

# LOW-LIFE-SLEAZY-BIG-HAIRED- TRAILER-PARK GIRL V. THE PRESIDENT: THE PAULA JONES CASE AND THE LAW OF SEXUAL HARASSMENT\*

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“Paula Jones got a new hairstyle. Did you see it? She looks pretty good. I’ll tell you, she looks pretty good. In fact, today even her lawyer said, ‘Now you only need four drinks to hit on her’”

- Jay Leno, The Tonight Show.

“Paula Jones is now upset because she is being audited by the IRS, and she claims the only reason that she is being audited is because of this lawsuit she has against the President. I don’t know, you figure it out . . . Anytime you write off \$20,000 for hair spray, you’re going to get audited”

- David Letterman, The Late Show.

## I. INTRODUCTION

On May 6, 1994, Paula Corbin Jones made history by filing the first

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sexual harassment suit against a sitting President of the United States.<sup>1</sup> Her case not only raised legal questions about sex-discrimination, but also broached the issue of whether a sitting President could be subject to a civil suit,<sup>2</sup> and led to the Monica Lewinsky scandal and ultimately the impeachment hearings of President Clinton.<sup>3</sup> Although Jones obviously received a great deal of media coverage, very little has been written by scholars on the particular legal ramifications of her sexual harassment case, perhaps suggesting that this case really meant nothing in terms of the development of sex-discrimination law. The media coverage of her sexual harassment case also led many to the conclusion that this was, in fact, a rather cut and dry legal question: Paula Jones' allegations were not believable and did not constitute sexual harassment.<sup>4</sup> The purpose of this Article is to suggest that there are, in fact, reasons to believe Jones' account, and that significant questions of law regarding both her quid pro quo and hostile work environment sexual harassment claims could have been decided either way. In addition, this case particularly highlights the role of power differences in sexual harassment. Finally, the appropriateness of dismissal through summary judgment is also open to question. Judge Susan Weber Wright's opinion is problematic in that elements of her reasoning

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1. See *Jones v. Clinton*, 990 F. Supp. 657, 662 (E.D. Ark. 1998) (discussing the procedural history of Paula Jones' lawsuit against President Clinton).

2. See *Clinton v. Jones*, 520 U.S. 681 (1997) (holding that there is no constitutional provision protecting a sitting President from being the subject of a lawsuit).

3. See H.R. REP. NO. 105-830, at 1 (1998) (impeaching President Clinton for high crimes and misdemeanors as a result of "perjurious, false and misleading testimony before a federal grand jury" in the Paula Jones case regarding the sexual nature of his relationship with Monica Lewinsky).

4. See William A. Henry, III, *How to Report the Lewd and Unproven*, TIME, Sept. 16, 1994, at 46 (commenting that the Jones case made media editors wary because they were fearful that she was only seeking money and publicity, as well as the fact that she had connections to "people hoping for political gain"); *Innocent Victim or Big Liar of the Week*, TIME, Sept. 16, 1994, at 31 (noting that many stories about Paula Jones attacked her character and portrayed her as a "promiscuous" liar); *Pundit Apologizes for Remarks about Clinton Accuser*, PHOENIX GAZETTE, May 23, 1994, at A1 (commenting that Evan Thomas, NEWSWEEK's Washington Bureau Chief, had to apologize after publicly stating that Jones "was sleazy and had big hair and came from a trailer park."); see also LARRY SABATO & ROBERT LICHTER, WHEN SHOULD THE WATCHDOGS BARK: MEDIA COVERAGE OF THE CLINTON SCANDALS 40 (1994) (commenting that reporters were reluctant to "report the most 'legitimate' angle of the Paula Jones story—on the job sexual harassment of a low level employee by a powerful boss . . ."); Lynn Rosellini & Greg Ferguson, *The Woman Who Sued Bill Clinton*, U.S. NEWS & WORLD REP., June 13, 1994, at 42 (commenting on Jones' portrayal in the media as a "white trash bimbo"); David Stout, *Clinton's Lawyers Say a Fund for Paula Jones is Being Misused*, N.Y. TIMES, Nov. 27, 1997, at 31 (remarking that many Clinton supporters perceived Paula Jones' lawsuit as a conservative-backed effort to destroy President Clinton). Cf. Nancy R. Hauserman, *Comparing Conversations About Sexual Harassment in the United States and Sweden: Print Media Coverage of the Case Against Astra USA*, 14 WIS. WOMEN'S L.J. 45, 47 (1999) (comparing the influence of the media on public perceptions in Sweden and the United States regarding sexual harassment).

conflict with Supreme Court precedent and are a step backward in the development of sexual harassment law.<sup>5</sup>

An analysis of the *Jones* case is important because it was part of a larger legal battle involving the President. The controversies surrounding her claims reveal not only contradictions in the law of sexual harassment,<sup>6</sup> but also tensions in the relationship between courts and the media,<sup>7</sup> and public perceptions of women who file

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5. Ironically, Judge Wright has herself acknowledged the ambiguities and contradictions in the law. See *Faragher v. City of Boca Raton*, 524 U.S. 742, 787 (1998) (holding that pervasive and severe sexual harassment altering the conditions of the workplace constitutes a violation of Title VII); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280 (1998) (holding that school districts can only be held liable under Title IX if there was knowledge of offending conduct by a teacher against a student, and action was not taken); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763 (1998) (holding that a tangible sexual harassment action in the workplace by a superior becomes the act of the employer under Title VII); Susan Weber Wright, *Uncertainties in the Law of Sexual Harassment*, 33 U. RICH. L. REV. 11, 12 (1999) (focusing on issues of vicarious liability and the potential conflicts between these *Faragher*, *Gebser*, and *Burlington Industries, Inc.*, each handed down by the Supreme Court at the end of the 1998 Term).

6. See, e.g., Hillary S. Axaam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual "Horseplay": Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After Oncale*, 11 YALE J.L. & FEMINISM 155, 208-09 (1999) (analyzing the contradictory nature of the Supreme Court's holding in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), which allows claimants to challenge same-sex sexual harassment under Title VII, but also reflects "constrained conceptions of sex"); Dawn D. Bennett-Alexander, *Lower Court Interpretation of the Meritor Decision: Putting Flesh on the Supreme Court's Sexual Harassment Skeleton*, 6 WIS. WOMEN'S L.J. 35, 85 (1991) ("The Court did not provide sufficient guidelines for lower courts to determine when a hostile environment is present and what activity would indicate that the defendant's conduct towards plaintiff is unwelcome."); Stephen Buehrer, *A Clash of the Titans: Judicial Deference to Arbitration and the Public Policy Exception in the Context of Sexual Harassment*, 6 AM. U.J. GENDER SOC. POL'Y & L. 265, 267 (1998) (discussing the conflicting doctrines in the area of sexual harassment law, which often results in employer confusion regarding an appropriate response to allegations of sexual harassment); Francis Carleton, *Women in the Workplace and Sex Discrimination Law: A Feminist Analysis of Federal Jurisprudence*, 13 WOMEN & POLITICS 1, 8 (1993) (commenting on the Supreme Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), which revealed contradictions in sexual harassment law because while the Court held that sexual harassment may occur without a tangible economic impact, it must exceed a "certain subjective level of severity" before it is actionable under Title VII); Lynn T. Dickerson, *Quid Pro Quo Sexual Harassment: A New Standard*, 2 WM. & MARY J. WOMEN & L. 107, 116-17 (1995) (noting that although the Supreme Court has held that a tangible economic harm is not necessary to a hostile environment claim, the Court has not yet addressed whether such economic harm must be shown in a quid pro quo sexual harassment case); Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 50-51 (1990) (discussing that even with the advent of *Meritor* there are contradictory conclusions regarding the application of the hostile work environment theory in sexual harassment claims).

