

February 2013

Wake Up and Smell the Starbucks Coffee: How *Doe v. Starbucks* Confirms the End of the "Age of Consent" in California and Perhaps Beyond

Jennifer Ann Drobac

Indiana University Robert H. McKinney School of Law, jdrobac@iu.edu

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/jlsj>

 Part of the [Juvenile Law Commons](#), [Law and Gender Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Jennifer A. Drobac, *Wake Up and Smell the Starbucks Coffee: How Doe v. Starbucks Confirms the End of the "Age of Consent" in California and Perhaps Beyond*, 33 B.C.J.L. & Soc. Just. 1 (2013), <http://lawdigitalcommons.bc.edu/jlsj/vol33/iss1/2>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Journal of Law & Social Justice by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

WAKE UP AND SMELL THE *STARBUCKS* COFFEE: HOW *DOE v. STARBUCKS* CONFIRMS THE END OF “THE AGE OF CONSENT” IN CALIFORNIA AND PERHAPS BEYOND

JENNIFER ANN DROBAC*

Abstract: Since 2005, California civil courts have effectively abandoned the “age of consent” set by former California statutory rape law and, arguably, encoded in current penal code sex crime provisions. In declaring that California civil law may credit a child’s consent to sex with an adult, courts conflate or confuse legal consent, capacity, and acquiescence. Given that California federal antidiscrimination cases have begun to treat minors like fully mature adults, other states may adopt these dangerous precedents. This Article analyzes both California and United States Supreme Court cases to conclude that a strict liability civil law approach to juvenile acquiescence to sex with an adult would better serve developing teenagers. Brief exploration of *adolescent assent*, a new mechanism based in traditional contract law for dealing with the decisions of maturing teenagers, also justifies review of the current approaches in California and across the nation.

INTRODUCTION

A Google search for “the age of consent” yields results indicating the age as sixteen, seventeen, or eighteen in the United States, depending on the state.¹ These sites specify the age at which California consid-

* Professor of Law, Indiana University, Robert H. McKinney School of Law; J.S.D., Stanford Law School. My sincerest gratitude to my readers: Professors Shawn Boyne, Nicholas Georgakopoulos, Lahny Silva, and R. George Wright who all reviewed and commented upon earlier drafts. Additional thanks to Miriam Murphy, Associate Director of the IU McKinney, Lilly Law Library, Sierra Bee, Julia Hill, Esq., and Dina Hoffman, Esq. for their expert assistance. I dedicate this Article to the Starbucks baristas and millions of “McTeens.”

¹ See, e.g., *Ages of Consent in North America*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/Ages_of_consent_in_North_America (last modified Dec. 9, 2012, 11:48 AM); *Worldwide Ages of Consent*, AVERT, <http://www.avert.org/age-of-consent.htm> (last visited Dec. 21, 2012). The “age of consent” commonly refers to the age at which a minor (someone under eighteen years old) may legally consent to engage in sexual activity with an adult and, thereby, insulate that adult from criminal prosecution. See *Age of Consent*, WIKTIONARY: THE FREE DICTIONARY, en.wiktionary.org/wiki/age_of_consent (last modi-

ers it permissible for someone to engage in sexual activity with an adult as eighteen, the age of majority.² A 2009 California federal district court ruled in *Doe v. Starbucks, Inc.*, however, that a person under eighteen *may* legally consent to sex.³ In support of its decision, the *Starbucks* court cited *People v. Tobias*, a 2001 California Supreme Court criminal case.⁴ *Tobias* and *Starbucks* mark changes in California law and may have legal implications across the nation.⁵

Before Part I of this Article delves into the California case law interpretation of juvenile “consent” to sexual activity, it explores definitions. I use quotations with adolescent “consent” because even explicit verbal consent by a minor may not constitute legal consent and may equate more realistically with acquiescence.⁶ Having established a common vocabulary, Part I analyzes the *Tobias* case and its treatment of California Penal Code section 261.5, which criminalizes “consensual” sex between an adult and a minor. Part I contrasts the *Tobias* dictum with case precedent that acknowledges environmental factors that may influence “consent,” namely, “communal experience” concerning adolescent decision making and abusive forces that corrupt autonomous teenaged choices.

Part II challenges the *Tobias* majority’s conclusions by reviewing historical interpretations of California Penal Code section 261.5. More particularly, Part II revisits both the United States Supreme Court and the California Supreme Court decisions in *Michael M. v. Superior Court of Sonoma County*, a case in which both courts evaluated the meaning and

fied Dec. 13, 2012 02:22 PM) (“[Age of consent] is used to indicate the age at which it is no longer a crime for someone else to engage in consensual sexual intercourse with the person who is still younger than the age of consent”) (emphasis omitted). *But see* Donaldson v. Dep’t of Real Estate, 36 Cal. Rptr. 3d 577, 588–89 (Ct. App. 2005) (noting while “age of consent” has often been used by courts “as shorthand for the age below which . . . sexual relations would support a charge for statutory rape,” the phrase may refer to the age at which a minor can legally consent to marry).

² See CAL. PENAL CODE § 261.5(a) (West Supp. 2012); *see, e.g.,* *Ages of Consent in North America*, *supra* note 1; *Worldwide Ages of Consent*, *supra* note 1.

³ No. SACV 08-0582 AG (CWx), 2009 WL 5183773, at *7–8 (C.D. Cal. Dec. 18, 2009).

⁴ *See id.*; *People v. Tobias*, 21 P.3d 758, 761 (Cal. 2001).

⁵ In a similar article, I discuss the criminal and civil law conflicts concerning the age of consent in New York. *See* Jennifer Ann Drobac, *A Bee Line in the Wrong Direction: Science, Teenagers, and the Sting to “The Age of Consent,”* 20 J.L. & POL’Y 63, 90–95 (2011) [hereinafter Drobac, *A Bee Line in the Wrong Direction*]. Taken together, these articles demonstrate a disturbing trend regarding the age of consent in criminal and civil laws. *See id.*

⁶ *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 59, 68 (1986) (determining respondent’s voluntary participation in the sexual activity in question irrelevant to an evaluation of the unwelcomeness of sexual conduct under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.*).

legislative intent of section 261.5.⁷ These high court precedents demonstrate the inconsistent and radically novel approach taken by the *Tobias* court to section 261.5 when it declared that minors might have the capacity to give legal consent to sex.

Next, Part III traces the end of the “age of consent” in California and supportive or associated court decisions. Part III examines how California civil courts relied on the *Tobias* dictum so that California now treats adolescent “consent” in seemingly irrational and contradictory ways. Part III also elucidates how state criminal and civil law influenced federal law. Thus, what began as an isolated problem in California could conceivably spread throughout the federal system. Lastly, Part III demonstrates how recent treatment of adolescent “consent” across the nation has influenced tort law and created misguided anti-discrimination law. The new tort and anti-discrimination precedents undermine protections established in state criminal codes that set ages of consent and allow for the prosecution of adult sexual predators.

Part IV concludes by reaffirming that a strict liability civil law approach to adolescent “consent” more effectively protects teenagers from sexual predators.⁸ This last part also explores “adolescent assent,” the mechanism of a new approach to adolescent “developing capacity.”⁹ Introduced more fully in a separate article, adolescent assent better serves teenagers and those interested in fostering emerging adulthood.¹⁰ Adolescents will engage in sex, sometimes with adults. The challenge is to protect teenagers while they explore the adult world. The adolescent assent proposal affords teenagers the chance to revoke their “consent” when an adult behaves abusively, takes unfair advan-

⁷ See *Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464, 472 n.6 (1981); *Michael M. v. Superior Court of Sonoma Cnty.*, 601 P.2d 572, 576 (Cal. 1979), *aff'd*, 450 U.S. 464 (1981).

⁸ Part IV is largely based on a previous article but, rather than reaching this conclusion by analyzing New York case law, I add a new dimension by considering recent, troubling decisions from California courts. See Drobac, *A Bee Line in the Wrong Direction*, *supra* note 5, at 90–95.

⁹ See Jennifer Ann Drobac, *Sex and the Workplace: “Consenting” Adolescents and a Conflict of Laws*, 79 WASH. L. REV. 471, 518–19 (2004) [hereinafter Drobac, *Sex and the Workplace*] (introducing the notion of “developing capacity”). “Developing capacity” signifies the transitional status from childhood to adulthood and the concomitant developing maturity. *Id.* The concept is distinguished from “diminished capacity,” which carries a negative connotation, suggesting that capacity should exist or may once have existed. *Id.* at 518. “Most teenagers suffer not from impairment but from immaturity—a blameless condition and a natural phase of growth.” *Id.*

¹⁰ See Jennifer Ann Drobac, *Abandoning Teenage Consent for Legal Assent: Harmonizing Developmental Sciences and the Law* (unpublished manuscript) (on file with author) [hereinafter Drobac, *Abandoning Teenage Consent for Legal Assent*].

tage, or breaches a duty owed to that minor. The assent approach contemplates that adults will treat minors with care or will “just say no,” especially if the law permits maturing teenagers to revoke their “yes.”

Finally, I conclude by highlighting a proposal from my recent article, *A Bee Line in the Wrong Direction: Science, Teenagers, and the Sting to “The Age of Consent.”* That article analyzed trends in New York case law to conclude that the legal significance of adolescent “consent” renders adolescents and minors vulnerable.¹¹ Here, by examining California law, I reach a similar conclusion. Adolescent “assent” better protects our minors and, thus, should be recognized by California courts and courts across the nation.

I. CONFUSION ABOUT “CONSENT” AND CONSENT IN CIVIL AND CRIMINAL LAW

In 2009, in *Doe v. Starbucks, Inc.*, a California federal district court explored the issue of whether a minor could assert a sexual harassment claim against her employer and supervisor when she “consented” to the alleged offensive sexual conduct.¹² In *Starbucks*, the legal significance of “consent” was pivotal; therefore, a review of definitions facilitates discussion of this case.¹³

A. Acquiescence, Legal Consent, and Legal Capacity in Civil Law

Consent means to give “permission for something to happen . . . agree to do something.”¹⁴ Consent must be informed and correspond to the activity it legitimates.¹⁵ Ignorant cooperation does not indicate consent and any misrepresentation taints consent.¹⁶ The consenting individual must possess the cognitive ability to reason about a choice and must be able to guide his or her own responsive choices.¹⁷ Consent must derive from freedom of choice and volition.¹⁸

¹¹ See Drobac, *A Bee Line in the Wrong Direction*, *supra* note 5, at 90–95.

¹² No. SACV 08-0582 AG (CWx), 2009 WL 5183773, at *6–8 (C.D. Cal. Dec. 18, 2009).

¹³ *See id.*

¹⁴ THE NEW OXFORD AMERICAN DICTIONARY 365 (Elizabeth J. Jewell & Frank Abate eds., 2001).

¹⁵ *See* RESTATEMENT (SECOND) OF TORTS §§ 892A(2)(b), 892B(1)–(2) (1979).

¹⁶ *See id.* § 892B(2).

¹⁷ *Id.* § 892A(2)(a) (noting that consent must be “by one who has the capacity to consent or by a person empowered to consent for him”).

¹⁸ *See id.* § 892B(3) (explaining that “[c]onsent is not effective if it is given under duress”).

Conversely, to acquiesce means to “accept something reluctantly but without protest.”¹⁹ This definition indicates less than full consent. To distinguish acquiescence, I would add another requirement for consent: a measure of autonomy and power. For example, can society truly value the consent of a person who had no opportunity or authority to dissent? Consent must be free of duress and coercion.²⁰ Arguably, consent assumes a level of mutuality and equality between the parties coming to an agreement or making a bargain. Consent presumes emotional, intellectual, and developmental capacity.²¹ These characteristics undergird legal capacity.²²

Federal courts have carefully examined acquiescence and consent in sexual harassment cases brought under Title VII of the Civil Rights Act of 1964 (Title VII).²³ In 1998, in *Faragher v. City of Boca Raton*, the U.S. Supreme Court emphasized that the “objectionable environment must be both objectively” offensive (the “reasonableness” standard) “and subjectively offensive” (the “unwelcomeness” requirement).²⁴ State fair employment practice statutes that prohibit sexual harassment also make “unwelcomeness” an element of the prima facie case.²⁵ Thus, in *Starbucks*, if Doe’s “consent” garnered legal significance, she would lose her sexual harassment case because the conduct was not subjectively “unwelcome.”²⁶

State sex crime statutes that specifically prohibit sexual conduct with minors complicate sexual harassment and sex-based tort cases.²⁷ Typically, a criminally-accused adult may not assert “consent” as a defense.²⁸ So what happens when criminal and civil claims stem from the same conduct? A review of recent California criminal and civil cases

¹⁹ THE NEW OXFORD AMERICAN DICTIONARY, *supra* note 14, at 14.

²⁰ See RESTATEMENT (SECOND) OF TORTS § 892B(2)–(3) (1979).

²¹ See *id.* § 892A(2), § 892A cmt. b.

²² The way that consent and acquiescence are defined shapes the legal discourse surrounding statutory rape. See Drobac, *A Bee Line in the Wrong Direction*, *supra* note 5, at 80–85, 90–95. I have developed these definitions elsewhere and provide them again to emphasize their import when addressing shifting norms of consent and statutory rape. See *id.* at 80–85.

²³ See 42 U.S.C. § 2000e-2(a)(1) (2006); see, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998).

²⁴ 524 U.S. 775, 787 (1998) (citing *Harris v. Forklift Sys.*, 510 U.S. 17, 21–22 (1993)).

²⁵ See, e.g., CAL. GOV’T CODE § 12940 (West 2011); *Fisher v. San Pedro Peninsula Hosp.*, 262 Cal. Rptr. 842, 851 (Ct. App. 1989) (holding a claim of sexual harassment under section 12940 requires “unwelcome” sexual harassment).

