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February 18, 2009

Criminalizing Coerced Submission in the Workplace and in the Academy

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CRIMINALIZING COERCED SUBMISSION IN THE WORKPLACE AND IN THE ACADEMY

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ABSTRACT

This article challenges the prevailing view that Title VII provides a single conceptual model that fits all forms of sexual harassment. In particular, it challenges the assumption that forced sexual intercourse in the workplace and in the academy is merely another form of sexual harassment, and therefore can be addressed within the current legal framework. The article argues for critically revisiting the current paradigm by providing an alternative account of the submission cases, one that separately categorizes them and acknowledges their distinctive harms. Accordingly, the article suggests that these cases should be criminalized, and elaborates upon the justifications and policy goals that support this choice, making it a desirable remedy. The article further explores the practical ramifications of this account by examining which criminal model is better suited to criminalize coerced submission. It compares and contrasts a lack of consent model and a sexual coercion model, and 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, and therefore the article proposes the adoption of a specialized criminal statute based on this model. This statute would criminalize supervisory sexual abuse of power within the workplace and the academy by identifying several conditions that suggest that submission resulted from this abuse. The article stresses the strengths of the proposal, which carefully targets sexually abusive situations that may be plausible candidates for criminalization, and offers a narrowly crafted prohibition that is both gender and race neutral, and limited in scope to avoid over-criminalization.

Word count: 24,803

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# CRIMINALIZING COERCED SUBMISSION IN THE WORKPLACE AND IN THE ACADEMY

## TABLE OF CONTENTS

INTRODUCTION .................................................................................................................. 3

I. JUSTIFICATIONS FOR CRIMINALIZING COERCED SUBMISSION ................. 6
   A. Targeting Coerced Submission and Defining Its Main Features .................. 6
   B. Revisiting the Current Views and Noting Their Main Drawbacks .............. 7
   C. Reconsidering Coerced Submission Through the Lens of Criminal Law ...... 11
      1. Applying the Two-pronged Account of the Harm ............................... 11
      2. The Harms Sustained by Victims of Coerced Sex .................................. 12
      3. What Is The Wrong at the Basis of the Perpetrator’s Conduct? .............. 14
   D. Policy Goals, Social Considerations and the Criminalization Tariff ......... 15

II. ALTERNATIVE MODELS FOR CRIMINALIZATION ........................................ 16
   A. A Lack of Consent Model ............................................................................. 18
      1. Contemporary Proposals to Criminalize Threats ..................................... 19
   B. A Sexual Coercion Model ............................................................................ 20
   C. Comparing and Contrasting the Models .................................................... 21

III. APPLYING THE MODELS ......................................................................................... 30
   A. Cases Where Threats Are Established ........................................................ 31
      1. Explicit Threats ......................................................................................... 31
      2. Implicit Threat .......................................................................................... 33
   B. Sexual Coercion Albeit the Lack of Threats ............................................... 35
      1. Cases Resembling Rape And Sexual Assault ........................................... 36
      2. Other Cases .............................................................................................. 38
   C. The Ramifications of Beneficial Actions ..................................................... 41
D. Sexual Relations That Fall Short of Sexual Coercion ........................................ 43

IV. A PROPOSAL FOR A SPECIALIZED STATUTE ........................................ 43
A. Some Legislative Guidelines ........................................................................ 43
B. The Proposed Sexual Abuse of Power Provision ........................................ 45
C. “Sexual Abuse”: The Main Features ......................................................... 45
   1. The Analogy Between Sexual Abuse of Power and Official Oppression .... 47
D. Power: The Main Features ........................................................................ 48
E. The Proposal’s Advantages ........................................................................ 49
F. Conditions That Tend to Indicate Abuse of Power ..................................... 50
   1. Gross Disparity in Power ........................................................................ 51
   2. Gross Economic Disparities .................................................................... 51
   3. Repeated and Persistent Demands for Sex ............................................. 52
   4. Fear and Intimidation ............................................................................. 53
   5. Passivity and Inactiveness ...................................................................... 53
   6. Who Initiated the Sexual Encounter? ...................................................... 54
   7. Violent Sex .......................................................................................... 55

V. CONCLUSION ............................................................................................... 55

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This article challenges the prevailing view that Title VII provides a single conceptual model that fits all forms of sexual harassment. In particular, it challenges the assumption that forced sexual intercourse in the workplace and in the academy is merely another form of sexual harassment, and therefore can be addressed within the current legal framework. The article argues for critically revisiting the current paradigm by providing an alternative account of the submission cases, one that separately categorizes them and acknowledges their distinctive harms. Accordingly, the article suggests that these cases should be criminalized, and elaborates upon the justifications and policy goals that support this choice, making it a desirable remedy. The article further explores the practical ramifications of this account by examining which criminal model is better suited to criminalize coerced submission. It compares and contrasts a lack of consent model and
a sexual coercion model, and 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, and therefore the article proposes the adoption of a specialized criminal statute based on this model. This statute would criminalize supervisory sexual abuse of power within the workplace and the academy by identifying several conditions that suggest that submission resulted from this abuse. The article stresses the strengths of the proposal, which carefully targets sexually abusive situations that may be plausible candidates for criminalization, and offers a narrowly crafted prohibition that is both gender and race neutral, and limited in scope to avoid over-criminalization.

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 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, 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. MacKinnon’s project, which was wildly successful, at least in the courts, 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 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. Furthermore, MacKinnon’s decision to rely on an existing legislation, rather than proposing a new statute, proved to be a prudent technique for convincing the legal system, as well as the public at large, that sexual harassment is a cognizable legal wrong.

1 CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, A CASE OF SEX DISCRIMINATION, (Yale University Press, 1979).
2 Title VII provides: “It shall be 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 section 2000e- 2 (a) (2000)
3 MACKINNON, supra note 1, at 174-192. (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).
In the mid 1980s, this strategy was wise and perhaps necessary to establish a new cause of action. By now, however, the cause of action has come of age, and the time is ripe for revisiting it critically. In particular, we must question the “one size fits all” characterization of sexual harassment law. The sexual harassment rubric covers a wide range of workplace misconducts – everything from sexually explicit utterances, to different forms of unwanted touching, to forced sexual intercourse. The law assumes, however, that the single cause of action is sufficient to redress the distinct harms flowing from each of these distinct invasions.

This article aims to challenge the “one size fits all” paradigm. I take up this task 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). I select these cases because they are especially egregious. Indeed, they are crimes, and yet neither the law nor commentators recognize them as such. While it might be sensible to treat many forms of unwanted sexual misconducts 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.

Alternatively, I propose that it is time to criminalize the submission cases. My point of departure is the insights offered, but never fully developed, by MacKinnon’s work. In her book Women’s Lives, Men’s Laws, MacKinnon argues that: “rape law must reflect the reality of sexual abuse as the result of power differentials,” and remarks that: “such abuse occurs, when a powerful person, such as an employer, forces a vulnerable person, such as an employee, into sex.”

While in theory, MacKinnon’s ideas begin to provide a conceptual framework for criminalizing coerced submission, in practice this step is insufficient, leaving a gap that needs to be filled. MacKinnon nowhere develops the pragmatic implications of her theory, or offer the operational aspects of her insights. Furthermore, she fails even to outline the elements of a criminal statute that would punish coerced submission. In addition, while MacKinnon’s critical polemics are 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, and therefore it is unable to provide useful guidance to legislatures.

In this article I undertake to develop and refine MacKinnon’s line of thinking, by offering the missing, and much needed, pragmatic approach and solution. In particular, I aim to give MacKinnon’s theory a practical edge, by proposing a specialized criminal statute, one that targets the submission cases by capturing the wrongfulness of the perpetrator’s misconduct and embodies the unique harms it inflicts.

Along the way, I identify, and compare and contrast two alternative models for criminalizing coerced submission: a “lack of consent” model, and a “sexual coercion”

5 CATHERINE A. MACKINNON, WOMEN’S LIVES, MEN’S LAWS, (Cambridge, 2005), at 243-247 (hereinafter: 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, at 1237 (2008) (reviewing CATHERINE A. MACKINNON, WOMEN’S LIVES, MEN’S LAWS, and advocating the adoption of criminal remedies to forced sex in the workplace). 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 farther practical and operational steps beyond MacKinnon’s theoretical arguments by providing the elements of an offense that would criminalize coerced submission.
model. I argue that the lack of consent model proves insufficient in providing a comprehensive basis for criminalizing economically and professionally coerced sex. Ultimately, I conclude that the sexual coercion model provides a better framework for criminalizing coerced submission, and I propose a new offense based on that model.

The article proceeds as follows: in part I, I explain that the submission cases must be separately categorized, because they inflict unique harms on victims. I further argue that viewing these cases within the anti-discrimination framework results in several drawbacks. Consequently, current civil remedies prove insufficient in successfully combating the problem. Alternatively, I suggest that the submission cases should be viewed through the lens of the criminal law. To do that, I provide the legal justifications for criminalizing this misconduct. These justifications are based on the two-pronged account of the harm principle, which consists of the harm to others and 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 may provide a desirable legal treatment.

Part II considers the lack of consent model and the sexual coercion model as two alternative conceptual bases for criminalizing the submission cases. I stress the features of the previous reform proposals, which focus on establishing threats to harm as circumstances that invalidate consent. After looking closely at the models, I conclude 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.

Part III offers a theoretical construct to illustrate which model is better fitted to criminalize the submission cases. To do that, I apply the criminal models to various cases that were litigated in courts under the sexual harassment cause of action. This exercise illustrates that the threat-based proposals do not provide a sufficient model for criminalizing the submission cases. It further demonstrates that the sexual coercion model offers a more nuanced construct, which would allow criminalizing various forms of sexually coercive conducts in the workplace and in the academy.

In part IV, I propose a specialized criminal statute, entitled sexual abuse of power, to criminalize the submission cases. I illustrate 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, I identify some specific conditions that tend to indicate that a conduct amounts to sexual coercion, and should be punished as a crime.

The article concludes by noting the advantages of the proposed prohibition. In particular, I contend that the statute is carefully crafted to criminalize sexually coercive conducts only in the workplace and in the academy. Furthermore, it avoids overreaching and overbroad criminalization by adopting some built-in limits, which narrow the scope of criminal regulation.

I. JUSTIFICATIONS FOR CRIMINALIZING COERCED SUBMISSION

A. Targeting Coerced Submission and Defining Its Main Features
He suggested that after dinner they go to a motel for the purpose of having sexual relations. She declined his invitation and 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...”

This excerpt describes the injuries alleged by Mechelle Vinson, who sued her employer, a bank, for sexual harassment by her supervisor. 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 conduct that has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating hostile or offensive working environment can also be a form of sex discrimination that is outlawed by Title VII.

Vinson ultimately won her case, and this holding further opened a door for many potential sexual harassment victims whose harm was previously unrecognized. Following Meritor, when similar allegations reach the courts, they typically are framed as employment discrimination based on gender, or as sexual harassment in education. These allegations would also seem to support rape charges against the perpetrators, but no such charges ever are brought.

The Meritor excerpt draws our attention to a specific form of supervisory misconduct. In this paper I shall argue that such wrongful conduct warrants its own definition and sanctions above and beyond those available under Title VII. In these scenarios, people in power abuse that power to obtain sex from their subordinates. In the typical scenario, a superior such as a supervisor, employer, teacher or professor, asks a subordinate or student for sexual intercourse. The subordinate or student goes along because she is afraid that, if she refuses, her superior will retaliate by making an adverse employment or academic decision against her. I use the terms “coerced submission” and

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8 Meritor, 477 U.S. at 64-65.
9 Title IX of the Civil Rights Act of 1964 provides that “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 section 1681 (a) (2000)
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 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.
“the submission cases” interchangeably to refer to these cases. Let me further clarify this article’s terminology and explain what I mean by two key terms I use here: 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 coerced sex” refers to the institutional and situational pressures that amount to coercive circumstances, and stem from the student’s academic and professional dependence on her 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, which may be appropriate for an intervention under Title VII. 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. As I begin to make the case for criminalizing coerced submission, let me point to one significant distinction between coerced submission and other forms of sexual harassment; in the coerced submission cases, the victims are forced to endure no mere sexual advance or proposal, but unwanted sexual intercourse itself.

