The Cassandra Curse: The Stereotype of the Female Liar Resurfaces in *Jones* v. *Clinton*

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INTRODUCTION

In Aeschylus' *Agamemnon*, Cassandra identifies herself as "[t]he prophetess of lies":

> Say, is my speech or wild and erring now,
> Or doth its arrow cleave the mark indeed?
> They called me once, *The prophetess of lies,*
> *The wandering hag, the pest of every door* —
> Attest ye now, *She knows in her sooth*
> *The house's curse, the storied infamy.*[1]

In Greek mythology, Cassandra was the daughter of Priam.[2] When the god Apollo fell in love with her, he gave her a gift that he could not revoke: the ability to foretell the future.[3] When Cassandra later rejected Apollo, he punished her by divesting her of credibility.[4] From that point onward, Cassandra was blessed with prophetic power yet cursed with the predicament that no one would believe her prognostications.

We should not dismiss Cassandra as the mere mythopoeic prophetess of lies. Instead, we should appreciate her plight as analogous to that of some women seeking judicial redress. As ancient Cassandra would attest, the female credibility impediment is neither new nor defunct. Quite recently, in an article on credibility of women in the justice system, Lynn Hecht Schafran wrote:

> Custom and law have taught that women are not to be taken seriously and not to be believed. For most of this country's history, the law classed women with children and the mentally impaired and forbade us to own property, enter into contracts, or vote. The rape laws were a codified expression of mistrust. Although the laws have changed, social science and legal research reveal that women are still perceived as less credible than men.[5]

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[1] Aeschylus, *Agamemnon* (Paul Elmer More trans.), *in* GREEK LITERATURE IN TRANSLATION 139, 196 (Whitney Jennings Oates & Charles Theophilus Murphy eds., 1944).

[2] *See* EDITH HAMILTON, MYTHOLOGY 202 (1969); *see also* FELIX GUIRAND, GREEK MYTHOLOGY 44 (Delano Ames trans., Paul Hamlyn 1963).

[3] *See* HAMILTON, *supra* note 2, at 202 (stating that once divine favors are granted, gods cannot revoke them).

[4] *See* GUIRAND, *supra* note 2, at 44.

[5] Lynn Hecht Schafran, *Credibility in the Courts: Why Is There a Gender Gap?*, JUDGE J., Winter 1995, at 5.

While Greek mythology attributes the female's lack of credibility to deific punishment, Schafran dates it back to the coverture heritage.[6] Dwelling on the same problem, other commentators attribute it to "legal attitudes that accord less value to the speech of socially subordinate groups."[7] For example, courts tend to view allegations of rape and sexual harassment by women as incredible, using procedural rules and doctrines to hinder such charges.[8]

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[6] *See id.; see also* United States v. Yazell, 382 U.S. 341, 361 (1966) (Black, J., dissenting) (discussing coverture as old common law fiction describing wife and husband as one unit, but effectively giving all power to husband); 1 WILLIAM BLACKSTONE, COMMENTARIES *442 (stating that law viewed husband and wife as one person, and marriage suspended legal existence of wife); LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 35 (1969) (discussing origins and antecedents of coverture); John D. Johnston, Jr., *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1045-47 (1972) (discussing married women's property rights under common law).

[7] Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 155 (1996).

[8] *See id.* Professor Hunter explains:

> The law has historically considered women alleging rape to be particularly incredible, and policymakers and judges developed special evidentiary rules, such as corroboration requirements, cautionary instructions, and the prompt complaint doctrine, to guard against the possibility that an innocent man would be convicted on the word of a vindictive, lying woman.

Id.; *see also* Anne Althouse, *The Lying Woman, the Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 NW. U. L. REV. 914, 942-92 (1994) (examining coverage of rape shield rules in evidence textbooks); Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277, 280 (1993)(assuming fact finders frequently disbelieve women's true accounts of sexual assault); Daphne Edwards, Comment, *Acquaintance Rape & the Force Element: When "No" Is Not Enough*, 26 GOLDEN GATE U. L. REV. 241, 249 (1996) (discussing underlying distrust of female rape victims); Denise R. Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus*, 7 YALE J.L. & FEMINISM 243, 243 (1995) (discussing societal attitudes embracing beliefs that women lie about sexual assault and rape for many reasons); Lani Anne Remick, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1112 (1993) (arguing that in order to dispel notion of justifiable rape and to provide sufficient protection against rape, laws must allow proof of lack of consent to satisfy nonconsent elements); Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Reversion of Truth*, 37 N.Y.L. SCH. L. REV. 123, 123 (1992) (explaining that stories told by women in court, especially in sexual harassment, rape, incest and battery cases, are often challenged as unbelievable); Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narrative in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 439 (1996) (stating that societal images of "lying woman" may contribute to courtroom narratives describing women as spurned, vengeful or committing perjury to affect revenge).

Other commentators and scholars have defined similar barriers for women charging men with sexual assault. *See, e.g.*, Janine Benedet, *Hostile Environment Sexual Harassment*

It is concededly outside the scope of this Article to speculate on what causes judges, juries, policymakers, and the public to disbelieve female accusers. Instead, this Article attempts to analyze the effect of the presumption that women lie on judicial reasoning, judicial decision-making, and the shaping of legal doctrines. Specifically, this Article examines the effect of this presumption on the courts' treatment of the presidential immunity doctrine in the *Jones v. Clinton* decisions[9] that arose out of the sexual harassment suit against the President.

The *Jones* case is an unsettling area of discussion for feminists because it threatens to vilify a President that women's groups have legitimately championed as a backer of women.[10] This

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Claims and the Unwelcome Influence of Rape Law, 3 MICH. J. GENDER & L. 125, 126 (1995) (arguing that prejudices and mistaken assumptions impede adequate responses to physical violations of women, both on and off job); Noelle C. Brennan, Comment, *Hostile Environment Sexual Harassment: The Hostile Environment of a Courtroom*, 44 DEPAUL L. REV. 545, 548-50 (1995) (arguing that heightened thresholds of injury and proof create judicial skepticism of women alleging sexual harassment); Sarah A. DeCosse, *Simply Unbelievable: Reasonable Women and Hostile Environment Sexual Harassment*, 10 LAW & INEQ. J. 285, 286 (1992) (asserting that courts disregard or disbelieve women's responses to acts that men perceive as innocent in sexual harassment cases); Paul Nicholas Monnin, Project, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence 412*, 48 VAND. L. REV. 1155, 1159 (1995) (arguing that perpetrators of sexual harassment violate victims not only during harassment but also while victims prosecute claims because adversaries attack their character and morality); Maria L. Ontiveros, *Fictionalizing Harassment — Disclosing the Truth*, 93 MICH. L. REV. 1373, 1374 (1995) (arguing Michael Crichton's book, *Disclosure*, characterizes sexual harassment to include women abusing power, harassing men, and falsely accusing men).

[9] *See* Jones v. Clinton, 869 F. Supp. 690 (E.D. Ark. 1994) (finding President entitled to limited or temporary immunity); Jones v. Clinton, 858 F. Supp. 902 (E.D. Ark. 1994) (holding that presidential immunity issue deserved threshold consideration); Jones v. Clinton, 72 F.3d 1354 (8th Cir. 1996) (reversing district court's decision and concluding President not entitled to immunity).

[10] *See, e.g., Distinguishing Characteristics (Paula Jones and Bill Clinton)*, NEW REPUBLIC, May 30, 1994, at 7 (highlighting feminist groups' dissimilar treatment of Paula Jones and Anita Hill); William Safire, Essay, *Above the Law*, N.Y. TIMES, Dec. 9, 1996, at A17 (arguing that feminist groups treated accusers of Bob Packwood and Clarence Thomas differently than Paula Jones because of President Clinton's support of women's issues). In discussing the ramifications of Jones' sexual harassment suit against Clinton, National Public Radio reporter Nina Totenberg noted:

> Well, the women's groups privately are squirming. They normally support President Clinton, and they view Paula Jones somewhat as a plant by the Right. On the other hand, they view her as a woman who's entitled to her day in court, they say, and they can't very well desert her. In fact, NOW sent her lawyer some sexual harassment legal materials. At the same time, they want to point out that there are differences between Anita Hill and Paula Jones. They're not

Article, however, does not engender a cognitive dissonance between feminist empathy with an alleged sexual harassment victim and deserved fealty to the President because it does not and cannot pass judgment on the merits of Jones's complaint.

Specifically, this Article does not intend to weigh the credibility of the *Jones* case combatants or conclude that Jones is telling the truth. Such a task is, of course, inappropriate when an action has not progressed beyond the pleading stage. Instead, that is the business of the trial court after the parties present the relevant facts. To sit now as an academic pre-trial lie detector and presumptively convict one of the parties would hypocritically mimic the very thing that this Article condemns: the prejudging and branding of one gender as a class of innate prevaricators.

This Article proceeds in three steps. Part I examines the stereotype of the female liar and shows how it poses a serious impediment for female plaintiffs in sexual harassment suits. This analysis identifies five types of female liars and defines the trait that unites them. All the mythic images of the female liar effectively nullify women's true identity as aggrieved plaintiffs or victims in litigation. That is, they essentially dispatch the message that because women lie, male defendants need additional protection.

Part II shifts into a discussion of presidential immunity doctrine and how it evolved out of a tug of war between competing policies. In the early qualified immunity cases, the United States Supreme Court recognized a need to accord the executive branch independence but feared the ramifications of elevating officials above the law. The Court further understood that one disturbing effect of granting defendants immunity is that it deprives an aggrieved plaintiff of the right to compensation. The Article then delves into the seminal decision *Nixon v. Fitzgerald*,[11] in which the Supreme Court first recognized an absolute immunity from damages liability for acts within the outer

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happy about this. And, of course, the conservative groups, who were never with Anita Hill, and attacked Anita Hill, now are raising the flag of sexual harassment. So everybody's in a different position, and nobody's particularly comfortable about it.

Weekend Edition (National Public Radio broadcast, May 7, 1994).

[11] 457 U.S. 731, 756 (1982).

perimeter of the President's official responsibility.[12] Although it was the Court's first recognition of absolute immunity, the *Fitzgerald* Court balanced the same considerations as the antecedent qualified immunity cases.

Part III focuses on the *Jones* district court decisions and isolates the images of the female liar in each of them. In the initial decision, in which the district court gave the President permission to file a motion to dismiss solely on the basis of presidential immunity, the court intimated that it was suspicious of Jones's claims because she purportedly delayed in filing her suit.[13] In fact, the court even implied that Jones's hesitation to commence the litigation made her case somehow less worthy of an expeditious resolution on the merits. In the second decision, in which the district court actually granted the President a limited or temporary immunity from immediate trial, the female liar surfaces intermittently in the court's reasoning. In this context, she *sub silentio* helps to not only tip the scales in favor of the recognition of a unique form of immunity for President Clinton, but also broadens the court's interpretation of the immunity doctrine.

While the image of the female liar plainly surfaces in the district court decisions, she is quite graphic in the Eighth Circuit dissenting opinions,[14] which house all types of the female liar. The dissent referred to the inevitable nature of harassment actions that typically "allege unwitnessed one-on-one encounters that are extremely difficult to dispose of by way of a pretrial motion."[15] The dissent then used that very inevitability to greet Jones's claims with skepticism and to advocate the broadening of presidential immunity protection to cover not only unofficial conduct, but also the conduct of a codefendant who is not an executive official. This Article concludes by briefly revisiting Cassandra's tragic bind in the context of assessing the real damage that courts inflict when they inject the prophetess of lies into their reasoning.

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[12] *See id.* at 756.

[13] *See* Jones v. Clinton, 858 F. Supp. 902, 906 (E.D. Ark. 1994).

[14] *See* Jones v. Clinton, 72 F.3d 1354, 1367-69 (8th Cir. 1996) (Ross, J., dissenting).

[15] *Id.* at 1368.

I. THE CASSANDRA CURSE: THE STEREOTYPE OF THE FEMALE LIAR

Discrimination and stereotyping often go hand in hand. As Professor MacKinnon has defined it, "To stereotype is to impose a trait or characterization that may be true of some members of a group upon all in the group."[16] Although both men and women are equally adept at telling lies, it is women who are most often stereotyped as liars.[17]

Cassandra herself illustrates how powerful the mythic identity of the liar can be. Cassandra, with her gift of prophecy, told the Trojans that the Greeks were hiding in the wooden horse. The Trojans would not heed her admonitions.[18] In Aeschylus' play, *Agamemnon*, she foresaw her own death, but her audience simply rejected her visions.[19] Despite Cassandra's unblemished track record, her community doggedly persisted in perceiving the soothsayer as lacking credibility. The myth of the female liar is not just an impasse for the archetypal Cassandra, but it has been and continues to be a real impediment for female plaintiffs in sexual harassment suits.[20]

A. Sexual Harassment Suits as Battles of Credibility

Sexual harassment suits often become battles of credibility. In fact, the "he said, she said"[21] contest resides in the Equal Employment Opportunity Commission's ("Commission") definition of sexual harassment.[22] When the Commission, charged with administering and enforcing federal laws prohibiting workplace

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[16] Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1292-93 (1991).

[17] *See supra* notes 5-10 and accompanying text (discussing application of stereotypes to women).

[18] *See* HAMILTON, *supra* note 2, at 202.

[19] *See* AESCHYLUS, *supra* note 1, at 197-98.

[20] *See supra* note 8 and accompanying text (citing difficulties women have in pursuing sexual harassment claims).

[21] *See* Scheppele, *supra* note 8, at 123 (stating that instances of sexual violation often break down into contest of differing stories); *see also supra* notes 5-10 and accompanying text (discussing credibility problem for women accusing men of rape and sexual harassment).

[22] *See* 29 C.F.R. § 1604.11(a) (1994).

discrimination, provided that sexual harassment violated title VII of the United States Code, it defined the offending conduct as follows:

> Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.[23]

Because "sexual advances" and "requests for sexual favors" tend to occur in the corridors of privacy, there are often no third-party witnesses. The particulars of the sexual transaction also tend to be clandestine. Thus, it is rarely documented or transmitted to an audience exactly how an employee's "submission to such conduct" can affect her "term or condition" of employment or become a "basis for employment decisions."[24] Establishing that the wrongful conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment" rests substantially on the victim's account of not just the occurrence itself, but of the impact of the conduct on her.[25] As such, the very definition of sexual harassment subsumes what is unavoidably the case: for victims in such lawsuits, so much hinges on the trier of fact believing them.[26]

The Commission and its guidelines carve out two basic theories of sexual harassment, both of which greatly depend on the plaintiff's credibility. In quid pro quo sexual harassment, where the employee must submit to the employer's sexual advances as a condition of future employment, the plaintiff must show that sex for job benefits was explicitly or implicitly "the deal."[27] In

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[23] *Id.*

[24] *See id.*

[25] *See id.*; Brennan, *supra* note 8, at 562-63.

[26] *See supra* note 8 (discussing lack of female credibility as impediment in sexual harassment suits).

[27] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 62 (1986) (defining two types of sexual harassment: quid pro quo and hostile environment). For discussions of quid pro quo ha-

essence, the woman's account of the man's advances and her understanding of its nexus to the terms and conditions of her job figure prominently in the presentation of the case. In hostile work environment sexual harassment,[28] the woman's word can play an even more important role because the plaintiff need not show that the alleged behavior affected her employment status.[29] Essentially, the employee must demonstrate that her work world was abusive or offensive. The main source of such proof will often, by necessity, come right out of her own mouth.[30]

In *Harris v. Forklift Systems, Inc.*,[31] the United States Supreme Court ostensibly expanded the protection for a sexual harassment victim in the workplace. The *Harris* Court granted certiorari to resolve the conflict among the circuits on whether a plaintiff must suffer severe psychological harm in order to bring an action for abusive work environment harassment.[32] The *Harris* decision, however, did not eradicate the obstacle that a female plaintiff faces in such a lawsuit — that she is the perceived liar.

The *Harris* Court, reiterating the "severe or pervasive" standard it had established in *Meritor Savings Bank v. Vinson*,[33] explained that a violation of title VII occurs when "the workplace

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rassment, see B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1-38 (1993); George Likourezos, *Sexual Harassment by a Public Official Gives Rise to a Section 1983 Claim: A Legal Argument*, 6 HASTINGS WOMEN'S L.J. 93, 98-99 (1995); Cathleen Marie Mogan, *Current Hostile Environment Sexual Harassment Law: Time to Stop Defendants from Having Their Cake and Eating It Too*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 543, 544 (1992); Monnin, *supra* note 8, at 1163; Sally A. Peifer, *Sexual Harassment from the Victim's Perspective: The Need for the Seventh Circuit to Adopt the Reasonable Woman Standard*, 77 MARQ. L. REV. 85, 91-94 (1993); Laura Hoffman Ruppe, *Harris Forklift Systems, Inc.: Victory or Defeat?*, 32 SAN DIEGO L. REV. 321, 322 (1995); Kent D. Streseman, *Headshrinkers, Manmunchers, Moneygrubbers, Nuts & Sluts: Reexamining Compelled Mental Examinations in Sexual Harassment Actions Under the Civil Rights Act of 1991*, 80 CORNELL L. REV. 1268, 1282-83 (1995); Lynn T. Dickinson, Note, *Quid Pro Quo Sexual Harassment: A New Standard*, 2 WM. & MARY J. WOMEN & L. 107-24 (1995); Chad W. King, Comment, *Sex, Lover Letters, and Vicious Rumors: Anticipating New Situations Creating Sexually Hostile Work Environments*, 9 BYU J. PUB. L. 341-65 (1995).

