despite its seeming reasonableness, the *Gebser* decision falls short because it ignores basic facts of academic life and a fundamental reality of sexual harassment.

Its demand that victims provide actual or constructive notice to those with authority works better in theory than in practice.<sup>139</sup> The typical sexual harassment victim experiences a variety of symptoms that include hopelessness, withdrawal, embarrassment, and shame;<sup>140</sup> these are exacerbated a thousand-fold when she has participated in an inappropriate affair. If the victim is a student, her vulnerability is, in many respects, even greater. Students are among the most subordinate of subordinates in the hierarchical environment of education; and females, socialized to passivity, are especially so. To preface such individuals' rights to damages on the assumption that many will readily provide "constructive notice" to "the appropriate person" is to ignore two decades of research on the behaviors of harassment victims.<sup>141</sup>

To those who know academe well, the majority in *Gebser* seems naive in its conditioning of damage awards on a showing of "deliberate indifference" by officials with "authority to institute corrective measures on the district's behalf."<sup>142</sup> Judge Stevens's dissent from the majority opinion reflected insight into a darker side of academia:

As long as school boards can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damages liability. . . . Indeed, the rule that the Court adopts would preclude a damages remedy even if every teacher at the school knew about the harassment but did not have 'authority' to institute corrective measures on the district's behalf. . . . As a matter of policy, the Court ranks protection of the school district's purse above the protection of immature high school students.<sup>143</sup>

Absent Congressional revisions in Title IX, students seeking relief from the courts will have a very difficult time, and institutions having reason to overlook harassment will find it much easier to do so.

Following the rulings in *Gebser*, decisions in *Faragher v. City of Boca Raton*<sup>144</sup>

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138. *Id.* at 2000.

139. As the following indicates, students and harassment victims perceive themselves as vulnerable and/or highly subordinate and are thus unlikely to feel secure in coming forward to provide notice.

140. See, for example, a description of Sexual Harassment Trauma Syndrome in MICHELE A. PAULDI & RICHARD B. BARICKMAN, ACADEMIC AND WORKPLACE SEXUAL HARASSMENT: A RESOURCE MANUAL 27 (1991).

141. Victims' reluctance to report is well documented in the literature. See, e.g., DZIECH & HAWKINS, *supra* note 64, at 23-6.

142. *Gebser*, 118 S. Ct. at 1993.

143. *Id.* at 2004, 2007.

144. 118 S. Ct. 2275 (1998).

and *Burlington Industries v. Ellerth*<sup>145</sup> offered more hope to workplace victims. They were announced on the same day, used identical reasoning, and broke new ground by holding for the first time that employers can be held vicariously liable for discrimination and sexual misconduct committed by supervisory personnel, even if they were not aware of the inappropriate behaviors.<sup>146</sup> If the rulings appeared to contradict *Gebser*, it was because the majority in both *Faragher* and *Ellerth* found significant distinctions between Title IX and Title VII, which applied to the later cases. The Court also determined that an employer could be liable for threatening an employee with repercussions, even if the threats were not carried out when the subordinate refused to submit.<sup>147</sup>

*Ellerth* and *Faragher* did provide employers an affirmative defense: If “the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . [if] the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.”<sup>148</sup> The two cases thus provide potential recourse for participants in coercive relationships, but they also contain a significant hurdle for victims who are too frightened or ashamed to take advantage of remedial procedures. Only time will tell whether future courts will adhere strictly to the qualification that plaintiffs’ failures to report must be “unreasonable.”

