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FICTIONALIZING HARASSMENT — DISCLOSING THE TRUTH

Maria L. Ontiveros*

DISCLOSURE. By *Michael Crichton*. New York: Alfred A. Knopf. 1994. Pp. 397. \$24.

BEARING WITNESS: SEXUAL HARASSMENT AND BEYOND — EVERYWOMAN'S STORY. By *Celia Morris*. New York: Little, Brown and Company. 1994. Pp. 326. \$21.95.

... people often tell stories. And these stories are telling.¹

Ask an experienced employment discrimination lawyer to describe a "typical sexual harassment case," and the lawyer might describe the case of a saleswoman who becomes part of a previously all-male department, is subjected to sexist jokes and pranks, and is told that she could only close a sale in a motel room and that a woman has no place in sales. Another lawyer might describe a Latina custodian who, over her protests, is regularly touched and kissed by her supervisor and told that she will have to submit to his advances to keep her job. Few attorneys, if any, would describe a white male professional harassed by his new female boss on her first day of a new job.²

It is disheartening, then, that the only best-selling work of popular fiction to deal with sexual harassment³ — *Disclosure*, by

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1. Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2075 (1989).

2. See *infra* notes 21-32 and accompanying text (summarizing the plot of *Disclosure*).

3. Although at least two other recent fictitious works deal with sexual harassment — a play, DAVID MAMET, *OLEANNA* (1992), and a novel, LINDA GRANT, *A WOMAN'S PLACE* (1994) — they have not reached the popularity of *Disclosure*, which was on the *New York Times* Hardcover Best Sellers List for 22 weeks and the Paperback Best Sellers List for 24 weeks. Its December, 1994 release as a motion picture directed by Barry Levinson and starring Demi Moore and Michael Douglas has only increased its visibility as the primary fictionalized account of workplace harassment. See *Demi to Play 'Disclosure' Predator*, ATLANTA J. & CONST., Mar. 20, 1994, at N6.

Oleanna also presents an unsympathetic woman making a sexual harassment charge that the author portrays as false. See *infra* notes 45-47 and accompanying text (discussing *Oleanna* and other sexual harassment fiction).

Michael Crichton⁴ — deals with a woman who sexually harasses a man and then falsely claims that he in fact harassed her. It is disheartening because stories both reflect and shape values. *Disclosure* presents the problem of sexual harassment as women abusing power — by harassing men and by falsely accusing men. This definition of the problem marginalizes legitimate claims of sexual harassment brought by women against men and obscures the issue of power imbalances between men and women.

Yet this is hardly surprising once one considers the source of the story. Stories can be told from many different perspectives, and *Disclosure* is the sexual harassment story told from the white male perspective. As Carolyn Heilbrun observes, "power consists to a large extent in deciding what stories will be told . . . male power has made certain stories unthinkable."⁵ The white-male perspective has prevailed in both popular fiction and the doctrine of sexual harassment law. This essay contrasts the two different stories of sexual harassment: the dominant story, told from the perspective of white men, that is found in sexual harassment law and in the pages of *Disclosure*, and the marginalized story, told from the perspective of women, that is found in feminist theory and in the pages of *Bearing Witness*.

In her book, *Bearing Witness*, Celia Morris⁶ uses Professor Heilbrun's observation as a challenge to compile and tell the stories of women who have been sexually harassed. As Morris puts it:

My own response was to crisscross the country listening to women's stories. . . . The Hill/Thomas hearings had forced one of those "unthinkable" stories into the open — a story that many women knew to be rather ordinary. Along with Heilbrun, I believed that "we must begin to tell the truth, in groups, to one another. . . ."

I was convinced that if we resurrected that will to truth-telling, the weight of evidence could then help us shift the focus from the women who are abused to the men who do the abusing. . . .

. . . .

And so, because these stories are relatively new on the world's stage, they can help us understand more clearly how men use women's sexuality to stunt and frighten them — and thereby keep them in "their place." Ultimately, these stories, and others like them, can give us the tools and energy to reshape our world. [pp. 7-8; citations omitted]

4. Michael Crichton is the author of numerous best-selling novels, including *JURASSIC PARK* (1990) and *RISEING SUN* (1992). He has also written many nonfiction works and directed motion pictures.

5. CAROLYN G. HEILBRUN, *WRITING A WOMAN'S LIFE* 43-44 (1988).

6. Celia Morris, who also wrote *STORMING THE STATEHOUSE: RUNNING FOR GOVERNOR WITH ANN RICHARDS AND DIANE FEINSTEIN* (1992) and *FANNY WRIGHT: REBEL IN AMERICA* (1984), helped organize a network of political support for Anita Hill during Justice Clarence Thomas's confirmation hearings.

These two nontraditional legal books — one a work of fiction and the other a collection of narratives — tell us a great deal about sexual harassment in our society. They contrast the fictitious vision of harassment from a white-male point of view with the dramatic experiences of approximately fifty women from different races, classes, and occupations.

Celia Morris's central themes — that storytelling plays an important role in setting a nation's agenda and that stories possess a unique ability to communicate information — are at the heart of what has come to be known in legal scholarship as the narrative debate. Narrative or storytelling has become a force in legal scholarship — as an accompaniment to, a defining structure of, or a substitute for traditional law review articles.⁷ Narrative has served at least two major purposes. "Counterstories" have been used to change the terms of the legal agenda by retelling stories of legal encounters from the outsider's perspective or by giving a legal cast to encounters that might not previously have been viewed as legal problems.⁸ Narrative has also been put forward as a different epistemological or methodological approach to the law. Stories or experiences can communicate and promote understanding or learning in a different way than traditional legal analysis can.⁹

Some commentators have resisted the narrative movement,¹⁰ claiming that narratives lack analysis,¹¹ do not constitute scholarship,¹² lack legal significance,¹³ and deceive by not disclosing whether they are objectively true.¹⁴ Narrative scholars have responded that these criticisms beg the questions of what constitutes scholarship, truth, legal issues, analysis, and reason — which are exactly the epistemological and methodological questions that the movement seeks to explore.¹⁵ These arguments, as well as the counter-responses,¹⁶ constitute the narrative debate.

7. See Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 983, 1001, 1006 (1991).

8. Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 261-71 (1994); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412-15 (1989); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 608-09 (1994); Scheppele, *supra* note 1.

9. Abrams, *supra* note 7, at 975-76, 994.

10. *Id.* at 977-80.

11. Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 849-52 (1993).

12. *Id.* at 847-48.

13. *Id.* at 853-54.

14. *Id.* at 831-40.

15. See, e.g., Abrams, *supra* note 7, at 1013; Baron, *supra* note 8, at 256-57; Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993); Eskridge, *supra* note 8, at 621-31.

16. Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647 (1994).

At the same time that this debate has been raging, theories pioneered by the law and literature movement and expanded in the law and popular culture school of thought also explain the importance of storytelling to legal scholarship. One branch of law and literature jurisprudence examines the law-related content of great literary works.¹⁷ Law and popular culture, on the other hand, looks at popular books and other media to see how they reflect and reinforce the societal views and values that shape legal issues. These books are popular precisely because they "reflect whatever it is that ordinary readers feel most comfortable with."¹⁸ They are especially effective at influencing and reinforcing "familiar values with subtlety and ease"¹⁹ because of their entertaining, trance-inducing natures.²⁰

Part I of this review discusses the plots, themes, and organizing structures of the two books. Part II discusses how the current doctrine of sexual harassment in practice, and its misinterpretation of women's response to harassment, has incorporated the themes of the dominant story found in *Disclosure* and ignored those themes brought out in *Bearing Witness*. Part III discusses how these books help us understand the nature of sexual harassment as a power dynamic between the genders — a dynamic that is also influenced by the race of the participants. It discusses the question "Can a woman sexually harass a man?"

I. TWO VIEWPOINTS ON SEXUAL HARASSMENT: *DISCLOSURE* AND *BEARING WITNESS*

A. Disclosure

1. *Sexual Harassment From the Male Perspective*

The action contained within the main text of *Disclosure* occurs during four days.²¹ On Monday we meet Tom Sanders, our protagonist, getting ready to go to work at a high-tech company in Seattle. Tom anticipates the announcement of a company reorganization and his promotion at a morning meeting. He gets to work later

17. Carol Sanger, *Seasoned to the Use*, 87 MICH. L. REV. 1338, 1342-43 (1989) (reviewing SCOTT TUROW, *PRESUMED INNOCENT* (1987) and SUE MILLER, *THE GOOD MOTHER* (1987)). Another branch of the law and literature movement, which many view as the primary one, looks to the use of literary analysis to examine legal opinions and other legal writing. *Id.* at 1342.

18. *Id.* at 1343.

19. *Id.*

20. *Id.* at 1344.

