

Consenting Adults?: Why Women Who Submit to Supervisory Sexual Harassment Are Faring Better in Court than Those Who Say No . . . and why They Shouldn't

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INTRODUCTION

When, in 1998, it came to light that a twenty-one-year-old White House intern named Monica Lewinsky had carried on an affair with U.S. President Bill Clinton while he was in office,¹ the ensuing firestorm of media coverage of the story was predictable. So too were the President's initial denials of an affair, and, eventually, the impeachment proceedings brought against him. What was perhaps less predictable was the variety of ways in which Ms. Lewinsky was characterized in the media.

A self-professed feminist writing for *The Washington Monthly*, which calls itself a "progressive magazine," wrote about a "painfully sentimental, pathologically vulnerable, sexually available young woman," noting that if she (the writer) *were not* "a feminist, I guess I'd call her a pathetic little slut."² In the media, Ms. Lewinsky was reduced to either a cartoonishly two-dimensional, predatory seeker of validation and attention, or a completely mindless victim.³ Under either characterization, she was viewed as incapable of existing among thinking adults in a world of constrained, albeit present, agency.

1. See, e.g., John M. Broder, *The President Under Fire: Ex-Intern Offered To Tell of Clinton Affair in Exchange for Immunity*, *Lawyers Report*, N.Y. TIMES, Jan. 23, 1998, at A1.

2. Elizabeth Austin, *Lipstick Feminists*, WASH. MONTHLY, Nov. 1998, at 8.

3. See Douglas Turner, *Senate, Public View Tapes of Testimony*, BUFFALO NEWS, Feb. 7, 1999, at 1A (describing news accounts of Ms. Lewinsky as "a troubled person from a broken home and as a stalker").

Other commentators lamented the way in which the President had “us[ed] his powerful position to seduce an impressionable young intern”⁴ By contrast, characterizations of Clinton evinced reverence and respect even as they expressed disapproval; one individual called him one of a group of “smart and powerful men who know exactly what they are doing when they do it.”⁵ Legal observers, too, noted that when the scandal first broke, Lewinsky was depicted as a “victim, seduced by an older and vastly more powerful man, but a victim reluctant to complain”⁶

Lewinsky’s depiction in popular discourse speaks volumes about the media covering the story and the culture within which that media is embedded. The characterization of Lewinsky—a legal *adult*—as wholly incapable of making a rational choice free from coercion appears to be undergirded by the cultural notion that she was one of numerous young female adults susceptible to being overcome, coerced, or even seduced, to the point where she bore little to no responsibility for her actions or choices.

It has long appeared to be the popular consensus that intimate affairs in the workplace are private matters that arise between “consenting adults”—usually beyond the purview of employer regulation and past the reach of the law.⁷ However, adult women, who comprised 84.6% of sexual harassment plaintiffs in fiscal year 2006,⁸ are not, to their detriment, being treated like consenting adults by recent jurisprudence governing the law of sexual harassment. In the five years following the breaking of the Clinton/Lewinsky scandal, three very important sexual harassment cases addressing this phenomenon were decided by the U.S. Supreme Court (*Pennsylvania State Police v. Suders*),⁹ the Second Circuit Court of Appeals (*Jin v. Metropolitan Life Ins. Co.*)¹⁰ and the Ninth Circuit Court of Appeals (*Holly D. v. California Institute of Technology*).¹¹

4. Jennifer Hunter, *Scandals, Shootings Make Parents Jittery*, CHI. SUN TIMES, Oct. 11, 2006, at 61.

5. Kitty Stallings, Letter to the Editor, SUN HERALD (BILOXI), Dec. 13, 2002, at D2.

6. Robert Batey, *Kenneth Starr—Among Others—Should Have (Re)read Measure for Measure*, 26 OKLA. CITY U. L. REV. 261, 285 (2001).

7. See, e.g., Billie Wright Dziech, Robert W. Dziech II & Donald B. Hordes, ‘Consensual’ or *Submissive Relationships: The Second-Best Kept Secret*, 6 DUKE J. GENDER L. & POL’Y 83, 88 n.34 (1999) (calling the consenting adults view “simplistic”); see also *A New Look at Managing Law Office Romance*, LAW OFFICE MGMT. & ADMIN. REP., Apr. 1994, at 2, 3 (advising employers dealing with office romances to “[b]e alert to such situations as they arise, but resist the impulse to prohibit or police a love affair between consenting adults”). But see Christina J. Fletcher, *Are You Simply Sleeping Your Way to the Top or Creating an Actionable Hostile Work Environment?: A Critique of Miller v. Department of Corrections in the Title VII Context*, 80 ST. JOHN’S L. REV. 1361, 1361-62 (2006) (observing that “[w]hile consensual sexual relationships in the workplace are certainly not illegal and not generally a target of workplace litigation, substantial risks can arise when those relationships are between subordinates and supervisors”) (citations omitted).

8. EEOC, *Sexual Harassment Charges: EEOC & FEPAs Combined: FY 1997-FY 2007*, <http://www.eeoc.gov/stats/harass.html> (last visited Apr. 26, 2008).

9. 542 U.S. 129 (2004).

10. 310 F.3d 84 (2d Cir. 2002).

11. 339 F.3d 1158 (9th Cir. 2003).

Read properly, this recent spate of cases renders plaintiffs who opt to have intimate relations with their supervisors and fail to report their harassment far better off than those who resist the propositioning of their bosses but fail to report the problem.

If sexual harassment law's sole objective were to strike at harassing behavior in the workplace, the legal framework within which cases were adjudicated (Title VII) would confer strict legal liability upon individual actors—harassing supervisors¹²—and the companies that employed them, without carving out an affirmative defense for employers in instances in which the employer is deemed to have had insufficient notice of the problem.¹³ However, in 1998, the Supreme Court determined that liability for supervisory harassment would be imputed directly to defendant-employers only in certain instances—those where a harassing supervisor exacted a “tangible employment action,” somehow ratified by the entity, upon a victim.¹⁴ In harassment scenarios where no such action was taken, the defendant-employer may use the so-called *Faragher/Ellerth* defense and plead the efficacy of its channels of complaint and the victim's failure to avail herself of them in order to evade liability.¹⁵ This defense, interposed by a defendant entity after a plaintiff makes out her prima facie case of harassment, calls for a demonstration that the plaintiff unreasonably failed to avail herself of an efficacious channel of recourse furnished by the defendant.¹⁶

On the one hand, the Supreme Court in *Suders* held that a constructive discharge—the legal point at which one's workplace conditions compel the most reasonable worker to quit employment—is not a tangible employment action sufficient to insulate a harassment claim from the two-pronged affirmative defense available to employers in hostile work environment cases.¹⁷ On the other hand, in *Jin* and *Holly D.*, the Second and Ninth Circuit Courts of Appeals held that agreeing to be intimate with one's supervisor in exchange for

12. See Anthony D. Pignotti, *If You Grab the Honey, You Better Have the Money: An In-Depth Analysis of Individual Supervisor Liability for Workplace Sexual Harassment*, 5 AVE MARIA L. REV. 207, 213, 216 (2007) (noting that although “the Supreme Court has never explicitly determined whether individual liability for the supervisor exists under Title VII,” the “federal courts have unanimously held that a supervisor may not be held liable in his individual capacity under Title VII for his acts of sexual harassment”).

13. See Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 721, 740 (2000) (arguing that “[t]here is every reason to compensate the victim for whatever harm flows from the initial act of harassment,” and observing that “[i]f the affirmative defense is construed to bar liability in some or all cases, sexual harassment victims who have suffered actionable discrimination are often deprived of compensation for harassment even where agency principles seem to dictate employer liability”).

14. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 807 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 753-54 (1998).

15. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

16. *Faragher*, 524 U.S. at 807-08.

17. *Pa. State Police v. Suders*, 542 U.S. 129, 152 (2004).

retaining one's job status *does* render one's harassment claim invulnerable to the *Faragher/ Ellerth* defense.¹⁸

Having held that a constructive discharge is not a tangible employment action, the *Suders* Court has done an immense disservice to harassment victims, whether or not they engaged in sexual relationships with their harassers. Harassment plaintiffs who have been constructively discharged have been effectively cut off—as a matter of law—from their ability to intercede on their own behalf and utilize channels of complaint. Considering that constructive discharge has been settled as a non-tangible employment action, important questions persist as to why the Second and Ninth Circuits remain willing to negate or somehow “undo” a plaintiff's consent to engage in sex with her supervisor in exchange for nothing more than keeping her job, and to designate her experience a “tangible employment action” sufficient to insulate her claim from the affirmative defense.

The so-called “submission cases” dot a legal landscape in which the Supreme Court has characterized constructive discharge as involving “an employee's decision to leave,”¹⁹ and has failed to explore properly the many reasons why this “decision” to leave is less than wholly volitional. Not only is the “choice” to leave in a constructive discharge scenario not a choice, but the initial choice that a plaintiff makes to remain silent initially about her harassment may also be far from volitional. In addition, the choice to *refrain* from reporting one's harassment is no less constrained than the choice to engage in a sexual relationship with one's harassing supervisor. The submission cases' recognition that a plaintiff's consent to sex is *not* volitional speaks volumes about the way in which courts view and treat women. The Second and Ninth Circuits' different treatment of plaintiffs who submit to their harassing supervisors' advances is not only inconsistent with the law of consent and the law of employment discrimination, but it also propagates a culture that infantilizes and incentivizes women to victimize themselves further through their submission.

The abuse of power by a harassing supervisor who propositions and threatens a subordinate is exactly the same irrespective of how the subordinate responds to the behavior. Nonetheless, if the harassment goes unreported, only the victim who relented and engaged in sex with her harassing supervisor will have unfettered access to Title VII and the recourse that it affords. This disparity illustrates the fact that victims are being treated differently based not upon the harm inflicted upon them, but upon their responses to that harm. Moreover, the abuse of power exhibited by the harassing supervisor in both situations creates the same cause of action. This is so because “harassing

18. *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1172-73 (9th Cir. 2003); *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 94-98 (2d Cir. 2002).

19. *Suders*, 542 U.S. at 148.

conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex,” and because sexual harassment exists whenever the perpetrator “is motivated by general hostility to the presence of women in the workplace.”²⁰

This Article reveals and examines how the current law governing sexual harassment operates, perhaps unwittingly, to favor plaintiffs who acquiesce to the propositions of their supervisors over those who resist harassment, but similarly fail to report it. It explores the roots of such a preference in society, as well as its consequences. Ultimately, this Article pauses to ask the following questions: Why does current caselaw view a victim’s failure to report hostile work environment harassment as a conscious choice whose consequences will almost always prove fatal to her legal claim, while viewing a plaintiff’s submission to her supervisor in order to retain her job as presumptively coerced and less than volitional? Is there a subconscious desire on the part of those crafting the law to “rescue” or alleviate from accountability women deemed too powerless to resist the influence and allure of a male boss? How and why should outward indices of consent be subverted when a plaintiff alleges that she had sex with her boss to maintain the status quo at work or to procure a promotion or a raise?

Part I of this Article lays out the legal framework for the resolution of a sexual harassment claim, whereby the presence or absence of a tangible employment action will divide those claims invulnerable to the *Faragher/Ellerth* defense to employer liability from those vulnerable to it. This Part sets forth the Supreme Court’s determination, subsequent to the promulgation of the *Faragher/Ellerth* defense, that a constructive discharge is not a tangible employment action, as well as the two circuits’ decisions that submission to the overtures of one’s harassing supervisor *is* a tangible employment action sufficient to insulate one’s claim from the interposition of the *Faragher/Ellerth* defense.

Part II of this Article describes the effect of the aforementioned cases, which display a clear judicial preference for plaintiffs who acquiesce (regardless of the surrounding circumstances) over those who resist their harassment until they are driven out of employment. It also describes the skeptical reaction, and some of the backlash, of the legal and academic communities to the so-called “submission cases.”

Part III asks why the decision to have a sexual relationship with one’s harassing supervisor is considered too constrained and coerced to be volitional, while the decision to refrain from reporting harassment, when motivated by the fear of losing one’s job, is not. Section A looks at why victims’ choices are coerced. Section B reviews the factors that often conspire to compel a constructive discharge victim to feel as though reporting her harassment is not

20. *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998).

an option. It also examines the cursory treatment that courts often give a defendant's invocation of the affirmative defense before deciding that a victim is, indeed, wholly accountable for her failure to make use of an available reporting mechanism. Section C shows that the failure to report harassment is just as coerced when constrained by financial and professional motivations as when one acquiesces to a supervisor's advances.

Finally, Part IV explores the root of this preference in the law by examining the relationship between women and consent through the lens of the law. Outside of the context of sex and sexual relations, women have historically been held accountable for their decisions and actions executed under various financial or professional pressures. However, I argue, the unique and distinct treatment of sexual harassment victims in the submission context resonates with earlier jurisprudence concerning women in the context of sex, and allegations that they were somehow "seduced" into having relations that they did not want to have, and, based on society's normative values, should not have had. All of this jurisprudence, I conclude, is undergirded by the notion that women do not fully possess their own sexuality, and that they are susceptible to "seduction." This notion, pervasive in society, and apparently endorsed by court decisions in the submission cases, includes the idea that women's wills may be overborne by pressures that fall well below the threshold of the imminent threat of physical harm. It stands, however, in sharp contrast to courts' traditional unwillingness to "undo" consent given in response to financial and professional pressures in contexts outside of sex.

The result of this phenomenon is a legal system apt to infantilize women and subvert the validity of their consent. The plight of *all* sexual harassment victims needs to be contemplated by the law and the frameworks that it employs to resolve workplace harassment claims; the unique treatment of the submission plaintiffs ultimately operates to harm the very class of individuals that we can only presume that the law intended to "rescue."

I. BACKGROUND

This Part lays out the jurisprudential framework within which the Supreme Court and circuit courts have resolved issues of employer liability for supervisory harassment in the contexts of general sexual harassment cases, constructive discharge harassment cases, and harassment cases involving submission.

A. Faragher and Ellerth and the Tangible Employment Action Framework

Under Title VII of the Civil Rights Act of 1964, employers are prohibited from subjecting employees to discriminatory employment environments and

practices on the basis of their membership in a protected class, such as gender.²¹ From this prohibition, the Supreme Court derived a cause of action for sexual harassment that creates a hostile or offensive work environment or that makes job benefits contingent upon the provision of sexual favors.²² The scope of vicarious employer liability for various supervisory harassment scenarios, however, remained to be unpacked over time.²³

In 1998, the Supreme Court attempted, in the companion cases of *Burlington Industries Inc. v. Ellerth*²⁴ and *Faragher v. City of Boca Raton*,²⁵ to contour the parameters of employer liability for supervisory sexual harassment in the workplace. Using basic precepts of agency law in order to deter would-be harassers and quell harassing workplace behavior, the Court attempted simultaneously to afford victims recourse and to provide employers with fair notice of the actions of its agents prior to the imposition of strict liability.²⁶ Finding the prior distinction between quid pro quo harassment and hostile work environment harassment to be “of limited utility,”²⁷ the Court determined that a critical question as to employer liability for supervisory harassment was whether a “tangible employment action” had occurred.²⁸

Within the Court’s framework, then, in cases in which the harassing supervisor used his ability to confer a “tangible employment action” upon a plaintiff, the defendant employers were held strictly liable for the actions of the supervisors.²⁹ These were, the Supreme Court announced, “a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the harassment: when a supervisor takes a

21. 42 U.S.C. § 2000e-2 (2007).

22. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

23. The Supreme Court in *Meritor* declined to provide explicit guidance in this area, instructing the lower courts only that “Congress wanted courts to look to agency principles for guidance in this area.” *Id.* at 72.

24. 524 U.S. 742 (1998).

25. 524 U.S. 775 (1998).

26. *Ellerth*, 524 U.S. at 764-65.

