

I CAN'T TO I KANT: THE SEXUAL HARASSMENT OF WORKING ADOLESCENTS, COMPETING THEORIES, AND ETHICAL DILEMMAS

*Jennifer Ann Drobac**

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* Associate Professor and John S. Grimes 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., Timothy Dooley, Professors Mary Anne Case, Dan Cole, John Hill, Linda Kelly-Hill, Andrew Klein, Anthony Page, and especially R. George Wright who reviewed and commented upon earlier drafts. Additional thanks to Miriam Murphy, Associate Director of our library, for her assistance. Finally, I am grateful for summer research stipends from Indiana University School of Law-Indianapolis that supported this Article. I dedicate this Article to Abram Dooley, Margaret Dooley, and Michal McDowell who recently joined the American workforce.

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I. INTRODUCTION

“Abandon Ship! Every man for himself!”

Capt. Robert Salmond, HMS Birkenhead, 1852

“Stand fast! Women and children first!”

Lt.-Col. Alexander Seton, HMS Birkenhead, 1852

“But to stand an’ be still to the *Birken’ead* Drill
is a damn tough bullet to chew”

Rudyard Kipling, *Soldier an’ Sailor Too*¹

¹ Accounts of the *Birkenhead*'s wreck vary. See, e.g., Iain Lundy, Women and Children First, <http://heritage.scotsman.com/greatscots.cfm?id=592282005> (last visited Dec. 19, 2006); Wikipedia, HMS Birkenhead, [http://en.wikipedia.org/wiki/HMS_Birkenhead_\(1845\)](http://en.wikipedia.org/wiki/HMS_Birkenhead_(1845)) (last visited Dec. 19, 2006).

Where is the legal theory that protects working teenagers from sexual harassment? Where is their lifeboat? Who speaks for our working adolescents and older teens on this subject?² In 2006, the U.S. Equal Employment Opportunity Commission (EEOC) announced that “[d]uring the height of the summer of 2004, more than 7.1 million young adults age 16–19 were employed.”³ Did those teens escape abuse?⁴ Consider that question while many adults focus on their own welfare.

The sexual harassment of adult female workers remains a serious problem;⁵ however, increasing numbers of teenagers are filing EEOC charges of discrimination.⁶ In 2001, teenagers filed two percent of the sexual harassment charges with the EEOC.⁷ By

² A Westlaw search of all legal periodicals for the last five years—TI (child! or teen! or adolescent!) & ((child! or teen! or adolescent!) w/5 (work or labor)) & (“FLSA” or “Title VII”) & da(after 2000)—produced 176 articles. Only four law review articles, in addition to mine, focused on child labor in the United States. Marie A. Failing, “*Too Cheap Work for Anybody But Us*: Toward a Theory and Practice of Good Child Labor,” 35 RUTGERS L.J. 1035 (2004); Seymour Moskowitz, *Malignant Indifference: The Wages of Contemporary Child Labor in the United States*, 57 OKLA. L. REV. 465 (2004); Celeste Corlett, Note, *Impact of the 2000 Child Labor Treaty on United States Child Laborers*, 19 ARIZ. J. INT’L & COMP. L. 713 (2002); Jessica Krieg, Comment, *There’s No Business Like Show Business: Child Entertainers and the Law*, 6 U. PA. J. LAB. & EMP. L. 429 (2004). Certainly, dedicated governmental agencies, including the U.S. Equal Employment Opportunity Commission (EEOC), function to protect working teens. Most advocacy groups, however, focus on working children outside of the United States. See, e.g., Understanding Children’s Work (UCW), About the UCW Project, <http://www.ucw-project.org> (stating that the UCW is an “inter-agency research project” between the International Labour Organization (ILO), UNICEF, and the World Bank) (last visited Dec. 19, 2006); Church World Service (CWS), Caution: Children at Work, <http://www.churchworldservice.org/FactsHaveFaces/childwrk.html> (last visited Dec. 19, 2006); United Nations Children’s Fund (UNICEF), Child Protection from Violence, Exploitation and Abuse, http://www.unicef.org/protection/index_childlabour.html (last visited Dec. 19, 2006).

³ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, FY 2007 PERFORMANCE BUDGET (2006), <http://www.eeoc.gov/abouteeoc/plan/2007budget/index.html> [hereinafter EEOC 2007 PERFORMANCE BUDGET].

⁴ The answer is negative. See Moskowitz, *supra* note 2, at 494–501.

⁵ The EEOC reported that workers filed 12,679 charges of sexual harassment in 2005. Men filed just over fourteen percent of those. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, SEXUAL HARASSMENT CHARGES: EEOC & FEPAS COMBINED: FY1992–FY2005, <http://www.eeoc.gov/stats/harass.html> (last visited Dec. 19, 2006).

⁶ “The EEOC has seen, through charges filed and anecdotal evidence, that discrimination is a problem for many in this [sixteen to nineteen-year-old] group.” EEOC 2007 PERFORMANCE BUDGET, *supra* note 3. The EEOC does not post the statistics for sexual harassment charges by minors. In 2003, I requested the sexual harassment charge trends for youths under eighteen and found that in 2002, minors filed approximately two percent (268 of 14,396) of the sexual harassment charges. See Jennifer Ann Drobac, *Sex and the Workplace: “Consenting” Adolescents and a Conflict of Laws*, 79 WASH. L. REV. 471, 479 & n.44 (2004) [hereinafter Drobac, *Sex and the Workplace*]. Per the direction of the EEOC, I will file a Freedom of Information Act (FOIA) request for additional and more current information.

⁷ Cathleen Flahardy, *EEOC Responds to Harassment Complaints from Teens: Finish Line*

2004, that number had quadrupled to eight percent.⁸ Rates are expected to rise.

Susan Fineran and James E. Gruber studied the problem of adolescent sexual harassment with a small sample of 260 high school females and found that forty-three percent had experienced some form of sexual harassment at their part-time jobs.⁹ Youth restaurant workers (62%) experienced more harassment than “care” workers (29%) who engaged in tasks such as babysitting and housekeeping.¹⁰ Teens described seventy-two percent of the perpetrators as being older than they were.¹¹ This small study sends an alarming message concerning the safety of adolescent workers and confirms the need for more research in this area.

In 1979, long before today’s working teenagers were even born, Catharine A. MacKinnon described her subordination theory to justify the prohibition of workplace sexual harassment as discrimination based upon sex.¹² She wrote:

Women are sexually harassed by men because they are women, that is, because of the social meaning of female sexuality, here, in the employment context. Three kinds of arguments support and illustrate this position: first, the exchange of sex for survival has historically assured women’s economic dependence and inferiority as well as sexual availability to men. Second, sexual harassment expresses the male sex-role pattern of coercive sexual initiation toward women Third, women’s sexuality largely defines women as women in this society, so violations of it are abuses of women as women.¹³

Other feminist legal theorists have added to our understanding of

Tailors Policy to Target Younger Workers, INSIDECOUNSEL, Nov. 2005, available at http://www.insidecounsel.com/issues/insidecounsel/15_168/labor/218-1.html.

⁸ *Id.*

⁹ Susan Fineran & James E. Gruber, *Sexual Harassment and Teens at Work 2* (Aug. 2005) (transcript available with Susan Fineran, Associate Professor at the University of Southern Maine). The authors noted that they studied predominantly white, suburban girls. *Id.* at 14. They postulated that given harassment rates of other groups, their figures “underreported the amount and type of [teen] harassment.” *Id.* at 14, 19.

¹⁰ *Id.* at 11.

¹¹ *Id.*

¹² See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 44 (1979). MacKinnon explained, “Sexual harassment, most broadly defined, refers to 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 [employment, for example] to lever benefits or impose deprivations in another [sexual relations].” *Id.* at 1.

¹³ *Id.* at 174.

why workplace sexual harassment constitutes a civil rights violation.¹⁴ These views may protect some minors. However, unique theoretical and ethical considerations may reinforce the prohibitions against the sexual harassment of teen workers.

Any theoretical exploration of the treatment of working minors must deal with several complicating factors. First, the law has never treated adolescents the same as adults.¹⁵ Statutory rape laws provide one example of how the law treats adolescent sexual conduct differently than it does consensual adult conduct.¹⁶ Based upon the reasoning that those children under the age of consent do not have the capacity to consent, statutory rape laws demonstrate that the law invalidates adolescent “consent”¹⁷ under certain circumstances.

Second, minors are not simply young adults. Teenagers exhibit different psychosocial, physical, and neurological traits than do most adults.¹⁸ New research confirms that adolescent brain development extends into the twenties, beyond the age of consent set in every state.¹⁹ Impulse control, emotional regulation, planning, decision-making, and organization capabilities may not fully mature until the third decade of life.²⁰ In addition, youth

¹⁴ See Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1171–72 (1998); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 450–51 (1997); Martha Chamallas, Essay, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN'S L.J. 37, 37–39 (1993) (reviewing the early scholarship); Katherine M. Franke, *Gender, Sex, Agency and Discrimination: A Reply to Professor Abrams*, 83 CORNELL L. REV. 1245, 1245, 1248–49 (1998); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 691 (1997) [Franke, *Sexual Harassment*; Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

¹⁵ See Drobac, *Sex and the Workplace*, *supra* note 6, at 473–77 (reviewing how the law treats adolescents differently than it does adults).

¹⁶ See *id.* at 484–86, 546 app. A; see also Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 706–07 (2000) [hereinafter Oberman, *Regulating Consensual Sex with Minors*]; Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 22 (1994).

¹⁷ I use quotations with adolescent “consent” because even explicit verbal consent by a minor may not constitute legal consent. See, e.g., *Combs v. Commonwealth*, 198 S.W.3d 574, 578 n.2 (Ky. 2006) (“‘Consent,’ as used here, does not mean ‘legal consent.’ The law deems a person under the age of sixteen to be incapable of consent. As used here, it means ‘to willingly engage in’ the activity.” (citation omitted)).

¹⁸ See Jennifer Ann Drobac, “*Developing Capacity*”: Adolescent “Consent” at Work, at Law, and in the Sciences of the Mind, 10 U.C. DAVIS J. JUV. L. & POL’Y 1, 11–32 (2006) [hereinafter Drobac, *Developing Capacity*] (discussing teen physical, psychosocial, and neurological developmental research).

¹⁹ Compare *id.* at 17–18, with Drobac, *Sex and the Workplace*, *supra* note 6, at 546 app. A (noting that the highest age of consent is eighteen).

²⁰ Drobac, *Developing Capacity*, *supra* note 18, at 22–27; JUVENILE JUSTICE CTR., AM. BAR

experiences may influence the winnowing and reorganization of brain gray matter during adolescence.²¹ Thus, new scientific research proves that adolescents are human being works in progress.

These developmental differences may influence the way that adolescents respond to and cope with sexual harassment.²² According to former EEOC acting Chair Paul Igasaki:

[Y]oung people are taught to respect their elders, and despite modern cautions that no one can touch you against your will, it is always difficult to take the risk of coming forward. If people experiencing harassment or unfair treatment are underage, they may be reluctant to talk about the problem with adults. When the problem touches on sex, teenagers may not feel comfortable discussing the topic even with their own parents.²³

ASS'N, ADOLESCENCE, BRAIN DEVELOPMENT AND LEGAL CULPABILITY 2 (2004), *available at* <http://www.abanet.org/crimjust/juvjus/Adolescence.pdf>.

²¹ Drobac, *Developing Capacity*, *supra* note 18, at 17–19.

²² In a policy statement, the American Academy of Child & Adolescent Psychiatry suggested: "It is common for children and adolescents to conceal these [sexual harassment] offenses 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." Am. Acad. of Child & Adolescent Psychiatry, Policy Statements: Sexual Harassment, Oct. 1992, <http://www.aacap.org/page.ww?section=Policy+Statements&name=Sexual+Harassment> (last visited Dec. 19, 2006).

²³ Paul Igasaki, *Civil Rights for Young Workers*, IMDIVERSITY.COM, Dec. 2004, http://www.imdiversity.com/Villages/Careers/articles/igasaki_youngworkers_1204.asp; *see also* Drobac, *Developing Capacity*, *supra* note 18, at 39–40 (documenting youth reluctance to discuss sexuality). According to Michael Blickman, who specializes in labor and employment at the law firm Ice Miller in Indianapolis:

"Younger employees are definitely more vulnerable to sexual harassment," he said.

"Because they have less experience in the workplace, they tend not to know their rights."

And even if they do, they are less likely to complain because they fear retaliation or the loss of the job, he said. Those attitudes often embolden the harasser.

Dana Knight, *Sexual Harassment and Bias Complaints Surging Among the Young*, INDIANAPOLIS STAR, Aug. 14, 2005. Other experts hold similar views:

"Teens are particularly vulnerable because they are new to the workplace, they are impressionable and are more likely than not at the bottom rung," said Jocelyn Samuels, vice president for education and employment with the National Women's Law Center. "They feel less authorized to complain, and they may not know that procedures are available to them."

"As long as humans have a dark spot, you can find a more sophisticated co-worker who takes advantage of someone more naive," said Naomi C. Earp, vice chairwoman at the EEOC, which launched a program this fall to train youths in high schools about sexual harassment after noticing an increasing number of such complaints.

Some teens who are taunted or touched may think the actions are not serious or assume that the culture is just part of work life, said Adele Rapport, regional attorney for the EEOC in Detroit. Her office has seen a number of teen harassment cases.

"A very small percentage of women complain. That's part of the issue with teens," Rapport said. "They are not sophisticated enough to know how to use those kinds of

Thus, experience indicates that teens respond to sexual harassment differently than adults do. We see that the second distinguishing factor, developmental differences, relates to the first complicating factor, differential legal treatment.²⁴

Recognition of the unique nature and status of adolescence clarifies a third complicating factor: adolescent “consent” may signify something different than adult consent and may, therefore, justify unique treatment under the law. Because adult consent (as opposed to mere tolerance or acquiescence) provides a complete defense to allegations of sexual harassment,²⁵ adolescent “consent” must be carefully considered in the analysis of the theoretical and ethical basis for sexual harassment prohibitions.

In Parts II and III, this Article considers the legal regulation of sexual conduct and sex-based harassment. Part II explores how socio-legal theory explains the regulation of sexuality. It discusses how such theory might address unique characteristics of teen development and employment to influence the law’s treatment of youth sexual harassment and adolescent “consent” to sex. Traditional, liberal, feminist, and pansexual perspectives regarding sexual conduct highlight the tension between safeguarding teen sexual autonomy and protecting maturing adolescents. This tension mirrors the conflict often associated with competing theoretical approaches to child policy, the self-determinist approach and the protectionist, nurturance perspectives.²⁶ Part III briefly reviews sexual harassment legal theory and how it protects adolescent workers. This section also notes the gaps in mainstream sexual harassment legal theory through which adolescents may fall

resources to report it.”

Amy Joyce, *Lawsuits Shed New Light on Sexual Harassment of Teens; More Young Workers File Complaints*, WASH. POST, Dec. 2, 2004, at A01.

²⁴ See generally *Roper v. Simmons*, 543 U.S. 551, 568–70 (2005) (using scientific and sociological studies to justify its decision regarding the appropriateness of the death penalty for minors); *Thompson v. Oklahoma*, 487 U.S. 815, 834–35, 835 n.43 (1988) (distinguishing legal rights of children and adults as related to adolescent psychosocial development).

²⁵ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986) (explaining that voluntary participation does not necessarily indicate consent or the welcomeness of the activity).

²⁶ See, e.g., Melinda G. Schmidt & N. Dickon Reppucci, *Children’s Rights and Capacities*, in *CHILDREN, SOCIAL SCIENCE, AND THE LAW* 76, 77 (Bette L. Bottoms et al. eds., 2002) (“Whereas nurturance rights emphasize children’s entitlements to nutrition, medical care, and other benefits, self-determination rights allow children to make autonomous decisions and exercise control over their environments.”); see also LAURA M. PURDY, *IN THEIR BEST INTEREST? THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN* 214 (1992) (exploring children’s liberationist views and arguing against equal rights for children); PHILIP E. VEERMAN, *THE RIGHTS OF THE CHILD AND THE CHANGING IMAGE OF CHILDHOOD* 50–51 (1992) (describing the self-determination orientation and the nurturance orientation).

unprotected.

Parts IV and V survey philosophical and psychological literature regarding adolescent capacity, legal rights, and ethical conduct. Part IV focuses first on classic philosophers who contemplated juvenile capacity—or the lack thereof. It then discusses adolescent psychosocial development to determine how science might influence the law's redress of the sexual harassment of adolescents. In Part V, this Article explores a Kantian perspective loosely patterned after the “categorical imperative” to formulate a dignity-based foundation for the prohibition of teen sexual harassment. This section answers how the law might respond to teen “consent” and explores the legal treatment of revocation.

Finally, Part VI concludes that the sexual harassment of adolescents differs from that of adults. It summarizes how harassment of teens is unique and offers a synthesis of legal theory, ethics, and sexual harassment law. This section invites further dialogue and assistance concerning the theoretical underpinnings for the prohibition of sexual harassment of teenagers by their adult co-workers.

II. SOCIO-LEGAL THEORY AND THE REGULATION OF SEX

The socio-legal regulation of sexual activity is not a new phenomenon. Legal theory concerning the regulation of sexuality may provide guidance for exploring the theoretical base of sexual harassment prohibitions and the redress of teen sexual harassment.

A. *The Traditional View*

Some scholars, including Martha Chamallas and William Eskridge, analyze the regulation of sex not according to the system (i.e., civil or criminal), but according to historical, societal mores, and values. In 1988, Chamallas distinguished between three dominant attitudes concerning sexual conduct: the traditional view, the liberal view, and the egalitarian view.²⁷ She explained that the traditional view relegated sexual conduct to the marriage bed.²⁸ This view, dominant until World War II,²⁹ promoted the marital family as the primary social institution. Embodied in law, this view

²⁷ Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 780 (1988).

