

Of Trauma and Power: Celebrity Sexual Misconduct Tribunals

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Abstract

In fall 2018, shortly after his nomination to the United States Supreme Court, Judge Brett Kavanaugh was accused of sexual assault. That same year, Professor Avital Ronell was the subject of a Title IX investigation at New York University (NYU), where she served as chair of the Department of German. Both were harshly scrutinized in the court of public opinion. Within several months of each other, these two individuals, at the peak of their prolific careers, were investigated for sexual misconduct by non-judicial tribunals that would determine their fate. Both scandals appeared in the midst of the #MeToo era, during which two assumptions about sexual misconduct have crystalized. First, it is often presumed that sexual misconduct causes trauma in the abused. Second, power imbalances in the workplace are understood as the context for sexual misconduct. This essay examines how these two trajectories interacted in the Kavanaugh and Ronell tribunals.

I. Introduction

His name is Brett Kavanaugh. Hers is Avital Ronell. He identifies as straight, white, and Christian; she as queer and Jewish. He is a federal judge. She is an academic. In the fall of 2018, shortly after being nominated to the United States Supreme Court, he was accused of a sexual assault. That same year, she was the subject of a Title IX investigation at New York University (NYU), where she served as chair of the Department of German.¹ His accuser is a woman from his high-school past. Her accuser is a male former graduate student. His tribunal was the United States Senate Judiciary Committee; hers, the Title IX office at NYU. Both were harshly scrutinized in the court of public opinion, yet his hearings were public and televised; hers were private and confidential. Within several months of each other, these two individuals, at the peak of their prolific careers, were suddenly investigated for sexual misconduct by non-judicial tribunals that would determine their fate. Both denied the allegations. He was “exonerated.” She was not.²

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¹ Ronell served for nine years as chair of the German Department and as director of Trauma and Violence: Transdisciplinary Studies at NYU.

² The Title IX Committee found her not liable for many of the accusations and liable for sexual harassment. Avital Ronell was suspended from NYU without pay for the 2018-19 academic year. See Colleen Flaherty, Feminist Philosopher Suspended for Sexual Harassment, *Inside Higher Ed*, Aug. 14, 2018 (<https://www.insidehighered.com/quicktakes/2018/08/14/feminist-philosopher-suspended-sexual-harassment>); Jemima McEvoy et al., NYU Professor and Feminist Scholar Found Responsible for Inappropriate Physical Contact, Sexual Texting, *Washington Square News*, Aug. 13, 2018 (<https://www.nyunews.com/2018/08/13/08-13-ronell-accusations>).

In the fall of 2017, several women accused Harvey Weinstein of sexual violence and #MeToo went viral on social media.³ The public response to Harvey Weinstein was fueled by disgust and rage at the fact that a “harasser-in-chief”⁴ had become president of the United States.⁵ Since then, many men have been accused of, and made accountable for, sexual misconduct.⁶ Brett Kavanaugh and Avital Ronell’s sex scandals appeared in the midst of high social alertness about sexual misconduct, male supremacy, and power abuses in the workplace.

Several feminist theorists have long emphasized abuses of power in the workplace;⁷ the #MeToo moment was a broader public reckoning with this injustice. In the college and university context, major Title IX reform began several years earlier. In 2011, the Obama administration instructed universities and colleges that their institutional obligations guaranteeing gender equality under Title IX reached further than most had assumed.⁸ Within several years, under financial pressure from the federal government, colleges and universities made sweeping changes to their Title IX regulations and policies. They established new Title IX offices and appointed special officers to solicit complaints, investigate, address, and adjudicate sexual misconduct claims. Among other changes, the level of proof that accusers had to establish was lowered to the “preponderance of the evidence” standard. Many colleges and universities have developed policies requiring

³ #MeToo did not begin in the fall of 2017, but as a social movement it has amplified exponentially since that time. See Abby Ohlweiser, *The Woman Behind “Me Too” Knew the Power of the Phrase When She Created It—10 Years Ago*, Wash. Post, Oct. 19, 2017 (<https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/>).

⁴ Kaitlyn Locke, *Gloria Steinem Calls Trump the “Sexual Harasser in Chief,”* Boston Globe, Dec. 7, 2017 (<https://www.bostonglobe.com/metro/2017/12/06/gloria-steinem-calls-trump-sexual-harasser-chief/pN1Te6RN1KN8nz7Wbk2QeL/story.html>).

⁵ Barbara Stark, *Mr. Trump’s Contribution to Women’s Human Rights*, 24 ILSA J. Int’l & Comp. L. 317 (2018); *In The Wake of Harvey Weinstein Scandal, Women Say #MeToo*, Nat’l Pub. Radio, Oct. 16, 2017 (<https://www.npr.org/2017/10/16/558165331/in-the-wake-of-harvey-weinstein-scandal-women-say-me-too>); Julie Miller, *This Changes Everything: Why Trump Is Responsible for Weinstein’s Downfall and Time’s Up*, Vanity Fair, Sept. 9, 2018 (<https://www.vanityfair.com/hollywood/2018/09/this-changes-everything-toronto-film-festival-documentary-weinstein-trump-me-too>).

⁶ Samantha Cooney, *Here Are All the Public Figures Who’ve Been Accused of Sexual Misconduct After Harvey Weinstein*, Time, Oct. 4, 2018 (<http://time.com/5015204/harvey-weinstein-scandal/>) (listing over 140 “prominent public figures”); Dan Corey, *A Growing List of Men Accused of Sexual Misconduct since Weinstein*, NBC News Digital, Nov. 8, 2017 (<https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546>) (listing numerous “high-profile men who have been accused of sexual harassment, assault, or both in the wake of the Weinstein scandal”).

⁷ See, e.g., Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979); Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (2006) (discussing the legal reforms led by what Halley calls “governance feminism”); Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (1989); Noa Ben-Asher, *How Is Sex Harassment Discriminatory?*, 94 Notre Dame L. Rev. Online 25 (2018).

⁸ Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to all public colleges and universities, Apr. 4, 2011 (<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>).

“affirmative consent.” Sexuality on college and university campuses is now regulated in entirely new ways.⁹ When the complaint against Avital Ronell was filed in 2017, these new rules and procedures were well in place.¹⁰

By the fall of 2017 two assumptions about sexual misconduct had emerged, one involving trauma and the other involving abuse of power.¹¹ First, it is often presumed that sexual misconduct (ranging from sexual harassment to assault or rape) commonly causes trauma. That is, in popular narratives generated by sources such as the press, television, film and legal tribunals, the emotional trauma of survivors appears as the primary injury of sexual misconduct. Second, power imbalances in the workplace, in colleges and universities, and in private domains, are often associated with sexual misconduct, making certain sexual interactions morally problematic.¹² It should come as no surprise that such narratives about trauma and abuse of power are especially appealing in our times, when aggressive and narcissistic men such as Donald Trump are unapologetically abusing whoever crosses their path (man or woman). Trump and the version of white power and masculinity that he represents provide the perfect setting for feminist, Marxist-influenced theories of trauma and power abuse. This essay examines how these two trajectories interacted in the Kavanaugh and Ronell tribunals.