[28] *See supra* note 27 (discussing hostile work environments).

[29] Henson v. City of Dundee, 682 F.2d 897, 901 (11th Cir. 1982); *see also Meritor Sav.*, 477 U.S. at 68; Brennan, *supra* note 8, at 547-50; Pfiefer, *supra* note 27, at 92.

[30] *See supra* note 8 and accompanying text (discussing credibility and corroboration problems).

[31] 510 U.S. 17 (1993).

[32] *See id.* at 20.

[33] 477 U.S. 57 (1986).

is permeated with 'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[34] According to the Court, title VII does not reach conduct which is merely offensive.[35] For example, the mere utterance of an offensive epithet is not actionable under title VII.[36] The Court also noted, however, that title VII does not require that the wrongful conduct actually fulminate into a victim's nervous breakdown.[37] The Court concluded that as long as the plaintiff reasonably perceived the environment as hostile or abusive, she need not also suffer psychological injury to bring an actionable claim.[38]

The *Harris* standard houses both an objective and subjective component.[39] The objective consideration is whether a reasonable person would consider the offensive conduct as creating a hostile or abusive environment.[40] The subjective aspect rests on whether the aggrieved plaintiff herself found the environment to be hostile or abusive.[41] Therefore, with respect to the subjective prong of the *Harris* test, the woman's credibility is indeed pivotal.

Significantly, the *Harris* Court recognized that there is no "mathematically precise test" and that the determination of the existence of a hostile or abusive environment is based on all of the circumstances.[42] Relevant factors include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance.[43] Thus, although

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[34] *Harris*, 510 U.S. at 21, (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65, 67 (1986)).

[35] *See id.*

[36] *See id.*

[37] *See id.* at 22.

[38] *See id.*

[39] *See id.* at 21-22; Brennan, *supra* note 8, at 578; Sara E. Burns, *Evidence of a Sexually Hostile Workplace: What Is It and How Should It Be Assessed After* Harris v. Forklift Systems, Inc.*?*, 21 N.Y.U. REV. L. & SOC. CHANGE 357, 392 (1994-95); Ruppe, *supra* note 27, at 332-40.

[40] *See* Ruppe, *supra* note 27, at 333-40.

[41] *See id.* at 332-33.

[42] *Harris*, 510 U.S. at 22-23.

[43] *See id.* at 23.

the effect of the behavior on the employee's psychological well-being is relevant to the determination, it is not dispositive.[44]

While the *Harris* Court eliminated actual injury as a prerequisite to recovery, it retained psychological harm as a factor. Most sexual harassment offenses cause psychological harm.[45] Most sexual harassment plaintiffs, therefore, seek to strengthen their case through inclusion of such a factor. Thus, in practical effect, the *Harris* Court did not relieve the plaintiff of the burden of making the trier of fact believe her account of not only the offensive conduct, but also how it psychologically harmed her. Although the Court fortified title VII as ammunition against gender-based hostility in the workplace, it did not significantly augment the female plaintiff's ability to defeat what is tantamount to a presumption that she tends to tell lies.

B. Five Forms of the Female Liar

When a woman brings a sexual harassment suit, the stereotype of the female liar can assume one or more of five somewhat intertwined forms. First, she can be the woman "who asked for it."[46] Ironically, the *Harris* decision may encourage a defendant to capitalize on such an image. Because the *Harris* standard has a subjective component, a defendant whose conduct is objectively unreasonable can still prevail if he can defeat the woman's argument that she subjectively found the environment to be abusive or hostile.[47] One obvious ploy for the defendant is to demonstrate that the woman welcomed the conduct.[48] In this

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[44] *See id.*

[45] *See* Streseman, *supra* note 27, at 1278 (arguing that tort law should provide remedies for sexual harassment victims because they suffer intentionally or negligently inflicted psychological and physical harm and often sustain loss of job status).

[46] *See* Coombs, *supra* note 8, at 283-84. Coombs states:

> One sociologist found that jurors explained their decisions to acquit [in rape trials] with statements such as: "she asked for it, and she got it. It's a poor man who turns down anything for free." "[S]he led him on. [She] accepted a ride in the middle of the night;" and "[she] consented with her body language."

Id. at 284 (quoting GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 218 (1989)).

[47] *See supra* note 39 and accompanying text (discussing *Harris* standard).

[48] *See generally supra* note 26 and accompanying text (discussing EEOC's definition of sexual harassment). *See also* Waltman v. International Paper Co., 875 F.2d 468, 472 (5th Cir.

respect, the defendant likens her to the alleged rape victim that teased or seduced the perpetrator and now wants him to pay for what she herself caused.[49] In essence, the underlying belief here is that she should not be the plaintiff, but rather the defendant, because she is the one that made advances or sexual overtures and, thus, brought about the whole supposed episode.

Second, the stereotype of the female liar appears as the woman with an ulterior motive.[50] Sometimes she is perceived as simply having something personal against the accused, who is either the defendant or the employer. In this context, she is sometimes branded as a "woman scorned,"[51] who either seeks to punish the man for rejecting her or instead attempts to reverse the situation because her own aggression or unsuccessful seductive tactic is something that retrospectively embarrasses her.[52]

1989) (describing example of sexual harassment in workplace and attempting to shift blame to female employees); Brennan, *supra* note 8, at 586-87 (discussing belief that sexual harassment victims invite harassment through provocative dress, words, or actions).

[49] *See* Althouse, *supra* note 8, at 916 (discussing portrayals of women, including prostitutes charging clients with rape); DeCosse, *supra* note 8, at 288-89 (discussing impact of sexual history on credibility and highlighting that prostitutes are perceived as especially unreliable witnesses); Edwards, *supra* note 8, at 249 (describing characterization of female rape victims as women of excessive or perverted sexuality); Remick, *supra* note 8, at 1103 n.4 (discussing reasons for underprosecution of rape); Scheppele, *supra* note 8, at 143 (discussing rationales sexual offenders cite for actions); Alinor C. Sterling, *Undressing the Victim: The Intersection of Evidentiary and Semiotic Meanings of Women's Clothing in Rape Trials*, 7 YALE J.L. & FEMINISM 87, 89 (1995) (highlighting one example of acquittal because of jury's belief that victim asked for it).

[50] *See* Carol Rivers, *Is There No Believable Woman to Accuse a Powerful Man?*, L.A. TIMES, Dec. 12, 1991, at A29. Rivers, discussing the plight of Anita Hill and the woman who accused William Kennedy Smith of rape, said: "The fact is, we do not believe women who seem to have no apparent motive for lying and not much to gain, either. But we do believe powerful men even though they have a lot to gain from not telling the truth." *Id.*

[51] *See* William Congreve, *The Mourning Bride* (1697), *reprinted in* THE MOURNING BRIDE, POEMS, & MISCELLANIES BY WILLIAM CONGREVE 125 (Bonamy Dobree ed., 1928) (stating "Nor Hell a fury, like a woman scorn'd").

[52] *See* Althouse, *supra* note 8, at 916 (discussing portrayals of women pursuing sexual harassment claims as jilted women seeking revenge against their lovers); Judith Olans Brown, et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L.J. 457, 520-21 (1996) (describing men's mythic fear that every innocent remark will become grounds for sexual harassment claims by vengeful or scorned women); Coombs, *supra* note 8, at 296 (describing how some explain Anita Hill's charges by characterizing her as woman scorned); Edwards, *supra* note 8, at 249 (finding distrust of female victims evident in characterizations of them as spurned females); Rivers, *supra* note 50, at A29 (questioning logic of those who believed that Anita Hill invented comments about porno talk because she was scorned, but refused to believe that Clarence Thomas, who people knew to watch such films, borrowed language from those movies); Scheppele,

Sometimes the ulterior motive is not romantic but instead a business gripe. Presumably, she is embittered because her employer fired or demoted her or gave her promotion to someone whom she perceived less deserving. Society depicts her as wielding the sexual harassment claim as a retributive workplace sword.[53] Other times, she is dismissed as being a mere political tool.[54] Whether the ulterior motive pertains to romance, business, or politics, the underlying assumption is that she is not the harmed but rather the harmer.

Third, the female liar can be the woman of money lust.[55] This creature, often denominated as the "gold digger,"

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supra note 8, at 128-29 (highlighting Republican Senators' attempts to insert stock stories about scorned women to influence Thomas hearings); *see also* David B. Wilkins, *Presumed Crazy: The Structure of Argument in the Hill/Thomas Hearings*, 65 S. CAL L. REV. 1517-22 (1992) (discussing supposed explanations for Anita Hill's charges).

[53] *See e.g.*, MICHAEL CRICHTON, DISCLOSURE (1994). Crichton presents a somewhat convoluted example of a retributive sexual harassment claim in the workplace in which a woman sexually harasses a man and then reverses their roles by accusing him of sexual harassment. Her motivation was pure ambition which, as the male author saw it, was an aspect of her villainy. *See also* Ontiveros, *supra* note 8, at 1374 (discussing DISCLOSURE). More generally, those seeking to discredit women accusers tend to make only vague assertions about their supposed ulterior motives. *See, e.g.*, Scheppele, *supra* note 8, at 138 (discussing how witnesses testifying for Judge Thomas created opportunities to recast Professor Hill's story into one from someone bent on revenge).

[54] *See* Coombs, *supra* note 8, at 296 (discussing characterization of Anita Hill as "perjuring dupe of special interest groups"); Scheppele, *supra* note 8, at 138 (discussing characterization of Anita Hill as calculating politician). *See generally* DAVID BROCK, THE REAL ANITA HILL: THE UNTOLD STORY 340-48 (1993) (describing Hill as driven by her radical views). Similar accusations have been directed at Paula Jones. *See, e.g.*, William P. Cheshire, *Questions, Answers on Paula Jones*, ARIZ. REPUBLIC, June 12, 1994, at C1 (questioning whether "bimbo eruptions" are additional examples of partisan gamesmanship and sensational journalism); *Distinguishing Characteristics (Paula Jones and Bill Clinton)*, *supra* note 10, at 7 (questioning Jones's actions because of associations with suspect characters).

[55] *See* Jane E. Larson, *Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 393 (1993) (discussing depiction of male defendants as innocent targets of scheming and hypocritical blackmailers in earlier twentieth century seduction cases). Larson further explains that "common stereotypes [of women were] the 'gold digger,' who married for money, and the 'seductress,' who lured wealthy men into sexual liaisons, and then threatened them with lawsuits aimed at extorting hefty settlements.'" *Id.* at 394. Paula Jones has also been branded a "gold digger." *See, e.g., Distinguishing Characteristics (Paula Jones and Bill Clinton)*, *supra* note 10, at 7 (highlighting discrepancies in Jones' story); *Pros and Cons of Paula Jones' Story*, DET. NEWS, May 14, 1994, at 12F (warning that Paula Jones may regret her accusations of President Clinton); *The Woman Who Sued Bill Clinton Up from Little Lonoke, Ark.*, U.S. NEWS & WORLD REP., June 13, 1994, at 42 (highlighting negative comments about Jones by her sister and national media).

supposedly sees the sexual harassment suit as an economic opportunity. In a somewhat perverted entrepreneurial spirit, she, cognizant of the accused's fear of negative publicity and scandal, aims to extort the defendant into a settlement. If the defendant fails to surrender, however, money lust will propel her to try to dupe a trier of fact into infusing her bank account with ready cash. She too is not presented as the victim, but instead is seen as the villainous perpetrator of a fraud.

Fourth, the female liar can be the woman of hyperbole.[56] In this mode, she is not literally cast as a liar but as someone with a penchant for maligning the innocuous. Shaping this stereotype is the notion that perhaps something did happen to her in the work place, but it did not rise to the level of harassment. Often the woman of hyperbole tends to exaggerate both the incidents themselves and her injuries. She is, in essence, likened to a malingerer with a flair for dramatizing her pain, anxiety, suffering, and physical symptoms.[57] The implicit view of this

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[56] *See* DeCosse, *supra* note 8, at 293 (discussing courts' dismissal of sexual harassment claims as idiosyncratic oversensitive responses to normal workplace situations); Gillian K. Hadfield, *Rational Women: A Test for Sexed-Based Harassment*, 83 CAL. L. REV. 1151, 1154-55 (1995) (discussing attitudes of female victims toward men); Hunter, *supra* note 7, at 156-59 (stating that courts often require corroboration in rape and sexual harassment cases, but that corroboration is often unavailable). The woman of hyperbole is an especially effective stereotype because sexual harassment in the workplace has been perceived as normal and commonplace. Consequently, when a woman makes an issue out of it, she is treated as if she is overreacting. *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1202-09 (1989) (arguing that courts trivialize women's experiences by depicting sexual taunts, inquiries, or magazines as comparatively harmless or as expected in workplace environments); Brown, et al., *supra* note 52, at 516-17 (arguing, "Despite the success of some women plaintiffs, both judicial opinions and public debate are plagued by fears that expanding the definition of sexual harassment beyond the most outrageous conduct will totally disrupt 'normal' interaction and that men will be unjustly punished by groundless sexual harassment claims simply for behaving in the way 'normal' men behave."); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 860 (1991) (stating, "The problem with the court decisions, and the attitudes they reflect, is that offensive sexuality is so routinely considered normal, abuse of power acceptable, and the dehumanizing of women in sexual relations unremarkable, that when we (or the courts, at least) see such things at work, it hardly seems a 'federal case.'"). *See generally* BARBARA A. GUTEK, SEX AND THE WORKPLACE 88-92 (1985) (examining differences in comments by men and women).

[57] *See* Larson, *supra* note 55, at 448 (citing feminist scholars discussing emotional injuries); *see also* Robin West, *The Difference In Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 82 (1987) (arguing that legal system's treatment of women's injuries is similar to market culture's treatment of women's work and that neither are recognized or compensated for full value).

hyperbolic woman is that her injuries are not real and, thus, she is unworthy of compensation. This perceived unworthiness effectually divests her of her plaintiff status.

Finally, the stereotypic female liar can be the woman of delusions. Perhaps she suffers specifically from erotomania[58] or more vaguely lacks the ability to differentiate fantasy from reality.[59] This fable of the delusional woman typically begins with an unsuspecting male who just happens to meander into the wrong place, her sphere, at the wrong time and then becomes grimly mired in the landscape of her illness. He is not her oppressor, but her unwitting victim.

The stereotype of the female liar is even more disquieting because she can subsume more than one or even all five species of the liar. One superb example of the female amalgamated liar is in the dissenting decision in *Corgan v. Muehling*[60] which although not a sexual harassment case, is nevertheless analogous. In *Corgan*, a former female patient sued an unregistered psychologist for malpractice. She alleged that the psychologist had sexual relations with her during the course of her treatment. A dissenting justice wrote:

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[58] *See* Althouse, *supra* note 8, at 916 (describing portrayal of "erotomaniacal women" as fantasizing about rape); Coombs, *supra* note 8, at 296 (discussing view that Anita Hill experienced delusional erotomania and fabricated allegations); *cf.* Alessandra Stanley, *Erotomania: A Rare Disorder Runs Riot — in Men's Minds*, N.Y. TIMES, Nov. 10, 1991, § 4, at 2 (suggesting erotomania as male fantasy and noting Geraldo Rivera could not locate enough women with that putative disorder to produce whole episode of his talk show on topic).

[59] *See* Scheppele, *supra* note 8, at 128-29 (stating that Republican Senators used Hill's silences and differing versions to insert stock stories about women losing touch with reality and that they relied on unqualified parties for comments on Hill's sanity). It wasn't enough for many commentators to liken Anita Hill to a scorned woman; rather, they assigned her with a mental illness — "fatal attraction" syndrome. *See* Joyce Price, *Thomas Will Not "Cry Uncle," Eager Callers Sure Where Truth Rests*, WASH. TIMES, Oct. 13, 1991, at A1. Dean Wigmore also believed that female accusers were afflicted with mental illness. He stated:

> Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the court in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary psychological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men.

3A WIGMORE, EVIDENCE § 924A, at 736 (Chadburne rev. 1970).

[60] 574 N.E.2d 602 (Ill. 1991).

> At the moment the sexual relationship began, the treatment relationship ended. From that time forward, the plaintiff and the defendant were engaged in a frolic, a mutually agreeable detour from any recognized or accepted treatment regimen. To hold the defendant legally liable under such conditions is to countenance a legal form of extortion or blackmail. The law should not permit it. The complaint should be dismissed. Even if such a claim were to be recognized, the attempt to fit this type of claim into a negligence or willful and wanton format is wholly misplaced. There is no allegation that the parties fell off a bed or injured any part of the plaintiff's anatomy. The plaintiff, having willingly engaged in a frolic, now seeks to use the legal system as a tool for a shakedown.[61]

The dissent in *Corgan* actually conceived a multifaceted alloy of the female prevaricator. The woman who "asked for it" appears here as the female that "willingly engaged in a frolic" or a "mutually agreeable" escapade.[62] The woman of money lust also emerges in the *Corgan* dissent as the woman using the system as a "form of extortion or blackmail" and as a "tool for a shakedown."[63] Further, the woman of hyperbole appears in the form of the dissent's contrasting the plaintiff with someone that "fell off the bed or injured [a] . . . part of [her] anatomy."[64] The dissent's clear implication is that the plaintiff did not suffer any real injury.

