Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment

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Introduction

Imagine this scenario: a woman applies for a job at a car dealership. The interviewer tells her that the job is hers if she will have oral sex with him. She refuses and he denies her the job. Last year, in response to such an occurrence in Georgia, Representative Jim Martin introduced a bill before the Georgia Legislature which, among other things, would have created a new felony: "A person commits the offense of solicitation of sex when such person . . . solicits a subordinate employee or job applicant to perform or submit to sexual intercourse or to an act involving the sex organs of one person and the mouth or anus of another as a condition of employment."[1] In a civil law context, courts have for over a decade[2] called this proposed crime quid pro quo sexual harassment.

Courts distinguish two types of sexual harassment: quid pro quo and hostile environment.[3] In the workplace, quid pro quo sexual harassment occurs when submission to sexual conduct is made a term or condition of an individual's employment or when an individual's submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual.[4] Hostile environment sexual harassment is conduct that "has the purpose or effect of unreasonably interfering with an individual's work per-

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1. Telephone interview with Jim Martin, Rep., (D. Atlanta) General Assembly of Georgia (May 24, 1994). H.B. 666, 1993 General Assembly of Georgia. The bill provided that the offense of solicitation of sex would be punishable by a fine of between $1,000 and $5,000 and/or incarceration for one to five years. *Id.; See generally* Ellen Whitford, *Sex Crimes Bill Redefining Rape Is in for a Fight*, ATLANTA CONST., Feb. 11, 1993, at F1 & F6. This bill did not pass.

2. Lipsett v. University of Puerto Rico, 864 F.2d 881, 897 (1st Cir. 1988).

3. The Supreme Court first recognized this distinction in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). *See infra* part I.A.

4. *Lipsett*, 864 F.2d at 897; *see also* ARTHUR LARSON & LEX K. LARSON, 1 EMPLOYMENT DISCRIMINATION § 41A.42 (1993).

formance or creating an intimidating, hostile, or offensive working environment."[5] Civil laws prohibit sexual harassment not only in the workplace, but also in education, housing, and other areas.[6] Recently, three states have explicitly criminalized sexual harassment,[7] and the military has used criminal sanctions against sexual harassment.[8] However, little discussion or exploration of the criminalization of sexual harassment exists.[9]

This Article argues that quid pro quo sexual harassment should be treated as a crime.[10] Part I begins by showing that sexual harassment is a pervasive problem occurring in many contexts such as employment, education, and housing. This Part then examines the evolution and current status of federal and state civil laws against sexual harassment. Federal sexual harassment laws only cover employers of a certain size and educational institutions receiving federal funds. State civil sexual harassment laws, on the other hand, cover a wider range of situations, such as sexual harassment in the doctor-patient and lessor-lessee relationships. An overview of these laws reveals their frequency and the manner in which sexual harassment is regulated by civil law. This Part provides a background against which to evaluate the usefulness of criminal sanctions against sexual harassment.

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5. *Meritor Savings Bank*, 477 U.S. at 65 (citing 29 C.F.R. § 1604.11(a)(3) (1985)).

6. *See* discussion *infra* part I.A. & I.B.

7. DEL. CODE ANN. tit. 11, § 763 (Supp. 1992); N.C. GEN. STAT. § 14-395.1 (1993); TEXAS PENAL CODE ANN. § 39.02 (Supp. 1994); *see infra* part IV.

8. *See* Eric D. Placke, *Criminal Liability Under the UCMJ for Sexual Harassment*, 19 REPORTER, Sept. 1992, at 1 (arguing that military prosecutors could prosecute, and in some cases have prosecuted, sexual harassers under existing laws prohibiting disrespect, assault, provoking speech or gestures, rape, sodomy, extortion, adultery, bribery, indecent acts, indecent assault, indecent exposure, and indecent language); *see also* Peter Cary & Bruce B. Auster, *What's Wrong with the Navy*, U.S. NEWS & WORLD REPORT, July 13, 1992, at 22 (reporting that "Acting Navy Secretary Dan Howard proposed amending military law to make sexual harassment a specific crime").

9. Robert T. Sigler & Ida M. Johnson, *Public Perceptions of the Need for Criminalization of Sexual Harassment*, J. CRIM. JUST. 229 (1986) (reporting on a survey of 200 residents of Tuscaloosa, Alabama). Over 59% of the survey respondents believed that sexual harassment resulting in sexual intercourse should be felony. *Id.* at 235. Over 31% believed that sexual harassment without sexual intercourse should be a misdemeanor. *Id.*

10. *See infra* part III for a discussion of quid pro quo sexual harassment. An investigation into criminalizing hostile environment harassment is beyond the scope of this paper. Whereas quid pro quo sexual harassment often does not fit within existing general crimes, hostile environment harassment often does fall within existing crimes such as battery, assault, harassment, or indecent exposure. Therefore, there is less of a need for a separate and specific criminal statute prohibiting hostile environment harassment.

Part II argues that quid pro quo sexual harassment should be considered a crime. This Part first examines the difference between civil and criminal wrongs, and explores why certain conduct is criminal and other conduct is not. An argument is then made that quid pro quo sexual harassment should be treated as a crime because sexual harassment harms not only individuals who are harassed, but also women as a group and society as a whole. Criminal laws against quid pro quo sexual harassment could complement the civil laws discussed in Part I to combat this kind of harassment. Part II concludes by discussing several drawbacks to criminalizing quid pro quo sexual harassment.

Part III discusses the possibility of prosecuting quid pro quo sexual harassment under traditional criminal laws. Many states have criminal laws that arguably prohibit some types of quid pro quo sexual harassment, such as laws against criminal coercion, extortion, and receiving commercial bribes. However, most states do not have general criminal laws that sufficiently prohibit all forms of quid pro quo sexual harassment. This Part concludes that if states want to criminally prohibit quid pro quo sexual harassment, they should adopt a specific criminal law that does so.

Part IV provides an example of a criminal statute prohibiting quid pro quo sexual harassment. This Part first describes three recently-adopted criminal laws that explicitly prohibit sexual harassment. A definition is then proposed for the crime of quid pro quo sexual harassment, based in part upon these three laws. The Article concludes by providing an historical context for the criminalization of quid pro quo sexual harassment.

I. The Civil Law Response to the Problem of Sexual Harassment

Sexual harassment is a pervasive, grave, and deeply rooted problem in American society. Numerous studies have documented the existence of sexual harassment in employment,[11] education,[12] and housing.[13] An early study on sexual harassment in the federal workplace revealed that forty-two percent of the approximately 10,648 women responding reported that they had been sexually harassed in the two years prior to the survey.[14] A follow-up study several years later revealed a similarly high rate of sexual harass-

11. *See infra* notes 14-18 and accompanying text.
12. *See infra* notes 19-22 and accompanying text.
13. *See infra* notes 23-24 and accompanying text.
14. U.S. MERIT SYS. PROTECTION BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? 33-35, A-4 (1981).

ment.[15] Sexual harassment of women in the private sector is also extensive.[16] Women occupying traditionally male jobs experience even higher rates of harassment.[17] Furthermore, the number of sexual harassment complaints appears to be increasing. The Equal Employment Opportunity Commission, the agency responsible for enforcing federal laws against sexual harassment in the workplace, has reported a tremendous increase in sexual harassment complaints in the last several years — from 5,694 sexual harassment complaints in 1990, to 6,675 in 1991, to 10,532 in 1992.[18]

Sexual harassment affects not only the workplace, but also other settings such as education and housing. Large numbers of college students report sexual harassment by professors[19] and by peers.[20] An estimated thirty percent of female undergraduates experience some form of sexual harassment from at least one of their professors during their education.[21] Younger students are also targets of sexual harassment. Two recent studies involving primary and secondary students reveal high rates of sexual harass-

15. U.S. MERIT SYS. PROTECTION BD., SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 2, 11-21 (1988).

16. 1 LARSON & LARSON, *supra* note 4, § 41A.12, at 80-152; *see also* Louise F. Fitzgerald & Alayne J. Ormerod, *Breaking Silence: The Sexual Harassment of Women in Academia and the Workplace*, *in* PSYCHOLOGY OF WOMEN: A HANDBOOK OF ISSUES AND THEORIES 553, 559 (Florence L. Denmark & Michelle A. Paludi eds., 1993) (estimating that 50% of women will experience sexual harassment at some time during their academic or working lives). A survey of large corporations revealed that ninety percent have received complaints of sexual harassment, and a third have been sued. Ronni Sandroff, *Sexual Harassment in the Fortune 500*, WORKING WOMAN, Dec. 1988, at 69 (reporting on 160 of the Fortune 500 companies that had responded to a survey).

17. Edward Lafontaine & Leslie Tredeau, *The Frequency, Sources, and Correlates of Sexual Harassment Among Women in Traditional Male Occupations*, 15 SEX ROLES 433, 436 (1986) (reporting survey findings that women in traditionally male occupations experience sexual harassment more frequently than women generally).

18. 1 LARSON & LARSON, *supra* note 4, § 41A.12 n.12; Ann Lopez, *Clippings*, MS., July-Aug. 1993, at 87. Some have speculated that this increase is at least in part due to the highly publicized sexual harassment scandals involving the 1991 Supreme Court nominee Clarence Thomas and the 1991 Tailhook naval aviators convention. *See* 1 LARSON & LARSON, *supra* note 4, § 41A.12, at 8-153.

19. Linda J. Rubin & Sherry B. Borgers, *Sexual Harassment in Universities During the 1980s*, 23 SEX ROLES 397 (1990); *see generally* BILLIE WRIGHT DZIECH & LINDA WEINER, THE LECHEROUS PROFESSOR (2d ed. 1990) (discussing sexual harassment of students by college professors).

20. JEAN O'GORMAN HUGHES & BERNICE R. SANDLER, PEER HARASSMENT: HASSLES FOR WOMEN ON CAMPUS (1988).

21. Rubin & Borgers, *supra* note 19, at 402; *see also* MICHELE A. PALUDI & RICHARD B. BARICKMAN, ACADEMIC AND WORKPLACE HARASSMENT: A RESOURCE MANUAL 1-26 (1991) (citing numerous studies showing the high incidence of sexual harassment in schools as well as the workplace); IVORY POWER: SEXUAL HARASSMENT ON CAMPUS (Michele A. Paludi ed., 1990) (discussing sexual harassment at colleges and universities).

ment in schools.[22] Sexual harassment also plagues women seeking housing.[23] A 1987 survey revealed that many women across the country have reported sexual harassment in housing to fair housing centers.[24] These studies all point to the fact that sexual harassment is a severe and widespread problem in American society.

Legislators have addressed the problem of sexual harassment extensively through civil laws. Sexual harassment first emerged as a civil rights cause of action focused primarily on the discriminatory effects of sexual harassment in the workplace.[25] However, over time, sexual harassment law has reached into housing, education, professional licensing, and other areas.[26]

A. Federal Sexual Harassment Law

Title VII of the Civil Rights Act of 1964,[27] prohibiting discrimination in employment, and Title IX of the Education Amendments of 1972,[28] prohibiting discrimination in education, are the primary sources for federal sexual harassment law. Redress for sexual harassment also has been sought, less frequently, under section 1983 of Title 42,[29] the Federal Employees Liability Act,[30] and the Equal

22. EDUC. FOUND. OF THE AM. ASS'N OF UNIV. WOMEN, HOSTILE HALLWAYS: THE AAUW SURVEY OF SEXUAL HARASSMENT IN AMERICA'S SCHOOLS (1993) (reporting high rates of sexual harassment in a survey of 1632 students in grades 8 to 11); NAN STEIN ET AL., SECRETS IN PUBLIC: SEXUAL HARASSMENT IN OUR SCHOOLS (1993) (reporting high rates of sexual harassment in a survey of over 4,000 school girls between the ages of 9 and 19).

23. WILLIAM LITT ET AL., *Recent Developments: Sexual Harassment Hits Home*, 2 UCLA WOMEN'S L.J. 227 (1992) (suggesting legal strategies for addressing rental housing sexual harassment); Kathleen Butler, Note, *Sexual Harassment in Rental Housing*, 1989 U. ILL L. REV. 175 (discussing the problem of sexual harassment of women in the rental housing market).