²⁸ *Id.* at 781.

²⁹ *Id.* at 784.

focused concern not upon the sexual activity but upon the status of the parties.³⁰ The traditional view established normative parameters around sex. This view rejected nonmarital sex and female sexual autonomy.³¹ Needless to say, it also rejected the legitimacy of teen sexual exploration and autonomy.³²

Statutory rape law fits neatly within this traditional approach. Criminalizing sex with unmarried young women works to discourage both premarital sex and female autonomy. Professor Lea VanderVelde discussed in her research on this subject how, historically, a rapist might avoid prosecution by marrying his victim.³³ In 1995, William Eskridge wrote that this was still the case in Virginia.³⁴ Professor Chamallas noted that a promiscuous female adolescent could not sue for statutory rape.³⁵

The Bush administration's funding of abstinence-only education and disapproval of premarital sex marks a renewed enthusiasm for this traditional approach.³⁶ What is unclear, however, is how a neo-traditional approach might influence sexual harassment law for teenagers. One might anticipate no reform. Those teens who can prove that they indicated the sexual harassment was unwelcome can file under Title VII. Those who cannot prove their discomfort or those who "consented" deserve no relief under a traditional approach since those teens violated neo-traditional norms concerning appropriate teen sexual conduct. The result is similar to the denial of a rape claim by a promiscuous teenager.

Alternately, a neo-traditional reform might mandate the uniform treatment of adolescent "consent" in civil and criminal laws. Since the repeal of statutory rape laws would thwart neo-traditional

³⁰ *Id.* at 781.

³¹ See Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 846 & n.140 (1996). Professor Chamallas has explained that the marital rape exemption insulated husbands from rape prosecution or limited penalties, thereby negating the sexual freedom of women. Chamallas, *supra* note 27, at 797-98, 797 n.95 ("Only ten states authorize prosecutions of husbands for the rape of their wives on the same terms as other rape defendants.").

³² See Oberman, *Regulating Consensual Sex with Minors*, *supra* note 16, at 777 (advocating for statutory rape laws to set normative parameters, enabling boys and girls to discover their own sexual autonomy).

³³ VanderVelde, *supra* note 31, at 846 & n.140.

³⁴ William N. Eskridge, Jr., *The Many Faces of Sexual Consent*, 37 WM. & MARY L. REV. 47, 56 & n.29 (1995) (citing VA. CODE ANN. § 18.2-66 (1995)).

³⁵ Chamallas, *supra* note 27, at 789 & n.56 (citing MODEL PENAL CODE § 213.6(3) cmt. at 419-20 (1980)).

³⁶ Ceci Connolly, *Some Abstinence Programs Mislead Teens, Report Says*, WASH. POST, Dec. 2, 2004, at A01 (noting that the Bush administration planned to give \$170 million in 2005 to groups that teach abstinence-only).

control of nonmarital sexual expression, jurists would have to redraft civil law to match the dictates of criminal law regarding the legal validity of “consent.” Thus, we would end up with a variety of interpretations of adolescent “consent” under Title VII, depending on the respective state criminal designation of the age of consent. Under that reform, one might also anticipate the denial of money damages for those “consenting” underage plaintiffs since criminal law provides no financial compensation to the victim.

The Seventh Circuit Court of Appeals recently took a variation on this approach in *Doe v. Oberweis Dairy*, a sexual harassment case brought under Title VII by a sixteen-year-old teenager.³⁷ Judge Richard Posner explained:

To avoid undermining valid state policy by reclassifying sex that the state deems nonconsensual as consensual, to simplify employment-discrimination litigation, and to avoid intractable inquiries into maturity that legislatures invariably pretermit by basing entitlements to public benefits (right to vote, right to drive, right to drink, right to own a gun, etc.) on specified ages rather than on a standard of “maturity,” federal courts, rather than deciding whether a particular Title VII minor plaintiff was capable of “welcoming” the sexual advances of an older man, should defer to the judgment of average maturity in sexual matters that is reflected in the age of consent in the state in which the plaintiff is employed. That age of consent should thus be the rule of decision in Title VII cases.³⁸

This passage confirms that litigants should look to the age of consent set under state law to determine whether the plaintiff’s “consent” will have legal significance under Title VII. While the underage plaintiff’s “consent” presents no bar to liability, the court suggested in dicta that evidence of her “consent” might “be used to

³⁷ 456 F.3d 704, 707 (7th Cir. 2006). In reviewing the facts, Judge Richard Posner noted: Construing the evidence as favorably to her as the record permits, as we must, we assume that Nayman, the shift supervisor, regularly hit on the girls (most of the employees were teenage girls) and young women employed in the ice cream parlor. He would, as one witness explained, “grope,” “kiss,” “grab butts,” “hug,” and give “tittie twisters” to these employees, including the plaintiff. These things he did in the store, but he would also invite the girls to his apartment. He had sexual intercourse in the apartment with two of them, one of them a minor, before it was the plaintiff’s turn. He was 25 when he had intercourse with her.

Id. at 712–13.

³⁸ *Id.* at 713.

reduce the defendant's damages in such a case."³⁹

Thus, while the court did not close the door completely to money damages, it did invite a trial of the plaintiff's conduct on the matter. Judge Posner added that "a jury should be able to sort out the difference between an employer's causal contribution to the statutory rape by its employee of a 16-year-old siren (if that turns out to be an accurate description of Doe) and to similar conduct toward, say, a 12-year-old."⁴⁰ The court did not elaborate on what evidence defense counsel might introduce to prove that an ice cream scooper was a "siren."⁴¹ Nor is the opinion clear on why a sixteen year old might be a "siren" while a twelve year old experiencing similar conduct would not. One can anticipate, however, the chilling effect that this ruling may have on "consenting" underage teens and their parents who want to protect them from further trauma.

For a variety of reasons, including the limitations on female autonomy and the discriminatory distribution of marital benefits, some adults and parents do not share an enthusiasm for neo-traditionalism. They want their children to "know" their intended life partners well, in every way, including the "biblical" one, before they make an enduring commitment. This perspective does not mean, however, that these parents disfavor laws that protect adolescents from clever seducers and sexual pirates. These adults might prefer legal reforms that acknowledge adolescent autonomy and "developing capacity."⁴² In other words, they might prefer legal reforms which focus on the alleged harasser's conduct and not on adolescent "consent" that may bear no resemblance to adult volitional affirmation.

³⁹ *Id.* at 714.

⁴⁰ *Id.* at 715.

⁴¹ *See id.*; OXFORD ENGLISH DICTIONARY 547–48 (2d ed. 1989) (defining siren as "[o]ne of several fabulous monsters, part woman, part bird, who were supposed to lure sailors to destruction by their enchanting singing").

⁴² Several years ago, I explained the term "developing capacity" and distinguished it from "diminished capacity," a term used to describe juvenile criminal offenders:

I find the term "diminished capacity" 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 developing maturity.

Drobac, *Sex and the Workplace*, *supra* note 6, at 518–19 (footnotes omitted).

B. The Liberal View

Associated with the sexual revolution that reached its height during the 1960s, the liberal view emphasized consent, not marriage.⁴³ During the reign of sexual liberalism, the Supreme Court recognized the penumbral right to privacy, protecting citizens from governmental interference in matters pertaining to sexuality and procreation.⁴⁴ Only external harm to a third person justified legal intervention under this view.⁴⁵ Chamallas noted that because choice and consent legitimized much of what had been legally disapproved (nonmarital sex), the definition of consent became critically important.⁴⁶ She explained:

Consent is a devilishly malleable term which may describe a wide spectrum of responsive behavior, ranging from the mere failure to engage in active resistance, to active participation in and encouragement of another's initiatives. For that reason, a decision as to what conduct constitutes consent in any particular context may mask value judgments implicit in the choice of definition. A determination of sexual consent may, for example, serve as a proxy for moral judgments about the behavior of the parties or as a shorthand method for classifying certain forms of sexual behavior as normal.⁴⁷

Chamallas' discussion of consent prompts the idea that the criminal system's continuing denial of adolescent capacity reflects a value judgment that we, through our prosecutors, want to control adolescent sexual conduct. We think that sex with a minor is abnormal.⁴⁸ Rather than punish the young for violating our chosen parameters, we call them incompetent and punish, or attempt to

⁴³ Chamallas, *supra* note 27, at 790, 793.

⁴⁴ *Id.* at 793. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) ("That the constitutionally protected right of privacy extends to an individual's liberty to make choices regarding contraception . . ."); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that a woman's right to privacy, either grounded in the Fourteenth or Ninth Amendments, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that the right to use contraception "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees").

⁴⁵ Chamallas, *supra* note 27, at 782.

⁴⁶ *Id.*

⁴⁷ *Id.* at 795 (footnotes omitted).

⁴⁸ The notion of abnormality includes the view that teen-adult sex may be damaging to the minor. It also includes the view that even if the sex is not physically or psychologically damaging, teen-adult sex is morally wrong, consistent with the traditional view. While we may not hold the teen responsible for her participatory conduct in the first case, we might in the second. See *Doe v. Oberweis Dairy*, 456 F.3d 704, 714 (7th Cir. 2006).

deter, those who would thwart our notion of what is acceptable sexual conduct for a minor.

Civil (legal) recognition of adolescent “consent,” where it exists, may indicate a liberal value judgment about adolescent sexuality.⁴⁹ Perhaps evolving societal liberalism influenced the civil system more quickly than it did the criminal system and, therefore, explains the civil system’s treatment of adolescent sexuality. On the other hand, we still maintain control over adolescent conduct in the civil system by withholding access, thereby preventing adolescents, without representation by parents or guardians, from suing.⁵⁰

At the same time, some civil courts deem restoration for sexual (mis)conduct against minors in the form of money damages abnormal, offensive, or at least suspect.⁵¹ Paul Igasaki noted:

In cases of this sort [i.e., youth sexual harassment claims], the monetary damage awards can be misleading or seem confusing to older people. After all, even in a legitimate claim, one might ask how much is really “lost” by a young person possibly working for a brief stint at a low-paying gig, with other opportunities and career options ahead of them. Viewed in this limited light, the loss of a presumably temporary, burger-flipping job may seem “no big deal” or not worthy of significant damages. Some may even suspect that complaints are a “scam” to win big awards.⁵²

Do adults simply discount the value of a job at a burger joint (or

⁴⁹ See, e.g., Drobac, *Sex and the Workplace*, *supra* note 6, at 527–32 (discussing cases in which the court gives adolescent consent legal weight).

⁵⁰ Many states prohibit minors from filing lawsuits unless represented by a parent, next friend, or guardian. See, e.g., *Porter v. Triad of Arizona*, 52 P.3d 799, 802 (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 (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); *Klak v. Skellion*, 741 N.E.2d 288, 289–90 (Ill. App. Ct. 2000) (stating that a minor has no capacity to maintain an action in his name); *Cleaver v. George Staton Co.*, 908 S.W.2d 468, 469 (Tex. Ct. App. 1995) (finding a lack of capacity because of the disability of minors 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 section 803.01(3)(c)(2) of the Wisconsin Statutes that requires an adult to represent the minor).

⁵¹ See Drobac, *Sex and the Workplace*, *supra* note 6, at 530–31 (discussing *LK v. Reed*, 631 So. 2d 604 (La. Ct. App. 1994)). *LK v. Reed* involved a thirteen-year-old special education student. 631 So. 2d at 605. The *Reed* trial court suggested that girls might deliberately initiate sexual liaisons, “provoke” criminal prosecution, and recover damages. *Id.* at 607; see also Drobac, *Sex and the Workplace*, *supra* note 6, at 531.

⁵² Igasaki, *supra* note 23.

ice cream parlor)? Or do they also distrust sexually active youth?⁵³ In *Oberweis*, Judge Posner referred to Doe as possibly a “siren” and “a part-time teenage worker—[who] would hardly have been considered a valued employee.”⁵⁴ Thus, adults do both.

In *Doe ex rel. Roe v. Orangeburg County School District*,⁵⁵ the South Carolina Supreme Court also ruled that a fourteen year old’s “consent” to sexual battery was admissible as to the issue of damages but not as to liability.⁵⁶ The Court explained:

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.⁵⁷

One could argue that the court simply distrusted plaintiffs, but such an argument would not explain the admissibility of “consent” as to liability. The additional irony here is that South Carolina Doe was not even the plaintiff.⁵⁸ Her guardian was.⁵⁹

The interpretation of “consent,” treated differently depending upon the context, may serve as a proxy for traditional moral judgments about adolescent sexuality. In *Oberweis*, Judge Posner commented:

At the damages stage of this proceeding, should it get that far, the defendant—who is not Nayman, but Nayman’s employer—should be permitted to put Nayman’s conduct in perspective. If Doe was sneaking around behind her mother’s—and her employer’s—back and thus facilitating Nayman’s behavior, the employer may be able to show that the harm she suffered that was caused by its violation of Title VII (if such a violation is found on remand), rather than

⁵³ See, e.g., Suzanne M. Sgroi, *Discovery, Reporting, Investigation, and Prosecution of Child Sexual Abuse*, 29 SIECUS REP., Oct./Nov. 2000, at 6. Dr. Sgroi explained:

There was also a widespread belief (then [during the 1970s] as now) that engaging in sexual interaction was a transforming experience that marked an individual’s rite of passage to adulthood. A sexually experienced child was viewed as an anomaly by most of the general public, who believed that youthful victims of sexual abuse had “lost their innocence” and become contaminated in a way that made them seductive and dangerous.

Id.

⁵⁴ 456 F.3d 704, 715, 717 (7th Cir. 2006).

⁵⁵ 518 S.E.2d 259 (S.C. 1999).

⁵⁶ *Id.* at 261.

⁵⁷ *Id.* (quoting *Barnes v. Barnes*, 603 N.E.2d 1337, 1342 (Ind. 1992)).

⁵⁸ *Id.* at 259.

⁵⁹ *Id.*

by Nayman, was minimal.⁶⁰

One might argue that a reading of the Illinois statutory rape law would put Nayman's conduct into perspective for any jury. The court, however, focuses on the possibility that Doe was sneaking around to facilitate Nayman's behavior—as if this supervisor,⁶¹ the employer's agent, was incapable of resisting her sirenian charm.⁶² Clearly, the court sees her potentially as guilty as her supervisor, a man nine years her senior.⁶³

Certainly, if Doe was “sneaking around” and deceiving her parents, she should not have been. We need, however, to look deeper. Why was she sneaking? Was she thinking clearly, anticipating the consequences of her actions? Had her neurological synapses formed sufficiently that she was even capable of anticipating the consequences? Is her conduct as culpable as Nayman's such that she deserves to be placed on trial for being a “siren”? And is “siren” just a more genteel substitute for “slut”? Are we concerned because she deceived her mother, because she defied adult authority and dominion to meet the man who professed to care for her? Is it possible that she was not defying adult authority but merely complying with Nayman's? Perspective is so important. Spin is everything. In *Romeo and Juliet*, William Shakespeare cautioned, “Virtue itself turns vice, being misapplied,/And vice sometime's by action dignified.”⁶⁴

As we craft legal defaults, we need to consider carefully. Is it likely that nine girls out of ten will prove “Lolita”⁶⁵ such that we need to protect unwary men and uninformed employers? Or is it more likely that nine out of ten girls will prove confused, misguided, foolishly duped—such that we should protect them and put the adults on notice? And what about the tenth girl, the siren? How do we deal with her? Rather than punish nine girls out of ten to catch her, perhaps we could admonish the supervisor to keep it zipped and the employer to select its agents more carefully. The law is a blunt knife; arguably, one that should not be turned against

⁶⁰ 456 F.3d 704, 715 (7th Cir. 2006).

⁶¹ The question arose in *Oberweis* whether Nayman was, in fact, a supervisor. The court concluded in dicta that he was. *Id.* at 717.

⁶² *Id.* at 715.

⁶³ *Id.* at 713.

⁶⁴ WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 3.

⁶⁵ Ironically, in the novel, Lolita was not the narrating protagonist but was the object of a pedophile's desire. See generally VLADIMIR NABOKOV, *LOLITA* (Vintage Books 1989) (1955) (telling the story of a man sexually obsessed with his landlady's twelve-year-old daughter).

adolescent girls.

Whether the civil system's treatment of adolescent sexuality reflects a traditional or liberal perspective, the results are the same and appear quite sad. An underage adolescent suffers the shame, humiliation, and trauma of a public trial, while she endures the prosecution of her abuser.⁶⁶ She may be constrained or completely pre-empted, however, in her suit for damages and emotional distress because of her "consent." A look at this ironic result raises two questions. First, why do we anticipate her shame and trauma in the criminal context? Would she suffer shame because someone stole her car or ran into her with one? Arguably, we expect shame because of the lingering notion that the female attracts her rapist and the abuse she suffers. Traditional notions about pre-marital sex, the shame of unwed pregnancy, abortion, and welfare dependency contribute to the disapproval and, therefore, the shame.⁶⁷ If this is true, then we answer a second question: Why do we deny civil damages to a sexually active minor? Because she is morally tainted and undeserving.

Another ironic fact results from this inconsistent treatment of "consent": the convicted faces incarceration and perpetual social stigma as a registered sex offender in the criminal arena. At the same time, he enjoys potential immunity from prosecution for monetary damages for any emotional and physical injuries he caused the minor.⁶⁸ How is this logical? Again, an explanation finds its roots in the idea that we find him less culpable if she failed to say "No," or if, heaven forbid, she said, "Yes." We may have experienced the sexual revolution but as with any "revolution," one often returns to the starting point. Query whether society ever really abandoned the association between moral taint and the sexually active teen female.