As the dissenting opinion in *Corgan* also demonstrates, the female liar can be unsettlingly protean in that her mythic identity can nimbly shift from one type of liar to another at any given time. As a result, she cannot effectively defend herself against the imposed stereotypes because the images themselves simply refuse to sit still.

Most disturbing here, however, is the common denominator between all five types of the female fabricator. As the woman "who asked for it" or the woman with an ulterior motive, it is

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[61] *Id.* at 611-12 (Heiple, J., dissenting); *see also* Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 21 (1977) (discussing instructions to attorneys to be vigilant against sex offense complaints alleged by scorned women who desire revenge or extortion).

[62] *See Corgan*, 574 N.E.2d at 611-12.

[63] *Id.* at 612.

[64] *Id.* at 611-12.

she that becomes the wrongdoer.[65] As the woman of money lust, she is not just a mere villainess but an outright extortionist making the legal system into her weapon of coercion.[66] Further, as the woman of hyperbole, she is also not what she purports to be: she is not a victim because nothing egregious ever really happened to her, and she is not entitled to compensation because her alleged damages are not legitimate.[67] As the woman of delusion, the male defendant is the victim of her derangement.[68] All five forms of the female liar, therefore, dispatch the same message: because women lie, it is really men who need protection.[69]

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[65] *See supra* notes 46-54 and accompanying text.

[66] *See supra* notes 55-56 and accompanying text.

[67] *See supra* notes 56-57 and accompanying text.

[68] *See supra* notes 58-59 and accompanying text.

[69] All the mythic liars negate the woman's true identity as the victim or the aggrieved plaintiff in the dispute. *See* Berger, *supra* note 61, at 21 (discussing Wigmore's warning to courts to guard against putting innocent men's liberty at mercy of unscrupulous and revengeful mistresses because true victims tend to be innocent men).

In the rape context, there were several rules that ensued from disbelief of rape victims and served to protect the accused from baseless charges. First, there was the corroboration requirement. *See* LINDA A. FAIRSTEN, SEXUAL VIOLENCE 15 (1995). The corroboration requirement usually compelled victims to produce evidence of torn clothing, injuries, and bruises, which had the effect of barring many victims from presenting the episode to the jury. *See id.* Second, there was the prompt complaint doctrine, which required that the victim report the rape immediately after it occurred. *See generally* Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1042 (1991) (discussing prompt complaint doctrine). The prompt complaint doctrine presumed that a real rape victim would be inclined to report the incident promptly. *See id.* Further, there was a cautionary instruction for rape cases, which arose out of Lord Hale's seventeenth century admonition that rape "is an accusation easily made and hard to be proved, and harder to be defended by the party accused." I. M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635-36 (1791); *see also* People v. Phillips, 536 N.E.2d 1242, 1246 (Ill. Ct. App. 1989) (Pincham, J., dissenting) (citing Hale's comments approvingly). Additionally, there are also doctrines at work in sexual harassment cases that operate to protect the male or the employer. One theme several sexual harassment opinions have in common is that the victim assumed the risk of the harassment. These opinions imply that when the work environment was hostile to women before the plaintiff was employed, she assumed any risk of harassment. Another theme prejudicing sexual harassment decisions is the belief that some women, due to a character flaw, do not deserve protection or, alternatively, due to some characteristic the female plaintiffs possess, they cannot be harmed by sexual harassment. *See* Brennan, *supra* note 8, at 580-81; *see also* Streseman, *supra* note 27, at 1271-72 (stating that court-ordered mental examinations of sexual harassment plaintiffs can intimidate such potential plaintiffs into silence). *See generally* Hunter, *supra* note 7, at 162-66 (discussing "informal mechanisms" undermining credibility of women complaining about sexual violence).

For the sexual harassment victim, her conscious or even unconscious awareness that such stereotypes exist can engender a fear that once the swearing match is on, no one will believe her. This fear can keep her from reporting an offensive incident or from bringing suit.[70] At the very least, she may delay seeking redress.[71] Ironically, such procrastination can cyclically substantiate her initial fear: that she would be portrayed or perceived as reprehensible or delusional. Stated otherwise, the accused might assert that the plaintiff's complaint is baseless and that her hesitation to sue belies the sham.[72]

An opposite reaction on the part of the woman, however, that of moving expeditiously, might not auger well either. A mad dash to the courthouse to file her complaint can make the sexual harassment victim look like a woman ignited by ulterior motive or money lust. Thus, the gender stereotypes in this context tend to do exactly what all stereotypes do: they create a trap or a "catch twenty-two" that has the effect of making all viable alternatives into things equally damning.[73]

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[70] *See* Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2480 (1994) (stating that pervasive sexual objectification both inside and outside work place shapes women's perception of themselves and their male counterparts' conduct); *see also* George, *supra* note 27, at 2 (stating that "accounts of sexual harassment are routinely denied, if not scorned"); Monnin, *supra* note 8, at 1159 (explaining that few women report sexual harassment because they fear being blamed, suffering retaliation, and receiving additional harassment). For example, a female police officer was asked why she tolerated the harassment. *See* Reed v. Shepard, 939 F.2d 484, 492 (7th Cir. 1991). For her, a formal complaint would signal that she did not fit in and, thus, was not suitable for her chosen career. As she put it, "It was important for me to be a police officer and if that was the only way that I could be accepted, I would just put up with it and kept my mouth shut." *Id.*

[71] *See* Scheppele, *supra* note 8, at 126-27 (arguing that abused women alter stories or delay reporting out of feelings of repression, doubt, or self-blame).

[72] *See supra* note 69 (discussing prompt complaint doctrine). The prompt complaint doctrine was based on a belief that a legitimate rape victim would not wait to report the incident. *See, e.g.*, People v. Lutzow, 88 N.E. 1049, 1052 (Ill. 1909) (stating victims who fail to report rape at first available opportunity lose some credibility). *See generally* Scheppele, *supra* note 8, at 126 (stating that changes in stories are used to discredit women as liars). With respect to Anita Hill, her delay became an issue that supposedly undermined her credibility. Senator Strom Thurmond emphasized that the alleged harassment took place almost a decade before she came forward and Judge Thomas himself found it "particularly troubling" that she had never raised it before. *See id.* at 130 (quoting *Nomination of Clarence Thomas to Associate Justice of the Supreme Court of the United States: Hearings of the Senate Judiciary Comm.*, 102d Cong., 2d. Sess., Federal News Service, Oct. 11, 1991, *available in* LEXIS Library, Fednew File).

[73] *See* Coombs, *supra* note 8, at 301 (describing "catch twenty-two" of appearing irrational and out-of-control or appearing too cool, unemotional, and controlled).

There is something undeniably noxious about stereotypes that operate to prevent the injured from seeking or obtaining redress. Conceivably worse, however, is when such sexist images infiltrate the principles in a judicial decision and deform legal reasoning. The decisions of the district court and dissenting opinion of the Eighth Circuit Court of Appeals in *Jones* harbor some subtle and not-so-subtle images of the she-liar. In so doing, these judges allowed the mythic female liar to unduly expand their interpretation of the presidential immunity doctrine.

II. THE EVOLUTION OF ABSOLUTE PRESIDENTIAL IMMUNITY

From the early presidential immunity cases to the seminal *Fitzgerald* decision, the Court has struggled to accommodate two competing concerns. On the one hand, the Court has been cognizant of the Framers' fear of tyranny and elevating the President above the law. On the other, the Court has sought to provide the President with enough immunity to effectively perform his official duties without fear of litigation. In striking a balance between these concerns, the Court has attempted to protect yet another interest: the fundamental right of access to the courts and redress. The tension between these principles can be traced throughout the evolution of the presidential immunity doctrine.

A. The Avoidance of the Deific Monarch Versus the Need for Executive Independence: Absolute Presidential Immunity

The doctrine of sovereign immunity derives from the English maxim that "the King can do no wrong."[74] In its incipience, the maxim went beyond merely implying that the King was immune from suit, but actually equated the monarch with a deity that was literally incapable of committing wrongful acts.[75] In

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[74] *See* BLACKSTONE, *supra* note 6, at *246. "The King can do nothing wrong. This means that whatever is exceptionable in the conduct of public affairs, is not to be imputed to the King, nor is he answerable for it personally to the people." *Id.*; *see also* R.J. Gray, *Private Wrongs of Public Servants*, 47 CAL. L. REV. 303, 305 (1959) (addressing maxim that "King can do no wrong").

[75] *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 3-4 (1963); *see also* Laurier W. Beaupre, *Birth of a Third Immunity? President Bill Clinton Secures Temporary Immunity from Trial*, 36 B.C. L. REV. 725, 729 (1995) (explaining

England, however, the tensions between Parliament and the King led to the adoption of the Petition of Right, which enlarged the Magna Carta and curtailed the King's power.[76] The once deific monarch was demoted to a King under God and the law.

Although that archaic English maxim worked its way into American sovereign immunity doctrine, it is not reflected in the constitutional definition of presidential power.[77] Indeed, the Framers of the Constitution abhorred the very concept of the President as a god above the law.[78] Nearly obsessed with the fear of tyranny, the Framers sought to avoid allotting too much power to any one branch of government.[79]

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that English sovereign immunity meant that sovereigns were incapable of committing illegal or malicious acts).

[76] *See* Jones v. Clinton, 869 F. Supp. 690, 693 & n.1 (E.D. Ark. 1994) (arguing that Petition of Right expanded Magna Carta to constitutionally limit power of monarchy). *See generally* Jennifer L. Long, *How to Sue the President: A Proposal for Legislation Establishing the Extent of Presidential Immunity*, 30 VAL. U. L. REV. 283, 287-88 (1995) (discussing limitations on monarchy created by Magna Carta).

[77] *See generally* Mayer G. Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U.L. REV. 526, 528-29 (1977) (discussing limited relevance of English history to officers' liability in American courts); Theodore P. Stein, Nixon v. Fitzgerald*: Presidential Immunity as a Constitutional Imperative*, 32 CATH. U. L. REV. 759, 762-63 (1983) (discussing origins of presidential immunity).

[78] *See generally* Laura Krugman Ray, *From Prerogative to Accountability: The Amenability of the President to Suit*, 80 KY. L.J. 739, 747-48 (1991-92) (discussing evolution of presidential immunity). Professor Ray explains:

> The idea that the President of the United States, unlike the English king, would be both accountable and subject to the rule of law recurred throughout the convention debates. Delegates repeatedly countered proposals for the structure and powers of the national executive with the objection that such proposals might create what Edmund Randolph of Virginia termed "the foetus of a Monarchy." Although some delegates praised the British government — Alexander Hamilton called it "the best model the world ever produced" — there was a strong sense that the unchecked privileges and powers of its king were antithetical to the goals of American society.

Id.

[79] *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §3.5 (4th ed. 1991) (discussing history of separation of powers); Michael B. Browde & M.E. Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M. L. REV. 407, 411-20 (1985) (discussing history of separation of powers); Amy D. Ronner, *Judicial Self-Demise: The Test of When Congress Impermissibly Intrudes on Judicial Power After* Robertson v. Seattle Audubon Society *and the Federal Appellate Courts' Rejection of the Separation of Powers Challenges to the New Section of the Securities Exchange Act of 1934*, 35 ARIZ. L. REV. 1037, 1042-55 (1993) (discussing history of separation of

While the Constitution vests the executive power in the President alone,[80] there are other mechanisms that curb potential abuses of power.[81] For instance, the Framers themselves provided the extreme remedy of impeachment for serious misconduct.[82] Also, as the United States Supreme Court noted in *Fitzgerald*, there are other checks on the President in the form of unrelenting press and media scrutiny and vigilant oversight by Congress.[83] Further, as the *Fitzgerald* Court also acknowledged, there is the tempering effect of the natural desire to win re-election and to preserve the prestige and historical dignity of the oval office.[84] All of these multiple forces conspire to keep Presidents from rising above the law.

Because neither the Constitution nor a statute provides immunity for the President, the United States Supreme Court has shaped the doctrine by relying primarily on public policy.[85] The driving force, of course, behind the concept of presidential immunity is to preserve executive independence.[86] This is the motif that emerges in Justice Joseph Story's 1833 constitutional treatise in which he describes what he feels should be the

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powers). *See also* Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 451 (1991) (arguing that Framers were virtually obsessed with fear of concentration of political power).

[80] *See* U.S. CONST. art. II, § 1, cl. 1; *see also* Stephen L. Carter, *The Political Aspect of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1341, 1373 (1983) (stating that Constitution grants executive authority to President and President directs power to other officers).

[81] *See* Nixon v. Fitzgerald, 457 U.S. 731, 757 (1982) (describing protections against presidential misconduct including impeachment, press scrutiny, congressional oversight, re-election desires, issues of prestige and influence, and concern for historical stature); *see also* Ray, *supra* note 78, at 747-49 (discussing Constitutional Congress's means to limit presidential power).

[82] *See* U.S. CONST. art. II, § 4; *see also Fitzgerald*, 457 U.S. at 757 (asserting impeachment is constitutional remedy).

[83] *See Fitzgerald*, 457 U.S. at 757.

[84] *See id.*

[85] *See* Freed, *supra* note 77, at 529-32 (discussing development and rationale of presidential immunity). *But see* Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 710-15 (1995) (arguing that Arrest Clause of Article I, Section 6 of U.S. Constitution serves as basis for temporary presidential immunity).

[86] *See Fitzgerald*, 457 U.S. at 757 (discussing need for President to be able to exercise discretion without fear of individual lawsuits); *see also* Long, *supra* note 76, at 305 (comparing President's need for independence with notion that President should not be above law).

inviolability of the presidential office.[87] As Justice Story put it, "In the exercise of his political powers, he is to use his own discretion, and is accountable only to his country and his conscience. His decision in relation to these powers is subject to no control, and his discretion, when exercised, is conclusive."[88]

The Court also considered the theme of unfettered executive decision-making in early decisions where they refused to entertain suits against the President. For example, in *Mississippi v. Johnson*,[89] the State of Mississippi tried to prevent the enforcement of the Reconstruction Acts by arguing that they were unconstitutional.[90] In concluding that it lacked jurisdiction to enjoin the President from enforcing the laws, the Supreme Court reasoned that such relief would violate the separation of powers doctrine and encroach upon the independence of the President.[91] The Court, however, did not explicitly predicate its refusal to hear the case on its merits on the immunity doctrine.[92]

The Supreme Court first dealt with the question of whether there should be immunity for high-ranking executive officials in *Spalding v. Vilas*.[93] In *Spalding*, the Postmaster General allegedly sent letters in which he defamed an attorney that had lobbied the government on behalf of local postmasters.[94] The Court found that the Postmaster General had acted within the scope of his official authority and, thus, it cloaked him with immunity.[95] The Court reasoned that without immunity, executive officials may not act in the public interest for fear of liability.[96]

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[87] *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1569 (5th ed. 1891).

[88] *Id.*

[89] 71 U.S. (4 Wall.) 475 (1866).

[90] *See id.*

[91] *See id.* at 500-01.

[92] *See id.* (stating that Court refused to hear case based on separation of powers principles and Court's lack of jurisdiction to enjoin President).

[93] 161 U.S. 483 (1896).

[94] *See id.* at 484-88.

[95] *See id.* at 498.

[96] *See id.* The Court said that exposing such executive officials to liability would seriously cripple the effective administration of public affairs within the executive branch. *See id.*; *see also* Beaupre, *supra* note 75, at 734 (discussing *Spalding*).

In *Barr v. Matteo*,[97] the Court extended immunity to executive branch officials beneath the cabinet rank.[98] However, the Court granted protection only to officials who were acting within the scope of their authority.[99] In *Barr*, suspended employees of the Office of Rent Stabilization sued the agency's Director for libel.[100] The Court repeated the policies behind the *Spalding* decision and extrapolated that the threat of such civil liability could "appreciably inhibit the fearless, vigorous and effective administration of policies of government."[101] In dismissing the suit, the Court found that the Director's issuance of the allegedly libelous press release fell within the outer limits of his authority.[102]

B. The Shift from Absolute to Qualified Immunity

The concern with preserving executive independence coexisted with the countervailing fear of inordinate power. Thus, in formulating an immunity doctrine, the Court understood that empowering an individual with immunity could have the effect of depriving a legitimately aggrieved plaintiff of the right to be made whole.[103] Consequently, the Court began qualifying the immunity available for most executive officials.[104] The shift from absolute to qualified immunity reflects the Court's effort to reconcile the need for executive independence with the basic remedial principle that the wrongdoer, not the victim, bears the cost of injury.

In *Scheur v. Rhodes*,[105] the Court described a qualified immunity for state executive officials and set the stage for what would become the federal executive official immunity standard.[106] In

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[97] 360 U.S. 564 (1959).

[98] *See id.* at 572-73.

[99] *See id.* at 575.

[100] *See id.* at 565.

[101] *See id.* at 571.

[102] *See id.* at 575; *see also* Beaupre, *supra* note 75, at 734-35 (discussing *Barr*).

[103] *See Barr*, 360 U.S. at 576.

