Washington Law Review

Volume 79 | Number 2

5-1-2004

Sex and the Workplace: "Consenting" Adolescents and a Conflict of Laws

Jennifer Ann Drobac

SEX AND THE WORKPLACE: "CONSENTING" ADOLESCENTS AND A CONFLICT OF LAWS

Jennifer Ann Drobac*

Abstract: According to the Equal Employment Opportunity Commission, sexual harassment of adolescents at work may constitute a serious, but to date largely undocumented, problem. Courts respond inconsistently to adolescent "consent" in sexual harassment employment cases. This Article reviews state criminal statutory rape law, federal civil law, and tort law to reveal the conflicting legal treatment of adolescent capacity to consent to sex. It highlights conflicts not only between the criminal and civil systems, but also between sister states' laws and laws within states. For example, this Article finds that despite criminal sexual abuse laws, courts permitted employers to use adolescent "consent" as a defense to sexual harassment in approximately fifty percent of the surveyed common law tort cases across the nation. After exploring the public policy goals for these various laws, this Article concludes that these goals do not justify the blatant conflicts between tort and criminal laws. This Article recommends both administrative and statutory reform to protect minors from the predation of adult supervisors and employers. Particularly, it recommends a strict liability standard in an approach that makes an adolescent's consent to sex with an adult at work voidable by the minor.

When Sara was fifteen, the forty-year-old manager of the movie theater where she worked befriended her and gained her confidence. His attention became increasingly intimate and physical.[1] At first, she rebuffed his physical advances. After several months, he told her that he had a brain tumor and was not sure how long he had to live. He told her he loved her. When she was sixteen, she agreed to have sexual intercourse with him. He promoted her to projectionist so that they could engage in sex more easily and frequently in the secluded projection room. She was soon pregnant. His adult girlfriend took her to have an abortion. Her manager was already in jail, serving time on a larceny conviction. Sara's parents knew nothing about the affair. Sara wrote to

---

* Associate Professor of Law, Indiana University School of Law-Indianapolis. J.S.D., Stanford Law School, 2000. My sincerest gratitude to my readers, Martin Drobac, Esq., Professors Cynthia Baker, Dan Cole, Robin Craig, Kenneth Crews, Nicholas Georgakopoulos, Andrew Klein, Deborah Malamud, Antony Page, Florence Roisman, Elaine Sutherland, and R. George Wright, who reviewed and commented upon earlier drafts. Special thanks to my research assistants, Miriam Murphy, Associate Director of our library, Margaret Marr, Esq., and Sandie McCarthy-Brown for their diligent efforts. I also thank Articles Editor Patrick McKenna for his comments and work. Finally, I am grateful for summer research stipends from Indiana University School of Law-Indianapolis that supported this work.

1. Complaint at 3–9, Sara Does v. Culver Theaters (Santa Cruz Super. Ct. 1999) (No. CV139513) [hereinafter Sara Doe Complaint].

him, believing he was wrongly convicted. When Sara's parents finally discovered the cause of her plummeting grades and disturbing behavior, they notified police, who told Sara the man had no tumor and was a registered sex offender. Sara cooperated with the district attorney, who prosecuted him for statutory rape.

Does Sara have a justiciable claim for sexual harassment against the theater owner?[2] This Article explores that question by examining her case within different legal regimes in numerous states.

This Article explores the laws of several states that address workplace sexual harassment of adolescents. In particular, it examines the legal capacity of teenagers[3] to consent to sexual conduct with a co-worker or supervisor.

Following Part I's introduction of adolescent legal rights and employment, Part II compares the treatment of adolescent "consent"[4] in criminal statutory rape prosecutions with multiple interpretations of the same "consent" in civil disputes. A comparison of state statutory rape laws, Title VII of the Civil Rights Act of 1964 (Title VII),[5] state fair employment practice statutes (FEPS), and state personal injury laws reveals the grossly inconsistent treatment of teenage consent between the criminal and civil law systems in the United States.

Part III discusses the public policy reasons for particular approaches to adolescent "consent." This review of the goals of criminal statutory rape laws and related civil laws highlights the overlapping functions of each system. It demonstrates that public policy goals may not explain the varied treatment of adolescent "consent."

---

2. Professor Deborah Malamud suggested that this is the wrong question with which to start. Conversation with Deborah Malamud, at the Law & Society Conference, Pittsburgh, Pa. (June 7, 2003). She suggested a regulatory approach to this problem to prevent harassment of minors in the first place. *Id.* I agree that a regulatory approach could prove fruitful, if combined with litigation and statutory reform. I explore the possible regulatory approaches in Part V of this Article.

3. While the term "teenager" technically includes eighteen- and nineteen-year-olds, I focus on minors in this Article. I also use the term "adolescents" when referring to minors, even though new research indicates that adolescence continues into the early twenties. *See* Jennifer Ann Drobac, I Can't to I Kant: The Transition to Maturity and the Meaning of Adolescent Consent in the Workplace 8–9 (2004) (unpublished manuscript, on file with author). Additionally, I refer to both male and female teenagers, even when I use the female pronoun, because both males and females experience sexual harassment at work.

4. I use quotations with adolescent "consent" because even explicit verbal consent by a minor may not constitute legal consent and may equate more realistically with acquiescence. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986) (holding that acquiescence is not consent in an evaluation of the "unwelcomeness" of sexual conduct under Title VII).

5. 42 U.S.C. § 2000e(2)(a)(1) (2000).

Part IV surveys the civil case law that addresses adolescent "consent" to sexual conduct. This Part analyzes how courts interpret the law and how their decisions support or oppose public policy goals. It concludes that legal treatment of Sara's consent, and her likelihood of prevailing in a suit for sexual harassment, depends upon the state in which she consented and files suit, and upon which claims she alleges.

Finally, Part V offers a synthesis of current law and public policy. Concluding that public policy goals fail to justify the blatant conflict in the law, this Part explores several options for future treatment of adolescent "consent" in the workplace. This Part also investigates possible regulatory approaches, as well as litigation and statutory reform. It discusses the advantages and disadvantages of each approach and offers a final recommendation: a strict liability standard that makes adolescent "consent" to sex with an adult at work voidable by the minor. In sum, this Article suggests how the law might permit Sara to sue for sexual harassment, whether she "consented" or not.

I. ADOLESCENT LEGAL RIGHTS & EMPLOYMENT

A. Adolescent Legal Rights

The law treats adolescents differently than it does adults.[6] The U.S. Supreme Court confirmed in *Planned Parenthood of Central Missouri v. Danforth*[7] that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[8] However, in *Thompson v. Oklahoma*,[9] the Court acknowledged:

> "[T]here *are* differences [between children and adults] which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal

6. All states but four set the age of majority at eighteen. In Alabama and Nebraska, persons reach their majority at nineteen. In Pennsylvania and Mississippi, the age is twenty-one. Heather Boonstra & Elizabeth Nash, *Minors and the Right To Consent to Health Care*, 3 THE GUTTMACHER REP. ON PUB. POL'Y NO. 4, at 7 (The Alan Guttmacher Inst.), *at* http://www.agi-usa.org/pubs/journals/gr030404.pdf.

7. 428 U.S. 52 (1976).

8. *Id.* at 74.

9. 487 U.S. 815 (1988).

> law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and hold office."[10]

The *Thompson* Court noted many of the legal limitations on the rights of minors, including eligibility to vote,[11] to serve on a jury,[12] to marry[13] and drive[14] without parental consent; to purchase alcohol,[15] pornographic materials,[16] and cigarettes,[17] and to gamble.[18]

The *Thompson* Court's explanation for the different legal treatment of minors relied in part on legal precedent[19] but also on then-current studies

---

10. *Id.* at 823 (quoting Goss v. Lopez, 419 U.S. 565, 590–91 (1975) (Powell, J., dissenting)).

11. The U.S. Constitution grants eighteen-year-olds the right to vote. U.S. CONST. amend. XXVI. The *Thompson* Court noted that no state had lowered its voting age below eighteen. 487 U.S. at 839.

12. In *Thompson*, the Court noted that no state had granted this right to persons under eighteen. 487 U.S. at 840.

13. *Id.* at 824. Only Mississippi permits persons younger than eighteen to marry without parental consent or judicial authorization. *See* Legal Info. Inst., *Marriage Laws of the Fifty States, District of Columbia and Puerto Rico*, *at* http://www.law.cornell.edu/topics/Table_Marriage.htm (last visited Apr. 20, 2004). Seven states (Delaware, Florida, Hawaii, Indiana, Kentucky, Maryland, and Oklahoma) allow minors to marry if they are pregnant or have a child. Boonstra & Nash, *supra* note 6, at 6–7.

14. The *Thompson* Court noted that in all states but one, the minimum requirement for a driver's license without parental consent was at least sixteen. 487 U.S. at 842.

15. *Id.* at 823. By 1988, all states had established a legal minimum drinking age of twenty-one. ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY, AND STATE 1087 (4th ed. 2000). In 1984, Congress amended federal law to withhold highway construction funds from states that failed to impose a minimum drinking age of twenty-one by 1986. *Id.*; *see* 23 U.S.C. § 158(a)(2) (1994). Research confirms that a disproportionately high percentage of fatal car accidents still involve teenagers. *See* MNOOKIN & WEISBERG, *supra*, at 1099–1100; NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (NHTSA), U.S. DEP'T OF TRANSP., TRAFFIC SAFETY FACTS (1997), *at* http://braininjuryoklahoma.org/intro/Transportation/traffic%20safety%20facts%201997.htm#sumarrys. Mnookin and Weisberg explain, "As a group, teenagers have had the least amount of experience with either activity [drinking or driving] and thus are more likely to misjudge their abilities and reactions. They are affected by small amounts of alcohol to a greater degree than more experienced drinkers." MNOOKIN & WEISBERG, *supra*, at 1100.

16. The *Thompson* Court stated that no state allowed a minor to purchase obscene materials. *Thompson*, 487 U.S. at 845; *see also* Ginsberg v. New York, 390 U.S. 629 (1968).

17. *Thompson*, 487 U.S. at 823. The Centers for Disease Control and Prevention (CDC) report that in 1998, all states prohibited the sale of tobacco products to minors. CDC, *State Laws on Tobacco Control—United States 1998*, 48 MMWR HIGHLIGHTS NO. SS-3, at 1 (1999), *at* http://www.cdc.gov/tobacco/research_data/legal_policy/mmwr699fs.htm.

18. The *Thompson* Court explained that thirty-nine of the forty-eight states that permitted gambling prohibited participation by minors. Another three prohibit it without the consent of the parents. *Thompson*, 487 U.S. at 847.

19. *See id.* at 834 (citing Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982); Bellotti v. Baird, 443 U.S. 622, 635 (1979)). The *Bellotti* Court noted three reasons for limiting the rights of children: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." 443 U.S. at 634.

regarding adolescent psychosocial development.[20] The Court concluded that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."[21]

The law limits adolescents in many other respects not covered in the *Thompson* decision. For example, common law declared that contracts with a minor were not void, but were voidable by the minor.[22] This law remains the majority rule.[23] In *Stanford v. Kentucky*,[24] the dissent noted that thirty-seven states restrict a minor's access to general medical treatment.[25] Many states prohibit minors from filing lawsuits unless represented by a parent, next friend, or guardian.[26] Additionally, the law limits the rights of adolescents to work. The federal Fair Labor Standards Act specifies a minimum work age of fourteen for non-agricultural work and child labor standards.[27]

---

20. *Thompson*, 487 U.S. at 835 n.43. For a more recent discussion of adolescent psychosocial development as it relates to sexual harassment law, see Drobac, *supra* note 3, at 14–16, 22–26.

21. *Thompson*, 487 U.S. at 835.

22. ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 227, at 318 (1952).

23. MNOOKIN & WEISBERG, *supra* note 15, at 1081.

24. 492 U.S. 361 (1989).

25. *Id.* at 394 (Brennan, J., dissenting); *see In re* Stanford, 537 U.S. 968, 969–70 (2002) (Stevens, J., dissenting). Currently, parents retain the legal authority to consent to medical treatment for their children "based on the principle that young people generally lack the maturity and judgment to make fully informed decisions before they reach the age of majority." Cynthia Dailard, *New Medical Records Privacy Rule: The Interface with Teen Access to Confidential Care*, 6 THE GUTTMACHER REP. ON PUB. POL'Y NO. 1, at 6 (The Alan Guttmacher Inst. 2003), *at* http://www.guttmacher.org/pubs/journals/gr060106.pdf.

26. *See, e.g.*, Porter v. Triad of Arizona, 52 P.3d 799, 803 (Ariz. Ct. App. 2002) (holding that a minor may not bring an action in his own name but may sue through a representative); Am. Alternative Energy Partners II v. Windridge, Inc., 49 Cal. Rptr. 2d 686, 690–91 (Cal. Ct. App. 1996) (finding that the incapacity of minors bars them from representing their own interests in court); Newman v. Newman, 663 A.2d 980, 987 (Conn. 1995) (holding that a child may bring an action only through a next friend or guardian); Cleaver v. George Staton Co., 908 S.W.2d 468, 669 (Tex. Ct. App. 1995) (finding a lack of capacity because of the disability of minority pertaining to the right to sue in one's own name); Jensen *ex rel.* Stierman v. McPherson, 655 N.W.2d 487, 491 (Wis. Ct. App. 2002) (relying on WIS. STAT. § 803.01(3)(c) that requires that an adult represent the minor); *see also* Klak v. Skellion, 741 N.E.2d 288, 298–90 (Ill. App. Ct. 2000) (stating that a minor has no capacity to maintain an action in his name).

27. 29 U.S.C. §§ 203, 212, 213 (2000); *see also* Child Labor Coalition, *Child Labor in the US: An Overview of Federal Child Labor Laws*, *at* http://www.stopchildlabor.org/USchildlabor/fact1.htm (last visited Apr. 20, 2004). Some minimum age exceptions exist for certain jobs such as newspaper delivery and farm work on the family farm. Child Labor Coalition, *supra*. Every state also has child labor laws. When both federal and state laws apply to the employment of a minor, employers must obey the more stringent of the two laws. Child Labor Coalition, *Child Labor in the US: State vs.*

Not all laws treat adolescents as "infants" or as children with a legal disability. Some laws grant adolescents adult privileges.[28] For example, all fifty states allow minors to consent, without parental approval or notification, to testing for HIV and sexually transmitted diseases (STDs). Forty-seven states permit minors to consent to treatment for STDs.[29] Thirty-four states permit a minor mother to place her child for adoption without consulting her own parents.[30] States also attribute adult responsibilities to adolescents.[31] For example, California automatically tries a minor of fourteen or older as an adult for the crimes of murder, rape, and certain other sex offenses.[32]

This very brief survey of adolescent rights and responsibilities raises some interesting questions about the relationship between adolescent employment and sexual activity. We know that the law permits adolescents to work, albeit with limitations. Additionally, they can consent to some medical services related to sexual activity, which means that the law acknowledges that minors engage in sex.[33] However, almost seventy percent of U.S. adults believe that adolescents fourteen to sixteen years old should not have sex.[34] Is workplace sex or sexual

---

Federal Child Labor Laws, *at* http://www.stopchildlabor.org/USchildlabor/statevsfedlaws.htm (last visited Apr. 20, 2004). Federal law allows employers to pay workers under twenty less than minimum wage for the first ninety days of their employment. U.S. Dep't of Labor, *Wages, Youth & Labor*, *at* http://www.dol.gov/dol/topic/youthlabor/wages.htm (last visited Apr. 20, 2004).

28. *See generally* Boonstra & Nash, *supra* note 6 (providing a useful survey of a minor's right in all fifty states to consent to various types of health care).

29. *Id.* at 5.

30. *Id.* at 8.

31. Dr. Michael J. Bradley discusses the trend to perceive adolescents as adults in his recent book. MICHAEL J. BRADLEY, YES, YOUR TEEN IS CRAZY! (2002). He writes:

> [W]e've somehow come to view adolescents as if they were adults and not children. From the kid's perspective, this is nothing new. Teenagers of all generations have lobbied for adult privileges with the swaggering assurances that they can handle "it." The fact is that they cannot handle "it" *and they know this* . . . . What's new is that we've somehow signed onto this disastrous notion that they *are* adults, capable of handling "it" completely solo. It's not working. Teens left on their own as small adults not only screw up big-time, they become depressed and rageful in the bargain.

Id. at 16–17.

32. CAL. WELF. & INST. CODE § 707(d)(2), (e) (West 1998). For a discussion of how states treat juvenile criminal offenders as adults, see Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 583–86 & nn.140–52 (2000).

33. For a discussion of recent statistics regarding teenage sexuality and sexual harassment, see Drobac, *supra* note 3, at 16–25.

34. Jennifer J. Frost et al., The Alan Guttmacher Institute, *Country Report for the United States: In Teenage Sexual and Reproductive Behavior in Developed Countries*, at 18 (Occasional Report No. 8, 2001), *available at* http://www.guttmacher.org/pubs/euroteens_summ.pdf (last visited Apr.

harassment a problem for minors? May minors legally consent to workplace sex, or does the law penalize them, or others, if minors engage in sex with an adult on the job? Can minors sue, through a friend or guardian, for workplace sexual harassment if they do "consent" to sex? More specifically, is Sara's case aberrational, and if not, how will the law treat her circumstances?

B. Adolescent Employment

Researchers estimate that approximately five-and-a-half million adolescents between the ages of twelve and seventeen work.[35] Approximately one-third of working adolescents find jobs in eating and drinking establishments. Another third work in other retail jobs. Approximately twenty-five percent work in service industries, including health, education, and entertainment or recreation jobs.[36] Working in a movie theater, Sara fit into this last category.

1. Youth Employment Generally

Particular individual characteristics correlate with youth employment. Fifty percent of employed American high school students work more than fifteen hours per week.[37] Black, Hispanic, and poor youth find less work and are unemployed at higher rates than their white and wealthier peers.[38] Similarly, adolescents in single-parent families experience more unemployment than those in married-couple families.[39] Youth

---

28, 2004) (reporting that "[i]n 1996, 69% of U.S. adults indicated that it was 'always wrong' for adolescents between the ages of 14–16 to have sex").

35. Child Labor Coalition, *Child Labor in the US: Youth Employment Statistics*, *at* http://www.stopchildlabor.org/USchildlabor/statistics.htm (last visited Apr. 20, 2004) [hereinafter *Youth Employment Statistics*]. The *Report on the Youth Labor Force* states that 2.9 million adolescents aged fifteen to seventeen worked during the school months in the period 1996–1998. U.S. Dep't of Labor, *Report on the Youth Labor Force* 30 (Nov. 2000), *at* http://www.bls.gov/opub/rylf/rylfhome.htm [hereinafter *Report on the Youth Labor Force*]. During the summers, that figure rose to 4.0 million. *Id.* Unless otherwise specified, all future employment statistics discussed in this article refer to the period 1996–1998.

36. *Report on the Youth Labor Force*, *supra* note 35, at 36; Child Labor Coalition, *Child Labor in the US: Industries and Occupations Where Youth Are Employed*, *at* http://www.stopchildlabor.org/USchildlabor/indandocc.htm (last visited Apr. 20, 2004).

37. *Youth Employment Statistics*, *supra* note 35.

38. *Report on the Youth Labor Force*, *supra* note 35, at 15. The report did not mention the employment rates of Asian or other U.S.-born minorities.

39. *Id.* at 33. Adolescents in married-couple families experienced fifteen percent unemployment during the 1996–1998 period as compared to almost double that (twenty-nine percent) for those in

unemployment rates typically far exceed those for other groups, averaging between fifteen and thirty-five percent, depending on age, race, family type, and time of year.[40] Most recent figures from 2002 concerning sixteen- and seventeen-year-olds show that while approximately twenty-seven percent were employed, another nineteen percent sought work.[41] The question arises whether adolescent workers, because they experience more unemployment than adults, are therefore more susceptible than their adult co-workers to sexual abuse and coercive demands by employers and supervisors.[42]

---

households headed by single women and twenty-three percent for those in households headed by single men. *Id.* The survey did not mention children of gay and lesbian families or children in households headed by unmarried domestic partners.

40. *Id.* at 31. The annual average unemployment rate of fifteen to seventeen-year-olds during the 1996–1998 period hovered at nineteen percent. *Id.* at 33. School-month unemployment averaged at seventeen percent for whites, thirty-five percent for Blacks, and thirty percent for Hispanics. *Id.* at 31. Male unemployment rates were slightly higher than those for females, twenty percent compared to seventeen percent. *Id.*

41. U.S. Dep't of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, tbl. 3, *Employment Status of the Civilian Noninstitutional Population by Age, Sex, and Race* 196, *at* http://www.bls.gov/cps/cpsaat3.pdf (last visited Apr. 20, 2004). The exact figures were twenty-seven percent employed and nineteen percent unemployed for that age group. *Id.*

42. Professor Robin Craig notes that adolescent unemployment may not carry the same import as adult unemployment and suggests that I may not be exploring the right question here. In a May 2003 presentation, I suggested to Professor Craig and other colleagues that new research concerning adolescent neurological and psychosocial development may dramatically change what we "know" about adolescence. In a draft paper based upon that research, I summarize that "[c]ritical abilities—including impulse control, emotional regulation, planning, decision-making, and organization—may not fully mature until the third decade of life." Drobac, *supra* note 3, at 9. I believe, and Professor Craig shares the view, that adolescent development makes minors more vulnerable than adults to workplace sexual harassment. I explored this notion more fully in that paper. *See id.* at 4–26.

Thus, Professor Craig wonders whether adolescents may suffer higher rates of sexual harassment not because of associated high unemployment rates but because of these maturational vulnerabilities and limited experiences in the workplace. She is skeptical of the importance of adolescent unemployment rates because people, thinking that adolescents should be in school and not at work, may discount those statistics. Moreover, most minors are dependents. Because they are not responsible for paying for their own necessaries, Professor Craig suggests that work is less critical to them and, by implication, these adolescents will tolerate less harassment. I think both maturational vulnerabilities and high unemployment rates may influence the prevalence of the sexual harassment of teen workers. In any case, the significance of adolescent unemployment and its relevance to sexual harassment deserves further investigation.

2. *Youth Sexual Harassment in the Restaurant Industry*

Equal Employment Opportunity Commission (EEOC) charge[43] statistics tend to support the notion that those industry sectors that employ more teen workers receive a high percentage of EEOC discrimination charges. For example, in 2002, the EEOC received 268 sexual harassment charges from workers under eighteen.[44] Of those, forty-six percent (123) came from adolescents who worked in eating and drinking establishments.[45] This statistic marks more than a ten percent increase in five years over the 1998 figure, in which only thirty-five percent of the charges came from teen workers in this industry.[46]

EEOC lawsuits document sexual harassment of youth in the restaurant industry. In 2002, the EEOC filed eighteen sexual harassment lawsuits against restaurants,[47] including Taco Bell, Church's Chicken, Applebee's, Denny's, Colonial Ice Cream, Pepe's Mexican Restaurant, and others.[48] One cannot always tell from EEOC press releases whether the alleged targets were minors at the time the incidents occurred; nevertheless, two EEOC press releases from 2003 documented the sexual harassment of female teenagers at Burger King, Church's

---

43. I use the term "charge" rather than "complaint" to distinguish EEOC administrative charges (filed to initiate EEOC investigations) from lawsuit complaints (filed to initiate a court action).

44. ORIP/PPAD, EEOC, EEOC/FEPA Charge Trends for 17 and Under Sexual Harassment Receipts by Charging Party Group—National (EEOC computer-generated statistics compiled on May 27, 2003) (on file with author) [hereinafter EEOC National 17 and Under Receipts]. I thank EEOC administrators and employees who provided me with the information discussed in this section and the footnotes that follow.

45. ORIP/PPAD, EEOC, EEOC/FEPA Charge Trends for 17 and Under Sexual Harassment Receipts by Charging Party Group—SIC: Eating and Drinking Places (EEOC computer-generated statistics compiled on May 30, 2003) (on file with author) [hereinafter EEOC Eating and Drinking 17 and Under Receipts].

46. EEOC National 17 and Under Receipts, *supra* note 44; EEOC Eating and Drinking 17 and Under Receipts, *supra* note 45. According to EEOC trial attorney Sanya Hill Maxion, the EEOC processed 1281 sexual harassment cases filed by workers eighteen or under in 1994. Alexei Oreskovic, *Targeted Teens*, THE RECORDER, July 15, 2003, at 1. The Oreskovic article also states that for the year 2003, minors had filed 541 cases, ninety-nine percent of which involved sexual harassment. *Id.* The EEOC statistics provided by the Commission refute that estimate: as of May 27, 2003, minors had filed only 133 sexual harassment cases in 2003. EEOC National 17 and Under Receipts, *supra* note 44.

47. Mary Sanchez, *Fast-Food Industry Serves Up Sexual Harassment*, TALLAHASSEE DEMOCRAT, May 10, 2003, at 8.

48. Dina Berta, *Sexual Harassment Remains Nagging Issue for Foodservice Industry*, NATION'S RESTAURANT NEWS, Dec. 16, 2002, at 1.

Chicken,[49] Jack-in-the-Box, and Taco Bell.[50] According to EEOC District Director Lynn Y. Bruner, no other industry receives as many complaints or sees as many cases filed in the civil court system.[51]

Is there a correlation between teen employment and sexual harassment charges more generally? The answer to this question remains unclear. We do know that in recent years workers filed more than 1200 discrimination charges annually against restaurants, the sector that employs one-third of all adolescents.[52] Thus, we know that minors filed approximately ten percent of the eating and drinking industry sexual harassment charges. The problem is that we do not know exactly what percentage of the industry workforce teenagers comprise.[53]

New anecdotal evidence of the sexual harassment of adolescent workers, particularly in the fast food industry, has alerted EEOC officials to what may be an alarming phenomenon and trend.[54] For example, on January 31, 2003, the *St. Louis Post Dispatch* reported the case of a Burger King manager who sexually harassed six women, five of whom were high school students.[55] The manager, in his late twenties,

---

49. This case alleged the rape of a fourteen-year-old girl by her store manager. Sanchez, *supra* note 47, at 8.

50. Press Release, EEOC, Sexual Harassment Charged at Cannery Row Restaurant (Apr. 10, 2003) (on file with author); Press Release, EEOC, Two Victims To Share $85,000 For Sex Harassment by Company Founder (Apr. 2, 2003) (on file with author).

51. Sanchez, *supra* note 47, at 8.

52. Berta, *supra* note 48.

53. The U.S. Department of Labor reports that 2,573,000 sixteen- and seventeen-year-olds worked in 2000. U.S. Dep't of Labor, *Household Data Annual Averages*, *in* CURRENT POPULATION SURVEY (2000), *at* http://www.bls.gov/opub/rylf/rylfhome.htm. It does not report the work statistics of fourteen- and fifteen-year-olds. *Id.* The number of sixteen- and seventeen-year-olds represented approximately two percent of the total employed workforce. *Id.* I could not find Department statistics that break down that figure by industry. If, however, the percentage holds for the eating and drinking industry (which it may not since that sector employs one third of all teenagers) then two percent of the workers filed ten percent of the sexual harassment charges.