24. Regina Cahan, Comment, *Home Is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WISC. L. REV. 1061, 1065-75. The survey was sent to 150 public and private fair housing centers, agencies, and organizations across the country. Of the 87 centers that responded, 57 reported receiving sexual harassment in housing complaints. *Id.* at 1066. Overall, 288 incidents of sexual harassment were reported to the centers. *Id.* Respondents reported instances of women who were evicted because they refused to cooperate with the landlords' sexual demands. *Id.* at 1067 n.20. One woman reported that a rental manager served her notice of eviction because she refused to have sex with him. *Id.* at 1065. Another woman reported that her apartment owner demanded that she have sex with him in addition to paying rent in order for her to remain on the premises. *Id.* at 1064-65. An undercover investigation of Chicago homeless shelters found that employees were requiring sexual conduct in exchange for admission to the limited spaces in shelters. Butler, *supra* note 23, at 180 n.48.

25. *See infra* notes 32-55 and accompanying text.

26. *See infra* notes 56-97 and accompanying text.

27. 42 U.S.C. § 2000e (1988).

28. 20 U.S.C. § 1681 (1988).

29. 42 U.S.C. 1983 (1988); *see* 1 LARSON & LARSON, *supra* note 4, § 41A.91(a); Kristin D. Sanko, Note, *Employer Liability and Sexual Harassment Under 1983:*

Protection and Due Process Clauses of the Constitution.[31] This section focuses on federal sexual harassment law under Titles VII and IX.

Title VII prohibits employers from discriminating on the basis of sex.[32] Very little legislative history exists to clarify the prohibition of sex discrimination because Title VII was primarily a race discrimination statute to which Congress added the word "sex" on the floor of the House of Representatives.[33] In 1980, the Equal Employment Opportunity Commission (EEOC), the administrative agency responsible for enforcing the Civil Rights Act of 1964,[34] issued guidelines interpreting Title VII to prohibit both quid pro quo and hostile environment sexual harassment.[35] The EEOC guidelines define sexually harassing conduct as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[36] Quid pro quo sexual harassment exists when a supervisor conditions employment benefits on the acquiescence to sexual advances[37] or subjects a subordinate to detrimental employment consequences, such as termination or denial of a promotion or job training, for refusing to submit to sexual advances.[38] Hostile environment harassment is sex-based conduct that does not result in a tangible detriment, but that adversely affects intangible aspects of employment such as the psychological

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Starrett v. Wadley, 67 DENV. U. L. REV. 571 (1990) (discussing municipal liability under § 1983 for sexual harassment).

30. Wilson v. Zapata Off-Shore Co., 939 F.2d 260 (5th Cir. 1991) (allowing FELA claim for sexual harassment); Masiello v. Metro-North Commuter R.R., 748 F. Supp. 199 (S.D./N.Y. 1990) (allowing FELA claim for sexual harassment). *But see* Griggs v. National R.R. Passenger Corp, 900 F.2d 74 (6th Cir. 1990) (reading FELA narrowly to exclude Title VII-type injuries). Claims under the Racketeer Influenced and Corrupt Organization Act and the Federal Tort Claims Act rarely succeed. *See* 1 LARSON & LARSON, *supra* note 4, § 41A.91(c).

31. *See* Doe v. Taylor Independent School District, 975 F.2d 137 (5th Cir. 1992) (holding that a student has a firmly established constitutional right under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to be free from sexual molestation by a state-employed school teacher).

32. Title VII states in pertinent part, "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's. . . sex. . . ." 42 U.S.C. § 2000e-2(a)(1) (1988).

33. 110 CONG. REC. 2577-84 (1964).

34. 42 U.S.C. § 2000e (1988).

35. 29 C.F.R. § 1604.11(a) (1991).

36. *Id.*

37. For example, the employer may say "I'll promote you if you have sex with me." The implicit threat in this statement is, "I won't promote you if you don't have sex with me." *See supra* note 4 and accompanying text.

38. 1 LARSON & LARSON, *supra* note 4, § 41A.42, at 8-192.

and emotional well-being of an employee.[39] According to the EEOC guidelines, an employer is vicariously liable for both forms of sexual harassment when perpetrated by supervisors.[40] The employer, however, is liable for harassment perpetrated by coworkers and nonemployees only if the employer knew or should have known of the harassment and failed to "take immediate and appropriate corrective action."[41] The guidelines also recommend that employers take preventive measures to eliminate sexual harassment[42] and state that employers may be liable to those denied employment opportunities or benefits given to another employee because of submission to sexual advances.[43] These guidelines have been very influential in the courts.[44]

Courts have followed the EEOC guidelines in interpreting Title VII to prohibit sexual harassment of employees. In 1986, the Supreme Court first addressed sexual harassment under Title VII in *Meritor Savings Bank v. Vinson*.[45] This case involved a female bank employee who claimed that she was constantly subjected to sexual demands by her supervisor for four years.[46] The supervisor did not threaten to fire or demote her, but she felt compelled to comply with his demands. She finally was discharged from the job for excessive use of sick leave.[47] The Court held that Title VII prohibited sexual harassment.[48] The Court accepted the distinction between quid pro quo and hostile environment harassment, and held that a hostile environment harassment plaintiff must prove that the harassment was "sufficiently severe or pervasive to alter the conditions of employment."[49] In other words, the harassment must have some specific negative effect on the plaintiff's employment. The Court also ruled that even an employee's "voluntary"[50] submission to an employer's sexual advances does not necessarily defeat a harassment claim if the advances were unwelcome, but that a complainant's "sexually provocative speech or dress is . . . obviously rel-

39. *Id.* § 41A.44.

40. 29 C.F.R. § 1604.11(c); *see* 1 LARSON & LARSON, *supra* note 4, § 41A.44.

41. 29 C.F.R. § 1604.11(d)-(e) (1991).

42. *Id.* § 1604.11(f).

43. *Id.* § 1604.11(g).

44. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986) (defining sexual harassment according to the EEOC guidelines).

45. 477 U.S. 57 (1986).

46. *Id.* at 60.

47. *Id.* at 60.

48. *Id.* at 73.

49. *Id.* at 67.

50. The Court defined "voluntary" to mean in these situations that the complainant was not forced to participate against her will. Meritor Savings Bank v. Vinson, 477 U.S. 57, 68 (1986).

evant"[51] in determining whether advances were unwelcome. Finally, the Court discussed but did not rule on employer liability for hostile environment harassment by supervisors, instead recommending the use of common law agency principles.[52] Circuit courts, however, have consistently held employers strictly liable for quid pro quo sexual harassment by supervisors.[53]

Since *Meritor Savings Bank*, lower courts have devised numerous tests to determine when harassing conduct is severe or pervasive.[54] The Supreme Court recently rejected a requirement that a plaintiff prove severe psychological harm in order to prevail in a Title VII sexual harassment claim. In *Harris v. Forklift Systems, Inc.*, a company president subjected a female manager, Teresa Harris, to sexual innuendo, unwanted physical touching, and insults because of her gender.[55] Harris complained to the president, but he continued his harassing conduct.[56] After two years, she left the job.[57] The District Court found that the president's conduct did not create an abusive environment because it was not so severe as to seriously affect Harris' psychological well-being or lead her to suffer injury.[58] The Supreme Court reversed, ruling that a plaintiff must only show that the conduct at issue would have offended a "reasonable person."[59]

Before 1991, Title VII only provided a partially compensatory remedy: reinstatement, back pay, and any other appropriate equitable relief.[60] Under the Civil Rights Act of 1991, Congress ex-

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51. *Id.* at 69. *See* Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499 (1994) (critiquing the court's treatment of the issue of welcomeness).

52. *Meritor Savings Bank*, 477 U.S. at 72. The Court stated that due to Title VII's definition of "employer" to include "agent", "we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors . . . [but that] absence of notice to an employer does not necessarily insulate that employer from liability." *Id.* However, the Court held that the mere existence of a grievance procedure and a policy against discrimination does not insulate an employer from liability. *Id.* at 73-4. *See generally* RESTATEMENT (SECOND) OF AGENCY §§ 219-237 (1958). Circuit courts are divided as to whether an employer is liable for hostile environment harassment by a supervisor. *See* 1 LARSON & LARSON, *supra* note 4, § 41A.65(a).

53. 1 LARSON & LARSON, *supra* note 4, § 41A.63.

54. *Compare* Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (adopting a reasonable person standard), *with* Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (adopting a reasonable woman standard).

55. Harris v. Forklift Systems, Inc., 61 Fair Empl. Prac. Cas. (BNA) 240 (M.D. Tenn. 1991), *aff'd per curiam*, 976 F.2d 733 (6th Cir. 1992), *rev'd and remanded*, 114 S. Ct. 367, 369 (1993).

56. Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 369 (1993).

57. *Id.*

58. *Id.*

59. *Id.* at 370.

60. 42 U.S.C. § 2000e-5(g) (1988).

panded the remedies for intentional discrimination under Title VII to include compensatory damages and punitive damages of up to $300,000, based on the size of the employer.[61] This change resulted from a recognition of the seriousness of discrimination and the inadequacy of the prior remedial structure.[62]§

Federal sexual harassment law also has developed under Title IX, which prohibits discrimination on the basis of sex in any federally assisted educational program,[63] with certain limited exceptions.[64] The United States Department of Education Office for Civil Rights enforces Title IX by monitoring federally funded educational institutions and withholding federal funds from institutions that discriminate on the basis of sex. In 1979, the Supreme Court held that Title IX was also enforceable by an individual through a private action.[65] However, in subsequent decisions the Supreme Court interpreted several procedural barriers into Title IX, which hampered its effectiveness.[66] As a result, sexual harassment law was slower to develop under Title IX than under Title VII.

In the late 1980s, however, Congress responded to these Supreme Court decisions by enacting legislation that strengthened Title IX.[67] Title IX was also strengthened by a recent Supreme Court decision, *Franklin v. Gwinnett County Public Schools*,[68]

61. 42 U.S.C. § 1981a cmt. (1991). The Civil Rights Act of 1991 also provided for jury trials.

62. ARTHUR LARSON & LEX K. LARSON, 2 EMPLOYMENT DISCRIMINATION § 55.41, 14-15 (1994).

63. 20 U.S.C. § 1681(a) (1988). "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." *Id.*

64. 20 U.S.C. § 1681(a) (1988) (exempting educational institutions controlled by religious organizations, military and merchant marine educational institutions, membership practices of certain organizations, boy or girl conferences, and father-son or mother-daughter activities at educational institutions from Title IX prohibitions).

65. Cannon v. University of Chi., 441 U.S. 677 (1979).

66. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982) (holding that Title IX only applied to specific programs receiving federal aid, and therefore an educational institution was not required to conform all of its programs or the entire institution to Title IX merely because one or a few programs received federal assistance); Grove City College v. Bell, 465 U.S. 555 (1984) (narrowly defining a 'program'); Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) (holding that mere acceptance of federal funds does not waive a state's sovereign immunity under the Eleventh Amendment).

67. *See* Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687(2)(A) (1988) (expanding the jurisdiction of Title IX to cover an entire institution if any part receives federal money); Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7 (1988) (expressly abrogating the states' Eleventh Amendment immunity from suit under Title IX, thereby allowing plaintiffs to file suit against states and state institutions).

68. 112 S. Ct. 1028 (1992).

which established a damage remedy for Title IX plaintiffs.[69] The Court held that a plaintiff can receive compensatory and punitive damages for an intentional violation of Title IX.[70] As a result of *Franklin*, Title IX has become an attractive tool to gain monetary compensation for harm resulting from sexual harassment in schools.

Due to Title IX's historical limitations, little case law exists on sexual harassment in educational institutions, especially with regard to students. The Office for Civil Rights has not issued specific guidelines on sexual harassment,[71] but informally maintains that sexual harassment is prohibited by Title IX.[72] Generally, courts have found both quid pro quo[73] and hostile environment harassment[74] actionable under Title IX. *Franklin v. Gwinnett County Public Schools*,[75] the first Title IX sexual harassment case filed by a student to reach the Supreme Court, involved a hostile environment sexual harassment complaint by a high school student who

69. Because students have historically been transient members of the educational community, they had little to gain personally through Title IX, especially considering the stigmatization and reprisals from peers likely to result from bringing such charges. Also, cases were likely to become moot before their judicial resolution because the student had graduated. Sandra Shullman & Barbara Watts, *Legal Issues, in* IVORY POWER, *supra* note 21, at 251, 258.