⁶⁶ In *Oberweis*, Doe's alleged harasser, Matt Nayman, was tried, convicted, and imprisoned under Illinois criminal law for his sexual conduct with Doe. 456 F.3d at 707.

⁶⁷ See, e.g., JENNIFER J. FROST ET AL., THE ALAN GUTTMACHER INST., TEENAGE SEXUAL AND REPRODUCTIVE BEHAVIOR IN DEVELOPED COUNTRIES, OCCASIONAL REPORT NO. 8, at 16 (2001), available at http://www.agi-usa.org/pubs/us_teens.pdf (explaining that disapproval motivates concern over teenage pregnancy).

⁶⁸ See *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (finding no individual liability under Title VII).

C. The Egalitarian and Mutuality Perspectives

Professor Chamallas offered the egalitarian view as the feminist critical response to liberalism and the slippery definition of consent. The egalitarian perspective, a creation of the feminist movement of the 1970s, unveiled the fallacy of “consent” by females subordinated and disempowered in a male dominated culture.⁶⁹ This view asked whether women could truly consent in the face of threatened violence, economic coercion, and duplicitous misrepresentation.⁷⁰ The negative answer prompted the reform of criminal rape laws,⁷¹ the advent of sexual harassment cases,⁷² and the first sexual deception tort actions.⁷³

Thus, for Chamallas and feminist egalitarians, three inducements to consent—physical force, economic pressure, and deception—invalidate any “consent” procured by the more powerful, wealthier, or better-informed male partner.⁷⁴ For Chamallas, equality and mutuality, not just consent, are the keys to legitimate sexual activity.⁷⁵ Chamallas acknowledged that her analysis of these inducements first found expression in contract law.⁷⁶ The law voided contracts compelled by force and made voidable those contracts induced by economic duress or misrepresentations.⁷⁷ She noted that the inducements “are novel, however, in their application to the sexual encounter, a relationship the law seldom treats as contractual.”⁷⁸

William Eskridge also wrote of modern law’s “movement from

⁶⁹ Chamallas, *supra* note 27, at 796.

⁷⁰ *See id.* at 796–97.

⁷¹ *Id.* at 797–800. Chamallas highlighted the elimination of the resistance requirement and the passage of rape shield laws as two significant feminist reforms of criminal rape law. *Id.* at 799 & n.101.

⁷² *Id.* at 801–10, 801 n.109 (“Catharine MacKinnon states that the term was apparently first used as a term of art by activist groups in 1975.”). For further information regarding this topic, see MACKINNON, *supra* note 12, at 27.

⁷³ Chamallas, *supra* note 27, at 810–11. Chamallas discussed injury claims for sexually transmitted diseases and pregnancy complications. *Id.* at 811. In these cases, the defendants misled the plaintiff by lying or by failing to disclose critical information. *Id.* In all of these cases, the plaintiff experienced physical harm associated with the lie or omission. *Id.* Chamallas distinguished the sexual deception actions from the old seduction and breach of promise to marry claims. *Id.* at 813. The deception claims seek recovery for physical damages, not for damage to reputation. *Id.* at 811. Query whether a court would allow a claim for psychological injuries brought through a sexual deception claim.

⁷⁴ *Id.* at 814.

⁷⁵ *Id.* at 815.

⁷⁶ *Id.*

⁷⁷ *Id.* at 815 n.167 (citing E. ALLAN FARNSWORTH, CONTRACTS §§ 4.15–.17 (1982)).

⁷⁸ *Id.* at 815.

status to contract, from a medieval, collectivist understanding of human relations to a liberal, individual rights one.”⁷⁹ Like Chamallas, Eskridge saw consent to sexual contact invalidated by several factors.⁸⁰ In addition to physical force, economic duress, and deception, Eskridge suggested that the form of the activity and the status of the parties continue to play important roles.⁸¹ For example, Eskridge emphasized that sodomy and sadomasochism (S&M) were (at the time he wrote) illegal in many jurisdictions despite the consent of the parties.⁸² He explained the continuing importance of status:

Liberal consent-based regimes of legal regulation do not spring full-grown from the brow of Zeus. They accrete over time, gradually displacing traditional status-based regimes. . . . [W]e do not enjoy a liberal regime for regulating sexuality, and . . . the regime we do have reflects a mixture of consent-based and status-based rules. The ubiquitous language of consent is just a rhetorical device for discussing the issue, but a device masking the more complex reality.⁸³

Eskridge discussed not only marital status but also familial status and incest.⁸⁴ He identified pedophilia, bestiality, and mental disability as conditions or behaviors that negated consent.⁸⁵ For this last trio of factors, Eskridge concluded that incapacity (of the child, animal, or disabled) ostensibly justified the negation of “consent.”⁸⁶ Eskridge challenged the inclusion of adolescents in this last trio with the contention that fourteen and fifteen year olds engage in sexual behavior.⁸⁷ He pondered whether they might

⁷⁹ Eskridge, *supra* note 34, at 48.

⁸⁰ *Id.* at 49–51.

⁸¹ *See id.*

⁸² *Id.* at 50 & n.16 (citing VA. CODE ANN. § 18.2-361(A) (1995)). In 2003, the United States Supreme Court invalidated a Texas criminal law that prohibited consensual, adult, homosexual sodomy. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003). Thus, the Court removed one barrier to which Eskridge referred. The Court specifically noted, however, that its opinion addressed only adult conduct. *Id.* at 564, 578. It cautioned, “The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.” *Id.* at 578.

⁸³ Eskridge, *supra* note 34, at 53. Some scholars may challenge Eskridge’s linear description of a movement from the legal preference of status to contract. For example, Dan Cole suggests, referring to landlord-tenant rights, that the emphasis ebbs and flows. Comments from Professor Dan Cole (on file with author). Cole acknowledges, though, that Eskridge’s point survives this ebb and flow. *Id.*

⁸⁴ Eskridge, *supra* note 34, at 49–51, 54–55.

⁸⁵ *Id.* at 51.

⁸⁶ *Id.* at 52.

⁸⁷ *Id.* Eskridge gave no citation for his reference to national surveys concerning the sexual

actually have the capacity to make that choice.⁸⁸

Accepting Eskridge's mixed-regime perspective, one might argue that criminal statutory rape laws rely on the old status-based regime where the adolescent's "consent" matters only to classify the level of the crime. Civil laws reflect the more modern liberal view and highlight the transition from a status-based regime to a consent-based one. Finally, sexual harassment law results from the egalitarian, feminist response to the liberal view. It addresses the economic coercion or the power differential between the perpetrator and the "consenting" female employee. Perhaps *Oberweis* showcases the gradual transition to a more liberal regime, if not a completely feminist one.

Mutuality also attracted Eskridge's attention but he approached it from a slightly different angle than did Chamallas. He relied upon gay experience and gay theory to explore the regulation of sexuality.⁸⁹ Agreeing with feminist theorists, Eskridge rejected marriage as the legitimizing force for sexuality.⁹⁰ However, he went beyond some feminists to embrace the diversity of sexuality represented in S&M and Bondage and Domination (B&D).⁹¹ Eskridge explained that "[t]he B&D literature suggests both procedural and substantive methods by which to achieve the feminist goal of mutual benefit from sex in a society of diverse sexual preferences."⁹²

Eskridge also addressed sex with minors. He noted:

What has been missing in the American hysteria about sex with children has been fact-based theorizing about children's sexual development and the effects of sex with older people on that development. . . .

On the other hand, the gay experience suggests reasons to be cautious. One of them is AIDS. The HIV virus has infected the adolescent population through adolescent sex with older infected people who take advantage of adolescent immaturity to induce unsafe practices. Moreover, it may well be fair to do what Virginia has done, and to err on the side of caution in regulating sex between adolescents and

behavior of fourteen and fifteen year olds.

⁸⁸ *Id.*

⁸⁹ *Id.* at 62–63.

⁹⁰ *Id.* ("From our point of view, marriage is a rotten organizing principle, first, because same-sex couples are excluded from marriage.")

⁹¹ *Id.* at 63.

⁹² *Id.* at 64.

adults, while leaving sex among adolescents essentially unregulated.⁹³

Eskridge's discussion of adolescent sexuality displays a frustration with the lack of fact-based knowledge about adolescent development as well as an acknowledgement of teen vulnerability caused by immaturity.⁹⁴ Teen ignorance and inexperience may also contribute to their vulnerability.

In sum, scholars such as Chamallas and Eskridge view the treatment of consent to sex as a part of a regulatory regime.⁹⁵ When procreative marriage is the goal, consent to nonmarital sex validates little. When individual power and autonomy are the valued conditions, consent validates much sexual conduct but also leads to asymmetrical relations and, thereby, taints consent. When society emphasizes equality and mutuality, the quality of the consent and the capacity of the one consenting receive greater scrutiny. The negative inducements—physical force, economic duress, and deception—invalidate apparent “consent.”

D. A Pansexual Perspective

A pansexual perspective provides yet another useful view of consent as part of a regulatory scheme. Several years ago, I introduced the idea of pansexuality as a tool that “deconstructs the stereotypical interrelation [of] biological sex and sexual behavior.”⁹⁶ Pansexuality encompasses the sexuality of children. When we think of sexuality, most people automatically think of adult activity. This automatic response reflects stereotyped thinking, the notion that only adults can (or should) engage in sexual conduct. A pansexual

⁹³ *Id.* at 65 (footnotes omitted).

⁹⁴ *See id.* at 65.

⁹⁵ *See* Chamallas, *supra* note 27, at 795; Eskridge, *supra* note 34, at 55. Eskridge elaborated upon his thesis by asking what motivated the policy-based construction of the law concerning sexual consent. Eskridge, *supra* note 34, at 57–58. He concluded that “Victorian male fantasies” explain its initial construction. *Id.* at 58.

⁹⁶ Jennifer Ann Drobac, *Pansexuality and the Law*, 5 WM. & MARY J. WOMEN & L. 297, 298 (1999). I suggested:

Pansexuality encompasses all kinds of sexuality. It differs, however, from pansexualism, a perspective that declares “all desire and interest are derived from the sex instinct.” Pansexuality includes heterosexuality, homosexuality, bisexuality, and sexual behavior that does not necessarily involve a coupling. It includes, for example, masturbation, celibacy, fetishism, and fantasy. Moreover, pansexuality includes heteroerotic and homoerotic play and sexual aggression, sometimes mislabeled as “horseplay.”

I submit we are all pansexual, individually, and as a collective. *Id.* at 300–01 (footnotes omitted).

perspective is one that attempts to unveil stereotypical interconnections that hinder us in exploring biological sex, gender, and sexuality.⁹⁷ This perspective also facilitates the deconstruction of the stereotypical interrelation of age and sexual behavior. Experts agree that children are born sexual beings.⁹⁸ As they mature, their sexuality develops.⁹⁹ A pansexual perspective acknowledges that development and its nuanced expression. The statistics regarding teen sexuality reinforce the validity of a pansexual perspective.¹⁰⁰

Because the pansexual perspective eschews stereotypical interconnections and emphasizes the panorama of human potential, it encourages an approach to adolescent sexuality that steps beyond bright line demarcations. For example, one might argue that if teens are finding adult sexual partners at work, society should toughen the statutory rape and other child molestation laws. Such an approach denies “developing capacity” and, more particularly, teen sexual development. A pansexual approach acknowledges both the need for teen sexual experimentation and a measure of protection to neutralize youth sexual predators and minimize the negative consequences of immature choices. A pansexual perspective in combination with notions of mutuality and equality holds promise for the legal regulation of adolescent sexuality and teen-adult sexual relations.

E. Socio-Legal Theory for the Twenty-First Century Adolescent

New developments in the socio-legal regulatory regime that stress equality and mutuality must address the unique position of adolescents. Never in the history of the United States have

⁹⁷ See, e.g., Jennifer A. Drobac, *The Oncale Opinion: A Pansexual Response*, 30 MCGEORGE L. REV. 1269, 1272 (1999).

⁹⁸ LYNN BLINN PIKE, UNIVERSITY OF MISSOURI-COLUMBIA, SEXUALITY & YOUR CHILD: FOR AGES 0 TO 3, at 1 (2000), available at <http://muextension.missouri.edu/explorepdf/hesguide/humanrel/GH6001.pdf> (“Sexual learning, however, begins at birth. It is during the early years that your child will develop basic attitudes about sexuality.”). See generally MEG HICKLING, SPEAKING OF SEX: ARE YOU READY TO ANSWER THE QUESTIONS YOUR KIDS WILL ASK? (1996) (discussing how to approach conversations about sex with children of all ages).

⁹⁹ See ANGELA HUEBNER, VIRGINIA POLYTECHNIC INST., ADOLESCENT GROWTH AND DEVELOPMENT 1–2 (2000), available at <http://www.ext.vt.edu/pubs/family/350-850/350-850.pdf>; LYNN BLINN PIKE, UNIVERSITY OF MISSOURI-COLUMBIA, SEXUALITY AND YOUR CHILD: FOR AGES 3 TO 7, at 1 (1995), available at <http://muextension.missouri.edu/explorepdf/hesguide/humanrel/GH6002.pdf>.

¹⁰⁰ See Drobac, *Developing Capacity*, *supra* note 18, 32–39 (discussing adolescent sexuality, consent, and sexual harassment).

adolescents enjoyed a fully equal status with adults. The notion of adolescent-adult equality and mutuality contradicts historical and current social conditions, as well as legal reality. If we value equality and mutuality, then we should never assume, as we do with the “rule of sevens,”¹⁰¹ that an adolescent has the capacity to consent to sex with an adult. Whether or not she has capacity, she may lack the fortitude and power to refuse an adult solicitation of a sexual relationship. Her lack of equality alone makes any “consent” potentially suspect and dictates against a presumption of capacity.

We also must acknowledge that all three of the negative inducements may be important in the context of teen-adult sex.

1. Physical Force

First, physical force certainly plays a role. Anecdotal evidence from teen sexual harassment charges confirms that supervisors use physical force to intimidate and harass teen workers. At one Burger King in Missouri, a male manager pinned young female workers against the wall in a walk-in freezer and grabbed their breasts.¹⁰² A male manager at a California UltraStar Cinema assaulted a sixteen-year-old female worker, dislocating her shoulder.¹⁰³ A male manager at a Pennsylvania Mexican restaurant sexually assaulted a sixteen-year-old female worker.¹⁰⁴ Promising a ride home to a fourteen-year-old Kansas fast food worker, a manager drove her to his house and sexually assaulted her.¹⁰⁵ Another question for scientific investigation is whether youth workers disproportionately face more violence and aggression because of their physical and emotional immaturity and relative lack of power.

¹⁰¹ Under this 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 eighteen, a rebuttable presumption declares that minors are competent to consent and are responsible for criminal and negligent conduct. In the criminal system, this rule is also known as the infancy defense. *See generally* MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 180–81 (1997) (discussing the infancy defense and capacity to commit a crime).

¹⁰² Kim Bell, *Teens Told to Speak Out Against Harassment*, ST. LOUIS POST-DISPATCH, June 26, 2006, at B1.

¹⁰³ Flahardy, *supra* note 7.

¹⁰⁴ Youth @ Work, U.S. Equal Employment Opportunity Comm’n, *Sixteen-year-old Claims She Was Sexually Harassed at Pennsylvania Mexican Restaurant*, <http://youth.eeoc.gov/case2.html> (last visited Dec. 19, 2006).

¹⁰⁵ Youth @ Work, U.S. Equal Employment Opportunity Comm’n, *Fourteen-year-old Reports Sexual Harassment and Assault at Kansas Fast Food Restaurant*, <http://youth.eeoc.gov/case3.html> (last visited Dec. 19, 2006).

2. Duress and Teen Responses

Second, economic duress must figure prominently in the choice of adolescents to “consent” to sexual relations with workplace supervisors and managers. With adolescent unemployment so high,¹⁰⁶ and teen job skills so low, the level of duress arguably increases when a supervisor presses sexual activity. One young female worker from a Missouri Burger King allegedly had sex with the manager after he threatened her job.¹⁰⁷

How much of such sexual duress goes unreported because of teen reluctance to talk about sexual issues that Paul Igasaki noted?¹⁰⁸ In the Missouri case an investigative reporter explained:

Family members of the girls helped crack the case.

One of the teens became withdrawn and moody at home but wouldn't confide. Her older sister figured something at work was the culprit. So the older sister went undercover—getting hired at the same restaurant—to find the truth. On the older sister's second day on the job, the boss began doing the same things to her. He would rub up against her while she was at a cash register and make sexual comments.

The mother of another victim took a tape recorder into the Burger King to gather evidence. She asked people what they had seen. Her daughter had been too afraid to come forward, fearing she would lose her job as part of a school Work Study program and be unable to graduate.¹⁰⁹

This anecdote confirms not only Igasaki's experience regarding teen response to sexual harassment but also highlights a manipulation tool unique to student workers who work for scholastic credit. While harassers coerce adult workers with the loss of tangible economic benefits, predators can often coerce student workers with the loss of both economic and academic benefits.¹¹⁰

¹⁰⁶ See Drobac, *Sex and the Workplace*, *supra* note 6, at 477–78 (noting that youth unemployment rates far exceed those for adults and range from between fifteen and thirty-five percent).

¹⁰⁷ Bell, *supra* note 102.

¹⁰⁸ See Igasaki, *supra* note 23; *supra* note 23 and accompanying text.

¹⁰⁹ Bell, *supra* note 102.

¹¹⁰ See generally JENNIFER ANN DROBAC, *SEXUAL HARASSMENT LAW: HISTORY, CASES, AND THEORY* 511–28 (2005) (reviewing the harassment of student interns).