27. *Fisher v. Elec. Data Sys.*, 278 F. Supp. 2d 980, 987 (S.D. Iowa 2003) (citing *Ellerth*, 524 U.S. at 751).

28. *Ellerth*, 524 U.S. at 751. Much has been written since the promulgation of the tangible employment action as the factor that insulates a claim from the affirmative defense, and many scholars have criticized the standard. See, e.g., Kerri Lynn Bauchner, *From Pig in a Parlor to Boar in a Boardroom: Why Ellerth Isn't Working and How Other Ideological Models Can Help Reconceptualize the Law of Sexual Harassment*, 8 COLUM. J. GENDER & L. 303, 317 (1999) (criticizing the hypertechnical distinction between incurring a tangible employment action and laboring under an unfulfilled, but constantly looming threat, and observing that *Faragher* and *Ellerth* effectively “educate employers as to how to harass workers effectively while incurring the least amount of liability”); Grossman, *supra* note 13, at 675 (arguing that *Faragher* and *Ellerth*, “far from imposing additional liability on innocent employers, have instead created a virtual safe harbor that protects employers from liability unless their own conduct is found wanting. This protection for employers comes at a high price, depriving some victims of actionable sexual harassment of legal redress.”); Martha S. West, *Preventing Sexual Harassment: The Federal Courts' Wake-Up Call for Women*, 68 BROOK. L. REV. 457, 461 (2002) (questioning the “viability of the affirmative defense in actually preventing hostile environment sexual harassment”).

29. *Ellerth*, 524 U.S. at 765.

tangible employment action against the subordinate.”³⁰ According to the Court, a tangible employment action was “an official act of the enterprise, a company act,” and “the means by which the supervisor brings the official power of the enterprise to bear on subordinates,” because of the harasser’s ability to misappropriate and deploy the “imprimatur of the enterprise.”³¹ It “constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”³² Thus, where a tangible employment action has been taken, “it would be implausible to interpret agency principles to allow an employer to escape liability.”³³

Other cases of supervisory harassment in which no tangible employment action was taken were termed “hostile work environment” cases, in which it was “less obvious” that the agency relationship between the supervisor and the plaintiff enabled the harassment.³⁴ Although the Supreme Court acknowledged that a supervisor’s “power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation,” it did not find that cases without a tangible employment action compelled the imposition of strict liability on the employer, irrespective of what the employer knew or reasonably could have known about the harassment.³⁵ Within the hostile work environment framework, then, the employer could offer a two-pronged affirmative defense: that “the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and that “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”³⁶ According to the Supreme Court, this affirmative defense resonates with basic tort principles by ensuring that victims of sexual harassment, like victims of other civil wrongs, are obligated to mitigate damages.³⁷

B. When Plaintiffs Leave: Constructive Discharge Is Not a Tangible Employment Action

In the 1999 Second Circuit Court of Appeals case of *Caridad v. Metro-North Commuter R.R.*,³⁸ the named plaintiff argued that she had been

30. *Id.* at 760.

31. *Id.* at 762. Typically, the Supreme Court observed, a tangible employment decision “is documented in official company records, and may be subject to review by higher level supervisors.” *Id.*

32. *Id.* at 761.

33. *Id.* at 763.

34. *Id.*

35. *Id.* at 764-65.

36. *Id.* at 765.

37. *See id.* at 764.

38. 191 F.3d 283 (2d Cir. 1999).

constructively discharged, meaning that her employment conditions had been rendered so objectively intolerable that any reasonable person in her shoes would have felt compelled to resign,³⁹ and that this constructive discharge was a tangible employment action, making the *Faragher/ Ellerth* defense inapplicable.⁴⁰ The Second Circuit rejected the latter argument, holding that a constructive discharge was not a tangible employment action because “unlike demotion, discharge, or similar economic sanctions, an employee’s constructive discharge is not ratified or approved by the employer.”⁴¹

In 2003, the Third Circuit split with the Second Circuit over this issue in the case of *Suders v. Easton*.⁴² Suders, a female police communications operator working in an all-male police barracks, alleged that she had been sexually harassed until she felt impelled to resign.⁴³ Suders endured instances of “name-calling, repeated episodes of explicit sexual gesturing, obscene and offensive sexual conversation, and the posting of vulgar images.”⁴⁴ Eventually, her harassers falsely accused her of stealing a missing file.⁴⁵

Although Suders tried to confront at least one of her harassers about the behavior, and made an effort to obtain (but did not procure or fill out) the necessary paperwork to utilize official channels of complaint, she never filed an official complaint.⁴⁶ The plaintiff alleged that the Equal Employment Opportunity Officer of the Pennsylvania State Police was “insensitive and unhelpful,” and directed her to complete a form without telling her how to locate the form.⁴⁷ Two days after her conversation with the officer, Suders felt impelled to resign on the spot after a final incident in which she was falsely accused of theft.⁴⁸ Suders’ harassers “handcuffed, photographed, and questioned” her, making her feel “abused, threatened and held against her will.”⁴⁹ At this point, Suders gave her harassers a letter of resignation that she had drafted and had been carrying around with her.⁵⁰ After initially refusing to

39. See *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987) (“When a constructive discharge is found, an employee’s resignation is treated . . . as if the employer had actually discharged the employee.”).

40. *Caridad*, 191 F.3d at 293. The plaintiff alleged that her harasser engaged in several episodes of harassment, including unwelcome comments and unwelcome physical contact with her. She testified that she found work difficult due to the fact that “she ‘didn’t know when [Clarke] was going to do this,’ and ‘every day [she felt she] could be subject to’ another attack.” She also alleged that she was subjected to unfair criticism of her work based on her gender and that other male co-workers treated her in a hostile manner; one of them “allegedly told her that ‘nobody cares what happens to you’ and that she had ‘walked into a lion’s den.’” *Id.* at 290.

41. *Id.* at 294.

42. 325 F.3d 432 (3d Cir. 2003), *rev’d sub nom.* *Pa. State Police v. Suders*, 542 U.S. 129 (2004).

43. *Id.* at 435.

44. *Id.* at 436.

45. *Id.* at 438.

46. *Id.*

47. *Id.*

48. *Id.* at 438-39.

49. *Id.* at 439.

50. *Id.*

allow her to leave, the plaintiff's harassers took her into an interrogation room and read her her Miranda rights before ultimately accepting her resignation and permitting her to leave.⁵¹

The Third Circuit held in Suders' case that, because "some of the most pernicious forms of workplace harassment, clearly amounting to tangible employment actions, are often not accompanied by official company acts," and because "a constructive discharge, when proved, operates as the functional equivalent of an actual termination . . . becom[ing], for all intents and purposes, the act of the employer,"⁵² a constructive discharge was a tangible employment action.

The Supreme Court resolved the circuit split by reversing the Third Circuit's holding, despite the fact that Suders had been abused, framed, and maligned, in what the Court called a "'worse [sic] case' harassment scenario, harassment ratcheted up to the breaking point."⁵³ Instead, the Court held that, "when an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis . . . calls for extension of the affirmative defense to the employer," because the plaintiff/employee's unilateral act of departure does not adequately place the defendant on notice that corrective measures are needed.⁵⁴

C. When Plaintiffs Submit: Submission Is Tantamount to a Tangible Employment Action

In *Jin v. Metropolitan Life Insurance Company*,⁵⁵ the plaintiff Min Jin asserted that Gregory Morabito, her supervisor at MetLife, sexually harassed her by, among other harassing behaviors, requiring her "to attend weekly Thursday night private meetings in his locked office," during which he would engage in egregious acts of sexual assault.⁵⁶ During these meetings, which Jin attended for months, Morabito would "threaten her with a baseball bat, kiss, lick, bite and fondle her, attempt to undress her, physically force her to unzip his pants and fondle him, push against her with his penis exposed, and ejaculate on her."⁵⁷ Additionally, Morabito made crude sexual comments to Jin, called

51. *Id.*

52. *Id.* at 458.

53. *Pa. State Police v. Suders*, 542 U.S. 129, 131-48 (2004).

54. *Id.* at 148-49. The Court added that, "[a]bsent such an official act, the extent to which the supervisor's misconduct has been aided by the agency relation, as we earlier recounted . . . is less certain." *Id.* at 148. *Suders* was eagerly awaited by many members of the legal and academic community. *See, e.g.*, Shari M. Goldsmith, Casenote, *The Supreme Court's Suders Problem: Wrong Question, Wrong Facts Determining Whether Constructive Discharge Is a Tangible Employment Action*, 6 U. PA. J. LAB. & EMP. L. 817, 819, 844 (2004) (arguing, after certiorari had been granted by the Court, that Suders's "resignation was 'ratified by the employer,'" and contending that the Supreme Court should "guarantee that resignations classified as constructive discharges would genuinely be the functional equivalents of formal discharges.").

55. 310 F.3d 84 (2d Cir. 2002).

56. *Jin*, 310 F.3d at 88.

57. *Id.* at 88-89.

her at home, touched her in an offensive manner, and repeatedly threatened to fire her and physically harm her if she did not submit to his sexual demands.⁵⁸ Eventually, Jin refused to attend any more weekly meetings, and Morabito continued to fondle and harass her until MetLife terminated her employment approximately a year and a half later.⁵⁹

Jin appealed after a jury found that she had been sexually harassed, but that the harassment did not result in a “tangible adverse action” that altered the terms or conditions of her employment.⁶⁰ MetLife was successfully able to use the *Ellerth* affirmative defense so as to prevent Jin from prevailing on her sexual harassment claim before the district court.⁶¹ The Second Circuit, however, held that the district court had “defined tangible employment action too narrowly” and had incorrectly instructed the jury that a tangible employment action needed to be “adverse,” noting that this requirement contravened “the plain language of both *Faragher* and *Ellerth*.”⁶²

The Second Circuit agreed with Jin that the jury ought to have been permitted to consider as a tangible employment action the explicit conditioning of Jin’s continued employment on her submission to Morabito’s sexual demands:

Requiring an employee to engage in unwanted sex acts is one of the most pernicious and oppressive forms of sexual harassment that can occur in the workplace. The Supreme Court has labeled such conduct “appalling” and “especially egregious.” It is hardly surprising that this type of conduct—a classic quid pro quo for which courts have traditionally held employers liable—fits squarely within the definition of “tangible employment action” that the Supreme Court announced in *Faragher* and *Ellerth*.⁶³

Here, Jin argued that Morabito used his authority to impose on her the added job requirement that she submit to weekly sexual abuse in order to retain her employment.⁶⁴

The Second Circuit also anchored its determination in the precepts of agency, noting that it had been Morabito’s status as Jin’s supervisor rather than her coworker, his ability to order her to report to his office to endure sexual abuse, and his “empowerment by MetLife as an agent who could make economic decisions affecting employees under his control that enabled him to force Jin to submit to his weekly sexual abuse.”⁶⁵ Thus, because employers are better situated to police the behavior of supervisors through screening, training,

58. *Id.*

59. *Id.* at 89.

60. *Id.* at 90.

61. *Id.* at 93.

62. *Id.*

63. *Id.* at 94.

64. *Id.* (citation omitted).

65. *Id.*

and monitoring, and because this policing is “certainly crucial when the conduct to be guarded against is the criminal assault of an employee in the employer’s own offices,”⁶⁶ the Second Circuit found that “Morabito’s alleged use of Jin’s submission as the basis for allowing her to continue working at MetLife creates [a] tangible employment action.”⁶⁷

The court stressed the fact that the critical issue in the archetypal quid pro quo case had always been “whether the supervisor has linked tangible job benefits to the acceptance or rejection of sexual advances.”⁶⁸ Thus, it found, strict liability is properly conferred on a defendant employer where a plaintiff submitted to an unwelcome sexual advance in exchange for retaining her employment status. The court distinguished Jin’s plight from those of the plaintiffs in cases like *Ellerth* and *Caridad*, noting that Jin’s situation was “substantially different from the type of unfulfilled threat alleged in *Ellerth*, where no job benefit was granted or denied based on the plaintiff’s acceptance or rejection of her supervisor’s advances.”⁶⁹

Moreover, the court noted that the EEOC’s Enforcement Guidance, issued after *Faragher* and *Ellerth*, dictated that a plaintiff’s claim would not be vulnerable to the interposition of the *Ellerth* defense where the plaintiff acquiesced to unwelcome sexual demands and acquired a “tangible job benefit” as a result,⁷⁰ consistent with the circuit’s pre-*Faragher/Ellerth* rule of strict liability “when a supervisor ‘conditions any terms of employment upon the employee’s submitting to unwelcome sexual advances.’”⁷¹ The court reiterated two key observations that it had previously made in a 1994 case: (1) “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;” and (2) “[t]he focus should be on the prohibited conduct, not the victim’s reaction.”⁷²

Despite the defendant’s contention that the victim’s reaction, “whether it be to submit to sexual abuse or to quit employment, does not convert sexually harassing activity into tangible employment action,”⁷³ the court noted that the proper analysis “focuses on the supervisor’s conduct, not the victim’s reaction.”⁷⁴ However, the Second Circuit’s finding in *Jin* that her supervisor had brought “‘the official power of the enterprise to bear’ on Jin by explicitly threatening to fire her if she did not submit and then allowing her to retain her

66. *Id.*

67. *Id.* at 97 (citing *Karibian v. Columbia Univ.*, 14 F.3d 773, 778 (2d Cir. 1994)).

68. *Jin*, 310 F.3d at 96 (quoting *Karibian*, 14 F.3d at 778).

69. *Jin*, 310 F.3d at 97.

70. *Id.* at 94-95.

71. *Id.* at 95 (quoting *Karibian*, 14 F.3d 773).

72. *Jin*, 310 F.3d at 96 (quoting *Karibian*, 14 F.3d at 778).

73. *Jin*, 310 F.3d at 97.

74. *Id.*

job based on her submission,”⁷⁵ inexplicably differed from its holding in *Caridad* that no tangible employment action existed in the constructive discharge even though *Caridad*’s supervisor acted just as *Jin*’s did.

*Holly D. v. California Institute of Technology*⁷⁶ followed the same fact pattern: The plaintiff alleged that her continued employment was conditioned on her having sexual relations with Stephen Wiggins, the professor for whom she worked.⁷⁷ *Holly D.* alleged that she labored under the implied but unarticulated threat that her position depended upon her compliance with his unwelcome advances, which lasted for over a year.⁷⁸ The Ninth Circuit announced in its decision that it would “join the Second Circuit in holding that a plaintiff who contends that she was coerced into performing unwanted sexual acts with her supervisor, by threats that she would be discharged if she failed to comply with his demands, has alleged a tangible employment action”⁷⁹ Sympathetic to the plight of a plaintiff who, “anxious to retain her position with the employer—a job that is likely to represent her sole means of earning a living—submits to her supervisor’s sexual demands”⁸⁰ under threats, the court found that “the threat does not simply remain unfulfilled or inchoate, but rather results in a concrete consequence.”⁸¹

The Ninth Circuit observed that “[s]uccessful coercion . . . depends on the same abuse of supervisorial authority—the power, for example, to hire and fire—that, *Faragher/Ellerth* held, renders a discharge a ‘tangible employment action.’”⁸² The court further found that the linchpin of the tangible employment action determination was the implication of the “supervisor’s ability to impose upon the employee the ultimate employment penalty—discharge—or to confer on her the ultimate employment benefit—the retention of her job.”⁸³ The court, however, never explained why this focus on the behavior and capabilities of the harasser did not also place constructive discharge sexual harassment cases within the same purview as submission cases.⁸⁴

Seeking to square its holding with the mandates of *Ellerth* and *Faragher*, the Ninth Circuit looked to the nonexhaustive listing of tangible employment actions enumerated by the Supreme Court and reasoned that submission to a coercive and unwelcome advance ought to constitute a tangible employment action.⁸⁵

75. *Id.* at 98.