21. There is also a brief preamble consisting of text from Title VII and a quote attributed to Katharine Graham ("Power is neither male nor female."), a postscript in which the author describes what happens to some of the characters after the end of the story, and an afterword.

than he planned,²² because his wife needs his help with the children, even though Monday is the day she "takes off" from work to spend with the kids.²³ Because he is late, he finds out through the grapevine that his promotion has been given to Meredith Johnson, a young, beautiful executive from the California office. She also happens to be Tom's former lover. At the same time, Tom is combating various problems in the company's product lines, including a production line in Malaysia for which he is personally responsible.

Meredith arranges a meeting with Tom for 6:00 p.m. to discuss his department; she also promises to reminisce about old times over a bottle of dry chardonnay. After several minutes of sexual innuendoes,²⁴ and tricking him into rubbing her neck, Meredith starts to kiss him; the telephone rings, and she is interrupted (pp. 87-90). Tom also places a call, and as he leaves a message on an answering machine, Meredith advances on him (pp. 90-91). She kisses him, presses her body against his, opens his trousers, and performs fellatio (pp. 91-93). Tom, being a good husband and a good employee, initially protests;²⁵ then he responds and tries to take control sexually and dominate the situation.²⁶ Finally, "in an instant of harsh clarity," he realizes that he does not want to "do this" and ends the encounter (pp. 94-96). She is furious at being scorned — she pounds on his chest, scratches him, and threatens to get revenge.²⁷

22. Although Tom does not intend to be late, he does not really try to get there early. He gets into the shower at 7:30, hoping to make the 7:50 ferry, which will allow him to arrive at the office a half hour before the meeting. P. 6. The author's perception that this behavior is that of a diligent manager is not consistent with reality.

23. P. 6. The author's misperceptions of reality continue with his belief that taking care of two young children is a "day off."

24. Meredith refers to their past sex life and suggests future business trips together. Pp. 87-90.

25. "[H]e had the uneasy sense of pleasure and danger at once He felt dominated, controlled, and at risk. He had the feeling . . . that he was somehow agreeing to a situation that he did not understand fully, that was not fully recognized." P. 92.

26.

In that moment he felt a burst of anger, a kind of male fury that he was pinned down, that she was dominating him, and he wanted to be in control, to take her. He sat up and grabbed her hair roughly, lifting her head and twisting his body. . . .

[He removes her underwear.] . . .

. . . .

. . . He kissed her hard, pulling her blouse wide, pressing her breasts to his bare chest. . . .

. . . .

[T]here was nothing but his desire, hot and angry, more intense for the fact that he didn't really want to be there, that he felt she had manipulated him to this place. Now he would fuck her. He wanted to fuck her. Hard.

. . . He crouched over her and she smiled at him, a knowing, victorious smile. It made him furious to see this sense that she had somehow won, this watchful detachment, and he wanted to catch her, to make her feel as out of control as he felt, to make her part of this, to wipe that smug detachment from her face.

Pp. 93-94.

27. Pp. 95-96. She also says to Tom, "You walk out on me, you're dead!" *Id.* Crichton even adds biting and hair pulling to his stereotypical list of actions by the woman scorned. *Id.*

Sanders retreats to his home, where he has a fight with his wife but otherwise goes on about his life as if nothing has happened (pp. 97-108).

The next day, Tom goes to work and discovers that *Meredith has accused him* of sexual harassment, that the company is backing her, and that he is expected to accept a transfer to another division (pp. 127-30). Tom decides to fight the charges, and he hires a Latina attorney named Louise Fernandez to pursue his own claim of sexual harassment. Fernandez actively listens to his story, painstakingly and accurately describes the doctrine of sexual harassment, and finally agrees to represent him.²⁸ The adversaries end up in mediation, where the existence of a tape recording of the sexual encounter is disclosed.²⁹

After some posturing, the company offers to drop the charges against Tom and give him a generous settlement. Below the surface, however, two plots continue to hatch against our hero. One involves the question of why Meredith would harass Tom on her first day of work, leaving herself open to charges of misconduct.³⁰ The answer lies in the fact that she is distracting him to prevent him from discovering her role in creating the problems on the production line in Malaysia — problems that could lead to his termination (pp. 376-79). She plans to look like a hero when she solves the problems that eluded Sanders. The second plot centers on a company investigation into Tom's use of illegal means to check employees' backgrounds (pp. 38-41). Tom avoids these problems, through the help of good friends,³¹ and he triumphs in the end.³²

2. Themes

Although the plot line is hung together with improbable devices,³³ characterizations that consist of describing body

28. Pp. 134-49. She explains to Tom the problems with the case: "[Y]ou claim that you got into an intimate situation with a younger, very attractive woman but you turned her down. In the absence of witnesses or corroborating evidence, that isn't going to be an easy story to sell to a jury." P. 148.

29. Pp. 270-78. Remember the message Tom was leaving when Meredith pounced on him? Conveniently, the answering machine happened to record the whole episode. Pp. 252-54.

30. Louise Fernandez suspects Meredith's ulterior motives and tells Tom, "You think it's just because you're irresistible? . . . With all due respect, I doubt it." P. 279.

31. Pp. 367-70. Perhaps his best friend is the convenient plot twist. See *infra* note 33.

32. Tom gets his job back, with the promise of a quick promotion; Meredith and the scheming corporate counsel are banished; and Tom's wife, after gaining new respect for her husband and their relationship, agrees to travel less and spend more time at home. Pp. 373-400.

33. See, e.g., pp. 252-54 (sexual encounter is inadvertently taped by answering machine); pp. 370, 376-79 (last-minute phone call out of the blue from employee in Malaysia reveals Meredith's production-line sabotage); pp. 183, 210, 344 (mysterious friend sends clues through electronic mail).

parts,³⁴ glitzy technology ready-made for the movies,³⁵ and more eavesdropping than in a Shakespeare play,³⁶ the novel strikes a chord with its three basic themes: (i) changing sex roles; (ii) the white-male fear that society disproportionately favors women and people of color, at his expense; and (iii) the fear that men will be accused — perhaps falsely, certainly unfairly — of harassment or discrimination, while their accusers are believed. This section examines these themes and notes how they reflect and reinforce values in our society.

a. *Changing Sex Roles of Men and Women.* In *Disclosure*, the changing role of women appears in Crichton's account of the wife who works, rather than properly cares for the children (pp. 104-05, 107); in his portrayal of women as sexually aggressive³⁷ and sexually manipulative;³⁸ and in the role of the female boss as the bitch from hell.³⁹ These examples converge in a scene in which Tom returns home after being sexually harassed by Meredith. Tom is tired and upset, and his wife, Susan, suggests that they have sex. When he tells her that he's not in the mood, she complains, "We hardly ever have sex anymore, as it is" (p. 104). When he retorts that it's because she's always traveling for work, the argument turns to whether he has to spend too much time helping at home and whether men or women work harder. They argue over whether women are oppressed. When he argues, "You're about as op-

34. One reviewer comments:

Crichton doesn't give us enough character development to pick his protagonist out of a police lineup.

Sanders is "a handsome man," we're told, "with the easy manner of an athlete." Sanders' wife . . . has "the kind of fresh beauty that required no makeup" and, apparently, no description.

Of Meredith Johnson, the woman who gets the job Sanders wants, all we're told is that she is "overtly sexual." How? ". . . in a certain way." Also, she has beautiful breasts. Sanders thinks so: "She still had beautiful breasts, the nipples hard under the touch." Another male character agrees: "Yes. So beautiful. Such lovely breasts." Well, it shouldn't be too tough to pick her out of a police lineup.

Allen Barra, *Michael Crichton's Latest Screenplay-in-Waiting*, NEWSDAY, Jan. 5, 1994, at 48.

35. The best section of the book is a description of a trip through "virtual reality" to find information in company files. Pp. 350-65.

36. Christopher Lehmann-Haupt, *Sex, Power and a Workplace Reversal*, N.Y. TIMES, Jan. 6, 1994, at C12 (pondering the question, "Why are there more scenes of unlikely eavesdropping [in *Disclosure*] than in an early Shakespeare comedy?").

37. Meredith Johnson is certainly sexually aggressive, as is Tom's wife, Susan. For example, at one point Susan pins Tom down with her leg as a sexual overture, and, in Tom's view, she "was always coming on to him at inappropriate times and places." Pp. 103-04.