70. *See Franklin*, 112 S. Ct. at 1029 (stating the federal courts have the power to award any relief for a federal cause of action).

71. However, OCR Guidelines prohibit a covered educational institution from subjecting any person to separate or different behavior, sanctions, or other treatment. 34 C.F.R. § 106.31(b)(4) (1986); *see* Carrie N. Baker, *Proposed Title IX Guidelines on Sex-Based Harassment of Students*, 43 EMORY L.J. 271 (1994) (proposing standards under Title IX for sex-based harassment of students).

72. *See* United States Department of Education Office for Civil Rights, Policy Memorandum from Antonio J. Califia, Director for Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981) (discussing Title IX and Sexual Harassment Complaints).

73. *See, e.g.*, Bougher v. University of Pittsburgh, 713 F. Supp. 139 (W.D. Pa. 1989), *aff'd*, 882 F.2d 74 (3d Cir. 1989) (holding that Title IX clearly reaches quid pro quo sexual harassment by conditioning benefits on the basis of impermissible criteria); Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980) (finding that quid pro quo sexual harassment was a valid claim under Title IX).

74. *See, e.g.*, Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028 (1992); Hastings v. Hancock, 842 F. Supp. 1315 (D. Kan. 1993) (applying agency principles to hold a school liable for hostile environment sexual harassment by a school director); Doe v. Petaluma City School District, 830 F. Supp. 1560 (N.D. Cal. 1993) (holding that a student may bring a hostile environment sexual harassment claim under Title IX); Patricia H. v. Berkeley Unified School District, 830 F. Supp. 1288 (N.D. Cal. 1993) (holding that Title IX prohibits the maintenance of a sexually hostile educational environment in any educational program or activity receiving federal financial assistance); Moire v. Temple University School of Medicine, 613 F. Supp. 1360 (E.D. Pa. 1985) (finding that Title IX prohibited hostile environment sexual harassment and suggesting that the EEOC guidelines on sexual harassment under Title VII may apply to Title IX), *aff'd*, 800 F.2d 1136 (3d Cir. 1986).

75. 112 S. Ct. 1028 (1992).

was persistently subjected to the sexual advances of a teacher at school.[76] *Franklin* was primarily about whether Title IX provides a damage remedy, but the Court also recognized that hostile environment sexual harassment was actionable under Title IX.[77] The Court stated, "unquestionably, Title IX placed on the [defendant] the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.' "[78]

In sum, federal courts have accepted that quid pro quo and hostile environment sexual harassment directed at students is forbidden by Title IX as is sexual harassment of employees under Title VII. Both of these civil actions provide compensatory and punitive damages for sexual harassment. State laws provide civil law remedies against sexual harassment in many additional areas.[79]

B. State Sexual Harassment Law

Most states have civil laws prohibiting sexual harassment. Many have laws similar to Title VII which broadly prohibit sex discrimination in employment, including sexual harassment.[80] However, state sexual harassment laws go beyond federal laws in that they also regulate behavior outside of the workplace and the educational environment. State regulation of sexual harassment covers six general areas: 1) employment; 2) housing; 3) education; 4) licensed professionals; 5) public accommodations, services, and benefits; and 6) tort causes of action for sexual harassment. This section briefly describes these general categories of law.

Most states have fair employment practice laws forbidding public employers[81] and often private employers[82] from discriminating on the basis of sex,[83] which often includes sexual harassment.[84] Most of these laws provide protection identical to Title VII.[85] However, state laws often offer longer statutes of limitations, more generous damage provisions, and a broader definition of an employer

76. *Id.* at 1031.

77. *Id.* at 1037.

78. *Id.*

79. *See supra* note 70.

80. *See supra* part I.A.

81. *See, e.g.*, GA. CODE ANN. §§ 45-19-20 *et seq.* (1992); IND. CODE ANN. § 2.11 (Burns 1991); IOWA CODE ANN. § 2.42 (West 1992).

82. *See, e.g.*, 43 PA. CONST. STAT. ANN. §§ 951 *et seq.* (1992).

83. Only Alabama and Arkansas do not have fair employment practice laws.

84. 1 LARSON & LARSON, *supra* note 4, § 41A.92.

85. *Id.*; *see, e.g.*, Fisher v. San Pedro Peninsula Hosp., 214 Cal. App. 3d. 590 (1989), *rev. denied*; Howard Univ. v. Best, 484 A.2d 958 (D.C. App. 1984).

than Title VII.[86] Many states also have laws requiring sexual harassment training and notices in the workplace,[87] as well as a written complaint process and penalties for sexual harassment.[88]

The second most common type of state law against sexual harassment prohibits sex discrimination and sexual harassment in housing.[89] Several states specifically prohibit sexual harassment of tenants;[90] others prohibit sex discrimination in housing, which includes sexual harassment.[91]

Sexual harassment in education is another common area of state regulation.[92] Several states prohibit sex discrimination in education,[93] and some require educational institutions to adopt and post written disciplinary procedures,[94] to provide sexual harassment reporting procedures,[95] and to assist students who are targets of sexual harassment.[96]

Eleven states mandate the revocation of some types of professional licenses if the licensee sexually harasses a client. Five states revoke psychology licenses for sexual harassment;[97] three revoke licenses of health care professionals (including physicians);[98] and one revokes licenses of professionals generally.[99]

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86. 1 LARSON & LARSON, *supra* note 4, § 41A.92; Lautenslager v. Supermarket Gen., 600 A.2d 525 (N.J. Law Div. 1991); IOWA CODE § 601A.15 (1988); Mich. Comp. Laws § 37.2201 (1985).

87. *See, e.g.*, ME. REV. STAT. ANN. tit. 26, § 807 (West 1993).

88. *See, e.g.*, ILL. REV. STAT. ch. 775, ¶ 5/2-105 (1993).

89. Seventeen states prohibit sex discrimination in housing (Alaska, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Missouri, New Jersey, North Carolina, North Dakota, Pennsylvania, Tennessee, and Wisconsin).

90. *See, e.g.*, WIS. STAT. § 101.22 (1992).

91. *See, e.g.*, IDAHO CODE § 67-5901 (1992); IOWA CODE §§ 216.8, 216.6 (1992).

92. Twelve states have laws regarding sex discrimination and sexual harassment in education (Alaska, California, Connecticut, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Washington, and Wisconsin).

93. *See, e.g.*, HAW. REV. STAT. § 296-71 (1)(B) (1992); IND. CODE ANN. § 22-9-1-2 (Burns 1992).

94. MINN. STAT. § 127.46 (1992 & Supp. 1993).

95. *See, e.g.*, CONN. GEN. STAT. § 10a-55c (a)(3) (Supp. 1994); MINN. STAT. § 127.46 (1992 & Supp. 1993).

96. WIS. STAT. § 36.11(22)(a)(1)(c) (1992).

97. ALA. CODE § 34-26-46 (1992); HAW. REV. STAT. § 465-13 (1992); LA. REV. STAT. ANN. § 37:2359(B)(2)(a) (West 1988); N.C. GEN. STAT. § 90-270.15 (1993); OKLA. STAT. tit. 59, § 1370(A)(6) (Supp. 1994).

98. D.C. CODE ANN. § 2-3305.14 (1994) (health care professional's license revoked for sexual harassment); S.D. CODIFIED LAWS ANN. § 36-4-29, -30 (1992) (physicians may lose their professional license for unprofessional conduct including 'gross or immoral sexual harassment'); VT. STAT. ANN. tit. 26, § 541 (Supp. 1993) (sexual harassment by a chiropractic physician is unprofessional conduct and grounds for revocation of license or disciplinary proceedings).

99. CAL. BUS. & PROF. CODE § 125.6 (Deering 1992) (revoking or denying professional license if a person discriminates based on sex).

Several states provide protection from sexual harassment in public accommodations,[100] services, and benefits. For example, Maine provides that an AFDC recipient cannot be sanctioned for failure to participate in a required educational program if the failure is due to sexual harassment.[101] Laws in Massachusetts and Minnesota explicitly provide for unemployment compensation benefits if employment termination was due to sexual harassment.[102] Massachusetts also prohibits sexual harassment of people in the care of the state.[103] Some states more generally prohibit sexual harassment of the elderly and disabled.[104] Kansas provides that sexual harassment is cause to dismiss public officials.[105]

A final important area of civil liability for sexual harassment is tort law. Plaintiffs have won compensation for sexually harassing conduct under state laws of assault and battery,[106] intentional infliction of emotional distress,[107] invasion of privacy,[108] tortious interference with contract,[109] and negligent hiring and retention.[110]

State laws against sexual harassment cover a much broader range of conduct and relationships than federal law. The large number of civil laws prohibiting sexual harassment indicate concern on the part of state legislatures about sexual harassment. The regulations presumably reflect areas in which states have discovered problems with sexual harassment. The statistics on sexual harassment and the extensive civil legislative response show that sexual harassment is a serious and widespread problem. Whether

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100. *See, e.g.*, MINN. STAT. § 363.03, subd. 3(1) (1992 & Supp. 1993).

101. ME. REV. STAT. ANN. tit. 22, § 3785 (West 1964 & Supp. 1993).

102. *See* MASS. ANN. LAWS ch. 151A, § 25(e) (Law. Co-op. Supp. 1994); MINN. STAT. § 268.09, subd. 1(a) (1992).

103. *See* MASS. ANN. LAWS ch. 30, § 9b (Law. Co-op. Supp. 1994).

104. GA. CODE. ANN. §§ 31-8-81 (1) & 31-8-82(3) (1991) (protecting residents in long-term care); OR. REV. STAT. § 430-735 (Supp. 1994) (disabled adults); PA. STAT. ANN. tit. 35, § 10211-24 (1992) (protects the elderly).

105. *See, e.g.*, KAN. STAT. ANN. § 75-2949f (1989).

106. *See, e.g.*, Valdez v. Church's Fried Chicken, Inc., 683 F. Supp. 596 (W.D. Tex. 1988) (holding coworker liable for civil damages); Wirig v. Kinney Shoe Corp, 461 N.W.2d 374 (Minn. 1990) (allowing plaintiff to bring a claim for battery and sexual harassment under Minnesota's Human Rights Act).

107. *See* Hogan v. Forsyth Country Club, 340 S.E.2d 116 (N.C. 1986) (finding sexual harassment constituted intentional infliction of emotional distress); Howard Univ. v. Best, 484 A.2d 958 (D.C. 1984) (harassing conduct constituted a prima facie case of intentional infliction of emotional distress). Some states also provide a private cause of action for damages under anti-discrimination laws. *See, e.g.*, D.C. CODE ANN. § 1-2556 (1992).

108. Rogers v. Loews L'Enfant Plaza Hotel, 526 F. Supp. 523 (D.D.C. 1981).

109. Kyziazi v. Western Elec. Co., 461 F. Supp. 894, 950 (D. N.J. 1978).

110. 1 LARSON & LARSON, *supra* note 4, § 41A.92, at 8-284.

civil law is an adequate response to this problem will now be explored.

II. Arguments for Treating Quid Pro Quo Sexual Harassment as a Crime

The problem of sexual harassment should be addressed through criminal laws as well as civil laws. The first section of this Part distinguishes civil law from criminal law. The second section argues that quid pro quo sexual harassment should be a crime and addresses some of the possible drawbacks to criminal sexual harassment laws.

A. Justifying Criminalization

Ordinary negligence in driving may lead to tort liability, but usually will not lead to criminal liability.[111] However, drunk driving may result in criminal liability as well as tort liability. Why are these acts treated differently? Criminal law and civil law both "aim to shape people's conduct along lines which are beneficial to society."[112] Civil liability for careless driving and criminal liability for drunk driving both serve the goal of reducing traffic accidents. The remedy may even be similar in effect: the civil wrongdoer may be required to pay the medical expenses of those hurt or may be subject to punitive damages, while the criminally liable drunk driver may have to pay a fine.

Criminal and civil law, however, address different concerns and function differently. For example, a drunk driver is generally considered more dangerous to society at large, and more morally blameworthy, than a negligent driver. The nature of the remedies afforded by civil and criminal law differ: the civilly liable negligent driver will only have to pay damages if someone or something is harmed because the damages compensate the victims for harm. On the other hand, the state imposes a fine upon the drunk driver whether or not anyone is harmed because the purpose of a fine is to punish the wrongdoer.[113] The drunk driver, as a result of a criminal action, may also go to jail. Finally, the victim of a negligent driver has the choice of whether to pursue civil remedies, whereas only the state can criminally prosecute the drunk driver.