7. See generally RICHARD DAVIS, *DECISIONS & IMAGES: THE SUPREME COURT AND THE PRESS* (1994). Davis discusses his experience as a journalist assigned to the Supreme Court and the love-hate relationship between the media and the justices that sit on the nation's highest court. *Id.* See Charles Franklin & Liane Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court*, in CONTEMPLATING COURTS 352, 352-53 (Lee Epstein ed., 1995) (commenting that the public lacks general knowledge of Supreme Court decisions due to the low level of media attention to the Court's holdings); THOMAS MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 143 (1989) (arguing that few reporters are well trained enough to cover judicial decision making resulting in poor press coverage, particularly in reference to Supreme Court cases, which also influences the public's perception of the Court); ELLIOT E. SLOTNICK & JENNIFER A. SEGAL, *TELEVISION NEWS AND THE SUPREME COURT* 5-6 (commenting that the

sexual harassment claims.<sup>8</sup> Perhaps most astonishing is that a sexual harassment case filed by a woman from Arkansas led to impeachment proceedings against the President of the United States. While President Clinton ultimately escaped removal, many thought he would be the first President to be indicted after leaving office.<sup>9</sup> Moreover, much of Clinton's continued public support, which many argue prevented him from being removed from office, came from women.<sup>10</sup> Consequently, the *Jones* case is worthy of our attention.

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Supreme Court's legitimacy is based primarily on the public's perception of it, which is transmitted through the mass media); see also Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1539 (1996) ("The segment of the public that does follow the work of the Court often cares intensely how the Court is covered and monitors journalism about the Court very closely, in recognition that today's journalism . . . is in many respects tomorrow's history of the Court."). See generally William Mischler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 88 (1993) (noting the effect of public perception on Supreme Court decisions); John M. Scheb II & William Lyons, *Public Perception of the Supreme Court in the 1990s*, 82 JUDICATURE 66, 67 (1998) (referencing a survey conducted in 1997 that provided a public rating of the Supreme Court).

8. See Christina E. Wells, *Hypocrites and Barking Harlots: The Clinton-Lewinsky Affair and the Attack on Women*, 5 WM. & MARY J. WOMEN & L. 151, 154-56 (1998) (comparing the public's perception of Anita Hill and Justice Thomas' confirmation hearings to that of the relationship between Monica Lewinsky and President Clinton).

9. See Judy Keen, *New Grand Jury Empanelled: Democrats Call Timing "Calculated,"* USA TODAY, Aug. 18, 2000, at 4A (noting that independent counsel Robert Ray, who took over from Kenneth Starr in October of 1999, "has always left open the possibility that he would seek criminal charges against Clinton for perjury and obstruction of justice - stemming from the President's denial of an affair with [Monica] Lewinsky in his testimony in Paula Jones' sexual harassment lawsuit."). Keen also explains that many Democrats viewed the timing of this decision calculated because Ray announced it hours before Democratic candidate for the 43rd President, Al Gore, was to give his nomination acceptance speech at the Democratic National Convention. *Id.* On his last day in office, Clinton signed a deal with Ray, in which he admitted to giving false testimony during the Jones deposition, paid a \$25,000 fine, and surrendered his law license for five years. In exchange Ray dropped his investigation. See Judy Keen, *Deal Brings an End to Scandal Investigation; Clinton's Law License Suspended for 5 Years*, USA TODAY, Jan. 22, 2001, at 8A.

10. Public opinion polls consistently showed a general lack of support for Jones and her claims. A majority of both men and women did not believe that her accusations were true. Gallup poll results from 1995 indicate that only 27% of respondents believed that Jones' story was more true than false. See David Moore, *Paula Jones Gains Credibility*, GALLUP POLL MONTHLY, June 1997, at 6. Two years later, of those who had heard of Jones, 40% had a negative view of her and only 12% had a favorable view of her. See *Paula Jones Faces an Uphill Battle Against Clinton*, WALL ST. J., June 27, 1997, at A1. There were, however, measurable differences in attitudes between men and women regarding her story. Women were far more harsh in their evaluations of Jones than men. See David Moore, *Americans Back Dismissal of Paula Jones' Lawsuit*, GALLUP POLL MONTHLY, Apr. 1998, at 15 (noting that "although the Jones case involved allegations of sexual harassment, an issue that normally concerns women more than men, such is not the case here," with 6% more women than men agreeing it was fair to Jones to throw out her case). Women were also far more likely to support Clinton. Fewer women (29%) than men (40%) felt that the Jones case was relevant for judging Clinton's performance as President. See *id.* In the 1996 election, there were significant differences between men and women in their votes for President, with 54% of women voting for Clinton as opposed to 43% of men, and 38% of women voting for Dole as opposed to 44% of men. See CENTER FOR THE AMERICAN WOMAN AND POLITICS, *THE GENDER GAP: VOTING CHOICES, PARTY IDENTIFICATION, AND PRESIDENTIAL PERFORMANCE RATINGS 1* (1997). In addition, much of Clinton's support during the impeachment hearings came overwhelmingly from women. A poll taken just before the

## II. THE "FACTS"

Paula Jones' claim was based on events that occurred in a hotel room in May of 1991 in Little Rock, Arkansas, and the way she was subsequently treated at her job as a state employee while Clinton was Governor of Arkansas.<sup>11</sup> According to the facts provided in the federal district court opinion, Jones was working the registration desk for an event at a hotel in Little Rock where Clinton was scheduled to deliver a speech.<sup>12</sup> Through one of his bodyguards, Clinton communicated to Jones that he wanted to meet her because she had "that come-hither look . . . a sort of [sexually] suggestive appearance."<sup>13</sup> Jones was then invited to meet Clinton in his hotel room.<sup>14</sup> Jones testified that she thought it was an honor to meet the Governor and that the meeting might lead to an enhanced employment opportunity.<sup>15</sup> After Jones arrived at the hotel room, they made "small talk" about her job, and Clinton told her that her supervisor, Dave Harrington, was a "good friend" of his.<sup>16</sup> At that point, Clinton attempted to kiss Jones and began sliding his hand up her thigh.<sup>17</sup> Upset and confused, Jones said she walked away from Clinton and went over to sit down on "the end of the sofa nearest the door."<sup>18</sup> He sat down next to her, unzipped his pants, and asked her to kiss his erect penis.<sup>19</sup> Jones then "jumped up from the couch" and told the Governor that she "had to go."<sup>20</sup> As she was leaving, Clinton said, "If you get in trouble for leaving work, have Dave call me immediately and I'll take care of it. . . . You are smart. Let's keep this between ourselves."<sup>21</sup> Jones testified that she "understood that he

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Senate's impeachment vote in February of 1999, revealed that 38% of men thought that Clinton should have been convicted and removed, while only 25% of women did. See Frank Newport, *Gender Gap Persists for Clinton*, GALLUP NEWS SERVICE, Feb. 12, 1999, available at <http://www.gallup.com/poll/releases/pr990212b.asp>.

11. See *Jones v. Clinton*, 990 F. Supp. 657, 662-66 (E.D. Ark. 1998) (recounting the basic facts that led up to Paula Jones' sexual harassment claim).

12. *Id.* at 663.

13. *Id.* (quoting Clinton's bodyguard, Danny Ferguson, who had been told by Clinton that if Jones wanted to meet him, she could "come up").