Based on the *Ellerth* and *Faragher* reasoning, a similar fact pattern may go either way. The uncertainty which lies ahead was demonstrated in *Karibian v. Columbia University*.<sup>149</sup> A lower court granted summary judgment in favor of Columbia, but the Second Circuit reversed in this case in which Sharon Karibian, a student employed by Columbia University’s fundraising office, alleged she was coerced into a violent sexual relationship by her supervisor, Mark Urban, who told her she “owed him” for raises, a flexible work schedule, and other privileges.<sup>150</sup> Over a period of years, Karibian complained to a member of Columbia’s Panel on Sexual Harassment, its Equal Opportunity Coordinator, her immediate supervisor at the external unit directing the fundraising effort, and the University’s Director of Development Services, who took her concerns to a Deputy Vice President.<sup>151</sup> A district court granted Columbia’s motion for summary judgment, ruling, in part, that it had provided reasonable avenues for complaints and that once it received actual notice of Urban’s misconduct, it took prompt action by firing him.<sup>152</sup> The district court reasoned that Karibian’s first two disclosures, for which she had requested confidentiality, and her subsequent complaints to the independent contractor administering the fundraising effort, did not constitute notice.<sup>153</sup>

The same court might find again for Columbia by maintaining that Karibian had “unreasonably failed to” employ its complaint procedures. On the other

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145. 118 S. Ct. 2257 (1998).

146. See *Faragher*, 118 S. Ct. at 2275; *Ellerth*, 118 S. Ct. at 2271.

147. See *Faragher*, 118 S. Ct. at 2293; *Ellerth*, 118 S. Ct. at 2271.

148. *Faragher*, 118 S. Ct. at 2293; see also *Ellerth*, 118 S. Ct. at 2270.

149. 14 F.3d 773 (2d Cir. 1994).

150. *Id.* at 776.

151. See *id.*

152. See *id.* at 776-77.

153. See *id.* at 777.

hand, the Second Circuit's reversal in *Karibian* demonstrates how far some courts have come in understanding submission cases. Ruling that the University was liable for the alleged harassment, "regardless of the absence of notice or the reasonableness of [its] complaint procedures,"<sup>154</sup> the higher court also rejected Columbia's claim that the plaintiff needed to prove actual rather than threatened economic loss to prove quid pro quo harassment: "In the nature of things, evidence of economic *harm* will not be available to support the claim of the employee who *submits* to the supervisor's demands. . . . We do not read Title VII to punish the victims of sexual harassment who surrender to unwelcome sexual encounters. Such a rule would only encourage harassers to increase their persistence."<sup>155</sup> It is undeniable that the Supreme Court has made significant progress in clarifying the law and educating people about harassment. The term "sexual harassment" did not even exist in 1974, but thousands of complaints now make their way each year to the EEOC, the OCR, and state courts. In thirteen years since *Meritor*, six decisions have helped to provide shape and form to harassment law. Nevertheless, challenges remain.

### III. FUTURE CHALLENGES

Long after the Supreme Court accepted its first harassment case, Americans continue to struggle with the issue, especially when it is cloaked in the terminology 'consensual sex.' On the one hand, 1998 was the year in which the Court handed down more decisions on harassment than ever before, a year in which the rights of victims were greatly expanded.<sup>156</sup> On the other, it was a year in which Americans, some ardent feminists, couldn't or wouldn't face the possibility that the most pernicious kind of sexual harassment might have occurred in the Oval Office of the President. It demonstrated that despite the law and attempts to educate people, 'consent' remains an enigmatic concern viewed always through the prism of private experience and personal loyalties and agendas. 1998 challenged Americans to consider the most fundamental complexities of 'consent' – the effects of power disparities on relationships and the distinctions between submission/acquiescence and welcomeness, vulnerability and irresponsibility/immorality. It revealed, above all, that 'consensual' sex is an issue which will challenge the courts and the public for years to come.

#### A. Clarifying Definitions of Unlawful Conduct

Despite *Harris*' assertion that there is no "mathematically precise test"<sup>157</sup> for determining conduct that creates a hostile environment, it appears that many assume a supervisor's erotic gestures or statements are per se coercive and hence unlawful. Yet decisions from several circuits suggest that this is not a universal assumption and that the most repugnant behaviors can be explained away as

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154. *Id.* at 780.

155. *Id.* at 778 (citations omitted).