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111. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.7(a) & (b) (2d ed. 1986).

112. *Id.* § 1.3(a).

113. *Id.* § 1.3(b) (noting that 'to shoot at and miss a sleeping man cannot be a civil assault, as there is no injury, even mental, to the sleeper; but such behavior is socially dangerous enough to constitute a criminal assault').

The interests affected, the party responsible for instituting judicial proceedings against the offender, and the remedy afforded by law distinguish civil and criminal wrongs.[114] Civil law enforces, redresses, and protects private rights.[115] Injured persons bring civil actions against wrongdoers, primarily in order to gain compensation "for the damage suffered at the expense of the wrongdoer."[116] Civil action may in some cases warrant punitive damages when "aggravation or outrage, such as spite or 'malice,' " accompanied the defendant's wrongdoing, but plaintiffs usually collect only compensatory damages.[117]

Criminal law, on the other hand, exists to protect the public from harm.[118] A crime is "an offense done against the public at large,"[119] or an "act done in violation of those duties which an individual owes to the community, and for the breach of which the law has provided that the offender shall make satisfaction to the public."[120] William Blackstone explained,

> The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community considered as a community, in its social aggregate capacity.[121]

In criminal cases, the state, as representative of the public, brings proceedings in the form of a criminal prosecution to protect and vindicate the interests of the public as a whole. The victim in a criminal case serves only as the accuser and witness for the state, and does not usually receive any direct compensation as a result of a conviction.[122]

The distinction, however, between private wrongs and public wrongs is ambiguous. Professor Lawrence Friedman argued that

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114. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 7 (5th ed. 1984) [hereinafter PROSSER & KEETON]; LAFAVE & SCOTT, *supra* note 111, § 1.3(a).

115. BLACK'S LAW DICTIONARY 244 (6th ed. 1990) [hereinafter BLACK'S].

116. PROSSER & KEETON, *supra* note 114, § 2, at 7.

117. *Id.* § 2 at 9-10 (footnotes omitted).

118. LAFAVE & SCOTT, *supra* note 111, § 1.3(b); BLACK'S, *supra* note 115, at 245. *But see* MODEL PENAL CODE § 1.02(1)(a) (1985) [hereinafter MPC] (defining the purposes of its provisions as "to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests").

119. PROSSER & KEETON, *supra* note 114, § 2, at 7.

120. BLACK'S, *supra* note 115, at 374.

121. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1428 (1897).

122. *Id.*

communities make a "social and political decision" that an act is a crime: "Behind every *legal judgment* of criminality is a more powerful, more basic *social* judgment, a judgment that this behavior, whatever it is, deserves to be outlawed and punished."[123] Friedman emphasized that many "nasty" or "evil" acts are not illegal.[124] In making decisions to criminalize certain conduct, the community comes to a consensus that it will not tolerate this kind of behavior.[125] However, this *descriptive* account of how conduct becomes criminal does not reveal sufficiently the principles underlying the decisions to criminalize behavior.

Professor Sanford Kadish described criminal law as a "highly specialized tool of social control" and argued that "the decision to criminalize any particular behavior must follow only after an assessment and balancing of gains and losses."[126] Factors such as who is affected by the conduct at issue and how they are affected are considered in this balancing process. Professor Joel Feinberg distinguished several principles underlying decisions to criminalize conduct.[127] According to Feinberg, governments historically have used four basic "liberty-limiting" (or "coercion-legitimizing") principles to justify the criminalization of certain conduct. First, the "harm principle" holds that criminal law is necessary to prevent harm or injury to persons other than the actor.[128] Second, the "offense principle" holds that criminal law is necessary to prevent hurt or offense to persons other than the actor.[129] Third, "legal paternal-

123. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 4 (1993) (emphasis in original).

124. *Id.* at 3-4. For example, lying, psychological abuse, or charging a huge markup at a restaurant or store. *Id.*

125. *Id.* at 4.

126. SANFORD H. KADISH, BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 33 (1987).

127. JOEL FEINBERG, 2 THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS, ix (1985) [hereinafter OFFENSE TO OTHERS].

128. Harm is a violation of another's rights that sets back the other's interests. JOEL FEINBERG, 1 THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 2 (1984) [hereinafter HARM TO OTHERS]. Feinberg suggests six factors to determine whether a harm is significant enough to warrant criminal prohibition: 1) the magnitude of the harm, 2) the probability of the harm, 3) the aggregate harm (when an activity has some benefits and some harms such as alcohol consumption), 4) statistical discrimination and the net reduction of harm (e.g., prohibiting minors from drinking), 5) the relative importance of the harm when there are conflicting interests, and 6) the liberty interests at stake. *Id.* at 187-217.

129. *Id.* OFFENSE TO OTHERS, *supra* note 127, at 2. Feinberg defines a "wrongful offense" as a violation of another's rights that causes the other "to experience a mental state of a universally disliked kind (*e.g.*, disgust, shame)." *Id.* Feinberg describes six categories of offense: 1) affronts to the senses, 2) disgust and revulsion, 3) shock to moral, religious, or patriotic sensibilities, 4) shame, embarrassment (including vicarious embarrassment), and anxiety, 5) annoyance, boredom, and frustration, and 6) fear, resentment, humiliation, and anger (from empty threats, insults, mock-

ism" holds that criminal law "is necessary to prevent harm to the very person it prohibits from acting, as opposed to others."[130] Finally, "legal moralism" holds that "it is necessary to prevent inherently immoral conduct whether or not such conduct is harmful or offensive to anyone."[131]

As Feinberg noted, most people would agree that harm to others is a valid justification for criminal laws.[132] However, there is much disagreement about whether offense, harm to self, or morality can justify criminal laws.[133] Many have argued that regulation of private morality is a proper function of criminal law.[134] However, others argue that American society has fallen into a pattern of overcriminalization based on moralistic criminal laws. John Stuart Mill argued that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."[135] Norval Morris and Gordon Hawkins condemned the "moralistic excrescences on

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ery, flaunting, or taunting). *Id.* at 10-13. The seriousness of an offense is determined by weighing the interests of both parties. *Id.* at 34. The interests of the victim are weighed by the following factors: "[t]he magnitude of the offense which is a function of its intensity, duration, and extent"; "the standard of reasonable avoidability"; "whether the risk was voluntarily incurred or voluntarily assumed"; and the "discounting of abnormal susceptibilities." *Id.* at 35. Against these factors are weighed the reasonableness of the offender's conduct, determined by six factors: personal importance, social value, free expression, alternative opportunities, malice and spite, and nature of the locality. *Id.* at 37-42.

130. *See* JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF (1986) [hereinafter HARM TO SELF]. The criminalization of suicide is an example of legal paternalism. *Id.* at 9.

131. OFFENSE TO OTHERS, *supra* note 127, at ix-x; *see* JOEL FEINBERG, 4 THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING (1988) [hereinafter HARMLESS WRONGDOING].

132. OFFENSE TO OTHERS, *supra* note 127, at ix. According to Feinberg, "[c]ontroversy arises when we consider whether [harm] is the *only* valid liberty-limiting principle." *Id.*

133. *Id.* at ix-x. "Liberalism" has historically accepted the harm and offense principles as the only justifications for criminal prohibitions. *Id.* "Extreme liberalism," according to Feinberg, rejects the offense principle, holding that only the harm principle justifies criminal prohibitions. *Id.* at x. Liberals reject paternalism and moralism as legitimate justifications for criminal law. *Id.*

134. JAMES F. STEPHEN, LIBERTY, EQUALITY, FRATERNITY (R.J. White ed., Cambridge University Press 1967) (1873) (arguing for "morally intolerant legislation"); PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 22 (1965) (arguing that "law exists for the protection of society. It does not discharge its function by protecting the individual from injury, annoyance, corruption, and exploitation; the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together").

135. JOHN STUART MILL, ON LIBERTY, 13 (Currin V. Shields ed., Bobbs-Merrill Co. 1955); *see also* H.L.A. HART, LAW, LIBERTY AND MORALITY (1963) (arguing against using morality to justify criminal laws, particularly with sexual morality); KADISH, *supra* note 126, at 21-39 (essays on the crisis of overcriminalization).

our criminal justice system"[136] and argued that the only valid justification for criminal law is "to protect our persons and our property."[137] According to Morris and Hawkins, people have "an inalienable right to go to hell in [their] own fashion, provided [they do] not directly injure the person or property of another on the way."[138] They advocated for the abolishment of criminal laws prohibiting drunkenness, narcotics and drug abuse, gambling, disorderly conduct and vagrancy, abortion, sexual behavior between consenting adults, and juvenile delinquency.[139]

Feinberg argued for using only the harm and offense principles to justify criminal laws.[140] He qualified his argument for the offense principle by stating that criminal law should not attempt to control offensiveness when other modes of regulation are equally efficient and economical, such as injunctions, administrative orders, and license withdrawals.[141] However, he argued that in some circumstances, civil actions will be insufficient to control offensive conduct.[142] Therefore, some offensive acts should be crimes, but only misdemeanors and the penalties should be light.[143]

One could argue for the criminalization of sexual harassment on the grounds of offense, paternalism, and moralism, but this is not necessary. The criminalization of quid pro quo sexual harassment is justified by the harm principle alone, the one universally accepted ground for criminalization. The next section will use the harm principle to argue that quid pro quo sexual harassment should be treated as a crime.

B. Quid Pro Quo Sexual Harassment is Criminal

Quid pro quo sexual harassment should be treated as a crime because it harms the public. It harms not only individual women,[144] but also women as a group, employers of harassers, and society as a whole. The legal history of sexual harassment reveals a movement away from the view that sexual harassment is a per-

136. NORVAL MORRIS & GORDON HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 2 (1970).

137. *Id.*

138. *Id.*

139. *Id.* at 3.

140. OFFENSE TO OTHERS, *supra* note 127, at 1-4 (arguing against paternalism and moralism). *See* HARM TO SELF, *supra* note 130; HARMLESS WRONGDOING, *supra* note 131.

141. OFFENSE TO OTHERS, *supra* note 127, at 3.

142. *Id.*

143. *Id.* at 4.

144. Men are also victims of sexual harassment, however, at a much lower rate than women. *See* PALUDI & BARICKMAN, *supra* note 21, at 14.

sonal, individual phenomenon, toward the view that it harms women as a group. In the first reported sexual harassment case, the judge rejected the plaintiff's claim on the ground that the alleged sexual harassment was merely a matter of the "personal proclivity, peculiarity or mannerism" of the male supervisor and that nothing in Title VII prohibited verbal and physical advances where the conduct had "no relationship to the nature of the employment."[145] In the early years, courts generally held that sexual harassment in the workplace was private conduct, and not meant to fall within the Title VII prohibition against sex discrimination in employment.[146]

In 1979, Professor Catharine MacKinnon proposed the revolutionary theory that sexual harassment was a social phenomenon reinforcing sex roles, not just a personal offense.[147] She argued that sexual harassment derived its "meaning and detrimental impact upon women not from personality or biology, but from this *social* content."[148] In other words, sexual harassment reinforced a social hierarchy in which women as a group occupied a structurally inferior and distinct place.[149] MacKinnon thereby shifted the paradigm; she recognized that sexual harassment was not only a wrong against individual women, but a wrong against women as a group.[150] She argued that sexual harassment perpetuated pervasive sexism in the workplace, thus constituting a formidable barrier to equal opportunity for women in the workforce.[151]

Several commentators have agreed with MacKinnon that sexual harassment reinforces women's subordination in the workplace.[152] Women as a group are still underpaid and segregated into traditionally female jobs. Women earn seventy-one cents for every

145. Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975); *see also* Miller v. Bank of America, 418 F. Supp. 233, 234 (N.D. Cal. 1976) (holding that plaintiff had alleged "essentially the isolated and unauthorized sex misconduct of one employee to another," and not an injury actionable under Title VII).

146. "Typically, employers, husbands, judges, and the victims themselves have understood and dismissed such incidents as trivial, isolated, and 'personal,' or as universal 'natural' or 'biological' behaviors." CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 2 (1979).

147. *Id.* at 6 (arguing sexual harassment in the workplace is sexual discrimination).

