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LENGTH: 32363 words**ARTICLE:** Per Se or Power? Age and Sexual Consent**NAME:** Joseph J. Fischel*

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HIGHLIGHT:

ABSTRACT: Legal theorists, liberal philosophers, and feminist scholars have written extensively on questions surrounding consent and sexual consent, with particular attention paid to the sorts of conditions that validate or vitiate consent, and to whether or not consent is an adequate metric to determine ethical and legal conduct. So too, many have written on the historical construction of childhood, and how this concept has influenced contemporary legal culture and more broadly informed civil society and its social divisions. Far less has been written, however, on a potent point of contact between these two fields: age of consent laws governing sexual activity. Partially on account of this under-theorization, such statutes are often taken for granted as reflecting rather than creating distinctions between adults and youth, between consensual competency and incapacity, and between the time for innocence and the time for sex. In this Article, I argue for relatively modest reforms to contemporary age of consent statutes but propose a theoretic reconstruction of the principles that inform them. After briefly historicizing age of consent statutes in the United States (Part I), I assert that the concept of sexual autonomy ought to govern legal regulations concerning age, age difference, and sexual activity (Part II). A commitment to sexual autonomy portends a lowered age of sexual consent, decriminalization of sex between minors, heightened legal supervision focusing on age difference and relations of dependence, more robust standards of consent for sex between minors and between minors and adults, and greater attention to the ways concerns about age, age difference, and sex both reflect and displace more normatively apt questions around gender, gendered power and submission, and queer sexuality (Part III). Ultimately, because adolescent youth as a class are positioned as uniquely desiring and dependent subjects, they warrant particularized treatment under law (Part IV). However, contemporary U.S. law, on account of its adherence to formal neutrality and its predominant language of prohibition, is ultimately a poor forum to detect and adjudicate coercion that arises at the interface of gender, sexuality and age differences. Therefore, not only should age of consent law be reformed and its principles rethought, but law itself should be deemphasized and refigured as a way to help better frame the problems of age and sex rather than as a way to resolve them (Part V).

TEXT:
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Introduction: Numbers, Power, Sex

Popular discussion of age and sex usually devolves into a numbers game. We generally agree that it is unfair for a seventeen-year-old to go to prison for having sex with a fifteen-year-old.ⁿ¹ We generally agree too that a high school teacher should be prohibited from having sex with his or her student. But what do we think about sex between a teenage girl and a man in his twenties when they are dating? Or about sex between a sixteen-year-old boy and a man in his thirties who meet online?

Numbers alone are not morally determinative. Blanket age of consent laws may be necessary to prevent harm and protect sexual autonomy, but they obscure the moral concerns at stake in sexual relationships conditioned by radical imbalances of power. A legal age of consent, as one of the few and probably most widely known per se sexual proscriptions, imagines one set of people (children) as categorically incapable of sexual decision-making, and another set (women) as categorically available for sex. More mildly, age of consent statutes may symbolically - if not quite functionally - figure sex below a certain age as guilty until proven innocent, and sex over that age as innocent until proven guilty.ⁿ² Such a calculation does not take into account the myriad other factors, beside age itself, that make young people more vulnerable to coercion and exploitation: inter alia, power, dependency, sexual and social experience, gender and gendered expectations.ⁿ³ It seems reasonable that the age [*282] of consent in most U.S. states ought to be lowered,ⁿ⁴ and sex between minors of the same age decriminalized,ⁿ⁵ but only - and this is the central focus of this article - in conjunction with other correctives: a more robust standard of consent for adult-minor and minor-minor sexual relations and heightened regulation of sex among persons in relationships of dependency, trust, and/or radical differences in power.ⁿ⁶

This Article is divided into five parts:

Part I skeletally describes past and current age of consent laws in the United States. Part II introduces the principle that I argue should inform age of consent statutes and that should underlie reforms to existing statutes: sexual autonomy. Adopting the concept from Stephen Schulhofer, I explain what I retain and reject from his understanding before applying a norm of sexual autonomy to the questions addressed in the remainder of the article.ⁿ⁷ The ideas and arguments articulated in Parts III, IV, and V are all in some sense tethered [*283] to this principle.ⁿ⁸ Although discussed more fully in Part II, it is worth saying here that sexual autonomy means something more like sexual liberty and less like sexual license, acknowledging and according a place for legal restraints to safeguard people's decision-making, to respect people's choices, and to hold open their options.ⁿ⁹

Part III advances four reforms to age of consent law that would encourage and be encouraged by sexual autonomy: lowering the age of consent and decriminalizing sex between teenagers; continuing the trend of codifying age-span provisions; regulating relations of trust and dependence; and establishing an affirmative consent standard for sex between minors and between minors and adults. These suggested reforms build on or against recent insights from liberal and feminist legal theory, as well as from other disciplines and writings. While I focus on a few liberal and feminist legal theorists, they do not serve as totems for liberal and feminist legal thought writ large, and I do not intend to lump their works together as "liberal" or "feminist" and then dismiss them accordingly, in gross caricature (the problem with liberal legalism is ...). To the contrary, I explicate and critique these authors because they have significant differences in their understandings of sexual consent, in their understandings of the criteria necessary for consent to possess moral and legal transformative force, and in their characterizations of age, age difference, and relations of dependence. By engaging the objections liberal and feminist legal theorists might raise against my claims, I work through the positions of these theorists and highlight their points of contention, both to advance my own claims and to defend their theoretical underpinnings.

The concluding subsection of Part III proposes that none of the theorists or theories discussed adequately address

the intersection of age, sex, and sexual [*284] orientation, nor do they consider the possibility that queer relations may have different dynamics than heterosexual relations, either because gender and gendered inequality operate differently in these different domainsⁿ¹⁰ and/or because queer cultures may have a distinguishable and (more) defensible place for intergenerational sexⁿ¹¹ (a possibility to which gay rights organizations are absolutely allergic, and with good reason, given the historic pattern of equating gays with pedophiles to imprison the former or deny them civil rights).ⁿ¹² In this article, a (slightly) stronger case is made that it is gendered inequality - and not queer exceptionality - that makes age difference different, depending on the genders of the participants. In any case, more nuanced thinking about gender and sexual orientation in this arena is necessary to protect the sexual autonomy of queer youth, to undermine gendered and heterosexist social imperatives, and finally to resist the conservative appropriation of child protection discourse to propel homophobic and anti-sex policies.ⁿ¹³ Nevertheless, the necessary limitations of color-blind - or in this case gender-blind, or gay-blind - liberal law initiate two wider concerns, cautionary reminders spelled out in Parts IV and V. First, recourse to law, especially criminal law, to resolve social or sexual inequality always entails unintended and sometimes regressive consequences, for example by solidifying the very norms agitators hope to dispel (boys as naturally desirous, girls as naturally wounded), or by authorizing the state's punitive power over already vulnerable subjects (queer men, men of color, young girls). Despite these serious objections to the "juridicalization" of social justice politics,ⁿ¹⁴ I argue adolescents - regardless of their gender or sexuality - should be considered a separate sex class under law (Part IV). Such classification, while perhaps making some Foucauldians recoil, is a better alternative to either maintaining existing laws governing sex and youth, or to abolishing regulation altogether.

Finally, despite the seductive allure of adjudication as a vehicle for social change, and despite an equally seductive allure of moral theorizing in the [*285] adjudicative modeⁿ¹⁵ (yes/no, good sex/bad sex), the law and its thou shalt notsⁿ¹⁶ must be decentered from our moral concern if we aim to promote and protect young people's sexual autonomy (Part V). The question no longer is (or never was), how can the law solve the problem, but rather, how can the law contribute to refiguring the problem, rather than codifying or reproducing it?

None of my suggestions - either the more modest ones for legal reformsⁿ¹⁷ or the more conceptual ones for moral theorizing - are completely new. But as far as I know, these suggestions - lowered age of consent, affirmative standards of sexual consent for minors, greater restrictions on relations of dependence, attention to questions of gender hierarchy and the possibly different dynamics of queer relations, and finally a diminution of law's primacy in theorizing age, sex, and harm - have never been offered in this combination. It is my hope that the proposals of this article work synergistically, developing a more complicated and consequently more honest cartography of young people, the law, and sexuality.

Part I: U.S. Age of Consent Statutes

This Part tracks the history and present forms of age of consent statutes in the United States. This history is partial, illustrating some of the central sociopolitical mores and objectives that mobilized age of consent reforms. This Part does not account for all changes to these laws over the past hundred and twenty years, nor does it contextualize in any sustained way age of consent reforms alongside other alterations to U.S. law, sexual (sex trafficking proscriptions, rape law, sex offender registration and notification, for [*286] example)ⁿ¹⁸ or otherwise (postwar Anglo-American liberalization, post-Reagan neoliberalization, 1990s broken windows, mandatory minimums, habitual offender, and truth-in-sentencing reforms, for example).ⁿ¹⁹ I am primarily concerned with how the law has changed, and the defining principles that informed those changes. My point is not only to trace the moral and political genealogy of laws governing young people's sexuality (and young people's older partners/johns/abusers), but also to extract those principles that continue to inform, or at least provide a palimpsest for, the present.

A. A Brief History of U.S. Age of Consent Statutes

In *Jailbait: The Politics of Statutory Rape Laws in the United States*, political scientist Carolyn Cocca explains that reforms to age of consent laws pivot around three historical junctures: the 1890s-1910s, led by social reformers and religious groups; the 1970s-1980s, led by second-wave feminists; and the 1990s, led mostly by neoconservative and

neoliberal politicians jointly advocating smaller government and a crackdown on crime.ⁿ²⁰ I adopt Cocca's periodization and complement it with other researchers' insights and observations, as well as my own.

Prior to the 1890s, states adopted English common law regarding statutory rape. Statutory rape was a strict liability offense, and covered only the sexual violation of young girls between the ages of ten and twelve.ⁿ²¹ The object of protection was a girl's chastity, where laws aimed to secure the smooth transfer of property in a girl's chastity from her father to her husband.ⁿ²² Statutory rape laws were enforced only against violations of white girls, as black girls' bodies were sexualized as open territory.ⁿ²³ If it were proven that a (white) girl had [*287] previously been "unchaste," the defendant was exonerated.ⁿ²⁴ That only white girls fell under the purview of protection, and that white girls who had been promiscuous ("promiscuity" included being raped) forfeited protection, "shows that the purpose of statutory rape law was to protect virginity, rather than to punish men who coerce sex from young girls."ⁿ²⁵

In the late 1880s and 1890s, in both Britain and the United States, antvice organizations, feminist reform movements, and social purity campaigns advocated raising the age of consent.ⁿ²⁶ Industrialization, urbanization, and the attendant influx of working-class young women in public spaces fueled coalition campaigns. Fears of sex trafficking in white girls, and fears that young immigrant and minority women were offering their sexual servicesⁿ²⁷ brought together a politically diverse coalition which was somewhat successful in changing state laws.ⁿ²⁸ Although many sought to raise the age of girls' legal consent to eighteen or twenty-one, most states compromised on ages between sixteen and eighteen to protect the interests and actions of men and male legislators.ⁿ²⁹

Both the marital exemption and the "promiscuity defense" were carried over from their common law adaptations into turn-of-the-century reforms. A man could not commit statutory rape (or rape proper, for that matter) against his underage wife, and girls with sexual histories were generally excluded from the protective ambit of state laws.ⁿ³⁰ While the dominant historicism of the reform movement at the turn of the nineteenth century interprets the coalitional efforts of white middle class feminists, social reformers, and religious groups as indicating a deeply conservative and reactionary movement to sanctify white women's virginity, regulate immigrant women's bodies, and discourage sex outside marriage,ⁿ³¹ there is also some evidence that this is not the complete story. Feminists and purity reformers also insisted that legal intervention was necessary to check the predatory desires of men and their presumptive right of access to young women.ⁿ³² So too, female doctors, attorneys, and writers argued [*288] that a raised age of consent would allow young women to develop their decisional abilities and sexualities free(r) from coercion.ⁿ³³ As others would argue a century later, extended statutory rape coverage also meant protecting girls from sex that, while coercive, did not meet the threshold of criminal rape liability.ⁿ³⁴

A confluence of postwar legal liberalization, the drafting of the Model Penal Code, the emergence of second wave feminism, and the sexual revolution of the 1960s set the terms for the next wave of age of consent reform.ⁿ³⁵ Feminist legal activists targeted both the gender specificity of extant laws and the criminalization of young people's sexuality.ⁿ³⁶ By only penalizing sex against young girls, the laws both ignored sexual abuse and coercion against young boys and codified the dominant assumption of young girls' sex and sexuality: passive, treasured, spoilable.ⁿ³⁷ Beginning then in the 1970s and carrying over into the beginning of the twenty-first century, states gender-neutralized their age of consent statutes and for the most part implemented age-span reforms to replace blanket proscriptions.ⁿ³⁸ Feminists targeted age difference as a better proxy to target coercive sexual relations than age per se. Legal attention shifted away from the traditionalist preservation of gendered relations and towards eradicating abuses of power. Age of consent reforms were a fraction of the broader egalitarian changes in formal sex law.ⁿ³⁹

There were at least two unintended consequences of the 1970s reforms, the legacies of which continue into the present. First, the formal gender neutrality of the law belies the non-neutrality of the problem.ⁿ⁴⁰ While boys are of course sexually coerced and manipulated by older partners, it is predominantly girls who report being victimized, being pressured into sex, and regretting their first sexual experiences.ⁿ⁴¹ Like in other areas of the law, there is a fear here that [*289] facially neutral statutes disfigure the social problem: gender-neutrality ignores the connection between age disparity and sex inequality, recasting the injustice as one of uniformly incapable and inexperienced boys and girls submitting to predatory older partners, rather than the paradigmatic case of a (somewhat) older man advancing on a

younger girl.ⁿ⁴² To rephrase the concern another way: gender neutrality of age of consent statutes may present sexual coercion across age difference as a problem experienced between atomized nongendered individuals rather than as a problem that intersects with and is strongly inflected by gender inequalities.ⁿ⁴³

The second problem revolves around queer sexualities and cuts two related ways. First, age of consent statutes, now gender neutral, could be and were used alongside other statutory apparatuses to incarcerate gay men. The moment second wave feminists brought attention to incest and family sexual abuse, police and prosecutors started hunting down gay men and gay organizations under the pretense of child protection.ⁿ⁴⁴

Gay activists, some pedophile rights activists, and some queer youth in the 1970s argued for the abolition of age of consent statutes on the basis that such laws censored youth sexuality, neglected young people's desires, and particularly stymied the exploration and desires of queer youth, already marginalized in their families and schools.ⁿ⁴⁵ The second prong of the second problem: gender neutrality flattens out potential differences between queer sexuality and heterosexuality, obscuring the possibility that sexual relations across generations take on different meanings and are differently imbued with power, depending on the genders and sexualities of the participants. These [*290] concerns, as well as the liberationist argument for abolishing age of consent laws, are discussed in Sections IIIe and IIId, respectively.

It should be noted that the trend in gender neutrality and age-span provisions did not occur uniformly, and girl-specific prohibitions and blanket age proscriptions continue into the twenty-first century.ⁿ⁴⁶ In the only age of consent case heard by the Supreme Court, the plurality opinion held that California's law penalizing exclusively men for sexually violating exclusively underage women did not violate the Equal Protection guarantees of the Fourteenth Amendment.ⁿ⁴⁷ Deterring teen pregnancy, the plurality opinion held, was a rational legislative objective to warrant gender specificity.ⁿ⁴⁸ Neither protecting the choices nor the bodies of girls and boys entered into the judicial calculus; in fact, despite testimony that the petitioner "slugged" the victim in the face until she acquiesced to sex, the consensuality of the sex was far from questioned.ⁿ⁴⁹ In his concurrence, Justice Blackmun tangentially noted that the drinking and "foreplay" between the petitioner and the victim indicated that the victim was not an "unwilling participant."ⁿ⁵⁰ He omits the part about her getting punched in the face. Meanwhile, the plurality insisted that pregnancy was punishment enough for girls - they need not also face jail time.ⁿ⁵¹ The dissent argued that jailing boys and girls would double the effectiveness of pregnancy deterrence.ⁿ⁵² The girl's body, her choice, and her resistance were incidental both to the prosecution and the Court. Rather, the rational basis of gender specificity fell on the fetus and its (non)future.ⁿ⁵³

The latest wave of age of consent reforms occurred in the 1990s. These reforms mainly constituted changes in enforcement patterns, sentencing extensions, and funding redistributions, rather than in legislated changes to actual ages of consent or age-span provisions (although some states did raise [*291] their ages of sexual consent).ⁿ⁵⁴ Reprioritized focus on statutory rape enforcement and boosted funding coincided with the Clinton-era overhaul of the federal criminal code in 1994, the rollback of welfare in 1996, and escalating sociopolitical anxiety throughout the 1980s and 1990s that childbearing, unwed, poor, teenage girls of color were the root cause of poverty, urban dysfunction, and wasteful government spending.ⁿ⁵⁵ The federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), restructuring welfare to workfare and replacing Aid to Families with Dependent Children with Temporary Assistance for Needy Families, declared unwed pregnancy a major cause of poverty.ⁿ⁵⁶ PRWORA encouraged states to bolster their enforcement of statutory rape laws to decrease rates of teen pregnancy.ⁿ⁵⁷ The underpinning logic, breathtakingly bizarre even without the empirical research that eventually undermined it, was: poverty is caused by unwed teenage girls having children; these children are mostly the result of sexual relations between younger girls and older men; more punitive sentences against older men for statutory rape and heightened enforcement (for example, requiring poor teenage girls to name the father of their child in order to receive social services)ⁿ⁵⁸ will act as a steady deterrent to age-differential sexual relations, reduce teen pregnancies, and ultimately reduce state and federal welfare spending.ⁿ⁵⁹

From the perspective of regulating underage sexual vulnerability, the most phenomenal aspect of these sentencing,

funding, and enforcement changes was their comprehensive failure, both as a matter of policy or as a matter of any a priori empirical rationale. In the 1990s, most unwed pregnant teens were between the ages of eighteen and twenty, putting these women over the age of consent in every state.ⁿ⁶⁰ Furthermore, a good number of pregnant teens at the time were married, and marriage generally inoculates statutory rape liability.ⁿ⁶¹ Data ultimately suggested that these policies did not accomplish their stated objectives of deterring teen pregnancy.ⁿ⁶² Furthermore, criminal focus on [*292] teenage pregnant girls distracted attention from prepubescent and non-pregnant teenage girls in sexually coercive relations.ⁿ⁶³ Finally, teenage pregnancy rates had been steadily declining since the 1950s (although the rate of teenage sex had been rising),ⁿ⁶⁴ putting into doubt whether teen pregnancy had any explanatory power over poverty. Some critics argued that perhaps poverty is the better explanatory variable of unwed teen pregnancies, that the causal arrows point in the opposite directions legislators assumed, and that targeting poverty to reduce teen pregnancy might have been more effective than targeting teen pregnancy to reduce poverty.ⁿ⁶⁵

Increased prosecution of men for statutory rape, harsher sentences, and retargeted funding coincided with the gutting of other social welfare programs, childcare services, and parent and job training programs. The 1990s refocalization of statutory rape prosecution and enforcement framed teenage pregnancy as (evidence of) a crime rather than as a public health concern or propellant of social inequality.ⁿ⁶⁶ So too, federal and state legislative attention characterized poor teenage girls of color as saps on government spending and/or victims to predatory men of color. Cumulatively, this has led many feminist scholars and legal theorists to object to these reforms as efforts to supervise and regulate the bodies of young black and brown women,ⁿ⁶⁷ to incarcerate black and brown men,ⁿ⁶⁸ and to drastically shrink social services,ⁿ⁶⁹ under the guise of reducing poverty and protecting girls.

B. Contemporary U.S. Age of Consent Statutes

Currently, laws vary state by state and are quite complicated; generally, they retain the structure of the 1970s reforms and have been amplified (with regards to both sentencing and enforcement) through the 1990s reforms. Most states follow a two-tier system.ⁿ⁷⁰ A person over a certain age, usually sixteen or eighteen, who engages in sexual activity with a younger person, usually under the age of twelve or thirteen, commits a "first-tier" crime of first degree rape or [*293] sexual assault;ⁿ⁷¹ a "second-tier" crime of a lesser degree is committed when a person engages in sexual activity with someone under (most commonly) the age of sixteen.ⁿ⁷² Second-tier offenses are popularly understood as "statutory rape," and first-tier offenses as "child sexual abuse," although "statutory rape" is not typically the name of the charge in criminal codes.ⁿ⁷³ In a few states, a second-tier offense is committed when a person of any age has sex with someone under the age of consent.ⁿ⁷⁴ In most states, the perpetrator must be a specific number of years older than the victim (age-span provisions).ⁿ⁷⁵

Age of consent statutes have a politically complicated and contentious history, sometimes securing the proprietary transfer of young girls from their fathers to their husbands, sometimes reflecting dominant mores of gender and sexuality, sometimes recognizing the structural vulnerability of young people, and sometimes leveraged as a club against unpopular minorities. Most often, the laws reflect all these political investments, and whatever normative propellant inspired the reform is attenuated, co-opted, or supplemented by additional political interests.ⁿ⁷⁶ I have recounted the social and juridical history of age of consent statutes and their contemporary formulations in order to illustrate the conflicted arrangement of youth, sex, and coercion manifest in U.S. law, and to map out the difficulties presented in the project of rethinking regulation. States have different age thresholds and varied age-span differentials; objectives of age of consent laws are progressive, protective, and/or paternalistic; and the imagined impressionability and innocence of youth make them symbolically exploitable for conservative political projects.

The reforms outlined in the following sections - as well as the principle mobilizing them - are therefore not intended as a cure-all to be uniformly superimposed over states' criminal or civil codes, as if these codes are all equally insufficient, oppressive, etc. Instead, I advocate changes that retain elements of current law targeting power asymmetry, that reject regressive figurations of youth and sex, and that protect and promote young people's sexual choices in the face of structural vulnerability and dependence. I focus not on how these changes would differentially supplement or supplant current [*294] statutes, but offer them instead to generate a more careful, capacious vision of the law and its

relation to youth, power, and sexual autonomy.

Part II. Towards A Sexual Autonomy Model of Age and Sexual Consent

In Part III of this article, I propose reforms to extant age of consent statutes, and delineate justifications for these reforms, utilizing empirical research, statutes, case law, and legal theorists' contributions. As referred to earlier, sexual autonomy is the principle that underlies the suggested reforms; here, I explain what Stephen Schulhofer understands sexual autonomy to entail, what I retain from that understanding, what tenets I disregard, and why I disregard them.

