CRIMINALIZING COERCED SUBMISSION IN THE WORKPLACE AND IN THE ACADEMY

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This Article challenges the prevailing view that Title VII and Title IX provide a single conceptual model that fit all forms of sexual harassment. In particular, it questions the assumption that coerced sexual intercourse in the workplace and in the academy is merely another form of sexual harassment that can be addressed within the current legal framework. Rather, the current paradigm must be critically revisited in order to provide an alternative account of these "submission cases" that separately categorizes them and acknowledges their distinctive harms. Accordingly, this Article suggests that these cases should be criminalized, and elaborates upon the justifications and policy goals that support this choice and make it a desirable remedy. This Article further explores the practical ramifications of an alternative account by examining which criminal model is better suited to criminalize coerced submission. Comparing and contrasting a lack of consent model and a sexual coercion model, the Article hypothetically applies them to various cases that were litigated under the sexual harassment framework. This exercise demonstrates that the sexual coercion model provides a more comprehensive and pragmatic construct for criminalization. Therefore, this Article proposes the adoption of a specialized criminal statute based on the sexual coercion model that would criminalize supervisory sexual abuse of power within the workplace and the academy and identify several conditions that suggest that submission resulted from this abuse. Such a proposal would carefully target sexually abusive situations that may be plausible candidates for criminalization and offer a narrowly crafted prohibition that is both gender- and race-neutral and limited in scope to avoid over-criminalization.

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INTRODUCTION

Over the last thirty years, sexual harassment has evolved from a social phenomenon into an established cause of action. In the workplace and academy, women were subjected to various forms of unwanted sex, but historically, the law provided them with no basis for complaint or redress. Indeed, as far as the law was concerned, this unwanted sex was "business as usual." Catherine MacKinnon's groundbreaking work,[1] first published in the late 1970s, located a legal framework for sexual harassment claims in Title VII of the Civil Rights Act of 1964, which outlaws employment discrimination because of sex.[2] The project led by MacKinnon—which was wildly successful, in the courts at least—was to persuade lawmakers, as well as the public, that unwanted sex in the workplace could violate an employee's right to be free of sex discrimination.

This current view of sexual harassment as a violation of the right to equality embodies a carefully considered policy choice. As the architect of the claim, MacKinnon assumed that the Title VII framework would best capture the harms that she believed are at the core of sexual harassment.[3] Furthermore, MacKinnon's decision to rely on existing legislation, rather than propose a new statute, proved to be a prudent technique for

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[1] CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

[2] Title VII provides:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C.A. § 2000e-2(a) (West 2010).

[3] MACKINNON, *supra* note 1, at 174–92 (considering common law tort remedies for sexual harassment, and ultimately rejecting them). Under MacKinnon's account, traditional tort law was ill suited for recognizing the gender group-based harms embodied in sexual harassment, because of the individual nature of the harm in a tort cause of action. MacKinnon argues that the harm in sexual harassment is an integral part of women's social status, and therefore tort law is poorly fitted to fully capture this problem as part of a large scale backlash against women in the workplace. *Id.*

convincing the legal system, as well as the public at large, that sexual harassment is a cognizable legal wrong.[4]

In the mid 1980s, this strategy was wise and perhaps necessary to establish a new cause of action. By now, however, this cause of action has come of age and the time is ripe for revisiting it critically. The sexual harassment rubric covers a wide range of workplace misconduct—everything from sexually explicit utterances, to different forms of unwanted touching, to coerced sexual intercourse. The law assumes, however, that this single cause of action is sufficient to redress the distinct harms flowing from each of these distinct invasions.

This Article aims to challenge that "one size fits all" paradigm by isolating one form of sexual harassment, namely, economically and professionally coerced sexual intercourse in the workplace and in the academy (hereinafter: the submission cases). These cases are especially egregious; indeed, they are crimes, and yet by and large, neither the law nor commentators recognize them as such. While it might be sensible to treat many forms of unwanted sexual misconduct as providing the basis for a civil cause of action, we must question whether weak civil remedies are a sufficient response to the criminal wrongs perpetrated in the submission cases.

Additionally, this Article proposes that it is time to criminalize these types of cases. MacKinnon provides an initial conceptual framework for criminalizing coerced submission. In her book *Women's Lives, Men's Laws*, she argues that "awareness of the social hierarchy is absent in the criminal law of rape," and remarks that "rape is a physical attack of a sexual nature under coercive conditions, and inequalities are coercive conditions."[5] However, MacKinnon nowhere develops the pragmatic implications of her theory, offers the operational aspects of her insights, or outlines the elements of a criminal statute that would punish coerced submission.[6] In addition, while MacKinnon's critical polemics are

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[4] *See, e.g.*, Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, U. PA. L. REV. 463, 516 (1998) (analyzing MacKinnon's reasons for rejecting tort-based approaches to sexual harassment); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 32–33 (1999) (discussing alternative causes of action for sexual harassment).

[5] CATHERINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 244, 246 (2005) [hereinafter MACKINNON, WOMEN'S LIVES].

[6] *See* Book Note, *Forced Sex in the Workplace as Rape: Applying Sex Equality to Criminal Remedies*, 121 HARV. L. REV. 1237, 1237 (2008) (reviewing CATHERINE MACKINNON, WOMEN'S LIVES, MEN'S LAWS (2005) and advocating the adoption of

designed to raise the public awareness about the problem and inspire us to think of an adequate construct for criminalizing the submission cases, her rhetoric is too abstract and far-removed from the substantive details of actual cases to offer guidance to legislatures.

This Article undertakes to develop and refine MacKinnon's line of thinking by offering the missing, and much needed, pragmatic approach that targets the submission cases by capturing the wrongfulness of the perpetrator's misconduct and demonstrating the unique harms it inflicts. Along the way, this Article identifies, compares and contrasts two alternative models for criminalizing coerced submission: a "lack of consent" model and a "sexual coercion" model. The lack of consent model proves insufficient in providing a comprehensive basis for criminalizing economically and professionally coerced sex; ultimately, the sexual coercion model provides a better framework for criminalizing coerced submission.

The Article proceeds as follows: Part I explains that the submission cases must be separately categorized because they inflict unique harms on victims. Moreover, it argues that viewing these cases within the anti-discrimination framework results in several drawbacks, implying that current civil remedies prove insufficient in successfully combating the problem. Alternatively, the submission cases should be viewed through the lens of the criminal law. The legal justification for criminalizing this misconduct is based on the harm principle. Under this account, harm consists of two elements: harm to third parties and wrongdoing (specifically, the perpetrator's wrongful conduct). Based on analogies between rape law and the submission cases, the first Part concludes that criminalizing the latter is justified and desirable.

Part II considers the lack of consent model and the sexual coercion model as two alternative conceptual bases for criminalizing the submission cases. This Part stresses the features of previous reform proposals, which focused on establishing threats to harm as circumstances invalidating consent. After looking closely at the models, it concludes that the sexual coercion model is more sensitive to the harms and to the perpetrator's wrongful conduct that provide support for criminalizing the submission cases.

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criminal remedies to coerced sex in the workplace) [hereinafter *Forced Sex*]. While the Note endorses MacKinnon's arguments for extending the scope of criminal law to include economically coerced sex in the workplace, it does not take any further practical or operational steps beyond MacKinnon's theoretical arguments by providing the elements of an offense that would criminalize coerced submission. *Id.*

Part III offers a theoretical construct to illustrate which model is better fitted to criminalize the submission cases by applying the criminal models to various cases that were litigated in courts under current sexual harassment doctrine. This exercise illustrates that the threat-based proposals do not provide a sufficient model for criminalizing the submission cases and demonstrates that the sexual coercion model offers a more nuanced construct that would allow criminalizing various forms of sexually coercive conduct in the workplace and in the academy.

Part IV proposes a specialized criminal statute, entitled sexual abuse of power, to criminalize the submission cases. It illustrates that these cases can be criminalized based on adopting more realistic definitions of what qualifies as "power" and on articulating which circumstances amount to abusive conduct. To support these determinations, this Part identifies some specific conditions that tend to indicate that a certain type of conduct amounts to sexual coercion and should be punished as a crime.

This Article concludes by noting the advantages of the proposed prohibition, while stressing that the statute is carefully crafted to criminalize sexually coercive conducts only in the workplace and in the academy. In so doing, it avoids overreaching and overbroad criminalization by adopting some built-in limits that narrow the scope of criminal regulation.

I. JUSTIFICATIONS FOR CRIMINALIZING COERCED SUBMISSION

A. Targeting Coerced Submission and Defining Its Main Features

> [H]e suggested that after dinner they go to a motel for the purpose of having sexual relations. She contends that she declined his invitation and that he advised her that she owed him since he obtained the job for her. She allegedly continued to resist but he insisted and after dinner they drove to a motel . . . . He then took her to a room . . . and then they engaged in sexual relations. She testified that she did so only because she was afraid that her failure to grant him a sexual favor would result in her dismissal from the job. Thereafter . . . he made repeated demands upon her for sexual favors . . . . She testified that she was forced to engage in sexual relations with him at the bank during and after banking hours, that they engaged in intercourse in the bank vault, in other rooms at the bank . . . that all of these activities were against her will, and that he often actually assaulted or raped her. She states that on one occasion . . . he so brutally raped her that it led to serious vaginal bleeding for

> which she was required to seek a doctor's care. [She alleged that over a period of about two years they] had sexual intercourse some 40 or 50 times . . . ."[7]

This excerpt describes the injuries alleged by Mechelle Vinson, who sued her employer, a bank, for sexual harassment by her supervisor. In analyzing *Meritor Savings Bank v. Vinson*, the Supreme Court acknowledged both quid pro quo and hostile environment claims as actionable under Title VII. In other words, it held that a sexual harassment claim is not limited to sexual misconduct that is directly linked to the grant or denial of an economic quid pro quo, and that a course of conduct that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment can also be a form of sex discrimination that is outlawed by Title VII.[8]

Vinson ultimately won her case, opening a door for many potential sexual harassment victims whose harm was previously unrecognized. Since *Meritor*, when similar allegations reach the courts, they are typically framed as sex discrimination in violation of Title VII. In addition, federal law prohibits sexual harassment by teachers and professors; Title IX of the Civil Rights Act outlaws discrimination in education on the basis of sex.[9] These types of allegations would also seem to support rape charges against the perpetrators, but no such charges are ever brought.[10]

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[7] Vinson v. Taylor, No. 78–1793, 1980 WL 100, at *1 (D.D.C. Feb. 26, 1980), *rev'd*, 760 F.2d 1330 (D.C. Cir. 1985), *aff'd*, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

[8] *Meritor*, 477 U.S. at 64–65.

[9] Title IX of the Civil Rights Act of 1964 provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C.A. § 1681(a) (West 2010). Protections against sexual harassment in education generally adopt similar rules that are applicable to harassment in the workplace and require similar standards. *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist. 524 U.S. 274 (1998) (holding that a school district will not be held liable in damages for a teacher's sexual harassment of a student absent actual notice and deliberate indifference).

[10] It should be noted, however, that the Court itself addressed the criminal nature of the allegations by stating that: "Respondent's allegations in this case . . . include not only

The *Meritor* excerpt draws our attention to a specific form of supervisory misconduct. This Article argues that such wrongful conduct warrants its own definition and sanctions above and beyond those available under Title VII and Title IX. In these scenarios, people in dominant positions abuse their power in order to obtain sex from their subordinates; for example, a superior such as a supervisor, employer, teacher or professor, might ask a subordinate or student for sexual intercourse.[11] The subordinate and student go along because they are afraid that, if they refuse, their superior will retaliate by taking adverse employment action against them or making an adverse academic decision . This Article uses the terms "coerced submission" and "the submission cases" interchangeably to refer to these cases.[12] The term "economically coerced sex" refers to the economic pressures that superiors at the workplace exert over employees, which result in their submission. Likewise, the term "professionally or institutionally coerced sex" refers to the institutional and situational pressures that amount to coercive circumstances and stem from the students' academic and professional dependence on their professor or teacher.

B. Revisiting the Current Views and Noting Their Main Drawbacks

Litigators and judges have treated coerced submission as just another form of sexual harassment that may be appropriate for intervention under Title VII or Title IX. Likewise, scholars have given these cases scant attention, and no commentator has argued that they should be placed in a category of their own. Consequently, their specific harms have never been properly theorized or redressed. However, one significant distinction between coerced submission and other forms of sexual harassment is that in coerced submission cases, victims are coerced to endure not mere sexual advances, but unwanted sexual intercourse itself.

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pervasive harassment but also criminal conduct of the most serious nature." *See Meritor*, 477 U.S. at 67.

[11] A preliminary remark is in order: this Article is premised on the assumption that the workplace and the academy are comparable for purposes of considering criminalizing the submission cases in these settings. The core feature these cases share lies in obtaining sex through supervisory sexual abuse of power.

[12] Some courts already use the term "submission cases" while discussing Title VII claims that resulted in sexual submission. *See, e.g.*, Lutkewitte v. Gonzales, 436 F.3d 248, 255 (D.C.Cir. 2006).

Once sexual harassment became an established cause of action, scholars spent little time articulating distinctions that might separate one form of harassment from another. Instead, contemporary theorists aimed to come up with one explanatory model or conceptual framework that would define a whole range of sexual behaviors as violations of Title VII or Title IX. Thus, following MacKinnon's lead, most scholars focus on gender group-based harms, which in turn adversely affect the individual victim's status at work or at school.[13] According to this view, sexual harassment is considered a legal wrong because of its adverse effects on victims' employment and educational opportunities. Moreover, contemporary litigants and scholars focus on reasons for imposing liability on employers and institutions for the conduct of their harassing employees, rather than investigating the employees' personal guilt.[14] The current framework also draws on the legal standards developed under employment discrimination law as the basis for distinguishing between different forms of sexual harassment. Not surprisingly, therefore, the cases and the scholarship mainly emphasize the tangible economic harms that harassment inflicts on women as members of a group.

The current framework has some clear strengths. Drawing on the well-established formal right to equality and placing gender stereotyping

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[13] *See generally* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (criticizing the "sexual desire-dominance paradigm," and arguing for replacing it by a "competence-centered paradigm"). Under Schultz's alternative account, sexual harassment is driven by a desire to preserve favored types of work as masculine. By maintaining a hold on highly compensated employment, men secure a host of advantages in and outside the workplace. *See also* Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998) (viewing sexual harassment as an attempt to entrench masculine norms and preserve male control in the workplace, and arguing that it results in socioeconomic subordination of women); Katherine M. Franke, *What's Wrong With Sexual Harassment?* 49 STAN. L. REV. 691, 691 (1997) (providing an alternative account for sexual harassment as gender harassment by referring to it as a "technology of sexism": a tool for perpetuating, policing and enforcing gender hierarchies). Although these scholars differ in their understanding of the harm that is sexual harassment, they share some core features; they focus on gender group-based harms, and shift the focus away from the sexual and the personal aspects of the harassing conduct.

[14] Focusing on imposing liability on employers is closely linked to the legal framework currently available for the victims of coerced sex in the workplace in two aspects. The first lies with the statutory provision itself: under Title VII, civil liability is imposed on employers for the misconduct of their employees. The second justification is economically-based: strong economic reasons support this current focus on employers and institutions rather than on the individual perpetrator. Indeed, turning to an institution's deep pocket is a favorable source of redress for an injured plaintiff rather than a tort action against the individual harasser.

and sexism at the center of the problem enables a wide array of harassing conduct to be actionable under Title VII or Title IX, providing potential redress to many victims. Furthermore, it addresses a whole range of harms—including work and education-related harm—under a single cause of action. However, its weaknesses cannot be ignored. The forms of sexual harassment vary substantially, and each inflicts specific harms that can be separately categorized and independently addressed.

Focusing on fitting together different forms of conduct under the discriminatory framework and emphasizing the tangible economic harms brought on by discrimination has arguably distracted reformers from taking a closer look at the distinctive harms inflicted by coerced submission. These include harms that are far more personal in nature, and go above and beyond those group-based economic or professional harms sustained by the victims as employees or students. A coerced submission victim suffers personal unique harm as an individual human being.[15]

The current paradigm sometimes obscures more than it clarifies, masking the harms rather than illuminating them. A prominent aspect masked by the economic focus in the current paradigm is the common features coerced submission shares with rape offenses; the harm inflicted on a coerced submission victim is similar to the harms sustained by rape victims. Characterizing coerced submission in the workplace and in the academy as just another type of sexual harassment distracts our attention from realizing that it is indeed a clear example of unwanted sex.[16]

Nonetheless, MacKinnon, and the scholars that followed her, carefully opted to avoid emphasizing the sexual nature of the misconduct and the sexual aspects of the harm it inflicts. This deliberate choice to distance sexual harassment from rape law may be explained in part by an attempt to avoid the common legal obstacles that characterize rape law jurisprudence. More importantly, the sexual acts may seem consensual at first glance. Consequently, fearing that stressing the similar features that sexual harassment shares with rape cases would prove a mistaken strategy, scholars shifted the focus away from these similarities. In particular, scholars shifted focus from the individual aspects of the harm sustained by victims and toward the more tangible harm women sustain as part of a

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[15] *Cf.* Ehrenreich, *supra* note 4, at 19 (suggesting that every sexual harassment victim suffers as an individual and feels degraded or frightened or outraged as an individual).

[16] *See generally* ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 89–118 (2003) (discussing the harms sustained by victims of unwanted sex in general and rape victims in particular).

group. It is precisely because of the personal aspect of the harm that the first sexual harassment cases were thrown out of the courts in the early 1970s. These courts viewed sexual harassment as completely private transgressions and as expressions of private personal desire, rather than a form of employment or education discrimination; therefore, they initially fell outside the scope of legal protection under Title VII's and Title IX's provisions.[17]

However, a close look at the submission cases illustrates that they share many features with other sexual offenses, particularly rape. These commonalities, which obfuscated under contemporary views, further support the argument that the current paradigm places coerced submission under the wrong legal framework.

A second major shortcoming of the current framework of focusing on the employer's or the school's liability for the harassing conduct of their employees is that it neglects to address the aspects of the individual harasser's wrongful conduct and his personal guilt. The current view mainly emphasizes the impact of the harasser's conduct on the victim's employment or academic opportunities, which has further resulted in shifting the focus away from the unique features of the individual harasser's coercive conduct and toward the effects this conduct carries on the victim's employment or professional status. Accordingly, this has further contributed to a decreased focus on the harassers' culpable conduct and their personal guilt.

Neglecting to separately address both the distinctive harms sustained by the victims as well as the unique features that characterize the individual harasser's conduct has resulted in a failure to provide suitable legal tools that would allow a thorough treatment of the phenomenon. Moreover, alternative forms of regulation, such as professional-ethical regulation, which also fail to take these unique features into consideration, have proved insufficient to combat this misconduct, and therefore also fail to provide victims with adequate redress.

Unfortunately, these drawbacks became even more apparent after the Supreme Court, in two major cases, changed the distinction between different forms of sexual harassment under Title VII.[18] In the past, the controlling legal standard distinguished between quid pro quo and hostile

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[17] *See, e.g.*, Corne v. Bausch & Lomb, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977) (referring to the sexual advances as "nothing more than a sexual proclivity," and an attempt to satisfy "a personal urge").

[18] Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indust. Inc. v. Ellerth, 524 U.S. 742 (1988).

environment. However, in 1998, the Supreme Court abandoned that distinction and adopted instead the "tangible employment action" standard, which requires a significant change in employment status that frequently results in direct economic harm.[19] While the Supreme Court has not yet addressed the question of whether the "tangible employment action" standard squarely fits coerced submission, federal courts have struggled with and reached conflicting conclusions over the definition of this key phrase.[20] Following this change, however, the need became more pressing to revisit whether the current paradigm is suitable when applied to coerced submission. To make things worse, this legal change also meant that many coerced submission victims who were not economically harmed lost their suits.[21] Without a doubt, this is an undesirable result, often leaving victims of severe sexual misconduct without a legal remedy.

The Supreme Court's new standard—the tangible employment standard—typically focuses on direct economic harm further illustrates the failure of sexual harassment law to provide an adequate conceptual framework that both captures coerced submission's unique harms and wrongs, and offers an appropriate legal remedy.

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[19] *Burlington*, 524 U.S. at 761–62, 765 (holding that an employer is strictly liable for a supervisor's harassing conduct when the supervisor's conduct culminated in tangible employment action such as discharge, demotion or undesirable reassignment). In contrast, when the tangible employment action was not taken, the employer may assert and prove a two pronged affirmative defense that considers the reasonableness of both the employer's and the subordinate's actions, namely, that the employer "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . [that the] employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765.