76. 339 F.3d 1158 (9th Cir. 2003).

77. *Id.* at 1161-62.

78. *Id.* at 1162.

79. *Id.*

80. *Id.* at 1168.

81. *Id.* at 1168-69.

82. *Id.* at 1168.

83. *Id.* at 1169.

84. *Id.*

85. *Id.* at 1173.

We . . . find no reasoned distinction between the listed occurrences and their opposites. For example, if a supervisor commits a “tangible employment action” by “hiring” a job applicant only because she has agreed to comply with his sexual demands then, surely, such an action must also occur if the supervisor refuses to hire the applicant because she is unwilling to participate in the sexual acts on which he insists. . . . Most significant for this appeal, if a supervisor commits a “tangible employment action” by “firing” an employee because she refuses to enter into a sexual relationship, a “tangible employment action” must also occur when he determines not to fire her because she has performed the sexual acts he demanded.⁸⁶

To date, no courts of appeals other than the Second and Ninth Circuits have published post-*Faragher* and *Ellerth* opinions addressing the issue of whether the receipt of benefits conditioned on submission to supervisory sexual advances is tantamount to a tangible employment action.⁸⁷ However, the Supreme Court has decided that a constructive discharge—a rendering of one’s workplace conditions so objectively intolerable that one feels compelled to resign—is not a tangible employment action that makes a claim invulnerable to the *Faragher/Ellerth* affirmative defense. So why have the Second Circuit and Ninth Circuit recognized voluntary submission to a harassing supervisor’s advances as *just* such an action? The decisions in *Jin* and *Holly D.* swoop in where a self-proclaimed victim has ostensibly consented to have sex with her supervisor and rescue her from the consequences of acquiescing though failing to report it.

II. THE EFFECT OF THE PREFERENCE FOR PLAINTIFFS WHO ACQUIESCE VERSUS PLAINTIFFS WHO PASSIVELY RESIST

This Part explores the effect of the jurisprudential framework laid out in the previous section. Specifically, it details how women who experience the most egregious form of sexual harassment in the workplace—rape—are often left without any recourse against their employers. Because plaintiffs who acquiesce have access to a holding of strict liability against their employers,

86. *Id.* at 1170.

87. See *Hetreed v. Allstate Ins. Co.*, 6 F. App’x 397 (7th Cir. 2001). In this unpublished opinion, the court held that, while the plaintiff alleged that she suffered sex discrimination when her male supervisor induced her to engage in sexual relations over a four-year period, “[h]er contention that sexual relations are ‘tangible employment actions’ is at variance with the definition given in *Faragher* and *Ellerth*, which used that phrase to refer to . . . acts that may be viewed as the official acts of the employer . . . a supervisor’s sexual activity is not attributed to the firm unless it fails to take preventive or responsive steps within its power.” *Id.* at 399. In *Lutkewitte v. Gonzales*, 436 F.3d 248 (D.C. Cir. 2006), the court addressed the plaintiff’s “contention that her ability to receive job-related benefits was conditioned on her submission to [her supervisor’s] demands.” *Id.* at 252. Because it could not find an adequate nexus between the plaintiff’s receipt of benefits and her sexual submission to her supervisor, the court declined to “address larger questions regarding the extent to which *Faragher* and *Ellerth* are applicable in the ‘submission’ context.” *Id.* at 254.

they are able to recover for the harm they have sustained, whereas victims who passively resist often do not. This Part will look at and add to the criticism this disparity has garnered.

A. The Harsh Reality: An Illustrative Case

Upon the issuance of *Faragher* and *Ellerth*, a crucial distinction was forged between sexual harassment cases in which a tangible employment action was taken and those in which one was not; only in the latter scenario would a case be rendered vulnerable to *Ellerth* defense. This defense precludes employer liability in cases where employer can demonstrate that the plaintiff unreasonably failed to avoid harm by taking advantage of sexual harassment complaint procedures.⁸⁸ Where a victim reports her harassment in a timely and effective fashion, the affirmative defense should not be successful, and the victim should be unfettered by it as she sets out to vindicate her rights.

However, where a plaintiff who did not suffer a tangible employment action fails to report her harassment, this failure will be fatal to her claim unless the court finds that the defendant's antiharassment policy was missing or defective or that the plaintiff's behavior was reasonable. This rule has proven to be rigid, irrespective of the severity of the incidents precipitating a victim's constructive discharge. In *Walton v. Johnson & Johnson Services, Inc.*,⁸⁹ a pharmaceutical sales representative sued her employer, alleging that, after she told her direct supervisor that she wanted a promotion, he made a series of bold and inappropriate advances toward her, escalating until he raped her repeatedly one evening.⁹⁰ As the Eleventh Circuit recounted:

Walton did not immediately report the alleged assault to either her employer or the police. The next day, Walton called in sick. She returned to work later that week, and about a week later . . . she attended a lunch business meeting with Mykytiuk [the supervisor]. After the meeting, he asked her to give him a ride back to his apartment. . . . [where] Mykytiuk allegedly raped her yet again. After the alleged assault, Mykytiuk apologized to Walton, who was crying. He said that it would not happen again and that they would have a professional relationship in the future. Once again, Walton did not immediately report Mykytiuk's conduct to either her employer or the police.⁹¹

When harassment of Walton continued, a friend in whom she had confided brought her plight to the attention of someone who worked for a sister company, and Walton was subsequently advised to report her situation through

88. See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998).

89. 347 F.3d 1272 (11th Cir. 2003).

90. *Id.* at 1275-76.

91. *Id.* at 1276.

her company's official channels.⁹² It was not, however, until more than two months after her initial assault that Walton finally reported Mykytiuk to her company's human resources department. Mykytiuk was subsequently terminated for "exercising poor judgment," but the plaintiff was informed that her employer "could not conclude that she had been raped and that they were unable to exclude the possibility of a consensual affair."⁹³ Walton, who had gone on leave shortly after she reported her harassment, went on long-term disability, but was terminated when she failed to return to work after a reviewing physician determined that she was no longer disabled.

After Walton brought a sexual harassment suit, the district court granted the defendant's motion for summary judgment on the basis of the *Ellerth* defense. It held that the defendant had behaved reasonably to prevent and then promptly correct the harassing behavior and that the plaintiff had unreasonably failed to properly utilize the defendant's anti-harassment policy.⁹⁴ On appeal, the plaintiff argued that her termination following a request for long-term disability benefits amounted to a tangible employment action, which should have precluded the affirmative defense.⁹⁵

The court of appeals, however, held that while there was "no question but that Walton's discharge constitutes a tangible employment action,"⁹⁶ and that she was arguably *harassed* because of her sex, there was no evidence that she was terminated on the basis of her sex.⁹⁷ The court refused to discern a nexus between the plaintiff's harassment and the disability that she claimed persisted despite her mandate to return to work. It did this by focusing solely on her termination, which stemmed from her failure to return to work, and the fact that her harasser technically played no role in her termination.⁹⁸

The court refused to address the plaintiff's argument that her rapes were tantamount to tangible employment actions, noting that this argument had been raised for the first time on appeal.⁹⁹ The court went on to evaluate her claim of hostile work environment sexual harassment, holding that while the harassment she experienced clearly rose to the point of being actionable,¹⁰⁰ the applicability of the affirmative defense operated to foreclose her claim.¹⁰¹ Walton was left without remedy against the defendant.

92. *Id.* at 1277.

93. *Id.* at 1278.

94. *Id.* at 1279.

95. *Id.* at 1281.

96. *Id.*

97. *Id.*

98. Indeed, the court said that, "[t]o the extent that Walton claims that Mykytiuk's conduct precluded her from returning to work, that claim is properly considered as a constructive discharge claim . . ." *Id.* at 1282 n.7.

99. *Id.* at 1283 n.10.

100. *Id.* at 1285 n.12 (noting "few incidents, isolated or not, that are more serious than those alleged to have occurred in this case").

101. *Id.* at 1293.

The court left open the issue of whether the alleged rapes were tangible employment actions by choosing not to entertain the question. However, even in that pre-*Suders* era, before the Supreme Court held that an act amounting to a constructive discharge was not, as a matter of law, a tangible employment action, courts were inclined to view even the most horrific criminal assaults on victims at work as falling short of being tangible employment actions. In 2003, for example, a district court in Virginia adjudicating a harassment suit in which the plaintiff alleged “rape at knifepoint” found that “[e]ven if [the alleged harasser] were a supervisor, there was no tangible employment action taken . . . that would short-circuit [the defendant’s] ability to claim the *Faragher/Ellerth* defense,”¹⁰² because “[t]here was nothing done to [the plaintiff] that changed her employment condition through the use of supervisory power.”¹⁰³ The court observed that “nothing . . . ‘made [the plaintiff] defenseless against the [harassment] in ways that comparable conduct by a mere co-worker would not’ have done.”¹⁰⁴

Following the Supreme Court’s 2004 pronouncement in *Suders* that the touchstone of deciding when an act is a tangible employment action is whether or not an “official company act” took place,¹⁰⁵ even an actual rape would likely not qualify as a tangible employment action.¹⁰⁶ This is because, even according to the submission cases in which intercourse between a victim and a harasser is deemed a tangible employment action, “unconditional liability attaches only if a quid pro quo threat is implemented,” and the “supervisor actually coerces sex by abusing the employer’s authority, and thus makes concrete the condition of employment he has imposed.”¹⁰⁷

102. *Cooper v. City of Roanoke*, No. 7:02-CV-00673, 2003 WL 24117704, at *4 (W.D. Va. Jan. 10, 2003).

103. *Id.*

104. *Id.* (quoting *Mikels v. City of Durham*, 183 F.3d 323, 333 (4th Cir. 1999)); *see also Conatzer v. Medical Prof'l Bldg. Servs., Inc.*, 255 F. Supp. 2d 1259, 1267 (N.D. Okla. 2003) (“In an effort to circumvent the *Ellerth/Faragher* affirmative defense, plaintiff argues that Woodruff’s assaults were, in themselves, tangible employment actions. This argument obviously lacks merit. If sexually harassing behavior by a supervisor could, in itself, be construed as a tangible employment action, the affirmative defense . . . would be a dead letter.”).

105. *Pa. State Police v. Suders*, 542 U.S. 129, 148 (2004).

106. *See, e.g., Allen v. Ohio Dept. of Job & Family Servs.*, No. 2:05-CV-00707, 2007 WL 2815569, at *8 (S.D. Ohio Sept. 25, 2007) (rejecting plaintiff’s claim that her physical assault was a tangible employment action, because it “did not change her employment status or reduce her job benefits”).

107. *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1170 (9th Cir. 2003). *But see Bolick v. Alea Group Holdings, Ltd.*, No. Civ. 3:03CV165, 2005 WL 2621516, at *4 (D. Conn. Sept. 30, 2005) (apparently mischaracterizing the holding in *Jin* by stating that in that case “the Court held only that the *criminal assault* of an employee constituted a tangible employment action”). In fact, *Jin* addressed its legal holding to a supervisor’s “classic quid pro quo” achieved by “[r]equiring an employee to engage in unwanted sex acts,” and specifically, in that case, by the supervisor’s “order[ing] her to submit to demeaning sexual acts, explicitly threaten[ing] to fire her if she did not submit, and then allow[ing] her to keep her job after she submitted.” *See Jin v. Metropolitan Life Insurance Co.*, 310 F.3d 84, 94 (2d Cir. 2002).

Indeed, only a few years after it decided *Jin*, the Second Circuit addressed a case in which the plaintiff claimed to have been continually harassed and propositioned by her supervisor, but admitted “she did not always resist [his] advances and never reported the various incidents now complained of.”¹⁰⁸ The district court had characterized the relationship as one in which there “was clearly a mutual emotional bond.”¹⁰⁹ The Second Circuit said that unlike in *Jin*, where the plaintiff “received an official employment benefit—the retention of her job—in return for submitting to her supervisor’s physical abuse,” the plaintiff here never argued that her harasser “explicitly threatened her with termination or otherwise formally altered or threatened to alter her job responsibilities if she did not submit to his advances.”¹¹⁰ It appears that absent a bargained exchange, even a court that is willing to view submission as a tangible employment action is not equally poised to view intercourse outside of that context as a tangible employment action as well.

What, then, is the significance of the *Walton* case? Although it was decided before the Supreme Court decided *Suders*, the result would have been the same post-*Suders*. Because no “official action” emanated from the company, despite the fact that “few incidents, isolated or not, [] are more serious than those alleged to have occurred in this case,”¹¹¹ the court held that no tangible employment action had occurred. A juxtaposition of *Walton*’s rape scenario with the “submission cases” brings into sharper focus the courts’ inconsistency in dealing with the cases of constructive discharge. Those victims who give consent—albeit coerced—to have sex with their supervisors often fare better under the law than those who are raped or assaulted, or those who are constructively discharged.

B. Examining the Submission Cases

*In the Second Circuit, an employee faced with a quid pro quo proposition fares better by submitting to a sexual demand rather than refusing and immediately reporting it.*¹¹²

Even before the Supreme Court issued its opinion in *Suders*, several district courts had already taken issue with *Jin*’s holding that submission can create a tangible employment action where there would otherwise not be one.¹¹³ These district courts noted that *Jin* represented “a return to the pre-*Faragher/Ellerth*

108. *Finnerty v. William H. Sadler, Inc.*, No. 7:04CV07007, 2005 WL 5353241, at *2 (S.D.N.Y. Jul. 25, 2005), *rev’d*, 176 F. App’x 158 (2d Cir. 2006).

109. *Finnerty*, 2005 WL 5353241, at *2.

110. *Finnerty*, 176 F. App’x at 162.

111. *Walton v. Johnson & Johnson Servs.*, 347 F.3d 1272, 1285 n.12 (11th Cir. 2003).

112. *Speaks v. City of Lakeland*, 315 F. Supp. 2d 1217, 1226 (M.D. Fla. 2004).

113. *See, e.g., id.* at 1225 (finding the Second Circuit’s reasoning in *Jin* to be both inconsistent with Supreme Court precedent and detrimental to the employee duty to avoid harm).

state of sexual harassment law where the category of harassment determined vicarious liability.”¹¹⁴ Indeed, some courts have contended that the retention of one’s job, even if predicated on one’s sexual submission, cannot be the basis for vicarious liability because it does not constitute the “significant change in status” required by *Faragher* and *Ellerth*.¹¹⁵ Moreover, some courts have argued that predicating quid pro quo status on a plaintiff’s submission divests employees of their “coordinate duty to avoid harm” and subverts the avoidable consequences doctrine by providing a disincentive to report or otherwise end harassment.¹¹⁶

A rebuffed supervisory advance, harassment that precipitates a victim’s quitting, and a workplace affair all occur beyond the sight of an employer—although often right under its nose. In none of these scenarios is the employer afforded the opportunity to correct unreported behavior. The Second Circuit, however, maintains that *Jin* is “consistent with” *Caridad* because, while the retention of an employment benefit in exchange for submission is “a classic quid pro quo,” a constructive discharge is not officially mandated or ratified by an employer.¹¹⁷ Some other courts have followed the Second Circuit’s approach, and have found that allowing one to retain one’s status quo or conferring benefits in exchange for submission is a tangible employment action. One district court has observed:

It would be a perverse result if the employer is foreclosed from raising the affirmative defense if its supervisor denies a tangible job benefit based on an employee’s rejection of unwelcome sexual demands, but can raise the defense if its supervisor grants a tangible job benefit based on submission to such demands.¹¹⁸

Indeed, the Equal Employment Opportunity Commission (EEOC) in Enforcement Guidelines issued in 1999, has noted that according to the Supreme Court, “there must be a significant change in employment status; [but] it did not require that the change be adverse in order to qualify as tangible.”¹¹⁹

114. *Id.*

115. *Id.*

116. *Id.*

117. *Finnerty v. William H. Sadler, Inc.*, 176 F. App’x 158, 161-62 (2d Cir. 2006).