[104] *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (stating that qualified immunity test protects public interest by deterring unlawful conduct and compensating victims); Butz v. Economou, 438 U.S. 478, 503-04 (1978) (stating that plaintiff whose constitutional rights are violated is entitled to damages).

[105] 416 U.S. 232 (1974).

[106] *See id.* at 249-50.

Scheur, representatives of students killed in the Kent State University shootings sued Ohio Governor James Rhodes under 42 U.S.C. §§ 1983 and 1985.[107] The gravamen of their complaint was that the Governor had violated the students' constitutional right to due process by recklessly deploying the National Guard.[108] In declining to find absolute immunity for the Governor, the Court reasoned that blanketly shielding state officials from suits pursuant to sections 1983 and 1985 would obliterate the laws' very objective by depriving injured citizens of redress for violation of their constitutional rights.[109] Consequently, the Court held that the law entitled state officials to qualified immunity from civil damages suits based on constitutional violations.[110] If officials reasonably believed that their actions were lawful and within the scope of immunity, the Court reasoned, then they were immune from suit.[111]

The decision in *Butz v. Economou*[112] imported the *Scheur* reasoning into the federal sphere.[113] In *Butz*, when a commodities trader criticized the Secretary of Agriculture's department, the Secretary tried to revoke the trader's registration.[114] The trader then brought suit, alleging that the Secretary's actions were retaliatory.[115] The Court concluded that executive branch officials had no greater immunity from civil liability based on constitutional claims than did state officials.[116]

The *Butz* Court distinguished *Spalding* and *Barr* on the grounds that neither case involved violations of constitutional

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[107] *See id.* at 232.

[108] *See id.*

[109] *See id.* at 243-49 (stating that § 1983 would be rendered meaningless if Court held that acts of executive officials overrode all conflicting property rights and were not subject to judicial review).

[110] *See id.* at 249-50.

[111] *See id.* at 247-48. Later, the Supreme Court clarified the test and imposed a standard with both a subjective and objective component. *See* Wood v. Strickland, 420 U.S. 308, 321-22 (1975) (granting immunity only when actors believe that they acted appropriately when they adhered to standard of conduct based own their on knowledge of constitutional rights related to their charges); *see also* Stein, *supra* note 77, at 765-66 (discussing standards established in *Scheuer*, *Wood*, and *Harlow*).

[112] 438 U.S. 478 (1978).

[113] *See id.* at 478.

[114] *See id.* at 481-83.

[115] *See id.* at 480.

[116] *See id.* at 506-07.

rights[117] and proclaimed that once executive officials knowingly violate the Constitution they can no longer enjoy absolute immunity.[118] However, the Court held that there was still absolute immunity for federal officials performing adjudicative functions.[119] The Court also left open the possibility that other federal officials could demonstrate that an extant public policy warrants the application of a broader absolute immunity.[120]

In *Harlow v. Fitzgerald*,[121] the companion case to *Fitzgerald*, the Court further recognized that qualified immunity sufficiently accommodates the competing interests of protecting high officials' discretionary decision-making and affording injured victims a right to redress.[122] The *Harlow* Court, however, abolished the subjective component of the qualified immunity test because it did not adequately insulate government functions from potential undue interference.[123] Thus, after *Harlow*, the particular defendant's state of mind was no longer at issue. Immunity depended entirely on whether the official violated an individual's clearly established statutory or constitutional right and whether a reasonable official would know of the existence of such a right.[124]

In sum, there is a common theme in the qualified immunity cases that preceded *Fitzgerald*. In shaping the qualified immunity doctrine, the Court struggled to effectuate a balance between the need for unfettered governmental decision-making and the

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[117] *See id.* at 489-95.

[118] *See id.* at 507.

[119] *See id.* at 508-13.

[120] *See id.* at 506 (stating that federal officials seeking absolute immunity bear burden of proving public policy mandates such broad immunity).

[121] 457 U.S. 800 (1982).

[122] *See id.* at 814. When an abuse of office occurs, a suit for damages may be the only realistic method for vindicating constitutional guarantees. Thus, the law denies absolute immunity to most public officers. However, claims brought against innocent officials create costs for both the defendant officials and society as a whole. Societal costs include diversion of the official's energy from state concerns, litigation expenses, and deterrence from seeking public office. Additionally, fears of lawsuits may undermine the enthusiasm and devotion of public officials in discharging their duties. *See id. See generally* Kathry Dix Sowle, *The Derivative and Discretionary — Function Immunities of Presidential and Congressional Aides in Constitutional Tort Actions*, 44 OHIO ST. L.J. 943, 944-45 (1983) (discussing *Harlow*'s derivative immunity holding).

[123] *See Harlow*, 457 U.S. at 815-19; *see also* Stein, *supra* note 77, at 766-67 (discussing *Harlow*); *supra* note 111 (discussing *Wood*).

[124] *See Harlow*, 457 U.S. at 818.

need to compensate injured victims. Although the actual dispositions appear to favor protecting officials from undue interference with their duties, the Court was nevertheless cognizant of the public's legitimate interest in making the aggrieved plaintiff whole.[125] Implicit in these decisions is an awareness that forcing victims to bear the costs of their own injuries can indeed resuscitate the English deific monarch by elevating a governmental wrongdoer above the law.[126]

C. Fitzgerald*: A Return to Absolute Immunity*

In *Fitzgerald* the Court distinguished its holdings in *Butz* and *Scheuer* and granted the President absolute immunity from suit for official acts.[127] While the *Fitzgerald* Court may have recognized a broader form of protection for the Chief Executive, the case is not in any sense an aberration. The same competing principles at work in the qualified immunity antecedents shape the *Fitzgerald* decision.

1. The *Fitzgerald* Background

Fitzgerald was a management analyst with the Department of the Air Force.[128] He attained national prominence during the last months of the Johnson presidency when he appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress.[129] To the obvious embarrassment of his Department of Defense superiors, Fitzgerald testified that the C-5A transport plane could experience cost-overruns of approximately two billion dollars.[130] He also disclosed that there had been unanticipated technical

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[125] *See, e.g.*, Scheur v. Rhodes, 416 U.S. 232, 250 (1974) (stating that plaintiffs are entitled to have judicial resolution of complaints); Butz v. Economou, 438 U.S. 478, 503-04 (1978) (stating courts must reconcile right to compensation with protection of executive officials).

[126] *See, e.g., Scheur*, 416 U.S. at 239 (discussing evolution of immunity from sovereign immunity principles); *see also Harlow*, 457 U.S. at 814 (stating that courts deny most public officials absolute immunity because compensation is often only recourse for constitutional violations).

[127] *See* Nixon v. Fitzgerald, 457 U.S. 731, 750 (1982).

[128] *See id.* at 733.

[129] *See id.* at 734.

[130] *See id.*

difficulties during the development of the aircraft.[131] Approximately one year later, Fitzgerald lost his job in a "departmental reorganization and reduction in force."[132] The Air Force packaged this action as an effort to advance the economy and efficiency of the Armed Forces.[133]

The Subcommittee on Economy and Government, concerned that the elimination of Fitzgerald's job was a form of retaliation for Fitzgerald's congressional testimony, conducted public hearings on the dismissal.[134] After a news conference in which President Nixon promised to look into the matter, the President asked White House Chief of Staff H.R. Haldeman to have Fitzgerald assigned to a new position within the administration.[135] Apparently, Nixon also requested Budget Director Robert May to consider Fitzgerald for a niche in the Bureau of the Budget.[136]

Members of Nixon's administration doubted Fitzgerald's loyalty and declined to re-employ him.[137] Consequently, Fitzgerald complained to the Civil Service Commission that the Air Force terminated him in retaliation for his testimony.[138] While the Commission convened a closed hearing, Fitzgerald fought to proceed in a public forum.[139] After Fitzgerald brought suit and obtained an injunction, the public hearings commenced.[140]

The hearings disclosed that Air Force Secretary Robert Seamans had received "some advice" from the White House before eradicating Fitzgerald's job.[141] Although President Nixon assumed personal responsibility for Fitzgerald's dismissal at a subsequent news conference, the White House press office

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[131] *See id.*

[132] *See id.* at 733-34.

[133] *See id.* at 734.

[134] *See id.*

[135] *See id.* at 735.

[136] *See id.*

[137] *See id.* at 735-36. As the Court explained, "In an internal memorandum . . . White House aide Alexander Butterfield reported to Haldeman that 'Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game.'" *Id.* at 735-36.

[138] *See id.* at 736.

[139] *See id.*

[140] *See id.*; *see also* Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972) (granting injunction to Fitzgerald).

[141] *See Fitzgerald*, 457 U.S. at 736-77.

retracted his statement the very next day.[142] The press spokesman took the position that the President had mistaken Fitzgerald for another former executive employee at the time of the statement.[143]

After a hearing, the Chief Examiner for the Civil Service Commission concluded that Fitzgerald's dismissal offended applicable civil service regulations.[144] The Examiner recommended, among other things, that Fitzgerald be reinstated to his old position or given a comparable one.[145] The Examiner, however, did not adopt the suggested finding that the Air Force discharged Fitzgerald in retaliation for his congressional testimony.[146]

In response to the Examiner's decision, Fitzgerald filed essentially the same claims in federal court, naming officials of the Defense Department and White House as defendants.[147] The district court dismissed the action because Fitzgerald failed to bring it within the statute of limitations.[148] The appellate court affirmed the dismissal as to all but one defendant and remanded the action against White House aide Alexander Butterfield.[149]

In the wake of the remand and after extensive discovery, Fitzgerald lodged a second amended complaint, naming Richard Nixon as a defendant.[150] Nixon promptly moved for summary judgment and asserted qualified immunity as a defense. The district court denied Nixon's motion and found that the law did not entitle him to absolute immunity.[151] After the court of

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[142] *See id.* at 737.
[143] *See id.*
[144] *See id.* at 738.
[145] *See id.* at 737-38.
[146] *See id.* at 739.
[147] *See id.*
[148] *See id.*
[149] *See id.* at 739-40.
[150] *See id.* at 740.
[151] *See id.* at 740-41.

appeals summarily dismissed his collateral appeal,[152] the United States Supreme Court granted certiorari.[153]

2. The *Fitzgerald* Decision

With Justice Powell writing for the majority, the Court held that the former President was entitled to absolute immunity from civil damages arising out of his official acts.[154] The Court's four part analysis rested on the premise that the presidential office is unique. First, the Court, describing immunity generally as a creature of "'public policy and convenience,'"[155] examined prior cases in which it had recognized a shield for government officials.[156] In *Spalding*, for example, the Court held that the Postmaster General was immune from suits for damages based upon his official acts.[157] The Court reasoned that if it held otherwise, the Postmaster General might hesitate to take the decisive action necessary to carry out his duties for fear of subsequent liability.[158] The *Fitzgerald* Court implied that this concern applies with even more force where the official duties in question are those of the President.[159]

After *Spalding*, which was a common law action, other decisions extended the shield of immunity to constitutional causes of action.[160] In *Butz*, for example, the Court determined that federal officials possess the same qualified immunity as state officials in section 1983 actions.[161] The *Fitzgerald* Court, however,

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[152] *See id.* at 741. The appellate court apparently dismissed the appeal because a recent decision rejected the claimed immunity defense. *See* Halperin v. Kissinger, 606 F.2d 1192, 1213 (D.C. Cir. 1979).

[153] *See* Nixon v. Fitzgerald, 452 U.S. 959 (1981).

[154] *See Fitzgerald*, 457 U.S. at 755-56.

[155] *See id.* at 745; *see supra* notes 93-96 and accompanying text (discussing Spalding v. Vilas, 161 U.S. 483 (1896)).

[156] *See Fitzgerald*, 457 U.S. at 744-48.

[157] *See supra* notes 93-96 and accompanying text (discussing *Spalding*).

[158] *See Fitzgerald*, 457 U.S. at 745.

[159] *See id.* at 745-48.

[160] *See id.* at 745-46. The Court discussed several prior cases. *See, e.g.*, Scheur v. Rhodes, 416 U.S. 232 (1974) (finding that state executive officials had "good faith" immunity from § 1983 suits alleging constitutional violations); Pierson v. Ray, 386 U.S. 547 (1967) (recognizing continued validity of absolute immunity for acts within judicial role); Tenney v. Brandhove, 341 U.S. 367 (1951) (stating § 1983 did not abolish privilege accorded to state legislators at common law); *see also supra* notes 101-09 and accompanying text (discussing *Burr*, *Spalding*, and *Scheur*).

[161] *See supra* notes 112-20 and accompanying text (discussing *Butz*); *Fitzgerald*, 457 U.S. at

stressed that the *Butz* Court had nevertheless adhered to an absolute immunity rule for administrative officials involved in functions similar to those of judges and prosecutors because of the special nature of their responsibilities.[162] The *Butz* decision left open the question of whether other federal officials could demonstrate public policy reasons for affording them full exemption from liability.[163]

Second, the *Fitzgerald* Court found that presidential immunity is rooted in the separation of powers doctrine.[164] The Court noted that the President occupies a unique position in the constitutional scheme.[165] Under Article II, the Court explained, the President is the Chief Executive and as such is entrusted with exceptionally sensitive matters requiring the exercise of substantial discretion. Private lawsuits could divert the President's energy from national affairs and potentially impair the effective functioning of government.[166]

The *Fitzgerald* Court elaborated that the office, by its very nature, embroils the Chief Executive in matters that tend to arouse intense feelings.[167] Thus, it is precisely in such charged situations that the public has a significant interest in enabling the President to undertake his duties fearlessly and impartially.[168] Further, the Court explained, because Presidents are highly visible and their official actions affect countless people, they are easily identifiable targets for lawsuits.[169]

Third, the Court defined the scope of presidential immunity, emphasizing a logical nexus between the sphere of protected action and the purpose of the immunity.[170] The Court found that because the President has discretionary responsibilities in so

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746-47.

[162] *See id.* at 747.

[163] *See id.*; *see also supra* note 125 (holding open question of extending immunity to other executive employees).

[164] *See Fitzgerald*, 457 U.S. at 749.

[165] *See id.*

[166] *See id.* at 751-53.

[167] *See id.* at 751-52; *see also supra* note 160 (listing cases examining immunity issues).

[168] *See Fitzgerald*, 457 U.S. at 752.

[169] *See id.* at 752-53.

[170] *See id.* at 755.

many highly sensitive areas, immunity should shield him from damages liability for acts within the outer perimeter of his official responsibility.[171]

The Court illustrated the scope of the immunity by focusing on the circumstances of the *Fitzgerald* case itself. The Air Force denied that Fitzgerald's dismissal was retaliatory. Instead, the Air Force argued that efficiency interests had motivated the underlying reorganization that resulted in the elimination of Fitzgerald's position. If indeed President Nixon had actually commanded such a reorganization, there would be an inquiry into Nixon's motives. Such an inquiry, according to the Court, would be unduly intrusive and offend the very policies behind immunity.[172]

In the course of its analysis, the Court rejected Fitzgerald's contention that Nixon had acted outside the outer perimeter of his duties when he discharged Fitzgerald.[173] The Court noted that this argument would expose the President to trial whenever plaintiffs allege that the President committed an unlawful act. Thus, Fitzgerald's proposed exception would swallow the immunity protection.[174]

Finally, the Court recognized that immunity does not preclude the existence of other remedies for presidential misconduct.[175] For example, absolute immunity does not affect the availability of constitutional impeachment[176] or other less extreme checks on presidential power such as press scrutiny, congressional oversight, the President's desire to earn re-election, and his desire to maintain the historical prestige of the office.[177] The Court concluded that impeachment along with these other deterrents ensure that absolute immunity from civil damages will not elevate Presidents above the law.[178]

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[171] *See id.* at 756.
[172] *See id.*
[173] *See id.*
[174] *See id.*
[175] *See id.* at 757.
[176] *See id.*
[177] *See id.*
[178] *See id.* at 758.

3. The *Fitzgerald* Concurrence

In his concurring opinion, Chief Justice Burger underscored the fact that presidential immunity had its roots in the separation of powers doctrine and acknowledged the premise that "the needs of a system of government sometimes must outweigh the right of individuals to collect damages."[179] As Burger saw it, judicial intrusion through civil suits against the President interferes with executive independence. This independence, Burger explained, is crucial to the President's function.[180] Because presidential decision-making tends to reach so many people, civil suits can expose the President to harassment.[181] Burger recognized that if everyone who considered themselves aggrieved could rightfully seek damages from the President, it would lead to extensive judicial probing of executive decisions.[182] According to Burger, the need to prevent such a trespass into the executive sphere outweighs the competing legitimate interest in affording judicial redress for individual harm.[183]

Burger noted that even if the private lawsuit was found frivolous and the process ultimately vindicated the President on the merits, the damage would be irreparable.[184] The suit's very existence would demand significant expenditures on the part of the President regardless of its legitimacy.[185]

Addressing the dissenters' concern that granting the President absolute immunity violated the maxim "no man is above the law,"[186] Burger emphasized the limitations of the new immunity doctrine. The doctrine only applies to civil damage claims directed at the President's official acts.[187] He also noted that the Court's holding places the President on the same footing with judges and other officials whose absolute immunity the Court has already recognized.[188]

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[179] *See id.* at 759 (Burger, C.J., concurring).
[180] *See id.* at 761.
[181] *See id.* at 762.
[182] *See id.*
[183] *See id.* at 759-64.
[184] *See id.* at 763.
[185] *See id.*
[186] *See id.* at 767 n.2 (White, J., dissenting).
[187] *See id.* at 763-64 (Burger, C.J., concurring).
[188] *See id.* at 764.

