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Centering the Teenage "Siren": Adolescent Workers, Sexual Harassment, and the Legal Construction of Race and Gender

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CENTERING THE TEENAGE “SIREN”:
ADOLESCENT WORKERS, SEXUAL HARASSMENT,
AND THE LEGAL CONSTRUCTION
OF RACE AND GENDER

*Anastasia M. Boles**

ABSTRACT

Recent scholarship and media attention has focused on the prevalence of sexually harassing behavior directed at working teenagers, and the emergence of sexual harassment lawsuits by these minors against their employers. Although many of the legal issues concerning workplace sexual harassment and adult workers (and the various state and federal jurisprudence prohibiting it) have been widely discussed, there is surprisingly little discourse, research, and precedent addressing the problem of workplace sexual harassment and teen workers.

Currently, most sexual harassment cases brought by adolescent workers are litigated using the doctrinal framework for adult workers. Only the Seventh Circuit has developed an adolescent-specific framework, and it produces the same result as the law governing adult workers—it functions to maintain historically subordinating racial and gender hierarchies embedded in sexual harassment law. This Article uses legal construction to evaluate the developing law of sexual harassment claims brought by adolescent workers. Absent a deconstruction framework, adolescent-specific sexual harassment law will continue to perpetuate the very racial and gender subordination Title VII was passed to remediate.

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INTRODUCTION

Natasha¹ was a 16-year-old high-school junior in September 2005 when Terence Davis recruited her to work for Taco Bell in Memphis, Tennessee. Davis, who was 34 years old at the time, was a store manager at the fast-food restaurant. Davis began sexually harassing Natasha soon after her employment began: he would tell Natasha she was “sexy,” make explicit gestures with his fingers and mouth simulating oral sex, and brush up against her when walking by. Natasha complained to a senior male em-

1. In an effort to protect the victims' privacy, I have used the names “Natasha” and “Jennifer” as pseudonyms. The facts are summarized here from public documents filed in *E.E.O.C. v. Taco Bell Corp.*, 575 F. Supp. 2d 884 (W.D. Tenn. 2008).

ployee at the store, but the harassment continued until that November, when Natasha’s family moved to a new neighborhood and she requested a transfer to a new location. Soon after the move, Davis called Natasha to request her new address in order to provide her final paycheck. He discovered she was at home alone from school ill. Minutes later, Davis knocked at Natasha’s front door, forced his way in, and forcibly raped her. Natasha did not report the rape to Taco Bell management or to the police, nor did she return to work at Taco Bell. A few months later, Davis sent Natasha a text message threatening to rape her again if she did not consent to a sexual relationship with him.

Just months later, in April 2006, Davis sexually assaulted Jennifer, another adolescent woman, on her first day of work. While Jennifer was retrieving some vegetables, Davis blocked the door to the restaurant’s cooler, preventing her exit. He began kissing her, placing his tongue down her mouth, fondling her breasts and buttocks, and penetrating her genitalia with his fingers. He then suggested they meet in the restaurant restroom to have sex. As soon as Davis let her out of the cooler, Jennifer ran out of the restaurant. She soon noticed that Davis was following her in his car. Jennifer asked a few young men standing nearby to walk her home. Once she got home, Jennifer’s mother called the police. After the attack, Jennifer’s mother decided to move her to a new neighborhood and school because Jennifer did not want to pass the Taco Bell location where she was attacked. She underwent counseling, suffered from depression, had problems with anger management, and her grades dropped at school.

Jennifer filed a sexual harassment charge with the Equal Employment Opportunity Commission (“EEOC”); the agency filed an enforcement suit against Taco Bell in September 2007.² During its investigation of Jennifer’s harassment and assault allegations, the EEOC discovered Davis’ unreported rape of Natasha. The EEOC amended its complaint against Taco Bell to seek relief on behalf of both Jennifer and Natasha. Eventually, Davis was criminally prosecuted for his attacks on Natasha and Jennifer. Although Tennessee recognizes the crime of statutory rape, Davis pled guilty to forcibly raping Natasha.³ Natasha became pregnant after the assault; court-or-

2. Jennifer later intervened in the enforcement suit and entered into a private settlement with Taco Bell before trial. Motion for Leave to Intervene, *EEOC v. Taco Bell Corp.*, 575 F. Supp. 2d 884 (W.D. Tenn. 2008) (No. 2:07-cv 02579), ECF No. 2 (requesting permission of court to enter lawsuit as a party-plaintiff); Stipulation of Dismissal With Prejudice, *EEOC v. Taco Bell Corp.*, No. 2:07-cv 02579, 2009 WL 5071663 (W.D. Tenn. Aug. 14, 2009) (stipulating for dismissal due to private settlement on August 14, 2009).