156. See, e.g., *Oncale v. Sundowner Offshore Serv. Inc.*, 118 S. Ct. 998 (1998); *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998); *Burlington Indus. v. Ellerth*, 118 S. Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

157. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

mere vulgarity.<sup>158</sup> The most publicized recent example is Judge Susan Webber Wright's finding of summary judgment against Paula Jones in *Jones v. Clinton*.<sup>159</sup>

Ms. Jones, an Arkansas state employee, alleged that then Governor Clinton requested that she be brought to him in a hotel room and that he put his hand on her leg, exposed his erect penis, asked that she "kiss it," and fondled himself in her presence.<sup>160</sup> Judge Webber Wright ruled that even if the allegations were true, Ms. Jones could not make a case of conduct adequately severe to violate federal or Arkansas law because the behavior was simply "offensive conduct."<sup>161</sup> She added that in Arkansas, the tort of outrage or intentional infliction of emotional distress "is clearly not intended to provide legal redress for every slight insult or indignity that one must endure."<sup>162</sup> She noted the Arkansas Supreme Court's definition of "extreme and outrageous conduct"<sup>163</sup> is "conduct that is 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 civilized society."<sup>164</sup> If exposing and fondling oneself and requesting oral sex from a stranger do not exceed the "bounds of decency" in Arkansas, the average person might wonder what behaviors are, in fact, sufficiently outrageous to constitute "atrocious" and "intolerableness." Is the inference to be drawn from the judge's decision that Arkansas women regard men's exposing themselves and requesting oral sex as merely a "slight insult or indignity"?

Ruling also that *Jones* was "not one of those exceptional cases in which a single incident of sexual harassment, such as an assault, was deemed sufficient to state a claim of hostile work environment sexual harassment,"<sup>165</sup> Webber Wright's decision reflected another of the unresolved ambiguities in sexual harassment law: Is one obnoxious act sufficient to constitute illegal behavior? Webber Wright held that the alleged conduct in the Jones case was relatively brief in duration and thus was not so severe or pervasive that it could "be said to have altered the condition of plaintiff's employment and created an abusive working environment."<sup>166</sup> On the other hand, the Court in *Harris* held that "Title VII comes into play before the harassing conduct leads to a nervous breakdown."<sup>167</sup>

While Jones' case was inarguably weak in several respects, much of the

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158. See *Black v. Zaring Homes, Inc.*, 104 F.3d 822 (6th Cir. 1997) (holding "sex-based" comments by supervisor insufficient to create a hostile work environment); *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134 (7th Cir. 1997) (holding that a hostile work environment did not exist where manager made comments about workers' anatomy and a weekend trip to a nudist camp); *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (8th Cir. 1986) (holding sexually explicit language and posters insufficient to create a hostile work environment); *Stacy v. Shoney's, Inc.*, 955 F. Supp. 751 (E.D. Ky. 1997) (holding that sexual harassment laws are "not designed to purge the workplace of vulgarity").

159. 990 F. Supp. 657 (E.D. Ark. 1998).

160. See *id.* at 664.

161. *Id.* at 677.

162. *Id.*

163. *Id.*

164. *Id.* (quoting *M.B.M. Co. v. Counce*, 596 S.W.2d 681, 687 (Ark. 1980)).

165. *Id.* at 675.

166. *Id.* at 676.

167. *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 22 (1993).

judge's rhetoric and reasoning should be profoundly troubling to those concerned about sexual harassment. By interpreting the law in its narrowest sense,<sup>168</sup> Judge Webber Wright was able to make a credible legal argument for summary judgment, but she also sent a chilling message to victims already leery of the courts. Another judge might have reached a different conclusion in this case and thus avoided depriving the plaintiff of the right to have her complaint heard by a jury. This kind of ambiguity is what bothered Judge Scalia when he wrote in his concurrence in *Harris*: "As a practical matter, today's holding lets virtually unguided juries [and judges] decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages."<sup>169</sup> As long as courts are "unguided" in determining the parameters of sex-related conduct, there will be judges like Judge Webber Wright who provide facile arguments to explain away the most demeaning behaviors, perpetrators who engage unscathed in coercion, and victims who submit to sexual blackmail or risk everything on refusal.