Burger further explained why dissenting Justice White's references to language in *Nixon* were inapposite.[189] The *Nixon* case involved a subpoena to the President to produce evidence in a criminal prosecution and did not implicate the issue of damages immunity.[190] As Burger put it, "It is one thing to say that a President must produce evidence relevant to a criminal case, as in . . . *Nixon*, and quite another to say a President can be held liable for civil damages for dismissing a federal employee."[191] Burger also deemed it significant that immunity did not deprive Fitzgerald of a remedy because he had already been reinstated with back pay for the wrongful dismissal.[192]

4. The *Fitzgerald* Dissenters

Justice White, with whom Justices Brennan, Marshall, and Blackmun joined, authored a dissenting opinion.[193] Challenging the majority's assertion that immunity stems from the Constitution,[194] the dissent argued that if the majority was correct, then Congress could not provide a remedy for presidential misconduct and the criminal laws of the United States would be inapplicable to the President.[195] The majority's approach of attaching absolute immunity to the Office of the President rather than to the President's specific functions elevates the President above the law.[196] In the dissent's view, the majority simply reactivated the notion that the King can do no wrong.[197]

The dissent also addressed the two principal arguments advanced by Nixon and the United States: (1) absolute immunity is an incidental power of the presidency, historically recognized as implicit in the Constitution, and (2) the separation of powers doctrine requires absolute immunity.[198] The dissent rejected the first theory, noting that neither constitutional text, history,

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[189] *See id.* at 760 (discussing United States v. Nixon, 418 U.S. 683, 706 (1974)).
[190] *See id.*
[191] *Id.*
[192] *See id.*
[193] *See id.* at 764-797 (White, J., dissenting).
[194] *See id.* at 765.
[195] *See id.*
[196] *See id.* at 766.
[197] *See id.*
[198] *See id.* at 770-771.

nor early commentators provide support for the idea that immunity is an incidental power of the presidency.[199] Thus, the majority's feeble historical argument does not support absolute presidential immunity.

Focusing on the Constitutional Convention, the dissent interpreted the delegates' ultimate vote of eight to two in favor of the ability to impeach the President to mean that they were not extraordinarily fearful of subjecting the President to the power of another branch of government.[200] According to the dissent, if this fear was really substantial, the delegates would not have approved the impeachment remedy.[201] Further, the dissenters noted that the debate at the Convention did not specifically focus on the President's commission of wrongs against individuals.[202] Thus, the Framers of the Constitution were not concerned with insulating the President from the consequences of his improper acts.[203] In the dissenters' view, the Framers shared Hamilton's concern, expressed in The Federalist No. 77, about potential presidential wrongs against the state, not individuals.[204]

The second reason advanced by Nixon and the United States in favor of absolute immunity was based on the separation of powers doctrine.[205] The dissent asserted that if immunity were actually rooted in the Constitution, then the President would be immune not just from damages actions, but also from suits for injunctive relief and from criminal prosecution.[206] As the dissent noted, however, precedent is to the contrary.[207] To illustrate, the dissent relied on *Burr* and *Nixon* which establish that neither allowing courts to determine the constitutionality of presidential actions nor subjecting the President to judicial process violates the separation of powers doctrine.[208] The Court's

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[199] *See id.* at 771-79.
[200] *See id.* at 772.
[201] *See id.*
[202] *See id.*
[203] *See id.* at 773.
[204] *See id.*
[205] *See id.* at 779.
[206] *See id.* at 780.
[207] *See id.*
[208] *See id.* at 781-82 (White, J., dissenting).

inquiry into these matters does not intrude on the executive branch so as to warrant immunity.[209] Private damages claims against the President are no more intrusive than suits seeking declaratory or injunctive relief.[210] Consequently, the dissent reasoned, a separation of powers problem could exist with respect to only private claims for damages if the constitutional infirmity resided in the remedy and not in the judicial process itself.[211]

The dissent proclaimed that "President[s] should have the same remedial obligations toward those whom [they] injure[] as any other federal officer."[212] The dissent understood that traditionally only liability that affected the governmental decision-making process trumped the well-settled remedial principal that the wrongdoer, not the victim, bears the costs of injury.[213] The majority's decision troubled the dissent primarily because, in the dissent's estimation, it departed from precedent.[214] Before *Fitzgerald*, the Court's inquiry focused on individual functions and assessed the effect of liability on governmental decision-making within the function itself.[215] Thus, the majority failed to address the real issue in *Fitzgerald*: "whether the dismissal of employees falls within a constitutionally assigned executive function, the performance of which would be substantially impaired by the possibility of a private action for damages."[216]

Fitzgerald based his claims on two federal statutes and the First Amendment.[217] One statute gave employees the right to furnish information to Congress, and the other made it a crime to obstruct congressional testimony.[218] These statutes were enacted "to assure congressional access to information in the possession of the Executive branch, which Congress believes it requires in order to carry out its responsibilities."[219] In enacting these statutes, Congress was actually "preserv[ing] its own

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[209] *See id.* at 782.
[210] *See id.*
[211] *See id.*
[212] *Id.* at 783.
[213] *See id.*
[214] *See id.* at 780.
[215] *See id.* at 784.
[216] *Id.* at 785.
[217] *See id.* The two federal statutes were 5 U.S.C. § 7211 and 18 U.S.C. § 1505.
[218] *See id.* at 785-86.
[219] *Id.* at 786.

constitutionally mandated functions in the face of a recalcitrant Executive."[220] The statutes preserved the separation of powers by preventing presidential encroachment upon congressional functions.[221] Thus, according to the dissent, the majority's contention that Fitzgerald's cause of action disrupts presidential functions assumes that presidential functions somehow preempt those of Congress.[222]

The dissent further explained that Congress, by providing a damages action under the two statutes, had acted within its constitutional authority.[223] In finding a constitutional impediment to Fitzgerald's claim, the majority makes the "frivolous contention" that an employment decision is a constitutionally assigned presidential function and, as such, Congress can not meddle in that supposedly sacred presidential sphere.[224]

The majority's concern with the President's visibility and commensurate vulnerability to such civil damage suits was also criticized by the dissent.[225] Citing the historical absence of such suits,[226] the dissent argued that routine procedures, like summary judgment, have adequately dealt with frivolous actions.[227] Thus, there was no reason to believe that frivolous claims would consume the President's time and energy.[228]

Finally, the dissent disagreed with the majority's fear that potential liability could unduly distract the President from public duties.[229] Because in reality the President makes few of the

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[220] *Id.*

[221] *See id.* at 786-87.

[222] *See id.*

[223] *See id.* at 787.

[224] *See id.* Additionally, the dissent objected to the majority's decision to grant the President immunity from a *Bivens* action as well. *See id.* at 770 (White, J., dissenting). In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court had held that where there has been a violation of rights guaranteed by the Fourth Amendment, the injured individuals could invoke the general federal-question jurisdiction of the federal courts in a suit for damages. *See id.* The dissenters concluded that a *Bivens* action against the President would neither trigger separation of powers problems nor "public policy" concerns that were different from those involved in subjecting the President to the statutory causes of action. *See id.*

[225] *See id.* at 795-96.

[226] *See id.* For example, eleven years after the doors opened to a *Bivens* action, there had only been a "handful" of such suits. *See id.* at 796.

[227] *See id.*

[228] *See id.*

[229] *See id.*

countless decisions required in the administration of government, the majority's rule will do little to insulate such decisions from liability in the future.[230] In closing, the dissent expressed regret that the Court's decision left Fitzgerald without an adequate remedy and that future plaintiffs would share the same unfortunate fate.[231]

5. *Fitzgerald*'s Balancing of Executive Independence with Executive Accountability

The *Fitzgerald* decision does not detour,[232] but instead heeds the reasoning in the earlier immunity cases.[233] In fact, the tension between executive branch independence and the dreaded deific monarch engendered the *Fitzgerald* absolute immunity doctrine. In defining the parameters of the doctrine, the *Fitzgerald* Court considered the aggrieved plaintiff's interest in obtaining redress.

The goal of protecting Presidents from undue interference with the performance of their duties figures prominently in three parts of the Court's analysis. The *Fitzgerald* Court, like the *Butz* Court, repeated the concern that officials performing adjudicative functions require absolute immunity because of the "special nature of their responsibilities."[234] The *Fitzgerald* Court yoked the issue of presidential immunity to the very question that the *Butz* Court had left unanswered — whether public policy warranted the recognition of such extensive immunity for

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[230] *See id.*

[231] *See id.* at 796-97. Justice Blackmun, with whom Justices Brennan and Marshall joined, authored a separate dissenting opinion. Justice Blackmun stressed what he felt was an unassailable principle that no person, not even the President, is absolutely above the law. *See id.* at 797-98. He also suggested that there was an inconsistency between hinging presidential immunity on the separation of powers doctrine, allowing the President to be "fully subject to congressionally created forms of liability." *See id.* at 798.

[232] Many commentators have viewed *Fitzgerald* as divergent. *See generally* Michael T. Matraia, *Running for Cover Behind Presidential Immunity: The Oval Office*, 29 SUFFOLK U. L. REV. 195, 223-26 (1995) (arguing that *Fitzgerald* Court's grant of absolute immunity represented significant departure from immunity jurisprudence). *See also* Ray, *supra* note 78, at 747-48, 780 (arguing that *Fitzgerald* goes far beyond prior case law in conferring unqualified presidential immunity); Stein, *supra* note 77, at 778-85 (asserting that *Fitzgerald* departs from traditional approaches in areas such as official immunity and separation of powers).

[233] *See supra* Part II.A.

[234] Butz v. Economou, 438 U.S. 478, 511 (1978); *Fitzgerald*, 457 U.S. at 747.

other federal officials.[235] In so doing, the *Fitzgerald* Court linked the problem before it to the broader immunity it had recognized in the early *Spalding* and *Barr* cases.[236]

Second, the need for unfettered presidential decision-making is at the heart of both Chief Justice Burger's concurrence and the fourth part of the majority opinion.[237] As the majority explained, the Constitution entrusts the President with "supervisory and policy responsibilities of the utmost discretion and sensitivity."[238] It is, according to the majority, the President's unique status in the constitutional scheme that warrants more extensive immunity than that bestowed upon other executive officials.[239] Specifically, the Court expressed concern that Presidents have to make sensitive decisions with far-reaching ramifications and, thus, must have the ability to discharge their official duties "fearlessly and impartially."[240] In this vein, the Court recognized that official presidential acts by their nature affect a great number of people, thereby creating an enormous class of potential plaintiffs. If such exposure to liability is not limited, the President's ability to act would be inhibited, which would be detrimental to the nation as a whole.

In his concurring opinion, Chief Justice Burger underscored this aspect of the Court's opinion. Burger stated that the separation of powers allows each coequal branch of government to function independently of the others.[241] For Burger, exposing Presidents to liability in private damage actions goes right to the crux of the problem that the separation of powers doctrine seeks to avoid: interference with executive independence.[242]

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[235] *See Fitzgerald*, 457 U.S. at 747.

[236] *See supra* notes 93-102 and accompanying text.

[237] *See Fitzgerald*, 457 U.S. at 749, 758-64.

[238] *See id.* at 750.

[239] *See* Ray, *supra* note 78, at 779 (discussing Court's reliance on differences between President and other executive officials); *see also* William F. Allen, Note, *President Clinton's Claim of Temporary Immunity: Constitutionalism in the Air*, 11 J.L. & POL. 555, 570-71 (1995) (discussing *Fitzgerald* Court's emphasis on unique role of President).

[240] *See Fitzgerald*, 457 U.S. at 750-52 (quoting Ferri v. Ackerman, 444 U.S. 193, 203 (1979)).

[241] *See id.* at 760-61.

[242] *See id.* at 761. In his concurring opinion, Chief Justice Burger took great pains to portray the kind of undue judicial probing that a President without immunity would endure:

Finally, the concern for preserving executive independence also shapes the third part of the *Fitzgerald* analysis. The majority relied on the President's "unique position in the constitutional scheme"[243] in recognizing an absolute presidential immunity from damages liability for acts within the outer perimeter of official responsibility.[244] According to the majority, management of the executive branch requires extreme discretion and sensitivity; it requires that the President have an unrestricted power to remove important subordinates from their duties.[245] Thus, the majority argued that it would be intrusive to conduct a judicial inquiry into Nixon's motivations for the reorganization in which Fitzgerald lost his job.[246]

While both the majority and the concurrence tipped the scales in favor of executive independence, they were careful not to place the President above the law.[247] In fact, apprehension about the undue concentration of power in one branch, indeed one single person, is omnipresent in all of the *Fitzgerald* opinions. For example, the fifth part of the majority's analysis is devoted to a discussion of the curtailment of potential presidential abuse of power. The majority exhaustively demonstrated that absolute immunity does not strip the nation of its formal and informal checks on actions by the Chief Executive.[248] Thus, while absolute immunity may appear to lift Presidents above the law, alternative remedies and deterrents hold them down to mortal turf.[249]

> The enormous range and impact of Presidential decisions — far beyond that of any one Member of Congress — inescapably means that many persons will consider themselves aggrieved by such acts. Absent absolute immunity, every person who feels aggrieved would be free to bring a suit for damages, and each suit — especially those that proceed on the merits — would involve some judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information.

Id. at 762.

[243] *See id.*

[244] *See id.* at 756.

[245] *See id.* at 750 n.30.

[246] *See id.* at 756-57.

[247] *See id.* at 757-58.

[248] *See id.* at 757.

[249] *See id.* at 758.

Burger's rebuttal to the dissent's contention that the absolute immunity doctrine has deified the President was the primary thrust of his concurring opinion. Rather than focusing on mechanisms to deter potential presidential misconduct, Burger was concerned with the effect of immunity on injured parties. Although Burger justified the decision as essentially one in which executive independence must prevail,[250] he did not ignore or belittle the needs of the aggrieved. In his discussion of the separation of powers policies behind absolute presidential immunity, Burger was sensitive to the plight of injured plaintiffs. More importantly, however, Burger was sensitive to those legitimately injured by official conduct.

Paradoxically, the very assumption that such real injuries exist is almost inextricably linked to the policies justifying absolute immunity. As Burger explained, presidential decisions are inherently far-reaching and that inescapably broadens the class of plaintiffs aggrieved by such acts.[251] A doctrine that frees countless aggrieved plaintiffs to sue the President for damages would promote precisely that which immunity is designed to prevent: excessive judicial trespass into the President's domain.[252]

Significantly, neither the majority nor the concurrence asserted that the proliferation of false and baseless claims against Presidents requires the Court to cloak the oval office with absolute immunity. Rather, Burger explicitly stated that a claimant may indeed have sustained some injury and, therefore, possess a legitimate interest in private redress.[253] Thus, the notion that such plaintiffs' claims are somehow inherently disingenuous was not a factor in Burger's decision to vote for absolute immunity. Instead, Burger simply acknowledged the reality that one of two competing policies must succumb to the other. Burger's view, which the *Fitzgerald* majority shared, was that the public interest in vindicating legitimate private claims must necessarily surrender to the constitutional ban against judicial interference with the workings of the executive office.[254]

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[250] *See id.* at 759.
[251] *See id.* at 762.
[252] *See id.* at 757-58.
[253] *See id.* at 762.
[254] *See id.*

Burger mentioned frivolity only once: he explained that only absolute immunity can provide the President with adequate protection.[255] His point was not that claims against the President are likely to be frivolous, but that the harm of the judicial proceeding bears little relation to its ultimate result. That is, even if the President prevails, or even if the lawsuit was ultimately determined to be frivolous, the real damage — interference with the executive's function — would be inevitable.[256]

In another context, Burger confronted the fear that placing Presidents above the law has the effect of forcing injured plaintiffs to bear the costs of their own injuries. In discussing the impact of immunity on Fitzgerald, Burger emphasized that Fitzgerald had an alternative form of redress for being wrongfully terminated.[257] Indeed, Fitzgerald had already been reinstated with back pay.[258]

Although the *Fitzgerald* dissent would ascribe a different weight to the competing policies than the majority, both share a common understanding of the policies involved. The dissent did not disagree with the basic premise that the President should enjoy freedom in performing official duties. However, it believed that attaching absolute immunity to the office, rather than to particular functions, risked a return to the policy "that the King can do no wrong."[259]

The dissenting opinion in *Fitzgerald* is significant because it highlights not what the majority ignored but what the majority indeed considered. The dissent did not attack the majority for failing to factor in the victim's right to be made whole but instead for its approach of making the well-settled and considered remedial principle inappropriately subservient to the interest in unfettered presidential decision-making.[260]

All the *Fitzgerald* opinions grappled with the same competing concerns. The authors of the *Fitzgerald* opinions understood the need to foster freedom and discretion in connection with the President's performance of official duties. They all feared the

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[255] *See id.* at 763.

[256] *See id.*

[257] *See id.* at 766 n.5.

[258] *See id.* at 760.

[259] *See id.* at 766.