118. *Temores v. Cowen*, 289 F. Supp. 2d 996, 1001 (N.D. Ill. 2003) (quoting EEOC, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999)). The EEOC Enforcement Guidance states that:

If a supervisor undertakes or recommends a tangible job action based on a subordinate’s response to unwelcome sexual demands, the employer is liable and cannot raise the affirmative defense. The result is the same whether the employee rejects the demands and is subjected to an adverse tangible employment action or submits to the demands and consequently obtains a tangible job benefit. . . . In both those situations the supervisor undertakes a tangible employment action on a discriminatory basis.

EEOC, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), available at <http://www.eeoc.gov/policy/docs/harassment.html> (emphasis added) [hereinafter EEOC ENFORCEMENT GUIDANCE].

119. *Temores*, 289 F. Supp. 2d at 1001 (quoting EEOC ENFORCEMENT GUIDANCE, *supra* note 118).

But why would the Supreme Court intend to allow submission to be tantamount to the conferral of a tangible employment action? Courts propounding *Jin*'s reasoning have noted that "[o]ne of the hallmarks of a tangible employment action—and the reason why the Supreme Court concluded an employer should be held strictly liable for the action—is that the agency relationship gave the supervisor the power to take the action he has taken against the plaintiff."¹²⁰

Moreover, some courts applying *Jin* have been willing to isolate aspects of the consensual relationship between a plaintiff and her supervisor—such as time she felt compelled to spend with him rather than pursuing her career—and brand these collateral effects of the relationship as tangible employment actions conferred upon and sustained by the plaintiff.¹²¹ In any event, there are ample reasons why the different treatment of plaintiffs in sexual harassment/submission cases and plaintiffs in sexual harassment/constructive discharge cases is ideologically untenable under either public policy or law.

C. Taking Aim at the Submission Cases

Scholars and courts alike have criticized the submission cases for failing to comport with either the Supreme Court's or Congress's conception of Title VII.

Professor Heather Murr has attempted to explain why the submission as a tangible employment action argument was crafted and then sanctioned by courts of appeal, concluding that:

Given the documented pro-employer trend in granting summary judgment on the . . . affirmative defense, and the courts' rather cursory and often incorrect analysis of the two prongs, it is highly unlikely that an employer will fail in its efforts to successfully assert the affirmative defense. In light of this trend, it is understandable why harassment victims are pleading, and certain courts are construing, supervisory sexual extortion cases as tangible employment actions in an effort to hold employers strictly liable for such conduct.¹²²

This explanation, however, simply does not work. First, the reasoning in the submission cases appears to contravene a crucial mandate of *Faragher* and

120. *Id.* at 1002 (citing *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761-62 (1998)).

121. *See, e.g., Bennett v. Progressive Corp.*, 225 F. Supp. 2d 190, 205 (N.D.N.Y. 2002) ("Plaintiff was allegedly on a career track to become an outside road adjuster. Such a position involves significant time out of the office, and is essentially a promotion. Mitchell denied her the opportunity to pursue such an avenue, or at least slowed down the process, by ensuring that plaintiff spent an increasing amount of time in the office with him. This could be found by a jury to significantly hamper, or even eliminate, a tangible job benefit.").

122. Heather S. Murr, *The Continuing Expansive Pressure To Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness*, 39 U.C. DAVIS L. REV. 529, 539 (2006) (footnote omitted). The author goes on to propose a framework for courts' analyses of the second prong of the *Faragher/ Ellerth* defense in what she terms "sexual extortion cases": "Under the proposed framework, employers will be liable for supervisory sexual extortion specifically, and supervisory sexual harassment more generally, under circumstances where it was not unreasonable for the employee to submit to the supervisor's abusive conduct." *Id.*

Ellerth: The touchstone of any tangible employment action analysis is that the action needs to be “an official act of the enterprise . . . a company act” and “the means by which the supervisor brings the official power of the enterprise to bear on subordinates” through the harasser’s ability to misappropriate and deploy “the imprimatur of the enterprise.”¹²³

Specifically, both submission and constructive discharge plaintiffs must argue that having to withstand harassing behavior at some point became “an additional job requirement or, alternatively, resulted in a constructive reduction in pay.”¹²⁴ Professor Murr, however, points out that because all hostile work environment plaintiffs can put forth this argument to some extent, deeming only submission cases to confer a new job requirement upon a victim that constitutes a tangible employment action “would eviscerate the distinction”¹²⁵ drawn in *Faragher* and *Ellerth* between cases that do and do not contain a tangible employment action.

Moreover, it seems that the Court’s goal in *Faragher* and *Ellerth* was to confer tangible employment action status on concrete, material, and affirmative acts requiring an official corporate mandate and reflected in official company documentation. However, it is difficult to characterize the retention of the status quo (the benefit enjoyed by submission plaintiffs) as such an act because it is not officially exacted or recorded by the defendant-employer.¹²⁶ Other scholars have similarly pointed out that a submission scenario conflicts with *Temores*’s requirement of a “significant change in status,” because maintenance of the status quo cannot constitute a change in status of any magnitude.¹²⁷ On the other hand, the victim’s “voluntary submission to a supervisor’s sexual advances does not constitute a tangible employment action because a tangible employment action requires ‘an official act of the enterprise, a company act.’”¹²⁸

A constructively discharged, harassed employee makes the unilateral, albeit coerced, decision to leave. A “submission” plaintiff makes a unilateral choice to submit to her supervisor’s advances. In both instances, the choice resides wholly with the employee, who short-circuits the employer-defendant

123. *Ellerth*, 524 U.S. at 762. Typically, the Court observed, a tangible employment decision “is documented in official company records, and may be subject to review by higher level supervisors.” *Id.*

124. Murr, *supra* note 122, at 575.

125. *Id.*; see also Carrie E. Fischesser, *Employer Vicarious Liability for Volunteer Relationships Between Supervisors and Employees*, 29 SEATTLE U. L. REV. 637, 651 (2006) (noting the ideological inconsistencies between the submission cases and “the Supreme Court’s prior definition of tangible employment action”).

126. See, e.g., Murr, *supra* note 122, at 577 (“Because an avoided-job-detriment plaintiff maintains the status quo, she cannot demonstrate the requisite change in employment status, much less the requisite significant change.”).

127. See, e.g., Fischesser, *supra* note 125, at 652 (citing *Ellerth*, 524 U.S. at 761) (“The Supreme Court has clearly stated that if the supervisor takes no specific job action, then the employer will not be strictly liable for the supervisor’s conduct. In both *Jin* and *Holly D.*, the supervisor took no specific job action.”).

128. Fischesser, *supra* note 125, at 652.

entirely and fails to engage in the harm avoidance contemplated by the Supreme Court in the creation of the affirmative defense.¹²⁹ It thus makes little sense for a court to acknowledge the defendant's inability to cure the harm and to foreclose relief for the plaintiff in the constructive discharge scenario, but to acknowledge that the plaintiff's "choice" was coerced and thus excused without consideration of the tort harm avoidance principles in the submission scenario. Just as a plaintiff can provide her employer with notice of her harassment so as to avoid further harm before she leaves her employment, so may a plaintiff stave off her injury by complaining about or otherwise reporting an inappropriate advance before choosing to submit to it. Nonetheless, under the current state of the law, "[a] subordinate who submits to a supervisor's unwelcome sexual advances to avoid the threatened termination arguably possesses a *graver* claim than a subordinate who successfully resists her supervisor's advances and threats but is not terminated."¹³⁰

The initial line drawn by the Supreme Court when it first set forth its framework for vicarious liability for supervisor harassment in *Faragher* and *Ellerth* made an indelible distinction between victims who feel able to report their harassment and those who feel compelled to remain silent. As will be explained in the next section of this Article, although the corporate ethos of many workplaces coerces victims not to report harassment, this failure to report is viewed by the courts as a volitional choice—and a crucial, often fatal choice at that.

III. ASKING THE UNASKED QUESTION: WHY UNDO CONSENT FOR HARASSMENT PLAINTIFFS IN SUBMISSION CASES BUT HOLD OTHER VICTIMS FULLY ACCOUNTABLE FOR THEIR FAILURE TO REPORT HARASSMENT?

Here is what the law says is bad: Trading sex for money is bad; trading a promise not to cause serious harm for sex is bad. . . . Forcing unwanted affections or love on adults is sometimes bad, but only if purposefully or at least clearly threatening. What to make of all

129. Murr, *supra* note 122, at 586, 593; *see also id.* at 596 ("Under both of the above scenarios, the imposition of strict liability turns not on the supervisor's conduct but instead on whether the employee either successfully resisted the threat of an unwarranted job detriment or refused the promise of an unwarranted job benefit."); *see also* Fischesser, *supra* note 125, at 656 (arguing that "[t]he approach of the Second and Ninth Circuits discourages employees from avoiding or ending harassment and discrimination").

130. Murr, *supra* note 122, at 586; *see also* Amanda M. Jarratt, Comment, *Customizing the Reasonable-Woman Standard To Fit Emotionally and Financially Disabled Plaintiffs Is Outside the Scope of the Civil Rights Act's Prohibition on Sex-Based Discrimination*: Holly D. v. California Institute of Technology, 34 GOLDEN GATE U. L. REV. 127, 148 (2004) (arguing that "[c]onditioning employer liability on the plaintiff's distorted perception of the supervisor's conduct does not further workplace equality. While the idea of an emotionally or financially depressed individual submitting sexually to her supervisor in order to 'save' her job is distressing, the fact remains that Title VII is concerned with eliminating gender discrimination.").

*this? At issue is love, affection, sexual intimacy, sex without intimacy.
At issue is money, or what it stands for—property.*¹³¹

The critical question is why courts have been so willing to view submission as coerced when plaintiffs engage in intimate relations with their supervisors, while the Supreme Court has not been willing to do the same for victims who make a similarly coerced choice to quit employment because they are constructively discharged. In an ideal world, victims' constrained agency would be recognized, and all constructive discharges—whether they involved rape, assault, or any kind of pressure sufficient to compel a reasonable person to leave employment—would be deemed tangible employment actions warranting the imposition of strict liability against the employer. In the world in which we live, however, cases involving submission are treated differently from other cases, and we should ask why.

A. Asking the Question

The current state of the law in parts of this country favors those victims/plaintiffs who submit to their supervisors' harassing demands over those who passively resist them until they are forced out of employment. In these submission cases, the courts seem perfectly willing to step in and undo what may have been adult, legal consent to engage in a sexual relationship. Although this consent is later argued by harassment plaintiffs to have been given under certain constraints, these pressures need not be anything more than professional or economic ones—extreme fear of losing one's professional status, employment, or income stream—in order for certain courts to declare the plaintiff was harmed by a tangible employment action.

Those who are constructively discharged—meaning those working in conditions so objectively intolerable that a reasonable person in their shoes would feel compelled to resign—typically also feel that their professional status and income are threatened by their harassers. These victims' departures are viewed by the courts as unilateral choices—and as choices that come with the consequence of having their claims made vulnerable to the *Faragher/ Ellerth* defense. This differential treatment begs the question: Why *would* courts undo a seemingly volitional decision made by a plaintiff (to have sex with a harassing supervisor), but not view as equally coerced the choice of a victim who passively resists harassment and does not report it immediately or at all?

It may be argued that on one level, perhaps these courts' views on the matter are colored by a sense that in the face of nonreporting, one outcome—coerced workplace sexual relations—is intolerable under any set of

131. Nancy L. Cook, *In Celia's Defense: Transforming the Story of Property Acquisition in Sexual Harassment Cases Into a Feminist Castle Doctrine*, 6 VA. J. SOC. POL'Y & L. 197, 302-03 (1999).

circumstances, while the other outcome—the victim’s coerced flight from the workplace—is somehow more tolerable.¹³² Such a puritanical view does little to advance the plight of victims at work, but it *does* fuel what Nadine Strossen has called “demeaning stereotypes about women, including that sex is bad for us.”¹³³ The argument, then, would be that certain courts have on some level come to the rather patriarchal conclusion that because unmarried sex engendered by workplace and power disparities is “bad,” unfettered recourse must be afforded to the submission plaintiffs. The alternative scenario, in which a victim is harassed until she is compelled to leave, would appear to certain courts far more palatable.

Clearly, the courts in the submission cases viewed the circumstances surrounding the sexual relationship—the power dynamic, the corporate culture, the financial pressures to acquiesce—as reasons to undo the plaintiff’s consent and to disregard the volitional nature of the plaintiff’s choice, thereby mitigating the consequences of the decision.¹³⁴ Despite this recognition by some courts, the current state of the law permits little to no acknowledgement of the realities that often permeate a workplace in which harassment occurs. These realities both discourage a victim from reporting a hostile environment and unfulfilled threats and force her to quit her employment. Specifically, courts’ applications of the first *Faragher/ Ellerth* prong turn a blind eye toward

132. Cf. Linda Clarke, *Harassment, Sexual Harassment, and the Employment Equality (Sex Discrimination) Regulations 2005*, 35 INDUS. L.J. 161, 175-76 (2006) (proposing that the government introduce a statutory tort of harassment in light of the fact that “[u]nderlying many workplace sex codes is a puritanical attitude that views sex as bad and casts women as needing protection from male sexuality and their own sick desires. The ideology that women’s sexuality is nonexistent or shameful accounts for why sexualisation can become a means to discredit and silence them. It also deprives women of their own legitimate sexual expression.”) (quoting Jean L. Cohen, REGULATING INTIMACY: A NEW LEGAL PARADIGM 137 (2002)); Sharon Rabin-Margalioth, *Love at Work*, 13 DUKE J. GENDER L. & POL’Y 237, 251-52 (2006) (“[T]he fight against sexual harassment was possible not only because companies wanted to avoid vicarious liability in sexual harassment claims, but because the fight was supportive of pre-existing managerial notions that sex is bad for productivity.”).

133. Nadine Strossen, *“Is Minnesota Progressive?” A Focus on Sexually Oriented Expression*, 33 WM. MITCHELL L. REV. 51, 60 (2006) (discussing why suppression of pornography undermines women’s equality). Professor Aya Gruber has discussed the societal message sent to women that “sex is bad” in the context of the law surrounding rape, observing that “[m]aking women assume the risk of rape aims at discouraging them from remaining silent, dressing sexy, or going to bars, by decriminalizing the resultant sexual abuse.” Aya Gruber, *Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape*, 4 WM. & MARY J. WOMEN & L. 203, 251 (1997). Thus, she has concluded, “criminal law should not permit the informal imposition of liability on victims, not just because women should have the freedom to do as they please, but also because the underlying acts themselves are not the kind that should be condemned by society.” *Id.*

134. It should be emphasized that this Article addresses itself to courts’ treatment of women who engage in an intimate relationship with a supervisor in order to retain their employment status, irrespective of the surrounding circumstances. Inasmuch as this Article argues that any scenario, involving relations or not, that amounts to a constructive discharge ought to be a tangible employment action, it does not deny that the point at which this occurs for a reasonable female plaintiff may not be the same point at which it would occur for a male. In any event, to bypass the analysis of the reasonableness of a plaintiff’s reaction to a given threat and to presume that any time that sex occurred, a tangible employment action occurred, is improper, especially where the plaintiff’s harm avoidance has been factored into the calculus of employer liability by the Supreme Court.

defects in technically adequate policies that render them wholly ineffective at times. More importantly, courts have consistently shown indifference to the myriad of ways in which a defendant's corporate culture; the relative physical or circumstantial situation of individuals in a hostile workplace; and the stark realities of being a harassment victim and feeling isolated, mistrusted, and fearful—as fearful, perhaps, as a woman who engages in a sexual relationship with her supervisor out of fear for her job—can conspire to render reasonable a victim's failure to report her harassment. This all underscores the point that the law, as set forth by the Second and Ninth Circuits, has been selective as to when it will undo consent so that a plaintiff's claim may survive and when it will demand accountability for an action or a failure to act. The result of this is a legal system that favors women who exist in one paradigm—the women perceived as helpless victims of their harassers, seduced by power, fear, and desperation, despite the fact that they made a choice to engage in sex with their supervisors—over women who exist in another paradigm—those who passively resist their harassers despite their fear of or inability to go about reporting it, until they are eventually driven out of the workplace entirely.