### B. Encouraging Reportage

In the years since *Meritor*, educational institutions and employers have implemented various strategies to encourage reporting of perpetrators.<sup>170</sup> If quantity is a measure of success, most have failed.<sup>171</sup> Mistrust of the legal system exacerbates reluctance to come forward, but this is not the only cause. 1-7 percent of all workplace harassment is ever reported<sup>172</sup> and formal complaints in academe average only 4.3 per year.<sup>173</sup> Most prevention "hot lines" and human resource personnel have done more to relieve employers and institutions of responsibility than they have to alleviate the burdens of those trapped in unwanted sexual affairs. A wealth of literature demonstrates why this is the case for women, the primary targets of harassment.<sup>174</sup> Not only are most women in subordinate positions and thus fearful of retaliation, but research also indi-

168. See *Jones*, 990 F. Supp. at 677.

169. 510 U.S. 24 (Scalia, J., concurring).

170. See U.S. MERIT SYSTEMS PROTECTION BOARD, *supra* note 28, at 40-46 (stating policies include formal and informal policies focusing on education, training, grievance procedures, and victim assistance); Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 AM. PSYCHOLOGIST 497, 500 (1991) (stating some employers have adopted informal grievance procedures using problem-solving rather than adversarial approaches).

171. See Riger, *supra* note 171, at 502.

172. J.A. Livingstone, *Response to Sexual Harassment on the Job: Legal, Organizational and Individual Actions*, 38 J. SOCIAL ISSUES 5 (1982).

173. D.A. Charney & R.C. Russell, *An Overview of Sexual Harassment*, 15 AM. J. PSYCHIATRY 13 (1994).

<sup>178</sup>See, e.g., Riger, *supra* note 171, at 497 (attributing the lack of sexual harassment complaints by women to gender-biased grievance procedures). For articles explaining women's inability to report sexual harassment because of the social pressures built into the grievance process, see T.C. Fain & D.L. Anderton, *Sexual Harassment: Organizational Context and Diffuse Status*, 5/6 SEX ROLES 291-311 (1987); J.E. Gruber & L. Bjorn, *Women's Responses to Sexual Harassment: An Analysis of Sociocultural, Organizational, and Personal Resource Models*, 67 SOCIAL SCIENCE Q. 812-826 (1986); B.A. Gutek & B. Morasch, *Sex-ratios, Sex Role Spillover, and Sexual Harassment of Women at Work*, 38 J. SOCIAL ISSUES 55-74 (1982); A.M. Konrad & B.A. Gutek, *Impact of Work Experience on Attitudes Toward Sexual Harassment*, 31 ADMIN. SCIENCE Q. 422-438 (1986). See also U.S. MERIT SYSTEMS PROTECTION BOARD, *supra* note 25, at 61 (demonstrating reporting rates remain low).



cates that they are often likely to blame themselves, to view harassment as an inevitability, and to endure it without significant protest.<sup>175</sup> Approximately half of women who do report are not likely to be pleased with the resolutions, as Bingham and Scherer discovered.<sup>176</sup> Their findings were consistent with other surveys: Women report dissatisfaction more often than men when assessing outcomes; victims' satisfaction level decreases as the authority of the perpetrator relative to the victim increases; filing formal or informal complaints and talking to supervisors or co-workers do not appear to help resolve harassment situations; and employees seldom use organizational channels to complain.<sup>177</sup>

What this suggests is that *Gebser* is very "bad news" for victims who are students and that, for all their good intentions, *Faragher* and *Ellerth* pay too little attention to the power disparities of the workplace and may, ironically, be detrimental rather than beneficial to those who are too ashamed or afraid to disclose submissive relationships. The Court reasoned that to accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority and Title VII's policies of encouraging forethought by employers, an affirmative defense is necessary. Such a defense should contain two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>178</sup>