[260] *See id.* at 797.

resurrection of the deific monarch and recognized that absolute immunity could potentially deprive legitimately aggrieved individuals of compensation.

III. THE *JONES* DECISIONS: IMPORTING THE FEMALE LIAR INTO PRESIDENTIAL IMMUNITY DOCTRINE

The district court and the Eighth Circuit dissenters in the *Jones* case have distorted the reasoning in the seminal *Fitzgerald* case and have attempted to broaden the immunity doctrine. At work within this distortion and attempted expansion is an interloper — the stereotypical female liar.

A. Jones *in the District Court*

1. The *Jones* Background

The *Jones* case arose out of an alleged incident that occurred when President Clinton was the Governor of the State of Arkansas and Jones was a $6.35-an-hour state employee.[261] In her complaint, Jones alleged that while she was working at a registration desk at the Governor's Quality Management Conference in the Excelsior Hotel in Little Rock, Danny Ferguson, a state trooper assigned to the Governor's security detail, approached her.[262] Allegedly, Ferguson informed Jones that the Governor wanted to meet her and gave her the Governor's hotel suite number.[263] When Jones asked Ferguson what the Governor wanted, he purportedly told her that "[i]t's okay, we do this all the time for the Governor.'"[264] Ferguson then brought Jones to the Governor's floor.[265] After Jones entered the Governor's suite, they chatted and the Governor asked Jones about her job. He also remarked that his appointee, David Harrington, who was also Jones' superior, was present at the conference and was his "'good friend.'"[266]

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[261] *See* Brief for Respondent at 1, Clinton v. Jones, 117 S. Ct. 1636 (1997) (No. 95-1853).
[262] *See id.*
[263] *See id.* at 1-2.
[264] *See id.* at 2.
[265] *See id.*
[266] *See id.*

The Governor then allegedly "'made a series of verbal and physical sexual advances toward Mrs. Jones, and undressed himself from the waist down.'"[267] When Jones pulled away and said, "'Look, I've got to go,'" the Governor pulled up his pants and said, "'If you get in trouble for leaving work, have Dave [Harrington] call me immediately and I'll take care of it.'"[268] The Governor also allegedly admonished Jones: "'You are smart. Let's keep this between ourselves.'"[269]

According to Jones's complaint, she did not keep this to herself, but told co-workers, friends, and relatives about the incident.[270] Jones, however, made no immediate official or public complaint because she feared losing her job and damaging her relationship with her fiancé.[271] She also felt that there was no one to whom she could complain because the incident involved her "ultimate boss" and the police.[272] Although she remained at her job for the next twenty-one months, she allegedly feared and experienced job retaliation for rejecting the Governor's proposition.[273]

After Jones moved to California and Clinton became President, a magazine article reported that while Clinton was Governor, the security police helped him solicit women for sex.[274] The article stated that Ferguson had told the magazine that, at the Governor's request, he had escorted a woman named "Paula" to the Governor's room at the Excelsior Hotel.[275] Based upon Ferguson's account, the article indicated that Paula had told the trooper that she "was available" for the Governor and implied that Jones was one of many women whom had engaged in such sexual trysts with the Governor.[276]

In response to the article, Jones publicly stated that she had rebuffed the Governor's advances and requested Clinton to ac-

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[267] *Id.*
[268] *See id.*
[269] *See id.*
[270] *See id.*
[271] *See id.*
[272] *See id.*
[273] *See id.*
[274] *See id.*
[275] *See id.* at 2-3.
[276] *See id.* at 3.

knowledge that fact.[277] Instead, however, Clinton's press spokespersons, responding for him, stated that Clinton had never even met Jones and called her a liar.[278]

2. The District Court Decisions

Jones sued Clinton in the federal district court for the Eastern District of Arkansas. In two counts of her complaint, Jones alleged that the President and his staff had conspired to deprive her of her constitutional rights to equal protection and due process under the Fifth and Fourteenth Amendments of the United States Constitution.[279] Specifically, she asserted that the President discriminated against her on the basis of gender and imposed a hostile work environment upon her.[280] Further, she alleged that the President caused her to fear not only that she would lose her job but also that she would experience other adverse actions in connection with her job and work environment.[281] In the final two counts of her complaint, Jones lodged both a claim of intentional infliction of emotional distress or outrage and a claim that the President had defamed her when his aides and attorney denied the allegations contained in her lawsuit.[282] Jones asserted similar conspiracy and defamation claims against Ferguson.[283]

Only Ferguson answered the complaint. In his answer he admitted, inter alia, that he had rode in the elevator with Jones and had pointed out a particular hotel room.[284] Ferguson, however, asserted that he lacked personal knowledge of what had actually transpired in the hotel room.[285]

The President did not answer the complaint, but instead informed the district court that he planned to file a motion to dismiss the complaint without prejudice to its reinstatement after

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[277] *See id.*

[278] *See id.*

[279] *See* Jones v. Clinton, 858 F. Supp. 902, 904 (E.D. Ark. 1994).

[280] *See id.*

[281] *See id.*

[282] *See id.*

[283] *See id.* at 904 n.2.

[284] *See* Brief for Respondent at 3-4, Clinton v. Jones, 117 S. Ct. 1636 (1997) (No. 95-1853).

[285] *See id.* at 4.

he leaves the presidency.[286] In so doing, he would argue that as a sitting President, the Constitution immunized him from having to litigate private suits for civil damages.[287] The President proposed a procedure that would enable him to raise the immunity issue by itself so that the question could be resolved before he filed any other pleadings in the case.[288]

In the order granting the President's preliminary motion, the district court emphasized that the proposed procedure was consonant with the principles behind absolute immunity.[289] The court stated that "[t]he entitlement is an immunity from suit rather than a mere defense to liability, [and] it is effectively lost if a case is erroneously permitted to go to trial."[290] The court agreed with the President that the immunity question is amenable to early resolution. Resolving the immunity issue at the beginning also seemed logical to the district court because it did not require an examination of the allegations of the complaint itself. In other words, the immunity issue hinged exclusively on the President's status as President and the court could simply resolve it as a matter of law.[291]

The court further noted that Jones had a legitimate "interest in seeking prompt relief for the alleged violation of her rights."[292] However, it deemed her concern about undue delay to be somewhat disingenuous for several reasons. First, the President could immediately appeal the court's denial of his immunity motion regardless of the court's rulings on other Rule 12(b) motions.[293] Second, while the President's entitlement to immunity can potentially affect not just the President but the entire nation, the court stated that the relief that Jones sought was "of

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[286] *See* Jones v. Clinton, 858 F. Supp. 902, 904 (E.D. Ark. 1994).

[287] *See id.* at 906.

[288] *See id.*

[289] *See id.* at 905.

[290] *Id.* (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

[291] *See id.* In rejecting Jones's argument that the Federal Rules of Civil Procedure require the defendant (even the President) to answer the complaint or file a single dispositive motion which raises all grounds for dismissal, the court pointed out that Rule 12 sanctions the filing of successive motions to dismiss for failure to state a claim. *See id.* at 905-06.

[292] *Id.* at 906.

[293] *See id.*

a purely personal nature, the delay of which [would] affect but a single individual who waited two days short of three years in which to file her lawsuit."[294]

In a subsequent order, the district court determined that the President was actually entitled to a "limited" or "temporary" immunity from immediate trial.[295] In so finding, the court traced the evolution of English law from the notion that the King had divine rights to the more modern perspective of Lord Coke and Parliament that the "King [was] under God and the law."[296] The court concluded that although Article II of the U.S. Constitution defines the powers and duties of the executive branch, it does not mention immunity. According to the district court, U.S. law with respect to the powers of the President essentially mirrored the English legacy until the decision in *Fitzgerald*.[297]

The court also examined two nineteenth century cases, *Marbury v. Madison*[298] and *Mississippi v. Johnson*.[299] In the classic *Marbury* case, the United States Supreme Court considered whether it could direct by mandamus the Secretary of State, James Madison, to deliver to Marbury his commission as justice of peace.[300] Such delivery, however, contravened the wishes of President Jefferson.[301] Although the *Marbury* Court did not explicitly speak to the immunity question, it implicitly concluded that the executive branch enjoyed no immunity from action by the judicial branch with respect to the enforcement of constitutional mandates.[302]

In *Johnson*, the Court refused to enjoin President Andrew Johnson from enforcing the Reconstruction Acts.[303] The Court distinguished *Marbury*, stating that *Marbury* dealt solely with

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[294] *Id.*

[295] *See* Jones v. Clinton, 869 F. Supp. 690, 700 (E.D. Ark. 1994).

[296] *See id.* at 696.

[297] *See id.*

[298] 5 U.S. (1 Cranch) 137 (1803).

[299] 71 U.S. (4 Wall.) 475 (1866).

[300] *See Marbury*, 5 U.S. (1 Cranch) at 153-54.

[301] *See* NOWAK & ROTUNDA, *supra* note 79, § 1.2, at 2.

[302] *See Marbury*, 5 U.S. (1 Cranch) at 163.

[303] *See Johnson*, 71 U.S. (4 Wall) at 475.

ministerial duties involving no discretion while the situation before it related to executive and political duties that were broadly discretionary.[304]

The problem, as the Arkansas district court defined it, was that *Jones* fit neither the *Marbury* nor *Johnson* configuration because it involved neither ministerial nor executive presidential duties.[305] The court emphasized that the allegations in Jones's complaint encompassed only the alleged conduct of the President while he was the Governor and did not even remotely deal with his ministerial gubernatorial or executive role.[306]

Although the Justice Department had presented the district court with contrary precedent — three private suits based on pre-presidential conduct that courts had actually adjudicated during a presidential term[307] — the *Jones* court found that *Fitzgerald* was most applicable.[308] The court, however, stressed that unlike the matter before it, Fitzgerald had sued Nixon for acts he committed while Nixon was acting in his capacity as President.[309]

Although the court distinguished the *Fitzgerald* case, it focused on what it saw as Justice Powell's "sweeping" concern: "to disturb the President with defending civil litigation that does not demand immediate attention under the circumstances would be to interfere with the conduct of the duties of the office."[310] The *Jones* court concluded that Justice Powell's reasoning, one

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[304] *See id.* at 498-99.

[305] *See* Jones v. Clinton, 869 F. Supp. 690, 697 (E.D. Ark. 1994).

[306] *See id.*

[307] *See id.* The court summed up these private suits as follows:

> (1) an action against Theodore Roosevelt and the Board of Police in New York City, which was resolved in the Board's favor in 1904, *People ex rel. Hurley v. Roosevelt*, 179 N.Y. 544, 71 N.E. 1137 (1904); (2) a damage suit against Harry Truman based upon his conduct as a county judge in 1931, resolved in Truman's favor in 1946, *Devault v. Truman*, 354 Mo. 1193, 194 S.W.2d 29 (1946); and (3) a suit against John F. Kennedy in California Superior Court asserting a tort claim from an automobile accident occurring during the 1960 campaign, which was ultimately settled, *Bailey v. Kennedy*, No.757,200 (Cal. Super. Ct. 1962).

Id.

[308] *See id.*

[309] *See id.*

[310] *See id.* at 698.

which had also surfaced in Chief Justice Burger's concurrence, prevails even where the alleged wrongdoing precedes the presidency.[311]

In justifying its decision that President Clinton should not have to expend time and effort defending the claims while in office, the court stated that the case did not necessitate a rush to trial.[312] As the court put it, "It is not a situation, for example, in which someone has been terribly injured in an accident through the alleged negligence of the President and desperately needs to recover such damages as may be awarded by a jury."[313]

The court also contrasted Jones's case to divorce actions, child custody, and child support cases, in which "immediate personal needs" are at stake.[314] Underscoring the fact that Jones waited until two days before the expiration of the three-year statute of limitations to file her suit against the President, the court opined that a judgment and damages did not "appear to be of urgent nature for [Jones], and a delay in trial of the case [would] not harm her right to recover or cause her undue inconvenience."[315]

The district court, however, excluded the discovery and deposition proceedings from the stay.[316] It determined that by allowing this aspect of the case to proceed, it had sufficiently protected Jones from the potential death, incapacitation, and memory loss of witnesses.[317]

With respect to the other defendant, Ferguson, the court concluded that the "interdependency of events and testimony"

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[311] *See id.*

> The problem, still, is essentially the same — the necessity to avoid litigation, which also might blossom through other unrelated civil actions, and which could conceivably hamper the President in conducting the duties of his office. This situation, as stated by Justice Powell in one of the . . . quotations from *Nixon v. Fitzgerald*, could only have harmful effects in connection not only with the President but also with the nation in general.

Id.

[312] *See id.*

[313] *Id.*

[314] *See id.* at 698-99.

[315] *See id.* at 699.

[316] *See id.*

[317] *See id.*

prevented it from proceeding in a piecemeal fashion.[318] Consequently, Ferguson could, in effect, piggyback on the President's limited stay.

B. The Eighth Circuit Dissenters

The Eighth Circuit reversed the district court's decision and concluded that President Clinton was not entitled to immunity.[319] Clinton then appealed for a rehearing and a rehearing en banc, both of which were denied. The reasoning of the Eighth Circuit dissenters resembled that of the district court.

In the dissenting opinion, Judge Ross stated that he would stay both the action and discovery proceedings during the President's term in office.[320] In Ross's opinion, *Fitzgerald* prohibited private actions for damages against a sitting President unless the plaintiff can demonstrate the existence of "exigent circumstances."[321] The *Fitzgerald* Court, according to Judge Ross, recognized that the executive branch is unique because it is entrusted to one individual.[322] As such, "[t]he unofficial nature of the alleged events would not make defending a private suit for civil damages any less of a burden on the President's time and attention."[323]

The *Jones* dissent echoed another of the *Fitzgerald* Court's concerns. The *Fitzgerald* majority viewed the President as especially vulnerable to individuals wishing to use a private suit for purposes of harassment and extortion.[324] As the *Jones* dissent saw it, Jones' suit against Clinton conceivably activated those very dangers. Because sexual harassment suits involve unwitnessed encounters, the dissent reasoned, they will be difficult to dispose

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[318] *See id.*

[319] *See* Jones v. Clinton, 72 F.3d 1354, 1354 (8th Cir. 1996). Both Clinton and Jones appealed the decision in the Eighth Circuit. Clinton sought reversal of the district court's rejection of his motion to dismiss and alternatively asked the appellate court to reverse the denial of his motion to stay discovery. *See id.* at 1356. Jones cross-appealed the decision to stay the trial of her claims. *See id.*

[320] *See id.* at 1369-70.

[321] *See id.* at 1367.

[322] *See id.*

[323] *Id.*

[324] *See id.* at 1368.

of in pretrial motions.[325] The dissent further explained that "such suits could be pursued merely for the purpose of gaining partisan political disruption, public notoriety, unwarranted financial gain, or potential extortion."[326]

In addition, Judge Ross expressed the view that a denial of presidential immunity violates the separation of powers doctrine by creating opportunities for the judiciary to encroach upon the executive sphere.[327] The *Jones* majority advocated the use of continuances and rescheduling as means of minimizing the burden on the President.[328] For the dissent, these mechanisms were potentially constitutionally infirm.[329] That is, Judge Ross questioned whether the judiciary could appropriately decide whether "the nation's interest in the unfettered performance of a presidential duty" is sufficient to justify the postponement of the proceedings.[330]

After reviewing what he believed was the burdensome and injurious impact the civil litigation could have on the presidency, the dissent turned to the plaintiff's interests.[331] These, Ross concluded, were comparatively de minimis.[332] In particular, he asserted that "there is no urgency to pursue a suit for civil damages" and that a stay would only mean delay and not an actual deprivation of a day in court for Jones.[333]

Judge Ross, however, emphasized that he would go further than even the district court and stay pretrial discovery as well.[334] In his view, discovery threatened to become more "intrusive" and "burdensome" than the actual trial.[335] In addition, like the district court, he would allow Ferguson to also

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[325] *See id.*
[326] *Id.*
[327] *See id.* at 1368-69.
[328] *See id.* at 1363.
[329] *See id.* at 1368-69.
[330] *See id.* at 1369.
[331] *See id.*
[332] *See id.*
[333] *See id.*
[334] *See id.* at 1369-70.
[335] *See id.*

avail himself of the stay. A stay of the suit against Ferguson would prevent its proceedings from undermining the effect of the stay against the President.[336]

Later when the Eighth Circuit denied a rehearing and a rehearing en banc, Judge McMillan authored a dissenting opinion.[337] His dissent opened with a somewhat flamboyant attack on the majority:

> The majority opinion not only has put short pants on President William Jefferson Clinton, but also has succeeded in demeaning the Office of the President of the United States, recognized throughout the world as the most powerful office in the world, an office which at this time is grappling with world problems in Bosnia, Iran, China, Taiwan, Cuba, Russia, and most third-world nations, not to mention the myriad of domestic problems here at home.[338]

Judge McMillan accused the majority of "put[ting] all of the problems of our nation on pilot control and treat[ing] as more urgent a private lawsuit that even [Jones] delayed filing for at least *three* years."[339]

C. *The Female Liar Distorts Presidential Immunity*

The stereotypical female liar materializes in each of the *Jones* district court decisions and in the Eighth Circuit dissenters' analyses. Her influence served to expand the concept of presidential protection in these opinions.