14. *Id.*

15. *Id.* (noting that when Jones asked Ferguson why the Governor wanted to see her, he replied, "we do this all the time").

16. *Id.*

17. *Jones*, 990 F. Supp. at 664 (commenting on Jones' testimony that Clinton's advances were unwelcome and that she resisted advances although she was "stunned and intimidated by them and intimidated by who he was").

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

was telling her that he had control over Mr. Harrington and over her job, and that he was willing to use that power,” and that filing a complaint might jeopardize her career.<sup>22</sup>

After this incident, Jones stated that she was “in constant fear” of retaliation, and that her supervisors at work began treating her “very rudely.”<sup>23</sup> When she came back from maternity leave, she was transferred to a position with less responsibility and often had no work to do.<sup>24</sup> She claimed that several times she informed her immediate supervisor of her interest in other jobs that had higher pay and more responsibility, but was told not to bother applying.<sup>25</sup>

Jones also describes several encounters with Clinton and his bodyguard after the incident at the hotel. One of her job responsibilities was to deliver items to the Governor’s office. The first time she ran into Clinton’s bodyguard, he told her that Clinton wanted her phone number. Jones refused to give it to him.<sup>26</sup> On another occasion, Clinton “draped his arm over her, pulled her close to him and held her tightly to his body, and said to his bodyguard, ‘Don’t we make a beautiful couple: Beauty and the Beast?’”<sup>27</sup>

Three years after the incident in the hotel, an article in the *American Spectator* reported that Jones had actually engaged in sexual relations with Clinton.<sup>28</sup> In a press conference, Jones demanded that Clinton acknowledge the article, explain that she had denied his advances, and apologize to her.<sup>29</sup> A Clinton spokesperson delivered a letter from Clinton to Jones stating that he had never met her and the incident never occurred.<sup>30</sup>

Jones subsequently filed her sexual harassment claim against Clinton, who was by this time President of the United States.<sup>31</sup> Jones filed both quid pro quo and hostile work environment claims.<sup>32</sup> In

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22. *Id.* (commenting on Paula Jones’ statements that since that moment in the hotel room she became “very fearful” about having refused to submit to Clinton’s advances).

23. *Jones*, 990 F. Supp. at 665.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 666 (observing that this report was published after Jones had terminated her employment in Arkansas and moved to California with her husband).

29. *Jones*, 990 F. Supp. at 666.

30. *Id.*

31. *Id.*

32. Jones actually filed her case under 42 U.S.C. § 1985(3), and not Title VII of the Civil Rights Act of 1964 because the statute of limitations had run. *See Jones*, 990 F. Supp. at 668 (suggesting that Judge Wright nevertheless used the legal tests under Title VII to evaluate Jones’ claims).

April of 1998, Judge Wright granted the President's motion for summary judgment and dismissed the case.<sup>33</sup>

Ultimately, we do not know what actually occurred between Paula Jones and Bill Clinton. Because the trial judge dismissed the case, the parties never publicly presented evidence about the truth or mendacity of the allegations.<sup>34</sup> Therefore, we have no way of knowing what happened at the Excelsior Hotel on May 8, 1991, or what Jones' supervisors did to her in the intervening twenty-one months until she quit her job. Moreover, there is reason to question the credibility of both parties to the case. The plaintiff was sponsored by groups, such as the Rutherford Institute, that had a clear ideological agenda.<sup>35</sup> President Clinton was held in contempt for lying during the deposition about his relationship with Monica Lewinsky,<sup>36</sup> making Jones' story easier to believe. This does not, however, provide the kind of evidence needed in a court case. These are the kinds of litigants who frustrate and confound juries and judges. Whose tainted story do we believe?

Immediately after the incident in Clinton's suite, Jones told Pamela Blackard, the other woman who was working at the registration desk, what had happened.<sup>37</sup> In her deposition, Blackard stated that when Jones came back from Clinton's room, she was "shaking and embarrassed."<sup>38</sup> A few days later, Jones also told two friends and her sister, who said that Jones was "bawling . . . and appeared scared, embarrassed, and ashamed."<sup>39</sup> One of her friends encouraged Jones to formally report the incident to her boss, but Jones pointed out that

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33. *Id.* at 679.

34. *Id.* at 678. See generally Kim Lane Scheppele, *Imagined Pasts: Sexualized Violence and the Revision of the Truth*, in CONTEMPLATING COURTS 155 (Lee Epstein ed., 1995) ("Lawsuits are not just about the determination of the law; they are also crucially authoritative determinations of 'what happened.'").

35. See Stout, *supra* note 4, at 31 (noting that the Rutherford Institute, a conservative group of "Clinton haters," took part in fund raising activities benefiting Jones and her lawsuit against President Clinton).

36. See Robert Suro, *Clinton is Sanctioned in Jones Lawsuit; Payment Ordered to Lawyers*, *Court*, WASH. POST, July 30, 1999, at A1 (noting that after Judge Wright dismissed Jones' sexual harassment case, she fined President Clinton over \$90,000 for giving "false, misleading and evasive answers that were designed to obstruct the judicial process" during deposition questioning). Clinton paid the fine, making him the first sitting President to ever be found in contempt of court. *Id.* As a result of Judge Wright's contempt charge, the bar committee created by the Arkansas State Supreme Court recommended revoking Clinton's license to practice law. See Neil A. Lewis, *Clinton is Angry and Dispirited Over Disbarment Fight*, *Friends Say*, N.Y. TIMES, Sept. 10, 2000, at 22 (commenting that the disbarment trial will occur before Clinton leaves office).

37. See *Jones*, 990 F. Supp. at 664 (citing Blackard's comments from her deposition noting that Jones was very upset when she recounted the alleged incident with Clinton).

38. *Id.*

39. *Id.* at 665.

“her boss was friends with the Governor,” and what Clinton had said and done had made her afraid to say anything.<sup>40</sup>

Many victims of sexual harassment do not tell their supervisors or file formal complaints, because, like Jones, they are afraid of retaliation.<sup>41</sup> Others do not file complaints because they think they did something to bring on the harassment or they fear they will not be believed.<sup>42</sup> It is quite common for victims to simply not tell anyone about their experiences.<sup>43</sup> However, if they later on decide to file a complaint, their initial silence is often used to attack their credibility.<sup>44</sup> This attack cannot be made against Jones. The factual record makes it clear that Jones did one thing that distinguishes her allegations from the sexual harassment claims of many other women: she told somebody about it.<sup>45</sup> Consequently, there are strong reasons to believe her account of the events.

### III. THE LEGAL QUESTIONS

Regardless of whether one believes Jones' story or not, if we take her allegations at face value, the question still remains: do her allegations constitute sexual harassment? The law generally recognizes two forms of sexual harassment, *quid pro quo* and hostile

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40. *See id.*

41. *See* Kathleen McKinney & Nick Maroules, *Sexual Harassment*, in *SEXUAL COERCION* 29, 37 (Elizabeth Grauerholz & Mary Koralewski eds., 1991) (setting forth a summary of studies which found that most incidents of sexual harassment in academia are not reported); Pamela Hewitt Loy & Lea P. Stewart, *The Extent and Effect of the Sexual Harassment of Working Women*, 17 *SOC. FOCUS* 31, 41 (1984) (discussing the results of a telephone survey that found that 62.3% of the harassed individuals sampled reported “negative organizational outcomes” of which 26% involved “lower work evaluations or denial of promotions”); Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 *AM. PSYCHOLOGIST* 497, 498 (1991) (citing a 1982 survey of federal employees that showed only 11% of employees reported incidents of harassment to supervisory authorities).