²⁶ See *Starbucks*, 2009 WL 5183773, at *158–59, *166.

²⁷ See Drobac, *Sex and the Workplace*, *supra* note 9, at 484 (noting the difference between the civil and criminal law treatment of consent by minors to sex).

²⁸ See, e.g., CAL. PENAL CODE § 261.5 (West Supp. 2012).

shows that conflicts between civil and criminal law can lead to disparate results.

B. *Criminal Law*—*People v. Tobias*

In 2001, in *People v. Tobias*, the California Supreme Court addressed the question of whether a minor who gives “consent” to an incestuous relationship is an accomplice under California Penal Code section 285.²⁹ The court held that a child under the age of eighteen, who engages in a “sexual relationship with an adult is a *victim*, not a perpetrator,” regardless of the child’s consent.³⁰ The court concluded that the adult, not the minor, bears the burden of refraining from a sexual relationship.³¹

The *Tobias* court relied on prior cases, including *People v. Stratton* and *People v. Stoll* to support its conclusion.³² Specifically, the *Tobias* court pointed to the *Stratton* court’s conclusion that, because minors are unable to legally consent to sexual intercourse, they cannot be criminally liable for incest.³³ Still, the *Tobias* court undermined the *Stratton* line of cases with its discussion of the modification of the California forcible rape statute, Cal. Penal Code section 261, and the passage of section 261.5 that prohibits unlawful sex with a minor.³⁴ Section 261.5(a) provides that:

[u]nlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a ‘minor’ is a person under the age of 18 years and an ‘adult’ is a person who is at least 18 years of age.³⁵

Subsequent subsections of this statute detail age differences between the juvenile and adult, levels of offense, and penalties.³⁶ This provision did not exist in the Penal Code prior to 1970. Before then, unlawful sex

²⁹ 21 P.3d 758, 759 (Cal. 2001).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 761–62; see *People v. Stratton*, 75 P. 166, 168 (Cal. 1904) (holding that a woman too young to consent to sexual intercourse is not an accomplice to incest), *superseded by statute*, CAL. PENAL CODE § 261.5, as stated in *Tobias*, 21 P.3d at 758; *People v. Stoll*, 257 P. 583, 584 (Cal. Ct. App. 1927) (same), *superseded by statute*, CAL. PENAL CODE § 261.5, as stated in *Donaldson v. Dep’t of Real Estate*, 36 Cal. Rptr. 3d 577 (Ct. App. 2005).

³³ *Tobias*, 21 P.3d at 761 (citing *Stratton*, 75 P. at 166).

³⁴ See *id.* at 761–62.

³⁵ CAL. PENAL CODE § 261.5(a) (West Supp. 2012).

³⁶ *Id.* § 261.5(b)–(e).

with a minor had been codified in section 261, which defined rape, in part, as “an act of sexual intercourse, accomplished with a female not the wife of the perpetrator . . . [w]here the female is under the age of eighteen years.”³⁷ Although the two statutes appear almost identical, they are unique because the old version, section 261, fell within the forcible rape statute. The post-1970 version, section 261.5, stands alone and prescribes variations in the violation and penalties.

The *Tobias* court suggested that the statutory reforms of 1970 marked the Legislature’s implicit rejection of incapacity among minors.³⁸ Moreover, the *Tobias* court implied that these legislative reforms undermined the incest cases, including *Stoll*, which rejected the notion that “consenting” minors were accomplices.³⁹ According to the *Tobias* court, “the Legislature created the crime of unlawful sexual intercourse with a minor ([section] 261.5) and amended the rape statute ([section] 261) so that it no longer included sex with a minor in the definition of rape.”⁴⁰ Consequently, the court posited that when a minor “knowingly and voluntarily” engages in a sexual act, the conduct may not equate to rape, but instead, a less serious crime.⁴¹ Although the *Tobias* court noted that a minor may still be found incapable of providing legal consent, the court concluded that by making this change, the California Legislature “implicitly acknowledged that, *in some cases at least, a minor may be capable of giving legal consent to sexual relations.*”⁴²

The court focused on behavior committed “knowingly and voluntarily,” arguably terms that closely track assent or acquiescence.⁴³ Slightly different from consent, assent means to “express approval or agreement”⁴⁴ Under this definition, assent signifies cooperation or secondary status. It lacks the connotations of independence and inherent capacity that accompany consent.⁴⁵

³⁷ Act of May 19, 1913, ch. 122, sec. 1, § 261, 1913 Cal. Stat. 212, 212 (amending section 261 of the Penal Code relating to the crime of rape).

³⁸ *Tobias*, 21 P.3d at 762.

³⁹ *Id.*

⁴⁰ *Id.* at 761–62 (comparing CAL. PENAL CODE § 261.5(b)–(d) [offense classification and punishment for unlawful sexual intercourse with a minor], with CAL. PENAL CODE § 264(a) (West 2008) [punishment for rape]). Note, the *Tobias* case dealt with violations of Cal. Penal Code § 285 (incest), not with § 261.5, thus much of this discussion was dictum. *See id.* at 759, 761–62.

⁴¹ *Id.* at 762.

⁴² *Id.* (emphasis added).

⁴³ *See id.*

⁴⁴ THE NEW OXFORD AMERICAN DICTIONARY, *supra* note 14, at 96.

⁴⁵ *See supra* notes 14–28 and accompanying text.

The court referred explicitly to legal consent, however, leaving no doubt that it did not mean assent or acquiescence.⁴⁶ This reasoning, quoted in *Starbucks*, announces a new determination that contradicts over a hundred years of court precedent finding that girls under a specified age are unable to give consent as a matter of law, regardless of their actual “consent.”⁴⁷

C. *Acquiescence, Legal Consent, and Legal Capacity—Civil and Criminal Law*

Perplexingly, neither section 261.5 nor section 261 refers to a minor acting “knowingly and voluntarily.”⁴⁸ We can distinguish these terms from legally binding consent, however, which presumes emotional, intellectual, and developmental capacity, or essentially, legal capacity.⁴⁹ In 2003, in *People v. Hillhouse*, a California appeals court evaluated this issue in the context of an adult’s defense to an oral copulation charge involving a minor.⁵⁰ The *Hillhouse* court explained that “legal consent presupposes an intelligence capable of understanding the act, its nature, and possible consequences.”⁵¹

This explanation mirrors section 892A of the Restatement (Second) of Torts regarding consent, which specifies that, in order to extinguish liability, consent must be “by one who has the capacity to consent.”⁵² Comment 2(b) of this section explains that the consent of a child “may still be effective *if* [the child] is capable of appreciating the nature, extent and probable consequences of the conduct consented to”⁵³ Thus, the Restatement implicitly starts with the notion that most minors are not capable of consenting.⁵⁴

⁴⁶ See *Tobias*, 21 P.3d at 762 (“[A] minor may be capable of giving *legal* consent to sexual relations.”) (emphasis added).

⁴⁷ See *Starbucks*, 2009 WL 5183773, at *7 (quoting *Tobias*, 21 P.3d at 761–62); see also, e.g., *People v. Verdegreen* 39 P. 607, 608 (Cal. 1895), *superseded by statute*, CAL. PENAL CODE § 261.5 (West Supp. 2012), as stated in *Tobias*, 21 P.3d at 758 (“It is the declared policy of our law . . . that any female under the age there fixed shall be incapable of consenting to the act of sexual intercourse”). Note, it was not until 1993 that the California Legislature modified section 261.5 to make it gender neutral. See Act of Sept. 29, 1993, ch. 596, sec. 1, § 261.5, 1993 Cal. Stat. 3139 (amending section 261.5 of the Penal Code, relating to crime).

⁴⁸ See CAL. PENAL CODE §§ 261, 261.5 (West 2008 & Supp. 2012).

⁴⁹ See *People v. Hillhouse*, 1 Cal. Rptr. 3d 261, 268 (Ct. App. 2003).

⁵⁰ See *id.* at 263, 268.

⁵¹ *Id.* at 268 (quoting *People v. Griffin*, 49 P. 711, 712 (Cal. 1897)).

⁵² RESTATEMENT (SECOND) OF TORTS § 892A(2)(a) (1979).

⁵³ *Id.* § 892A(2) cmt. b (emphasis added).

⁵⁴ See *id.*

Other articles have explored the neuroscientific and psychosocial evidence of whether adolescents are consistently capable of appreciating the nature, extent, and probable consequences of their decisions in order to regulate their behavior.⁵⁵ Although adolescents have “developing capacity,” they are not consistently the functional equivalents of mature adults.⁵⁶ Their “consent” is more like assent or acquiescence which carries no presumption of legal capacity.

Given the emphasis by both criminal and civil law on capacity, the differences between the *Tobias* concept of juvenile “consent” in California criminal and civil law is perplexing. One must consider whether the *Tobias* court conflated volitional acquiescence with legal consent. Did it simply follow California’s legislative lead and obscure the relation between legally binding consent and legal capacity? Confusion concerning these similar but distinct concepts is common.⁵⁷ In *Meritor Savings Bank v. Vinson*, the 1986 U.S. Supreme Court case that first recognized workplace sexual harassment, the Court examined volition in its discussion of unwelcomeness.⁵⁸ There, the Court reasoned that acquiescence is not legal consent.⁵⁹ Moreover, the Court refuted the district court’s opinion because it focused on the *voluntariness* of the plaintiff’s participation in the alleged sexual acts when the appropriate inquiry is whether or not the plaintiff indicated that the sexual advances were *unwelcome*.⁶⁰ If an adult’s knowledge and voluntary participation in sexual conduct does not necessarily equate with consent, then surely juvenile acquiescence and “consent” deserve special regard.

⁵⁵ For a thorough, detailed, and updated discussion of the neurological and psychosocial development of teenagers, see JENNIFER ANN DROBAC, *WORLDLY BUT NOT YET WISE* (Univ. of Chi. Press, under contract). See also Jennifer Ann Drobac, *Consent, Teenagers, and (Un)Civil(ized) Consequences*, in *CHILDREN, SEX AND THE LAW* (Ellen Marrus & Sacha Coupet eds.) (forthcoming 2013); Jennifer Ann Drobac, *I Can’t to I Kant: The Sexual Harassment of Working Adolescents, Competing Theories, and Ethical Dilemmas*, 70 ALB. L. REV. 675, 713–17 (2007) [hereinafter Drobac, *I Can’t to I Kant*]. See generally Jennifer Ann Drobac, “Developing Capacity”: Adolescent “Consent” at Work, at Law, and in the Sciences of the Mind, 10 U.C. DAVIS J. JUV. L. & POL’Y 1 (2006) [hereinafter Drobac, *Developing Capacity*] (discussing new neuroscientific and psychosocial evidence regarding adolescent physical and psychosocial development).

⁵⁶ See Drobac, *Developing Capacity*, *supra* note 55, at 19 (noting brains of adolescents continue developing into the adolescents’ twenties).

⁵⁷ See, e.g., Doe v. Willits Unified Sch. Dist., No. C-09-03655-JSW (DMR), 2010 WL 2524587, at *3–5 (N.D. Cal. June 23, 2010); *Starbucks*, 2009 WL 5183773, at *7–8.

⁵⁸ 477 U.S. 57, 68 (1986).

⁵⁹ *Id.*

⁶⁰ *Id.*

1. “Communal Experience” of Adolescence

The *Hillhouse* court did not need the new neuroscience literature to explain “communal experience” regarding adolescent capacity.⁶¹ The court stated, “It is teenagers’ judgment and impulse control, not his or her knowledge or intelligence, which tend to be problematic.”⁶² There, the court concluded that a minor’s consent to sexual contact is irrelevant given the “communal experience” that adolescents are less mature and responsible than adults.⁶³

The *Hillhouse* court confirms a hundred years of common sense and observation, namely that teenagers are not always emotionally and developmentally mature enough to make wise choices, including perhaps choices about sexual activity.⁶⁴ According to this perspective, even adolescent sexual initiative with an adult deserves special treatment.⁶⁵ Thus, the *Tobias* court’s implication that adolescents might be ready for consensual sexual activity with an adult in the civil context, at the workplace for example, but not under criminal law, challenges logic.

2. Child Abuse and the Corruption of “Consent”

Another factor to consider in a discussion of adolescent “consent” is the sexual victimization of children, including teenagers. Sexual predators may manipulate children of all ages to extract “consent” or compliant cooperation.⁶⁶ Many courts recognize the need for expert testimony regarding the methods employed by child molesters and the behavior of their targeted victims.⁶⁷ One court explained “that the behavioral characteristics and psychological dynamics of child molestation victims are beyond the ken of the average juror.”⁶⁸

⁶¹ *Hillhouse*, 1 Cal. Rptr. 3d at 268–69 (quoting *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 855 (Cal. 1997) (Mosk, J., dissenting)).

⁶² *Id.*

⁶³ *See id.* The court stated that:

“[a]dolescents are more vulnerable, more impulsive, and less self-disciplined than adults, and are without the same capacity to control their conduct and to think in long-range terms.” It is for those reasons that our laws governing sexual contact with minors make it irrelevant, as a general rule, whether the minor consented.

Id. at 269 (quoting *Lungren*, 940 P.2d at 855 (Mosk, J., dissenting)) (citations omitted and first set of internal quotation marks omitted).

⁶⁴ *See id.* at 268–69.

⁶⁵ *See id.*

⁶⁶ *See Jones v. United States*, 990 A.2d 970, 975–76 (D.C. 2010).

⁶⁷ *See, e.g., id.*

⁶⁸ *Id.* at 978 n.17.