Many uniquely vulnerable women such as single mothers may be humiliated by their own acquiescence and reluctant to 'rock the boat' when the harasser is of sufficiently higher rank or value to an organization. These women are likely to reject "corrective opportunities" provided by employers if they fit male models of behavior and dispute resolution. A similar response may characterize female students, who are inclined to avoid conflict and hesitate to become involved in formal and seemingly adversarial grievance proceedings.<sup>179</sup> If *Faragher* and *Ellerth* are to benefit victims of sexual coercion, employers must ensure that complaint procedures and the personnel administering them demonstrate understanding and empathy. Equally important is the courts' obligation to educate themselves about female psychology and to act with objectivity and deliberateness in determining whether plaintiffs have, in fact, behaved "unreasonably" in refusing "to take advantage of" remedial procedures.

### C. Dealing with Complaints about Retaliation

Objectivity and caution are necessary for judges and juries because gender stereotyping and the temptation to generalize from personal experience may cause them to stigmatize victims of 'consensual' sex and disregard the influences that drove them to destructive relationships. Women are especially vulnerable

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175. See Riger, *supra* note 171, at 500-01.

176. See Shereen G. Bingham & Lisa L. Scherer, *Factors Associated with Responses to Sexual Harassment and Satisfaction with Outcome*, 29 SEX ROLES 239, 260 (1993).

177. See *id.* at 261-65. See also Riger, *supra* note 171, at 497 (1991) (attributing the lack of sexual harassment complaints by women to gender-biased grievance procedures).

178. *Burlington Indus. v. Ellerth*, 118 S. Ct. 998, 2261 (1998).

179. See Riger, *supra* note 171, at 500.

to revictimization by the courts because of the prevailing notion that only 'tramps' or females trying to 'screw their way to the top' submit to sex without emotional attachment. When illicit affairs end, the fallout almost inevitably affects the workplace or educational setting in which the partners interact. At times, as in *Keppler*, hostility may become so great that one of the ex-lovers must depart. In academia, the natural movement of students makes some 'break-ups' or rejections easier, and it advantages harassers who may repeat their conquests undetected for years. The tensions that occur when workplace romances sour are frequently more apparent and can be extremely detrimental to efficient operation of a business.<sup>180</sup> This being the case, it is often the subordinate, usually a woman, who suffers the consequences of a failed relationship if her ex-partner is more indispensable to the organization because of the money and good will or recognition he generates.

When a woman is unfairly demoted, fired, not promoted or given bad reviews or grades after rejecting a former lover, as in *Keppler*, or is discarded by her ex-partner, as in *Campbell*, she faces difficult hurdles if she attempts litigation. The courts are reluctant to dictate procedures to businesses and educational institutions and are thus unenthusiastic about interfering in their operations except in very clear cut cases of retaliation and discrimination. Already likely to be stigmatized as 'loose,' 'opportunistic,' and a 'home wrecker' if the ex-partner or teacher is married, the plaintiff charging retaliation must prove that the sexual relationship was [not?] the reason for the supervisor's adverse action against her. This is an incredibly difficult task when he has so many pretexts on which to claim that her work or academic performance was substandard. In essence, subordinates in submission affairs find themselves in a "Catch 22." Their personal vulnerabilities and poor judgment trap them in unwelcome sexual relationships, and when they become strong enough or threatened enough to resist further entrapment and victimization, then sex no longer matters as perpetrators metamorphose into employers, supervisors, or teachers recounting their academic or work transgressions to courts which are often unsympathetic to the plight of working women.

This is not to suggest that all women claiming retaliation are ideal employees and students or that judicial decisions are routinely sexist. What it does mean is that once sex enters a human relationship, it is inevitably altered; a subordinate's qualifications and performance are evaluated, either positively or negatively, by standards distinct from those governing others who have not been intimate with the power figure. Intimacy colors judgments not only during but also after the affair, making it impossible for a hostile ex-partner (what defendant in a trial isn't hostile to the plaintiff?) to be unbiased in assessments. If the goals of Title VII and IX are to prevent discrimination and sexual coercion, courts must be extremely cautious in weighing evidence of plaintiffs' work or academic limitations and in ensuring that their decisions are not tainted by gender bias.