54. Telephone Interview with David Grinberg, Spokesperson, EEOC (May 22, 2003); E-mail from William Tamayo, Regional Attorney, EEOC, San Francisco to author (May 22, 2003, 7:06 p.m. CST) (on file with author) ("Our office has litigated a few cases involving teenagers subjected to sexual harassment, and we see a growing trend."); *see also* Oreskovic, *supra* note 46, at 1 ("Among the millions of teenagers who staff the nation's fast food and retail outlets, sexual harassment is a pervasive problem that's long existed under the radar."). EEOC Program Analyst Linda Li notes that the agency "has not consistently tracked the age of the harassment victims." E-mail from Linda Li, Program Analyst, EEOC, to author (May 22, 2003, 5:18 p.m. CST) (on file with author). Growing awareness of this phenomenon may cause more detailed tracking of the sexual harassment of adolescent workers.

55. Peter Shinkle, *Restaurant Manager Is Accused of Harassing Workers; EEOC Official Voices Concern About Teen Workers*, ST. LOUIS POST DISPATCH, Jan. 31, 2003, at B2.

allegedly fondled the workers, made vulgar comments, and demanded sex. Initially, the women did not know how to make a complaint to someone more senior than their manager.[56]

In the EEOC press release concerning the *Burger King* case, Lynn Bruner expressed her concern for vulnerable adolescents in the restaurant industry. She commented, "We as a society fail when teenagers—as part of their first employment experience—are subjected to graphic language, inappropriate touching, and requests for sexual favors by the very adults who are supposed to make sure they're safe."[57] She further explained that sexual harassment may be a particular problem in the restaurant industry because restaurants often hire young, inexperienced workers.[58] High employee turnover contributes to the problem, presumably because of monitoring difficulties and the need to train new employees continually.[59] Bruner also suggested that "restaurants often try to create an 'entertainment atmosphere' that can cloud the rules for appropriate conduct in the workplace."[60]

3. *Youth Sexual Harassment Generally*

San Francisco Legal Aid Society-Employment Law Center staff attorney David Pogrel agreed that teenagers face unique risks, stating:

> Teenagers on the job are often seen as fungible. A lot of employers don't treat them with the same respect [as adult workers] . . . . I think that sort of runs over into a whole myriad of rights that are often violated on behalf of young workers—not getting paid correctly and sexual harassment among young women.[61]

---

56. EEOC Regional Attorney William R. Tamayo explained that many young workers may not know their rights. Press Release, EEOC, EEOC Settles Sex Harassment Suit with Fresno Chain Uncle Harry's Bagels (Mar. 13, 2003) (on file with author). On March 13, 2003, the EEOC settled a sexual harassment case against a Fresno, California-based chain, Uncle Harry's Bagels. *Id.* A store manager allegedly sexually harassed several teenaged workers, among other employees. *Id.* Uncle Harry's agreed to pay $150,000 to the six female victims. *Id.* According to Sanya Hill Maxion, teens may not recognize sexual harassment and may not know what to do when they experience it. Oreskovic, *supra* note 46, at 1.

57. Shinkle, *supra* note 55, at B2.

58. *Id.*

59. Sanchez, *supra* note 47, at 8.

60. Shinkle, *supra* note 55, at B2.

61. Oreskovic, *supra* note 46, at 1.

Adolescents face this treatment at a time in their development when they are learning new interpersonal skills and how to function in a workplace environment. They may not yet understand the boundaries between what may be appropriate outside the workplace but illegal within it.[62]

Sexual harassers prey upon teens in other workplace sectors, not just restaurants. In 1999, the EEOC filed suit against Footaction USA. A manager in his late thirties allegedly sexually harassed a teenaged employee. The manager, co-workers, and customers subjected the teenager to sexual jokes, propositions, and threats, culminating in a physical assault. San Francisco EEOC District Director Susan L. McDuffie commented:

> Several incidents of sexual harassment of minors have been brought to our attention this year .... Sexual harassment—at what is very often the teenaged employee's first job—can have a devastating psychological effect, causing the victim to feel shame, to change the way she dresses, to drop out of school, and to be afraid to tell anyone what is happening. We hope this suit will send two messages. Employers must have zero tolerance for sexual harassment. In addition, teens should know they have a right to report unwelcome, offensive sexual conduct whether by a customer, co-worker, or supervisor, and that if they come to the EEOC, we will take action.[63]

In this passage, McDuffie raised several important points. First, she acknowledged the phenomenon of teen harassment. Second, she briefly explored sexual harassment's devastating effects on adolescents and mentioned their fear of reporting harassment. Third, she called for zero tolerance by employers in order to protect these teens. Fourth, she emphasized the need for teens to know their rights and that the EEOC responds to complaints. This fourth point supports the notion that some teens do not know their rights and fail to understand that an agency exists to help them.

4. Empirical Research Needed

This anecdotal evidence highlights the need for immediate, comprehensive empirical research in this field. We need to know the prevalence and scope of the sexual harassment of working adolescents.

---

62. *Id.*; *see also* Drobac, *supra* note 3, at 14–16.

63. Press Release, EEOC, EEOC Sues Footaction USA for Sexual Harassment of Teen Employee (Sept. 29, 1999) (on file with author).

We know, for example, that eighty-three percent of girls and seventy-nine percent of boys report experiencing sexual harassment at school.[64] In the workplace, is sexual harassment of teenagers as pervasive as sexual harassment of adults? Is it even more pervasive? We must determine whether the presence of adolescent workers in an industry correlates with high numbers of sexual harassment charges. Specifically, do harassers target teens rather than adult workers? An investigation into adolescent harassment will lead to other, more sophisticated questions. For example, if sexual harassment of teenagers is pervasive, do they tolerate harassment and, if so, why? Are they ignorant of their rights? Are they immobilized by shame? Is it shame or do they fear economic retaliation, or even physical violence? The American Academy of Child & Adolescent Psychiatry (AACAP) suggested in a policy statement: "It is common for children and adolescents to conceal these offenses [sexual harassment] because they feel afraid, ashamed, vulnerable, and humiliated. They may actually believe their own behavior may have precipitated the sexual harassment. These incidents are often not revealed for many years, if ever."[65]

The conduct of Sara, whose story begins this Article, supports this statement. She concealed her manager's abuse and her resulting trauma from her parents.[66] She later reported feeling humiliation and shame.[67] Had the manager not continued to telephone her from prison, Sara's parents might never have discovered the cause of her plummeting grades and bizarre behavior.[68]

The AACAP statement raises other questions. To what extent do teenagers fail to report harassment? If teenagers are not complaining, do they have unique coping techniques? Do they "consent" to sexual activity and then complain? Is Sara's case unique? Answers to these questions will enable jurists, educators, healthcare professionals, and

64. Am. Ass'n of Univ. Women, Hostile Hallways: Bullying, Teasing, and Sexual Harassment in School 4 (2001), *at* http://www.aauw.org/member_center/publications/HostileHallways/hostilehallways.pdf.

65. Am. Acad. of Child & Adolescent Psychiatry, Policy Statement—Sexual Harassment (Oct. 1992), *at* http://www.aacap.org/publications/policy/ps28.htm.

66. Report of Deputy R. Mitchell #73-2801, Aug. 9, 1999, at 3–4 (on file with author & Santa Cruz County Sheriff's Department) [hereinafter Mitchell #73-2801].

67. Sara Doe Complaint, *supra* note 1, at 10.

68. Mitchell #73-2801, *supra* note 66, at 4; Jail Incident Report #99-R-174, Aug. 16, 1999, at 1–2 (on file with author & Santa Cruz County Sheriff's Department).

employers to address problems through training, counseling, and legal reform.

While the answers to these questions are important, we can take the anecdotal and EEOC statistical evidence to explore how the law currently treats or fails to address the sexual harassment of adolescents. Additionally, we can explore the public policy reasons for addressing teen sexual harassment. For, as one news reporter noted: "From a legal standpoint, the fast-food industry is liable for alleged incidents. But this is a societal problem. At its most basic level it is an issue of respect. What a sad commentary on American society that so little respect is afforded young women."[69]

If society truly affords our children—transitioning into adults—so little respect, if employers treat adolescent workers as fungible, then public policy and the law should address the situation.

II. ADOLESCENT "CONSENT" TO SEX—HISTORIC AND CURRENT LEGAL TREATMENT

The criminal and civil legal systems deal with adolescent "consent" to sex in different ways. Statutory rape laws dominate the criminal field. The civil system addresses such consent through state tort laws, Title VII, state FEPS, and other statutory responses. By comparing the varied approaches, one sees the gross legal inconsistencies.

A. Statutory Rape Laws

Historically, statutory rape laws defined "the age of consent" as a girl's age at which her consent to sexual intercourse earned legal significance and insulated the male participant from criminal prosecution.[70] During the nineteenth century, states raised the age of consent from ten to as high as twenty-one.[71] Currently, all fifty states prohibit the sexual predation of minor females by adults.[72] As late as

69. Sanchez, *supra* note 47, at 8. This reporter's assertion regarding employer liability is inaccurate. Employers become liable only when the complainant proves that the harassment and damages occurred. Moreover, liability may not attach if a teen "consents."

70. *See* Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 24–25 (1994).

71. *Id.* at 24.

72. App. A, *infra* pp. 546–73; Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 41–78 (1997); *see also* Oberman, *supra* note 70, at 22–36.

1994, only thirty-five states had gender neutral laws protecting both male and female minors.[73] Now, all fifty states protect both sexes.[74]

In 1997, Charles A. Phipps surveyed state sex crime laws and found that most states distinguish among sex crimes against children by the severity of the offense and the age of the child.[75] He concluded that most states classify crimes against children under thirteen or fourteen as the most serious.[76] The least serious were non-forcible sex crimes with older children.[77] An age difference of at least two to five years was an element of a sex crime in most states.[78]

Because of the complexity of these laws, I found it difficult to pinpoint a definitive "age of consent." Some states set a baseline age of consent but then increase the age when a case involves special facts, such as an adult in a position of trust or authority, a relative, or a school employee. For example, four states set the age at fourteen but increase it to sixteen under special circumstances.[79] Twenty states increase the age from their respective bases to eighteen under special circumstances.[80] If

---

73. Michael M. v. Sonoma County, 450 U.S. 464, 492 (1981) (Brennan, J., dissenting). Alabama, Arkansas, Delaware, Georgia, Idaho, Kentucky, Louisiana, Missouri, New Hampshire, Nevada, New Jersey, North Carolina, North Dakota, Pennsylvania, and Texas protected only female minors from predation by males. Oberman, *supra* note 70, at 32 n.88.

74. *See* App. A, *infra* pp. 546–73.

75. Phipps, *supra* note 72, at 55–62; *see also* Charles A. Phipps, *Misdirected Reform: On Regulating Consensual Sexual Activity Between Teenagers*, 12 CORNELL J.L. & PUB. POL'Y 373 app. A (2003). I disagree with some of Mr. Phipps' conclusions regarding the age of consent in his more recent work. I have noted my own conclusions concerning the age of consent in App. A, *infra* pp. 546–73.

76. Phipps, *supra* note 72, at 57. Phipps also discussed the Model Penal Code's treatment of sex crimes and highlighted its gendered approach. *Id.* at 18–19. Moreover, the Model Penal Code sets the age of consent at ten—an age no longer adopted by any state. Phipps explains, "The drafters were worried about the seductive powers of adolescents as well as the application of a rule of strict liability and they wanted to draw a clear line for the most serious offense." *Id.* at 19 (citing MODEL PENAL CODE § 213.1 cmt. 6 at 324 (1985)).

77. *Id.* at 59–60. The age of consent for sexual contact, as opposed to penetration, was lower in most states. Seventeen states set the age of consent for sexual contact at fifteen or below. Another twenty-two set it at sixteen. *Id.* at 62.

78. *See id.* at 62 & n.252; Oberman, *supra* note 70, at 32. Some states set age minimums for culpability. Phipps, *supra* note 72, at 62–63 & n.248 (citing ALASKA STAT. § 11.41.434(a)(1) (Michie 1996)).

79. *See* App. A, *infra* pp. 552, 557, 560, 568 (summarizing the laws for Hawaii, Maryland, Mississippi, and South Carolina).

80. *See* App. A, *infra* pp. 546–73 (summarizing the laws for Alaska (16), Arkansas (16), Colorado (15), Connecticut (16), Delaware (16), Florida (16), Iowa (14), Illinois (17), Maine (14), Michigan (16), Minnesota (16), New Hampshire (16), New Jersey (16), New Mexico (17),

one takes the highest age in each state, then twenty-seven states set the age of consent at eighteen, five at seventeen, and eighteen at sixteen.[81] These laws demonstrate that almost half of the states set the age of consent at below the age of majority. Only fourteen percent of the states (seven) set it at the age of majority absent special circumstances.[82]

Many states recognize an enhancement of the offense when a member of the family or another adult in a position of authority commits the offense.[83] Teachers and other school employees, guardians, babysitters, employers and shift supervisors, psychotherapists, and medical professionals are all examples of persons who wield authority over adolescents.[84]

While statutory rape is a strict liability offense, a few states retain now uncommon elements of the offense or unusual defenses. For example, in California, mistake of age, particularly of older victims, constitutes a defense.[85] In Massachusetts, chastity remains an element of the crimes against older children.[86] Thus, if the child was not virginal at the time of the offense, the perpetrator may use that as a complete defense to the crime of statutory rape.

Oklahoma (16), South Dakota (16), Tennessee (13), Utah (16), Vermont (16), and Washington (16)).

81. *See* App. A, *infra* pp. 546–73.

82. *Id.*

83. *Id.*; Phipps, *supra* note 72, at 66–69; *see also* Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 767–68 (2000). As Phipps explains, the Model Penal Code creates an offense by one in a position of authority but narrowly defines that position and excludes the teacher-student relationship. Phipps, *supra* note 72, at 23–24. The 1980 commentary to the Model Penal Code explains, "Coverage of every instance of sexual relations with an employee, student, or other person under one's supervision would reach too far." MODEL PENAL CODE § 213.3 cmt. 4, at 389 (1980).

84. *See, e.g.*, Phipps, *supra* note 72, at 68 n.264; *see also* Doe v. Estes, 926 F. Supp. 979 (D. Nev. 1996) (finding that school-aged children are particularly vulnerable to sexual abuse by an adult in a position of authority). The *Estes* court determined that "[s]choolchildren are particularly vulnerable to mistreatment at the hands of adults, especially where those adults are cloaked with the authority of the state." 926 F. Supp. at 988; *see also infra* note 315 and accompanying text.

85. Phipps, *supra* note 72, at 51–52 & n.219.

86. *Id.* at 70–71 & n.275 (citing MASS. GEN. LAWS ANN. ch. 272, § 4 (West 1990); MISS. CODE ANN. §§ 97-3-67, -5-21 (1994)). In 1998, Mississippi repealed laws requiring that the target be "chaste." *See* MISS. CODE ANN. § 97-3-65 (1999).

1. A Case Example: Hernandez v. State

Until 1993 in Texas, the perpetrator could argue capacity to consent to sex based on a promiscuity defense.[87] In *Hernandez v. State*,[88] the court emphasized:

> We do observe that the State's brief acknowledges "that children aged fourteen to seventeen who have voluntarily become sexually active are, unlike their sexually inactive peers, imputed by the law with the capacity to consent to sexual conduct like an adult." It then adds, "Stated conversely, the law which imputes to children an incapacity to consent to sexual activity makes a logical exception for those in their mid-teens who have chosen to become sexually active."[89]

The court did not explain exactly how sex, or more specifically, the choice to have sex, elevates a minor's legal capacity to that of adult with full maturity, understanding, and appreciation.

Did the law really impute capacity because these minors made a choice? Did the law assume that every teenager who "chooses" to have sex weighs the decision carefully, considering all the potential ramifications? The court's reasoning flies in the face of our common understanding of teenage passion, sex, and willingness to engage in risky behavior.[90] The chastity and promiscuity defenses attribute full capacity to minors. What about the *Hernandez* facts? The minor's mother allegedly "sold" her daughter to the accused rapist and other men.[91] Perhaps, the minor's "choice" not to resist the accused reflected a well-reasoned decision, but I would hardly attribute to her adult status based on those facts.

To follow this reasoning further, let us ask why both the prosecution and the court suggested that the law made a logical exception for sexually active teens. If teen virgins suffer incapacity, shouldn't the law protect them from their own naïve and misguided choices? Why would the law credit their choice to have sex in the first place? If the law places

---

87. Hernandez v. State, 861 S.W.2d 908, 909–10 (Tex. 1993) (finding that § 22.011(d)(1) of the Texas Penal Code permits the accused to raise a statutory promiscuity defense in a case in which the minor's mother "sold" her to the accused and other men). The Texas legislature deleted this defense when it revised the penal code in 1993. *Id.* at 910 (Miller, J., concurring).

88. 861 S.W. 2d 908 (Tex. 1993).

89. *Id.* at 909 n.1; *see also* Oberman, *supra* note 70, at 33.

90. For a discussion of teenage sexuality, see Drobac, *supra* note 3, at 16–22.

91. *Hernandez*, 861 S.W.2d at 910 (McCormick, J., dissenting).

such responsibility and resulting consequences on fourteen- to seventeen-year-olds, if it affords their perpetrators the ability to invite a promiscuity defense, then it is not logical to keep statutory rape laws on the books for youth over thirteen.[92]

Another interpretation of the *Hernandez* court's reasoning is that the law imputed capacity because *sex* elevates minors to a new level of understanding. One could argue, using this reasoning, that if we simply introduced all of our teenaged children to sex, they would all develop adult wisdom and legal capacity. Unlikely.

The law in *Hernandez* reflected adult prejudice. Some adult lawmakers in Texas thought that teenaged children who chose to have sex chose an immoral path and were, therefore, promiscuous and bad. They did not reward or protect bad minors in Texas. In fact, they let adults who raped them avoid punishment. The promiscuity defense, which reflected this adult prejudice, died only ten years ago in Texas.[93] Did the prejudice die with it? I doubt it.

2. *Federal Rule of Evidence 412*

The chastity and promiscuity defenses clearly contradict the provisions of Federal Rule of Evidence 412 and parallel state statutes that specifically prohibit introduction of the victim's prior sexual history.[94] When courts fail to invoke Rule 412 (or similar state equivalents)[95] to protect the sexual history of minor victims, then any evaluation of a minor's maturity could conceivably include a discussion of the minor's sexual maturity and sexual history. This circumstance leaves minors vulnerable to the grossest procedural abuses that legislators intended Rule 412 (and state equivalents) to combat.[96]

---

92. I thank Professor R. George Wright for clarifying this point.

93. *See Hernandez*, 861 S.W.2d at 910 (Miller, J., concurring).

94. Phipps, *supra* note 72, at 70 n.275; *see* FED. R. EVID. 412 & advisory committee's note. *But see* Barnes v. Barnes, 603 N.E.2d 1337, 1342–43 (Ind. 1992) (holding that in a tort action, the Indiana Rape Shield Statute did not preclude the defendant from introducing evidence of plaintiff's other sexual activities); Doe by Roe v. Orangeburg County Sch. Dist., 495 S.E.2d 230, 233 (S.C. Ct. App. 1997) (finding that the South Carolina rape shield statute did not apply in civil cases).

95. *See, e.g.*, CAL. EVID. CODE § 1106 (West 1995); CAL. GOV'T CODE § 11513 (West 1992).

96. *See, e.g.*, Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 849 (1991) (arguing that exposure of a woman's sexual history will "lead not only to shame in the courtroom but acquiescence in the workplace").

Because Sara lived in California, a state that sets the age of consent for penetration at eighteen,[97] the District Attorney successfully prosecuted a statutory rape charge.[98] Her manager could not raise mistake of age as a defense. He knew (or should have known) her age from her work permit, which California required her to obtain from her school. Had Sara lived in twenty-four other states, however, her "consent" would have insulated the manager from prosecution because she was sixteen, the "age of consent" in those other states, by the time the manager actually seduced her.[99] Thus, the state in which she consented and where the District Attorney prosecuted the claim made a difference in her case.

B. Title VII and State Fair Employment Practice Statutes (FEPS)

Title VII prohibits discrimination against any individual "with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."[100] In *Meritor Savings Bank v. Vinson*,[101] the Court held that severe or pervasive sexual harassment violates Title VII when it alters the worker's conditions of employment and creates an abusive working environment.[102] Courts assess the working environment by "'looking at all of the circumstances' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'"[103]

In order to bring a case of sexual harassment against an employer under Title VII, a plaintiff must show: (1) membership in a protected

---

97. CAL. PENAL CODE § 288a (West 1999).

98. *See* People v. Cosio, No. S9-09852 (Santa Cruz County Super. Ct. 1999).

99. Absent the special facts of her case (e.g., the age disparity and Cosio's managerial position), the number of states that would not protect her increases to thirty-six. *See* App. A, *infra* pp. 546–73.

100. 42 U.S.C. § 2000e-2(a)(1) (2000); *see* Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998).

101. 477 U.S. 57 (1986).

102. *Id.* at 67. Professor Catharine MacKinnon defined sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivations in another." CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979).

103. *Faragher*, 524 U.S. at 787–88 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)).

class;[104] (2) unwelcome sexual harassment; (3) harassment based on sex; (4) an effect on the terms or conditions of employment; and (5) direct or indirect employer liability.[105] No claim against individual perpetrators exists under Title VII.[106] However, some state FEPS permit sexual harassment damage claims against individual harassers.[107] In *Faragher v. City of Boca Raton*,[108] the Court emphasized that the "objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."[109] Jurists refer to the objective component as the "reasonableness" standard and to the subjective element as the unwelcomeness requirement. Every state FEPS that similarly prohibits sex discrimination and sexual harassment also makes "unwelcomeness" an element of the prima facie case.[110]

The *Meritor* Court specifically addressed the issue of volition in its discussion of unwelcomeness:

> While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, the District Court in this case erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.[111]

Thus, acquiescence to sex is not consent. The plaintiff must prove only that she somehow indicated that the sexual behavior was unwelcome.[112]

---

104. Under Title VII, both male and female workers enjoy protection from sexual harassment by members of either sex, as long as the harassment is "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998).

105. *See* Henson v. City of Dundee, 682 F.2d 897, 903–05 (11th Cir. 1982).

106. Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 588 (9th Cir. 1993).

107. *See, e.g.*, CAL. GOV'T CODE § 12940 (1992); Matthews v. Superior Court, 40 Cal. Rptr. 2d 350, 351 (1995); Page v. Superior Court, 37 Cal. Rptr. 2d 529, 532 (1995).

108. 524 U.S. 775 (1998).

109. *Id.* at 787 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993)).

110. *See, e.g.*, CAL. GOV'T CODE § 12940.

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

112. *Cf.* T.L. v. Toys R Us, Inc., 605 A.2d 1125, 1135 (N.J. Super. Ct. App. Div. 1992) (finding that unwelcomeness is an implicit requirement for sexual harassment and that consent will not negate this element as a matter of law and holding that "[t]he issue is one of fact, dependent on the surrounding circumstances").

One can see how the unwelcomeness requirement, absent invocation of Federal Rule of Evidence 412 (or a similar state statute in combination with a FEPS claim), could lead to the trial of the plaintiff's conduct.[113]

Title VII and the FEPS make clear that legislators either neglected adolescent workers when they drafted these laws or knowingly created a glaring conflict between state criminal statutory rape laws and civil antidiscrimination laws. In every state, fifteen-year-old workers lack the capacity in a criminal context to consent to sexual intercourse with a twenty-one-year-old supervisor, but these civil rights laws assume that capacity by making no mention of adolescents. How did this blatant inconsistency pass inspection? This Article reviews the public policy motivating these laws,[114] but my guess is that legislators simply forgot adolescent workers.[115]

Can Sara successfully sue for sexual harassment under antidiscrimination laws? The real question is whether she can prove that her manager's sexual attention was unwelcome. At first glance, she cannot. She "consented" to sex after initially rebuffing the manager's advances. Does her ultimate "consent" negate the initial rebuff? Probably not.[116] However, she continued to write to her lover while he was in jail.[117] Not until she learned that he had lied to her and was a registered sex offender did she again declare his attention unwelcome.[118]

---

113. *See* DEBORAH RHODE, SPEAKING OF SEX 102–04 (1997). Professor Rhode explains:

> Although recent reforms seek to restrict disclosures of a complainant's prior sexual experiences, such evidence is still admissible at trial if the judge decides that its value to a defendant substantially outweighs harm to the complainant. Moreover, in pretrial proceedings, attorneys have greater freedom to ask intimate questions, and can often grill victims about their sex lives, birth control practices, and counseling histories. If a plaintiff alleges physical or psychological damage resulting from harassment, opposing attorneys can explore possible alternative causes for her distress—everything from closeted lesbian experiences to intimate marital difficulties. As a result, defendants' lawyers can discredit or deter a harassment complaint with harassing tactics of their own.

Id. at 102.

114. *See infra* Part III.

115. A review of the legislative history of Title VII reveals no mention of adolescents. *See* 110 CONG. REC. 2577–84, 2718–21, 2728, 2804–05, 13825, 13837–38, 14511, 15896–97 (1964).

116. *Cf. In re* Neal, 179 B.R. 234, 237 (Bankr. D. Idaho 1995) (holding that consent to sexual relations will not negate, as a matter of law, a prior ineffective consent to sexual relations).

117. Letters from Sara Doe to Michael Cosio (July 18, 1999–Aug. 25, 1999), Report No. 99-7955 (No. S9-09852) (on file with author & Santa Cruz County Sheriff's Department, Records Division).

118. *See, e.g.*, Sara Doe Complaint, *supra* note 1, at 9.

C. *State Personal Injury and Other Tort Claims*

Some sexual harassment targets look to common law tort claims, in addition to antidiscrimination laws, for relief.[119] However, most common law intentional tort claims depend upon the plaintiff's subjective offense and an absence of consent[120] under the maxim *volenti non fit injuria* ("a person is not wronged by that to which he or she consents").[121] Additionally, consent may trigger defenses to negligence-based tort claims, such as contributory negligence, comparative negligence, and assumption of risk.[122] Finally, many state FEPS provide the exclusive state law remedy for workplace sexual harassment and preempt state common law tort claims.[123] Thus, most "consenting" targets of workplace sexual harassment either cannot avail themselves of common law tort claims or face a trial of their own conduct when they bring common law claims against harassers.

1. *Common Law Doctrine and Remedies*

Common law was not, historically, without its remedies. Early American civil claims for sexual predation took the form of the writ of

---

119. *See, e.g.*, Doe v. Mama Taori's Premium Pizza, No. M1998-00992-COA-R9-CV, 2001 WL 327906, at *2 (Tenn. Ct. App. Apr. 5, 2001).

120. KENNETH ABRAHAM, THE FORMS AND FUNCTION OF TORT LAW 32–35 (1997). I thank Professor Andy Klein for emphasizing the need to distinguish between intentional torts and negligence claims, and for exploring with me the relevance of consent to these different claims.

121. BLACK'S LAW DICTIONARY 1569 (7th ed. 1999) (referring also to assumption of risk); *see also* Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 860 (1996).