In *Jones v. United States*, decided in March 2010, the U.S. Court of Appeals for the District of Columbia considered whether the admission of expert testimony in a case against a high school counselor and teacher accused of sexually assaulting three female students was a reversible error.⁶⁹ The expert, Special Agent Kenneth Lanning, had twenty years of experience in the FBI's Behavioral Science Unit, focusing on the sexual exploitation of minors.⁷⁰ Lanning explained that at one end of the continuum are "situational offenders" who have no clear preference but opportunistically exploit children.⁷¹ At the other end, "preferential" predators target children consistently.⁷²

The court recapped Lanning's conclusions, namely that "preferential" child molesters manipulate and "groom" their victims who may eventually comply with the molesters' advances.⁷³ The court noted that, according to Lanning, these immature victims often delay reporting the abuse and sometimes provide inconsistent accounts of the abuse because their acquiescence produces shame and guilt.⁷⁴

Lanning's testimony clearly demonstrates that teenage acquiescence may result from predatory abuse.⁷⁵ Lanning testified that most child molesters do not force themselves on children but bond with young victims to psychologically manipulate them.⁷⁶ One might argue that this kind of abuse is worse than forcible rape. In these cases, the perpetrator uses the teenager to facilitate her own abuse.⁷⁷ The adult leaves the teenager not only physically but also emotionally and psychologically violated.⁷⁸

The *Jones* court thoroughly recounted the grooming process as presented by Lanning.⁷⁹ The court explained that the abuser identifies and attempts to fill a child's needs, and in some cases molesters employ severe, unsavory tactics to coerce their victims.⁸⁰ Teenagers from dysfunctional households are most susceptible to the grooming process.⁸¹

⁶⁹ *Id.* at 972.

⁷⁰ *Id.* at 973, 979.

⁷¹ *Id.* at 975–76, 976 n.8.

⁷² *Jones*, 990 A.2d at 975–76.

⁷³ *Id.*

⁷⁴ *Id.* at 976.

⁷⁵ *See id.* at 975–76.

⁷⁶ *Id.* at 976.

⁷⁷ *See id.*

⁷⁸ *See Jones*, 990 A.2d at 976.

⁷⁹ *See id.* at 975–76.

⁸⁰ *Id.* at 976 (noting, molesters coerce, "for example by listening sympathetically to the child, complementing [sic] her on her looks, giving her hugs, and buying her things she needs" and in some instances, molesters will "expos[e] children to pornography, supply[]

Lanning's testimony sounds surprisingly similar to a Santa Cruz, California case, where a forty-year-old manager of a movie theater allegedly befriended teenaged employees, provided them with alcohol, gave them free theater tickets, and even offered to teach one, sixteen-year-old Sara (an alias), to drive.⁸² This manager encouraged Sara "to speak with him about her problems, how her parents did not understand her, and about things that mattered to her, a teenage girl."⁸³ He gave her expensive gifts, took her to nice dinners, and even gave her cash.⁸⁴ Sara had no idea that her manager was a registered sex offender, convicted of molesting his twelve-year-old niece.⁸⁵

The manager lied to Sara after repeatedly soliciting sexual favors from her.⁸⁶ He told her that he was suffering from a potentially inoperable brain tumor, and shortly thereafter suggested they go to a hotel to have sexual intercourse.⁸⁷ Convinced that she loved her "desperately ill" manager, Sara eventually acquiesced.⁸⁸

Sara became the compliant victim that Lanning described.⁸⁹ The court recounted Lanning's testimony, noting that "[t]he grooming process results in . . . 'compliant victims'—children who cooperate in their victimization. Their non-resistance may seem to indicate consent . . . ; indeed, the children may return to their abusers and even enjoy the sexual activity."⁹⁰ In Lanning's testimony, he noted that "compliant victims suffer a lifetime of shame, embarrassment and guilt because their victimization does not fit society's understanding that children do not willingly acquiesce in abuse."⁹¹ The court noted that, "[a]ccording to Lanning, those feelings help explain why victimized children fail to disclose or delay disclosure of their abuse, and why their disclosures often contain 'incomplete,' 'inaccurate,' 'distorted,' or 'contradictory'

them with drugs and alcohol, blackmail[] them, and coerc[e] their silence by threats of suicide").

⁸¹ *Id.* at 976.

⁸² Complaint at 2–9, Sara Doe [alias] v. Culver Theaters, Inc., No. 139513 (Cal. Super. Ct. Oct. 27, 2000) [hereinafter Sara Doe Complaint]. I note that I was personally involved in the preparation and filing of Sara Doe's case while I was still in private practice. I did not, however, negotiate her case's resolution as it was handled by independent counsel.

⁸³ *Id.* at 6.

⁸⁴ *Id.*

⁸⁵ *Id.* at 4.

⁸⁶ *Id.* at 6–7.

⁸⁷ *Id.*

⁸⁸ Sara Doe Complaint, *supra* note 82, at 6–7.

⁸⁹ See *Jones*, 990 A.2d at 975–76; Sara Doe Complaint, *supra* note 82, at 6–8.

⁹⁰ *Jones*, 990 A.2d at 976.

⁹¹ *Id.* (internal quotation marks omitted).

information.”⁹² Lanning’s testimony, as summarized by the *Jones* court, clarified that although non-resistance may appear to indicate consent, in reality, it may indicate abuse and manipulation.⁹³

Additionally, in a policy statement about sexual harassment, the American Academy of Child & Adolescent Psychiatry (AACAP) explained that children and adolescent victims commonly conceal the perpetrator’s offenses based on feelings of shame, fear, humiliation, and vulnerability.⁹⁴ Children and adolescents may even believe that their behavior precipitated the sexual abuse.⁹⁵ Often, the abuse is not revealed for years, if ever.⁹⁶

Lanning’s testimony coupled with the AACAP policy statement highlight how a manipulated teenager might respond to sexual abuse and harassment with acquiescence and later with shame and humiliation, if not worse.⁹⁷ After being kissed by her manager, Sara “remember[ed] feeling ‘numb’ at first. Everything was moving so quickly. Everything was a blur to her.”⁹⁸ When Sara’s brother, also a theater employee, observed the manager kissing his sister in a storage room, the manager again lied, stating that Sara had forced herself on him.⁹⁹ Sara felt ashamed and was concerned about how her brother thought of her.¹⁰⁰ Later the manager began calling Sara a “whore” and a “slut.”¹⁰¹ When

⁹² *Id.*

⁹³ *Id.* at 975–76.

⁹⁴ *Policy Statements—Sexual Harassment*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Oct. 1992), http://www.aacap.org/cs/root/policy_statements/sexual_harassment; see *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 449 (5th Cir. 1994) (noting that “Doe explained that she had kept the [sexual conduct with a teacher] a secret because she feared the repercussions of disclosure”); *Leach v. Evansville-Vanderburgh Sch. Corp.*, No. EV98-0196 C-Y/H, 2000 WL 33309376, at *2–3 (S.D. Ind. May 30, 2000) (finding that a student failed to report sexual harassment because she felt ashamed, was afraid to tell her mother for fear of upsetting her, and was afraid that no one would believe her that a teacher was sexually fondling her).

⁹⁵ *Policy Statements—Sexual Harassment*, *supra* note 94.

⁹⁶ *Id.*; see also *Doe v. Estes*, 926 F. Supp. 979, 988 (D. Nev. 1996). In 1996, in *Doe v. Estes*, the U.S. District Court for the District of Nevada explained:

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

926 F. Supp. at 988.

⁹⁷ See *Jones*, 990 A.2d at 975–76; *Policy Statements—Sexual Harassment*, *supra* note 94.

⁹⁸ Sara Doe Complaint, *supra* note 82, at 6.

⁹⁹ *Id.* at 7–8.

¹⁰⁰ *Id.* at 8.

¹⁰¹ *Id.*

Sara and the manager argued, he threatened to tell her parents about their relationship.¹⁰² Sara was ashamed and fearful of how her parents would respond to her conduct with the manager.¹⁰³ She did not realize that as the adult, her manager was responsible for the abuse.¹⁰⁴ Ultimately, the manager was convicted criminally for abusing Sara.¹⁰⁵

Sara's conduct in response to her manager's manipulations supports the *Jones* court's findings.¹⁰⁶ She concealed her manager's abuse and the resulting trauma from her parents.¹⁰⁷ She reported feeling humiliation and shame.¹⁰⁸ Had not the manager continued to telephone her from jail following an unrelated larceny conviction, Sara's parents might never have discovered the cause of her plummeting grades and bizarre behavior.¹⁰⁹ Lanning's profile of a sexually abused or manipulated teenager, like Sara, helps us understand why adolescent "consent" might deserve special treatment under the law.

D. *The Tobias Irony*

Despite the *Tobias* court's finding that minors may "knowingly and voluntarily" participate in sexual relations, it distinguished incest.¹¹⁰ The court explained that incest differs from other sex crimes because "the act itself is unlawful," regardless of the minor's involvement or consent.¹¹¹ An important purpose of the incest law is the protection of minors and the court found it inconceivable that a minor in an incest

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Sara Doe Complaint, *supra* note 82, at 8.

¹⁰⁵ *Id.* at 10; see Minute Order Entering Guilty Plea, *People v. Cosio*, No. S9-09852 (Cal. Super. Ct. Nov. 29, 1999) (order entering defendant-manager's guilty plea to count one for unlawful sexual intercourse with Sara).

¹⁰⁶ Compare *Jones*, 990 A.2d at 976 (explaining "compliant victims" often do not disclose the sexual abuse because of feelings of "shame, embarrassment and guilt"), with Sara Doe Complaint, *supra* note 82, at 8, 9 (describing Sara's unwillingness to disclose the sexual abuse because of feelings of shame, embarrassment, and insecurity).

¹⁰⁷ Sara Doe Complaint, *supra* note 82, at 8–9.

¹⁰⁸ *Id.* at 8–10.

¹⁰⁹ See *id.* at 9; B. Cole, Jail Incident Report #99-R-174, at 1–2 (Aug. 16, 1999) (on file with the Santa Cruz County Sheriff's Department) (documenting Defendant-manager's use of contraband cell phone to telephone Sara); R. Mitchell, Santa Cruz Sheriff's Office, Incident Report #99-7955, at 4 (Aug. 9, 1999) (on file with the Santa Cruz County Sheriff's Department) (documenting conversation between Sara's mother and deputy at Sheriff's office regarding phone calls between Defendant-manager and Sara).

¹¹⁰ *Tobias*, 21 P.3d at 762.

¹¹¹ *Id.* at 763.

case would be criminally liable as an accomplice to the incest rather than a victim.¹¹²

The irony is that the *Tobias* court supported its reasoning concerning the nature of the incest crime with reference to section 261.5. According to the *Tobias* court, section 261.5 was intended to protect minors and made sexual intercourse with minors a strict liability offense.¹¹³ At the same time, the court stated that the California Legislature “implicitly acknowledged that, in some cases at least, a minor may be capable of giving legal consent to sexual relations.”¹¹⁴ How could this 1970 legislative initiative implicitly mark the Legislature’s abandonment of “the age of consent” and its rejection of a minor’s incapacity? If anything, section 261.5 confirms eighteen as the age of consent and, standing alone, reinforces that minors lack the capacity to consent to sex with adults.¹¹⁵ The *Tobias* majority opinion is internally inconsistent on this issue.

1. Offending Minors

Another analytical snarl discussed in *Tobias* and other criminal cases becomes apparent when one considers that minors commit sex crimes against other children. One might readily agree that adults should carry the burden of resisting criminal sexual temptation when contemplating adult-child sexual conduct. But, what if all of the actors are children? Do criminally offending minors have legal capacity? This may be the wrong question to ask in the context of the criminal prosecution of a minor for offenses committed against another child. Rather, the more appropriate question is whether the law is designed to protect the *offending* minor.

Arguably, legislatures draft sex crime statutes to protect minors from abuse by adults who wield more power and authority than the minor. The law protects those who cannot adequately protect themselves. When a minor wields the power over another child and sexually exploits the child, the sex crime law does not protect the offending minor who is not the contemplated innocent target. Thus, whether or not an offending minor possesses what we might call legal capacity, we can choose to prosecute that offending minor to protect the less powerful and less sophisticated child target. Whether we prosecute the offending

¹¹² *Id.*

¹¹³ *Id.* at 762.

¹¹⁴ *Id.*

¹¹⁵ See CAL. PENAL CODE § 261.5 (West Supp. 2012).

minor the same way that we would prosecute and punish an adult is a separate question.¹¹⁶

Finally, what about the “Romeo and Juliet” example where two minors engage in consensual sexual intercourse, thereby becoming victims of the other’s crime?¹¹⁷ Common sense should determine that case. If both children are victims, there is no classic offender to prosecute. In 1998, in *People v. T.A.J.*, the presiding California appeals court opined that section 261.5 may criminalize conduct between minors.¹¹⁸ The court explained that the decision to prosecute a minor for violating section 261.5 is an exercise of prosecutorial discretion.¹¹⁹ One can only hope that common sense will prevail.¹²⁰ The odd dictum in *Tobias*, and news of other “Romeo and Juliet” prosecutions, however, suggest that section 261.5 may not stand out as a beacon of judicious use of prosecutorial discretion.¹²¹

2. A Voice of Reason: Chief Justice George’s *Tobias* Concurrence

In a *Tobias* concurring opinion, then Chief Justice George expressed concern. He disputed the *Tobias* majority’s reasoning regarding the legislative intent in the 1970 revision of the rape statute.¹²² After reviewing the case law and historical acknowledgement of juvenile in-

¹¹⁶ I am firmly opposed to prosecuting and punishing minors the same way that we do adults. Especially in the area of sex crimes, teenagers’ lack of sophistication and knowledge can lead to devastating results. Sexting is just one example of how the consequences (lifetime assignment to a sex offender registry) may not fit the crime. See Tamar Lewin, *Rethinking Sex Offender Laws for Youths Showing Off Online*, N.Y. TIMES, Mar. 21, 2010, at A1.