148. *Id.* at 2.

149. *Id.*

150. *Id.*

151. *Id.* at 4.

152. *See, e.g.*, Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND L. REV. 1183, 1205-09 (1989) (arguing that sexual harassment reinforces women's subordination in the workplace because it is coercive and it demeans women as workers); Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 182-88 (1994) (arguing that sexual harassment "is a means of social control to keep women in subordinate positions in the workplace").

dollar earned by men.[153] Women are overrepresented in low paying, traditionally female fields such as secretarial work, bookkeeping, nursing, and administrative/clerical support[154] and underrepresented in many traditionally male fields such as construction, mining, and engineering.[155] Men in traditionally female jobs earn more than women in these positions, and the wage gap is even greater in traditionally male jobs.[156]

The high rate of sexual harassment women experience in the workplace[157] reinforces women's inferior status. Several studies reveal that the effects of sexual harassment on the work tenure of individual female workers are often severe. In one study, forty-two percent of sexual harassment targets left their jobs and another twenty-four percent were fired.[158] The costs of leaving a job include loss of income and seniority, a disrupted work history, problems with obtaining references for future jobs, loss of confidence in seeking a new job, and loss of career advancement.[159] Numerous studies reveal that sexual harassment causes women enormous emotional and physical harm.[160] In light of the feminization of pov-

153. U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS SERIES P-60, NO. 184, at xi (1992).

154. NATIONAL ASS'N FOR FEMALE EXECUTIVES, WOMEN IN THE AMERICAN WORKFORCE AND POWER STRUCTURE 2 (1993) [hereinafter WOMEN IN THE AMERICAN WORKFORCE] (reporting that in 1992, women were 99% of secretaries, 93% of bookkeepers and nurses, and 82% of administrative/clerical support workers).

155. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN NO. 2385, WORKING WOMEN: A CHARTBOOK 19 (1991) (women represent 11% of construction workers and 14% of mining workers).

156. WOMEN IN THE AMERICAN WORKFORCE, *supra* note 154, at 2 (reporting that in 1989 male bookkeepers earned 16% more than females and male registered nurses earned 10% more than females).

157. *See infra* notes 158-62 and accompanying text.

158. PEGGY CRULL, THE IMPACT OF SEXUAL HARASSMENT ON THE JOB: A PROFILE OF THE EXPERIENCES OF 92 WOMEN (1979); *see also* BARBARA A. GUTEK, SEX AND THE WORKPLACE (Jossey Blass, Inc. 1985) (showing private sector workers surveyed reported being fired, not being promoted, not given raises, all because of refusal to comply with requests for sexual relationships); Frances S. Cole, *Forced to Quit: Sexual Harassment Complaints and Agency Response*, 14 SEX ROLES 81, 89 (1986) (40 out of 88 sexual harassment victims were fired and 20 out of 88 quit).

159. Dolkart, *supra* note 152, at 187 (citing Jean A. Hamilton, *Emotional Consequences of Victimization and Discrimination in "Special Populations" of Women*, 12 PSYCHIATRIC CLINIC N. AM. 35, 161 (1989)); Ronni Sandroff, *Sexual Harassment Survey Results*, WORKING WOMAN, June 1992, at 50 (finding numerous ill effects of sexual harassment, including being fired or forced to quit a job, seriously undermined self-confidence, impaired health, and long term career damage); U.S. MERIT SYS. PROTECTION BD., *supra* note 15, at 41-42 (discussing the reported costs of sexual harassment to victims and estimating that federal employees took annual leave valued at $25.6 million and leave without pay valued at $9.9 million in salaries in order to avoid harassment).

160. PALUDI & BARICKMAN, *supra* note 21, at 27-39 (discussing Sexual Harassment Trauma Syndrome, and the effects of harassment on the physical, emotional, interpersonal, and career aspects of women's lives); IVORY POWER, *supra* note 21, at

erty[161] and the increasing number of female headed households,[162] women's equal access to the workforce, as well as to housing, education, and other services, is critical. Sexual harassment deprives many women of an equal opportunity to pursue an occupation, education, housing, and other critical pursuits free from the sexual demands of those in power.

Not only do sexual harassers harm their victims individually, and women as a group, but they also harm their employers. When an employee with some degree of power sexually harasses another person, that employee abuses the power granted by the employer. For example, when a police officer stops a woman by the side of a road and harasses her, the law enforcement mission suffers as well as the woman harassed. In attempting to extort sexual access in exchange for employment-related benefits, the workplace harasser abuses the authority granted by the employer, and thus may deprive the employer of maximum workforce productivity. Sexual harassment not only can impair the harassed employee's productivity, but it can also reduce the productivity of other workers through harm to morale in the workplace. Sexual harassment cost the federal government an estimated $267,000,000 between May of 1985 and May of 1987 because of job turnover, increased sick leave, and loss of individual and work group productivity.[163] Another survey estimated that sexual harassment costs a typical Fortune 500 company as much as $6.7 million a year due to absenteeism, turnover, and lost productivity.[164] In addition, the harasser subjects the em-

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73-123 (finding that many women report that their emotional and physical condition deteriorated as a result of sexual harassment); Dolkart, *supra* note 152, at 226-33 (discussing the psychological impact of sexual harassment on women and how women's responses to sexual harassment differ).

161. "Feminization of poverty" means the increasing number of women in poverty as compared to men. HILDA SCOTT, WORKING YOUR WAY TO THE BOTTOM: THE FEMINIZATION OF POVERTY (1984) (discussing how women are increasingly economically responsible for children but that job segregation and the income gap between men and women are still great); Diane Pearce, *The Feminization of Poverty: Women, Work, and Welfare*, 11 URB. & SOC. CHANGE REV. 28 (1978) (coining the phrase "feminization of poverty").

162. HARRELL R. RODGERS, JR., POOR WOMEN, POOR FAMILIES: THE ECONOMIC PLIGHT OF AMERICA'S FEMALE-HEADED HOUSEHOLDS 3 (M.E. Sharpe, Inc., 1991) (stating that the "largest group of poor people in America is made up of single women and their children"); DAVID T. ELLWOOD, POOR SUPPORT, POVERTY IN THE AMERICAN FAMILY 45-80, 128-88 (Basic Books, Inc. 1988) (reporting that in 1985, 20% of families with children were headed by single females and 50% of children in single-parent families lived in poverty).

163. U.S. MERIT SYS. PROTECTION BOARD, *supra* note 15, at 40. The Senate passed a resolution in 1991 condemning sexual harassment in the federal government. S. Res. 209, 102d Cong., 1st Sess., 137 CONG. REC. 15290 (1991).

164. Sandroff, *supra* note 16, at 69.

ployer to significant potential civil liability under Title VII for sexual harassment.[165]

Sexual harassment is a serious and pervasive problem not only in the workforce, but also in education[166] and housing.[167] Students subjected to sexual harassment typically change their major or educational program and report physical and emotional reactions including depression, insomnia, headaches, and decreased motivation.[168] Targets of sexual harassment in rental housing report that their harassers threaten to evict them or to withhold necessary repairs or services.[169]

The economic cost of sexual harassment to society is great. Sexual harassment is not just a private wrong; sexual harassment affects the ability of women as a group to function in society and impairs the functioning of business and government. Under the narrowest principle of criminalization—the harm principle[170]—quid pro quo sexual harassment should be treated as a crime. Applying the harm principle, sexual harassment warrants criminal prohibition because the magnitude and probability of harm resulting from quid pro quo sexual harassment are great. States should treat quid pro quo sexual harassment as a crime in order to protect society and individuals from harassers' inappropriate exercise of power.[171]

Several objections may be made to criminalizing quid pro quo sexual harassment. First, some may argue that criminal laws are unnecessary because civil laws adequately and more effectively address the problem of sexual harassment. The trend has been toward using civil causes of action to compensate victims of rape and

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165. *See supra* note 52 and accompanying text.

166. *See supra* notes 19-22 and accompanying text.

167. *See supra* notes 23-24 and accompanying text.

168. PALUDI & BARICKMAN, *supra* note 21, at 27-34; *see also* IVORY POWER, *supra* note 21, at 67-118 (discussing the impact of sexual harassment on cognitive, physical, and emotional well-being).

169. Cahan, *supra* note 24, at 1073-75.

170. *See supra* note 118 and accompanying text.

171. Beyond the harm principle, moral principles justify criminalizing sexual harassment. Sexual harassment involves the moral wrongs of coercion and exploitation. *See* Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. PA. L. REV. 1639, 1640 (1993) (arguing that in profiting from victims' vulnerability, "[b]lackmailers commit two serious moral wrongs—coercion and exploitation—that justify condemnation and prohibition"). A harasser subjects his victim to moral duress by "taking . . . undue advantage of business or financial stress or extreme necessity or weakness of another." BLACK'S, *supra* note 115, at 1008 (defining moral duress). A criminal law against quid pro quo sexual harassment may also serve an educational function. *See* Jean Hampton, *The Moral Education Theory of Punishment*, *in* CRIMES AND PUNISHMENTS 494 (Jules L. Coleman ed. 1994) (arguing that moral education is a complete justification for punishment).

other crimes.[172] This trend has caused the victims' rights movement to criticize the criminal process for ignoring victims and their needs.[173] The existence of criminal sanctions for a harm against society does not preclude civil sanctions to protect the individual; in fact, civil and criminal remedies may complement each other. A criminal conviction for quid pro quo sexual harassment would not prevent a civil sexual harassment suit for damages. Even if the defendant is acquitted, a plaintiff could still win a civil case because the burden of proof is lower in the civil action than in the criminal action. The only potentially negative effect of criminal proceedings would be a delay in deposing the defendant in the civil sexual harassment case until after the completion of the criminal proceedings because of the Fifth Amendment right against self-incrimination.[174] While the criminalization of sexual harassment may create some delays in civil trials, this inconvenience does not outweigh the benefits of making sexual harassment a crime.

One might also argue that the crime of quid pro quo sexual harassment will be difficult to prove and rarely enforced. Some cases will have tape recordings or documents to show the harassment, but often the case will come down to the victim's word against the accused's word. In addition, the laws may be rarely enforced because prosecutors are overburdened with violent crimes. The difficulty in proving a claim and the likelihood of enforcement should be considered in deciding whether to adopt a law,[175] but should not be dispositive. Many crimes, such as extortion and bribery, have similar proof problems in that the evidence may consist only of one person's word against another's.[176] These laws, however, remain important because they set a standard with which community members are expected to comply. Even if sexual harassment is rarely prosecuted under criminal laws, these laws still

172. For example, Title III of the Violence Against Women Act recently passed by Congress provides that violence directed against women on the basis of their gender is a civil rights violation. The Act allows victims to sue their attackers for compensation. See W.H. Hallock, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577, 600 (1993) (discussing how sexual assault victims are turning increasingly to civil remedies for compensation for the harms of sexual assault).

173. *See* Karen L. Kennard, Comment, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CALIF. L. REV. 417 (1989).

174. U.S. CONST. amend. V.

175. *See* JONATHAN SCHONSHECK, ON CRIMINALIZATION: AN ESSAY IN THE PHILOSOPHY OF CRIMINAL LAW (1994) (arguing for the importance of considering the enforceability of laws when deciding whether to adopt them).

176. *See infra* notes 189-98 and accompanying text for a discussion of bribery and extortion laws.

represent an important community standard condemning sexual harassment.

Criminal laws against quid pro quo sexual harassment provide new tools to combat sexual harassment beyond those offered by civil law. First, criminal laws enable targets of harassment to prevent the threatened harm. Civil laws require that the target of harassment suffer tangible detrimental consequences in order to state a case. For example, under Title VII, a threat of adverse consequences is insufficient to establish liability; the plaintiff must prove negative employment consequences.[177] Therefore, a target of harassment must wait until she suffers tangible harm before she has a right to bring a legal claim against the harasser. Once she suffers tangible harm, she must prove that the harm resulted from her refusal to submit to sexual demands. A criminal law against quid pro quo sexual harassment, on the other hand, would enable the target to prevent the tangible harm by reporting the harasser as soon as the threat is made. The crime of quid pro quo sexual harassment could go beyond civil law to address the threat made by the harasser, not just the tangible detrimental consequence resulting from the threat.[178] Criminalization of quid pro quo sexual harassment may therefore encourage and assist targets of sexual harassment in resisting their harasser's demands. The legal right to be free from sexually harassing threats gives them the leverage of threatening to go to the police before they suffer a detriment for refusing to consent to sex.[179] Finally, criminalizing sexual harassment authorizes

177. 1 LARSON & LARSON, *supra* note 4, § 41A.42; *see, e.g.*, Watts v. New York City Police Dep't, 724 F. Supp. 99 (S.D.N.Y. 1989) (threats were not actual employment decisions); Trautvetter v. Quick, 916 F.2d 1140 (7th Cir. 1990) (denying plaintiff's claim because she was not discharged, nor denied a promotion or other job benefit).