II. Trauma: The Public Tribunal of Brett Kavanaugh

A. *The Complaint: A Traumatizing Assault*

Let me clarify the purpose of my analysis. The goal here is not to adjudicate the veracity of Dr. Christine Blasey Ford or her testimony. What is interesting about this testimony and its reception by the public is the discursive, political, and sexual power of trauma in our times. The question is not whether or not we believe Dr. Blasey Ford (I do); it is how cultural and scientific ideas about trauma have come to shape how we think and regulate sexual misconduct laws and perceptions.

On September 27, 2018, Dr. Blasey Ford testified against Judge Brett Kavanaugh in a Senate Judiciary Committee hearing that was televised nationally and internationally. Blasey Ford testified that her entire life had been shaped by one traumatic event that

⁹ See, e.g., Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 *Calif. L. Rev.* 881, 887-91 (2016); Aya Gruber, *Consent Confusion*, 38 *Cardozo L. Rev.* 415, 418-19 (2016); Janet Halley, *The Move to Affirmative Consent*, 42 *Signs* 257 (2016). The Trump administration has decided to roll back on some of these positions on Title IX. See Erica L. Green et al., “Transgender” Could Be Defined Out of Existence Under Trump Administration, *N.Y. Times*, Oct. 21, 2018 (<https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>).

¹⁰ See also Laura Kipnis, *Unwanted Advances: Sexual Paranoia Comes to Campus* (2017).

¹¹ In a current work-in-progress, tentatively entitled “The New Sexual Harassment,” I further examine and elaborate this point.

¹² See, e.g., Joe Fischel, *Screw Consent* ch. 2 (2018) (arguing that sex laws should proscribe sex within relationships of trust, authority, and dependence).

occurred in the summer of 1982.¹³ In that hearing, Blasey Ford established herself as a prototypical trauma survivor, and many trauma survivors came out to mobilize, lobby, protest, and tell their stories.¹⁴ The Democratic senators on the judiciary committee submitted for the record scientific data regarding trauma survivors, including why they do not come forward early and why they remember selective details.¹⁵

In her testimony, Blasey Ford describes a summer evening, when she was fifteen years old and Kavanaugh was seventeen. A small gathering at a house in the Chevy Chase/Bethesda area in Maryland.¹⁶ Four boys: Brett Kavanaugh, Mark Judge, P.J. Smyth, and another whose name she could not recall. Blasey Ford's words and performance have been understood by commentators as symptoms of post-traumatic stress disorder (PTSD). She is nervous and trembling. "I am terrified," she admits. She apologizes for her inability to recollect all the facts,¹⁷ but assures her audience that "the details about that night that bring me here today are ones I will never forget. They have been seared into my memory and have haunted me episodically as an adult."¹⁸ This is the memory:

When I got to the small gathering, people were drinking beer in a small living room on the first floor of the house. I drank one beer that evening. Brett and Mark were visibly drunk. Early in the evening, I went up a narrow set of stairs leading from the living room to a second floor to use the bathroom. When I got to the top of the stairs, I was pushed from behind into a bedroom. I couldn't see who pushed me. Brett and Mark came into the bedroom and locked the door behind them. There was music already playing in the bedroom. It was turned up louder by either Brett or Mark once we were in the room. I was pushed onto the bed and Brett got on top of me. He began running his hands over my body and grinding his hips into me. I yelled, hoping someone downstairs might hear me,

¹³ Written Testimony of Dr. Christine Blasey Ford (2018) (<https://www.judiciary.senate.gov/imo/media/doc/09-27-18%20Ford%20Testimony.pdf>) (stating "details about that night . . . have been seared into my memory and have haunted me especially as an adult").

¹⁴ Rashaan Ayes, After Ford's Testimony, Sexual Assault Victims Come Forward, News & Observer, Sept. 28, 2018 (<https://www.newsobserver.com/latest-news/article219214200.html>); Jessica Glenza et al., "I Saw Myself in Dr Ford's Words": Protesters Tell of Jeff Flake Elevator Confrontation, Guardian, Sept. 29, 2018, (<https://www.theguardian.com/us-news/2018/sep/29/abuse-survivors-say-flake-lift-protest-in-solidarity-with-ford>); Crystal Haynes, Christine Blasey Ford Testimony Triggers Memories for Sexual Assault Survivors, Bos. 25 News, Sept. 28, 2018 (<https://www.boston25news.com/news/christine-ford-testimony-triggers-memories-for-sexual-assault-survivors/842600047>); How Americans Across the Country Are Reacting to Christine Blasey Ford's Testimony, N.Y. Times, Sept. 27, 2018 (<https://www.nytimes.com/2018/09/27/us/dr-ford-kavanaugh-reaction.html>).

¹⁵ Kavanaugh Hearing: Transcript, Wash. Post, Sept. 27, 2018 (<https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/>); Christine Blasey Ford Testifies at Kavanaugh Confirmation Hearing, PBS News Hour, Sept. 26, 2018 (<https://www.pbs.org/newshour/politics/watch-live-christine-blasey-ford-testifies-at-kavanaugh-confirmation-hearing>).

¹⁶ For Dr. Blasey Ford's full testimony, see Politico Staff, Full Transcript: Christine Blasey Ford's Opening Statement to the Senate Judiciary Committee, Politico, Sept. 26, 2018 (<https://www.politico.com/story/2018/09/26/christine-blasey-ford-opening-statement-senate-845080>).

¹⁷ Id. Ford states, "I do not remember all of the details of how that gathering came together, but like many that summer, it was almost surely a spur of the moment gathering. I truly wish I could provide detailed answers to all of the questions that have been and will be asked about how I got to the party, where it took place, and so forth."

¹⁸ Id.

and tried to get away from him, but his weight was heavy. Brett groped me and tried to take off my clothes. He had a hard time because he was so drunk, and because I was wearing a one-piece bathing suit under my clothes. I believed he was going to rape me. I tried to yell for help. When I did, Brett put his hand over my mouth to stop me from screaming. This was what terrified me the most, and has had the most lasting impact on my life. It was hard for me to breathe, and I thought that Brett was accidentally going to kill me. Both Brett and Mark were drunkenly laughing during the attack. They both seemed to be having a good time. Mark was urging Brett on, although at times he told Brett to stop. A couple of times I made eye contact with Mark and thought he might try to help me, but he did not. During this assault, Mark came over and jumped on the bed twice while Brett was on top of me. The last time he did this, we toppled over and Brett was no longer on top of me. I was able to get up and run out of the room. Directly across from the bedroom was a small bathroom. I ran inside the bathroom and locked the door. I heard Brett and Mark leave the bedroom laughing and loudly walk down the narrow stairs, pinballing off the walls on the way down¹⁹

Trauma and laughter shape Blasey Ford’s allegation against Kavanaugh. As an expert on trauma herself—with degrees in experimental psychology, clinical psychology, and educational psychology—she self-diagnosed her trauma and linked it to the fear of death and to the laughter of her attackers.²⁰

Blasey Ford’s trauma played at least two key roles in this hearing. First, trauma appears to be the primary *injury* of the accuser and other survivors. Because of trauma, what happened in that summer night in 1982 is still felt today.²¹ Trauma is present in the brain. Their laughter continues to cause distress. Trauma is the injury that has shaped her life. Second, besides establishing injury, trauma also validates the *credibility* of its bearer. It has evidentiary value. Arguably, Blasey Ford can remember details because they are stored in her brain as traumatic events. Commentators praised Blasey Ford for being a “better” accuser than Anita Hill, who did not show the distress and fragility of a proper trauma

¹⁹ Id.