A. What Sexual Autonomy Entails

What holds greatest normative purchase in Schulhofer's account of sexual autonomy is its centralization of infringement on choice as paramount in determining what constitutes a sexual wrong. The idea of sexual autonomy offers a way for law and legal theorizing to deemphasize sexual violations as violations of the body alone. "Sexual autonomy" helps us avoid two persistent juridical embroilments: sacralizing (and consequently pacifying) the (female) body, and overdetermining "proper" levels of force and/or consent. The following explication of Schulhofer's analysis illustrates why the protection of choice is a more productive normative framework with which to consider young people and their relation to sex, sexuality, and each other. However, and despite himself, at moments Schulhofer privileges the body and specializes sex, which I suggest is a fraught maneuver for theorizing questions of sex and power, particularly in relation to young people, for whom "innocence" and "incapacity" are reigning cultural metaphors.ⁿ⁷⁷

In *Taking Sexual Autonomy Seriously*ⁿ⁷⁸ and *Unwanted Sex*,ⁿ⁷⁹ Schulhofer develops an understanding of sexual autonomy as a set of entitlement rights that hold open, foster, and protect sexual choices. The need for a legal principle of sexual autonomy arises, he argues, on account of deficiencies in sexual abuse and assault laws, and in the face of limited success in prosecution arising [*295] from feminist reforms.ⁿ⁸⁰ Since both sex law and feminist reforms to sex law have focused primarily on the issues of nonconsent and force, too many coercive - but nominally consensual - sexual encounters fall through juridical cracks.ⁿ⁸¹ Rather than determining if there was "enough force" in the sexual encounter to make it criminal, or if there was "enough resistance" to determine nonconsent, the law - and the rest of us - ought to take a more comprehensive view of sexual encounters, asking if the context, the relation between the persons, and the facts of the case seem to undermine sexual choice, or promote freer decision-making.ⁿ⁸² The notion of sexual autonomy allows the law to more carefully treat threats and offers made conditional on sex,ⁿ⁸³ and to regulate sex in professional, familial, or other relationship forms where the validity of consent is questionable.ⁿ⁸⁴ Schulhofer persuasively argues that incorporating sexual autonomy under the law is more practical and philosophically consistent than attempting to expand the legal definition of force to encompass more than violence against the body and threats of bodily injury and death. To concretize the distinction: one way of arguing that sex between a psychotherapist and her patient ought to be legally impermissible is to insist that the professional relation itself is a form of force that compels consent, or that the patient is not "really" consenting on account of something like false consciousness. The problem with such arguments, Schulhofer insists, is that stretching "force" this far renders it meaningless, or collapses distinctions the law should not collapse, namely, between this situation and the stranger with a knife at a woman's throat.ⁿ⁸⁵ So too - and this is more my point than his - the patient does consent, so making the sex legally nonconsensual consequently dismisses the desire of the patient, ironically reproducing the coerciveness of which it accuses the defendant.ⁿ⁸⁶ Instead, arguing from a baseline commitment to sexual autonomy, the law can justify regulating sex by presuming that the sexual choices or choice structure of the patient cannot be adequately guaranteed on account of the structural vulnerability that defines the relationship: it is not consent that is at issue, but rather the asymmetry which marks consent as an unacceptably ambiguous metric.ⁿ⁸⁷ We cannot know if she consents, which makes consent less useful. Similarly, the professional services offered in the relationship [*296] should not be contingent upon sex between the partners, a possibility that cannot be checked should the sex be unequivocally permissible.ⁿ⁸⁸

Incidentally, Schulhofer's advocacy for more robust standards of sexual consent also rely on his commitment to sexual autonomy.ⁿ⁸⁹ Schulhofer outlines a number of rape cases where defendants were cleared in which women were

threatened but did not resist, or did resist but not enough to count legally, or resisted but then acquiesced, or were so financially dependent on defendants that they could not reasonably resist.ⁿ⁹⁰ None of these cases can be construed as respecting the sexual autonomy of the victim, and a legal schema that did respect the sexual autonomy of the victim, that considered her choices and desires protectable, would require a more exacting standard of consent which signals, at the least, some volitional attachment to the sex one is having.ⁿ⁹¹

The moral valuing of "autonomy" quickly triggers some hefty philosophical objections. The most significant and perhaps best-known criticism is that the notion of "autonomous subjects" presupposes an undifferentiated, unmoored person who is rational and deliberative.ⁿ⁹² The concept, particularly in the realm of sexuality, may be unfortunately complicit with the culturally compulsory figure of a unitary, consolidated psychic subject whose desire is unidirectional.ⁿ⁹³ Autonomy belies our fundamental (but racially, economically, sexually, etc. differentiated) dependence on others, it belies the confluence of forces that influence our decisions and self-understanding.ⁿ⁹⁴ Similarly, autonomy makes the unit of analysis the individual at the expense of group life, communal relations, or structural modes of exclusion or inequality that cannot be accounted for through a localized defense [*297] of the deliberating person.ⁿ⁹⁵ But sexual autonomy need not get mired in problems connected to high liberal theories of the person:

Legal protection of autonomous choice has a narrower objective [than the proposals of feminist legal theorists like Chamallas and Pineau, who argue for some form of mutuality standard], to permit individuals to act freely on their own unconstrained conception of what their bodies and their sexual capacities are for. This approach need not imply a naive, laissez-faire liberalism blind to the inequalities of wealth and power. On the contrary, the objective is to protect individuals from real-world conditions that constrain freedom of choice, without dictating how that freedom can be used.ⁿ⁹⁶

Sexual autonomy need not assume that we all come to the table - or bed - as unencumbered free agents. Instead, it can attempt to recognize differentiated relations of dependence, and to theorize acceptable and unacceptable forms of interference in the realm of sexual decision-making, without prescribing what good sex should look like. The autonomy here is not an ontological truth of the human,ⁿ⁹⁷ but a guiding, revisable principle that recognizes available choices and checks certain constrictions on those choices.

So too, if we interpret sexual autonomy as but one formal precondition of just sexual arrangements, rather than as the conclusive objective of those arrangements, we need not eclipse patterned forms of sexual violence, and the influence of material power on sexual relations.ⁿ⁹⁸ Nor, finally, should we set this autonomy right against relational rights.ⁿ⁹⁹ That sexual autonomy applies to persons does not mean it does so in vacuo, but rather in order to secure and foster their desired relations.

B. What Sexual Autonomy Need Not and Should Not Entail

As Schulhofer explicates sexual autonomy, the precept need not sanctify sex as a good that trumps all others, nor must it valorize the separateness and [*298] sanctity of the body as a treasured artifact. Unfortunately, Schulhofer sanctifies both sex and the body:

Few of our other personal rights and liberties, perhaps only our right to life itself, are as important as our right to decide whether and when we will become sexually intimate with another person.ⁿ¹⁰⁰ A second dimension of autonomy is also important. The core concept of personhood inherent in the common law ... implies a physical boundary, the bodily integrity of the individual. Autonomy therefore, is not only the moral and intellectual, not only the capacity to choose. It is also physical, the distinctive separateness of the corporal person.ⁿ¹⁰¹

For the purposes of both criminal law reform and normative legal theorizing, I suggest we reject these premiums placed on sex and body. Sexual intimacy and intimate decisions may or may not be monumentally important to the individual, but there is something uncompromising about nominating sex rights so special by fiat, and in presuming that the special status of sex arises primordially, absent history and discourse.ⁿ¹⁰² By positioning sex rights as second only to life itself, we amplify the harm resultant in the violation of that right by interpretation. When sex is discursively constructed to be as special as life, and when the violation of sex rights are discursively constructed as a fate worse than death, this sociojuridical description animates and then redoubles the severity of the pain and harm it hopes to dispel.ⁿ¹⁰³ The sacralization of sex and body undermines the normative utility of sexual autonomy. Schulhofer himself developed his version of sexual autonomy as a way to identify and then minimize the problems of sexual coercion not reducible to bodily violation. In fact, as Sharon Marcus and others have provocatively argued, when rape law or legal theory imagines the body as pristine, separate, and distinct, this figured body is complicit with rather than resistant to rape culture.ⁿ¹⁰⁴ Such a body is [*299] without agency, a feminized and passive treasure, a temple whose only function is to await pollution, a body that is "already raped" or "already rapable."ⁿ¹⁰⁵

The problem, I believe, is reinforced in the case of young people, whose bodies are culturally apprehended as either pure and therefore imminently contaminable, or as already sexualized and therefore not salvageable. When the problem of young people and their relations is sociolegally reduced to the problem of preserving bodies from sex rather than protecting choices within existing inequalities of power, the target becomes sex and its presumptive interference with innocence, rather than exploitation or manipulations of dependence.ⁿ¹⁰⁶

None of the remarks here are to suggest that rape is not harmful, that it does not harm the body, or that sexual violence against the body is not experienced traumatically or as singularly disturbing. But theorizing sexual harm as a constriction on choice, as an external imposition against or willful negligence towards desire, or as potentially manifest in structural relations of dependence, allows one to take sex rights seriously without the pitfalls of specializing sex for everyone, a priori determining sexual harm to be the worst kind,ⁿ¹⁰⁷ or discursively building up the body as a temple awaiting its defacement (women) or defilement (children).

Let me clarify then two points of contrast between Schulhofer's perspective on sexual autonomy and my respectful appropriation of that perspective. First, while it is necessary to enlarge our perspective on sexual harm in order to incorporate constraint on choice, a recursive valorizing of corporeality and sex risks replacing the legal figure of a desiring, volitional subject with the figure of an always endangered, passive one. Second, and consequently, Schulhofer's sexual autonomy ultimately overdetermines sexual noninterference - the right to say no, to not be violated, to not have "unwanted sex." These rights are indispensable, but another promising feature of sexual autonomy as I see it is the right to desire, to have wanted sex - provided factors of coercion and constraint are accounted for. Articulating a right to make [*300] sexual decisions is more feasible when we resist attributing to sex and body positions of privileged passivity.

If sexual autonomy is a right to which we are entitled, if the right entails the holding open and fostering of choices, as well as respect for choices already made or to be made, and if a commitment to sexual autonomy guided legal reform and legal theorizing in the realm of age and sexual consent, what might such reforms look like?

Part III. Reforming and Rethinking Age of Consent Statutes

A. Lowering the Age of Consent, Decriminalizing Sex Between Minors

Foremost, a commitment to sexual autonomy advises lowering ages of sexual consent in jurisdictions where the age threshold is significantly higher than the age at which the majority of adolescents are having sex. So too, sexual autonomy demands that jurisdictions which criminalize sex between minors of the same age repeal such statutes.

The median age of consent in the United States is sixteen.ⁿ¹⁰⁸ In some states, however, the age of consent is seventeen or eighteen.ⁿ¹⁰⁹ While most states now have age-span provisions (as discussed previously), some do not, and

others have narrow age-span provisions.ⁿ¹¹⁰ Functionally, this means that in several states minors commit a crime when they have sex with one another, as each has sex with someone under the age of consent.ⁿ¹¹¹ Criminalizing sexual activity among minors condemns sex, not coercion; dampens the sexual autonomy of young people; and disrespects their choices.ⁿ¹¹² If many or mostⁿ¹¹³ young people are first having sex while below the age of consent, our social and legal obligation is not to penalize the sex - making it more difficult for teenagers to report coercion - but to protect young people's choices, desires, and safety. We fail this obligation if we criminalize teenagers for having sex. **[*301]** Meanwhile, where some jurisdictions treat minors who have consensual sex as incapable children, they concomitantly sentence them as culpable adults when they commit crimes.ⁿ¹¹⁴ The sociolegal impulse here is punitive rather than protective: adolescents are incapable children when they have sex, but deliberative, intentional adults when they commit crimes. Also, insofar as black male youth are disproportionately transferred to criminal court,ⁿ¹¹⁵ and insofar as age of consent statutes are and have been disproportionately enforced against black men and gay men,ⁿ¹¹⁶ criminal law in the areas of sexual proscriptions and sentencing is more plausibly rendered as a conduit and codification of racism and homophobia.ⁿ¹¹⁷

I am not particularly wedded to fixing the age of consent - which should probably be called something like the age of sexual majority or sexual citizenshipⁿ¹¹⁸ - once and for all. Indeed, as the rest of this article suggests, such fixation on fixity reinscribes volitional youth as ontologically incompetent, deflects attention from relations of power and dependency in young people's lives that constrain consent's transformative force, ignores the sociological and educational contexts that influence young people's sexual decisions and decision-making capacities,ⁿ¹¹⁹ and smoothes out important differences between heterosexuality and queer sexualities,ⁿ¹²⁰ and perhaps differences between sexual acts.ⁿ¹²¹ Nonetheless, given the prevalence of teen sex, the number of young people who first have sex with older partners,ⁿ¹²² the developing **[*302]** reasoning of many young people,ⁿ¹²³ and the particular regulatory pressure the formally neutral law places on young queer peopleⁿ¹²⁴ and racial minorities in their social/sexual choices, the age of consent should probably be lowered from its most common current range of sixteen to eighteen, to something closer to twelve or fourteen, with age-span provisions for younger teenagers between twelve and sixteen.ⁿ¹²⁵ However, unlike Heidi Kitrosser, I resist the notion that nonconsent ought to be the rebuttable presumption of sexual activity within these age spans, challengeable by an affirmative consent defense.ⁿ¹²⁶ If this sex is guilty until proven innocent, it will, by prosecutorial and police enforcement, be black and gay men who are found guilty, and white suburban teens who are let off the hook; the sexual/social relations forged against background hostility will be retargeted, while sex among white youth will be presumptively noncoercive.ⁿ¹²⁷

Before addressing two objections to lowering the age of consent - the presumptive sexual incapacity of minors, and the presumptive sexual vulnerability of girls - I should pause to more carefully explain how this article is both deeply indebted to and departs from the arguments made by Heidi Kitrosser, referenced above, in *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*. Many of the suggestions put forth here are similar to those Kitrosser proffered over a decade ago: specifically, defining an affirmative standard of consent for sex involving minors, and more stringently regulating sex in age-discrepant relations of dependence and trust.ⁿ¹²⁸ She successfully evidences the conditions of vulnerability unique to minors (particularly girls) as a class that warrant her (and my) revisions.ⁿ¹²⁹

Despite our substantial areas of overlap, however, at least three lines of Kitrosser's argument remain troubling from the perspective of sexual autonomy. First, as just mentioned, Kitrosser asks the law to treat all sex between minors as illegal, but an affirmative defense of consent may challenge a rebuttable presumption of nonconsent. For those jurisdictions in which sex between minors would be reclassified from strictly criminal without the possibility of rebuttal to presumptively criminal with the possibility of rebuttal, **[*303]** this is a welcome change. But this begs the question: why is the sex criminalized from the start? Kitrosser herself suggests the law should punish coercion, not sex, so why make sex guilty until proven otherwise?ⁿ¹³⁰ If the consent standard is an affirmative one, the defendant charged with sexual assault must prove that the plaintiff willingly agreed to sexual activity.ⁿ¹³¹ This should be adequate enough, without criminalizing minor sex wholesale.

Second, Kitrosser insists that restrictions on sex in relations of dependence and the rebuttable presumption of nonconsent are both justified because in each situation the consent of the minor subject is allegedly not meaningful:

either she does not know what she is doing or she is coerced into doing what she does. In the absence of a principle like sexual autonomy, Kitrosser must either advance expanding definitions of force to capture asymmetrical relations, or question the validity of minors' and/or dependents' consent. But relations of dependence need not be "criminally coercive" for the sex in those relations to be regulated.ⁿ¹³² By focusing on infringements of choice and choice structure, relations may be regulated without attributing by legal designation an inherent incapacity to consent, and without therefore marking the minor as coerced or violated preemptively.ⁿ¹³³

Third, at moments in her article, Kitrosser treats minors as a Trojan Horse to restructure rape laws more generally, for adults. Her proposals, she suggests, would ideally be incorporated throughout all rape law, and she surmises that statutory changes addressing the unique vulnerability of minors could compel legislators to overhaul rape law for everyone.ⁿ¹³⁴ Kitrosser too quickly assumes that children are simply vulnerable like women but doubly so, and that changes in law - and social responses to those changes - will all operate evenly over different subpopulations. Ironically, her maneuver potentially objectifies children and childhood to marshal political and legal change for adults, a questionable move to advance the sexual rights of young people.ⁿ¹³⁵

1. Objection: Children Are Incapable of Consent

Scholars from many disciplines have documented how innocence and (concomitantly) incompetence are the pervasive tropes of childhood in modern and late modern Western societies (tropes to which Kitrosser intermittently but [*304] unfortunately takes recourse).ⁿ¹³⁶ And while such tropes are always inflected through other social divisions (the skewed racial allocation of innocence, for example, where the white girl is endangered and the black boy is endangering; or the media whitening of children of color to look innocent, or the persistent portrayal of children of color as a threat to white innocence),ⁿ¹³⁷ it is the presumptive innocence and incompetence of children and childhood which news programs, talk shows, legislators, judges, and lobbyists extol (and lament the loss of) when calling for greater protections for youth or harsher punishments for those desiring them.ⁿ¹³⁸

A central argument of this article is that lodged in the objection of constitutional incapacity (she is just a kid!) is dualistic thinking that is damaging to young people and sexual autonomy, and that precludes a more nuanced understanding of power and its legitimate and illegitimate injection into sexual relations. In response to this objection, I suggest that we think of consent as a spectrum instead of a switch. From childhood to adolescence to adulthood, the guiding metric of sexual consent ought to gradually shift focus from capacity to voluntariness; currently, some age of consent laws suppose a clean division between incapable children and volitional adults.ⁿ¹³⁹ Before attempting to exposit a more nuanced understanding of consent (a sliding scale from capacity towards voluntariness as age increases) in relation to young sexual subjects, I want to cut off two potential challenges preemptively. First, this article is only considering young people in the United States, statistically sexually active or almost sexually active, confronting sexual decisions. I am not considering those subjects under "tier 1" law, usually children under twelve,ⁿ¹⁴⁰ as we can reasonably assume that capacity is and ought to be a guiding legal metric here, not only on cognitive or developmental grounds, but on the [*305] presumption that sexual knowledge and information is seriously limited.ⁿ¹⁴¹ Thus, I do not believe consent should be an affirmative defense for sexual relations with tier 1 children. This invites the second challenge: despite the pastiche attached to developmental psychology, neuroscience, or just science generally, I place very little emphasis on discovering a neurological moment when young people fully understand sex, their sexual choices, and the ramifications of sex acts, because there is enough sociological evidence that such a moment is illusory; education, safer sex education, resources, gender, regional location, family dynamics, and politics all mediate, dampen, empower, or in other ways give shape to a young person's sexual agency and her ability to consent.ⁿ¹⁴²

To discuss the normative shift from capacity to volition in greater detail, I focus on two legal theorists' analyses of age and sexual consent, those of David Archardⁿ¹⁴³ and Michelle Oberman,ⁿ¹⁴⁴ despite a stronger political theoretic affinity with Schulhofer's arguments for rethinking legal regulations around sex.ⁿ¹⁴⁵ This is because, surprisingly, Schulhofer does not investigate age, age difference, and constraints on choice, and Archard and Oberman do. Despite an otherwise prescient comment that age of consent statutes often neglect power relations by collapsing power inequality into a line-drawing game,ⁿ¹⁴⁶ Schulhofer repeatedly writes off the sexual consent of a hypothetical fifteen-year-old as

meaningless, on the ungrounded rationale of presumed incapacity, therefore perpetuating the deficiency of the statutes he questions.ⁿ¹⁴⁷

In *Sexual Consent*, David Archard unpacks what he calls the "common view" that consent, and only consent, morally legitimizes sexual activity.ⁿ¹⁴⁸ His book attempts to understand what consent means under different contexts, and why and if it is morally transformative. I start with *Sexual Consent* because Archard's treatment of questions around sex and youth provides much of the architecture for the remainder of this Article. Specifically, I develop three of [*306] the factors he takes to be pertinent in evaluating youth and sexual relations - age, age difference, and special relationshipsⁿ¹⁴⁹ - and then add another, an affirmative standard of consent for sex between youth and between youth and adults.

Archard is sensitive to cultural narratives that underwrite modern understandings of childhood and sexuality. He recognizes how the ubiquitous image of childhood innocence works at once to sexualize children and to deny them any sexual agency and decision-making capabilities. "A child's innocence is rather like the purity of the virginal woman which is the object of a certain male sexual desire - attractive for being that which is not yet but can be corrupted."ⁿ¹⁵⁰ Accordingly, argues Archard, "a child is deemed incapable of offering real consent, and abuse is frequently defined in terms of an exploitation of that very fact."ⁿ¹⁵¹ Thus, child sexuality is often read as child sexual abuse, without nuance for age, age difference, sexual practices, the relationship of the persons involved, and any other factors relevant to the encounter or relationship.ⁿ¹⁵² The project of pinpointing standards for sexual relations across age is complicated indeed if the law, media sensationalism, and eroticized myths of innocence re-sexualize the very children needing protection, and demonize the adults who apparently desire them.ⁿ¹⁵³ Against such a saturated backdrop, Archard teases out what he takes to be morally significant in defending and determining age of consent laws.

First, though, Archard proposes that the three central criteria implicit in the "standard account" of meaningful sexual consent (for all people, youth and adults) are: voluntariness, knowledge, and capacity.ⁿ¹⁵⁴ We should want to do what we are doing free of specific pressures and constraints (voluntariness), we should understand what it is that we are doing (knowledge - in the literal sense, as in knowing a penis and not a medical instrument is the object of insertion),ⁿ¹⁵⁵ and we ought to have the cognitive wherewithal - to be sober, not severely mentally handicapped - to make sexual decisions (capacity). On Archard's first attempt, childhood looks like mental disability: "A child is judged to lack the capacity of an adult but not to be permanently disabled in [*307] that she will acquire capacity with age ... Wherever the age of majority is fixed, we may presume normal sane adults to be capable of giving their consent."ⁿ¹⁵⁶ Childhood is equivalent to a kind of immature insanity or mental underdevelopment, and so capacity is the criterion that counts. However, in a later chapter focused explicitly on age of consent, Archard complicates his assessment. The four evaluative criteria he introduces are "the nature of sexual activity, the age of the consenting party, the age differential between the parties, and the existence, if any, of a special relationship between the parties."ⁿ¹⁵⁷ He also argues that local circumstances, particularly the degree of sexual education and experience among young people, necessarily ought to influence age of consent law.ⁿ¹⁵⁸ From these categories it is evident that capacity is just one of many considerations, and is more or less salient depending on the specifics of the situation. It is important to contrast the earlier reflections of the book with the later ones, because it is the myth of eroticized childhood innocence which Archard himself observes that imagines capacity, or incapacity, as the singularly relevant factor regarding minor sex and sexuality.