122. *See infra* Part II.C. *Cf.* Detmer v. Bixler, 642 N.W.2d 170, 176–77 (Neb. Ct. App. 2002) (affirming rejection of negligence claims because minor consented to sexual intercourse and, therefore, no tort claim existed against her partner). *See generally* ABRAHAM, *supra* note 120, at 137–58.

123. *See, e.g.*, Geise v. Phoenix Co., 639 N.E.2d 1273, 1275–76 (Ill. 1994) (concluding that Illinois' state FEPS serves as the exclusive remedy for any "alleged civil rights violation"); Greenland v. Fairtron Corp., 500 N.W.2d 36, 38 (Iowa 1993) (holding that Iowa's state FEPS preempted intentional infliction of emotional distress claim because sexual harassment was the "outrageous conduct"); Fandrich v. Capital Ford Lincoln Mercury, 901 P.2d 112, 116 (Mont. 1995) (finding that Montana's state FEPS preempted assault claim against co-worker). A few scholars have argued that tort law should serve as the exclusive remedy for sexual harassment. *See, e.g.*, Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 CONN. L. REV. 375, 376 (1998). *But see* MACKINNON, *supra* note 102, at 88; Krista J. Schoenheider, Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1462–63 (1986) (arguing for the creation of a new sexual harassment tort claim).

seduction.[124] This claim escaped the consent hazard because the seduced young woman did not sue on her own behalf. Instead, a father sued for his lost honor, now besmirched by his daughter's damaged reputation, and for his financial losses, tethered to her earning capacity now reduced by pregnancy and motherhood.[125] Consent was irrelevant to the seduction claim.[126]

Professor Lea VanderVelde has suggested that two assumptions precluded women from recovering for themselves. She wrote:

> First, women lacked the protection against sexual interference afforded by self ownership. Second, the law tacitly assumed that if a woman became involved in a sexual connection she must have consented to the act and all its subsequent consequences. The act of involvement in the event, even as a victim, spoke for the woman, denying her ability to recover against the man.[127]

Do these assumptions still apply to working adolescents? As to the first point, one could argue that current laws do not afford minors self-ownership. For example, the law gives parents the right to wages earned by their children.[128] As discussed earlier, children do not enjoy many of the contractual and civil rights enjoyed by adults.[129] They must emancipate themselves to enjoy full legal status.[130]

---

124. Phipps, *supra* note 72, at 14 & n.63; VanderVelde, *supra* note 121, at 818–19; *cf.* Bostic v. Smyrna Sch. Dist., No. 01-0261, 2003 WL 723262, at *7 (D. Del. Feb. 24, 2003) (rejecting loss of filial consortium claim based upon an 1828 Kentucky seduction action that allowed a family to recover for the "dishonor and disgrace" of a seduced child).

125. VanderVelde, *supra* note 121, at 819. Originally, the writ of seduction, a feudal writ, allowed masters (employers) to recover for the lost work of their servants (employees). Thus, when a female servant became pregnant, the master could seek reimbursement for his financial losses. This system ignored the servant's losses and the needs of her newborn. The law extended these rights to fathers with daughters working outside of the fathers' households. *Id.* at 821.

126. *Id.* at 825.

127. *Id.* at 828–29.

128. *See, e.g.*, CAL. FAM. CODE § 7500 (West 1994); Singer v. Brookman, 578 N.E.2d 1, 6 (Ill. App. Ct. 1991) (finding that "in the absence of specific fiduciary relationship, a parent has the right to the use of a minor child's earnings and services"); Biermann v. Biermann, 584 S.W.2d 106, 108 (Mo. Ct. App. 1979) (holding that a parent having custody may give the minor child license to work and retain the earnings of that child); Peot v. Ferraro, 266 N.W.2d 586, 731 (Wis. 1978) (ruling that a "parent is entitled to a minor child's wages and services as a matter of right").

129. *See supra* Part I.A.

130. BLACK'S LAW DICTIONARY, *supra* note 121, at 1011 (defining minor as "a person who has not reached full legal age" and an emancipated minor as a "minor who is self-supporting and independent of parental control, [usually] as a result of a court order"). *See generally* MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 31–32 (1997) (examining the concept of emancipation).

As to the second point, current law, embodied in the "rule of sevens,"[131] explicitly posits the capacity in most teenagers to consent. Under this traditional rule, a minor under age seven cannot give consent, be held liable for negligent conduct, or formulate the requisite mental state to engage in criminal conduct. From seven to fourteen, the law presumes that a minor lacks capacity. From fourteen to twenty-one (now eighteen), a rebuttable presumption declares that minors are competent to consent and responsible for criminal and negligent conduct.[132] Thus, in the context of a civil claim for damages and absent evidence to the contrary, this bright-line rule allows a trier-of-fact to presume that a child over fourteen consents to sexual contact.[133]

Another archaic rule that may relate to modern treatment of sexual harassment victims is the misprision doctrine. Under this rule, a plaintiff risked criminal prosecution if she attempted to sue civilly for her physical injuries before first pressing criminal charges against her rapist or seducer.[134] Thus, the failure to file criminal charges effectively barred a civil suit. Criminal sanctions failed to compensate the victims for the damage to their reputations, medical expenses, and the expense of any child conceived. By funneling the redress for a rape or seduction into the public forum, the government minimized the damage to the victim, maximized the societal harm, and retained its exclusive control over vengeance and retribution.[135] This result has a parallel in modern jurisprudence, as embodied in the new affirmative defense to Title VII claims.

2. *An Affirmative Defense to Modern Sexual Harassment Claims*

Compare the misprision doctrine to one of Title VII's new affirmative defenses to sexual harassment charges. In *Faragher v. City of Boca*

131. In the criminal system, this rule is also known as the infancy defense. *See generally* GARDNER, *supra* note 130, at 1880–81 (discussing the infancy defense and capacity to commit a crime); WAYNE R. LAFAVE & AUSTIN W. SCOTT, HANDBOOK ON CRIMINAL LAW 351 (1972).

132. *See* Doe v. Mama Taori's Premium Pizza, No. M1998-00992-COA-R9-CV, 2001 WL 327906, at *5 (Tenn. Ct. App. Apr. 5, 2001).

133. Another bright line rule similar to the rule of sevens is the "mature minors" doctrine. The *Mama Taori's* court recognized that some mature minors may consent to conduct reserved for adults. *Id.* at *5; *see infra* notes 227–28 and accompanying text. *See generally* GARDNER, *supra* note 130, at 6 (discussing the "mature minor" and consent to medical treatment).

134. *See* VanderVelde, *supra* note 121, at 847.

135. *See id.* at 846–48.

Raton and *Burlington Industries, Inc. v. Ellerth*,[136] the U.S. Supreme Court ruled that a victim's unreasonable failure to avail herself of an employer's preventive or corrective procedures insulates the employer from liability for sexual harassment that does not result in a tangible employment detriment.[137] Thus, if the employer adopts a complaint procedure that a victim "unreasonably" fails to follow, the *Faragher* and *Ellerth* decisions effectively bar her from pursuing a sexual harassment claim.[138]

The rationale behind the new affirmative defense centers on motivating employers to adopt preventative and corrective procedures.[139] The Court's *Faragher* and *Ellerth* decisions encourage victims to complain and employers to cure hostile work environments. A complaint procedure and corrective action, however, cannot remedy the damage already done by a harasser. Moreover, by completely insulating the employer from liability for past harassment, the Court has ultimately charged the cost of this incentive system to the injured victim.[140] With this defense, the government (the judiciary) minimizes the harm to the victim, maximizes the harm (discrimination) to society, and gives exclusive control over vengeance and retribution to the employer.

When consent is not an issue and state FEPS do not preempt common law claims, modern plaintiffs can bring a wide variety of tort claims. Such claims include but are not limited to assault, battery, false imprisonment, invasion of privacy, intentional and negligent infliction of

---

136. 524 U.S. 742 (1998).

137. The *Ellerth* Court held:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Id. at 765 (citations omitted); *see also Faragher v. City of Boca Raton*, 524 U.S. 742, 807–08 (1998).

138. *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 765.

139. *Faragher*, 524 U.S. at 805–06; *Ellerth*, 524 U.S. at 764; *see infra* notes 182–83 and accompanying text.

140. *See, e.g.*, Ashton v. Okosun, 266 F. Supp. 2d 399 (D. Md. 2003) (holding that a minor, whose manager touched her on her buttocks and attempted to hug her, had unreasonably failed to avail herself of all complaint procedures when she complained the day after she left work and refused to return after an investigating manager declared her allegations unfounded but offered to transfer her to another shift to avoid the accused).

emotional distress, and loss of consortium or companionship. Other claims focus on the employer's failure to satisfy a particular duty. Those claims include negligent hiring, negligent supervision, and negligent retention. The minor's consent operates to weaken, if not extinguish, all of these claims unless some statutory treatment of consent negates the default.[141]

3. *Consent as a Limiting Factor in Tort Claims*

The Restatement (Second) of Torts § 892C offers hope, however, for "consenting" adolescent workers. Subsection (2) states, "If conduct is made criminal in order to protect a certain class of persons irrespective of their consent, the consent of the members of that class to the conduct is not effective to bar a tort action."[142] This guidance suggests that in those states with a high "age of consent" for statutory rape (eighteen), adolescent "consent" should not operate to bar tort recovery.[143] The Restatement functions as a guide, but lacks the power of binding precedent.

The Restatement (Second) of Torts § 892A provides meager support for those adolescents in states with lower ages of consent (below eighteen). Subsection (2)(a) specifies that in order to extinguish liability, consent must be "by one who has the capacity to consent."[144] The comment to this subsection provides:

> If, however, the one who consents is not capable of appreciating the nature, extent or probable consequences of the conduct, the consent is not effective to bar liability unless the parent, guardian, or other person empowered to consent for the incompetent has given consent, in which case the consent of the authorized person will be effective even though the incompetent does not consent . . . .[145]

---

141. One might argue that consent should not extinguish the negligent hiring and supervision claims. However, if the claim that the employer was negligent relates back, for example, to a sexual battery to which the plaintiff consented, then no underlying tort exists and the negligent supervision claim loses its strength.

142. RESTATEMENT (SECOND) OF TORTS § 892C(2) (1979).

143. *See* Wilson v. Tobiassen, 777 P.2d 1379, 1384 (Or. Ct. App. 1989) (holding that a minor's incapacity to consent to sexual acts under Oregon Revised Statute § 163.315(1) extends to civil cases).

144. RESTATEMENT (SECOND) OF TORTS § 892A(2)(a).

145. *Id.* § 892A cmt. b.

This exception appears tailored for the mentally challenged, disabled, or immature. According to this caveat, an adolescent's consent should not be legally binding if the minor could not understand the nature, extent, or probable consequences of the proposed activity. Arguably, a minor, who has never had sex, might not appreciate the consequences of such a choice. Even a non-virginal minor may not appreciate the potential ramifications of sex with a co-worker or supervisor. Scientific information regarding adolescent psychosocial and brain development suggests that adolescents may not have the neurological function and psychosocial ability to formulate legally binding consent.[146]

Finally, the Restatement (Second) of Torts § 892B addresses some of the special facts in Sara's case. Subsection (2) states:

> If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm.[147]

This provision describes how fraud and misrepresentations can invalidate consent induced by such falsehoods. One might argue that the manager's profession of love for Sara, his lies about the brain tumor, and his failure to disclose his status as a registered sex offender constituted multiple misrepresentations that vitiated her consent.[148] Because she never would have consented to have sex with him had she known the truth, and withdrew her consent once she understood the truth, the fraud paves the way for a sexual harassment suit. Whether a court would follow this non-binding legal guidance remains unclear.[149]

---

146. A detailed discussion of adolescent physical and psychosocial development is beyond the scope of this Article. For a complete discussion of adolescent development as it pertains to sexual harassment law, see Drobac, *supra* note 3. I thank Professor Lois Weithorn who kindly referred me to the MacArthur Juvenile Adjudicative Competence Study that prompted my research of adolescent psychosocial development and its application to sexual harassment law.

147. RESTATEMENT (SECOND) OF TORTS § 892B(2).

148. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 18, at 119 (5th ed. 1984); *see also* Hackett v. Fulton County Sch. Dist., 238 F. Supp. 2d 1330, 1369–70 (2002); *In re* Neal, 179 B.R. 234, 237 (Bankr. D. Idaho 1995).

149. *See* Leleux v. United States, 178 F.3d 750, 755 (5th Cir. 1999) (finding that a naval officer's fraudulent concealment of venereal disease invalidated consent of partner to sexual intercourse). *But cf.* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 518–19 (4th Cir. 1999) (giving legal effect to consent to an entry and allowing consent as a defense to a claim of trespass, even though it was obtained by misrepresentation or concealed intentions).

D. Conclusions Concerning Criminal and Civil Law

This review of criminal and civil law reveals several truths. First, the law handles adolescent "consent" to sexual conduct inconsistently. The system (criminal or civil), the geographic region (or jurisdiction), and the particular claims alleged all influence the legal treatment of adolescent "consent." A teenager in California can expect very different treatment than a teenager in Colorado, where the "age of consent" is three years lower.[150] Second, common law claims may provide little or no relief to "consenting" teens. Preemption may bar tort claims in employment cases,[151] or courts may conclude that a minor appreciated the consequences of her consent to specific conduct. On the other hand, depending upon where the minor works, state criminal law may pave the way for tort recovery via Restatement (Second) of Torts § 892C(2).[152] Third, antidiscrimination laws always require that the minor worker find the activity "unwelcome," and often require the alleged victim to report misconduct.[153] Fourth, statutory rape laws draw bright-line rules determining the "age of consent" and denying capacity below that age.[154] In sum, no national consensus exists regarding the age of consent or the treatment of adolescent "consent" to a broad variety of adult activities, including sex.

III. PUBLIC POLICY

The question persists why criminal and civil law handle the exact same "consensual" behavior very differently. One response focuses on juridical objectives and public policy motivations. While the goals of the criminal and civil systems overlap in some aspects, they remain distinct in others. The differences in motivating justifications for criminal and civil laws may explain the differing treatment of adolescent "consent."

A. Criminal Statutory Rape Law

Criminal law prevents harm to society, as well as individuals within society. Our designation of the "State" or the "People" to prosecute

150. *See supra* notes 70–82 and accompanying text.

151. *See supra* note 123 and accompanying text.

152. *See supra* Part II.C.3.

153. *See supra* notes 109–13 and accompanying text.

154. *See supra* Part II.A.

perpetrators serves as a constant reminder of that broad utilitarian goal.[155] Another goal of the criminal justice system centers on punishment of the perpetrator who commits the bad act, or actus reus. Punishment serves several subsidiary aims: deterrence (both general and specific), rehabilitation, retribution, and incapacitation.[156] With a strict liability offense such as statutory rape, society demonstrates its concern not with the actor's guilty mind, or mens rea, but with the harm to our children.

What harm results from "consensual" teen-adult sexual contact? How is this illegal conduct between the adolescent and the adult so different from the same, legal behavior between consenting adults? The question, properly framed, analyzes not so much the sexual conduct but the quality of the consent. The physical acts between teenagers and adults may be the same as those between two adults. What differs between adolescents and adults are the expectations, motivations, and experiential wisdom (or lack thereof) that produce the problematic "consent."[157] Additionally, because adolescent expectations and motivations differ, and because the nature of the consent differs, the consequences of the exact same behavior also differ for adolescents.[158]

After studying statutory rape cases, Professor Michelle Oberman suggested that "there is at least one important difference between girls and women when it comes to consensual sex: the sexual bargains struck by girls often are so painfully one-sided that it is difficult for adults to understand what prompted the girl to consent."[159] Professor Oberman categorized a national Westlaw database of statutory rape cases into four groups: consensual relationships, acquaintance rape, stranger rape, and

---

155. *See* Phipps, *supra* note 72, at 27; *see, e.g.*, CAL. GOV'T CODE § 26500 (West 1988) ("The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses.").

156. *See* Phipps, *supra* note 72, at 28–29.

157. *See* Drobac, *supra* note 3, at 14–16.

158. Harms in addition to juvenile sexual violation justify the statutory rape laws. Phipps explained that in addition to protecting children, statutory rape laws historically protected "the Weaker Sex" and facilitated the prevention of unwanted pregnancy. Phipps, *supra* note 72, at 34–40; *see* Michael M. v. Sonoma County, 450 U.S. 464, 470–71 (1981). The *Michael M.* Court reviewed other possible justifications for the law in validating pregnancy prevention: "Some legislators may have been concerned about preventing teenage pregnancies, others about protecting young females from physical injury or from the loss of 'chastity,' and still others about promoting various religious and moral attitudes towards premarital sex." 450 U.S. at 470. Phipps noted that in 1996, the increasing birth of children to teenagers on public assistance renewed legislative interest in statutory rape laws. Phipps, *supra* note 72, at 4–5.

159. Oberman, *supra* note 83, at 714.

overreaching and/or age range of more than ten years. Eighty-one percent of the national group and ninety-one percent of the Illinois cases fell into the overreaching category.[160] Oberman concluded that prosecutors targeted the cases with a greater age gap between the parties because of the greater "risk of significant power disparity between the parties."[161] Her findings suggest that the public is concerned about coercion and power disparities in sexual relationships involving minors.

The notion that juvenile capacity, and therefore "consent," differs qualitatively from adult consent engenders passionate debate.[162] This idea, however, dates back hundreds if not thousands of years.[163] Because we have historically deemed children incapable of giving informed consent, the law pertaining to children differs from that concerning adults in everything from contract formation to fundamental civil rights.[164]

If we accept that children cannot give informed consent because they lack capacity, the sexual taking of a child's body constitutes a theft of the most intimate kind—a rape. This violation, or actus reus, justifies the punishment.[165] As the child approaches the age of consent and maturity, however, society becomes less certain of the disability. We see this uncertainty in the statutes that set lower ages of consent for sexual contact than for sexual penetration.

Children's rights advocates, who take a self-determinist approach, maintain that children should enjoy the right to make decisions for

---

160. *Id.* at 748.

161. *Id.* at 751.

162. *Compare* Gary B. Melton, *Toward "Personhood" for Adolescents' Autonomy and Privacy as Values in Public Policy*, 38 AM. PSYCHOL. 99–102 (1983) *with* Elizabeth S. Scott et al., *Evaluating Adolescent Decisionmaking in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 224–31, 240 (1995).

163. Phipps, *supra* note 72, at 33–34 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 212 (William S. Hein ed., 1992) (1769)).

164. *See supra* Part I.A (highlighting some of these differences in the review of adolescent rights and legal limitations).

165. *See, e.g.*, Virginia v. Black, 538 U.S. 343 (2003). Justice Thomas stated:

> For instance, there is no scienter requirement for statutory rape. *See, e.g.*, Tenn. St. § 39-13-506; Or. St. § 163.365; Mo. St. § 566.032; Ga. St. § 16-6-3. That is, a person can be arrested, prosecuted, and convicted for having sex with a minor, without the government ever producing any evidence, let alone proving beyond a reasonable doubt, that a minor did not consent. In fact, "[f]or purposes of the child molesting statute . . . consent is irrelevant. The legislature has determined in such cases that children under the age of sixteen (16) cannot, as a matter of law, consent to have sexual acts performed upon them, or consent to engage in a sexual act with someone over the age of sixteen (16)." Warrick v. State, 538 N.E.2d 952, 954 (Ind. 1989) (citing Ind. Code 35-42-4-3). The legislature finds the behavior so reprehensible that the intent is satisfied by the mere act committed by a perpetrator.

Id. at 397 (Thomas, J., dissenting).

themselves whenever practicable.[166] Some argue that statutory rape laws disregard adolescent capabilities and sexual autonomy. In her recent book *Harmful to Minors: The Perils of Protecting Children from Sex*, Judith Levine argues that adult fears concerning juvenile sexuality combined with the "politics of child protectionism" dominate our governance of children's sexuality.[167] She advocates for "not only protection and schooling in safety but also the entitlement to pleasure."[168] She explains:

> There is no distinct moment at which a person is ready to take on adult responsibilities, nor is it self-evident that only those who have reached the age of majority are mature enough to be granted adult privileges . . . .
>
> Legally designating a class of people categorically unable to consent to sexual relations is not the best way to protect children, particularly when "children" include everyone from birth to eighteen. Criminal law, which must draw unambiguous lines, is not the proper place to adjudicate family conflicts over youngsters' sexuality.[169]

Levine raises a valid criticism. Her critique of American treatment of child sexuality deserves attention.

In her analysis of the statutory rape laws, Levine recommends the review of Dutch legislation passed in 1990. In Holland, the parliament lowered the age of consent to twelve, but permits adolescents to invoke a consent age of sixteen if those teens conclude that their partners coerced or exploited them. The primary power to decide rests with the

---

166. *See generally* Robert Batey, *The Rights of Adolescents*, 23 WM. & MARY L. REV. 363 (1982); Henry H. Foster & Doris Jonas Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972). Virginia Coigney, who advocated for *A Child's Bill of Rights*, listed "The Right to Self Determination" as the first right. MNOOKIN & WEISBERG, *supra* note 15, at 1028 (quoting VIRGINIA COIGNEY, CHILDREN ARE PEOPLE TOO: HOW WE FAIL OUR CHILDREN AND HOW WE CAN LOVE THEM 197 (1975)). She wrote:

> Children should have the right to decide the matters which affect them most directly. This is the basic right upon which all others depend. Children are now treated as the private property of their parents on the assumption that it is the parents' right and responsibility to control the life of the child. The achievement of children's rights, however, would reduce the need for this control and bring about an end to the double standard of morals and behavior for adults and children.

Id. See *generally* RICHARD E. FARSON, BIRTHRIGHTS (1974).

167. JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX xxxv (2002).

168. *Id.*

169. *Id.* at 88.

adolescent. Parents can preempt their children only if those parents persuade the Council for the Protection of Children that the parents better represent the child's best interests.[170]

Professor Michelle Oberman also offered a revised version of current statutory rape laws to account for adolescent autonomy while ensuring the protection of children.[171] Oberman opined:

> [O]ne of the most powerful reasons for enforcing statutory rape laws is to set normative parameters around sex so that both boys and girls will learn to honor their own and others' sexual autonomy . . . .
>
> Thus, to the extent that the law ignores the learning curve at work in adolescent sexual encounters, it may be too harsh. But the failure to condemn "mistakes" involving nonvoluntary sex with an underage partner is equally pernicious. Lenience in such cases only encourages girls to internalize a sexual script that fuses dominance and exploitation with sexual gratification. As such, it vitiates the promise and obligation of statutory rape laws: to make the world safe for boys and girls who are coming of age.[172]

Rather than lowering the age of consent, Oberman recommended setting the minimum age for consent at no lower than sixteen and asking victims to direct whether the court should suspend the sentence of a first time offender.[173] All parties would understand that if the perpetrator

---

170. *Id.* at 89. Some observers might argue that a child who is too young to have sex is too young to decide whether to invoke the higher age of consent. I thank Professor Florence Roisman for her poignant comment that Holland leaves a critical decision to those youth who, by their own admission, may lack capacity.

171. *See* Oberman, *supra* note 83, at 778.

172. *Id.* at 777.

173. *Id.* at 778. This scheme avoids the flaw raised in *supra* note 170: that we burden the child with the decision of whether to prosecute. Under Oberman's plan, the prosecutor retains prosecutorial discretion. The victim simply makes a plea for a suspended sentence. Oberman also allowed for exceptions to the rule for conduct that appeared obviously coercive or "offensive to societal mores." *Id.* at 779. *But see* Phipps, *supra* note 75, at 419–21 (rejecting many of Oberman's conclusions and her final proposal and offering alternate reforms). In his 2003 article, Phipps challenged many of Oberman's conclusions regarding the prevalence of statutory rape and statutory rape laws generally. However, Phipps emphasized Obereman's conclusions pertaining to cases involving only adolescents—not adults. *See id.* at 411. Moreover, Phipps mischaracterized Oberman's proposal to have victims cooperate with the prosecutions of statutory rape. *Id.* at 415. Oberman stated, "It strikes me that mandating victim cooperation would be problematic for several reasons" and then discussed those reasons. Oberman, *supra* note 83, at 779–82. Finally, it appears that Phipps misunderstood Oberman's plan for reform, suggesting that minor "victims" would direct criminal prosecutions. Phipps, *supra* note 75, at 420–21. Oberman's scheme contemplates a role for

completed a specified course of action, such as mandatory counseling and/or a sex education class, the court could dismiss the charges.[174] If the victim declined to offer an opinion, the prosecutor, not the parents, could make the decision of whether to request a suspended sentence.[175] Finally, Oberman suggested a set of statutorily defined exceptions that would indicate "per se violations."[176] Statutory law would direct cases with facts suggesting coercion or behavior normatively reprehensible to full prosecution rather than suspended sentence.[177] In the list of exceptions, Oberman included cases involving incest, abuse of authority, repeat offenders, and multiple offenders.[178]

Oberman's envisioned changes to U.S. statutory rape law acknowledge several public policy goals. First, they recognize society's determination that underage sex hurts children and that the law should punish and deter it. Second, her plan provides for full prosecution when the perpetrator uses a position of authority or manipulates a clear power disparity to coerce sexual conduct. Third, her proposals reflect an awareness of the developing autonomy and capacity of teenagers to make decisions regarding sexual activity. They attempt to balance a protectionist, nurturance approach with the self-determinist philosophy that would afford adolescents more autonomy as their developing capacity permitted.[179] Under Oberman's plan, the sexual conduct remains illegal, but older adolescents with sufficient life experience may declare themselves ready for the activity and request the suspended sentence.

B. Civil Antidiscrimination Law

Like criminal law, antidiscrimination law addresses harms to individuals, as well as to society. Professor Catharine MacKinnon described the social harm of sexual harassment: "Sexual harassment exemplifies and promotes employment practices which disadvantage

---

the minor but ultimately, as noted above, leaves discretion to the prosecutor. Oberman, *supra* note 83, at 778–79.

174. Oberman, *supra* note 83, at 778.

175. *Id.* at 778–79.

176. *Id.* at 779.

177. *See id.*

178. *Id.*

179. For a more in-depth analysis of a mixed approach to adolescent rights, see generally FRANKLIN ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE (1982).

women in work (especially occupational segregation) and sexual practices which intimately degrade and objectify women."[180] MacKinnon focused on the subordination of women. Professor Deborah Rhode described the harms more concretely:

> For individual victims, harassment often results in economic and psychological injuries, including job dismissals, transfers, coworker hostility, anxiety, depression, and other stress-related conditions. For women as a group, harassment perpetuates sexist stereotypes and discourages gender integration of male-dominated workplaces. For employers and society as a whole, the price includes decreased productivity and increased job turnover. The estimated cost of harassment for a Fortune 500 company averages $8 million a year.[181]

In this passage, Rhode untangled the consequential threads of sexual harassment for the individual target, for women, and for society.

Antidiscrimination laws respond to each level of injury. "For example, Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms."[182] "Although Title VII seeks 'to make persons whole for injuries suffered on account of unlawful employment discrimination,' . . . its 'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm."[183] The U.S. Supreme Court noted that Title VII compensates individuals for their damages but emphasized Title VII's prevention goal and deterrent effect.