3. Deception and Teen Perception

Third, deception may also play an increased role in securing workplace adolescent consent or sexual favors. Inexperience and naiveté lead some adolescents to accept as true the most seemingly obvious misrepresentations. Adele Rapport, an EEOC attorney in Detroit, suggested that teens may conclude that taunting and touching are not serious or are just part of work culture.¹¹¹ I prosecuted a sexual harassment case against a movie theater in which a fifteen year old initially rebuffed her forty-year-old manager's sexual advances.¹¹² Later, she believed him when he lied to her, saying that he had a brain tumor and would live only a few months.¹¹³ He said that he loved her and that they should consummate "their love" while he could. When she was sixteen, she finally "consented" and was soon pregnant.¹¹⁴ This case provides just one example of youthful gullibility and predatory deception. This story rivals only those of the daytime soap operas. The influence of coyote confidants highlights adolescent vulnerability.

Finally, adolescents may view their adult supervisors and co-workers as parental authority figures or as role models for whom compliance and obedience is expected.¹¹⁵ An American Bar Association primer on child sexual abuse states, "[i]n other cases, [sexual abuse] offenders achieve compliance through the abuse of adult authority."¹¹⁶ Recall Igasaki's comment that children are taught to respect their elders.¹¹⁷ In one school sexual harassment case, the court noted, "[a] teenaged student's susceptibility to coercion by an adult role model inherently contains the elements of 'quid pro quo' activity which, under the current Title VII standards,

¹¹¹ Joyce, *supra* note 23.

¹¹² Drobac, *Sex and the Workplace*, *supra* note 6, at 471–72 (describing [Doe] v. Culver Theaters, No. CV139513 (Cal. Santa Cruz Super. Ct. 1999)).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ The Vice-President for Education and Employment at the National Women's Law Center, Jocelyn Samuels, offered, "[teens] feel less authorized to complain, and they may not know that procedures are available to them." Joyce, *supra* note 23.

¹¹⁶ CTR. ON CHILDREN AND THE LAW, AM. BAR ASS'N, A JUDICIAL PRIMER ON CHILD SEXUAL ABUSE 3 (Josephine Bulkley & Claire Sandt eds., 1994). Many states recognize an enhancement of sexual assault offenses against a minor when a member of the family or other adult in a position of authority commits the offense. Drobac, *Sex and the Workplace*, *supra* note 6, at 546 app. A; *see also* Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 66–69 (1997).

¹¹⁷ *See* Igasaki, *supra* note 23.

invokes strict liability.”¹¹⁸ Adult female workers might feel obliged to respect managerial authority but, unlike teen workers, they do not suffer the added servility of youth.

4. Socio-Legal Theory and Sexual Harassment Law

This discussion of general socio-legal theory relating to sexual relations offers guidance on the issue of teen sexual harassment and “consent.” A pansexual perspective acknowledges that teens are sexual beings that need opportunities to develop sexually in age-appropriate, safe ways. This view is consistent with an emphasis on equality and mutuality. Such an approach rules out most teen-adult sexual relationships at work since that environment may compromise both equality and mutuality for teens.

As an acknowledgement to teen “developing capacity” and autonomy, I have elsewhere advocated against legally restricting a teen who chooses to engage in sex with an adult co-worker.¹¹⁹ The adult partner would still run the risk of criminal prosecution and civil liability if the teen later withdrew consent during her minority (or shortly thereafter),¹²⁰ upon determining that her adult partner took advantage of her “developing capacity” or other vulnerability at the workplace. A strict liability scheme would prevent her withdrawn consent from being used against her in any subsequent sexual harassment suit.¹²¹ This approach operates like adolescent “consent” to a contract under common law.¹²² The “consent” to sex is

¹¹⁸ *Bolon v. Rolla Pub. Schs.*, 917 F. Supp. 1423, 1429 n.3 (E.D. Mo. 1996); *see also* *State v. Holm*, 137 P.3d 726, 752 (Utah 2006). The court in *Holm* found:

While the State's power to interfere with the private relationships of consenting adults is limited, it is well established that the same is not true where one of the individuals involved in the relationship is a minor. *See State v. Elton*, 680 P.2d 727, 732 (Utah 1984) (accepting the proposition “that young people should be protected from sexual exploitation by older, more experienced persons until they reach the legal age of consent and can more maturely comprehend and appreciate the consequences of their sexual acts”).

Id.

¹¹⁹ *See Drobac, Sex and the Workplace*, *supra* note 6, 544–45.

¹²⁰ I advocated an appropriate limitations period for suit and recovery. *Id.* at 545 n.377.

¹²¹ I advised 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. *Id.* at 544 n.375. Such a rule should satisfy skeptics. Moreover, we can expect previously injured minors to learn from the past and not need the same level of protection funded by an employer. *Id.*

¹²² Common law declared that a contract with a minor was not void but was voidable by the minor. ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS* § 227, at 318 (1st vol. ed. 1952). This law remains the majority rule. ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE* 1081 (4th ed. 2000).

voidable by the minor but not void. Adults remain free to “just say no.” As we move through the discussion regarding the theoretical support for the prohibition of sexual harassment, we should keep this approach in mind for further analysis.

III. SEXUAL HARASSMENT LEGAL THEORY

While socio-legal theory offers guidance for the theoretical justification of sexual harassment prohibitions, feminist legal theorists have created a library of work that addresses the problem directly. Because federal law did not explicitly prohibit the sexual harassment of women, feminist legal theorists first worked to prove why sexual harassment constituted discrimination “because of . . . sex” under Title VII of the 1964 Civil Rights Act.¹²³ As noted, Catherine MacKinnon introduced her subordination theory in 1979. She suggested that the male demand for sexual favors from female workers reinforces their subordination to men. She explained:

Sexual harassment perpetuates the interlocked structure by which women have been kept sexually in thrall to men and at the bottom of the labor market. Two forces of American society converge: men’s control over women’s sexuality and capital’s control over employees’ work lives. . . .

. . . .

. . . A guarantee of equal access to job training, education, and skills has little substance if a requirement of equality in hiring, promotion, and pay can legally be withheld if a woman refuses to grant sexual favors.¹²⁴

Certainly this reasoning applies to female teens as well as to adult women. However, it does not translate, without explanation, to support prohibitions for harassed teen males.

A. *Beyond the Subordination of Women*

The subordination theory depends on the exploitation of sexuality as associated with biological sex to sustain power roles, particularly heterosexual male power.¹²⁵ MacKinnon reasoned that “[f]rom an inequality perspective, too, the vulnerability of gays is analogous to

¹²³ 42 U.S.C. § 2000e-2(a) (2000); see MACKINNON, *supra* note 12, at 5–6.

¹²⁴ MACKINNON, *supra* note 12, at 174, 177.

¹²⁵ See *id.* at 220–21.

that of women.”¹²⁶ One might similarly argue that the vulnerability of minors is analogous to that of women. Males traditionally exercised phenomenal power over children. Early Roman law permitted even infanticide by fathers.¹²⁷ Thus, one could argue that male domination finds expression in the sexual subordination of younger, less powerful males and females.

Prisons provide numerous examples of exactly this type of male subjection. Analyzing same-sex sexual harassment in male prisons, James E. Robertson explained:

Most sexual aggressors in prison . . . are heterosexual[] [males] who define sexual aggression as affirmation of heterosexuality

. . . .

The first type of sexual harassment consists of comments intended to feminize the target and are thus offensive to most inmates. . . .

. . . .

[A]ttributes that mark inmates as effeminate or weak make them likely targets of sexual harassment. . . .

Being of slight stature or being a young, non-Hispanic white male also stigmatizes one as both effeminate and weak and thus prime sexual fodder.¹²⁸

Not only do physical attributes of targets correlate with the feminization of young inmates, labels such as “kid” and “punk” that are assigned to targets infantilize them and symbolically highlight the subordination of youth.¹²⁹

B. Gender Policing

Katherine Franke further explored same-sex harassment, sexuality, and sex-role stereotypes in her discussion of the “technology of sexism.”¹³⁰ She suggested that sexual harassment produces “gendered bodies” and enforces the hetero-feminization of women and the hetero-masculinization of men.¹³¹ She resisted the

¹²⁶ *Id.* at 204.

¹²⁷ LARRY S. MILLER, *HARDNESS OF HEART/HARDNESS OF LIFE: THE STAIN OF HUMAN INFANTICIDE* 29 (2000).

¹²⁸ James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 8–9, 18 (1999).

¹²⁹ DROBAC, *supra* note 110, at 603 n.21.

¹³⁰ Franke, *Sexual Harassment*, *supra* note 14, at 693.

¹³¹ *Id.* at 762.

notion that the harassment of non-masculine males meant their subordination as feminine objects.¹³² Instead, she insisted that legal theory acknowledges that men might be harassed “as a way of policing masculinity, which may or may not have the collateral damage of vilifying femininity.”¹³³ MacKinnon also discussed gender identity, sex roles, and sex role enforcement in her subordination theory.¹³⁴ No matter the angle one takes, one can acknowledge the value of a perspective that focuses on gender traits and not simply on biological sex.

Franke did not, however, immediately equate same-sex male sexual “horseplay”¹³⁵ and “bagging” as having a gendered disciplinary or regulating function.¹³⁶ If not explicitly endorsing the characterization, she repeated the description of such behavior as “unnecessary juvenile behavior by aggressive male co-workers.”¹³⁷ If it does not exemplify gender *policing* (and it may), this conduct arguably resembles the male self-assertive reinforcement of heterosexuality and power in prisons noted by Robertson. The description also specifically labels this reinforcement as *juvenile*. Why? My guess is that people think of sexual bullying and “horseplay” as a socializing and stratifying behavior common to adolescent boys. In *Oncale v. Sundowner Offshore Services Inc.*, the Court equated male-on-male horseplay with “ordinary socializing.”¹³⁸

It is possible that such socializing, in fact, marks the establishment of a gendered hierarchy and the policing of gender norms, a socialization process that begins during adolescence. I hope social-anthropologists will investigate this question. What becomes clear in this discussion, though, is that harassment may constitute not only the subordination of the disfavored sex (females),

¹³² *Id.* at 758.

¹³³ *Id.*

¹³⁴ See MACKINNON, *supra* note 12, at 151–58.

¹³⁵ See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

¹³⁶ See Franke, *Sexual Harassment*, *supra* note 14, at 767–68. Franke explained: “Bagging” is a practice whereby “one man would walk past another and make a feinting motion with his hand toward the other’s groin.” *Quick v. Donaldson Co.*, 90 F.3d 1372, 1374–75 (8th Cir. 1996) (“Quick alleges that at least twelve different male co-workers bagged him on some 100 occasions,” and that when he complained of this behavior, his employer “told him that the next time somebody bagged him ‘to turn around and bag the shit out of them.’”).

Id. at 767 n.400.

¹³⁷ *Id.* at 767–68 (quoting *Quick v. Donaldson Co., Inc.*, 895 F. Supp. 1288, 1296 (S.D. Iowa 1995), *rev’d*, 90 F.3d 1372, 1380 (8th Cir. 1996)).

¹³⁸ 523 U.S. at 81.

but also those individuals who exhibit or are assigned untraditional gender traits and youth. It also highlights the intersectional nature of sexual harassment.¹³⁹

C. Subordination in Context

Both Vicki Schultz and Kathryn Abrams contributed to the evolution of sexual harassment legal theory by integrating gender discrimination and sex-based subordination.¹⁴⁰ Focusing on gender enforcement and the masculine hierarchy of the workplace, Abrams discussed how sexual harassment robs women of the new work opportunities open to them.¹⁴¹ It undermines agency for both nonconforming men and women.¹⁴² By focusing on the workplace, Abrams saw that the sexually charged workplace evidences an authorization of male sexual initiative, masculine norms, and male hierarchical dominance.¹⁴³ Operating within the framework of Title VII, Abrams made a strong point about not losing sight of the venue.¹⁴⁴

Schultz emphasized not the sexual nature of sexual harassment, but its sex-based nature. She suggested:

Indeed, many of the most prevalent forms of harassment are actions that are designed to maintain work—particularly the more highly rewarded lines of work—as bastions of masculine competence and authority. . . .

. . . .

. . . The focus of harassment law should not be on sexuality as such. The focus should be on conduct that consigns people to gendered work roles that do not further their own aspirations or advantage.¹⁴⁵

¹³⁹ See generally Dorothy Roberts, *The Collective Injury of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 365, 370–72 (Catharine MacKinnon & Reva B. Siegel eds., 2004); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); Peggie R. Smith, *Separate Identities: Black Women, Work, and Title VII*, 14 HARV. WOMEN'S L.J. 21 (1991); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775, 796–801 (1991).

¹⁴⁰ Abrams, *supra* note 14, at 1169; Schultz, *supra* note 14.

¹⁴¹ Abrams, *supra* note 14, at 1195–98.

¹⁴² *Id.* at 1220.

¹⁴³ *Id.* at 1205–17.

¹⁴⁴ *Id.* at 1219; see also Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345 (1980).

¹⁴⁵ Schultz, *supra* note 14, at 1687, 1689.

Take this emphasis on gendered roles and venue and focus not on the entry of women into male dominated workplaces but on the entry of adolescents into adult dominated workplaces.

In 2006, Robert Bozick published his findings regarding the relationship between employment and first sexual intercourse for young teens.¹⁴⁶ He wanted to know whether work influenced teen sexual development.¹⁴⁷ He tested two hypotheses: the opportunity-cost hypothesis¹⁴⁸ and the precocious development hypothesis. He hypothesized:

In the precocious development hypothesis, involvement in an adult role at an early age may lead adolescents to prematurely view themselves as adults, resulting in early experimentation with other adult behaviors. Participation in the workforce, therefore, should be associated with an increased likelihood of early sexual behavior. Additionally, teens who hold jobs in adult environments, such as restaurants and retail stores, where they have less parental supervision and greater exposure to older teens and adults, should have higher odds of early first sexual intercourse than teens who hold jobs normative for their age, such as babysitting or mowing lawns.¹⁴⁹

While nuanced details of his fascinating study are beyond the scope of this Article, Bozick found that work experiences significantly influence twelve to fourteen year olds.¹⁵⁰ Specifically, young adolescents who work eleven to twenty hours per week engage in early sexual intercourse at a rate seventy-one percent higher than nonworkers.¹⁵¹ Young adolescents working at adult jobs engage in sexual intercourse at a rate seventy-nine percent higher than nonworkers.¹⁵² Bozick determined that “[w]orking in a youth job has no bearing on the odds of engaging in sexual

¹⁴⁶ Robert Bozick, *Precocious Behaviors in Early Adolescence: Employment and the Transition to First Sexual Intercourse*, 26 J. EARLY ADOLESCENCE 60 (2006).

¹⁴⁷ *Id.* at 61.

¹⁴⁸ Bozick explained:

The opportunity-cost hypothesis . . . predicts that young adults who have strong ties to the labor force will perceive there to be viable and achievable economic opportunities and consequently refrain from risky behaviors that could potentially jeopardize their chances of attainment. Sexual behavior in this sense is considered risky as it could lead to unwanted pregnancy or sexually transmitted diseases.

Id. at 63.

¹⁴⁹ *Id.* at 65.

¹⁵⁰ *Id.* at 66.

¹⁵¹ *Id.* at 74.

¹⁵² *Id.* at 78.

intercourse in the early teen years.”¹⁵³ He concluded that the data supported the premise of the precocious development hypothesis.¹⁵⁴ Stunned? Consider next that none of these children had reached the age of consent by any state’s standard.¹⁵⁵

Of course, Bozick’s study does not shed light on several concerns important to the issue of adolescent sexual harassment. First, the transition to first sexual activity may be completely welcome for these youths. If the sex is consensual, that fact might distinguish it from conduct complained of by harassed adult workers who find sexual conduct unwelcome. With that thought, however, we also return to the question of whether a twelve year old has the capacity or power to consent.¹⁵⁶ If not, the conduct might be equated at law with adult sexual harassment.

Second, the data does not reveal with whom these children are having sex, whether with their peers, adult co-workers, or others.¹⁵⁷ We also know nothing of the mutuality of that sex.¹⁵⁸ I am reminded of Fineran’s finding that seventy-two percent of the harassers in her study of female high school workers were reportedly older than their targets.¹⁵⁹ However, it would be irresponsible to correlate the information from that study with Bozick’s. I suggest again that this problem begs for research.

In a land of speculation, let us hypothesize that many sexual partners are male adult co-workers or supervisors. Kathryn Abrams’s concerns then resurface: it is possible that these teens are being socialized at work to the validity of male sexual initiative, masculine norms, and male hierarchical dominance.¹⁶⁰ Moreover, we must reconsider Chamallas’s discussion of equality and mutuality¹⁶¹ and question how equal a fourteen-year-old fast food restaurant worker and her adult supervisor really are. How

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 80. According to Bozick, several studies “suggest that opportunities in the labor force suppress risky sexual behavior among older adolescents and young adults.” *Id.* at 64. These studies examined the use of birth control and the incidents of pregnancy, however, and did not appear to focus on sexual development generally.

¹⁵⁵ See generally Drobac, *Sex in the Workplace*, *supra* note 6, at 546 app. A (providing the “age of consent” from statutes in all fifty states).

¹⁵⁶ See generally Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983, 983 (1993) (questioning whether children have the capacity to consent).

¹⁵⁷ See Bozick, *supra* note 146, at 69–73 (not considering adolescent partners as variables).

¹⁵⁸ See *id.* (not considering mutuality as a variable).

¹⁵⁹ See Fineran & Gruber, *supra* note 9, at 11.

¹⁶⁰ See Abrams, *supra* note 14, at 1204–17.

¹⁶¹ See Chamallas, *supra* note 27, at 815.

mutually beneficial is their sexual encounter?