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180. See *Hoch/Schepman*, *supra* note 12, at 11.

## D. Dealing with 'Star Struck' Participants in 'Consensual' Affairs

At the heart of the soap opera and political bickering the nation has endured for over a year lies the paradoxical question of how to deal with targets in abusive relationships who refuse to face the truth.

Despite one veiled threat to Mr. Clinton, Monica Lewinsky apparently would never have availed herself of even the most effective complaint procedures because she seemed in almost all respects, not a victim but a willing participant in the affair. Having challenged him about whether their relationship was "just about sex"<sup>181</sup> or whether he had "some interest in getting to know [her] as a person,"<sup>182</sup> she eventually convinced herself that he was truthful when he said he cherished their time together,<sup>183</sup> and she even allowed herself to believe that his remark about being "alone in three years"<sup>184</sup> implied "he was in love with"<sup>185</sup> her. One of her friends testified that she thought "maybe she [would] be his wife."<sup>186</sup> Ultimately, Monica Lewinsky would tell the Grand Jury, "I never expected to fall in love with the President. I was surprised that I did."<sup>187</sup>

The seemingly impassable divide separating critics and defenders of the President lies in the ability of each to assert an indisputable truth: (1) Monica Lewinsky welcomed, encouraged, and sought to extend the relationship and (2) the President of the United States knowingly and recklessly abused his power in taking advantage of a psychologically vulnerable, 'star struck' romantic half as old as he. Determining whether Monica Lewinsky was more sinned against than sinning is less important than recognizing that this is not an isolated case. A few others like it make their way to the courts; some end in lost jobs, abandoned education, or even violence; but most wind down in secret shame and despair for the more vulnerable partner. And without a complaint, how is the relationship to be characterized?

In higher education, at least, it appears that 'consensual' sex looks different from the perspective of age and experience. Glaser and Thorpe reported that while 72 percent of respondents to their survey reported no feelings of coercion at the time of contact, that figure changed to 49 percent once they left school.<sup>188</sup> Whereas 36 percent originally recognized an ethical problem with "consent," 55 percent acknowledged it later in life.<sup>189</sup> With greater experience, 51 percent of former students came to see affairs with professors as hindrances to working relationships, whereas only 40 percent had that perception while involved with teachers.<sup>190</sup>

Since no one has devised satisfactory means for assessing blame in the intricate and perplexing situations in which subordinates welcome and even pur-

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181. STARR, *supra* note 10, at 68.

182. *Id.*

183. *See id.*

184. *Id.* at 98.

185. *Id.*

186. *Id.* at 50.

187. *Id.*

188. *See* Glaser & Thorpe, *supra* note 66, at 46.

189. *See id.* at 49.

190. *See id.*

sue sex with superiors, it is easiest to assume that unless one is a minor, the responsibility is equal. But chronological age is not the sole or even the most important determinant of victim vulnerability. A host of other characteristics affect the warped perspective of infatuated subordinates in destructive relationships, and the courts must resist the temptation to oversimplify the motivations of formerly 'star struck' plaintiffs who eventually come forward with complaints. It would be easier to relegate the Monica Lewinsky's of the world to the ranks of 'stalkers' and 'bad girls' because they add to the ambiguity of an already incomprehensible problem, but their behaviors and the responses they elicit from men and sometimes the courts reveal how far society is from understanding the fundamental principles of sexual harassment.