3. General Sessions Criminal Court Case Status History for Terence Davis, SHELBY COUNTY GENERAL SESSIONS AND CRIMINAL COURT CASE INFORMATION DATABASE, <http://jssi.shelbycountyttn.gov/> (follow “GS Case History” hyperlink;

dered DNA testing confirmed that the baby belonged to Davis. She later dropped out of high school, in part due to the emotional trauma of the assault, and in part due to the difficulties balancing adolescent motherhood and her education.

Taco Bell's litigation strategy was clear. Natasha was portrayed as a sexually promiscuous liar with a tainted criminal history. She was incapable of experiencing workplace sexual harassment. She was undeserving of a legal remedy. Despite Davis' guilty plea to forcible rape and sexual battery, Taco Bell defended the litigation, in part, by claiming Natasha was lying about the sexual assault and characterizing the sexual encounter with Davis as consensual. At one point during her deposition, Natasha emphasized, "I didn't have sex with him. He *raped* me."⁴ Taco Bell attorneys obtained deposition testimony from Natasha that she was not a virgin prior to being raped by Davis; she admitted having a sexual relationship with another teenage boy. Defense attorneys also sought to introduce extensive evidence of Natasha's juvenile criminal history, including her guilty plea to a misdemeanor shoplifting charge committed years after the attack, evidence that she spent a night in a juvenile detention facility as a teenager, and evidence that she was involved in an unrelated assault incident. The EEOC and Taco Bell settled the case before trial, and Taco Bell entered into a consent decree.

Unfortunately, Natasha and Jennifer's experience with workplace sexual harassment is common but relatively uncharted. Recent studies suggest that adolescent workers experience sexual harassment at much higher rates than their adult counterparts.⁵ Media focus on the issue is increasing,⁶ as are

then follow "Arrest by RNI" hyperlink; then enter case RNI number "267073"; then follow Indictment No. "06 06292" hyperlink). *Compare* TENN. CODE ANN. § 39-13-503 (Westlaw through end of the 2014 Second Reg. Sess.) (criminal offense of rape is a Class B felony), *with* TENN. CODE ANN. § 39-13-506 (Westlaw through end of the 2014 Second Reg. Sess.) (aggravated statutory rape, a Class D felony, is a lesser offense).

4. Motion in Limine to Exclude Documents and Testimony Regarding Motel Registry Card, *EEOC v. Taco Bell Corp.*, 575 F. Supp. 2d 884 (W.D. Tenn. 2008) (No. 2:07-cv 02579), ECF No. 103-3 (emphasis added).
5. See Susan Fineran, *Adolescents at Work: Gender Issues and Sexual Harassment*, 8 VIOLENCE AGAINST WOMEN 953 (2002); Susan Fineran & James E. Gruber, *Youth at Work: Adolescent Employment and Sexual Harassment*, 8 CHILD ABUSE & NEGLECT 550 (2009).
6. See, e.g., Laura Gunderson, *Young Workers Least Likely to Find Help, Yet Suffer Deepest Scars: Teen Sexual Harassment*, THE OREGONIAN, Apr. 1, 2014, available at 2014 WLNR 8795305 [hereinafter Gunderson, *Deepest Scars*]; Laura Gunderson, *Teen Sexual Harassment: Oregon Labor Commissioner Says Young Workers Vulnerable*, THE OREGONIAN, Mar. 31, 2014, available at 2014 WLNR 8692527; *NOW on PBS: Is Your Daughter Safe At Work?*, (PBS television broadcast Feb. 20, 2009), available at <http://www.pbs.org/now/shows/508/>; E.J. Graff, *Is Your Daughter Safe At Work?*, GOOD HOUSEKEEPING, June 2007, at 162, available at

federal and state efforts to identify and adjudicate sexual harassment claims brought by teen workers. For example, in 2004, the EEOC launched Youth@Work, an educational and enforcement litigation campaign that has resulted in an increase in enforcement suits on behalf of adolescent workers alleging workplace sexual harassment claims.⁷ Despite the media and enforcement attention, however, relatively little legal scholarship has explored the problem of workplace sexual harassment involving teenaged workers.⁸