In discussing age differentials between partners, Archard focuses on situations in which the choices of the younger person are or reasonably seem to be constricted or unfairly manipulated by another person. Because young people, particularly girls, may seek validation, respect, or attention from an idealized older person, they may be willing to engage in sexual activity despite their not desiring to do so.ⁿ¹⁵⁹ It is their voluntariness that is primarily at issue, although it is likewise clear that the presumption of underdeveloped capacity is part of what makes the consent to sex less than voluntary. The "special relationships" Archard describes are those of institutionalized power differentials: a father and daughter, an uncle and nephew, a coach and athlete - relationships that often characterize adult-minor sexual activity. In these [*308] relationships, Archard again emphasizes the constraints on a child's choice, rather than the child's capacities. As for age itself, Archard comments, "what matters is not just that one can have sex but that one has some understanding or appreciation of what is involved in having sex."ⁿ¹⁶⁰ Puberty then is not adequate as a metric of

capable consensuality, but rather an awareness of what one is doing with one's sex and sexuality. This appears to be straightforwardly about capacity, but note that Archard is not simply interested in whether a young person is capable of literally saying yes or no to sex, but whether a young person understands the physical and emotional ramifications of sexual activity. This understanding requires education, experience, and knowledge of sexual life. When the assumption of incapacity justifies the withholding of sexual education, then young people really are incapable of sex or giving sexual consent, but because of lack of information, not incapacity per se. ⁿ¹⁶¹

Archard builds a solid foundation to better theorize age and the question of sexual consent. Against a cultural imaginary that envisions youth as sexually incompetent and/or duped sexualized commodities, Archard's distinctions between capacity and voluntariness recall that different young people, of different ages, are positioned differently in their relation to sex. Age-span provisions and "special relationships" are elaborated further in Section IIIb, with an emphasis on voluntariness and choice, rather than capacity. ⁿ¹⁶² As I have been trying to make clear against the objections of innocence and incapacity, a moral or juridical insistence on capacity alone ensnares us in problems analogous to those we encounter in valorizing the body or specializing sex.

Although I follow Archard's typology, I depart from his reasoning somewhat: Archard explores primarily how age differences and special relations may invalidate consent. In contrast, I will suggest that such divisions in positions of power sideline consent as the central moral or legal metric. And where Archard suggests that more robust standards of consent may be appropriate for sexual relations between people relatively unknown to each other, ⁿ¹⁶³ I apply such standards to youth as a legal class of persons. The normative distinction is that Archard sees affirmative consent as a hedge against potential and interpersonal forms of coercion; I see affirmative consent as a hedge against the social structural vulnerabilities and forms of dependence particular to young people.

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2. Objection: A Lowered Age of Consent and the Decriminalization of Sex Between Minors Will Under-Protect Girls and Condone Sexual Violence Against Them

A more compelling objection to lowering the age of consent and decriminalizing sex between minors comes from Michelle Oberman, who is concerned that such reforms would exacerbate the already subordinate condition of young girls. ⁿ¹⁶⁴

Oberman offers sociological and psychological studies as well as case law that illustrate the sexual pressures young women face, the common regret they share after their first sexual experiences, and the recurring emotional and physical harms from sexual abuse and early-age sexual activity. ⁿ¹⁶⁵ She observes:

The vulnerability inherent in adolescence, including severely diminished self-esteem, ambivalence about one's changing body, and a marked reluctance to assert one's self, leads teenagers to consent to sexual contact that may not be fully, or even partially, desired... [A] multiplicity of factors beyond sexual desire and love that lead teenagers to consent to sex ... [are] fear, confusion, coercion, peer pressure, and a desire for male attention. ⁿ¹⁶⁶

Outlining the coercive sexual experiences particular to girls and the legal failure to prevent these experiences, she proposes her own reforms, among them "retaining a relatively high age of consent, while simultaneously enlisting victim cooperation in determining the course that a criminal action will take." ⁿ¹⁶⁷ She thus proposes that the age of consent be no lower than sixteen, and that victims be consulted to determine the appropriate punishment for perpetrators. For Oberman, law ought to be a social corrective to gender as it exists for young people, and laws that once commodified girls ought to be recuperated for their protection.

The major problem with her proposals is that Oberman wants to criminalize all sex under age sixteen, regardless of

the age of the parties or their desires. Although the "ideal" type of mutually pleasurable sex between teenagers of the same age is rarely prosecuted, and although Oberman encourages leniency, reduced sentencing, and/or sexual education programs for first time offenders of nonviolent, per se crimes, the message is still unambiguous: sex is bad when you're young, there is always a perpetrator and [*310] always a victim, and the girl qua girl is always vulnerable, always in need of state protection from others and herself. ⁿ¹⁶⁸

Oberman maintains that a young girl's continued insistence that she wanted the sexual relations to occur may not exonerate the perpetrator, and this seems right. Part of the point of Oberman's statutory rape law is to shield young girls from a socialization process where they "want" to have sex in order to be respected, validated, and appreciated by men. But in all of her case examples, the girls were either silent or asked the perpetrator to stop. ⁿ¹⁶⁹ The boys target the girls because they are younger, and sequester them to places where they are alone and cannot reasonably resist. ⁿ¹⁷⁰ The boys often physically assault the girls, or advance despite their resistance. ⁿ¹⁷¹ As a critic reviewing her cases notes, "the members of the Spur Posse committed rape, not statutory rape; the older adolescents in the Chicago case abused eleven-and twelve-year-old children; and Joshua Hemme raped two girls." ⁿ¹⁷² Oberman herself admits that it would be "absurd to consider these encounters consensual." ⁿ¹⁷³ What is odd, then, is that Oberman's evidence against taking a girl's "yes" as "yes" - that her yes is coerced and thus ought to be discounted - is precisely the times she has not said yes. The marshaling of coercive teen sex as evidence of a general unhealthiness of teen sex makes coercive sex seem less problematic (by defining it as a status crime), and mutually desired sex more suspect.

Oberman's age of consent law criminalizes sex in relations of dependence, across wide age spans, and sex in the "grey area" - when older teenage boys make unwelcome sexual advances against teenage girls. But she also aims to criminalize all mutually desired sex among minors. The line Oberman draws - in essence the same line that exists now but with a different color - both overreaches and falls short. She casts too wide a proscriptive net over youth sexual activity, and in doing so recreates the patriarchal assumptions she seeks to reverse. ⁿ¹⁷⁴

Like Archard, Oberman largely refuses to consider a more robust standard of consent for sex between young people and between young people and adults. ⁿ¹⁷⁵ It is this refusal that results in an otherwise persuasive call for the [*311] state to protect the sexual autonomy of young girls, but which ultimately and unilaterally criminalizes their sex. However, unlike Archard (or Schulhofer), Oberman importantly understands that questions and problems around age, sex, and consent are also always questions and problems about gender and power. But such recognition of this interface need not collapse, legally, into the assumption that girls are either sexless or powerless.

B. Continuing the Trend in Age-Span Restrictions over Per Se Proscriptions

As mentioned in Part I, feminist-led reforms in the 1970s both gender neutralized age of consent statutes and transformed blanket, one-age proscriptions into age-span provisions. ⁿ¹⁷⁶ In most states, a seventeen-year-old is no longer criminally liable for sex with a fifteen-year-old, but a nineteen-or twenty-year-old is. ⁿ¹⁷⁷ Age-span reforms are doubly motivated. First, such reforms shift the punitive response away from sex per se, so the moral problem to be legally solved is no longer teens having sex. Age-span provisions can signal that there is nothing innately impermissible about sex at a young age. Second, and consequently, these reforms aim at eliminating coercion, not sex; age difference is considered an adequate proxy for coercive relations. ⁿ¹⁷⁸ Insofar as these provisions reflect the social and economic pressures young people, particularly girls, face to acquiesce to sex with older men, ⁿ¹⁷⁹ insofar as they reflect differences in sexual knowledge and experience between younger teenagers and older people, ⁿ¹⁸⁰ and insofar as they acknowledge young people as sexually volitional rather than incompetent or incapable, they are welcome [*312] substitutions to the older laws. They should continue to replace one-age blanket proscriptions still on the books in some states. ⁿ¹⁸¹

1. Objection: Age Spans are Not a Necessarily Adequate Proxy for Sexual Coercion

There is, though, no necessary reason for sexual relations between younger people and older people to be any more coercive than sex between people of the same age. ⁿ¹⁸² Age-span provisions build in a presumption of coerciveness and

power asymmetry, a presumption with empirical support,ⁿ¹⁸³ but the age difference itself might not explain the coercive nature of the sex. In *Consent to Sexual Relations*, Alan Wertheimer suggests that age differences between partners may not accurately index sexually coercive encounters, and he therefore equivocally opts instead for blanket prohibitions effected through a single age of consent.ⁿ¹⁸⁴ Oberman also points to problems with age-span differentials both in law and as a priority of prosecutorial enforcement. She cautions that a focus on age-spans may deflect attention from the coercive sexual experiences of young girls with partners of the same age, and may naturalize the less-than-wanted sex between same-aged young people as an inevitable rite of passage into adulthood.ⁿ¹⁸⁵ I respond to Wertheimer and Oberman in turn.

Wertheimer begins his discussion on age and sex promisingly, asking, "positive law aside, when and why should we regard the consent of a young person as invalid?"ⁿ¹⁸⁶ He continues with this counter-conventional claim:

It is not obvious that age, per se, should be a worry at all. Age may be a useful proxy for psychological capacities that are relevant to the validity of consent, but it is only a proxy. In principle, we could evaluate a person's competence by reference to the mental capacities that are relevant to that decision and there is no reason to think that the relevant mental capacities of many minors are lower than the mental capacities of many intoxicated or retarded adults whom we typically regard as capable of giving morally transformative consent.ⁿ¹⁸⁷

[*313] This challenge to what might be called the capacity model of age and sexual consent is clarified by the six hypothetical scenarios Wertheimer offers to illustrate the difficulties around sex and age.ⁿ¹⁸⁸ The most flagrant cases of illegitimate consent involve partners of different ages and positions of power: an eleven-year-old girl and an eighteen-year-old brother's friend, a thirty-four-year-old male babysitter and a fourteen-year-old girl,ⁿ¹⁸⁹ a seventeen-year-old gang member and high school freshman,ⁿ¹⁹⁰ a thirty-three-year-old man and a fourteen-year-old girl who meet online. What is bothersome here is not exclusively age per se, but age difference, relative positions of power, and the exploitation of that difference and power. Among Wertheimer's scenarios, he believes only consensual sex between two fifteen-year-olds is morally valid, but is admittedly unsure about which relations should be legally valid.ⁿ¹⁹¹

Yet despite Wertheimer's own examples, and his own evaluation, he insists that age spans are not necessarily problematic, and that a single age metric should hold. He contends,

it is possible that wide age spans are more likely to be coercive, that the proportion of peer relationships that are problematic on these grounds is lower than the proportion of wide-age-span relationships. This may or may not be so. But, absent evidence about the way in which age spans are, in fact, a good proxy for coercion, this argument provides little support for the age-span approach.ⁿ¹⁹²

But then why do we, or does Wertheimer, find sex between fifteen-year-olds unproblematic? In one of his more uncomfortable scenarios, two eleven-year-olds have sex. This is startling, but is it criminal? The situation of the eighteen-year-old, however, who advances on an eleven-year-old is suspect because he is more sexually knowledgeable, exploits her inexperience, and knows that she will willingly accede to appease her brother's friend.ⁿ¹⁹³

Wertheimer summarizes his discussion by claiming that considerations of age span and other differences in power are too complicated for any rigorous discussion or legal regulation, and seems to suggest that blanket age of consent [*314] laws may be the best we can do, even though they may be no more (or less) defensible than other per se laws like age-span prohibitions.ⁿ¹⁹⁴ Wertheimer asks a number of questions that are left unanswered, and ultimately little is developed on this front. Why? Because, despite his introductory remarks, Wertheimer collapses age into the problem of capacity. He does so because his theory on voluntariness - which is in fact his theory on sexual consent writ large -

cannot canvass structural relations of power, nor the effects of power on choice and submission. In Wertheimer's analysis, choices are only compounded by individual and individualized threats, and so the status of the partners (employer-employee, different levels of intoxication, etc.) rarely matter unless one person has leveraged the authority to explicitly disadvantage another.ⁿ¹⁹⁵ Put differently, because Wertheimer cannot address the kinds of pressures and constraints manifest in most relations between adults and minors, and because his theory cannot acknowledge socialization processes that condition girls to acquiesce or submit to sex to older partners, he is left with no other alternative but to make children incapable, to end where he began, with positive law.ⁿ¹⁹⁶

Oberman is also skeptical of age-span criteria. She reviews six cases in which underage girls did not want to have sex with their partners, but where the consent standard of criminal rape law would likely not have protected them, that is, would not have found the behavior of the men criminal.ⁿ¹⁹⁷ The cases evidence the need, she says, for bolstered age of consent statutes. Although Oberman presents her examples to indicate why prosecutorial priority on age-span cases would be under-protective, Phipps points out that "Oberman's case studies do more to demonstrate the legitimacy of age span provisions than to undermine them."ⁿ¹⁹⁸ Indeed, all the cases involve girls at least several years younger than the boys. The facts of these casesⁿ¹⁹⁹ (like the facts of Michael M.)ⁿ²⁰⁰ are incongruous with a plea to criminalize all teenage sex. Oberman is concerned that age-span provisions will skew social understandings of sexual violence as a problem of creepy old men and vulnerable young girls, thus detracting attention from peer-on-peer sexual coercion. But her case studies suggest instead that properly tailored and enforced provisions would strengthen the sexual autonomy of young people, particularly girls. Such provisions would [*315] not imply that the problem of sexual violence is and is only the problem of great age discrepancy, but rather that different ages reflect different degrees of experience and power, that older people intimidate younger people, and younger people acquiesce to older people.

Wertheimer, because he is interested primarily in defending the deliberative adult, cannot apprehend the unequal distribution of power between groups, in this instance young people and older people. By re-making children incapable, he reworks the problem as one of capacity rather than constraints on volition. Oberman, because she is interested primarily in defending girls as a class, cannot apprehend the desiring female subject. Since she (myopically, at moments) only sees gendered subordination, her account too quickly assumes problems of age-difference can only be epiphenomenal to gender hierarchy, and so the teenage girl desiring sex with her teenage boyfriend looks equivalent to any and all age-discrepant, coercive sex.

C. Regulating Relations of Dependence and Trust

If age-span provisions have been codified to approximate relations of coercion, why not regulate relations that are more proximately coercive? Anecdotally and statistically, adult perpetrators of child sexual abuse are much more often fathers, stepfathers, or family acquaintances of the victim than they are the feared strangers in the park.ⁿ²⁰¹ But when such stories are narrated (and legislated) as violations of innocent, asexual children rather than as manipulations of relational dependence, the fifteen-year-old victim is lumped into the same story as the four-year-old, and children and youth are written over as blank slates, unwanting and undesiring, whose corruption is inevitable.ⁿ²⁰² The problem to be fixed becomes the pathological evildoer rather than the relation of trust or dependence leveraged for sexual satisfaction - perhaps morally exonerating everyday abuse through the construct of an externalized villain.ⁿ²⁰³ Most states do legally prohibit incestⁿ²⁰⁴ and some - but not enough - states regulate relations between young people and their custodians - teachers, psychologists, coaches, family members, etc.ⁿ²⁰⁵ It is relations of trust, authority, [*316] and dependence, not age or age difference alone, that ought to be the centerpiece of regulating sex among minors.ⁿ²⁰⁶ By centering relations of dependence over age, we are left with a rather different juridical imaginary, where differences of power and its abuses are targeted, and where young people are considered capable and volitional. In essence, the law would no longer assume that young people cannot say yes to sex, but that in certain relations of dependence they cannot reasonably say no. Thus the law would no longer convey to young people, you cannot know what you want, and you do not want sex, but rather, whatever you want, there are certain relations where the ambiguity is too great, where exit options are too few, and where harm and/or coercion is too likely to legally permit unregulated sex.ⁿ²⁰⁷ An emphasis on relations of dependence signals that law takes young people's choices as paramount, and doubts the integrity of

meaningful choice, and the holding open of options, when a father, stepfather, coach, or teacher makes sexual advances.

1. Objection: Dependency Is Ubiquitous and Too Variable To Be Regulable

Sexual partners are rarely if ever equal; in fact, it is hard to make sense out of what that might mean, or along what dimensions the equality ought to be measured. In the absence of conceptual qualification, a stipulation to regulate sex in relations of dependence leads two ways: either all sex everywhere is impermissible since all power differentials functionally manufacture consent; or, the stipulation is to be junked, precisely because it holds all sex everywhere suspect, and this cannot be right, because sometimes sex is good, or fun, or mutually desired, despite and sometimes because of power asymmetry. ⁿ²⁰⁸

Wertheimer's work helps tease out one compelling way to normatively distinguish relations of dependence that do and do not compromise sexual relations. At the point where Wertheimer's theoretical distinctions reach a dead end, I concentrate on a debate between Schulhofer and Wertheimer to round out the specifications of regulating sex in relations of dependence between minors and adults.

[*317] Much of Wertheimer's Consent to Sexual Relations is concerned with distinguishing sexual threats from sexual offers, and articulating principles of valid moral and/or legal consent under conditions of inequality or asymmetry: a mechanic "offers" to fix a woman's car only in return for sex, a man spikes a woman's drink before advancing on her, and so forth. ⁿ²⁰⁹ Wertheimer ultimately posits that tokened consent under conditions of inequality or asymmetry should be considered valid if the recipient of the proposition can reasonably expect to maintain or improve what he labels her "moralized baseline." ⁿ²¹⁰ In cases where her refusal to have sex results in a worsening of her condition below that baseline, consent is invalid and the sex illegitimate. For example, it is wrong for a woman's doctor to make performing her surgery conditional on her sexual reciprocation: the doctor has a conventionalized obligation to treat her, she has a reasonable expectation of treatment, and the withholding of treatment wrongly lowers her baseline standard of living. ⁿ²¹¹ However, if a wealthy man offers a poor woman one million dollars for sex, the consent is valid and the sex legitimate, if not morally ideal. She either remains poor or receives money, and neither the offer nor its fruition makes her worse off than she would otherwise be. ⁿ²¹²

There is much commendable in this approach - a kind of sexual realism, reminding us that sex often takes place in grids of asymmetry, that we do not always "want to want" to have sex, ⁿ²¹³ that choices - not just the sexual ones - are always constrained by circumstance, but are choices nonetheless. The moralized baseline approach is adaptable to the variety and inequality of everyday life, and grounds a usable evaluative framework. On the other hand, it oversimplifies how power operates between sexual partners, ultimately limiting its utility to those situated unequally by institution or social convention, as is often the case with minors and adults.

The limited applicability of the moralized baseline approach for sex between minors and adults in relations of dependence is best illustrated in a disagreement between Wertheimer and Schulhofer over Wertheimer's Higher Grade hypothetical. In Higher Grade, a professor offers to raise the grade of his student should she have sex with him. If she refuses sex, she will receive the grade she deserves on merits. Wertheimer argues the professor is not as sexually coercive or as morally culpable as he is in Lower Grade, where a professor threatens to lower the student's grade below what she deserves unless she has sex: "One reason for thinking [the professor's] proposal in Lower [*318] Grade is wrong simply does not apply to Higher Grade, namely, that [the professor] is not proposing to violate [the student's] rights should she reject his proposal." ⁿ²¹⁴ In Lower Grade, the student has a conventional right to a grade earned on merits confounded by the sexual threat, whereas in Higher Grade her baseline, supposedly, is unaffected. Schulhofer argues the professor is equally coercive and culpable in both scenarios. Because it is reasonable and likely to assume that buried under the offer of a higher grade is retaliation "below the baseline" for refusal, the law and moral theory should treat these cases alike. The employee who refuses sex for a promotion often gets fired, the student who refuses sex for a higher grade often gets a lower one than she deserves - these offers are more often than not retrospectively threats, and therefore illegitimate. ⁿ²¹⁵

Wertheimer has responded to Schulhofer that if Higher Grade were "genuine" - that is, if in fact there were no punishment for refusal, but the student simply retained her earned grade - then the offer of Higher Grade and the threat of Lower Grade would (and should) be separate questions. ⁿ²¹⁶

Schulhofer does not have much of a reply. His claim depends on the empirical evidence that this outcome, receiving the earned grade, is an outlier, but it need not. Rather, the very fact that the student cannot know a priori whether this offer will ultimately violate her rights is itself tantamount to a suppression of her sexual autonomy. It is not the likelihood that the offer is a threat that is the problem, but the fact that the professor qua professor leverages that ambiguity, whether consciously or not, to his sexual advantage and the student's sexual disadvantage. Even if there is no retaliation, the professor secures sex by misusing a position of power and manipulating a relationship of dependence. The question ought not to be did the student suffer as a result of the refusal, but instead can a student reasonably say no, given the power conditions of the relationship?

Schulhofer offers a number of regulations and restrictions on sexual relations between teachers and students, (some) lawyers and clients, and psychiatrists and patients. ⁿ²¹⁷ The impetus for regulation is that one party is highly dependent on the other, and that that dependence undermines valid consent. It is therefore unnecessary to argue that these relationships should be regulated based on some measured probability of retaliation. Given the dependency in certain unequal relations, it is the constraint on choice, the manipulation of one's will for sexual gratification, and the ambiguity of potential retaliation that require legal response and adjudication. It is these [*319] forms of dependency that often characterize relations between adults and minors - stepfather and daughter, teacher and student, coach and athlete. It is impermissible for a father to have sex with his daughter not because the sex is incestuous, or potentially abusive or coercive, but because the sex is likely to be abusive or coercive with or without the threat. There is no way to tell, and that is the problem - an upshot of relational dependence, buffered by age differential and (most often) gender. In these circumstances, the giving of consent is indistinguishable from a necessary concession to maintain the baseline, to check violence, or to avoid deprivation, and Wertheimer's distinctions cannot perform the evaluative work for which they are intended.