¹¹⁷ See *Tobias*, 21 P.3d at 762.

¹¹⁸ 73 Cal. Rptr. 2d 331, 339 (Ct. App. 1998); see CAL. PENAL CODE § 261.5(b). The statute states, “Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor.” CAL. PENAL CODE § 261.5(b).

¹¹⁹ *T.A.J.*, 73 Cal. Rptr. 2d at 341.

¹²⁰ See generally Meredith Cohen, Note, *No Child Left Behind Bars: The Need to Combat Cruel and Unusual Punishment of State Statutory Rape Laws*, 16 J.L. & POL’Y 717, 724–25 (2007) (arguing for the decriminalization of consensual teenage sex).

¹²¹ See Brenda Goodman, *Man Convicted as Teenager in Sex Case Is Ordered Freed by Georgia Court*, N.Y. TIMES, Oct. 27, 2007, at A9. The Supreme Court of Georgia held:

[The Superior Court of Monroe County] properly ruled that Wilson’s sentence of ten years in prison for having consensual oral sex with a fifteen-year-old girl when he was only seventeen years old constitutes cruel and unusual punishment, but erred in convicting and sentencing Wilson for a misdemeanor crime that did not exist when the conduct in question occurred.

Humphrey v. Wilson, 652 S.E.2d 501, 502 (Ga. 2007). The case was remanded to the habeas court to reverse Wilson’s conviction and discharge him from custody. *Id.*

¹²² *Tobias*, 21 P.3d at 766–67 (George, C.J., concurring).

capacity, Chief Justice George distinguished the new section 261 from section 261.5 pertaining to minors.¹²³ He offered that section 261 (rape) involves a victim incapable of consenting because of a mental disability or one who was challenged by violence or force.¹²⁴ Chief Justice George noted that a minor’s “consent” might be relevant to the prosecution of section 261.¹²⁵ He argued that the California Legislature did not intend to establish that a minor is capable of legally consenting to sexual relations.¹²⁶ Instead, Chief Justice George contended that in section 261.5, the Legislature merely recodified a preexisting principle in section 261, which provided that a minor’s consent to sexual intercourse with an adult does not relieve the adult of criminal responsibility.¹²⁷ In turn, by amending section 261, the Legislature enhanced the criminal severity of raping a minor, requiring that it be accomplished by additional circumstances specified in the statute.¹²⁸

Chief Justice George’s reasoning causes one to wonder what the Legislature might have done differently, if anything, had it heard Special Agent Lanning’s testimony about non-resistance. Query whether it would have left criminal sexual intercourse as part of the forcible rape statute. Here, Chief Justice George provided an explanation of the statutory revision that differentiates the elements of the section 261 offense from the section 261.5 crime while still preserving the traditional view that minors lack the legal capacity to legally consent to sex.

A final point by Chief Justice George in his concurrence detailed that the *Tobias* majority’s analysis conflicts with section 261.6. Section 261.6 reads:

In prosecutions under Section 261, 262, 286, 288a, or 289, in which consent is at issue, “consent” shall be defined to mean

¹²³ *Id.*

¹²⁴ *Id.* Chief Justice George quoted the 1970 version of section 261, stating that “sexual intercourse with a female constituted rape if, among other things, she was ‘incapable, through lunacy or other unsoundness of mind, . . . of giving legal consent,’ or her resistance was overcome by force or violence.” *Id.* at 766. The current version of the statute confirms George’s reading. Section 261(a)(1) refers to those “incapable, because of a mental disorder or developmental or physical disability, of giving legal consent.” CAL. PENAL CODE § 261(a)(1) (West 2008). Section 261(a)(2) refers to force and violence. *Id.* § 261(a)(2). Section 261(a)(3) mentions intoxication and anesthetic substances. *Id.* § 261(a)(3). Other subsections raise loss of consciousness, fraud, and duress. *Id.* § 261(a)(4)–(7). None of these subsections apply to developmental immaturity. *See id.* § 261(a)(1)–(7).

¹²⁵ *Tobias*, 21 P.3d at 766 (George, C.J., concurring).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 766–67 (noting, for example, by force or violence that overcame the victim’s resistance).

positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.¹²⁹

Note that section 261.6 does *not* list section 261.5, arguably because consent is not at issue as minors cannot *legally* consent. Chief Justice George asserted that the Court of Appeal accurately determined that the concept of “*actual* consent,” defined in section 261.6, is distinct from “*legal* consent.”¹³⁰

So what was the actual intent of the 1970 California Legislature? In *Michael M. v. Superior Court of Sonoma County*, the U.S. Supreme Court addressed this very question.¹³¹

II. THE INTENT OF SECTION 261.5: *MICHAEL M. V. SUPERIOR COURT OF SONOMA COUNTY*

Michael M. v. Superior Court of Sonoma County, decided by the U.S. Supreme Court in 1981, involved an Equal Protection Clause challenge to California Penal Code section 261.5 because it originally criminalized sexual intercourse with only minor girls, not with boys.¹³² Thus, only males faced criminal liability under the statute.¹³³ In evaluating whether the statute constituted invidious sex discrimination, a plurality of the Court reviewed the Legislature’s intent, cautioning that questioning congressional motives or intent is troublesome and often elusive.¹³⁴ For example, the Court noted that in passing section 261.5, some legislators may have been interested in protecting young females from the loss of chastity or physical injury while other legislators may have been espousing moral or religious views.¹³⁵

¹²⁹ CAL. PENAL CODE § 261.6 (West 2008).

¹³⁰ *Tobias*, 21 P.3d at 767 (George, C.J., concurring) (emphasis added). In discussing *People v. Young*, 235 Cal. Rptr. 361 (Ct. App. 1987), George argued:

The [*Young*] Court of Appeal thus properly recognized that a defendant might violate section 261.5 without also violating section 261, and that, although a minor cannot give legal consent to sexual intercourse, he or she voluntarily and willingly can participate in the act, and thus actually consent within the meaning of section 261.6.

Id. at 768 (footnotes omitted).

¹³¹ See 450 U.S. 464, 469 (1981).

¹³² 450 U.S. 464, 466 (1981).

¹³³ *Id.*

¹³⁴ *Id.* at 469–70.

¹³⁵ *Id.* at 470.

Theorizing about chastity and physical injury, the *Michael M.* plurality hypothesized about the possible intentions of legislators.¹³⁶ Significantly, the plurality made no mention of juvenile legal incapacity or of traditional “ages of consent.”¹³⁷ Ultimately, the plurality deferred to California’s expressed goal, namely the prevention of “illegitimate teenage pregnancies.”¹³⁸ The Court noted that California has a strong interest in preventing such pregnancies.¹³⁹

Although the plurality affirmed the expressed goal of teenage pregnancy prevention offered by the state, this goal makes sense only for menarchal teenage females. The statute, however, prohibited sexual intercourse with all minor girls, not just those who might become pregnant.¹⁴⁰ The statute was grossly over inclusive, thus calling into doubt that the officially stated goal was the primary motivator. Now that the statute applies to protect minor boys and girls, the pregnancy prevention justification makes even less sense. Given that this legislation came on the heels of the “Summer of Love” (1967) and Woodstock (1969), the more likely legislative intent in 1970 was the prevention of sexual activity with all of California’s daughters.¹⁴¹

A. *An Alternative Interpretation: Justice Brennan’s Michael M. Dissent*

In his *Michael M.* dissent, Justice Brennan strongly contested the legislative intent adopted by the plurality.¹⁴² Justice Brennan noted that California courts and commentators had only recently advanced the theory that the legislature had intended that the California statutory rape law safeguard against pregnancy in young women.¹⁴³ Justice Brennan traced the historical development of section 261.5, concluding that legislators initially promulgated it because people considered young women to be incapable of legally consenting to sex.¹⁴⁴ Legislators, who valued the chastity of young women, assumed them to be particularly in need of protection from the State.¹⁴⁵ Conversely, people deemed young

¹³⁶ *Id.* at 469–71.

¹³⁷ *See id.* at 469–76.

¹³⁸ *Michael M.*, 450 U.S. at 479.

¹³⁹ *Id.*

¹⁴⁰ *See* Act of May 19, 1913, ch. 122, § 261, 1913 Cal. Stat. 212, 212 (amending section 261 of the Penal Code relating to the crime of rape).

¹⁴¹ IMAGINE NATION: THE AMERICAN COUNTERCULTURE OF THE 1960s AND '70s, at 7, 189 (Peter Braunstein & Michael William Doyle eds., 2002).

¹⁴² *Michael M.*, 450 U.S. at 494–96 (Brennan, J., dissenting).

¹⁴³ *Id.* at 494.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 494–95.

men capable of making such decisions and, thus, not in need of special protection from the law.¹⁴⁶ Justice Brennan's analysis highlights the stereotypes traditionally enforced with respect to juvenile capacity to consent to sex.¹⁴⁷

Justice Brennan elaborated in several footnotes, tracing the legislative history and statutory precursors to section 261.5.¹⁴⁸ Justice Brennan explained, "[t]he only legislative history available, the draftsmen's notes to the Penal Code of 1872, supports the view that the purpose of California's statutory rape law was to protect those who were too young to give consent."¹⁴⁹ Later revisions of the statute postponed the age of consent, ultimately to the age of majority—eighteen.¹⁵⁰

In a separate footnote, Justice Brennan tracked the case law interpreting statutory rape.¹⁵¹ Quoting *People v. Hernandez*, a 1964 decision by the California Supreme Court, Justice Brennan explained that a minor female was "presumed too innocent and naive to understand the implications and nature of her act."¹⁵² Thus, Justice Brennan stated that the law of statutory rape may be explained in part by a popular conception of the moral, social, and personal values preserved by a young woman's sexual abstinence.¹⁵³

Justice Brennan's emphasis on the historical and stereotypically gendered motivation for California's section 261.5 is much more consistent with my lay understanding of California's "statutory rape" law from when I was a teenager growing up in California in the 1970s. Who knew, but a handful of lawmakers and other jurists, that section 261.5 would later be billed as "the Teenage Pregnancy Prevention Act of 1995"? How many Californians today know that there is no California "statutory rape law"? Do they know that sexual intercourse with a minor is illegal but that the victim may not be able to recover civilly if he or she "consents"?

¹⁴⁶ *Id.* at 495–96.

¹⁴⁷ *See id.* at 496.

¹⁴⁸ *Michael M.*, 450 U.S. at 495 n.9 (Brennan, J., dissenting).

¹⁴⁹ *Id.*

¹⁵⁰ *See id.*

¹⁵¹ *Id.* at 495 n.10.

¹⁵² *Id.* (quoting *People v. Hernandez*, 393 P.2d 673, 674 (Cal. 1964)) ("An unwise disposition of her sexual favor is deemed to do harm both to herself and the social mores by which the community's conduct patterns are established. Hence the law of statutory rape intervenes in an effort to avoid such a disposition.").

¹⁵³ *Id.*

B. Michael M.: *The California Supreme Court Opinion*

The earlier *Michael M. v. Superior Court of Sonoma County* California State Supreme Court decision also contributes to our understanding of the conclusions reached in *People v. Tobias*.¹⁵⁴ The defendant, Michael M., argued that a validation of section 261.5 would necessarily signal the state's disrespect for the autonomy and independence of girls.¹⁵⁵ In upholding the constitutionality of section 261.5, the *Michael M.* court used familiar language, rejecting the assertion that upholding the constitutionality of section 261.5 “creates adverse inferences concerning the capacity of minor females to make *intelligent and volitional* decisions.”¹⁵⁶ The court went on to state that the Legislature's adoption of section 261.5 indicates the “obvious truism that minor females are fully capable of *freely and voluntarily* consenting to sexual relations,” noting that if this were not so, then the uniform charge brought in such cases would be forcible rape.¹⁵⁷

Here the court walked the fine line between dismissing or infantilizing minor females and attributing to them legal status and capacity which they had not held before under California law.¹⁵⁸ As explained above, the *Tobias* California Supreme Court majority revisited this discussion of when a minor “knowingly and voluntarily” engages in the sexual act.¹⁵⁹

In his *Tobias* concurrence, however, Chief Justice George argued that *Michael M.* referred to a girl's voluntary behavior, not her legal consent or capacity.¹⁶⁰ Recall the discussion of voluntariness by the majority opinion in *Meritor Savings Bank v. Vinson*. In that sexual harassment civil law opinion, the U.S. Supreme Court found that voluntary participation did not equate with legally significant consent.¹⁶¹ Recall also Special Agent Lanning's discussion of acquiescence and how it only seemed to indicate consent.¹⁶² In *Tobias*, George explained that a minor may “voluntarily” engage in sexual relations but cannot “legally consent” to such acts.¹⁶³ Chief Justice George contended that *Michael*

¹⁵⁴ See *People v. Tobias*, 21 P.3d 758, 762 (Cal. 2001); *Michael M. v. Superior Court of Sonoma Cnty.*, 601 P.2d 572, 575–76 (Cal. 1979), *aff'd*, 450 U.S. 464 (1981).

¹⁵⁵ *Michael M.*, 601 P.2d at 576.

¹⁵⁶ *Id.* (emphasis added).

¹⁵⁷ *Id.* (emphasis added).

¹⁵⁸ See *id.* at 575–76.

¹⁵⁹ *Tobias*, 21 P.3d at 761–62.

¹⁶⁰ *Id.* at 767.

¹⁶¹ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1985).

¹⁶² See *Jones v. United States*, 990 A.2d 970, 976 (D.C. 2010).

¹⁶³ *Tobias*, 21 P.3d at 768 (George, C.J., concurring).