[20] The Second and the Ninth Circuits, for example, held that coerced submission meets the tangible employment action definition. *See, e.g.*, Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158 (9th Cir. 2003); Jin v. Metro. Life Ins., 310 F.3d 84 (2d Cir. 2002). In contrast, the District of Columbia, for example, held that coerced submission does not amount to tangible employment action. *See, e.g.*, Lutkewitte v. Gonzales, 436 F.3d 248, 272 (D.C. Cir. 2006) (Brown, J., concurring). However, since neither the Faragher nor the Ellerth cases directly deal with submission cases, the Supreme Court has not yet held whether the "tangible employment action" standard applies to these cases as well.

[21] *See, e.g.*, Samedi v. Miami-Dade County, 206 F. Supp. 2d 1213 (S.D. Fla. 2002) (demonstrating a disturbing example of a victim who was raped but did not suffer any economic harm and thus lost her case, since she could not establish that a tangible employment action was taken against her).

C. Reconsidering Coerced Submission through the Lens of Criminal Law

In response to the drawbacks highlighted above, this Article challenges the prevailing employment discrimination paradigm by offering an alternative theoretical framework that better suits the specific features of the submission cases. Accordingly, this Article's principle contribution is suggesting that we should view sexual coercion from a criminal law perspective. This lens would provide coerced submission victims with a powerful tool that only the criminal law is able to offer, namely: the unique societal stigma imposed by criminal sanctions. Indeed, only the state itself is able to criminally punish the individual perpetrator by attaching personal blame and guilt, providing a general deterrence effect on potential abusers as well as a specific deterrence effect on the abusive individual. Applying basic criminal law principles to these cases better captures not only the distinctive harms inflicted in them, but also the coercive features embodied in the perpetrator's conduct.

Proposing criminal law's lens as an alternative necessitates addressing the relationship between sexual harassment and criminal law. Sexual harassment cases, for example, incorporate various other types of conduct that are not necessarily sexual in nature and that do not involve any physical touching. As Vicki Schultz astutely points out, these actions have nothing to do with sexuality but everything to do with gender. Schultz demonstrates that the forms of such non-sexual actions are wide ranging, including harassing women verbally with humiliating sexist comments, gendered utterances and insults regarding either a particular woman or women in general. They also include other forms of actions that are meant to create an unbearably hostile working environment, such as engaging in deliberate work sabotage, assigning women sex stereotyped work responsibilities that lie outside their job description, withholding information, training, or opportunity to do the job well, and many more forms of gender-based actions. [22]

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[22] *See generally* Schultz, *supra* note 13 at 1686–87 and accompanying text (discussing various examples of non-sexual actions that qualify as sexual harassment). *See also* MACKINNON, *supra note* 1, at 9–32. MacKinnon's research first identified the less apparent form of harassment which she termed "offensive working environment," later entitled hostile environment. *Id.* MacKinnon defined this form of harassment as "the situation in which sexual harassment simply makes the work environment unbearable." *Id.* at 40. Prominent scholars have written extensively about the different aspects of sexual harassment and have criticized the view that sexual harassment is motivated either by sexual desire or by the desire to sexually exploit women and to dominate them through sex.

Coerced submission is distinguished from many other forms of sexual harassment in two prominent respects: the conduct is explicitly sexual in nature and sexual intercourse is successfully obtained. These features suggest that coerced submission should be viewed as a sexual offense rather than one more form of sexual harassment. While current views distance themselves from both the personal features of the harm and the individual features of the perpetrator's conduct, under the new offense proposed herein, the criminal law's perspective would shift the focus back to not only the personal suffering inflicted on victims, but also to the perpetrator's guilt.

Revisiting coerced submission cases brings home the point; since current civil remedies have been ineffective at combating the phenomenon, criminal law may provide lawmakers with a better set of tools. This, in turn, will furnish better legal remedies for battling sexual coercion in the workplace and in the academy. Meanwhile, this Article suggests that the missing and pivotal component in current remedies rests in its failure to attach personal blame and societal stigma to the perpetrator. On the other hand, criminal regulation provides personal and general deterrence by stigmatizing and assigning personal guilt to the perpetrator. As opposed to current sexual harassment regulation—which imposes liability on employers while ignoring individual perpetrators—criminal regulation would be far more personal in nature. More importantly, only criminal law will provide the deterrence of the unique societal stigma of being labeled a "sex offender." While every criminalization decision undoubtedly entails some stigma, the unique stigma attached to sexual offenses is more severe. This is precisely the missing and much-needed feature in coerced submission's current legal framework.

1. The Harm Principle: Harm to Others and Wrongdoing

To answer the threshold question of whether coerced submission justifies criminalization we must delve into the legal justifications for adopting a new criminal offense that regulates sexual misconduct. The harm principle is widely considered the core justification for criminalization, and therefore targeting the harm embodied in certain conduct stands at the heart of every criminalization decision.[23]

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[23] *See generally* WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW ch. 1,§1.2 (2d ed. 2003) (noting that harm is one of the basic premises which underlie substantive criminal law, and only harmful conduct should be made criminal).

Legal scholars provide a two-pronged account of harm: first, harms to others, or identifying the harms that the conduct inflicts on victims; second, establishing the perpetrators' wrongful conduct that justifies placing personal guilt through the imposition of criminal liability.[24] Again, revisiting the landmark *Meritor* case[25] provides the focal point for considering the proper thinking and mindset for coerced submission. Applying the two-pronged account of the harm to this case best highlights the rationale behind the proposal to criminalize coerced submission. Characterizing the perpetrator's conduct as employment discrimination based on gender raises significant doubts as to whether it provides a comprehensive and accurate account of the harm inflicted on the victim. One may wonder why the victim, who was clearly raped by her supervisor, was viewed both by the Court, as well as by prominent legal scholars, as suffering from gender discrimination.

2. The Harms Sustained by Victims of Coerced Sex

The harms sustained by Vinson illustrate that substantial similarities can be seen in the specific harms inflicted on coerced submission victims and the harms inflicted by other types of sexual offenses, including rape. When combined with the perpetrator's wrongful conduct, these comparable harms support the criminalization of the submission cases.

The following analysis focuses on identifying the victims' subjective injuries and suffering which, as this Article suggests, can be perceived as the invasion and violation of the victim's rights.[26] While these transgressions demonstrate severe harms that are inflicted on victims of coerced intercourse, current laws have not yet recognized them as a

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[24] *See generally* JOEL FEINBERG, 1 THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 105–18 (1986) (discussing the harm principle as the core justification for criminalization); DOUGLAS HUSAK, PHILOSOPHY OF CRIMINAL LAW 223–44 (1987) (arguing that only wrongful, blameworthy, immoral conduct should be criminalized).

[25] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 59–60 (1986).

[26] *See generally* WERTHEIMER, *supra* note 16, at 89–118 (arguing that all forms of unwanted sexual relationships, including rape, are indeed harmful to their victims). *See also* Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1448 (1993) (arguing that "[f]rom the victim's perspective, unwanted sexual penetration involves unwanted force, and unwanted force is violent . . . often leaving scars").

violation of fundamental rights that victims are legally entitled.[27] Some commentators, however, adopt the right-based framework and terminology, suggesting that the law acknowledge victims' rights pertaining to their sexual choices as fundamental entitlements. [28] Stephen Schulhofer, for example, argues that like other fundamental rights—such as our rights to physical safety, to property and to labor—the right to choose or refuse sexual intimacy deserves the protection and support of society and its laws.[29] Furthermore, contends Schulhofer, the right to sexual autonomy deserves to be protected directly and for its own sake.[30] This Article adopts the position that the violation of the victims' rights should indeed stand at the core of our understanding of the prohibitions against rape and other sexual offenses. But in contrast with Schulhofer's exclusive focus on the right to sexual autonomy, this Article proposes that the harms of coerced intercourse also be recognized as violations of additional fundamental rights that victims should be entitled—in particular, the right to be free from sexual coercion. The following section utilizes this rights-based approach.

a. Violation of the Right to Remain Free from Sexual Coercion

A prominent feature that coerced submission and other sexual offenses share is that they operate as a violation of a person's right to be free of sexual coercion. While a violent rape victim is faced with the need to choose between her right to remain free of sexual coercion and her physical well-being, a coerced submission victim faces a strikingly similar

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[27] *See generally* STEPHEN SCHULHOFER, UNWANTED SEX; THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998). As Schulhofer observes,

> Of all our rights and liberties, few are as important as our right to choose freely whether and when we will become sexually intimate with another person. Yet, as far as the law is concerned, this right—the right to sexual autonomy—doesn't exist.

Id. at 274.

[28] *See generally* WERTHEIMER, *supra note* 16, at 108 (discussing the view that it is the violation of the victim's rights that is at the core of the wrongness of rape, and not the other sorts of experiential harms that typically come in its trail).

[29] SCHULHOFER, *supra* note 27, at 282 (arguing that: "Like our right to physical safety, to our property, out time and our labor, the right to choose—or refuse—sexual intimacy deserves the protection and support of society and its laws.").

[30] *Id.*

choice: being free from sexual coercion or enjoying the other basic rights that every human being is entitled to, such as economic survival, professional development, and mental and emotional well-being.

Victims of coerced submission in the workplace and in the academy who do not suffer physical violence are not afforded adequate protection by the criminal law. The law should adopt a rigorous regime of protections that secure the right to remain free from sexual coercion, , just as it secures other rights to physical autonomy.[31]

b. Violation of the Right to Bodily Integrity

An additional feature that coerced submission shares with other sexual offenses is the manner in which it violates a person's bodily integrity. This focuses on the physical aspect of the violation: invasion of the body, obtained through coerced penetration of sexual organs.[32] Robin West addresses the distinctive harms of physical invasion inflicted upon victims' physical bodies.[33] West further argues that these harms are deeply gendered harms. She suggests that the physically invasive penetration of the woman's body by the man's penis is "itself a painful part of the experience," which demonstrates one aspect of the experience of unwanted sex as a gendered harm.[34] Moreover, West contends that "the coupling of . . . nonconsensual penetration with . . . the threat of further violence renders the invasion of the woman's body . . . not only painful but life threatening; [t]he painful physical invasion becomes not just *unwanted*, but terrifying, and terrorizing."[35]

c. Non-physically Invasive Harms

A second aspect of invasiveness focuses on its non-physical expressions. These mainly consist of violation of privacy rights, particularly the violation of sexual integrity. The invasion of self and the

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[31] *See* SCHULHOFER, *supra* note 27, at 280 (arguing that: "Just as nonviolent threats to take property amounts to criminal extortion, nonviolent coercion to induce consent to unwanted intercourse should constitute a serious criminal offense.").

[32] *See, e.g.*, WERTHEIMER, *supra* note 16, at 97–103 (discussing the experiential account of the harm sustained by victims of unwanted sex).

[33] ROBIN L. WEST, CARING FOR JUSTICE 100–09 (1997).

[34] *Id.* at 101.

[35] *Id.* at 102.

psyche is a basic violation resulting from unwanted sexual intercourse, including coerced submission in the workplace and in the academic setting. Robin West addresses the invasiveness aspect of the violation by suggesting that:

> [t]he fear of sexual . . . invasion is the fear of being occupied from within, not annihilated from without; of having one's self overcome, not ended; of having one's own physical and material life taken over by the pressing physical urgency of another, not ended by the conflicting interests of another; of being, in short, overtaken, occupied, displaced, and invaded, not killed.[36]

A prominent feature of privacy and invasive harms includes emotional and psychological injuries endured by victims of unwanted sex.[37] Research suggests that victims of all forms of unwanted sex suffer comparable psychological harms stemming from the unwelcome sexual penetration, regardless of whether sex was violent or not.[38] The central injury of coerced submission is therefore harm to the victim's spirit and soul.[39]

Moreover, forcing victims into submitting to unwanted sex by using coercive pressures to overpower genuine choices violates a basic right to sexual integrity, which incorporates victims' capacity to have full control over their sexual experiences and their sexual choices. [40] Current

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[36] Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 41 (1988).

[37] WERTHEIMER, *supra* note 16 at 104-107 (discussing the unique psychological harms inflicted on victims of rape and nonconsensual sex).

[38] For an example of a study that shows that the risk of developing post-traumatic stress disorder is higher for victims of rape than all other traumatic events except being held captive, tortured or kidnapped, see, e.g., Jane E. Brody, *When Post-Traumatic Stress Grips Youth*, N.Y. TIMES, March 21, 2000, at F8. A caveat is warranted for the discussion of sociological data on the harms of coerced sexual intercourse. Much of the empirical work on victims' experiences has focused on those who have suffered stranger rape. There is no separate data regarding the harms of other forms of unwanted sexual intercourse. It is therefore impossible to quantify the experience of victims of unwanted sex. *See generally* Samuel H. Pilsbury, *Crimes Against the Heart: Recognizing the Wrongs of Coerced Sex*, 35 LOY. L.A L. REV. 845, 846 (2002) (discussing the lack of empirical data on the unique harms of coerced sex).

[39] *See generally* Linda Fairstein, *Men, Women, and Rape*, 63 FORDHAM L. REV. 125, 158 (1994) (discussing the unique harm to the sprit that is often aggravated by sense of betrayal of a personal bond).

[40] *See generally* PETER WESTEN, THE LOGIC OF CONSENT 149 (2004) (discussing the dignitary harm of rape which is the harm that an actor inflicts on a subject by acting in

rape laws are typically willing to protect against violation of bodily integrity but refuse to protect against the violation of sexual integrity. Both rights, however, represent two different aspects of bodily control. Failing to capture that the right to sexual integrity is an equally important right as the right to bodily integrity is therefore a significant shortcoming in current rape laws. Coerced submission in the workplace and in the academy offers a prominent example where typically bodily integrity in the physical sense is not violated, while the victim's sexual integrity and sexual control are clearly violated. Again, current laws have not yet recognized that the harms that stem from coerced sex—harm to sexual integrity being among them—amount to violations of fundamental rights. This Article suggests that criminalizing coerced submission in the workplace and in the academy would help in recognizing these rights.

d. Violation of Human Dignity

Another common feature both coerced submission victims and other sexual offense victims share lies in the harm done to a person's dignity. Forcing sex on an unwilling person violates that person's dignity. The idea that harm to one's dignity is one of the harms that is inflicted on victims of coerced intercourse has been suggested in academic commentary on rape and sexual harassment law. Scholars such as Peter Westen have concurred in the observation that dignity harm is one of the key injuries rape victims sustain .[41] Westen argues that rape inflicts both a harm to one's dignity, which he designates as a secondary harm, and a material, actual harm, which he designates as a primary harm.[42] Dignitary harm, argues Westen, occurs when the perpetrator inflicts harm on the

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disregard of her sexual integrity, that is by proceeding to have sexual intercourse without his having reason to believe that she is subjectively choosing it as that which she desires for herself under conditions of choice to which she is legally entitled). *See also* Martha Chamallas, *Unpacking Emotional Distress: Sexual Exploitation, Reproductive Harm and Fundamental Rights*, 44 WAKE FOREST L. REV. 1109, 1117 (2009) (discussing the notion of sexual integrity in tort law and arguing that plaintiff's interest sexual integrity should be prioritized). The notion of sexual integrity, as an alternative to the sexual autonomy language, is further developed in foreign legal regimes such as in England and in Canada. *See generally* Nicola Lacey, *Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law*, 11 CAN. J.L. & JURIS. 47, 63 (1998) (discussing the right to sexual integrity in rape laws. Lacey argues that the notion of sexual autonomy is too narrow and allows no space for the expression of affective aspects of sexual harm).

[41] *See, e.g.*, WESTEN, *supra* note 40, at 148-52.

[42] *Id.* at 149 (discussing the dignitary harm in rape).

victim "by acting in disregard of her sexual integrity, that is, by proceeding to have sexual intercourse without his having reason to believe that she is subjectively choosing it as that which she desires for herself under conditions of choice to which she is legally entitled."[43] Westen further argues that "the magnitude of the dignitary harm of rape is a function of the extent of the actor's disregard of a victim's interests . . . [namely,] an intent to violate a person's sexual integrity [is] worse than recklessness regarding her sexual integrity, and recklessness being worse than negligence."[44] The significance of Westen's analysis rests on the link he makes between the dignitary harm in rape and the violation of a right to sexual integrity, which is a core value that rape laws must promote.[45] However, this view concerning harm to dignity, has not yet figured prominently into court decisions involving rape cases.

In addition, the idea that harm to one's dignity is another harm that is inflicted in coerced intercourse has been examined in the context of understanding the wrongs in sexual harassment, While this position is not the prevailing view in sexual harassment cases, which normally focus on the violation of equality[46], it has been suggested in academic literature. Rosa Ehrenreich, for example, argues that workplace harassment is fundamentally an affront to the victim's dignity and personality interests.[47]A move towards criminalizing coerced sexual intercourse in the workplace and the academy suggests that the exploitation of power to induce sexual submission may further constitute a violation of the fundamental right to human dignity.

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[43] *Id.*

[44] *Id.*

[45] *See* WESTEN, *supra* note 40, at 149 (linking between the dignitary harm and the right to sexual integrity). *See also infra* Part II.D.4 (comparing and contrasting the models, for further discussion of the right to sexual integrity and the counter-argument regarding the right to sexual autonomy).

[46] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (noting that when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex); *cf.* Susanne Baer, *Dignity or Equality? Responses to Workplace Harassment in European, German and US Law, in* DIRECTIONS IN SEXUAL HARASSMENT LAW 582 (Catherine A. MacKinnon & Reva B. Siegel eds., 2003) (suggesting that in contrast with the prevailing American views on sexual harassment, European sexual harassment law has traditionally focused on the dignitary harm as distinguished from equality harms).

[47] *See* Eherenreich, *supra* note 4, at 3 (arguing that the excessive reliance on Title VII has also led scholars to overlook the fact that workplace harassment is fundamentally a dignitary harm).

3. What is the Wrong at the Basis of the Perpetrator's Conduct?

Establishing commonalities between sexual offenses and coerced submission and suggesting that comparable harms should result in comparable legal response cannot, in and of itself, provide the legal justifications for criminalization. The pivotal component focuses on the wrong underlying the perpetrator's conduct. Accordingly, since sex can be harmful even if it is not necessarily the result of criminally wrongful conduct,[48] the following discussion proceeds on the assumption that these harms must result from the perpetrator's wrongful conduct.

Generally speaking, every conduct that violates a person's right to remain free from sexual coercion is wrong; using another human being's body to fulfill one's sexual urges is inherently wrong because every person has a moral right to be treated as an end, rather than a means.[49]. We must further articulate, however, what the wrong at the basis of the perpetrator's conduct is, in the workplace and in the academy. Looking closely at the features of the superiors' conduct in these specific settings provides an account of what precisely is the wrong underlying their conduct; this will involve separately addressing the sexual abuse of supervisory power in the context of the workplace and the academy.

A variety of reasons support the argument that sexually coercive conduct in these settings should be criminalized. First, the sexual abuse of power by a person in a higher hierarchical position to compel submission on subordinates is inherently wrong. Undoubtedly, social inequalities and power disparities are an inevitable part of life. However, it should be regarded as wrong for superiors in the workplace and in the academy to abuse these circumstances to gain personal advantage. The wrong lies in obtaining sexual favors by intimidating subordinates into feeling that rejecting the sexual demands would result in adverse consequences. Moreover, abusing the subordinates' economic or professional dependence on those holding the power further supports the wrong underlying the

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[48] *See, e.g.*, Robin West, *Desperately Seeking a Moralist*, 29 HARV. J.L. & GENDER 1, 19–20 (2006) (arguing that consensual but unwanted and undesired sex may also be harmful and injurious, even where it does not necessarily result from wrongful conduct and coercion. West further argues that the conflation of the harms of consensual albeit unwanted sex with the harms of rape obfuscates the specific harms of unwelcome but consensual sex).

[49] *See generally* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (H.J. Paton trans., 1948) (1785) (articulating the classic account of the formula of humanity: the "categorical imperative"—namely, one must act in such a way that always treats humanity never simply as a means, but always at the same time as an end).

conduct. Consequently, creating this intimidating environment and abusing the subordinates' dependence should be considered to be illicit pressure.

Second, it is wrong to coerce subordinates to choose between two evils. By creating unbearable pressures, superiors place subordinates in an untenable position; they must risk one of their basic rights, either sacrificing their professional and economic status or sacrificing their right to remain free from sexual coercion. In addition, forcing subordinates to make these choices is wrong not only regarding the particular victim, but also because it has ramifications extending to third parties by establishing a dubious normative practice in which professional decisions may be exchanged for sexual favors.