42. *See* Riger, *supra* note 41, at 502 (discussing how perceptions of normal sexual relations of men lead many women to interpret incidents of sexual harassment as commonplace and normative).

43. *See id.* at 501 (summarizing how the outcomes in informal proceedings, which often do not punish the harasser, discourage victims of sexual harassment from bringing a complaint).

44. Many women are not believed when they take their claims into the legal arena or make them public. *See, e.g.*, TIMOTHY M. PHELPS & HELEN WINTERNITZ, *CAPITOL GAMES, CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION* 332-77 (1992) (noting that Anita Hill's allegations against Clarence Thomas were not taken seriously by either Democrats or Republicans in the Senate, until she revealed that she had told three of her friends about Thomas' harassment); Emma Coleman Jordan, *Race, Gender, and Social Class in the Thomas Sexual Harassment Hearings: The Hidden Fault Lines in Political Discourse*, 15 *HARV. WOMEN'S L.J.* 1, 2 (1992) (explaining that the Clarence Thomas confirmation hearings resembled a “credibility contest” and 55% of respondents believed Hill was lying two days into the hearings).

45. *Jones v. Clinton*, 990 F. Supp. 657, 664-65 (E.D. Ark. 1998).

work environment.<sup>46</sup> Jones filed both claims against Clinton.<sup>47</sup>

*A. The Quid Pro Quo Claim*

In evaluating the quid pro quo claim, Judge Wright adopted a standard requiring Jones to show that “her refusal to submit to unwelcome sexual advances or requests for sexual favors resulted in tangible job detriment.”<sup>48</sup> Jones argued that she was discouraged from applying for jobs with higher pay and was transferred to a position with fewer responsibilities and less potential for advancement.<sup>49</sup> Judge Wright, however, noted that during the two years after the incident at the hotel, Jones received “every merit increase and cost-of-living allowance for which she was eligible . . . and consistently received satisfactory job evaluations . . . and her position was reclassified from Grade 9 to Grade 11.”<sup>50</sup> Consequently, Jones did not suffer “tangible job detriment” and could not show quid pro quo harassment.<sup>51</sup> Arguably, under this standard, the promotions and salary increases that Jones received effectively refuted her quid pro quo claim, largely because Jones offered no convincing evidence that she would have been treated better if the incident had never happened.<sup>52</sup>

Jones also averred that concrete evidence of tangible job detriment was not required, rather mere threats would be enough.<sup>53</sup> Judge Wright rejected this argument, stating that “a showing of a tangible job detriment or adverse employment action is an essential element of . . . [a] quid pro quo sexual harassment claim.”<sup>54</sup> Furthermore, the Judge maintained that Clinton’s statements to her did “not in any way constitute a clear threat that clearly conditions concrete job benefits or detriments on compliance with sexual demands,” since Jones was only “read[ing] between the lines” when Clinton said her boss was a

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46. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 32 (1979) (explaining how two forms of sexual harassment exist and that each requires the application of different legal standards).

47. *Jones*, 990 F. Supp. at 666.

48. *Id.* at 669.

49. *Id.* at 665.

50. *Id.* at 672.

51. *Id.*

52. *Id.* at 670 (discussing how Jones argued that “a showing of tangible job detriment is not an essential element of an action for quid pro quo harassment,” but she also “acknowledge[d] that no one . . . ever told her that if she refused to submit to his alleged advances it would have a negative effect on her job . . .”).

53. *Jones*, 990 F. Supp. at 669.

54. *Id.* at 674.

good friend.<sup>55</sup>

Three months after the *Jones* case was dismissed, the U.S. Supreme Court handed down its decision in *Burlington Industries, Inc. v. Ellerth*,<sup>56</sup> holding that “an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences” could still prevail on a sexual harassment claim.<sup>57</sup> In that case, Kimberly Ellerth was subjected to numerous remarks and gestures by one of her supervisors over a fifteen month period. On one occasion, for example, her supervisor made a comment about her breasts, and when she did not respond, he said, “I could make your life very hard or very easy at Burlington.”<sup>58</sup> She was never specifically told that she would suffer retaliation if she did not submit to his advances. In fact, she even received a promotion. Although the Supreme Court focused on the issue of the vicarious liability of the employer, it made it clear that even threats that were not carried out would constitute sex discrimination, provided the conduct was “severe or pervasive.”<sup>59</sup>

Although *Ellerth* was not controlling in the *Jones* case, the question of whether Jones could have prevailed under this standard can still be explored. Jones’ case appears to be less clear than Ellerth’s. Judge Wright’s analysis focused on the single comment made by Clinton that Jones’ supervisor was his good friend.<sup>60</sup> Judge Wright discounted this statement as merely an implied threat.<sup>61</sup> Jones, however, clearly did not interpret this comment in the way that Wright did. Judge Wright also did not give any weight to Clinton’s remark to Jones as she left the room: “You’re smart. Let’s keep this between ourselves.”<sup>62</sup> This statement can be construed as a much more overt threat. In this part of her analysis, Judge Wright completely ignored Jones’ assertion that Clinton exposed himself to her. If making comments regarding a woman’s breasts creates an actionable claim, as they did in *Ellerth*, surely the physical act of exposing one’s penis does as well. What is clear from *Ellerth* is that the Supreme Court disagreed with Judge

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55. *Id.* at 670-71.

56. 524 U.S. 742 (1998).

57. *Id.* at 747.

58. *Id.* at 748.

59. *Id.* at 754.

60. *Jones*, 990 F. Supp. at 670.

61. *Id.* It should be noted that in *Ellerth*, the Supreme Court specifically stated that, “we express no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment.” *Ellerth*, 524 U.S. at 754.

62. *Jones*, 990 F. Supp. at 664.

Wright's general assertion that threats are not enough.<sup>63</sup> Thus, it is conceivable that under the standard articulated in *Ellerth*, Jones would have at least an arguable quid pro quo claim.<sup>64</sup>

*B. The Hostile Work Environment Claim*

Perhaps even murkier is Judge Wright's opinion regarding Jones' hostile work environment claim. Judge Wright reasoned, based on *Meritor Savings Bank v. Vinson*,<sup>65</sup> that a plaintiff must show that "she was subjected to unwelcome sexual harassment based upon her sex that affected a term, condition, or privilege of employment . . . [and the] harassment must also be sufficiently severe or pervasive 'to alter the conditions of employment and create an abusive working environment.'"<sup>66</sup> With regards to Jones' claim against Clinton, Judge Wright concluded that Clinton's behavior at the hotel room, while "if true, was certainly boorish and offensive," did not create a hostile work environment.<sup>67</sup>

In assessing whether harassment was sufficiently severe or pervasive, "a court must look to the totality of the circumstances," which includes the frequency of harassment, the use of physical threats and interference with work performance.<sup>68</sup> In her analysis of the totality of circumstances, Judge Wright noted that Jones "never missed a day of work, . . . continued to go on a daily basis to the Governor's office to deliver items, . . . never filed a complaint, . . . never consulted a psychiatrist . . . or incurred medical bills as a result of the alleged incident."<sup>69</sup> Thus, according to Judge Wright, the incident in the hotel and Jones' subsequent encounters with Clinton and his bodyguard were not severe or pervasive enough to create an

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63. See Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 834 (1991) (arguing that the requisite showing of both "an actual threat" and "that [the plaintiff's] reaction to the threat, rather than some other factor, resulting in her firing or demotion" is too narrow and often results in courts finding that legitimate complaints do not "establish the requisite nexus").