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. 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. According to this view, sexual harassment is considered a legal wrong because of its adverse effects on women’s 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. 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

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12 Some courts already use the term “submission cases” while discussing Title VII claims that resulted in sexual submission. See, e.g., Janet Lutkewitte v. Alberto Gonzales, 436 F. 3d 248 at 255 (2006).
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 lines of work as masculine. By maintaining a hold on highly rewarded employment, men secure a host of advantages in and outside the workplace); Katherine M. Franke, What’s Wrong With Sexual Harassment? 49 STAN. L.REV. 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); 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). Although these scholars differ in their understanding of the harm 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.
women as members of a group. Undoubtedly, the current framework has some clear strengths; drawing on the well-established formal right to equality and placing gender stereotyping and sexism at the center of the problem enable a wide array of harassing conduct to be actionable under Title VII, and therefore provides potential redress to many victims. Furthermore, it addresses a whole range of work-related harm, under a single cause of action. However, its weaknesses cannot be ignored; this attempt to provide a “one size fits all” framework by treating different forms of sexual misconduct within a single legal rubric has its drawbacks. The forms of sexual harassment vary substantially, and each inflicts specific harms. Therefore, they must be separately categorized and independently addressed.

Focusing on fitting together different forms of conduct under the discriminatory framework 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. Yet, a coerced submission victim suffers personal unique harm as an individual human being. In fact, the focus on the tangible economic harms has rendered the more personal types of harm practically invisible. In addition, the current paradigm sometimes obscures more than it clarifies, masking the harms, rather than illuminating them. In particular, a prominent aspect so masked lies in the common features coerced submission shares with rape offenses. Yet, MacKinnon and the scholars that followed her carefully opted to avoid emphasizing both the sexual nature of the misconduct, as well as 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. In other words, establishing both forceful compulsion, as well as nonconsensual intercourse, could have been a significant hurdle when applied to the submission cases, since typically these cases do not involve physical force to obtain sex. More importantly, at first glance, the sexual acts may seem consensual. 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, and in particular from the individual aspects of the harm sustained by victims, toward the more tangible harm women sustain as part of a group. In addition, 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 discrimination, and therefore, they initially fell outside the scope of legal protection under Title VII’s provisions.

A close look at the submission cases however, illustrates that they share many features with other sexual offenses. In particular, substantial similarities can be seen in the specific harms inflicted on coerced submission victims and the harms inflicted in

14 See generally, Ehernriech, supra note 4 at 20-21 (discussing the distinction between the nature of the harm inflicted in sexual harassment -- a dignitary harm --and the context in which that harm occurs --a context of discrimination against women).

15 See, e.g., Corne v. Bausch &Lomb, Inc., 390 F. Supp. 161 (D.Ariz. 1975), at 163, vacated by 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”).
rape, as I elaborate in the following section. These commonalities, which are obfuscated under contemporary views, further support the argument that current-thinking places coerced submission under the wrong legal framework.

In addition, focusing on the employer’s or the school’s liability for the harassing conduct of their employees also 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, namely, whether this conduct resulted in any tangible adverse employment or academic consequences. This 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 further contributed to a decreased focus on the harasser’s culpable conduct and his personal guilt.

Consequently, 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 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 that also does not take these unique features into consideration, have proved insufficient to successfully combat this misconduct, and therefore also fail to provide victims with an adequate redress. Indeed, civil remedies are weak and unsuitable in providing the proper legal response to coerced submission victims.

Unfortunately, these drawbacks became even more apparent after the Supreme Court’s holding that changed the distinction between different forms of sexual harassment under Title VII.\(^\text{16}\) In the past, the controlling legal standard distinguished between quid pro quo and hostile environment, but in 1998, the Supreme Court abandoned it and adopted instead the “tangible employment action” standard, namely, a significant change in employment status, which in most cases inflicts direct economic harm.\(^\text{17}\) While the Supreme Court has not yet addressed the question whether the “tangible employment action” standard squarely fits coerced submission, Federal courts currently struggle, and reach conflicting conclusions over the definition of this key phrase and on deciding whether it pertains to coerced submission.\(^\text{18}\) Following this change,

\(^{17}\) Burlington, 524 US at 761-762 (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 unreasonable failed to take advantage of any preventive and corrective opportunities provided by the employer to avoid harm).
\(^{18}\) The Second and the Ninth Circuits, for example, held that coerced submission meets the tangible employment action definition. See, e.g., Min Jin v. Metropolitan Life Insurance 310 F. 3d 84 (C.A. 2 (N.Y.2002); Holly D. v. California Institute of Technology 339 F. 3d 1158 (9th circuit, 2003). In contrast, the District of Columbia, for example, held that coerced submission does not amount to tangible employment action. See, e.g., Lukewitte, 436 F. 3d at 310 (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.
however, the need became more pressing to revisit whether the current paradigm is suitable when applied to coerced submission. In fact, while the employee who rebuffs sexual demands consequently suffers direct economic harm, such as being fired or demoted, a coerced submission victim normally doesn’t experience this harm, or any adverse employment consequences, since she submitted to the superior’s sexual demands. Moreover, she might even gain some employment benefits resulting from her submission. However, as noted above, coerced submission results in other types of harms that stem from unwanted sex, and focus mainly on the personal aspects of the injury. Nevertheless, the current paradigm in fact overlooks these other forms of harm. To make things worse, this legal change also meant that many coerced submission victims who were not economically harmed lost their suits.\textsuperscript{19} Without a doubt, this is an undesirable result, often leaving victims of severe sexual misconduct without a legal remedy.

Adopting the new standards that focus on direct economic harm, further illustrates the failure of sexual harassment law to provide an adequate conceptual framework that would not only capture coerced submission’s unique harms and wrongs but also offer an appropriate legal remedy. Examining these standards, which were developed under the sexual harassment framework, further sharpens the point that while they may fit this particular context, they fail to fit the submission cases. Moreover, they provide insufficient and misguided understanding of the criminal wrongs perpetrated in the submission cases. Indeed, these cases clearly involve criminal conduct, and therefore only the criminal law’s perspective may fit its features and provide an accurate and complete account of its harms. Accordingly, this calls for considering an alternative view that squarely fits these criminal features.

\textbf{C. Reconsidering Coerced Submission Through the Lens of Criminal Law}

In response to the above drawbacks, I aim to challenge the prevailing employment discrimination paradigm by offering an alternative theoretical framework, to better suit the submission cases’ specific features. Accordingly, the thrust of the article lies in suggesting that we should view these cases from a criminal law perspective. Applying basic criminal law principles and considerations to these cases not only better captures the distinctive harms inflicted in them, but also the coercive features embodied in the perpetrator’s conduct. This alternative view necessitates addressing the relationship between sexual harassment and criminal law. In particular, we see that coerced submission cases are at the intersection between one subcategory of sexual harassment and rape law, all involving one form or other of unwanted sex. Yet, while in other sexual harassment cases, the harassing conduct may consist of offensive touching, threats, demands, sexual advances, etc., coerced submission is distinguished in two prominent respects: the conduct is explicitly sexual in nature, and sexual intercourse is obtained. Indeed, this further suggests that coerced submission should be viewed as sexual offenses

\textsuperscript{19} See, \textit{e.g.}, Francoise 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.)
rather than as one form of sexual harassment. To accomplish this goal, I propose adopting a new offense that would criminalize coerced submission in the workplace and in the academy. While current views distance themselves from both the personal features of the harm and the individual features of the perpetrator’s conduct, 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 that since current civil remedies offer insufficient tools to successfully combat the phenomenon, criminal law may provide lawmakers with a better strategy for dealing with this problem, which will, in turn, furnish better legal remedies for battling sexual coercion in the workplace and in the academy. Meanwhile, let me suggest that the missing and pivotal component in current remedies rests in not attaching personal blame and societal stigma to the perpetrator. The core feature, however, that criminal regulation provides is personal and general deterrence by stigmatizing and assigning personal guilt on the perpetrator. As opposed to current sexual harassment regulation that imposes liability on employers while ignoring individual perpetrators, criminal regulation would be far more personal in nature. More importantly, the most prominent feature that only criminal law may provide is deterrence, due to the unique societal stigma of being labeled a “sex offender.” While every criminalization decision undoubtedly entails some stigma, the unique stigma attached in sexual offenses is more severe. In fact, this is precisely the missing and much-needed feature in coerced submission’s current legal framework.

1. Applying the Two-pronged Account of the Harm

Considering the idea of criminalizing coerced submission demands that we closely examine a threshold question, namely, whether coerced submission truly justifies criminalization. To answer that, 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 a certain conduct stands at the heart of every criminalization decision.

Legal scholars provide a two-pronged account of the harm that justifies criminalization: first, harms to others, namely, identifying the harms that the conduct inflicts on victims; second, establishing the perpetrator’s wrongful conduct that justifies placing personal guilt on him by imposing criminal liability. Again, revisiting the landmark Meritor case 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

20 See generally, JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW, VOLUME 1, HARM TO OTHERS, (Oxford University Press, 1986), at 105-118 (discussing the harm principle as the core justification for criminalization); DOUGLAS HUSAK, PHILOSOPHY OF CRIMINAL LAW (Rowman and Littlefield, 1987), at 224-244 (arguing that only wrongful, blameworthy, immoral conduct should be criminalized).

21 Meritor, 477 U.S. at 59-60
raped by her supervisor, was viewed both by the Court, as well as by prominent legal scholars, as suffering from gender discrimination. However, Vinson’s account of the sequence of events that resulted in her coerced submission further supports the arguments for re-examining the perpetrator’s conduct through the lens of criminal law, by providing the justifications for criminalizing this conduct.

2. The Harms Sustained by Victims of Coerced Sex

As noted above, the harm sustained by Vinson suggests that substantial similarities can be seen in the specific harms inflicted on coerced submission victims and the harms inflicted in other sexual offenses, including rape. These common features illustrate that the harms sustained by all victims of unwanted sex are in fact comparable and therefore, when combined with the perpetrator’s wrongful conduct, support the justifications for criminalizing the submission cases. These commonalities focus on identifying the victims’ subjective injuries and sufferings, which are perceived in terms of invading and violating the rights that victims are entitled to.22

The following four features summarize the main types of harm inflicted in sexual offenses in general, and in coerced submission in particular: first, violation of the right to remain free of sexual coercion; second, violation of bodily integrity, aggravated by the sexual nature of the conduct; third, non-physical violations, namely, harms of invasiveness, such as personal violation of self, invasion of the psyche, psychological impairment and distress and invasion of privacy; and fourth, violation of human dignity. Let me briefly illuminate some of these violations:

A prominent feature coerced submission and other sexual offenses share focuses on the 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 physical well-being and her right to remain free of sexual coercion, a coerced submission victim faces a strikingly similar choice; likewise, when a subordinate engages in unwanted sex with her superior to avoid the risk of adverse actions, she is forced to choose between two equally important rights: her right to economic survival and her right to remain free of sexual coercion. Indeed, since in practice economic survival is often equivalent to maintaining physical well-being, the law should adopt and uphold vigorous protections against violating this right, just as it typically secures rights to physical autonomy. I will further elaborate on this right in the following part while discussing alternative models for criminalizing the submission cases. For now, suffice it to say, that securing this right should stand at the heart of every sexual offense, and therefore any proposal to criminalize coerced submission must recognize it as such.

An additional feature coerced submission shares with other sexual offenses lies in sexually violating a person's bodily integrity. This focuses on the physical aspect of the violation: invasion of the body, obtained through forced penetration of sexual organs.