It is not simply vulnerability and dependence that nullify consent, because sex frequently takes place in worlds and relations of inequality. Nor is sexual consent only nullified if one's moralized baseline is threatened through leveraging vulnerability and dependence. Rather, there are certain relations where the degree of vulnerability and dependence is so great that, to paraphrase (but redirect) MacKinnon, it is impossible to tell the difference between coerced submission and consent. ⁿ²¹⁸

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D. Creating an Affirmative Standard of Sexual Consent for Minor-Minor and Adult-Minor Sexual Relations

Although Schulhofer and Archard promote a more robust standard of consent than the extant standards of most state laws, neither they, nor Oberman, nor Wertheimer, address the possibility of revising standards of sexual consent for young people as a class of persons. I argue for the construction of such a consent standard here, first situating this demand in the context of prior feminist reforms and then responding to potential objections. An affirmative standard of sexual consent unique to and for young people spurs concerns from all stripes - legal realists, critical theorists, protectionist feminists, pro-sex feminists, poststructuralists - and I do my best within space limitations to suggest not so much that their concerns are discountable, but that the costs of stasis - for young people and for sex - are higher than the costs of the proposed alternative.

Beginning in the 1970s, states reformed their criminal rape laws, also under pressure from feminist legal activists and scholars. ⁿ²¹⁹ Marital exemptions to rape were mostly abolished (husbands can now be considered sexually coercive, as a matter of law), ⁿ²²⁰ as was the requirement that a rape charge be corroborated by a third party (women are now believable, as a matter of law). ⁿ²²¹ Judges no longer peremptorily instruct juries that rape is often falsely accused, ⁿ²²² and many states have enacted "rape shield" laws that, to varying degrees, preclude testimony reporting the sexual

history of the claimant.ⁿ²²³ More important for our purposes, women are no longer required to display "utmost resistance" to satisfy the force requirement of rape and sexual assault statutes;ⁿ²²⁴ that is, women previously had to have demonstrated the "utmost resistance" against sexual advances for those advances to be determined criminal.ⁿ²²⁵ The force element has been relaxed,ⁿ²²⁶ and a few states have switched from a force or resistance requirement to a "nonconsent" requirement.ⁿ²²⁷ However, scholars and lawyers have noted that this change has not made much material difference in successful prosecutions, as "nonconsent" [*321] and "forcible compulsion" are interpreted by judges and juries to require a demonstrable act of resistance by the alleged victim.ⁿ²²⁸ In other words, the nonconsent standard has been rescripted as a force element.ⁿ²²⁹

While most states retain a force element in their rape or sexual assault statutes, and while some states have transformed their force element into a nonconsent standard, only a handful of states require an affirmative version of consent for the sex act to be non-criminalⁿ²³⁰ - some verbal or nonverbal freely made assent signaling agreement or willingness beyond acquiescence or compliance.ⁿ²³¹ Although scores of feminist legal theorists have argued for an affirmative standard of consent - either to advance a legal model of sexuality that underscores mutuality and reciprocity,ⁿ²³² and/or to militate against gendered power imbalancesⁿ²³³ - the calls are mostly ignored juridicallyⁿ²³⁴ and challenged jurisprudentially.ⁿ²³⁵

Whether or not feminist legal scholarship had, or has, the moral force or empirical evidence to make the case for affirmative consent in adult heterosexual relations,ⁿ²³⁶ such a standard should be incorporated for regulating sex between minors and between minors and adults. A rationale for that standard closely resembles rationales made by feminists over the past twenty-five years, but is more actionable and potent in the context of youth and sexuality; furthermore, such an argument poses fewer collateral problems in this sphere than as applied to sex tout court.

An affirmative standard of consent promotes sexual autonomy - it tracks, better than extant laws, young people's objectives. It checks sex in the "grey area" among teens or between teens and adults in which sex is secured through silence, nonresistance, or weak resistance.ⁿ²³⁷ As far as I know, only Heidi Kitrosser has explicitly argued for an affirmative standard of consent for sexual relations involving minors. Although I partially agree with the rationales on [*322] which her theory is developed,ⁿ²³⁸ I want to add another: a shift to affirmative consent in fact makes the standard no longer entirely about consent, but about sexual autonomy and young people's desires and choices. Affirmation displaces consent as the central metric in determining criminal sexual conduct, refocusing attention onto the choices and options of young people instead. Sex and sexuality come to look less like a commodity reluctantly ceded through contract - a thing one male person wants and one female person relinquishes - and more like a collaboration of desiring subjects.ⁿ²³⁹ Several feminist theorists make the case for more protective sex laws by demonstrating the comparative robustness of laws guarding individual's proprietary rights to objects like carsⁿ²⁴⁰ and horses.ⁿ²⁴¹ The body, they suggest, is surely as protection-worthy. The problem with this analogy is that it symbolically reproduces sex with women as a thing to be proprietarily protected and contractually traded, rendering female volition interchangeable with cars and horses.ⁿ²⁴² If instead the law asks not to what will young people accede, but what do young people want, it acknowledges agency, hedging against the sexualizing of socially imagined childhood innocence or blankness the law had previously codified.ⁿ²⁴³ Insofar as consent presupposes incapable young people on one side of the line and reasoning-but-acquiescing people on the other, volition drops out of the equation, and eroticized innocence fills the vacuum.ⁿ²⁴⁴ To legally imagine a young person wanting sex is to legally imagine a young person wanting, [*323] puncturing fantasies of a child tabula rasa that fuels both conservative erotophobic politicsⁿ²⁴⁵ and (some) pedophilic desires alike.ⁿ²⁴⁶

I do not define explicitly what constitutes "affirmative consent." I avoid this thorniness mostly because those with more legal training and those working in criminal law and public policy are better suited for the job. I am inclined though to agree with Schulhofer that "sexual intimacy must always be preceded by the affirmative, freely given permission of both parties."ⁿ²⁴⁷ The consent token need not be verbal. It can include body language, particular forms of conduct, and mutual initiation. A Washington statute defines consent as "actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact."ⁿ²⁴⁸ Indeed, a spoken requirement may be asking too much since young people report being uncomfortable verbalizing their desires to each other.ⁿ²⁴⁹

1. Objection: "Affirmative Consent" Can Be Coerced; "Affirmative Consent" Is Still Subject to Judicial Interpretation

There are obvious problems with an affirmative consent defense for minor sexual relations, two of which stand out readily and similarly: coercion and judicial interpretation. With regard to coercion, if perpetrators know the standard has shifted to an affirmative one, might they not coerce victims, most often younger girls, to "affirm" they want to have sex? Perhaps. As it stands, many young teenagers who are now having mutually desired sex are criminals. [*324] The many older teenagers who are having sex are under-protected by standards of consent and force that ultimately codify and normalize coercive sex. Girls are unlikely to say "no" to unwanted sex, and the law evaluates fearful silence as legitimate consent. At least with an affirmative consent standard, silence might no longer be transformative.ⁿ²⁵⁰ So too, one might hope that an affirmative standard would disqualify affirmations given on account of threats or force.ⁿ²⁵¹

With regard to judicial interpretation, the "welcomeness" standard developed under sexual harassment law since *Meritor Savings Bank v. Vinson*,ⁿ²⁵² and which has an obvious affinity with affirmative standards of consent, is infamously riddled with the problem of dubious (one might say misogynist) interpretation. Although offered as a more robust alternative to the consent standard of criminal rape law, "welcomeness" has sometimes hinged on the sexual character of the plaintiff, her choice of clothing, and her choices of speech and humor.ⁿ²⁵³ The welcomeness standard presumes all sexual advances are welcome, regardless of their content, unless proven otherwise. The actions of the perpetrator are naturalized and the burden falls on the victim.ⁿ²⁵⁴ If judges have been capricious in interpreting "welcomeness," why would they do a better job interpreting "affirmative consent"? Will a teenager's sexual dress and sexual past be considered evidence of affirmation? Ultimately the issue here collapses into the issue of coercing a "yes," and my response is similarly, admittedly, unsatisfying: an affirmative standard beats the extant alternative, at least making it more likely that silenced submission or resistance without force will not be legally discounted. Similarly, narrowly tailored definitions of consent in sexual relations might address misogynistic, ad hoc judicial interpretation. It should not be exceedingly difficult to enact a consent [*325] standard that requires more than a short dress either to signal interest in sexual activity or to neutralize evidence of resistance.ⁿ²⁵⁵

Another similar feminist concern with the "welcomeness" standard of sexual harassment law is that it shifts evidentiary focus onto the behavior and desires of the plaintiff and away from the power hierarchy that constitutes the workplace relationship.ⁿ²⁵⁶ As for power hierarchies, regulations on relations of dependence and age-span provisions hedge against an overly individualized characterization of sexual coercion.ⁿ²⁵⁷ As for transposing the burden of proof, while theorists and activists have argued that rape law mistakenly queries the plaintiff, her character, and her behavior instead of querying the behavior of the defendant, it strikes me that any reform more extensive than pushing an affirmative standard of consent - for example, making nonconsent the rebuttable presumption in charges of sexual assaultⁿ²⁵⁸ - veers into marking the defendant guilty until proven innocent. This is a supposition susceptible to a barrage of criticisms, among them: it potentially attributes guilt without fact finding, trial, or jury deliberation,ⁿ²⁵⁹ and it portrays sex itself as an inherently unwelcome act equivalent to, say, theft or assault.ⁿ²⁶⁰ One legal theorist analogizes that "consent" is not an affirmative defense to robbery as we would not reasonably believe the plaintiff to have asked or consented to be robbed.ⁿ²⁶¹ But we do not need to value sex like we value armed robbery to demand a more robust standard of consent in sexual relations between young people and young people and adults. That is, the law can require a form of affirmative consent that does not a priori assume that sex is, with occasional exceptions, experienced like armed robbery.

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2. Objection: Why Not Adopt "Affirmative Consent" as a Standard for All Sex To Better Protect Adult Victims?

Catharine MacKinnon, Lois Pineau, Martha Chamallas, Heidi Kitrosser, Stephen Schulhofer, and a host of others have suggested that states reform their standards of consent for criminal rape law.ⁿ²⁶² Given that - as MacKinnon and Andrea Dworkin have famously remarked - a dead woman is legally capable of sexual consent in most jurisdictions,ⁿ²⁶³ there is not all that much to rebut this demand.

On the plane of gender, I have hesitations - but only hesitations - about fully incorporating affirmative consent reforms. Some critics point to problems with this move and the conceit that motivates it: it infantilizes women, it patronizes sexual partners, it imagines sex as conversational, it takes the sexy out of sex, it opens the door to endless legal retaliation and places unfair burdens on the defendant.ⁿ²⁶⁴ I sympathize with only some of these criticisms, but indeed there is a risk in the assumption first, that adult women cannot say what they want and second, that protectionist law is the best vehicle for women's empowerment and respect.

However agnostic I am about such concerns, I have focused here on gender as it intersects with age. On this intersecting plane, welcomeness carries fewer problems than it does when applied to rectifying women's inequality, and seems the right course of reform. As Oberman evidences, young people, whether or not in relations of power, are disinclined to express their desires, and their silence is exploited. Young people are less experienced and less informed than adult women.ⁿ²⁶⁵ A standard of affirmative consent recognizes that sexual relations among minors and between minors and adults are more fraught, new, and vulnerable than sexual relations among adults, but that they occur frequently,ⁿ²⁶⁶ and ought to be safeguarded, not suppressed. Kitrosser argues that if the law cannot be reformed for everybody, perhaps at least the [*327] law can be adjusted for young people.ⁿ²⁶⁷ Tentatively, there is a case to be made that rather than consider reforms for young people the best we can do, we might think of young people as a separate class of individuals for whom the law rightfully has a different function. Affirmative consent does not presuppose that young people are constitutionally helpless, powerless, or dependent, but recognizes instead forces, circumstances, and gendered socialization that disproportionately impact youth, and that necessitate a more fortified legal shelter for sexual autonomy.

3. Objection: Who Says "Yes" to Sex?

A commonly invoked objection to an affirmative standard of consent is that sex is not a conversation, that people do not and do not want to speechify the sex they are having. They do not want to contractualize the encounter, deeroticize it, or make sex unsexy by sitting around and talking about it, killing what would have been seductive because subtle foreplay.ⁿ²⁶⁸ People who share a history of intimacy presumably share some level of familiarity with each other, and need not explicitly agree to sex each and every time they have it.ⁿ²⁶⁹ This commonsensical skepticism is a powerful antidote to feminist agitation. In the 1990s, the infamous sexual consent policy of Antioch College was much maligned for requiring that students verbally consent to each "level" of sexual activity before proceeding to another.ⁿ²⁷⁰

The first response to this objection is simply a reminder that affirmative consent need not be a "yes" or a clumsy nod of the head. It intends instead that lying still, submitting after resisting, or submitting after threats are leveled do not meet the threshold for exculpation. In the well-known rape cases discussed by Schulhofer, Estrich, Oberman, and so forth, the facts of the case are often not disputed - everyone agrees that the victim lay there, submitted after resisting, or submitted after threats were leveled.ⁿ²⁷¹ It is rather the interpretation of the facts that are litigated. An affirmative consent standard excludes interpretation of such facts as constituting consent. Moaning, moving, kissing, saying "that feels good," removing some of one's own clothing, guiding one's [*328] partner's hands, initiating a sexual act after one's partner initiated the first act: such behaviors might all be factors in determining consent. Lying scared, silent, and still, however, would not count.

In his survey of rape laws and attempted rape law reforms, David Bryden proffers a few critiques of an affirmative consent standard - all variants or derivatives of but who says yes to sex? While admitting that "symbolically and educationally, [affirmative consent] would be an excellent rule,"ⁿ²⁷² Bryden objects that "in an ongoing sexual relationship the parties usually do not regard every sexual encounter as a momentous decision, fraught with dangers that need to be carefully evaluated."ⁿ²⁷³

The claim presumes that affirmation or agreement to sex is only required if sexual decisions are momentous, and if dangers run high. But what if affirmation is about respecting the wants and desires of the people having sex - respecting sexual autonomy - whether or not the act is momentous or the danger imminent? "With your lover," he writes, "a greater degree of spontaneity is acceptable," but can't one have the pleasures of spontaneity coterminous with the pleasures of

consensual sex? ⁿ²⁷⁴ If I spontaneously jump my partner, and he lays there motionless, never signaling any verbal or bodily interest, is that the kind of spontaneity the law should recognize as permissible? Perhaps. But is it the kind of spontaneity young people, those newly entering into sexual relations, should learn is morally acceptable and legally allowable?

Similarly, Bryden criticizes the affirmative consent argument because it presupposes a "gross imbalance of power," that may not characterize relations between most men and women. In line with some feminist commentary, Bryden suggests the argument for affirmative consent may stereotype and reify - rather than rectify - the power imbalance between men and women. ⁿ²⁷⁵ This hesitation is less applicable to sex among minors and between minors and adults. As between minors and adults, there are more often measurable or immeasurable imbalances of power, whether in different levels of knowledge and experience, different forms of emotional investment and psychic need, or in different institutional locations. ⁿ²⁷⁶ As for sex among minors, it seems plausible that the adoption of affirmative consent could be conceived of not as a reiteration of gender norms around aggression and passivity, but as a statutorily recognized commitment to sexual autonomy. While consent reform in the worlds of either adult sex or youth sex would be facially gender-neutral, the reforms in the former (analytically, let's imagine they are discrete) would be more quickly and ubiquitously interpreted as protections for women, given [*329] that such reforms are spearheaded by women, and that the history of rape reform is the history of figuring women's bodies and bodily availability to men. ⁿ²⁷⁷ But the history of age of consent reform is not gendered as monolithically, ⁿ²⁷⁸ and reform to consent standards may here be as equally interpretable as applying to youth as a class, rather than to young girls. In a perfectly sexually autonomous world, an affirmative standard of consent would be introduced alongside more egalitarian safer sex programs that relinquish models of sexuality as eroticized dominance, that centralize both safety and desire, and that articulate the import of respecting and defending sexual choice. ⁿ²⁷⁹ An affirmative standard of legal consent could be understood as both indicating and propelling a political appreciation of young people's sexual choices.

Lastly, Bryden objects that an affirmative consent standard may conflate sexually amoral acts with sexually criminal acts, which would result in harsher sentencing:

while many of us might criticize a man who fails to ask, or at least to wait for an affirmative signal, in the absence of some sort of physical or at least verbal resistance by the woman few observers would say that the man's conduct was so unusual and immoral that it warrants the extreme sanction of imprisonment... ⁿ²⁸⁰

While some disagree about whether "date rape" and "stranger rape" ought to be treated as different in degree or kind, ⁿ²⁸¹ no one advocates uniform [*330] punishment for all sexually violent or coercive acts. Schulhofer specifies different degrees of proscribed sexual conduct that warrant different levels of punitive or civil response. ⁿ²⁸² One can and should advance an affirmative standard of consent without presuming that all convicted defendants deserve the same punishment.

4. Objection: Why Not Abolish All Per Se Proscriptions and Status Distinctions in Place of Affirmative Consent?

If sexual choice matters, then what marks the difference between the law denying the sexual agency of a young person and a person constricting the choices of a young person? If, as I have been arguing (and as Schulhofer argues), an under-thought problem in sexual coercion and violence is the fact of restricting another's choices and dismissing another's desires, then the law just as surely regulates desire when it forbids a young person to be sexual as does a person when he forces a young person to be sexual. Beginning in the 1970s, some gay rights activists called for the abolition of age of consent laws for this reason, ⁿ²⁸³ a position advanced by some later writings as well. ⁿ²⁸⁴ Objections to age of consent laws were also objections to selective, homophobic, and racist enforcement patterns. ⁿ²⁸⁵

The three replies here are cursory, since their substantive force has been implicit or explicit throughout the Article. First, the analogy is not apt. In the case of law, sexual activity is being prohibited. In the case of forced sex, sexual

activity is being compelled. While both scenarios impact sexual autonomy, like any other legal right sexual autonomy must be balanced against other rights. Until the harms that result from abstaining from sex are shown to be equivalent to the harms of forced sex, the parallel between restriction by law and pressured sex by persons should not be overdrawn.

[*331] Second, the regulations on sex in relations of dependence are designed precisely to encode autonomy, on the presumption that those relations pollute the possibility of willed agreement. The law need not pretend that a seventeen-year-old cannot want to have sex with her psychotherapist, but rather that her autonomy is better protected through restricting her behavior regardless, since she cannot reasonably say no in the relationship, since the sex may become a condition of the treatment, and since her structural vulnerability will more likely than not contribute to present or future harm. ⁿ²⁸⁶

Third, desires are not prediscursive. In a 1978 France-Culture radio interview on intergenerational sex and the recriminalization of the "sex offender," Michel Foucault concluded, "an age barrier laid down by law does not have much sense. Again, the child may be trusted to say whether or not he was subjected to violence." ⁿ²⁸⁷ And Guy Hocquenghem seconded, "listen to what the child says and give it a certain credence. This notion of consent is a trap, in any case. What is sure is that the legal form of an intersexual consent is nonsense. No one signs a contract before making love." ⁿ²⁸⁸

Linda Alcoff effectively counters these arguments in her mostly measured, mostly exacting, *Dangerous Pleasures: Foucault and the Politics of Pedophilia*. ⁿ²⁸⁹ Although for Foucault power is diffuse, productive, micro-and multi-directional, its grounding coordinates for sex and sexuality, at least in the radio interview, are relatively fixed: the law, sexology, psychiatry, and their concomitant discourses. For Alcoff, gender and age too, as eroticized power differentials, constitute or at least mediate sexuality and the desire for object choices. Media, law, academia, and psychology condition the experiences of pleasure and desire, cultural judgments internalized differentially across social strata. Alcoff argues:

It is a mistake to think that putting forward such judgments [about sex between adults and minors] will necessarily result in an overall increase in repression: the repression of adult-child sex may effect a decrease in the constraints by which children's own sexual energies are policed, managed, and deflected.

There is no necessary contradiction between a view that takes seriously the connection among discourse, power, and sexuality, and a politics of sexuality that repudiates various sexual pleasures. ⁿ²⁹⁰

[*332] Foucault is not "Foucauldian" all the way down: the "truth" about our sex and sexuality in relation to external power, whether figured as the adult or the state, is a priori nothing, always already entrapped in discursive routes preformed in normative expectations, and in this case in a sexualized, authorial world of adults not of the child's making. The child verbalizes consent or understanding in the same discursive - not just juridical - regime that subordinates her. As Vikki Bell argues, "in this appeal to change the law and legal practice ... Foucault seems to forget his well known scepticism of this notion of rights and this notion of 'no restraints' as freedom." ⁿ²⁹¹ Listening to the child may be necessary to evaluate the facts of the relationship in question, but it is wholly insufficient as a matter of law. "Listening to what the child wants" can be critically appreciated, without imagining that those wants are not inflected by psychic needs, socialization, and gender difference, and without supposing that law cannot work as a (impossibly partial, double-binding) corrective to the manipulations of desire. This is all an elaborate way of extending an argument asserted in Part III: restricting relations between adults and "tier 1" children is justified both to account for presumptive differential decision-making capacities and sexual knowledge, and to hedge against forms of emotional and financial dependency, manipulation, and socialization processes that manufacture children's sexual consent.

E. Is Gay Intergenerational Sex Exceptional?

But what if the consent of the child, as well as its sexual encounters, are neither uniformly manufactured nor necessarily damaging, respectively? What if, as has been implied throughout the Article, the gender and sexuality of the

child reorganizes scenes of consent, desire, sex, and harm? Alcoff's critique of Foucault's willing sexual child holds such traction in part because his child is genderless, and he does not address - either here or elsewhere ⁿ²⁹² - how the [*333] child's consent, desire, self-understanding, and experience of the sexual encounter may be mediated by being a girl, or a boy, or gay, or straight, or so forth. But what if Foucault (and others) had considered the girl child and the set of pressures she faces, or the gay child and the set of pressures he faces?

This section suggests that boys who have sexual relations with adult men may not suffer the same sequelae and emotional harms at the same rates as do girls who have sexual relations with adult men, and that these sexual experiences are important for boys' self-discovery and acceptance as queer or gay.

Nonetheless, I conclude, the law may still penalize the adult man in both situations (with the young boy, with the young girl). Despite how the problem of youth and sex is differentiated by gender and sexuality, I nonetheless suggest in the next section that youth be treated - by law - as a separate sex class (Part IV), since the benefits of uniform classification outweigh gendered juridical distinctions. But because the problem of youth and sex is differentiated by gender and sexuality, and because neutral, abstracted adjudication of everyday sexual conduct faces a host of other conceptual and practical difficulties, I conclude by refiguring a more diminutive and yet more efficacious function for law in the arena of youth and sexual autonomy (Part V).