Third, typically, perpetrators are supervisors or managers whom the employer has authorized to exercise professional power over subordinates.[50] When superiors abuse the power vested in them in their professional capacity for their personal purposes, they act outside the scope of their professional role, abusing the employers' trust and mandate. When employers entrust supervisors with professional power, they do so for the purpose of promoting professional goals, rather than promoting the supervisors' personal urges. Furthermore, the employment or academic status exchanged for sex does not belong to the supervisors, but to the employers. Thus, the supervisors would be violating their obligation to the organization if they made decisions based on sexual submission rather than on professional merits.

D. Policy Goals, Social Considerations, and the Criminalization Tariff

Before shifting our approach, it is necessary to examine the policy goals and social considerations that support criminalization and weigh the costs, benefits, and trade-offs. Every decision to impose criminal liability needs to be supported by both moral and policy choices that a community makes regarding the types of behavior it deems illicit. This determination cannot be solely legal; it requires the adoption of a moral view that holds that abusing power differentials and economic disparity in the workplace and in the academy should be criminally prohibited. This policy choice further provides the legal boundary that the community adopts between what is criminal and what is legitimate sexual conduct in these particular settings.

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[50] This excludes situations where the perpetrator is the employer himself, such as an owner of a company.

From a policy perspective, criminalization provides ample advantages. Adopting a criminal prohibition against economically and professionally coerced sex serves an educational purpose by acknowledging that it is a form of wrongful conduct that is harmful to others and that endangers the essential values of society. Criminally prohibiting coerced submission further places the right to be free from sexual coercion as a core societal value.[51] Through criminalization, society sends a legal and moral condemnation of this wrongful conduct. It conveys an instructional message to the public that society will not condone coercive behavior in general, and in the workplace and in the academy in particular, and is willing to stigmatize perpetrators by using the gravest form of regulation. This view provides a significant modification in cultural and social perceptions, and a crucial step toward promoting social change through legal reform.

Criminalization will also permit increased legal redress for coerced submission. As noted above, coerced submission victims often find themselves without a legal remedy under the current sexual harassment framework. [52] Since these coerced submission is an egregious and significant form of sexual harm, criminal penalties would help to underscore the fact that civil remedies are a weak and inefficient means of tackling the problem. Adopting criminal regulation would provide victims with a new avenue of redress by offering them the option to press criminal charges—an additional legal remedy rather than a replacement for the current regime altogether. Indeed, it should be stressed that this Article neither suggests that criminalization always provides the proper solution, nor recommends that every coerced submission case result in criminal penalties. Rather, it argues that criminal prohibition may be appropriate in egregious cases, and then only pursuant to the exercise of careful

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[51] *See generally* SCHULHOFER, *supra* note 27, at 276–82 (discussing the two conflicting aspects of the right to enjoy sexual autonomy: the positive right to seek sexual fulfillment, and the negative aspect, a right to be free from sexual coercion. Attempts to protect the positive side of sexual autonomy, however, can significantly undermine attempts to protect the right to remain free from sexual coercion). The proposal advanced in this Article, however, clearly favors the latter right by adopting strong protections to ensure that this right is not violated.

[52] *See, e.g.*, Holly D v. California Inst. of Tech., 339 F.3d 1158 (D.C. Cir. 2006); Lutkewitte v. Alberto Gonzales, 436 F.3d 248 (9th Cir. 2003). The victims in these cases lost their Title VII suits since they were unable to prove that the harassers' conduct amounted to "tangible employment action," namely, that a significant change in employment status was taken against them. *Holly D*, 339 F.3d 1158; *Lutkewitte*, 436 F.3d 248. This Article further discusses these cases in more detail in Part III.

prosecutorial discretion. Applying the criminal statute would not be required, instead, it provides an alternative tool that may be implemented when the suitable circumstances are identified.

While criminalization provides abundant benefits, it never comes without a cost. Two main concerns may be raised with respect to unintended consequences. Foremost, some might argue that criminalization will weaken rather than empower victims—portraying them as helpless victims and perpetuating negative sex stereotypes.[53] Secondly, some might argue that criminalization is too blunt a tool to regulate this type of misconduct.[54] However, this Article contends that balancing the trade-offs with the benefits makes clear that providing victims with the option of pressing charges and resorting to the criminal justice system is a desirable solution to the problem of economically and professionally coerced sex. In addition, designing a suitable criminal model and properly and wisely applying it can alleviate these concerns.

Moreover, it should be noted that the problems that might arise from the prosecution of sexual coercion in the workplace and in the academy might be similar to the problems that typically characterize the prosecution of other sexual offenses, including rape cases. In both instances, there are typically no witnesses to the alleged events, and the parties provide contrasting accounts in a "he said, she said" swearing contest. Articulating an elaborate list of factors and circumstances that indicate whether a specific instance of sexual relations as induced by the abuse of power imbalances and disparities in positions, as the proposal advanced in Part IV suggests, offers an important tool for determining sexual coercion. Targeting these conditions therefore provides an important mechanism that ensures that only the appropriate and most suitable candidates are prosecuted.

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[53] *See, e.g.*, Noya Rimlat, *Stereotyping Women, Individualizing Harassment: The Dignitary Paradigm of Sexual Harassment Law: Between the Limits of Law and the Limits of Feminism*, 19 YALE J.L. & FEMINISM 391, 442–46 (discussing potential tension between feminist notions and provisions against sexual harassment).

[54] *See. e.g.*, SCHULHOFER, *supra* note 27, at 185–87 (advocating a number of non-criminal provisions to regulate sexual relations between supervisors and employees, instead of imposing criminal liability). He further argues that guidelines of this sort are much less intrusive than formal legal rules. *See id.* at 188–201. Schulhofer rejects criminal regulation in the context of educational institutions. *See id.*

II: ALTERNATIVE MODELS FOR CRIMINALIZATION

This Part explores the alternative models that could criminalize coerced intercourse in the workplace and in the academy. Proposing the adoption of a new sexual offense demands that we look closely at the doctrinal underpinnings of rape law. Current rape law is constructed around a two-pronged inquiry: force and lack of consent to engage in sex. Under traditional rape jurisprudence, as well as under current law in many jurisdictions, both elements should be established concurrently in order to secure a rape conviction.[55] Thus, cases amounting to nonconsensual sex can be criminalized only if the force requirement is met as well.[56] Moreover, the force element is narrowly defined, incorporating only actual physical force, and therefore legitimizing the use of many other non-physical, nonviolent forms of coercion.

Legal scholars, however, continually criticize the definition of rape. Most reformers propose dropping one or the other of these elements, defining rape solely in terms of one element.[57] While most reformers focus on lack of consent, others suggest expanding the legal definition of force to

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[55] *See generally* Joshua Dressler, *Where We Have Been and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 418–39 (1998) (discussing the basic requirements for rape conviction); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1094–132 (1986) (providing an elaborate discussion on the definition of rape under traditional rape jurisprudence); David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 355–60 (2000) (articulating the elements that need to be met to support a rape charge).

[56] Following proposals for rape law reform, some states have abandoned the two-pronged definition of rape and amended their rape laws, defining rape either in terms of force or in terms of lack of consent. However, even in states that define rape only in terms of force, the non-consent element still remains a part of the legal construction of the offense. This is done either by making consent an affirmative defense, or by incorporating it into the force element by focusing on the woman's resistance. Many cases illustrate that even in jurisdictions where non-consent is not an element of rape courts might still measure a woman's resistance against what she should have done in order to establish the force element. In New Jersey, for example, the offense of sexual assault is defined as: "the actor uses physical force or coercion." *See*, N.J. Stat. Ann. § 2c: 14-2 (West 2010). However, the court's decision in *M.T.S* incorporated the consent element by holding that physical force does not require proof of force in addition to that necessary for penetration, so long as the penetration was accomplished in the absence of what a reasonable person would believe to be affirmative and freely given permission. *See In re* M.T.S., 609 A.2d 1266, 1277 (N.J. 1992).

[57] *See generally* SCHULHOFER, *supra* note 27, at 17–98 (discussing statutory and judicial rape law reforms and various feminist approaches advocating alternative definitions of rape).

include more forms of nonviolent coercion.[58] Further, some reformers attempt to redefine rape according to the ever-evolving social norms of both sex and gender-based equality.[59]

At the outset, a preliminary remark is in order before discussing which model of criminalization may best fit the submission cases. Submission to unwanted sexual demands in the workplace and in the academy cuts across gender lines. As the cases discussed below demonstrate, both male as well as female victims endure this form of sexual coercion. Moreover, this sexual coercion in turn carries devastating effects that equally apply to both genders. It is therefore crucial that every model that advocates criminalizing the submission cases apply equally to both genders. The sexual abuse of power model that this Article offers successfully addresses this concern in two aspects; it acknowledges that abuse of power differentials and exploitation of position imbalances may be perpetrated by women, as well as by men. It further acknowledges that the victims of coerced sex may be men, as well as women, ensuring that the sexual abuse of power model advanced by this Article is gender-blind.[60]

A. Lack of Consent Model

Most reformers advocate defining rape solely in terms of nonconsensual sex and propose shifting the focus away from establishing physical compulsion to establishing the victim's lack of consent to engage in sexual relations (hereinafter: the "lack of consent model"). Further, they advocate acknowledging nonviolent forms of harm resulting from nonconsensual sex, including psychological, economic, professional, reputation and status harms, as well as the violation of the right to sexual

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[58] *Id.*

[59] RICHARD J. BONNIE ET AL., CRIMINAL LAW 342 (2d ed. 2004) (suggesting that "legislators and courts must weigh the policies favoring stable criminal norms . . . against arguments that support redefining the crime of rape in accordance with evolving [social] norms about sexuality and gender equality").

[60] While the gender blindness of the abuse of power model is a crucial component in the proposal, at times it may seem to the reader that the Article tends to heavily focus on the ramifications of the model on women. This focus must be understood in light of current social structures in which typically men hold greater power, including economic power, and enjoy privileged positions. The importance of the abuse of power model, however, lies in its potential to offer a gender-neutral construct for criminalizing the submission cases.

autonomy.[61] The question remains, however, when is consent truly genuine, and the result of free will and choice?

In general, cases illustrating lack of consent to sexual relationships may be separated into two groups. The first incorporates situations in which consent was absent altogether, with the victim never exhibiting it. Reformers focus on providing an objective external standard for determining where and when consent to sex was absent. The most prominent standards have been either the "No Means No"[62] or the "Affirmative Permission"[63] standard. In the paradigmatic nonconsensual case, the victim explicitly declined the perpetrator's sexual demands by expressing a verbal refusal; some reformers argue that such an explicit verbal refusal should be enough to meet the definition of rape.[64] Others critique this view, arguing that it ignores rape cases where the victim is silent and unable to exhibit refusal due to coercive pressures. These critics advocate the "Affirmative Permission" standard, arguing that the perpetrator should obtain the victim's affirmative consent prior to engaging in sex.[65]

Coerced submission, however, typically falls under the second, more challenging, and perhaps more controversial group, in which some form of consent was in fact expressed, but where that consent actually resulted from various forms of coercive circumstances, ranging from actual threats to harm to severe economic pressures. The key question therefore is whether these circumstances vitiate consent.[66]

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[61] *See* SCHULHOFER, *supra* note 27, at 99–113 (arguing that the right to sexual autonomy is the missing entitlement that rape law reform must acknowledge). *See also* WERTHEIMER, *supra* note16, at 102–18 (discussing the harms of unwanted sex).

[62] *See, e.g.*, SUSAN ESTRICH, REAL RAPE 41, 98 (1987) (arguing that a verbal refusal suffices to establish nonconsensual sex and thus support a rape conviction); Lynn Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 159 (1992) (arguing that once a victim had said "no," the perpetrator had been alerted to the lack of consent, and strict liability should apply).

[63] *See* SCHULHOFER, *supra* note 27, at 268–69, 271–73 (advocating the adoption of the "Affirmative Consent" standard as the controlling standard for determining consent to sex).

[64] *See generally* ESTRICH, *supra* note 52.

[65] *See generally* SCHULHOFER, *supra* note 27.

[66] This Article's discussion is confined only to coercion as a circumstance that taints consent. Incompetence and deception are two other potential circumstances in which consent might be tainted. These circumstances are irrelevant when considering

Looking closely at the distinctive features of the submission cases illustrates that the "Affirmative Permission" standard is a poor fit, as it fails to acknowledge that, under certain coercive pressures, an affirmative verbal "yes" does not necessarily indicate a genuine free will choice, but rather an economically coerced decision resulting from the power exerted over the victim. It further fails to take into account the previous sequence of events leading to the victim's "affirmative permission," as well as the background circumstances characterizing the unequal relations between the parties due to hierarchical differentials and economic disparities. Consequently, the "Affirmative Permission" standard validates the victim's "consent" even if it was given under coercive circumstances, failing to acknowledge that where disparities in powers are prominent what purports to be "consent" in fact resulted from supervisory abuse of power and thus should not validate the coercive conduct. The underlying result is that while this form of sexual coercion clearly warrants criminalization, the law does not typically recognize it as such. This feature is one of the lack of consent model's main drawbacks, demonstrating that the "affirmative permission" standard fails to provide a comprehensive conceptual basis for criminalizing the submission cases. Developing a better standard to fit the submission cases' features is a much-needed reform, one that Part IV proposes.

1. Contemporary Proposals to Criminalize Threats

Many reformers supporting the lack of consent model agree that threats to harm lie at the core of the coercive circumstances that invalidate the victim's consent to sex. Accordingly, they suggest criminalizing situations where the perpetrator threatens to harm a victim or to violate her rights, and the victim submitted. This Article uses the terms "lack of consent model" and "threat-based model" interchangeably to refer to these models. Two path-breaking works, *Unwanted Sex*[67] and *Consent to Sexual*

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criminalizing economically and professionally coerced sex, however, and discussing them in detail exceeds the scope of this article.

[67] SCHULHOFER, *supra* note 27. Schulhofer's model places the right to sexual autonomy at the center of his proposal for rape law reform. The sexual autonomy model is aimed at expanding the scope of the criminal prohibition beyond threats to inflict harm in some other professional and institutional settings beyond the workplace and the academic setting. These include, for example, sexual relations between mental therapists and their patients and between prison guards and inmates, or other cases in which the perpetrators hold legal authority to control others. However, in the workplace and in an academic setting, the sexual autonomy model that Schulhofer proposes does not expand the criminal prohibitions beyond threats to inflict harm or violate rights.

Relations,[68] provided a landmark contribution to contemporary reform, offering a conceptual framework that allows criminalizing coerced submission in the workplace and in the academy that resulted from threats.[69] Under the threat-based model that is developed in these works, distinguishing permissible from impermissible conduct is based upon establishing a causal link between a proposal to engage in sex and a detrimental employment decision. The following features characterize these reform proposals: first, situations amounting to threats, whether explicit or implicit, may be criminalized due to their inherent coerciveness.[70] Second, where threats are absent, and proposals are made to engage in sex in exchange for beneficial rather than detrimental employment decisions the prohibition does not apply, since typically "offers" are not coercive.[71] Third, where mere proposals to engage in sex are made, without linking them to any employment decisions, the prohibition also does not apply.[72] This model concludes that, in the latter cases, negating the consent is unjustified since it is not tainted by threats.[73] Consequently, all submission cases where the conditioning element is missing fall outside the scope of potential criminal regulation. This is true even where other features clearly indicate sexually coercive, albeit non-threatening conduct.

An additional feature characterizing the threat-based model lies in its failure to separately categorize the submission cases by providing an independent standard for criminalizing them, one that goes beyond the narrow definition of threats. By placing the threatening conduct at the center of the inquiry, the threat-based model fails to articulate the

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[68] WERTHEIMER, *supra* note 16.

[69] Proposals to criminalize threats start as early as the Model Penal Code's Gross Sexual Imposition provision. *See generally* MODEL PENAL CODE § 213.1(2) and commentaries at 301–13 (1980) (1962) (extending criminal liability to include threats to inflict various types of nonviolent harm). Susan Estrich follows this line by advocating criminalizing threats of a sexual nature. *See generally* Estrich, *supra* note 55, at 1120 (suggesting that rape law should prohibit extortion to secure sex to the same extent that the criminal law already prohibits extortion to secure money).

[70] SCHULHOFER, *supra* note 27, at 132–34, 280; WERTHEIMER, *supra* note 16, at 165–67.

[71] SCHULHOFER, *supra* note 27, at 166; WERTHEIMER, *supra* note 16, at 171–72.

[72] SCHULHOFER *supra* note 27 at 168–69; WERTHEIMER, *supra* note 16, at 188.

[73] SCHULHOFER, *supra* note 27, at 168–70, 280; WERTHEIMER, *supra* note 16, at 188–92.

underlying wrongful conduct embodied in all submission cases. In fact, making threats the focal point for addressing the perpetrator's wrongful conduct sometimes leads to reform proposals that do not clearly distinguish between threats that result in sexual submission and threats to inflict harm or to violate rights that did not result in submission.[74] This feature further masks the distinctive harms that result from submitting to unwanted sex. While the threat-based proposals offer some important advantages—acknowledging that threats to inflict nonviolent harm amount to sexual coercion, and therefore justify criminalization provides a significant step toward criminalizing more sexually abusive behaviors—these proposals also have some substantial shortcomings, which I will further elaborate on in the following Section.

B. Sexual Coercion Model

An alternative model suggests dropping the consent element from the rape definition and focusing instead on expanding the force element. Reformers who propose that rape be defined in terms of "force" advocate expanding the force definition to include various forms of coercion beyond the purely physical (hereinafter: the "sexual coercion" model).

Catherine MacKinnon, for example, suggests recognizing many forms of coercive pressures to engage in sex as one type of force.[75] MacKinnon argues that rape should be defined as "a physical attack of a sexual nature under coercive conditions, and inequalities are coercive conditions."[76] She further suggests that criminal law prohibit taking advantage of unequal social positions to coerce sex on a person who does not want it. While she advocates the broadening of meaning of coercion to include inequalities of power in social hierarchies, she also advocates consent being replaced with an "unwelcome-ness" standard.[77]

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[74] *See, e.g.*, Carrie N. Baker, *Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment*, 13 L. & INEQUALITY 213 (1994) (advocating criminalizing quid pro quo sexual harassment). These proposals to criminalize the former sexual harassment subcategory of "quid pro quo," without distinguishing between cases that resulted in submitting to unwanted sex and cases where the threats did not result in submission obfuscate the substantial differences between these types of conduct.

[75] For another view that expands the definition of force, see, e.g., WESTEN, *supra* note 40, at 184 (proposing to expand the notion of wrongful force to criminalize both wrongful threats as well as wrongful oppression).

[76] *See* MACKINNON, WOMEN'S LIVES, *supra* note 5, at 247.

[77] *Id.*

However, MacKinnon nowhere develops the practical implications of her innovative theoretical views by proposing a criminal statute that would clearly articulate the elements of the proposed offense, nor does she define the precise circumstances that indicate sexual coercion. To bridge this gap between theories and practice the law must provide a workable, distinguishing legal boundary between criminal conduct and conduct to be left outside the scope of criminal regulation. Proposals suggesting the expansion of the force element have been widely criticized for their failure to provide clear demarcation between criminal and legitimate sexual conduct.[78] Other commentators have argued that expanding the force definition to include more forms of coercive power negates women's sexual autonomy, and is "neither practically workable nor politically realistic."[79] This critique further contends that this overreaching expansion leads to over-criminalization, resulting in prohibiting too many legitimate sexual practices.[80] This Article will propose a criminal statute that would provide a persuasive response to this criticism in Part IV. In order to clearly articulate the coercive circumstances that may indicate sexual coercion and provide a legal boundary between criminal and legitimate conduct, the conditions that establish supervisory sexual abuse of power will be laid out in Part IV.

C. Reforms in Selected Jurisdictions

In light of the above theoretical models, it is important to evaluate how far these proposals have turned into practical reforms, examining the extent to which different jurisdictions have encompassed coercive impositions beyond the traditional force requirement. The core problem here is line drawing; namely, where should rape laws set the legal boundaries between pressures that amount to coercion and permissible pressures. In general, many current rape laws refuse to expand the crime of rape beyond force or threat of force to encompass other techniques of coercion. Courts typically have taken such statutory language as "by force" or "forcibly" as "barring any extension of the crime of rape to include other varieties of coercion, no matter how severe."[81]

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[78] *See generally* SCHULHOFER, *supra* note 27 at 82–98 (criticizing reform proposal that focuses on expanding the definition of force).