It is important to note that this Article restricts its discussion of the relationship between women, sex, consent, and submission to examples that do not occur in the context of violent crime. It is only where lawful consent was given—ostensibly, as judged through the lens of criminal law—that a submission scenario may be argued to parallel a constructive discharge scenario. It is equally important to note that the behavior of the harasser described in *Jin* certainly appears to have been criminal in several respects.¹³⁵ However, by reasoning that the harasser's "use of Jin's submission as the basis for allowing her to continue working at MetLife create[d] the tangible employment action,"¹³⁶ and that the harasser's "use of his supervisory authority to require Jin's submission was, for Title VII purposes, the act of the employer,"¹³⁷ as well as by holding that the jury ought to have been instructed to consider the exchange of continued employment for submission as a plausible tangible employment action,¹³⁸ *Jin* is consonant with cases like *Holly D.* in which no criminal act took place.¹³⁹ This Article leaves for another day a

135. *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 88-89 (2d Cir. 2002).

136. *Id.* at 97.

137. *Id.* at 98.

138. *Id.*

139. In *Holly D.*, the court noted that the plaintiff did not allege that her supervisor used physical force to coerce sex, or that he explicitly threatened her with job-related consequences if she did not have sex with him. Nor d[id] she assert that he ever stated, directly or indirectly, that there was a connection between his requests for sex, initial or otherwise, and any problem with her past work performance or her prospects for future employment.

Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1163 (9th Cir. 2003). Nonetheless, the court noted, she premised her claim "on what she believe[d] to be indications that her job depended on her sexual submission." *Id.*

discussion of how the law does and should treat sexual harassment plaintiffs who were the victims of violent crime.

B. Not Always a "Choice": Why Victims Don't Report Harassment

This Section explains why courts' treatment of the facts and arguments in sexual harassment cases, as well as the workplace realities that often surround harassment, can discourage victims from coming forward to report the harassment. It is important to look at how and why so many victims find themselves in a predicament where they failed to report their harassment in the first place. After all, if a victim uses available channels of internal complaint to complain about her harassment and it persists, the defendant will not be able to deflect her claim through the successful interposition of the *Faragher/ Ellerth* defense.

Workplace realities make it such that many victims of harassment do not feel that they can report harassing behavior.¹⁴⁰ A victim of a relentless harasser, who chooses or feels forced to remain silent while continuing to labor in a hostile work environment where threats remain unfulfilled, is left with only two remaining options. She can either submit to the unwelcome demands, or tacitly tolerate the behavior while resisting the advances until the environment becomes so oppressive that she cannot take it any more and feels compelled to resign. Before examining these dual scenarios and the way in which the law treats them, it is worth examining how so many victims wind up at that fork in the road—feeling too fearful or powerless to report harassment, and ultimately, compelled to resign.

According to the EEOC, in comportment with the affirmative defense's requirement that a successful defendant exercise reasonable care to remedy and prevent workplace harassment, "[r]emedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur."¹⁴¹ Despite this, courts have traditionally viewed with skepticism and incredulity plaintiffs' assertions that they were too frightened or intimidated by their supervisors or by their corporate environments to report their harassment. This phenomenon, coupled with corporate and workplace environments that do, in fact, discourage employees from pursuing official internal harassment complaints,¹⁴² causes many

140. See Anne Lawton, *The Emperor's New Clothes: How the Academy Deals with Sexual Harassment*, 11 YALE J.L. & FEMINISM 75, 86 (1999) ("[T]he most frequently occurring reaction to sexual harassment is inaction.") (quoting U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES 3 (1995)).

141. EEOC ENFORCEMENT GUIDANCE, *supra* note 118.

142. See generally Joanna Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 51-52 (2003) (explaining that there are numerous reasons why victims fail to use internal channels of complaint, including fear of retaliation, ostracization, and alienation from mentors and coworkers, as well as "blam[ing] themselves

otherwise successful plaintiffs to be foreclosed from prosecuting their rights. This is because while they may have made out a prima facie case of harassment, their employers can establish that they will not succeed in overcoming the *Faragher/Ellerth* defense, and can thus procure summary judgment on their claims.

1. Courts' Adjudication of the First Prong of the Affirmative Defense

Since *Faragher* and *Ellerth*, courts have followed a new approach in reviewing the adequacy of policies for the purposes of applying the first prong of the affirmative defense. Policies pass muster despite having flaws that, it was argued, rendered them overly onerous, if not impossible, to use. For example, less than two years after *Faragher* and *Ellerth*, the Eleventh Circuit held that a defendant's complaint procedures were in compliance with the requirements for the affirmative defense where they set forth only one person in the plaintiffs' workplace to be contacted regarding sexual harassment, and that individual was both the plaintiffs' store manager *and* their harasser.¹⁴³ Having failed to find bad faith on the part of the defendant or any inherent defect in the policy,¹⁴⁴ the court noted that its "sister circuits have found more narrowly

for the situation, or because '[c]alling attention to offensive behavior reinforces stereotypes of women as victims.'" (quoting Nina Burleigh & Stephanie B. Goldberg, *Breaking the Silence: Sexual Harassment in Law Firms*, A.B.A. J., Aug. 1989, at 46, 51); Lea B. Vaughn, *The Customer Is Always Right . . . Not! Employer Liability for Third Party Sexual Harassment*, 9 MICH. J. GENDER & L. 1 (2002); see also West, *supra* note 28, at 523 (arguing that the affirmative defense "has the potential to create meaningful dispute resolution procedures at work," but that if "women remain afraid and reluctant to complain, employers will continue to escape their obligation to provide a place to work where both women and men enjoy an equal opportunity to succeed").

143. *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1298 (11th Cir. 2000). The court based its reasoning on the fact that there were "other designated, appropriate company representatives . . . accessible to Publix's store employees" via weekly visits and a toll-free phone number provided to employees. *Id.* Due to this, and the "open door policy" providing what the court felt were "multiple avenues for lodging a sexual harassment complaint outside the supervisory chain of command," the court found the policy to be adequate. *Id.* at 1294, 1299. This is particularly ironic in light of the court's flat rejection of the plaintiffs' argument that their reporting of harassment to mid-level managers, "rather than the individuals delineated in Publix's sexual harassment policy, was not unreasonable given Publix's Open Door Policy." *Id.* at 1297, 1302.

144. The policy at issue consisted of the "Statement Concerning Prohibited Harassment, Including Sexual Harassment" in the employee handbook, which read:

To help ensure that none of us ever feel we are being subjected to harassment, and in order to create a comfortable work environment, the Company prohibits any offensive physical, written or spoken conduct regarding any of these items, including conduct of a sexual nature.

.....
If any of us believe that he or she is being subjected to any of these forms of harassment, or believes he or she is being discriminated against because other associates are receiving favored treatment in exchange for, (example-sexual favors), he or she must bring this to the attention of appropriate persons in Company Management. The very nature of harassment makes it virtually impossible to detect unless the person being harassed registers his or her discontent with the appropriate Company representative. Consequently, in order for the Company to deal with the problem, we must report such offensive conduct or situations to the Store Manager, District Manager or Divisional Personnel Managers:

[list of individuals and telephone numbers by location]

.....

drawn anti-harassment policies to satisfy the requirement that an employer exercise reasonable care to prevent sexual harassment.”¹⁴⁵ In a later case, a district court in the Eleventh Circuit dismissed allegations challenging the efficacy of an unused policy, calling them “nothing[] but unsupported conjecture[,]”¹⁴⁶ and holding that “[a]s part of its burden, the employer need not prove how many times the sexual harassment policy was effectively utilized.”¹⁴⁷

By endorsing policies that are, in fact, flawed in their efficacy, the legal system permits defendants’ ineffectual or even insincere attempts to cure harassment. This can only further serve to chill employee complaints of harassment, placing more and more victims in a position of either giving in to their harassers or waiting to be constructively discharged because they don’t have official channels of recourse that they feel safe using. As the next Section will show, courts are quick to dismiss victims’ unsuccessful attempts to report harassment or the reasons for their failures to report it at all.

2. Courts’ Adjudication of the Second Prong of the Affirmative Defense

Similarly, courts’ analyses of the second prong of the affirmative defense evince a reluctance to take into account circumstances that might have coerced

A record of the complaint and the findings will become a part of the complaint investigation record and the file will be maintained separately from the associate’s personal file. Any person electing to utilize this complaint resolution procedure will be treated courteously. The complaint will be handled as swiftly and as confidentially as practical in light of the need to remedy the problem, and registering the complaint will in no way be used against the associate nor will it have adverse impact on the individual’s employment status.

Id. at 1294 (emphasis and omission in original).

Publix also published an “Open Door Policy” in the employee handbook; it “encouraged employees to talk to a manager about any ‘problems or misunderstandings,’” and “reminded employees that they could ‘talk to anyone in management,’ but encouraged them to first discuss their problem with their ‘immediate Supervisor’ and then proceed to ‘the next highest level of management.’” *Id.* at 1294-95.

145. *Id.* at 1299 (citing *Ritchie v. Stamler Corp.*, 205 F.3d 1341 (6th Cir. 2000) (per curiam) (“finding a policy which only allowed sexual harassment complaints to be made in writing to the president of the company reasonable.”); *Montero v. AGCO Corp.*, 192 F.3d 856, 862 (9th Cir. 1999) (“finding that promulgation of a policy which identified only an employee’s supervisors and the company’s Human Resources Department as the appropriate vehicles for registering a sexual harassment complaint and dissemination of that policy to employees satisfied the requirement that an employer exercise reasonable care to prevent sexual harassment.”); *Watkins v. Prof’l Sec. Bureau, Ltd.*, 201 F.3d 439 (4th Cir. 1999) (per curiam) (unpublished table decision) (“concluding a policy was reasonable when employee was not placed in the position of having to report their supervisor’s conduct to someone in the supervisor’s chain of command.”)); see also *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998)) (noting that where “there is no evidence that an employer adopted or administered an antiharassment policy in bad faith or that the policy was otherwise defective or dysfunctional, [its] existence . . . militates strongly in favor of a conclusion that the employer ‘exercised reasonable care to prevent’ and promptly correct sexual harassment”).

146. *Speaks v. City of Lakeland*, 315 F. Supp. 2d 1217, 1228 n.27 (M.D. Fla. 2004).

147. *Id.* The court also noted that “[w]hile it may be more effective to frequently and separately disseminate a sexual harassment policy, *Faragher/Ellerth* and their progeny do not require such measures for an employer to exercise reasonable care.” *Id.* at 1227-28.

a harassment victim into failing to utilize a reporting mechanism. Specifically, the fear that accompanies reporting harassment in an environment in which support and success is uncertain is typically given no weight, absent explicit evidence that a plaintiff will often not be able to produce. In *Faragher*, the Supreme Court said:

[W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.¹⁴⁸

The Second Circuit, accordingly, has said that credible fear that renders a failure to report reasonable "must be based on more than the employee's subjective belief."¹⁴⁹ The plaintiff must produce objective evidence that proves that the employer ignored or resisted similar complaints or took adverse actions against employees in response to such complaints.

In *Fierro v. Saks Fifth Avenue*, for example, the plaintiff testified that though he was aware that Saks had a complaint procedure—in his words "most big companies do"—he declined to avail himself of it, because: "I was afraid of repercussions. If you start to conflict with you[r] manager, before you know it its [sic] not a very pleasant outcome."¹⁵⁰

In response, the court summarily dismissed the idea that any such fears could be well-founded, holding, "[a]s a matter of law . . . that such generalized fears can never constitute reasonable grounds for an employee's failure to complain

148. *Faragher*, 524 U.S. at 807-08.

149. *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001); see also *Guillebeaux v. Jewish Child Care Ass'n*, No. 1:03CV6577, 2005 WL 1265906, at *9 (S.D.N.Y. May 25, 2005) (rejecting the plaintiff's assertion that she "did not immediately report the sexual harassment to which Torok subjected [her] because [she] was embarrassed by it, was afraid that if [she] did complain [she] would not be seen as a team player, and was afraid that by complaining [she] might place [her] job in jeopardy," because "[c]onclusory assertions alone cannot satisfy [her] burden"). But see *Deborah Zalesne, Sexual Harassment Law in the United States and South Africa: Facilitating the Transition from Legal Standards to Social Norms*, 25 HARV. WOMEN'S L.J. 143, 200 (2002) (describing survey showing that "women are more likely to ignore a harassing incident or use informal means of dealing with the harassment than to report it to the appropriate authority, despite the fact that three out of every four respondents knew about the available channels for formal reporting. Reasons given for victims' failure to report include '(a) positive results were not likely to come of reporting, (b) the benefits of reporting would not outweigh the repercussions, (c) they had no control over the procedure, (d) their complaint would be trivialized, and (e) reporting would exacerbate rather than relieve their situation.'").

150. 13 F. Supp. 2d 481 (S.D.N.Y. 1998). But see *Meng v. Ipanema Shoe Corp.*, 73 F. Supp. 2d 392, 401 (S.D.N.Y. 1999) (denying summary judgment on a *Faragher/ Ellerth* defense because material question of fact existed as to whether sexual harassment policy was distributed to employees in a timely fashion); *Mills v. George R. Funaro & Co.*, No. 1:99CV04816, 2001 WL 50893, at *11 (S.D.N.Y. Jan. 19, 2001) (denying summary judgment due to the fact that "a genuine issue of fact exist[ed] as to whether [the employer's] policy had force").

to his or her employer.”¹⁵¹ The court noted that although the plaintiff sought to justify his failure to report his alleged harassment because he feared reprisal:

[E]very employee who feels harassed by a supervisor will at some level fear the inevitable unpleasantness which will result from complaining to the employer. Confrontation is by its very nature unpleasant. However, to allow an employee to circumvent the reasonable complaint requirements of *Faragher* and *Burlington* by making conclusory allegations of feared repercussions, would effectively eviscerate an affirmative defense which the Supreme Court clearly went to great effort to craft in order to stem the tide of unwarranted lawsuits.¹⁵²

Moreover, even when victims do eventually report harassment, courts often balk at the amount of time that it took for them to do so and subsequently invalidate any legal effect that the reporting might have had.¹⁵³ In *O'Dell v. Trans World Entertainment Corporation*,¹⁵⁴ for example, the district court found that where a plaintiff waited almost a year after her harassment began—and four months after her harasser became her supervisor—to report the harassment, the “lengthy delay alone demonstrate[d] that [she] unreasonably failed to take advantage of . . . preventive and corrective opportunities.”¹⁵⁵ Moreover, the court found, without any further investigation into the subject, the fact that the plaintiff declined to participate in the internal investigation that resulted from her complaint compounded her failure and was “unreasonable,” even though she declined “upon the advice of counsel.”¹⁵⁶ In *Walton*, the Eleventh Circuit found that a reporting delay of less than three months from the

151. *Fierro*, 13 F. Supp. 2d at 492 (further noting that “[a]t some point, employees must be required to accept responsibility for alerting their employers to the possibility of harassment. Without such a requirement, it is difficult to see how Title VII’s deterrent purposes are to be served, or how employers can possibly avoid liability in Title VII cases.”); see also *Walton v. Johnson & Johnson Servs.*, 347 F.3d 1272, 1290 (11th Cir. 2003) (“Subjective fears of reprisal may exist in every case, but . . . those fears, standing alone, do not excuse an employee’s failure to report a supervisor’s harassment.”).