38. Crichton portrays women who use their sexuality to manipulate others and advance themselves as typical.

39. The following reviews of *Disclosure* highlight this theme: Christopher Lehmann-Haupt, *Sex, Power and a Workplace Reversal*, *supra* note 36, at C12; Paula Maccabee, *Crichton's 'Disclosure' Titillates Modern Man's Sexual Fears*, STAR TRIB. (Minneapolis), Feb. 7, 1994, at 1E; see also Janet Kidd Stewart, *Female Bosses: An Improvement on Male Model?*, CHICAGO SUN-TIMES, Feb. 20, 1994, at 1.

pressed as Leona Helmsley," she says that the only reason he is arguing that women are not oppressed is that a woman got his job, threatening his "fragile male ego" (pp. 103-06). The issue of changing sex roles has been apparent for quite some time in legal thought and popular fiction.⁴⁰

b. *The Downtrodden White Male.* The theme of white men being unfairly hurt by antidiscrimination laws, including affirmative action, develops in many passages of *Disclosure*. In a Texas manufacturing facility, men have to remove pinups from their locker room, even though the women never enter the room and "[e]ven if the women have pinups in *their* locker room."⁴¹ The company owner tells Tom that they have an obligation to attain equality, so he supports Meredith because she is a woman (p. 259). The owner continues: "And I keep coming back to the idea that we have to make allowances for women. We have to cut them a little slack" (p. 259). The most telling argument comes from one of Tom's co-workers, consoling him over the lost promotion:

Pale males eat it again. I tell you. Sometimes I get so sick of the constant pressure to appoint women It's hurting everybody. Look: when I started in DigiCom, there was only one question. Are you good? If you were good, you got hired. If you could cut it, you stayed. No more. Now, ability is only one of the priorities. There's also the question of whether you're the right sex and skin color to fill out the company's HR profiles. And if you turn out to be incompetent, we can't fire you. Pretty soon, we start to get junk⁴²

The white-male fear that affirmative action has gone too far in helping women and minorities has become increasingly apparent in legal cases and popular thought.⁴³

40. On treatment in popular fiction, see Janet Maslin, *Sex and Terror: The Male View of the She-Boss*, N.Y. TIMES, Jan. 14, 1994, at C1, and Carole Shapiro, *A Woman Lawyer's Perspective on Film*, N.Y.L.J., Feb. 7, 1994, at 2. On treatment in legal literature and legal opinions, see generally Carolyn Heilbrun & Judith Resnick, *Convergences: Law, Literature, and Feminism*, 99 YALE L.J. 1913 (1990).

41. P. 21. The women on the production line complained because the pinups offended the women who clean the locker room at night. *Id.*

42. P. 67; cf. p. 107 (describing Tom coming home after being harassed, finding nothing to eat in his refrigerator except a leftover, partially eaten peanut-butter-and-jelly sandwich, and saying to his reflection, "Another privileged member of the patriarchy, lording it over the manor.").

43. Legal cases involving these issues include *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 287 (1986) (stating that affirmative action programs must not "unnecessarily trammel the rights[] of innocent individuals directly and adversely affected by a plan's racial preference") and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) ("[T]here is a measure of inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making."). On treatment in popular thought, see Michele Galen, *White, Male, and Worried*, BUS. WK., Jan. 31, 1994, at 50 (discussing white male response to corporate diversity programs); David Gates, *White Male Paranoia*, NEWSWEEK, Mar. 29, 1993, at 48 (discussing the movie *FALLING DOWN* (Warner Bros. 1992)); *Compassion for the Poor is Declining*, POLL FINDS, S.F. CHRON., Sept. 21, 1994, at A6 (finding that a majority of whites,

c. *Unfair Accusation*. The fear of being accused of sexual harassment forms the central and most original theme of *Disclosure*. As Louise Fernandez says, "A harassment claim is a weapon" (p. 397). At its most basic level, *Disclosure* is the story of a man falsely accused by a lying woman. The novel also raises issues of men being unfairly accused because they do not realize that they have done anything wrong (pp. 329-37). In either case, the author argues that the accusers will always be believed.⁴⁴

David Mamet covers similar ground in his play *Oleanna*.⁴⁵ He focuses on an unsympathetic female student making a charge of sexual harassment against a professor. Mamet portrays the charge early in the play as stemming from a misunderstanding. As the characters continue to interact, the student's accusations escalate to a charge of attempted rape; Mamet portrays these accusations as untrue. As a result of these "unfair" accusations, the professor ends up losing his job and possibly his wife.⁴⁶ Thus, both of these popular fictional works dealing with harassment take as their paradigm lying women and unfairly accused men.⁴⁷

Within this theme lies the notion that harassment is not really a problem because sex is normal in the workplace⁴⁸ and because women lead men on. Tom is lambasted for

51%, say they agree that equal rights have been pushed too far — up from 42% in 1992); and *White Male Fear*, *ECONOMIST*, Jan. 29, 1994, at 34 (discussing this theme in a review of *Disclosure*).

44. The book includes the story of a man accused of child abuse as a result of a recovered memory. His life is destroyed, even though the accusation is never proved. Pp. 216-18. The author concludes, "[We inhabit a] contemporary climate where men were assumed to be guilty of anything they were accused of." P. 218.

45. See MAMET, *supra* note 2.

46. *Id.* at 77.

47. Seven other works of fiction address, in whole or part, the issue of sexual harassment. Of these, three tell the story from a male perspective. See EDWARD ALLEN, *MUSTANG SALLY* (1992); ANNE BERNAYS, *PROFESSOR ROMEO* (1989); JERRY OSTER, *FIXIN' TO DIE* (1992). The latter two involve a man who is "set up" and unfairly accused. Two other works involve sexual harassment as a minor theme. See IRENE ALLEN, *QUAKER WITNESS* (1993); STEVEN SPRUILL, *MY SOUL TO TAKE* (1994).

The mystery by Linda Grant is exceptional in this list. See GRANT, *supra* note 3. It deals with the harassing "pranks" played upon women at a software company in San Francisco. Told from the female perspective, it portrays the fear and humiliation felt by the women involved. It also explores the perceived difference between sexual and racial harassment. Eventually, the harassment escalates into violent pornography sent to female employees with pictures of the employees' faces taped to the pictures. Finally, as in most mysteries, someone is killed. Although the book is not totally believable as a mystery, its discussion of sexual harassment is realistic and perceptive.

The final book, recently released, is BEBE MOORE CAMPBELL, *BROTHERS AND SISTERS* (1994), which deals with sexual harassment in the African-American community.

48. One character — another of Meredith's subordinates who she "came on to" — tells Tom:

"That's all anybody can go out with — the people you work with. That's the only people you get to know. And sometimes those people are your superiors. Big deal. Women screw men and get ahead. Men screw women and get ahead. Everybody's going to

acting like one of those women in all this. The way they always go, "Who, me? I never intended that." The way they go, "Oh, it's not *my* responsibility. I never thought if I got drunk and kissed him and went to his room and lay down on his bed that he'd fuck me. Oh dear me no." [p. 194]

When discussing Tom's response to her sexual advances, Meredith argues that sometimes "no" does not really mean "no" (p. 274). Finally, Tom is told clearly that he should not think of himself as a victim because he is responsible (p. 330). These examples support the idea that most of the time, regardless of what they claim later, women desire and encourage sexual encounters at work.

Although the theme of unfair accusation is standard in literature,⁴⁹ *Disclosure* is the first best-selling work of fiction to bring this theme to sexual harassment. In the realm of legal thought, Susan Estrich has described how the male fear of being unfairly accused of rape has shaped the laws governing rape prosecution.⁵⁰ Further, she has demonstrated convincingly how the fear of unfair accusation has been imported into sexual harassment law.⁵¹ Current sexual harassment doctrine incorporates this fear by misunderstanding how women respond to harassment and by incorporating heightened credibility and proof requirements.

3. Organizing Principle

The author links the above themes with the book's organizing principle: the novel is based on a "true story."⁵² In this way, he

screw everybody else anyway, if they can. Because they want to. I mean, women are just as hot as men. They want it just like we do. That's real life."

P. 309.

49. See, e.g., VICTOR HUGO, *LES MISERABLES* (1862) (involving a man unfairly accused and hunted for stealing food).

50. See SUSAN ESTRICH, *REAL RAPE* 1-7, 42-56 (1987). According to Estrich,

Three centuries ago the English Lord Chief Justice Matthew Hale warned that rape is a charge "easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent." . . .

... [T]he law of rape stands as clear proof of the power and force of a male rape fantasy. The male rape fantasy is a nightmare of being caught in the classic, simple rape. A man engages in sex. Perhaps he's a bit aggressive about it. The woman says no but doesn't fight very much. Finally, she gives in. It's happened like this before, with other women, if not with her. But this time is different: she charges rape. There are no witnesses. It's a contest of credibility, and he is the accused "rapist."

Id. at 5-6.

51. See Susan Estrich, *Sex at Work*, 43 *STAN. L. REV.* 813, 815 (1991); cf. Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction, 93 *COLUM. L. REV.* 374, 445-53 (1993) (discussing the use of these themes in torts of sexual fraud).