While Wertheimer, Archard, Schulhofer, Oberman, and MacKinnon, with varying degrees of success, incorporate gender and age as variables, or as systemic difficulties, in distilling down tokens of meaningful sexual consent, none of them treat same-sex sexuality sufficiently. This is not a shortcoming of their works so much as it is beyond their scope. They centralize a man having sex with a woman as the paradigmatic case of investigation, and are responding or contributing to feminist critiques of existing rape law. Nonetheless, when these theorists do discuss same-sex sexual relations they do so wrongly. Wertheimer's sociobiology naturalizes heterosexuality, male aggression, female passivity, and all but suggests homosexual sex occurs only in the absence or frustration of available heterosexual options. ⁿ²⁹³ The entirety of Oberman's argument rests on the presumption that girls' sexuality is categorically vulnerable, and the law ought to function as a categorical corrective. It is telling that her first mention of "boys" in "Regulating [*334] Consensual Sex" comes near the conclusion, placed in parentheses, in a sentence really about securing girls' safety. ⁿ²⁹⁴ Boys are simply not the object of her concern, since they are not, from the evidence she retrieves, as susceptible to or do not suffer as much from sexual coercion as do girls. ⁿ²⁹⁵ Archard (like Schulhofer), if we extrapolate from his case studies, assumes that the coercive dynamics of sex between men is equivalent to those between men and women. And MacKinnon has long maintained - and long been critiqued in such an assumption - that force in same-sex relations simulates the eroticized dominance that is heterosexuality, that sadomasochistic, rough, or indeed abusive relations between same-sex partners mirrors or reifies sex inequality, in which the "bottom," "submissive" or "abused" is a placeholder for "woman." ⁿ²⁹⁶

This is possibly true, but not always or necessarily: the social conditions of and constraints on same-sex sexuality versus the imperatives of "compulsory heterosexuality" distinguishes intergenerational sex between a man and younger woman and a man and a younger man as often markedly dissimilar situations. One might argue that since most sex across age is sex between men and girls, and since most of that sex is abusive, focusing either morally and/or legally on relations between men and boys is at best distracting and at worst disavowing. Yet the dynamics of gay intergenerational sex brings into relief, as does Oberman, the fact that our problem with age is more often than not a problem with gender, and with the manipulation of young girls' anxieties and longings. Boys are no doubt sexually abused. ⁿ²⁹⁷ But a sexually curious and sexually frustrated teenage boy who searches for an older male partner may be a different scenario from Wertheimer's teenage girl who propositions her babysitter. ⁿ²⁹⁸ Adolescent boys may seek out older men for companionship, for sexual experience, for an introduction to gay culture, and for a shelter from homophobic culture. ⁿ²⁹⁹ It is telling too that, according to Alcoff's research, [*335] "gay" pedophilic men are interested in teenage boys, "straight" pedophilic men are interested in prepubescent girls, and the average age of incest victims is seven. ⁿ³⁰⁰ In several European studies, boys did not suffer the sequential harms from early-age sex with older partners nearly as commonly as did girls. ⁿ³⁰¹ Studies in the 1980s and 1990s in the Netherlands, Australia, and the United States also suggest that boys and adolescent men generally report their sexual experiences with older men as

positive, reporting both as boys and later as adults.ⁿ³⁰² A recent study among gay college and bisexual men found that most responded positively to (noncoercive, reportedly consensual) sexual relations with adult men when they were younger;ⁿ³⁰³ also, these boys (now adults) did not manifest the sequelae predicted in mainstream child sexual abuse literature.ⁿ³⁰⁴

If it is (partially) male dominance that leverages sex as domination, then sex without women,ⁿ³⁰⁵ or sex among men,ⁿ³⁰⁶ is not so seamlessly interfaced with power.ⁿ³⁰⁷ I am not romanticizing gay culture as a world of gender parity [*336] free from sexual violence and coercion, nor making the faulty claim, as queer theory is (sometimes rightly) accused of, that desire is freedom, that gender is discursively instantiated, and that sexual freedom from gender identity is the just sexual order of things.ⁿ³⁰⁸ However, the cultural dynamics and social reality of sexuality matter, a point made by feminist critics but not fully appreciated by the theorists discussed.

It is remarkable that in the debates around pedophilia between feminists and (very few) gay and queer theorists in the 1980s and 1990s, nobody, as far as I can tell, adequately observed that each camp had a different subject in mind. For the feminists, the person to be protected is the young female child at the mercy of parents or family friends.ⁿ³⁰⁹ For these gay and queer theorists, their reserved defense of pedophilia imagined, interviewed, or sometimes recalled their own experience as, a teenage boy having sex with an older gay man.ⁿ³¹⁰ It is surprising and disappointing that in the studies cited above, as well as cultural commentary on man-boy relations, there is such little attention to socialized gender difference as an explanatory variable worth pursuing in the experiences of young boys and girls to sex with older men.ⁿ³¹¹ Indeed, a 2008 Sexuality and Culture article surveying the studies of man-boy relations, as well as the studies' authors themselves, use the data more to criticize dominant tropes of child sexual abuse literature (harm as foregone conclusion) and the construction of child sexuality (as nonexistent, always already spoilsable, deluded) than to interrogate why it might be "different for boys."ⁿ³¹² A [*337] particularly myopic interpretation can be found in Julian Marlowe's *It's Different for Boys*.ⁿ³¹³ Marlowe posits that the very phenomenon of male prostitution bankrupts arguments against female prostitution as patronizing and protectionist. He writes, "concern for the mental health of female sex workers rests on a normative view of female sexuality as connected to love and relationship," and so feminist objections to prostitution are in fact sexist assumptions about female chastity, victimhood, and passivity.ⁿ³¹⁴ Since gay sex is just like straight sex and there is nothing normatively wrong with gay sex for pay then there is nothing normatively wrong with straight sex for pay. Regardless of one's position on prostitution, he dubiously presumes that the power dynamic at play is fully collapsible into age difference, and not gender. One need not be a MacKinnonite all the way down to flip the argument on its head: precisely the fact that male-male sex for pay does not reflect the same systemic violence and exploitation as does female prostitution makes gender difference and heterosexuality more suspect, not less. He undercuts his own argument when he writes that "many gay men have learned not only to accept but also take pride in sexual deviance," overlooking the possibility that pride in deviance may, at least in part, be a privilege of comparable social power between male partners.ⁿ³¹⁵

This brief discussion then intends two admonitions: first, that legal theorists should not assume that age difference is gender indifferent, nor that gay sexuality is a copy of heterosexuality, replete with identical patterns of [*338] power, inequality, and socialization.ⁿ³¹⁶ Second, the very fact that this area is a no-go zone for theory and discussion further incapacitates unpacking the intersection of gender and age inequalities. Because attempts to explore differences of straight and gay sexuality in terms of age are heard as defensive rationalizations or apologia for pedophiles, it is exceedingly difficult to assert that the discourse on sex predators - often homophobic and hysterical - undermines critically interrogating family, home, heterosexuality, and other typical, unceremonious sites of abuse and coercion.

Rightfully, gay people hate talking about this. NAMBLA is still the specter that haunts the gay rights movement.ⁿ³¹⁷ Political organizations against extending civil rights to queers continuously deploy the rhetoric of child protection and child harm, usually successfully.ⁿ³¹⁸ This then is the first reason law should not dictate different rules for gay sex and straight sex among minors and between minors and adults; one could only imagine the social response to statutes that make the latter more presumptively suspect than the former.

But a second and more subtle reason for resisting legal differentiation is that the comparative benignity of gay boys'

sexual experiences with adults may have less to do with gayness and more to do with the social conditions of boyness, and the ways in which boys, queer or not, are (generally) taught that sex is enjoyable, inevitable, and something to which they are entitled, whereas girls, queer or not, are taught that sex is invasive, dangerous, and something which they are expected to prevent, defer, and not desire.ⁿ³¹⁹ If this is the case, then differentiated law codifies and reinforces just this sexual imaginary, in which boys get to get off and girls get to get hurt.ⁿ³²⁰

Part IV. Minors as a Separate Sex Class Under Law

Although gender and sexuality then must register in considerations of sex and youth, they need not register in statute.

[*339] Therefore, the converging point to which all the listed reforms (decriminalizing sex between minors, age-span provisions, relations of dependence provisions, affirmative consent) lead is the codification of minors - between the ages of twelve and seventeen, perhaps - as a separate sex class under law, distinguishable from "tier 1" children on the one hand, and from adults on the other.ⁿ³²¹ Defining this demographic as a particular class recognizes youth as vulnerable yet desiring agents - and it may be this combination of vulnerability and desire that is in part what makes youth sexuality altogether uncomfortable in the contemporary United States.ⁿ³²² Historically, law and social policy have managed this discomfort by over-determining vulnerability and deflecting desire.ⁿ³²³ The reforms I have delineated, as well as the principles that inform them, attend both to the sexual agency of young people and to the material, institutional, and psychic sources of their vulnerability. These proposed reforms are imperfect, but so is everything in the bluntness, formality, and facial neutrality of liberal law, and they are more normatively defensible than many extant statutes.

There is a body of critical feminist and queer theoretic scholarship, influenced by Marxism, critical legal studies, and critical race studies, that is highly skeptical of sexual justice theories and politics that demand more, not less, legal intervention and disciplinary regulation.ⁿ³²⁴ Janet Halley scrutinizes what she calls a "governance feminism" that positions the state and its heavy punitive hand, as well as other institutional sites, as the salvation to sex inequality.ⁿ³²⁵ There are sound reasons to reject "governance feminism" and other such state-centered, state-sanctifying, juridical theories and politics: they depoliticize and disempower non-state actors,ⁿ³²⁶ they redress (and thus legally [*340] ossify) rather than prevent injury,ⁿ³²⁷ they are lodged in the language of liberal citizenship rights rather than the language of restructuring social power,ⁿ³²⁸ and they further entrench the state in disciplining the practices and behaviors of its subjects.ⁿ³²⁹

I am inclined to think that when all is tallied, the reforms here would not add to legal intervention nor further consolidate state power around sex and sexuality, but instead redirect the law and its priorities. Law already regulates young people's sex lives, and law is unlikely to retreat on this front soon. The challenge here is how to regulate (and think about) sexuality better rather than to imagine a stateless sexual politics. These proposals are not a substitute for a more creative, multi-site politics of sexual justice. Rather, they are envisioned as precursors to and part and parcel of such a politics, propounding nuanced and less detrimentally fanciful sociolegal portrayals of sexual autonomy and sexual harm.

Part V: Law's Limit

Differences in power, desire, and sex that interface with intergenerationality, sexuality, and gender provide but one piece of evidence, among thousands that could be gathered, illustrating that law is and ought to be a tiny component of building a more sexually just environment that minimizes harm and engenders autonomy. The bluntness and neutrality of liberal law - its strength and weakness - means that the experiences and desires of queer kids will be more greatly disfigured in and by the juridical imaginary.

Here is another limitation of law's efficacy: the seductive appeal in transgressing sexual prohibition, the eroticizing of subjects marked out of bounds, because they are out of bounds.ⁿ³³⁰ Child pornography is a terrific example of a discourse eroticized by virtue of its legal condemnation.ⁿ³³¹

[*341] And another: moral theorizing in the adjudicative mode (this is ethically acceptable sex, this is impermissible sex) feels good, just, comforting, and simple, ⁿ³³² but grafting regulations and restrictions from on high neither implies social uptake ⁿ³³³ nor ever attends to complex, non-codifiable realities or to the history and politics that produce reality (and that generate desire). ⁿ³³⁴

As a matter of policy, progressive, critical assessments of past and present statutory rape law (and of criminal rape law more generally) invariably admonish that law and legal change are only a small part of the institutional, social, and economic overhaul required for a more comprehensive vision of sexual justice. ⁿ³³⁵ Law students, law professors, activists and theorists all argue that guaranteeing the sexual autonomy of young people would require, beyond legal thou shalt nots, far more comprehensive health care, funded antipoverty programs, funded job training programs, more sex positive and egalitarian safer sex educational programs, better resourced public schools, and more critical assessments of and creative alternatives to dominant cultural and media representations of young people's sexuality. ⁿ³³⁶

However, there is a tendency in these hortatory appeals to split "law" off from "the social," so that changes in the former are understood as ancillary to or isolable from the latter. I want to conclude by pressing for a more fluid picture, in which revised legal regulations are not just items on a checklist to implement before or after broader social restructuring. Instead such reforms might contribute to identifying what those social problems are, and how they should be attenuated. By shifting legal focus from capacity to voluntariness, and from status prohibitions that reflect traditionally gendered mores to status prohibitions that reflect a commitment to sexual choices, the law produces a more nuanced figure of the young person, who is neither *prima facie* a sexually abused child nor, *primo coitu*, a sexually unfettered adult. Rather, she is a vulnerable and desiring subject before the law. Such a subject demands social and political changes that promote neither unqualified access to her body, nor her strict and mythic abstinence, but her autonomy.

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Criminal Offenses Child Pornography Constitutional Law Equal Protection Scope of Protection Criminal Law & Procedure Criminal Offenses Sex Crimes Sexual Assault Statutory Rape Elements

FOOTNOTES:

n1. In 2005, Genarlow Wilson received a ten-year prison sentence for aggravated child molestation for having had oral sex with a fifteen-year old girl when he was seventeen. Amidst much public outcry and charges of prosecutorial racial bias (Wilson is black), the Georgia General Assembly recategorized the statutory crime of teenage sex, formerly a felony, as a misdemeanor. Wilson was released in 2007 following a Georgia Supreme Court ruling holding the punishment cruel and unusual. *Humphrey v. Wilson*, 282 Ga. 520 (2007); Brenda Goodman, *Man Convicted as Teenager in Sex Case Is Ordered Freed by Georgia Court*, N.Y. Times, Oct. 27, 2007, at A9; see also Meredith Cohen, Note & Comment, *No Child Left Behind Bars: The Need to Combat Cruel and Unusual Punishment of State Statutory Rape Laws*, 16 J.L. & Pol'y 717, 717-20 (2008).

n2. Catharine A. MacKinnon, *Women's Lives, Men's Laws* 245-46 (2005) ("If the rape law worked, there would be no need for statutory rape laws. Abuse of power, access, trust, and exploitation of vulnerabilities to pressure people into sex that is not wanted for its own sake would be illegal... Young age or age differential below a certain age is ... ossified into an absolute rule. This segregates out some of the most sympathetic cases for relative structural powerlessness in sexual interactions and leaves the rest of the victims ... unprotected, their inequalities uncouned. By cushioning its excesses, this helps keep male dominance as a social system in place."). MacKinnon overlooks state criminal laws that do account for other differences in power besides age - see *infra* note 217 - but such nuance would rob the argument of its rhetorical force which stages gender difference as the primary and paramount inequality (notice the slippage from "abuse of power, trust, and exploitation of vulnerabilities" to "male dominance").

n3. See *infra* Part III.

n4. See *infra* text accompanying notes 108-127.

n5. *Id.*

n6. As further explained, this article is agnostic about gender - not as to whether gender manifests social hierarchy, but whether as a system of power inequality gender requires the same legal or moral qualifiers (more robust consent, restrictions on heterosexual relations) as does intergenerational sex. Much feminist legal theory is incorporated into my argument but is applied to minors, not women. To foreground my argument somewhat, I believe Catharine MacKinnon's well-known structural account of gender is less problematic when mapped onto age divisions than when applied to gender alone. Although it is possibly true that the current cultural obsession with age appropriateness might stall an appreciation of gender hierarchy, MacKinnon tacks too far, reducing problems of age and sex to gender subordination. We might do better thinking about children as if they were MacKinnon Women, rather than thinking about women as if they were children, as MacKinnon sometimes does. See, e.g., Catharine A. MacKinnon, *Sex Equality* 1341 (2d ed. 2007) [hereinafter MacKinnon, *Sex Equality*] ("[Child pornography] enforcement is relatively vigorous. Consider whether this [more extensive] definition [of child pornography, in relation to the obscenity standard of adult pornography] is indeterminate and impossible to administer consistent with free speech guarantees. Should child and adult sexual materials have different definitions? Should harm count in one and not in the other? Might women who are used to make sex pictures thereby be harmed, whether or not the pictures violate contemporary community standards, as children are regarded as being?"); Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 110 (1989) [hereinafter MacKinnon, *Toward a Feminist Theory of the State*] ("If the literature on sex roles and the investigations of particular issues are read in light of each other, each element of the female gender stereotype is revealed as, in fact, sexual. Vulnerability means the appearance/reality of easy sexual access; passivity means receptivity and disabled resistance, enforced by trained physical weakness; softness means pregnability by something hard. Incompetence seeks help as vulnerability seeks shelter Woman's infantilization evokes pedophilia."). The selected stereotypes are as applicable to children as they are to women, and, despite acknowledging these stereotypes as stereotypes, MacKinnon's *a priori* truth that masculinist sexual fantasy produces gendered social reality compels her to utilize women's (now "real") vulnerability, passivity, and infantilization to authorize her claims for legal protections. For similar critiques of MacKinnon, see Lauren Berlant, *The Subject of True Feeling: Pain, Privacy, and Politics*, in *Cultural Pluralism, Identity Politics, and the Law* 49, 73 n.44 (Austin Sarat & Thomas R. Kearns eds., 1999) ("In [MacKinnon's] work the inner little girl of every woman stands as the true abused self who is denied full citizenship in the United States."); and Katie Roiphe, *The Morning After: Sex, Fear, and Feminism on Campus* 148 (1993) ("The idea of women as children enters MacKinnon's writing. If you're going to claim that women have as little power and autonomy as MacKinnon claims, then they may as well be children.").

n7. See *infra* Part II.

n8. I call sexual autonomy a "principle" as it is both a propellant and an objective of the reforms and theoretic revisions delineated below. I will describe the principle but not defend it; it is foundational and generative, grounding arguments without being argued for, but is nonetheless open to contestation, revision, and improvement. Despite the important admonition against feminist political projects miring

themselves in determining epistemological certainties (always impossible) at the expense of open-ended democratic engagement, I cannot figure another way to intervene in law and legal theorizing, discourses of principles, foundations, and rules all the way down. See generally Linda M.G. Zerilli, *Feminism and the Abyss of Freedom* (2005).

n9. See John Locke, *The Second Treatise: An Essay Concerning the True Original, Extent, and End of Civil Government*, in *Two Treatises of Government and a Letter Concerning Toleration* 100, 102 (Ian Shapiro ed., Yale University Press 2003) (1690) ("But though this [state of nature] be a state of liberty, yet it is not a state of license: though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it ... and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us that may authorize us to destroy another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours."). Despite his recourse to a higher authority to ground universal rights, despite his naturalization and deification of private property in the state of nature, and despite his presumption of innate hierarchies among humans and between humans and other species, Locke's distinction between liberty and license and his rejection of instrumentalizing human relations are worth retaining in discussions of age and sexual consent.

n10. See *infra* text accompanying notes 299-306.

n11. See *infra* text accompanying notes 307-312.

n12. George Chauncey, Jr., *The Postwar Sex Crime Scare*, in *True Stories from the American Past* 160 (William Graebner ed., 1993); see *infra* note 44. Consider also the centralization of supposedly sexually threatened and vulnerable children in recent opposition campaigns against same-sex marriage. See, e.g., two television advertisements produced by protectmarriage.com, a major supporter of Proposition 8 in California. The passage of Proposition 8 restricted the definition of marriage in California's constitution to be between one man and one woman. *Vote Yes on Prop 8, Yes on 8 TV Ad: It's Already Happened*, YouTube (Oct. 7, 2008), <http://www.youtube.com/watch?v=0PgjcqFYP4>; *Vote Yes on Prop 8, Yes on 8 TV Ad: Everything To Do With Schools*, YouTube (Oct. 20, 2008), <http://www.youtube.com/watch?v=7352ZVMKBQM>.

n13. See *supra* note 12; *infra* note 44.

n14. Judith Butler, *Excitable Speech: A Politics of the Performative* 50 (1997) ("When political discourse is fully collapsed into juridical discourse, the meaning of political opposition runs the risk of being reduced to the act of prosecution.").

n15. In a rather different (but maybe contiguous) consideration of gay men and bareback sex, Tim Dean writes, "I'm claiming that thinking about bareback subculture happens most productively when judgments concerning whether it is good or bad are deferred. I'm arguing that intellectual and political work involves more than adjudication among positive and negative images of others or of ourselves... I contend that sexual ethics begins not with making judgments about (or trying to regulate) others' sex lives but with establishing others' freedom from interference, even as we recognize our mutual sexual interdependence." Tim Dean, *Unlimited Intimacy: Reflections on the Subculture of Barebacking* 26 (2009). Although I agree that productive politics and intellectualism are foreclosed by unreflexive recourse to adjudication, I am not certain that "judgments" and noninterference can be juxtaposed so definitely, nor that noninterference is an uncomplicated ethical commitment (precisely because of our "mutual sexual interdependence"), a point upon which this article attempts to expound.

n16. Foucault famously insists that the modern idea of sex as the truth of the subject and of subjectivity installed a dominant image of power as juridical and repressive (thou shalt not) rather than as organic to and co-constitutive with discourses of sexuality. 1 Michel Foucault, *The History of Sexuality* 155 (1990) ("The notion of sex brought about a fundamental reversal; it made it possible to invert the representation of the relationships of power to sexuality, causing the latter to appear, not in its essential and positive relation to power, but as being rooted in a specific and irreducible urgency which power tries at best it can to dominate; thus the idea of 'sex' ... enables one to conceive power solely as law and taboo.").

n17. See *infra* Part III.

n18. For a contemporary (if now somewhat dated) account of laws regulating private sexual conduct, see generally Richard A. Posner & Katharine B. Silbaugh, *A Guide to America's Sex Laws* (1996). For a more recent analysis of historical and contemporary sex offender laws, see generally Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 Nw. U. L. Rev. 1317 (1998); Joseph J. Fischel, *Transcendent Homosexuals and Dangerous Sex Offenders: Sexual Harm and Freedom in the Judicial Imaginary*, 17 Duke J. Gender L. & Pol'y 278 (2010).

n19. For recent analyses and critiques of late twentieth century transformations in U.S. criminal law, see, e.g., Bernard E. Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (2007); Bernard E. Harcourt, *Illusion of Order: The False Promise of Broken Windows Policing* (2001); Loic Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (2009).