64. See *Ellerth*, 524 U.S. at 754 (indicating that unfulfilled threats would now be considered as part of a hostile work environment claim, rather than a quid pro quo claim). Arguably, while *Ellerth* could make Jones' quid pro quo claim weaker, it could make her hostile work environment claim stronger.

65. 477 U.S. 57 (1986).

66. *Jones*, 990 F. Supp. at 674 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)) (discussing that Jones also filed a hostile work environment claim against her supervisors and there was little evidence to support such an allegation). Her list of complaints against her supervisors included: "moving her work location, refusing to give her meaningful work, watching her constantly, and failing to give her flowers on Secretary's Day in 1992, even though all the other women in the office received flowers." *Id.* at 665.

67. *Id.* at 675.

68. *Id.* at 674.

69. *Id.* at 675.

abusive work environment.<sup>70</sup>

Conceivably, Jones' incidental encounters with Clinton and his bodyguard in and of themselves may not have created a work environment that was sufficiently hostile to win a sexual harassment claim. However, it is interesting to note the factors Judge Wright considered in her totality of the circumstances analysis. By her standard, women must consult a psychiatrist or become so upset as to make themselves sick and in need of a doctor's care for their experiences to be considered sexual harassment.<sup>71</sup> This seems to conflict with the Supreme Court's 1993 decision in *Harris v. Forklift Systems*,<sup>72</sup> which was binding when Judge Wright decided Jones' case. Justice O'Connor, writing for a unanimous Court, in *Harris* stated "Title VII comes into play before the harassing conduct leads to a nervous breakdown."<sup>73</sup> The Court held that "[t]o be actionable as 'abusive work environment' harassment, conduct need not 'seriously affect [an employee's] psychological well being' or lead the plaintiff to 'suffe[r] injury.'"<sup>74</sup> Consequently, Wright's analysis of the totality of the circumstances appears to rely on a standard that the Supreme Court found inappropriate.

There is another problematic aspect of Judge Wright's hostile work environment analysis. Lower courts have recognized that a single incident of sexual harassment can constitute a legally valid claim,<sup>75</sup> and much of Judge Wright's analysis of Jones' hostile work environment claim focuses on the incident in the hotel room. Judge Wright argued, however, that Jones' alleged experience in the hotel room was "not one of those exceptional cases in which a single incident of sexual harassment, *such as an assault*, [can be] deemed sufficient to state a claim of hostile work environment sexual harassment."<sup>76</sup> This reasoning suggests that unless a woman actually endures a physical assault, a single incident is more than likely not going to be sufficient to create a hostile work environment. Judge Wright relied primarily on *Crisonino v. New York City Housing*

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70. *Id.*

71. *Id.*

72. 510 U.S. 17 (1993).

73. *Id.* at 22.

74. *Id.* at 17.

75. See Jeffrey S. Klein & Nicholas J. Pappas, "Jones v. Clinton: An Emerging Trend in Title VII Law, 1998 N.Y. L.J. 3 (stating that while many courts have acknowledged that a single severe episode of harassment can be the basis of a hostile work environment claim, Judge Wright cited that a single episode of harassment that does not involve an assault cannot be severe enough to constitute a valid hostile work environment claim).

76. *Jones*, 990 F. Supp. at 675 (emphasis added).

*Authority*<sup>77</sup> to support this conclusion. In that case, Elizabeth Crisonino had been fired from her job with the Housing Authority after an incident with her boss, in which he called her a “dumb bitch” and “shoved her so hard that she fell backward and hit the floor, sustaining injuries from which she has yet to fully recover.”<sup>78</sup> The opinion, which upheld Crisonino’s Title VII claim, did not expressly state whether or not a hostile work environment claim could be sustained absent a sexual assault.<sup>79</sup> Judge Wright’s opinion, however, appears to do just that.

In evaluating cases involving a single incident, Crisonino’s case was recognized by the court as serious enough to constitute sexual harassment.<sup>80</sup> On the other end of the spectrum, in *Lam v. Curators of the University of Missouri*,<sup>81</sup> a federal court ruled that a single exposure to an offensive instructional videotape “containing sexual innuendoes” did not establish a cause of action.<sup>82</sup> Where on this continuum does Clinton’s alleged behavior fall? In the absence of congressional or administrative guidance, Judge Wright was free to make that decision. Jones’ allegations presented Judge Wright with the classic situation described long ago by Benjamin Cardozo, “where the colors do not match, when the references in the index fail, where there is no decisive precedent, [and] the serious business of judging begins.”<sup>83</sup> What Jones experienced in the hotel room clearly fell short of the kind of insult to her body that Crisonino suffered. On the other hand, an erect penis on a video tape does not have the same impact as one attached to a man who tells you to kiss it.

One possible test to determine if a single incident constitutes sexual harassment might be whether the alleged behavior constitutes a criminal act under the law of that jurisdiction. By this test, Crisonino and Jones could establish a case, respectively, for assault (a

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77. 985 F. Supp. 385, 392 (S.D.N.Y. 1997) (recounting that a former employee’s allegations may be sufficient to support the finding that she was a victim of gender motivated crime for purposes of GMVA).

78. *Id.* at 388.

79. *Id.* at 390 (stating that “stray remarks” can suffice to establish a prima facie case under some circumstances).

80. *Id.* at 393.

81. 122 F.3d 654 (8th Cir. 1997).

82. *Id.* at 655 (stating that an allegedly offensive videotape did not create a pervasive hostile environment).

83. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 21 (1921) (describing the encroachment of subjective standards into the judicial decision making process); see also JUDITH BAER, *OUR LIVES BEFORE THE LAW: CONSTRUCTING A FEMINIST JURISPRUDENCE* 32 (1999) (explaining that under subjective standards one person may not feel harassed while another person will).

felony) and indecent exposure (a misdemeanor), but Lam probably could not. At any rate, Judge Wright had an opportunity to establish a new rule, or at least refine an existing one. If she erred, she erred on the side of a narrow reading of the law.

### C. *Sexual Harassment and the Role of Power*

Without doubt, Jones did not experience the kind of harassment that women such as Mechelle Vinson,<sup>84</sup> Kimberly Ellerth, Teresa Harris,<sup>85</sup> or Elizabeth Crisonino endured. There is, however, one aspect of Jones' case that does clearly distinguish her case from the others: the power relationship between her and her harasser. This approach points out that sexual harassment is not just about sex, but about power.<sup>86</sup> "If there is any common feature to the many factors suggested as variables influencing [the occurrence] of sexual harassment . . . , it is the factor of power or status. Whether formal or informal, organizational or diffuse, real or perceived, status differences between victims and offenders are the root of the problem of sexual harassment."<sup>87</sup>

Clinton clearly took advantage of, or at least benefited from, the tremendous power differences between himself and Jones. As Governor, Clinton had appointed her supervisor, suggested that he had control over him, and intimated that he could thwart any attempts that Jones might make to complain.<sup>88</sup> As President, Clinton had tremendous legal resources at his disposal. Beyond that, he had the ability to shape media coverage of the case and public perceptions of her claims as frivolous.<sup>89</sup> Judge Wright did not address

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84. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 60 (1986) (describing how Vinson was subjected to harassment by her supervisor for over four years, including numerous instances of sexual assault).

85. See *Harris v. Forklift Sys.*, 510 U.S. 17, 19 (1993) (reporting that Teresa Harris was repeatedly insulted by the President of the company. Among other things, he called her a "dumb ass woman," asked her to fetch coins from his pants pocket, purposely dropped items on the floor and asked her to pick them up, and suggested that they negotiate her raise at the Holiday Inn.).

86. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 85-88 (1987) (recounting the social hierarchy of genders in which sexual harassment and power are inextricably linked); MACKINNON, *supra* note 46, at 156-58 (describing the allocation of power in the interest of men in sexual harassment).

87. McKinney & Maroules, *supra* note 41, at 42 (describing the central role of power structures in sexual harassment cases).

88. See *Jones v. Clinton*, 990 F. Supp. 657, 664 (E.D. Ark. 1998) (recounting Clinton's reference to Dave Harrington as an inference of his power over her).

89. See generally SABATO & LICHTER, *supra* note 4. Much of the negative media attention Jones received was generated by the White House and Clinton's legal advisors. She was portrayed stereotypically, based on her appearance, her region, her personal communication style, and her choices about how to proceed with her claims, and as a result was discounted by

the issue of the power differences between Jones and Clinton at all. And to suggest that Judge Wright could have addressed this issue is not far fetched.<sup>90</sup> In the development of their own workplace regulations, many employers for quite some time have specifically recognized the role of power relationships in their sexual harassment policies. For example, many universities and colleges strongly discourage or even prohibit consensual relationships between faculty and students because of the power differences between them.<sup>91</sup>

The *Jones* case particularly highlights the role of power in sexual harassment, especially when Clinton's alleged exposure of himself is taken into account. The display of one's genitals as a means of intimidation and assertion of power has a long history.<sup>92</sup> Consider a few hypothetical cases involving a secretary, a nurse, an assistant professor, or an associate at a law firm. Imagine that any of these women finds herself alone with her superior—an executive, a doctor, a tenured colleague, or a partner—who behaves as Clinton allegedly did. Or imagine that the superior is not the woman's boss, but her boss' superior, or someone else at the top of an institutional

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most observers. Charles Craver, Professor of Labor and Employment Law at George Washington University Law School, suggested that if this case "did not involve the President of the United States, I think her chances would be very good. The White House has done a masterful job of calling Paula Jones 'trailer park trash.'" See Carrie Johnson et al., *Does She Have a Prayer?*, 20 LEGAL TIMES 47, 47 (1998). This media coverage, without doubt, had an impact on the progress of her lawsuit as an individual. Perhaps even more important, however, are the broader social implications of the images of Jones as "trailer park trash." They suggest that the complaints of certain kinds of women, Anita Hill, for example, should be taken seriously, while perhaps the complaints of others, such as Jones, are more suspect. Thus, an impression emerges of professional women, whose sexual harassment charges are taken more seriously, and non-professional women, who are given much less credibility. If this case is perceived as allowing the harassment of non-professional women, this further magnifies work-place power differentials, and is damaging indeed.

90. See, e.g., *Rowinsky v. Bryan*, 80 F.3d 1006, 1011 (5th Cir. 1996) (noting the impact of power differences by comparing student-on-student harassment to teacher-on-student harassment and co-worker-on-co-worker harassment to supervisor-on-employee harassment).

91. See, e.g., BILLIE WRIGHT DZIECH & LINDA WEINER, *THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS* (2d ed. 1990) (describing the power relations involved in teacher/student sexual relationships); Peter DeChiara, *The Need for Universities to Have Rules on Consensual Sexual Relationships Between Faculty Members and Students*, 21 COLUM. J.L. & SOC. PROBS. 137, 142 (1988) (recounting the more subtle coercion involved in a student-teacher consensual relationship); Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 180 (1987) (describing the harm not as nonconsensual acts but as the way we defined the self that consent to the non-coercive relationships in which we engage). But see Sherry Young, *Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education*, 4 AM. U.J. GENDER & L. 269, 269 (1996) (arguing that policies prohibiting consensual sexual relationships between faculty and students belittle adult women's judgment and renders her incompetent to choose).

92. See W.H. LEWIS, *THE SPLENDID CENTURY* 46-47, 57 (1957) (describing such practices during the Court of Louis XIV); see also DORIS KEARNS, *LYNDON JOHNSON AND THE AMERICAN DREAM* 241-42 (1976) (reporting that former President Johnson attempted to embarrass "one of the delicate Kennedyites" by making the man join him in the bathroom).

structure—the CEO, the hospital director, the university president, a judge, or the governor of a state—and she is at the bottom. How is this man's behavior likely to affect this woman? At the very least, she will be reluctant to be alone with him again, possibly to the detriment of both her own career and the clientele she serves. The consequences might be far more serious than this. She might never be comfortable in that work environment again. Sometimes a single instance of intimidation is enough to poison a situation. For example, Kathleen Carlin, a social worker and advocate for battered women, tells a story about a man who beat his wife only once, the first Thanksgiving they were together. For the rest of their marriage, all he had to say to her was "remember Thanksgiving" to control her behavior.<sup>93</sup> Clinton's alleged behavior, given his position of power, was more than boorish and offensive. It was potentially devastating.

Clearly, there are some instances of boorish, offensive behavior that, complained of and never repeated, do not create a hostile environment. A joke, a personal remark, an inappropriate form of address like "honey" or "babe," an unwelcome dinner invitation, or a pat on the shoulder constitute the type of social errors human beings are prone to make with people they do not know. When they learn quickly, as indicated by apologies and behavior changes, they should not be vulnerable to lawsuits. Judge Wright's conclusion, however, that Clinton's alleged behavior when he was alone with Jones in that hotel room could not create a hostile work environment ignores the principles of fairness, the purposes of sexual harassment law, and the lessons of history.

#### D. *The Issue of Summary Judgment*

Finally, even putting aside Jones' legal claims, Judge Wright's use of summary judgment to dismiss the case is also open to question.<sup>94</sup> Two weeks before Wright dismissed Jones' case, in *Gallagher v. Delaney*,<sup>95</sup> a court of appeals judge from the Second District held that summary judgment should not be used in sexual harassment cases because federal judges may not be qualified to evaluate whether or not specific conduct constitutes sexual harassment.<sup>96</sup>

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93. See Robert McG. Thomas Jr., *Kathleen Carlin, 57, Fought for Abused Wives*, N.Y. TIMES, Sept. 30, 1996, at 8.

94. See Cheryl Saban & Robert Stevenson, *Courts Continue to Define Meanings of Sexual Harassment*, 219 N.Y. L.J., June 1, 1998, at 103, col. 3 (stating that the *Jones* decision may be affected by recent decisions suggesting that district court judges may not be qualified to decide on summary judgment whether conduct constitutes sexual harassment).

95. 139 F.3d 338 (1998).

96. *Id.* at 347.

Carmel Gallagher was an executive secretary at Consolidated Edison (“Con Ed”), who filed suit against her supervisor, Robert Hansen, after enduring two years of what she felt was harassing behavior.<sup>97</sup> It began with him telling her “that he had a dream that she kissed him.”<sup>98</sup> For the next two years, he gave her cards and gifts, which included plants, jewelry, and teddy bears, complemented her on her appearance, gave her days off without charging her sick time, and invited her to lunch and to go to Atlantic City with him, and told her that she “brought out feelings in him that he had not had since he was sixteen.”<sup>99</sup> On one occasion when she went into his office, there were boxes and paper stacked on the chairs, and he suggested that “the only place for her to sit was on his lap.”<sup>100</sup> When she reported his behavior to her company’s EEOC officer and Hansen’s supervisor, he changed his behavior towards her, acting rude and staring at her.<sup>101</sup> Gallagher conceded that “she accepted gifts, compliments, and kisses” from other managers where she worked.<sup>102</sup> Gallagher also admitted that Hansen “never directly asked [her] to engage in sexual relations,” but he had “explicitly reminded her: he was her boss, he wrote her performance reviews, he ‘had control over [her] career.’”<sup>103</sup> Con Ed’s EEOC officer also “confirmed that Hansen had a romantic interest in her.”<sup>104</sup>

The Judge in this case overturned Con Ed’s motion for summary judgement.<sup>105</sup> The Judge argued that:

Creating a mosaic with the bits of pieces of available evidence, a reasonable juror might picture either a malign employer using his position to pressure a subordinate for sexual favors or a benign boss trying – however ineptly – to express concern for his secretary in a non-erotic manner that she mistakenly viewed as sexually aggressive . . . . A jury made up of a cross-section of our heterogenous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment . . . .<sup>106</sup>

The opinion indicates that in sexual harassment cases, especially

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97. *See id.* at 341 (discussing Gallagher’s employment history).