52. Crichton uses a number of techniques to present *Disclosure*'s plot as a true story. In an afterword, he declares that he based the novel on an actual incident. He claims to have discussed it with many experts — attorneys, human resource personnel, individual employees, and corporate officials — but "characteristic of the extreme sensitivity [of harassment cases, all] asked to remain anonymous." Additionally, in his prologue, he features the text of

claims legitimacy for his story. It is not just one story but the "true" story. According to Crichton, sexual harassment is not a problem of male domination. Women can and do harass men, and this harassment is no different from its more common counterpart.

Crichton does offer a disclaimer on this point. He writes in his Afterword that the plot is "not intended to deny the fact that the great majority of harassment claims are brought by women against men" (afterword). He goes on to tell us in the Afterword that the advantage of a role-reversal story is that it may enable us to examine aspects concealed by traditional responses and conventional rhetoric. However readers respond to this story, it is important to recognize that the behavior of the two antagonists mirrors each other, like a Rorschach inkblot. The value of a Rorschach test lies in what it tells us about ourselves. [afterword]

Nonetheless, Crichton's most credible character and Tom's advocate, Louise Fernandez, makes the argument that men and women harass equally. Statistically, she says:

About five percent of sexual harassment claims are brought by men against women. It's a relatively small figure. But then, only five percent of corporate supervisors are women. So the figures suggest that women executives harass men in the same proportion as men harass women. And as more women get corporate jobs, the percentage of claims by men is going up.⁵³

In another section of the book, she explains:

From my point of view, it's to be expected. . . . Harassment is about power — the undue exercise of power by a superior over a subordinate. I know there's a fashionable point of view that says women are fundamentally different from men, and that women would never harass an employee. But from where I sit, I've seen it all. . . . That gives me another perspective. Personally, I don't deal much in theory. I have to deal with the facts. And on the basis of facts, I don't see much difference in the behavior of men and women. [pp. 147-48]

A few of the author's less credible characters do want to "deal in theory" with whether there is a difference between women harassing men and men harassing women, but the argument is given short shrift.⁵⁴ As for dealing with the facts, the author's statistics are inaccurate and misleading. For example, Crichton inaccurately

Title VII. His description of Tom's interview with an attorney and her discourse on sexual harassment doctrine are very factual and accurate. Pp. 135-49. His postscript describes the fates of his characters, as if they were real people.

53. P. 268; *see also* pp. 80-81 (discussing another example of a female supervisor harassing a male subordinate).

54. Constance Walsh, a newspaper columnist portrayed as an irrational zealot for women's rights, and Meredith Johnson state that men and women are different with regard to harassment. Pp. 213-14, 275. One of Louise Fernandez's female co-workers tries to present this counterargument, but Fernandez interrupts her and dismisses the argument as equivalent with the stereotypes that "black people have rhythm Asians are workaholics. And Hispanics don't confront" Pp. 150-51.

states that five percent of corporate supervisors are women. According to the Department of Labor, however, forty-two percent of managers, administrators, and executives are women.⁵⁵ His numbers are also misleading because most harassment claims stem from actions of co-workers, rather than supervisors.⁵⁶

In *Disclosure*, the role of race in sexual harassment is nonexistent; all the major characters are white and professional.⁵⁷ The author's treatment of racial issues, though limited, is generally offensive.⁵⁸ Crichton portrays the Malays, for instance, as discriminatory against women (p. 386), discriminatory against Chinese (p. 24), and believing in voodoo and spells (pp. 16, 77, 298-99). His treatment of the two women of color in the book demonstrates how little he understands the intersection of race and gender. When discussing the oppression of women, Crichton does not consider Tom's housekeeper Consuela⁵⁹ to be a woman. He genders Consuela when Tom tells his wife that women are not oppressed. He yells: "You never wash a load of clothes. You never cook a meal. You never sweep a floor. Somebody does all that for you. You have somebody to do everything for you" (p. 105). Presumably, that somebody is Consuela, a woman whom even Crichton might consider oppressed, if he considered her a woman and not just a Latina. Similarly, although Crichton describes Louise Fernandez as a "Hispanic gal" (p. 98), he effectively erases her ethnicity.⁶⁰

55. See Janet Kidd Stewart, *New Rules, Mindset Reflect Rising Harassment Claims*, CHICAGO SUN-TIMES, Feb. 20, 1994, at 23.

56. See, e.g., U.S. MERIT SYS. PROTECTION BD., *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 20* (1988).

57. In reality, sexual harassment is most prevalent among women making less than \$20,000 a year and those in small firms. Diana Kunde, *Full Disclosure: Corporate Thriller Turns the Tables on Harassment*, DALLAS MORNING NEWS, Jan. 30, 1994, at 1H.

58. For discussions of Crichton's portrayal of race in an earlier book, MICHAEL CRICHTON, *RISE* (1992), see Steve Garbarino, 'Rising Sun's' *Rising Flak Astounds Its Author*, NEWSDAY, Feb. 11, 1992, at 50 (stating that the book portrays Japanese as amoral, obsessed with high-tech gadgetry, lacking individuality, attracted to American women and kinky sex, and racist); Christopher Hyde, VANCOUVER SUN, Feb. 29, 1992, at D21 (stating that the book portrays Japanese as sneaky and cowardly, as chasing white women, and as two-faced sycophants); David Mura, *Bashed in the U.S.A.*, N.Y. TIMES, Apr. 29, 1992, at A25 (arguing that the Japanese are portrayed as duplicitous, cruel, and the most racist people on earth); and *Japanophobia: Theydunnit*, ECONOMIST, Feb. 22, 1992, at 86 (noting that although the book makes a disclaimer that it is absurd to blame Japan for its success, the story he tells and the invective and scorn he presents makes the disclaimer ring hollow).

59. I assume that she is a Latina.

60. Tom is confused by her looks because she has "straight blond hair and a handsome, aquiline face;" he thinks she is "certainly not Hispanic." P. 134. After she explains that her father is Cuban (p. 134), her race becomes a nonissue in her character. Constance Walsh, the irrational zealot, characterizes Fernandez as "just another minority woman trying to get ahead with the patriarchy by getting down on her knees." P. 286. Given Crichton's characterization of Walsh, she is not supposed to be believed. The implication seems to be that Cuban is different from Hispanic. Perhaps Hispanic is only meant to refer to Mexicans or Central Americans who are stereotyped differently than the intelligent, hardworking, clear-

Disclosure has already become *the* book on sexual harassment. It has also become *the* movie on sexual harassment. Given the power of these media to shape our attitudes and their accuracy in reflecting the beliefs of many, those who shape and use the law must examine the themes of this novel. Such an examination should reflect more than the white-male perspective, however; it should also take account of women's perspectives on these themes. The next book reviewed, *Bearing Witness*, gives those perspectives.

B. Bearing Witness

1. *Sexual Harassment From the Female Perspective*

Bearing Witness describes, through first-person accounts, the experiences of women facing and responding to harassment. It also attempts to analyze these experiences. The book begins with a chapter entitled "Anita Hill Sparks a Revolution" (pp. 3-33). By grounding the book in the shared national experience of the Anita Hill-Clarence Thomas hearings, Morris recognizes that sexual harassment is often about more than just gender; race can also influence the dynamic.⁶¹ The only reason people could assume that the hearings had nothing to do with race, she explains, is "because white Americans have buried so many stories connected with race and sex in this country that *they have no idea* how we got where we are today. And the stories have been buried in part because they reflect so badly on white men" (p. 9).

She argues that our country's history of race relations, specifically white men's sexual abuse of African-American women during slavery, continues to influence the way white women and African-American women relate to each other (pp. 9-20, 234-37). Although race plays a critical role in understanding sexual harassment of women of color, her analysis recognizes only this one aspect of the dynamic — the difficulty women from different races encounter in understanding and working with each other on issues involving sex. She does not deal with non-Black women of color in her analysis or attempt to discuss other complexities resulting from the intersection

thinking Louise Fernandez. For a discussion of the different stereotypes of various Latino groups, see EARL SHORRIS, *LATINOS* 160 (1992).

61. Other commentators have also looked at the race and gender implications in the hearings. For example, RACE-ING JUSTICE, EN-GENDERING POWER — ESSAYS ON ANITA HILL, CLARENCE THOMAS AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992), and Symposium, *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1279 (1992), deal specifically with the hearings. For discussions of the intersection of race and gender in harassment generally, see CATHARINE A. MACKINNON, *ONLY WORDS* 45-68 (1993), and Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817 (1993).

of race and gender, such as the lower status of women of color or racialized stereotypes of their sexuality.