22 See generally: ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS (Cambridge University Press, 2003) at 89-118 (discussing the harms sustained by victims of unwanted sex in general, and rape victims in particular). (Hereinafter: WERTHEIMER). See also: Robin L. West, Legitimizing the Illegitimate: A Comment on Beyond Rape, 93 COLUM. L. REV. 1442, 1448 (1993) (arguing that from the victim’s perspective, unwanted sexual penetration involves unwanted force, and unwanted force is violent, and often leaves scars).
While every forced invasion of bodily integrity inflicts serious harm on victims, the fact that the invaded body part is a sexual organ exacerbates the severity of the violation.\textsuperscript{23} The second aspect of invasiveness harms consists of nonphysical invasion. The invasion of self and the psyche is a basic violation resulting from unwanted sex, including coerced submission. A prominent feature of invasiveness harms includes emotional and psychological injuries endured by victims of unwanted sex.\textsuperscript{24} Research suggests that these victims suffer comparable psychological harms stemming from the unwelcome sexual penetration, regardless of whether sex was violent or non-violent, albeit coercive in other respects.\textsuperscript{25} The common thread coerced submission victims share with other sexual offenses victims comes from forcing victims into submitting to unwanted sex, using coercive pressures to overpower genuine choices.

Another common feature both coerced submission and other sexual offenses victims share lies in the harm done to a person's dignity. Compelling sex on an unwilling person violates that person's dignity and has been a recurring theme in academic literature.\textsuperscript{26} Commentators concur that one of the harms sustained by rape victims is harm to one's dignity. Peter Westen, for example, argues that rape inflicts both a harm to one's dignity, which he designates secondary harm, and a material, actual harm, which he designates as a primary harm.\textsuperscript{27} A similar focus on harm to one's dignity is provided in the context of understanding the wrongs in sexual harassment. Rosa Ehrenreich, for example, argues that workplace harassment is fundamentally an affront to the victim’s dignity and personality interests.\textsuperscript{28}

In light of these features, rather than viewing the harms to Vinson through the lens of employment discrimination law, the criminal law’s perspective should be considered. Consequently, an alternative reading of \textit{Meritor} focuses on its close similarities and the compelling analogy it provides to a rape case, in terms of the personal harms the victim sustains. It further requires us to determine that economically and professionally coerced sex is in fact a form of conduct that significantly harms others and endangers the essential values of society, and therefore should be considered criminal conduct. This leads to the conclusion that imposing criminal liability is justified, provided that the perpetrator’s actions are determined as wrongful conduct. This conclusion in turn, calls for articulating why the law must recognize these actions as criminally wrong.

\textsuperscript{23} \textit{See, e.g.}, \textit{WERTHEIMER, supra} note 22, at 97-103 (discussing the experiential account of the harm sustained by victims of unwanted sex).
\textsuperscript{24} \textit{Id.} at 97-100 (providing an elaborate discussion of the unique psychological harms inflicted on victims of unwanted sex. It should be noted, that this discussion extends beyond the harms sustained by rape victims, and includes the harms sustained by victims of other forms of unwanted sex).
\textsuperscript{25} \textit{Id.} at 104
\textsuperscript{26} \textit{See generally}, Susanne Baer, \textit{Dignity or Equality? Responses to Workplace Harassment in European, German and US law}, in \textit{DIRECTIONS IN SEXUAL HARASSMENT LAW}, (Catherine A. MacKinnon and Reva B. Segal eds., 2003), at 582. (discussing the differences between the American jurisprudence that grounds the harm in sexual harassment on violation of the right to equality, and the European jurisprudence that focuses on the dignitary aspects of the harm).
\textsuperscript{27} PETER WESTEN, \textit{THE LOGIC OF CONSENT}, (Ashgate, 2004), at 148-149 (discussing the dignitary harm in rape).
\textsuperscript{28} \textit{See} Ehrenreich, \textit{supra} note 4 at 16 (describing the harm in sexual harassment in terms of violation of human dignity).
3. What is the Wrong at the Basis of the Perpetrator’s Conduct?

Indeed, 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 however, focuses on the wrong underlying the perpetrator’s conduct. Accordingly, my following discussion proceeds on the assumption that these harms must result from the perpetrator’s wrongful conduct; indeed, sex could be harmful to the victim, while not necessarily the result of criminally wrongful conduct.29

Generally speaking, every conduct that violates a person’s right to remain free from sexual coercion is clearly wrong; using a human being’s body to fulfill one’s sexual urges is inherently wrong, since every person has a moral right to be treated as an end, rather than a means.30 The second prong of the harm principle, however, demands that we further articulate what is the wrong at the basis of the perpetrator’s conduct, in particular in the workplace and in the academy. Looking closely at the features of the superior’s conduct in these specific settings provide an account of what precisely is the wrong underlying his conduct. With this, we must separately address these features that focus on the sexual abuse of supervisory power and on the characteristics of the workplace and the academy.

A variety of reasons support the argument that sexually coercive conduct in these settings justifies criminalization: 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 disparity in powers 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 advantages. The wrong lies in obtaining sexual favors by intimidating subordinates to 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 conduct. Consequently, creating this intimidating environment, and abusing the subordinates’ dependence should be considered as illicit pressure. Second, it is wrong to force subordinates to choose between two evils. By creating unbearable pressures, superiors place subordinates in an untenable position; they must risk either one of their basic rights: either sacrificing their professional and economic status, or sacrificing their right to remain free from sexual coercion. Forcing subordinates to make these choices also is wrong not only regarding the particular victim; it has ramifications extending to third parties, because it establishes a dubious normative practice in which professional decisions may be exchanged for sexual favors. Third, typically, perpetrators are supervisors or managers, whom the employer authorizes to exercise professional

29 See, e.g., Robin West, Desperately Seeking a Moralist, 29 HARV. L.J.& GENDER 1, at 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).

30 See, generally IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (London, Random House, 1948), translated by H.J. Paton, chapter 2 (articulating the classic famous 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).
power over subordinates.\textsuperscript{31} When a superior abuses the power vested in him under his professional capacity for his personal purposes, he acts outside the scope of his professional role. By that, the supervisor abuses the employer’s trust and mandate. When an employer entrusts a supervisor with professional power, he does so for the purposes of promoting professional goals, rather than promoting the supervisor’s personal urges. Furthermore, the employment or academic status exchanged for sex does not belong to the supervisor, but rather to the employer. Thus, the supervisor would be violating his obligation to the organization if he made decisions based on sexual submission rather than on professional merits.

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

Upon concluding that coerced submission justifies criminalization, we must then explore criminalization in terms of its tariffs, namely, weighing the costs, benefits, and trade-offs with imposing criminal liability. Criminalization further necessitates examining the policy goals and social considerations that support this choice. Indeed, every decision to criminalize needs to be supported by both moral and policy choices that a community makes regarding the types of pressures it deems illicit. This determination cannot be solely legal, requiring 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.

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 one form of wrongful conduct that harms others and endangers the essential values of society, and therefore must be criminalized. Criminalizing coerced submission further places the right to be free from sexual coercion as a core societal value. 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 certainly willing to stigmatize perpetrators by using the gravest form of regulation. This provides a significant modification in cultural and social perceptions, and a crucial step toward promoting social change through legal reform.

In addition, as noted above, under the current sexual harassment framework coerced submission victims often find themselves without a legal remedy. This is an aberrant situation, since these victims undoubtedly suffer one of the most egregious forms of sexual coercion, one that results in significant harm. This further emphasizes that civil remedies are too weak and insufficient to tackle the problem, thereby necessitating a stronger legal tool that only the criminal law is able to provide. Adopting criminal regulation would provide victims with the option to pursue the criminal avenue, if they truly choose to do so. It offers an additional legal remedy to the current ones, rather than replacing them altogether. Again, victims would be provided with a choice of

\textsuperscript{31} This excludes situations where the perpetrator is the employer himself, such as an owner of a company.
legal remedies. It should be stressed, however, that I am suggesting neither that criminalization always provides the proper solution, nor that every coerced submission case should necessarily be criminalized, regardless of the circumstances. Rather, I argue that the criminal prohibition may apply, in the most appropriate and egregious cases, and only after exercising careful discretion. Applying the criminal statute is nowhere required, but rather provides an alternative tool that may be implemented when the suitable and plausible candidates are identified.

Yet, while criminalization provides abundant benefits, it never comes without a cost; two main concerns may be raised on the cost side: some might argue that criminalization could result in weakening rather than empowering victims, portraying them as helpless victims and perpetuating female stereotypes. Others might argue that criminalization is too blunt a tool to regulate this type of misconduct. In my view, however, balancing the trade-offs with the benefits makes clear that providing victims with the option to choose the criminal avenue in the appropriate cases is a desirable solution to the problem of economically and professionally coerced sex. Moreover, the proposal to use criminal law comes as a last resort, after alternative forms of civil regulation prove weak and insufficient. In addition, opting for a suitable criminal model, and properly and wisely applying it can alleviate these concerns, as I further elaborate in the following parts. Of course, a careful application of criminal prohibitions is always required, and this is no exception. Indeed, various policy considerations support adopting criminal remedies that can significantly contribute to eradicating the problem. I therefore conclude that criminalizing coerced submission is not only justified, but also worthwhile.

II: ALTERNATIVE MODELS FOR CRIMINALIZATION

Upon concluding that coerced submission should be criminalized, and developing the theoretical arguments supporting this view, I move toward its doctrinal aspects by exploring the alternative criminal models that could accomplish this goal. 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 consisting of lack of consent to engage in sex and the force requirements. Under traditional rape jurisprudence, as well as under many current jurisdictions, to secure a rape conviction, both elements should be established concurrently. Thus, cases amounting to nonconsensual sex can be criminalized only if the force requirement is met as well. 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, namely, 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 consent. To provide a comprehensive understanding of the legal landscape and the various models of criminalization, I will examine several proposals that have been suggested to address this issue.
physical force, and therefore legitimizing the use of many other non-physical forms of force and nonviolent 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.\(^\text{34}\) While most reformers focus on the lack of consent element, others suggest expanding the definition of force to include more forms of non-violent coercion.\(^\text{35}\) Further, some reformers attempt to redefine rape, according to the ever-evolving social norms of both sexuality and gender equality.\(^\text{36}\) However, while reformers propose to relax the criteria for what type of conduct constitutes a sexual offense, most of them agree that submission resulting from economic coercion should not constitute a sexual offense.\(^\text{37}\) In other words, reformers refuse to recognize as criminal conduct situations in which the compulsion used was of an economic nature.\(^\text{38}\) Accordingly, the question of whether submission affected by economic coercion should be recognized as a criminal offense remains an open question, one that this article attempts to answer.

A. 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. These incorporate psychological, economic, professional, reputation and status harm, as well as the violation of the right to sexual autonomy.\(^\text{39}\) The most difficult question, however, remains ambiguous: when is consent truly genuine, a result of a free will choice?


\(^{35}\) Id.

\(^{36}\) RICHARD J. BONNIE, ANNE M. COUGHLIN, JOHN C. JEFFRIES, Jr, PETER W. LOW, CRIMINAL LAW, (Foundation Press, 2d ed. 2004), at 342 (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).

\(^{37}\) See, generally, Martha Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct, 61 S. CAL. L. REV. 777, at 820-825 (1988) (discussing the refusal of contemporary jurisdictions to outlaw submission that is affected by economic coercion).

\(^{38}\) See, generally, WERTHEIMER, supra note 22, at 189-192 (discussing the arguments against invalidating consent in cases that demonstrate coercive circumstances and economic pressures).