Also common in sexual harassment litigation is Taco Bell’s litigation strategy of portraying the victim of sexual harassment as undeserving or otherwise unworthy of legal protection. Indeed, sexual harassment law has developed in a way that allocates legal protection more on the basis of vic-

ing.com/family/parenting-tips/daughter-safe-work-jun07; Donna Koehn, *Innocence Lost*, TAMPA TRIB., June 11, 2006, at 1; Dana Knight, *Sexual Harassment and Bias Complaints Surging Among the Young*, INDIANAPOLIS STAR, Aug. 14, 2005, at D1; H.J. Cummins, *Workplace Often Ugly for Young Women: ‘U’ Study Finds One-Third of Those 14 to 26 are Sexually Harassed*, STAR TRIB. (Minneapolis, Minn.), Apr. 1, 2004, at 1D.

7. Press Release, U.S. Equal Emp’t Opportunity Comm’n, EEOC Launches “Youth@Work” Initiative to Educate Teen Employees About Their Rights and Responsibilities (Sept. 21, 2004), <http://www.eeoc.gov/eeoc/newsroom/release/archive/9-21-04a.html> [hereinafter EEOC Youth@Work Press Release]. See generally *Youth@Work*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/youth//index.html> (last visited Mar. 26, 2014) [hereinafter EEOC Youth@Work homepage] (providing youth in the workforce with information on their legal rights and responsibilities as an employee).
8. Indeed, only one scholar, Prof. Jennifer Ann Drobac, has examined the legal issues relating to adolescent workers and sexual harassment in depth. See, e.g., Jennifer Ann Drobac, *Sex and the Workplace: “Consenting” Adolescents and a Conflict of Laws*, 79 WASH. L. REV. 471 (2004) [hereinafter Drobac, *Sex and the Workplace*]; 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); 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 (2007) [hereinafter Drobac, *I Can’t to I Kan’t*]; Jennifer Ann 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); 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 (2011); Jennifer Ann Drobac & Leslie A. Hulvershorn, *The Neurobiology of Decision Making in High-Risk Youth and the Law of Consent to Sex*, 17 NEW CRIM. L. REV. 502 (2014); see also Seymour Moskowitz, *Save the Children: The Legal Abandonment of American Youth in the Workplace*, 43 AKRON L. REV. 107, 127–31 (2010) (discussing susceptibility of adolescent female workers to sexual harassment due to their developmental stage, nature of employment, and power imbalance). Professor Drobac argues that employers of adolescent workers should be held strictly liable for sexual harassment claims brought by young workers, and any consent given by the underage worker to sexual contact is voidable. See Drobac, *Sex and the Workplace*, *supra* at 543–45.

tim characteristics than the victim's actual experience with workplace sexual harassment.⁹ Taco Bell sought to convince the court, and eventually the jury, that Natasha was not the type of young woman who deserved legal protection from sexual harassment.

To fully understand Natasha's experience with litigating her sexual harassment claim, and specifically why Taco Bell hinged its defense strategy on attacking her character, one must examine how constructions of race and gender shape sexual harassment doctrine. It is not clear from the court documents whether Natasha, or Jennifer, is a young woman of color.¹⁰ Indeed, absent a corollary claim for racial discrimination or explicit references to a target's racial identity in the evidence of harassment, the axis of race is typically absent from the text of the court opinions that shape sexual harassment law. Yet historical constructions of race and gender are invisibly but prominently embedded in the doctrine¹¹—controlling images¹² of virtuous White women are juxtaposed against images of vile women of color.¹³ In turn, the law functions to reinforce and continue the construction of race and gender,