152. *Fierro*, 13 F. Supp. 2d at 492.

153. See, e.g., *Walton*, 347 F.3d at 1290 (plaintiff’s delay of three months to report supervisor’s repeated sexual assaults was not exercise of reasonable care by an employee); see also Camille Hebert, *Why Don’t “Reasonable Women” Complain About Sexual Harassment?*, 82 IND. L.J. 711, 725 (2007) (“Courts have generally rejected the contentions of employees that they justifiably delayed reporting sexual harassment because of their fears of retaliation. Even courts that have expressed a willingness to consider the possibility of retaliation as a justification for a delay . . . have rejected the suggestion that a plaintiff’s subjective fear of retaliation is sufficient; instead, those courts want to see specific evidence that retaliation was in fact likely to occur. . . .”); Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 262 (2004) (“Once the employer satisfies prong one by offering evidence that it has disseminated a policy and procedure and promptly corrected the complained-of behavior, some federal courts presume that any delay by the plaintiff in reporting is unreasonable.”).

154. 153 F. Supp. 2d 378 (S.D.N.Y. June 28, 2001).

155. *Id.* at 391.

156. *Id.*; see also Hebert, *supra* note 153, at 723 (stating that “courts seem to be judging the reasonableness of employee actions in hindsight, based on events that occurred after the initial failure to complain”).

time of harassment was unreasonable.¹⁵⁷ In *Gonzalez v. Beth Israel Medical Center*,¹⁵⁸ the court held that the defendant employer's assertion of the sexual harassment affirmative defense could not be defeated where the plaintiff "let the harassment continue for two and a half years and went to complain only when threatened with termination by Sanchez for her consistent lateness."¹⁵⁹ The court found that the plaintiff did not act reasonably in waiting to report the harassment despite the plaintiff's contention that

she did not complain because she hoped that [the] conduct would end if she told him to stop and avoided situations where he could harass her, and that she was concerned about reporting him because it might cause both of them to lose their jobs and [the harasser] had a family that would be adversely effected [sic].¹⁶⁰

The court called these reasons for the delay in reporting "speculative and unsubstantiated" and declared that they are not recognized as valid excuses for such delay.¹⁶¹ The court noted that it had previously held "that in similar cases, a lengthy delay of as little as a year is sufficient by itself to demonstrate unreasonable failure to take advantage of an employer's preventive and corrective opportunities."¹⁶² Thus, the court determined, the defendant had made out the affirmative defense and it merited summary judgment on the plaintiff's hostile work environment claim.¹⁶³

In 2006, the Second Circuit addressed a district court's determination that a plaintiff did not take adequate advantage of available preventative or corrective opportunities provided by her employer when she failed to report alleged harassment by her supervisor for more than three years after it commenced, and then did so after a co-worker initially apprised the employer of her allegations.¹⁶⁴ When questioned about her failure to report the harassment in a timely manner, the plaintiff maintained that, because the head of the

157. *Walton*, 347 F.3d at 1291 ("Subjective fears of reprisal may exist in every case, but . . . those fears, standing alone, do not excuse an employee's failure to report a supervisor's harassment").

158. 262 F. Supp. 2d 342 (S.D.N.Y. May 22, 2003).

159. *Id.* at 356.

160. *Id.*

161. *Id.* at 357 (citing *Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481, 492 (S.D.N.Y. 1998) (requiring plaintiff to offer more than fear of "unspecified repercussions and an unpleasant outcome" in order to survive summary judgment); *Dayes v. Pace Univ.*, No. 1:98CV03675, 2000 WL 307382, at *6 (S.D.N.Y. Mar. 24, 2000) (granting employer summary judgment on its affirmative defense where plaintiff delayed one year before reporting supervisor's harassment); *O'Dell v. Trans World Entm't Corp.*, 153 F. Supp. 2d 378, 391 (S.D.N.Y. 2001) (requiring plaintiff "to come forward with evidence that her failure to avail herself of [defendant's] remedial procedures was caused by a credible fear that her complaint would not be taken seriously or that she would suffer an adverse employment action")); see also *Hebert*, *supra* note 153, at 724.

162. *Gonzalez*, 262 F. Supp. 2d at 356-57 (citing *O'Dell*, 153 F. Supp. 2d at 391 (finding employer had met burden because employee waited almost a year to report harassment); *Dayes*, 2000 WL 307382, at *6 (granting employer summary judgment on its affirmative defense where plaintiff delayed one year before reporting supervisor's harassment)).

163. *Gonzalez*, 262 F. Supp. 2d at 357.

164. *Finnerty v. William H. Sadler, Inc.*, 176 F. App'x 158, 162 (2d Cir. 2006).

defendant's Human Resources Department informed her that a complaint could not be kept confidential, she feared reprisal from her harasser, whom she held in high esteem.¹⁶⁵ According to the Second Circuit, "None of those explanations rendered her three-year delay reasonable," and the plaintiff's respect for her harassing supervisor and not justify her delay because although "[s]he may have had reasons that were, for her personally, sufficient to support a decision not to report [the harassment] earlier . . . that cannot be part of our analysis."¹⁶⁶ Nor, the court added, did the plaintiff's fear of reprisal from her supervisor excuse her refusal to report his harassment, because "[f]or such reluctance to preclude the employer's affirmative defense, 'it must be based on apprehension of what the [defendant] employer might do.'"¹⁶⁷

On this last point, it must be noted that this reasoning is inconsistent with the rationale underlying the imposition of the defense in the first place: "In crafting the first prong of the *Faragher* affirmative defense, which in part requires employers to take reasonable measures to prevent harassment, 'the Supreme Court sought to give effect to Title VII's deterrent purpose.'"¹⁶⁸ The Supreme Court sought to impute liability to defendant entities where it could discern "the imprimatur of the company the supervisor's harassing actions carry."¹⁶⁹ Indeed, "vicarious liability is automatic in cases involving a tangible employment action precisely because such actions 'are the means by which the supervisor brings the official power of the enterprise to bear on subordinates.'"¹⁷⁰ Thus, it makes little sense to predicate one's excusal on the second prong of the *Faragher/Ellerth* defense, which evaluates the reasonableness of one's failure to report, on whether the plaintiff feared reprisal by the supervisor or by the defendant enterprise. Inasmuch as a harassing supervisor is capable of using the vehicle of his position and authority within the enterprise to exact reprisal on a complaining defendant, the distinction is meaningless.

3. *Workplace Realities Not Recognized*

Finally, despite the rationale proffered by the Supreme Court for the affirmative defense—avoiding "a mechanical application of indefinite and malleable factors set forth in the Restatement," while encouraging "an enquiry

165. *Id.*

166. *Id.* at 162-63 (noting that the Court had "never required a company to maintain a policy that guarantees confidentiality in order to invoke the affirmative defense").

167. *Id.* at 163 (quoting *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999)).

168. *Walton v. Johnson & Johnson Servcs.*, 347 F.3d 1272, 1290 (11th Cir. 2003) (quoting *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1297 (11th Cir. 2000)).

169. *Browne v. Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d 904, 915 (E.D. Tenn. 2003).

170. *Id.* at 915 (quoting *Burlington Indus. v. Ellerth*, 524 U.S. 742, 762 (1998)); see also *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992) ("From the perspective of the employee, the supervisor and the employer merge into a single entity.").

into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment,"¹⁷¹—courts often adhere rigidly to the requirement that plaintiffs follow the exact course of action prescribed by a defendant's policy, even if a plaintiff acted in a manner that was reasonably calculated or likely to put the defendant on actual notice of harassment requiring correction. Such courts refuse to acknowledge the various complexities that often chill or hinder a precise execution of the proper complaint procedures.

In *Walton*, the Eleventh Circuit held the plaintiff's reporting delay of less than three months to be unreasonable, despite the fact that, in the same month that the harassment took place, the plaintiff's friend had informed officials at the defendant's parent company that her supervisor had engaged in harassing behavior toward the plaintiff.¹⁷² The court found it significant that the informed officials were not officially responsible for addressing such complaints.¹⁷³ Moreover, the court found that while it was relevant that the plaintiff did, in fact, complain to her harassing supervisor, himself, about the harassment, the fact that she failed to argue that, "based on these warnings, she had reason to believe that the advances would stop, particularly after those warnings had already proven to be unsuccessful," undercut her argument that she had behaved reasonably.¹⁷⁴ This is particularly ironic: The fatal blow to the plaintiff's argument was dealt by her harasser's own incorrigibility.

The court attempted to acknowledge that workplace realities do not always create a conducive environment for prompt reporting, noting that it was "mindful of the fact that severe harassment such as that which is alleged . . . here can be particularly traumatic."¹⁷⁵ However, it found that "the problem of workplace discrimination . . . cannot be [corrected] without the cooperation of the victims" and thus the plaintiff's subjective fears of retaliation could not justify her failure to report her harassment.¹⁷⁶ This, too, seems inconsistent with the court's mandate to evaluate the reasonableness of the plaintiff's failure to timely report her harassment, and not to weigh the policy interests served by requiring promptness as opposed to excusing delay.

Finally, the court gave short shrift to the plaintiff's allegation that she felt physically intimidated by her harasser, summarily observing that "the second prong of the *Faragher* defense would be rendered meaningless if a plaintiff-

171. *Faragher v. City of Boca Raton*, 524 U.S. 775, 797 (1998).

172. *Walton*, 347 F.3d at 1289 n.15.

173. *Id.*

174. *Id.* at 1290.

175. *Id.*

176. *Id.* (quoting *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1302 (11th Cir. 2000)); see also *Reed v. MBNA Mktg. Sys.*, 333 F.3d 27, 35 (1st Cir. 2003) ("Reporting sexually offensive conduct by a supervisor would for many or most employees be uncomfortable, scary or both. But because this will often or ordinarily be true, . . . [Title VII's] regime necessarily requires the employee in normal circumstances to make this painful effort *if the employee wants to impose vicarious liability on the employer and collect damages under Title VII.*").

employee could escape her corresponding obligation to report sexually harassing behavior based on an unsupported subjective fear that the employee would suffer physical harm at the hands of her alleged harasser.”¹⁷⁷

It is often the unspoken code of conduct at a workplace that operates to chill reporting. It was recently reported that a jury in Illinois awarded a police officer who served as the sole female working in an undercover gang unit in Chicago \$150,000 in damages and \$500,000 in attorneys’ fees after she brought suit alleging that pornography was left in her mailbox daily.¹⁷⁸ According to the Associated Press, the police department’s internal affairs unit had initially dismissed the majority of the officer’s complaints, and once she reported what was happening to her, the officer said, she became known as a “beef,” which is a word used by officers to describe their colleagues who report fellow officers.¹⁷⁹ In an interview conducted after her jury award, the officer said that she had returned to work, but that she felt like a pariah.¹⁸⁰ “Five to six years later, people still don’t talk to me, still don’t trust me People look at you like you have five eyes. Nobody talks to you. It’s very lonely.”¹⁸¹

C. One Coerced Choice Versus Another: Why Is the “Consent” Offered in Submission Viewed by Courts as Coerced, While the “Decision” To Refrain from Reporting Harassment Is Not?

As discussed in the previous sections, the decision not to report hostile work environment sexual harassment is often not a voluntary decision. Rather, an employer’s corporate culture/workplace environment, coupled with the law’s harsh treatment of plaintiffs when applying the *Faragher/Ellerth* defense, can render the decision not to report just as “coerced” as the decision to engage in sex with one’s harassing supervisor. The law, however, has drawn a sharp distinction between the decision to engage in intimate relations with one’s supervisor and the decision to refrain from pursuing official channels to report harassment. The question persists as to why. After all, the string of “what-if’s” that run through a victim’s head just before she proffers her consent to have sex with her harassing boss are not necessarily more nefarious than the “what-if’s” a victim ponders before she decides that it is too risky to report her harassing boss and risk reprisal. While retaliation for reporting harassment is illegal under Title VII, firing or demoting a subordinate for refusing to submit to one’s

177. *Walton*, 347 F.3d at 1291 n.17.

178. Associated Press, *Federal Jury Awards Female Chicago Police Officer Damages for Harassment Over Mailbox Porn*, LEGAL INTELLIGENCER, Aug. 1, 2007, available at <http://www.law.com/jsp/pa/PubArticlePA.jsp?hubtype=Regional+News&id=1185959204328>; Hebert, *supra* note 153, at 740 (discussing the pressures women feel in a male-dominated workplace).

179. Associated Press, *supra* note 178.

180. *Id.*

181. *Id.*

inappropriate advances is similarly illegal, and a similarly persistent barrier to victims' agency.

The final section of this Article will explore the complex relationships between consent and accountability, and submission and seduction. It does this by reviewing the historical treatment of people's attempts to have their consent "undone" for the purpose of mitigating their actions, furthering their causes, or otherwise justifying their behavior. It then examines the unique treatment of women who are seen to have been seduced, and it connects the submission cases—heralded by many commentators as anomalous—to an archaic, but still extant premise that women do not fully possess their own sexuality.

IV. LOOKING FOR ANSWERS: THE RELATIONSHIP BETWEEN WOMEN AND CONSENT AND UNDERSTANDING WHY THE LAW OPERATES AS IT DOES

The seductive tale of "the romance of patriarchal power" plays out a dynamic familiar in literature and popular culture: The story involves a harassing man who becomes the figure that the woman seeks to win over, to please, and perhaps even to captivate, even as he lords over her a chance to have her situation improved, to elevate herself, or to be magically "rescued" from her circumstances. Professor Hilary M. Schor likens elements of this plot to stories ranging from *Jane Eyre* to *Working Girl* to *Cinderella* and says, "It's a story that is awfully hard to resist because it does something that is really important for our culture. It mystifies power. It romanticizes the abuse of power, and it teaches women to consent to things they otherwise might never allow."¹⁸² Whereas one might think that actual stories of victims having been sexually harassed at work would fly in the face of such paradigms, this is not the case. It would appear that far from debunking the myth and mystique of the fictional narratives, the actual harassment scenarios played out in the courts are imitating and animating the fictional narratives.

What is the allure of these narratives? What draws people into this story such that they consume it for entertainment and—a more sobering thought—live and relive it in their own experiences? Professor Schor argues that these narratives "promise us happiness, . . . promise us people will see *and love* us for ourselves, . . . [and] promise us power."¹⁸³ Most saliently, she argues, the stories comfort would-be victims about their harassers, about the state of the world in which they live, and the environments in which they work and interact with others.¹⁸⁴ They do this by holding out the notion that those in power ultimately have others' best interests at heart, and thus, Professor Schor argues,

182. Hilary M. Schor, *Storytelling in Washington, D.C.: Fables of Love, Power, and Consent in Sexual Harassment Stories*, 65 S. CAL. L. REV. 1347, 1348-49 (1992).

183. *Id.* at 1349.

184. *Id.*

“make it harder for us to stand up for ourselves, harder to stand up and say, yes, this happened to me too and *it wasn't about love*. They make it harder for us to believe our friends when they come to us and say it happened to me.”¹⁸⁵

“The romance of patriarchal power” feeds into not only the way in which victims respond to harassment, but also the way in which the law has responded to harassment claims. Women in the workplace continually need to combat the persistent notion that if they are lucky, they will somehow be “discovered,” “chosen,” or “rescued” by men. The law cannot resist identifying, insulating, and rescuing a woman who has already identified herself as a victim and who has already traded her submission for approval from the man whom she identified as her victimizer. By swooping in to their rescue, while failing to protect women do not submit, the law does a disservice to women in the workplace.