If Title VII serves primarily to prevent abusive sex-based conduct, then legal tolerance of the consent defense as applied to adolescents interferes with Title VII's deterrence effect.[184] In order to avoid Title VII's purview, sexual predators will manipulate their vulnerable adolescent targets to "consent." Without an incentive to prevent "consensual" adolescent sexual exploitation, employers will not create effective policies or warn adolescent workers about coercive or subtly manipulative managers. Obviously, this concern over prevention premises the undesirability of all adolescent workplace sexual conduct,

---

180. MACKINNON, *supra* note 102, at 7.

181. RHODE, *supra* note 113, at 101.

182. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998).

183. Faragher v. City of Boca Raton, 524 U.S. 775, 805–06 (1998) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)) (citations omitted).

184. Similarly, the admission of consent evidence in an evaluation of fault and damages interferes with Title VII's deterrent effect by redistributing responsibility for the conduct.

including "consensual" behavior. Because almost seventy percent of adults think fourteen- to sixteen-year-olds should not engage in sexual relations,[185] and because seven states define the age of consent unequivocally at eighteen,[186] this presumption concerning the undesirability of "consensual" adolescent sexual conduct in the workplace seems reasonable.

C. Tort Law

Professor Kenneth Abraham described five functions served by the imposition of civil liability for accidental and intentional injuries.[187] First, many people expect civil tort liability to compensate individuals for their injuries.[188] Abraham reasoned that compensation alone is not really a goal of the tort system, or anyone injured could obtain compensation.[189] Instead, Abraham focused on tortious conduct and other goals, including deterrence.[190] Like antidiscrimination laws, tort liability serves to deter bad acts and prevent future harm.[191] Abraham also mentioned a third function, loss distribution.[192] Rather than make the plaintiff bear the burden of any loss, tort law provides for a broader distribution.[193] The tort system contemplates that insurers will pay damages incurred by policy holders and that those prospective defendants who can increase the costs of their goods and services to pay future judgments will do so.[194]

Fourth, Abraham suggested that corrective justice warrants civil liability in that it restores the moral balance between parties.[195] For

---

185. *See supra* note 34.

186. The number of states increases to twenty-seven if a case includes special facts, such as a significant age difference between the parties or an adult in a position of trust or authority. *See* App. A, *infra* pp. 546–73.

187. ABRAHAM, *supra* note 120, at 14–19.

188. *See id.* at 17.

189. *Id.* at 17–18.

190. *Id.* at 15. Abraham ultimately decided that tort law "does not serve any single goal . . . [but] performs a 'mixed' set of functions." *Id.* at 19.

191. Abraham modified this goal by calling it "optimal deterrence." *Id.* at 19. He explained that, under this justification, liability should deter only excessively risky conduct. Some conduct is not risky enough to justify the deterrence costs that people might incur. *See id.* at 15.

192. *Id.* at 17.

193. *Id.* at 16.

194. *Id.* at 16–17.

195. *Id.* at 14–15.

example, when one person intentionally injures another, basic fairness justifies the imposition of liability for damages on the bad actor. Corrective justice seems less appropriate when someone other than the actor, such as a corporate employer, must pay the damage award.[196] In that situation, the disconnect between the intentional harm and the remedial compensation lessens the moral justification. The loss distribution function better justifies the imposition of tort liability in such a case—especially when the tortfeasor lacks deep pockets to pay for the damage caused.[197]

Finally, Abraham reviewed the redress of social grievances through the tort system. Again, much like the function of antidiscrimination law, tort law arguably "is a populist mechanism that permits ordinary people to put authority on trial."[198] This conception of tort law envisions the amelioration of problems that affect society more broadly.

Taken together, the goals of the tort system harmonize nicely with the desire to protect adolescent workers. Arguably, we want to deter sexual behavior that could harm these workers. By making employers liable for the acts of their agents, we distribute the losses associated with injuries to teens who cannot easily cover those losses. Additionally, tort liability supports corrective justice by restoring the moral balance between employers and their agents, and adolescent workers who may not have the experience or wisdom to recognize manipulative sexual advances. As "a populist mechanism that permits ordinary people to put authority on trial,"[199] tort law allows adolescents to challenge supervisors, managers, and employers. When tort law affords adolescent "consent" legal significance, it fails those young workers and thwarts the goals of the system.

D. Conclusions

This review of the law and public policy demonstrates that statutory rape law, antidiscrimination law, and tort law share many similar functions and public policy goals. Each attempts to deter and prevent antisocial, harmful behavior. The sexual exploitation of minors conceivably falls into the set of antisocial behaviors under criminal, tort, and antidiscrimination law. Each system holds actors who cause harm

196. *Id.* at 15.

197. *Id.* at 16–17.

198. *Id.* at 19.

199. *Id.*

responsible, by punishing them with incarceration or by awarding damages against them. Each system operates to protect potential victims from harm through the deterrence and prevention mechanisms. The only function that the criminal system does not share with civil law is the redistribution of the costs of harm suffered. Typically, criminal laws do not compensate the victims for their losses. Both antidiscrimination and tort laws provide for such compensation, with damage awards against either the tortfeasor or another responsible party, such as an employer or insurer.

The obvious next question is whether the civil compensation function explains why the criminal and civil systems treat adolescent "consent" so differently. The answer is not immediately apparent. If minors lack capacity to consent in the criminal arena, why might civil courts consider such consent in the redistribution of the costs of injury—especially at the minor's expense? Courts that resolve civil adolescent sexual harassment cases must deal with the contradictions and conflicts between civil and criminal laws. Not surprisingly, they deal with adolescent "consent" in inconsistent ways.

IV. CASE LAW

Even with five million adolescents in the United States workforce, no Title VII case decisions discuss adolescent "consent."[200] Common sense dictates that some of these adolescent workers "consented" to sexual contact.[201] Sara's situation proves that such cases exist. Where are the Title VII decisions then? Do these cases all settle before trial?[202] Are they decided without opinions and never appealed? The unwelcomeness requirement may deter many youth, but surely not all.

Several factors may explain the dearth of Title VII cases. First, practical considerations may prevent prosecution of these cases. Concerned that adolescent "consent" may constitute a complete defense

---

200. Of course, any suit would have to be brought by the parents or guardian because minors lack the capacity to sue in federal and state courts. How ironic that United States' antidiscrimination laws attribute to minors the ability to consent to sexual relations but not the capacity to seek judicial relief in court for their own injuries.

201. An informal poll by *Teen People* magazine reported forty-seven percent of teenage girls said they had been touched against their will at work. Glenn Burkins, *A Special News Report About Life on the Job—And Trends Taking Shape There*, WALL ST. J., Apr. 20, 1999, at A1. I find it incredible that they all protested or otherwise indicated that they found this contact unwelcome.

202. These cases may settle quickly because the media impact of a public sexual harassment trial involving a minor victim might engender much more expense and ill will than a quick settlement.

and disqualify minors from suit, lawyers may decline to take these cases on a contingent fee basis. Minors and their parents may lack the financial resources to pay an attorney an hourly fee. Second, as the AACAP Policy Statement suggested, adolescents may think that they somehow caused the problem or "attracted" the inappropriate attention.[203] Humiliated and ashamed, they may decide not to report the abusive behavior.[204] Third, many adolescents may not even realize that they have been sexually harassed or that they can bring a claim for damages.[205] A child that does not appreciate the nature of the conduct or its consequences may not appreciate its illegal nature. Empirical research can answer whether these cases abound and why adolescents refrain from filing suit. These listed reasons are just a few of the plausible explanations for the nullity of Title VII cases on the issue of consent.

A review of tort and statutory adolescent sexual harassment "consent" cases from across the nation reveals that they fall into four different groupings with several that fit into two or more categories.[206] The largest

---

203. *See* Am. Acad. of Child & Adolescent Psychiatry, *supra* note 65; *see also* Doe v. Estes, 926 F. Supp. 979, 988 (D. Nev. 1996). The *Estes* court explained:

> Children are often reluctant to report invasions of their bodily integrity. They may fear reprisals by their attackers, they may harbor doubts that their attackers' fellow grownups will display sympathy or willingly credit their accounts, and they all too frequently are paralyzed by the shame that attends subjection to sexual abuse.

926 F. Supp. at 988.

204. *See, e.g.*, Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 449 (5th Cir. 1994) (noting that "Doe explained that she had kept the matter [sexual conduct with a teacher] a secret because she feared the repercussions of disclosure"); Leach v. Evansville-Vanderburgh Sch. Corp., No. EV98-0196 C-Y/H, 2000 WL 33309376, at *2–*3 (S.D. Ind. May 30, 2000) (finding that a student failed to report sexual harassment because she felt ashamed, was afraid to tell her mother for fear of upsetting her, and was afraid that no one would believe her that a teacher was sexually fondling her).

205. *See supra* note 56. Minors may also miss the applicable statute of limitations for filing their claims. *See, e.g.*, Ashton v. Okosun, 266 F. Supp. 2d 399, 404 (D. Md. 2003) (refusing to toll the 300-day statute of limitations for a minor to bring suit under Title VII).

206. A few of the Westlaw search phrases I used in the "allcases" directory include the following:

> ("title vii" "title ix" "feps" "human rights" "civil rights") & (minor child adolescent teenage!) w/5 sexual! w/2 harass!; (adolescent! minor! child!) w/5 consen! w/20 (seduc! sex! intercourse) & ("1983" "title ix" fep! negligen! "title vii" "human rights" "civil rights") & "sexual harassment"; (adolescent! minor! child!) w/5 consen! w/5 (seduc! sex! intercourse) & ("1983" "title ix" fep! negligen! "title vii" "human rights" "civil rights") % ti(state people commonwealth); (adolescent! minor! child!) w/10 consent w/10 (seduc! sex! intercourse) & "sexual harassment" & ("1983" "title ix" fep! negligen! "title vii" "human rights" "civil rights") % ti(state people commonwealth).

I do not consider cases decided before 1945 because of the very different prevailing sexual norms and changes in law in the succeeding years. *See, e.g.*, Barton v. Bee Line, Inc., 265 N.Y.S. 284, 285 (N.Y. App. Div. 1933) (holding that consent negates civil claim for damages resulting from a rape); Braun v. Heidrich, 241 N.W. 599, 601 (N.D. 1932) (finding that minor guilty of fornication may not

category (seventeen cases) deals not with sexual harassment per se, but with state and common law civil claims based upon alleged inappropriate sexual conduct with a minor.[207] The next largest group (four cases) involves sexual harassment but not in employment. It comprises those cases brought under Title IX of the Education Amendments of 1972[208] because the harassment happened at school or the perpetrator was a teacher or staff member.[209] In several cases (three), plaintiffs used § 1983[210] when the perpetrator was a public school

---

recover civil damages); Parsons v. Parker, 170 S.E. 1, 3 (Va. 1933) (confirming that consent will not bar civil recovery for seduction but is admissible concerning damages).

207. Beul v. ASSE Int'l, Inc., 233 F.3d 441, 444–45 (7th Cir. 2000) (resolving common law claims against a non-profit corporation); Bostic v. Smyrna Sch. Dist., No. 01-0261 KAJ, 2003 WL 723262, at *4–8 (D. Del. Feb. 24, 2003) (disposing of Title IX and state common law claims); Hackett v. Fulton County Sch. Dist., 238 F. Supp. 2d 1330, 1346, 1356–60 (N.D. Ga. 2002) (resolving Title IX, § 1983 and Georgia common law claims); Teti v. Huron Ins. Co., 914 F. Supp. 1132, 1142 (E.D. Pa. 1996) (resolving a claim for defense and indemnity and addressing the issue of a student's consent to sex with a teacher); Angie M. v. Hiemstra, 44 Cal. Rptr. 2d 197, 202–03 (Cal. Ct. App. 1995) (ruling on a seduction claim and other state statutory and common law tort claims against a physician); Cynthia M. v. Rodney E., 279 Cal. Rptr. 94, 98 (Cal. Ct. App. 1991) (deciding a violation of California Civil Code § 1714.1, a parental responsibility statute); Bohrer v. DeHart, 943 P.2d 1220, 1231 (Colo. Ct. App. 1996) (deciding tort claims against a minister and church by a minor parishioner); McNamee v. A.J.W., 519 S.E.2d 298, 301 (Ga. Ct. App. 1999) (resolving negligence claims brought against parents and their minor child for a sexual encounter with the minor plaintiff); Robinson v. Roberts, 423 S.E.2d 17, 18 (Ga. Ct. App. 1992) (resolving a negligence claim against a school principal and a teacher); Landreneau v. Fruge, 676 So. 2d 701, 709–10 (La. Ct. App. 1996) (addressing various state statutory claims concerning a sexual relationship between a student and teacher); LK v. Reed, 631 So. 2d 604, 608–09 (La. Ct. App. 1994) (affirming a decision on negligence and other tort claims against the school board and another student); Pettit v. Erie Ins. Exch., 699 A.2d 550, 560 (Md. Ct. Spec. App. 1997) (resolving the issue of insurance coverage and addressing the issue of consent); Wilson v. Tobiassen, 777 P.2d 1379, 1385 (Or. Ct. App. 1989) (deciding tort claims against a boy scout troop and leader); Doe by Roe v. Orangeburg County Sch., 518 S.E.2d 259, 261–62 (S.C. 1999) (reviewing a negligent supervision claim against the school district); Doe by Doe v. Greenville Hosp. Sys., 448 S.E.2d 564, 567–68 (S.C. Ct. App. 1994) (deciding a seduction claim and other tort claims for a hospital volunteer), *cert. dismissed as improvidently granted*, 464 S.E.2d 124 (S.C. 1995); Robinson v. Moore, 408 S.W.2d 582, 584 (Tex. Ct. App. 1966) (resolving a seduction claim); Michelle T. by Sumpter v. Crozier, 495 N.W.2d 327, 334 (Wis. 1993) (affirming a civil battery resolution).

208. 20 U.S.C. § 1681 (2000).

209. Mary M. v. N. Lawrence Cmty. Sch. Corp., 131 F.3d 1220, 1227–28 (7th Cir. 1997) (deciding both Title IX and § 1983 claims), *cert. denied*, 524 U.S. 952 (1998); *Bostic*, 2003 WL 723262, at * 4–8 (disposing of Title IX and state common law claims); *Hackett*, 238 F. Supp. 2d 1330, 1346, 1356–60 (resolving Title IX, § 1983, and Georgia common law claims); Benefield v. Bd. of Trs. of the Univ. of Ala., 214 F. Supp. 2d 1212, 1218 (N.D. Ala. 2002) (deciding only a Title IX claim).

210. 42 U.S.C. § 1983 (2000). Some courts have rejected § 1983 claims brought with Title IX claims, reasoning that the "Sea Clammers Doctrine," *see* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981), prevents overlapping claims and that Title IX

employee.[211] Under § 1983, a student sued for a violation of her Fourteenth Amendment substantive due process liberty interest right to bodily integrity.[212] I found only one state FEPS employment case for an incident that occurred at a restaurant.[213]

A. FEPS: Doe v. Mama Taori's Premium Pizza

In *Doe v. Mama Taori's Premium Pizza*,[214] a sixteen-year-old male and his parents brought suit under the Tennessee FEPS for sexual harassment against a male adult co-worker and the restaurant owner.[215] Doe claimed he engaged in sexual acts in the restaurant bathroom with thirty-two-year-old Christopher Abson, who had given him "a 'marijuana cigarette [that] contained a "knock out drug" that caused [him] . . . to become incapacitated.'"[216] The parents alleged that Abson had two prior rape convictions, one for raping a child.[217] Abson pled guilty to two counts of the statutory rape of Doe.[218] Via an interlocutory appeal in the civil case, the plaintiffs challenged the trial court's refusal to strike the restaurant owner's affirmative defenses based on the minor's consent and comparative fault.[219]

1. Consent—A Civil Defense?

Doe and his parents first argued that consent should not constitute a defense to a civil action for damages when it fails as a defense to a

---

preempts any § 1983 claim. *See, e.g.*, *Leach*, 2000 WL 33309376, at *11–*12. *But see* DiSalvio v. Lower Merion Sch. Dist., No. CIV.A. 00-5463, 2002 WL 734343, at *1 (E.D. Pa. Apr. 25, 2002) (holding that the Sea Clammers Doctrine does not preempt a Title IX claim).

211. *Mary M.*, 131 F.3d at 1220; Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 449–50 (5th Cir. 1994) (resolving only a § 1983 claim); *Hackett*, 238 F. Supp. 2d at 1330.

212. *Taylor*, 15 F.3d at 451.

213. Doe v. Mama Taori's Premium Pizza, No. M1998-00992-COA-R9-CV, 2001 WL 327906 (Tenn. Ct. App. Apr. 5, 2001).

214. No. M1998-00992-COA-R9-CV, 2001 WL 327906 (Tenn. Ct. App. Apr. 5, 2001).

215. Doe and his parents made claims under the state FEPS, the Tennessee Human Rights Act, as well as intentional tort and negligence claims. *Id.* at *2. Same-sex harassment based on sex violates Title VII. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998). Most states have similarly interpreted their antidiscrimination FEPS.

216. *Mama Taori's*, 2001 WL 327906, at *2.

217. *Id.* at *1.

218. *Id.* at *2. Mr. Abson also pled guilty to contributing to the delinquency of a minor. *Id.*

219. *See id.*

criminal statutory rape charge.[220] The court disagreed, classifying the sexual behavior as a battery.[221] Referring to well-established principles of common law, the court held that a plaintiff who consents cannot later complain of the behavior.[222] The court acknowledged that consent lacks defensive significance "if (1) the person giving consent lacked the necessary capacity, (2) the consent was coerced, (3) the person giving the consent was mistaken about the nature and quality of the act, or (4) the nature of the act was such that no person could consent to it."[223] The court also explained that "[i]ncapacity to give consent may arise from age, intoxication or mental incompetence."[224] However, the court declined to rule, as a matter of law, that Doe lacked capacity simply because he was under eighteen. Doe's capacity and the quality of his consent remained triable issues of fact.[225]

In discussing the capacity of minors to consent, the court relied upon a medical consent case, *Cardwell v. Bechtol*.[226] Quoting *Cardwell*, the court found "that maturity is now reached at earlier stages of growth than at the time the common law recognized the age of majority at 21 years."[227] The court listed the *Cardwell* factors that determine a mature minor's capacity: "age, ability, experience, education, training, degree of maturity or judgment, [and] . . . the minor's conduct and demeanor at the time of the incident."[228] The *Mama Taori's* court avoided a detailed evaluation of the nuanced indicia of maturity and training, however. The *Mama Taori's* court endorsed the "rule of sevens," used in *Cardwell*, as guidance for determining whether a minor has the capacity to give consent.[229] Thus, the *Mama Taori's* court found Doe presumptively capable of giving consent, and thereby presumptively insulated his co-worker (and the restaurant owner) from liability.[230]

---

220. *Id.* at *4. The age of consent in Tennessee is eighteen when the perpetrator is at least four years older than the target who is at least thirteen. *See* TENN. CODE ANN. § 39-13-506 (2003).

221. *See Mama Taori's*, 2001 WL 327906, at *4.

222. *Id.*

223. *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 892A(2), 892B).

224. *Id.* (citing Cardwell v. Bechtol, 724 S.W.2d 739, 746 (Tenn. 1987)).

225. *See id.* at *8.

226. 724 S.W.2d 739 (Tenn. 1987).

227. *Mama Taori's*, 2001 WL 327906, at *5 (quoting *Cardwell*, 724 S.W.2d at 744–45). *But see* Drobac, *supra* note 3, at 9–10, 16, 25–26.

228. *Mama Taori's*, 2001 WL 327906, at *5 (citing *Cardwell*, 724 S.W.2d at 748) (internal quotations omitted).

229. *Id.*; *see supra* notes 131–33 and accompanying text.

230. *Mama Taori's*, 2001 WL 327906, at *8.

The *Mama Taori's* court bolstered its conclusion that minors develop the capacity to consent before age eighteen by reviewing the post-*Cardwell* "mature minors" doctrine and the Tennessee law that affords minors legal decision-making capacity in a variety of contexts. First, the court discussed consent to medical treatment, specifically abortion, birth control information and supplies, and treatment for drug abuse.[231] With respect to a minor's capacity to consent to abortion, the court ignored the fact that a minor must typically have a parent's permission or be adjudged competent by a court to make that decision *before* obtaining an abortion.[232] Surely, in referencing abortion, the *Mama Taori's* court was not suggesting that a minor should seek judicial by-pass for a capacity determination prior to consenting to sexual relations at the workplace.

With respect to contraception and drug abuse treatment, the *Mama Taori's* court failed to address the public policy rationale for those provisions. Laws do permit minors to obtain contraceptives and seek treatment for drug abuse and sexually transmitted diseases, but not because society considers those minors competent to make medical decisions without parental involvement.[233] To the contrary, we know that many of those minors need medical treatment because they made immature and uninformed decisions to have unprotected sex, thus demonstrating their lack of competence to make well-reasoned decisions regarding sexuality.[234] Rather, as a matter of public policy, we have determined that medical assistance is so important, and the potential

231. *Id.* at *5.

232. *See* TENN. CODE ANN. § 37-10-303 (2001).

233. *See* Scott, *supra* note 32, at 568 & n.80. Scott explained:

> No one argues that minors should be deemed adults because they are particularly mature in making decisions in these treatment contexts. Rather, the focus is on the harm of requiring parental consent. The targeted treatments all involve situations in which the traditional assumption—that parents can be counted on to respond to their children's medical needs in a way that promotes the child's interest—simply might not hold. For example, some parents may become angry upon learning of their child's drug use or sexual activity. Moreover, even if most parents would act to promote their children's welfare, adolescents may be reluctant to get help if they are required to inform their parents about their condition, either because they fear their parents' reactions or because they do not want to disclose private information. Removing this obstacle encourages adolescents to seek treatment that may be critically important to their health. Of course, society also has an interest in reducing the incidence of sexually transmitted diseases, substance abuse, mental illness, and teenage pregnancy. Together, these social benefits largely explain why lawmakers shift the boundary of childhood for the purpose of encouraging treatment of these conditions.

Id. at 568 (footnote omitted).

234. *See* Angela Huebner, Va. Coop. Extension, *Adolescent Growth & Development*, FAMILY AND CHILD DEVELOPMENT PUBLICATION 350–850, at 2 (2000), *at* http://www.ext.vt.edu/pubs/family/350-850/350-850.pdf (explaining the "personal fable," a belief that causes teens to take unnecessary risks such as having unprotected sex).

negative consequences of no treatment are so devastating, that we will facilitate the medical treatment of minors, despite their immaturity.[235]

The *Mama Taori's* court also noted that Tennessee law criminalizes sex with teenagers over thirteen only if their partners are more than four years their senior.[236] Tennessee's failure to criminalize sex between two fourteen-year-olds does not necessarily mean that the Tennessee legislature has judged these minors emotionally, psychologically, and physically mature, however. The permissive stance concerning young teens, associated with the required age differential for prosecution, results more likely from the targeted obviation of predation by mature adults, than a judgment that young teens are ready to appreciate fully the ramifications of their sexual behavior. When neither teen has the capacity to consent to sex, why prosecute one (or both)?[237] Laws pertaining to underage sex may not deter those youth who lack the capacity to appreciate the ramifications of their sexual behavior. When the threat of death, from AIDS or other sexually transmitted disease, fails as a deterrent, we cannot expect that statutory rape laws will inhibit teen sexual exploration.

In addition, age difference requirements in statutory rape laws say little about the ability of adolescents to consent at the workplace. Even if the *Mama Taori's* court properly used this age differential element to demonstrate that a sixteen-year-old has the capacity to consent to sex with peers away from the workplace, one cannot conclude from that determination that the same youth possesses the capacity to consent to sex with a thirty-two-year-old co-worker. The logic simply fails. If anything, the age difference requirement and its associated concern for power disparities are even more relevant at the workplace. At work, a manager or an adult with more work experience enjoys a position of

---

235. *See* Oberman, *supra* note 70, at 47; Scott, *supra* note 32, at 568.

236. *Mama Taori's*, 2001 WL 327906, at *6.

237. *See* Allstate Ins. Co. v. Patterson, 904 F. Supp. 1270, 1282 (D. Utah 1995). In an insurance coverage case, the *Patterson* court explained:

> If the age of the victim is relevant, then arguably the age of the perpetrator should also be relevant. The reason a child lacks the capacity to consent to sexual activity is because the child cannot fully appreciate the consequences of such activity. But if a child cannot fully appreciate the consequences of sexual activity, that is reason not to hold the child perpetrator to the same standard as an adult . . . . [C]riminal statutes that make it a crime to engage in sexual acts with a minor regardless of the minor's consent are based on the premise that minors lack the experience necessary to give meaningful consent, yet "courts cannot seek to protect naïve fourteen-year-old[s] . . . on the one hand, while inferring the most degrading and unnatural [intentions] on the other hand."

Id. (quoting Allstate Ins. Co. v. Jack S., 709 F. Supp. 963, 966 (D. Nev. 1989)).

greater status, power, or seniority, and can more easily seduce an inexperienced minor.

The *Mama Taori's* court equated the capacity of adolescents to consent to teen-adult sex with their ability to engage in a broad variety of activities: lease safety deposit boxes, work part-time, obtain a driver's license, execute a durable power of attorney for healthcare, and consent to sex with a peer.[238] The court drew completely inapposite analogies. Bright-line age demarcations account crudely for the fact that adolescent capacity varies by individual and, more particularly, by specific situation. To suggest that an adolescent worker has the capacity to consent to oral sex at the workplace with an adult co-worker because Tennessee law allows him to lease a safety deposit box would be laughable if the results of such a conclusion were not so potentially devastating. The court repeatedly failed to recognize the more plausible motivating reasons for permitting minors certain liberties normally reserved for adults. For example, we allow minors to surrender their children for adoption,[239] not because we think that those minors are sufficiently competent to make the adoption decision, but because we consider them incompetent to raise children.

The *Mama Taori's* court found that the "mature minors" rule as well as the "rule of sevens" governed this case and presumptively determined that Doe's consent carried legal weight.[240] In sum, the court placed the burden of proof on Doe, requiring him to overcome the presumption of capacity. The court's further discussion of the "totality of the circumstances" and the *Cardwell* factors was irrelevant since the court never engaged in a detailed analysis of Doe's maturity.[241] Later in this Article, I address the advisability of engaging in such analysis.[242] Suffice it to say here, with a reference back to the Texas *Hernandez* case,[243] that a serious concern arises. Any sexual harassment case could devolve into a trial of the minor's maturity (and morality), rather than of the perpetrator's culpability and the principal's liability. Do we really want our children on trial as they seek remedy for sexual abuses?

---

238. *Mama Taori's*, 2001 WL 327906, at *6.

239. *Id.* (citing TENN. CODE ANN. § 36-1-110(a) (1996)).

240. *Id.*

241. The court postponed this more detailed analysis for subsequent proceedings. *Id.* at *11.

242. *See infra* Part V.A.

243. *See supra* Part II.A.1.