\(^{39}\) See SCHULHOFER, supra note 34, at 99-113 (arguing that the right to sexual autonomy is the missing entitlement that rape law reform must acknowledge). See also, WERTHEIMER, supra note 22, at 102-118 (discussing the harms of unwanted sex).
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”\textsuperscript{40} or the “Affirmative Consent”\textsuperscript{41} standard. In the paradigmatic nonconsensual case, the victim explicitly declined the perpetrator’s sexual demands by expressing a verbal refusal. Some reformers argue that a victim’s explicit verbal refusal should be enough to meet the definition of rape.\textsuperscript{42} Others critique this view, arguing that it cannot apply where the victim is silent and passive, and is unable to exhibit her refusal due to coercive pressures. Alternatively, they advocate the “Affirmative Consent” standard, arguing that the perpetrator should obtain the victim’s affirmative consent prior to engaging in sex.\textsuperscript{43}

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; however, it 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 taint the consent and thus should invalidate it.\textsuperscript{44}

Looking closely at the submission cases’ distinctive features illustrates that the “Affirmative Consent” standard poorly fits these cases; 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 consent,” as well as the background circumstances characterizing the unequal relations between the parties due to hierarchical differentials and economic disparities. Consequently, the “Affirmative Consent” standard validates the victim’s “consent” even if it was given under coercive circumstances. Moreover, this standard fails 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. Using this form of “consent” to legitimize certain coercive practices proves highly problematic, as it ignores the economically and professionally constrained circumstances under which “consent” was exhibited. Further, under this standard the perpetrator’s coercive conduct unjustifiably passes legal scrutiny. Indeed, in these cases, despite the victim’s affirmative consent, the perpetrator’s conduct amounts to sexual coercion, thus clearly justifying criminalization. This feature, in my view, is one of the lack of consent model’s main drawbacks. Thus, I

\textsuperscript{40} See, e.g., SUSAN ESTRICH, REAL RAPE, (Harvard University Press, 1987), at 41, 98 (arguing that a verbal refusal suffices to establish nonconsensual sex, and thus support a rape conviction); Lynn Henderson, Rape and Responsibility, 11 Law and Philosophy, 127 at 158, 215 (1992) (arguing that once a victim had said “no”, the perpetrator had been alerted to the lack of consent, and strict liability should apply).

\textsuperscript{41} See SCHULHOFFER, supra note 34, at 96, 268-269, 271-273 (advocating the adoption of the “Affirmative Consent” standard, as the controlling standard for determining consent to sex).

\textsuperscript{42} See supra note 40

\textsuperscript{43} See, SCHULHOFFER, supra note 34

\textsuperscript{44} 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 however, are irrelevant when considering criminalizing economically and professionally coerced sex, and discussing them in detail exceeds the scope of this article.
argue that the “Affirmative Consent” standard fails to provide a comprehensive conceptual basis for criminalizing the submission cases. This conclusion necessitates developing a separate standard to better fit the submission cases’ features, which leads to examining proposals to criminalize threats.

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 taint the victim’s consent to sex and therefore invalidate it. Accordingly, they suggest criminalizing situations where the perpetrator threatens to harm a victim or to violate her rights, and the victim submitted. I use the terms “lack of consent model” and “threat-based model” interchangeably to refer to these models. Two path-breaking works: “Unwanted Sex” and “Consent to Sexual Relations” provide a landmark contribution to contemporary reform, offering a conceptual framework that allows criminalizing coerced submission that resulted from threats. Under the threat-based model, which 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. 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. Third, where mere proposals to engage in sex are made, without linking them to any employment decisions, the prohibition also does not apply. This model concludes that, in the latter cases, negating the consent is unjustified since it is not tainted by threats. 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 underlying wrongful conduct embodied in all submission cases, separate and apart from drawing on the single threat element. In fact, making threats the focal point for

45 SCHULHOFFER, supra note 34
46 WERTHEIMER, supra note 22
47 Proposals to criminalize threats start as early as the Model Penal Code’s Gross Sexual Imposition provision. See, generally, Model Penal Code, section 213.1(2), and commentaries at 301-313 (1980) (extending criminal liability to include threats to inflict various types of nonviolent harm. Susan Estrich followed this line, by advocating criminalizing threats of a sexual nature. See, generally, Estrich, supra note 32, 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).
48 SCHULHOFFER, supra note 34, at 132-134, 280; WERTHEIMER, supra note 22 at 165-167
49 SCHULHOFFER, id, at 166 ; WERTHEIMER, id, at 170-172
50 SCHULHOFFER, id, at 168 ; WERTHEIMER, id 22 at 191-192
51 SCHULHOFFER, id, at 168-170, 280 ; WERTHEIMER, id, at 188-192
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. This feature further masks the distinctive harms that result in submitting to unwanted sex.

The threat-based proposals, however, 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. Nonetheless, these proposals also have some substantial shortcomings, which I will further elaborate on in the following section.

B. A 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 leads this body of research; she suggests recognizing different forms of coercive pressures to engage in sex as one type of force. MacKinnon argues that rape should be defined as “a physical attack of a sexual nature under coercive conditions, and gender inequalities are one type of coercive conditions.” She further suggests that criminal law prohibit taking advantage of unequal social positions to force sex on a person who does not want it. While she advocates the meaning of force being broadened to include inequalities of power in social hierarchies, she also advocates consent being replaced with an "unwelcome-ness" standard.

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. Further, she does not define the precise circumstances that indicate sexual coercion, and therefore fails to set clear boundaries between sexually abusive behavior that deserves to be outlawed and sexual behavior that does not justify criminalization. Indeed, MacKinnon’s conceptual ideas are insufficient and lacking in practice. While her insights provide an important step in understanding the coercion embodied in the submission cases, she fails to elaborate upon the pragmatic aspects and operational details of the criminal prohibition. To bridge this gap between theory 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. Indeed, proposals suggesting the expansion of the force element have been widely criticized precisely due to their failure to provide clear demarcation between criminal and

52 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.

53 For another view that expands the definition of force, see, e.g., WESTEN, supra note 27, at 184 (proposing to expand the notion of wrongful force to criminalize both wrongful threats as well as wrongful oppression).

54 See MACKINNON, WOMEN’S LIVES, MEN’S LAWS, supra note 5 at 247

55 Id.
legitimate sexual conduct. Commentators further argue 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.” This critique further contends that this overreaching expansion leads to over-criminalization, resulting in prohibiting too many legitimate sexual practices. In the fourth part, I take up the challenge of proposing a criminal statute that would provide a persuasive response to this criticism; I advocate adopting a new criminal prohibition based on the sexual coercion model, and offer a much-needed practical edge to MacKinnon’s key insights. However, since any reform proposal should clearly articulate the coercive circumstances that may indicate sexual coercion, in order to provide a legal boundary between criminal and legitimate conduct, I will further elaborate on the elements of the proposed statute, as well as on the conditions that establish supervisory sexual abuse of power.

C. Comparing and Contrasting the Models

We must ask, when comparing and contrasting the models, first, how does one model differ from the other, and second, what ramifications does choosing between them carry. While conceptually they share some common features, in practice, crucial differences distinguish them, and different outcomes might result in our consideration to criminalize the submission cases. In a nutshell, the sexual coercion model provides a more comprehensive conceptual basis for criminalizing a wider field of sexual abuse cases than the lack of consent model does.

The common thread of the two models lies in delving into the notions of both coercion and free will choices, by looking at the circumstances that taint these choices. The core concept underlying every criminal regulation of sexual misconduct, under any contemporary criminal model, rests on 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 clearly 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. These differences further rest on a different construction of these notions; 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: First, the models adopt a different definition of sexual coercion. They provide a different answer to the question whether the coercive conduct extend beyond threats to inflict harm. Consequently, the models result in different views as to whether

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56 See, generally, SCHULHOFFER, supra note 34, at 82-98 (criticizing reform proposal that focus on expanding the definition of force)
57 Id., at 88.
58 Id., at 277 (discussing examples of statutes that outlaw consensual sexual relations).
economically and professionally coerced sex in the workplace and in the academy should be criminalized. Second, the models stipulate very different elements that define the offense. While the lack of consent model establishes nonconsensual sex as an element of the offense, the sexual coercion model defines the offense by looking at the perpetrator's conduct, without any reference to the victim’s consent. The models therefore differ in dealing with the perpetrator’s culpable conduct; while the sexual coercion model focuses on his personal guilt, the lack of consent model shifts the attention to the victim’s response and behavior. Third, the models differ in whether they provide a separate legal response to sexual misconduct within the workplace and in the academy, or rather provide a single legal standard for sexual misconducts occurring under different social settings. Fourth, the models vary in the values they promote and the objectives they secure, in particular, whose interests are protected by the prohibition. Fifth, the models differ in the ramifications of criminalizing coerced submission, and in whether it would result in strengthening or rather weakening victims. Sixth, the models differ with respect to whether they focus on individual harms or rather on group-based harms and whether they promote gender equality. Finally, the models vary in how they respond to any counterarguments that may be raised against criminalization. I now further elaborate on each of the above features:

The first feature focuses on the different definitions the two models adopt for sexual coercion. In other words, the key difference between the models lies in determining which circumstances amount to sexual coercion. Before I continue, let me clarify. Coercion may be narrowly or broadly construed. The Model Penal Code’s criminal coercion provision illustrates the narrow construction of coercion; it only incorporates threats to inflict harm, typically of a tangible nature. It should be noted, however, that the Model Penal Code does not specifically define “sexual coercion,” but rather defines “coercion” in general. The threat-based model adopts the Model Penal Code’s narrow definition of criminal coercion, and applies it to set the legal boundary for sexual coercion. A more realistic definition of sexual coercion, however, incorporates other forms of pressures, those extending beyond threats. The sexual coercion model acknowledges that sexual coercion should be differently construed, and opts for a pragmatic construction, one that extends beyond the Model Penal Code’s definition.

While many reformers agree that threats to inflict harm invalidate consent, there is substantial controversy over the precise types of pressures, beyond threats, that add -up to 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, even though it acknowledges that even without explicit threats or other improper inducements, freedom of choice can still be affected because of the unequal distribution of power, such as between

59 See Model Penal Code section 212.5 (1980) (defining the offense of criminal coercion as threatening to perform certain predicate acts “with purpose to unlawfully restrict another’s freedom of action to his detriment”).

60 See generally, WERTHEIMER, supra note 22, at 189-192 (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); SCHULHOFFER, supra note 34, at 161-167 (arguing that an approach that views economic pressures on subordinates and fear of retaliation as coercion poses a risk to sexual autonomy)
supervisors and employees. However, in the absence of threats, the reformers supporting this model refuse to acknowledge that the pressures that pervade some relationships justify criminalization. Stephen Schulhoffer, for example, suggests that: “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 in the absence of illegitimate threats.”\(^{61}\)

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, I suggest the adoption of a separate standard to fit the criminal law arena by developing a non threat-based legal boundary for determining sexual coercion in the workplace and in the academy, one that takes into account criminal law principles.

The sexual coercion model, however, expands the definition of sexual coercion to include more sexually coercive pressures beyond threats. This model further questions the power of consent to legitimize sexually abusive behaviors. Instead, it poses that the consent standard fails to set an adequate boundary between permissible and criminally prohibited sexual conduct, and further fails to fully capture the ramifications of various coercive pressures exerted by powerful people over their subordinates in the workplace or in the academy. Rather than focusing on the particular moment when consent was manifested, the sexual coercion model probes into the sequence of events leading to that consent; it also probes into the background conditions and into 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; it looks closely at the features indicating sexual abuse of power and the perpetrator’s taking advantage of economic and professional disparities to coerce sex.

The ramifications of adopting a different definition of sexual coercion are substantial; the lack of consent model refuses to criminalize economically and professionally coerced sex, unless threats are established. By adopting a narrow definition of what would invalidate consent, supporters of the lack of consent model legitimize all other forms of coercive conditions and sexually coercive practices that fall short of threats. Under this model, victims may consent to be sexually abused, and criminal law should validate this consent to ensure a person’s right to express his/her sexual autonomy. By drawing on the victim’s consent as legitimizing certain coercive conducts, exerted by people who hold power over economically dependent people, the law leaves many sexual and social practices justifying criminal regulation outside legal scrutiny. Consequently, the threat-based model’s main drawback stems from its failure to provide a comprehensive conceptual basis for criminalizing coerced submission, in situations falling short of threats. Thus, this model would not criminalize a significant amount of the submission cases, as my discussion in the third part demonstrates.

\(^{61}\) See SCHULHOFFER, supra note 34, at 112
The sexual coercion model, however, 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 sexual misconducts, refusing to legitimize many sexually coercive practices that the lack of consent model validates. The model further limits the legal significance of the victim’s consent to be sexually abused by holding that it does not carry any legal relevance. Moreover, the sexual coercion model focuses on the negative aspect of sexual relations by securing a person’s right to remain free from sexual coercion. Accordingly, this model supports stronger protections to ensure this right. 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. 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. This feature clearly renders the sexual coercion model a more desirable response to address the problem of the submission cases, since it sets a more realistic and pragmatic standard for determining whether sex actually resulted from sexual coercion.