²⁰ LEAHY: Well, then, let’s go back to the incident.

What is the strongest memory you have, the strongest memory of the incident, something that you cannot forget? Take whatever time you need.

FORD: Indelible in the hippocampus is the laughter, the laugh—the uproarious laughter between the two, and their having fun at my expense.

LEAHY: You’ve never forgotten that laughter. You’ve never forgotten them laughing at you.

FORD: They were laughing with each other.

LEAHY: And you were the object of the laughter?

FORD: I was, you know, underneath one of them while the two laughed, two friend—two friends having a really good time with one another.

Kavanaugh Hearing: Transcript, *supra* note 15.

²¹ Id. (“Brett’s assault on me drastically altered my life. For a very long time, I was too afraid and ashamed to tell anyone these details. . . . I convinced myself that because Brett did not rape me, I should just move on and just pretend that it didn’t happen.”).

victim.²² Many perceived Blasey Ford as credible because trauma is understood to have sharpened her memory of the assault, a memory triggered by the seemingly benign event of remodeling her home.²³ During the hearing, and for days to follow, survivor hotlines across the country received calls from women reporting similarly triggered trauma.²⁴

Blasey Ford's complaint involved a violent sexual assault. In 1982, there was no email, Twitter, social media, or cell phone records to which we can now turn for validation. We cannot ping cell phone towers, search Facebook, or sample DNA. The only available evidence for Blasey Ford is her memory. To determine what happened, the viewer has to watch her closely and decide if she is telling the truth. In our times, many have become averse to—possibly incapable of—using their own judgment.²⁵ A growing body of medical and psychological experts on trauma has become the key to decipher the Ford/Kavanaugh tribunal. Trauma has become an important mode of truth.²⁶ Dr. Christine Blasey Ford became intelligible to the public through sexual trauma.²⁷

²² Joanna Weiss, Christine Blasey Ford and the Power of Vulnerability, Politico, Sept. 27, 2018 (<https://www.politico.com/magazine/story/2018/09/27/christine-blasey-ford-and-the-power-of-vulnerability-220737>).

²³ Politico Staff, *supra* note 16:

Over the years, I told very few friends that I had this traumatic experience . . . I had never told the details to anyone until May 2012, during a couples counseling session [when we were discussing the] extensive remodel[ing] of our home, and [how] I insisted on a second front door, an idea that he and others disagreed with and could not understand. In explaining why I wanted to have a second front door, I described the assault in detail. I recall saying that the boy who assaulted me could someday be on the U.S. Supreme Court and spoke a bit about his background. My husband recalls that I named my attacker as Brett Kavanaugh.

²⁴ Public trauma from the 1991 Anita Hill/Clarence Thomas hearings may have also been triggered. Merrit Kennedy & Bill Chappell, Anita Hill Says Kavanaugh Accuser Hearing “Cannot Be Fair,” Nat’l Pub. Radio, Sept. 25, 2018 (<https://www.npr.org/2018/09/25/651489805/anita-hill-says-kavanaugh-accuser-hearing-cannot-be-fair>); Clifford Krauss, Anita Hill to Christine Blasey Ford: “Don’t Do Anything That Will Dehumanize You,” N.Y. Times, Sept. 28, 2018 (<https://www.nytimes.com/2018/09/28/us/anita-hill-metoo-houston.html>); see also Mikayla Bouchard & Marisa Schwartz Taylor, Flashback: The Anita Hill Hearings Compared to Today, N.Y. Times, Sept. 27, 2018 (<https://www.nytimes.com/2018/09/27/us/politics/anita-hill-kavanaugh-hearings.html>).

²⁵ See Hannah Arendt, *The Life of the Mind* (Introduction) (1978) (distinguishing between thinking and judging).

²⁶ In the recent past, trauma studies have become a standalone field of inquiry across the humanities. See also Lauren Berlant, *The Subject of True Feeling: Pain, Privacy, and Politics*, in *Left Legalism/Left Critique* 105 (Wendy Brown & Janet Halley eds., 2002).

²⁷ See also *The Late Night Show with Stephen Colbert*, CBS television broadcast (Oct. 5, 2018). Stephen Colbert, hosting Lady Gaga, asked about the Kavanaugh hearing. Lady Gaga said that hearing Dr. Blasey Ford's testimony was a difficult experience for her as a trauma victim who has also suffered sexual abuse. It is quite normal, she said, for a trauma victim to remember the actual traumatic events but forget other facts surrounding it.

B. *The Denial: Brett Kavanaugh's Defense*

Brett Kavanaugh was angry. He denied all allegations.²⁸ At stake was his seat on the Supreme Court. He detested the proceeding, calling it a shameful circus, a plot of the Clintons, and a “calculated and orchestrated political hit.”²⁹ His “job interview” for the Supreme Court was suddenly headed south because Blasey Ford’s allegation could deem him unqualified. So he sat, adjusted the microphone, and rambled about lifting weights with Mark and PJ and Squi, about games with strange names, and about liking beer then and now. He ranted about the unfairness of being accused of sexual assault, especially given how hard he had worked in high school, college, and Yale Law School. If Blasey Ford gave an intelligible and credible account of trauma, Kavanaugh made no sense.³⁰

Two angry young women confronted Republican Senator Jeff Flake when he was on his way to vote “yes” on Kavanaugh’s nomination. “Don’t look away from me,” one of them said, “[l]ook at me and tell me that it doesn’t matter what happened to me, that you will let people like that go into the highest court of the land.”³¹ Congresswomen stood together holding hands in solidarity, and women across the country were furious. In *Good and Mad: The Revolutionary Power of Women’s Anger*, journalist Rebecca Traister examines how social movements in the United States, from abolition to LGBT rights, originated in women’s anger.³² She observes, “Women are judged very harshly for showing anger. We’re told that it is invalid, irrational, that we sound hysterical, infantile or dangerous—it’s a witch hunt. We’re a mob . . . it’s a fight and a balance between an unwillingness to hear women’s anger and women’s determination to voice it.”³³ Senator Flake flaked nonetheless, and

²⁸ See, e.g., Peter Baker, *She Said. Then He Said. Now What Will Senators Say?*, N.Y. Times, Sept. 27, 2018 (<https://www.nytimes.com/2018/09/27/us/politics/dr-blasey-ford-testimony-kavanaugh.html>); Deborah Tuerkheimer, *Kavanaugh’s Hearing: The Most Momentous “He Said, She Said” Showdown of Our Time*, CNN Opinion, Sept. 26, 2018 (<https://www.cnn.com/2018/09/26/opinions/kavanaugh-momentous-he-said-she-said-showdown-opinion-tuerkheimer/index.html>).