n20. Carolyn E. Cocca, *Jailbait: The Politics of Statutory Rape Laws in the United States* 9-28 (2004).

n21. *Id.* at 11.

n22. *Id.*; Michelle Oberman, *Girls in the Master's House: Of Protection, Patriarchy, and the Potential for Using the Master's Tools to Reconfigure Statutory Rape Law*, 50 DePaul L. Rev. 799, 802 (2001) ("Statutory rape laws were an outgrowth of biblical precepts, by which virginity was so highly prized that a man who took a girl's virginity without her father's permission was considered to have committed a theft against the father.").

n23. See Cocca, *supra* note 20, at 11.

n24. *Id.*

n25. Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. Crim. L. & Criminology 15, 27 (1994); see also J. Shoshanna Ehrlich, *You Can Steal Her Virginity But Not Her Doll: The Nineteenth Century Campaign To Raise the Legal Age of Sexual Consent*, 15 Cardozo J.L. & Gender 229 (2009) (observing that purity campaigns in the 1880s and 1890s reinterpreted the low age of consent as inviting and legitimizing older male predatory desire).

n26. Cocca, *supra* note 20, at 12-16.

n27. *Id.* at 12-13.

n28. *Id.* at 14-15.

n29. *Id.* ("In effect, the raising of the age of consent and the codification of the 'chaste character' defense made what was a crime about taking the virginity of a female of 10 or 12 into a crime about taking the virginity of a female of 16 or 18."); Ehrlich, *supra* note 25, at 235.

n30. Cocca, *supra* note 20, at 15.

n31. See, e.g., Mary E. Odem, *Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885-1920* (1995).

n32. See Ehrlich, *supra* note 25, at 244-45 ("Most scholarly accounts of the age of consent campaign tend to view it as either protective or repressive in nature... . One can both appreciate the fact that the reformers had a genuine interest in protecting young women from sexual predation, while at the same time acknowledging that this emphasis on bodily integrity was also a function of their belief that the loss of virginity was a fate worse than death."); Oberman, *supra* note 22, at 803 (citing Jane E. Larson, "Even a Worm Will Turn At Last": Rape Reform in Late Nineteenth Century America, 9 Yale J.L. & Human. 1, 2 (1997)).

n33. See Ehrlich, *supra* note 25, at 237-38.

n34. See Susan Caringella, *Addressing Rape Reform in Law and Practice* 41-42 (2009); Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 Buff. L. Rev. 703, 714-17 (2000).

n35. Cocca, *supra* note 20, at 16-24; Frances Olson, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 Tex. L. Rev. 387, 404-07 (1984).

n36. Cocca, *supra* note 20, at 18-20; see also Olson, *supra* note 35, at 404-10.

n37. See Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Court, and Feminism*, in *The Second Wave: A Reader in Feminist Theory* 71, 76-77 (Linda Nicholson ed., 1997).

n38. Cocca, *supra* note 20, at 22-24.

n39. *Id.* at 17-18.

n40. *Id.* at 19.

n41. See Oberman, *supra* note 25, at 63-70; Oberman, *supra* note 34, at 707-10; Lynn M. Phillips, Recasting Consent: Agency and Victimization in Adult-Teen Relationships, in *New Versions of Victims: Feminists Struggle with the Concept* 82, 95 (Sharon Lamb ed., 1999).

n42. See Elizabeth Hollenberg, Note, The Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood, 10 *Stan. L. & Pol'y Rev.* 267, 270-71 (1999) (finding that older partners are most often within five-year age spans of older teenage girls). However, younger sexually active girls between eleven and fifteen years of age are more likely than older sexually active girls to describe their sexual experiences as unwanted, and more likely to have had those experiences with significantly older men. *Id.* at 271. This younger, more often coerced subset has been neglected by 1990s statutory rape enforcement targeting pregnancy prevention. See *infra* text accompanying notes 54-69.

n43. Hollenberg, *supra* note 42, at 270-71; see also Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 *Yale L.J.* 1281, 1305 (1991) ("Underage girls form a credible disadvantaged group for equal protection purposes when the social facts of sexual assault are faced, facts which prominently feature one-sided sexual aggression by older males.").

n44. See Pat Califia, *Public Sex: The Culture of Radical Sex* 56-57 (2000); Cocca, *supra* note 20, at 76-77, 92; Philip Jenkins, Moral Panic: Changing Concepts of the Child Molester in Modern America 156-57 (1998). For a sobering account of how Canada exploited its age of consent and other child protection laws to harass and arrest gays, see generally Vincent Doyle, How to Make "Kiddie Porn" in Canada: Law Enforcement, the Media, and Moral Panic in the Age of AIDS, in *Moral Panics Over Contemporary Children and Youth* 77 (Charles Krinsky ed., 2008). On the episodic conservative appropriation of feminist campaigns against child sexual abuse to domesticate women, criminalize non-normative sex, and regulate children, see, e.g., Linda Gordon, The Politics of Child Sexual Abuse: Notes from American History, 28 *Feminist Rev.* 56 (1988).

n45. See generally *The Age Taboo: Gay Male Sexuality, Power and Consent* (Daniel Tsang ed., 1981).

n46. Cocca, *supra* note 20, at 22; Charles A. Phipps, Misdirected Reform: On Regulating Consensual Activity Between Teenagers, 12 *Cornell J.L. & Pub. Pol'y* 373, 391 (2003).

n47. *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

n48. Id. at 471-73.

n49. Id. at 467, 475.

n50. Id. at 483-85 (Blackmun, J., concurring).

n51. Id. at 473 ("The risk of pregnancy itself constitutes a substantial deterrence to young females... . A criminal sanction imposed solely on males thus serves to roughly 'equalize' the deterrents on the sexes.").

n52. Id. at 494 (Brennan, J., dissenting); see also MacKinnon, *supra* note 43, at 1305 ("The plurality opinion grasped the sex-differential reality at the cost of attributing it to biology. The dissent understood the reality of sexual assault of girls to be socially created rather than biological, at the cost of failing to understand it as nonetheless gender-based. The plurality saw a hierarchy but thought it was biologically fixed. The dissent saw the possibilities for change, but missed the hierarchy.").

n53. On the organization of U.S. politics around the always vulnerable fetus, on the political infantilizing of U.S. citizenry that contains capitalist inequalities and privatizes racial and sexual pluralism outside and beneath civic contestation, and on the political possibilities eclipsed or assaulted by the sanctification of "reproductive futurism," see Lauren Berlant, *The Queen of America Goes to Washington City: Essays on Sex and Citizenship* 25-82 (1997); and Lee Edelman, *No Future: Queer Theory and the Death Drive* 1-32 (2004).

n54. Cocca, *supra* note 20, at 93-128. On states that adopted a higher age of consent or increased penalties, see Hollenberg, *supra* note 42, at 273; and Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 *Wm. & Mary J. Women & L.* 313, 323 (2003).

n55. Cocca, *supra* note 20, at 24-26; see also Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* 238 (2004); Anna Marie Smith, *The Politicization of Marriage in Contemporary American Public Policy: The Defense of Marriage Act and the Personal Responsibility Act*, 5 *Citizenship Stud.* 303 (2001).

n56. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101(9)(A), 110 Stat. 2349-50 (1996).

n57. *Id.*

n58. Hollenberg, *supra* note 42, at 276.

n59. See Lisa Duggan, Holy Matrimony!, *Nation*, Mar. 15, 2004, at 14.

n60. Hollenberg, *supra* note 42, at 270.

n61. *Id.*

n62. *Id.* at 274-76; see also Rigel Oliveri, Note, Statutory Rape Law and Enforcement in the Wake of Welfare Reform, 52 *Stan. L. Rev.* 463, 505 (2000).

n63. Hollenberg, *supra* note 42, at 271.

n64. *Id.* at 269.

n65. *Id.* at 272; see also Oliveri, *supra* note 62, at 508.

n66. Hollenberg, *supra* note 42, at 268.

n67. See, e.g., Cocca, *supra* note 20, at 93-128; Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 244-45 (1998); Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 *GLQ: J. Lesbian & Gay Stud.* 437, 455-56 (1997).

n68. See, e.g., Richard Delgado, *No: Selective Enforcement Targets 'Unpopular' Men*, 82 *A.B.A. J.* 87 (1996).

n69. See, e.g., Roberts, *supra* note 67, at 217; Duggan, *supra* note 59; Smith, *supra* note 55.

n70. Oberman, *supra* note 34, at 761.

n71. Charles A. Phipps, *Children, Adults, Sex, and the Criminal Law: In Search of Reason*, 22 *Seton Hall Legis J.* 1, 56-61 (1997).

n72. *Id.* at 61-62 (noting different degrees of offense for sexual contact versus sexual penetration).

n73. *Id.* at 4 n.3.

n74. In twelve states, sexual activity between minors is a crime, and in several of those states it is a felony. Phipps, *supra* note 46, at 444 (listing current age of consent statutes).

n75. *Id.* at 390.

n76. See Cocca, *supra* note 20. On the more generalized marshalling of children's assumed innocence and vulnerability to invigorate conservative political projects, see generally Lisa Duggan, *Queering the State*, 39 *Soc. Text* 1 (1994); Gordon, *supra* note 44; Patrick McCreery, *Beyond Gay: "Deviant" Sex and the Politics of the ENDA Workplace*, 61 *Soc. Text* 39 (1999); Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *The Lesbian and Gay Studies Reader 3* (Henry Abelove, Michele Aina Barale & David M. Halperin eds., 1993). See also *supra* note 53.

n77. See *infra* Part IIb.

n78. Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 *L. & Phil.* 35 (1992).

n79. Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (1998).

n80. *Id.* at 38.

n81. *Id.* at 267-73. Both Schulhofer and Oberman document several disturbing cases in which women or girls unwillingly submitted to sexual activity, but whose unwilling submission legally counted as consent. See *id.* at 1-16; *infra* text accompanying notes 169-173.

n82. Schulhofer, *supra* note 79, at 103.

n83. *Id.* at 114-67.

n84. *Id.* at 168-253.

n85. Schulhofer, *supra* note 78, at 55-58.

n86. See Schulhofer, *supra* note 79, at 226; see also Laurie Schaffner, Capacity, Consent, and the Construction of Adulthood, in *Regulating Sex: The Politics of Intimacy and Identity* 189-208 (Elizabeth Bernstein & Laurie Schaffner eds., 2005).

n87. See Schulhofer, *supra* note 78, at 81-84.

n88. *Id.* at 84-87.

n89. *Id.* at 75.

n90. Schulhofer, *supra* note 79, at 33-38, 75, 77-78.

n91. *Id.* at 280; see also Martha Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct, 61 S. Cal. L. Rev. 777, 836 (1987-1988) ("By redefining consent to mean welcomeness [the determinative standard of workplace sexual harassment liability] from the target's viewpoint, we can begin to incorporate the interests of women in the formulation of a legal standard.").

n92. See, e.g., Seyla Benhabib, *Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics* 161-68, 170 (1993) ("The ideal of autonomy in universalistic moral theories from the social contract tradition ... is based upon an implicit politics which defines the 'personal' ... as ahistorical, immutable and unchanging, thereby removing it from discussion and reflexion. Needs, interests, as well as emotions and affects, are then considered properties of individuals which moral philosophy recoils from examining on the grounds that it may interfere with the autonomy of the sovereign self."); Fineman, *supra* note 55; Michael J. Sandel, *Liberalism and the Limits of Justice* (1982).

n93. For accounts of the different but nonetheless destructive political consequences provoked through individual and collective attachments to desire as unidirectional, gender-object-oriented, and genitally focused, see Judith Butler, *The Psychic Life of Power: Theories in Subjection* 132-50 (1997); Leo Bersani, *Is the Rectum a Grave?*, 43 *AIDS: Cultural Analysis/Cultural Activism* 197, 220-22 (1987).

n94. See *supra* note 92; see also Iris Marion Young, *Justice and the Politics of Difference* (1990) (arguing that theories of justice which privilege the individual instead of communities, and which model the equitable distribution of goods without analyzing systems of distribution or cultural processes of recognition and interpretation, overlook how persons see themselves and others in foundationally communal terms).

n95. See Young, *supra* note 94; see also Lynn M. Sanders, *Against Deliberation*, 25 *Pol. Theory* 347 (1997).

n96. Schulhofer, *supra* note 78, at 70.

n97. *Id.*

n98. See Martha C. Nussbaum, "Whether from Reason or Prejudice": Taking Money for Bodily Services, 27 *J. Legal Stud.* 693 (1997).

n99. See Young, *supra* note 94, at 25 ("Rights are not fruitfully conceived as possessions. Rights are relationships, not things; they are institutionally defined rules specifying what people can do in relation to one another. Rights refer to doing more than having, to social relationships that enable or constrain action."). Although I am not sure she will be convinced by the compatibility I suggest between autonomy and relational sex rights, I thank Lauren Berlant for drawing my attention to this analytic distinction.

n100. Schulhofer, *supra* note 79, at 100.

n101. Schulhofer, *supra* note 78, at 71.

n102. See generally Foucault, *supra* note 16; Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-77*, at 56-57 (1980) ("But sexuality, through thus becoming an object of analysis and concern, surveillance and control, engenders at the same time an intensification of each individual's desire for, in and over his body.").

n103. See Janet Halley, *Split Decisions: How and Why To Take a Break from Feminism* 346 (2006) ("So much feminist rape discourse insists on women's objectlike status in the rape situation: man fucks woman - subject verb object. Could feminism be contributing to, rather than resisting, the alienation of women from their own agency in narratives and events of sexual violence? ... Oddly, representing women as end points of pain, imagining them as lacking the agency to cause harm to others and particularly to harm men, feminists refuse also to see women - even injured ones - as powerful actors.").

n104. Sharon Marcus, *Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention*, in *Feminists Theorize the Political* 385, 400 (Judith Butler & Joan W. Scott eds., 1992) ("I have argued against understanding rape as the forced entry of a real inner space and for considering it as a form of invagination in which rape scripts the female body as a wounded inner space Rape exists because our experience and deployment of our bodies is the effect of interpretations, representations, and fantasies which often position us in ways amenable to the realization of the rape script: as paralyzed, as incapable of physical violence, as fearful.").

n105. *Id.* at 386; see also Judith Butler, *Bodies that Matter* 29 (1993) ("We may seek to return to matter as prior to discourse to ground our claims about sexual difference only to discover that matter is fully sedimented with discourses on sex and sexuality that prefigure and constrain the uses to which that term can be put. Moreover, we may seek recourse to matter in order to ground or to verify a set of injuries or violations only to find that matter itself is founded through a set of violations, ones which are unwittingly repeated in the contemporary invocation.").

n106. See Suzanne Ost, *Child Pornography and Sexual Grooming* 15, 103-47, 189-91 (2009) (surveying the uneven development of British child pornography and sexual grooming laws, and arguing that innocence and communal standards of decency have too often been the foci of protective attention, rather than the minimization of coercion and exploitation of children).

n107. *Id.* at 140 ("There is also a need to avoid the over-prioritization of sexual exploitation above other forms of harmful misuse of children.") (citations omitted).

n108. Oberman, *supra* note 22, at 809.

n109. In California, for example, sexual contact with someone under eighteen is a crime, unless the partners are married. Cal. Penal Code §

261.5(a) (2010); Phipps, *supra* note 46, at 444. The marriage exemption, of course, generally preempts same-sex sexual activity from such an affirmative defense (and assumes a seventeen-year-old can reason enough to marry, but not to have sex).

n110. In Utah and Ohio, for example, an eighteen-year-old can be criminally liable for sexual contact with a fifteen-year-old. Ohio Rev. Code Ann. § 2907.04(A) (2010); Utah Code Ann. § 76-5-406(11) (2010).

n111. See *supra* note 74.

n112. See Ost, *supra* note 106.

n113. Based on a 1994 Allan Guttmacher Institute study, Oberman reports that most U.S. teenagers have had sex, so there are "potentially millions of statutory rapes every year." Oberman, *supra* note 22, at 809. But see Phipps, *supra* note 46, at 393 (suggesting that a more nuanced study of criminal sex laws would reveal that most sexually active teens are above statutory age thresholds). For a more recent study on the sexual activity of teenagers, see *infra* note 122.

n114. Schaffner, *supra* note 86.

n115. Donna M. Bishop, Juvenile Offenders in the Adult Criminal Justice System, 27 *Crime & Just.* 81, 102-04 (2000); Schaffner, *supra* note 86.

n116. See *supra* text accompanying notes 44-45, 68-69.

n117. *Id.*

n118. Age of consent laws clearly cannot and do not locate the transformative moment, sixteen years after the day of one's birth, where a person may meaningfully consent to sexual activity. Rather, "definitions of age of consent laws can be conceived as articulations of particular degrees and forms of citizenship granted to specific social groups (defined, for example, by gender, sexuality and age) by states Perspectives on age of consent laws are structured in relation to broader debates over citizenship, concerning issues including the appropriate role of law in relation to collective morality; the balance between majority preferences and minority freedoms; the balance between the equality and liberty of individuals; the definition of 'rights' including 'human rights' and the scope of privacy; and the distribution of power between men and women, and between groups with particular sexual identities." Matthew Waites, *The Age of Consent: Young People, Sexuality, and Citizenship* 37-38 (2005) (citations omitted).

n119. *Id.* at 29, 212.

n120. *Id.* at 211-12; see *infra* text accompanying notes 305-318.

n121. States generally distinguish crimes of sexual penetration with a minor from sexual contact with a minor, penalizing the former more heavily. Phipps, *supra* note 71, at 43-47. That said, popular discussion ("what's the age of consent in Illinois?") obscures these nuances. Although such criminal gradations may be somewhat commendable under the rubric of sexual autonomy - recognizing the diversity of sexual experiences and contacts, intimating differentiated degrees of violation - the statutes portray a manifestly phallocentric and heteronormative account of sex. Penetration (with a penis) is the real deal, the other stuff is foreplay, or child's play. See also Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. Davis L. Rev. 195 (2008).

n122. See Guttmacher Inst., *Facts on American Teens' Sexual and Reproductive Health* (2010), available at <http://www.guttmacher.org/pubs/FB-ATSRH.pdf> ("Nearly half (46%) of all 15-19-year-olds in the United States have had sex at least once The majority (59%) of sexually experienced teen females had a first sexual partner who was 1-3 years their senior."). However, the study also finds that most younger teens, under age seventeen, have not had sex.

n123. Despite contextual factors such as education and experience that influence young people's decision-making capabilities, studies indicate that teenagers possess the necessary logical and abstract reasoning skills to make their own medical and sexual choices. See Cohen, *supra* note 1, at 730.

n124. See Higdon, *supra* note 121.

n125. State laws are moving in this direction, as Part I explains. See also Phipps, *supra* note 46, at 390-91.

n126. Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 Va. J. Soc. Pol'y & L. 287, 330-33 (1996).

n127. See Cocca, *supra* note 20, at 136-38.

n128. Kitrosser, *supra* note 126, at 329-30, 333-34.

n129. *Id.* at 323-26.

n130. *Id.* at 323.

n131. See *infra* Part IIIId.

n132. Kitrosser, *supra* note 126, at 321.

n133. See *infra* text accompanying notes 217-218.

n134. Kitrosser, *supra* note 126, at 309, 329-30.

n135. On the portrayal of wounded children to affect public opinion, see Patricia Holland, *Picturing Childhood: The Myth of the Child in Popular Imagery* 143-71 (2004); McKenzie Wark, *Fresh Maimed Babies*, 65 *Transitions* 36 (1995).

n136. See, e.g., David Archard, *Children: Rights and Childhood* 19-50 (2004); David Archard, *Sexual Consent* 118 (1997) [hereinafter Archard, *Sexual Consent*] ("It does seem true that we - as in we of the modern Western world - have a particular understanding of childhood as a period of incompetence and innocence."); James R. Kincaid, *Erotic Innocence: The Culture of Child Molesting* 14-17, 53-56 (1998); Ost, *supra* note 106, at 12-15, 183-86; Jenny Kitzinger, *Defending Innocence: Ideologies of Childhood*, 28 *Feminist Rev.* 77 (1988).

n137. On ways media makes and unmakes the innocence of children of color, see generally Kincaid, *supra* note 136, at 20 ("Children of color find themselves blanched to ungodly sallowness."); Kathryn Bond Stockton, *The Queer Child* 31-33, 207-14 (2009). On the cultural withholding of innocence to children of color, see Roberts, *supra* note 67, at 21. For an account of how racialized innocence informs public school safer sex education, see Jessica Fields, "Children Having Children": Race, Innocence, and Sexuality Education, 52 *Soc. Probs.* 549 (2005).

n138. See Jenny Kitzinger, *Framing Abuse: Media Influence and Public Understanding of Sexual Violence Against Children* (2004); Ost, *supra* note 106, at 180-91; Kitzinger, *supra* note 136; Pamela D. Schultz, *Naming, Blaming and Framing: Moral Panic over Child Molesters and Its Implications for Public Policy*, in *Moral Panics over Contemporary Children and Youth* 95 (Charles Krinsky ed., 2008).

n139. On the political and political theoretic origins of this division, see generally Holly Brewer, *Children, Law, and the Anglo-American Revolution in Authority* (2007).

n140. See *supra* text accompanying notes 70-74.

n141. See Waites, *supra* note 118, at 233.