[79] *Id.* at 88.

[80] *Id.* at 277 (discussing examples of statutes that outlaw consensual sexual relations).

[81] *See generally* LAFAVE, *supra* note 23 , ch. 1 § 17.3(d) (coercion).

Various jurisdictions, however, were willing to amend their criminal provisions to incorporate some forms of coercive impositions beyond the traditional force requirement. State legislatures have adopted three general approaches in determining the types of pressures that meet the definition of coercion.[82] Some jurisdictions focus on threats to harm as the key circumstance that amounts to coercive conduct; these states either prohibit threats to retaliate including extortion,[83] or expand the scope of threats to include exposing the victim to public humiliation or disgrace.[84] Other jurisdictions, modeled after the Model Penal Code's gross sexual imposition provision,[85] employ a generalized standard such as rendering an individual of reasonable firmness incapable of resisting.[86]

A few jurisdictions have adopted separate provisions criminalizing instances of sexual extortion. Delaware, for example, opted for a specialized sexual extortion provision that covers a broad range of extortionate measures such as exposing secrets or harming another in health, business or reputation.[87] Texas is the only state which specifically criminalizes one form of sexual harassment by banning "quid pro quo" in the workplace.[88]

Other jurisdictions have criminalized sexual relations between victims and persons holding positions of power, authority and trust.[89]

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[82] Patricia Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 177–78 (1998).

[83] *See, e.g.*, FLA. STAT. ANN. § 794.011 (West 2010); MICH. COMP. LAWS ANN. § 750.520b (West 2010); N.H. REV. STAT. ANN. § 632-A:2 (2010); N.M. STAT. ANN. § 30-9-10 (West 2010); UTAH CODE ANN. § 76-5-406 (2010).

[84] *See, e.g.*, N.H. REV. STAT. ANN. § 632-A:1 (2010).

[85] MODEL PENAL CODE § 213.1(2)(a) (1962).

[86] CAL. PENAL CODE § 261 (West 2010); COLO. REV. STAT. ANN. §18-3-402 (West 2010); N.D. CENT. CODE § 12.1-20-04 (2010); OHIO REV. CODE ANN. § 2907.03 (LexisNexis 2010); 18 PA. CONS. STAT. ANN. § 3125 (2010); WYO. STAT. ANN. § 6-2-303 (2010).

[87] DEL. CODE ANN. tit 11, § 776 (2010) (criminalizing sexual extortion and specifying such threats as exposing secrets or harming another in various ways).

[88] TEX. PENAL CODE ANN. § 39.03(a)(3), (c) (Vernon 2009),.

[89] *See, e.g.*, CAL. PENAL CODE § 261 (West 2010); CONN. GEN. STAT. ANN. § 53a–71 (West 2010); FLA. STAT. ANN. § 794.011 (West 2010); MICH. COMP. LAWS. ANN. § 750.520b (West 2010); MINN. STAT. ANN. § 609.343 (West 2010); OHIO REV. CODE ANN. § 2907.03 (West 2010).

However, these jurisdictions significantly limit the extent of these provisions to include only situations in which the perpetrators exercise official power and hold legal control over the victims, such as prison guards over inmates or police officers over suspects. Under the above provisions, the abuse of positions of power, authority, and trust is considered an illegitimate inducement to sexual relations, regardless of the victim's consent. Pennsylvania provides an example of a jurisdiction that significantly expanded its definition of the phrase "forcible compulsion" as used in the offense of rape to also include moral, psychological or intellectual force used to compel a victim to engage in sexual intercourse against her will.[90] This seemingly broad expansion, however, has not reached sexual coercion in the workplace or in the academy. While courts are sometimes willing to expand the criminal prohibitions to include the exploitation of minors and other incompetent victims,[91] this provision has never been applied when the victims are competent adults.[92]

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[90] *See* 18 PA. CONS. STAT. ANN. § 3121 (West 2010); *see also* Commonwealth v. Rhodes, 510 A.2d 1217, 1226 (Pa. 1986), holding that:

> [the] degree of force involved in rape . . . is defined, not in terms of the physical injury to the victim, but in terms of the effect it has on the victim's volition. Accordingly, the 'force necessary to support convictions for rape . . . need only be such as to establish lack of consent and to induce a woman to submit without additional resistance . . . . The degree of force required to constitute rape . . . is relative and depends upon the facts and particular circumstances of the case' . . . . [Such a determination is based on] the totality of the circumstances that have been presented to the fact finder. Significant factors to be weighed in that determination would include the respective ages of the victim and the accused, the respective mental and physical conditions of the victim and the accused, the atmosphere and physical setting in which the incident was alleged to have taken place, the extent to which the accused may have been in a position of authority, domination or custodial control over the victim, and whether the victim was under duress. This list of possible factors is by no means exclusive.

Id.

[91] *See, e.g.*, Pennsylvania v. Smolko, 666 A.2d 672 (Pa. Super. Ct. 1995) (applying the expanded definition of "forcible compulsion" a case in which the victim was handicapped and unable to manifest his objection to the sexual acts coerced on him by his care provider). *See, also*, Commonwealth. v. Meadows, 553 A. 2d 1006, 1113 (Pa. Super. Ct. 1989) (holding in a rape case of a fifteen-year-old deaf-mute victim, that psychological coercion existed and that this coercion was sufficient to meet the requirement of forcible compulsion).

[92] It should also be noted that the *Rhodes* decision and the phrase "moral, psychological or intellectual force" are typically construed narrowly in Pennsylvania courts.

Considering the scope of these reforms demonstrates that while many legislatures have expanded their criminal provisions to include additional forms of coercive pressures, coerced sexual intercourse in the workplace and in the academy generally remains un-criminalized. Jurisdictions that acknowledge that sexual abuse of power in certain professional and institutional relations justifies criminalization limit the scope of this position to circumstances in which authoritative and official power is exercised over the victims, such as in the prison context. They refuse, however, to expand these provisions to include sexual abuse of power in cases where the victims are competent adults in the workplace or in the academy. [93] The reasoning behind the refusal to expand criminalization to additional settings where the victims are competent adults rests on the assumption that these victims are able to make their own sexual choices regarding when and with whom they engage in sexual relations. Moreover, there is a general agreement amongst the various jurisdictions that submission resulting from economic coercion should not constitute a sexual offense.[94] Legislatures, as well as legal scholars, have explicitly refused to recognize as criminal conduct situations in which the compulsion used was of an economic nature, or where the harm was professionally-based, such as in the educational context, preferring to view these situations as merely one form of civil sexual harassment.

The proposal that this Article advances therefore offers an innovative approach in two respects: first, it challenges common views by arguing that submission induced by coercive impositions, including economic pressures, that occurs in the workplace and in the academy should be recognized as a criminal offense. Second, it offers the practical

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For instance, in Commonwealth v. Titus, 556 A. 2d 425, 429 (Pa. Super. Ct. 1989), the court held that the mere fact of parent/child relationship, without more, does not establish the requirement of "moral, psychological or intellectual force," and reversed the defendant's conviction of raping his 13-year-old daughter. The court distinguished the case at bar from Rhodes, noting that the victim was not threatened by the defendant, the victim was not taken to a remote, unfamiliar location, and there was no evidence that the victim or other family members had been abused by the defendant in the past. *Id.*

[93] *See, e.g.*, Rhode Island v. DiPetrillo, 922 A.2d 124 (R.I. 2007) (refusing to extend the coercion and the abuse of power rationales to the workplace and holding that the implied threat construction which was adopted when a police officer abuses his power cannot extend to the case of coerced sex at work).

[94] *See generally* Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 820–25 (1988) (discussing the refusal of contemporary jurisdictions to criminalize submission that is affected by economic coercion).

doctrinal implications of this position by proposing the expansion of the current criminal abuse of power provisions to include sexual abuse in the workplace and in the academy.

D. Comparing and Contrasting the Models

When comparing and contrasting the two models, it becomes clear that the sexual coercion model provides a more comprehensive conceptual basis for criminalizing a wider field of sexual abuse cases than the threat-based model does. The common thread between the two models lies in examining the notions of both coercion and free will and looking at the circumstances that taint individual choices. The core concept underlying every criminal regulation of sexual misconduct, under any contemporary criminal model, rests in determining that sex was unwanted and was a result of some element that tainted, marred, or sidestepped free will. Accordingly, reformers attempt to determine what types of pressures negate free will choices. Focusing on coercive circumstances and on genuine choices illustrates the close relationship between the lack of consent model and the sexual coercion model. Indeed, they represent the flip side of the same coin: the lack of consent model focuses on the positive aspect of sexual relations, consent, while the sexual coercion model focuses on the negative aspect of the relationship, sexual abuse and coercion. Accordingly, the practical differences between the models stem directly from considering whether the law focuses on securing the positive or the negative aspect of sexual relations. While the lack of consent model adopts a narrow definition of what qualifies as consent, the sexual coercion model adopts a broader definition of what qualifies as coercive circumstances. The following summarizes the seven considerations in choosing between the models.

1. The Types of Coercive Circumstances That Justify Criminalization

The models adopt different definitions for sexual coercion; the key difference between them lies in determining the types of impositions and pressures that amount to sexual coercion. In particular, the models adopt different views on the question of whether coercive pressures extend beyond threats to inflict harm. Determining the types of coercive pressures that qualify as legal coercion is a core problem in setting the legal boundaries between permissible and impermissible conduct. The Model Penal Code's criminal coercion provision illustrates a narrow construction of coercion; it only incorporates threats to inflict harm, typically of a

tangible nature.[95] The Model Penal Code however, does not specifically define "sexual coercion," but rather defines "coercion" in general, leaving unresolved the question of which types of impermissible pressures amount to sexual coercion. While many reformers agree that threats to inflict harm amount to coercive circumstances that invalidate consent, there is substantial controversy over the precise types of pressures, beyond threats, that add up to sexual coercion.[96]

The threat-based model adopts the Model Penal Code's narrow definition of criminal coercion in setting the legal boundary for sexual coercion. Under the threat-based model, only threats to harm or to violate rights amount to sexual coercion and justify criminalization. This model refuses to criminalize coercive circumstances beyond actual threats, and holds that subtle and less overt pressures fail to meet the sexual coercion definition. Stephen Schulhofer, for example, suggests that "[c]riminal law is not always the best tool of regulation, however; civil liability standards and private workplace norms are often better means of protecting sexual autonomy, especially in the absence of illegitimate threats."[97]

In addition, adopting a threat-based model brings earlier sexual harassment standards into the criminal law context. It does so by drawing the legal boundary between coercive and non-coercive conduct on threats, similar to the way sexual harassment litigation previously distinguished between quid pro quo and hostile environment. However, this distinction is no longer the controlling standard in sexual harassment litigation. Likewise, this Article suggests the adoption of a separate standard to fit the criminal law arena by developing a non threat-based legal boundary for

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[95] *See* MODEL PENAL CODE § 212.5 (1962) ("(1) Offense Defined. A person is guilty of criminal coercion if, with purpose unlawfully to restrict another's freedom of action to his detriment, he threatens to: (a) commit any criminal offense; or (b) accuse anyone of a criminal offense; or (c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or (d) take or withhold action as an official, or cause an official to take or withhold action.").

[96] *See generally* WERTHEIMER, *supra* note 16, at 189–92 (discussing the effects of economic pressure and inequality on consent to sexual relations, and arguing that it is a mistake to think that difficult circumstances and inequalities should be regarded as invalidating consent); SCHULHOFER, *supra* note 27, at 161–67 (arguing that an approach that views economic pressures on subordinates and fear of retaliation as coercion poses a risk to sexual autonomy).

[97] *See* SCHULHOFER, *supra* note 27, at 112.

determining sexual coercion in the workplace and in the academic setting, one that takes into account criminal law principles.

The sexual coercion model, in contrast, acknowledges that a more realistic definition of sexual coercion incorporates other forms of pressure, extending beyond the types of threats acknowledged in the Model Penal Code's narrow definition of coercion. The sexual coercion model expands the definition of sexual coercion to include more sexually coercive pressures beyond threats.

The sexual coercion model also questions the power of consent to legitimize sexually abusive behaviors. Rather than focusing on the particular moment when consent was manifested, the sexual coercion model probes the sequence of events leading up to that consent, examining the background conditions and the constrained economic and professional choices resulting in the victim's submission. Consequently, it poses that these conditions amount to coercive circumstances that justify imposing criminal liability. Rather than scrutinizing the victim's response to the sexual misconduct, this model focuses instead on the perpetrator's wrongful conduct.

Moreover, the sexual coercion model expands the scope of criminal regulation to include economically and professionally coerced sex, regardless of whether threats are established. Reformers supporting this model seek to criminalize more forms of sexual misconduct, refusing to legitimize many sexually coercive practices that the threat-based model validates.[98] The sexual coercion model focuses on the negative aspect of sexual relations, highlighting a person's right to remain free from sexual coercion. The model's main virtue lies in acknowledging that the sexual abuse of economic disparities and inequalities in power amounts, in and of itself, to coercive conditions, and deserves to be outlawed.[99] Therefore, establishing that the perpetrator abused his power to coerce submission under these circumstances suffices, without more, to determine sexual coercion. No further requirements, such as threats, need to be met in order to criminalize the sexual misconduct.

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[98] *See* MACKINNON, WOMEN'S LIVES, *supra* note 5, at 240–48 (advocating the adoption of a criminal remedy for victims of coerced sex in the workplace). MacKinnon argues that the law should criminalize coerced sex in the workplace to promote the equality and dignity of women. *Id.*

[99] *Id.* at 243, 247 (proposing that sexual assault reform responds to rape as a practice of inequality that occurs when a powerful person such as an employer forces a vulnerable person such as an employee into sex).

2. The Elements that Define the Offense

The two models use different elements in defining the offense of coercing sexual submission in the workplace and in an academic setting. For the lack of consent model, the most significant element is the existence or absence of consent. As noted above, defining the offense in terms of nonconsensual sex wrongly focuses on the victim's behavior and response to the perpetrator's conduct, rather than scrutinizing the perpetrator's conduct itself. For the sexual coercion model, however, establishing abuse of power is the key element that defines the offense of coerced sex in the workplace and in the academy. The model does not resort to investigating the victim's response to that abuse, nor does it consider the victim's consent to carry any legal relevance. The sexual coercion model shifts the focus away from scrutinizing the victim's behavior, towards scrutinizing the perpetrator's conduct. By defining the offense by terms of the perpetrator's culpable conduct, it better captures the wrong that underlies it.

The implications of this difference are clear; there is a profound disagreement both on the notion of consent itself, as well as on the circumstances negating consent. In particular, the models reach profoundly different answers to the question of whether economically and professionally coerced sex should invalidate expressed consent.[100] Due to substantial difficulties in agreeing upon the definition of consent and on the circumstances that vitiate it, defining the offense's elements without referring to the disputed notion of consent is a major virtue of the sexual coercion model. Defining the offense using separate elements, by articulating the type of conduct that amounts to sexual coercion, provides a clearer prohibition that avoids the consent controversy.

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[100] *See generally* SCHULHOFER, *supra* note 27 at 166 (contrasting offers and threats and arguing that "an offer to provide financial benefits in return for sex normally is not coercive if the woman won't put her rights at risk by turning the proposal down"); WERTHEIMER, *supra* note 16, at 167 (arguing that the single factor in determining whether a proposal is coercive is whether the perpetrator proposes to make the victim worse off than her "*moralized* baseline," and that if the answer is in the positive, then the proposal is coercive, but if he proposes to make her better off, compared to her moralized baseline, the offer is not coercive). Wertheimer further argues that beneficial offers made under coercive circumstances should not negate consent. *See also id.* at 189–92 (discussing the effects of economic pressure and inequality on sexual relations, and arguing that these circumstances should not invalidate consent). Wertheimer and Schulhofer both reject the idea of criminalizing economic pressures resulting in submission to unwanted sex in the workplace. *But cf.* MACKINNON, WOMEN'S LIVES, *supra* note 5, at 240–48 (advocating criminalizing coerced sex in the workplace).

3. Distinguishing Between the Public and the Private Spheres

Another feature distinguishing the models lies in whether they adopt the same legal standard for criminalizing sexual misconduct in public and in private settings. Most threat-based proposals do not distinguish between the different settings under which threats occur. Instead, they lump together threats to inflict harm within public settings—the workplace and the academic setting—and threats to inflict harm within private settings—relations between spouses and acquaintances.[101] Criminal regulation under the threat-based model also fails to fully capture the differences between the various settings; it assumes that consent to sex should be equally construed in the public as well as in private settings, based on a uniform standard for what qualifies as coercive conditions, and regardless of the background circumstances under which consent was expressed. This model refuses to take into account the fact that consent is a highly contextual notion, and whenever disparity in powers within the public sphere is a prominent feature it should be differently construed compared to private settings. Thus, this model fails to acknowledge the unique wrong inflicted by sexually coercive conduct in the workplace and in the academy.

It is interesting to note that even those who favor the threat-based model acknowledge its shortcomings when it is applied in the workplace and in the academic setting. Wertheimer, for example, doubted whether his own model was sufficient and suitable for these settings. Upon concluding that coercive and non-coercive situations can be distinguished based on whether threats were exhibited, he then adds a caveat regarding these settings: "there are certain contexts in which it is unacceptable for people to use their capacity to help another person in order to obtain sexual favors and some where it is acceptable (or less unacceptable), and that this is to be explained at least in part, in terms of the social consequences of regarding such arrangements as morally or legally permissible."[102] Wertheimer further concludes that "it may make sense to adopt a per se rule that prohibits quid-pro-quo sexual proposals in certain contexts, even when such proposals are genuine offers and are *not* best understood as coercive."[103]

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[101] *See, e.g.*, WERTHEIMER, *supra* note 16, at 178–86.

[102] *Id.* at 181.

[103] *Id.* at 182.

In contrast with the threat-based model, the sexual coercion model better captures the differences between the public and the private sphere and justifies adopting more vigorous protection against sexual coercion within the workplace and the academy. The sexual coercion model provides a separate legal standard for sexual relations that occur under professional and institutional settings, where imbalances in powers and positions are noticeable. There are a variety of reasons stemming from the supervisory abuse of power why sexually coercive conduct in these settings should be treated differently. As discussed earlier, sexually coercive conduct should be viewed as wrongful for a number of reasons. First, abusing disparities in power in public settings to obtain sexual favors from economically dependent and financially vulnerable subordinates is wrong. Second, forcing subordinates to choose between their professional and economic status and their right to remain free from sexual coercion is wrong as well. Lastly, , where the perpetrator is a supervisor authorized by the employer to exercise professional power, the power abused to coerce sex does not belong to the abuser; it is thus a supervisory abuse of authority. Consequently, the distinctive features of abuse of power in the workplace and in the academy differentiate sexual coercion in the public and in the private settings, requiring that we adopt different legal standards by proposing a different criminal model. This model must be developed especially for public settings.[104]

[104] The abuse of power model is potentially a broad construct, which might apply in various contexts. Discussing in more detail the broader ramifications of this model exceeds the scope of this article. In a nutshell, suffice it to say that many jurisdictions build upon a similar model in criminalizing different forms of sexual abuse of power and authority. However, criminalization is limited to situations where official capacity to command obedience is established, for example when the perpetrators are prison guards or police officers. Indeed, many jurisdictions adopted provisions criminalizing abuse of power whenever certain perpetrators abuse their position to induce the submission of inmates or suspects. *See, e.g.*, Rhode Island v. Burke, 522 A.2d 725 (R.I. 1987) (uniformed and armed police officer coerced sex on an alcoholic he picked in his police cruiser implicitly threatening to harm her if she refused the sexual demands). *See also* Ohio v. Cummings, No. 89AP-866, 1990 WL 40018, at *1 (Ohio Ct. App. April 5, 1990) (the victim was stopped by a police officer for drunk driving, and was induced by him to submit to unwanted sexual demands to avoid arrest). The abuse of power model has never been expanded to include victims who are competent adults, where there is no official power to command obedience. Criminalization therefore has not been expanded to the workplace or the academy. The novelty of the proposal advanced in this article is expanding the abuse of power model to these contexts as well.