#### E. Accommodating Third-Party Victims

Inappropriate sexual relationships,<sup>191</sup> whether coerced or otherwise, adversely impact more than the subordinate partner. Others who have never been the object of the perpetrator's attention or who are not even known to him are derivative victims of his behaviors. These third-party victims fall into several categories, the most commonly recognized of which are spouses and children. At the end of the day, a woman forced into sexual activity with a supervisor takes her anger, humiliation, impotence, and despair home, where illness, depression, short temper, loss of sexual interest, and preoccupation estrange her from loved ones.<sup>192</sup> While most loss-of-consortium cases occur as a result of physical injuries that prohibit spouses from having functional sex, many jurisdictions do allow suits to be brought in the wake of psychological damages that harassment inflicts.<sup>193</sup>

In the academic setting, students who are indirect victims of acquiescent affairs are also unlikely to seek formal or even informal redress.<sup>194</sup> Lack of resources, limited long-term associations with offenders, and the hierarchical nature of education convince them that protest will not be worth the cost. Far more likely to initiate litigation are co-workers who are adversely affected by supervisors' or employers' affairs. When talented or dedicated males and females are deprived of opportunities and rewards because the authority figure's amorous eye is directed at a co-worker with whom he is involved, 'consensual'

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191. "Inappropriate sexual relationships" are relationships between individuals of unequal power and status that have the potential to adversely affect the participants, the organization, or institution with which they are associated, and third parties associated with the institution or organization.

192. For example, Terri Nichols, the plaintiff in *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994), testified that after being coerced into performing oral sex on her supervisor, her marriage was affected: "I got real emotional at home . . . I remember as time progressed, I was getting crazier. I hated that sex. I didn't even want sex with my husband." *Id.* at 507. Ultimately, Nichols' husband did file for divorce. *See id.*

193. *See, e.g.,* Bowersox v. P.H. Glatfelter Co., 45 F.E.P. 1443 (M.D. Pa. 1988); *Smith v. Teledyne Indus., Inc.*, 578 F. Supp. 353 (E.D. Mich. 1984); *Exxon Corp. USA v. Schoene*, 508 A.2d 142 (Md. Ct. Spec. App. 1986). Theoretically, children can also sue for loss of familial consortium. Nevertheless, the difference between theory and practical reality is that in order to avoid public embarrassment, the vast majority of spouses and children keep the secret of the relationship and are thus victimized by lack of closure.

194. *See* DZIECH & HAWKINS, *supra* note 64, at 23-24, 99.

sex ceases to be a 'private' or 'victimless' act.<sup>195</sup>

Those federal courts considering the issue have held that neither male nor female employees can successfully maintain a sex discrimination or harassment suit when a less qualified female is promoted or granted preferential treatment as a result of an affair with a supervisor.<sup>196</sup> The courts' reasoning is that such unsuccessful candidates for promotions and/or raises are not discriminated against because of gender if both male and female candidates were also deprived of preferential treatment.<sup>197</sup> The seminal third-party complaint case is *DeCintio v. Westchester County Medical Center*<sup>198</sup> in which a group of male physical therapists alleged Title VII sex discrimination when a supervisor created a position for which his "paramour" was uniquely qualified.<sup>199</sup> Concluding that "voluntary, romantic relationships cannot form the basis of a sex discrimination suit under either Title VII or the Equal Pay Act," the court held the "[a]ppellees were not prejudiced because of their status as males; rather, they were discriminated against because [the supervisor] preferred his paramour."<sup>200</sup>

A similar finding occurred in *Ayers v. AT&T*<sup>201</sup> when the plaintiff argued that a less qualified co-worker was given a preferred job location because of her sexual affair with her supervisor.<sup>202</sup> The defendant employer was granted summary judgment by the court which held that "favoring a 'paramour' does not constitute a violation of Title VII. The 'discrimination' is not based on sexism (whether gender or activity), but is rather more akin to nepotism. The favoritism is gender neutral, albeit unfair, justification for the given action. If someone favors a 'close friend,' other men and women do not thereby have Title VII . . . claims."<sup>203</sup>

While some courts have reached the opposite result, it is usually only when the sexual relationship with the female subordinate was coerced and not truly consensual.<sup>204</sup> The difficulty, of course, is that it is almost impossible to know the circumstances that drive "paramours" to submit. Every situation is unique and every subordinate is motivated by a variety of unknowable factors. The two in-