178. Also, current civil laws often do not provide a cause of action against the offender, but only against the offender's employer. Titles VII and IX and many state laws hold employers civilly liable for sexual harassment by superiors in the workplace and teachers in schools. The actual harassers, however, are not held liable for their actions by federal law. *See, e.g.*, Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993) (holding that employees lack standing to sue individual co-workers or supervisors for discrimination under Title VII). *But see* 1 LARSON & LARSON, *supra* note 4, § 41A.91(a) (stating that employees of state and local governments may sue individuals directly for harassing them under § 1983 if they acted under color of state law); Eastwood v. Department of Corrections, 846 F.2d 627 (10th Cir. 1988) (noting that the defendant employer's investigator was not protected by qualified immunity under § 1983 when sued in his individual capacity). However, a plaintiff may sue a harasser directly under state tort law.

179. *See* Wendy J. Gordon, *Truth and Consequences: The Force of Blackmail's Central Case*, 141 U. PA. L. REV. 1741, 1776 (1993) (arguing that blackmail should be criminalized for these reasons). The criminalization of sexual harassment "reinforces [the target's] sense that she has a 'right' to be free from such threats, and thus reinforces her willingness to angrily refuse the demands made." *Id.* at 1778. A target now has the threat of a civil suit if the harasser carries through with his threat

the state to prosecute offenders. Civil laws against harassment put the burden upon the victim to pursue a harassment claim. Victims often do not have the money, time, or access to information about how to pursue these remedies. Criminal sexual harassment laws would sanction the state to prosecute sexual harassers.

Another objection is that a criminal conviction for quid pro quo sexual harassment might cut off employer civil liability for sexual harassment suits brought by their employees. Under Title VII, an employer is strictly liable for quid pro quo sexual harassment.[180] However, courts normally consider whether the employee's conduct was within the scope of employment.[181] The fact that quid pro quo sexual harassment is a crime strengthens the argument that the act was outside the employee's scope of employment. An employer's duty to exercise reasonable care in providing a safe workplace to employees does not extend to the prevention of unlikely or unforeseeable occurrences, but only to dangers that may reasonably be anticipated.[182] An employer would have a strong argument that a criminal act was not reasonably anticipated. However, considering that the employee used authority granted by the employer in order to harass, that quid pro quo sexual harassment is foreseeable in the workplace, and that strong precedent exists for holding employers strictly liable for quid pro quo sexual harassment, the criminalization of this behavior would probably not expunge employer liability.

A final objection is that there are First Amendment problems with the criminalization of sexual harassment.[183] However, many

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(usually against employers, but also against the harassers in some cases, see *supra* part I.B.), but the threat of going to the police is much more impressive.

180. See *supra* note 52 and accompanying text.

181. 1 LARSON & LARSON, supra note 4, § 41A.63.

182. ALFRED G. GELIU, PRIMER ON INDIVIDUAL EMPLOYEE RIGHTS 267 (1992); *see, e.g.*, Vallejo v. Osco Drug, 743 S.W.2d 423 (Mo. App. 1987) (finding no liability under duty to provide a safe workplace for a store owner whose security guard shot an employee during an attempted robbery because the act was clearly outside the scope of employment).

183. There is a debate in the literature as to whether sexual harassment laws, particularly hostile environment harassment laws, violate free speech rights. *Compare* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991) (arguing that allowing evidence of verbal expressions of discrimination into a consideration of sexual harassment charges infringes First Amendment rights and has a chilling effect on the workplace) *with* Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 197 (1990) (arguing that the transactional setting of sexual harassment opens sexist speech to regulation); Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 38-41 (recommending a balancing test between the state's interest in eradicating sexist speech from the workplace and free speech rights, paying particular attention to whether the speech is directed at a particular woman, whether it is discriminatory, and considerations of the employment context, e.g. captive audience).

acts that take the form of speech are crimes unprotected by the First Amendment, such as treason,[184] blackmail, or laws against soliciting bribes. The Supreme Court recently reaffirmed this principle in *R.A.V. v. City of St. Paul*:

> Since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.[185]

Laws against quid pro quo sexual harassment are directed at words that function as conduct.[186]

Despite some possible drawbacks, sexual harassment should be treated as a crime. The coercion and exploitation of sexual harassment cause sufficient harm to justify criminalization. Criminal law would forcefully address this serious problem that affects large numbers of women in American society.[187] Punishment not only would serve an educational purpose by teaching that harassment is unacceptable behavior,[188] but also would deter sexual harassment. Criminal law sanctions would complement currently existing civil law sanctions. The next Part will explore whether quid pro quo sexual harassment falls within traditional general criminal laws.

III. Prosecuting Quid Pro Quo Sexual Harassment Under General Criminal Laws

If states make the commitment to prosecute quid pro quo sexual harassers, they may look to their existing laws or they may adopt new criminal statutes specifically addressing quid pro quo sexual harassment. Many states have general criminal laws that prohibit some types of quid pro quo sexual harassment. However, only a few have laws that prohibit all types. This Part analyzes six general criminal laws to determine whether these laws could adequately address quid pro quo sexual harassment: soliciting commercial bribes, extortion, criminal coercion, criminal solicitation, attempted offensive sexual touching, and harassment.

Many states have criminal laws against soliciting commercial bribes, which may encompass some types of quid pro quo sexual

184. *See* 18 U.S.C. § 2385 (1993) (punishing those advocating the overthrow of the government with up to 20 years in prison and/or a fine of up to $20,000).

185. 112 S. Ct. 2538, 2546 (1992).

186. One court rejected a First Amendment challenge to a sexual solicitation statute on the grounds that the solicitation constituted "fighting words." Ohio v. Phipps, 389 N.E.2d 1128 (Ohio 1979).

187. *See supra* notes 14-24 and accompanying text.

188. Hampton, *supra* note 171, at 494.

harassment. Most commercial bribery statutes prohibit an employee or agent from soliciting a benefit from another person under the "understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs."[189] These statutes could cover quid pro quo sexual harassment, but only when the harasser is an employee or agent. Some commercial bribery statutes are broader. Colorado has a law against "commercial bribery and breach of duty to act disinterestedly," which covers not only employees, but also fiduciaries, professional advisors, and people who hold themselves out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities, property, or services.[190] Probably all types of quid pro quo sexual harassment would fall under this statute. Few states, however, have statutes this broad.

Quid pro quo sexual harassment may also fall within extortion laws. Extortion laws usually prohibit obtaining the property of another by threatening to cause certain harms like inflicting bodily injury, accusing of a crime, or exposing an incriminating secret.[191]

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189. CHARLES E. TORCIA, 4 WHARTON'S CRIMINAL LAW § 693 (1978 & Supp. 1993); *see, e.g.*, CONN. GEN. STAT. ANN. § 53A-161 (West 1985); DEL. CODE ANN. tit. 11, § 882 (Supp. 1992) (covering "action with regard to his employer's or principal's affairs which would not be warranted upon reasonable consideration of the factors which he should have taken into account"); ILL. ANN. REV. STAT. ch. 720, para. 5/29A-1 (Smith-Hurd 1993); IOWA CODE ANN. § 722.10 (West 1993) (covering an action which "the employee has reason to know is in conflict with the employment relation and duties of the employee to the employer").

190. The Colorado statute provides:

> (1) A person commits a class 6 felony if he solicits, accepts, or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as:
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> (a) Agent or employee; or
>
> (b) Trustee, guardian, or other fiduciary; or
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> (c) Lawyer, physician, accountant, appraiser, or other professional advisor; or
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> (d) Officer, director, partner, manager, or other participant in the direction of the affairs of an incorporated or unincorporated association; or
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> (e) Duly elected or appointed representative or trustee of a labor organization or employee welfare trust fund; or
>
> (f) Arbitrator or other purportedly disinterested adjudicator or referee.
>
> (2) A person who holds himself out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities, property, or services commits a class 6 felony if he knowingly solicits, accepts, or agrees to accept any benefit to alter, modify, or change his selection, appraisal, or criticism.

COLO. REV. STAT. ANN. § 18-5-401 (Supp. 1992); *see also, e.g.*, NEB. REV. STAT. § 28-613 (Supp. 1992); 18 PA. CONS. STAT. ANN. § 4108 (Supp. 1993).

191. MPC, *supra* note 118, § 223.4. The Model Penal Code includes the following threats:

> A person is guilty of [extortion] if he obtains property of another by threatening to: (1) inflict bodily injury on anyone or commit any other

Many extortion statutes cover demands for "property" or "chattel."[192] Some speak more broadly of "pecuniary advantage" or "anything of value."[193] A few cover threats made to induce the victim to do "any act against [the victim's] will."[194] Washington state specifically includes demands for "sexual favors."[195] Quid pro quo sexual harassment is sexual extortion. By threatening to deny or withdraw benefits from a victim, the harasser attempts to induce her to comply with his sexual demands.[196] Many extortion laws, however,

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> criminal offense; or (2) accuse anyone of a criminal offense; or (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or (4) take or withhold action as an official, or cause an official to take or withhold action; or (5) bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or (6) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or (7) inflict any other harm which would not benefit the actor.

Id.; *see also* BLACK'S, *supra* note 115, at 585 (defining extortion as the "obtaining of property from another induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right"); *see, e.g.*, DEL. CODE ANN. tit. 11, § 846 (Supp. 1992). The United States Code defines extortion as the 'obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.' 18 U.S.C. § 1951 (1988). Robbery, on the other hand, is obtaining another's property by means of a threat of immediate bodily harm to the victim (or a companion). Robbery requires that the defendant actually acquire the victim's property as a result of a threat, and that the property be taken from the person or in the presence of the victim. LAFAVE & SCOTT, *supra* note 111, § 8.11. Robbery also historically has been defined to include threats to destroy a victim's home or threats to accuse the victim of sodomy. Other threats, however, have not been included in the definition of robbery, such as the threat to inflict future bodily harm, to destroy property other than one's home, to accuse another of some crime other than sodomy, or to damage the victim's good name or reputation. However, states have filled the gap by creating the crimes of extortion and blackmail, which carry a less severe penalty than robbery, but are very similar. *Id.* § 8.12.

192. LAFAVE & SCOTT, *supra* note 111, § 8.12. The Model Penal Code defines "property" as "anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action, and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power." MPC, *supra* note 118, § 223.0(6).

193. LAFAVE & SCOTT, *supra* note 111, § 8.12.

194. *Id.*; *see* Furlotte v. State, 350 S.W.2d 72 (Tenn. 1961) (involving a defendant who induced victim by threats to sign a statement admitting an illicit love affair with the defendant's wife).

195. WASH. REV. CODE ANN. § 9A.56.110 (West 1988).

196. Sometimes the distinction between extortion and bribery is unclear. For example, in a recent case in the Southern District of New York, the director of a halfway house under federal contract gave special benefits (such as passes to leave the house) to certain residents who agreed to have sex with him. The defendant pleaded guilty to receiving bribes in the form of sexual favors. The court refused to find that the director had extorted sex by threatening the residents, despite evidence that the defendant approached several residents offering them benefits for sex and that he controlled all aspects of their life in the halfway house, including whether they would be sent back to prison. United States v. Alter, 788 F. Supp. 756 (S.D.N.Y.

require the actual acquisition of the thing demanded.[197] Therefore, a woman would have to submit to her harasser's sexual demands before he would be criminally liable. However, the state could prosecute a harasser on attempted extortion in the absence of a victim's submission to sexual demands. But, as with commercial bribes, quid pro quo sexual harassment would fall only within the broadest of extortion laws—those that cover sexual acts. While some states' statutes would include quid pro quo sexual harassment, many would not.