As laid out in the previous Parts of this Article, courts have treated women who fail to resist their harassers' advances differently from women who fail to report harassment, by intervening in the case of the plaintiff who submits to her harasser's advances and finding that a tangible employment action has occurred. Is it that the law (and by extension—society) sympathizes more with women who acquiesce to sexual overtures than with women who quietly resist them, such that it will read coercion into that consent? Or is it that women who engage in a sexual relationship with those who wield power over them are deemed more in need of being rescued than women who are willing or able to walk away from a harassing supervisor? It is interesting to note that victims of hostile work environment harassment who fail to report it are often not necessarily the objects of their harassers' desire, whereas plaintiffs in submission cases clearly are. This preference in the law insulates, protects, and favors those victims who are deemed “desirable” enough to be propositioned by their harassers. It could be said that the law appears to be seeking to rescue women in the submission scenarios, while those who toil under unfulfilled threats are left to reckon with their failures to report them, irrespective of why they failed to do so.

The disparity between the constructive discharge jurisprudence and the submission jurisprudence is not, as scholars have claimed, the result of courts' desires to help plaintiffs' cases survive despite the often fatal blow that the affirmative defense strikes, or courts' misapprehension of agency law and the law of *Faragher* and *Ellerth*. Rather, the inconsistency in the jurisprudence is a natural extension of a notion that has been deeply embedded in cultural consciousness since law's earliest recorded days: the notion that women do not truly own their sexuality.¹⁸⁶ Accordingly, outside the context of sexuality,

185. *Id.*

186. See generally Ruth Jones, *Inequality from Gender-Neutral Laws: Why Must Male Victims of Statutory Rape Pay Child Support for Children Resulting from Their Victimization?*, 36 GA. L. REV.

women whose consent may be harmful to themselves or their cases have not traditionally been able to justify, excuse, or otherwise “undo” their behavior. In contrast, women who fall prey to “seduction” have been and are still treated by courts as something less than consenting adults. The sexual harassment/submission cases are current paradigmatic examples of the law’s willingness to step in and subvert the integrity of female consent. In undoing consent, courts seem to be motivated by a sense that the woman’s will was overcome, and that she was coerced to act to such an extent that she should not be held accountable for having made a decision.

In support of this proposition, this Article will now look at the bifurcation of the courts’ and the law’s treatment of women and consent first in contexts outside of sex and seduction, and then in the context of sex and seduction. In contexts outside of sex and seduction, women’s consent, once given, has been held to be volitional and valid. However, when it comes to allegations that women have been “coerced” into engaging in intimate relations, even absent the normally required indicia of an imminent threat, the law will cease to hold them accountable for what were their own choices and actions.

Before reviewing the way in which the law has engaged the dynamic between women and consent, it is important to note that this Article will deliberately avoid discussing women and consent in the context of rape/sexual assault, or whether a woman who seems to have given consent actually has. This is to underscore the fact that in the submission scenario envisioned in this Article, the harassment victim does, in fact, give consent to a sexual relationship with her harasser, precluding a later charge of rape or sexual assault against him.

411, 424-33 (2002) (describing early statutory rape laws as based on the understanding that women did not own their own bodies); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1286 (1991); Kate Millett, *What Is To Be Done?*, 75 CHI.-KENT L. REV. 659, 662 (2000) (describing the patriarchal view of female sexuality as something that “must always be legally circumscribed, punished with poverty and illegitimacy and never permitted to be free and by their own choice”); Tamara Packard & Melissa Schraibman, *Lesbian Pornography: Escaping the Bonds of Sexual Stereotypes and Strengthening Our Ties to One Another*, 4 UCLA WOMEN’S L.J. 299, 326 (1994) (urging lesbians and other women to discover the erotic in order to take control of their own sexuality); Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 865 (2002) (describing the traditional paradigm of romance in American culture as one in which the man is sexually aggressive, while the woman is passive); Susan E. Thompson, *Prostitution—A Choice Ignored*, 21 WOMEN’S RTS. L. REP. 217, 233-34 (2000) (describing the radical feminist view of male dominance as one in which males view female sexuality as belonging to them); Jennifer M. McKinney, Comment, *Washington State’s Return to Indeterminate Sentencing for Sex Offenses: Correcting Past Sentencing Mistakes and Preventing Future Harm*, 26 SEATTLE U. L. REV. 309, 318 (2002) (acknowledging the importance of historical concepts of male ownership of women in analyzing sexual assault).

A. *Women and Consent: A Bifurcated History*

It is crucial to view the law's disparate treatment of female victims of harassment in different situations in its historical context. A look at the history of the relationship and consent shows a clear bifurcation between the way adult women are treated in the context of an allegation of seduction, and the way they are treated in the context of other claims such as pressure or duress. Of course, "consent" given by a subordinate of a harassing supervisor who is even tacitly threatening her employment status is coerced. That said, depending on the circumstances, a plaintiff who submits to supervisory advances may or may not have a rational alternative means of staving off harm. The submission cases equate the coercion implicit in submission with the victim's will being overcome, without any query into the extent of that coercion. Consent given by women in other contexts such as contract law is often engendered by any number of coercive pressures, including social, economic, and professional pressures. However, one is hard-pressed to find examples in which courts, cognizant of the presence of these pressures, have eschewed them in lieu of an automatic finding that one's will has been overborne.

1. *Women and Consent Outside of the Context of Sex and Seduction*

*In a world that often seeks to avoid moral ambiguity by finding victims and villains, it is unclear which appellation more fairly describes a person who accedes to an unlawful threat.*¹⁸⁷

Such is, as described by one scholar, the way in which society and the law has viewed those who seek to be excused from or to otherwise "undo" actions on the ground that they were coerced. As will be shown in this section, victims of coercion, including women, have historically been expected to adduce evidence of an immediate threat of some sort of grave harm before a court will divest them of responsibility for their actions or omissions.¹⁸⁸

187. Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1332 (1989).

188. See, e.g., *Clearshot Holdings, LLC v. Nat'l Grid Wireless Holdings, Inc.*, No. 98 CIV. 3675(WHP), 2007 WL 4357834, at *9-*10 (Mass. Super. Ct. Nov. 26, 2007). The *Clearshot Holdings* court noted:

The elements of economic duress have also been described as follows: "(1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party." . . . Merely taking advantage of another's financial difficulty is not duress.

....

Because an element of economic duress is thus present when many contracts are formed or releases given, the ability of a party to disown his obligations under a contract or release on that basis is reserved for extreme and extraordinary cases.

Id.; see also *Theisen v. Theisen*, No. C6-99-2042, 2000 WL 979124, at *1 (Minn. Ct. App. July 18, 2000) ("Minnesota courts only recognize duress as a defense to a contract when there is coercion by

Under common law, “[i]f conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent.”¹⁸⁹ Duress, according to the Second Restatement of Contracts, makes a contract voidable at the option of the party claiming it, if that “party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative.”¹⁹⁰ Thus, duress is a defense to the enforcement of a contract on the basis that wholly volitional assent was not procured by a party to the contract. State courts have recognized the fact that a contract may be invalidated on the basis of implied coercion where the offensive conduct alleged is “of such a nature as to actually over-ride the judgment and will of the other party.”¹⁹¹

However, before women were deemed a protected class or even given the right to vote, courts in this country acknowledged that women could give valid consent and were ultimately responsible for their actions and decisions, irrespective of the various pressures or motivations that compelled or suppressed their actions.¹⁹² In one case, a party brought suit to reform a deed that had been executed by the defendant and his wife, alleging a mistake in the deed’s description of the land.¹⁹³ However, while the defendant-husband did not object to the reformation of the deed, his wife averred that “she did not join in the execution of the bond for title, and that she did not sign the deed of her own free will, but that her signature and acknowledgment thereto was obtained by coercion and undue influence of her husband.”¹⁹⁴ The court, however, found that neither

fraud was practiced [n]or coercion exercised upon her to obtain her signature or acknowledgment to the deed. . . . She was unwilling to sign the deed; but, inasmuch as she could not get the money therefore without signing it, she permitted her great desire for the money to

means of physical force or unlawful threats, *which destroys one’s free will and compels compliance with the demands of the party exerting the coercion.*”)

189. RESTATEMENT (SECOND) OF CONTRACTS § 174 (1981).

190. *Id.*

191. *Harris v. Harris*, No. CK00-03979, 2006 WL 4551981, at *12 (Del. Fam. Ct. Mar. 31, 2006).

192. *See, e.g.,* *Batton v. Massar*, 369 P.2d 434, 437 (Colo. 1962) (holding mother’s consent to have her children adopted valid). In this case, the court found:

The record is devoid of evidence of fraud, coercion, undue influence, misrepresentation or misconduct on the part of the adopters or their attorneys. . . . There is nothing to indicate that the mother was lacking in understanding and she was fully advised as to the consequences of her consent to the adoption. . . . It is not the law that one may avoid the consequences of his voluntary acts, acts not induced by fraud, duress, coercion, etc., by proof that he or she: ‘did not realize the seriousness and finality of the papers she . . . was signing.’ Such a rule of law would render every contract voidable at the whim of the maker.

Id.; *see also* *Succession of Bendel*, 116 So. 2d 84, 86 (La. Ct. App. 1959) (“A donation of community property made by the husband to the wife is valid, because the wife alone has the right to complain of a violation of Article 2404 of the Civil Code, which forbids the husband to make a donation of community property, and when she consents the donation is valid.”).

193. *Bell v. Castleberry*, 132 S.W. 649, 650 (Ark. 1910).

194. *Id.*

overcome her will. This was not an undue influence exerted upon her, or an involuntary act upon her part The statute does not require that she shall execute it without motive, or as a mere act of generosity, but that she shall execute it on account of acts of intimidation or coercion by her husband, or from fear of injury from him, before it can be said that she executed it through compulsion or undue influence on his part. . . . [W]e cannot say that appellant was compelled to sign or acknowledge the deed by reason of any undue influence exercised upon her.¹⁹⁵

The court refused to move from the notion that the wife had motivations and desires compelling her to act to the notion that she was not fully responsible for the free exercise of her will. More recently, courts have continued to note that although many pressures and considerations may be brought to bear by parties and/or circumstances in the procurement of consent, these should not operate to divest that consent of its force and validity:

Wives contemplating divorce are often distraught and without experience in negotiating contracts. Should contingent fee contracts between them and the attorneys they employ under such conditions become the usual fee arrangement, charges of overreaching and undue influence will be all too frequent.¹⁹⁶

This is also the case when women are accused of crimes and attempt to claim that they were unduly coerced to act such that they bear no legal responsibility for their actions. According to the Restatement of Agency, a “servant or other agent is not relieved from criminal liability for conduct otherwise a crime because of a command by his principal.”¹⁹⁷ Although this Article has focused on exploring consent and the means by which the law “undoes” or undermines it in the context of civil law, it should be noted that, when one seeks to be exculpated from having committed an actual crime,

[t]o establish [the] defense [of duress and coercion], a defendant must prove *immediate* threat of death or serious bodily injury, a well-grounded fear that the threat would be carried out if he did not commit the crime in question *and* the absence of any reasonable opportunity to escape the threatened harm without committing the offense. There must be *direct* causal relationship between the criminal act and avoidance of the threatened impending harm. The threat of harm must be so immediate as to preclude both the opportunity to escape and to seek assistance from law enforcement.¹⁹⁸

Indeed, the standard for alleviating one’s responsibility on the basis that one’s actions were coerced is very high in the context of criminal law.

195. *Id.* at 651.

196. *In re Cooper*, 344 S.E.2d 27, 34 (N.C. Ct. App. 1986).

197. RESTATEMENT (SECOND) OF AGENCY § 359A (1958).

198. *Gatto v. U.S.*, 997 F. Supp. 620, 629 (E.D. Pa. 1997) (citation omitted).

Moreover, the Model Penal Code permits a defense based on coercion only where the coercion involves another's "use of, or a threat to use, unlawful force . . . that a person of reasonable firmness in his situation would have been unable to resist."¹⁹⁹ Thus, this defense is only applicable where the defendant can demonstrate a legitimate apprehension of actual physical harm to herself or another.²⁰⁰

A concrete example bearing out the general unavailability of the duress defense to women accused of crimes occurs in the context of failure-to-protect charges often brought against battered women with children—ostensibly the population of defendants who are most vulnerable and most likely not to be held accountable for their actions or omissions. Nonetheless, it remains the case that lawyers rarely attempt a duress defense when representing battered women charged with failing to protect their children, and courts generally have not accepted such a defense when they do.²⁰¹

Similarly, in a civil context, the Restatement of Agency provides that the tortious actions of an agent who claims to have acted at the behest or command of a principal will not typically absolve him of liability.²⁰² Moreover, according to the Restatement, even "[t]he fact that the agent acts under physical or economic duress used by his principal does not relieve him from liability for causing harm to another."²⁰³

It is thus clear that a "Nuremberg" or "superior orders" defense, in which one claims that one should not be legally accountable for one's actions due to undue coercion, will not ordinarily be successful in most areas of the law, absent a threat of imminent physical harm.²⁰⁴ Despite the fact that diverse professions have been known to factor in claims of "superior orders" to

199. MODEL PENAL CODE § 2.09 (2001).

200. See Carol M. Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887, 907 n.54 (1997) (citing MODEL PENAL CODE § 2.09(1)).

201. Heather R. Skinazi, Comment, *Not Just a "Conjured Afterthought": Using Duress as a Defense for Battered Women Who "Fail to Protect,"* 85 CAL. L. REV. 993, 993 (1997) ("[A] battered woman who is charged with killing her abuser and argues self-defense, possesses a better chance of exoneration than a battered woman who is charged with failing to protect her child and argues duress.").

202. RESTATEMENT (SECOND) OF AGENCY § 343 (1958) (noting that exceptions exist where "he is exercising a privilege of the principal, or a privilege held by him for the protection of the principal's interests, or where the principal owes no duty or less than the normal duty of care to the person harmed.").

203. *Id.* § 343 cmt. e.

204. See, e.g., *Coaker v. Home Nursing Servs., Inc.*, Civ. A. No. 95-0120-AH-C, 1996 WL 316739 (S.D. Ala. Feb. 5, 1996). In *Coaker*, the Court rejected the plaintiff's allegation that her employer's offer to transfer her after she was accused of falsifying documents was a pretext for racial and disability discrimination. The court rejected her "Nuremberg defense—She was only following orders," and noted that she had failed to produce "any document that she claims was falsified by anyone other than herself." *Id.* at *18.

mitigate fault in disciplinary proceedings, superior orders defenses are not typically set forth in their codes of ethics.²⁰⁵

Perhaps the best example of courts' rejection of the idea that one can, absent an immediate threat to one's physical wellbeing, have one's agency limited where one alleges only professional or financial pressures is the caselaw on constructive discharge. As discussed in *Suders*, the Supreme Court held that constructive discharge was not a tangible employment action because "[u]nlike an actual termination . . . [a] constructive discharge involves both an employee's decision to leave and precipitating conduct: The former involves no official action"²⁰⁶ The determination that a wholly compelled departure could be termed a "decision to leave" is simply inexplicable. Outside of the context of submission and seduction, the law has treated female litigants as fully accountable for their actions and omissions, despite various financial, professional, and personal pressures often attendant to those actions and omissions.

2. *Women and Consent in the Context of Sex and Seduction*

The historical relationship between women and consent, viewed through the lens of the law, is tortured and complex. As one scholar describes it:

From at least the thirteenth to the second half of the seventeenth century, the responsibility for regulating aberrant sexual behavior belonged to the Anglican church. Local church "bawdy courts" tried cases of adultery and meted out punishment by public humiliation. Justices of the peace could impose further penalties; a cuckolded husband who desired financial compensation, however, needed to bring royal writs for abduction. The charge in such cases was theft of chattels . . . even if the woman participated voluntarily.²⁰⁷

Eventually, "seduction" cases came to be heard by secular courts, and a shift in the theory underlying the cause of action evolved, such that "the property interest that justified the plaintiff's trespassory complaint was located not in his physical property but in the intangible property rights he enjoyed through the contractually beneficial relationship of marriage," and "adultery was fictionally represented as a tortious interference in a service relationship."²⁰⁸

205. Rice, *supra* note 200, at 908 n.58 (discussing "the official codes of ethics of the major professional organizations in business, health, and law") (citing BUREAU OF NATIONAL AFFAIRS, CODES OF PROFESSIONAL RESPONSIBILITY, at viii (Rena A. Gorlin ed., 2d ed. 1990)). Rice argues against the American Bar Association's Model Rules, which afford young lawyers the ability to excuse misbehavior when they claim that they were following supervisors' orders. See generally Rice, *supra* note 200.