²⁹ Kavanaugh Hearing: Transcript, *supra* note 15.

³⁰ Perhaps this lack of intelligibility is exactly what the older white males on the Judiciary Committee needed in order to move him through the process. See also Saturday Night Live, NBC television broadcast (Sept. 29, 2018) (Chuck Grassley, portrayed by Kate McKinnon, announcing that he is “hard,” after Kavanaugh’s testimony).

³¹ Ronald J. Krotoszynski Jr., *Commentary: 2 Women Confronted Jeff Flake—and Proved that “Petitioning the Government” Works*, Oct. 3, 2018 (<https://www.chicagotribune.com/news/opinion/commentary/ct-perspec-flake-kavanaugh-political-petition-citizens-1004-20181003-story.html>).

³² Rebecca Traister, *Good and Mad: The Revolutionary Power of Women’s Anger* (2018); see also Rebecca Traister, *Fury Is a Political Weapon. And Women Need to Wield It*, N.Y. Times, Sept. 29, 2018 (<https://www.nytimes.com/2018/09/29/opinion/sunday/fury-is-a-political-weapon-and-women-need-to-wield-it.html>) (“Outside the room where Christine Blasey Ford was testifying on Thursday morning, women were incandescent with rage and sorrow and horror. They were getting angry in a new way, a public way, an unapologetic way—a way that is typically reserved for men, and that would again serve men well, when afternoon came”).

³³ Jessica Kegu, “Good and Mad”: Rebecca Traister on the “Catalytic” Power of Women’s Rage, CBS News, Oct. 2, 2018 (<https://www.cbsnews.com/news/good-and-mad-rebecca-traister-on-the-catalytic-power-of-womens-rage/>).

Kavanaugh was confirmed. In contrast with the narcissistic rage of the judge, the waves of that righteous anger felt across the country translated into political action. In the 2018 elections, women and minorities voted and were elected in unprecedented numbers.³⁴

C. *Male Privilege on Trial*

Perhaps Brett Kavanaugh's performance at the hearing was also a demonstration of trauma. Political scientist Corey Robin has described conservatism as a lament over the loss of white male privilege.³⁵ Kavanaugh's ramble could be seen in this light. If Blasey Ford's trauma was caused by fear of death and loss of physical autonomy, Kavanaugh's was caused by privilege castration anxiety.³⁶ He wasn't alone. Anyone watching Republican Senator Lindsey Graham would worry for his health as well. "You cannot ruin this man!" he shouted. This new business of accountability for sexual misconduct is quite damaging and embarrassing.³⁷ Nostalgia and tears were the core of Kavanaugh's defense: football, beer, his father's calendar, his calendar, weight lifting, and, of course, church. All gone now that feminists and #MeToo rule. The trauma of the judge can be seen as a Deleuzian event: a dramatic shift in meaning in which white men are threatened to be held accountable for bad behavior.³⁸ The judge was falling apart, and his facial expressions and body language screamed NO FAIR!³⁹ He worked hard his entire life and how dare they?⁴⁰ This was one of the loudest NO FAIRs in the history of American politics.

In the end, Washington politics were the determinative forces in the public tribunal of Brett Kavanaugh. The nomination was always going to go through. In the "culture wars" between liberals and conservatives, the structure of the Supreme Court has long been a central political issue.⁴¹ In 2016, Donald Trump promised that, if elected, he would appoint

³⁴ Karen Zraick, *Night of Firsts: Diverse Candidates Make History in Midterm Elections*, N.Y. Times, Nov. 7, 2018 (<https://www.nytimes.com/2018/11/07/us/politics/election-history-firsts-blackburn-pressley.html>).

³⁵ Corey Robin, *The Reactionary Mind: Conservatism from Edmund Burke to Sarah Palin* (2011).

³⁶ I thank Joe Fischel for suggesting this term.

³⁷ Donald Trump has said recently that every American boy should be worried because they are all under attack. Jeremy Diamond, *Trump Says It's "A Very Scary Time for Young Men in America,"* CNN Pol., Oct. 2, 2018 (<https://www.cnn.com/2018/10/02/politics/trump-scary-time-for-young-men-metoo/index.html>).

³⁸ Gilles Deleuze, *The Logic of Sense* (Constantin V. Boundas ed., Mark Lester trans., 1990).

³⁹ Actor Matt Damon's impersonation of Kavanaugh on Saturday Night Live captures this affect perfectly. *Saturday Night Live*, supra note 30.

⁴⁰ To no one's surprise, at the end of Kavanaugh's testimony, President Donald Trump tweeted, "Judge Kavanaugh showed America exactly why I nominated him. His testimony was powerful, honest, and riveting. Democrats' search and destroy strategy is disgraceful and this process has been a total sham and effort to delay, obstruct, and resist. The Senate must vote!" Donald J. Trump (@realDonaldTrump), Twitter (Sept. 27, 2018, 3:46 PM) (<https://twitter.com/realdonaldtrump/status/1045444544068812800?lang=en>).

⁴¹ See generally Andrew Hartman, *A War for the Soul of America* (2015) (exploring historical foundations and consequences of the "Culture Wars").

a judge who would overrule *Roe v. Wade*.⁴² Trump promised to boost the conservative agenda by appointing a judge who would limit the freedoms of women and sexual minorities. This conservative project was the broader context of Kavanaugh's nomination. The hearing was orchestrated by the party in power against internal threats to the political order.⁴³ As one scholar observed, "Ford's testimony was a show trial—and a poorly handled one at that."⁴⁴ While the hearings took the form and language of a legitimate legal process, this formality was only a facade. The Senate approved Kavanaugh by a vote of 50-48.

III. Power: The Private Tribunal of Avital Ronell

Avital Ronell's tribunal has been viewed by many as a test case for #MeToo and feminism.⁴⁵ In contrast with the framework of trauma that dominated the Kavanaugh/Ford tribunal, the prevalent framework in the Ronell/Reitman tribunal was abuse of power.⁴⁶ Ronell's accuser and those who have condemned her allege that she abused her power as Nimrod Reitman's academic supervisor throughout their mentor-mentee relationship. But unlike Brett Kavanaugh, Avital Ronell was not offered a public stage to defend herself against her accuser. Her eleven-month investigation at NYU was private and confidential. Ronell was not allowed to speak or communicate about it publicly.⁴⁷

A. *The Complaint: Exploiting Power*

In July 2017, two years after receiving his Ph.D. from NYU, Nimrod Reitman filed an official Title IX complaint against Avital Ronell with NYU's Office of Equal Opportunity. He alleged that Ronell violated NYU's policies prohibiting sexual harassment,

⁴² Dan Magan, Trump: I'll Appoint Supreme Court Justices to Overturn *Roe v. Wade* Abortion Case, CNBC, Oct. 19, 2016 (<https://www.cnn.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html>); Aaron Blake, Trump Makes Clear *Roe v. Wade* Is On the Chopping Block, Wash. Post, July 2, 2018 (<https://www.washingtonpost.com/news/the-fix/wp/2018/07/02/trump-makes-clear-roe-v-wade-is-on-the-chopping-block/>).