Narrative chapters portray, in general, three types of harassment:⁶² verbal (pp. 34-57), physical (pp. 58-70), and extortionate (pp. 99-108). Verbal harassment, she argues, diminishes women workers by shrinking them to their sexual parts — like when a supervisor greeted one woman by saying, “Oh good! We’ve got another member of the itty bitty titty club” (p. 35) — or by emphasizing the belief that the most important thing about them is sexual, for instance, when men constantly ask women if they “fool around” (pp. 36-38, 50-53). Sometimes verbal harassment takes the form of a veiled threat — to eliminate a program or to slash a tire — followed by a sexual invitation (pp. 53-55). Always, it is the use of power and authority to demean a woman’s workplace capabilities by concentrating on her bedroom abilities.

Stories of physical harassment include a male doctor entering the office of a female colleague and kissing and licking her ear while she is trying to counsel a suicidal patient on the phone (p. 60); of supervisors pulling women into their laps (pp. 61-62); and of all forms of touching, grabbing, and groping. One particularly powerful story describes a female blue-collar worker who, in her words, was grabbed and kissed “so hard I had a place on my lips where his whiskers dug in”; was chased around the room by a scissors-wielding co-worker trying to cut her hair; and was wrestled down by three co-workers, turned over, and bit on the buttocks “so hard I was bleeding through my jeans” (pp. 139-41). The combination of events and first-person voices creates emotionally gripping reading.

The reading gets even more emotionally difficult in the chapter on extortion, which tells the stories of women who are least able to protect themselves — those made powerless by class and immigration status. In the story of sixteen-year-old, working-class Cleo, the narrator discusses her first job as a hostess in a restaurant. After being challenged to drink shots of vodka, Cleo accepted a ride from Larry, the bartender. Instead of taking her home, he took her to his trailer where he raped her at gunpoint. She continues:

The next day I went to my job, and the boss said, “Larry told me you slept with him. I can’t believe you did that. You’re supposed to

62. Although *Bearing Witness* focuses primarily on workplace harassment, it also discusses sexual harassment in Congress (pp. 154-72), the military (pp. 173-91), and the home (pp. 192-213). Some of the stories deal with harassment of students by professors, and several deal with domestic abuse. The author does this because she

began to make the necessary connections between sexual harassment and other forms of male violence against women. Victims of child abuse . . . were often victimized again at work Furthermore, it made no sense to separate women’s experiences in factories and offices from their experiences at home; wives worked at home, whether or not they held paying jobs

sleep with me!" He acted very betrayed! I was much more frightened of Bill than I was of Larry. . . . [He] said "You're gonna sleep with me tonight, and you're not gonna tell anybody about this. 'Cause you were supposed to sleep with me and not Larry, and you're gonna pay for it. . . ." He said otherwise I'd lose my job and he'd tell my parents. . . .

He'd not only raped me, but he was gonna bypass the law [against sexually abusing a minor] too, since I wasn't gonna tell anybody. They were both so sure of their power that they gambled I wouldn't tell. [pp. 104-06]

Their gamble paid off; Cleo did not tell anyone before Celia Morris.

One of the book's strengths is its inclusion of the voices of women of color and those from the working class. The author includes the experiences of Latinas (pp. 38-43, 60-63, 72-74, 100-04), African-American women (pp. 86-87, 158-60, 167-70, 199-202, 206-11), and Chinese-American women (pp. 129-39), as well as stories from working-class women (pp. 72-74, 78-83, 100-07, 123-28, 139-45, 186-89, 195-99). The women clearly express how their gender, race, and class influence their experience. For instance, one Mexican immigrant housekeeper who was sexually exploited by her employer describes how her own fear of not being believed, the sexualized stereotypes of her race, and the harsh judgment of her community affected her:

In Mexico, when a woman calls the police under the same circumstances, they'll ignore her. If a maid or housekeeper calls the police, the employer will simply pay the police off, and that will be the end of the case. . . .

....

After I reported [my employer] to the police, he said I was crazy and I'd provoked him. He said many bad things about me to the press. He said I was a *typical hot Latin woman*. . . .

....

[Later on,] I found a job in a hotel, and I was fine there. But all the female workers were Mexican, and they didn't want to talk to me because they thought I'd asked for it. They blamed me for what had happened.⁶³

Dr. Jean Y. Jew, a Chinese-American woman, explains how her ethnicity shaped her feelings about fitting in,⁶⁴ led her to her job as

63. Pp. 102-03 (emphasis added); cf. pp. 42-43 (observing that women from Mexico are unable to defend themselves because of their limited English, fear of the system, and fear of men who have power or influence); p. 60 (describing the working conditions that face undocumented female janitors as rife with sexual harassment).

64. She explained that when she grew up in Greenwood, Mississippi, the schools were still segregated, but by then the Asians were allowed to go to the white school. Everyone knew their place according to the color of their skin. So I was used to a society in which my family didn't really belong anywhere; we weren't a part of black society, but we weren't a part of white society either.
P. 129.

a doctor,⁶⁵ and eventually affected the way she reacted to allegations that she was sleeping with her mentor. Regarding the latter, she says, "I can't remember responding. I was terribly embarrassed. *We're talking about sex here*, and I'd been raised in a traditional Chinese family — very straitlaced and conservative — where we didn't talk about those things. Moreover, in the South, we'd been taught that nice people didn't talk about such things" (p. 131). Her ethnicity also affected the things others said about her.⁶⁶

Several African-American women give accounts of how the combination of race and gender placed them further down on the power hierarchy than other women. One journalist was shocked when a man grabbed her around the thighs and pulled her into his lap at a party in Washington, D.C. (pp. 167-68). After the incident was disclosed, she was amazed that there were no repercussions against the man. She states:

[N]obody was acknowledging it. And I had to wonder if it was simply because I'm black and he was a powerful white man. You always wonder when that's a part of your life.

....

... The only reason color or gender matters is that those things make it easier to deny other people's humanity, and that dismissive impulse needs to be squashed. [pp. 169-70]

Another woman laments, "So many of the men I got involved with made me think I just had to accept the realities of life: I had to accept the lower status of women, and of black women, and of me. In that order."⁶⁷

The stories in *Bearing Witness* also focus on how women respond to harassment. Readers hear women explain in their own words why they put up with harassment (pp. 71-84), how they fell into the trap of thinking that going along with the harassment would make their jobs more secure (pp. 85-98), and what happened when they blew the whistle on the harasser (pp. 109-53). These sto-

65. Dr. Jew comments:

Many of my parents' Chinese friends would tell them it was a waste to spend money to educate a daughter because you wanted her to get married and to have children. They'd say that if girls got too educated, it would be harder for them to find husbands. My parents didn't buy into that for their daughters, and they'd talk to me about being a doctor.

P. 130.

66. Her dean received anonymous letters referring to her as "Chinese pussy." P. 134. A witness assumed that Dr. Jew was the unidentified woman the co-worker saw having sex on a table in the departmental library because of "the color of [the woman's] legs." P. 137. Martha Chamallas discusses Dr. Jew's case in detail in Martha Chamallas, *Jean Jew's Case: Resisting Sexual Harassment in the Academy*, 6 YALE J.L. & FEMINISM 71 (1994). Chamallas discusses the role of race throughout the article. See, e.g., *id.* at 84-86.

67. P. 87; cf. p. 160 ("I've always maintained that I've suffered more from sexism than from racism. You're subjected to racism from white people. You're subjected to sexism from black people and white people. I've never found that black men are any less abusive than white men.").

ries bring home a clear lesson — that women lose when they are victims of harassment. Most of the women, whether they reported the harassment or went along with it, ended up losing their jobs or other opportunities.⁶⁸ Dr. Francis Conley,⁶⁹ who threatened to resign her position at Stanford rather than see a harasser appointed as chairman of the department, reflects on her experience by saying, “I still think that what I did will ultimately be a career-ending move. I will *not* advance further; I will *not* be an attractive candidate for positions at other academic institutions — *ever*” (p. 115). Although women suffer the consequences of harassment, the stories show that men expect that they will not be held accountable for their behavior; and, by and large, they are right.⁷⁰

Morris tries to explain how our society developed into one in which men harass women (pp. 214-31). To do this, Morris focuses on classic Western literature that developed stories of powerless women forgiving men for their domination. She uses this approach because of her belief in the power of stories to shape attitudes.⁷¹ She uses her narrative methodology to show how women as a group are responding to harassment⁷² and the shape this response must take to be effective (pp. 296, 232). The author borrows a slogan from a group of Zimbabwean women who attended the 1993 United Nations Conference on Human Rights: “United we bargain; Divided we beg” (p. 232). Using stories and analysis, Morris explains why women sometimes do not support each other.⁷³ She concludes with her central theme that women must engage in truth-telling and bear witness (pp. 295-306).