206. Pa. State Police v. *Suders*, 542 U.S. 129, 148 (2004).

207. Adam Komisaruk, *The Privatization of Pleasure* "Crim. Con." in *Wollstonecraft's Maria*, 16 LAW & LITERATURE 33, 35-36 (2004).

208. LAURA HANFT KOROBKIN, CRIMINAL CONVERSATIONS: SENTIMENTALITY AND NINETEENTH-CENTURY LEGAL STORIES OF ADULTERY 49 (1998).

It is certainly the case that historically, an unmarried woman's consent would be deemed "irrelevant" in certain criminal contexts pertaining to intimate relations, and this, according to another scholar, "might be explained as the law's desire to protect the woman's chastity even when she, presumably incorrectly, had determined not to protect it."²⁰⁹ However, that scholar continued, a more powerful explanation for the law's discounting female consent is that this is the law's assertion of the

ownership interest of the dominant social group (men) being asserted in the law to prevent the owned members of the oppressed group (women) from determining the course of their own bodily integrity. Such an act of self-determination would threaten the ownership rights of men, as a group, over women, as a group.²¹⁰

From the early 1900s until World War II, U.S. civil law continued to treat women as though they did not own their own sexuality, as though their chastity was something that needed to be safeguarded for them through external controls. For example, the denial of access to contraceptives to unmarried people, laws compromising the rights of those born outside of wedlock, and many public schools' denials of educational and enrichment opportunities to single parents all served to evince "an elaborate array of indirect civil sanctions that bolstered the legal and moral ban on nonmarital sex."²¹¹

Despite the promulgation of numerous torts that dealt with extra-marital sex, so-called "unchaste woman" were not, in many places and under many circumstances, deemed eligible to bring suit for their own seduction or for a breach of a promise to marry.²¹² At first blush, this appears to run counter to the current treatment of submission plaintiffs as plaintiffs who endured a tangible employment action; after all, submission plaintiffs are, in a sense, able to wield their intimacy with their harassers as a sword to aid in their legal stance. Nonetheless, the very fact that sex with a woman who was not one's wife could result in a civil suit for recompense for her "seduction" illustrates the fact that the law viewed a woman's sexuality as something disembodied from her—something that could be "taken" from her, even if she were a willing participant. Given that she could not even bring the suit, these cases seem to reflect the notion that, not only was a woman's sexuality not her own, but it actually belonged to someone else.

We might see the presumption that submission plaintiffs have been coerced to consent by the threat of a change in their employment status—such that their own act of agreeing to have sex is deemed to be an affirmative act committed

209. Keith M. Harrison, *Law, Order, and the Consent Defense*, 12 ST. LOUIS U. PUB. L. REV. 477, 490 (1993).

210. *Id.*

211. See Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 784-85 (1988).

212. See *id.* at 789-90.

against them—as a modern day extension of the ideals underlying the jurisprudence of seduction. One scholar has described the “Catch-22” inherent in the law of seduction: “At the level of formal legal doctrine, women perceived as ‘virtuous’ were technically protected from sexual exploitation by men other than their husbands. But . . . exploitation or victimization itself often served to degrade the female victim.”²¹³ It is hard to miss the irony of a modern victim of harassment that has her legal status (as a plaintiff) formally “protected” by a legal rule that affords her the ability to cite her own “seduction” as a tangible employment action, but simultaneously has her legal status (as an adult capable to consent) compromised by the “undoing” of her consent to the seduction.

B. The Dangerous Implications of the Submission Cases

The disparity in the ways in which courts treat differently-situated harassment victims has a powerful impact on the validity of a woman’s consent. Women who engage in sex with more powerful, and often older, male supervisors in the workplace are seemingly “excused” from their decision as Courts deem their actions to be too coerced to be volitional. Yet this trend simultaneously undermines and undoes women’s consent. Although seduction victims are successful in showing a tangible employment action, thereby immunizing their claims from the affirmative defense, their consent is subverted, mitigating its power and striking at its integrity.

On one hand, it is relatively simple to see why the choice to submit to one’s harasser may be less than wholly volitional. As one scholar has noted [K]nowledge of the right to withhold consent and an opportunity to reflect, do not guarantee that consent will be voluntary in a sense of manifesting free will and true choice. Knowledge is not synonymous with unconstrained actual choice. Women, for example, usually know that they have a right not to consent to sex. In many cases however, particularly in the context of date or marital rape or sexual harassment by employers, women nonetheless “consent,” and submit to the socially empowered and domineering male even absent an overt threat or force. We would not infer that in all of these cases women consented to have sex in the sense of free choice and unconstrained agency.²¹⁴

Nonetheless, current sexual harassment case law ignores the fact that the so-called choice not to make use of a reporting mechanism may be just as coerced as the choice to have sex with one’s supervisor. The question persists as to whether, in keeping with the goals of Title VII and sexual harassment

213. *Id.* at 789.

214. Dana Raigrodski, *Consent Engendered: A Feminist Critique of Consensual Fourth Amendment Searches*, 16 HASTINGS WOMEN’S L.J. 37, 48 (2004).

jurisprudence, the supervisory coercion of *all* such detrimental choices ought to implicate automatic employer liability. The Supreme Court's stance on constructive discharge as failing to constitute a tangible employment action, and its stance on the fate of victims without tangible employment actions who fail to report, ought to preclude the holdings in the submission cases.

Catharine MacKinnon has famously expressed her view that, "[a]s with all prostitution, the women and children in pornography are, in the main, not there by choice but because of a lack of choices."²¹⁵ According to MacKinnon, this "consent" takes place "only in the degraded and demented sense of the word . . . in which a person who despairs at stopping what is happening, sees no escape, has no real alternative . . . [and] is almost always economically desperate, acquiesces in being sexually abused for payment"²¹⁶ Applying this notion in the sexual harassment context, it is unfair *not* to recognize the quiet desperation with which submission plaintiffs in sexual harassment cases acquiesce, the price that they are willing to pay for their economic and professional survival, and the constraints to which they have been subjected. Unfortunately, the problems inherent in the view that the constrained agency of women is tantamount to no agency are obvious and intractable. Is the law to preclude (in any number of contexts) all but the most paternalistic of resolutions: foreclosing most "consensual" sexual behavior engaged in by women under the theory that it is, at its core, involuntary?²¹⁷

Political theorist and legal ethicist Alan Wertheimer has addressed the relationship between rational wealth maximization and consent. Wertheimer advocates, among other things, gauging whether permitting intoxicated consent to be transformative will be in a group's welfarist interests by asking whether the group's members, when sober, would wish their intoxicated consent to be valid.²¹⁸ In the context of the submission cases, we must think about whether women would want their consent to be intimate with another, although given under extreme pressures that touch upon their professional, financial, and emotional well-being, to be deemed valid later. If financial, emotional, or economic pressure is enough to undo a woman's ostensible consent in a harassment context, her consent given under routine pressures and considerations that bear upon and inform decisions in other contexts will also be susceptible to challenge. The clear implication for harassment victims whose consent to submit to their harasser's overtures is undone in court for the purposes of claiming a tangible employment action is that the face value of their consent is devalued.

215. Catharine A. MacKinnon, *Pornography as Trafficking*, 26 MICH. J. INT'L L. 993, 995 (2005).

216. *Id.*

217. See Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 746-47 (1997). Professor Franke takes note of the fact that the very "requirement that the plaintiff prove the sexual conduct was unwelcome clearly presupposes a degree of female agency in these contexts." *Id.*

218. ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 250-53 (2003).

As alluring and laudable as the rescue of submission victims may appear to courts, it is accomplished at the cost of devaluing female consent. The propagation of women's relative weakness in the workplace is accomplished by the law's need to rescue women from their own choices. Looking at the dynamics of a typical sexual harassment scenario aids one's understanding of why the law has done this, even as it underscores the disservice that it does to harassment victims.

Professor Schor has conceptualized the trajectory of what she termed a "sexual harassment story" as it unfolds for many women, concluding that many victims react by feeling confused and flattered, forgiving, and even somehow complicit, in the face of a harasser's inappropriate behavior: "Well, we call it sexual harassment when it happens to someone else. When it happens to us we say, 'Well, I'm sure it was really my fault' or 'It was just this once; I'm sure he didn't mean it' or 'These things happen.'"²¹⁹

Using now-Supreme Court Justice Clarence Thomas's alleged sexual harassment of Anita Hill as an example, Professor Schor characterizes the Senate Judiciary Committee's response to Hill as dismissive, insinuating that incidents like those that she alleged "happen," and that she would just have to "take it."²²⁰ Finally, though, the Committee conveyed to Hill a message, often transmitted to victims of harassment, that was "more insidious: 'Didn't you know what was going on?' They said, 'What did you think you were getting into?' They said, 'If you took it so seriously, why didn't you do something?'"²²¹

Professor Schor ultimately concludes that "the entire *notion* of consent is rendered suspect in relations of unequal power"²²² and entreats women to stop equivocating when they recount their stories of victimization and to stop blaming themselves for the actions of their harassers.²²³ She declares that society and its folklore need to stop telling victims: "'Oh, don't say anything, you'll get in trouble' . . . 'They'll never believe you' . . . 'Oh come on, it's more trouble than it's worth.'"²²⁴ She is correct. These are the messages, the reverberations of the stories and signals that society has consumed and reenacted until now, and the unfortunate lessons of past victims' experience. But this is only half of the problem in sexual harassment law. Once the gap between the expectations (imposed by society and the law) placed upon victims and the messages telegraphed to them (by the same sources) is bridged, victims should start to report harassment in ways that they have not been reporting it and thereby preclude the *Faragher/Ellerth* defense. Until this happens,

219. Schor, *supra* note 182, at 1349.

220. *Id.*

221. *Id.*

222. *Id.* at 1350.

223. *Id.*

224. *Id.*

however, the Supreme Court's pronouncement that a constructive discharge is not a tangible employment action and the existence of the *Faragher/ Ellerth* defense are unfair, but extant, stumbling blocks.

The other half of the problem is society's need to infantilize and rescue an adult woman, who has not been the victim of any violent crime, and who has declined to either report her harassment or otherwise escape it, and instead has acquiesced to her harasser's demands. Professor Schor has called for the rewriting of the harassment story from the point of view of the victim, "a task even harder than winning structural power because it means redefining, renaming, even reimagining our own relationship to power. We must find ways of making the courts listen, of making universities listen, of making the media listen, of *winning* a different hearing for ourselves and our own stories."²²⁵ This task is made impossible by the submission cases, and the way in which they educate would-be victims about the fact that they will fare better under the law and bypass the consequences of their failure to report by consenting to their harassment.

The insulation of harassment plaintiffs from the affirmative defense in submission cases, and the exposure to the defense of plaintiffs who have been constructively discharged has implications, and indeed, reflects upon the normative values of our current legal system. The plaintiff who acquiesces to that which she knows is wrong—intimate relations with a supervisor for the sole purpose of retaining her job—fares better than the plaintiff who resists. This does not serve to protect victims of harassment, nor does it induce behavior that is strong and thoughtful in the face of indecent and aggressive threats made by supervisors entrusted by defendant entities with the *ability* to exact a tangible employment action on a victim, regardless of whether or not they actually do.

CONCLUSION

The "romance of patriarchal power" narrative is alive and well in the facts and opinions of the submission cases. Held next to the Supreme Court's failure to assign "tangible employment action" status to a constructive discharge—the legal breaking point of a harasser's ability to inflict torment upon his victim—the submission cases teach victims, harassers, and society alike a perverse lesson: The law will afford you more protection and support as you go about vindicating your civil rights if you have engaged in a sexual relationship with your harasser than if you have permitted yourself to be forced out of employment.

225. *Id.*

By her own account, Monica Lewinsky initiated her affair with President Clinton.²²⁶ There is no evidence that she felt compelled to engage in a sexual relationship with him because she feared that, if she did not, she would lose her job. She was nonetheless deemed a victim by many members of the press and of society because of the president's status, age, and gender as opposed to her own. If Monica Lewinsky can be branded a victim, why should anyone be surprised that sexual harassment plaintiffs who have sex with their harassing supervisors have been cast by courts as the ultimate victims—incapable of giving consent that has any validity?

Victims who have been constructively discharged, whether or not they opted to have a sexual relationship, likely ought not have their claims rendered vulnerable to the interposition of the affirmative defense. However, in any event, the stark act of consenting to sex with one's supervisor certainly should not operate to *privilege* a claim on the basis of victims' (and thus generally, women's) perceived wholesale inability to make a better choice than to acquiescence under any set of circumstances.²²⁷

The choice to acquiesce to the advances of a harasser is no more compelled or constrained than the "choice" a victim makes to refrain from reporting her harassment through the proper internal channels prior to the point at which her situation approaches a constructive discharge. It is certainly no more compelled or constrained than the "choice" that a constructively discharged plaintiff makes to quit her employment. Immunizing submission plaintiffs from the *Faragher/Ellerth* defense, while holding other plaintiffs responsible for their failures to report their harassment by rendering their claims vulnerable to the defense, infantilizes women.

The roots of the disparity between the way in which constructive discharge plaintiffs and submission plaintiffs in sexual harassment cases are treated by the law lie in the law's historical treatment of women—the majority of sexual harassment plaintiffs—as people who are not in possession of their own sexuality. The law, however, persists in subscribing to a bifurcated notion of women's accountability for their actions and omissions in and out of the context of sex and seduction. In the end, whether motivated by an entrenched puritanical notion that "sex is bad," by an ignorance of the ways in which pressures and constraints operate upon victims who feel forced to walk away,

226. Cathy Young, *Maybe the Clinton-Lewinsky Fiasco Will Bring Some Sanity into the Sexual Harassment Debate*, CHI. TRIB., Sept. 27, 1998, at 21.

227. Professor Gruber has argued, in the context of analyzing and criticizing the victims' rights movement, that "[b]y projecting onto defendants the character of totally autonomous individuals and onto victims the character of perpetual victimhood, society can distance itself from responsibility for crime." Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 783 (2007). Similarly, courts that bestow a further dimension of "victimhood" upon those already victimized by harassment simply because they opted to engage in relations with their harasser appear to be operating under the presumption that these women were incapable of making the responsible, harm-avoiding choice of reporting that the courts expect all other plaintiffs/victims to make.

or by something else entirely, various courts' disparate notions of what constitutes a choice and, ultimately, what amounts to a tangible employment action, are harmful.

To be sure, recognizing the power disparity inherent in the relationship and interactions of a would-be male harasser and female victim sheds light on the intractable problems in crafting harassment jurisprudence. Professor Schor has noted, with some frustration, that the fact that her own university declared that a policy that would limit "consensual relations" between faculty and students would have a chilling effect on voluntary interactions between faculty members and students and ultimately burden and disenfranchise the very group of female students the policy sought to protect.²²⁸ She has eloquently stated the case for women in the workplace: "Women do not want to be seduced and they do not want to be loved. They want to be taken seriously, they want their work to be taken seriously, they want their careers to be taken seriously."²²⁹ Certainly the way for the law to facilitate these goals is *not* for it to treat submission plaintiffs as too compromised to function as accountable adults, while simultaneously holding women who fail to report harassment to super-human standards of care, courage, and wisdom.

228. Schor, *supra* note 182, at 1350.

229. *Id.* at 1350-51.