Catharine MacKinnon also spoke to socialization. She explained:

Sexual harassment as a working condition often does not require a decisive yes or no to further involvement. . . . Since communicated resistance means that the woman ceases to fill the implicit job qualifications, women learn, with their socialization to perform wifely tasks, ways to avoid the open refusals that anger men and produce repercussions.¹⁶²

Are adolescent girls learning wife-like tasks? Are their brains being hardwired with those lessons? Again in the land of speculation, one might answer these questions in the affirmative with the precocious development hypothesis. More research regarding the details of teen sexual activity, teen employment, and adolescent sexual harassment will answer some of these questions.

D. Beyond Subordination Theory

During the last decade, sexual harassment theory has evolved beyond MacKinnon's subordination theory. Summarizing what she saw as the problem, Linda Kelly Hill wrote:

Yet despite feminism's hegemonic strength, feminist theory is on the brink of self-annihilation. After waves of liberal, radical, and cultural feminism, we are now riding a "third wave" of feminism that risks crashing into nothingness. The permutations of feminist legal theory have proliferated to the point of endangering feminism's existence.

. . . .

. . . [T]o truly recognize the freedom of women and men, the ubiquity of patriarchy cannot be presumed.¹⁶³

Kelly Hill emphasized a focus on the abominable conduct rather on its motivation.¹⁶⁴

In her review essay, Elizabeth Anderson recognized equality theory—including sexual equality, economic equality, and formal equality—but also described two alternative approaches which provide relief where equality theory may not.¹⁶⁵ She suggested that

¹⁶² MACKINNON, *supra* note 12, at 44.

¹⁶³ Linda Kelly Hill, *The Feminist Misspeak of Sexual Harassment*, 57 FLA. L. REV. 133, 135, 186 (2005) (footnotes omitted).

¹⁶⁴ *Id.* at 186.

¹⁶⁵ Elizabeth Anderson, *Recent Thinking About Sexual Harassment: A Review Essay*, 34 PHIL. & PUB. AFF. 284, 290–92 (2006).

equality theory best addresses injuries among social groups.¹⁶⁶ About the alternatives, she explained:

Sexual autonomy theories view sexual harassment as an oppressive enforcement of conventional sexist and homophobic norms of gender and sexuality. It forces people to conform to these norms, and punishes anyone who deviates. . . . These theories seek to protect individual freedom of sexual expression.

Dignity theories abstract from the possibly sexist or homophobic intent and effects of harassing behavior, locating the wrong instead in the means harassers use to achieve their objectives. . . . Dignity theories uphold conventional norms of respect for individuals, rather than challenging conventional norms of gender and sexuality.¹⁶⁷

Both of these theories, imported to remedy sexual harassment, serve without insisting on a challenge to a perceived patriarchal order.

One can immediately envision the utility of both sexual autonomy theory and dignity theory in a comprehensive theoretical scheme designed to bolster the prohibition of sexual harassment of teen workers. Drawing from the pansexual perspective, we acknowledge that teens are sexual beings. A theory of sexual autonomy underscores the importance of permitting an adolescent to explore her sexuality in a safe, age-appropriate manner, without moralistic repression. A theory of dignity secures for her a basic level of respect as an individual. If combined with both a subordination theory and the notion that adolescents belong to one or more subordinated groups, these approaches could produce a robust theoretical base for legal protection of working teenagers.

¹⁶⁶ *Id.* at 289–90.

¹⁶⁷ *Id.* at 290–91. See generally Susanne Baer, *Dignity or Equality? Responses to Workplace Harassment in European, German, and U.S. Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 139, at 582 (differentiating the European Union and German legal reaction to sexual harassment based on dignity from the United States' legal reaction to sexual harassment based on equality); Orit Kamir, *Dignity, Respect, and Equality in Israel's Sexual Harassment Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 139, at 561–62 (presenting the Israeli approach to sexual harassment laws); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 4 (1999) ("This article argues for a comprehensive re-examination of how workplace harassment is conceptualized.").

IV. PHILOSOPHY AND PSYCHOLOGY

At a certain point, however, statistics, theory, and historic trends frustrate the instinctual desire to protect our children—including our older children. We might take the step that could be challenged on every intellectual level and say, “Just do it. Protect them! To hell with the justifications.” Rather than succumb to this iconoclastic response, let us first turn instead to psychologists and philosophers¹⁶⁸ who explore what we know instinctually about human beings. Their work offers guidance for theorizing about sexual harassment law for teenagers.

A. *Some Classic Philosophers on Children and Capacity*

Moral philosophers often have not considered children to be rational beings. For example, in his discussion of moral responsibility, Aristotle equated children with animals.¹⁶⁹ He said, “[B]oth children and animals have a share in voluntary action, but not in choice; and we call actions done on the spur of the moment voluntary, but not the result of choice.”¹⁷⁰ Aristotle suggested that acts committed in ignorance were “non-voluntary” but only “involuntary” if they subsequently caused the actor pain and repentance.¹⁷¹ Thus, according to Aristotelian philosophy, any adolescent operating in ignorance could not act voluntarily, could not exercise choice, and could not, therefore, consent as the law now understands it.¹⁷²

1. The Social Contract Theorists

In her discussion of children’s political and moral rights, Katherine Federle critiqued the emphasis on juvenile incapacity by

¹⁶⁸ I note here that, with a few exceptions, I do not cite to the original philosophers or scientific studies but to accounts of those original works by competent experts. The aim here is not to properly interpret any particular philosopher, but to raise and discuss ideas that are of interest independent of pedigree.

¹⁶⁹ THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS 116 (J.A.K. Thomson trans., Penguin Books rev. ed. 1976).

¹⁷⁰ *Id.* at 116.

¹⁷¹ *Id.* at 113.

¹⁷² *See id.*; *see also* Bernstein, *supra* note 14, at 457 (“According to Aristotle, ‘the deliberative faculty in the soul is not present at all in a slave; in a female it is present but ineffective; in a child present but undeveloped.’ And for Aristotle there could be no good life without reason . . .” (footnotes omitted)).

many political and moral philosophers.¹⁷³ She provided a valuable review of perspectives, beginning with seventeenth and eighteenth century philosophers.¹⁷⁴ While a complete analysis of her work is beyond the scope of this Article, a summary of her conclusions adds value to this exploration of sexual harassment legal theory. First, Federle related that the Social Control theorists, such as Thomas Hobbes, John Locke, and Jean Jacques Rousseau, believed “that children have no freedom because of their incompetencies and are instead subject to parental authority until they attain capacity.”¹⁷⁵ Locke thought that reason and knowledge develop incrementally through experience.¹⁷⁶ The more experience and reason children acquire, the less protection they need.¹⁷⁷ Thus, parents, and ultimately the state, were charged with the welfare of children until they reached maturity.¹⁷⁸ Influenced by the Enlightenment, these men determined that only those persons who could engage in rational thought and choice merited freedom and political power.¹⁷⁹ Incompetency did not merely limit rights; it negated them completely.¹⁸⁰ Children enjoyed neither freedom nor autonomy because of their incapacity.

¹⁷³ Federle, *supra* note 156, at 987.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 987. Anita Bernstein noted that Rousseau held similarly disparaging views concerning women. Bernstein, *supra* note 14, at 457 (“Rousseau denounced women as incapable of thought and unsuited to education; his ‘highest accolade’ for a woman was ‘Oh lovely ignorant fair!’” (footnotes omitted)).

¹⁷⁶ Federle, *supra* 156, at 991, 994.

¹⁷⁷ Jennifer Soper, *Straddling the Line: Adolescent Pregnancy and Questions of Capacity*, 23 LAW & PSYCHOL. REV. 195, 198 (1999) (citing DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD 2–10, 25 (1993)). This belief appears consistent with a notion of “developing capacity.”

¹⁷⁸ *Id.* Federle explained, “But the social compact theorists articulated a vision of childhood and family that influenced their own jurisprudence as well as present notions about children and parents. It is to these familial power relationships that the social compact theorists analogize when speaking of the state’s authority over its own citizens.” Federle, *supra* note 156, at 987–88; *see also* Parham v. J.R., 442 U.S. 584, 602 (1979) (“The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”).

¹⁷⁹ Federle, *supra* note 156, at 987–95. Bernstein explained that Hobbes and Locke ignored women in their political discussions. Bernstein, *supra* note 14, at 457 (“Hobbes, Locke, and Adam Smith, did not craft misogynous aphorisms about reason as they constructed their view of the state. Rather, their writings, which refer continually to the individual, presume the absence of women’s thought, consent, and decisionmaking.”).

¹⁸⁰ Federle, *supra* note 156, at 995.

2. Further Perspectives on Children and Rationality

Second, Federle reviewed Utilitarian and, later, Legal Positivist views.¹⁸¹ Like the Social Contract theorists, Utilitarians and Legal Positivists also rejected the idea that children could reason effectively.¹⁸² Federle distinguished the Utilitarians, including Jeremy Bentham and John Stuart Mill, from the Social Contract theorists: “Although, in utilitarian terms, capacity is the ability to make rational choices in the pursuit of happiness (rather than the competence to consent under social contract theory), it is that capacity which circumscribes governmental interference with individual autonomy.”¹⁸³ The Legal Positivists—including H.L.A. Hart—also equated capacity with rational thought.¹⁸⁴ Hart contended that rational ability empowered individuals to affect the application of law and the exercise of rights.¹⁸⁵ For both groups, juvenile irrationality meant a lack of capacity and a lack of political power.

Federle also discussed moral philosophers and specifically Immanuel Kant. She summarized Kant’s views on children:

Children are passive citizens in Kant’s political state because they are dependent upon their parents for their support, and, although they do have certain moral rights which spring from their innate right to freedom, children lack the capacity Kant associated with greater liberty and political participation. . . .

. . . .

. . . Kant does not dispute the centrality of capacity to concepts of freedom and autonomy; consequently, the rights children have are protective rights that depend upon others for enforcement.¹⁸⁶

This passage confirms that while still endorsing the incapacity of children,¹⁸⁷ Kant reasoned that children are born with rights that

¹⁸¹ *See id.* at 995, 1009.

¹⁸² *Id.* at 990, 999, 1010.

¹⁸³ *Id.* at 998.

¹⁸⁴ *Id.* at 1009–10.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1000, 1002. Anita Bernstein noted that Kant held a similarly low opinion of women. Bernstein, *supra* note 14, at 457 (“Kant wrote that women were not ‘capable of principles’ and that their ‘philosophy is not to reason, but to sense.’” (footnotes omitted)).

¹⁸⁷ Allen Wood suggested that Kant believed that young children do not have the capacity to set ends and, therefore, are not “persons” for purposes of ethics analysis. ALLEN W. WOOD, KANT’S ETHICAL THOUGHT 144 (1999). I thank R. George Wright for his gift of Allen’s book

others, including parents, enforce.¹⁸⁸

John Rawls echoed this moral justification for examining the rights of children.¹⁸⁹ Rawls also rejected, however, the idea “that the mere humanness of children confers equal liberty.”¹⁹⁰ Federle concluded, “Rawls sees children as moral primitives who must be protected from the ‘weakness and infirmities of their reason and will in society’; others, therefore, are authorized to act on children’s behalf in a manner most likely to secure their approval when they become rational persons.”¹⁹¹

3. Approaching Women and Children

Even children’s rights theorists, argued Federle, agree concerning the limited capacity of some children.¹⁹² To avoid the dilemma of where to draw the line between capacity and incapacity, some advocates, such as Richard Farson and John Caldwell Holt, presume capacity to argue that children deserve the same legal and political rights as adults.¹⁹³ Others, such as Bruce Hafen and Joseph Goldstein, use incapacity to support the reinforcement of parental control.¹⁹⁴

Federle acknowledged that some theorists discuss children’s rights not by focusing on capacity but by exploring the relationships that involve children.¹⁹⁵ She ultimately found this emphasis equally unsatisfying. For example, she criticized feminists, including Martha Minow, who distance themselves from notions of autonomy and individuality which they view as being hierarchical and supportive of male dominance.¹⁹⁶ Federle argued that concentration on relationships “underscores children’s dependencies rather than rendering them irrelevant.”¹⁹⁷ She worried that feminists might

and his emphasis of this particular point.

¹⁸⁸ *See id.*

¹⁸⁹ *See Federle, supra* note 156, at 1007.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* (footnotes omitted).

¹⁹² *Id.* at 1011.

¹⁹³ *Id.* at 1012.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1017. Federle noted how Ferdinand Schoeman suggested fostering intimacy between children and adults and limiting unnecessary governmental intrusion into those relationships. *Id.* Arguably, the problem of workplace sexual harassment and sex discrimination more generally warrant governmental intrusion. Thus, that view holds little value here.

¹⁹⁶ *Id.* at 1017, 1019–20.

¹⁹⁷ *Id.* at 1019.

overlook their own power by ignoring the hierarchical relationship between women and children.¹⁹⁸

Federle engaged in her historical and theoretical review to argue against the pervasive emphasis on capacity for the justification of children's rights. She explained:

We must reconstruct rights talk about children in terms of power, and only when we make explicit the role of capacity is a new theory of rights for children possible. . . .

. . . .

My point here is that an adequate rights theory must account for power. Power is the obverse of social oppression and political inequality, for it licenses hierarchy and status. Rights, however, mitigate the exclusionary effects of power by allowing the powerless to access existing political and legal structures in order to make claims. Permitting these types of rights claims also has the salutary effect of redistributing power and altering hierarchies. Herein lies the real value of rights, for rights require that we respect the marginalized, empower the powerless, and strengthen the weak.¹⁹⁹

From this elucidation of the importance of children's power and rights, Federle demonstrated that the focus on children's capacity, and one might argue the "developing capacity" of adolescents, disabled children who need rights to access existing political and legal structures.²⁰⁰

Most people will agree that, vis-à-vis adults, children lack political, economic, and legal power. Translate this lack to MacKinnon's definition of sexual harassment:

Sexual harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power [between males and females]. Central to the concept is the use of power derived from one social sphere [employment] to lever benefits or

¹⁹⁸ *Id.* at 1020.

¹⁹⁹ *Id.* at 985–86.

²⁰⁰ *Id.* at 1025. In her concluding paragraphs, Federle endorses a nonanthropocentric theory of rights found in "deep ecology." *Id.* at 1025–27. I actually agree that this view looks fascinating in its potential; however, I also think—perhaps too pessimistically—that we are a long way in the evolutionary process from adopting a nonanthropocentric justification for political and legal rights. Because the redress of a power differential also justifies the provision of rights, I leave this theory for another article.

impose deprivations in another [sexual relations].²⁰¹

The new definition should read:

Sexual harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power [between adults and teens]. Central to the concept is the use of power derived from ~~one~~ [every] social sphere to lever benefits or impose deprivations in another [sexual relations often deemed illegal].

The sexual harassment of minors is unique. At least women now enjoy the right to vote, file suit in court, and serve on juries. So when we refer to their discriminatory abuse, we know that women nevertheless wield at least some political and legal authority. Minors, as noted, wield little to none. Often their power—if it can be called that—rests in the hands of the adults who purport to care for them but who may have conflicting interests. From this discussion of capacity and rights, we see another unique justification for the prohibition of sexual harassment against minors. Specifically, they enjoy even less political and legal power than do women, nonwhite adults, and adults with untraditional gender traits.

B. Psychology

Federle's review of philosophical perspectives concerning children highlights a common theme: the perceived inability of children to reason. Too many philosophers have been concerned primarily with adult rights and capabilities and not with those of children. Second, the defining parameters of the incapacitated group—children—are not clear enough for specific application. Were these philosophers referring only to infants? To young children? To adolescents? Third, too many fail to distinguish among the types of decisions that a child might make, or rights that a child might exercise when contemplating capacity. They draw an "all or nothing" conclusion. A child either has legal capacity for all purposes in all contexts or for none. The "one size fits all" approach may not be appropriate for children, and particularly not for adolescents who are developing capacity.

²⁰¹ MACKINNON, *supra* note 12, at 1.

1. Capacity—Cognition

New evidence regarding adolescent cognitive abilities proves the inaccuracy of these classic philosophical attitudes regarding older children and their rational capabilities, at least. Elizabeth Cauffman and Laurence Steinberg explained, “In fact, most studies indicate that there are few, if any, differences between the cognitive processes of adults and adolescents. Developmental theory posits that the cognitive capacity for logical reasoning emerges during early adolescence—the ages of eleven and fourteen.”²⁰² Thus, adolescents possess the ability to engage in rational thought. Therefore, the denial of political rights, power, or autonomy based upon a lack of reasoning capacity alone is unjustified. Close the book on hundreds of years of philosophy—at least with respect to adolescent rationality.

This scientific confirmation of the rational capacity of even young adolescents is wonderful news, especially for self-determinist children’s rights advocates. This information supports the notion that adolescents have the capacity to give informed medical consent, which is primarily determined by cognitive ability,²⁰³ for procedures, including abortion.

2. Capacity—Other Decision-making Skills

Psychologists, however, have determined that cognitive capability is not the only trait useful for effective function and decision-making.²⁰⁴ Other traits come into play. We know, for example, that adolescents take more and greater risks than do adults.²⁰⁵ Neither a lack of information nor cognitive capacity explains their risk-taking tendency.²⁰⁶ Studies have demonstrated that increasing knowledge does not necessarily lead people to make better

²⁰² Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1768 (1995) (reporting that “reasoning abilities do not differ markedly between middle adolescents and adults” and that “there were few differences in health care decision-making skills between adolescents and young adults”).

²⁰³ *See id.* at 1763–64 (describing how cognitive ability has been used as the measure of whether a patient can make a knowing, competent, and voluntary decision to undergo a medical procedure).