2. Bearing Witness and Legal Storytelling

Without ever explicitly discussing the debate in legal scholarship surrounding storytelling, Celia Morris becomes an effective example of both purposes of narrative jurisprudence. In structuring her argument about the importance and prevalence of sexual harassment around first-person accounts of harassment, she uses the

68. P. 152 (summarizing the job effects and physical effects on the victims).

69. At the time of the events she describes, Dr. Conley was the world's only female tenured full professor of neurosurgery. Pp. 113-14.

70. See, e.g., pp. 104-07.

71. This methodology is not as effective as her narrative methodology because it lacks rigor. It succeeds in highlighting sexism in stories, but she needs more analysis to show these stories as a significant cause of harassment.

72. Pp. 256-94 (noting that women respond through writing; working on political and social issues such as abortion, rape, and battered women; and participating in electoral campaigns).

73. Pp. 232-54. She raises again the history of sexual abuse of slave women to explain why white women and black women often do not support each other. Pp. 234-37. She also illustrates how women attack each other as a defense mechanism to show that they would have handled the situation better. Pp. 238-42.

strength of the narratives as counterstories to illustrate and bolster her argument that women's stories must be told in order for the substance of the stories to become part of the national agenda. In discussing the importance of literature in promoting harassment, she displays the ability of storytelling to shape power relationships between men and women.

The collection of interviews also serves some of the best communicative and educational purposes of narrative jurisprudence: voices of outsiders, compelling in their authenticity, convince us of the harm done by sexual harassment, as well as how little women like it or invite it. The volume and details of the stories convince the reader that the problem of sexual harassment, in whatever form it takes, is widespread. The interviews also help us to understand women's responses to sexual harassment.⁷⁴ In addition, it is refreshing and important to hear the voices of women of color and women from different classes describing how these factors affected the harassment and their reactions.⁷⁵ Thus, these stories form the main contribution made by *Bearing Witness*.⁷⁶ Although the narratives show the importance of race, class, and ethnicity in how these women experience "sexual harassment," Morris's *analysis* never discusses, explains, or even mentions the importance of these factors.

II. THE PRACTICE OF SEXUAL HARASSMENT LAW: WOMEN'S RESPONSE

Formally, in order to state a claim of sexual harassment, a woman must establish (i) that she is a member of a protected class; (ii) that she was subjected to harassment because of her gender; (iii) that the harassment was sufficiently severe to alter her conditions of employment *or* that a tangible aspect of her employment was conditioned upon her response to sexual requests or advances; and (iv) that the harassment was unwelcome.⁷⁷ In practice, the litigation fo-

74. How important it is that the legal system understand these issues, and the harm done when the law misunderstands them, forms the legal analysis found in Part II of this review.

75. Part III of this review discusses the importance of their voices in understanding the nature of sexual harassment.

76. Interestingly, the narratives are not as helpful when Morris uses them to describe the causes of sexual harassment and prescriptions for women to overcome the problem. For me, these narratives do not succeed because they seem mismatched with the issue she is addressing and do not have the same authenticity. They show that all narratives are not inherently good. There are successful narratives and unsuccessful narratives, just as there are successful and unsuccessful traditional law review articles. For possible ways to evaluate narratives, see Abrams, *supra* note 7, at 1020-42; Baron, *supra* note 8, at 271-85; Farber & Sherry, *supra* note 11, at 831-54. *But see* Delgado, *supra* note 15, at 676 (arguing that the "better approach [is] to postpone efforts to evaluate [narrative or other] new scholarly movements" and to "nurture" them instead).

77. 1 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 5.4, at 486 (1994).

cuses to a large extent on the woman's response to the harassment. She is expected to respond and attempt to end the harassment — promptly and forcefully. If she does not, she will often be unable to prevail on her claim because of the damage to her credibility or her inability to demonstrate that the harassment was unwelcome. This Part examines how current doctrine has been constructed to demand this response. It then discusses how *Disclosure* and *Bearing Witness* show that requiring this response ignores the reality of how women respond to harassment and why they respond that way.

A. Current Doctrine: A Prompt and Forceful Response

Sexual harassment doctrine currently requires a woman to respond actively to harassment in two ways. First, if a woman does not respond by reporting the harassment to someone, her credibility is often undermined. Second, if she does not respond by clearly telling the man to stop, she will not be able to meet the “unwelcomeness” requirement of the sexual harassment doctrine. Perhaps not surprisingly, *Disclosure* reflects and reinforces the assumptions underlying these requirements. *Disclosure* is based on a lying woman who should not be believed and deals extensively with the theme of unfair accusation.⁷⁸ Further, it argues that women often welcome sexual attention in the workplace, crying “harassment” only when things do not work out or because they do not want to take responsibility for their actions.⁷⁹ Current doctrine incorporates these themes in several ways.

As in *Disclosure*, a sexual harassment lawsuit often turns on the credibility of the parties involved.⁸⁰ Because of the fear of false accusation captured so well by Crichton,⁸¹ a woman may be required to file a report of sexual harassment promptly in order to be believed.⁸² Both the Equal Employment Opportunity Commission

78. See *supra* notes 44-47 and accompanying text.

79. See *supra* note 48 and accompanying text.

80. See Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definition*, 13 HARV. WOMEN'S L.J. 35, 69 (1990) (arguing that women are not trusted in hostile-work-environment sexual harassment cases). Most plaintiffs are not lucky enough to discover that the harassment was inadvertently tape recorded as it was in *Disclosure*. See *supra* note 33.

81. See *supra* notes 44-47 and accompanying text. According to social-science research, the fear of false complaints is epidemic and often the reason that institutions resist the implementation of sexual harassment policies and procedures. Claire Robertson et al., *Campus Harassment: Sexual Harassment Policies and Procedures at Institutions of Higher Learning*, 13 SIGNS 792, 800 (1988).

82. See Estrich, *supra* note 51, at 847-53; Pollack, *supra* note 80, at 76.

(EEOC)⁸³ and the courts⁸⁴ have found that a contemporaneous complaint may be required to establish the credibility of the plaintiff.

Contrary to this requirement, research shows that people need not fear false reports. One study found that although people are very sensitive to the possibility of false reports, less than one percent of all sexual harassment complaints each year are false.⁸⁵ Other survey and anecdotal evidence also supports this conclusion.⁸⁶ Indeed, given the difficulties women faced when they filed complaints, few women would choose to expose themselves to these problems unless their claims were valid.⁸⁷

According to the U.S. Supreme Court, "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"⁸⁸ In order to prevail in a sexual harassment lawsuit, the plaintiff has the burden of proving the unwelcomeness element of her harassment claim.⁸⁹ In order to carry this burden, the EEOC and many courts have said that the plaintiff has an affirmative duty to communicate that the conduct is unwelcome; further, they will look for objective evidence that the woman actually informed the harasser that the conduct was unwelcome.⁹⁰ Because of these requirements, women must respond to harassment — quickly and firmly.

The EEOC has explicitly stated that the unwelcomeness requirement is necessary to "ensure that sexual harassment charges do not become a tool by which one party to a consensual relation-

83. The Equal Employment Opportunity Commission is the agency responsible for enforcing Title VII. One guidance memorandum states that a contemporaneous complaint can affect credibility and insists that where a complaint is not made, the investigation must ascertain the reason for nonreport. See Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 511 (1994) (citing *Policy Guidance on Current Issues of Sexual Harassment*, EEOC Notice N-915-050, at 8 (Mar. 19, 1990)).

84. See, e.g., Estrich, *supra* note 51, at 851 n.151; Radford, *supra* note 83, at 518-19.

85. Robertson et al., *supra* note 81, at 800.

86. See Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1227, 1275 n.236 (1994); Ronni Sandroff, *Sexual Harassment in the Fortune 500*, WORKING WOMAN, Dec. 1988, at 69, 70-71.

87. See *infra* notes 96-101 and accompanying text; see also CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 97 (1979) (noting that women who file complaints feel humiliated and intimidated, become the targets of ridicule and reprisals, and expend large amounts of time, money, and energy.).

88. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

89. See, e.g., Radford, *supra* note 83, at 519 ("All circuits except one follow this approach."); see also Estrich, *supra* note 51, at 826-34 (criticizing the unwelcomeness requirement); cf. Ann C. Juliano, Note, *Did She Ask For It? The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558, 1574-92 (1992) (arguing for the reform of current tests for unwelcomeness).