⁴³ *Id.*

⁴⁴ Heidi Matthews, Why the Kavanaugh Hearings Were a Show Trial Gone Bad, Conversation, Oct. 7, 2018 (<https://theconversation.com/why-the-kavanaugh-hearings-were-a-show-trial-gone-bad-102025>) (Matthews stating that Democrats failed in their attempt to resist Kavanaugh's nomination because they foolishly relied on the energy of #MeToo to destabilize the Republican Senate majority).

⁴⁵ Zoe Greenberg, What Happens to #MeToo When a Feminist Is the Accused?, N.Y. Times, Aug. 13, 2018 (<https://www.nytimes.com/2018/08/13/nyregion/sexual-harassment-nyu-female-professor.html>); Masha Gessen, An N.Y.U. Sexual-Harassment Case Has Spurred a Necessary Conversation about #MeToo, New Yorker, Aug. 25, 2018 (<https://www.newyorker.com/news/our-columnists/an-nyu-sexual-harassment-case-has-spurred-a-necessary-conversation-about-metoo>).

⁴⁶ The language of trauma is not absent from Reitman's narrative. My point is that it is not the leading framework, as it was for Blasey Ford.

⁴⁷ During an eleven-month University Title IX investigation, Ronell says, "I was in a kangaroo court, and now I look completely like a caricature of predatory aggression, which is a joke to anyone who knows me. In another day, people would say, 'That's Avi. That's how she talks.'" Katherine Mangan, NYU Scholar Accused of Harassment Assails Rush to Judgment as Sign of "Sexual Paranoia," Chron. Higher Educ., Aug. 17, 2018 (<https://www.chronicle.com/article/NYU-Scholar-Accused-of/244308>).

sexual assault, stalking, and retaliation. The complaint is about power exploitation. As told by the *New York Times*, “In Mr. Reitman’s recollection, he was afraid of his professor and the power she wielded over him, and often went along with behavior that left him feeling violated.”⁴⁸ Reitman alleged that “for more than three years while a student at NYU, [he] was subjected to sexual harassment, sexual assault, and stalking by [Ronell], which devastated him and caused serious damage that he will likely suffer for the years to come. Ronell created a false romantic relationship between herself and [him] and by threat of, among other things, not allowing him to advance his Ph.D., asserted complete domination and control over his life.”⁴⁹

The facts are messy.⁵⁰ Unlike Kavanaugh’s she-said-he-yelled tribunal, Ronell’s tribunal turns on interpretation of emails, text messages, voicemails, gestures, and other communication.⁵¹ Reitman’s fifty-six page complaint chronologically narrates his relationship with Ronell, citing many exchanges of words and gestures.⁵² Ronell and Reitman both identify as queer (he is gay, she is a lesbian), and words that suggest a strong two-way bond seem to have been sent in both directions.⁵³

⁴⁸ Greenberg, *supra* note 45 (emphasis added).

⁴⁹ Complaint, *Reitman v. Ronell* (N.Y. Sup. Ct. 2018) (<https://blog.simplejustice.us/wp-content/uploads/2018/08/FINAL-Complaint-Reitman-v.-Ronell-and-NYU.pdf>) (emphasis added). There are seven causes of action in Reitman’s complaint against Ronell and NYU: 1. Violation of NYC Human Rights Law—Gender Discrimination in Accommodations, Advantages and/or Privileges (Against AR and NYU). Here, the claim essentially is that AR harassed N because he was male. NYU also let her off the hook because he is male and she is female; 2. Violation of NYC Human Rights Law—Quid Pro Quo Sexual Harassment (AR and NYU); 3. Violation of NYC Human Rights Law—Hostile Educational Environment (Against AR and NYU); 4. Violation of NYC Human Rights Law—Retaliation (Against AR and NYU); 5. Violation of NYC Human Rights Law—Gender Discrimination in Accommodation, Advantages, Privileges (Against NYU); 6. Negligent Training, Supervision, and Retention (Against NYU); 7. Negligent Infliction of Emotional Distress (against AR).

⁵⁰ Gessen, *supra* note 45 (stating that “of all the accusations that have come out in the era of #MeToo, the case of Avital Ronell may be the messiest and most difficult to digest”); see also Lisa Duggan, *The Full Catastrophe*, *Bully Bloggers*, Aug. 18, 2018 (<https://bullybloggers.wordpress.com/2018/08/18/the-full-catastrophe/>) (observing that “The nature of the email exchange resonates with many queer academics, whose practices of queer intimacy are often baffling to outsiders”). But see Andrea Long Chu, *I Worked With Avital Ronell. I Believe Her Accuser*, *Chron. Higher Educ.*, Aug. 30, 2018 (<https://www.chronicle.com/article/I-Worked-With-Avital-Ronell-I/244415>) (arguing that the facts are not messy, she believes the accuser, and this is a clear cut case of power abuse).

⁵¹ Gessen, *supra* note 45; see also Duggan, *supra* note 50.

⁵² Gessen, *supra* note 45; see also Duggan, *supra* note 50.

⁵³ Reitman’s complaint against Ronell is full of language that she allegedly sent him since he began his studies at NYU. See Complaint, *Reitman v. Ronell*, *supra* note 49. However, Ronell has also shared notes that he wrote her that seem loving and enthusiastic. For example, she provided to Masha Gessen of the *New Yorker* an email message from Reitman that reads,

Mon Avital, beloved and special one . . . I thank you for your infinite understanding and sensitivities which are always beyond measure, all of which I reciprocate with tenderness and love. I thank you so much for walking me through this catabasis. I don’t know how I would have survived without you. You are the best!!! I love you so much. You are the best, my joy, my miracle. Kisses and devotion always. - n.

Gessen, *supra* note 45.

Many have been quick to condemn Ronell and characterize this as a clear cut case of abuse of power.⁵⁴ The abuse-of-power framework has turned into a primary lens through which allegations of sexual misconduct are assessed. The accusations against Ronell thus resonated for many as good old abuse of power with a twist: reversed gender. According to this logic, Ronell (a woman) exploited Reitman (a man) as his supervisor, and a feminist who disagrees must be a hypocrite or worse: a man-hater. To clarify, my point is not that Ronell is innocent or guilty.⁵⁵ It is that the framework of abuse of power has broad discursive prevalence today: power imbalances in and of themselves often function as proof of abuse.