M. concerned actual consent, not legal consent, and thus, lent no support to the *Tobias* majority's reasoning.¹⁶⁴

The rest of the discussion by the California majority in *Michael M.* foreshadows George's *Tobias* interpretation. The California *Michael M.* majority noted that section 261.5 does not address a young woman's ability to consent.¹⁶⁵ Rather, the court stated that the statute simply prohibits sexual intercourse with underage females, thereby rejecting consent as a defense.¹⁶⁶ According to the *Michael M.* court, "[i]n this regard section 261.5 is no different than a variety of other statutes which prohibit minors from engaging in certain activities of much less consequence to the minor, *no matter how well informed, how knowledgeable and how willing or consenting the minor might be.*"¹⁶⁷ The *Michael M.* California court clarified that section 261.5 was not a radical shift by the California Legislature but just another treatment of juvenile *legal* incapacity.¹⁶⁸

III. CIVIL LAW ADOPTION OF CRIMINAL CASE DICTUM

Whether or not the California Supreme Court accurately interpreted the intent of the California Legislature in *People v. Tobias*, California criminal courts continue to sanction adults who engage in sex with a minor.¹⁶⁹ When civil courts began to rely on the *Tobias* 2001 dictum however, protections for minors eroded.¹⁷⁰ In 2005, the California Appeals Court case *Donaldson v. Department of Real Estate* created the proverbial slippery slope.¹⁷¹

A. *The Slippery Slope: Donaldson v. Department of Real Estate*

The *Donaldson* court analyzed the California Department of Real Estate's revocation of a twenty-four-year-old licensee's real estate license after discovering that the licensee had seduced his sixteen-year-old sis-

¹⁶⁴ *Id.* at 767.

¹⁶⁵ *Michael M.*, 601 P.2d at 576.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* (emphasis added). For example, the court noted other statutes regulating conduct regardless of consent, including section 308 (furnishing or selling tobacco to a minor), section 310 (minors under sixteen years of age cannot attend a prizefight), and section 326.5 (minors are prohibited from participating in bingo games). *Id.*

¹⁶⁸ *See id.*

¹⁶⁹ *See* 21 P.3d 758, 761–62 (Cal. 2001); *see, e.g.*, Glenda Anderson, *Willits Man Gets Jail for Sex with Pupil*, PRESS DEMOCRAT (Santa Rosa, Cal.), Aug. 5, 2009, at B1.

¹⁷⁰ *See Tobias*, 21 P.3d at 761–62; *see, e.g.*, *Donaldson v. Dep't of Real Estate*, 36 Cal. Rptr. 3d 577, 585–88 (Ct. App. 2005); *Doe v. Starbucks, Inc.*, No. SACV 08-0582 AG (CWx), 2009 WL 5183773, at *7–8, *18 (C.D. Cal. Dec. 18, 2009).

¹⁷¹ *See* 36 Cal. Rptr. 3d at 585–88.

ter-in-law.¹⁷² Donaldson, the licensee, pled no contest to charges brought under section 261.5 of the California Penal Code.¹⁷³ In revoking Donaldson's real estate license, the California Real Estate Commissioner construed his actions to be "[s]exually related conduct causing physical harm or emotional distress to a . . . non-consenting participant in the conduct."¹⁷⁴ Relying on *Tobias*, the California appellate court reversed the revocation.¹⁷⁵ Summarizing its holding, the *Donaldson* court concluded that the Commissioner had incorrectly relied on the offense of statutory rape which, according to the *Donaldson* court, the Legislature had abolished thirty-five years prior.¹⁷⁶ Accordingly, the *Donaldson* court stated that the California Supreme Court had authoritatively disavowed the presumption of non-consent solely based on the minor's age.¹⁷⁷ Through this professional discipline case, the *Tobias* dictum made its way into California civil law precedent.

1. *Donaldson* Facts and Procedural History

While Donaldson's wife was away on a business trip, her sixteen-year-old sister took care of the Donaldson children one evening.¹⁷⁸ During his wife's absence, Donaldson gave his sister-in-law marijuana and the two engaged in sexual activities.¹⁷⁹ Later, Donaldson was charged with two counts of furnishing marijuana to a minor and a violation of section 261.5.¹⁸⁰ A court ultimately dismissed the marijuana charges.¹⁸¹ The judge suspended the sentence on the section 261.5 felony conviction and placed Donaldson on three years probation.¹⁸²

At an administrative hearing following the disciplinary charges, the Administrative Law Judge (ALJ) asked, "[D]o you understand that because you are an older man in a position of power that [the minor] did not consent to the act that followed or do you think she consented?"¹⁸³ Donaldson responded, "I think I had consensual—she con-

¹⁷² See *id.* at 578–79.

¹⁷³ *Id.* at 579.

¹⁷⁴ *Id.* at 582 (quoting CAL. CODE REGS. tit. 10, § 2910(a) (5) (2002)).

¹⁷⁵ See *id.* at 586–88.

¹⁷⁶ *Id.* at 578.

¹⁷⁷ *Donaldson*, 36 Cal. Rptr. 3d at 578.

¹⁷⁸ *Id.* at 579.

¹⁷⁹ See *id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Donaldson*, 36 Cal. Rptr. 3d at 579 n.1 (first alteration in original).

sented, and in every sort of the way.”¹⁸⁴ The ALJ concluded that Donaldson could retain his realtor license on a restricted basis because the sexual misconduct was an isolated incident.¹⁸⁵

The appellate decision does not indicate whether any of the reviewing *Donaldson* tribunals received expert testimony. The ALJ’s determination, however, sounds like a finding that Donaldson was, what Special Agent Lanning might have called, a “situational offender.”¹⁸⁶ Still, the few facts relayed in this case also reveal that Donaldson gave his minor sister-in-law marijuana.¹⁸⁷ That conduct may be more consistent with grooming behavior. Special Agent Lanning suggested in *Jones v. United States* that once an abuser cultivates a relationship of trust and dependence with a victim, the abuser may manipulate the victim’s feelings, encouraging the child to overcome their sexual inhibitions.¹⁸⁸ Perhaps the Real Estate Commissioner felt that Donaldson had behaved in this manner with his sister-in-law.

The Real Estate Commissioner issued her own decision, contrary to that of the ALJ.¹⁸⁹ She relied on the victim’s statements in investigative reports to find that the intercourse was rape.¹⁹⁰ The Commissioner asserted that circumstantial evidence and the police report indicated that the minor felt “paralyzed” and “forced” to participate in the sexual activity.¹⁹¹ The Commissioner noted that, although Donaldson subsequently realized that his sister-in-law was not old enough to consent legally and that he betrayed a position of trust, Donaldson failed to recognize that his sister-in-law did not consent to the act.¹⁹² Rather, the Commissioner noted, Donaldson believed the act was consensual, denied that he raped his sister-in-law, and did not seem to appreciate that his position of trust and physical size may have been coercive.¹⁹³ She found that these intimidating factors led to the minor’s feelings of paralysis.¹⁹⁴

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 579–80.

¹⁸⁶ Compare *Jones v. United States*, 990 A.2d 970, 976 n.8 (D.C. 2010) (describing situational offenders as opportunistically taking advantage of children), with *Donaldson*, 36 Cal. Rptr. 3d at 579–80 (describing the sexual misconduct as “an isolated situational incident”).

¹⁸⁷ *Donaldson*, 36 Cal. Rptr. 3d at 579, 583 n.6.

¹⁸⁸ 990 A.2d at 976.

¹⁸⁹ *Donaldson*, 36 Cal. Rptr. 3d at 580.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 580 n.2.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* The Commissioner’s assessment focuses much more on the minor’s perspective and leaves the reader confused about what actually happened. See *id.* One wonders whether

The reviewing district court found that the police reports constituted hearsay and were admissible only to support or explain other unidentified, circumstantial evidence.¹⁹⁵ In response to the petition for the writ of mandamus, the district court held that the available admissible evidence did not support the Commissioner's decision and remanded it for further consideration.¹⁹⁶ With a new decision omitting any discussion of actual consent, the Commissioner again found against Donaldson.¹⁹⁷ The district court denied a subsequent petition.¹⁹⁸

2. The *Donaldson* Appellate Decision

When reviewing the second Real Estate Commission decision against Donaldson, the appellate court reviewed the Legislature's passage of section 261.5, the meaning of non-consent and the age of consent, and the function of the Real Estate Commission.¹⁹⁹ The court reasoned that section 261.5 effectively restored rape "to its traditional outlines."²⁰⁰ It explained that the California Legislature abolished the crime of statutory rape thereby implicitly foreclosing the presumption of juvenile non-consent.²⁰¹ The *Donaldson* court recommended referring to conduct prohibited under section 261.5 as "criminal intercourse" to avoid confusion.²⁰² It offered no support other than the *Tobias* dictum for its interpretation of the 1970 legislative amendments to section 261 and the passage of section 261.5.

The *Donaldson* court also considered the "age of legal consent."²⁰³ The court explained, "[t]his phrase, like 'statutory rape,' has passed into lay usage and been incorporated into folk law."²⁰⁴ The court explored the activity and the age to which the phrase referred.²⁰⁵ In a detailed discussion, citing to both civil code sections and case law, the court concluded that the phrase was used primarily in the context of consent to marriage—even with respect to the former "*tort* of 'seduc-

the minor was ever interviewed by an expert, and whether the jurists involved received any training or education regarding the effects of incest and sexual abuse/involvement.

¹⁹⁵ *Donaldson*, 36 Cal. Rptr. 3d at 580 n.3.

¹⁹⁶ *Id.* at 580.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 580–81.

¹⁹⁹ *Id.* at 583–92.

²⁰⁰ *Id.* at 584.

²⁰¹ *Donaldson*, 36 Cal. Rptr. 3d at 586.

²⁰² *Id.* at 585 n.12.

²⁰³ *Id.* at 588–89.

²⁰⁴ *Id.* at 588.

²⁰⁵ *Id.* at 588–89.

tion of a person under the age of legal consent'"²⁰⁶ It meant the age at which consent to marriage would garner legal authority.²⁰⁷ Acknowledging, however, that many courts have used the phrase in reference to sexual relations, the *Donaldson* court held that the Legislature abolished statutory rape as a crime, and with it, the "age of consent."²⁰⁸

In its introduction, this Article reported that California set eighteen as "the age of consent." *Donaldson* corrects that report; there is no "age of consent" in the state of California.²⁰⁹

Apparently, neither court—*Donaldson* nor *Tobias*—considered that the California Legislature intended merely to simplify the forcible rape statute (section 261) and to more precisely classify criminal (but perhaps unresisted) sex with a minor (section 261.5). Such reorganization arguably allowed the Legislature to confirm what had been implied in the so-called statutory rape provisions of the former penal code: that minors are *legally incapable* of consenting.²¹⁰

3. *Donaldson's* Flaws

As noted above, many jurists suggest that the California Legislature actually intended to abandon the notion of non-consent. Rejecting Chief Justice George's *Tobias* concurrence, the *Donaldson* court stated that the concurrence merely established "an artificial distinction between 'legal' and 'actual' consent"²¹¹ The court continued that although this distinction provided a mechanism for preserving the presumption of non-consent, which preceded the 1970 legislation, Chief Justice George failed to provide a legal reason for doing so.²¹²

Several problems surface in the *Donaldson* court's line of reasoning. First, the discussion in the majority's *Tobias* opinion was nonbind-

²⁰⁶ *Id.* (citations omitted) (citing CAL. CIV. CODE § 49, subd. (b) (West 2007)). The *Donaldson* court also considered CAL. FAM. CODE section 302 which "declares that upon the filing of parental consents and an order of court, a minor 'is capable of *consenting* to and *consummating* marriage.'" *Id.* at 588 n.17. The court suggested that this section was perhaps incompatible with the notion of incapacity to consent to sexual relations. *Id.* Other readers might think that this section is completely compatible with the notion of juvenile incapacity since the code requires two parental consents *and* a court order before the juvenile can marry and consummate the relationship. *See* CAL. FAM. CODE § 302 (West Supp. 2012).

²⁰⁷ *Donaldson*, 36 Cal. Rptr. 3d at 589.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *See* CAL. PENAL CODE § 261 (West 2008); Act of Sept. 29, 1993, ch. 596, § 261.5, 1993 Cal. Stat. 3139 (amending section 261.5 of the Penal Code, relating to crime).

²¹¹ *Donaldson*, 36 Cal. Rptr. 3d at 587–88.

²¹² *Id.*

ing dictum.²¹³ Section 261.5 was not at issue in *Tobias*.²¹⁴ The *Donaldson* court was not obligated to follow the *Tobias* majority's dictum.

Second, one wonders why the court thought the notion of non-consent advocated for in the *Tobias* concurrence was unsound.²¹⁵ Did the court really think that all minors have the capacity to consent? Did the *Donaldson* court really believe that the civil law should afford sixteen-year-old girls the irrevocable opportunity to consent to sex with a twenty-four-year-old boss, teacher, or brother-in-law?

Third, why did the court disfavor the "artificial distinction" between "legal" and "actual" consent?²¹⁶ The law often makes such "artificial distinctions" to protect "consenting" people. For example, would the *Donaldson* court have erased the "artificial distinction" between "legal" and "actual" consent of the mentally challenged and the disoriented elderly? Would it have repealed "cooling off" periods for the revocation of adult consent given in door-to-door sales?²¹⁷ Such "artificial distinctions" protect minors and others from unscrupulous or savvy operators who can extract actual consent in ways the rest of us deem unfair. The *Donaldson* court could have embraced the distinction between legal and actual consent to interpret the real estate regulation at issue. Had the court read the regulation to require actual non-consent, as opposed to legal non-consent, it might have reached the same result in favor of the licensee.