N142. *Id.* at 12-13; 177-78.

n143. Archard, *Sexual Consent*, *supra* note 136.

n144. Oberman, *supra* note 22; Oberman, *supra* note 34; Oberman, *supra* note 25.

n145. See *supra* Part II.

n146. Schulhofer, *supra* note 79, at 196 ("[Many] states focus on maturity (age) as the sole measure of capacity to consent, ignoring the problems of power that arise when an adolescent and her sexual partner are not contemporaries.").

n147. *Id.* at 102 ("Intercourse with an apparently willing fifteen-year-old or with a mentally incompetent woman is not prohibited because the man is a potential killer; it is prohibited because the preconditions for meaningful choice are absent."). Although Schulhofer stages the teen and the incompetent to advance his argument for an expanded legal understanding of sexual violation, he unfortunately throws them both under the bus to do so - both are declared unilaterally and equivalently incapable of decision-making, and both of their desires stand irrelevant to law. I incorporate Schulhofer's insights when I consider the potential objections raised against regulating relations of dependence between minors and adults and against creating an affirmative sexual consent standard for young people. See *infra* text accompanying notes 217-218, 237-246.

n148. Archard, *Sexual Consent*, *supra* note 136, at 1.

n149. *Id.* at 120.

n150. *Id.* at 119.

n151. *Id.* at 117.

n152. *Id.*; see also Kincaid, *supra* note 136, at 74-82; Waites, *supra* note 118, at 24-28.

n153. See Kincaid, *supra* note 136; see generally Laura Kipnis, *Bound and Gagged: Pornography and the Politics of Fantasy in America* 3-63 (2003); Judith Levine, *Harmful to Minors: The Perils of Protecting Children from Sex* 20-44 (2002). That I suggest affirmative consent ought not to function as a defense for sex with "tier 1" children should not be confused with propositions that children are not sexual, that pedophilic desire is irredeemably heinous, or even that pedophilic behavior is always and only morally reprehensible. There are several reasons in the contemporary United States for legally restricting sex with tier 1 children whether or not such sex is wrong absolutely.

n154. Archard, *Sexual Consent*, *supra* note 136, at 44.

n155. *Id.* at 46.

n156. *Id.* at 44-45. However, Archard is careful: while he writes that mentally disabled and drunk people are incapable, Archard uses the passive voice in considering children, intimating that such incapacity may be a determination of legal positivism and not biological fact. *Id.* ("The lack of such a capacity may be permanent, as would be the case with someone who is seriously mentally ill or disabled ... a child is judged to lack the capacity of an adult Clearly a comatose person is not able to consent to ... sexual activity.") (emphasis added). *Id.* at 119 ("Sexual activity by someone below the age of majority is characterized as non-consensual.") (emphasis added).

n157. *Id.* at 120. When Archard considers the "nature of sexual activity," he is primarily commenting on the then-different age of consent laws in Britain for homosexual and heterosexual sexual activity, and he suggests the legal difference should be abolished (it has), since it has nothing to do with capacity, knowledge, or voluntariness, but rather homophobia. See also Waites, *supra* note 118, at 166-82. Waites chronicles the discursive parameters of the political debates in Britain that led to the equalization of the age of consent to sixteen in 2000. Although supportive of decriminalizing same-sex sex for teenagers, he is concerned with the tactics that were used for getting there. The "equality" idiom under which the campaign was waged obscures extralegal hierarchies of sexuality, and the emphasis placed on the alleged physiological fixity of sexual orientation serves to solidify heterosexuality and homosexuality as discrete, exhaustive, ontological categories.

n158. Archard, *Sexual Consent*, *supra* note 136, at 125.

n159. *Id.* at 126-27; see also Oberman, *supra* note 22, at 820-21; Oberman, *supra* note 34, at 725-26; Oberman, *supra* note 25, at 63-70.

n160. Archard, *Sexual Consent*, *supra* note 136, at 124.

n161. *Id.* at 125; see Levine, *supra* note 153, at 90-116.

n162. See *infra* text accompanying notes 176-218.

n163. Archard, *Sexual Consent*, *supra* note 136, at 37-38.

n164. See Oberman, *supra* note 22; Oberman, *supra* note 34; Oberman, *supra* note 25.

n165. Oberman, *supra* note 34, at 714.

n166. *Id.* at 709.

n167. *Id.* at 778.

n168. See Phipps, *supra* note 46, at 386, 424.

n169. Oberman, *supra* note 34, at 718-28.

n170. *Id.*

n171. *Id.*

n172. Phipps, *supra* note 46, at 434.

n173. Oberman, *supra* note 34, at 721, cited in Phipps, *supra* note 46, at 380.

n174. Phipps, *supra* note 46, at 424-25.

n175. See *id.* at 425, 439-40 (cursorily suggesting that progressive proposals to revise statutory standards of sexual consent might be usefully applied to young people); Oberman, *supra* note 34, at 767-77 ("One can easily imagine the consequences of this [consent reform] approach, were it to be permitted in cases involving young victims. Owing to factors with which we are well acquainted, girls are less likely to take an active role in rejecting a sexual advance. And if their silence may be taken as consent ... this 'reform' would enslave them to male sexual predilections."). Oberman's criticism accounts neither for the possibility of criminal statutes explicitly rejecting silence as a token of consent, nor for the differences in dynamics depending on the age span of the partners, nor for the different circumstances facing younger and older teenagers.

n176. See *supra* text accompanying notes 35-39.

n177. Phipps, *supra* note 46, at 390. In Hawaii, for example, a twenty-year-old commits sexual assault in the first degree (felony) for penetrative sex with a fifteen-year-old, unless the partners are married. Haw. Rev. Stat. Ann. § 707-730(1)(c)(i-ii) (2010). In Maryland, a seventeen-year-old commits a second degree sex offense (felony) for sexual contact with a thirteen-year-old. Md. Code Ann., Crim. Law § 3-306(a)(3) (2010).

n178. Cocca, *supra* note 20, at 19.

n179. Sharon G. Elstein & Noy Davis, Am. Bar Ass'n, *Sexual Relationships Between Adult Males and Young Teenage Girls: Exploring the Legal and Social Responses* (1997), available at http://new.abanet.org/child/PublicDocuments/statutory_rape.pdf; Phillips, *supra* note 41, at 95.

n180. See Waites, *supra* note 118, at 238-41. However, in the United States the gap in sexual knowledge between teenagers and adults may not be so wide, as younger adults often have little or incorrect information about sex, contraception and reproduction. Elizabeth Landau, *Gaps Found in Young People's Sexual Knowledge*, CNN, Dec. 15, 2009, <http://www.cnn.com/2009/HEALTH/12/15/sex.report/index.html>.

n181. Suggesting age-span provisions are more defensible than blanket prohibitions does not condone severe sentencing, nor does it imply that criminal sanction will dissolve the socioeconomic realities that induce sexual relations between younger girls and older men. See Phillips, *supra* note 41.

n182. See Oberman, *supra* note 34, at 752.

n183. See Elstein & Davis, *supra* note 179; Sharon Lamb, *The Secret Lives of Girls: What Good Girls Really Do - Sex Play, Aggression, and Their Guilt* 116-22 (2002).

n184. Alan Wertheimer, *Consent to Sexual Relations* 221-22 (2003). Wertheimer argues that Oberman opposes *per se* proscriptions, which is incorrect. Oberman advances *per se* proscriptions, but with qualifications regarding prosecuting and sentencing.

n185. See Oberman, *supra* note 34, at 751-52.

n186. Wertheimer, *supra* note 184, at 216.

n187. *Id.* at 217.

n188. *Id.* at 216-22.

n189. *Id.* at 217. That Wertheimer specifies the babysitter is male, and that, moreover, all the hypothetical scenarios judged problematic involve a male perpetrator and female victim, reflects that gender inequality amplifies the coerciveness attributed exclusively to age or age difference.

n190. Although Wertheimer's scenarios are presented as abstracted hypotheticals (person A does x, person B does y), many of them are taken from court cases. The gang members and high school freshman scenario refers to the "Spur Posse" scandal, discussed in Oberman, *supra* note 34, at 718 n.50.

n191. Wertheimer, *supra* note 184, at 217.

n192. *Id.* at 218.

n193. *Id.* at 217.

n194. *Id.* at 218, 222. Wertheimer suggests that wide age-spans may be inherently exploitive (not coercive), but still seems to weakly endorse *per se* proscriptions.

n195. *Id.* at 180-82.

n196. *Id.* at 222.

n197. Oberman, *supra* note 34, at 713 ("[Her case evidence] demonstrates the ways in which [teenagers] are simply not protected by contemporary rape laws.").

n198. Phipps, *supra* note 46, at 408.

n199. See Oberman, *supra* note 34, at 718-28.

n200. See *supra* text accompanying notes 47-53; see also Alice Susan Andre-Clark, Note, Whither Statutory Rape Laws? Of Michael M., the Fourteenth Amendment, and Protecting Women from Sexual Aggression, 65 S. Cal. L. Rev. 1933, 1992 (1992).

n201. See, e.g., Howard N. Snyder, Bureau of Justice Statistics, Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics 10 (2000); Am. Psychological Ass'n, Understanding Child Sexual Abuse: Education, Prevention, and Recovery (2001), <http://www.apa.org/releases/sexabuse/homepage.html>; Human Rights Watch, No Easy Answers: Sex Offender Laws in the U.S. 24 (2007), available at <http://www.hrw.org/en/reports/2007/09/11/no-easy-answers>.

n202. See generally Kincaid, *supra* note 136.

n203. See Kipnis, *supra* note 153; Fischel, *supra* note 18.

n204. See Leigh B. Bienen, Defining Incest, 92 Nw. U. L. Rev. 1501, 1504 (1998).

n205. *Id.* at 1575 (noting further that some states only criminalize sex between minors and persons in positions of familial authority, while other states have more expansive definitions that include teachers, coaches, and so forth); see also Phipps, *supra* note 71, at 132-33.

n206. See Kitrosser, *supra* note 126, at 333-34.

n207. *Id.*; see also Schulhofer, *supra* note 79, at 196.

n208. See, e.g., Jane Gallop, *Feminist Accused of Sexual Harassment* (1997); *Pleasure and Danger: Exploring Female Sexuality* (Carol Vance ed., 1984); Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 *Colum. L. Rev.* 181, 207 (2001) ("Desire is not subject to cleaning up, to being purged of its nasty, messy, perilous dimensions, full of contradictions and the complexities of simultaneous longing and denial. It is precisely the proximity to danger, the lure of prohibition, the seamy side of shame that creates the heat that draws us toward our desires, and that makes desire and pleasure so resistant to rational explanation. It is also what makes pleasure, not a contradiction with or haven from danger, but rather a close relation.").

n209. Wertheimer, *supra* note 184, at 176, 233.

n210. *Id.* at 163-92.

n211. *Id.* at 167-68. In Wertheimer's example, a lifeguard is required to rescue a drowning person. If the lifeguard offers to rescue the person only in exchange for his money, the agreement is void and the person should not be expected to pay.

n212. See *id.* at 175.

n213. See Archard, *Sexual Consent*, *supra* note 136, at 67.

n214. Wertheimer, *supra* note 184, at 180.

n215. See Schulhofer, *supra* note 79, at 135-36, 143-44, 174, 178, 197-98. Schulhofer also discussed Wertheimer's "Lower Grade" and "Higher Grade" scenarios at the University of Chicago Law and Philosophy seminar on coercion, Spring 2008.

n216. Wertheimer, *supra* note 184, at 180.

n217. Schulhofer, *supra* note 79, at 206-26, 253.

n218. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *Signs: J. Women Culture & Soc'y* 635, 647 (1983) ("Perhaps the wrong of rape has proven so difficult to articulate because the unquestionable starting point has been that rape is definable as distinct from intercourse, when for women it is difficult to distinguish them under conditions of male dominance."). David Archard, like many a skeptical law student, claims that MacKinnon believes all heterosexual sex is indistinguishable from rape, and then dismisses her argument as such. Archard, *Sexual Consent*, *supra* note 136, at 90. This strategic misreading allows Archard and others to contain feminist critiques of rape law as paranoid and excessive; moments of MacKinnon are paranoid and excessive, but this is not one of them. MacKinnon's (admittedly polemic, but never sloppy) critique of traditional rape law exposes its fundamental precepts that have made it so intractable to reform. See also Halley, *supra* note 103, at 44-50 (2006); Oberman, *supra* note 22, at 823-24 (observing how other critics of MacKinnon have made the same mistaken conclusion). Halley, in her otherwise stinging critique of MacKinnon, points out that the "early" MacKinnon's analysis of rape and criminal rape law was proffered as a broadside on patriarchal epistemology and its juridical constructions of force and consent.

In *The Many Faces of Sexual Consent*, 37 *Wm. & Mary L. Rev.* 47 (1995), William N. Eskridge, Jr. observed that sex law was moving away from restrictions based on status to restrictions based on consent. Nonetheless, he pointed to status-based statutes still on the books that, reflecting gendered and heteronormative mores, penalized various forms of nonprocreative sex outside marriage. I concur with the position he advanced then, the reintroduction of status crimes, but where status differentials index power differentials that constrain sexual autonomy rather than privilege marital procreative sexuality: "Gaylaw should insist that 'choice' be viewed realistically and should explore the many ways in which sexual choice is or can be 'impaired.' ... At this point, conceptions of status reenter the policy calculus - not to render consent irrelevant, but instead to consider whether apparent consent ('yes') has been rendered meaningfully. In situations in which one party stands in a position of authority or power over the other party, the latter's acquiescence in sexual relations might be doubted and more easily negated." *Id.* at 66-67 (citations omitted). Although many status-based sex crimes have been rendered unconstitutional since 2003 as a result of *Lawrence v. Texas*, 539 U.S. 558 (2003), a few state criminal codes still differentiate between underage sodomy and intercourse, penalizing the former more greatly and thus disparately impacting same-sex sexual activity between minors and between minors and adults. So too, exemptions to statutory rape liability are made if partners are of the "opposite sex" and within a specified age range of one another. See generally Higdon, *supra* note 121.

I should also note that regulating sexual relations of trust and authority is one of two ways to mitigate the effects of structural dependence on sexual autonomy. The other is to revolutionize social conditions so that these relations of dependence dissolve, say, by abolishing the nuclear family and wage labor, and securing children's financial independence. Until the revolution, I hesitantly endorse regulation (nor does this particular regulation stall or co-opt the revolution). See Kate Millet, *Beyond Politics? Children and Sexuality*, in *Pleasure and Danger*, *supra* note 208, at 217-24.

n219. Chamallas, *supra* note 91, at 796-813; see *supra* text accompanying notes 35-39.

n220. Chamallas, *supra* note 91, at 796-813.

n221. Caringella, *supra* note 34, at 14-15; Chamallas, *supra* note 91, at 796-813; Oberman, *supra* note 34, at 711.

n222. See Caringella, *supra* note 34, at 16; *supra* text accompanying notes 35-39.

n223. Caringella, *supra* note 34, at 15; see *supra* text accompanying notes 35-39.

n224. Schulhofer, *supra* note 79, at 3, 30-31.

n225. Caringella, *supra* note 34, at 14-15, 65-70; Schulhofer, *supra* note 79, at 3, 30-31.

n226. Caringella, *supra* note 34, at 14-15, 65-70.

n227. Many states require some proof of resistance as an element in a crime of rape or sexual assault, while some have abolished the resistance requirement altogether, centralizing nonconsent instead. Caringella, *supra* note 34, at 14-15, 30-31.

n228. *Id.* at 31, 106-07.

n229. See Schulhofer, *supra* note 79, at 10.

n230. New Jersey, Wisconsin, and Washington all require affirmative consent for exculpation. Caringella, *supra* note 34, at 75-78.

n231. *Id.* In Wisconsin, "consent" is "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact." Wis. Stat. § 940.225(4) (2010).

n232. See, e.g., Chamallas, *supra* note 91; Lois Pineau, *Date Rape: A Feminist Analysis*, in *Date Rape: Feminism, Philosophy, and the Law* 1 (Leslie Francis ed., 1996).

n233. See, e.g., MacKinnon, *supra* note 2, at 243-47; Lani Anne Remick, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. Pa. L. Rev. 1103 (1993).

n234. See Schulhofer, *supra* note 79, at 43-46.

n235. See Caringella, *supra* note 34, at 78-82; David P. Bryden, *Redefining Rape*, 3 Buff. Crim. L. Rev. 317, 402-11 (2000).

n236. Caringella, *supra* note 34; Bryden, *supra* note 235; see *infra* text accompanying notes 259-267.

n237. See *supra* text accompanying notes 34, 155, 157, 166, 170.

n238. Kitrosser, *supra* note 126, at 329-30 (arguing that adolescent girls' heightened vulnerability and likely acquiescence to unwanted sex demands a more exacting consent standard). On our points of disagreement, see *supra* text accompanying notes 126-135.

n239. See Rachel Kramer Bussel, *Beyond Yes or No: Consent as Sexual Process*, in *Yes Means Yes: Visions of Female Sexual Power and a World Without Rape* 43 (Jaclyn Friedman & Jessica Valenti eds., 2008); Thomas Macaulay Millar, *Toward a Performance Model of Sex*, in *Yes Means Yes*, *supra* at 29.

n240. Fineman, *supra* note 55, at 42-43; Susan Estrich, *Palm Beach Stories*, 11 *Law & Phil.* 5, 10-11 (1992).

n241. Ehrlich, *supra* note 25, at 235 (noting that 19th-century reformers wryly argued that if Congress could act quickly to pass a bill rebuilding the burned down stables for President Grant's horses, surely Congress could act as speedily to protect girls).

n242. See Millar, *supra* note 239, at 36-37; see also Carole Pateman, *The Sexual Contract* 15 (1988) ("That individual freedom, through contract, can be exemplified in slavery should give socialists and feminists pause when they make use of the idea of contract and the individual as owner.").

n243. See generally Kincaid, *supra* note 136 (arguing that the innocence ascribed to Western children from the end of the 18th century until the present, although historically varied, has eroticized them as placeholders for and projections of adult desire). For a thorough, trenchant treatment of the relation between U.S. law, the codification of child (a)sexuality and (sexual) abuse, and the disciplinary encroachments the legal child requires from the state and its professional institutions, see Gillian Harkins, *Everybody's Family Romance: Reading Incest in Neoliberal America* 26-68 (2009).

n244. See Harkins, *supra* note 243, at 197 ("Consent hinges on children, heuristically and protectively. Historically, sexual consent upholds relations between family and state more than it recognizes specific forms of sexual agency... . It might be more accurate to say that consent produces children as the case for political negation... . subjects produced through a series of competing and conflictual negations that enjoin them to desire."). See generally Kincaid, *supra* note 136.

n245. See Berlant, *supra* note 53, at 66-67 ("Sometimes when the little girl, the child, or youth are invoked in discussions of pornography, obscenity, or the administration of morality in U.S. mass culture, actually endangered living beings are being imagined. Frequently, however, we should understand that these disturbing figures are fetishes, effigies that condense, displace, and stand in for arguments about who 'the people' are, what they can bear, and when, if ever.").

n246. In his study of thirty men convicted of sex offenses against children, sociology professor Douglas Pryor finds, "one [erotic] contingency was the perceived vulnerability of the child Many men noted that they had picked a particular child they believed to be an easy or willing mark Erotic desire seemed to flourish for men when they were in control of their victims The men felt that the victims began to use sex and their knowledge of what had been occurring to gain leverage Other men admitted that they lost power when the victim started to initiate sex back In these instances, erotic interest dissipated, sexual momentum essentially stopped, and offenders began to search for ways out of the situation" (emphasis added). Douglas W. Pryor, *Unspeakable Acts: Why Men Sexually Abuse Children* 266-67 (1996); see also Ost, *supra* note 106, at 185-86 ("Our construction and objectification of children as innocent may cause us to reduce them simply to objects of innocence, the one aspect of childhood that may be of greatest attraction to the child sexual abuser."); Richard Yuill & Dean Durber, "Querying' the Limits of Queering Boys Through the Contested Discourses on Sexuality, 12 *Sexuality & Culture* 257, 266 (2008) (citing studies finding that a presumed innocence and a presumed need-of-guidance were reported factors of attraction for self-identified "boylovers" and "pedophiles").

n247. Schulhofer, *supra* note 79, at 280.

n248. Wash. Rev. Code § 9A.44.010(7) (2003).

n249. See Terry P. Humphreys, *Understanding Sexual Consent: An Empirical Investigation of the Normative Script for Young Heterosexual Adults*, in *Making Sense of Sexual Consent* 209 (Mark Crowley & Paul Reynolds eds., 2004); Kitrosser, *supra* note 126, at 324-26.

n250. See Catharine A. MacKinnon, *Sex Equality: Rape Law* 217 (2001).

n251. The obvious parallels here are the invalidity of coerced contracts, and the absolution of criminal culpability under conditions of duress. Of course, what counts (morally, legally) as coercion to invalidate contract, and what counts (morally, legally) as duress to exonerate criminal behavior, are questions as complicated as determining when and under what circumstances affirmative consent to sex is transformative. For a jurisprudential and philosophical account of coercion and a proposal to revise its meaning and scope, see generally Alan Wertheimer, *Coercion* (1990). For an analysis of duress and a proposal to revise its meaning and scope, see Craig L. Carr, *Duress and Criminal Responsibility*, 10 *Law & Phil.* 161 (1991); Meir Dan-Cohen, *Responsibilities and the Boundaries of the Self*, 105 *Harv. L. Rev.* 959, 997-99 (1992); and Daniel Varona Gomez, *Duress and the Anticolony's Ethic: Reflections of the Foundations of the Defense and Its Limits*, 11 *New Crim. L. Rev.* 615 (2008). All writers cited point out that factors which legally exculpate may or may not morally exculpate, and vice versa. At any rate, the more general analogous point is that the validity of the subject's "yes" to sex must be evaluated under the conditions in which the "yes" is procured.

n252. 477 U.S. 57 (1986).

n253. See Raymond F. Gregory, *Unwelcome and Unlawful: Sexual Harassment in the American Workplace* 35-47 (2004); Louise F. Fitzgerald, *Who Says? Legal and Psychological Constructions of Women's Resistance to Sexual Harassment*, in *Directions in Sexual Harassment Law* 94 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

n254. See Fitzgerald, *supra* note 253, at 104-05.

n255. In *State v. Grunke*, 752 N.W.2d 769 (Wis. 2008), the Wisconsin Supreme Court reversed lower court rulings and held defendants in violation of the state's sexual assault laws for attempting to have sex with a corpse. Importantly, the finding in part hinged on Wisconsin's statutory definition of consent as "indicating a freely given agreement to have sexual intercourse or sexual contact." Wis. Stat. § 940.225(4) (2006). The state, the Court concluded, need not prove the corpse withheld consent, but simply that she did not affirmatively provide it (which she did not, as she was dead). *Grunke*, 752 N.W.2d at 776. At least in Wisconsin, Catharine MacKinnon's and Andrea Dworkin's grievance that under U.S. law dead women can consent to sex is allayed by this statutory affirmative standard. However, Caringella observes that judges in jurisdictions with affirmative consent requirements often interpret acquiescence or submission as voluntariness. Caringella, *supra* note 34, at 80-82, 112-13.

n256. See Fitzgerald, *supra* note 253, at 94.

n257. See *supra* text accompanying notes 182-218.

n258. See *supra* text accompanying notes 126-135.

n259. See, e.g., Joshua Dressler, *Where We Have Been, and Where We Might Be Going? Some Cautionary Reflections on Rape Law Reform*, 46 Clev. St. L. Rev. 409 (1998); Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 Colum. L. Rev. 1781, 1792-93, n.41 (1992).