4. The Different Values and Interests that the Models Promote

Another difference between the models is the values they protect and the interests they promote specifically, whether the model favors the promotion of a right to exercise sexual autonomy, or whether it prefers the promotion of a right to sexual integrity as well as a right to remain free from sexual coercion. To better capture the difference between these models regarding the rights they promote, we must briefly pause here to further elaborate on these two fundamental values. The right to enjoy personal autonomy with respect to when and with whom we engage in sexual relations is considered a fundamental right, and is part of our broader right to liberty. *Lawrence v. Texas*[105] best illustrates the role of sexual autonomy in consensual sexual acts is Autonomy, as a fundamental right protected under substantive due process, figures prominently under one of several interpretations of this decision. The Court endorsed a general principle under which consensual sexual behavior counts as a fundamental right for purposes of the due process clause. Interfering with consensual sexual behavior without a compelling justification is, therefore, unconstitutional.[106]

The key role that sexual autonomy plays in consensual sexual relations is also considered an accepted core premise in regulating sexual conduct. A more controversial question is whether it should play a similar role when nonconsensual sexual acts are at stake. Stephen Schulhofer's work provides an illustrative example of a model that places the right to sexual autonomy at the center of rape law reform. Schulhofer argues that the rape laws should focus on ensuring the right to sexual autonomy, and sexual offenses should be viewed as violations of this right.[107] Schulhofer contends:

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[105] Lawrence v. Texas, 539 U.S. 558 (2003).

[106] *See* Cass R. Sunstein, *Liberty after Lawrence*, 65 OHIO ST. L.J. 1059, 1061; *see also* Cass R. Sunstein, *What Did Lawrence Hold: Of Autonomy, Desuetude, Sexuality and Marriage*, 55 SUP. CT. REV. 27, 29–30 (2003) (suggesting several plausible readings on Lawrence). Sunstein however, suggests a narrower reading under which the Court in fact adopted a desuetude principle: under this reading a criminal law cannot be enforced if it has lost public support. The state cannot bring the criminal law to bear on consensual sexual behavior without a strong justification if enforcement of the relevant law can no longer claim to have significant moral support. *Id.* at 31.

[107] SCHULHOFER, *supra* note 27, at 274–82 (arguing that the right to enjoy sexual autonomy is the missing entitlement that rape law reform must acknowledge).

> Of all our rights and liberties, few are as important as our right to choose freely whether and when we become sexually intimate with another person. Yet, as far as the law is concerned, this right—the right to sexual autonomy—does not exist. Citizens simply do not have a legally recognized claim to protection for their freedom of sexual choice.[108]

Schulhofer suggests that criminal punishment is warranted only when a defendant knowingly engages in sexual intercourse with a victim under a threat of nonviolent harm. He contends, however, that only threats amount to coercion that would warrant criminal sanctions. When uncoerced consent has been given, he argues, "[T]he place for criminal sanctions is far smaller."[109] Schulhofer stresses the importance of the positive aspect of the sexual autonomy, and is wary of adopting criminal provisions that might put at risk the right to choose to engage in sexual acts. In his words:

> Respect for autonomy normally obliges us not to interfere with voluntary choices and not to criminalize consenting relationships between competent adults. Yet, the pressures that pervade some relationships may require legal intervention to protect the weaker party, even in the absence of explicit threats. Criminal law is not always the best tool of regulation, however; civil liability standards and private workplace norms are often better means of protecting sexual autonomy, especially in the absence of illegitimate threats.[110]

There is an inherent tension, however, between two different aspects of sexual autonomy—positive and negative—which often results in confusion in rape law reform. The positive aspect focuses on every human being's right to engage in sexual acts, provided that both parties are consenting and competent adults. The negative focuses on a person's right to be free from sexual coercion in order to ensure their autonomy and free choice regarding when and with whom they choose to engage in sex.[111] The problem stems from the contradiction between these aspects, since

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[108] *See id.* at 274.

[109] *See id.* at 280.

[110] *Id.* at 112.

[111] *Id.* at 276–82 (discussing the various aspects embodied in the right to sexual autonomy).

promoting one person's right to sexual autonomy may violate another person's right to remain free from sexual coercion, and vice versa. Reconciling these conflicting considerations is thus highly challenging, and the models clearly vary on which right they better secure.

Most proposals of contemporary scholars favor the promotion of victims' rights to sexual autonomy.[112] This liberal right stands at the core of the threat-based model, which is wary of violating a person's right to engage in sex with others.[113] Thus, it adopts strong protections ensuring the positive aspect of this right by emphasizing that criminal law should refrain from regulating sexual conduct between competent, consenting individuals.[114] In particular, it refuses to criminalize coerced sexual relations in the workplace and in an academic setting whenever threats to harm are lacking.[115] The main drawback in this model, however, is that in favoring the positive aspect of the right to sexual autonomy, it fails to adequately protect the negative aspect of this right. It does not afford the much needed protection of victims' rights to remain free from sexual coercion and to enjoy the fundamental right to sexual integrity. The perpetrator's right to enjoy sexual autonomy often prevails at the expense of the victim's right to remain free of sexual coercion and to enjoy a right to sexual integrity.

In contrast, the sexual coercion model seeks to protect the right to sexual integrity and the right to remain free from sexual coercion. Under the sexual coercion model, a prohibition that focuses on sexual autonomy

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[112] *See, e.g., id.* at 99–113, 168–70 (advancing a lack of consent model that favors the promotion of sexual autonomy); WERTHEIMER, *supra* note 16, at 189–92 (arguing that the law should not adopt provisions that may violate victims' rights to enjoy autonomous sexual choices).

[113] *See* SCHULHOFER, *supra* note 27, at 184 (suggesting that a formal law banning—and perhaps even criminalizing—sex between supervisors and their subordinates would avoid the problems but at a high cost, and that the harm of unwanted sexual intimacy is extremely serious but freedom to pursue mutually desired relationships is important as well).

[114] *Id.* at 112 (arguing that "[r]espect for autonomy normally obliges us not to interfere with voluntary choices . . . and not to criminalize consenting relationships between competent adults",that "criminal law is not always the best tool of regulation," and that "civil liability standards and private workplace norms are often better means of protecting sexual autonomy, especially in the absence of illegitimate threats").

[115] *Id.* at 186 (noting that absent threats to harm the employee if she refuses to submit to the superior's sexual demands, "the discomfort resulting from 'hostile environment' sexual harassment ordinarily would warrant only civil, not criminal, sanctions").

tries to satisfy both the goals of protection from harm and the promotion of sexual autonomy in contradictory ways. Focusing on the right to sexual autonomy will simply not accomplish the goals of promoting a right to remain free from sexual coercion as well as a right to sexual integrity. It is bound to fail to accomplish both goals. The sexual coercion model therefore favors the promotion of the negative aspect of autonomy. It better protects victims' rights to remain free from sexual coercion by narrating victims' stories and representing their interests. By acknowledging that disparities in power in the workplace and in the academy can constitute coercive conditions, this model extends more vigorous protection to ensure this right. Reformers supporting the sexual coercion model therefore advocate criminalizing more sexually coercive behaviors to better ensure a victim's right—male or female—to remain free of sexual coercion.[116] This Article therefore rejects the idea of focusing on the right to sexual autonomy as the core value that rape laws must promote. Instead, it suggests that the key value that must stand at the heart of every rape law reform is a right to remain free from sexual coercion as well as a right to sexual integrity.

An additional key issue to be considered is whose interest is better served under either one of the models. The answer to that varies according to different social and cultural inclinations and is motivated largely by gender politics. Supporters of the threat-based model frame the right to sexual autonomy in gender-neutral terms.[117] By contrast, supporters of the sexual coercion model argue that promoting the right to sexual autonomy in fact results in ignoring and misrepresenting the cultural, material and psychological conditions that constrain women's exercise of sexual agency.[118] They argue further that current rape laws purporting to promote women's rights to sexual autonomy actually focus on promoting the sexual autonomy of men, thereby preserving the male's interests and easy accessibility to women by exploiting their sexuality. Thus, they conclude that the law will never represent women's perspectives and experiences

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[116] MACKINNON, WOMEN'S LIVES, *supra* note 5, at 240–48 (advocating the adoption of criminal remedies when victims are coerced to engage in sex under conditions of inequality in power).

[117] *See, e.g.*, SCHULHOFER, *supra* note 27, at 102 (stating that "[s]exual autonomy . . . is an independent interest, indeed one of the most important interests for any free person").

[118] *See generally* Anne Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 1–6 (1998) (discussing different views regarding the assertion that "the prohibition against rape exists to protect female sexual autonomy").

until lawmakers thoroughly revise not only rape law prohibitions but also the liberal construct of autonomy itself.[119] While promoting a right to sexual autonomy is an important value under any model, we must carefully evaluate whose rights are in fact protected under this model, and at what cost. The sexual coercion model advanced in this Article offers broader protection to victims, both male and female, by ensuring that they remain free from sexual coercion.

5. Weakening or Empowering Victims of Coerced Submission

Another difference between the models rests on the implications of criminalizing coerced submission. In particular, the key concern is whether criminalization would result in strengthening and empowering victims or in weakening them. The threat-based model generally demands that the legal significance of the victims' expressed consent be negated due to threats.[120] Determining when valid consent is expressed requires a double-step inquiry: first, establishing a token of consent to sexual relations, and second, separately considering whether this form of expressed consent should be legally validated. Comparing women making choices under economically constrained conditions and institutional and professional pressures to incompetent victims, and treating their decisions similarly by invalidating their "consent," may prove problematic. Supporters of the threat-based model argue that invalidating women's choices whenever unequal conditions are present is paternalistic and would violate their right to exercise autonomous sexual choices.[121] The implications of invalidating women's consent to sex may undoubtedly raise concerns that criminalization would result in weakening victims.

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[119] *See, e.g.*, CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 175–78 (1989) (arguing that both law and culture define the crucial constraints of human will and consent from a male perspective). MacKinnon further calls for exposing the underlying structure of constraint and disparity and acknowledging the inequality of power that characterize women's conditions. *See also* Dorothy Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 387 (1993) (arguing that "[t]he concept of sexual autonomy must spring from a substantive vision of gender, race, and class relations that seeks liberation from all conditions of subordination").

[120] As noted earlier, the other two types of circumstances that may invalidate consent are deception and certain defects in the victims' competency to exhibit consent, due to mental disorders, cognitive impairments or age.

[121] *See, e.g.*, SCHULHOFER, *supra* note 27, at 281–82 (discussing the need to be wary of infringing on women's autonomous sexual choices).

In contrast, the sexual coercion model avoids invalidating the victims' choices simply because their consent to being sexually abused bears no legal significance. Since lack of consent is not part of the definition of the offense under this model, it does not demand negating the victims' consent. Determining that sexual abuse of power induced the victim's sexual submission to unwanted sexual acts requires only a single-step process; rather than first determining that consent is obtained and then vitiating its legal power, the sexual coercion model identifies the coercive pressures that amount to sexual abuse of power and proposes criminalizing this conduct. The sexual coercion model further poses that whenever disparity in power is prominent, trading on victims' sexuality represents a desperate exchange rather than an autonomous choice. The ramifications of this feature are clear: criminalizing coerced submission under the sexual coercion model will not result in weakening victims. It is, moreover, more likely to result in empowering victims in general, and women in particular, by limiting their exposure to coercive sexual practices in the workplace and in the academy.

6. Protecting Against Individual or Gender-Based Group Harms

An additional feature distinguishing the models rests on whether they address mainly individual harms or gender group-based harms. The threat-based model focuses on the personal aspects of the harm that the particular sexual offense inflicts on victims, while neglecting to address the specific context in which it actually occurs. Viewing coerced submission as a particular sexual offense inflicted on an individual results in narrowing the problem of sexual abuse of power to specific personal incidents of nonconsensual sex, obfuscating its broader implications and effects on women in the workplace and in the academy.

In contrast, the sexual coercion model better addresses broader aspects of the harm inflicted in the submission cases. Moreover, it also addresses the context in which the harm occurs, by stressing the implications of disparities in power and social hierarchies within the workplace and the academic setting. It further takes into consideration the unique features of sexual abuse of power and the coercive circumstances that victims—who are often women—endure in these settings. Consequently, by going beyond the victims' individual experiences and personal injuries, the model better addresses the need to remedy the group-based gender harms that coerced sex inflicts on women as members of a group. Thus, the sexual coercion model provides broader protection to victims' rights, particularly in promoting gender equality.

7. Responses to Counterarguments

Finally, any proposal to criminalize coerced submission is likely to face various types of criticism. Comparing and contrasting the models demands an exploration of which model provides a better response to any potential counterarguments against criminalization. Two potential criticisms have been addressed earlier: the concern that criminalization inadvertently disempowers victims and the worry that criminalizing the submission cases will obscure the gender group-based harms inflicted on victims. As noted above, this Article suggests that the sexual coercion model provides a sound response to these concerns. Another type of criticism, however, relates to concerns about over-criminalization, suggesting that criminalizing the submission cases fails to provide workable legal boundaries between what qualifies as criminal conduct and what should be left aside.

The threat-based model resolves this concern by adopting a narrow legal boundary that rests on whether threats are established. A closer look at the features of the submission cases, however, suggests that this model provides an under-inclusive remedy. The sexual coercion model, by contrast, sets clear boundaries between criminal and non-criminal conduct, without providing an over-inclusive response. It does so by limiting criminalization only to particular professional and institutional relations where imbalances in powers may be abused, such as the workplace and the academy.[122]

III: APPLYING THE MODELS

The following Section applies the above models to cases litigated under a sexual harassment cause of action. In the cases discussed below the

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[122] This Article focuses solely on criminalizing coerced submission in the workplace and in the academy based on an abuse of power model. The abuse of power model, however, offers a broader framework that may apply to various other settings as well. Elaborating on other forms of abuse of power is beyond the scope of this Article. This Article therefore chooses to focus on one particular example of sexual abuse of power: coerced sex in the workplace and in the academy mainly because applying the abuse of power model to these settings has never been thoroughly considered before. This Article argues that the abuse of power model squarely fits to criminalize harmful sexual conduct in the workplace and in the academy, a conduct that deserves to be outlawed. This Article further suggests that this model carries powerful potential to acknowledge the submission cases as criminal conduct, a potential that has not been fulfilled before.

courts examined whether imposing civil liability on employers was justified, but did not consider the applicability of criminal provisions since criminal charges were never brought before them. Consequently, the considerations they took into account substantially differ from those that would have been relevant for imposing criminal liability on the individual perpetrator. Revisiting sexual harassment cases through the lens of criminal law allows us to conjecture how these cases would have turned out were they actually adjudicated under criminal provisions. This hypothetical move allows the reader to consider whether the conduct in question justifies criminalization in light of the outcome under civil remedies, as well as to weigh which criminal model is better suited to criminalize these cases. Moreover, these scenarios are crucial for understanding the unique harms of coerced submission, which is particularly important because criminal charges are never brought in these cases. However, one should always keep in mind that since criminalization was outside the scope of the courts' considerations, their actual holdings, under the Title VII framework, along with the reasoning supporting them, carry only limited relevance.

In what follows, this Article examines a total of fourteen submission cases in order to consider whether imposing criminal liability is justified. These cases are broken down into two categories which vary in their degree and amount of coercion, and in their similarities to other sexual offenses. In six of these cases, threats to inflict harm or to violate rights are established, whereas these threats are lacking in the remaining eight cases. While seven of these last eight cases contain features which indicate that the conduct in question was sexually coercive, the eighth case illustrates that these coercive features are lacking.

Breaking down the submission cases into two categories suggests a gradual approach to criminalization, moving from clear examples of sexual coercion to its less obvious and more subtle forms. Situations involving explicit and blatant threats are situated close to one end of this continuum, closer to rape offenses. Coercion is easily identified in these cases through nonviolent, yet explicit or implicit threats to cause harm. Victims in these cases establish that their supervisors made employment or academic decisions conditional to their sexual submission, and these cases were therefore formerly characterized as "quid pro quo" sexual harassment. Indeed, these cases may be plausible candidates for criminalization, based both on the threat-based model and on the sexual coercion model, as this Article will shortly demonstrate.

Moving farther down the continuum, we find the subtle and less overt cases of sexual coercion, where threats are absent and a causal link

between employment and academic decisions and sexual submission cannot be established. Here, coercion takes a different form and is mainly economic or professional. Situations where threats are lacking may be further broken down into two additional subcategories. The first subcategory incorporates cases where the perpetrator did not obtain the victim's consent to sex, but also did not use physical force to compel her submission. The second group, the most complex and controversial scenarios, incorporates cases where either the superior offered to benefit the subordinate, for example proposing to promote her in exchange for sex, or merely proposed to engage in sex with her, without mentioning any employment or academic decision. In these cases, the subordinate submits, albeit without threats, because she felt pressured to do so, reasonably believing that she might lose her employment or academic position if she refused. While her account is subjective, it is well-grounded on objective evidence that clearly indicates that submission resulted from sexual coercion.

The threat-based model does not allow the criminalization of cases that fall into these latter two subcategories. Consequently, the threat-based model fails to provide a comprehensive legal boundary between abusive and non-abusive sexual conduct. The alternative sexual coercion model provides a better-suited framework for criminalizing coerced submission, a framework that targets supervisory abuse of power. Identifying the conditions and circumstances that establish that sexual acts resulted from supervisory abuse of power in the cases discussed below supports the conclusion that these cases should be criminalized. These conditions include the following seven factors: gross disparities in power; gross economic disparities; repeated and persistent demands for sex; the victim's fear and intimidation; the victim's passivity and inactiveness; examining who initiated the sexual encounter; and whether the sexual acts were violent in nature. The Article will further elaborate on each of these conditions in Part IV, while developing the proposed model in more detail.

A. Sexual Acts Obtained By Threats: Explicit Threats and Implicit Threats

Cases which incorporate threats to cause harm provide the clearest illustrations for sexual coercion. These cases may be broken down into two subcategories: the first includes explicit threats to inflict harm on victims. For example, in *Jin v. Metropolitan Life Insurance*, the victim's supervisor engaged in a pattern of egregious conduct towards her, which included touching her buttocks, breasts and legs on numerous occasions at the

office.[123] He further coerced her to attend weekly private meetings in his locked office, where he coerced her to engage in sexual acts, repeatedly threatening to fire her if she refused to do so.[124] In *Samedi v. Miami Dade County*, two county employees separately coerced the victim, a cleaning lady, to engage in numerous sexual acts with them during working hours.[125] They separately told her that they were her bosses, and that they would fire her if she did not submit to their demands.[126] In *Arnold v. The Answer Group* the victim's supervisor lured her to his trailer on several different occasions, instructing her to bring work-related files, and then coerced her to submit to sexual acts, while threatening to fire her if she refused.[127]

The second subcategory of cases involves implicit and tacit threats to cause harm if sexual demands are refused. For example, in *Terri Nichols v. Anthony Frank* the victim was a deaf-mute postal employee, whose supervisor was the only one at the workplace who could communicate with her through sign language.[128] During night shifts, the supervisor demanded that she perform sexual acts on him.[129] While in the beginning she declined, eventually she submitted, afraid she might lose her job if she refused.[130] This routine occurred over a period of approximately six

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[123] Jin v. Metro. Life Ins., 310 F.3d 84, 88 (2d Cir. 2002).

[124] *Id.* 88–89 at (noting further that in addition to verbally threatening to fire Jin if she did not accede to his sexual demands, the perpetrator had also threatened her with physical harm, by using a baseball bat).

[125] Samedi v. Miami-Dade County, 206 F. Supp. 2d 1213, 1215 (S.D. Fla. 2002).

[126] *Id. Samedi* was a non-English speaking Haitian woman temporarily employed in the trash division of the Waste Management Department. She alleged various incidents of heinous sexual assaults that the two perpetrators, who purported to be her supervisors, committed against her during work hours. *Id.*

[127] Arnold v. Answer Group, No. 07-1040, 2008 WL 2700295, at *3, *10 (W.D. La. July 10, 2008). The victim, who was employed as a security officer, claimed that her immediate supervisor started touching her in "sexually sensitive areas." *Id.* at *3. He then invited her to his trailer to watch a movie and physically coerced her to perform oral sex on him, threatening her with the loss of her job if she refused. *Id.* at *10. On two other occasions, he instructed her to bring work files to his trailer, and upon her entrance he coerced her to perform oral sex on him, under the threat of being fired. *Id.*

[128] Nichols v. Frank, 42 F.3d 503, 506 (9th Cir. 1994).

[129] *Id.* at 507.