The second feature focuses on the different elements used in defining the offense under the two models. The core question is whether lack of consent should be an element of the offense or be defined by other elements that focus only on the perpetrator’s conduct. Under the lack of consent model, nonconsensual sex is an element of the offense; in other words, the offense is defined by articulating the conditions that invalidate consent. In contrast, the sexual coercion model does not incorporate lack of consent as an element of the offense. Rather than defining the offense in terms of nonconsensual sex, it is defined by referring to the perpetrator’s coercive conduct, namely, in establishing sexual abuse.

The ramifications of this difference are clear; due to profound disagreement on the circumstances negating consent, and in particular, whether economically and professionally coerced sex should invalidate expressed consent, defining the offense’s elements without referring to the disputed notion of consent is a major virtue of the sexual coercion model. In fact, defining the offense using separate elements, by articulating the type of conduct that amounts to sexual coercion, provides a clearer prohibition, one that avoids the controversy over what qualifies as genuine consent. In addition, defining the offense in terms of nonconsensual sex wrongly focuses on the victim’s demeanor and response to the perpetrator’s conduct. The sexual coercion model, however, 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.

Looking closely at the elements defining the offense raises another question: whether the definition of the offense should replace consent with the unwelcome-ness requirement. MacKinnon argues that consent is insufficient to legitimize sexually coercive practices. She suggests that rape law should follow sexual harassment’s path and replace consent with welcome-ness: “If force were defined to include inequalities in power, meaning social hierarchies and consent were replaced with a welcome-ness
standard, then the law of rape would begin to approximate the reality of forced and unwanted sex.”

Two questions then remain open: first, whether establishing that the victim did not want sex should be an element of the offense. Second, what role, if any, should the unwelcome-ness requirement play in the offense, and who should bear the burden of proof regarding whether sex was wanted, namely, is it the prosecution or the defendant who should bear this burden.

While MacKinnon’s view suggests that unwelcome-ness should be an element of the offense, let me respectfully disagree, by arguing that it should not be part of the definition of the offense. Adopting the unwelcome-ness standard here seems problematic in light of the ramifications this standard entails under sexual harassment litigation. Susan Estrich criticizes the unwelcome-ness standard in sexual harassment litigation; she suggests that the same doctrines, rules and prejudices used in rape law have been borrowed and applied in sexual harassment law, and therefore both areas share similar problems, in particular those stemming from the unwelcome-ness standard that resembles rape standards of consent and resistance.

The *Meritor* case best illustrates the drawbacks in the unwelcome-ness standard. The court held that: “a complainant’s sexually provocative speech or dress is not irrelevant in determining whether he or she found the particular sexual advances unwelcome.” This statement shifts the legal scrutiny to the victim’s conduct and her sexuality, rather than scrutinize the perpetrator’s coercive misconduct. Sexual harassment litigation illustrates the drawbacks of probing into the welcome-ness of sex, since courts use irrelevant factors, such as the victim’s speech and dress, to establish it. This suggests that we should be wary of applying this standard to the definition of the offense. Consequently, in light of these shortcomings, I suggest that any legal reform should be more cautious in adopting the same problematic standards used in civil litigation into the criminal law. Accordingly, the proposal I advocate for in the fourth part, defines the offense neither in terms of lack of consent nor in terms of unwelcome sex. Rather, the proposal adopts the view that abusing power differentials to coerce sex on subordinates should be regarded as wrong per se. Thus, establishing it should be the single element defining the offense.

The remaining question then is whether the unwelcome-ness requirement should play any role in the proposed offense. While I argued earlier that it should not be an element of the offense itself, I suggest that it could be a possible defense that the perpetrator may raise under a sexual abuse charge; namely, the perpetrator could prove

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62 See MACKINNON, WOMEN’S LIVES, MEN’S LAWS, supra note 5 at 247. Many other feminist scholars argue that consent in itself is insufficient to legitimize sexual relations. These commentators agree that in addition to being consensual, some form of mutuality has to be met, namely, both parties should also want to engage in sex, and equally welcome it. However, they disagree on the precise content of this requirement. Thus, it remains vague, undefined, and an unworkable line drawing. See, e.g., Chamallas, supra note 37, at 784-785 (advocating the mutuality model, and arguing that consent should not be considered freely given when it results from economic inducements stemming from gender inequalities and disparities in power). See also Lois Pineau, Date Rape: A Feminist Analysis, 8 Law and Philosophy 217, 236 (1989) (advocating the communicative model, and arguing that when the circumstances do not point to a communicative sexual experience, consent should be regarded tainted).


64 *Meritor*, 477 U.S at 68-69
that the victim welcomed sex with him. The difference between making the unwelcomeness requirement a defense as opposed to making it part of the offense’s elements is clear. It carries significant ramifications on who should bear the burden of proof regarding whether sex was wanted. While adopting the welcome-ness standard as part of the offense’s elements places the burden of proving that sex was unwanted on the prosecution, adopting the same standard as a defense places the burden of proving the victim did want to engage in sex with him on the defendant.

A third feature distinguishing the models lies in whether they adopt the same legal standard for criminalizing sexual misconduct in public and in private settings. The lack of consent model provides a single legal standard to fit all types of social settings and fails to distinguish between public and private spheres. Most threat-based proposals do not distinguish between the different settings under which threats occur; they lump together threats to inflict harm within public settings -- the workplace and the academy -- and threats to inflict harm within private settings -- relations between spouses and acquaintances. Criminal regulation under the lack of consent 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 the private setting, 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 most 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 academy. 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.” 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.”

While Wertheimer acknowledges the need to consider the adoption of a specialized per se rule for the workplace and for the academy, he does not further elaborate on the practical ramifications of this rule, nor does he articulate the circumstances where it may apply. Thus, adopting a per se rule to criminalize the submission cases remains an open challenge. In part four, I attempt to follow Wertheimer’s line of thinking about proposing a special rule for certain settings, by articulating the elements of a prohibition against supervisory abuse of power.

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65 See, e.g., WERTHEIMER, supra note 22, at 178-186
66 Id, at 181
67 Id.
In contrast with the lack of consent 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. Accordingly, the sexual coercion model provides separate legal standards for these settings. It acknowledges that abusing power differentials in the workplace and in the academy should be considered wrong per se, and therefore should be criminalized. There are a variety of reasons stemming from the supervisory sexual abuse of power, why sexually coercive conducts in these settings should be treated differently. Let me briefly summarize: 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. Third, 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. They call for adopting different legal standards by proposing a different criminal model developed especially for public settings.

Fourth, another difference between the models rests on the values they protect and the interests they promote. The right to sexual autonomy is undeniably a basic core value under any model. However, it embodies two contrasting aspects; the positive one focuses on every human being’s right to engage in sex, provided that both parties are consenting and are competent adults. The negative aspect, however, focuses on a person’s right to be free from sexual coercion to ensure their autonomy and free choice regarding when and with whom they choose to engage in sex. The problem stems from the contradiction between these aspects, since 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’ right to sexual autonomy. This right stands at the core of the lack of consent model, which is wary of violating a person’s right to engage in sex with others. 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. Schulhoffer’s work provides an illustrative example. He argues that the law should focus on ensuring the right to sexual autonomy, and sexual offenses should be viewed as violations of this right. In contrast, the sexual coercion model favors the promotion of the negative aspect of autonomy. It better protects victims’ right to remain free from sexual coercion, by narrating victims’ stories and representing their interests. By acknowledging that disparities in power constitute coercive conditions, this model extends more vigorous protection to ensure this right.

In light of this backdrop, another 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.

68 See generally SCHULHOFFER, supra note 34, at 276-282 (discussing the various aspects embodied in the right to sexual autonomy).
69 Id., at 274-282
Supporters of the lack of consent model argue that the right to sexual autonomy is gender neutral. By contrast, reformers supporting 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.\(^{70}\) They further argue that current rape laws purporting to promote women’s right to sexual autonomy, in fact, focus on promoting sexual autonomy of men, 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 until lawmakers thoroughly revise not only rape law prohibitions but also the liberal construct of autonomy itself.\(^{71}\) Consequently, reformers supporting the sexual coercion model advocate criminalizing more sexually coercive behaviors to better ensure a victim’s right -- male or female -- to remain free of sexual coercion.

Fifth, an additional difference between the models rests on the ramifications of criminalizing coerced submission. In particular, the key concern is whether criminalization would result in strengthening victims or rather in weakening them. Indeed, the lack of consent model generally demands that we negate the legal significance of the victims’ expressed consent, due to coercion.\(^{72}\) However, comparing women making choices under economically constrained conditions to incompetent victims, and treating their decisions similarly by invalidating their “consent,” may prove problematic. Supporters of the lack of consent model argue that invalidating women’s choices whenever unequal conditions are present is paternalistic and would violate their right to exercise autonomous sexual choices.\(^{73}\) The implications of invalidating women’s consent to sex may undoubtedly raise concerns that criminalization would result in weakening victims. Viewed through the lens of feminist jurisprudence, this is a significant shortcoming in this model.

The sexual coercion model, however, resolves this concern. It avoids invalidating the victims’ choices simply because their consent to being sexually abused bears no legal significance. Since under this model, lack of consent is not part of the definition of the offense, it does not demand negating the victims’ consent. It 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

\(^{70}\) See generally Anne Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1 at 1-6, and accompanying citations (discussing different views regarding the assertion that the prohibition against rape exists to protect female sexual autonomy).

\(^{71}\) See, e.g., CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) at 175-178 (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: “the concept of sexual autonomy must spring from a substantive vision of gender, race and class relations that seeks liberation from all conditions of subordination”).

\(^{72}\) 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.

\(^{73}\) See, e.g., SCHULHOFFER, supra note 34 at 281-282 (discussing the need to be wary of infringing on women’s autonomous sexual choices)
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.

Sixth, an additional feature distinguishing the models rests on whether they address mainly individual harms or gender group-based harms. The lack of consent 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. Adopting a similar construction of consent to sex to different social settings tends not only to focus on the personal aspects of the submission cases but also to obscure the broader aspects of the phenomenon as well as its broader ramifications on women as a group. 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 ramifications of disparities in power and social hierarchies within the workplace and the academy. It further takes into consideration the unique features of sexual abuse of power and the coercive circumstances that women endure in these settings. Consequently, the model better addresses the need to remedy group-based gender harms inflicted on women as members of a group by coerced sex. It further treats those harms by going beyond the victims’ individual experiences and personal injuries. Thus, the sexual coercion model provides broader protection to victims’ rights and, in particular, in promoting gender equality.

Finally, any proposal to criminalize coerced submission is likely to face various types of criticism. Comparing and contrasting the models demands that we examine which model provides a better response to any potential counterarguments against criminalization. After summarizing the differences between the models, I conclude that the sexual coercion model better resolves these criticisms, and therefore provides a more favorable approach. I addressed earlier two potential criticisms: the weakening concern, and second, the worry that criminalizing the submission cases will obscure the gender group-based harms inflicted on victims. As noted above, I believe that the sexual coercion model provides a sound response to these concerns. Another type of criticism however, relates to concerns about over-criminalization. It suggests that criminalizing the submission cases fails to provide workable legal boundaries between what qualifies as criminal conduct and what should be left aside. The lack of consent 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 the workplace and to the academy, and therefore avoiding being over-reaching. It acknowledges the need to criminalize economically and professionally coerced sex, provided that this expansion is carefully crafted and that the coercive conduct is properly defined. I will return to these points in the fourth part, when I articulate the offense’s elements.
III: APPLYING THR MODELS

After discussing the conceptual differences between the alternative criminal models, I move to explore their practical ramifications by applying the models to cases litigated under a sexual harassment cause of action.