B. Avital Ronell's Defense: Consent

Ronell did not deny having a close relationship with Reitman.⁵⁶ After a long silence imposed on both parties during the Title IX proceedings, Ronell responded to Reitman's allegations shortly after they were made public.⁵⁷ She denied all allegations of sexual assault, harassment, and retaliation, insisting that there was no sexual contact between the two. Ronell offered evidence as to the consensual nature of the relationship. For example, she revealed Reitman's hand-written inscription on a book that he gave her after their 2012 stay in Paris (where he claimed that she assaulted him). It reads, "For my most wonderful Avital, indeed we would always have Paris for yet another aspect of our own private musical 'Grapheme'—tenderly—always—ever—Nimrod Paris 12.5.12."⁵⁸

These communications, Ronell claimed, are inconsistent with Reitman's later claims of sexual assault that occurred on that same trip. She pointed to the University's Title IX finding that their frequent email communications were equally initiated by both sides. She argued that the correspondence—between a gay man and a lesbian woman—was "largely gay coded, with literary allusions, poetic runs and obviously exaggerated expressions of tenderness that were often initiated and returned by Reitman."⁵⁹ Ronell provided emails from Reitman that involved loving, enthusiastic texts ("Mon Avital, beloved and special

⁵⁴ Corey Robin, for example, writes, "Hanging over all of these exchanges, unmentioned, is the question of power." Corey Robin, *The Unsexy Truth About the Avital Ronell Scandal*, *Chron. Higher Educ.*, Aug, 20, 2018 (<https://www.chronicle.com/article/The-Unsexy-Truth-About-the/244314>) (adding that "The precinct of the academy in which this story occurs prides itself on its understanding of power. Unfortunately, that understanding is often not extended to the faculty's dealings with graduate students, where power can be tediously, almost comically, simple. Cross your adviser in any way, and that can be the end of your career."); see also Long Chu, *supra* note 50.

⁵⁵ The Title IX committee found her not liable for many of the accusations and liable for sexual harassment. The case is currently before a New York State court.

⁵⁶ Greenberg, *supra* note 45; see also Press Release on Behalf of Professor Avital Ronell, Aug. 16, 2018 (<https://chronicle-assets.s3.amazonaws.com/5/items/biz/pdf/Ronell%20Press%20Release%202018.pdf>) (responding).

⁵⁷ *Id.*

⁵⁸ *Id.* (adding an email that Reitman wrote her two years later about their time in Paris together, "[s]ending tender love and kisses, I too remember and reminded of our beautiful scenery in Paris—vivid and always occurring I send you music, love, and kisses." (11/21/2014)).

⁵⁹ *Id.*

one”; “most darlinest”; “sweet beloved”; “Baby”),⁶⁰ and asserted that she had no reason to suspect that her affection was unwelcome. Witnesses who observed them together on many occasions also denied seeing any harassing behavior. They recalled that Reitman often praised Ronell and admitted seeking her attention. Ronell denied retaliating against Reitman, and claimed that she helped him secure two prestigious post-graduate positions.

C. *Feminism on Trial*

Avital Ronell’s investigation effectively put feminism and #MeToo on trial. Ronell is one of the few and most well-known females accused of sexual harassment since #MeToo emerged as an important social force. #MeToo activism is often understood by mainstream media as representing all of feminism. In reality, however, feminists have, all along, taken nuanced positions on #MeToo and Title IX activism.⁶¹ Feminists have expressed concerns about over-emphasizing women as victims,⁶² over-emphasizing erotic harassment while neglecting other forms of sex and race discrimination in the workplace;⁶³ causing sex panics,⁶⁴ and denying a fair process to accused individuals.⁶⁵

Conflating all feminist approaches under the #MeToo umbrella manufactured the Ronell saga as a “gotcha” moment: you feminists complain about sexual exploitation, but what are you going to do when one of your own is accused? Are you hypocrites or will you hold her accountable? Leading news coverage, including the *New York Times* report that broke the story, were in fact referenda on the integrity of #MeToo and feminism. Somewhat ironically, Ronell is often portrayed as a feminist scholar when in fact her writing has not generally dealt with feminism.⁶⁶ Judith Butler and other scholars came under attack for defending Ronell in a letter to NYU.⁶⁷ This “test-moment” administered to feminists

⁶⁰ Id.

⁶¹ See, e.g., Brenda Cossman, #MeToo, Sex Wars 2.0 and the Power of Law, *Asian Y.B. Hum. Rts. & Humanitarian L.* (forthcoming).

⁶² See Kipnis, *supra* note 10, at 205.

⁶³ See, e.g., Vicky Schultz, Reconceptualizing Sexual Harassment, Again, 128 *Yale L.J. F.* 22 (2018).

⁶⁴ See Masha Gessen, When Does a Watershed Become a Sex Panic?, *New Yorker*, Nov. 14, 2017 (<https://www.newyorker.com/news/our-columnists/when-does-a-watershed-become-a-sex-panic>) (calling out metoo as creating a sex panic).

⁶⁵ See Rethink Harvard’s Sexual Harassment Policy, *Bos. Globe*, Oct. 15, 2014 (<https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>).

⁶⁶ Ronell has written extensively on Goethe, Nietzsche, Kafka, and others, none of whom were world known feminists. “Reverse Sexual Harassment” has long fascinated and garnered attention from good-minded liberals. See also Jane Gallop, *Feminist Accused of Sexual Harassment* (1997); *Disclosure* (dir. Barry Levinson, 1994) (telling the story of a female boss, played by Demi Moore, who sexually forces herself onto a subordinate male employee).

⁶⁷ The letter, sent on May 11, 2018 to the president of NYU, was indeed problematic in that it claimed lack of knowledge of the facts, and at the same time commented on the accuser’s character. See Nell Gluckman, How a Letter Defending Avital Ronell Sparked Confusion and Condemnation, *Chron. Higher Educ.*, June 12, 2018 (<https://www.chronicle.com/article/How-a-Letter-Defending-Avital/243650>). Philosopher Brian

seems less about whether they will pass or fail than indicting feminists as already partial and hypocritical (read: they failed). Certainly, dramatizing the affair as a feminist referendum takes us far afield from learning anything about the affair itself. And any statements short of categorical condemnation were perceived as victim-blaming. Feminists and #MeToo supporters came under public scrutiny, with the assumption that standing by Ronell was akin to hypocrisy and victim-blaming.

IV. Consequences

Donald Trump and his Supreme Court nominee—two white males in positions of power—got away with allegations of sexual assault that seem to have caused ongoing private and public trauma. Brett Kavanaugh has a lifetime appointment as an Associate Justice on the Supreme Court, and will likely lead a sharp right turn of the Court’s jurisprudence on matters including reproductive rights, gender and racial justice, immigration, LGBT rights, national security, and climate change. Avital Ronell’s teaching career at NYU has been suspended and her reputation stained without real opportunity to refute the allegations publicly. In both cases, power and trauma played key roles. As of today, he won and she lost.