Sexual harassment also resembles the crime of criminal coercion because the harasser tries to coerce another by threatening to act to her detriment. Criminal coercion is "unlawfully restricting another's freedom of action to his detriment [by] threaten[ing] to . . . take or withhold action as an official, or cause an official to take or withhold action."[198] The application of this law to sexual harassment would be very narrow, however, because it only applies to public officials. Anyone who has authority or power can threaten to subject another to detrimental action for the wrongful purpose of demanding sex. Also, this statute would not apply when the quid pro quo sexual harassment involves offering a benefit in exchange for sexual conduct.

Criminal solicitation may also include sexual harassment. Criminal solicitation occurs when a person commands, encourages, requests, entices, advises, or incites another person to commit a crime.[199] "The crime solicited need not be committed."[200] Quid pro

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1992). *See* James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695 (1993). With the crime of sexual harassment, the distinction between extortion and bribery should revolve around who initiated the negotiation and a consideration of the power relationship involved.

197. LAFAVE & SCOTT, *supra* notes 190-91; *see, e.g.*, WASH. REV. CODE ANN. § 9A.56.110 (West 1988); VA. CODE ANN. § 18.2-59 (Mitchie 1988).

198. MPC, *supra* note 118, § 212.5(1). In more complete form, the model statute provides that a "person is guilty of criminal coercion if, with purpose unlawfully to restrict another's freedom of action to his detriment, he threatens to: (a) commit any criminal offense; or (b) accuse anyone of a criminal offense; or (c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or (d) take or withhold action as an official, or cause an official to take or withhold action." *Id.* § 212.5. Many states have adopted this type of criminal coercion law. *See, e.g.*, ALASKA STAT. § 11.41.530 (1989); DEL. CODE ANN. tit. 11, § 791 (1987); OR. REV. STAT. § 163.275 (1990). The Model Penal Code does not define the term "official." However, the term historically means under color of public office. *See* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815 (1988).

199. LAFAVE & SCOTT, *supra* note 111, § 6.1 at 486. Some solicitation statutes cover all crimes, some cover only the solicitation of felonies or certain classes of felonies, and some cover only specified offenses. *Id.* § 6.1(a), at 487. Solicitation is generally considered to be a crime one grade below the solicited offense. *Id.* However, some statutes authorize punishment equivalent to that of the solicited crime. *Id.*;

quo sexual harassment may be characterized as the solicitation of another to engage in the crime of prostitution. In offering benefits for sex, sexual harassers ask their targets to prostitute themselves. Similarly, quid pro quo sexual harassment could be prosecuted under laws prohibiting the solicitation of illegal sexual acts[201] or under laws that prohibit the solicitation of sex in return for a fee.[202] However, none of these existing criminal laws capture the nature of sexual harassment. The element of coercion present in quid pro quo sexual harassment is missing from criminal solicitation statutes. Additionally, the law should not have to characterize a target of harassment as a prostitute in order to prosecute her harasser. Finally, in many cases, the harasser abuses authority vested in him by an employer, an aspect absent from criminal solicitation statutes.[203]

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see also 4 TORCIA, *supra* note 189, § 713, at 511, 514; *see, e.g.*, ALASKA STAT. § 11.31.110 (1989); ARK. CODE ANN. § 5-3-301 (Michie 1987); DEL. CODE ANN. tit. 11, § 501-503 (Supp. 1992); HAW. REV. STAT. 705-510 (1994); VA. CODE ANN. § 18.2-29 (Michie Supp. 1994). The Model Penal Code defines criminal solicitation as follows: "A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission." MPC, *supra* note 118, § 5.02(1). Under the Model Penal Code, criminal solicitation is a crime of the same grade and degree as the most serious offense which is solicited. *Id.* § 5.05(1). Prostitution is a petty misdemeanor in the Model Penal Code. *Id.* § 251.2(1).

200. LAFAVE & SCOTT, *supra* note 111, § 6.1, at 486. *See also*, MPC *supra* note 118, § 5.02, cmt. 3.

201. *See* GA. CODE ANN. § 16-6-15 (Michie 1992) (prohibiting solicitation of sodomy).

202. Several types of laws prohibit solicitation of sex in return for a fee such as laws against promoting prostitution, patronizing prostitutes, or pandering. *See* CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW, §§ 273-74 (1979); MPC, *supra* note 118, §§ 251.2(2) & 251.2(5); *see, e.g.*, ILL. ANN. STAT. ch. 38, para. 11-15(a) (Smith-Hurd Supp. 1992) (prohibiting soliciting for a prostitute); CONN. GEN. STAT. ANN. § 53a-86(a) (West 1985) ("A person is guilty of promoting prostitution in the first degree when he knowingly: (1) Advances prostitution by compelling a person by force or intimidation to engage in prostitution . . . "); GA. CODE ANN. § 16-6-12 (1992) ("A person commits the offense of pandering when he or she solicits a person to perform an act of prostitution . . . ."); ARK. CODE ANN. § 5-70-103 (Michie 1987) (providing that "(a) A person commits the offense of patronizing a prostitute if he: (1) Pays or agrees to pay a fee to another person on an understanding that in return that person or a third person will engage in sexual activity with him; or (2) Solicits or requests another person to engage in sexual activity with him in return for a fee").

203. Sexual harassment also often occurs between an employee and an employer, a student and a teacher, or others who have an established relationship that is supposedly built on trust, and resembles a fiduciary relationship. The breach of an established relationship should be considered more egregious than criminal solicitation that occurs among strangers or acquaintances. *See, e.g.*, Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 551-52 (1987) (arguing that a "faculty-student relationship is best characterized as one of fiduciary and beneficiary"); BLACK'S, *supra* note 115, 626 (providing examples of fidu-

Quid pro quo sexual harassment may also fall within laws against nonconsensual sexual contact. Several states have laws against offensive or nonconsensual sexual contact.[204] Quid pro quo sexual harassment could be characterized as attempted offensive touching. However, this characterization fails to take account of the unique kind of coercion involved with quid pro quo sexual harassment: the harasser uses his position of power as an employer, lessor, or teacher to coerce his target into complying with sexual demands. Most rape and sexual assault statutes would not apply because they require that the offender use or threaten to use force, that the victim is incapable of consenting, or in certain circumstances that the consent is obtained by fraud.[205] However, several sexual assault statutes prohibit sexual contact when "the victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority to coerce the victim to submit."[206] Quid pro quo sexual harassment in an institutional setting may fall within these laws.

A final crime that may include quid pro quo sexual harassment is the more general crime of harassment. The Model Penal Code describes harassment as when a person

> (1) makes a telephone call without the purpose of legitimate communication or; (2) insults, taunts or challenges another in a manner likely to provoke violent or disorderly response or; (3) makes repeated communications anonymously or at extremely inconvenient hours, or in offensively coarse language or; (4) subjects another to offensive touching or; (5) engages in any other course of alarming conduct serving no legitimate purpose of the actor.[207]

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ciary relations as "those existing between . . . guardian and ward, principal and agent"); *see* Beverly Balos & Mary Louise Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599 (1991) (arguing *inter alia* that a prior relationship in cases of nonstranger rape imposes on the defendant a heightened duty of care based on the doctrine of confidential relationship to obtain consent by positive words or actions).

204. CHARLES E. TORCIA, 3 WHARTON'S CRIMINAL LAW § 298-300 (1980); *see, e.g.*, DEL. CODE ANN. tit. 11, § 767 (Supp. 1992) (defining unlawful sexual contact in the third degree as contact that is "either offensive to the victim or occurs without the victim's consent"); OHIO REV. CODE ANN. § 2907.06 (Baldwin 1993) (defining the crime of "sexual imposition" as having sexual contact with another when the "offender knows that the sexual contact is offensive to the other person . . . or is reckless in that regard"); OR. REV. STAT. § 163.415 (Supp. 1993) (sexual abuse in the third degree).

205. 3 TORCIA, *supra* note 204, §§ 288-290.

206. COLO REV. STAT. ANN. § 18-3-403(1)(g) (West 1986); CONN. GEN. STAT. ANN. § 53a-73a(a)(1)(E) (West Supp. 1994). *See also* 3 TORCIA, *supra* note 204, § 297.

207. MPC, *supra* note 118, § 250.4.

Many states have adopted this type of harassment statute.[208] This statute, however, would not be useful to prosecute quid pro quo sexual harassment, which often does not involve telephone calls, repeated communications, behaviors likely to provoke violence, or offensive touching. Quid pro quo sexual harassment is alarming conduct serving no legitimate purpose. However, this definition does not fully capture the nature of sexual harassment, which is the attempt to coerce another into sexual behavior by using one's position of authority. Also, state harassment laws are often narrower than the Model Penal Code provision.[209]

Sexual harassment may fall under some of the above existing criminal statutes.[210] In many ways, however, sexual harassment is unique. Most states do not have general laws that comprehensively prohibit quid pro quo sexual harassment. Therefore, states that want to criminally prosecute harassers should adopt specific criminal laws against quid pro quo sexual harassment. Even in states where quid pro quo sexual harassment may fall within a different statute, there is still value in having a law explicitly prohibiting sexual harassment because it proclaims a strong state commitment to combat sexual harassment.

IV. The Crime of Quid Pro Quo Sexual Harassment

Three states have criminal laws explicitly forbidding sexual harassment: North Carolina prohibits sexual harassment in the lessor-lessee relationship,[211] Texas prohibits sexual harassment by

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208. *See, e.g.*, DEL. CODE ANN. tit. 11, §§ 1311-12 (Supp. 1992); KY. REV. STAT. ANN. § 525.070 (Baldwin 1990). The Kentucky law provides:

> (1) A person is guilty of harassment when with intent to harass, annoy or alarm another person he:
> (a) Strikes, shoves, kicks or otherwise subjects him to physical contact or attempts or threatens to do the same; or
> (b) In a public place, makes an offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or
> (c) Follows a person in or about a public place or places; or
> (d) Engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

KY. REV. STAT. ANN. § 525.070. Hostile work environment sexual harassment might fall under the crime of harassment.

209. *See, e.g.*, NY PENAL LAW § 240.25 (Consol. 1994). "A person is guilty of harassment in the first degree when he or she intentionally and repeatedly harasses another person by following such person in or about a public place or places or by engaging in a course of conduct or by repeatedly committing acts which places such person in reasonable fear of physical injury." *Id.*

210. Some states have criminal laws that implicitly prohibit sexual harassment. *See, e.g.*, IOWA CODE § 729.4 (1993) (providing that sex discrimination in employment is a simple misdemeanor. This may be read to include sexual harassment.).

211. N.C. GEN. STAT. § 14-395.1 (Supp. 1993).

public servants,[212] and Delaware has a general criminal law against sexual harassment.[213] An analysis of these statutes is helpful in formulating a model quid pro quo sexual harassment statute.