In the initial district court decision, the court gave the President permission to file a motion to dismiss solely on the basis of presidential immunity and to defer the filing of his other motions.[340] It is here that the female liar makes her debut in the *Jones* case. In granting the President's motion, the district court explained that resolving the preliminary issue of presidential immunity "[did] not require an analysis of the allegations of the complaint."[341] If it were dealing with the issue of qualified immunity, however, it would have to explore the substantive

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[336] *See id.* at 1370.

[337] *See* Jones v. Clinton, 81 F.3d 78, 78 (8th Cir. 1996).

[338] *Id.*

[339] *Id.*

[340] *See* Jones v. Clinton, 858 F. Supp. 902, 906-07 (E.D. Ark. 1994).

[341] *See id.* at 905.

allegations of Jones's complaint to determine whether she alleged a violation of her "'clearly established statutory or constitutional rights of which a reasonable person would have known.'"[342] In contrast, because Clinton asserted absolute immunity based entirely on his status as President, the court was not required to inquire into whether Jones's version of the facts was correct.[343]

The district court acknowledged that the President's proposed procedure would delay the proceedings.[344] According to the court, however, that delay was negligible because it would "affect but a single individual who waited two days short of three years . . . to file her lawsuit."[345] This language houses two implications: one that downplays the importance of Jones' suit because she is just one "single individual" and the other that sheds doubt on Jones's allegations or "version of the facts" because Jones supposedly was tardy in commencing the litigation.[346]

While the court stated that it did not intend to belittle the plaintiff's "interest in seeking prompt relief" and even proclaimed that the interest was "legitimate," it nevertheless put Jones's hesitation at issue. Further, it interpreted her hesitation to mean that her claims were less worthy of an expeditious resolution on the merits.[347] This reasoning is defective, however, because Jones's purported delay was clearly not germane to a motion to dismiss based solely on immunity. In this respect, the court simply contradicted itself. Although it began its analysis with the premise that it need not and would not question the allegations of Jones's complaint, the court indirectly did precisely that. The court questioned Jones's "version of the facts"[348] through focusing on her supposed dilatoriness and then injected that concocted factor into its decision to grant the President's motion.[349]

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[342] *See id.* (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
[343] *See id.*
[344] *See id.* at 906.
[345] *See id.*
[346] *See id.* at 905-06.
[347] *See id.* at 906.
[348] *See id.* at 905.
[349] *See id.* at 906.

As discussed in Part I, the mythic images of the female liar share the tendency to nullify the woman's identity in litigation as the allegedly aggrieved plaintiff.[350] The preliminary district court decision expressed some incredulity because of Jones' supposed procrastination. Jones's delay in bringing suit gave rise to the district court's presumption that she was not truly aggrieved.[351] Thus, the court pierced the allegations of Jones's complaint and then imbued those allegations with doubt.

The distortion of the immunity doctrine accompanies the portrait of Jones as the prevaricating plaintiff. Inextricable from the notion that women habitually lie is the belief that men need protection from their lies.[352] The district court decision, agreeing to the President's suggested ordering of his motions, espouses this notion as well.

The district court acknowledged that President Clinton's claim of immunity from suit was unprecedented because the alleged conduct occurred prior to the President's assumption of office.[353] In nonsequitorial fashion, the court then concluded that the President's immunity argument was amenable to resolution "at the earliest possible stage in litigation."[354] That is, although the President's theory took immunity well beyond the scope of *Fitzgerald*,[355] the district court embraced the President's motion as first priority and gave it near emergency status. Belying the court's approach is an unspoken assumption

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[350] *See supra* note 69 and accompanying text (discussing mythic liars).

[351] *See supra* notes 71-73 and accompanying text. The media has also approached the matter by focusing on Jones's purported delay. *See* Katherine Buo & Christopher George, *Tess of the D'Ozarks? Why the Likes of Paula Jones Should Get the Benefit of Our Doubt*, WASH. POST, May 22, 1994, at C01 (questioning veracity of Jones' story based on three year delay); *Weekend Edition*, *supra* note 10 (noting Jones's three year delay); Harold Johnson, *Missing Person*, NAT'L REVIEW, Apr. 18, 1994, at 22. (quoting interview with Jones: "Why did she wait three years to go public? 'I was nervous and confused — and felt dirty and humiliated,' she tells me. Besides, who was there to complain to? The police? 'Remember, it was a state trooper who took me to Clinton's room.'").

[352] *See supra* note 69 and accompanying text (discussing mythic liars).

[353] *See* Jones v. Clinton, 858 F. Supp. 902, 904 (E.D. Ark. 1994).

[354] *See id.* at 905.

[355] *See generally* Allen, *supra* note 241, at 581-85 (arguing that President Clinton, in raising issues of temporary immunity, neglects express boundaries of *Fitzgerald*, misinterprets policy rationales of those boundaries, and only introduces historical evidence supporting his position).

that Jones is not really the victim. This assumption unconsciously impels the court to bend over backwards to grant the male defendant an added modicum of protection.

All the *Fitzgerald* opinions attempted to reconcile competing concerns.[356] Although the opinions struggle to achieve both independent executive decision-making and executive accountability, they are likewise cognizant of the aggrieved plaintiff's right to be made whole. In granting the President's request to entertain the immunity motion first, the *Jones* court made immunity's fiercest opponent into its most loyal ally. The court underscored the fact that Jones was seeking relief" of a purely personal nature" that was merely for the benefit of a "single individual."[357] The very factors that the *Fitzgerald* court viewed as inimical to the recognition of broad immunity became the core reason for the *Jones* court's treatment of immunity as top priority. As such, an ironic inversion occurred where Jones's purely personal interest in obtaining redress turned into something that, rather than conspiring against, actually bolstered the President's requested immunity procedure.[358]

In the second decision, the district court concluded that the President was entitled to a limited or temporary immunity from immediate trial.[359] The female liar surfaces intermittently in the court's reasoning and *sub silentio* helps to not only tip the scales in favor of relief for President Clinton but also to broaden the court's interpretation of the immunity doctrine.

While the district court rejected the extreme result of dismissing Jones's action altogether, it relieved the President from the obligation of "devot[ing] his time and effort to the defense of this case at trial while in office."[360] In justifying what it called a "limited" or "temporary" immunity, which is really a euphemism for a stay, the court explained:

> This is not a case in which any necessity exists to rush to trial. It is not a situation, for example, in which someone has been terribly injured in an accident through the alleged negligence of the President and desperately needs to recover

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[356] *See supra* Part II.B.5.

[357] *See Jones*, 858 F. Supp. at 906.

[358] *See id.*

[359] *See* Jones v. Clinton, 869 F. Supp. 690, 700 (E.D. Ark. 1994).

[360] *See id.* at 698.

> such damages as may be awarded by a jury. It is not a divorce action, or a child custody or child support case, in which immediate personal needs of other parties are at stake.[361]

In this context, the woman of hyperbole rears her head.[362] Although the court said that resolution of the immunity issue did not require consideration of Jones's complaint, the court not only tacitly considered and effectually pre-tried Jones's damage claims, but ultimately issued a defense verdict. The court reasoned that there was no necessity to rush to trial because the supposed sexual harassment victim had no real injuries — she was, after all, not like a tort victim with concrete physical injuries.[363] It was not a divorce action where parties were engaged in a real-life contest over real-life things, like marital property, child support, or child custody. In fact, the court implied that Jones had no personal stake in the litigation at all when it turned its ken from her and instead considered whether the "immediate personal needs of other parties [were] at stake."[364]

The woman of hyperbole, who exaggerates her injuries, nullified Jones's true identity as the aggrieved plaintiff in the litigation.[365] As the woman of hyperbole, Jones was not what she purported to be: she was not a victim because she was not injured. The *Jones* court took this eradication to its brutal extreme. The court implicitly treated the matter as if there was not a plaintiff in the case; as if the case was devoid of a party with a personal stake in the outcome.

Further, in bestowing temporary immunity on President Clinton, the district court explained:

> The situation here is that the Plaintiff filed this action two days before the three-year statute of limitations expired. Obviously, Plaintiff Jones was in no rush to get her case to court and, in fact, has stated publicly and in her brief that her lawsuit came about in an effort to clear her name of allegations of sexual activity involving then-Governor Clinton.[366]

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[361] *Id.* at 698-99.

[362] *See supra* notes 56-57 and accompanying text (discussing woman of hyperbole).

[363] *See Jones*, 869 F. Supp. at 698.

[364] *See id.* at 698-99.

[365] *See supra* note 69 and accompanying text (discussing mythic liar).

[366] *Jones*, 869 F. Supp. at 699.

Again, the court offered Jones's putative delay as evidence of her disingenuousness.[367] The decision's warped reasoning is most apparent, however, because the situation before the court did not involve laches, but an actual statute of limitations. The unremarkable proposition in a statute of limitations is that if a plaintiff commences litigation before the expiration of a set time frame, then the suit is timely. With respect to such a rigid filing rule, there are no *if*s, *and*s, or *but*s. Stated otherwise, a statute of limitations does not contemplate suits that are technically timely but equitably late.

In reality, the law unequivocally gave Jones three years to commence her suit and she used the time to which the law entitled her.[368] Therefore, in the context of a legitimate statute of limitations analysis, the court cannot indict Jones for delaying the filing of her suit. Conversely, if she had filed her suit two days after the expiration of the limitations period, she would not have been deemed timely simply because it was close. Accordingly, the condemnation of Jones in this respect is entirely inappropriate.

The female liar can be disturbingly protean in that she can nimbly shift from one manifestation to another.[369] In the second district court decision, Jones modulates from being the woman of hyperbole to the woman with an ulterior motive. As the court explained, Jones was not really an aggrieved plaintiff needy of compensation but a woman merely trying to use the courts to clear her name:

> Her complaint, in [paragraphs] 41-47, discusses in detail this situation and indicates that suit was brought because of the use of the name "Paula" in an article appearing in *The American Spectator*, in which the author purportedly, obtained his information from state troopers, including Defendant Ferguson. Consequently, the possibility that Ms. Jones may obtain a judgment and damages in this matter does not appear to be of urgent nature for her, and a delay in trial of

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[367] *See id.*

[368] *See* ARK. CODE ANN. § 16-56-105 (Michie 1994) (listing causes of action with three year statute of limitations).

[369] *See supra* notes 60-64 and accompanying text (discussing *Corgan* and demonstrating that female liar's identity can shift from one type of liar to another).

> the case will not harm her right to recover or cause her undue inconvenience.[370]

The court intimated that Jones's veritable interest in "clear[ing] her name" after the paper accused her of sexual misconduct somehow makes her less credible and her case less "urgent."[371] Thus, the court implied that there could be no real harm in putting Jones's case on a second-class time track.

The court's reasoning, however, is flawed because Jones lodged a defamation claim against the defendants.[372] The desire to clear one's name is not even arguably spurious, but is one of the things that typically motivates many aggrieved plaintiffs to sue for defamation. Consequently, the court's reasoning fostered a kind of vicious circle of sophistry where the court perceived Jones' suit for defamation as frivolous for a reason that does not make her case frivolous, and Jones's improper motives somehow caused her supposed foot dragging and ultimately proved her case to be frivolous.

In grappling with the immunity question itself, the district court engaged in a somewhat elaborate exegesis of the evolution of the immunity doctrine. The court traced the movement in English law "from the divine right of kings assertion to the assertion of Lord Coke and Parliament that the King was under God and the law."[373] It also drew a parallel between the English demotion of the monarch and the American law prior to *Fitzgerald*.[374]

The immunity cases that preceded the *Fitzgerald* decision, however, balanced the need for unfettered governmental decision-making with the need to compensate injured victims.[375] Although, as Chief Justice Burger explained, the *Fitzgerald* decision recognizes that "the needs of a system of government sometimes must outweigh the right of individuals to collect damages,"[376] the *Fitzgerald* Court does not deride injured

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[370] *Jones*, 869 F.Supp. at 699.

[371] *See id.*

[372] *See id.* at 691.

[373] *See id.* at 696.

[374] *See id.*

[375] *See supra* Part II.A.

[376] Nixon v. Fitzgerald, 457 U.S. 731, 759 (1982) (Burger, J., concurring).

plaintiffs' interests.[377] Rather, *Fitzgerald* and its predecessors contained a genuine sensitivity to the fact that elevating an official wrongdoer above the law could have the unfortunate effect of forcing victims to bear the costs of their own injuries.[378]

In *Jones* the district court acknowledged the same competing interests and even paid lip service to the fear of resurrecting the defunct deific monarch.[379] The district court stated, however, that "[f]or want of better phraseology, this amounts to the granting of temporary or limited immunity from trial as *Fitzgerald* seems to require due to the fact that the primary defendant is the President."[380] In essence, the *Jones* court conceded that it was ennobling the President simply because of his office. In this respect, the court rather mindlessly reverted to what it had earlier banished as archaic: the divine right of kings.[381]

The court further recognized the interest in affording relief to injured plaintiffs. However, the court took pains to diminish Jones's interest in seeking relief. When the district court modulated from its more academic treatise on immunity to the very application of the immunity principles, the court essentially erased the victim from the analysis by finding no one with injuries, no one with a necessity "to rush to trial," and no one with a personal stake in the outcome.[382]

In discussing *Fitzgerald*, the *Jones* district court isolated Justice Powell's concern that, without immunity, the President would

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[377] *See supra* Part II.B.5.

[378] *See supra* Part II.B.5.

[379] *See Jones*, 869 F. Supp. at 696.

[380] *Id.* at 699.

[381] *See id.* at 696. *See generally* Allen, *supra* note 241, at 582 (discussing effects of temporary immunity). Allen states:

> While temporary immunity would not put the President 'above the law' in the sense that the *Fitzgerald* decision did, it nevertheless places the President 'beyond the law' while he is in office. In particular, the claim alleges two counts of violating constitutional rights guaranteed under the Fourteenth and Fifth Amendments of the Constitution. Under a theory of temporary immunity, Jones would not receive a remedy for the duration of President Clinton's stay in office and President Clinton would remain beyond the reaches of laws that are otherwise applicable to all citizens.

Id.

[382] *See Jones*, 869 F. Supp. at 698.

have to devote an inordinate amount of time to defending civil litigation.[383] Powell's reasoning, however, can not be divorced from the fact that when Nixon fired Fitzgerald, he was acting in his executive capacity.[384] In fact, the *Fitzgerald* Court constructed its entire decision on the understanding that official presidential actions are unique.[385] Specifically, as Powell opined, "the visibility of [the President's] office and the effect of his actions on countless people" makes the President "an easily identifiable target for suits for civil damages."[386] The *Fitzgerald* Court yoked the burdensome time-consumption factor to the exposure of the President to liability not for all acts but solely for his official acts.[387]

The *Jones* court noted the distinction between *Fitzgerald* and the matter before it where "President Clinton's alleged acts took place before he was President."[388] The court, however, simply aligned the *Jones* situation with that of *Fitzgerald* in reasoning that "the concerns expressed by [the *Fitzgerald*] Court are not lessened by the fact that these alleged actions preceded his Presidency, nor by the fact that his alleged actions would not have been within his official governmental capacity anyway."[389] Although the *Jones* court did not dismiss Jones's case and instead ostensibly mollified the effect of the immunity doctrine by putting only the trial itself "on hold,"[390] it still expanded the *Fitzgerald* immunity principles. The court expanded *Fitzgerald* to cover any and all exposure to liability when someone sues the President while he is in office.

Further, the court applied the new-fledged limited or temporary presidential immunity to a defendant that was not even part of the executive branch.[391] The court simply stated that there

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[383] *See id.*

[384] *See supra* Part II.B.5.

[385] *See supra* Part II.B.5.

[386] Nixon v. Fitzgerald, 457 U.S. 731, 753 (1982).

[387] *See id.* at 761.

[388] *See Jones*, 869 F. Supp. at 698.

[389] *Id.*

[390] *See id.* at 699.

[391] *See id.*

was "too much interdependency of events and testimony to proceed piecemeal." In an unfounded and unprecedented stretch of immunity principles, the court allowed Ferguson to stand behind Clinton's immunity shield.[392]

As the *Jones* court emphasized, the most relevant case to *Jones* was *Fitzgerald*.[393] The *Fitzgerald* immunity, however, like its qualified immunity antecedents, ensued from the need to foster executive independence and avoid presidential deification.[394] None of the policies percolating in the *Fitzgerald* reasoning can conceivably spill over into the matter of Ferguson. The district court treated Jones's case as if it was so negligible that all defendants, not just the President, deserve to stand under the presidential immunity umbrella.[395]

While the image of the female liar plainly surfaces in the district court decisions, she is most obvious in the Eighth Circuit dissenting opinions.[396] In his dissent, Judge Ross said that he would not only affirm the district court, but would stay all discovery.[397] Judge Ross highlighted the portion of Chief Justice Burger's concurrence in *Fitzgerald* that "noted the possibility that private suits for damages against a President could be used for purposes of harassment and extortion."[398] Although Judge Ross conceded that Burger was really concerned with the effect of depriving the President of immunity for "official acts,"[399] he bolted that concern onto the *Jones* matter:

> The same concerns are implicated in the present action as well, where such suits could be pursued merely for the purpose of gaining partisan political disruption, public notoriety, unwarranted financial gain, or potential extortion. Indeed, any number of potential private claims could be contrived to entangle a sitting President in embarrassing or protracted litigation, alleging unwitnessed one-on-one encounters that are extremely difficult to dispose of by way of a pretrial motion.[400]

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[392] *See id.*

[393] *See id.* at 697.