[130] *Id.*

months.[131] When she could not stand the sexual demands any longer, she requested a leave of absence; in response, her supervisor demanded that she perform oral sex on him. She submitted for the last time, whereupon he approved her request.[132] In *Gary Showalter v. Allison Reed Group*, two male employees working at a jewelry firm alleged that the firm's general manager coerced them to engage in sex with him and his secretary, threatening them with loss of their jobs if they did not acquiesce to his demands.[133] Showalter established evidence that Smith, his manager, directly pressured him to join his sexual liaison with his secretary and when Showalter verbally refused, Smith told him that the secretary controlled the hiring and firing decisions at the firm and if he valued his job, he would follow his demands.[134] Furthermore, Smith made repeated references to Showalter regarding his extensive connections in the jewelry business.[135] Ultimately, Showalter submitted out of fear of losing his job.[136]

The decision in *Liu v. Striuli* provides an example of sexual coercion in the academy, where a foreign graduate student was coerced to engage in sex with a professor who held the power to expel her from school.[137] The victim, a native of Taiwan, was a student at Providence College, holding a student visa.[138] Striuli was a professor at that college and also the designated school official who handled the immigration affairs of international graduate students.[139] When Liu's visa expired, she was referred to Striuli.[140] He told her that he was the only college official who

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[131] *Id.*

[132] *Id.* (discussing the events that lead the victim to leave her job: after her husband filed for divorce, Nichols requested a leave of absence, and in response her supervisor demanded she perform oral sex on him, whereupon she submitted for the last time and he approved her request).

[133] Showalter v. Allison Reed Group, Inc., 767 F. Supp. 1205 (D.R.I. 1991), *aff'd sub non* Nenh Phetosomphone v. Allison Reed Group, 984 F.2d 4 (1st Cir. 1993).

[134] *Id.* at 1209.

[135] *Id.*

[136] *Id.*

[137] Liu v. Striuli, 36 F. Supp.2d 452 (D.R.I 1999).

[138] *Id.* at 458.

[139] *Id.* at 459.

[140] *Id.*

could help her with her visa problems and that in order to write a supporting letter to the Immigration and Naturalization Services, he would have to "know her better."[141] Liu kept refusing Striuli's advances, while he repeatedly told her that she could be deported because of her illegal status.[142] She alleged that when she came to his apartment one night he raped her and then threatened to have her expelled from school if she reported the event.[143] Liu further alleged that Striuli raped her on many other occasions, and that she never willingly engaged in any sexual acts with him.[144]

The courts in these cases acknowledge that implicit threats also meet the definition of making employment and academic decisions conditional on sexual submission. They stress that typically, supervisors obtain sexual submission through subtle techniques and attenuated expressions, rather than through overtly explicit threats.

Revisiting these cases through the lens of criminal law illustrates that the perpetrators' conduct clearly justifies imposing criminal liability. Furthermore, the cases demonstrate that criminalization could be based on either one of the alternative models. The threat-based model allows criminalizing these cases since the victims were able to establish that overt threats to harm them resulted in their submission, and that their supervisors explicitly made employment decisions conditional to their submission. This Article suggests, however, that criminalizing these cases may also be based on the sexual coercion model, which is better suited to capture the perpetrator's wrongful conduct, clearly underlying the coercive features embodied in this conduct. The cases share the seven features discussed above, which indicate that sex was coerced on the victims through supervisory sexual abuse of power. First, the relationship between the parties illustrates stark disparities and imbalances in power due to the hierarchical position the supervisors had over the subordinates. The supervisors held the professional power to directly affect and control the subordinates' employment status, and explicitly indicated their willingness to use this powerful position if the victims refused their sexual demands. Second, due to gross economic differentials, the victims were economically vulnerable and financially dependent on their jobs, as well as on their

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[141] *Id.*

[142] *Id.*

[143] *Id.* at 460.

[144] *Id.* at 461.

supervisors. Third, the perpetrators' conduct illustrates persistent and repeated demands for sex lasting over a significant period of time, which amount to coercive pressure. Fourth, the victims remained passive and motionless in response to the sexual acts, clearly indicating by their behavior that they did not want to participate in these activities. Fifth, the victims established evidence that they were intimidated by their supervisors' conduct, fearing the loss of their jobs. Sixth, various other forms of unwanted sexual advances and touching of a sexual nature such as kissing, hugging and touching sexual organs preceded the sexual submission. Finally, some of the sexual acts were violent in nature, such as the encounter in the *Jin* case, where the supervisor threatened physical harm with a baseball bat, and pushed and bit the victim.[145]

The above cases illuminate various other features provided by the sexual coercion model; the *Liu* case illustrates that the same justifications for criminalizing coerced submission in the workplace apply equally in the academy. In both settings, a person having the capacity to affect and control the subordinate's employment or academic status coerces her to engage in sex with him in exchange for retaining her current professional/academic position. These similar features call for adopting the sexual coercion model as a basis for criminalizing coerced submission both in the workplace and in the academy.

The *Showalter* case illustrates that the sexual coercion model provides a gender-blind basis for criminalization. While many cases involve female victims whose supervisors took advantage of their economic vulnerability, Showalter was an economically vulnerable male whose manager abused his unique economic dependence on the job, knowing that he desperately relied on it to provide medical insurance for his sick child.[146] Such abuse of a powerful position justifies criminalizing economically coerced sex regardless of the perpetrator's or the victim's gender.

Most importantly, the courts' own language and rhetoric supports applying the sexual coercion model to these cases. The *Jin* court, for example, refers to requiring the subordinate to engage in unwanted sexual acts as coercion resulting from abuse of power.[147] Moreover, the *Jin* court compares Jin's coerced submission to other cases where threats did not

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[145] Jin v. Metro. Life Ins. 310 F.3d 84, 88–89 (2d Cir. 2002).

[146] Showalter v. Allison Reed Group, Inc., 767 F. Supp. 1205, 1209 (D.R.I. 1991), *aff'd sub non* Nenh Phetosomphone v. Allison Reed Group, 984 F.2d 4 (1st Cir. 1993).

[147] *Jin*, 310 F.3d at 99.

result in submission, holding that an "employee who is coerced into satisfying a supervisor's sexual demands to keep her job may suffer a greater injury than the employee who is able to refuse those demands."[148] By the use of the term "sexual coercion" to describe the sexual acts, the *Jin* court acknowledges, in its language, the unique features of coerced submission. This rhetoric may open a door to separately categorize coerced submission's distinctive harms through the lens of criminal law by adopting the sexual coercion model.

The language of the *Nichols* case also brings to light some additional important features that support adopting this model. First, the *Nichols* court specifically addresses the unique harm that stems from sexual coercion in general, and the distinctive injuries sustained by a coerced submission victim in particular. Nichols sustained severe emotional harm resulting from her coerced submission: she became depressed, anxious and irritable, and she did not want to have sex with her husband, who filed for divorce. Moreover, she was diagnosed as having post-traumatic stress disorder and was granted federal disability benefits.[149]Addressing this personal psychological harm further illustrates that the similarities in the harm shared by coerced submission victims as well as by rape victims justify comparable legal treatment, and that adopting the sexual coercion model as a basis for criminalization best accomplishes this goal.

Second, the *Nichols* court refers to the supervisor's behavior as "forced sexual conduct."[150] The court's own language compares the perpetrator's conduct to other cases of sexual assaults, stating that "[n]othing is more destructive of human dignity than being forced to perform sexual acts against one's will."[151] Analogously, the *Showalter* court also uses the term "force" to address the nature of the sexual encounters, holding that "[t]he clear weight of the credible evidence indicates that the plaintiffs were forced to engage in intimate sexual contact

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[148] *Id.*

[149] Nichols v. Frank, 42 F.3d 503, 507 (9th Cir. 1994).

[150] *Id.* at 507 (describing the factual background underlying the holding and stating that "[a]s a result of the repeated forced sexual conduct with Francisco, Nichols became depressed, anxious and irritable"). The court further notes that Nichols performed the sexual acts on her supervisor "unwillingly." *Id.* at 513.

[151] *Id.* at 510.

as a condition of retaining their employment at [the firm]."[152] The court's repeated use of the term "forced sex" to address the nature of the sexual encounters further supports criminalizing this conduct based on the sexual coercion model.

Third, the *Nichols* court views coerced submission as conduct violating the victims' human dignity.[153] Viewing the harm in coerced submission through the lens of human dignity carries important implications for proposals to criminalize such conduct based on the sexual coercion model. Under this model, promoting the right to remain free from sexual coercion, as part of securing a broader right to human dignity, plays a significant role.[154]

B. Sexual Coercion Albeit the Lack of Threats

The second category incorporates cases where sex was proposed without threats and without mentioning any employment or academic decisions. However, other features of these cases demonstrate that sexually coercive conduct may justify criminalization. These cases further illustrate that threats are only one indication of sexual coercion; additional forms of pressure, mainly economically-based, may equally qualify as sexual coercion, based on establishing supervisory sexual abuse of power. Under the former distinctions of sexual harassment law, these cases fell under the "hostile environment" category. However, abandoning the threat-based distinctions under sexual harassment law suggests that they should be abandoned within criminal law as well. Furthermore, they should be replaced with alternative standards that better fit criminal law principles and considerations.

The threat-based model clearly does not fit these cases. Since threats cannot be established, the model does not enable criminalizing

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[152] Showalter v. Allison Reed Group, Inc., 767 F. Supp. 1205, 1212 (D.R.I. 1991), *aff'd sub non* Nenh Phetosomphone v. Allison Reed Group, 984 F.2d 4 (1st Cir. 1993).

[153] *Nichols*, 42 F.3d at 510.

[154] *See* Ehrenreich, *supra* note 4, at 16 (providing an elaborate discussion on sexual harassment as a violation of human dignity). In addition, sexual misconduct within the prison context provides an additional example for referring to sexual coercion as a violation of a right to human dignity. *See, e.g.*, Morris v. Eversley, 343 F. Supp.2d 234, 248 (S.D.N.Y. 2004) (describing how a female prisoner who was sexually assaulted by a corrections officer filed an action for damages). The judge, who was frustrated by the fact that the jury awarded a paltry award for the sexual assault, stated: "It is hard to imagine that Morris could be made whole for the damages she suffered, including the loss of her dignity, by a mere $500 or $1000 in compensatory damages." *Id.*

these cases, even when various other factors indicate that submission resulted from sexual abuse of power, and the case certainly justifies criminalization. This is one of the threat-based model's main drawbacks. Nevertheless, proposals for expanding criminal liability to include economically and professionally coerced sex in situations where threats were absent have not yet been fully developed. Consequently, despite their clearly coercive features, these cases remain outside the potential scope of criminal regulation. The cases in the non-threatening category may be further broken down into two subcategories, varying in the degree and the amount of sexual coercion involved.

1. Cases Resembling Rape and Sexual Assault

The first subcategory incorporates cases that share many similarities with rape and other sexual assaults. Here, the superior compelled the victim's submission without her consent, albeit without using physical force and without expressing threats to harm. The above mentioned *Meritor* case is the paradigm for this subcategory.[155] Most importantly, the *Meritor* Court itself voiced its opinion that "[r]espondent's allegations in this case . . . include not only pervasive harassment but also criminal conduct of the most serious nature."[156] However, the Title VII framework could not have provided the basis for elaborating upon the practical ramifications of the Court's own statements. This Article previously concluded Part I by arguing that the *Meritor* case justifies criminalization, based on the harms sustained by the victim, and resulting from the perpetrator's culpable conduct.[157] This Article now moves to consider which one of the criminal models discussed above could provide the conceptual basis for criminalizing this case.

Revisiting *Meritor* through the lens of criminal law illustrates that the threat-based model does not apply in such a scenario: the *Meritor* court distinguished between quid pro quo cases, where employment decisions were made conditional on sexual submission, and hostile environment cases, where a causal link between employment decisions and submission could not have been established.[158] Since *Meritor* clearly falls within the

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[155] For an elaborate description of the *Meritor* facts see *supra* Part I.A.

[156] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

[157] See discussion of the harm *supra* Part I.C.

[158] *Meritor*, 477 U.S. at 66 (Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by

latter category, it cannot be criminalized based on current threat-based reform proposals. Vinson never claimed that her supervisor threatened to fire her or to make any employment decisions based on her submission to his sexual demands. Moreover, *Meritor* did not involve the controversial distinction between threats to harm and offers to benefit, which is a common feature often suggested by reformers to mark the legal boundary between permissible and illegitimate conduct,[159] as the supervisor did not offer the victim any actions that would benefit her economically or professionally. His only proposal to Vinson was to engage in sex, leaving it open for her interpretation as to what might be the possible consequences if she refused his sexual demands. This purported "choice" placed her in an untenable position, in which she had to take a significant risk, believing that declining the sexual demands might result in retaliation and harmful employment actions.

The *Meritor* case therefore best illustrates that the threat-based model is ill suited for criminalization where various factors, other than threats, indicate that submission resulted from sexual coercion. Consequently, despite their sexually coercive features, cases such as *Meritor* are left outside the scope of potential criminal regulation by the threat-based model. Nevertheless, acknowledging the justifications for criminalizing *Meritor* calls for considering adopting a criminal model that would expand the definition of sexual coercion to include economic and professional coercion. Such a model would rest on establishing various factors indicating sexual coercion through supervisory sexual abuse of power.

At first glance, the *Meritor* court seemed to adopt a broad legal framework for what sorts of conduct qualify as sexual harassment by

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proving that discrimination based on sex has created a hostile or abusive work environment.").

[159] *See, e.g.*, SCHULHOFER, *supra* note 27, at 166 (contrasting offers and threats, and arguing that "an offer to provide financial benefits in return for sex normally is not coercive if the woman won't put her rights at risk by turning the proposal down"); WERTHEIMER, *supra* note 16, at 167 (arguing that the single factor in determining whether a proposal is coercive is whether the perpetrator proposes to make the victim worse off than her "*moralized* baseline." If the answer is in the positive, then the proposal is coercive. If, however, he proposes to make her better off, compared to her moralized baseline, the offer is not coercive). Wertheimer further argues that beneficial offers made under coercive circumstances should not negate consent. WERTHEIMER, *supra* note 16, at 189–92 (discussing the effects of economic pressure and inequality on sexual relations, arguing that these circumstances should not invalidate consent, and arguing that the law should not keep people from consenting to offers and economic transactions that would move them from an unfortunate situation to a better situation).

expanding the employer's liability to cases where threats were absent. However, the *Meritor* court refused to prohibit sexual relations between supervisors and subordinates whenever abuse of power resulting in coerced submission was established. It thus failed to adopt a comprehensive definition for sexual coercion in professional settings where disparity in power and economic differentials are prominent. Moreover, the Court adopted the unwelcome-ness requirement as the focus of the inquiry, placing on the victim the burden of proving that she did not want to engage in sex with her supervisor.[160] By insisting that the victim's conduct should indicate to her supervisor that his conduct is unwelcome, the *Meritor* court significantly narrowed the definition of sexual abuse of power. The implication of the unwelcome-ness requirement, is that if the victim fails to prove that the sex was unwelcome, the supervisor is free to repeatedly pressure her; if she acquiesces without protesting, he will not be liable for sexual harassment.[161] Requiring the victim to establish evidence that she did not welcome her supervisor's sexually abusive conduct provides one of the decision's main drawbacks.

The *Meritor* Court could have instead adopted a more realistic definition for sexual abuse of power within hierarchical relationships in the workplace. Under such a definition, establishing supervisory sexual abuse of power to compel submission would suffice, in and of itself, to demonstrate that the conduct was coercive. Had the Court ruled that sexual abuse of power qualifies as sexual coercion, regardless of whether the victim welcomed this conduct, it could have provided the practical basis for criminalization. Under this hypothetical view, determining that the superior's conduct was sexually coercive rests on a comprehensive inquiry into the circumstances, rather than on establishing the single threat element. Consequently, meeting the "sexual abuse of power" element in *Meritor* lies in establishing various factors that indicate sexual coercion: the parties' power differentials and economic disparities; the superior's

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[160] *See, e.g.*, Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1227, 1249 (1994) (criticizing the unwelcome-ness requirement in sexual harassment law, and suggesting that "[s]exual harassment is the only subcategory of American federal antidiscrimination law where the victim must prove that the discrimination was . . . unwelcome").

[161] See, SCHULHOFER, *supra* note 27, at 176 (noting that the Meritor court refused to rule that "sexual demands from a person in authority are inherently coercive"). Instead, the court put the burden on the employee to indicate by her conduct that the sexual advances are unwelcome. *Id.* Until she does, the supervisor remains free to ask, even repeatedly. *Id.* If fear for her job leads the subordinate to acquiesce without protesting, the boss's advances do not count as sexual harassment. *Id.*

capacity to control and affect the victim's employment status; the victim's economic vulnerability and financial dependence on the job; the persistent and repeated demands for sex, resulting in the victim's submission; the victim's intimidation and fear of losing her job; other forms of unwanted sexual advances preceding the sexual act; and the violent nature of some of the sexual encounters. Furthermore, meeting the definition of the "abuse of power" element should not depend on what the superior verbally told the victim. Rather, the coerciveness inquiry must focus on what his conduct tacitly signaled to the victim and on what was reasonable for her to infer under the circumstances. Exploring these circumstances illustrates that submission resulted from economic pressure and intimidation.

The following two decisions provide additional examples of situations that fall under this subcategory. In *Walton v. Johnson Services Inc.*, the victim was a pharmaceutical sales representative working under Mykytiuk's direct supervision.[162] After hosting a work-related dinner, he ordered her to follow him to his home, to recap the event.[163] Upon arrival, Mykytiuk discussed his marital problems with Walton, showed her his gun, jumped on her and tried to kiss her.[164] She claimed that she tried to push him away, and told him "no," but despite her efforts he physically entered her without her consent.[165] She further claimed that she fell into a state of shock, and that she believed he raped her again that night.[166] About a week later, he ordered her again to follow him to his apartment where he again raped her.[167] In *McPherson v. City of Waukegan* the victim was a clerical technician who claimed that her supervisor sexually harassed her for two years; the supervisor allegedly began by making offensive comments to her, and eventually sexually assaulted her.[168] She claimed that he called her to his office, closed the door, slid his hand under her shirt and touched her breast.[169] She asked him to stop, but he pushed her towards the wall behind

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[162] 347 F.3d 1272, 1275 (11th Cir. 2003).

[163] *Id.* at 1276.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] 379 F.3d 430 (7th Cir. 2004).

[169] *Id.* at 435.

the closed office door, and inserted his finger into her vagina.[170] She again asked him to stop but he continued until someone else entered his office.[171]

These two cases share many similarities with rape and sexual assault cases, where consent to sex was absent. However, since threats to harm were lacking, the sexually harassing nature of the offender's conduct could not have been criminalized under the threat-based model. The various factors identified earlier in *Meritor* as indications of coercion are of controlling importance in *Walton* and *McPherson* as well, illustrating that submission resulted from supervisory sexual abuse of power and may thus be criminalized under the sexual coercion model.

2. Other Cases

The second subcategory in the non-threatening group incorporates cases that seem less akin to rape and sexual assault cases. In these cases, the superior merely proposed to the victim to engage in sex without mentioning any employment or academic decisions, and the victim submitted. This subcategory involves the most complex cases regarding criminalization decisions, since the sexual coercion here is tacit and less easily identified. While sex in these cases may seem consensual at first glance, carefully considering the backdrop against which such purported "consent" was obtained illustrates that sex resulted from supervisory abuse of power. Undoubtedly, these cases are situated on the farther end of the coercion continuum. However, a closer look at them clarifies that sex was unwanted and economically or professionally coerced on the victim by a perpetrator holding a powerful position. The evidence in these cases demonstrates that, while the victim did not welcome the sexual relations, she acquiesced following persistent pressure in an effort to avoid what she perceived to be potential retaliation and repercussions.

The following cases are the paradigm examples in this subcategory. In *Holly D. v. California Institute of Technology*, the victim was a 47-year-old single mother who suffered from depression, as well as from serious financial difficulties.[172] She began working at Caltech for one professor, and then was promoted to work under Professor Wiggins, a transfer entailing a six months probationary period.[173] She claimed that

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[170] *Id.*

[171] *Id.*

[172] 339 F.3d 1158, 1162 (9th Cir. 2003).