2. *Consent's Admissibility*

The *Mama Taori's* court also rejected the plaintiffs' reliance on criminal law to prevent the jury from even considering Doe's consent. The court suggested that barring consideration of consent "would permit any victim of statutory rape to recover civil damages notwithstanding the circumstances."[244] The court listed three reasons for its rejection of plaintiffs' argument: the courts that have declined to adopt this per se liability rule have recognized (1) that the statutory rape laws do not explicitly create a private right of action for damages;[245] (2) that criminal and civil proceedings have different purposes;[246] and (3) that it is fundamentally unfair to permit a civil litigant to obtain money damages while preventing the trier-of-fact from considering relevant evidence regarding damages and credibility.[247]

In this analysis, the court found first that statutory rape laws create no private civil claim. However, they do enforce a public consensus that adolescents lack the capacity to consent to sexual intercourse and, at certain ages, to sexual contact of any kind. Statutory rape laws also reflect society's determination that underage sex hurts children.[248] The *Mama Taori's* court deflected attention from the relevance of the consent defense by focusing on the availability of civil damages in a private civil claim. The court did not explain how the availability of damages transforms the nature of capacity to consent. More particularly, the court neglected to explain why the lack of a private claim in the criminal statute precludes, in a civil claim, treatment of adolescent "consent" consistent with the criminal law's approach.

Second, the court noted the different purposes of criminal and civil law with regard to the admissibility of consent. However, our recent review of the public policy goals suggests that criminal and civil law functions are more similar than they are different.[249] Statutory rape laws have a three-fold purpose: to protect children (individuals subordinated because of their immaturity) from sexual predators, to punish

---

244. *Mama Taori's*, 2001 WL 327906, at *7.

245. *Id.* (citing Beul v. ASSE Int'l, Inc., 233 F.3d 441, 450–51 (7th Cir. 2000); McNamee v. A.J.W., 519 S.E.2d 298, 302 (Ga. Ct. App. 1999)).

246. *Id.* (citing Cynthia M. v. Rodney E., 279 Cal. Rptr. 94, 97 (Cal. Ct. App. 1991)).

247. *Id.* (citing LK v. Reed, 631 So. 2d 604, 607 (La. Ct. App. 1994); Doe by Roe v. Orangeburg County Sch., 518 S.E.2d 259, 261 (S.C. 1999)).

248. *See supra* note 34 and accompanying text.

249. *See supra* Part III.

perpetrators, and to deter predators.[250] Civil rights claims such as Title VII and FEPS serve similar purposes: to protect those workers (subordinated because of their weaker status) who experience discrimination (often in the form of sexual predation) and to punish and deter those employers who permit employees (or agents) to prey upon subordinated individuals.[251] The primary difference relates to the availability of damages, intended to make the person whole in the civil case. The civil system compensates victims for their injuries and influences employers with the threat of a financial penalty.

Thus, the different purposes of the civil and criminal systems, and the second reason for the court's treatment of Doe's consent, boils down to the availability of damages to compensate the victim in the civil system. The *Mama Taori's* court had referred to this difference, the right to damages, as the first reason for a rejection of a per se liability rule. The second of the court's reasons collapses into the first and still makes no sense. The court again failed to explain why the lack of a private claim for damages in the criminal statute precludes, in a civil claim, treatment of adolescent "consent" consistent with the criminal law's approach.

The third reason reveals the court's motivating concerns: credibility and damages. This reason centers on the alleged unfairness of permitting the recovery of money damages absent a hearing of all relevant evidence, including consent, which may provide guidance on the evaluation of credibility and the calculation of damages. It also highlights several problems with the court's treatment of adolescent "consent." If a sixteen-year-old lacks the capacity to consent to teen-adult sex in Tennessee under criminal law, how does this same consent miraculously shed light on either credibility or damages under civil law? If the minor lacks the capacity to consent, then credibility is not relevant as long as the sex occurred. The sex constitutes an offense no matter what the adolescent said at the time of the incident or says later in court. It qualifies as an offense because society (the legislature) has determined that teen-adult sex is offensive and injurious.

Is society misguided? Is teen-adult sex inoffensive? The reality of the *Mama Taori's* case is that Abson did not really "hurt" society by having sex with Doe. This case was not a criminal prosecution, so it lacked the underlying criminal public policy concern for "society." Abson may

250. *See supra* Part III.A.

251. Faragher v. City of Boca Raton, 524 U.S. 775, 805–06 (1998); *see supra* note 183 and accompanying text.

have outraged those adults who learned of the behavior, but "society" did not change. The reality is that Doe suffered the brunt of whatever injury Abson caused. Moreover, society (via the prosecutor) did not sue for its own damages. Nor did society sue on behalf of Doe. His parents did. Here rest the problems.

The credibility determination for the *Mama Taori's* court concerns not whether the sex occurred, but the severity, and even existence, of consequential damages. The *Mama Taori's* court wanted to ensure that the jurors had the opportunity to evaluate Doe's credibility regarding his *personal* offense and damages. Society's determination that teen-adult sex is criminally offensive in Tennessee was irrelevant to the *Mama Taori's* civil court. Society's determination evaporated, and the court started from a clean civil slate, demanding that Doe prove his personal offense and damages. This civil court equated consent with immunity from damage (*volenti non fit injuria*) and did not equate societal harm with individual harm. The judge and jurors may have felt outraged about the homosexual "rape," but their offense was not Doe's, and the judge wanted the jurors to evaluate Doe's personal offense and damages.

Doe's consent fostered the judge's skepticism about Doe's damages and outrage. Why? Because jurors might find that Doe was morally culpable, an accomplice in an illicit act. The court even noted in the recitation of the facts that, prior to the alleged sexual encounter, when Mama Taori's transferred Abson to another restaurant, Doe sought a transfer to the same location. When Mama Taori's denied Doe the transfer, he threatened to quit and reapply at the other location.[252]

These facts are irrelevant to the issue of capacity for several reasons. That Doe may have admired or even adored Abson does not prove that Doe had the cognitive and psychosocial ability to formulate legally significant consent to sex. Second, Tennessee statutory rape law that sets the age of consent at eighteen indicates the legislature's determination that someone Doe's age does not have capacity.[253] Third, reliance on these facts risks the importation of a defense similar to the chastity and promiscuity defenses. Recall *Hernandez*.[254] In *Hernandez*, the court ruled that consent to sex elevates a minor's capacity to one of legal significance.[255] As noted previously, the choice to engage in sex is not a

252. *Mama Taori's*, 2001 WL 327906, at *1.

253. *See* TENN. CODE ANN. § 39-13-506 (2003).

254. Hernandez v. State, 861 S.W.2d 908 (Tex. 1993); *see supra* Part II.A.1.

255. *Hernandez*, 861 S.W.2d at 910 n.1.

scientific indicator of maturity and capacity. Neither is the choice to follow a worker to another employment site. These facts paint Doe as a willing accomplice and foreshadow the court's true concerns—moral culpability and legal responsibility. Ultimately, the court conflated the two and found Doe (potentially) legally responsible because he was (possibly) morally culpable.

3. *Developmental Capacity Applied to* Mama Taori's

I distinguish between legal responsibility and moral culpability or blameworthiness. If I accidentally break a glass, I am responsible but not morally culpable because I did not smash the glass purposefully. With the rule of sevens and the infancy defense, we shield young children from legal responsibility for their criminal and negligent behavior because we adjudge them incapable of understanding or avoiding criminal and tortious conduct. We believe them innocent, morally blameless.[256]

Consider this distinction step by step as it relates to *Mama Taori's*. Begin with the notion that no capacity equates with no fault. Graduate to the concept that teenagers have some capacity. I find the term "diminished capacity"[257] inappropriate because the word "diminished" carries a negative connotation. Additionally, it suggests that full capacity should exist or may once have existed. Most teenagers suffer not from impairment but from immaturity—a blameless condition and a natural phase of growth. I prefer the term "developing capacity" because of a teenager's transitional status from childhood to adulthood and his or her

256. *See generally* Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 510–11 (1984); Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, *in* YOUTH ON TRIAL 267, 272 (Thomas Grisso & Robert G. Schwartz eds., 2000).

257. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 801, 829–34 (2003). In discussing adolescent criminal offenders, Professors Scott and Steinberg explained:

> The differences that distinguish adolescents from adults are more subtle—mitigating, but not exculpatory. Most obviously, cognitive and psycho-social immaturity undermines youthful decisionmaking in ways that reduce culpability. Moreover, due to their immaturity, adolescents may be more vulnerable to coercive pressures than are adults. Finally because their criminal acts are influenced by normal developmental processes, typical adolescent law breakers are different from fully responsible adults whose crimes are assumed to be the product of bad moral character. Thus, young offenders are less culpable than adults because of their diminished capacity; but they are also appropriately identified with actors who succumb to coercive pressures or who demonstrate that their criminal acts were out of character, and who are less culpable because their responses are those of ordinary persons.

Id. at 829–30.

developing maturity.[258] What level of fault should we associate with developing capacity? "No fault" hardly seems fair since the teenager has some capacity. Logically, one could equate the quantum of fault with the level of maturing capacity. Thus, we see how a comparative fault scheme would appear attractive to a court attempting to associate fault with capacity. Here, however, is the flaw in the logic.

Full legal capacity means just that—complete capacity. Not diminished capacity. Not developing capacity. Full legal capacity is an all-or-nothing proposition. There is no sliding scale for legal capacity. Our discussion in Part I confirmed that adolescents have not reached that legal threshold. Even in the criminal system, we try adolescents in juvenile court as children or in adult court as adults. We do not try them in adult court as mature children. When one considers such a sliding scale seriously, one sees the fallacy of such an idea. How can we justify holding someone morally culpable and then fully legally responsible, when that person is incapable of manifesting full reasoning and decision-making abilities because of transitioning developmental maturity?

I realize that this stance necessarily leaves intact an inconsistency between the criminal and civil systems. Because of the need to protect society from crimes committed by adolescents, I endorse Professors Elizabeth Scott and Laurence Steinberg's proposal that the juvenile justice system recognize adolescent "diminished responsibility" due to diminished culpability.[259] However, I reassert that adolescents—even adolescent criminal offenders—lack full adult legal capacity. Moreover, I do not suggest a "diminished culpability" or "diminished responsibility" parallel for the civil system because my focus is the protection of youth, and their developing capacity, from sexual exploitation by adults. I would still shield adolescents from legal responsibility for their immature choices because adult exploitation causes their injury. The need to protect society (and individual victims) from crimes committed by adolescents, however, justifies the different treatment in the criminal system of adolescent "developing capacity" and the different level of legal responsibility (and culpability) attributed to adolescent criminal offenders.

---

258. I thank Martin Drobac for clarifying this point.

259. Elizabeth Cauffman et al., *Justice For Juveniles: New Perspectives on Adolescents' Competence and Culpability*, 18 QUINNIPIAC L. REV. 403, 405 (1999); Scott & Steinberg, *supra* note 257, at 835–36; *see also* Scott, *supra* note 32, at 589–96; Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 VA. J. SOC. POL'Y & L. 389, 399, 405–06 (1999).

Consider another example using a younger child and compare it to the *Mama Taori's* case. A stranger in a car offers candy to a six-year-old on the street. If the child consents to enter the car, do we hold the child legally responsible for his damages that result? No. First, the child lacks the experience and knowledge to comprehend that he should not follow the stranger for the candy. The child lacks capacity—the ability to make a well-reasoned decision in the given circumstances. Second, the damage results not from the child's choice, nor from his entering the car. The damage results when the adult molests or abducts that child.

One might argue that a sixteen-year-old should know better than to enter a car with a stranger; but should the teenager know better than to follow a caring workplace mentor to another pizzeria? We, as a society, traditionally give children (including adolescents) the benefit of the development doubt until they reach the age of eighteen. They are innocent until adjudged mature. Tennessee law considers Doe incapable of consenting to sex. Why would this same law credit him capable of foretelling his own abuse before it occurs? Second, just as with the younger child, Doe's damages resulted neither from his requested (and denied) transfer to another location, nor from his consent. They resulted from Abson's abuse and exploitation of Doe's immaturity.

Given this discussion of capacity and the distinction between culpability and responsibility, the most likely explanation for the *Mama Taori's* holding is that the judge did not credit Doe's lack of capacity. One without capacity remains faultless, morally innocent and legally shielded. From the perspective of a strict moralist (and perhaps most of society), Doe's consent destroyed his credibility and negated his subjective offense.[260] Because Doe was morally culpable, the judge was willing to let a jury find him legally responsible.

---

260. *See, e.g.*, Barton v. Bee Line, Inc., 265 N.Y.S. 284, 285 (N.Y. App. Div. 1933) (finding that in 1933 a fifteen-year-old girl could not sue the common carrier for tort damages resulting from a rape when she consented to sex). The *Barton* court held that the New York statutory rape law served "to protect the virtue of females and to save society from the ills of promiscuous intercourse." *Id.* Note that the court did not equate the injury to the women with the injury done to society. With respect to the woman's injury, the *Barton* court explained:

> It is one thing to say that society will protect itself by punishing those who consort with females under the age of consent; it is another to hold that, knowing the nature of her act, such female shall be rewarded for her indiscretion. Surely public policy—to serve which the statute was adopted—will not be vindicated by recompensing her for willing participation in that against which the law sought to protect her. The very object of the statute will be frustrated if by a material return for her fall "we should unwarily put it in the power of the female sex to become seducers in their turn." Smith v. Richards, 29 Conn. 232. Instead of incapacity to consent being a shield to save, it might be a sword to desecrate. The court is of the opinion that a female under the age of eighteen has no cause of action against a male with whom she willingly consorts, if she knows the nature and quality of her act.

4. *Comparative Fault in* Mama Taori's

The *Mama Taori's* court revealed its fault-based, moralistic perspective as it dealt with Restatement (Second) of Torts § 892C. The court explained:

> As we construe this provision, it eliminates consent as a complete defense to a civil action for damages. It does not, however, prevent the trier-of-fact from considering evidence of consent when it is allocating fault or determining the existence and extent of the plaintiff's damages.
>
> Deterrence and punishment for illegal acts should be left to the criminal law. The public's interests are sufficiently protected by the imposition of criminal sanctions. Thus, civil actions for damages should be left to proceed under ordinary tort law principles.[261]

The court completely sidestepped the provisions of Restatement (Second) of Torts § 892C. If this subsection eliminates consent as a complete defense, because the legislature intended to protect minors from underage sex, how did the court justify removing that shield with respect to damages? The court ignored the shared purposes of both criminal and civil laws. It ignored that criminal law generally protects potential individual victims as well as society. Additionally, the court ignored the deterrent and punitive effects of tort law.

Rather than accept Tennessee's judgment regarding teen capacity, the court reverted to "ordinary tort law principles" and redirected the litigation into a comparative fault paradigm. The court reasoned: "[c]onsistent with the doctrine of comparative fault, one of these principles is that a mature minor's conduct, like an adult's conduct, is relevant with regard to fault and damages."[262]

A moralistic perspective also explains the court's suggestion that Doe's consent could negate consequential damages. Consent does not disprove damage. It merely releases the tortfeasor from liability, civil legal responsibility. If Abson had offered to punch Doe, and Doe had

---

Id. This passage makes clear that lawmakers wanted to protect society and female "virtue," not individual women. The court does stress, however, that the woman must know the nature and quality of her act before her consent bars recovery.

261. Doe v. Mama Taori's Premium Pizza, No. M1998-00992-COA-R9-CV, 2001 WL 327906, at *7 (Tenn. Ct. App. Apr. 5, 2001).

262. *Id.* Mama Taori's had responded with a comparative fault defense, directed at the parents as non-parties. The court affirmed the lower court's decision not to strike that defense as to the parents. *Id.* at *8–*9.

consented, his consent would not have erased the resulting bloody nose. It would have simply insulated Abson from liability for the broken nose and resulting medical bills. The damage would still exist.

If the *Mama Taori's* court had been truly worried about the extent or even existence of damage, it could have directed the litigation in other ways. Defense counsel could have impeached Doe's testimony regarding his damages by pointing to a lack of corroborating medical or other physical evidence. Defense counsel could have introduced evidence of Doe's ability to function in other contexts during that same time period. Evidence of persistently good academic evaluations, excellence on an athletic team, and the ability to maintain other friendships might all speak to his good adjustment and the lack of negative impact by the alleged sexual encounter.

If consent has relevance, one might argue that Doe's consent exacerbated his trauma. The knowledge that he "consented" to homosexual activity and a sexual predator who duped him might enhance his sense of shame and humiliation. However, the introduction of that evidence will inevitably raise prejudices regarding sexuality and morality: good children do not engage in sex. We return again to *Hernandez* morality: children who have sex do not deserve protection or compensation for their injuries.[263]

5. *Conclusions for* Mama Taori's

The ultimate issue addressed in the interlocutory appeal opinion by the *Mama Taori's* court was whether the defense could use Doe's consent as a legal defense to the FEPS and tort claims. Instead of protecting Doe, the *Mama Taori's* court arranged for the trial of Doe. With the harassment trial, he risked what rape victims often

263. Elizabeth Scott and Laurence Steinberg argued for formal recognition of developmental characteristics to avoid racist and other discriminatory results in criminal adjudications. Scott & Steinberg, *supra* note 257, at 837. They reasoned:

> A developmentally-informed boundary constraining decisionmakers represents a collective pre-commitment to recognizing the mitigating character of youth in assigning blame. Otherwise, immaturity often may be ignored when the exigencies of a particular case engender a punitive response . . . . This concern is critical, given the evidence that illegitimate racial and ethnic biases influence attitudes about the punishment of young offenders and that decisionmakers appear to discount the mitigating impact of immaturity in minority youths.

Id. One can see the parallel concern for how sexist attitudes might cause the discounting of immaturity in a sexual harassment case. Decisionmakers might blame the victim without understanding the nature of the target's developing capacity.

experience—a trial of his character and the accusation, "He asked for it!"

Susan Estrich, who argued against the unwelcomeness requirement in sexual harassment Title VII cases, commented upon the relevance of adult consent (or failure to resist adequately):

> The [rape] consent standard—and the corresponding inquiries into what a woman did or said, how she "led the man on," or how she failed adequately to signal her nonconsent—have at least until recently, made successful prosecution of acquaintance rape all but impossible. Where the relationship is "appropriate," at least to the court's eyes, judges tend to see sex, not rape. Similarly, in Title VII cases they see sex, not sexual harassment. In both types of cases, they are often wrong. That a certain relationship might be appropriate does not necessarily mean that the man's behavior has been.
>
> The strongest justification for the welcomeness doctrine is that the rule ensures that consensual workplace sex does not provide the basis for a civil action. The more radical response to this argument is that there is no such thing as truly "welcome" sex between a male boss and a female employee who needs her job. And if there is, then the women who welcome it will not be bringing lawsuits in any event.[264]

Estrich's comments prove even more poignant with respect to "consenting" teens. One could argue (and the Tennessee legislature, among others, has decided) that there is no such thing as truly welcome sex between adults and minors below the age of consent. Employment only worsens the calculus. If a mature (but subordinated) woman who needs her job has difficulty refusing a man, think of the trouble an immature teen will experience in trying to refuse the same man.

Estrich concluded that the unwelcomeness requirement serves, in part, to discourage women from filing suit. She noted the empirical studies concerning the prevalence of workplace sexual harassment and pointed to the dearth of lawsuits.[265] We began this section on FEPS by noting that only one case documents a complaint by a "consenting" teen.[266] Where are the other teens who surely were manipulated? Or those who, unknowingly, said "Yes"?

---

264. Estrich, *supra* note 96, at 831.

265. *Id.* at 833.

266. *See supra* note 213 and accompanying text.

The *Mama Taori's* court's justifications for considering Doe's consent cannot withstand scrutiny. What the court referred to as the "mature minor" rule is in many cases a misnomer. The "rule of sevens" pretends to mark accurately the development of adolescent maturity. Actually, it is an archaic bright-line rule designed to avoid the onerous and inexact task of evaluating the maturity of a minor at a given point in time that has long since passed.[267] The court sidestepped the Restatement's guidance in § 892C and ignored underlying public policy reasons that justify both criminal and civil law.[268] To add insult to injury, the court charged Doe and his parents with the costs of the appeal.[269]

The *Mama Taori's* decision could have a chilling effect on future sexual harassment cases. It also demonstrates that a court, struggling with a new issue, might presume Sara capable of consenting and, thereby, prevent a successful sexual harassment suit under Title VII, state FEPS, or relevant tort law.

B. Tort Cases

Of the seventeen tort cases, sixteen split evenly on whether they held consent relevant to the tort claims.[270] One found that fraud invalidated a minor's consent, but the court's reasoning suggests that it might have

---

267. Scott and Steinberg noted how prejudices threaten any maturity evaluation. They emphasized:

> [W]e currently lack the diagnostic tools to evaluate psycho-social maturity reliably on an individualized basis or to distinguish young career criminals from ordinary adolescents who, as adults, will repudiate their reckless experimentation. Litigating maturity on a case-by-case basis is likely to be an error-prone undertaking, with the outcomes determined by factors other than immaturity.

Scott & Steinberg, *supra* note 257, at 836–37.

268. *See supra* Part III.

269. Doe v. Mama Taori's Premium Pizza, No. M1998-00992-COA-R9-CV, 2001 WL 327906, at *11 (Tenn. Ct. App. Apr. 5, 2001).

270. Eight cases found consent relevant. Beul v. ASSE Int'l, Inc., 233 F.3d 441 (7th Cir. 2000); Teti v. Huron Ins. Co., 914 F. Supp. 1132 (E.D. Pa. 1996); Cynthia M. v. Rodney E., 279 Cal. Rptr. 94 (Cal. Ct. App. 1991); McNamee v. A.J.W., 519 S.E.2d 298 (Ga. Ct. App. 1999); Robinson v. Roberts, 423 S.E.2d 17 (Ga. Ct. App. 1992); LK v. Reed, 631 So. 2d 604 (La. Ct. App. 1994); Doe by Roe v. Orangeburg County Sch., 518 S.E.2d 259, 261 (S.C. 1999); and Michelle T. by Sumpter v. Crozier, 495 N.W.2d 327 (Wis. 1993). Eight cases found consent irrelevant. Bostic v. Smyrna Sch. Dist., No. 01-0261 KAJ, 2003 WL 723262 (D. Del. Feb. 24, 2003); Angie M. v. Hiemstra, 44 Cal. Rptr. 2d 197 (Cal. Ct. App. 1995); Bohrer v. DeHart, 943 P.2d 1220 (Colo. Ct. App. 1996); Landreneau v. Fruge, 676 So. 2d 701 (La. Ct. App. 1996); Pettit v. Erie Ins. Exch., 699 A.2d 550 (Md. Ct. Spec. App. 1997); Wilson v. Tobiassen, 777 P.2d 1379 (Or. Ct. App. 1989); Doe by Doe v. Greenville Hosp. Sys., 448 S.E.2d 564 (S.C. Ct. App. 1994), *cert. dismissed as improvidently granted*, 464 S.E.2d 124 (S.C. 1995); and Robinson v. Moore, 408 S.W.2d 582 (Tex. Ct. App. 1966).

credited the consent had the fraud not occurred.[271] Several of the cases that ruled consent relevant served as guiding precedent in *Mama Taori's* and used now familiar reasoning. Those cases that determined consent irrelevant employed reasoning consistent with each other, most adopting the home state's criminal law assessment of adolescent "consent."

1. Consent as Irrelevant

In *Doe by Doe v. Greenville Hospital System*,[272] the court ruled that a candy striper, under sixteen-years-old and working in a hospital,[273] could not legally consent to sexual intercourse with a thirty-one-year-old hospital employee. The hospital argued, as had the defense in *Mama Taori's*, that a criminal statute had no relevance to a battery claim. The hospital further asserted that battery required a nonconsensual touching. The court disagreed, finding that § 16-3-655(3) of the South Carolina Code,[274] which invalidated consent as a defense to a sexual battery against a minor, applied in both criminal and civil contexts. The court held:

> As a matter of public policy, the General Assembly has determined a minor under the age of sixteen is not capable of voluntarily consenting to a sexual battery committed by an older

---

271. *See* Hackett v. Fulton County Sch. Dist., 238 F. Supp. 2d 1330, 1369 (N.D. Ga. 2002) (finding that the lies the science teacher told his male student induced the student's consent to inappropriate sexual touching). The court held, "[C]onsent to the act by the person affected negates the contact as an actionable tort. 'As a general rule, there can be no tort committed against a person consenting thereto, if that consent is free and not obtained by fraud, and is the action of a sound mind.'" *Id.* (quoting Mims v. Boland, 138 S.E.2d 902, 906 (1964)).

272. 448 S.E.2d 564 (S.C. Ct. App. 1994). The lower court returned a verdict for Mary in the sum of $545,000. The trial judge reduced the award to $250,000 under the South Carolina Tort Claims Act. *Id.* at 565. The jury rejected a claim by Mary's father "for loss of custody, companionship, and service." *Id.* The father's claim appears to be akin to a seduction claim already discussed. *See supra* note 125.

273. The Workers' Compensation Act did not preclude Mary Doe's tort claims because she received only classroom credit and job skills training in exchange for her services. *Greenville Hosp.*, 448 S.E.2d at 567–68. Thus, the court did not consider her an employee. *Id.* Non-employee status also would preclude someone like Mary Doe, engaged in volunteer work, from suing under an applicable state FEPS. *See, e.g.*, O'Connor v. Davis, 126 F.3d 112, 114–16 (2d Cir. 1997) (finding that volunteer student intern did not qualify as an employee under Title VII), *cert. denied*, 522 U.S. 1114 (1998); Lippold v. Duggal Color Projects, Inc., No. 96 CIV 5869(JSM), 1998 WL 13854, at *2 (S.D.N.Y. Jan. 15, 1998) (confirming that unpaid volunteer cannot sue under Title VII because she is not an employee).

274. S.C. CODE ANN. § 16-3-655(3) (Law. Co-op. 1985).

> person. This is the law of the state whether it is applied in a criminal or civil context.[275]

Additionally, the court found that the criminal law applied to Mary Doe's negligent hiring and supervision claims against the hospital.[276]

The question understandably left unanswered by the *Greenville Hospital* decision is what the court would have done if Mary Doe had been sixteen, as Sara was. The *Greenville Hospital* court consistently applied the criminal law presumptions in a civil case, but this application is hardly shocking since the South Carolina Code defined the age of consent at sixteen. Mary Doe was under sixteen, so the criminal presumptions still applied in her case. The law might have forced the dismissal of Mary Doe's claims had she been only a few months older.[277] Again, we notice the relevance of the state-defined age of consent, which may or may not coincide with the age of majority, typically eighteen.

Other courts similarly found that the age of consent, as defined under criminal law, establishes a compelling public policy that under-aged youth lack the ability to consent to sexual conduct.[278] In *Bostic v. The Smyrna School District*,[279] the court noted the public policy concerns and reasoned:

> It would be a bizarre rule indeed that, for purposes of civil liability, would call a teenager's "consent" sufficient to make a relationship "welcome" and thus not a basis for civil liability, when the very same relationship is rape under the exacting standards for criminal liability. Bostic's sadly misguided participation in the affair is no shield from liability for the defendants.[280]

---

275. *Greenville Hosp.*, 448 S.E.2d at 566.

276. *Id.*

277. *See, e.g.*, Teti v. Huron Ins. Co., 914 F. Supp. 1132, 1139–40 (E.D. Pa. 1996) (finding that because the criminal law permits a consent defense when the victim is sixteen, the civil law must recognize the capacity of minors sixteen and older).