In 1989, North Carolina passed a law prohibiting lessors of residential real property or their agents from sexually harassing lessees or prospective lessees.[214] The statute defines harassment to be "unsolicited overt requests or demands for sexual acts when (i) submission to such conduct is made a term of the execution or continuation of the lease agreement, or (ii) submission to or rejection of such conduct by an individual is used to determine whether rights under the lease are accorded."[215] Sexual harassment under this statute is a "misdemeanor punishable by [im]prisonment not to exceed six months, a fine not to exceed two hundred dollars, or both."[216]

In response to numerous allegations of sexual harassment by uniformed and off-duty law enforcement officers,[217] Texas recently criminalized sexual harassment by public officials. The Texas statute prohibits a "public servant acting under color of his office or employment [from] intentionally subject[ing] another to sexual harassment."[218] The statute defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, immunity, either explicitly or implicitly."[219] Sexual harassment under this law is a Class A misdemeanor.[220]

A 1990 Delaware law criminalized sexual harassment generally. The statute defines sexual harassment as when a person "threatens to engage in conduct likely to result in the commission of

212. TEXAS PENAL CODE ANN. § 39.03 (West Supp. 1994).
213. DEL. CODE ANN. tit. 11, § 763 (Supp. 1992).
214. N.C. GEN. STAT. § 14-3951(a) (Supp. 1993).
215. *Id.* § 14-395.1(b)(1).
216. *Id.* § 14-395.1(a).
217. *See* Roy Bragg, *More Women Report Inappropriate Behavior by Police: Departments Do Bad Job of Educating Officers, Expert Says*, HOUSTON CHRON., Aug. 8, 1993, at 1A (reporting that there are nine pending cases of sexual harassment by police in Dallas); Gayle Reaves, *Arrested by Fear: Women Say Sexual Abuse by Dallas Police Elicits Terror, Lingering Mistrust*, DALLAS MORNING NEWS, June 8, 1993, at 1A (reporting that a bill making it a "felony for public servants to use the power of their office to coerce sexual acts" passed the Senate, but died on the House calendar).
218. TEXAS PENAL CODE ANN. § 39.03(a)(3) (West Supp. 1994). The public servant acts under color of public office or employment "if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity." *Id.* § 39.03 (b).
219. *Id.* § 39.02(c).
220. *Id.* § 39.03.

a sexual offense against any person"[221] or when a person "suggests, solicits, requests, commands, importunes or otherwise attempts to induce another person to have sexual contact or sexual intercourse or unlawful sexual penetration with him, knowing that he is thereby likely to cause annoyance, offense or alarm to that person."[222] Sexual harassment is an unclassified misdemeanor.[223]

All three laws prohibit quid pro quo sexual harassment.[224] A comparison of these laws shows how they are similar and how they differ.[225] The North Carolina law uses language very similar to the EEOC Title VII guidelines,[226] as does the Texas statute. The North Carolina and Texas laws apply to people with a special status, "lessor of residential real property"[227] and "public servant acting under color of his office or employment,"[228] whereas the Delaware law applies to any person.[229] The type of sexual request covered by the statutes also differs. The North Carolina law is narrow in that it covers "unsolicited overt requests or demands for sexual acts,"[230] whereas the Texas law is broader—an officer need only "subject" the victim to certain behaviors.[231] Delaware steers a middle path with the language "suggests, solicits, requests, commands, importunes or otherwise attempts to induce."[232] Texas also covers the broadest range of conduct ("unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature"),[233] whereas Delaware and North Carolina cover only re-

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221. DEL. CODE ANN. tit. 11, § 763(1) (Supp. 1992).

222. *Id.* § 763(2).

223. *Id.* § 763.

224. The Delaware and Texas laws also appear to prohibit some types of hostile environment sexual harassment as well.

225. The chart in the Appendix maps the differences among the three criminal sexual harassment laws. *See* DEL. CODE ANN. tit. 1, § 763 (Supp. 1992); DEL. CODE ANN., tit. 11, § 4206 (Supp. 1992); N.C. GEN. STAT. § 14-395.1 (1993); TEXAS PENAL CODE ANN. § 39.02 (Supp. 1994); TEXAS PENAL CODE ANN. § 12.21 (Supp. 1994) (providing penalties for a class A misdemeanor).

226. 29 C.F.R. § 1604.11 (1991). The EEOC guidelines define 'harassment on the basis of sex' as

> unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature [ ] when (1) *submission to such conduct is made* either explicitly or implicitly *a term* or condition of an individual's employment, (2) *submission to or rejection of such conduct by an individual is used* as the basis for employment decisions affecting such individual . . . .

Id. (emphasizing language that is the same in the North Carolina statute).

227. N.C. GEN. STAT § 14-395.1 (1993).

228. TEXAS PENAL CODE ANN. § 39.03 (West Supp. 1994).

229. DEL. CODE ANN. tit. 11, § 763 (Supp. 1992).

230. N.C. GEN. STAT. § 14-395.1.

231. TEXAS PENAL CODE ANN. § 39.03.

232. DEL. CODE ANN. tit. 11, § 763.

233. TEXAS PENAL CODE ANN. § 39.03.

quests for sexual acts.[234] Both Texas and Delaware cover a broad range of harm—"annoyance, offense, or alarm"[235] in Delaware and "exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly" in Texas.[236]

The crime of quid pro quo sexual harassment should be called sexual extortion in order to distinguish it from hostile environment harassment. An example of a sexual extortion statute would be:

> (a) A person is guilty of sexual extortion if the person suggests, solicits, requests, commands, importunes, or otherwise attempts to induce another person to have sexual contact with him or her (or anyone else) by threatening to (1) take or withhold action related to employment; (2) take or withhold action on the execution or continuation of a lease agreement, or the rights accorded under a lease agreement; (3) take or withhold action related to education; (4) grant or withhold professional services; (5) take or withhold action as an official, or cause an official to take or withhold action; (6) grant or withhold any service generally held out to the public.
>
> (b) An offense under this section is punishable as follows:
>
> (1) Sexual extortion by a public servant acting under color of office or employment is a class A misdemeanor punishable by a term of imprisonment up to one year, a fine of up to $3,000, or both.
>
> (2) Sexual extortion by a person other than a public servant acting under color of office or employment is a class B misdemeanor punishable by a term of imprisonment up to 6 months, a fine of up to $1,000, or both.
>
> (3) A second conviction under this statute is punishable by a term of imprisonment for a period not less than one nor more than five years, a fine not less than $1,000 nor more than $5,000, or both.

This statute draws heavily upon existing sexual harassment laws. The type of request language ("suggests, solicits, requests, commands, importunes, or otherwise attempts to induce") comes from the Delaware sexual harassment criminal law.[237] This language is narrower than the Texas law ("subject") and broader than the North Carolina law ("unsolicited overt requests or demands").[238] This language is appropriate to limit the crime of sexual extortion to quid pro quo sexual harassment. The sexual conduct requested is general—sexual contact. The Texas statute is broader ("unwelcome sexual advances, requests for sexual favors, or

234. DEL. CODE ANN. tit. 11, § 763; N.C. GEN. STAT. § 14-395.1.

235. DEL. CODE ANN. tit. 11, § 763.

236. TEXAS PENAL CODE ANN. § 39.03.

237. DEL. CODE ANN. tit. 11, § 763(2).

238. TEXAS PENAL CODE ANN. § 39.03; N.C. GEN. STAT. § 14-395.1.

other verbal or physical conduct of a sexual nature"),[239] but again encompasses more than quid pro quo sexual harassment.

The "threatening" language tracks the Model Penal Code extortion statute.[240] The threats are primarily taken from the laws described in Part II.B., mirroring areas in which states have already regulated sexual harassment (and presumably found sexual harassment to be a problem). Clause (5) comes from the Model Penal Code extortion statute.[241] Clause (6) is a catch-all to encompass behaviors not included in the previous clauses, such as the granting of credit. The punishment for a public servant is the same as the Texas statute.[242] The punishment is graded because sexual extortion by public officials involves not only the abuse of the victim, but also the abuse of public office or employment. This statute provides more severe punishment for repeat offenders.

This comprehensive law is designed to prohibit all forms of quid pro quo sexual harassment. Some states may want to adopt a narrower construction to address specific problems within their state. Other states may want to adopt a broader statute that prohibits the making of any threat in order to coerce sex.[243]

Conclusion

Lawrence Friedman's history of criminal justice in America documents the decriminalization of sexual and sex-related behavior in the latter half of the twentieth century.[244] Some states removed laws against any form of sexual behavior between consenting adults, and other states relaxed their enforcement of laws against sexual conduct such as fornication, adultery, and sodomy.[245] The Supreme Court ruled that forced sterilization violated the equal protection clause,[246] and that birth control[247] and abortion[248] fell under a constitutional right to privacy. The twentieth century saw a shift from the Victorian view of sex as dangerous to a modern

239. TEXAS PENAL CODE ANN. § 39.03.
240. *See supra* note 191 and accompanying text.
241. *Id.*
242. TEXAS PENAL CODE ANN. § 39.02 (West Supp. 1994).
243. This situation may already be covered if the state has a statute against criminal coercion, *see supra* note 198 and accompanying text, or terroristic threats, see MPC, *supra* note 118, § 211.3 ("A person is guilty of a felony of the third degree if he threatens to commit any crime of violence with purpose to terrorize another"). For example, the statute may prohibit the situation where a man approaches a woman in the street and says to her that he will beat her up unless she has sex with him.
244. FRIEDMAN, *supra* note 123, at 342-43.
245. *Id.* at 345-46.
246. Skinner v. Oklahoma, 316 U.S. 535 (1942)
247. Griswold v. Connecticut, 381 U.S. 479 (1965).
248. Roe v. Wade, 410 U.S. 113 (1973).

view of sex as healthy and the repression of sexual instincts as dangerous.[249] Interestingly, this sexual revolution occurred at the same time that women were entering the workforce in greater numbers,[250] with the result that men and women were increasingly encountering each other in nonsexual educational and professional relationships—in the workplace and at coeducational schools. Recent years have seen the increasing re-regulation of sex, but in a new way. Whereas the deregulated sexual conduct primarily involved consensual sex, the current regulation of sex mainly involves coercive sex-related conduct that harms people. For example, marital rape,[251] stalking,[252] and date rape[253] have all been recently recognized as crimes. The criminalization of quid pro quo sexual harassment falls logically within this developing trend.

Over the last two decades, sexual harassment victims in the workplace and, more gradually, in schools and in other contexts have begun to fight back in the courts. The development of civil causes of action for sexual harassment under Titles VII and IX of the Civil Rights Act of 1964 have aided women in gaining compensation from the employers of their harassers for some of the harms they have suffered. State laws have reached beyond federal civil rights laws to provide not only compensation from employers, but also protection against harassment in housing, by licensed professionals, by state actors, of the elderly and disabled, and through tort causes of action. Delaware, North Carolina, and Texas have criminal laws specifically prohibiting sexual harassment, and other states have laws that may prohibit some sexually harassing conduct. However, quid pro quo sexual harassment is not covered by most general criminal laws.

Quid pro quo sexual harassment should be treated as a crime because it is a unique form of oppression rooted in the historical

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249. *See e.g.*, FRIEDMAN, *supra* note 123, at 346.

250. *See* 1 LARSON & LARSON, *supra* note 4, § 3.10 (reporting that the proportion of adult women in the United States working or seeking work rose from 25% in 1920, to 34% in 1950, to 37% in 1960, to 43% in 1970, to 55% in 1985).

251. FRIEDMAN, *supra* note 123, at 433 (reporting that most states have abandoned in whole or in part a husband's immunity from prosecution for raping his wife).

252. *See* Kelli L. Attinello, Comment, *Anti-Stalking Legislation: A Comparison of Traditional Remedies Available for Victims of Harassment Versus California Penal Code Section 646.9*, 24 PAC. L.J. 1945 (1993) (discussing stalking laws and arguing that they are necessary because traditional remedies for victims of harassment do not provide protection); Robert A. Guy Jr., *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991 (1993) (categorizing types of stalking laws and assessing their constitutionality).

253. *See* John Dwight Ingram, *Date Rape: It's Time for "No" To Really Mean "No,"* 21 AM. J. CRIM. L. 3 (1993) (arguing for reform of rape laws to include date rape).

subordination of women and it harms individual women, women as a group, and society as a whole. In states with general criminal laws that prohibit quid pro quo sexual harassment, prosecutors should consider the value of pursuing sexual harassers under these laws. All states, however, should consider adopting criminal laws specifically prohibiting quid pro quo sexual harassment. The crime of quid pro quo sexual harassment should be modeled after extortion statutes that go beyond property law by punishing those who make threats in order to extort any sexual act against the victim's will. By criminalizing sexual extortion, states can take a more active role in lessening the tremendous harm caused by sexual harassment.

Appendix

	DELAWARE	N. CAROLINA	TEXAS
DEFENDANT	a person	lessors or agent	public servant acting under color of his office or employment
STATE OF MIND	knowing that he is likely to cause	(no explicit requirement)	intentionally
TYPE OF REQUEST	suggests, solicits, requests, commands, importunes, or otherwise attempts to induce	unsolicited overt requests or demands	subjects (requests)
VICTIM	another person	lessee or prospective lessee	another
SEXUAL CONDUCT REQUESTED	to have sexual contact or sexual intercourse or unlawful sexual penetration	submission to sexual acts	unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature
HARM, THREAT, OR CONDITION	annoyance, offense or alarm to that person	the execution or continuation of the lease agreement, whether rights under the lease are accorded	exercise or enjoyment of any right, privilege, power, immunity, either explicitly or implicitly
CLASS OF CRIME	class B misdemeanor	misdemeanor	class A misdemeanor
MAXIMUM PUNISHMENT	6 months, $1,150, restitution, and/or other conditions	6 months and/ or $200	one year and/or $3,000