Fourth, the *Donaldson* court could have accepted section 261.5 as the prescriptive rule of law and the reason for confirming a minor's non-consent. Instead, the court stated that the presumption asserting a minor's inability to consent to sexual relationships was inferred from statutory law that was abandoned by the California Legislature.²¹⁸ The court noted: "That consent is *not* a defense to section 261.5 means only that for reasons of policy, the Legislature has chosen to treat sexual intercourse with a minor as a criminal act *notwithstanding that the minor consented to it*."²¹⁹ The *Donaldson* court concluded that such a law, regardless of how widely it is accepted, cannot remain established when the Legislature elects to change course.²²⁰

²¹³ See *Tobias*, 21 P.3d at 761–62.

²¹⁴ See *id.* at 759.

²¹⁵ See *Donaldson*, 36 Cal. Rptr. 3d at 587–88.

²¹⁶ See *id.* at 588.

²¹⁷ See 16 C.F.R. § 429.1 (2012) (requiring door-to-door salespeople to notify buyer of the right to cancel the order).

²¹⁸ *Donaldson*, 36 Cal. Rptr. 3d at 586.

²¹⁹ *Id.* at 588.

²²⁰ *Id.*

Here again, several problems arise with the *Donaldson* court's reasoning. Concerning legal definitions, the court casually labeled non-consent a presumption.²²¹ Presumptions may be refuted. The court offers no evidence, however, that minors have the capacity to give legal consent.²²² The court falls into the same pit that entraps so many: the pit of conflation concerning actual consent and legal consent. The court ignores the requirement of legal capacity.²²³

The *Donaldson* court also referred to "reasons of policy" which undergird the Legislature's decision not to permit consent as a defense in a section 261.5 case.²²⁴ What policy? Isn't a determination of juvenile incapacity the logical basis of a legislative policy judgment that teenagers cannot legally consent to sex? Why else would the Legislature choose to criminalize sex with minors if it thought that their "consent" was meaningful, advised, appropriate, etc.? Just to prevent pregnancy? If minors have (legal) capacity, surely they can plan against pregnancy. The truth is that we know teenagers take risks that adults do not take.²²⁵ Did the Legislature pass section 261.5 simply because it was politically expedient? How is it expedient to criminalize the conduct and then allow courts to credit the associated consent in the civil trial? Something else must have been motivating the *Donaldson* decision.

4. *Donaldson's* Footnote 10

In a footnote, the *Donaldson* court revealed important additional information which bears on this discussion.²²⁶ The court explained that

²²¹ See *id. passim*.

²²² See *id.* at 587–88 (supporting notion that minors may be able to give legal consent by quoting *Tobias*, not by providing evidence of this capacity).

²²³ See *id.*; *supra* notes 14–28 and accompanying text.

²²⁴ *Donaldson*, 36 Cal. Rptr. 3d at 588.

²²⁵ See *supra* notes 55, 56, 61, 63 and accompanying text; see also Drobac, *I Can't to I Kant*, *supra* note 55, at 714–15 (discussing Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1764–66 (1995)).

²²⁶ See *Donaldson*, 36 Cal. Rptr. 3d at 584 n.10. In footnote 10, the court stated:

We readily agree that licensee's conduct is "troubling." So did the Legislature when it criminalized such conduct. The question, of course, is not how troubling a licensee's conduct may be, but whether it has any bearing on his or her qualifications as a real estate professional under prescribed criteria. Similarly, we have no quarrel with the Department's repeated observation that the victim belonged to a "protected class." She was, in fact, protected by the criminal law, which intervened here to sanction licensee with a felony conviction. The Commissioner's function is to protect the public from unqualified

although it felt Donaldson's conduct was "troubling," it did not "ha[ve] any bearing on his or her qualifications as a real estate professional under prescribed criteria."²²⁷ Essentially, the court thought that Donaldson had been punished enough by the felony conviction for seducing his sixteen-year-old sister-in-law and that he was still qualified to work in the real estate business.²²⁸ The court did not think that a felony conviction for criminal intercourse with a minor should interfere with his ability to pursue his profession.²²⁹ Of course, this reasoning has nothing to do with whether the minor had actual or legal capacity to consent to sex with her brother-in-law.

Another interesting aspect of this footnote is the court's characterization of Donaldson's conduct as "troubling."²³⁰ Why was it troubling to the court if the conduct was consensual and the minor possessed legal capacity? And, why was the liaison just "troubling" and not "outrageous," "despicable," "predatory," "contemptuous," or some other stronger adjective? After all, this was a felony. Donaldson seduced his wife's minor sister while his wife was out of town and when the sister was caring for their children.²³¹ No matter the *Donaldson* court's actual motivation, one can now trace its adoption of the *Tobias* dictum to the *Doe v. Starbucks* case.

B. *The Tobias Legacy: Doe v. Starbucks*

Jane Doe was sixteen-years-old in July 2005 when she began working at Starbucks.²³² Timothy Horton, who was then twenty-four-years-old, supervised and worked closely with her.²³³ Doe alleged that Horton repeatedly asked her out and that she initially spurned his advances.²³⁴ In pleadings, Doe claimed that while at work and in front of coworkers, Horton made "perhaps hundreds" of profane, sexually explicit re-

practitioners of the real estate profession, *not to amplify the sanctions of criminal law by further punishing its transgressors.*

Id. (emphasis added).

²²⁷ *Id.*

²²⁸ *See id.*

²²⁹ *See id.*; *c.f.* Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 167-68 (2010) (describing state and federal law revocation of licenses for convicted felons).

²³⁰ *See Donaldson*, 36 Cal. Rptr. 3d at 584 n.10.

²³¹ *Id.* at 579.

²³² *Starbucks*, 2009 WL 5183773, at *1, *4.

²³³ *Id.*

²³⁴ *Id.*

marks concerning his sexual interest in her.²³⁵ Eventually, Doe acquiesced to Horton's advances in the hopes that he would stop.²³⁶ In November or December 2005, they allegedly engaged in sexual activity.²³⁷ Doe stated,

[Horton] demanded that I perform oral sex on him, which I did. I felt like I had to—that I had no choice I felt that, because he had given me marijuana and I had smoked it with him, I had to do what he said, because he was my Supervisor and I didn't want to lose my job.²³⁸

Horton insisted that Doe not disclose their relationship to anyone.²³⁹

Starbucks management and employees suspected that Horton was having an "extracurricular" relationship with Doe.²⁴⁰ An assistant manager reminded Horton of Starbucks's policy and warned Horton that he could not date Doe.²⁴¹ Horton denied any dating relationship.²⁴² Doe did not deny their involvement when a shift leader, Candice, asked her about her offsite relationship with Horton.²⁴³ When Horton found out about the exchange with Candice, he shouted at Doe.²⁴⁴ Both Doe and Horton subsequently denied their involvement when other Starbucks employees confronted them.²⁴⁵ Store Manager, Lina Nobel, contacted a Starbucks human resources director, Sarah Kelly, about her concerns regarding Horton and Doe.²⁴⁶ No one, however, fully investigated the matter.²⁴⁷

²³⁵ *Id.* at *2 (quoting Starbucks's Objections to Plaintiff's Evidence at 9:9–10:8, Doe v. Starbucks, Inc., No. SACV 08-0582 AG (CWx), 2009 WL 5183773 (C.D. Cal. Dec. 18, 2009)).

²³⁶ *Id.* at *1, *4 (citing Doe Declaration ¶ 4, Doe v. Starbucks, Inc., No. SACV 08-0582 AG (CWx), 2009 WL 5183773 (C.D. Cal. Dec. 18, 2009)).

²³⁷ *Id.* at *2.

²³⁸ Starbucks, 2009 WL 5183773, at *3, *4 (quoting Doe Declaration, *supra* note 236, ¶ 20). Doe and Horton engaged in sexual activities regularly through June 2006. *Id.* at *5. In addition to "vaginal intercourse and oral copulation" at work and offsite, "[t]hey exchanged explicit sexual comments and text messages at work." *Id.* (quoting Plaintiff's Statement of Material Facts ¶¶ 20, 25, Doe v. Starbucks, Inc., No. SACV 08-0582 AG (CWx), 2009 WL 5183773 (C.D. Cal. Dec. 18, 2009)).

²³⁹ *Id.* at *5.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Starbucks, 2009 WL 5183773, at *5 (quoting Doe Declaration, *supra* note 236, ¶¶ 18–20).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

Doe informed her mother about her sexual relationship with Horton in February 2006.²⁴⁸ Doe's mother requested that Starbucks take steps to protect her daughter and conduct an investigation of the allegedly illicit relationship.²⁴⁹ Nobel, the store manager, agreed to ensure that Doe and Horton not have contact until she completed an investigation.²⁵⁰ Nobel questioned Doe who admitted that she was involved sexually with Horton.²⁵¹ Horton continued to deny anything other than a professional relationship with Doe.²⁵² Nobel did not feel like she was in a position to question Horton about a sexual relationship with Doe.²⁵³ Moreover, she did not make a credibility determination because she did not believe it was her place to pass judgment.²⁵⁴ Starbucks did not otherwise formally investigate.²⁵⁵

Although Starbucks initially failed to take action against Horton, others interceded for Doe.²⁵⁶ Doe's mother eventually learned from Nobel that Horton had denied Doe's allegations of wrongdoing.²⁵⁷ Nobel was concerned that terminating Horton would lead to a wrongful termination claim.²⁵⁸ Presumably at her mother's urging, Doe ultimately requested a "transfer[] to a different Starbucks store because she 'felt like she had to.'"²⁵⁹ In 2006, Doe left her job to enroll in a mental health treatment facility.²⁶⁰ State authorities charged Horton with criminal unlawful sexual intercourse with a minor for his conduct with Doe, to which he pled guilty.²⁶¹ In a parallel civil action, Doe alleged sexual harassment and torts claims against Starbucks and Horton.²⁶²

In response to Starbucks's Motion for Summary Judgment, the court analyzed Doe's capacity to consent and whether she did consent

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Starbucks*, 2009 WL 5183773, at *5 (citing J.M. Deposition at 158:10–15, *Doe v. Starbucks, Inc.*, No. SACV 08–0582 AG (CWx), 2009 WL 5183773 (C.D. Cal. Dec. 18, 2009)).

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* (citing Kelly Deposition at 65:13–66:3, *Doe v. Starbucks, Inc.*, No. SACV 08–0582 AG (CWx), 2009 WL 5183773 (C.D. Cal. Dec. 18, 2009)). Kelly testified that she did not think the Starbucks's sexual harassment policy applied to Doe's situation because no one had complained about harassment. *Id.*

²⁵⁵ *Id.*

²⁵⁶ *See Starbucks*, 2009 WL 5183773, at *5.

²⁵⁷ *Id.* at *6.

²⁵⁸ *Id.* (citing J.M. Deposition, *supra* note 250, at 187:18–24).

²⁵⁹ *Id.* (quoting Plaintiff's Statement of Material Facts, *supra* note 238, ¶ 40).

²⁶⁰ *Id.* (citing Plaintiff's Statement of Material Facts, *supra* note 238, ¶ 59).

²⁶¹ *Id.*

²⁶² *Starbucks*, 2009 WL 5183773, at *6.

to Horton's advances.²⁶³ The *Starbucks* court explained that resolution of the arguments concerning Doe's capacity influenced several claims at issue, including Doe's sexual harassment claim.²⁶⁴

First, the court evaluated California Penal Code section 261.5 which Doe argued confirmed her incapacity to consent to sexual contact.²⁶⁵ The *Starbucks* court disagreed, quoting the relevant *Tobias* dictum that "in some cases at least, a minor may be capable of giving legal consent to sexual relations."²⁶⁶ The court failed to explain why, if some minors are capable of giving legal consent, section 261.5 is a strict liability offense. The court acknowledged that *Tobias* was a criminal case but held that its rule had been extended to civil cases by *Donaldson*.²⁶⁷

In support of her contention that minors lack the capacity to consent to sexual intercourse with adults, Doe also cited *Doe v. Oberweis Dairy*, a 2006 case decided by the U.S. Court of Appeals for the Seventh Circuit.²⁶⁸ The court determined that *Oberweis* had "little persuasive effect" because it was a Seventh Circuit case which failed to consider California law and controverted the precedent established by *Tobias*.²⁶⁹ A closer examination of *Oberweis*, however, may demonstrate that it had more to offer in the *Starbucks* sexual harassment case than the *Starbucks* California federal district court concluded.

C. Doe v. Oberweis Dairy: *An Alternate View*

Like *Starbucks*, *Oberweis* was a sexual harassment case involving a sixteen-year-old teenager and her twenty-five-year-old supervisor.²⁷⁰ Like California, Illinois prohibits sex between minors, defined as those under age seventeen, and adults.²⁷¹ The Illinois *Oberweis* federal district court, which decided the case in the first instance, determined that the "unwelcomeness" requirement applies in employment cases involving

²⁶³ *Id.* at *7–8.

²⁶⁴ *Id.* at *7.

²⁶⁵ *Id.*

²⁶⁶ *Id.* (emphasis omitted) (quoting *Tobias*, 21 P.3d at 762).

²⁶⁷ *Id.*

²⁶⁸ *Starbucks*, 2009 WL 5183773, at *7; see *Doe v. Oberweis Dairy*, 456 F.3d 704 (7th Cir. 2006).

²⁶⁹ *Starbucks*, 2009 WL 5183773, at *7.

²⁷⁰ See *id.* at *1, *4; *Doe v. Oberweis Dairy*, No. 03 C 4774, 2005 WL 782709, at *1 (N.D. Ill. Apr. 6, 2005), *rev'd*, 456 F.3d 704 (7th Cir. 2006).