²⁰⁴ *See id.* at 1764–65 (observing that psychological traits influence decision-making).

²⁰⁵ *See id.* at 1767 (providing examples of adolescents’ frequent participation in dangerous activities). “[F]ifty-eight percent of all driving fatalities involve persons age sixteen to twenty-four. . . . In addition, tobacco, alcohol, and illicit drug use begin most often between the ages of sixteen and eighteen.” *Id.*

²⁰⁶ *Id.* at 1771–72.

decisions.²⁰⁷ Other studies suggest that adolescents hold different priorities than do adults. First, teens “view long-term consequences as less important than short-term consequences.”²⁰⁸ Second, they demonstrate a preference for sensation-seeking.²⁰⁹ Third, they are preoccupied with their own social status.²¹⁰ Given these priorities, one can see how sex with an adult co-worker might seem like a good idea. De-emphasizing the long-term career, reputation, and health risks, a teen might choose an exciting sexual relationship and the concomitant status increase with an older, more “sophisticated” man offering such a prize.

In theorizing about traits other than cognition that operate in mature decision-making, Cauffman and Steinberg explained:

In our view, a more complete approach to considerations of decision-making competence addresses not only the cognitive abilities required for competent decision-making, but also the psychosocial traits that determine whether an individual makes good use of the cognitive tools at his or her disposal. These psychosocial traits comprise what we call “maturity of judgment” . . . [M]aturity of judgment can be further broken down into three core components: (1) responsibility, which includes healthy autonomy, self-reliance, and clarity of identity; (2) perspective, or the ability to acknowledge the complexity of a situation and see it as part of a broader context; and (3) temperance, which refers to the ability to limit impulsive and emotional decision-making, to evaluate situations thoroughly before acting (which may involve seeking the advice of others when appropriate), and to avoid decision-making extremes.²¹¹

These three core components deserve greater discussion since they may influence a decision to “consent” to sex at the workplace. Cauffman and Steinberg cautioned, “Adolescents who demonstrate that they meet the criteria for informed [medical] consent may nevertheless lack the psychosocial maturity required to make consistently mature judgments.”²¹²

²⁰⁷ *Id.* at 1772.

²⁰⁸ *Id.* at 1773.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 1764–65.

²¹² *Id.* at 1766.

a. Responsibility

With respect to the development of responsibility, Cauffman and Steinberg described three foci: autonomy, identity differentiation, and ego development.²¹³ They noted that adolescents are most susceptible to peer influence at about age fourteen, after which that influence declines.²¹⁴ Studies, however, indicate that a coherent sense of identity does not emerge until about age eighteen.²¹⁵ Ego development or individuation, according to some studies, increases throughout adolescent years.²¹⁶

As teens individuate, other people exert influences that affect various aspects of adolescent life. For example, parents influence adolescents in matters of religion and career choice whereas peers sway choices regarding daily concerns such as clothing and music preferences.²¹⁷ Cauffman and Steinberg suggested that “adolescents’ display of independence—and hence, maturity of judgment—may be highly situation-specific, with youngsters being influenced more on some topics than others, and by different sources of influence to differing degrees, depending on the decision in question.”²¹⁸

Because little research has been done correlating responsibility development, various specific ages, and maturity of judgment, psychologists hesitate to draw any conclusions for the practical application of what they do know.²¹⁹ This new information, however, raises several important questions for our purposes. For example, who influences an adolescent’s decision to have sex with her supervisor? A parent? Her peers? Only the boss? Moreover, if she has not formed a coherent independent identity, should we consider her “consent” to sex with an adult co-worker legally significant?

b. Temperance

Several factors contribute to personal temperance. Preliminary studies of childhood impulsivity suggest that it remains relatively

²¹³ *Id.* at 1774, 1776, 1778.

²¹⁴ *Id.* at 1775.

²¹⁵ *Id.* at 1776.

²¹⁶ *Id.* at 1778–79.

²¹⁷ *Id.* at 1774–75.

²¹⁸ *Id.* at 1775.

²¹⁹ *Id.* at 1780.

stable until age sixteen when it increases and then again stabilizes at age nineteen.²²⁰ Impulsivity declines during adulthood.²²¹ More investigation is needed regarding the relation between impulsivity, sensation-seeking, and judgmental maturity.²²² Stress and mood state also influence temperate decision-making.²²³ Studies indicate that middle adolescents exhibit greater mood volatility than do adults.²²⁴ Again, more investigation is needed to correlate these factors with maturity of judgment. If we can, however, say that adolescents are more impulsive and moody, we can anticipate another issue. Do adolescent impulsivity and moodiness combine with stress (on-the-job pressure for sex) to influence a teen's decision-making process? Should the law regard teen "consent," given impulsively and under stress, as significant and legally binding?

c. Perspective

A third trait, perspective, allows someone to frame a decision in context, taking a broader view that would include potential consequences, impact on other people, and the "cost-benefit calculus."²²⁵ Teens demonstrate improvement in abstract and less egocentric thinking until about age seventeen or eighteen.²²⁶ Research suggests that development of future-time orientation "continues beyond mid-adolescence, at least through the last year of college."²²⁷ Cauffman and Steinberg could not draw firm conclusions regarding perspective and maturity of judgment due to insufficient correlative research.²²⁸ If there is a correlation, however, one might reasonably conclude that an inability to see "the big picture" could influence a teen's decision to have sex with an adult co-worker.

²²⁰ *Id.* at 1781.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 1782.

²²⁵ *Id.* at 1783–84.

²²⁶ *Id.* at 1784–85.

²²⁷ *Id.* at 1787.

²²⁸ *Id.*

3. Does Adolescent Capacity Even Matter?

We began this discussion of psychology and adolescent psychosocial development to evaluate the validity of classic philosophical conclusions that discounted juvenile rational capacity. We can conclude that the philosophers were wrong about adolescent cognitive ability; however, the research regarding adolescent psychosocial development is relatively new and ongoing. We cannot draw many other firm conclusions. We should at least question, though, whether adolescent “consent” to sex should have legal significance and whether it should be legally binding.

a. Physical Appearance

Assume for a moment that such “consent” should not be legally binding because adolescents do not have the power, (equal) status, and/or competence to consent to sex with an adult co-worker. Will jurists account for adolescent developing capacity, status, and power in their allocation of rights and liabilities?

Donald Kramer and Jennifer Soper suggest that while many people claim to base the attribution of rights on competency, they often judge competency and assign rights based on physical appearance.²²⁹ Thus, society treats the children who look physically mature as adults, whether or not those adolescents are emotionally, neurologically, and psychosocially mature. For an example of this phenomenon, examine the statutory rape defenses. Under this criminal scheme, a minor lacks capacity even if she “consents,” so her “consent” is no defense. Her physical maturity, however, might constitute one. In California, the perpetrator’s mistake of age particularly of older victims—arguably based on physical maturity—comprises a defense.²³⁰

Even if we cannot yet make firm conclusions regarding adolescent “developing capacity” and judgmental maturity, we should at least avoid confusing physical maturity with neurological and psychosocial maturity as we assign legal rights and duties. Neither the blooming of the adult body or its withering with disease or old age necessarily equates with mental maturity or acuity.

²²⁹ Soper, *supra* note 177, at 199.

²³⁰ See Phipps, *supra* note 116, at 52 n.219 (citing *People v. Hernandez*, 393 P.2d 673 (Cal. 1964)).

b. "Consent" in Different Contexts

As we consider whether or not adolescents have the threshold level of competence, sufficient power, and status to give legally significant consent to sex, we must return to the context. Sexual harassment by definition is not consensual. No one freely chooses to be sexually harassed. Some adolescents, however, may "consent" to sexual activity without fully appreciating to what they are "consenting" or why. The context and nature of the decision may veil the nature of the proposed activity. Additionally, teens may not have the power to refuse a sex solicitation. If we suggest, however, that adolescents may be *incapable* of consenting to sex with an adult co-worker, then we run the risk of invalidating consent in contexts that we might wish to permit teen "consent," such as for abortion and other medical treatment. If possible, we need to distinguish the two contexts since I do not want to craft a theoretical basis for sexual harassment law that undermines a teen's access to abortion or other medical services.²³¹

A responsible abortion choice typically requires information and will lead to change: the termination—or not—of an undesired pregnancy. When confronted with an undesired pregnancy, most women who contemplate abortion have access to information and professional guidance from the people providing the medical service at least. They may also have the benefit of advice from a partner, parents, and other advisors. The choice to have an abortion is typically an informed one. Passivity about the choice will likely result in significant change: the birth of a child. There is little debate about the result and the potential medical risks of abortion.²³² What produces huge debate is the morality of abortion.²³³ Thus, this abortion choice is arguably complex because—while information is available—both action and forbearance result in significant consequences with moral implications.

Responsible sexual intimacy also arguably requires information about safety and consequences. One can find information about

²³¹ I thank Mary Anne Case for emphasizing this concern that I share. Mary Anne, I hope this discussion suffices for our adolescents.

²³² See generally MedlinePlus, Abortion, <http://www.nlm.nih.gov/medlineplus/abortion.html> (last visited Dec. 19, 2006) (providing links to various sources discussing the result and potential risks of abortions).

²³³ See, e.g., Sylvia A. Law, *Abortion Compromise—Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 933–35 (1992) (examining underlying issues in the debate about abortion).

safety through a variety of free services, including the public library and the Internet.²³⁴ Information on consequences, however, other than pregnancy and sexual transmitted diseases, is harder to find. Where does one find out how sex will change a relationship? Where can a person find out how sex will affect his or her emotional well-being? How can a person know whether the experience will be “good” or worth potential risks?

Certainly, people can ask professionals—such as psychologists—for advice about sexual activity; however, accessing such professional information involves more effort than stopping by the public library and is often expensive. Additionally, many people do not feel comfortable talking about sex so they do not ask for advice about it. Moreover, asking someone—even a professional—whether you will like sex with a particular partner is a bit like asking whether you will like spumoni ice cream. I have never tried spumoni so I would be at a loss to advise you. And even if you were asking about vanilla, I would want to know whether you are trying it during a heat wave or in the middle of a blizzard. The circumstances might make a difference. Additionally, people often do not anticipate needing this information. My guess is that most people do not make an appointment to have sex for the first time with a new partner. I suspect that the decision to have sex is often more spontaneous and informal than even the choice to have an ice cream cone.

With sexual intimacy, the failure to participate does not disturb the status quo. Thus, no action means no change. However, as with abortion, morality colors the choice of whether to engage in sex—especially outside of marriage. We covered that territory with the Traditional View.²³⁵

Now consider both decisions concerning abortion and sexual relations with an adolescent female as the decision-maker. If she has the competence and therefore the capacity to make a legally valid choice, we have no problem. However, often we do not know and cannot tell whether she has the capacity to make the decision to make a mature judgment. So let us assume—perhaps wrongly—that she does not have capacity and consider whether she should

²³⁴ See, e.g., MedlinePlus, Safe Sex, <http://www.nlm.nih.gov/medlineplus/ency/article/001949.htm> (last visited Dec. 19, 2006) (discussing sexually transmitted diseases and safe sex).

²³⁵ See *supra* Part II.A.

make the choice anyway.²³⁶ Several factors should influence us as we decide whether the adolescent should have the right to make a choice: (1) the risk of her injury from no choice; (2) the availability of assistance for a healthy choice if she has the right to choose; (3) available remedies if she changes her mind; and (4) the accuracy with which we can evaluate options for her or second-guess her choice.

First, if a pregnant teen has no right to choose abortion, her guardians will decide for her and she loses a valuable learning experience in the choice process.²³⁷ Her guardians may also require her to give birth to a child. Adolescent childbearing is highly risky.²³⁸ According to the United Nations Children's Fund (UNICEF), pregnancy is the leading cause of death for fifteen- to nineteen-year-old females worldwide.²³⁹ The World Health Organization describes adolescent childbearing as "profoundly disempowering."²⁴⁰ It "cuts short her education, severely limits her income-earning capacity and impairs her ability to make well informed choices about life."²⁴¹ Thus, the risk of no choice is potentially high.

Second, if she has an abortion right, a teen will have medical professionals and probably other adults to advise her regarding health and other consequences.²⁴² Moreover, the process of making

²³⁶ One might argue that the right to liberty guaranteed by the United States Constitution protects her right to make a choice in both cases. U.S. CONST. amend. XIV, § 1; *see also* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding a substantive due process right to make decisions about adult private sexual conduct, but not extending that right to minors); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693 (1977) (finding a right to privacy and abortion services for minors); *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942) (finding a right to procreate).

²³⁷ Of course, she could choose an illegal abortion or to terminate the pregnancy herself. The risks of both those options are obvious.

²³⁸ *See generally* NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY, NOT JUST ANOTHER SINGLE ISSUE: TEEN PREGNANCY PREVENTION'S LINK TO OTHER CRITICAL SOCIAL ISSUES (2002), *available at* <http://www.teenpregnancy.org/resources/data/pdf/notjust.pdf> (discussing the social, economic, and health risks associated with teen pregnancy).

²³⁹ INNOCENTI RESEARCH CTR., UNITED NATIONS CHILDREN'S FUND, EARLY MARRIAGE: CHILD SPOUSES 11 (2001), *available at* <http://www.unicef-icdc.org/publications/pdf/digest7e.pdf>.

²⁴⁰ ADOLESCENT HEALTH AND DEV. PROGRAMME, WORLD HEALTH ORG., THE SECOND DECADE: IMPROVING ADOLESCENT HEALTH AND DEVELOPMENT 6 (1998), *available at* http://www.who.int/reproductive-health/docs/improving_adolescent_health.pdf.

²⁴¹ *Id.*

²⁴² *See, e.g.*, Planned Parenthood, *Laws Requiring Parental Consent or Notification for Minors' Abortions*, <http://www4.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/abortion/fact-parental-consent.xml> (last visited Dec. 19, 2006) (confirming that thirty-five states have laws in effect that require parental consent or notification for a minor to access abortion).

the decision will be a learning experience. Even if the choice consists of two unattractive options, she may at least have the psychological satisfaction of choosing the option that she deems the lesser of two evils.

No remedy exists for a teen if she changes her mind once she has terminated a pregnancy. She cannot undo the procedure. Nor would we allow her to sue medical providers for damages—absent negligence or medical malpractice—since they acted to help her. The injury that the adolescent suffers comes not from the abortion procedure but from the undesired pregnancy (facilitated by someone else). The medical procedure was designed to terminate the injurious pregnancy. Thus, no good could come from permitting the withdrawal of “consent” to the abortion.

Finally, no matter which choice she makes, to either continue or terminate the pregnancy, few adults can say with certainty that she made an incorrect or unwise choice. While some people view abortion as morally wrong, intelligent, capable people disagree. Additionally, we should not conflate the moral correctness of the choice with the more practical, factual considerations. The pregnant adolescent either gives birth to another child or endures an abortion. The statistics regarding the outcomes for teens and their children²⁴³ speak to the practical realities. Who can say with absolute authority which is morally worse: the handicapping of two lives or the termination of (the potential for) one.

With respect to the decision to have sex with an adult co-worker, the first consideration is really a non-issue. We cannot realistically control whether adolescents have sex; they just do it. We can control access to safe, legal abortion services but short of isolating every adolescent on a mountain peak or mandating modern chastity belts, we cannot completely control their access to sex.

²⁴³ The Washington State Department of Health determined:

Infants born to teen mothers are one and a third times more likely to be born prematurely, and 50 percent more likely to be low birthweight babies (under 5.5 pounds). Low birthweight and prematurity raise the probability of a number of adverse conditions, including infant death, blindness, deafness, mental retardation and cerebral palsy.

Children born to single teenage mothers “are more likely to drop out of school, to give birth out of wedlock, to divorce or separate, and to become dependent on welfare, compared to children with older parents.” Sons of adolescent mothers are almost 3 times more likely to be incarcerated than sons of mothers who delay childbearing until older.

Washington State Department of Health, Public Fact Sheet: Teen Pregnancy, <http://www.doh.wa.gov/Topics/teenpreg.htm> (last visited Dec. 19, 2006).

If we remove the stigma concerning nonmarital sex and permit it, teens might access more information about it. The problem remains, however, that sufficient information may be unavailable given the uniqueness and complexity of each circumstance and liaison. Thus, we should assume that inexperienced youths may not even be able to access sufficient information to make an informed choice about intimate sexual relations.

Are there available remedies if she changes her mind? If she realizes—within a reasonable time frame—that she did not have sufficient capacity to consent, can we help her? Here is where the decision to have an abortion and the decision to have sex with an adult co-worker differ most prominently. While a teen cannot change her mind about abortion, she can about the advisability of her “consent” to sex.²⁴⁴ We can and do prosecute adults for having sex with minors. Thus, we could permit a teen to withdraw her “consent” if she found that she made an uninformed or unwise choice and sue her adult partner. Unlike the medical services provider, the adult partner was probably acting on his own behalf, not (just) hers. We assume that adults know the law and can conform to it. We routinely hold them responsible when they do not. Therefore, instead of imposing on the minor the costs of the detrimental choice, we redirect those costs to the adult who should have known better—whether or not the act was illegal—and could have refrained from sex with the minor.

Finally, while adults might differ regarding the appropriateness of a pregnancy termination decision, fewer will argue with a teen who determines she should not have had sex with an adult co-worker. Assuming no fraud, adults should agree that once a teen acknowledges an immature error, facilitated by a responsible adult, we should assist her in remedying the problem. Some adults, such as Judge Posner, may blame the teen for bringing her injuries upon herself—or for not being more mentally mature when she looks physically mature. If behavior is truly the result of immaturity, however, a natural developmental condition, then there should be no associated blame. We do not blame the blind for their inability to see, and we should not blame youth for their inability to act maturely.