At the outset, a cautionary remark is in order, regarding the attempt to use criminal prohibitions on cases litigated under civil law; revisiting sexual harassment cases through the lens of criminal law rests on a hypothetical application. It involves a theoretical construct, which requires us to conjecture how these cases would have turned out were they actually adjudicated under criminal provisions. This move allows the readers to consider a twofold question, involving both normative perceptions and doctrinal aspects: first, whether the conduct in question justifies criminalization, in light of the outcome under civil remedies, and second, which criminal model is better suited to criminalize these cases. However, since criminalization was outside the scope of the courts’ considerations, their actual holdings, under the Title VII framework, carry only limited relevance. Furthermore, while these courts contemplated whether imposing employer’s liability is justified, the considerations they took into account differ from those that would have been relevant for imposing criminal liability on the individual perpetrator, since obviously different considerations apply in different areas of law.

In what follows, I examine a total of fourteen submission cases, to consider whether imposing criminal liability is justified. I break down these cases to 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. In the remaining eight cases these threats are lacking; nonetheless, while in seven of them, other features indicate that the conduct in question was sexually coercive, the eighth case illustrates that these coercive features are lacking.

Breaking down the submission cases to two categories suggests that we take a gradual approach to criminalization, in which we move from clear examples of sexual coercion to its less obvious and subtler forms. A hypothetical coercion continuum provides an illustrative way of capturing these incremental steps. 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 therefore they were 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 I will shortly demonstrate.

Moving farther down the continuum, we find the subtle and less overt cases of sexual coercion, where threats are absent. In these situations, 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 group incorporates cases that are more comparable to sexual assault; while the perpetrator did not obtain the victim’s consent to sex, he did not use physical force to compel her submission. It is the second group, however, that incorporates the most complex and controversial scenarios. They occur either where 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, since 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 features, which clearly indicate that submission resulted from sexual coercion.

Applying the threat-based model to these latter two subcategories illustrates that it does not enable criminalizing cases that fall short of threats. Consequently, the threat-based model fails to provide a comprehensive legal boundary between abusive and non-abusive sexual conduct. I suggest however, that the alternative sexual coercion model provides a better-suited framework for criminalizing coerced submission. In what follows, I will show that adopting a more realistic definition for what conduct qualifies as sexual coercion allows for criminalizing a wider range of situations, including economic and professional coercion, by acknowledging it as one form of sexual abuse of power.

A. Cases Where Threats Are Established

1. Explicit Threats

Cases incorporating explicit threats to cause harm provide the clearest illustrations for sexual coercion: In Min Jin, for example, the victim’s supervisor forced her to attend weekly 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. In Samedi, two employees forced the victim to engage in numerous sexual acts with them, while threatening to fire her if she refused. In Arnold, the victim’s supervisor lured her to his trailer, instructing her to bring work-related files, then forced sex on her, while threatening to fire her if she refused.

Revisiting these cases through the lens of criminal law illustrates that the perpetrators’ conduct undoubtedly justifies imposing criminal liability. Furthermore, the cases’ features 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. However, let me suggest that criminalizing these cases may also be based on the sexual coercion model. The cases share the following features, 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

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74 Min Jin, 310 F. 3d at 88-89
75 Samedi, 206 F. Supp. 2d at 1216 (Samedi was a non-English speaker Haiti 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).
76 Debbie Arnold v. The Answer Group, Slip Copy, 2008 WL 2700295 (W. D. La) 2008 (the victim who was employed as a security officer, claimed that her immediate supervisor started touching her in sexually sensitive areas, and then forced her to perform oral sex on him, on different occasions, under the threat of being fired).
subordinates. The supervisors held the professional power to directly affect and control the subordinates’ employment status, and explicitly indicated to them their willingness to exert 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 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.\(^77\)

Based on these cumulative factors, I suggest that the sexual coercion model enables criminalizing coerced submission resulting from supervisory abuse of power. Moreover, this model is better suited to capture the perpetrator’s wrongful conduct, clearly underlying the coercive features embodied in this conduct.

While the courts could not have considered actual criminal provisions under the sexual harassment framework, in some cases, the courts’ own rhetoric and choice of words employed criminal principles, which may, in turn, support criminalization. The Jin court, for example, refers to requiring the subordinate to engage in unwanted sexual acts as coercion resulting from abuse of power.\(^78\) Moreover, the Jin court compares Jin’s coerced submission to other cases where threats did not 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.”\(^79\) 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. The court could not further address the possible ramifications of its statements, since its judgment was confined within the sexual harassment cause of action. However, this rhetoric may open a door to separately categorize coerced submission’s distinctive harms through the lens of criminal law, which may be done by adopting the sexual coercion model.

2. Implicit Threats

Another subcategory of cases involves implicit and tacit threats to cause harm if sexual demands are refused. In Nichols, for example, 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.\(^80\) During night shifts, the supervisor demanded that she perform sexual acts on him. While in the beginning she declined, eventually she submitted, afraid she might lose her job if she refused. This routine occurred over a

\(^{77}\) Min Jin, 310 F. 3d, at 88-89
\(^{78}\) Id. at 99
\(^{79}\) Id.
\(^{80}\) Terri Nichols v. Anthony Frank, 42 F. 3d 503, (C.A.9 Or 1994)
period of approximately six months. In Showalter, two male employees working at a jewelry firm, alleged that the firm’s general manager forced 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. 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. Furthermore, Smith made repeated references to Showalter regarding his extensive connections in the jewelry business. Ultimately Showalter submitted, out of fear of losing his job.

The Liu case provides an example for sexual coercion in the academy, where a graduate student was forced to engage in sex with a professor who held the power to expel her from school. The victim, a native of Taiwan, was a student at Providence College, holding a student visa. Striuli was a professor at that college and also the designated school official who handled the immigration affairs of international graduate students. When Liu’s visa expired, she was referred to Striuli. He told her that he was the only college official who 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.” Liu kept refusing Striuli’s advances, while he repeatedly told her that she could be deported because of her illegal status. 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. Liu further alleged that Striuli raped her on many other occasions, and that she never willingly engaged in any sexual acts with him.

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 justifies criminalization as well. Similar to the previous subcategory, either one of the models may be the basis for criminalizing these cases. On the one hand, the specifics of these cases squarely fit the threat-based model, since the victims were able to establish that their submission resulted from implicit threats. On the other hand, the alternative sexual coercion model may also allow criminalizing these scenarios, and further provides a framework that more clearly captures the perpetrators’ coercive conduct. Indeed, the cases in this subcategory illustrate the paradigm whereby supervisors abuse their professional roles and powerful positions to coerce sex on subordinates.

The same conditions that I identified earlier, which support the sexual coercion determination, are established here as well: the stark imbalances in power and the superior’s capacity to control and affect the subordinate’s professional status; the subordinate’s economic and professional vulnerability; the perpetrators’ persistent and

81 Id., at 507 (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. She submitted for the last time, whereupon he approved her request).


84 Id., at 461
repeated demands for sex, which lasted over a significant period of time; the victims’
passivity and inactiveness in response to the sexual acts; the victims’ intimidation and
fear of losing their job or academic position; the other forms of touching of a sexual
nature that came before the sexual submission; and the violent nature of some of the
sexual encounters.\textsuperscript{85}

In addition, the cases discussed above illuminate various other features provided
by the sexual coercion model; the \textit{Liu} case illustrates that the same justifications for
criminalizing coerced submission in the workplace, equally apply 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 \textit{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.\textsuperscript{86} 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. While the courts could not have considered actual
criminal provisions, their choice of words sheds a new light on proposals to criminalize
such cases based on the sexual coercion model. The language of the \textit{Nichols} case, for
example, brings to light some important features that support adopting this model:

First, the \textit{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.\textsuperscript{87} 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 \textit{Nichols} court refers to the supervisor’s behavior as “forced sexual
conduct.” The court’s own language compares the perpetrator’s conduct to other cases of
sexual assaults, holding that: “nothing is more destructive of human dignity than being
forced to perform sexual acts against one’s will.”\textsuperscript{88} The \textit{Showalter} court also uses the
term “force” to address the nature of the sexual encounters, holding that: “the clear
weight of the credible evidence indicates that the plaintiffs were forced to engage in

\textsuperscript{85} \textit{Id}, at 460 (an example for a case in which the victim alleged that one occasion resulted in vaginal
bleeding)
\textsuperscript{86} \textit{Showalter}, 767 F. Supp. at 1209
\textsuperscript{87} \textit{Nichols}, 42 F. 3d at 507
\textsuperscript{88} \textit{Nichols}, \textit{id}, at 510
intimate sexual contact as a condition of retaining their employment at the firm.”

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 a conduct violating the victims’ human dignity. Looking at the harm in coerced submission through the lens of human dignity carries important implications on 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.

B. Sexual Coercion Albeit the Lack of Threats

The second category incorporates cases where threats are lacking. Moreover, in these cases sex was proposed without mentioning any employment or academic decisions. However, these cases demonstrate sexually coercive conduct, which is established through other features. Consequently, they clarify that other sexually coercive situations, other than threatening conduct, may justify criminalization as well. 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.

Applying the threat-based model to cases falling under the second category illustrates that it clearly does not fit these cases. Since threats cannot be established, this model does not enable criminalizing these cases. This is true even where various other factors indicate that submission resulted from sexual abuse of power, and the case certainly justifies criminalization. This feature provides 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.

89 Showlater, 767 F. Supp. at 1212

90 Id.

91 See generally 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., Beatrice Morris v. Gilbert Eversley 343 F. Supp 2d 234, (S.D.N.Y. 2004) at 248 (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.)
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 no physical force was used and no threats to harm were expressed. The *Meritor* case is the paradigm for this subcategory. Most importantly, the *Meritor* Court itself voiced its opinion that “Respondent’s allegations in this case include not only pervasive harassment but also criminal conduct of the most serious nature.” However, the Title VII framework could not have provided the basis for elaborating upon the practical ramifications of the Court’s own statements. I concluded the first part by arguing that the *Meritor* case justifies criminalization, based on the harms sustained by the victim, and resulting from the perpetrator’s culpable conduct. I now move 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. Since *Meritor* clearly falls within the 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. Furthermore, the case did not involve any evidentiary hurdles regarding the causal link between employment and academic decisions and sexual submission; it was clear that the perpetrator never expressed any threats to harm the victim. 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. *Meritor* illustrates that 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,

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92 *Meritor*, 477 U.S. at 67
93 See discussion of the harm supra Part I. C. 1-3
94 See, e.g., SCHULHOFFER, supra note 34 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 22 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. See WERTHEIMER, at 189-192 (discussing the effects of economic pressure and inequality on sexual relations, and arguing that these circumstances should not invalidate consent, and that the law should not prevent people from consenting to offers and economic transactions that would move them from an unfortunate situation to a better situation).
knowing 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. 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 expanding the employer’s liability to cases where threats were absent. However, a closer reading illustrates that, in fact, the court adopted a narrow definition of supervisory sexual abuse of power within the hierarchical relationship in the workplace. In particular, the Meritor court refused to prohibit sexual relations between supervisors and subordinates whenever abuse of power resulting in coerced submission was established. By doing that, it 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. By insisting that the victim’s conduct should indicate to her supervisor that his conduct was unwelcome, the Meritor court significantly narrowed the definition of sexual abuse of power. Under the Court’s reasoning, if the victim fails to prove that the sex was unwelcome, the supervisor is free to repeatedly pressure her, and if she acquiesces without protesting, he will not be liable for sexual harassment. Requiring the victim to establish evidence that she did not welcome her supervisor’s sexually abusive conduct provides, in my view, one of the decision’s main drawbacks.

Instead, the Court could have adopted a more realistic definition for sexual abuse of power within hierarchical relationships in the workplace. This hypothetical construct rests on determining that supervisory sexual abuse of power is indeed one form of sexual coercion. Under this alternative view, establishing supervisory sexual abuse of power to compel submission should suffice, in and of itself, for demonstrating 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 the entire 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; these would include: the parties’ power differentials and economic disparities; the superior’s 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 intercourse; 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, since actions always speak louder than words, 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 illustrate that submission resulted from economic pressure and intimidation. This type of conduct qualifies as sexual coercion, based on supervisory sexual abuse of power. The Walton and the McPherson decisions provide additional examples for situations falling under this subcategory.