[173] *Id.*

during that period, Wiggins made sexual advances towards her, including references to his sexual preferences, and that she showed him that she was not interested in them.[174] When she received a negative performance evaluation, she believed it to be connected to her failure to respond positively to these advances.[175] Eventually, she decided that if Wiggins were to request that she engage in sex with him, she would have to submit in order to keep her job.[176] When Wiggins next asked her to perform oral sex on him, she replied "yes," and from that date on, they engaged in various sexual acts during working hours.[177] Holly D. claimed that after a year-long sexual relationship, she received a positive performance evaluation.[178] She contended that she could mitigate potentially job-threatening criticism by performing sexual acts, thus claiming that she was coerced to commence and maintain the sexual relationship in order to keep her employment.[179] Holly D. lost her sexual harassment suit after the court held that she failed to establish the causal link between her continued employment and her sexual submission.[180]

In *Lutkewitte v. Gonzales* the victim was working as a computer specialist for the FBI, while Ehemann was her direct supervisor.[181] He first began making sexual overtures towards her, asking Lutkewitte to go out to dinner when they attended out of town conferences, behaving flirtatiously and telling her, "don't worry about getting your [promotion to GS-]13, . . . and if you stick with me you'll go higher."[182] He later ordered her to assist him during an inspection in New York, where he pressured her into undesired sexual intimacies, which she acquiesced to because she thought she would lose her job if she told him to stop.[183] After that event,

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[174] *Id.* at 1163.

[175] *Id.*

[176] *Id.* at 1163–64.

[177] *Id.* at 1164.

[178] *Id.*

[179] *Id.* 1162.

[180] *Id.* at 1175.

[181] 436 F.3d 248, 255(D.C. Cir. 2006).

[182] *Id.* at 256.

[183] *Id.*

Ehemann's pursuit of Lutkewitte included rubbing up against her and kissing her during work hours.[184] She never told him to stop because she feared losing her job, but she did try to discourage him and to avoid him.[185] The FBI launched an investigation, which concluded that Lutkewitte "was placed in the untenable position of having to rebuff his advances and risk retaliation (although the evidence does not reflect that any had been explicitly threatened by Ehemann), or to acquiesce to them, to the detriment of her personal well being."[186] However, the court rejected Lutkewitte's sexual harassment suit against her employer, holding that she failed to establish that her supervisor made employment decisions conditional upon her sexual submission; moreover, the court held that the evidence did not show that the supervisor threatened her with a loss of her job, demotion or other tangible employment action if she did not submit to his advances.[187]

The common thread between these cases is that the victims were able to establish neither explicit nor implicit threats of harm to them if they refused their supervisors' sexual demands. Neither of the victims claimed that her supervisor told her that employment decisions were conditioned on her sexual submission. Consequently, these cases could not have been criminalized under the threat-based model, which does not apply whenever the victims are unable to establish a causal link between their employment or academic status and their sexual submission. As noted earlier, this feature is one of the threat-based model's significant shortcomings; these cases illustrate that various factors that indicate sexual coercion were clearly established even without overt threats. Looking closely at these coercive conditions further demonstrates that these cases in fact justify criminalization, as the victim's submission resulted from supervisory abuse of power. Nevertheless, the lack of a comprehensive model allowing for criminalization suggests a legal gap that needs to be filled; indeed, developing an alternative basis for criminal regulation by proposing a specialized criminal statute may serve this very need.

The nature of the hierarchical relationship between the parties plays a significant role when considering criminalizing cases falling under this subcategory. Under the criminal model advocated by this Article, the

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[184] *Id.*

[185] *Id.*

[186] *Id.* (internal quotations omitted).

[187] *Id.* at 253.

cumulative effect of the power emanating from the hierarchical relationship and the abuse of such power suffices to determine that submission resulted from sexual coercion. Consequently, this Article suggests that an alternative criminal model should focus on the perpetrator's wrongful conduct, by examining various conditions indicating that he abused his supervisory power to coerce sex on his subordinate. Indeed, the *Holly D.* and *Lutkewitte* cases illustrate these five factors. First, gross imbalance and disparity in powers characterize the relationships between the parties. In both cases, the supervisors abused the professional authority granted to them by their employers to obtain personal sexual favors for themselves. Second, the economic differentials between the parties highlight both the victims' economic dependency on their jobs and on their supervisors, as well as their financial vulnerability. Third, repeated demands for sex and persistent pressures are another indication that sex was economically and professionally coerced on the victims. Fourth, both victims testified that they feared losing their jobs if they refused to submit. Fifth, in both cases, various other forms of unwanted sexual advances and touching of a sexual nature preceded the actual sexual acts.

Identifying the coercive conditions in these cases further supports the conclusion that the supervisory abuse of power amounts to sexual coercion, and therefore deserves to be outlawed by criminal law.[188] *Cobb v. Community Action Council for Lexington-Fayette*[189] illustrates another case that justifies criminalization. The victim, Cobb, was employed as an administrative assistant and claimed that Hinton, her supervisor, touched her inappropriately and coerced her to perform oral sex on him between six and twelve times.[190] Cobb claimed that Hinton "frequently made comments about the power that he wielded and about how he could do whatever he wanted . . . ."[191] Moreover, she contended that Hinton threatened her not to tell anyone about the sexual acts, or else she would lose everything, including her husband.[192] In this case, the supervisor did not make any threats to take harmful employment decisions prior to the victim's

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[188] Interestingly, the Lutkewitte court itself uses the term "forced submission" while describing the sexual acts that the victim endured. *See Lutkewitte*, 436 F.3d at 250.

[189] No. 2006-CA-002457-MR, 2008 WL 1087122 (Ky. App. April 11, 2008).

[190] *Id.* at *1.

[191] *Id.*

[192] *Id.*

submission. However, after she submitted, he threatened to harm her if she complained to anyone about his conduct. This case could not have been criminalized under the threat-based model, since a causal link between the submission and any employment decision could not have been established. On the other hand, it could have been a plausible candidate for criminalization under the sexual coercion model, based on the various factors indicating abuse of power.

C. The Ramifications of Beneficial Actions

The following case, *Tobin v. Irwin Mortgage Corp.*, provides another compelling example falling under the second subcategory.[193] It further illustrates that the problematic distinction between threats to harm and offers to provide benefits does not work in distinguishing between coercive and non-coercive sexual conduct.[194] In this case the victim, Tobin, worked under Tebelman's supervision as a loan officer, later transferring into an operational position.[195] Tobin and Tebelman, together with other employees, attended an out-of-town conference, where both drank heavily at night.[196] Tobin claimed that after they went to a nightclub, Tebelman began his sexual advances by touching and groping her.[197] She said that she politely declined his advances, but he was persuasive and persistent in continuing to grope her.[198] Eventually, she gave in, because she felt she could no longer say no, and she went with him to his room and had sex with him.[199] She testified that she stopped resisting because she was afraid of the situation, and "it was all getting out of control and I was afraid."[200]

Tobin lost her sexual harassment suit after the court found that Tebelman did not explicitly or implicitly threaten to harm her.[201]

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[193] No. 03 C 4305, 2006 WL 861258 (N.D. Ill. March 8, 2006).

[194] *See generally supra* note 122 and accompanying text for a discussion of the distinction between threats and offers.

[195] *Tobin*, 2006 WL 861258, at *1.

[196] *Id.* at *2.

[197] *Id.*

[198] *Id.*

[199] *Id.* at *2-3.

[200] *Id.* at *3.

[201] *See id.* at *10-11.

Furthermore, the court stated that "the evidence suggests that Tebelman may have treated the plaintiff more favorably after the harassment," and that Tebelman lobbied for plaintiff to receive a generous raise in her salary, and allowed her to work from home, which was a uniquely favorable arrangement for her.[202] The court holds that Tobin's supervisor made no threats to harm her; in fact, rather than suffering harm, Tobin might have benefited economically from the sexual relationship with her supervisor.[203]

The *Tobin* case highlights two points with respect to choosing between the alternative criminal models. First, it illustrates the ramifications of relying on the flawed distinction between threats to harm the victim and offers to benefit her. This distinction is premised on the assumption that harm is measured solely in economic terms, and refuses to acknowledge that economically beneficial offers may harm the victim in other respects and violate other rights to which she is entitled. Moreover, it is based on a narrow construction of rights—one that acknowledges only tangible rights while ignoring personal ones. The *Tobin* case thus illustrates that distinguishing between threats and offers proves ill suited in providing an adequate demarcation between legitimate and illicit sexual conduct.

Second, the *Tobin* case illustrates the importance of focusing on the supervisor's wrongdoing rather than on the victim's response. The court points to several factors that indicate that Tobin actually welcomed her supervisor's advances. The court places heavy emphasis on the fact that the sexual encounter was a one-time event, which occurred at an out-of-town conference, after both parties had been drinking heavily. Moreover, the court states that the plaintiff herself described her supervisor's advances as "being real friendly," "real sweet," and "very persuasive," and she submitted after he continued to pursue her after she politely said no several times and "scooted away."[204]

While the *Tobin* case could not have been criminalized under the threat-based model, revisiting its facts illustrates that it justifies imposing criminal liability on the supervisor, who abused his power to coerce sex on his subordinate. The same conditions articulated earlier in this Article indicate that the abuse of power in this case amounted to sexual coercion. These include the gross imbalance in power and the capacity to affect and control Tobin's employment, Tobin's economic dependency on the job, the

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[202] *Id.* at *11.

[203] *Id.*

[204] *Id.* at *2.

victim's fear and intimidation, the victim's passivity, and the supervisor's persistent and repeated pressure, which eventually resulted in submission.

D. Sexual Relations That Fall Short of Sexual Coercion

In contrast with the cases discussed above, where various conditions indicate supervisory sexual abuse of power to coerce sex, *Speaks v. City of Lakeland* is a case where sexual coercion may not be established under any criminal model, since these factors are lacking.[205] Speaks was employed as a public safety aide for the Lakeland police department.[206] Chin, one of the sergeants at the department, made sexual advances towards her.[207] Speaks testified that she did not welcome these advances but eventually acquiesced to sex with him.[208] When the sexual relationship first started, Speaks was not assigned to Chin's squad, and he did not have any supervisory authority over her.[209] Soon after the sexual relationship began, she initiated a request to transfer to his squad since she did not get along with her previous supervisor, and her request was granted. [210] Following the transfer, Speaks was under Chin's direct supervision.[211] She testified that Chin continued to demand sex from her, and she continued to acquiesce because she feared that Chin would harm her and also feared being fired or transferred.[212]

Several factors indicate that, unlike the previous cases, the sexual coercion model does not support criminalizing this case, since the evidence does not suggest that sex resulted from supervisory abuse of power. Speaks testified that she had sex with Chin long before she was working under his direct supervision. Moreover, after the sexual relationship started, she initiated a request to transfer to his squad. The fact that she asked to be

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[205] 315 F. Supp. 2d 1217 (M.D. Fla. 2004).

[206] *Id.* at 1220.

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.* at 1221.

transferred specifically to his squad, knowing he would supervise her directly, suggests that she was not coerced to engage in sex with him, since she could have requested to be transferred to a different squad. This case illustrates that the sexual relations started long before the supervisory relations began, indicating no causal link between the sex and the nature of the supervisory relations. Furthermore, the evidence did not suggest that Speaks was repeatedly pressured to acquiesce to Chin's sexual advances. The fact that she initiated the transfer that caused her to be under his supervision cannot be reconciled with a claim that she feared any retaliation on his part. Thus, comparing and contrasting *Speaks* with previous cases suggests that this scenario does not justify criminalization. The lack of the various conditions elaborated on earlier further supports this conclusion.

IV: A PROPOSAL FOR A SPECIALIZED STATUTE

In the previous parts, this Article offered some fundamental insights on current reform proposals and their shortcomings. The Author concluded that the lack of a comprehensive model that would enable criminalizing economically and professionally coerced sex necessitates considering a specialized criminal statute. Before this Article elaborates on the elements of the proposed legislation, it will summarize the key ground rules on which it will be established.

A. Some Legislative Guidelines

First, the proposal's key goal is protecting submission victims from sexual coercion in the workplace and in the academy. Accordingly, it is based on the sexual coercion model, which expands the definition of coercion to include economically and professionally coerced sex in the workplace and in the academy. The proposed statute enables criminal regulation to be expanded to prohibit coercive pressures beyond threats by focusing on the features of supervisory sexual abuse of power.

Second, the proposal refuses to adopt a complete prohibition against any sexual relationship, regardless of the circumstances, between people of disparate power in the workplace and in the academy. The proposal rejects adopting the fraternization bans in the workplace and in the academy that are commonly held in the military justice system.[213] Rather, the proposal opts for a relative and relaxed ban, in which the

[213] *See, e.g.*, SCHULHOFER, *supra* note 27, at 170–71 (discussing anti-fraternization policies in the military).

prohibition applies only once the abuse of these power differentials is established. Under the proposal, criminalizing sexually coercive conduct rests on identifying specific conditions that tend to indicate supervisory sexual abuse of power.

Third, proposing a new statute that regulates sexual misconduct calls for a close consideration of the relationship between the proposed offense of supervisory sexual abuse of power and rape law. The sexual abuse of power prohibition does not suggest that the criminal law should treat sexual abuse of power as equally severe as rape. Here, this Article proposes a separate prohibition that would apply only in the workplace and in the academy and would specifically address the unique features of coerced submission in these settings. While the proposal acknowledges that sexual abuse of power and rape may result in comparable harms, it rejects adopting a similar legal response for both offenses.[214]

Fourth, the proposal adopts a specialized criminal prohibition which specifically proscribes sexual abuse of power in the workplace and in the academy, by separately targeting coercive conduct within these settings. It also goes further and defines the offense using appropriate elements that squarely fit the specific features of these settings. Rather than drawing on previous sexual harassment standards, as suggested by the threat-based model, this proposal opts for new elements, which better take into account criminal law principles and considerations by focusing on the perpetrator's guilt and the stigma attached to it. Furthermore, the proposal acknowledges that the criminal law should vindicate harms that go beyond tangible and economic harms by adopting a broader construction of victims' rights. Consequently, the offense's elements do not distinguish between threats of harm and offers of economic benefits.

B. The Proposed Sexual Abuse of Power Provision

With the legislative guidelines now established, the following proposed criminal provision would proscribe sexual abuse of power in the workplace and in the academy. The statute is entitled "Sexual Abuse of Power," and provides:

> 1. The following actors commit a felony of sexual abuse of power, a felony of the second degree, if they engage in sexual intercourse with another person under the following circumstances:

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[214] *Cf. Forced Sex, supra* note 6 (arguing that coerced sex in the workplace should be recognized as rape).

> (a) An employer, supervisor or another person in a superior position in the workplace who abuses his/her professional power and the hierarchical differentials to compel submission on his/her subordinate employees.
>
> (b) A teacher, professor, instructor, teacher assistant or any other person who holds a position that enables him/her to control and affect the student's academic future, and who abuses this professional power and the hierarchical differentials to compel submission on his/her students.

2. Culpability:

> (a) The *mens rea* for this offense is met either by proving recklessness, or by proving criminal negligence, as defined in the Model Penal Code.
>
> (b) The victim's consent and the actor's mistake of fact as to the victim's consent are not defenses under this offense.

The Article now turns to elaborating the offense's elements by illuminating their main features. In general, criminalizing economically and professionally coerced submission under this proposal is based on meeting a two-pronged requirement that consists of both the "abuse" and the "power" elements. In addition, to impose criminal liability, the perpetrators can be either one of the following: supervisors, employers or any other superior in the workplace, or professors and teachers in the academy and in schools.

C. "Sexual Abuse": The Main Features

The proposal's focal point lies in determining what type of conduct meets the definition of "sexual abuse." Accordingly, the proposed statute focuses on capturing the features of the perpetrator's coercive conduct, which amounts to an abuse of power. Generally speaking, sexual abuse is established when a superior in the workplace or in the academy takes advantage of his professional power and of the hierarchical differentials to exploit these circumstances and demand sexual favors from his employee or student.

The following features characterize the abuse element: first, there exists a causal link between the sexual abuse and the resulting submission. Looking at submission cases illustrates the close tie between the conduct indicating exploitation of professional power and the sex obtained through this conduct; the sexual act clearly hinges upon the abuse of power. Most importantly, these sexual favors would not have been obtained had the powerful position and professional and economic disparities not been abused. To meet the burden of establishing the abuse element, the prosecution must prove that the subordinate's submission to supervisory sexual demands resulted directly from this abuse, namely, proving that she submitted to avoid the potential risk of retaliation.

Second, the prohibition assumes that establishing the abuse element is not necessarily limited to a single specifically defined conduct, such as threats. Instead, determining whether a particular conduct meets the "abuse" definition rests on a totality of the circumstances inquiry, rather than on merely whether threats were established. The proposal acknowledges that abuse may be explicit or implicit, direct and overt or tacit, indirect and subtle. A mere proposal to engage in sexual relations, combined with the inherent intimidation and fear of retaliation, suffice in a pressured environment to compel the victim's submission. Thus, the abuse definition should consist of any words or conduct that would communicate to a reasonable person in the victim's position, that she might suffer an employment consequence if she did not submit to the sexual demands. Third, another feature that characterizes the abuse element lies in its power to negate the requirement to explicitly express refusal to engage in sexual activity. Whenever abuse is established, the victim does not need to resist, verbally or by conduct, and manifest to her abuser that she refuses any sexual relationship with him. Consequently, the prosecution does not have to prove that the victim did not consent to the sexual conduct.

Fourth, an additional feature that characterizes the abuse element applies in situations where the superior is someone who is authorized by his employer to exercise professional power on his behalf. When a superior obtains personal favors for himself such as sex, he exceeds the scope of his professional authority, since his powerful capacity was granted to him to promote professional goals rather than his personal desires. Thus, exploiting the power granted to him under his professional role for personal purposes also constitutes abuse of authority and of trust, in addition to abuse of power.[215]

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[215] It should be noted, however, that this feature does not apply whenever the perpetrator is the employer himself, such as the owner of a business, since his actions were

1. The Analogy Between Sexual Abuse of Power and Official Oppression

The offense of official oppression provides an illustrative analogy, supporting the rationales behind the abuse of power prohibition. Section 243.1 of the Model Penal Code prohibits a person from taking advantage of his professional capacity to violate another person's rights or to cause harm.[216] The common thread underlying both of these offenses is the abuse element. Both the proposed sexual abuse of power offense and the official oppression offense incorporate a superior who abuses his powerful position and inflicts harms on victims. While under the proposed offense the abuse is of a sexual nature, the abuse under the official oppression offense may include other forms of misconduct. Several states adopted provisions that are modeled after the official oppression offense.[217] Texas, for example, amended its laws to include quid pro quo sexual harassment as one specific form of official oppression.[218] The novelty of this Texas amendment lies in acknowledging that a superior who abuses his official power to obtain sex from subordinates should be criminally punished, and is thus an important step towards recognizing the justifications behind criminalizing sexual abuse of power. While these two provisions share some features, the sexual

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not authorized by anyone. I thank professor George Rutherglen for clarifying this point for me.

[216] The offense proscribes: "A person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity . . . if, knowing that his conduct is illegal, he: subjects another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien or another infringement of personal property rights, or: Denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity." MODEL PENAL CODE §243.1 (1962).

[217] For illustrative examples of statutes that are modeled after the official oppression provision, see, e.g., COLO. REV. STAT. ANN. §18-8-403 (West 2010) (Colorado); ME. REV. STAT. ANN. tit. 17-A, §608 (2010) (Maine); N.H. REV. STAT. ANN. § 643:1 (2010) (New Hampshire); N.J. STAT. ANN. § 2C:30-2 (West 2010) (New Jersey); 18 PA. CONS. STAT ANN. § 5301 (West 2010) (Pennsylvania); TENN. CODE ANN. §39-16-403 (2010) (Tennessee).

[218] 1993 Tex. Gen. Laws 3586, 3674 (codified as amended at TEX PENAL CODE ANN. § 39.03(a)(3), (c) (Vernon 2010)). Section 39.03 became effective September 1, 1994. For criminal charges that were brought under this provision see a series of court decisions regarding the Sanchez case, see Sanchez v. Texas 974 S.W.2d 307 (Tex. App. 1998), *rev'd* Sanchez v. Texas 995 S.W.2d 677 (Tex. Crim. App. 1999), Sanchez v. Texas, 32 S.W.3d 87 (Tex. App. 2000), *vacated* Sanchez v. Texas 120 S.W.3d 351 (Tex. Crim. App. 2003).

abuse of power offense provides a better-suited framework for criminalizing coerced submission. Unlike the official oppression provision, it is not limited to perpetrators who hold official positions; it can apply to employers or supervisors in any public or private workplace or in the academy. The sexual abuse of power offense further provides a specialized sexual offense, particularly crafted to address both the severity and the harms of coerced sex in the workplace and in the academy. In contrast, the official oppression provision encompasses different forms of abuse of power, varying in their degree of severity. The advantages of adopting a specialized sexual offense, which specifically proscribes sexual misconduct, rather than a general all-encompassing prohibition are clear: it enables addressing not only the distinctive features of the perpetrator's conduct, but also the unique harms resulting from coerced sex.