n260. See Bryden, *supra* note 235, at 385.

n261. Susan Estrich, *Real Rape* 70-71 (1987).

n262. Kitrosser, *supra* note 126; see *supra* notes 232-233.

n263. MacKinnon, *supra* note 43, at 1300 ("The notion of consent here, the law's line between intercourse and rape, is so passive that a dead body could satisfy it.") (citing Andrea Dworkin, *Intercourse* 129 (1987) ("Consent in this world of fear is so passive that the woman consenting could be dead and sometimes is.")). But see *supra* note 255 (a dead woman cannot consent to sex in Wisconsin).

n264. Caringella, *supra* note 34, at 78-85; Vivian Berger, *Not So Simple Rape*, 7 *Crim. Just. Ethics* 69, 75-76 (1988); Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 *Akron L. Rev.* 981, 1053 (2008) ("Silence, preceding and during sexual relations, ought not be deemed sufficient to transform intercourse into a rape. In some jurisdictions, an accused can be convicted even if he believed there was consent, even if such a belief was a reasonable one, and even if there was no indication whatsoever, no physical or verbal resistance, of the lack of desire for the intercourse.") (internal citation omitted); see *infra* text accompanying notes 272-274. Although an otherwise informative and well-researched article, Klein offers no aggregate data to suggest that such rape reforms have in fact led to significant convictions or incarcerations of hapless men without *mens rea*.

n265. See *supra* note 180.

n266. See *supra* notes 113, 122.

n267. Kitrosser, *supra* note 126, at 309 ("An affirmative consent standard is a crucial step in the general law of rape In particular though, such a standard is especially important in the case of minors, given the increased likelihood that a minor, particularly in relation to an older person, might be intimidated into sexual activity... .").

n268. See Caringella, *supra* note 34, at 79-80 ("It is unrealistic - in fact, to many fairly ludicrous - to think about the questions: 'Can I touch your boobs now [sic]' 'Do you mind if I suck your vagina?' 'Shall I penetrate you now?' People just don't have sex this way.'").

n269. See Archard, *Sexual Consent*, *supra* note 136, at 37.

n270. See Caringella, *supra* note 34, at 79; Editorial, "Ask First" at Antioch, N.Y. Times, Oct. 11, 1993, at A16.

n271. Schulhofer, *supra* note 79, at 47-55; Estrich, *supra* note 240, at 10-11; Oberman, *supra* note 34, at 718-28.

n272. Bryden, *supra* note 235, at 400.

n273. *Id.* at 403.

n274. *Id.*; see also Archard, *Sexual Consent*, *supra* note 136, at 23 (arguing that only a particularly caricatured account of securing consent would render it so deflating for erotic spontaneity).

n275. Bryden, *supra* note 235, at 400.

n276. See *supra* text accompanying notes 179-181, 186-196.

n277. See Caringella, *supra* note 34, at 11-21.

n278. See Cocca, *supra* note 20, at 16-24.

n279. See Jessica Fields, *Risky Lessons: Sex Education and Social Inequality* 140 (2008) (finding, in her sociological investigation of safer sex education in three politically and socially diverse North Carolina secondary schools, that, "liberals promoted comprehensive sex education as a means to prepare young people - and, again, young women in particular - to navigate a sexually dangerous world Conservatives, however, argued that sexual knowledge introduces youth to a sexual terrain that is too treacherous for them to navigate successfully Neither argument acknowledged the pleasure that might await a person in sexual expression or relationships Unable to find any good reason for a middle school student to know about a range of pleasurable experiences, including clitoral orgasms, adults' impulse became to shut down learning and critical inquiry. For too many students, sex education becomes an effort to do no more than help young people survive sexual danger"); Levine, *supra* note 153, at 90-116 (tracking and mourning the trajectory of safer sex education in U.S. public schools from the 1970s until the beginning of the 21st century, and finding that as a result of religious and conservative political organizing, the more comprehensive safer sex programs of the 1970s almost entirely surrendered to abstinence and abstinence-only models by the 1990s and early 2000s); Cathy J. Cohen, *Black Sexuality, Indigenous Moral Panics, and Respectability*, in *Moral Panics, Sex Panics: Fear and the Fight Over Sexual Rights* 104, 123 (Gilbert Herdt ed., 2009) ("The retreat from comprehensive sex education in the public schools may be one of the most significant attacks on challenging HIV and AIDS in black communities as well [as] protecting the sexual rights [of] people of color. Public schools are one of the few places - other than prisons - where we have the chance to intervene in the lives of significant numbers of black and Latino children, challenging and changing how they think about sex; how they think about themselves; and how they think about HIV and AIDS.").

n280. Bryden, *supra* note 235, at 409.

n281. For discussions of the distinctions between stranger and date rape, see Caringella, *supra* note 34, at 87; and Schulhofer, *supra* note 78, at 57. In addition, Estrich argues that a hard and fast distinction minimizes the harms and disqualifies the prosecutions of acquaintance rape cases, while Lynne Henderson suggests that collapsing this distinction trivializes more violent, non-acquaintance sexual assaults. Estrich, *supra* note 261, at 8-26; Lynne Henderson, *What Makes Rape a Crime?*, 3 *Berkeley Women's L.J.* 193, 224-29 (1988) (although concluding that both "simple" and "stranger" rapes should be criminal).

n282. See Schulhofer, *supra* note 78, at 281 ("Criminal sanctions are ... out of place in most consensual sexual relationships between supervisors and subordinates or between teachers and students ... the risks point to the need for safeguards that are less severe and more flexible than the sanctions of criminal law.") (emphasis added). He also presents a "Model Criminal Statute for Sexual Offenses." *Id.* at 283-84.

n283. See *supra* text accompanying notes 44-45.

n284. *Id.*; see also Schaffner, *supra* note 86, at 203-04 (arguing that statutory rape laws should be repealed, and that forcible rape laws and laws against child sexual abuse, properly enforced, are adequate safeguards for young people's sexual autonomy).

n285. Delgado, *supra* note 68; Rubin, *supra* note 76; Schaffner, *supra* note 86; see *supra* text accompanying notes 44-45.

n286. See *supra* text accompanying notes 85-88, 204-207.

n287. Michel Foucault, Guy Hocquenghem & Jean Danet, *Sexual Morality and the Law*, in *Politics, Philosophy, Culture: Interviews and Other Writings, 1977-1984*, at 271, 284 (Lawrence D. Kritzman ed., 1988) (radio transcript).

n288. *Id.* at 285.

n289. Linda Martin Alcoff, *Dangerous Pleasures: Foucault and the Politics of Pedophilia*, in *Feminist Interpretations of Michel Foucault* 99 (Susan Hekman ed., 1996).

n290. *Id.* at 111. However, the critical purchase Alcoff achieves interrogating the socialization of desire is hampered in the latter half of her essay. By way of graphic descriptions of child sexual abuse, traumatic autobiography, and the imputation of pedophilia at Foucault and his conversationalists, she concludes that all intergenerational sex is harmful, makes little distinction between incest and sex between teenagers of different ages, and advocates a unilateral prohibition on sex between young people and adults. *Id.* at 104, 120-21, 126, 128-29.

n291. Vikki Bell, *Interrogating Incest: Feminism, Foucault and the Law* 154 (1993).

n292. To historicize sexuality as an emergent juridical and scientific discourse of the 19th century, Foucault offers the allegory of a "simple-minded" farm hand who "had obtained a few caresses from a little girl, just as he had done before and seen done by the village urchins around him." The girl's parents disclose his actions to the police, and the farm hand is then analyzed by an array of professionals. His features are measured and body investigated, until ultimately he is "shut away till the end of his life." "What is the significant thing about this story?" Foucault asks, "The pettiness of it all; the fact that this everyday occurrence in the life of village sexuality, these inconsequential bucolic pleasures, could become, from a certain time, the object not only of a collective intolerance but of a judicial action, a medical intervention, a careful clinical examination, and an entire theoretical elaboration." Foucault does not consider what this inconsequential, bucolic pleasure might have meant for the girl qua girl, or why her body was her best and most expected form of currency. Foucault, *supra* note 16, at 31; see also Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* 97 (1990) (arguing that Foucault momentarily forgets the Foucauldian contribution that there is no sexuality prior to discourse, when he appears to discover unadulterated pleasure in this aforementioned sexual exchange); Alcoff, *supra* note 289, at 111.

n293. See Wertheimer, *supra* note 184, at 86. It is outside the scope of this paper to critique the way Wertheimer puts evolutionary biology to use for his theories of consent and coercion. It suffices to say that Wertheimer's discussion leaves something to be desired for gay sexuality: "Consider homosexual rape in prison. If male minds have been hard-wired to seek sexual satisfaction, that disposition will result in consensual heterosexual intercourse in favorable environments, but may result in nonconsensual or homosexual intercourse in less favorable environments." *Id.* (emphasis added). Rather than explain why men become violently sexual in prisons, this line of reasoning instead suggests that homosexual sex and rape are - interchangeably - warped, expressive forms of normal heterosexuality by other means.

n294. Oberman, *supra* note 34, at 775 ("All of these [prior] proposals fall somewhat short of the promise that I believe underlies statutory rape laws: that girls (and boys) must be permitted to explore their incipient sexuality in an environment that is free from coercion, exploitation, and nonvoluntary sexual encounters.").

n295. *Id.* at 708-10; Oberman, *supra* note 25, at 53-59, 63-70.

n296. See, e.g., MacKinnon, *Toward a Feminist Theory of the State*, *supra* note 6, at 141-42, 248. Janet Halley objects to MacKinnon's assimilation of same-sex harassment as symptomatic of male domination over women. Halley, *supra* note 103, at 54-59.

n297. Studies cataloguing sexual abuse against boys are cited in Phipps, *supra* note 46, at 425-26. Despite Phipps's protest against Oberman's gender-specific approach, his own citations of the literature reflect that sexual abuse of or against girls is extremely frequent. See studies cited *id.* at 395-96. I want to take a middle path between Oberman and Phipps: we can recognize the problem of child sexual abuse as gender-differentiated, but not entirely so, and still advocate a gender-neutral legal response.

n298. Wertheimer, *supra* note 184, at 217.

n299. The Age Taboo, *supra* note 45; Jessica L. Stanley, Kim Bartholomew & Doug Oram, Gay and Bisexual Men's Age-Discrepant Childhood Sexual Experiences, 41 J. Sex Res. 381, 388 (2004) ("These [age discrepant] sexual experiences may provide these adolescents with the opportunity to explore their sexuality and feel affirmed by the gay community. Gay youth often speak of feeling different from their childhood peers and unaccepted by the dominant culture. It may be less threatening for young gay males to seek out an older gay male than to risk rejection and possible humiliation from making sexual advances toward a peer ... the assumptions of the heterosexual community may not apply to gay youth when it is that very community which does not allow gay youth an outlet to explore their sexuality."). One need not accept the authors' supposition of a monolithic and stabilized "heterosexual community" with uniform "assumptions" to accept their findings on the sexual experiences of gay youth.

n300. Alcoff, *supra* note 289, at 99-135.

n301. Studies cited in Waites, *supra* note 118, at 26-27.

n302. Terry Leahy, Positively Experienced Man/Boy Sex: The Discourse of Seduction and the Social Construction of Masculinity, 28 J. Soc. 71 (1992); Bruce Rind & Philip Tromovitch, A Meta-Analytic Review of Findings from National Samples on Psychological Correlates of Child Sexual Abuse, 34 J. Sex Res. 237 (1997); Theo Sandfort, Pedophile Relationships in the Netherlands: Alternative Lifestyle for Children?, 5 Alternative Lifestyles 164 (1983). Sandfort concludes that pedophilic relationships may be beneficial for "children" and younger adolescents, momentarily ignoring the gender specificity of his own research. Despite the promising title of Leahy's report, the author never seriously engages how male adolescents' conceptions of "male political rights" and "masculine adulthood as citizenship" materialize through conceptions of sexual difference. *Id.* at 86.

n303. Bruce Rind, Gay and Bisexual Adolescent Boys' Sexual Experiences with Men: An Empirical Examination of Psychological Correlates in a Nonclinical Sample, 30 Archives Sexual Behavior 345 (2001).

n304. *Id.* at 357.

n305. Admittedly and somewhat indefensibly, I do not examine the dynamics of sex between women and girls, or between women and boys. However, scholarly literature and media attention on intergenerational sex focus almost entirely on relations between men (or "male predators") and girls, men (or "gay pedophiles") and boys, and occasionally women (or "deluded, emotionally stunted temptresses") and boys. See Cocca, *supra* note 20, at 63-92, for an account of these media narratives and their rhetorical force. I have not found studies examining young girls' responses to sexual activity with adult women.

n306. Feminist theorists, especially MacKinnon, have long argued that gendered power need not require anatomically different bodies for its operations. That said, differently anatomized bodies probably facilitate gender inequality, not necessarily on any biologically deterministic grounds, but rather because anatomical differences embody and thus perform socially constructed power differences. See *supra* note 296.

n307. For an account of the sex trade industry and the different dynamics and pressures faced by men and women therein, see Scott Anderson, Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution, 112 Ethics 748, 779 & n.49 (2002) (stating that "the superior social position [of] men" and the "different role that sex plays in a part of gay-male society" may mollify the harms experienced by male prostitutes).

n308. See Biddy Martin, *Extraordinary Homosexuals and the Fear of Being Ordinary*, 6 *Differences: J. Feminist Cultural Stud.* 100 (1994).

n309. See, e.g., Bell, *supra* note 291, at 150-60; Sheilla Jeffreys, *Anticlimax: A Feminist Perspective on the Sexual Revolution* 188-210 (1990). In assessing the validity of consent in pedophilic relations, Alcoff writes, "perhaps the most crucial distinction besides age that needs to be made is that between homosexual and heterosexual practices," but then disregards the distinction in her proposals. Alcoff, *supra* note 289, at 117. Jeffreys brushes aside the possibility that "man-boy" relations may be distinct from those between men and girls. She argues by assertion only that "gay male sexuality is not different in kind from heterosexual male sexuality ... they develop a ruling-class sexuality in which power and dominance are eroticised." Jeffreys, *supra* at 208.

n310. See Edward Brongersma, *Boy-Lovers and Their Influence on Boys: Distorted Research and Anecdotal Evidence*, 20 *J. Homosexuality* 145 (1990); Gay Left Collective, *Happy Families? Pedophilia Examined*, in *The Age Taboo*, *supra* note 45, at 53; David Thorstad, *Man/Boy Love and the American Gay Movement*, 20 *J. Homosexuality* 251 (1990). The Gay Left Collective states that it "feels that male heterosexual and homosexual pedophilia raise different questions." Gay Left Collective, *supra*, at 56-57. Unfortunately, the article reduces those questions to culturally diagnostic ones about the social construction of homosexual predators and the erasure of female sexuality, rather than the potential of distinct power and sexual dynamics in these different relations. Brongersma also provides research showing that relations between men and boys and men and girls are characterized by different experiences, mostly to the disadvantage of girls. He does not, however, apply his findings to explain the political fault lines between some feminists and some gay activists in the 1980s and 1990s.

n311. See *supra* notes 293-294.

n312. Yuill & Durber, *supra* note 246, at 262-63; see also Rind, *supra* note 303. Rind argues that his data challenge the "victimological model" of child sexual interaction that presumes a uniform experience of trauma across gender and sexuality. However, rather than suppose that gender and age difference may compound each other to produce the effects experienced by young girls, he instead implies that homophobia and a generalized panic around child sexuality forecloses contrasting research like his own. This is right, but it supplants a more nuanced critique for recourse to a paranoid presumption of victimization that grants him scientific authority against a duped research community. Commenting on another (more infamous, controversial, and Congressionally censured) study conducted by Rind and his colleagues questioning the presumptive effects of child sexual abuse and the uniformity of effects across gender, Gillian Harkins notes, "One of the main questions raised by the study then is how to interpret such 'empirical' measures of gender identity as the grounds for meaningful willingness and the rationale for psychological harm To put it in my own words, the Rind study's careful navigation of citational sources suggests that although girls more often experience sex in the context of force or dysfunctional families, in those cases there is no empirically solid evidence that the sexual experience and not the force and dysfunction cause harm. The family emerges as the culprit, but only to the degree that it is radically divorced from conditions of sexual activity, desire, or willingness... . Sexuality is liberated from the family, a specifically gendered conduct released from its once constraining context. Willingness in this account produces the boy as a protoliberal individual Girls' potential sexuality is determined (once again) by the family and enclosed within its circuits as gender identity. And, when sexual abuse appears within the family, it may be the result of genetic inheritance and community dysfunction. Thus even as the family appears to be the only empirically verifiable source of harmful child sexual abuse, the harm of that experience is unintelligible as anything other than dysfunctional sociobiological gender identity In their own interpretation of their study, Rind et al. suggest that incestuous trauma is most likely a false positive, a form of 'secondary victimization' and 'iatrogenesis' fostered by feminist antisex moralism. If girls think that sexual abuse caused harm, it is sex panic." Harkins, *supra* note 243, at 204, 206-07; see Bruce Rind, Philip Tromovitch & Robert Bauserman, *A Meta-Analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples*, 124 *Psychol. Bull.* 22

(1998).

n313. Julian Marlowe, *It's Different for Boys*, in *Whores and Other Feminists* 141 (Jill Nagle ed., 1997).

n314. *Id.* at 142.

n315. *Id.* at 141.

n316. Judith Butler, *Imitation and Gender Subordination*, in *The Lesbian and Gay Studies Reader*, *supra* note 76, at 307.

n317. See The North American Man-Boy Love Association, www.nambla.org.

n318. See *supra* text accompanying notes 12, 76.

n319. See Fields, *supra* note 279, at 113-36; Levine, *supra* note 153, at 128-30, 155-77; Michelle Fine & Sara I. McClelland, *Sexuality Education and Desire: Still Missing After All These Years*, 76 Har. Ed. Rev. 297 (2006) (arguing that while the past twenty-five years have witnessed a flourishing of desirous girls in media and advertising, girls' desire is contained, normalized or extinguished through the administration of social services and the lessons of abstinence-only sex education; such programs disproportionately impact girls who are further marginalized on other axes of inequality, such as race, class, and disability). That desire is socially and pedagogically attributed and afforded to boys qua boys does not in any way presuppose that social and sexual life is easily managed for queer boys, that expectations of sexual expression and aggression are not often taxing on all boys, or that same-sex sexual desire is acknowledged or tolerated in sex education programs.

n320. A third, simpler, positivist, and hybrid reason to resist juridical distinction is adherence to the principles of fairness and nondiscrimination. U.S. Const. amend. XIV, § 1.

n321. Roger Levesque also suggests that the U.S. "recognize adolescents as legal subjects," giving them greater rights over their medical, sexual, financial, and social decisions. Roger J. R. Levesque, *Adolescents, Sex, and the Law: Preparing Adolescents for Responsible Citizenship* 338-48 (2000).

n322. Thanks again to Lauren Berlant for this insight. See also Stockton, *supra* note 137, at 37 ("Just as children are deemed more vulnerable by their guardians in the 1900s (and thus are deemed more in need of protections, many in the form of laws), they are constructed as more problematic, as presenting adults with more and newer problems, even dangers to face. A second paradox that shows up in [childhood studies] ... is the observation that the century of the child turns out to be the century in which the state of childhood is itself shrinking Sexual precocity ... is high on scholars' lists of factors causing children to 'grow up fast' and thus disappear.") (citation omitted).

n323. *Id.* at 16, 44-45. Katherine Franke similarly suggests that feminist legal reform has often constructed women as endangered or dependent figures. See generally Franke, *supra* note 208.

n324. See, e.g., *Left Legalism/Left Critique* (Wendy Brown & Janet Halley eds., 2002); Janet R. Jakobsen & Elizabeth Lapovsky Kennedy, *Sex and Freedom*, in *Regulating Sex*, *supra* note 86, at 247, 266 (advocating a notion of sexual freedom that "doesn't pose the liberal state as the site of freedom, nor does it pose state involvements as the opposite of freedom... . Movements based on this notion of freedom would be leery of strategies that simply appeal to the state in ways that contemporary gay rights groups like the Human Rights Campaign are not").

n325. Halley, *supra* note 103, at 20-22.

n326. See Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* 3-29 (1995).

n327. *Id.* at 52-76.

n328. *Id.*; see also Wendy Brown, *Suffering the Paradoxes of Rights*, in *Left Legalism/Left Critique*, *supra* note 324, at 420.

n329. Brown, *supra* note 326; see also Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* 39-40, 45-50

(1999).

n330. See MacKinnon, *Sex Equality*, *supra* note 6, at 828-29 ("Do statutory rape laws target girls for forced sex by defining girls as off limits, making it sexy to violate them as 'jail bait'? ... Are statutory rape laws necessary or are they both perverse and ineffective?"); MacKinnon, *Toward a Feminist Theory of the State*, *supra* note 6, at 167-68 (arguing that obscenity law eroticizes obscenity). MacKinnon's suppositions are perversely fascinating, since feminists have long charged that her antipornography polemics and her legal reforms sexualize and symbolically strengthen pornography. See, e.g., Brown, *supra* note 326, at 77-95. Despite MacKinnon's insistence that obscenity law trades in morality whereas pornography law would, if it existed, trade in power and politics, the erotics of transgression are presumably indifferent to such distinctions.

n331. Amy Adler, *The Perverse Law of Child Pornography*, 101 *Colum. L. Rev.* 209 (2001).

n332. See Dean, *supra* note 15.

n333. On the gap between, in particular, court order and social/administrative uptake, see generally Donald L. Horowitz, *The Courts and Social Policy* (1977); Gerald N. Rosenberg, *Hollow Hope: Can the Courts Bring About Social Change?* (1991).

n334. See Franke, *supra* note 208; *supra* text accompanying notes 289-291.

n335. Reducing the moral problem of underage sex to a yes-or-no, legal-or-illegal question distracts from the "unsexy" project of querying the socioeconomic constraints on sexual choices. Nussbaum, *supra* note 98; see also Youth Liberation, *Children and Sex*, in *The Age Taboo*, *supra* note 45, at 50 ("The problem here is not so much that young women are becoming prostitutes - the problem is that this society has so little respect for the young that it provides no decent jobs or alternatives for kids in oppressive home situations.").

n336. See, e.g., Fields, *supra* note 279; Levine, *supra* note 153; Hollenberg, *supra* note 42, at 277; Oberman, *supra* note 22, at 825-82.