²⁷¹ See CAL. PENAL CODE § 261.5 (West Supp. 2012); 720 ILL. COMP. STAT. ANN. 5/12-15(c), -16(d) (West 2011) (defining criminal sexual abuse for victims under seventeen).

minors and that Doe had not complained of “unwelcome” conduct.²⁷² The court noted that Doe *voluntarily* visited her supervisor Nayman on the day of the sexual encounter and continued to interact with Nayman socially, outside of the workplace, following the encounter.²⁷³ Thus, the court concluded that there was no issue of material fact as to whether the sexual conduct was unwelcome.²⁷⁴

Like the *Tobias* Court, the *Oberweis* district court clearly equated voluntariness with legal consent.²⁷⁵ The district court dismissed Doe’s sexual harassment case against Oberweis Dairy because she did not resist or otherwise indicate that the conduct was unwelcome.²⁷⁶

In reversing the district court, the Seventh Circuit described in detail how Nayman interacted with Doe and other employees.²⁷⁷ Specifically, it noted that Nayman inappropriately grabbed and groped numerous employees, including Doe.²⁷⁸ The court explained that Nayman did these things at work but also invited female employees to his apartment for sexual encounters.²⁷⁹ In fact, Nayman had intercourse with two other female employees, one a minor, at his apartment prior to the encounter with Doe.²⁸⁰ The Seventh Circuit’s rendition of the facts por-

²⁷² *Oberweis Dairy*, 2005 WL 782709, at *6–7. The district court also found the conduct was not severe or pervasive, another requirement of the prima facie case. *Id.* at *7. The court stated:

Here, it is undisputed that through Plaintiff’s approximately eight-month employment with Defendant, Nayman only touched Plaintiff on fifteen occasions. As detailed above, these touches included squeezing Plaintiff’s arm above her elbow, whereby Nayman would ask Plaintiff how she was doing, or giving Plaintiff non-sexual “side hugs.” Once, Nayman gave Plaintiff a hug and kiss in an effort to make Plaintiff happy; and another time, Nayman gave Plaintiff a “happy-to-see-you type of hug” when she came to work. Nayman also “playfully” hit Plaintiff on the behind with a rag on one occasion. On a few occasions, Nayman made allegedly harassing remarks towards Plaintiff, but it is undisputed that Plaintiff found these remarks “flattering.” Despite these allegedly harassing workplace events, Plaintiff continued to visit with Nayman socially outside of work, even after Plaintiff’s mother prohibited Plaintiff from visiting Nayman. Accordingly, no genuine issue of material fact exists as to whether the conduct which occurred at Plaintiff’s workplace was not severe or pervasive.

Id.

²⁷³ *Id.* at *6.

²⁷⁴ *Id.*

²⁷⁵ See *Tobias*, 21 P.3d at 761–62; *Oberweis Dairy*, 2005 WL 782709, at *6.

²⁷⁶ See *Oberweis Dairy*, 2005 WL 782709, at *6.

²⁷⁷ *Oberweis Dairy*, 456 F.3d at 712–13, 719.

²⁷⁸ *Id.* at 713.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

trays Nayman as what Special Agent Lanning refers to as a “situational offender” who opportunistically exploits his young subordinates.²⁸¹

Emphasizing the age disparity between Nayman and Doe, the Seventh Circuit found that although Nayman had not committed forcible rape, he had committed “statutory rape.”²⁸² The court reasoned that statutory rape is a crime because minors may be unable to make responsible decisions about engaging in sex.²⁸³ The court noted that in Illinois, as elsewhere, the severity of the crime increases with the age disparity between the parties.²⁸⁴ The court explained the graduated crimes with the theory that minors are likely to have difficulty resisting the flatteries of adults.²⁸⁵ In this case, the plaintiff was nine years younger than Nayman at the time of intercourse.²⁸⁶ Thus, in its holding, the Seventh Circuit in *Oberweis* implicitly recognized the “communal experience” regarding teenage capacity that the California appellate court, in *People v. Hillhouse*, identified and labeled three years earlier.²⁸⁷

Acknowledging the “unwelcomeness” requirement under Title VII but understanding that minors may not always make responsible decisions about sex, the *Oberweis* appellate court devised a plan for dealing with adolescent “consent” to sex.²⁸⁸ Judge Posner, writing for the court, explained that it wanted to avoid reclassifying sex that a state deems to be nonconsensual as consensual.²⁸⁹ Posner steered clear of “intractable inquiries into maturity that legislatures invariably pretermitt by basing entitlements to public benefits (right to vote, right to drive, right to drink, right to own a gun, etc.) on specified ages rather than on a standard of ‘maturity. . . .’”²⁹⁰ He suggested that courts defer to the state’s age of consent, which reflects the judgment of average maturity for

²⁸¹ Compare *Jones*, 990 A.2d at 976 n.8 (describing situational offenders as opportunistically taking advantage of children), with *Oberweis Dairy*, 456 F.3d at 712–13 (explaining Nayman “regularly hit” on the teenage girls he supervised, and engaged in sexual intercourse with other employees, one a minor, before Doe).

²⁸² *Oberweis Dairy*, 456 F.3d at 713. The court cited to the Illinois statutory rape law. *Id.*; see 720 ILL. COMP. STAT ANN. 5/12-15(c), 16(d) (West 2011).

²⁸³ *Oberweis Dairy*, 456 F.3d at 713.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ Compare *Oberweis Dairy*, 456 F.3d at 713 (explaining that the policy behind the Illinois statutory rape law is that “below a certain age a person cannot . . . make a responsible decision about whether to have sex”), with *People v. Hillhouse*, 1 Cal. Rptr. 3d 261, 268–69 (Ct. App. 2003) (explaining the “communal experience” that minors’ “judgment and impulse control . . . tend to be problematic”).

²⁸⁸ See *Oberweis Dairy*, 456 F.3d at 713.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

sexual matters, rather than determining whether a Title VII minor was able to welcome the sexual overtures of an adult.²⁹¹ Thus, the court concluded that for Title VII cases, the age of consent should be the rule of decision.²⁹²

Unfortunately, a serious problem with this plan becomes obvious immediately. The Seventh Circuit in *Oberweis* acknowledged that the protection afforded to teenage employees by Title VII varies by jurisdiction because the age of consent differs between states.²⁹³ The court, however, mistakenly calculated that the variance would be limited to a “fairly narrow band.”²⁹⁴ For states, such as California, with no age of consent, adolescent “consent” arguably garners legal significance, whether or not the minor has legal capacity in the criminal context.²⁹⁵ The Seventh Circuit clearly did not know in 2006 that only a few months earlier in California, the *Donaldson* state district court had declared the end of the “age of consent” in California civil cases.²⁹⁶ Thus, the Seventh Circuit offered the nation a logical but seriously flawed formula for responding to adolescent “consent” in sexual harassment and sexual abuse cases. In states, such as two of the most populous, California and New York, where state criminal and civil law conflict, this formula provides no clear guidance on how to treat adolescent non-resistance or “consent.”²⁹⁷

D. *The Hidden Conflicts Regarding “the Age of Consent”*

Return to the Google search on ages of consent.²⁹⁸ The results do not warn that state civil law in any given jurisdiction may conflict with ages of consent designated for criminal prosecution. In a 2004 article, I reviewed the conflicting laws across the United States and evaluated the chances that a sixteen-year-old, such as Sara (or her guardian who would sue on her behalf), might have in pursuing a sexual harassment or other related tort case.²⁹⁹ The article determined that the outcome would depend upon where she “consented” and sued, in addition to

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* at 714.

²⁹⁴ *Oberweis Dairy*, 456 F.3d at 714.

²⁹⁵ *See, e.g., Donaldson*, 36 Cal. Rptr. 3d at 587–88.

²⁹⁶ *See id.*

²⁹⁷ *See Drobac, A Bee Line in the Wrong Direction*, *supra* note 5, at 90–95 (discussing the criminal and civil law conflicts concerning the age of consent in New York).

²⁹⁸ *See supra* notes 1–2 and accompanying text.

²⁹⁹ Drobac, *Sex and the Workplace*, *supra* note 9, at 538–39.

which claims she brought.³⁰⁰ She would have almost no chance for success in twenty-four states where the age of consent was sixteen or lower.³⁰¹ That number grew to thirty-five if courts in eleven states rejected the specific aggravating facts of her case.³⁰² Those states would treat her as an adult and bar most claims.³⁰³ In the remaining fourteen states, conflicts between criminal and civil outcomes made predictions virtually impossible.³⁰⁴

Eight years later, California should be added to the list of states where Sara's chances for success in civil court are slim to none. Especially now that California has rejected *Oberweis*, one can anticipate that other skeptical judges will grant summary judgment for employers against acquiescing teenagers. The trend at the dawn of the twenty-first century is to punish teenagers for their lack of resistance and failure to abstain. That result becomes literal if an underage male fathers a child via the illicit sexual intercourse with an adult female.³⁰⁵ For example, in 1996, in *County of San Luis Obispo v. Nathaniel J.*, a fifteen-year-old described sex with his thirty-four-year-old consort as "a mutually agreeable act."³⁰⁶ Therefore, the California appellate court refused to re-

³⁰⁰ *Id.*

³⁰¹ *Id.* at 538 n.359. These twenty-four states included: (14) Hawaii, Maryland, Mississippi, South Carolina; (16) Alabama, Georgia, Indiana, Kansas, Kentucky, Massachusetts, Montana, Nevada, North Carolina, Ohio, Pennsylvania, Rhode Island, West Virginia, and Wyoming; and those states with special fact requirements that did not match Sara's: (14) Maine, (16) Connecticut, Michigan, Oklahoma, South Dakota, and Vermont. *Id.* app. A at 546-73.

³⁰² *Id.* at 539 n.360. In a previous article, *Sex and the Workplace*, I concluded:

Without the special facts . . . including the age disparity and . . . managerial position [of the alleged harasser], eleven more states joined the list: (14) Iowa; (15) Colorado; (16) Alaska, Arkansas, Delaware, Florida, Minnesota, New Hampshire, New Jersey, Utah, and Washington. . . . In Colorado, the *Bohrer* court found consent irrelevant because of the prohibition regarding the sexual violation of a minor by an adult in a position of trust. *Bohrer v. DeHart*, 943 P.2d 1220, 1227 (Colo. Ct. App. 1996) Additionally, in *Bostic*, the plaintiff was fifteen when her relationship with her coach commenced. *Bostic v. Smyrna Sch. Dist.*, No. 01-0261 KAJ, 2003 WL 723262, at *1 (D. Del. Feb. 24, 2003). The Delaware court found that the coach held a position of trust. Thus, the court found consent irrelevant. *Id.* at *6.

Id.

³⁰³ *See id.* at 539.

³⁰⁴ *See id.* The age of consent in the remaining fourteen states are: (17) Illinois, Louisiana, Missouri, Nebraska, New Mexico, New York, and Texas; (18) Arizona, California, Idaho, North Dakota, Oregon, Virginia, and Wisconsin. *Id.* at 539 and accompanying notes.

³⁰⁵ *See Cnty. of San Luis Obispo v. Nathaniel J.*, 57 Cal. Rptr. 2d 843, 844-45 (Ct. App. 1996).

³⁰⁶ *Id.* at 844.

lease him from liability for child support, finding that the adolescent plaintiff was not an innocent victim of the adult's criminal acts.³⁰⁷

This discussion of legislative intent and case law interpretation shows inconsistencies that are problematic.

1. Misguided Confusion?

Does misguided confusion or paternalistic judgment concerning sexually active teenagers explain the current state of affairs for adolescents? The *Tobias* court was not reviewing Penal Code section 261.5 nor was it reviewing a civil sexual harassment claim when it determined that California minors might give legal consent to sex.³⁰⁸ With its 2001 pronouncement, the *Tobias* majority set California civil and criminal law completely at odds. Neither the California Legislature nor the California Supreme Court has responded in the intervening decade to ameliorate this resulting situation. As the precedent expands, scholars will find it less plausible to attribute the resulting conflicts between civil and criminal law to continuing misunderstanding or confusion.

Fortunately for Sara Doe, her case settled in 2002, before the *Donaldson* court extended the *Tobias* dictum to the civil context.³⁰⁹ *Starbucks's* Doe was not so lucky. After the *Starbucks* court, relying on the *Tobias* dictum, decided that the issue of Doe's actual consent was a triable fact, the case settled out of court.³¹⁰ Had the case not settled, Doe could have anticipated an invasive trial based on her maturity and "consent" under the "unwelcomeness" standard of the California fair employment practice statutes, despite the fact that her adult consort, Tim Horton, was prosecuted under section 261.5.³¹¹ Other teenagers should anticipate that defense attorneys will use the *Starbucks* summary judgment opinion to defend sexual harassment and other civil rights and tort claims across the country. Judges already use the *Starbucks* precedent outside of the employment context.³¹²

³⁰⁷ *Id.* at 845.

³⁰⁸ See *Tobias*, 21 P.3d at 759, 761–62.

³⁰⁹ Order Entering Judgment Against Defendant Culver Theaters, Inc. Pursuant to Settlement Agreement, Sara Doe [alias] v. Culver Theaters Inc., No. CV139513 (Cal. Super. Ct. Dec. 2, 2002); see *Donaldson*, 36 Cal. Rptr. 3d at 587–88.

³¹⁰ *Starbucks*, 2009 WL 5183773, at *7–8; E-mail from Lisa Bredahl, Court Clerk, to author (Aug. 24, 2010, 1:03 PM) (on file with author).

³¹¹ See *Starbucks*, 2009 WL 5183773, at *6–8.

³¹² See, e.g., Doe v. Willits Unified Sch. Dist., No. C-09-03655-JSW (DMR), 2010 WL 2524587, at *3–5 (N.D. Cal. June 23, 2010).