90. Radford, *supra* note 83, at 511-13, 518-20.

ship may punish the other."⁹¹ The same themes that occupied Crichton clearly concern the EEOC: the fear of false accusations and of women who really want sex but do not want to accept the responsibility. Contrary to these views, most women do not welcome or desire sexual relationships in the workplace.⁹² Additionally, the unwelcomeness requirement duplicates the other requirements of sexual harassment doctrine — that an employee must bargain sex for economic gain or experience harassment that is so severe that it alters an employment condition — because neither of these situations should ever be viewed as welcome.⁹³

B. *Current Reality: Understanding Women's Nonresponse*⁹⁴

Current doctrine assumes that women do not report or try to stop harassment either because the harassment never in fact occurred or because they welcome the attention. Despite their flaws, *Disclosure* and *Bearing Witness* demonstrate other reasons why women do not respond to the harassment in the way the law demands.⁹⁵

Like Anita Hill, many women who report harassment are viciously attacked as a result of and in retribution for filing their claim.⁹⁶ Women may choose not to report harassment because they fear that the response to their complaint may be even worse than the problem. Interestingly, despite its gender-bending scenario, *Disclosure* accurately captures the typical response to someone who has alleged harassment — Tom is ostracized (pp. 193-94, 215), sent threatening and obscene electronic mail (pp. 297-98), patronized (pp. 263, 294), and disbelieved.⁹⁷ In *Bearing Witness*, the women

91. Juliano, *supra* note 89, at 1575 (quoting Brief for the EEOC at 15, *Meritor* 477 U.S. at 57 (No. 84-1979)).

92. Radford, *supra* note 83, at 522 & n.147.

93. See Estrich, *supra* note 51, at 831-32 (arguing that because quid pro quo requires a connection between response to sexual advances and job benefit or loss, it is startling to suggest that such a bargain could be welcome); *Id.* at 833 (arguing that for hostile-environment claims, the requirement of "objectivity" makes the unwelcomeness requirement "either utterly gratuitous or gratuitously punitive").

94. This section focuses on the reasons for nonresponse discussed in *Disclosure* and *Bearing Witness*. Women of color have unique reasons for nonresponse that are not explicitly dealt with in the books. See Ontiveros, *supra* note 61, at 821-24 (noting that women of color are not as likely to respond forcefully because of cultural values, feelings of self-blame, lack of understanding of legal rights, and fear of portraying their community in a poor light). Some of these ideas can be seen in Morris's transcription of the stories of Janet Turner and Jean Jew, but Morris does not highlight or discuss them. Pp. 86-87, 129-39.

95. Similar stereotypes found in rape cases were addressed effectively by former California Chief Justice Rose Bird in *People v. Barnes*, 721 P.2d 110 (Cal. 1986).

96. Morris discusses this at pp. 21-23.

97. Pp. 213-14; see also Kunde, *supra* note 57. On the other hand, the outcome of Tom's claims is completely unrealistic and unique because, unlike in most harassment cases, he has corroborating evidence in the form of a tape recording, the company feels compelled to re-

who report harassment suffer severe physical⁹⁸ and emotional problems⁹⁹ as a result of the way their employers and co-workers respond to their complaints. In one instance, the co-workers' response was so threatening and humiliating that it drove the complainant to attempt suicide (p. 144). Social-science studies report that women who take formal action against harassment experience greater physical and emotional problems than women who do not take such action.¹⁰⁰ In addition, women who report harassment often face discipline and other career problems (pp. 115, 142-44). Finally, their sexuality is often attacked (pp. 131-33), and they sometimes face physical threats.¹⁰¹

In addition to those women who are deterred from filing claims by the gauntlet they must face, many do not report harassment or leave their jobs after being harassed at work for other reasons. For some, they simply need the job (pp. 79-81). Others may realize that they are unlikely to find any job where men will not harass them.¹⁰² Some assume that harassment is a natural part of the workplace, that they have no choice but to put up with it, or even that men have the right to harass them (pp. 74-76, 82). Contrary to the assumptions of the legal system, in none of these cases do the women welcome the conduct, and in all of them the harassment is very real. The narratives of *Bearing Witness* and Crichton's portrayal of the reaction Tom encounters when he brings a charge show us the inaccuracies of the current legal approach and help us to understand the victims' experiences.

III. THE THEORY OF SEXUAL HARASSMENT LAW: THE NATURE OF HARASSMENT

One of the most provocative things about *Disclosure* is the choice of the victim's sex. Crichton suggests that men can and do become victims of harassment. This Part explores the role of gender in sexual harassment doctrine and theory. The first section discusses the current approaches of gender-neutrality and gender-

solve the dispute quickly and quietly because of a pending merger, and — perhaps most fantastically — the whole thing is resolved in three days.

98. P. 114 (weight loss); p. 136 (eczema).

99. P. 128 (relating that one woman cried for two or three days); p. 136 (stating that a woman reporting harassment suffered depression from her "ordeal"); pp. 119-22 (describing how one woman's decision to report harassment spurred psychological problems that led to revelations of childhood incest and alienated her from her parents).

100. Jan Salisbury et al., *Counseling Victims of Sexual Harassment*, 23 *PSYCHOTHERAPY* 316, 319-20 (1986).

101. P. 128 (noting that one woman's lawyer's tires were slashed and her windows shot out).

102. See, e.g., pp. 74-76 (relating the story of a woman who was harassed at a series of jobs, as a waitress, in a skating rink, and as an aerobics instructor).

centrality. Then, the second section argues for the development of an alternative approach to analyzing harassment that considers issues of race and class.

A. Current Approaches to Sexual Harassment Law

In legal thought, there have traditionally been two approaches to defining the nature of harassment. The first approach holds that the sex of the harasser does not matter. Sexual harassment is a form of sex discrimination that can be practiced against both men and women. In other words, sexual harassment is illegal whenever the victim is disadvantaged because of his or her gender. Title VII law currently embodies this gender-neutral approach, allowing either men or women to bring a sexual harassment claim based on differential treatment. As Susan Estrich summarized:

[I]f a woman is being sexually harassed . . . because she is a woman, then she is suffering from gender discrimination. When conditions are imposed on a person that would not be imposed but for her being a woman, that is sex discrimination regardless of the nature of the offensive conditions. If the boss harasses everyone . . . he may well be a philanderer [and] a terrible person . . . but he would not be engaging in sex discrimination.¹⁰³

This same approach is illustrated in *Disclosure*, when Crichton argues that sexual harassment is about power and quotes Katharine Graham's statement that "[p]ower is neither male nor female."¹⁰⁴

Yet even in *Disclosure*, Tom reacts to and perceives the harassment differently than a woman might. During the harassment, Tom is not concerned about his physical safety or about being raped. Later, Tom acknowledges that the fear of rape is something men cannot understand.¹⁰⁵ During the sexual encounter, Tom's primary response is anger, not because of fear for his job, but because Meredith is the one in control, not him (p. 93). His other concern is that she is not sufficiently excited or involved. Tom confesses to Fernandez that he did not want to consummate the sexual encounter because Meredith "coughed, and that was why I stopped. She wasn't involved, and I was very — angry about it, I guess" (p. 337). Compared with the female responses to episodes of harassment described by Morris,¹⁰⁶ Tom's concerns take on a surreal air.

The second school of legal thought with regard to the nature of harassment acknowledges that harassment of women is different

103. Estrich, *supra* note 51, at 819.

104. Preamble; see *supra* note 21; cf. *supra* notes 52-55 and accompanying text.

105. P. 215. He equates women's fear of rape with the fear of accusation that only men feel. *Id.*

106. P. 84 (discussing sexual harassment's effect on women); *supra* notes 97-100 (discussing the effects on women of reporting sexual harassment).

from harassment of men. In this gender-centered school of thought, the difference is traceable to the power differential between men and women in society, the *sexual* nature of harassment, and the role that sex and sexuality play in that power differential. As Estrich explains, the gender-neutral Title VII approach to sexual harassment

ignores the "sexual" aspect of sexual harassment and the unique meaning of such harassment in a male-female context. . . . We treat the issue of sexuality, and the special nature of sexual coercion, as entirely beside the point: The sole issue becomes whether the coercion, whatever form it takes, would have been imposed on a man. . . . [I]n our society, the meaning of this behavior inevitably differs if the person being patted is a woman. What makes sexual harassment more offensive, more debilitating, and more dehumanizing to its victims than other forms of discrimination is precisely the fact that it is sexual. . . . In my view, these cases are such a disaster in doctrinal terms precisely because, as with rape, they involve sex and sexuality. And yet however clear all that might be, the argument for treating these cases as violations of Title VII begins from the premise that the sexuality which lies at their core is legally invisible: They are simply cases of differential treatment based on gender.¹⁰⁷

According to the gender-centered perspective, an understanding of sexual harassment turns on recognizing the differences between being a man and being a woman in our society.

Celia Morris seems to subscribe to this school of thought. Her analysis of the causes of sexual harassment centers on the dominant-subordinate relationship of men and women in a variety of circumstances.¹⁰⁸ Further, she believes that all women, regardless of race, can unite in understanding sexual harassment as a *women's* problem. Although race, in her view, does make it more difficult for women to relate to one another, it does not affect the definition and central experience of harassment. She writes:

As the [Thomas-Hill] hearings progressed, then, women drew closer to one another, although the politics [of race] between and among them remained complex. . . .