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 however, the superior merely proposed to the victim to engage in sex, without mentioning any employment or academic decisions, and she submitted. This subcategory involves the most complex cases regarding criminalization decisions, since the sexual coercion here is tacit, and less easily identified. While at first glance, sex in these cases may seem consensual, 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 to avoid potential retaliation and repercussions.

The Holly D. and the Lutkewitte cases are the paradigm examples in this subcategory. Holly D. was a 47-year-old single mother, who suffered from depression, as well as from serious financial difficulties. She began working in Caltech for one professor, and then was promoted to work under Professor Wiggins, a transfer entailing a six months probationary period. She claimed that during that period, Wiggins made

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95 Luanne Walton v. Johnson Services Inc. 347 F. 3d 1272 (11th Circuit, 2003) (Walton was a pharmaceutical sales representative working under Mykytiuk’s direct supervision. After hosting a work-related dinner, he ordered her to follow him to his home, to recap the event. Upon arrival, Mykytiuk discussed his marital problems with Walton, showed her his gun, jumped on her and tried to kiss her. She claimed that she tried to push him away, and told him “no”, but despite her efforts he physically entered her without her consent. She further claimed that she fell into a state of shock, and that she believed he raped her again that night. About a week later, he ordered her again to follow him to his apartment where he again raped her).

96 Leslie McPherson v. City of Waukegan, 379 F. 3d 430 (C.A. 7 (III), 2004) (McPherson was a clerical technician who claimed that her supervisor sexually harassed her for two years, beginning with making offensive comments to her, and culminating in sexually assaulting her. She claimed that he called her to his office, closed the door, slid his hand under her skirt and touched her breast. She asked him to stop, but he pushed her towards the wall behind the closed office door, and inserted his finger into her vagina. She again asked him to stop but he continued until someone else entered his office).

97 The Walton and McPherson cases share many similarities with rape and sexual assault cases, where consent to sex was absent. However, since threats to harm were lacking, they could not have been criminalized under the threat-based model. The various factors identified earlier as indications of coercion, are of controlling importance in these cases as well, illustrating that submission resulted from supervisory sexual abuse of power, and therefore justifying criminalizing them under the sexual coercion model.

98 Holly D., 339 F. 3d at 1162-1164

99 Lutkewitte, 436 F. 3d at 288
sexual advances towards her, including references to his sexual preferences, and she showed him that she was not interested in them. When she received a negative performance evaluation, she drew the connection between her failure to respond positively to these advances and Wiggins’s criticism. 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. When Wiggins next asked her to perform oral sex on him, she replied “yes,” and from that date, they engaged in various sexual acts during working hours. Holly D. claimed that after a year of a sexual relationship, she received a positive performance evaluation. She contented that she could mitigate potentially job-threatening criticism by performing sexual acts, thus claiming that she was forced to commence and maintain the sexual relationship in order to keep her employment. 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.¹⁰⁰

Janet Lutkewitte was working as a computer specialist for the FBI, while Ehemann was her direct supervisor. He first began making sexual overtures to Lutkewitte. He asked her to go out to dinner when they attended out of town conferences, behaved flirtatiously and told her: “don’t worry about getting your promotion to GS-13, and if you stick with me you’ll go higher.” On one occasion he ordered her to assist him during an inspection in New York, where he pressured her into undesired sexual intimacies, to which she acquiesced because she thought she would lose her job if she told him to stop. After that event, Ehemann’s pursuit of Lutkewitte included rubbing up against her and kissing her during work hours. She never told him to stop because she feared losing her job, but she did try to discourage him and to avoid him. 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 at the detriment of her personal well being.”¹⁰¹ However, the court rejected Lutkewitte’s sexual harassment suit, holding that she failed to establish that her supervisor made employment decisions conditional to her submission. It also 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.¹⁰²

The common thread characterizing 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 do 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 shortcoming; these cases illustrate that various factors that indicate sexual coercion were clearly established, albeit with the lack of threats. Looking closely at these coercive conditions further demonstrates that these cases in fact justify criminalization, since submission resulted from supervisory abuse of

¹⁰⁰ Holly D., 339 F. 3d, at 1164
¹⁰¹ Lutkewitte, 436 F 3d, at 288
¹⁰² Id.
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; while both the Holly D. and the Lutkewitte courts acknowledge that the supervisory nature of the employment relationship between the superior and the victim must be considered when determining whether employment decisions were conditioned on sexual submission, both courts deny that this factor suffices in establishing the causal link between the employment status and the sexual submission. Under the criminal model I advocate, however, the 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, I suggest 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, looking at the Holly D. and Lutkewitte cases demonstrates these five factors; First, gross imbalance and disparity in powers characterize the relationships between the parties. The perpetrators held direct supervisory position over the victims, and had the capacity to control and affect their employment status. In both cases, the supervisors also abused the professional authority granted to them by their employers to obtain personal sexual favors for themselves. Second, the economic differentials between the parties support 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. This sharpens the need to provide a substantive per se rule, which prohibits supervisory sexual abuse of power in the workplace and in the academy. This proposal would allow criminalizing various forms of coercive conducts, namely, economically and professionally coerced sex in these settings. The Cobb decision illustrates another case that fits these features, and thus justifying criminalization.

103 Interestingly, the Lutkewitte court itself uses the term “forced submission” while describing sexual acts that the victim endured. See Lutkewitte, 436 F. 3d 248, at 250
104 See Melody Cobb v. Community Action Council for Lexington-Fayette, not reported in S. W. 3d, 2008 WL 1087122 (Ky. App). (Cobb, who was employed as an administrative assistant, claimed that Hinton, her supervisor, touched her inappropriately and forced her to perform oral sex on him between six and twelve times. Cobb claimed that Hinton frequently made comments about the power that he wielded, and how he could do whatever he wanted. Moreover, she contended that Hinton threatened her not to tell anyone about the sexual acts; otherwise she would lose everything, including her husband). In this case, the supervisor did not make any threats to take harmful employment decisions prior to the victim’s submission. However, he threatened to harm her after she submitted, if she complained to anyone about his conduct. This case could not have been criminalized under the threat-based model, since a casual link between the submission and any employment decision could not have been established. However, it could have been a plausible
C. The Ramifications of Beneficial Actions

The *Tobin* case provides a compelling example falling under the second subcategory as well. 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. The faulty conclusion that the “offers” made in this case are not coercive, further sharpens the need to adopt an alternative legal boundary, which would capture the potential coerciveness of beneficial offers. Tobin was working under Tebelman’s supervision as a loan officer, later transferring into an operational position. Tobin and Tebelman, together with other employees, attended an out-of-town conference, where both of them were drinking heavily at night. Tobin claimed that while they were at a nightclub, Tebelman began his sexual advances, by touching her, groping and kissing her. She said that she politely declined his advances, since she was not interested in sexual relations with him. She claimed that she kept saying no to him, but he was persuasive and persistent in continuing to grope her. 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. She testified that she stopped resisting because she was afraid of the situation, and: “it was getting out of control and I was afraid.”

Tobin lost her sexual harassment suit after the court found that Tebelman did not explicitly or implicitly threaten to harm her. 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 is a uniquely favorable arrangement for her. The court compares and contrasts this case with the *Jin* case, and concludes that *Jin* established far more compelling facts. It holds that Tobin’s supervisor made no threats to harm her, thus *Jin*’s holding does not apply to *Tobin*’s case. Moreover, the court also suggests that rather than suffering harm, Tobin might have benefited economically from the sexual relationship with her supervisor.

The *Tobin* case further 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 she is entitled to. Moreover, it is based on a narrow construction of rights -- one that acknowledges only tangible rights – while ignoring personal ones. The *Tobin* case thus further illustrates that distinguishing between threats

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106 See generally supra note 94 and accompanying text for a discussion of the distinction between threats and offers.
107 Tobin, 2006 WL 861258, at 3
108 Id.
109 Id.
and offers proves ill suited in providing an adequate demarcation between legitimate and illicit sexual conduct.

Second, it illustrates one of the main drawbacks to the threat-based model, namely, the misplaced focus on the victim’s behavior, by scrutinizing her response to the perpetrator’s advances, rather than focusing on the perpetrator’s coercive conduct. By comparing and contrasting the Tobin’s facts with those of Jin’s, the Tobin court voices its opinion on Tobin’s response to the sexual advances; the court points to several factors that indicate that Tobin actually welcomed her supervisor’s advances. While the Tobin court refers to Jin’s case using harsh language to describe the severity of the sexual coercion, it expresses a different view on the nature and characteristics of the sexual encounter between Tobin and her supervisor: 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.”\footnote{110}

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 I have articulated earlier 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 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, the following case provides an example where sexual coercion may not be established under any criminal model, since these factors are lacking. Speaks was employed as a public safety aide for the Lakeland police department. Chin, one of the sergeants at the department, made sexual advances towards her. However, Speaks was not assigned to Chin’s squad, and he did not have any supervisory authority over her. Speaks testified that she did not welcome these advances but eventually acquiesced to sex with him. Soon after, she initiated a request to transfer to his squad since she did not get along with her previous supervisor, and her request was granted. Following the transfer, Speaks was under Chin’s direct supervision. 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.\footnote{111} 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

\footnote{110} Id.
\footnote{111} Sandra Speaks v. City of Lakeland, 315 F. Supp. 2d 1217 (M.D. Fla), 2004
relationship started, she initiated a request to transfer to his squad. The fact that she asked to be transferred specifically to his squad, knowing he would supervise her directly, suggests 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 being under his supervision cannot reconcile 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, I provided some fundamental insights on current reform proposals and their shortcomings. I concluded that the lack of a comprehensive model, that would enable criminalizing economically and professionally coerced sex, necessitates considering a specialized criminal statute. Before elaborating on the elements of the proposed legislation, let me summarize the key ground rules it is premised upon.

A. Some Legislative Guidelines

First, the proposal’s key goal rests on protecting submission victims from sexual coercion in the workplace and in the academy. Accordingly, the proposed statute is based on the sexual coercion model. I elaborated earlier on the ramifications of choosing between this model and the lack of consent model. Let me briefly recap them by stressing that the sexual coercion model expands the definition of force to include economically and professionally coerced sex in the workplace and in the academy. It 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 proposed statute further rejects the presumption that any sexual relationship between parties in hierarchical positions in these settings should be deemed abusive. It refuses to determine that the superior should automatically be held guilty of sexually abusing his power once sexual acts occur under circumstances of unequal power. By that, the proposal rejects adopting fraternization bans in the workplace and in the academy that are commonly held in the military justice system. 112

In contrast, under my proposal, the mere presence of power differentials and economic disparities in a certain sexual relationship does not amount, in and of themselves, to sexual abuse, and does not suffice to criminalize the conduct. Rather, the proposal opts for a relative and relaxed ban, in which the 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

112 See, e.g., SCHULHOFFER, supra note 34, at 170-171 (discussing anti-fraternization policies in the military)
supervisory sexual abuse of power. Gross disparities in power may be one of these potential conditions, when combined with additional factors that support the sexual abuse determination.

Third, proposing a new statute, which 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 purports neither to expand the scope of rape law in general nor to advocate adopting a redefinition of rape. Furthermore, it does not suggest that the criminal law should treat sexual abuse of power as equally severe as rape. Here, I propose a separate criminal 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. It further acknowledges the differences between violent rape and other forms of nonviolent force, which amount to less severe violations of rights. Consequently, the proposal distinguishes between rape and sexual abuse of power by opting for a different title as well as a different grading. Thus, the new offense is not entitled “rape,” but rather “sexual abuse of power.” In addition, the proposal suggests that sexual abuse of power should be acknowledged as a less aggravated form of sexual misconduct and therefore, should not be punished as severely as rape. By suggesting a different grading for sexual abuse of power, this proposal distinguishes itself from other proposals, which suggest criminalizing coerced submission as one form of rape.\textsuperscript{113}

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 define the offense in terms of supervisory sexual abuse of power. These new elements better take into account criminal law principles and considerations; namely, they focus on the perpetrator’s guilt and the stigma attached to it. By doing so, the proposal corresponds with the typical focal point of criminal law, that of the wrongful conduct. 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, let me propose the criminal provision, which proscribes sexual abuse of power in the workplace and in the academy. The statute is entitled “Sexual Abuse of Power,” and provides:

\textsuperscript{113} Cf.: Forced Sex in the Workplace as Rape, supra note 6 (arguing that forced sex in the workplace should be recognized as rape).
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:

   (a) An employer, supervisor or another person in a superior position in the workplace who abuse their professional power and the hierarchical differentials to compel submission on their subordinate employees.