One might argue that a remedy in the form of money damages is

²⁴⁴ Obviously, a teen cannot recapture his or her virginity and monetary damages will never make the teen “whole”; however, he or she can mitigate the negative consequences by covering medical expenses, psychological counseling, and costs of lost opportunities.

not fair to the adult who relied on the “consent” or the employer who hired the seducer. The adult, however, was always free to refrain from the liaison that he knew could ultimately result in withdrawn “consent.” One might say that he assumed the risk. Additionally, the employer is able to monitor its workplace and select its agents. If it fails to do either, the principal rests in a better place to cover the damage costs otherwise borne by the employed minor.

c. Capacity Matters If It Exists—But Who Knows?

The advantage of permitting “consent” in both contexts is that we avoid violating the rights of those teens who, unbeknownst to us, have developed the threshold level of capacity to deliver meaningful consent. By allowing a teen to withdraw “consent” in certain situations such as those involving contracts and sexual relations with adults, we avoid some of the damage that results from assuming capacity where it does not exist. Moreover, while we cannot completely prevent injury to those teens who “consent” to sexual relations, we can deter their prospective adult partners and later facilitate a remedy for any damage done to teens who realize that they lacked the capacity, power, or status to consent.

One day we may know when any given teen develops the threshold level of competence and, therefore, capacity to make legally binding, significant decisions. Until then, we need to acknowledge their developing capacity and help them transition into adulthood and the myriad decisions that they will face. The transition process typically includes some kind of apprenticeship in the workforce. Adolescents need to develop a work ethic and job skills. Thus, adults should facilitate this transition into labor. As scientists continue to research adolescent psychosocial, neurological, and sexual development, jurists and legal theorists should pursue one additional avenue for investigation regarding the sexual harassment of teens. Specifically, the philosophy of ethics may offer guidance for dealing with adolescent “consent” to sex with an adult co-worker.

V. KANTIAN ETHICS

While Immanuel Kant believed in the incapacity of children, scientific studies evidence the rational cognitive abilities of adolescents; therefore, Kant’s discussion of the treatment of rational beings may have some application for adolescents. His views on

ethical conduct as expressed in the “categorical imperative” offer an attractive framework for exploring the treatment of adolescents without imposing extraneous moral judgments.

A. *Humanity, Morality, Means, and Ends*

Allen Wood summarized Kant’s conclusions concerning morality:

Kant’s theory maintains that to act morally is always to act for the sake of a person, or more precisely, for the sake of humanity in someone’s person. In following a categorical imperative, the determining ground of the will is the objective worth of humanity or rational nature, as an object of respect. From this standpoint, all conduct is regarded fundamentally from the standpoint of what it *expresses* about the agent’s attitude toward humanity. Morally good conduct expresses respect for humanity as an existent end, while bad conduct is bad because it expresses disrespect or contempt for humanity.²⁴⁵

Thus, respect for “humanity,” which Kant defined as the rational nature of human beings,²⁴⁶ constitutes moral conduct. With “The Formula of the End in Itself,” Kant proposed treating humanity always as an end and “never merely as a means” to an end.²⁴⁷ We use another person as a tool, as a mere means to an end, when our proposed activity reflects an underlying principle to which the other could not consent.²⁴⁸ Clearly, rational and informed consent matter in this maxim.

Kant further distinguished humanity in his discussion of “personality.” According to Allen Wood, “[p]ersonality seems ‘higher’ than humanity in that it has essential reference to *moral* value, moral responsibility, and the ‘positive’ concept of freedom, where humanity includes none of these. But Kant has at least two reasons for choosing humanity rather than personality as the end in

²⁴⁵ WOOD, *supra* note 187, at 116–17 (footnotes omitted).

²⁴⁶ *Id.* at 118.

²⁴⁷ R. George Wright, *Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle*, 36 U. RICH. L. REV. 271, 271 (2002) [hereinafter Wright, *Treating Persons*] (quoting IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 38 (Mary Gregor ed. & trans., Cambridge Univ. Press 1998) (1785)); *see also* WOOD, *supra* note 187, at 119–20 (discussing Kant’s means to an end).

²⁴⁸ *See* Onora O’Neill, *The Moral Perplexities of Famine and World Hunger*, in *MATTERS OF LIFE AND DEATH: NEW INTRODUCTORY ESSAYS IN MORAL PHILOSOPHY* 294, 319–24 (Tom Regan ed., 2d ed. 1986) (considering Kant’s moral theory in the context of dealing with famine).

itself.”²⁴⁹ Wood concluded that the capacity for rational choice, and not the virtuosity of a particular choice or obedience to moral laws, comprises the fundamental value of human beings.²⁵⁰

With reference to dignity, R. George Wright elaborated on this Kantian concept of humanity. Wright suggested, “If people have the capacity to make rational moral choices freely, autonomously, and self-originatingly, beyond being pulled about mechanically by the tugs of nature, that capacity will be the source and embodiment of moral worth, dignity, and their status as ends in themselves.”²⁵¹ What indicates value and dignity is free choice, not necessarily the moral correctness of any choice.²⁵² Are adolescents capable of free, autonomous, self-originating moral choices? Are they beyond the tugs of nature or peers, parents or adult co-workers? Adolescents may be developing the capacity of free moral choice but may not have completed the process.

Let us assume, however, that all human beings are at some basic level dignified.²⁵³ Even babies, who do not engage, and may not even have the capacity to engage, in independent moral deliberation, possess something like inherent if unactualized dignity—if only because of their potential for rationality, moral development, and growth. I find no value in discussing a world in which human beings have no worth or dignity simply because they do not always engage in moral deliberation.²⁵⁴ Thus, I start with the proposition that any cogitant human being possesses some basic level of dignity and worth.²⁵⁵ Moving from that proposition, I find it

²⁴⁹ WOOD, *supra* note 187, at 120.

²⁵⁰ *Id.* at 120–21.

²⁵¹ Wright, *Treating Persons*, *supra* note 247, at 274–75 (footnotes omitted).

²⁵² My thanks to R. George Wright for clarifying this point.

²⁵³ See R. George Wright, *Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively*, 75 B.U. L. REV. 1397 (1995) [hereinafter Wright, *Consenting Adults*]. Wright acknowledged many conceptions of dignity and proffered:

Dignity is, in our sense, a matter of what one is, or of one’s status as a person. It relates to how one deserves to be treated by other people. Dignity is a matter of respect-worthiness, or of intrinsic worth that calls for respect. Dignity is thus, on most views, a matter of taking persons seriously as persons.

Id. at 1398 (footnotes omitted).

²⁵⁴ I offer a crass and ungrammatical modification of René Descartes’ famous contention and assert, “I think; therefore, I end.” In other words, I suggest that because I think, I deserve to be treated not merely as a means but also as an end. In sum, anyone who thinks possesses dignity, the end.

²⁵⁵ I would also argue for the dignity of human beings whose neurological functions have ceased but who continue to live. While no cogitative potential remains for persons in a perpetual vegetative state, I would acknowledge their dignity as something that survives the extinguishing of both brain and heart function. There is dignity in the human memory of a former human being. I also realize that the reliance on cogitation means that other beings,

indisputable that adolescents, who demonstrate rational cognitive ability, deserve to be treated as ends and not merely as means.

B. The Categorical Imperative, Sexual Harassment, and Consent

Using Kant's categorical imperative to evaluate sexual harassment, we might all agree that in the most obvious and egregious cases, the harasser uses the target merely as a means to a particular end. However, does hostile work environment sexual harassment that targets no one person violate this categorical imperative? Does the harasser violate the imperative when the target acquiesces or consents?

1. Sexual Harassment

Wright applied Kantian ethics to the issue of adult sexual harassment and opined: "[o]nly when the Kantian formula is taken with proper seriousness can all common forms of sexual harassment be clearly seen as violating that formula."²⁵⁶ The harasser's end may vary and could include sexual gratification, a satisfying sense of power and domination, or a desire to isolate and exclude a person through oppression and insult.²⁵⁷ "A harasser might implicitly envision his victim as capable of rationality and moral law making, and thus not a mere thing."²⁵⁸ The harasser may not even be aware of his end or consider his target.²⁵⁹ A target might, in the abstract, consent to the harasser's sexual gratification. However, we would not label the conduct harassment if the target would or could truly consent to the behavior. Wright concluded, "A faithful Kantian will instead see sexual harassment as . . . tending to inhibit the otherwise possible development of the target's capacities for rational deliberation and choice on the job. Sexual harassment also fails to minimally cooperate with the victim's morally permissible projects,

including animals, might also possess dignity and worth. I cannot argue with this extension. Do animals deserve to be treated as ends and not merely as means? I will, with acknowledged cowardice, leave that question for another day. All of this exploration extends far beyond our purpose here.

²⁵⁶ Wright, *Treating Persons*, *supra* note 247, at 296.

²⁵⁷ Wright anticipated that some harassers might fear women and their movement into traditionally male dominated workplaces. He noted, "Kant insightfully observes that someone can be the object of fear, yet not the object of respect." *Id.* at 298.

²⁵⁸ *Id.* at 297; *see also* Hill, *supra* note 163, at 185 (challenging the notion that sexual harassment necessarily perpetuates a patriarchal hierarchy).

²⁵⁹ Wright, *Treating Persons*, *supra* note 247, at 297.

chosen by her in her own way.”²⁶⁰ Thus, sexual harassment always violates the categorical imperative.

2. Consent

The issue of consent deserves more attention, however, since under Title VII, consent is a complete defense to a charge of sexual harassment. Both Onora O’Neill and R. George Wright analyzed adult consent in the context of Kant’s philosophy.²⁶¹ While O’Neill focused on the treatment of “others as persons,”²⁶² Wright explored “[h]uman dignity.”²⁶³ They each discussed the notion of capacity²⁶⁴ and probed “morally significant”²⁶⁵ or “genuine”²⁶⁶ consent. Morally significant consent must be informed and match the activities it legitimates.²⁶⁷ One who is less than fully informed of the intentions of another, even when she consents to those intentions that are clear, consents nonetheless to other intentions to which she might choose to dissent if she could only be aware of the full range of those intentions.²⁶⁸ When the possibility of dissent does not exist, neither does significant consent. The coercion, though more subtle, nevertheless treats its subject as a means by preventing a full range of consent/dissent possibilities.²⁶⁹

O’Neill argued that to treat others as persons, one “must view them not abstractly as possibly consenting adults, but as particular men and women with limited and determinate capacities to understand or to consent to proposals for action.”²⁷⁰ For O’Neill, consent is obviously inauthentic in several circumstances. For example, true consent may not exist “when there is ignorance, duress, misrepresentation, pressure, or the like.”²⁷¹ This view is reminiscent of Martha Chamallas’s and William Eskridge’s

²⁶⁰ *Id.* at 300–01 (footnotes omitted).

²⁶¹ See Onora O’Neill, *Between Consenting Adults*, 14 PHIL. & PUB. AFF. 252 (1985) [hereinafter O’Neill, *Between Consenting Adults*]; Wright, *Consenting Adults*, *supra* note 253, at 1397–98, 1426–30.

²⁶² O’Neill, *Between Consenting Adults*, *supra* note 261, at 252.

²⁶³ Wright, *Consenting Adults*, *supra* note 253, at 1398.

²⁶⁴ See O’Neill, *Between Consenting Adults*, *supra* note 261, at 253; Wright, *Consenting Adults*, *supra* note 253, at 1414.

²⁶⁵ O’Neill, *Between Consenting Adults*, *supra* note 261, at 258–60.

²⁶⁶ Wright, *Consenting Adults*, *supra* note 253, at 1414.

²⁶⁷ O’Neill, *Between Consenting Adults*, *supra* note 261, at 254–57.

²⁶⁸ *Id.* at 256.

²⁶⁹ *Id.* at 259.

²⁷⁰ *Id.* at 253.

²⁷¹ *Id.* at 254.

discussion of mutuality and equality.²⁷²

Wright added that noncoercive factors can also influence a person's consent which "has social antecedents."²⁷³ He explained:

We do not have pure personalities apart from the social formation of our preferences, including our preferences to consent or refuse to consent. . . .

. . . .

But not all processes of the social formation of preferences are equal in the degree to which they respect freedom and dignity. There is a real difference . . . between a broad education and brainwashing.²⁷⁴

One might argue that the socialization to male sexual initiative, masculine norms, and male hierarchical dominance that Abrams noted,²⁷⁵ and to wife-like tasks that MacKinnon identified,²⁷⁶ are examples of socialization processes that do not respect individual freedom and dignity.

Commercial advertising provides another example of a noncoercive influence on consent, beyond even the inclination to consent to a purchase. Aspirational advertising specifically appeals to people through images that portray them as they wish to be. According to the popular on-line encyclopedia, Wikipedia, the aspirational age in our culture is sixteen or seventeen.²⁷⁷

In theory, consumers younger than this age aspire to the maturity and freedom it signifies, while those older than it seek to recapture the (real or imagined) youthfulness and freedom from responsibility of this age. Thus, products pitched at notional 16-year-olds will appeal to a broader target market.²⁷⁸

Marketers even developed an aspirational name for targeted juvenile consumers between ages eight and twelve: "tweens."²⁷⁹ One

²⁷² See *supra* notes 74, 79 and accompanying text.

²⁷³ Wright, *Consenting Adults*, *supra* note 253, at 1435.

²⁷⁴ *Id.*

²⁷⁵ See Abrams, *supra* note 14, at 1205–17.

²⁷⁶ See MACKINNON, *supra* note 12, at 44.

²⁷⁷ Wikipedia, Aspirational Age, http://en.wikipedia.org/wiki/Aspirational_age (last visited Dec. 19, 2006).

²⁷⁸ *Id.*

²⁷⁹ Kay S. Hymowitz, *Girls' Sexy Aspirations Are Marketers' Target*, PHILADELPHIA INQUIRER, Oct. 7, 2000, available at http://www.manhattan-institute.org/html/_philing-girlsSexyAspiration.htm; Lynn Neary, *Tweens and Media: What's Too Adult?* (NPR radio broadcast Aug. 1, 2006) (transcript available at <http://www.npr.org/templates/story/story.php?storyId=5595146>).

reporter commented that “a quick visit to the mall makes it clear that marketers believe what girls . . . want to be is an 18-year-old starlet on the make. Snakeskin pants, belly shirts, faux leopard jackets and bikini underwear are this season’s offerings for little girls.”²⁸⁰

While philosophical purists might argue that twenty-first century American advertising has nothing to do with Kantian ethical discourse, others will disagree.²⁸¹ Arguably, philosophers, jurists, and scientists need to understand the influences brought to bear on American teens as these professional adults consider how the law should assist (or not) sexually harassed adolescents. Conceivably, the aspirational brainwashing that bathes our teens—through magazines, on television, in music, on DVDs, in movies, and at the mall—influences how they respond to sexual advances from adult co-workers. Assuming this brainwashing occurs, and I see it when trying to purchase clothing for my own teen,²⁸² then we need to evaluate whether the commercial seduction of teens influences their vulnerability to seduction in the more traditional sense. And should the law account for this phenomenon?

O’Neill suggested, “A planned seduction of someone less experienced treats him or her as means even when charmingly done. Employers who take paternalistic interest in employees’ lives may yet both use them and fail to treat them as persons.”²⁸³ In the first instance, the seducer entices the seduced into a wrongful, foolish, or unintended action. The seduced does not consent because she does not have the experience to understand the action itself, its probable consequences, or both. She does not know to what she might be consenting.

In the second instance, the employer may believe that, for example, contract concessions will benefit employees. Many employees may still consent to a bad contract with concessions because they have no alternative source of income. By failing to

²⁸⁰ Hymowitz, *supra* note 279.

²⁸¹ See, e.g., Wright, *Consenting Adults*, *supra* note 253, at 1413 (“The imperatives of a commercial society based on consumption tend to close our eyes to legal enforcement of transactions based on insufficient knowledge and freedom.”).

²⁸² I call the “fashion statement” pervasive in the teen departments at most chain stores the “Après Molestation” look. We cannot avoid the torn jeans, thongs visible over pants cut just above the pubic bone, T-shirts that fall off shoulders, and shoes that have teens tottering as if they were still reeling from an attack. I have also heard the style called the “Come Fuck Me” look. I find this appellation doubly offensive but apt because, in addition to its crudity, it suggests, as some adults believe, that these girls invite their own sexual violation.

²⁸³ O’Neill, *Between Consenting Adults*, *supra* note 261, at 253.

acknowledge the complete economic dependence of many employees and their lack of options, the employer also fails to treat them as persons as he uses them to make money. Both the seducer and the employer fail to respect the involved persons and “their *particular* capacities for rational and autonomous action.”²⁸⁴ Does sexual harassment law, as applied by jurists, fail to respect the particular capacities of workers? Anita Bernstein thought so.

Bernstein’s sexual harassment legal theory draws on Kantian ethics to propose a change in sexual harassment jurisprudence. Bernstein noted that the sexual harassment *prima facie* case requires that the plaintiff prove the conduct both subjectively offensive at the time it occurred and objectively offensive.²⁸⁵ She disfavored the purportedly objective “reasonable person” standard for a variety of reasons, including the historic treatment of women as unreasonable or irrational.²⁸⁶ Instead, she advocated a standard based on respect, or the recognition of a person’s inherent worth as a human being.²⁸⁷ She suggested that “the respectful person must replace the reasonable person as the gauge by which courts determine whether the alleged harasser has violated the law.”²⁸⁸ Bernstein concluded, “Kantian ethics, widely (although not universally) esteemed for their breadth and compelling clarity, comport with the worldviews of many persons — indeed, many religions and societies — and suggest a consensus upon which lawmaking may build.”²⁸⁹

C. *Double Duty, Context, and the Person*

While Bernstein focused on the duty not to disrespect, both Wright and O’Neill highlighted that Kant’s ethic calls for positive action—beneficence—in addition to restraint from disrespect.²⁹⁰

²⁸⁴ *Id.* at 264.