In the end, however, many women like me — brown, yellow, black, and white — experienced what Edmund Wilson called "the shock of recognition" and admitted openly that men could be very dangerous to our health. And with years of experience behind us in reaching across the barriers of color, [we] talked to one another. Angry women all over the country began talking to other angry women. [p. 30]

107. Estrich, *supra* note 51, at 819-20.

108. See p. 32 (arguing that sexual harassment is linked to other forms of male violence against women); pp. 214-31 (discussing the perpetuating role of literature featuring powerless women forgiving men for their domination).

In her view, sexual harassment is clearly a women's issue. It is defined by exploitation and domination of women through the use of sex and sexuality. She simply does not seem open to the possibility that a woman could harass a man.

B. *Toward an Alternate Theory of Sexual Harassment*

It seems to me that neither of these approaches captures the nature of sexual harassment. The former school of thought wrongly ignores gender and sexuality; the latter school inaccurately argues that the problem is only about gender and sexuality. Legal scholars have begun to examine the effect that race, sexual orientation, and class have on sexual harassment.¹⁰⁹ The voices of color captured by Morris make clear, for example, that their harassment was also about race. As the voices of the Mexican-immigrant housekeeper, Dr. Jean Jew, and the African-American journalist explain, their race affected their being chosen as the target for harassment, it affected the statements made by the harassers, and it affected their own ability to respond.¹¹⁰ Because these factors play such an important role, it is inaccurate to describe the dynamic as just about gender.

In her recent book *Only Words*,¹¹¹ Catharine MacKinnon addresses this issue. Her analysis is important because she is probably the most extreme proponent of the gender-centered view of sexual harassment. She argues that sex and sexuality are the defining characteristics of sexual harassment. Although she concedes that harassment based on race and harassment based on gender are often inseparable¹¹² and that much of sexual harassment is expressly racist,¹¹³ she ultimately concludes that the essence of sexual harassment is based on sexuality.¹¹⁴ She reaches this conclusion by drawing a distinction between harassment that is sexual and therefore a sex act, and asexual harassment based on race, gender, or

109. See sources cited in Martha Chamallas, *Writing about Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN'S L.J. 37, 52-56 nn.62-80 (1993); see also *supra* note 61 and accompanying text; cf. Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994); Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 137-42 (1992); Martha R. Mahoney, *Whiteness and Women, In Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217, 231 (1993); Ontiveros, *supra* note 61.

110. See *supra* notes 63-66 and accompanying text; cf. Ontiveros, *supra* note 61, at 824-27 (arguing that race also affects courts' evaluation of the harassment incident).

111. MACKINNON, *supra* note 61.

112. *Id.* at 56.

113. *Id.* at 57.

114. For example, MacKinnon states, "In the Thomas-Hill hearings, and in the social upheaval surrounding them, race and gender were discussed, revealing many questionable social attitudes. But sex, with all its racial dimensions, was what was done." *Id.* at 67.

both, that is essentially speech and not necessarily an illegal act.¹¹⁵ She argues that harassment based purely on sexuality "manipulates the perpetrator's socialized body relatively primitively and directly, as pornography does."¹¹⁶

She then distinguishes racial harassment from sexual harassment because "[n]othing analogous to the sexual response has been located as the mechanism of racism, or as the mechanism of response to sexist material that is not sexual."¹¹⁷ When looking at the dynamics of racism, she suggests that

[p]erhaps sexuality is a dynamic in racism and ethnic prejudice as well as in gender bias. Upon examination, much racist behavior is sexual. Consider the pure enjoyment of dominance that makes power its own reward, reports of the look of pleasure on the face of racist torturers, accounts of the adrenalin high of hatred and excitement that survivors of lynchings describe having seen, the sexual atrocities always involved. Recall the elaborate use of race, ethnicity, and religion for sexual excitement in pornography and in much racist harassment. Remember the racially coded sex and marriage taboos Once the benefits and functions of much racial murder, torture, hatred, and dominance, perhaps even economic supremacy, are exposed as sexual, its rationalizations as natural, converging with gender on the ideological level, what of racism is left to explain? Something, but what?¹¹⁸

She ultimately concludes that all sexual harassment is, by definition, about sex and sexuality. The racial aspects, when they involve sex, are simply a subset of sexual harassment. When they do not involve sex, they are irrelevant to the *act* of sexual harassment.

While some of what she has to say is appealing,¹¹⁹ she falls into the trap of demanding that harassment of women of color must be categorized as sexual harassment before it can become actionable. She demands that racism be defined by sexism before it is prohibited harassment. She insists on defining the experience as one or the other, making sexism preeminent. In doing so, she inadequately addresses research on the unconscious nature of racism¹²⁰

115. *Id.* at 56. MacKinnon makes the distinction between sexual harassment as an illegal sex act and asexual harassment as speech because she wrote her book to distinguish illegal sex-based speech — such as sexual harassment and pornography — from free speech protected by the First Amendment. *See generally id.*

116. *Id.* at 61.

117. *Id.* at 62.

118. *Id.* at 63-64.

119. The observation that "attempts to defend regulation of racial harassment in education on the basis of sexual precedents have not been persuasive, yet decisions invalidating racial harassment codes threaten to take sexual harassment regulations down with them," is particularly insightful. *Id.* at 55. Her discussion of the sexuality inherent in much racism is also very interesting. *Id.* at 63-64.

120. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

and the concrete harm of racist speech.¹²¹ These gaps are crucial because these are the very factors that she uses to distinguish and privilege harassment based on sexuality over harassment based on race. Unconscious racism works as a mechanism like the sexual response, and the personal, internalized harm caused by racial harassment mirrors the harm MacKinnon describes as attributable to sexual harassment.

MacKinnon's conclusion also defies the experiences of women of color that harassment is not just, or even necessarily primarily, about sex. MacKinnon's own description of sexuality as a dynamic in racism and ethnic prejudice recognizes the inseparability in theory. Morris's voices of color emphasize the same in practice. Although Title VII prohibits discrimination based on certain fixed categories, a person will always fit into at least two of these categories, by virtue of her race and gender. In addition, the harasser perceives his target as more than a single Title VII label.¹²² A growing body of legal scholarship argues that accurate definitions of harassment and discrimination ought to be based on categories that are tentative, relational, and unstable — not fixed and rigid.¹²³ People define themselves by more than one label — they have multiple consciousness. Discrimination is about power and domination, but power and domination exercised against women is generally not solely about gender and sexuality.¹²⁴

This does not mean that the Title VII gender-neutral construction of harassment — that women harass men and do so in the same way that men harass women — is correct either. The power and domination that form the basis of harassment and define its effects depend on the relative placement of men and women, and of various races and classes, in society's hierarchy. As Susan Estrich convincingly argues,¹²⁵ gender and sexuality are important, but they are not the only things that are important. Thus, neither current approach is accurate. Although authors advocating the new, alter-

121. See, e.g., Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

122. For example, Morris recounts that harassers viewed Dr. Jean Jew as a "Chinese pussy" (pp. 102-03) and the immigrant housekeeper as a "hot Latin woman" (p. 134); see also *supra* notes 63, 66.

123. See, e.g., Martha Chamallas, *supra* note 109; Trina Grillo & Stephanie Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. RPTR. 7 (1989).

124. Martha R. Mahoney, *supra* note 109, at 217.

125. See *supra* note 107 and accompanying text.

nate approach of flexible categories and multiple consciousness have not yet been able to offer a definitive answer regarding the nature of sexual harassment — taking into account issues of class, race, ethnicity, sexual orientation, and disability — scholarship in the area is still new. Perhaps there is no need to rush to find *the* answer or to criticize the lack of an answer.¹²⁶ Scholars must continue to develop the notions of flexible categories and multiple consciousness before they, and the legal system, can truly understand the nature of sexual harassment. Unfortunately, because of their different but equally one-dimensional perspectives, neither Celia Morris nor Michael Crichton contribute much to this advancement.

CONCLUSION

“In other words, what stories do, stories can undo.”¹²⁷

Disclosure, a poorly written, improbable thriller, has become a runaway bestseller. It is *the* book on sexual harassment. Its themes appeal to those who fear women becoming successful in the workplace and exposing men's domination, discrimination, and harassment. Unfortunately, the doctrine of sexual harassment law reflects these themes as well. *Bearing Witness*, which tells the real-life stories of harassment victims, provides a dramatic, nonfiction counterpoint that exposes the inaccuracies in the current approach of the law and in *Disclosure*. These are the stories that must be told — in popular fiction, literature, law reviews, and legislatures — to transform law and society.

126. Delgado, *supra* note 15, at 676.

127. Baron, *supra* note 8, at 267.