   (b) A teacher, professor, instructor, teacher assistant or any other person who holds a position that enables him to control and affect the student’s academic future and, who abuse this professional power and the hierarchical differentials to compel submission on their 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.

   I turn now to elaborate on 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, the relationship between the sexual abuse and the resulting submission points to a causal link between them. 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 otherwise, 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. Indeed, the conduct that can qualify as “abuse” may take various forms. Furthermore, 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. As the cases discussed earlier illustrate, while threats are one form of extreme abuse, they are certainly not the only indication of it. Other forms of sexually coercive conduct may establish the abuse element as well. The proposal acknowledges that in a coercive atmosphere, expressing actual threats to harm becomes redundant. 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. Consequently, the proposal suggests that the law should acknowledge as illicit various forms of abuse, resulting from situational and institutional pressures, including economic and professional coercive circumstances.

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 show to her abuser that she did not want any sexual relationship with him. Consequently, the prosecution does not have to prove that the victim did not welcome the sexual conduct. Once abuse is demonstrated, the burden of proving the unwelcome-ness shifts from the victim to the perpetrator.\textsuperscript{114} This rests on a careful policy judgment that holds that, whenever a victim establishes that she was sexually abused, she should not be required to prove that she did not want to be abused. Rather, the superiors should bear the burden of proving that they did not sexually abuse their power to coerce submission. Moreover, superiors should take the necessary steps to ensure that they refrain from abusing their power to obtain sexual favors.

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.\textsuperscript{115}

\textbf{1. The Analogy Between Sexual Abuse of Power and Official Oppression}

An illustrative analogy, supporting the rationales behind the abuse of power prohibition, is provided by the offense of official oppression. Section 243.1 of the Model Penal Code prohibits a person from taking advantage of his professional capacity to

\textsuperscript{114}See supra Part II.C for further discussion of the unwelcome-ness requirement and its role in the definition of the offense.

\textsuperscript{115} 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 not authorized by anyone. I thank professor George Rutherglen for clarifying this point for me.
violate another person’s rights or to cause harm. The common thread underlying both of these offenses is the abuse element. We can make an analogy between the proposed sexual abuse of power offense and the official oppression offense, since both 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. Texas, for example, amended its laws to include quid pro quo sexual harassment as one specific form of official oppression. Addressing the strengths and the weaknesses of this amendment exceeds the scope of this article. Let me suggest, however, that this offense provides an additional underpinning for criminalizing economically coerced submission. The novelty of the Texas amendment lies in acknowledging that a superior, who abuses his official power to obtain sex from subordinates, should be criminally punished. The amendment is an important step towards recognizing the justifications behind criminalizing sexual abuse of power. Moreover, the provision acknowledges that sexual abuse of power provides one example for official oppression, since the perpetrator takes advantage of his official capacity to coerce sex on his subordinates. While these two provisions share some features, the sexual 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 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

116 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.


Establishing a position of power is the additional element, which the abuse of power statute rests upon. 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. Let me further elaborate on the features that characterize this element:

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 the position differentials. 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 and force sex on subordinates. Holding the position of power is therefore precisely the feature that enables the abuse. The perpetrator is capable of abusing his position to obtain sex only as much as he holds the power and control over the subordinate’s economic and professional status. Typically, subordination in the workplace and in the academy inherently creates power and dependency, in particular economic and professional. It is the abuse of this power and dependency, however that justifies criminalization under the proposed statute.

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 needs to be established. The prohibition can thus apply only to certain types of perpetrators, namely, employers, supervisors, teachers and professors. Two important ramifications directly stem from this feature: first, the criminal provision cannot apply to unwanted sex between colleagues and coworkers at the workplace and at the academy. Typically, peers do not hold the power to control and affect the victims’ employment or academic status. Therefore, under the proposal, when this feature is absent, and there is no potential power that can be abused, the sexual relationship falls outside the scope of criminal regulation. Second, 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 relationship 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.119

119 But see, WERTHEIMER, supra note 22 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
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. They further argue that the over-criminalization tendency 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. In addition, many reformers argue that the criminal law is a too blunt an instrument and should be used only as a last resort whenever alternative civil remedies prove insufficient.

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 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.

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 criticism. Furthermore, I believe that adopting a careful legislation, as suggested here, can alleviate these concerns: 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 relationship between the two elements that comprise the prohibition provide a significant virtue; to criminalize a certain conduct, both the “abuse” and the “power” elements should be established concurrently. Establishing only one of them is not sufficient for imposing criminal liability.

Second, the proposal is narrowly crafted to carefully target sexually abusive situations that may be plausible candidates for criminalization. This provides an important advantage, that ensures that the prohibition is not overreaching and overbroad in terms of criminalization. The proposal further limits the scope of the criminal offense in several respects: It prohibits 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.

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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).


122 See, e.g., SCHULHOFFER, supra note 34, at 223-224 (noting that criminal law is a stringent weapon, that should be confined to situations in which other remedies are insufficient).

123 Id., at 274-281
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 equally applying 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 illustrates, the sexually abused victim was a male, whose manager took advantage of his economic vulnerability to coerce sex on him.124 Applying this proposal to the Showalter facts illustrates that it 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 racial overtones. Indeed, criminalizing sexual abuse of power is race-neutral, applying equally to all types of powerful perpetrators.

Finally, and perhaps most importantly, as noted in the first part, 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, I suggest 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.

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 conducts 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 for 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. Further, the absence of one of the factors in a certain situation does not necessarily suggest that the conduct in question does not amount to sexual coercion. I have mentioned these factors in the previous part, while targeting them in the submission cases. Let me briefly summarize them, and further illuminate some of their features.

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 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

124 See Showalter, 984 F. 2d at 5-6
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 the other side of the power coin, since the superiors’ relative strength and power directly stem from their economic superiority. Consequently, the subordinate’s disadvantageous position creates an inherent economic vulnerability. While typically all human beings depend on their jobs to subsist, the aforementioned cases illustrate substantial financial dependency on the job, which results in unique economic vulnerability. These cases demonstrate the victims' limited economic options that make keeping their positions a necessary means for economic survival. 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 powerless 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, and women in particular. Thus, the proposal raises a significant concern that it might actually perpetuate stereotypes of female weakness and dependence. In my view, however, these concerns can be significantly sidestepped 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, predicking 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, similarly to invalidating the choices made by incompetent victims. Consequently, the focus of the inquiry shifts away from the victims’ vulnerability, and from scrutinizing their choices, toward the perpetrator’s coercive conduct.

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 certain victims suffer from. Moreover, the victims’ situational vulnerability and the superiors’ situational strength lie in the organizational and structural features that characterize the workplace and the academy. Undoubtedly, in these settings, hierarchical positions inherently create economic vulnerability. However, since these are socially and structurally constructed differences, stressing the economic vulnerability should not result in perpetuating stereotypes of women’s weakness.

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125 See discussion supra Part II. C.
126 Id.
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. An illustrative example is provided by the Showalter case, where the victim was a male, who was particularly dependent on his employer for providing medical insurance for his sick child. Undoubtedly, in many cases, the victims who suffer from economic vulnerability are women, but this is not a necessary feature. Typically, men are more protected from these types of sexual abuses, due to their advantageous social and structural status. However, some cases illustrate the male’s economic vulnerability when faced with the choice between economic survival and their right to remain free from sexual coercion. 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 results in empowering victims; adopting a prohibition that ensures that employees and students will not face the choice between economic and professional survival and being free 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 the coerciveness inquiry. Moreover, the sexual demands typically last over a significant period of time and gradually build up in pressures. These further contribute to creating an intimidating and coercive atmosphere. Furthermore, other forms of unwanted sexual advances that come before the sexual submission, provide one particular illustration of the repetition and persistence features. The cases discussed above illustrate that, typically, the superior’s sexual advances start with attempts to kiss, hug, grope, fondle and other types of touching of a sexual nature, particularly touching intimate body parts. 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, a strong suspicion arises that sex was not truly wanted when evidence suggests that the demands were explicitly declined in the beginning, but after extensive pressures, the victim submitted without expressing any further refusal. Thus, these circumstances

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127 Showalter, 767 F. Supp. at 1214-1215 (explaining Showalter’s unique dependence on the medical insurance provided by the employer to his sick child)
provide a strong indication that submission resulted from sexual coercion. 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.  

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. The cases illustrate that the intimidating atmosphere the superior created objectively supports this fear. Furthermore, the fear factor is closely related to the victims’ economic and professional vulnerability. Whenever victims heavily depend on their job or academic position, they perceive submission as a necessary and ultimate step to avoid the potential risk of losing that job or academic position. Most importantly, the victims’ dependence on the job or on the academic status facilitates the sexual abuse of power, since their fear of losing their positions is precisely the feature enabling 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 forced upon her. Responses to sex vary, and even when both parties equally want it, 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. Consequently, objective indications of sexual coercion may include complete passivity, silence, motionless, 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.

128 See discussion supra Part II.C articulating why the unwelcome-ness should not be an element in the offense.
129 See, e.g., Nichols, 42 F. 3d at 509; Meritor, 477 US at 60 (discussing the fear factor that lead victims to submit to unwanted sexual demands)
130 See, e.g., Nichols, 42 F. 3d, at 507; Walton, 347 F. 3d at 1276 (illustrating the victims’ claims that following the forced sexual act they fell into a state of shock, that explained their passivity and inability to respond).
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. Here, I speak of the 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. I suggest, however, that the initiative factor should be treated as an inconclusive indication of determining the coerciveness of the sexual relationship. Its ramifications further vary, depending on the specific circumstances. On the one hand, when the evidence shows that the subordinate started the sexual encounter, it may serve as an indication that she actually 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, rather than separately focusing on the specific moment she started it. 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.\(^{131}\) Other cases illustrate milder forms of violence, such as shoving and pushing.\(^{132}\) 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.\(^{133}\)

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\(^{131}\) See Vinson, 23 Fair Empl. Pra. Cas. (B.N.A) at 38. For another example where the sexual act resulted in vaginal bleeding: see Mary Liu, 36 F. Supp. 2d at 460

\(^{132}\) See, e.g., Min Jin, 310 F. 3d at 88-89

\(^{133}\) In 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

This article has challenged the prevailing view that Title VII provides a single conceptual model to capture the harms embodied in all forms of sexual harassment. In particular, I have argued 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, I have argued that it is time to critically revisit this paradigm by considering a new account of coerced submission, one that separately categorizes these cases and independently addresses the distinctive harms they inflict.

This new 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, I have argued that these cases should be criminalized since they demonstrate a form of conduct that clearly qualifies as a sexual offense. I have 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, I have offered the missing and much needed pragmatic ramifications of this conclusion, and have given innovative theories a practical edge, by proposing a specialized criminal statute. Most importantly, my analysis has suggested that this 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. This construct is further based on the key elements that characterize coerced submission, namely, the supervisory sexual abuse of power. To support the abuse of power determination I have identified several specific conditions that suggest that the conduct amounts to sexual coercion. I have further elaborated that this narrowly crafted proposal provides ample advantages, and have 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, I have nowhere suggested that every coerced submission case must be criminalized. Indeed, I realize that criminalization cannot always provide the adequate solution. I have 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 requires 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. I have 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, I have argued 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 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 fully recognized yet. 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 would help eradicate abusive sexual practices and help create a world in which people are free from sexual coercion, I feel the timing is ripe for promoting such a social change through the proposed legal reform.