195. For example, Mabel King, the plaintiff in *King v. Palmer*, 778 F.2d 878 (D.C. Cir. 1985), successfully argued that her failure to receive a promotion was based upon her supervisor's preference for a less qualified woman with whom he was romantically involved. But few other complainants have prevailed in arguing that Title VII prohibits favoritism. See, e.g. *Piech v. Arthur Anderson & Co.*, 841 F. Supp. 825 (N.D. Ill. 1994) (plaintiff's claim that a "less qualified, single female co-worker" was promoted to manager due to the "favored female's knowledge of inappropriate male partner sexual conduct" survived a motion to dismiss); *Miller v. Aluminum Co. of America*, 679 F. Supp. 495 (W.D. Pa., 1988), *aff'd*, 856 F.2d 184 (3d Cir. 1988) (holding that favoritism based on consensual romantic relationship is not gender-based discrimination).

196. See, e.g., *Autry v. North Carolina Dept. of Human Resources*, 820 F.2d 1384 (4th Cir. 1987); *Billissimo v. Westinghouse Electric Corp.*, 764 F.2d 175 (3d Cir. 1985).

197. See, e.g., *Candelore v. Clark County Sanitation Dist.*, 752 F. Supp. 956 (D. Nev. 1990), *aff'd*, 975 F.2d 588 (9th Cir., 1992); *Handley v. Phillips*, 715 F. Supp. 657 (M.D. Pa. 1989).

198. 807 F.2d 304 (2d Cir. 1986).

199. *Id.* at 308.

200. *Id.*

201. 826 F. Supp. 443 (S.D. Fla. 1993).

202. See *id.* at 445.

203. *Id.*

204. See *Karibian v. Columbia Univ.*, 14 F.3d 773, 780-81 (2d Cir. 1994).

disputable observations that are apparent about third-party suits is that they reinforce the prejudice that subordinates, usually women, welcome submissive affairs and that they damage innocent people who cannot be expected to sympathize with those who seem privileged as a result of inappropriate sex. In the end, 'consensual' relationships bring the observer full circle to the recognition that, however 'private' they may seem, they set in motion destructive dynamics from which few are free.

### CONCLUSION

During his Grand Jury testimony, the forty-second President of the United States probably spoke for most Americans when he referred to sex as, in some ways, the most mysterious area of human behavior.<sup>205</sup> What he did not say is that judging human behavior, however mysterious it might be, is a fundamental responsibility of the law. Today "consent" is as enigmatic an issue as it was when Hester Prynne donned the scarlet "A," ascended a scaffold, and refused to reveal the name of her companion in adultery. "I will not speak," said Hester.<sup>206</sup> "And would that I might endure his agony as well as mine."<sup>207</sup> The young clergyman, who stood nearby and was at once a pillar of the community and father of her illegitimate child, marveled at her willingness to bear their shame alone: "Wondrous strength and generosity or a woman's heart! She will not speak!"<sup>208</sup>

It is a compelling scene and Hester an unforgettable heroine, but we must not forget that her society and ours are centuries apart. We have replaced scaffolds with courtrooms and scarlet letters with laws which, though imperfect, govern relationships between the powerful and the weak, reminding us that silence is not always strength or even generosity. The challenge now is for the courts to interpret the laws so that victims of coercive sex will not be afraid to use them.

In the case of Monica Lewinsky and Bill Clinton, an entire nation was polarized for a year and its history profoundly altered by supposedly private sexual conduct. Only time and experience may rescue the "star struck" in acquiescent affairs, but reportage can be encouraged and attempts at retaliation curtailed if the courts and the public assume responsibility for educating themselves about the consent dynamic and the dangers it sets in motion.

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205. See *Independent Counsel Investigation before the Grand Jury, Testimony of William J. Clinton*, *supra* note 10.

206. NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 64 (Bantam Classic ed., 1986).

207. *Id.*

208. *Id.*