278. Wilson v. Tobiassen, 777 P.2d 1379, 1384 (Or. Ct. App. 1989); *see also* Angie M. v. Hiemstra, 44 Cal. Rptr. 2d 197, 202 (Cal. Ct. App. 1995) (acknowledging "the strong public policy that underlies the Legislature's enactment of the multiple statutes directed at protecting minors from sexual exploitation"). The *Angie M.* court distinguished another sexual battery statute, California Civil Code § 1708.5, which required a lack of consent. *Angie M.*, 44 Cal. Rptr. at 202–03. Despite the *Angie M.* court's focus on public policy regarding minors, that reference suggests that the court would have denied a claim by Angie M. under § 1708.5.

279. No. 01-0261 KAJ, 2003 WL 723262 (D. Del. Feb. 24, 2003).

280. *Id.* at *6 (citing Mary M. v. N. Lawrence Cmty. Sch. Corp., 131 F.3d 1220, 1227 (11th Cir. 1997), *cert. denied*, 524 U.S. 952 (1998)). The *Bostic* court discussed consent in the context of the

In this passage, the *Bostic* court stressed the lack of logic in an inconsistent treatment of adolescent "consent." In *Robinson v. Moore*,[281] the court explained:

> The [c]ourts in this country have uniformly taken the position that where the defendant's act constitutes a violation of a statute, such as a rape statute fixing the age of consent to intercourse, which has as its primary purpose the protection of a definite class of persons from their own immaturity of judgment, the plaintiff's consent is not a defense to a civil action.[282]

This language tracks the reasoning of Restatement (Second) of Torts § 892C. Two other courts specifically cited or discussed this provision and the other Restatement sections.[283] Several cases did not make explicit the public policy rationale but held that consent could not constitute a defense under the circumstances alleged.[284]

2. *Consent as Relevant*

Courts that found consent relevant to the discussion of civil liability based their determinations on several factors. First, as in *Mama Taori's*, the courts noted that criminal laws provide no private right of action.[285] As explained earlier, this reason does not clarify why courts should not apply the criminal law presumptions consistently for an existing civil private right of action. Additionally, the absence of a private right of action under a criminal statute fails to address the absence of logic of finding capacity in one system and a lack thereof in another.

Second, courts pointed to the different purposes of the criminal and civil systems.[286] The primary differences relate to the availability of

---

Title IX claim as well as the other civil claims and, therefore, referred to whether the plaintiff welcomed the sexual relationship. *Id.*

281. 408 S.W.2d 582 (Tex. Ct. App. 1966).

282. *Id.* at 583. The court was incorrect that other courts in this country have uniformly adopted this position. *See supra* Part II.C.3.

283. Pettit v. Erie Ins. Exch., 699 A.2d 550, 557 (Md. Ct. Spec. App. 1997) (evaluating RESTATEMENT (SECOND) OF TORTS § 892A, cmt. b); *Wilson*, 777 P.2d at 1384 (discussing RESTATEMENT (SECOND) OF TORTS § 892C).

284. Bohrer v. DeHart, 943 P.2d 1220, 1227 (Colo. Ct. App. 1996); Landreneau v. Fruge, 676 So. 2d 701, 707 (La. Ct. App. 1996); *Pettit*, 699 A.2d at 557.

285. McNamee v. A.J.W., 519 S.E.2d 298, 302 (Ga. Ct. App. 1999). *See generally* Beul v. ASSE Int'l, Inc., 233 F.3d 441, 450–51 (7th Cir. 2000).

286. Cynthia M. v. Rodney E., 279 Cal. Rptr. 94, 97 (Cal. Ct. App. 1991); *McNamee*, 519 S.E.2d at 302.

damages and the influence of civil liberties afforded older adolescents. With respect to civil liberties, several courts reasoned that because minors engage in certain adult conduct, civil law should assign full legal capacity. In *Cynthia M. v. Rodney E.*,[287] the court listed the abortion right and the right to consent to other types of medical treatment.[288] The *Cynthia M.* court reasoned:

> "Capacity exits when the minor has the ability of the average person to understand and weigh the risks and benefits. Moreover, decisional and statutory law is replete with examples of situations in which a child over the age of fourteen is deemed to have the mental capacity of an adult."[289]

Again, this comment confuses a determination of adolescent capacity with other public policy reasons for granting minors the right to engage in these adult activities. As previously noted, just because we permit an adolescent to obtain an abortion does not necessarily mean that we attribute to her the ability of the average adult to weigh the risks and benefits on a regular basis—or even in most circumstances.

The existence and assessment of damages appears to be the major concern of all of these courts. The damage calculus figures into not only the second factor concerning the different purposes of the criminal and civil systems, but also a third factor regarding unfairness. Specifically, courts that permitted consideration of adolescent "consent" emphasized the injustice of granting damages to a participant in a crime and of limiting evidence under those circumstances.

The restriction of evidence concerned the *Mama Taori's* court and other tribunals. For example, in *Doe by Roe v. Orangeburg County School District*,[290] the South Carolina Supreme Court allowed admission of plaintiff's "willing participation" to the sex but only on the issue of damages, not the issue of liability.[291] The court specifically distinguished the lower court's holding in *Greenville Hospital*, which found that a child under sixteen did not have the capacity to consent to sex.[292] In *Orangeburg*, the plaintiff and her parents sued the school district and a teacher who failed to supervise students, during which time a sexual

287. 279 Cal. Rptr. 94 (Cal. Ct. App. 1991).

288. *Id.* at 97.

289. *Id.* (quoting PROSSER & KEETON, *supra* note 148, § 18, at 115) (citation omitted); *see also McNamee*, 519 S.E.2d at 302 (using the same words as the *Cynthia M.* decision).

290. 518 S.E.2d 259 (S.C. 1999).

291. *Id.* at 261.

292. *Id.*

assault occurred.[293] A sixteen-year-old mentally handicapped student allegedly sexually assaulted a fourteen-year-old girl after the coach left them alone in the school gym.[294]

The *Orangeburg* court relied on *Barnes v. Barnes*,[295] a challenge to the Indiana Rape Shield Statute.[296] Quoting *Barnes*, the *Orangeburg* court reasoned:

> "Unlike the victim in a criminal case, the plaintiff in a civil damage action is 'on trial' in the sense that he or she is an actual party seeking affirmative relief from another party. Such plaintiff is a voluntary participant, with strong financial incentive to shape the evidence that determines the outcome. It is antithetical to principles of fair trial that one party may seek recovery from another based on evidence it selects while precluding opposing relevant evidence on grounds of prejudice."[297]

This passage highlights the court's focus on fairness. The court ignored, however, that prejudice regularly justifies the exclusion of probative evidence.[298] Additionally, the court missed the point of exclusion. The main reason for excluding the consent was not the prejudice potentially created, but the minor's incapacity that rendered the consent legally invalid. This court did not even hesitate to put the consenting minor "on trial."

The other concern pertaining to fairness centered on the minor's "willing participation" in the conduct.[299] Just as in *Mama Taori's*, many of these cases invoked concepts of comparative fault, contributory negligence, or assumption of risk to deal with the victim's conduct.[300]

---

293. *Id.* at 259.

294. *Id.*

295. 603 N.E.2d 1337 (Ind. 1992).

296. *Id.* at 1342.

297. *Orangeburg*, 518 S.E.2d at 261 (quoting *Barnes*, 603 N.E.2d at 1342).

298. *See* FED. R. EVID. 403 (directing that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice").

299. *Orangeburg*, 518 S.E.2d at 261; *see also* Cynthia M. v. Rodney E., 279 Cal. Rptr. 94, 98 (Cal. Ct. App. 1991); LK v. Reed, 631 So. 2d 604, 607 (La. Ct. App. 1994).

300. *See, e.g.*, Beul v. ASSE Int'l, Inc., 233 F.3d 441, 451 (7th Cir. 2000) (opting for a comparative fault rule); Robinson v. Roberts, 423 S.E.2d 17, 18 (Ga. Ct. App. 1992) (evaluating contributory negligence and assumption of risk to find that a thirteen-year-old can "appreciate dangers of his environment and . . . avoid consequences associated with exposure to such dangers"); *LK*, 631 So. 2d at 608 (determining that their "analysis must include the principles of comparative fault").

Many took a moralistic stance, evaluating whether the victim was "innocent" or not.[301] The *Cynthia M.* court explained: "We have emphasized the word 'innocent' because we believe there is an important distinction between a party who is injured through no fault of his or her own and an injured party who willingly participated in the offense about which the complaint is made."[302] Quoting a 1922 Louisiana Supreme Court decision, the *Cynthia M.* court added, "'[T]o recognize the asserted right to recover would be to permit plaintiff to profit by the wrong to which she voluntarily was a party . . . .'"[303] Just like the *Mama Taori's* court, the *Cynthia M.* court ignored the fact that a minor lacks the capacity to consent in the criminal context. The court missed the meaning of the statutory rape charge. The notion that a minor "profits" when she collects money for medical bills associated with a pregnancy, for psychotherapy, or for emotional and physical distress deserves no comment. *Cynthia M.* stands as another classic example in which we blame the victim, this time, a sixteen-year-old.

In *LK v. Reed*,[304] a thirteen-year-old special education student took the blame, or at least a pro rata share of it.[305] A.K., through her estate administrators, sued another student and the school board after A.K. allegedly agreed to engage in sex with an eighteen-year-old special education high school junior.[306] The *LK* court noted:

> [T]he anomaly created by the trial court's holding . . . necessarily entitles any carnal knowledge victim to civil damages. Under the trial court's holding, a girl could

---

301. *See, e.g.*, *Cynthia M.*, 279 Cal. Rptr. at 98; *LK*, 631 So. 2d at 607; *Orangeburg*, 518 S.E.2d at 259–60 (noting that the "District proffered testimony tending to dispute the claim Doe was a sweet, innocent young girl with testimony that she had been overheard making sexually explicit statements").

302. *Cynthia M.*, 279 Cal. Rptr. at 98.

303. *Id.* (quoting Overhultz v. Row, 92 So. 716, 717 (La. 1922)). Having stated that *Overhultz* was "directly on point," the *Cynthia M.* court then applied reasoning formulated for an adult. *Id.* In its final footnote, the *Cynthia M.* court admitted that the *Overhultz* plaintiff was not a minor. *Id.* at 98 n.14. The court then stated, "However, we are not inclined to dwell on outdated legal fictions concerning the ability of underage females to consent to sex." *Id.* Commenting upon the current prevalence of underage sexual activity and the problem of pregnancy among unwed teenagers, the court added, "To cling to vestiges of a bygone era, is to ignore the contemporary realities of nature." *Id.* In this footnote, the *Cynthia M.* court arguably blamed teenagers for their promiscuity and particularly teenaged girls for their non-marital pregnancies. The court's treatment of their consent and effective denial of their damages may not prove to be the best way to handle these social ills.

304. 631 So. 2d 604 (La. Ct. App. 1994).

305. *Id.* at 607.

306. *Id.* at 605.

> provoke a criminal prosecution against a sexual partner and recover damages from him, both as a result of her willful and voluntary actions in consenting to, or instigating, a sexual liaison.[307]

This passage conjures the specter of the young seductress, luring men to their financial demise. It bears no relation to the reality of a thirteen-year-old special education student with an IQ of between sixty-four and seventy-four.[308] The *LK* court also neglected to consider that any potential sexual partner of such a Lolita[309] remained free to reject her advances and spare himself criminal and potential civil liability. This notion of the child harlot, ready to entrap an unsuspecting partner, exemplifies the most dated, sexist notions of women (and girls) as avaricious temptresses.[310]

---

307. *Id.* at 607; *see also Orangeburg*, 518 S.E.2d at 261 (reasoning that "[t]o prohibit such evidence [of consent] would effectually allow a victim to come in and tell a one-sided version of events, without being subject to any real cross-examination or impeachment as to the damages actually suffered").

308. *LK*, 631 So. 2d at 605. Despite its ultimate determination, the court recited other disturbing facts:

> [A]t the time of these events A.K. was a 13-year-old girl with minimal intellectual and social skills. She was shy and obedient and had never had a boyfriend. She had a history of seizures for which she took daily medication. Her family was poor in financial assets but rich in religious beliefs. In the year preceding these events, A.K.'s father was involved in an accident which rendered him a paraplegic, and A.K.'s mother donated a kidney to A.K.'s younger sister, a surgery requiring extended visits to New Orleans.
>
> A.K.'s family stress coupled with her age, intellect, and social skills, render her consent, from a legal standpoint, almost meaningless. Accordingly, we assess A.K.'s fault at 5% and reduce the damages awarded to her by that percentage.

Id. at 608.

309. VLADIMIR NABOKOV, LOLITA (Random House 1989) (1955) (telling the story of a middle-aged man seduced by his landlady's twelve-year-old daughter).

310. *See* Marybeth Hamilton Arnold, *"The Life of a Citizen in the Hands of a Woman": Sexual Assault in New York City, 1790–1820*, *in* PASSION AND POWER: SEXUALITY IN HISTORY 35, 40–45 (Kathy Peiss & Christina Simmons eds., 1989) (discussing sexual assault of women at the turn of the nineteenth century and highlighting the popular myth of sexually voracious working class women). Arnold noted the rape of a thirteen-year-old girl who was likened to a harlot. *Id.* at 42. Counsel for the defense argued:

> [If] anything of an improper nature passed between them, I am inclined to believe that it has been with her consent. The passions may be as warm in a girl of her age as in one of more advanced years, and with very little enticement she may have consented to become his mistress . . . . [It] is said her youth renders it impossible she should have been a lewd girl. Who is acquainted with the dissolute morals of our city, and does not know that females are to be found living in a state of open prostitution at the early ages of 12 and 13 years?

Id. (citing *Report of the Trial of Richard D. Croucher, on an Indictment for a Rape of Margaret Miller, on Tuesday, the 8th day of July, 1800*, at 15, 18 (New York: 1800)); *see also* Estelle B. Freedman, *"Uncontrolled Desires": The Response to the Sexual Psychopath, 1920–1960*, *in* PASSION AND POWER, *supra*, at 199, 212 (explaining that victims of sexual predators were described

In *McNamee v. A.J.W.*,[311] the court suggested that the admissibility of the consent might hinge upon whether the sexual partner was also a minor.[312] This suggestion again reflects an emphasis on comparative fault.[313] As discussed earlier, if neither party possesses the capacity to consent, why should we blame (in a comparative fault scheme) either?[314] Such a policy makes no logical sense. While comparative fault seems inappropriate when applied to minors who lack capacity, the concept hints at a parallel concern—comparative power. The *McNamee* court was perhaps correct (but for the wrong reason) to emphasize the difference between teen-teen and teen-adult consensual sex.

3. *From Comparative Fault to Comparative Power*

Many of the tort cases that found adolescent "consent" relevant to a civil claim for damages favored comparative fault schemes. In contrast, those cases that found consent irrelevant emphasized the power disparity between teenagers and adult partners. Courts attributed enhanced power to factors such as older age and maturity, a position of authority, and a position of confidence or trust.[315] For example, in *Angie M. v. Hiemstra*,[316] the minor consented to sex with a forty-eight-year-old physician with whom she worked. The court found that he "took advantage of his position of authority and of Angie's confidence in him to cause her to develop a dependent relationship on him 'in much the manner of the phenomen[on] of "transference" between a patient and his or her psychotherapist.'"[317]

In *Bohrer v. DeHart*,[318] the court rejected a comparative fault instruction after a minister allegedly sexually abused a minor parishioner. The court determined that "dependence, transference and the resulting vulnerability do not cease merely because a child physically

---

"as 'seductive,' 'flirtatious,' and sexually precocious"). *But see* Kathy Peiss, *"Charity Girls" and City Pleasures: Historical Notes on Working Class Sexuality, 1880–1920*, *in* PASSION AND POWER, *supra*, at 57, 64 (discussing "charity girls," working women who traded sex for gifts and attention).

311. 519 S.E.2d. 298 (Ga. Ct. App. 1999).

312. *Id.* at 302–03.

313. *Id.*

314. *See supra* Part IV.A.4.

315. *See, e.g.*, Angie M. v. Hiemstra, 44 Cal. Rptr. 2d 197, 200 (Cal. Ct. App. 1995) (noting the partner's age, position of authority, and position of confidence).

316. 44 Cal. Rptr. 2d 197 (Cal. Ct. App. 1995).

317. *Id.* at 200.

318. 943 P.2d 1220 (Colo. Ct. App. 1996).

matures while sexual abuse in secrecy by an adult in a position of trust continues unabated."[319] The *Bohrer* court determined that consent was inadmissible as a defense because of a power imbalance caused by the minor's sexual encounters with a religious counselor.[320]

Other teen-adult relationships, in addition to those involving doctors or ministers, resulted in power disparities acknowledged by courts. A teacher holds a position of authority that permits influence over and creates a power imbalance with an adolescent.[321] The *Bostic* court explained that "Smith's affair with Bostic cannot be viewed as consensual, given the minority of the student and the relationship of trust and authority which the coach held over her."[322] Additionally, in *Orangeburg*, a case that found consent relevant to the issue of damages, the court referenced a South Carolina Code criminal provision that prohibited sexual conduct between a minor and an "actor [who] is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim."[323] Thus, both tort and criminal law recognize that a power imbalance creates a greater potential for influence and abuse of a minor.

C. Title IX and § 1983 Cases

Title IX and § 1983 cases raise some of the same issues as the more traditional tort claims but borrow heavily from Title VII jurisprudence. In *Benefield v. Board of Trustees of the University of Alabama*,[324] the court considered whether a fifteen-year-old college student could sue her university under Title IX for sexual harassment by classmates.[325] The court distinguished college students from elementary and secondary

319. *Id.* at 1227.

320. *Id.* (citing E. Cruz, *When the Shepherd Preys on the Flock: Clergy Sexual Exploitation and the Search for Solutions*, 19 FLA. ST. U. L. REV. 499 (1991)).

321. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 646 (1999) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995), in holding that "the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults").

322. Bostic v. Smyrna Sch. Dist., No. 01-0261 KAJ, 2003 WL 723262, at *6 (D. Del. Feb. 24, 2003).

323. Doe by Roe v. Orangeburg County Sch., 518 S.E.2d 259, 260 (S.C. 1999) (reviewing South Carolina Code § 16-3-655(3)).

324. 214 F. Supp. 2d 1212 (N.D. Ala. 2002).

325. *Id.* at 1215.

school students.[326] It rejected her claim, holding that the university did not stand *in loco parentis*.[327] The *Benefield* court ultimately ruled that "[t]o constitute sexual harassment, the behavior in question must be unwelcome."[328]

In *Mary M. v. North Lawrence Community School Corp.*,[329] the court took a different position. The *Mary M.* court reviewed a Title IX claim by an eighth grader against a twenty-one-year-old cafeteria worker.[330] The district court had permitted an instruction regarding whether the plaintiff found the conduct unwelcome.[331] The instruction read:

> In order to find in favor of the Plaintiff, you must find first that the alleged sexual advances and/or abuses occurred, and if it did, that the advances and/or abuses were unwelcome by her. Conduct is unwelcome if Diane M. did not solicit or incite it, and if she regarded the conduct as undesirable or offensive. In determining whether the conduct was unwelcome, you should consider such things as Diane M.'s receptiveness to the alleged sexual advances and/or abuse in light of her words, acts and demeanor; her emotional predisposition, if any; the age disparity between her and Andrew Fields; any power disparity between them due to Diane M.'s status as a student and Andrew Field's status as a school employee.[332]

This instruction tracks the unwelcomeness requirement established for Title VII cases. It also acknowledges the potential power disparity between an adult school worker and a minor.

The appellate court rejected the instruction and held:

> While welcomeness is properly a question of fact in the context of Title VII employment discrimination cases, we decline to extend the inquiry to Title IX cases when elementary students are involved. It goes without saying that sexual harassment in

326. *Id.* at 1218.

327. *Id.* at 1220. Black's Law Dictionary defines *in loco parentis* to mean "[a]cting as a temporary guardian of a child." BLACK'S LAW DICTIONARY, *supra* note 121, at 791. Ironically, when defining the noun, Black's Dictionary refers to "[s]upervision of a young adult by an administrative body such as a university." *Id.*

328. *Benefield*, 214 F. Supp. 2d at 1220.

329. 131 F.3d 1220 (7th Cir. 1997).

330. *Id.* at 1221.

331. *Id.* at 1223.

332. *Id.* at 1224.

> the workplace is vastly different from sexual harassment in a school setting.[333]

Despite the obvious differences between school and work, the court listed six reasons why sexual harassment at school deserves a different analysis.[334] First, the court noted the greater ability of teachers and school officials to control behavior in the classroom, suggesting that "students look to their teachers for guidance as well as for protection."[335] Second, the court explained that school harassment leaves a "longer lasting impact on its younger victims and institutionalizes sexual harassment as accepted behavior."[336] Third, the court reasoned that while adults can leave a hostile work environment, children can rarely leave school.[337] Fourth, the court emphasized that children need a nondiscriminatory environment in which to maximize their intellectual growth. The court stated: "A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program."[338] Fifth, the court admonished that schools act *in loco parentis* while employers do not.[339] Finally, the court concluded that "employees are older and (presumably) know how to say no to unwelcome advances, while children may not even understand that they are being harassed."[340]

The third and sixth reasons reveal that the *Mary M.* court assumed a workplace populated by adult workers. If one reviews the court's reasoning and substitutes adolescent workers for the adults, the court's analysis weakens, and the two environments (school and work) appear less distinct. For example, one might argue that sexual harassment at work leaves a lasting impact on young workers just as it does on young students. Additionally, as noted previously, many adolescent workers may not understand they are experiencing sexual harassment.[341]

---

333. *Id.* at 1226 (citation omitted). The court noted that in Indiana, where the harassment occurred, elementary school extends through the eighth grade. *Id.* at 1225 n.6. The court added: "We decline to opine, however, on whether secondary school students can welcome sexual advances in harassment claims arising under Title IX." *Id.*

334. *See id.* at 1226–27.

335. *Id.* at 1226 (citing Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1193 (11th Cir. 1996)).

336. *Id.* (citing *Davis*, 74 F.3d at 1193).

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* at 1227.

341. *See supra* note 62 and accompanying text.

Arguably, the court should have distinguished two different types of sexual harassment—harassment of children and harassment of adults—rather than two different environments.[342] In other words, the unwelcomeness requirement may be appropriate as applied to adults[343] but not as applied to minors, whether they are at school or at work.

1. Reliance on Criminal Law

Like many of the tort cases, the *Mary M.* case also raised the relevance of the criminal law's definition of the age of consent. The *Mary M.* court concluded:

> If elementary school children cannot be said to consent to sex in a criminal context, they similarly cannot be said to welcome it in a civil context. To find otherwise would be incongruous.
>
> An opposite holding would defeat the purposes of Title IX and make children claiming sexual discrimination under Title IX subject to intense scrutiny . . . . If welcomeness were properly an issue for the jury in cases involving elementary students, the very children bringing the suits would be subject to intense scrutiny regarding their responses to their alleged abusers. Trial transcripts would be replete with insinuations that a child dressed or acted in such a manner as to ask for the very conduct she or he is seeking to redress . . . . We decline to allow the inference that an elementary school student is presumed to have not consented to molestation by a twenty-one year old in a criminal case, but welcomed the same conduct in a civil case.[344]

In this passage, the court acknowledged the inconsistency of a failure to apply a criminal law presumption in a civil case. More importantly, the *Mary M.* court understood that once a child's consent comes into evidence, the child goes on trial. Unlike the *Orangeburg* court, the *Mary M.* court eschewed the notion of putting a child on trial.[345] The *Mary M.*

342. *But see* Benefield v. Bd. of Trs. of the Univ. of Ala., 214 F. Supp. 2d 1212, 1218 (N.D. Ala. 2002) (holding that Title IX does not distinguish between types of behavior based on the age of the student).

343. Many feminists, including Professor Estrich, would dispute that assertion. *See supra* note 264 and accompanying text.

344. *Mary M.*, 131 F.3d at 1227.

345. *Compare id. with* Doe by Roe v. Orangeburg County Sch., 518 S.E.2d 259, 261 (S.C. 1999); *see also supra* notes 94–96 and accompanying text. Ironically, the *Orangeburg* court took its guidance from *Barnes*, an Indiana case. *See supra* notes 295–98 and accompanying text. The *Mary M.* case originated in Indiana. *Mary M.*, 131 F.3d at 1220.

court "refused to transfer the onus on the child to prove that in fact she or he did not welcome the complained-of advances."[346]

2. *An Abuse of Power or Casual Sex?*

The *Doe v. Taylor Independent School District*[347] case again explored the power disparity first acknowledged in the tort cases.[348] It also supports Professor Estrich's view that how a person characterizes the appropriateness of a relationship will influence whether he calls sexual conduct sex or sexual harassment.[349] The *Taylor* majority held that a child holds a constitutional right to bodily integrity under the Due Process Clause[350] and permitted a § 1983 claim.[351] While the majority did not specifically address Doe's consent, the concurrence and dissents raised interesting perspectives.

In his concurrence, Justice Higginbotham described the attitudes of the majority and dissent:

> The majority and dissents divide today over the "law," but that division rests largely on perceptions of the human condition. We have all looked at the same set of facts and come away with quite different perceptions of what transpired between teacher and pupil. The majority sees an exploitation of power and the dissents see ca[s]ual sex. Make no mistake about it. This case is not about a high school coach who happened to have an affair with a student. It is about abuse of power.[352]

In this passage, the Justice emphasized the teacher's abuse of power over his student.[353]

---

346. *Mary M.*, 131 F.3d at 1227.

347. 15 F.3d 443 (5th Cir. 1994).

348. *See id.*

349. *See supra* note 264 and accompanying text; *see also* Oberman, *supra* note 70, at 34–35.

350. U.S. CONST. amend. XIV. The *Taylor* court explained:

> This circuit held as early as 1981 that "the right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process."
>
> If the Constitution protects a schoolchild against being tied to a chair or against arbitrary paddlings, then surely the Constitution protects a schoolchild from physical sexual abuse—here, sexually fondling a 15-year old school girl and statutory rape—by a public schoolteacher.

Taylor, 15 F.3d at 450–51 (citations omitted).

351. *Taylor*, 15 F.3d at 457.

352. *Id.* at 459 (Higginbotham, J., concurring).

353. *See also id.* at 460 (Higginbotham, J., concurring) (interpreting "Coach Stroud's use of his position of authority to pressure and manipulate Doe into sex" as "arbitrary and capricious").

In contrast, the dissenters focused, in part, on Doe's consent. Justice Garwood suggested that he would permit the § 1983 claim only if the consenting child was immature.[354] He argued:

> It is not clearly established that age fifteen is, *per se*, sufficiently immature. Plainly Doe was of a sufficient age to bear children. Perhaps that should not be the test and instead arguably a minimum age of sixteen, seventeen, or eighteen would make sense as a bright line for these purposes.[355]

Justice Garwood's concern regarding the bright-line demarcation raises an interesting question that another dissenter posed later. Justice Edith Jones noted that not all criminal statutory rape laws set the age of consent at fifteen.[356] She explained that in some states the age is lower.[357] She then asked, "[H]as the majority made a constitutional offense of conduct that in some states is not criminal?"[358] This question highlights just one of the problems that results from the American legal system's failure to implement a consistent policy regarding adolescent "consent" to sexual conduct.