D. Power: The Main Features

Establishing a position of power is the second element of the abuse of power under the proposed statute. The key to understanding this element lies in capturing its distinct meaning within the workplace context and academy, in which the perpetrator enjoys a higher position in the organizational hierarchy than the victim. The power element consists of two components: first, position differentials between the parties, namely, the higher rank the superior holds in the workplace or in the academic hierarchy, compared to the subordinate's; and second, the superior's capacity to control and affect the subordinate's employment or academic status. The necessary condition for establishing the power element lies in the superior's capacity to control and affect the subordinate's professional status in the workplace and in the academy due to their differential positions. Holding the ability to harm the subordinate by making adverse employment or academic decisions, or even the ability to make any changes regarding her employment or academic position, including granting beneficial actions, is the source of this power.

In addition, a unique relationship exists between the power and the abuse elements since each one is contingent upon the other. The organizational climate and specific power relations enable the perpetrator to take advantage of economic inequalities and professional disparities to coerce sex from subordinates. Holding the position of power is therefore precisely the feature that enables the abuse. Another feature that characterizes the power element lies in the built-in limitations it provides. The power element significantly narrows the scope of the criminal provision by ensuring a key prerequisite for imposing criminal liability—a hierarchical relationship between the perpetrator and the victim. The

prohibition can thus apply only to certain types of perpetrators, namely, employers, supervisors, teachers and professors. The power element further limits the scope of the criminal provision by ensuring that it applies only to the abuse of supervisory power, and does not extend to various other forms of power that may characterize other types of relationships as well. Consequently, the prohibition applies only in the workplace and in the academy and does not include disparities in power in the private sphere, such as inequalities in economic status between spouses or acquaintances.[219]

E. The Proposal's Advantages

The above features underline several of the proposal's important strengths. Any reform that proposes a new criminal prohibition raises concerns that adopting it might result in overbroad and overreaching criminalization. Prominent scholars criticize the one-way-ratchet toward the enactment of additional crimes.[220] They further argue that the tendency towards over-criminalization and being "tough on crime" is unwarranted and unjust. Moreover, they contend that these trends result in inequalities in the legal justice system, since they mainly affect minorities and underprivileged perpetrators.[221] In addition, many reformers argue that the criminal law is too blunt an instrument and should be used only as a last resort whenever alternative civil remedies prove insufficient.[222]

Additional concerns are especially prominent in the area of criminal regulation of sexual conduct. Many critics fear that adopting new criminal provisions may result in prohibiting too many common sexual

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[219] *But see* WERTHEIMER, *supra* note 16, at 164, 174, 184 (discussing various examples that incorporate other forms of power, other than supervisory power, such as the power that stems from economic disparity between two individuals in the private sphere; the supervisory power to affect and control the subordinate's or student's conditions is the underlying feature that is lacking in the above examples).

[220] *See generally* William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) (discussion the heavy-handed approach and the over-criminalization trend).

[221] *See, e.g.*, William Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1970–74 (2008) (discussing the reasons for inequality as a core feature of American criminal justice system).

[222] *See, e.g.*, SCHULHOFER, *supra* note 27, at 223–24 (noting that criminal law is a stringent weapon that should be confined to situations in which other remedies are insufficient).

practices that are an inevitable part of a socialized community. Furthermore, critics worry that adopting such provisions violate a person's right to enjoy sexual autonomy.[223]

Consequently, potential critics of the proposed statute might argue that criminalizing economically and professionally coerced sex in the workplace and in the academy is unjustified and overreaching. The proposal takes these concerns into consideration by responding to some potential criticisms. First, the proposal does not advocate prohibiting all sexual relationships in the workplace and in the academy. By ensuring that the prohibition applies only once the abuse of power is established, it acknowledges that certain relationships in these settings are legitimate. Thus, the relationships between the two elements that comprise the prohibition provide a significant virtue; to criminalize a certain conduct, both the "abuse" and the "power" elements must be established concurrently.

Second, the proposal is narrowly crafted to carefully target sexually abusive situations that may be plausible candidates for criminalization by prohibiting only the abuse of power between superiors and subordinates. However, it leaves outside the scope of potential criminal regulation any sexual relationship between peers at the workplace and in the academy. It also leaves outside the scope of criminal regulation welcome and wanted sexual relationships between people of hierarchical positions where the abuse of power cannot be established. Furthermore, the prohibition does not apply to additional forms of power exerted in various types of personal relationships outside the workplace and the academy.

Third, the proposal advocates adopting a gender-blind prohibition that would apply equally to both male and female victims. It acknowledges that a woman in a powerful position may just as well take advantage of her professional power to obtain sexual relationship from a male subordinate. As the *Showalter* case[224] illustrates, the proposal provides a well-suited remedy that enables criminalizing sexually abusive conducts regardless of gender.

Fourth, adopting a white-collar offense to criminalize sexually abusive conduct would help to balance recent legislation that has been characterized as affecting mainly under-privileged perpetrators, and having

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[223] *Id.* at 274–81.

[224] *Showalter v. Allison Reed Group, Inc.*, 767 F. Supp. 1205 (D.R.I. 1991).

racial overtones.[225] Indeed, criminalizing sexual abuse of power is race-neutral, applying equally to all types of powerful perpetrators.[226]

Finally, and perhaps most importantly, proposing to criminalize the submission cases implies neither that every coerced submission case must be criminalized nor that criminalization always provides the proper solution. Rather, this Article suggests that the criminal prohibition *may* apply, in the most appropriate cases, and only after exercising careful discretion. The criminal statute is nowhere required, but rather provides an alternative tool for regulation, which may be implemented only if the suitable candidates are identified. The conditions and circumstances below provide an important mechanism that ensures that only egregious cases that clearly demonstrate the exploitation and abuse of imbalances in powers are prosecuted.

F. Conditions That Tend to Indicate Abuse of Power

Identifying several conditions that point to sexual abuse of power can serve as a supporting tool in determining which types of conduct justify criminalization in particular cases. These are based on identifying some common features in the submission cases discussed above. However, a cautionary remark is in order: while the factors enumerated here may be indications of abuse of power, none of them is an element of the offense itself. Moreover, none of them is conclusive in the abuse of power determination, which is based on a totality of the circumstances inquiry. Accordingly, the proposed list does not preclude the consideration of other factors that may support this determination as well, nor does the absence of one of the factors in a certain situation necessarily suggest that the conduct in question does not amount to sexual coercion.

1. Gross Disparities in Power

The imbalance in power between the parties, due to the hierarchical position the superior has over the subordinate is a prominent

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[225] *See generally* Stuntz, *supra* note 221, at 2025 (discussing the massive use of drug laws and their disproportionate effects in urban black neighborhoods).

[226] The potential for abuse of power and position equally cuts across various perpetrators. The abuse of power model therefore is theoretically race-neutral. An interesting open question, however, is whether the application of such a model in practice would prove race-neutral as well. The answer mainly depends on the identity of those who hold powerful positions, as well as on the identity of their potential victims. Conceptually, however, the abuse of power model is free from any racial overtones.

factor in the sexual coercion inquiry. Its presence strongly suggests that the sexual activity resulted from supervisory abuse of power. Striking differences between the superior's advantageous position and the subordinate's disadvantageous position, both professionally and economically, create the potential for abuse of this power. The abuse is facilitated by the perpetrator's ability to affect and control the subordinates' status and by his willingness to exploit it. Furthermore, the greater the disparity in power between the parties, the stronger the indication of abusing it.

2. Gross Economic Disparities

The stark economic differentials between the parties represent one aspect of the power element, since the superiors' relative strength and power directly stem from their economic superiority. Consequently, the subordinate's disadvantageous position creates an inherent economic vulnerability. The aforementioned cases illustrate substantial financial dependency on the job, which results in unique economic vulnerability. Moreover, the superiors' awareness of this economic vulnerability renders victims easy prey for imposing sexual demands on them, since the superiors know that the victims are unlikely to be able to actively resist their demands.

This unique economic and professional vulnerability calls for separately addressing the possible ramifications of emphasizing this factor. It further demands that we consider a possible line of criticism regarding the proposal to criminalize economically and professionally coerced sex. As noted earlier, while comparing and contrasting the alternative criminal models, some critics might argue that by stressing the victims' vulnerability, the law could end up weakening rather than empowering victims, particularly women.[227] Thus, the proposal raises a significant concern that criminalization might actually perpetuate stereotypes of female weakness and dependence. However, these concerns can be addressed by stressing the advantages of criminalization under the proposed abuse of power offense and by illuminating some of the features of this vulnerability.

First, as suggested earlier, predicating criminal liability on the sexual coercion model rather than on the lack of consent model provides at least a partial response to these concerns. The proposal does not require invalidating women's consent. Consequently, the focus of the inquiry

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[227] See discussion *supra* Part II.C.

shifts away from scrutinizing the victim's choices, toward the perpetrator's coercive conduct.[228]

Second, looking closely at the features of this vulnerability further alleviates the weakening concern by emphasizing that it is a situational economic vulnerability, rather than a personal one. In particular, the victims' vulnerability stems from striking economic disparities and structural differences between the parties, rather than from individual characteristics of the victims. Moreover, the victims' situational vulnerability and the superiors' situational strength lie in the organizational and structural features that characterize the workplace and the academy. However, since these are socially and structurally constructed differences, stressing the economic vulnerability should not result in perpetuating stereotypes of women's weakness.

Third, the economic vulnerability is a gender-neutral factor. Male as well as female victims may fall prey to sexual abuse of economic disparities by superiors, as *Showalter* demonstrates.[229] Undoubtedly in many cases the victims who suffer from economic vulnerability are women, but this is not always true. Acknowledging that the gender-blind vulnerability factor equally applies to both male and female victims further mitigates the above concerns.

Fourth, balancing the foreseeable trade-offs between the costs of the victims' vulnerability with the benefits of promoting their right to remain free from sexual coercion makes clear that criminalization is a desirable remedy. Further, the upshot of acknowledging the economic vulnerability and then taking remedial steps to address it is to empower victims; adopting a prohibition that ensures that employees and students will not face the choice between economic and professional survival and freedom from sexual coercion will ultimately strengthen their position at the workplace and in the academy.

3. Repeated and Persistent Demands for Sex

The methods and strategies that are used to obtain sexual submission are key indicators of sexual abuse of power. Accordingly, repetitive and persistent proposals for sexual activity are a crucial factor in

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[228] *Id.*

[229] *Showalter*, 767 F Supp. at 1209–10 (explaining Showalter's unique dependence on the medical insurance provided by the employer to his sick child).

the coerciveness inquiry. Moreover, the sexual demands typically last over a significant period of time and gradually build up in pressure, further contributing to an intimidating and coercive atmosphere. The victims' responses to these sexual overtures vary. In some cases, when the sexual demands first begin, the victim is still able to decline them by requesting that the superior stop. Ultimately, however, when the coercive pressures become more unbearable, many victims submit. In other cases, the victims try to avoid the advances and discourage the superiors, but they do not explicitly express their rejection verbally. The cases illustrate, however, that in both scenarios, the superiors eventually compelled the victims' submission, regardless of the victims' response to the previous advances.

The following conclusions can be reached after closely looking at these features: first, when evidence suggests that the demands were explicitly declined in the beginning, but after extensive pressures, the victim submitted without expressing any further refusal, a strong suspicion arises that sex was not truly wanted. Second, it should be further emphasized that under the proposal, determining the coerciveness of the sexual relationship does not hinge upon whether the victim explicitly declined the sexual demands. The victim is not required, at any point, to manifest to her superior her refusal to engage in sex with him. Once the prosecution establishes the perpetrator's coercive conduct, it does not bear the burden of proving that the victim expressed her refusal, either when the sexual touching first began, or later on before submitting.[230]

4. Fear and Intimidation

The common thread to submission lies in the victims' fear that the superior might take harmful actions if they decline his sexual demands. Victims testified that they were intimidated by their superior's conduct, and that their fear of retaliation and repercussions eventually brought them to submission.[231] The cases illustrate that the intimidating atmosphere created by the superior objectively supports this fear. Furthermore, the fear factor is closely related to the victims' economic and professional vulnerability. Whenever victims depend heavily on their job or academic position, they perceive submission as a necessary and ultimate step to

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[230] *See* discussion *supra* Part II.C, articulating why the unwelcome-ness should not be an element in the offense.

[231] *See, e.g.*, Nichols v. Frank, 42 F.3d 503, 509 (9th Cir. 1994); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 60 (1986) (discussing the fear factor that leads victims to submit to unwanted sexual demands).

avoid the potential risk of losing that job or academic position. This dependency facilitates the sexual abuse of power, since the victim's fear of losing their positions is precisely the feature that enables the supervisors to abuse their powerful position to coerce sex.

5. Passivity and Inactiveness

As already noted, the definition of the proposed offense does not depend on the victim's response to the abusive behavior. Revisiting the cases, however, reveals that the victim's lack of response to the sexual act may indicate that it was coerced. Responses to sex vary, and even when both parties want it equally, some participants may play a more passive role. The basic premise, however, is that legitimate sex involves a mutual activity that both parties want to engage in. Typically, some indication of a positive response can be identified. In contrast, the cases above involve passive victims, who remained inactive, motionless, and often in a state of shock throughout the encounter.[232] Consequently, objective indications of sexual coercion may include complete passivity, silence, motionlessness, shock, and any other factors that suggest that the victim did not want to have sex with her superior. In addition, the lack of any sign of a positive response may serve as a warning signal to the perpetrator. It should raise suspicion in his mind that engaging in sexual acts with a motionless subordinate might amount to sexual abuse of his professional power.

6. Who Initiated the Sexual Encounter

Looking closely at the victim's responses necessitates addressing a related factor; namely, the possible ramifications of the victim initiating the sexual encounter. An interesting question arises: whether the subordinate who initiates the sexual acts necessarily trumps the coercion determination. These are more controversial situations, where the subordinate commenced the sex to obtain benefits in the workplace or in the academy. It may seem unclear whether these circumstances necessarily lead to a conclusion that the sexual relationship did not result from abuse of power. This Article suggests, however, that the initiative factor should be treated as an inconclusive indication of determining the coerciveness of the sexual relationship. On one hand, when the evidence shows that the subordinate started the sexual encounter, it may serve as an indication that she actually

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[232] *See, e.g.*, Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272, 1276 (11th Cir. 2003) (illustrating the victim's claims that following the coerced sexual act they fell into a state of shock, that explained their passivity and inability to respond).

wanted to engage in sex with her superior. Thus, when none of the other factors enumerated above indicate that sex resulted from abuse of power, it is most likely that the sexual relationship was not coerced. On the other hand, however, the counterargument suggests that the fact that the subordinate initiated the particular encounter does not necessarily, in and of itself, prove that the sexual acts did not result from abuse of power. Rather, concluding whether the subordinate's initiative precludes the abuse of power determination should rest on a totality of the circumstances inquiry. Accordingly, whenever superiors create an intimidating atmosphere in which subordinates can reasonably infer that submission is the only way to keep their position, the issue of who commenced the particular encounter becomes less relevant. Under these circumstances, an abuse of power determination is a plausible conclusion. Moreover, the inquiry should focus on the background circumstances and the sequence of events leading the subordinate to initiate the sex. Consequently, whenever the issue of initiating the sexual act seems strictly technical, it should not necessarily rule out an abuse of power determination.

7. Violent Sex

The violent nature of the sexual encounter is another possible indication of abuse of power. In some cases, the perpetrator physically harms the victim, and uses violence throughout the sexual act. The *Meritor* case, for example, provides an example in which severe physical violence was used, resulting in vaginal bleeding that required medical treatment.[233] Other cases illustrate milder forms of violence, such as shoving and pushing.[234] While typically the use of violence is not common in submission cases, its presence may support the conclusion that sex resulted from abuse of power.[235]

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[233] *See* Vinson v. Taylor, No. 78–1793, 1980 WL 100, at *1 (D.D.C. Feb. 26, 1980), *rev. sub nom.* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). For another example where the sexual act resulted in vaginal bleeding, see Liu v. Striuli, 36 F. Supp.2d 452, 460 (D.R.I 1999).

[234] *See, e.g.*, Jin v. Metro. Life Ins., 310 F.3d 84, 88–89 (2d Cir. 2002).

[235] It should be noted that current rape laws do not allow criminalizing these cases, since the lack of consent element is not met. Under current jurisprudence, submitting to economically and professionally coerced sex is typically viewed as consensual sexual relationship. Thus, criminal charges could not have been filed in these cases.

V. CONCLUSION

In the workplace and in the academy, coercing sexual intercourse on victims who do not want to engage in sex, but are unable to refuse the demands because they fear repercussions is a severe criminal conduct that needs to be outlawed. However, neither legislatures nor scholars have taken any steps in acknowledging this harmful conduct by criminalizing it. The abuse of power model has never been applied in these settings. This Article has taken up the challenge of criminalizing these cases by using the powerful potential of this model.

This Article has challenged the prevailing view that Title VII and Title IX provide a single conceptual model to capture the harms embodied in all forms of sexual harassment. In particular, this Article argues that the current paradigm provides an inadequate framework for understanding the wrongs and harms of coerced submission in the workplace and in the academy. Alternatively, this Article has argued that it is time to critically revisit this paradigm by considering a new account of coerced submission that separately categorizes these cases and independently addresses the distinctive harms they inflict.

This innovative criminal account provides two key insights into understanding coerced submission which have fundamental practical implications for potential legal reform; first, at a normative and theoretical level, the Article argued that these cases should be criminalized since they demonstrate a form of conduct that clearly qualifies as a sexual offense. The Article further elaborated that criminalization is justified based both on the distinctive harms coerced submission inflicts on victims, as well as on the perpetrator's wrongful conduct. Second, at the doctrinal level, the Article offered the missing and much needed pragmatic ramifications of this conclusion, and has given innovative theories a practical edge by proposing a specialized criminal statute. Most importantly, the Article's analysis has suggested that the new statute should be based on the sexual coercion model, which provides a comprehensive and nuanced solution that would allow criminalizing various forms of sexually coercive conducts in the workplace and in the academy. In other words, the proposal advocates criminalizing economically and professionally coerced sex in these settings, based on adopting an abuse of power model.

The proposed model is based on the key elements that characterize coerced submission—namely, the supervisory sexual abuse of power. To support the abuse of power determination, the Article identified several specific conditions that suggest that the conduct amounts to sexual coercion. The Article further elaborated that this narrowly crafted proposal provides ample advantages, and has argued that it offers a carefully limited

criminal regulation, targeting only the appropriate plausible candidates for criminalization while avoiding over-criminalization. Of course, properly and thoughtfully applying the statute is crucial to ensure its success, since, as with any other criminal regulation, the prohibition can be implemented wisely or poorly. Further, the Article has nowhere suggested that every coerced submission case must be criminalized. Indeed, the Article acknowledges that criminalization cannot always provide the adequate solution. This Article has suggested, however, a potential criminal tool of regulation that may or may not be used, depending on the unique circumstances of each case. Further, it should be applied only to the most suitable and perhaps egregious cases, which would require a careful exercise of prosecutorial discretion.

Significant policy goals and social considerations support the conclusion that the proposal offers a desirable remedy. Societal norms and cultural perceptions of what types of conduct justify criminal regulation are constantly changing. This is particularly true in the area of regulating sexual misconduct. Here, it incorporates ever-evolving policies and moral judgments about the relationship between sexuality, gender, and the role of law in general, and of the criminal law in particular. The Article has argued that contemporary developments in the criminal regulation of sexuality demonstrate a need for adopting a more realistic alternative view of what types of sexual misconduct amount to sexual coercion and therefore deserve to be outlawed. Accordingly, the Article has contended that our current culture must recognize that coerced sexual intercourse in the workplace and in the academy indeed justifies criminalization, and that it should be the next necessary step in contemporary reform of sexual offenses. Taking this inevitable step would further acknowledges that the right to remain free from sexual coercion in the workplace and in the academy deserves to be fully protected, like all other basic human rights—something that current jurisprudence has not yet fully recognized. This in turn would provide lawmakers with the basis for devising an alternative model for adjudicating the submission cases. In the hope that criminalizing coerced submission will help eradicate abusive sexual practices and help create a world in which people are free from sexual coercion, it seems that the timing is ripe for promoting such a social change through the proposed legal reform.