98. *Id.* at 343.

99. *Id.* at 343-44.

100. *Id.* at 343.

101. *See id.* at 345 (describing how Gallagher’s supervisor’s behavior changed).

102. *Id.* at 344.

103. *Id.*

104. *Id.*

105. *See id.* at 342 (delivering the decision of the court).

106. *Id.* at 342.

those in which the allegations are not clear-cut instances of harassment, the “dangers” of using summary judgment are “particularly acute.”<sup>107</sup> Gallagher’s account of the incidents she experienced was considered a “borderline” case of sexual harassment, deserving of a jury trial.<sup>108</sup>

There are some striking similarities between the *Jones* case and *Gallagher*. When Gallagher resisted Hansen’s advances, he reminded her of the control he had over her job.<sup>109</sup> When Jones resisted Clinton’s advances in the hotel room, he reminded her that her boss was his good friend and they should keep what had happened between themselves.<sup>110</sup> Both women had the same interpretation of these events: they had reason to believe their jobs and their performance reviews would be adversely affected.<sup>111</sup> There is, however, a substantial difference between the two cases. Gallagher admitted that Hansen “never directly asked [her] to engage in” any kind of sexual relationship, and there is no evidence that Hansen ever physically touched her.<sup>112</sup> Jones alleged, however, that Clinton attempted to kiss her, slid his hand up her thigh, exposed himself, and asked her to kiss his erect penis.<sup>113</sup> If *Gallagher* is a borderline case, than *Jones* is arguably less borderline. In other words, under *Gallagher*, Paula Jones would be entitled to her day in court.<sup>114</sup>

On the other hand, maybe Jones was lucky that her case was dismissed. Perhaps one of the most disturbing aspects of the entire episode was the defense that Clinton’s attorneys had prepared: the use of Jones’ past sexual history in order to challenge the credibility and validity of her claims.<sup>115</sup> In an interview a year before Judge

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107. *Id.* at 343.

108. *See id.* (explaining why Gallagher’s case should go to trial).

109. *See id.* at 344 (discussing why Gallagher believed the security of her job was dependent upon her “accepting his gifts, offers, and signs of affection”).

110. *See Jones v. Clinton*, 990 F. Supp. 657, 664 (E.D. Ark. 1998) (explaining how Clinton asked Jones to “keep this between ourselves”).

111. *See Gallagher*, 139 F.3d at 344; *Jones*, 990 F. Supp. at 664.

112. *Gallagher*, 139 F.3d at 344.

113. *See Jones*, 990 F. Supp. at 664.

114. *See Gallagher*, 139 F.3d at 345 (explaining that “if a reasonable jury might evaluate the evidence to find that material propositions of fact a plaintiff must prove, summary judgment must be denied”).

115. *See Jim Abrams, Clinton’s Lawyer Says He’s Ready to go to Trial in Jones Case*, ASSOCIATED PRESS, June 1, 1997, available at 1997 WL 4868748 (explaining the strategy Clinton’s lawyers would use if the case goes to trial); *see also* Ann Althouse, *Thelma and Louise and the Law: Do Rape Shield Rules Matter?*, 25 LOY. L.A. L. REV. 757, 760 (1992) (analyzing the use of a victim’s past sexual history in rape cases); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1174 (1986) (explaining that not only does “the jury tend to be biased against the prosecution in a rape case, but that it will go to great lengths to be lenient with the defendant when there are any suggestions of ‘contributory behavior’ on the part of the woman”). *See generally* CAROL SMART, FEMINISM AND

Wright dismissed Jones' case, Robert Bennett, Clinton's chief counsel, stated that "he could get rough," and would be willing to make an issue of Jones' sexual past.<sup>116</sup> Documents released after the dismissal indicated that if the case had gone to trial, Clinton's legal team wanted to use testimony from a man who "claimed he had sex with Jones in his car in a bar parking lot on their first encounter," and that she had "initiated oral sex" with him during another encounter.<sup>117</sup> These alleged events occurred a few months before Jones had met Clinton at the Excelsior Hotel. This man's testimony was considered relevant evidence by Clinton's defense attorneys to rebut Jones' claims, to demonstrate that she was no "minister's daughter," and to show that she could not be "emotionally traumatized" by being asked to perform a sex act.<sup>118</sup>

In 1994, Congress proposed an amendment to Rule 412 of the Federal Rules of Evidence, commonly known as "the rape shield rule," to extend the prohibition of the use of a victim's sexual history from criminal sexual assault trials to civil trials, including sexual harassment cases.<sup>119</sup> The Supreme Court refused approval of this amendment, arguing that it conflicted with *Meritor Savings Bank v. Vinson*.<sup>120</sup> In April of 1994, Congress overruled the Court and adopted the amendment.<sup>121</sup> This new rule, however, is not a categorical exclusion of a victim's past sexual history. In sexual harassment cases, exceptions can be made if the "probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party," and "if [the incident] has been placed in controversy by the alleged victim."<sup>122</sup> The decision to make exceptions and allow the use of a victim's past sexual history is at the discretion of the judge.<sup>123</sup>

Jones' past sexual behavior regarding the man in the parking lot would presumably be banned under Rule 412, unless Clinton's

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THE POWER OF LAW 33 (1989) (explaining how a legal system has made a woman's past sexual activity relevant in rape cases, but not a man's past sexual activity).

116. See Abrams, *supra* note 115.

117. *Judge Releases More Pages in Jones Case*, ST. LOUIS POST-DISPATCH, Oct. 20, 1998.

118. *Id.*

119. See FED. R. EVID. 412 advisory committee note (explaining that Rule 412 applies in both civil and criminal proceedings).

120. See *id.* (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986)).

121. See *id.* (explaining that "Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct").

122. FED. R. EVID. 412(b)(2).

123. See FED. R. EVID. 412(c)(2) (explaining that "before admitting evidence under this rule the court must conduct a hearing").

attorneys argued that this or any other incidents fell under the exception. The decision to allow Jones' past sexual behavior would then be up to Judge Wright.<sup>124</sup> The application of the amended Rule 412 and its exceptions has been inconsistent. Many practitioners are still unaware of this Rule to begin with, but even in cases when the Rule has been invoked, there are numerous examples in which a victim's past sexual behavior has been considered admissible evidence.<sup>125</sup> In fact, courts have consistently allowed at least the partial admission of this kind of evidence in almost every application of the Rule.<sup>126</sup> Consequently, there is reason to believe that at least part of Jones' sexual past could have been allowed if the case went to trial. But the fact that Clinton's defense attorneys would consider using this strategy is especially troubling given Clinton's record for supporting women's rights issues during his administration. Clinton's first act as President was to sign the Family Medical Leave Act.<sup>127</sup> He also strongly supported the Violence Against Women Act, which gave victims of sexual assault the right to sue in federal court.<sup>128</sup> At any rate, although the dismissal of Jones' case in and of itself is questionable, given the strategy that Clinton's lawyers were planning on employing, perhaps Jones was better off settling before attempting to appeal the dismissal and go to trial.