Theories that can explain everything are seductive and should be resisted. They suspend our ability to think and judge for ourselves. Our growing knowledge and expertise about trauma has been productive; and our engagement with power and gender, racial and other stereotyping has informed vital policy and legal reforms. The problem is not that trauma and power are not real or true. They are. Trouble begins when we take them as absolute truths and arbiters of human disputes. At that point we stop paying attention. One problem with trauma and power as the principal lenses through which allegations of sexual misconduct are assessed is that they can generate both false positives and false negatives. Eventually, if trauma and abuse of power *replace* the existing legal standards of consent and welcomeness,⁶⁸ we will enter a new era of sexual misconduct laws.⁶⁹

A. *The Over- and Under-Inclusiveness of Trauma and Power*

It was often said that Christine Blasey Ford was a stronger accuser than Anita Hill because she manifested trauma and vulnerability that Hill did not.⁷⁰ There were obviously

Leiter publicized the letter and attacked its signees for victim-blaming. Judith Butler later published an apology for discrediting the complainant and for implying that Ronell’s status and reputation should lead to differential treatment of the allegations against her. Judith Butler Explains Letter in Support of Avital Ronell, *Chron. Higher Educ.*, Aug. 20, 2018 (<https://www.chronicle.com/blogs/letters/judith-butler-explains-letter-in-support-of-avital-ronell/>).

⁶⁸ In *Meritor Savings Bank v. Vinson*, the Supreme Court recognized that both quid pro quo and hostile environment sexual harassment violate Title VII of the Civil Rights Act of 1964, and that to be actionable under Title VII, sexual advances must be (1) “unwelcome” and (2) “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” 477 U.S. 57 (1986). For a shift in consent standards in criminal rape laws, see, e.g., Halley, *supra* note 9; Gruber, *supra* note 9.

⁶⁹ I examine this further in a work in progress tentatively entitled “The New Sexual Harassment.”

⁷⁰ See Weiss, *supra* note 22.

racial stereotypes at play here. Anita Hill, an African-American woman accusing an African-American male of sexual harassment, did not tear up or show distress during her testimony. She appeared stoic and self-composed. She did not testify about recurring dread, trauma, and PTSD symptoms. She simply explained to a committee of doubting and mocking white men, many of whom had never heard of sexual harassment, what Clarence Thomas said to her and why it was offensive. Consequently, although Anita Hill has received admiration and support in the decades that passed, she is commonly understood by prosecutors as a less ideal accuser than Blasey Ford.

Overall, the concern is that accusers who do not manifest obvious trauma symptoms may suffer from false negatives in a legal system that views trauma as the chief consequence of sexual misconduct. For instance, such false negatives can be generated by “battered woman’s syndrome” (BWS), which was developed as a legal defense for victims of domestic violence who turned on their abusers.⁷¹ The logic of the BWS defense is that ongoing trauma from spousal abuse may explain, among other behaviors, violent responses of women towards their abusers.⁷² The image of a traumatized woman who turns on her aggressor has entered the public imagination through popular literature, film and TV shows.⁷³ But the BWS defense and the reliance on trauma to justify the behavior of abused individuals can come with a cost. We now expect trauma, and doubt the veracity of testimony, from those who do not appear traumatized.⁷⁴

The abuse-of-power framework can also generate false negatives and false positives. To begin with, power is multifaceted. It is not an easy binary metric that one person has and the other does not. It can be distributed in any relationship along multiple dimensions, such as age, attractiveness, levels of interest, wealth, citizenship, and others. Feminism has always had an ambivalent relationship to Foucault, who saw the capillaries rather than the totalities of power.⁷⁵ But any feminism worth its salt nowadays is, or claims to be, intersectional, and surely employment hierarchies are not the only salient axis of inequality for theorizing or politicizing sexuality, intimacy, and misconduct.

Avital Ronell’s tribunal, if we accept even small parts of her version, is arguably a case of over-inclusiveness of abuse-of-power theory (a false positive). Many commentators who quickly sided with Reitman took the position that a professor supervising a Ph.D.

⁷¹ Lenore E. A. Walker, *Battered Women Syndrome and Self-Defense*, 6 *Notre Dame J.L., Ethics & Pub. Pol’y* 321 (1992).

⁷² See, e.g., *People v. Humphrey*, 13 Cal. 4th 1073 (1996) (holding that Battered Women’s Syndrome may be introduced as evidence with respect to whether the defendant held a reasonable belief that lethal force was necessary).

⁷³ See, e.g., *Thelma and Louise* (MGM/UA, 1991); *Big Little Lies* (HBO television, 2017); *A Question of Silence* (Sigma Film Productions, 1982).

⁷⁴ See, e.g., *R. v. Malott*, [1998] 1 S.C.R. 123 (Can.) (“It is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent battered woman will not have their claims to self-defence fairly decided.”).

⁷⁵ Michel Foucault, *The History of Sexuality, Volume 1: An Introduction* (Robert Hurley trans., 1978).

candidate possesses and exercises absolute power over the graduate student. But does this assumption do justice to this particular situation? Masha Gessen, writing for *The New Yorker*, observed that on some prevalent axis of power, Reitman has more of “it”: he is a white man, he is wealthier, and he is younger than Ronell.⁷⁶ One thing we all know about love, romantic or not, is that we experience devastating powerlessness if we want it more than the other.⁷⁷ One possible interpretation of this scandal is that Ronell was vulnerable, sought Reitman’s attention, and was consistently apologetic for this very vulnerability. These dynamics do not resemble prototypical, Harvey Weinstein style, predatory abuse-of-power behavior. Even if Ronell inappropriately crossed boundaries in her interactions with Reitman, the abuse-of-power framework fails to fully capture how, when, and why. Turning her as a test-moment for feminism tells us more about the testers than the accused. It is quite possible that Ronell behaved in a manner that colleges and universities should discourage, and that graduate students should not have to weigh the dilemma of private relationships with their supervisors. Ronell’s suspension can be viewed as consistent with such a policy. There is an important difference between university policies about inappropriate relationships and dramatic abuse-of-power narratives.⁷⁸ I support the former. The latter can lead to dangerous and unfair consequences.

The consequences of Kavanaugh’s tribunal should be viewed as an atrocious false negative, but one that occurred for an altogether different reason. This false negative was not due to the absence of trauma in the accuser. It was the result of Washington politics. What determined his fate was the congressional power of Republicans in the fall of 2018: the power of white male privilege. This political power enabled Kavanaugh’s appointment to the Supreme Court despite Blasey Ford’s credible attempted rape allegation against him.

B. The Decline of Consent and Welcomeness

As trauma and abuse-of-power narratives gather greater momentum in the legal system, it is possible that the legal standards of consent and welcomeness will fade.⁷⁹ The unwelcomeness standard comes from civil rights law (defining sexual harassment), whereas the consent standard comes from criminal and tort laws (defining battery, sexual assault, and rape).⁸⁰ When examined together, it is possible that the *overall* system of sexual

⁷⁶ See Gessen, *supra* note 45 (explaining why the Ronell story is complicated).

⁷⁷ Kipnis, *supra* note 10, at 94.