²⁸⁵ Bernstein, *supra* note 14, at 452–53.

²⁸⁶ *Id.* at 456.

²⁸⁷ *Id.* at 452. Bernstein said:

As philosophers have elaborated, a fundamental meaning of respect, apart from a separate meaning of *esteem*, is *recognition* of a person’s inherent worth. Respect in the sense of recognition is owed to all persons, and thus workplace sexual harassment betrays the ideal of recognition respect, regardless of whether the harassed worker deserves high esteem.

Id.; see also Wright, *Treating Persons*, *supra* note 247, at 298–99 (discussing Bernstein’s inherent worth standard).

²⁸⁸ Bernstein, *supra* note 14, at 525.

²⁸⁹ *Id.* at 483 (footnotes omitted).

²⁹⁰ Wright, *Treating Persons*, *supra* note 247, at 277–79.

The notion that one should not use another merely as a means to an end reflects the need for respect.²⁹¹ Kant also believed that one should treat persons as ends in themselves.²⁹² O'Neill explained, "Policies of practical love or beneficence require us to recognize the needs particular others have for assistance in acting on their maxims and achieving their ends."²⁹³ For illustration, return to the example of the employer. The employer need not have as an end goal the employee's economic survival; however, the employer must acknowledge the employee's survival as *his or her* end goal and, therefore, recognize his or her limited bargaining position at the contract negotiation table.

O'Neill elaborated on the idea of treating others as ends:

[T]he Kantian conception of beneficence is from the start antipaternalistic. The duty to seek others' happiness is always a duty to promote and share others' ends *without* taking them over, rather than a duty to provide determinate goods and services or to meet others' needs, or to see that their ends are achieved. Beneficence of this sort presupposes others who are at least partly autonomous and have their own ends.²⁹⁴

This discussion of ethical conduct sheds light in two arenas: the adult's duty at work and our duty as legal theorists interested in fostering adolescent workers. Adolescents are at least partly autonomous, rational persons at work. The adult harasser is perhaps the seducer who beguiles adolescent "consent" to sexual activity with charm and by leveraging power, authority, and perhaps more to gain sexual favors. In this case, the harasser fails to treat the adolescent as a person because he fails to consider or, even worse, knowingly takes advantage of her inexperience and "*particular* capacities for rational and autonomous action,"²⁹⁵ including the developing psychosocial traits that Cauffman and Steinberg noted.²⁹⁶ His conduct expresses his attitude toward humanity: disrespect.

²⁹¹ O'Neill, *Between Consenting Adults*, *supra* note 261, at 265.

²⁹² O'Neill, *Between Consenting Adults*, *supra* note 261, at 262; Wright, *Treating Persons*, *supra* note 247, at 278 & n.35.

²⁹³ O'Neill, *Between Consenting Adults*, *supra* note 261, at 265; *see also* Wright, *Treating Persons*, *supra* note 247, at 282 (discussing Kant's theory of "need-fulfillment").

²⁹⁴ O'Neill, *Between Consenting Adults*, *supra* note 261, at 265; *see also* Wright, *Treating Persons*, *supra* note 247, at 279–81 (discussing Kant's theory of benevolence).

²⁹⁵ O'Neill, *Between Consenting Adults*, *supra* note 261, at 264.

²⁹⁶ *See* Cauffman & Steinberg, *supra* note 202, at 176–65.

Confused, one might argue that any teen who “consents” manifests her end. That might be true; however, whether it is or is not has as much to do with the context and activity as with the teen’s particular capabilities. For example, if an adult asks to borrow the teen’s cellular phone and the teen consents, is the teen used as a mere means to an end? Probably not. But what if the adult then uses the phone, not just to place a call, but to download expensive digital images off the Internet? Arguably, that use goes beyond the consent given and is inconsistent with the teen’s goal of helping a friend make a telephone call. In that case, the adult has used the teen—via her cell phone—as merely a means to an end because he could not have gotten consent for conduct that she did not anticipate.

Similarly, if an adult entices “consent” to sex, the adult’s end may not be congruent with the “consent” and the teen’s end. For example, the adult may want only sexual gratification. The adolescent may desire intimacy or status. She might seek a sense of importance and worth, or maturity, or being cared for as an adult—none of which may actually occur.²⁹⁷ Those ends are not necessarily compatible with raw sexual gratification.

While Kant emphasized universal maxims, as the above examples demonstrate, the type of activity and context may figure importantly in an evaluation of ethical conduct. O’Neill focused on sexual relationships to explain this point. She said that sexual intimacy, commonly understood, conveys affection, openness, trust, and “a commitment which goes beyond a momentary clinging.”²⁹⁸ When “gestures of intimacy are not used to convey what they standardly convey, miscommunication is peculiarly likely.”²⁹⁹ O’Neill discussed two important results from intimate conduct:

First, those who are intimate acquire deep and detailed (but incomplete) knowledge of one another’s life, character, and desires. Secondly, each forms some desires which incorporate or refer to the other’s desires, and consequently finds his or her happiness in some ways contingent upon the fulfillment of the other’s desires. Intimacy is not a merely cognitive relationship, but one where special possibilities for respecting and sharing (alternatively for disrespecting and

²⁹⁷ See Drobac, *Developing Capacity*, *supra* note 18, at 41–42 (“[M]ore than a quarter of sexually active teens . . . [sought] a more intimate relationship through sexual intercourse.”).

²⁹⁸ O’Neill, *Between Consenting Adults*, *supra* note 261, at 269.

²⁹⁹ *Id.*

frustrating) another's ends and desires develop. It is in intimate relationships that we are most able to treat others as persons—and most able to fail to do so.³⁰⁰

If one considers this reasoning in the context of an adult's sexual advances toward a teen at work, one can see how the teen might misconstrue the communication. The teen might see affection and commitment where the adult desires only sexual intercourse or other sexual gratification. Assume that O'Neill is correct and intimacy is not merely a cognitive relationship.

Then, adolescents, who demonstrate less temperance, perspective, responsibility, and are generally less sexually experienced, are even less likely than adults to recognize manipulative or exploitative gestures. They may "consent," having formed a desire that incorporates the other's desire for sexual gratification.

Robin West anticipated a similar response from adult women when she contemplated a liberal, gender-neutral perspective regarding consent and sexual engagement. She wrote:

[I]f women "consent" to transactions not to increase our own welfare, but to increase the welfare of others—if women are "different" in this psychological way—then the liberal's ethic of consent, with its presumption of an essentially selfish human (male) actor and an essentially selfish consensual act, when even-handedly applied to both genders, will have disastrous implications for women.³⁰¹

If women do think differently than men, and if teens, because of their "developing capacities," think differently than adults, then teen females may need adults to anticipate their particular adolescent capabilities, especially when addressing teen sexual harassment.

D. The "Formula of the End" and Sexual Harassment Law

The categorical imperative and the mandate to treat rational beings as persons offer guidance to legal theorists addressing the issue of teen harassment. They dictate against the paternalistic denial of teen capacity and the substitution of socially approved ends concerning juvenile workers, for a particular teen's ends.³⁰²

³⁰⁰ *Id.* at 270 (footnotes omitted).

³⁰¹ Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 92 (1987).

³⁰² See generally O'Neill, *Between Consenting Adults*, *supra* note 261, at 271–72 (comparing

The categorical imperative, as applied in the context of teen sexual harassment, requires that we treat teens as persons and not merely as a means to our end—the eradication of workplace sexual harassment. To treat them with respect, we must acknowledge their cognitive abilities, sexuality, partial autonomy, and “developing capacity.” To treat them with beneficence and as persons, we also take into account their relative lack of power, responsibility, perspective, and temperance. Onora O’Neill said, “Among vulnerable beings agency can be secure for all only when agents act to support as well as to respect one another’s agency.”³⁰³ We need to support the agency of our developing youth.

The question remains how best to support adolescent agency and protect them with the law. Wright concluded that sometimes “dignity can be upheld best, if not only, by means other than enforced compliance with legal or majoritarian norms. . . . Persons can, in typical cases of injury to their own dignity, often be led to revoke their consent . . . through noncoercive means.”³⁰⁴ No problem. In my experience, teens resist enforced compliance with adult majoritarian norms anyway. How can we get them to see when their “consent” was misguided though? How can we foster revocation without becoming paternalistic? We will certainly deter adolescent revocation of “consent” to illegal or ill-advised workplace sexual conduct if we penalize them under sexual harassment laws for their initial “consent.”

Kant, Rousseau, and many others have suggested that education is the key to moral development and growth.³⁰⁵ Wright explained, “Education is closely linked to rational development, the exercise of autonomy, and the fullest expression of human dignity. Treating all persons as ends in themselves requires the provision of educational opportunities, at public expense if necessary. . . . Kant regards

the failures of paternalism with other relationships).

³⁰³ ONORA O’NEILL, CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT’S PRACTICAL PHILOSOPHY 140 (1989).

³⁰⁴ Wright, *Consenting Adults*, *supra* note 253, at 1434–35.

³⁰⁵ See, e.g., JOHN DEWEY, DEMOCRACY AND EDUCATION ch. 3 (1966) (describing the importance of education as providing an individual direction); IMMANUEL KANT, EDUCATION ch. II (Annette Churton, trans. 1966) (1960) (discussing the physical education of children); 1 LAWRENCE KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE 1, 4 (1981) (outlining a basic theory on the stages of educational development); JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD 353 (Marjorie Gabain trans., 1965) (discussing moral education according to Durkheim); JOHN RAWLS, A THEORY OF JUSTICE 101 (1971) (“[I]mportant is the role of education in enabling a person to enjoy the culture of his society . . . and in this way to provide for each individual a secure sense of his own worth.”).

education as of central importance.”³⁰⁶ Thus, education may help in the case of teen sexual harassment.

Some adults have already identified the education answer and its potential in the battle against teen sexual harassment. In 2004, the EEOC launched its website and educational campaign.³⁰⁷ In an unpublished Consent Decree, Judge Sarah Evans Barker of the United States District Court for the Southern District of Indiana ordered Taco Bell to adopt and implement a special training program.³⁰⁸ She ruled that “[t]his training shall cover unlawful employment practices under Title VII . . . with particular emphasis on the awareness of discrimination issues that may affect youth, and especially minors, at work.”³⁰⁹ I would add that we also need to educate by example. Adults must model appropriate workplace conduct for new adolescent workers.

Will education cure the problem? No, not completely. As Cauffman and Steinberg noted, increasing knowledge may not always lead to better decision-making. For example, they warned that “while adolescents are largely aware of the relationships between condom use and the probability of HIV infection, two-thirds of sexually active sixteen to nineteen year olds surveyed in a recent study reported engaging in sexual intercourse without using a condom.”³¹⁰ Thus, the law needs to anticipate that until adolescents have sufficient experience and maturity, some will “consent” to sex solicited by an adult co-worker.

One way to satisfy the categorical imperative in the case of teen harassment is, as previously discussed, to permit teens to void their “consent” to sex with an adult co-worker or supervisor, without legal penalty during their minority, if they conclude that the adult has treated them merely a means to an end. If jurists invalidate “consent” at the liability phase and admit evidence of “consent” at the damages phase of any trial, they treat “consent” inconsistently and use teens merely as a means to their end of eradicating sexual harassment.³¹¹ They also give “consent” more value than it is

³⁰⁶ Wright, *Treating Persons*, *supra* note 247, at 318.

³⁰⁷ See EEOC, Youth @ Work, <http://youth.eeoc.gov/index.html> (last visited Dec. 19, 2006); Press Release, EEOC, EEOC Reaches Out to High Schoolers to Combat Workplace Harassment of Teens (Dec. 15, 2004), available at <http://www.eeoc.gov/press/12-15-04.html>.

³⁰⁸ See EEOC v. Taco Bell Corp., No. 1:05-cv-0998-SEB-TAB, Consent Decree (S.D. Ind. Feb. 16, 2006) (on file with author).

³⁰⁹ Jennifer A. Drobac, *Please Don't; I Have My Standards!*, 27 BNA EMP. DISCRIMINATION REP., July 12, 2006, at 55, 57.

³¹⁰ Cauffman & Steinberg, *supra* note 202, at 1772.

³¹¹ See *Doe v. Oberweis Dairy*, 456 F.3d 704, 714 (7th Cir. 2006) (“[A]lthough consent to

worth. Wright suggested:

The crucial point remains that the proper scope or value of consent—even free and knowledgeable consent—depends on other considerations and finally on an ultimate value, human dignity. An act of consent or refusal to consent that genuinely and substantially undermines human dignity, in the person of the chooser or others, is on shaky grounds at best, however much that choice may promote utility.³¹²

The notion of allowing even adults to withdraw consent is not a new one. For example, consumers often have the right to rescind agreements made with door-to-door salespersons within three days without penalty or obligation.³¹³ Wright explained that “[i]n the door-to-door sales case, the salesperson may use manipulative or high-pressure sales techniques that create a merely temporary desire for the product. The cooling-off period gives the buyer time to reflect on whether the perceived need is authentic.”³¹⁴

Arguably, this reasoning applies to adolescents who might succumb to manipulative or high pressure requests for sexual favors that create merely a temporary desire to experience sex. The rescission period, extended through minority, to account for “developing capacity” gives the adolescent time to reflect on whether the relationship was equal and mutual.

One might argue that consumers do not typically proceed to sue the employers of high pressure salespersons after withdrawal of consent and rescission of the agreement; however, consumers do not need to do so. Consumers can return to their pre-bargain position typically by providing written notice of rescission. Youth who “consent” typically cannot return to their “pre-consent” position; therefore, they should be allowed to sue for the value of what was lost in the corrupt transaction or their damages.

Wright concluded that “there is no deep Kantian reason why the

sexual relations with a coworker . . . is not a defense in a . . . suit for sexual harassment brought by a plaintiff who was underage when the conduct alleged to constitute harassment occurred, this does not mean that the conduct of the plaintiff can never be used to reduce the defendant's damages in such a case.”)

³¹² Wright, *Consenting Adults*, *supra* note 253, at 1425.

³¹³ *Id.* at 1413. Wright also gave the example of a consumer credit transaction in which the creditor acquires a security interest in the consumer's home. The consumer also has the right rescind that contract within three days. This right reduces the chance that a consumer might lose “one of his most precious possessions” after making an ill-considered deal. *Id.* at 1413–14 (quoting *N.C. Freed Co. v. Bd. of Governors of the Fed. Reserve Sys.*, 473 F.2d 1210, 1216 (2d. Cir. 1973)) (footnotes omitted).

³¹⁴ *Id.* at 1414.

Kantian duty of respect should not be legally enforced even in cases in which the target did not, for some reason, perceive her situation to be one of harassment.”³¹⁵ When she does perceive conduct as harassment within a reasonable period thereafter, the law should respect her and protect her dignity.

VI. CONCLUSION

“But to stand an’ be still to the *Birken’ead* Drill
is a damn tough bullet to chew”³¹⁶
Rudyard Kipling, *Soldier an’ Sailor Too*

The *Birkenhead* Drill—a damn tough bullet to chew? Our teenagers need comprehensive legal protections against sexual harassment and abuse at work. As demonstrated in this Article, they are at particular risk for several reasons. First, adolescents have never been legal or political equals to adults. Both the law and our political processes evidence their subservient status. We exercise dominion over them, often to care for them, by teaching them to comply with and respect adult authority. Their subordinated status makes some teens vulnerable to sexual harassment by adults.

Second, teens have not finished maturing in a variety of ways just identified; however, they may look physically mature, causing people to expect them to behave as adults would. Third, adolescents are inexperienced and often have not completed their educational training. They may not recognize harassing or manipulative conduct to protest or resist it. Fourth, teens are sexual beings. If we ignore that fact, we fail to anticipate their needs, including their need for protection from sexual predators. Fifth, teens may work for academic credit in addition to economic rewards; therefore, predatory supervisors possess an additional tool, not available for use against most adults, for leveraging sexual favors. Finally, both boys and girls experience sexual harassment on the job. Thus, a subordination theory that serves only women fails to address the harassment of male teens.

We must stand fast while we formulate a theoretical and ethical framework to customize for adolescent workers the legal prohibition of sexual harassment by adults. A life boat, a sturdy theoretical

³¹⁵ Wright, *Treating Persons*, *supra* note 247, at 299.

³¹⁶ See *supra* note 1 and accompanying text.

foundation, can be crafted to support such prohibitions and to protect our youth. The framework should include elements of subordination theory that accurately account for the intersectional, sexist, and gendered nature of the sexual harassment of teens. The subordinated group members are predominantly young and female (or effeminate, or femalized in some manner) and our theoretical framework should address this fact.³¹⁷

We should, however, build a theoretical framework that works for all young individuals—who may not be capable of responding to sexual harassment or resisting solicitations the way adults might. The categorical imperative, or a dignity-based theory, serves to justify protections designed for teen workers. It acknowledges adolescent autonomy, their particular capacities, and their potential for growth and development.

This Article proposes making “consent” voidable and allowing teens to sue under Title VII. Evidence of any prior “consent” should be inadmissible at both the liability and damage phases of trial. We should not discourage complaints by penalizing those workers who are “developing capacity.” Making “consent” voidable is but one practical approach built upon this theoretical foundation for the prohibition of teen sexual harassment. With this Article, I send an S.O.S. for assistance to feminists, legal theorists and philosophers, parents, employers, and even to all working teens. We stand together in this drill or we risk losing our children to the sexual pirates and other harassers of the American workplace.

³¹⁷ Perhaps all children are femalized in our regard since they come so recently from women.