#### IV. CONCLUSIONS

Both quid pro quo and hostile environment abuses are illegal, yet they are still quite prevalent. Surveys of the private sector have indicated that the proportion of women saying they have experienced

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124. See FED. R. EVID. 412(a)(1) (stating that evidence of past sexual behavior is inadmissible if it is "offered to prove that any alleged victim engaged in other sexual behavior"); FED. R. EVID. 412(a)(2) (stating that evidence of past sexual behavior is inadmissible if it is "offered to prove any alleged victim's sexual predisposition").

125. See Julie Springer et al., *Survey of Selected Evidentiary Issues in Employment Law Litigation*, 50 BAYLOR L. REV. 415, 416 (1998) (documenting instances where "defendants are . . . aggressively using the sexual behavior and attitude of plaintiffs in and out of the workplace to show that the plaintiff welcomed the allegedly offensive conduct").

126. See Jennifer E. Smith, *Fine Tuning the Wrong Balance: Why the New Rule 412 Does Not Go Far Enough to End Harassment in Sexual Harassment Litigation*, 10 WIS. WOMEN'S L.J. 63, 107 (1995) (explaining that defendants continue to "have the opportunity to pursue abusive discovery and to admit irrelevant evidence concerning complainants' sexual activities"). See generally Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U.L. REV. 1655, 1664-74 (1995) (detailing the historical and current rulemaking procedures, including the application of and amendments made to rules).

127. 29 U.S.C. § 2601.

128. See 42 U.S.C. § 13981 (stating that "a person . . . who commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and other relief as a court may deem appropriate"). *But see* United States v. Morrison, 529 U.S. 598, 627 (2000) (holding that the civil remedy provision of the Act was unconstitutional).

one or the other is well over fifty percent.<sup>129</sup> In a 1994 survey of federal government employees, forty-four percent of women respondents reported that they had experienced some form of unwanted sexual attention.<sup>130</sup> Numerous studies have shown that sexual harassment is quite prevalent in courtrooms, the very forum that is supposed to provide women protection from harassment.<sup>131</sup> Given the pervasiveness of sexual harassment, the pursuit of legal action is certainly not the only factor that can contribute to positive or negative changes in the workplace. Extensive media coverage of a case like Jones' can also effect public perceptions regarding what constitutes appropriate workplace behavior and perceptions of women who file claims.<sup>132</sup> Court decisions in and of themselves, however, do affect workplace cultures in important ways.<sup>133</sup> Legal doctrines establish precedent, but also the perception and recognition by employers of the ground rules regarding sexual harassment.<sup>134</sup>

In *Jones v. Clinton*,<sup>135</sup> Judge Wright was given the opportunity to further clarify those ground rules. Instead, this case has promoted confusion in the law. Judge Wright ultimately concluded that Jones

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129. See Riger, *supra* note 41, at 502 (discussing the prevalence of sexual harassment in the workplace and noting that "unwanted sexual attention may be the single most widespread occupational hazard in the workplace today").

130. See BEN ERDREICH ET AL., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES* viii (1994).

131. See, e.g., Marina Angel, *Sexual Harassment by Judges*, 45 U. MIAMI L. REV. 817, 817-18 (1991) (giving examples of and discussing "issues related to sexual harassment by judges"); Cynthia Grant Bowman, *Bibliographic Essay: Women in the Legal Profession*, 7 AM. U.J. GENDER, SOC. POL'Y & L. 149, 151 (1998/99) (discussing "the situation of women lawyers"). See generally Sharon Grubin & John Walker, *Report of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 11 (1997) (summarizing the findings of the task force); Lynn Hecht Schafran, *Educating the Judiciary About Gender Bias: The National Judicial Education Program to Promote Equality for Women and Men in the Courts and the New Jersey Supreme Court Task Force on Women in the Courts*, 9 WOMEN'S RTS. L. REP. 109 (1985); *Minnesota Supreme Court Task Force for Gender Fairness in the Courts: Final Report*, 15 WM. MITCHELL L. REV. 827 (1989); *First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts*, 9 WOMEN'S RTS. L. REP. 129 (1986).

132. See, e.g., Steven Thomma & Elsa C. Arnett, *Jones Case May Leave Mark on Harassment*, ARIZ. REPUBLIC, Apr. 5, 1998 (explaining that Clinton's "court victory against a harassment lawsuit could provide a legal road map to punishment-free behavior by perpetrators and have a chilling effect on women filing complaints, many analysts, lawyers and academics believe. And at the very least, it reopens a debate over what is proper sexual conduct between men and women at work"); SABATO & LICHTER, *supra* note 4.

133. See *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998) (explaining that court decisions "produce questionable legal definitions for the workplace where recognition of employees' dignity might require standards higher than those of the street").

134. See *id.* (explaining that it is possible "through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment").

135. 990 F. Supp. 657 (E.D. Ark. 1998).

did not have a case sufficiently strong enough to bring before a jury.<sup>136</sup> This decision in and of itself appears to conflict with another federal court decision regarding the use of summary judgment in sexual harassment cases.<sup>137</sup> In addition, there are problems with Judge Wright's analysis of both the quid pro quo and hostile work environment claims, regardless of whether or not one agrees that Jones' claims did in fact constitute sexual harassment. Feminists themselves disagreed on whether or not Jones' claims constituted sexual harassment,<sup>138</sup> but what we have attempted to show in this Article is that Judge Wright's interpretation and application of sexual harassment law was not the only line of reasoning available. Moreover, much of Judge Wright's opinion potentially conflicts with existing precedent and is a step backwards in the development of sexual harassment law. If nothing else, this case highlights the difficulties women face in pursuing their sexual harassment claims, and the ambiguities and contradictions that still exist in the law.

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136. See *id.* at 679 (granting Clinton's and Ferguson's motions for summary judgment).

137. See *Gallagher*, 139 F.3d at 350.

138. See, e.g., Gwendolyn Mink, *Misreading Sexual Harassment Law*, N.Y. TIMES, Mar. 30, 1998, at A17 (describing the different reactions women had to the Clinton sexual harassment scandal while concluding that "we must affirm the distinction drawn by the Supreme Court between welcomeness and consent. Otherwise, no woman who unwillingly succumbs to her boss will have any legal recourse"); David Savage & Alan Miller, *Clinton Allegations Dividing Feminists, Ideology: Kathleen E. Willey's Account of a Sexual Encounter With the President Draws Far Different Assessment by Women's Rights Advocates*, L.A. TIMES, Mar. 23, 1998, at A13 (discussing how the different reactions to "allegations that President Clinton groped a female volunteer . . . [reflect] a fundamental struggle to determine what constitutes sexual harassment"); Gloria Steinem, *Feminists and the Clinton Question*, N.Y. TIMES, Mar. 22, 1998, § 4, at 15 (explaining that regardless of whether "the allegations swirling around the White House turn out to be true . . . feminists will still have been right to resist pressure by the right wing and the media to call for his resignation or impeachment"); Wells, *supra* note 8, at 166 (recognizing that not all women supported Clinton while "attempt[ing] to debunk the unfair attacks implying that those women who do support President Clinton are unprincipled and irrational").