[394] *See supra* Part II.B.5.

[395] *See Jones*, 869 F. Supp. at 699.

[396] *See* Jones v. Clinton, 72 F.3d 1354, 1367-70 (8th Cir. 1996) (Ross, J., dissenting).

[397] *See id.* at 1367.

[398] *See id.* at 1368 (discussing Nixon v. Fitzgerald, 457 U.S. 731, 762-63 (1982)).

[399] *See id.*

[400] *Id.*

The dissent underscored what is often the hub of a sexual harassment trial: the battle of credibility.[401] Because sexual advances and requests for sexual favors tend to occur in private and frequently lack witnesses, recovery for the plaintiff often depends on whether the trier of fact believes her.[402] Judge Ross took the inevitable nature of such a cause of action, which "allege[s] unwitnessed one-on-one encounters that are extremely difficult to dispose of by way of a pretrial motion,"[403] and used that inevitability to not only greet her claims with skepticism, but also to advocate the broadening of the immunity protection to cover unofficial acts.

Judge Ross's language reveals several types of female liars at work within the dissent. The woman with an ulterior motive, who fabricates the whole saga for some extraneous reason,[404] appears in Judge Ross' suggestion that Jones was pursuing her suit "for the purpose of gaining partisan political disruption" or for obtaining "public notoriety."[405] As Judge Ross speculated, Jones could be a Republican "monkey wrencher" or simply someone seeking to thrust herself into the lime light.[406] Either way, Jones is not what she purports to be. She is not, according to Judge Ross, an aggrieved plaintiff seeking redress.

The woman of money lust also appears in the dissent. Recall that this stereotypical woman supposedly latches onto the sexual harassment suit as an economic opportunity, aiming to either extort the defendant into a settlement or manipulate a jury into issuing a sizeable verdict.[407] In Judge Ross's view, Jones may be such a villainess out for "unwarranted financial gain" or "potential extortion."[408]

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[401] *See supra* notes 20-45 and accompanying text (discussing issues of credibility).

[402] *See supra* notes 20-45 and accompanying text (discussing belief problems).

[403] *Jones*, 72 F.3d at 1368.

[404] *See supra* note 54 (ascribing political motives to female accusers).

[405] *See Jones*, 72 F.3d at 1368.

[406] *See id.*

[407] *See supra* note 55 and accompanying text (discussing stereotype of woman of money lust).

[408] *See Jones*, 72 F.3d at 1368; *see also supra* notes 61-65 and accompanying text; *cf.* Corgan v. Muehling, 574 N.E.2d 602, 610 (Ill. 1991) (stating that it is unlikely that plaintiffs will initiate or pursue complaints through administrative or criminal justice system without potential for tangible reward).

The dissent also portrays Jones as the woman "who asked for it," the woman who is really the perpetrator and wants the man to pay or be punished for something she herself caused.[409] Judge Ross's depiction of Jones as someone seeking to "embarass" the President or subject him to the agonies of "protracted litigation"[410] potentially subsumes this type of truth twister as well.

When Judge Ross weighed the objectives of the immunity doctrine against its impact on Jones's right to prompt recovery, his language repeatedly denigrated the legitimacy of her complaint.[411] He branded her case as "non-exigent," recited that "there is no urgency to pursue a suit for civil damages," and insisted that staying her claims would "rarely defeat . . . [Jones's] ability to ultimately obtain meaningful relief."[412] Judge McMillian, who dissented from the later denial for rehearing en banc, hummed a similar tune when he rejected the contention that postponement for Jones, the woman who herself "delayed filing for at least three years," would be "prejudicial."[413]

As the Eighth Circuit majority and the concurrence pointed out, however, the potential prejudice to Jones is not insignificant, but "approaches constitutional magnitude."[414] The majority understood that Jones is like any other plaintiff who "is constitutionally entitled to access to the courts and to the equal protection of the laws."[415] As the concurring judge saw it, "justice delayed is justice denied"[416] and "Jones faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time."[417] The dissenters, Judges Ross and McMillian, simply ignore their colleagues' concerns about the damage of "justice delayed."

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[409] *See supra* notes 46-49 and accompanying text (highlighting images of women in trials).

[410] *See Jones*, 72 F.3d at 1368.

[411] *See id.* at 1368-69.

[412] *See id.* at 1369.

[413] *See* Jones v. Clinton, 81 F.3d 78, 78-80 (8th Cir. 1996) (McMillian, J., dissenting).

[414] *See Jones*, 72 F.3d at 1363 (Beam, J., concurring).

[415] *See id.* at 1360.

[416] *Id.* at 1363.

[417] *Id.; see also* Beaupre, *supra* note 75, at 751-52 (discussing arguments for and against Jones's need for immediate relief).

Had the Eighth Circuit adopted the dissent's analysis, Jones's "chose in action" would have been annihilated.[418] Jones, as the delusional woman, supposedly has no real injuries and, thus, is not deserving of the same considerations and protections accorded real plaintiffs.[419] As such, she is not entitled to recovery or even a reasonably expeditious route to a day in court.

Stereotypes of the female liar tend to obliterate the woman's identity as the victim in the litigation, mutating her into a male oppressor.[420] In the context of discrimination, the male defendant is often perceived as puerile and, thus, in need of rescue. This mind-set perspicuously comes across in Judge McMillian's dissent from the denial of rehearing en banc when he figuratively accused the majority of "put[ting] short pants" on the President and demeaning the office.[421] Thus, McMillian implies that the majority's rejection of an immunity shield for the President has left the male defendant diminished, vulnerable, and exposed. That is, without some boosted judicial succor, Jones will victimize the little King of the oval office.

The need to afford the defendant extra protection is the thrust of the dissenting approach in *Jones*. Judges Ross and McMillian, like the district court judge, excised language from the *Fitzgerald* majority and concurrence that dealt narrowly with the need to immunize the President from liability for official acts.[422] Both dissenters then imported that language into the separate realm of unofficial conduct.[423] In contrast, the Eighth Circuit majority appropriately characterized *Fitzgerald*: "The Court's struggle in *Fitzgerald* to establish presidential immunity for acts within the outer perimeter of official responsibility belies the notion, here advanced by Mr. Clinton, that beyond this outer perimeter there is still more immunity waiting to be discovered."[424]

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[418] *See Jones*, 72 F.3d at 1364.

[419] *See supra* note 69 and accompanying text (examining disbelief of women).

[420] *See supra* note 69 and accompanying text (discussing effects of stereotypes).

[421] *See* Jones v. Clinton, 81 F.3d 78, 78 (8th Cir. 1996) (McMillian, J., dissenting).

[422] *See Jones*, 72 F.3d at 1367-69 (Ross, J., dissenting); *Jones*, 81 F.3d at 78-80 (McMillian, J., dissenting).

[423] *See Jones*, 72 F.3d at 1368; *Jones*, 81 F.3d at 79-80.

[424] *Jones*, 72 F.3d at 1359.

Further, Judge Ross, like the district court, wanted to extend immunity not only to cover unofficial conduct but also to protect other non-executive defendants.[425] His position was that Ferguson should reap the benefits of presidential immunity. Such a stretch, however, is entirely unfounded because the case against Ferguson can not conceivably trigger any of the policies behind immunity protection.

Judge Ross would expand the district court's protection beyond a stay of the trial to a stay of pretrial discovery as well. Significantly, in advocating the broadest immunity stay, Judge Ross unwittingly employs most of the stereotypes of the female liar.[426] Although Judge Ross was silent with respect to the potential prejudice to Jones and the damage to her right to gather and preserve evidence, he dwelled on the defendant's need for more protection because discovery "is likely to pose even more intrusive and burdensome demands on [his] . . . time and attention."[427] The reasoning of both Judges Ross and McMillian reveal that there is a direct correlation between the obtrusiveness of the female liar stereotype and the breadth of protection proposed for the male defendant.[428]

CONCLUSION

The image of the woman liar, a common impediment for female plaintiffs in sexual harassment suits,[429] materializes in the *Jones* district court decisions and those of the Eighth Circuit dissenters. The stereotypes distort the courts' interpretation of immunity principles and broadens the scope of the immunity in

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[425] *See id.* at 1370.

[426] *See id.* at 1369-70.

[427] *See id.* at 1369.

[428] Although the Eighth Circuit majority apparently rejected the district court's "limited" or "temporary" immunity, it still implicitly remained wedded to the notions that women tend to lie and men need additional protection. The Eighth Circuit's doubts regarding Jones come across in the remand directions. The Eighth Circuit did not simply command the district court to move the matter forward. Instead, it urged the scheduling of judicial matters with the President's responsibilities and duties in mind. *See id.* at 1361. The Eighth Circuit ultimately authorized procedures that are nearly tantamount to the initial stay itself. Similarly, the United States Supreme Court majority and concurrence put its imprimatur on procedures that could in essence replicate and perhaps exceed the scope of the very stay that it had repudiated. *See* Jones v. Clinton, 117 S. Ct. 1636, 1652, 1656 (1997).

[429] *See supra* Part I.

their opinions.[430] The *Jones* district court decisions and the opinions of the Eighth Circuit dissenters poignantly demonstrate the pernicious effect of the female liar on judicial reasoning.

In the initial decision, in which the district court gave the President permission to raise the immunity issue as a threshold matter, the court implicitly diminished Jones' suit and suggested that Jones's "version of the facts" are suspicious because she supposedly delayed in commencing the litigation.[431] Even at such an embryonic juncture, the court effaced Jones's identity as the aggrieved plaintiff.

In that initial decision, the court's expansion of the immunity doctrine accompanies its diminution of Jones. Although, as the district court acknowledged, the President was taking immunity well beyond what the *Fitzgerald* Court had envisioned, the court gave the President's immunity motion a preferred status and even allowed him to defer the filing of other dismissal motions. In granting the President's request, the court emphasized the fact that the relief Jones sought was "of a purely personal nature, the delay of which will affect but a single individual."[432] Such factors, however, are the very ones that the *Fitzgerald* Court believed militated against absolute immunity.[433]

In the later decision, the district court further deflated Jones into the woman of hyperbole and augmented immunity. In this decision, the court proclaimed that the disposition of the immunity issue did not require it to address the allegations of the complaint. Yet, the court essentially pre-tried the case. It indicted Jones for dilatoriness, determined that the situation was not one in which someone had been terribly injured, and found no necessity to rush to trial.[434] The court also portrayed Jones as the woman with an ulterior motive, that of "clear[ing] her name," which somehow reduced the urgency of her case.[435]

In this second decision, the district court improperly expanded the concept of immunity. The *Fitzgerald* Court sought to

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[430] *See supra* Part III.C.

[431] *See* Jones v. Clinton, 869 F. Supp. 690, 699 (E.D. Ark. 1994) (highlighting Jones's delay in filing complaint until two days before expiration of statute of limitations).

[432] *See* Jones v. Clinton, 858 F. Supp. 902, 906 (E.D. Ark. 1994).

[433] *See supra* Part II.B.5.

[434] *See Jones*, 869 F. Supp. at 698.

[435] *See id.* at 699.

insulate official presidential conduct from liability because it creates the potential for a nearly infinite class of plaintiffs.[436] While the district court in *Jones* distinguished the situation before it from that in *Fitzgerald*, it nevertheless applied immunity policies to actions that preceded the President's assumption of office.[437] The court even went so far as to extend its newly created temporary shield to a non-executive defendant.[438] In essence, the district court treated Jones's case as something so minuscule that anybody she happened to accuse could enjoy the unwarrantedly broadened presidential protection.

In the Eighth Circuit dissenting opinion, the image of the female liar is pronounced as Judge Ross endorsed an even more expansive sanctuary for the President.[439] Judge Ross, imbuing Jones with an ulterior motive, suggested that she was pursuing her suit "for the purpose of gaining partisan political disruption" or for obtaining "public notoriety."[440] In the dissent, Jones appeared as the woman of money lust, seeking "unwarranted financial gain" and pursuing "potential extortion."[441] More generally, Jones was depicted as delusional or as a woman seeking to punish the defendant by embarrassing him and embroiling him in protracted litigation.[442] Also, as Judge McMillian put it in his dissent, the stay would not prejudice Jones because she herself was guilty of tardy commencement.[443]

Along with this deprecation of Jones, the dissenters advocated the need for broader immunity. Judges Ross and McMillian, like the district court, injected the *Fitzgerald* reasoning into a case involving unofficial conduct. The dissenters sought to distend immunity even further so that it could embrace the non-presidential defendant.[444] Judge Ross, moreover, did not believe

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[436] *See supra* Part II.C.5.

[437] *See Jones*, 869 F. Supp. at 698 (arguing President needs to avoid litigation while in office).

[438] *See id.* at 699.

[439] *See supra* Part III.C.

[440] *See* Jones v. Clinton, 72 F.3d 1354, 1368 (8th Cir. 1996).

[441] *See id.*

[442] *See id.*

[443] *See* Jones v. Clinton, 81 F.3d 78, 78 (8th Cir. 1996) (comparing urgency of Jones's complaint with President's responsibilities and noting Jones's delayed filing for three years).

[444] *See Jones*, 72 F.3d at 1370 (Ross, J., dissenting); *Jones*, 81 F.3d at 78-80 (McMillian, J.,

that the district court stay had gone far enough and wished to arrest even the pretrial discovery.[445] The dissent failed to express any real appreciation of the harm such an extensive immunity stay would have on Jones and the right to gather and preserve evidence. Her concerns disappear and the "intrusive and burdensome" effect of her case on the defendant becomes paramount.[446]

In the qualified immunity cases that predate *Fitzgerald*, the Court grappled with the problem of reconciling the need for unfettered governmental decision-making with the interest in compensating injured victims. Even when those decisions appeared to prefer immunity, the Court acknowledged the countervailing concern that victims should not have to bear the costs of their own injuries. The doctrine of absolute immunity, as formulated by the *Fitzgerald* Court, has a ligature to the qualified immunity predecessors. Specifically, the tug of war between executive independence and the fear of the deific monarch is at the center of the *Fitzgerald* decision.

In *Fitzgerald*, the Court recognized that Presidents performing their official duties have to make sensitive decisions with far-reaching ramifications. Consequently, they need to have "'the maximum ability to deal fearlessly and impartially'" when they are performing official functions.[447] The *Fitzgerald* Court, expressing appropriate apprehension about the undue concentration of power in any one branch, explained that absolute immunity does not divest the nation of the extant "formal and informal" checks on the actions of the Chief Executive.[448] One such check that the *Fitzgerald* Court left in tact was liability for unofficial acts. That is, when wearing their unofficial hat, Presidents are not shielded from immunity and, thus, stand on equal footing with the individual seeking judicial redress.

The *Fitzgerald* Court, abiding by qualified immunity principles, shaped an absolute immunity doctrine that best reconciled these competing policies and respected the separation of powers.

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dissenting).

[445] *See Jones*, 72 F.3d at 1369-70.

[446] *See id.* at 1369.

[447] *See* Fitzgerald v. Nixon, 457 U.S. 731, 752 (1982) (quoting Ferri v. Ackerman, 444 U.S. 193, 203 (1979)).

[448] *See id.* at 757.

Because the presidential immunity issue has arisen in the context of a sexual harassment suit, however, the *Jones* decisions discussed herein threatened to upset that delicate balance. Because both of the district court decisions and the opinions of the Eighth Circuit dissenters harbor stereotypes of the female liar, they improperly expanded the immunity doctrine and resurrected the deific monarch. In the course of such a transformation, the courts slighted the interest in vindicating private claims. That is, the district court and the Eighth Circuit dissenters indicated a willingness to approve procedures that could put an allegedly injured individual's case on hold and, as a result, preclude recovery altogether.

The reasoning in the *Jones* decisions tended to negate in varying degrees the plaintiff's status as the alleged injured victim and, instead, viewed the defendant male as the party worthy of additional protection. In fact, the stereotype of the female liar is so powerful that the district court and the Eighth Circuit dissenters come close to placing the President above the law. The devastation here, however, is not just the resurrection of the all-powerful monarch that Americans have historically dreaded. It also transcends mere delayed justice or even the outright deprivation of an aggrieved plaintiff's right to her day in court. Such stereotyping threatens to actually shatter the sacred core of our whole judicial system by acquiescing in alleged victims bearing the costs of their own injuries. It is in many ways the beginning of the demise of compensation. Thus, when discrimination controls legal reasoning, the ultimate damage is total demolition.

This Article began with Aeschylus' tragic depiction of Cassandra, the so-called prophetess of lies. Although Cassandra continued to accurately forecast doom, the Trojans persisted in their refusal to believe her. It was, however, their predisposition to cast her aside as the female prevaricator that made her tragedy into their tragedy. The sad picture that comes to mind is one of a community so full of an unshakable bias that it leads the wooden death horse right into its fortress without ever hearing the soothsayer's lifesaving song. While this Article does not suggest that all claims by female plaintiffs are accurate and meritorious, its veritable thesis is that a legal system that presumptively attaches a lack of credibility to certain parties invites nothing but ruin.