D. Conclusion for Sara?

Does Sara have a justiciable claim for sexual harassment against the theater owner? From this review of criminal, sexual harassment, and tort law, we see that the answer still depends on where she consented and files suit. The claims she brings will also influence the outcome. She faces a long and humiliating trial, the outcome of which is not clear, if she sues in Tennessee under its FEPS. Even a successful statutory rape prosecution against the perpetrator will not assist her there. She has almost no chance for success under antidiscrimination or tort law in those twenty-four states that set the age of consent at sixteen or lower.[359] That number increases to thirty-five if courts in eleven states reject the

354. *Id.* at 467–68 (Garwood, J., dissenting).

355. *Id.*

356. *Id.* at 479 n.8 (Jones, J., dissenting).

357. *Id.*

358. *Id.*

359. These twenty-four states include: (14) Hawaii, Maryland, Mississippi, South Carolina; (16) Alabama, Georgia, Indiana, Kansas, Kentucky, Massachusetts, Montana, Nevada, North Carolina, Ohio, Pennsylvania, Rhode Island, West Virginia, and Wyoming; and those states with special fact requirements that do not match Sara's: (14) Maine, (16) Connecticut, Michigan, Oklahoma, South Dakota, and Vermont. *See* App. A, *infra* pp. 546–73.

special facts of her case.[360] In those states, she will be treated as an adult and her consent will bar most claims. She also has little chance for success in Wisconsin where the age of consent is eighteen but where, in *Michelle T. by Sumpter v. Crozier*,[361] the court determined that consent would defeat a civil battery claim by a minor.[362]

In two states, California and Louisiana, where the ages of consent are eighteen and seventeen respectively, the law is as murky as it is in Tennessee. In San Diego, California, the *Angie M.* court found consent irrelevant.[363] However, in *Cynthia M.*, the same San Diego court found it relevant.[364] Sara's chance of success there depends completely upon the types of claims she pleads. In Louisiana, the *LK* court found consent relevant, and the same Third Circuit court found it irrelevant two years later in *Landreneau*.[365] I cannot predict what might happen there for Sara today. Neither can I predict with certainty what will happen in the remaining eleven states.[366]

V. A SYNTHESIS FOR A FUTURE APPROACH

If some advantage explained the inconsistency in the treatment of adolescent "consent" by the United States civil and criminal systems, one might argue for the maintenance of the status quo. No such advantage exists, however. The systems have evolved inconsistently and incongruently. The only justifying explanation for affording adolescent "consent" legal significance, seen in the civil case law, centers on the

360. Without the special facts in Sara's case, including the age disparity and Cosio's managerial position, eleven more states join the list: (14) Iowa; (15) Colorado; (16) Alaska, Arkansas, Delaware, Florida, Minnesota, New Hampshire, New Jersey, Utah, and Washington. *See* App. A, *infra* pp. 546–73. In Colorado, the *Bohrer* court found consent irrelevant because of the prohibition regarding the sexual violation of a minor by an adult in a position of trust. Bohrer v. DeHart, 943 P.2d 1220, 1227 (Colo. Ct. App. 1996). It is not clear that a Colorado court would find that Sara's manager held a position of trust. Additionally, in *Bostic*, the plaintiff was fifteen when her relationship with her coach commenced. Bostic v. Smyrna Sch. Dist., No. 01-0261 KAJ, 2003 WL 723262, at *1 (D. Del. Feb. 24, 2003). The Delaware court found that the coach held a position of trust. Thus, the court found consent irrelevant. *Id.* at *6.

361. 495 N.W.2d 327 (Wis. 1993).

362. *Id.* at 329.

363. Angie M. v. Hiemstra, 44 Cal. Rptr. 2d 197, 206 (Cal. Ct. App. 1995).

364. Cynthia M. v. Rodney E., 279 Cal. Rptr. 94, 97 (Cal. Ct. App. 1991).

365. Landreneau v. Fruge, 676 So. 2d 701, 707 (La. Ct. App. 1996).

366. The age of consent in the remaining eleven states are: (17) Illinois, Missouri, Nebraska, New Mexico, New York, and Texas; (18) Arizona, Idaho, North Dakota, Oregon, and Virginia. *See* App. A, *infra* pp. 546–73.

need in civil cases to evaluate the existence and extent of a plaintiff's damages. As the discussion of *Mama Taori's* indicates, however, consent does not measure or even indicate damages. Alternative avenues for the exploration of a plaintiff's injuries exist. Thus, the critical evaluation of the plaintiff's injuries cannot justify treatment of adolescent "consent" that is inconsistent with the criminal statutory rape scheme or with conclusions based on scientific evidence regarding adolescent development.[367]

Public policy concerning the treatment of adolescent "consent" deserves attention and revision. Scientific evidence and social science studies should inform the revision to secure for minors a standard that properly accounts for their constitutional liberties as well as their developmental abilities. I cannot endorse the maintenance of the status quo. It is simply too illogical and provides too little protection for developing teenagers. Moreover, it perpetuates outdated moral judgments concerning non-marital and homosexual sex, as well as stereotypical attitudes about "good" girls and boys.

A. State Statutory Rape Laws and the Rule of Sevens

State statutory rape laws also fail to provide adequate direction for the treatment of adolescent "consent." The first problem with reliance on statutory rape laws rests on the fact that "the age of consent" varies from state to state and from statute to statute within states.[368] "So what?" states rights advocates might ask. They might argue that individual states should enjoy the right to set the age of consent as local judgment dictates. The appropriate response is that scientific evidence does not suggest that minors in Colorado develop physically, emotionally, and mentally any earlier than do those in California or New York. We are talking about developmental capacity, not about moral judgments concerning sex or local attitudes about "deviant" sexual behavior. It makes no logical sense to permit multiple and inconsistent

---

367. *See* Drobac, *supra* note 3, at 8–9; *see also* Scott & Steinberg, *supra* note 257, at 928–30. Scott and Steinberg caution:

> Psycho-social development proceeds more slowly than cognitive development. As a consequence, even when adolescent cognitive capacities approximate those of adults, youthful decisionmaking may still differ due to immature judgment. The psycho-social factors most relevant to differences in judgment include: (a) peer orientation, (b) attitudes toward and perception of risk, (c) temporal perspective, and (d) capacity for self-management.

Scott & Steinberg, *supra* note 257, at 813.

368. *See* App. A, *infra* pp. 546–73.

determinations of adolescent capacity absent some accurate maturity test. Moreover, Justice Jones' footnote in *Taylor* reminds us that these inconsistent statutory rape laws potentially create a constitutional offense in some states where the conduct is not criminal.[369]

Second, I doubt state legislatures passed statutory rape laws in reliance on medical research regarding adolescent developmental capabilities. These laws have been on the books for decades. We should invest the resources necessary to complete scientific research regarding adolescent capabilities and then implement an appropriate national standard based upon reliable scientific evidence. If states want to choose an age of consent higher than that indicated by scientific evidence, then let the states' rights versus individual rights debate ensue.

The same reliance on science addresses the archaic rule of sevens and the mature minors doctrine. Until we know that fourteen-year-olds possess the same ability as adults to make reasoned decisions and judgments in unfamiliar circumstances, or under stress, we should presume them incapable and protect our older children from sexual abuse. If we must adopt a bright-line, because we have no sure measure of individual cognitive, neuro-psycho-social maturity, the age of majority better serves us.

B. Teenagers on Trial

One alternative to the bright-line drawing, accomplished by ages of consent, necessitates the case-by-case evaluation of the plaintiff's maturity. Presumptions, either for or against capacity, also inevitably devolve into such an analysis since the side disadvantaged by the presumption will try to challenge it. Either way, the evaluation puts the teen on trial.

A trial of the teenager's maturity raises several serious concerns. First, the evaluation typically will occur months (if not years) after the teenager "consented." Therefore, no objective test can accurately evaluate the teenager's maturity as it existed at the time of the "consent."[370] Anyone who has bought shoes for a teenager knows that adolescents mature and grow with astonishing rapidity. A teenager who "consents" in April may demonstrate a very different level of maturity than he or she will in December, or years later. Fairness dictates that we

369. Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 479 n.8 (5th Cir. 1994) (Jones, J., dissenting).

370. *See supra* note 267.

not use the level of maturity that he or she exhibits during trial or discovery to judge capacity at the time of alleged injurious events.

Second, the indicators that we use to gauge teenager maturity may subject that teenager to humiliating, prejudicial, and perhaps even unconstitutional scrutiny. For example, the defense may attempt to introduce evidence of prior sexual activity to demonstrate a teenager's maturity. While federal sexual harassment law and rules of evidence[371] regulate the use of the plaintiff's sexual history, exceptions allow introduction of that evidence when the plaintiff places the issue in controversy or for other reasons during civil trials.[372] Defense counsel may argue that the claim of incapacity places the plaintiff's maturity, and therefore her sexual history, in controversy. Conceivably, a court could allow the introduction of the plaintiff's history of sexual abuse or incest survival to demonstrate that the plaintiff was aware of the difference between consensual and offensive or coerced sex. Even the threat of such admission or discovery of such evidence might deter some teenagers, and their parents, from prosecuting civil claims.

Third, juveniles risk that a judge and jurors will blame them (the teenagers) for not being more mentally mature when they look physically mature or for bringing their injuries upon themselves with their immaturity. One might argue that jurors can resist the temptation to blame the victim. Think about how many times, however, you have thought to yourself, "Oh, that is so immature!" If behavior is truly the product of immaturity, there should be no associated "blame." A person cannot help his or her immaturity. Immaturity is a natural stage of development. We do not condemn the mentally challenged for their failure to comprehend. Similarly, we should not blame the immature for their failure to act maturely. However, we do all the time.

Associated with this argument concerning blame, one might suggest that even though we should not censure adolescents for their immaturity, neither should we protect them from the consequences of their behavior. How else are people to learn if they do not suffer the consequences of their behavior? I offer two responses to this question. First, teenagers do not "consent" to what we would otherwise label sexual harassment in isolation. The controversial conduct always involves another person, a co-worker or supervisor. I will guess that this second person is usually

371. FED. R. EVID. 412.

372. *See supra* notes 297–98, 307 and accompanying text.

an adult.[373] That adult has the power to prevent the harm by refusing to become sexually involved with the minor. But for the willing assistance of the adult, the harm would not occur. Thus, I would hold the adult responsible for the consequential damages.

My second response to the imposition of consequences borrows from common parenting wisdom. When a child reaches for the hot pot and burns himself, we do not refuse to treat the burn so that the child will learn a lesson and refrain from grabbing pots on the stove. The pain of the moment should deter the child in the future. Neither do we consider a bandage and dressing a reward for bad behavior. Finally, we would not hesitate to scream "Stop!" at the child to prevent the injury in the first place. Take this simple example and apply it to teenager-adult workplace sex. When a teenager suffers injury from teenager-adult workplace sex, we should not hesitate to compensate the injury. The teenager is injured through no fault of his own because he did not have capacity to consent. We should not view the compensatory monetary payment to be a reward for bad behavior. The money is not an "award," even if we use that term in legal parlance. Lastly, we should not hesitate to yell "Stop!" to prevent workplace teen-adult sex that traumatizes and injures adolescent workers.

C. Strict Liability—Law Reform and Legal Regulation

The best way to prevent workplace sexual harassment of teenagers involves the implementation of both regulatory mechanisms and statutory reform. First, sexual harassment of minors by adults must become a strict liability offense for which consent is no defense. Lawmakers should amend Title VII, state FEPS, and tort law to account for adolescent workers, their developmental abilities, and the phenomenon of their sexual exploitation.[374] Research evidence regarding adolescent development and sexual harassment of minors should inform and guide statutory reform.

---

373. If the sexual partner is another adolescent, I would deny recovery since neither teenager has acquired the capacity to consent. Each would bear his or her own costs, unless the employer knew or should have known of the conduct. In that case, I would hold the employer liable under a negligence standard for failing to prevent and cure sexual harassment. Similarly, if the second adolescent is a supervisor, I would impose liability on the employer because the employer has made an adolescent its supervising agent. In that case, the employer should bear the burden of that decision and pay for the resulting damages caused by its agent.

374. I would also support the amendment to Title IX to address the issues raised in this Article as they pertain to sexual harassment of minors by adults at school.

Strict liability will serve many of the public policy concerns raised in this Article. It will ensure the development by employers of appropriate workplace policies and procedures to prevent and cure the sexual predation of adolescents on the job. Strict liability, and the necessarily related exclusion of consent evidence,[375] will lead to cost redistribution. It will lift the financial burden of sexual harassment injuries from minors and their parents. Sexual predators responsible for the injuries will bear the costs. Employers who regulate the workplace and reap the rewards of adolescent labor will share in carrying the cost burden. Moreover, employers can purchase employment practice liability insurance to spread the cost burden further. Strict tort and antidiscrimination law liability will redress the social grievance of the subordination of this nation's working youth. Such laws will attack the treatment of adolescents as fungible.

In addition to law reform, education and regulatory mechanisms could address this problem. For example, some states subsidize the employment of young workers.[376] State employment departments could mandate that in exchange for tax breaks or other benefits received, employers provide special training for adolescent workers regarding workplace rights and sexual harassment. Additionally, states might require that to obtain a permit to work, adolescent applicants must complete a sexual harassment training seminar. State education departments might also add sexual harassment curricula to their health and business administration classes. These are just a few of the possible regulatory approaches.

A strict liability scheme and regulatory mechanisms are compatible with affording adolescents some measure of autonomy and self-determination. An adolescent might still choose to engage in sex with an adult co-worker, who would still run the risk of civil and criminal liability. In essence, this scheme operates like adolescent "consent" to a contract. The sex "contract" is voidable by the adolescent but not void. The adolescent can retract the consent if she realizes during her minority

375. I would consider making evidence of consent admissible in any second (or successive) trial for money damages if the minor had successfully sued for similar injuries on a prior occasion. Such a rule should satisfy those skeptics who will argue that adolescent seductresses will win their fortunes from multiple unsuspecting employers. Additionally, once an injured adolescent has received her recovery and "learned the lesson," she should not need the same protection, funded by an employer, as one who is inexperienced and naïve.

376. I thank Professor Cynthia Baker who educated me on this point.

(or shortly thereafter)[377] that her adult partner took advantage of her "developing capacity" at the workplace.

One might argue that if law imposed strict liability on employers for the sexual harassment of adolescent workers by supervisors, employers would simply stop hiring adolescents. Teenagers would face even higher unemployment rates. I challenge that criticism. Employers can pay adolescent workers less money for the same work performed by adults. Often employers avoid providing part-time adolescent employees benefits that adult workers receive. It makes good business sense to hire young, seasonal, or part-time workers. I doubt that the cost of sexual harassment judgments and training would exceed the financial advantages employers enjoy by employing adolescents—if those employers implemented age-appropriate policies and proper training. Holding employers strictly liable for the sexual exploitation of their minor workers would not shut down the markets of this nation.

Sara and the other Does of this nation deserve our protection as they transition to adulthood. These minors mature and develop full capacity through work and other life experiences. As they mature, we should continue to shield them from the humiliating, devastating trauma of sexual exploitation in the workplace. American tort and sexual harassment laws fail our nation's working youth. If we ignore the conflict of laws that deny our adolescent children protection and recovery, then their seduction is our sin.

377. I would advocate an appropriate limitations period for suit and recovery. *See* Oberman, *supra* note 83, at 782–83 (noting the tolling of the reporting time limitation under some statutory rape statutes until the victim reaches her majority).

APPENDIX A*

STATE CODE & COMMENT AGE OF CONSENT		
Alabama 16	ALA. CODE § 13A-6-61 Rape, 1st degree	Gender neutral, but must be with member of opposite sex. Perpetrator (Perp): 16 or older; Target (Targ): under 12.
	ALA. CODE § 13A-6-62 Rape, 2nd degree	Gender neutral, but must be with member of opposite sex. Perp: 16 or older; Targ: 12–15 plus 2 yr. age diff. **Phipps (16)
	ALA. CODE § 13A-6-63 Sodomy, 2nd degree	Gender neutral. Perp: 16 or older; Targ: under 12.
	ALA. CODE § 13A-6-64 Sodomy, 2nd degree	Gender neutral. Perp: 16 or older; Targ: 12–15.
	ALA. CODE § 13A-6-65 Sexual misconduct	Gender neutral, but must be with member of opposite sex. No age specified. (This is the statutory rape section.)

* I thank Sandie McCarthy-Brown for her excellent research and work on this table. The statutes to which Phipps cites are noted in the comment column with the comment "**Phipps." The age of consent Phipps claims for each state is in parenthesis after his name. Phipps, *supra* note 75, at 441 app. A. All statutes are current on Westlaw as of February, 2004.

STATE CODE & COMMENT AGE OF CONSENT		
Alaska 16/18	ALASKA STAT. § 11.41.436 Sexual Abuse of a minor, 2nd degree	Gender neutral. Perp: 16 or older; Targ: under 13; Targ: 13–15 plus 3 yr. age diff. Perp: 18 or older; Targ: under 18 plus family relationship. Perp: 18 or older plus in a position of authority over target; Targ: under 16. **Phipps (16)
	ALASKA STAT. § 11.41.438 Sexual Abuse of a minor, 3rd degree	Gender neutral. Perp: 16 or older; Targ: 13–15 plus 3 yr. age diff. Perp: 18 or older plus in a position of authority; Targ: 16–17 plus 3 yr. age diff.
	ALASKA STAT. § 11.41.440 Sexual Abuse of a minor, 4th degree	Gender neutral. Perp: under 16; Targ: under 13 plus 3 yr. age diff. Perp: 18 or older plus in a position of authority; Targ: 16–17 plus 3 yr. age diff.
Arizona 18	ARIZ. REV. STAT. § 13-1404 Sexual abuse	Gender neutral. Targ: 15 or older w/out consent or under 15 if only female breast involved.
	ARIZ. REV. STAT. § 13-1405 Sexual conduct with a minor	Gender neutral. Targ: under 18. **Phipps (18)

STATE CODE & COMMENT AGE OF CONSENT		
Arkansas 16/18	ARK. CODE ANN. § 5-14-103 Rape	Gender neutral. Targ: under 14 plus 3 yr. age diff. Targ: under 18 plus family relation plus 3 yr. age diff.
	ARK. CODE ANN. § 5-14-110 Sexual indecency with a child	Gender neutral. Perp: 18 or older; Targ: under 15 plus 3 yr. age diff.
	ARK. CODE ANN. § 5-14-124 Sexual assault, 1st degree	Gender neutral. Targ: under 18 plus perp. is in position of authority.
	ARK. CODE ANN. § 5-14-126 Sexual assault in the 3rd degree	Gender neutral. Perp: under 18; Targ: under 14 plus 3 yr. age diff.
	ARK. CODE ANN. § 5-14-127 Sexual assault in the 4th degree	Gender neutral. Perp: 20 or older; Targ: under 16. (This is the statutory rape code.) **Phipps (16)
California 18	CAL. PENAL CODE § 261.5 Unlawful sexual intercourse with person under 18	Gender neutral. Variations in level of punishment according to age of target. Targ: under 18. **Phipps (18)
Colorado 15/18	COLO. REV. STAT. § 18-3-402 Sexual assault	Gender neutral. Targ: under 15 plus 4 yr. age diff.; Targ: 15–16 plus 10 yr. age diff. **Phipps (17)
	COLO. REV. STAT. § 18-3-404 Unlawful sexual contact	Gender neutral. Targ: under 18.

STATE CODE & COMMENT AGE OF CONSENT		
	COLO. REV. STAT. § 18-3-405 Sexual assault on a child	Gender neutral. Targ: under 15 plus 4 yr. age diff.
	COLO. REV. STAT. § 18-3-405.3 Sexual assault of a child by one in a position of trust	Gender neutral. Targ: under 18 plus perp. is in position of trust.
Connecticut 16/18	CONN. GEN. STAT. § 53a-71 Sexual assault in the 2nd degree	Gender neutral. Targ: 13–15 plus 2 yr. age diff.; Targ: under 18 plus perp. is target's guardian. **Phipps (16)
	CONN. GEN. STAT. § 53a-70 Sexual assault in the 1st degree	Gender neutral. Targ: under 13 plus 2 yr. age diff.
	CONN. GEN. STAT. § 53a-73a Sexual assault in the 4th degree	Gender neutral. Targ: under 15.; Targ: under 18 plus perp. is target's guardian.
Delaware 16/18	DEL. CODE ANN. tit. 11, § 223 Gender/ Number	Masculine includes the feminine.
	DEL. CODE ANN. tit. 11, § 770 Rape in the 4th degree	Gender neutral. Targ: under 16. Perp: 30 and over; Targ: under 18; Targ: 16–17 plus perp. in position of authority.

STATE CODE & COMMENT AGE OF CONSENT		
	DEL. CODE ANN. tit. 11, § 771 Rape in the 3rd degree	Gender neutral. Targ: under 16 plus 10 yr. age diff. or perp. causes physical injury or serious mental or emotional injury. Perp: 19 or older; Targ: under 14. **Phipps (16)
	DEL. CODE ANN. tit. 11, § 773 Rape, 1st degree	Gender neutral. Perp: 18 older; Targ: under 12; Targ: under 16 plus perp. in position of authority or perp. inflicts serious physical injury.
	DEL. CODE ANN. tit. 11, § 772 Rape, 2nd degree	Gender neutral. Targ: under 16 plus perp. causes serious physical injury or uses deadly weapon or dangerous instrument. Perp: 18 or older; Targ: under 12; Targ: under 16 plus perp. in position of authority.
	DEL. CODE ANN. tit. 11, § 768 Unlawful sexual contact, 2nd degree	Gender neutral. Targ: under 16.
	DEL. CODE ANN. tit. 11, § 762(b) Gender	"Unless a contrary meaning is clearly required, the male pronoun shall be deemed to refer to both male and female."

STATE CODE & COMMENT AGE OF CONSENT		
	DEL. CODE ANN. tit. 11, § 761 Definitions	"(j) A child who has not yet reached his or her sixteenth birthday is deemed unable to consent to a sexual act with a person more than 4 years older than said child. Children who have not yet reached their twelfth birthday are deemed unable to consent to a sexual act under any circumstances."
D.C. 16	D.C. CODE ANN. § 22-3001 Definitions	"'Child' means a person who has not yet attained the age of 16 years." Targ: under 16.
	D.C. CODE ANN. § 22-3008 1st degree child sexual abuse	Gender neutral. Targ: under 16 plus 4 yr. age diff.
	D.C. CODE ANN. § 22-3009 2nd degree child sexual abuse	Gender neutral. under 16 plus 4 yr. age diff.
Florida 16/18	FLA. STAT. ANN. § 800.04 Lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age	Gender neutral. Diff. punishment if perp. is over/under 18; Targ: 12–15 or under 16.
	FLA. STAT. ANN. § 794.011 Sexual battery	Gender neutral. Perp: 18 or older; Targ: under 12 plus injury to sexual organs; Targ: age 12 or older without consent.

STATE CODE & COMMENT AGE OF CONSENT		
	FLA. STAT. ANN. § 794.05 Unlawful sexual activity with certain minors	Gender neutral. Perp: 24 or older; Targ: 16 or 17. **Phipps (18)
Georgia 16	GA. CODE ANN. § 16-6-3 Statutory Rape	Gender neutral. Different punishment if perp. is under/over 21; Targ: under 16. **Phipps (16)
Hawaii 14/16	HAW. REV. STAT. § 707-730 Sexual assault, 1st degree	Gender neutral. Targ: under 14; Targ: 14–15 plus 5 yr. age diff. **Phipps (16)
	HAW. REV. STAT. § 707-732 Sexual assault, 3rd degree	Gender neutral. Targ: under 14; Targ: age 14–15 plus 5 yr. age diff.
Idaho 18	IDAHO CODE § 18-1506 Sex abuse of child under age 16	Gender neutral. Perp: 18 or older; Targ: under 16.
	IDAHO CODE § 18-1508 Lewd conduct with a minor	Gender neutral. Targ: under 16.
	IDAHO CODE § 18-6101 Rape	This code section specifies that "rape" can only be committed by a male and only a female may be a target. Female: under/over 18. **Phipps (18)
	IDAHO CODE § 18-6108 Male Rape	This code section specifies that "male rape" can only be committed by a male and only a male may be a target. No age specified.

STATE CODE & COMMENT AGE OF CONSENT		
Illinois 17/18	720 ILL. COMP. STAT. 5/12-13 Criminal Sexual Assault	Gender neutral. Targ: under 18 plus perp. is family member. Perp: 17 yrs or older plus in position of authority; Targ: 13–17.
	720 ILL. COMP. STAT. 5/11-6 Indecent Solicitation Of A Child	Gender neutral. Perp: 17 or older; Targ: under 17.
	720 ILL. COMP. STAT. 5/12-16 Aggravated Criminal Sexual Abuse	Gender neutral. Targ: under 18 plus perp. is family member. Perp: over 17; Targ: under 13. Perp: 17 or older plus in position of authority, trust, etc.; Targ: 13–17. Perp: 17 or older plus used force or threat of force; Targ: 13–16. Perp: under 17;.Targ: 13–16 plus 5 yr. age diff.; Targ: under 9. Perp: under 17 plus use of force or threat of use of force; Targ: 9–16. **Phipps (17)
	720 ILL. COMP. STAT. 5/12-14.1 Predatory sexual assault of child	Gender neutral. Perp: 17 or older; Targ: under 13.
	720 ILL. COMP. STAT. 5/12-15 Sexual abuse	Gender neutral. Perp: under 17; Targ: 9–16; Targ: 13–16 plus less than 5 yr. age diff.

STATE CODE & COMMENT AGE OF CONSENT		
Indiana 16	IND. CODE § 35-42-4-3 Child molesting	Gender neutral. Diff. punishment if perp. is under/over 21; Targ: under 14.
	IND. CODE § 35-42-4-5 Vicarious sexual gratification	Gender neutral. Perp: 18 or older; Targ: under 14.
	IND. CODE § 35-42-4-6 Child solicitation	Gender neutral. Perp: 18 or older; Targ: under 14.
	IND. CODE § 35-42-4-9 Sexual misconduct with a minor	Gender neutral. Perp: 18 or older; Targ: 14–15. **Phipps (16)
	IND. CODE § 35-42-4-1 Rape	Must be with "member of the opposite sex." No age specified.
Iowa 14/18	IOWA CODE § 702.5 Definition of "Child"	Targ: under 14.
	IOWA CODE § 709.3 Sexual abuse, 2nd degree	Gender neutral. Targ: under 12.
	IOWA CODE § 709.4 Sexual abuse, 3rd degree	Gender neutral. Targ: 12–13; Targ: 14–15 plus family relationship, position of authority, or 4 yr. age diff. **Phipps (16)
	IOWA CODE § 709.12 Indecent contact	Gender neutral. Perp: 18 or older or 16–17 plus 5 yr. age diff.; Targ: under 14.
	IOWA CODE § 709.14 Lascivious conduct with a minor	Gender neutral. Perp: over 18 plus in a position of authority; Targ: under 18.
Kansas 16	KAN. STAT. ANN. § 21-3502 Rape	Gender neutral. Targ: under 14.