⁷⁸ See, e.g., Kipnis, *supra* note 10.

⁷⁹ I examine this in a work-in-progress tentatively entitled “The New Sexual Harassment.” See also Halley, *supra* note 9; Gruber, *supra* note 9; Gersen & Suk, *supra* note 9.

⁸⁰ See Restatement (Second) of Torts § 892, 892A (ALI 1979) (stating that “[o]ne who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it” and defining consent as “willingness in fact for conduct to occur [which] may be manifested by action or inaction and need not be communicated to the actor”); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (stating that, to be actionable under Title VII, sexual advances must be (1) “unwelcome” and (2) “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”); Kari Hong, *A New Mens Rea for Rape: More Convictions*

misconduct laws is headed towards a presumption that neither consent nor welcomeness is truly possible across differences of power. Erotic interactions in which one person is in a position of authority are increasingly perceived, presumptively, as exploitation of power.⁸¹ The injury is understood to be trauma. Trauma of the abused is what we are expecting as a consequence of exploitation of power.⁸²

Monica Lewinsky's changing assessment of her affair with President Bill Clinton, especially the eradication of consent and its replacement with abuse of power (of the abuser) and trauma (of the abused), metaphorizes this trajectory of sexual misconduct laws. Monica Lewinsky steps in. It's 2001.⁸³ She is in her late 20s, and appears vulnerable and anxious. The audience is a group of perhaps one hundred college students. The film is in black and white. The room is packed. She steps in, sits on the edge of the stage, and promises to tell the honest truth. Clinton is no longer president and she is free to talk. Her story, still very close to the events in 1998 that changed her life, is unequivocally one of betrayal by a loved one. She *loved* the President, she says, and he betrayed her. If you listen, you hear a young woman with a broken heart and the beginning of righteous anger at someone who allegedly loved and cared for her, and at legal authorities who manipulated her (the FBI officers who locked her in a hotel room for hours without an attorney and threatened her with jail time for perjury). Lewinsky in 2001 is still making awkward jokes about the decision to wear the unflattering black beret, and is moved by her lover, the President, who gave her a copy of *Leaves of Grass* before ending the affair. Through her eyes in 2001, the anger was not about nonconsensual sex or abuse of power.

Monica Lewinsky of 2018 has a different perspective.⁸⁴ Trauma and abuse of power are now the main themes of her 1998 scandal. She identifies as a trauma victim,⁸⁵ and believes that a national trauma also occurred in 1998 when Clinton was investigated and impeached. She writes, "For two decades, I have been working on myself, my trauma, and my healing." She credits #MeToo for *changing her understanding* of what happened, which

and Less Punishment, 55 Am. Crim. L. Rev. 259 (2018) (explaining that, depending on the jurisdiction, consent can be considered an element in proving rape or other criminal sexual offenses); The Criminal Defense of Consent, Justia (<https://www.justia.com/criminal/defenses/consent/>); see also Joanna Stromberg, Sexual Harassment: Discrimination or Tort?, 12 UCLA Women's L.J. 317 (2003).

⁸¹ See Halley, *supra* note 7; Gruber, *supra* note 9; Gersen & Suk, *supra* note 9.

⁸² While most of the time this understanding of power and trauma are gendered (females are powerless and traumatized, males are powerful and traumatizing), the Ronell affair has provided the opportunity to take gender out of this equation.

⁸³ Monica Lewinsky - Documentary "In Black & White" (Part 1), YouTube, Nov. 13, 2017 (<https://www.youtube.com/watch?v=sPj3pYS8YoM>).

⁸⁴ Monica Lewinsky, Monica Lewinsky: Emerging from "The House of Gaslight" in the Age of #MeToo, Vanity Fair, Feb. 25, 2018 (<https://www.vanityfair.com/news/2018/02/monica-lewinsky-in-the-age-of-metoo>).

⁸⁵ *Id.* (stating, "To be blunt, I was diagnosed several years ago with post-traumatic stress disorder, mainly from the ordeal of having been publicly outed and ostracized back then. My trauma expedition has been long, arduous, painful, and expensive. And it's not over . . ."). Notably, the source of the trauma for Lewinsky seems to be not the President himself but the national treatment of the affair and how she was depicted.

“given my PTSD and my understanding of trauma,” would not have been possible.⁸⁶ Lewinsky now has a new lens: “Just four years ago, in an essay for this magazine, I wrote the following: ‘Sure, my boss took advantage of me, but I will always remain firm on this point: *it was a consensual relationship*. Any ‘abuse’ came in the aftermath, when I was made a scapegoat in order to protect his powerful position.’”⁸⁷ Shortly before the #MeToo moment, and when Obama was still president, Lewinsky viewed her relationship as consensual. That’s no longer the case: “I now see how problematic it was that the two of us even got to a place where there was a question of consent. Instead, the road that led there was littered with inappropriate abuse of authority, station, and privilege.”⁸⁸ Lewinsky now views her earlier consent as possibly moot:

Now, at 44, I’m beginning (just beginning) to consider the implications of the power differentials that were so vast between a president and a White House intern. I’m beginning to entertain the notion that in such a circumstance the idea of consent might well be rendered moot. (Although power imbalances—and the ability to abuse them—do exist even when the sex has been consensual.)

Meaningful consent, it seems, was impossible, says the forty-four-year-old Lewinsky about the twenty-three-year-old Lewinsky: “He was my boss. He was the most powerful man on the planet. He was 27 years my senior, with enough life experience to know better. He was, at the time, at the pinnacle of his career, while I was in my first job out of college”⁸⁹ The current moment has allowed Lewinsky to shift perspective, and “I know one thing for certain: part of what has allowed me to shift is knowing I’m not alone anymore. And for that I am grateful. I—we—owe a huge debt of gratitude to the #MeToo and Time’s Up heroines. They are speaking volumes against the pernicious conspiracies of silence that have long protected powerful men when it comes to sexual assault, sexual harassment, and abuse of power.”⁹⁰

IV. Conclusion

Monica Lewinsky is not alone. Her change of perspective is representative of our current legal system and popular culture. Her #MeToo narrative represents the crystallization of a shift in our attitudes towards sexual misconduct. Lewinsky’s rereading of her own life is troubling: it commits her to her own powerlessness and victimization that she defiantly refused earlier. On a broader societal level, the growing prominence of trauma and abuse of power as the primary trajectories of sexual misconduct, alongside the decline of consent and welcomeness, call for serious consideration.⁹¹ The goal of sexual misconduct laws has

⁸⁶ Id.

⁸⁷ Id. (emphasis added).

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Many of these are beyond the scope of this essay and will be pursued by the author separately.

always been to provide Anita Hill, Monica Lewinsky, Christine Blasey Ford, Nimrod Reitman, Clarence Thomas, Bill Clinton, Brett Kavanaugh, Avital Ronell, and many others with something which we are obligated to strive for and yet doomed never fully to achieve: justice. It is our task today to think harder about where our truths about sexual misconduct and our justice meet.