2. Beyond Employment—*Doe v. Willits Unified School District*

A recent California Title IX case adumbrates potential issues for teenagers across the country.³¹³ Title IX of the Education Amendments of 1972 forbids discrimination in educational institutions.³¹⁴ In 2010, in *Doe v. Willits Unified School District*, the U.S. District Court for the Northern District of California ruled on a defense motion concerning discovery of the fifteen-year-old student-plaintiff's sexual conduct with her thirty-eight-year old teacher, her sexual history, and the student's "consent."³¹⁵ Following a sexual liaison with her teacher, Doe asserted a Title IX claim and various tort claims against her teacher, her principal, and the school district.³¹⁶ During Doe's deposition, which was eventually suspended due to discovery conflicts, defense counsel questioned Doe about her sexual history.³¹⁷ Although the court denied discovery related to Doe's sexual history, it granted discovery concerning whether she "welcomed" or "consented" to her teacher's sexual overtures.³¹⁸

The *Willits* court acknowledged that other circuits had examined whether the "unwelcomeness" requirement is properly considered in cases where a minor alleges sexual harassment at an educational institution.³¹⁹ The court found that cases outside of the Ninth Circuit have explored whether consent is an element of a Title IX case.³²⁰ The court noted that in each of those cases, the cause of action did not include consent.³²¹ The court found that the paramount theme from these cases was that welcomeness or consent should not be conflated with capacity to consent.³²² Moreover, when capacity is absent, the court

³¹³ *See id.*

³¹⁴ 20 U.S.C. § 1681 (2006).

³¹⁵ *Willits Unified Sch. Dist.*, 2010 WL 2524587, at *1–5.

³¹⁶ *Id.* at *1.

³¹⁷ *Id.*

³¹⁸ *Id.* at *3–5 (finding Federal Rule of Evidence 412 protects against admission of evidence regarding plaintiff's sexual history, but finding question of plaintiff's consent or welcomeness a potential element of the claim and therefore discoverable).

³¹⁹ *Id.* at *4–5.

³²⁰ *Id.*

³²¹ *Willits Unified Sch. Dist.*, 2010 WL 2524587, at *4 (citing *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220 (7th Cir. 1997) (finding that a "13-year old student could not 'welcome' advances of 21-year old school employee; if 'children cannot be said to consent to sex in a criminal context, they similarly cannot be said to welcome it in a civil context. To find otherwise would be incongruous"); *Chancellor v. Pottsgrove Sch. Dist.*, 501 F. Supp. 2d 695 (E.D. Pa. 2007) (finding that "notwithstanding high school senior's voluntary and willing participation in sexual relations with a teacher, the student cannot 'welcome' the teacher's sexual advances if she lacks the capacity to consent").

³²² *Id.*

concluded that any evidence of welcomeness or consent is irrelevant as a matter of law.³²³

This analysis demonstrates that the *Willits* court recognized the complexity of the issue. Here, the court evinces the distinction between “voluntary and willing participation,” and capacity to consent, which may produce actual, legally significant consent.³²⁴ The *Willits* court seemed persuaded by the reasoning from other courts regarding the issues of capacity to consent and adolescent “consent” to sexual activity with an adult.³²⁵

In a footnote, however, the *Willits* court explained that California case law is unsettled regarding the relevance of “consent,” citing *Tobias* and *Donaldson*.³²⁶ The court then ruled on the discovery of Doe’s “consent,” finding that cases have resolutely held that “consent” and “welcomeness” are not elements of a Title IX claim.³²⁷ Still, because the *Willits* court refused to define the elements for the cause of action in that case, it held that questions on the issue of “welcomeness” and “consent” with regard to the minor’s sexual relationship with an adult constituted permissible discovery.³²⁸

This compromise and acknowledgement of the *Tobias* dictum, later adopted in *Donaldson*, essentially ensured that Doe would face invasive, humiliating, and perhaps traumatizing inquiries by defense counsel during her deposition. One can expect that defense counsel would focus on whether *Doe* set limits with her thirty-eight-year-old teacher, thus casting Doe as the “responsible” actor.

News articles, not referenced in the *Willits* court opinion, gave more details about the Doe-Smith liaison, details that the defense counsel could use.³²⁹ For example, the district attorney suggested that Doe at least acquiesced to the sexual conduct.³³⁰ One news article reported, “[t]he relationship, believed to have taken place over several months, was not forced, [Mendocino County District Attorney Meredith] Lintott said. But a 15-year-old cannot legally consent to a sexual relationship with a 38-year-old, she said.”³³¹ Despite what the district attorney

³²³ *Id.*

³²⁴ *Id.* at *4–5.

³²⁵ *See id.*

³²⁶ *Id.* at *4 n.4.

³²⁷ *Willits Unified Sch. Dist.*, 2010 WL 2524587, at *5.

³²⁸ *Id.*

³²⁹ *See* Anderson, *supra* note 169; Glenda Anderson, *Willits Teacher Accused of Sex with Student*, PRESS DEMOCRAT (Santa Rosa, Cal.), Feb. 6, 2009, at B1.

³³⁰ *See* Anderson, *supra* note 329.

³³¹ *Id.*

believed, the *Willits* civil judge left it open as to whether Doe could legally consent and ruled to allow discovery on the matter.³³² Smith's guilty plea to one count of unlawful sex with a minor under sixteen and receipt of a six month county jail sentence with thirty-six months of probation may not make a difference in the civil case.³³³

The *Willits* discovery ruling highlights how the conflicts in California put our teenagers at risk. It also threatens to chill future reporting of sexual exploitation. A teenager, who understands that she may have to endure rigorous examination in front of her parents and strangers on whether she "came-on" to an adult teacher, may opt not to report offensive conduct at all. Because the *Willits* case began as a Title IX filing, it could serve as guidance in other federal Title IX cases across the nation. Critics might argue that other states will not follow California into the legal tangle created by *Tobias* and the inconsistent treatment of adolescent "consent." Still, do we really want to take that chance with our teenage children?

3. Crediting Adolescent "Consent"

This discussion of "the age of consent" and the appropriate legal weight to give adolescent "consent" also highlights the consequences that result when we do not afford adolescent "consent" legal significance. Some states allow teenagers to consent to abortion services and all states allow teenagers to consent to treatment for sexually transmitted diseases.³³⁴ If we negate adolescent legal capacity, we risk the inconsistency of affording adolescents autonomy with respect to these important healthcare decisions.³³⁵ Perhaps California courts, scholars, and jurists are reluctant to classify minors as legally incapacitated because of the understanding that it might prevent minors from accessing lifesaving medical treatment. Thus, the conundrum becomes clear: how to account for "developing capacity" while also affording teenagers the chance to make decisions in their own best interests.

³³² See *Willits Unified Sch. Dist.*, 2010 WL 2524587, at *5.

³³³ See Anderson, *supra* note 169.

³³⁴ *Parental Consent and Notification Laws*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/health-topics/parental-consent-notification-laws-25268.htm> (last updated Aug. 3, 2009) (listing state requirements for parental consent); *Sexually Transmitted Diseases Treatment Guidelines, 2010*, CENTER FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/std/treatment/2010/specialpops.htm> (last updated Mar. 4, 2011) ("All 50 states and the District of Columbia explicitly allow minors to consent for their own health services for STDs.").

³³⁵ See Drobac, *I Can't to I Kant*, *supra* note 55, at 719–24.

IV. ADOLESCENT ASSENT INSTEAD OF IMMATURE “CONSENT”

More than seven years ago, I offered a strict liability plan to ensure the protection of our malleable teenagers at work.³³⁶ The plan recommended that the law be revised to account for adolescent workers, their developmental abilities or “developing capacity,” and the phenomenon of their sexual exploitation.³³⁷ Under this strategy, the law would permit an adolescent who “consented” to sex with an adult supervisor or coworker to retract that “consent” if she realized during her minority, or shortly thereafter, that her adult partner had taken advantage of her naïveté or “developing capacity.”³³⁸ I recommended that “consent” should not provide a defense to a civil claim at any phase of a case and I still endorse such a strict liability approach.³³⁹

The treatment of adolescent “consent” by California courts deserves serious review. In a recent article, *A Bee Line in the Wrong Direction: Science, Teenagers, and the Sting to “The Age of Consent,”* I noted similar treatment of “consent” by New York courts, suggesting that nationwide reform may be necessary.³⁴⁰ Wholesale elimination of ages of consent wreaks havoc, placing unnecessary burdens on developing teenagers and empowering savvy predators. Although a detailed exploration of options is beyond the scope of this paper, I relay here another proposal in brief: society can make “consent” voidable in a variety of contexts—as it does in contract law.³⁴¹

This novel theoretical approach prescribes that the law should credit adolescent “consent,” not as legal consent but as *adolescent assent*.³⁴² As opposed to medical assent, adolescent assent does not require associated parental permission or consent. Unlike consent, adolescent assent conveys no associated threshold level of capacity. Similar

³³⁶ Drobac, *Sex and the Workplace*, *supra* note 9, at 543–45.

³³⁷ *See id.* at 543.

³³⁸ *Id.*

³³⁹ *See id.*

³⁴⁰ *See* Drobac, *A Bee Line in the Wrong Direction*, *supra* note 5, at 90–95.

³⁴¹ *See* ERIC MILLS HOLMES, CORBIN ON CONTRACTS: FORMATION OF CONTRACTS 294 (Joseph M. Perillo ed., 1998) (“At common law the contract of an infant is said to be voidable”); *see also In re B.W.*, 313 S.W.3d 818, 823 (Tex. 2010) (“[A] minor’s contracts are voidable at the minor’s election, even if the minor knew what he or she was doing and innocent people are prejudiced.”).

³⁴² *See* Drobac, *Abandoning Teenage Consent for Adolescent Assent*, *supra* note 10. This approach is also detailed in *Bee Line* which primarily examined New York cases while this Article highlights a similar trend, requiring a similar solution, in California courts. *See* Drobac, *A Bee Line in the Wrong Direction*, *supra* note 5, at 90–95, 113–16.

to consent by a minor under contract law, assent is voidable by the minor.

Assent operates slightly differently from traditional, voidable contract consent by a minor, however. As noted, assent presumes no legal capacity. Moreover, the minor may void assent only with good reason. Adult abuse, adult exploitation of an unfair advantage, and breach of a duty owed to the minor, all justify revocation. Additionally, parents cannot void a minor's assent. Although parents may offer their wise guidance, undue influence by a parent or other adult nullifies revocation. If a court determines that the original decision was, borrowing from family law, in the minor's best interests it can reject the revocation.³⁴³ On the other hand, if a minor successfully voids her assent, a court cannot admit it into evidence or permit discovery on the matter. A criminal prosecutor might still prosecute an adult who has sex with an assenting minor, however, because the assent operates *solely* to benefit the minor.

To understand the impact of adolescent assent, reconsider *Doe v. Willits Unified School District*.³⁴⁴ Recall that the Doe in this case allegedly agreed to sex with her teacher, Clint Smith.³⁴⁵ Under the assent scheme, Smith might still face prosecution for statutory rape or, in California, unlawful sex with a minor.³⁴⁶ A successful criminal prosecution vindicates a society that does not want sexual relationships between its minor children and their teachers. If Doe maintains her assent, there is no parallel civil case; the controversy ends.

If, however, Doe believes that Smith coerced, deceived, or otherwise took advantage of her when she originally assented, she can nullify her assent and bring a sexual harassment or tort charge (through her parents or guardian) to recover damages. Following a motion in limine, the court will accept Doe's revocation. Criminal sanctions for adults who seduce minors clearly suggest that those adults have abused or otherwise breached a duty owed the children. If Smith raises assent as a civil defense in a Title IX or tort case, the court should deny discovery and exclude admission of evidence related to Doe's assent. Because the law assumes that Doe lacked capacity, discovery into the assent, for evidence that would be used *against Doe*, is not in a minor's best interests.

³⁴³ See *Troxel v. Granville* 530 U.S. 57, 69 (2000) (explaining the "presumption that a fit parent will act in the best interest of his or her child").

³⁴⁴ No. C-09-03655-JSW (DMR), 2010 WL 2524587 (N.D. Cal. June 23, 2010).

³⁴⁵ See Anderson, *supra* note 329.

³⁴⁶ See CAL. PENAL CODE § 261.5 (West Supp. 2012).

By allowing Doe to void her assent, society encourages teachers to refrain from engaging sexually with minors.

Thus, Doe makes two choices: to assent and whether to revoke her assent. Society permits Doe to revoke her assent in order to protect her against the poor choices she might make *and* to empower her to remedy the mistake. A court holds Doe to her assent if she errs in the revocation of assent. At that point, however, if someone challenges Doe's revocation, the court scrutinizes the participating adult's actions, not the moral purity or maturity of the adolescent. The court considers whether the revocation is based on good cause given the adult's conduct and developmental advantage. The court's analysis emphasizes the circumstances, not the individual minor. Under this approach, all of the Does examined in this paper could have nullified their assent.

This theory of adolescent assent is "consistent with what we know about adolescent development; teenagers need maturing experiences and the opportunity to practice their skills."³⁴⁷ Teenagers may not have the capacity to accurately assess and make every decision, but this approach permits teenagers to avoid those that they later believe were inept, asinine, or inappropriate. Proposals like this one should spark conversation for the germination of new ideas and approaches.

CONCLUSION

Arguably, California, New York, and other states are brewing a bitter dram in their civil legal treatment of juveniles. Additionally, California civil decisions are compounding problems first apparent in criminal law case precedent. The existing conflicts between criminal and civil law treatment of adolescent "consent" leave teenagers vulnerable, especially to sexual predators. Court conflation of acquiescence, consent, and capacity highlights the need for legal reform and intervention. Rather than eliminate default guidance or attempt to implement a myriad of separate rules for the regulation of adolescent activities and "consent" across the nation, society should explore new options and perhaps give voidable adolescent assent legal significance.

Assent would take the venti jolt out of *Starbucks*.

³⁴⁷ Drobac, *A Bee Line in the Wrong Direction*, *supra* note 5, at 115.