STATE CODE & COMMENT AGE OF CONSENT		
	KAN. STAT. ANN. § 21-3503 Indecent liberties (touching)	Gender neutral. Targ: 14–15.
	KAN. STAT. ANN. § 21-3504 Aggravated indecent liberties with a child (penetration)	Gender neutral. Targ: 14–15. **Phipps (15)
	KAN. STAT. ANN. § 21-3510 Solicitation of a child	Gender neutral. Targ: 14–15.
Kentucky 16	KY. REV. STAT. ANN. § 510 References and Annotations	Explanation of legislative age choices (ages 12, 14, & 16). Age of full consent: 16.
	KY. REV. STAT. ANN. § 510.040 Rape, 1st degree	Written in masculine, but gender neutral due to Ky. Rev. Stat. Ann. § 446.020. Targ: under 12.
	KY. REV. STAT. ANN. § 510.050 Rape, 2nd degree	Written in masculine, but gender neutral due to Ky. Rev. Stat. Ann. § 446.020. Perp: 18 or older; Targ: under 14.
	KY. REV. STAT. ANN. § 510.060 Rape, 3rd degree	Written in masculine, but gender neutral due to Ky. Rev. Stat. Ann. § 446.020. Perp: 21 or older; Targ: under 16. **Phipps (16)
	KY. REV. STAT. ANN. § 510.020 Lack of consent	Gender neutral. Targ: incapable of consenting when under 16.

STATE CODE & COMMENT AGE OF CONSENT		
	KY. REV. STAT. ANN. § 510.070 Sodomy, 1st degree	Written in masculine, but gender neutral due to Ky. Rev. Stat. Ann. § 446.020. Targ: under 12.
	KY. REV. STAT. ANN. § 510.080 Sodomy, 2nd degree	Written in masculine, but gender neutral due to Ky. Rev. Stat. Ann. § 446.020. Perp: 18 or older; Targ: under 14.
	KY. REV. STAT. ANN. § 510.090 Sodomy, 3rd degree	Written in masculine, but gender neutral due to Ky. Rev. Stat. Ann. § 446.020. Perp: 21 or older; Targ: under 16.
	KY. REV. STAT. ANN. § 510.110 Sexual abuse, 1st degree	Written in masculine, but gender neutral due to Ky. Rev. Stat. Ann. § 446.020. Targ: under 12.
	KY. REV. STAT. ANN. § 510.120 Sexual abuse, 2nd degree	Written in masculine, but gender neutral due to Ky. Rev. Stat. Ann. § 446.020. Targ: under 14.
	KY. REV. STAT. ANN. § 510.130 Sexual abuse, 3rd degree	Written in masculine, but gender neutral due to Ky. Rev. Stat. Ann. § 446.020. Targ: 14–15 plus 5 yr. age diff.
	KY. REV. STAT. ANN. § 446.020 Gender & number	Use of the masculine includes the feminine unless otherwise indicated.
Louisiana 17	LA. REV. STAT. ANN. § 14:81 Indecent behavior with a juvenile	Gender neutral. Targ: under 17 plus 3 yr. age diff.

STATE CODE & COMMENT AGE OF CONSENT		
	LA. REV. STAT. ANN. § 14:81.2 Molestation of a juvenile	Gender neutral. Perp: over 17; Targ: under 17 plus 3 yr. age diff. plus use of force, intimidation, or position of authority.
	LA. REV. STAT. ANN. § 14:80 Felony carnal knowledge of a juvenile	Gender neutral. Perp: 19 yrs or older; Targ: 12–16. Perp: 17 or older; Targ: 12–14. **Phipps (17)
	LA. REV. STAT. ANN. § 14:80.1 Misdemeanor carnal knowledge of a juvenile	Gender neutral. Perp: 17–18; Targ: 15–16 plus 3 yr. age diff.
	LA. REV. STAT. ANN. § 14:43.3 Oral sexual battery	Gender neutral. Targ: under 15 plus 3 yr. age diff.
Maine 14/18	ME. REV. STAT. ANN. tit. 17-A, § 253 Gross sexual assault	Gender neutral. Targ: under 14; Targ: 18 if perp. has supervisory or disciplinary control.
	ME. REV. STAT. ANN. tit. 17-A, § 254	Gender neutral. Targ: 14–15 plus 5 yr. age diff. Perp: 21; Targ: 16–17 plus perp. is school personnel in target's school **Phipps (16)
Maryland 14/16	MD. CODE ANN., CRIMINAL LAW § 3-304 Rape 2nd degree	Gender neutral, but must involve a vagina. Targ: under 14 plus 4 yr. age diff.

STATE CODE & COMMENT AGE OF CONSENT		
	MD. CODE ANN., CRIMINAL LAW § 3-306 Sexual offense 2nd degree	Gender neutral. Targ: under 14 plus 4 yr. age diff.
	MD. CODE ANN., CRIMINAL LAW § 3-307 Sexual offense, 3rd degree	Gender neutral. Targ: under 14 plus 4 yr. age diff. Perp: 21 or older; Targ: 14–15 **Phipps (15)
	MD. CODE ANN., CRIMINAL LAW § 3-308 Sexual offense, 4th degree	Gender neutral but must involve a vagina. Targ: 14–15 plus 4 yr. age diff.
Massachusetts 16	MASS. GEN. LAWS ANN. ch. 265, § 22A Rape of a child	Gender neutral. Targ: under 16 plus force or threat used.
	MASS. GEN. LAWS ANN. ch. 265, § 23 Rape and Abuse of a child	Gender neutral. Targ: under 16. **Phipps (16)
	MASS. GEN. LAWS ANN. ch. 265, § 24B Assault of child; intent to rape	Gender neutral. Targ: under 16.
	MASS. GEN. LAWS ANN. ch. 272 § 4 Inducing persons under eighteen to have sexual intercourse	Gender neutral. Targ: under 18 but must be of "chaste life." [I do not consider this a protective statute since it leaves the target open to a trial regarding her sexual history.]
Michigan 16/18	MICH. COMP. LAWS § 750.520b Criminal Sexual Conduct, 1st degree	Gender neutral. Targ: under 13; Targ: 13–15 plus perp. in position of authority.

STATE CODE & COMMENT AGE OF CONSENT		
	MICH. COMP. LAWS § 750.520c Criminal Sexual Conduct, 2nd degree	Gender neutral. Targ: under 13; Targ: 13–15 plus Perp. in position of authority.
	MICH. COMP. LAWS § 750.520d Criminal Sexual Conduct, 3rd degree	Gender neutral. Targ: 13–15; Targ: 16–17 plus perp. is school personnel in target's school. **Phipps (16)
	MICH. COMP. LAWS § 750.520e Criminal Sexual Conduct 4th degree	Gender neutral. Targ: 13–15 plus 5 yr. age diff.; Targ: 16–17 plus perp. is school personnel in target's school
Minnesota 16/18	MINN. STAT. § 609.342 Criminal Sexual Conduct, 1st degree	Gender neutral. Targ: under 13 plus 36 mo. age diff.; Targ: 13–15 plus 48 mo. age diff. plus perp. is in position of authority; Targ: under 16 plus perp. has "significant relationship" to target plus force or coercion used.
	MINN. STAT. § 609.343 Criminal Sexual Conduct, 2nd degree	Gender neutral. Targ: under 13 plus 36 mo. age diff.; Targ: 13–15 plus 48 mo. age diff. plus perp. is in position of authority; Targ: under 16 plus perp. has "significant relationship" to target plus force or coercion used.

STATE CODE & COMMENT AGE OF CONSENT		
	MINN. STAT. § 609.344 Criminal Sexual Conduct, 3rd degree	Gender neutral. Targ: under 13 plus 36 mo. age diff.; Targ: 13–15 plus 24 mo. age diff.; Targ: 16–17 plus 48 mo. age diff. plus perp. is in position of authority; Targ: 16–17 plus significant relationship to perp. **Phipps (16)
	MINN. STAT. § 609.345 Criminal Sexual Conduct, 4th degree	Gender neutral. Targ: under 13 plus 36 mo. age diff.; Targ: 13–15 plus 48 mo. age diff. or perp. is in position of authority; Targ: 16–17 plus 48 mo. age diff. plus perp. is in position of authority; Targ: 16–17 plus significant relationship to perp.
	MINN. STAT. § 609.3451 Criminal Sexual Conduct, 5th degree	Gender neutral. Targ: under 16.
	MINN. STAT. § 609.352 Solicitation of Children to Engage in Sexual Conduct	Gender neutral. Perp: 18 or older; Targ: 15 and under.
Mississippi 14/16	MISS. CODE ANN. § 97-3-65 Statutory Rape	Gender neutral. Perp: 17 or older; Targ: 14–15 plus 36 mo. age diff.; Targ: under 14 plus 24 mo. age diff. **Phipps (17)

STATE CODE & COMMENT AGE OF CONSENT		
Missouri 17	MO. REV. STAT. § 566.032 Statutory Rape, 1st degree	Gender neutral. Targ: under 14.
	MO. REV. STAT. § 566.034 Statutory Rape, 2nd degree	Gender neutral. Perp: 21 or older; Targ: under 17. **Phipps (17)
	MO. REV. STAT. § 566.062 Statutory Sodomy, 1st degree	Gender neutral. Targ: under 14.
	MO. REV. STAT. § 566.064 Statutory Sodomy, 2nd degree	Gender neutral. Perp: 21 or older; Targ: under 17.
Montana 16	MONT. CODE ANN. § 45-5-501 Definitions	Gender neutral. Targ: under 16. **Phipps (16)
	MONT. CODE ANN. § 45-5-502 Sexual assault	Gender neutral. Targ: any age.
Nebraska 17	NEB. REV. STAT. § 28-319 Sexual assault, 1st degree	Gender neutral. Perp: 19 or older; Targ: under 16. **Phipps (16)
	NEB. REV. STAT. § 28-320 Sexual assault, 2nd or 3rd degree	Gender neutral. No age specified.
	NEB. REV. STAT. § 28-320.01 Sexual assault of a child	Gender neutral. Perp: 19 or older; Targ: 14 and under.
	NEB. REV. STAT. § 28-805 Debauching a minor	Gender neutral. Perp: 18 or older; Targ: under 17.

STATE CODE & COMMENT AGE OF CONSENT		
Nevada 16	NEV. REV. STAT. § 200.368 Statutory sexual seduction: Penalties	Gender neutral. Specifies age of perpetrator. **Phipps (16)
	NEV. REV. STAT. § 200.364 Definitions	Gender neutral. Perp: 18 or older; Targ: under 16. **Phipps (16)
New Hampshire 16/18	N.H. REV. STAT. ANN. § 632-A:2 Aggravated felonious sexual assault	Gender neutral. Targ: under 13; Targ: 13–15 plus perp. lives in same household or family relation; Targ: 13–17 plus perp. in position of authority.
	N.H. REV. STAT. ANN. § 632-A:3 Felonious sexual assault	Gender neutral. Targ: 13–15 yrs plus penetration; Targ: under 13, contact only. **Phipps (16)
	N.H. REV. STAT. ANN. § 632-A:4 Sexual assault	Gender neutral. Targ: 13 and over; Targ: 13–15 plus age diff. of 3 yrs. or fewer.
New Jersey 16/18	N.J. STAT. ANN. § 2C:14-1 Definitions	Gender neutral. No age specified.
	N.J. STAT. ANN. § 2C:14-2 Sexual assault	Gender neutral. Targ: under 13; Targ: 13–15 plus family relation or perp. in position of authority or 4 yr. age diff.; Targ: 16–17 plus family relation or perp. in position of authority. **Phipps (16)
	N.J. STAT. ANN. § 2C:14-4 Lewdness (exposure)	Gender neutral. Targ: under 13 plus 4 yr. age diff.

STATE CODE & COMMENT AGE OF CONSENT		
New Mexico 17/18	N.M. STAT. ANN. § 30-9-11 Criminal sexual penetration	Gender neutral. Targ: under 13; Targ: 13–18 plus position of authority. Perp: 18 or older plus 4 yr. age diff.; Targ: 13–16; Targ: 13–18 plus perp. is school personnel in target's school. **Phipps (16)
	N.M. STAT. ANN. § 30-9-12 Criminal sexual contact	Gender neutral. Targ: 18 and over plus no consent.
	N.M. STAT. ANN. § 30-9-13 Criminal sexual contact w/ a minor	Gender neutral. Targ: under 13; Targ: 13–18 plus perp. in position of authority.
New York 17	N.Y. PENAL LAW § 130.05 Sexual offense: lack of consent	Gender neutral. Targ: under 17.
	N.Y. PENAL LAW § 130.25 Rape, 3rd degree	Gender neutral. Perp: 21 or older; Targ: under 17. **Phipps (17)
	N.Y. PENAL LAW § 130.30 Rape, 2nd degree	Gender neutral. Perp: 18 or older; Targ: under 15.
	N.Y. PENAL LAW § 130.40 Criminal sex act, 3rd degree	Gender neutral. Perp: 21 or older; Targ: under 17.
	N.Y. PENAL LAW § 130.45 Criminal sex act, 2nd degree	Gender neutral. Perp: 18 or older; Targ: under 15 plus 4 yr. age diff.

STATE CODE & COMMENT AGE OF CONSENT		
	N.Y. PENAL LAW § 130.50 Criminal sex act, 1st degree	Gender neutral. Targ: under 11. Perp: 18 or older; Targ: under 13.
	N.Y. PENAL LAW § 130.70 Aggravated sexual abuse, 1st degree	Gender neutral. Targ: under 11. (Legislation changing ages is pending: 2003 New York Senate Bill No. 5278)
	N.Y. PENAL LAW § 130.60 Sexual abuse, 2nd degree	Gender neutral. Targ: under 14.
	N.Y. PENAL LAW § 130.65 Sexual abuse, 3rd degree	Gender neutral. Targ: under 11.
	N.Y. PENAL LAW § 130.66 Aggravated sexual abuse, 3rd degree	Gender neutral. Targ: under 11. (Legislation changing ages is pending: 2003 New York Senate Bill No. 5278)
	N.Y. PENAL LAW § 130.67 Aggravated sexual abuse, 2nd degree	Gender neutral. Targ: under 11. (Legislation changing ages is pending: 2003 New York Senate Bill No. 5278)
North Carolina 16	N.C. GEN. STAT. § 14-27.7A Statutory rape or sexual offense	Gender neutral. Targ: 13–15 plus 6 yr. age diff. **Phipps (16)
	N.C. GEN. STAT. § 14-27.2 Rape, 1st degree	Gender neutral. Perp: 12 or older; Targ: under 13 plus 4 yr. age diff.

STATE CODE & COMMENT AGE OF CONSENT		
	N.C. GEN. STAT. § 14-27.4 Sexual offense, 1st degree	Gender neutral. Perp: 12 or older; Targ: under 13 plus 4 yr. age diff.
North Dakota 18	N.D. CENT. CODE § 12.1-20-03 Gross sexual imposition	Gender neutral. Targ: under 15.
	N.D. CENT. CODE § 12.1-20-03.1 Continuous sexual abuse of child	Gender neutral. Targ: under 15.
	N.D. CENT. CODE § 12.1-20-05 Corruption or solicitation of minor	Gender neutral. Perp: 18 or older; Targ: 15–17. Perp: 18 or older; Targ: under 15. Perp: 22 or older; Targ: 15–17. **Phipps (15)
	N.D. CENT. CODE § 12.1-20-07 Sexual assault	Gender neutral. Perp: 18 or older; Targ: 15–17.
Ohio 16	OHIO REV. CODE ANN. § 2907.01 Definitions	"Minor" means under age 18;"juvenile" means under 18.
	OHIO REV. CODE ANN. § 2907.04 Unlawful sex. conduct with a minor	Gender neutral. Perp: 18 or older; Targ: 13–15. **Phipps (16)
	OHIO REV. CODE ANN. § 2907.05 Gross sexual imposition	Gender neutral. Targ: under 13.
	OHIO REV. CODE ANN. § 2907.06 Sexual imposition	Gender neutral. Perp: 18 or older; Targ: 13–15 plus 4 yr. age diff.

STATE CODE & COMMENT AGE OF CONSENT		
Oklahoma 16/18	OKLA. STAT. tit. 21 § 1111 Definitions	Gender neutral rape. Targ: under 16; Targ: 16–18 plus perp. is school personnel in target's school. **Phipps (15)
	OKLA. STAT. tit. 21 § 1114 Rape, 1st degree & 2nd degree	Gender neutral. Perp: 18 or older; Targ: under 14.
	OKLA. STAT. tit. 21 § 1123 Lewd or indecent propositions or acts to a child	Gender neutral. Targ: under 16.
Oregon 18	OR. REV. STAT. § 163.315 Incapacity to consent	Gender neutral. Targ: under 18.
	OR. REV. STAT. § 163.355 Rape, 3rd degree	Gender neutral. Targ: under 16.
	OR. REV. STAT. § 163.365 Rape, 2nd degree	Gender neutral. Targ: under 14.
	OR. REV. STAT. § 163.375 Rape, 1st degree	Gender neutral. Targ: under 12; Targ: under 16 plus certain family relationships.
	OR. REV. STAT. § 163.385 Sodomy, 3rd degree	Gender neutral. Targ: under 16.
	OR. REV. STAT. § 163.395 Sodomy, 2nd degree	Gender neutral. Targ: under 14.
	OR. REV. STAT. § 163.405 Sodomy, 1st degree	Gender neutral. Targ: under 12; Targ: under 16 plus certain family relationships.

STATE CODE & COMMENT AGE OF CONSENT		
	OR. REV. STAT. § 163.408 Unlawful sex. Penetration, 2nd degree	Gender neutral. Targ: under 14.
	OR. REV. STAT. § 163.411 Unlawful sex. Penetration, 1st degree	Gender neutral. Targ: under 12.
	OR. REV. STAT. § 163.415 Sexual abuse, 3rd degree	Gender neutral. Targ: under 18.
	OR. REV. STAT. § 163.427 Sexual abuse, 1st degree	Gender neutral. Targ: under 14.
	OR. REV. STAT. § 163.435 Contributing to the sexual delinquency of a minor	"[O]pposite sex" requirement. Perp: 18 or older; Targ: under 18. **Phipps (15)
	OR. REV. STAT. § 163.445 Sexual misconduct	Gender neutral. Targ: under 18.
Pennsylvania 16	18 PA. CONS. STAT. § 3121 Rape of a child	Gender neutral. Targ: under 13.
	18 PA. CONS. STAT. § 3122.1 Statutory sexual assault	Gender neutral. Targ: under 16 plus 4 yr. age diff. **Phipps (16)
	18 PA. CONS. STAT. § 3125 Aggravated indecent assault	Gender neutral. Targ: under 13; Targ: under 16 plus 4 yr. age diff.
	18 PA. CONS. STAT. § 3126 Indecent assault	Gender neutral. Targ: under 13; Targ: under 16 plus 4 yr. age diff.

STATE CODE & COMMENT AGE OF CONSENT		
Rhode Island 16	R.I. GEN. LAWS § 11-37-6 Sexual assault 3rd degree	Gender neutral. Targ: 14–15. **Phipps (16)
	R.I. GEN. LAWS § 11-37-8.1 Child molestation 1st degree	Gender neutral. Targ: 14 and under.
	R.I. GEN. LAWS § 11-37-8.3 Child molestation 2nd degree	Gender neutral. Targ: 14 and under.
South Carolina 14/16	S.C. CODE ANN. § 16-3-655 Criminal sexual conduct with minors	Gender neutral. Targ: under 11; Targ: 11–14; 14–15 plus perp. is in a position of familial, custodial or official authority. **Phipps (16)
South Dakota 16/18	S.D. CODIFIED LAWS § 22-22-1 Rape defined	Gender neutral. Targ: under 10; Targ: 10–15 plus 3 yr. age diff.; Targ: 10–17 plus perp. is parent's spouse or former spouse. **Phipps (16)
	S.D. CODIFIED LAWS § 22-22-7 Sexual contact with a child	Gender neutral. Perp: 16 or older; Targ: under 16.
	S.D. CODIFIED LAWS § 22-22-7.3 Sexual contact with a child; misdemeanor	Gender neutral. Perp: 16 or under; Targ: under 16.
	S.D. CODIFIED LAWS § 22-22-24.5 Solicitation of a minor	Gender neutral. Perp: 18 or older; Targ: under 18.

STATE CODE & COMMENT AGE OF CONSENT		
Tennessee 13/18	TENN. CODE. ANN. § 39-13-504 Aggravated sexual battery	Gender neutral. Targ: under 13.
	TENN. CODE. ANN. § 39-13-506 Statutory rape	Gender neutral. Targ: age 13–17 plus 4 yr. age diff. **Phipps (18)
	TENN. CODE. ANN. § 39-13-522 Rape of a child	Gender neutral. Targ: under 13.
	TENN. CODE. ANN. § 39-13-527 Authority figure, sexual battery	Gender neutral. Targ: age 13–17 plus perp. in supervisory or disciplinary position.
Texas 17	TEX. PENAL CODE ANN. § 22.011 Sexual assault	Gender neutral. Targ: under 17. **Phipps (17)
	TEX. PENAL CODE ANN. § 22.021 Aggravated sexual assault	Gender neutral. Targ: under 17.
	TEX. PENAL CODE ANN. § 21.01 Definitions	Gender neutral. No age specified.
	TEX. PENAL CODE ANN. § 21.11 Indecency with a child	Gender neutral. Targ: under 17.
Utah 16/18	UTAH CODE ANN. § 76-5-401 Unlawful sex activity with a minor	Gender neutral. Targ: 14–15.
	UTAH CODE ANN. § 76-5-401.1 Sexual abuse of a minor	Gender neutral. Targ: 14–15 plus 7 yr. age diff.

STATE CODE & COMMENT AGE OF CONSENT		
	UTAH CODE ANN. § 76-5-401.2 Unlawful sexual conduct with a 16 or 17 old	Gender neutral. Targ: 16–17 plus 10 yr. age diff.
	UTAH CODE ANN. § 76-5-402 Rape	Gender neutral. No age specified. **Phipps (16)
	UTAH CODE ANN. § 76-5-402.1 Rape of a child	Gender neutral. Targ: under 14.
	UTAH CODE ANN. § 76-5-402.3 Object rape of a child	Gender neutral. Targ: under 14.
	UTAH CODE ANN. § 76-5-403.1 Sodomy of a child	Gender neutral. Targ: under 14.
	UTAH CODE ANN. § 76-5-404 Forcible sexual abuse	Gender neutral. Targ: 14 and over.
	UTAH CODE ANN. § 76-5-404.1 Sexual abuse of a child, aggravated	Gender neutral. Targ: under 14.
	UTAH CODE ANN. § 76-5-406 Sexual offense without consent	Gender neutral. Targ: under 14; Targ: under 18 plus certain family relationships; Targ: 14–17 plus 3 yr. age diff.
Vermont 16/18	VT. STAT. ANN. tit. 13, § 3252 Sexual assault	Gender neutral. Targ: under 16; Targ: under 18 plus certain family relationships. **Phipps (16)
	VT. STAT. ANN. tit. 13, § 3253 Aggravated sexual assault	Gender neutral. Perp: 18 and older; Targ: under 10.

STATE CODE & COMMENT AGE OF CONSENT		
Virginia 18	VA. CODE ANN. § 18.2-61 Rape	Gender neutral. Targ: under 13.
	VA. CODE ANN. § 18.2-63 Carnal knowledge of a child	Gender neutral. Targ: 13–14.
	VA. CODE ANN. § 18.2-67.1 Forcible sodomy	Gender neutral. Targ: under 13.
	VA. CODE ANN. § 18.2-67.2 Object sexual penetration	Gender neutral. Targ: under 13.
	VA. CODE ANN. § 18.2-67.3 Aggravated sexual battery	Gender neutral. Targ: under 13. Targ: 13–14 plus use of force or threat.
	VA. CODE ANN. § 18.2-371 Causing or encouraging acts rendering children delinquent, abused, etc.; penalty; abandoned infant	Gender neutral. Perp: 18 or older; Targ: "child" 15 or older. **Phipps (18)
Washington 16/18	WASH. REV. CODE § 9A.44.073 Rape of a child, 1st degree	Gender neutral. Targ: under 12 plus 24 mo. age diff.
	WASH. REV. CODE § 9A.44.076 Rape of a child, 2nd degree	Gender neutral. Targ: age 12–13 plus 36 mo. age diff.
	WASH. REV. CODE § 9A.44.079 Rape of a child, 3rd degree	Gender neutral. Targ: age 14–15 plus 48 mo. age diff. **Phipps (16)

STATE CODE & COMMENT AGE OF CONSENT		
	WASH. REV. CODE § 9A.44.083 Child molestation, 1st degree	Gender neutral. Targ: under 12 plus 36 mo. age diff.
	WASH. REV. CODE § 9A.44.086 Child molestation, 2nd degree	Gender neutral. Targ: 12–13 plus 36 mo. age diff.
	WASH. REV. CODE § 9A.44.089 Child molestation, 3rd degree	Gender neutral. Targ: 14–15 plus 48 mo. age diff.
	WASH. REV. CODE § 9A.44.093 Sexual misconduct with a minor, 1st degree	Gender neutral. Targ: 16–17 plus 60 mo. age diff., perp. in significant relationship with target, and perp. in supervisory position over target.
	WASH. REV. CODE § 9A.44.096 Sexual misconduct with a minor, 2nd degree	Gender neutral. Targ: 16–17.
West Virginia 16	W. VA. CODE § 61-8B-2 Lack of consent	Gender neutral. Targ: under 16.
	W. VA. CODE § 61-8B-3 Sexual assault, 1st degree	Gender neutral. Perp: 14 or older; Targ: 11 and under.
	W. VA. CODE § 61-8B-5 Sexual assault, 3rd degree	Gender neutral. Perp: 16 or older; Targ: under 16 plus 4 yr. age diff. **Phipps (16)
	W. VA. CODE § 61-8B-7 Sexual abuse, 1st degree	Gender neutral. Perp: 14 or older; Targ: 11 and under.

STATE CODE & COMMENT AGE OF CONSENT		
	W. VA. CODE § 61-8B-9 Sexual abuse, 3rd degree	Gender neutral. Perp: 16 or older; Targ: under 16 plus 4 yr. age diff.
Wisconsin 18	WIS. STAT. § 948.02 Sexual assault of a child	Gender neutral. Targ: under 13; Targ: under 16.
	WIS. STAT. § 948.09 Sexual intercourse with a child	Gender neutral. Targ: 16 and over. **Phipps (16)
Wyoming 16	WYO. STAT. ANN. § 6-2-308 Criminality of conduct; Victim's age	Gender neutral.
	WYO. STAT. ANN. § 6-2-303 Sexual assault, 2nd degree	Gender neutral. Targ: under 12 plus 4 yr. age diff.
	WYO. STAT. ANN. § 6-2-304 Sexual assault, 3rd degree	Gender neutral. Perp: 18 or older; Targ: under 14; Targ: under 16 plus 4 yr. age diff. **Phipps (18)