9. See THERESA M. BEINER, *GENDER MYTHS V. WORKING REALITIES* 62 (2005).
10. Critical legal scholarship is rich with discourse concerning the compound barriers women of color confront in the experience of workplace sexual harassment, in reporting the harassment, and in seeking a legal remedy. See, e.g., Kimberlé Williams Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467 (1992) (discussing how pervasive stereotypes of black women shape the types of sexual harassment they experience and whether their stories are likely to be believed); Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817 (1993) (suggesting the indivisibility of race and gender in sexual harassment can be understood by looking at the harassment from the perspectives of the harasser, the victim, and the judicial system); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177 (1997) (discussing how the converging racial and gender stereotypes of Asian Pacific American women as being politically passive and sexually exotic and compliant racialized sexual lead to "racialized sexual harassment"); Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235 (2006) (examining the racial disparity in internal reports of sexual harassment and formal sexual harassment charges).
11. See Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionalist Arguments in Court*, 81 OR. L. REV. 629, 633–34 (2002) (citing Daniel Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1836, 1838, 1847 (1993)).
12. I use Patricia Hill Collins' concept of "controlling images" to focus on "the process by which certain assumed qualities . . . are used to justify oppression." PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 68 (1991).
13. Tanya Katerí Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER RACE & JUST. 183, 185 (2001) (arguing that both sexual harassment and international sex tourism import racialized stereotypes of women).

thus sustaining racial and gender subordination.¹⁴ Antidiscrimination doctrine, generally, and the law of sexual harassment, specifically, have functioned together as a perpetuating and stabilizing force of reinforcing racial and gender hierarchies.¹⁵ The law of sexual harassment functioned to allow Natasha’s portrayal as a thieving, promiscuous liar incapable of being sexually harmed by a manager twenty years her senior when forcibly raped. Whether Natasha was a young woman of color does not actually matter; during the litigation she was treated as one.

This Article explores the legal construction of race and gender in sexual harassment law.¹⁶ I posit that sexual harassment jurisprudence in the United States has imported the constructions of race and gender to the point that the two are interdependent. The current doctrinal framework used to adjudicate sexual harassment claims under Title VII of the Civil Rights Act of 1964 is premised upon societal norms, racialized stereotypes, hegemonic goals, racism, and sexism. Legal rules and tests used today to determine who is and who is not entitled to legal relief are tightly bound with the constructions of race and gender commenced in the antebellum south, solidified during the passage of Title VII, and continuing now as precedent. Laws act in a hegemonic way to ensure the permanency of race and gender hierarchies.

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14. Cheryl I. Harris, *Finding Sojourner’s Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 314 (1996) (“Indeed, through the rigid construction of the virgin/whore dichotomy along racial lines, the conception of womanhood was deeply wedded to slavery and patriarchy and the conduct of all women was policed in accordance with patriarchal norms and in furtherance of white male power.”).
 15. See Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) (analyzing cases in which black female employees alleging workplace discrimination were denied relief because they did not conform to the law’s classification requirements of discrimination based on “race” or “sex” but rather alleged the intersectionality of these two immutable characteristics was the cause of the discrimination); Hernández, *supra* note 13, at 196 (arguing that all sexual harassment is “racialized” sexual harassment because even when male peers or supervisors sexually harass white women to maintain the masculine domain of the workplace, they are being treated like women of color).
 16. Several highly influential critical race scholars have examined the ways in which law operates as an affirmative force upon, rather than simply a reflection of, the social construction of race and gender. See, e.g., Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1725 (1993) (“The law’s construction of whiteness defined and affirmed critical aspects of identity (who is white); of privilege (what benefits accrue to that status); and, of property (what legal entitlements arise from that status).”). This Article uses and examines Ian Haney López’s articulation of “legal construction” as one way of distinguishing the role of law in establishing and maintaining socially constructed racial and gender hierarchies. IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 123–24 (1996).

Specifically, this Article uses legal constructionism to explore the developing jurisprudence concerning sexual harassment and adolescent workers. Given the problematic legal construction of race and gender, I argue that it is inappropriate to import those constructions in the evolving legal framework for adjudicating sexual harassment claims brought by adolescent workers. In order to truly protect adolescent workers like Natasha and Jennifer, courts must be willing to depart from traditional sexual harassment doctrine.¹⁷ Only a focused approach on dismantling race and gender hierarchies, as part of what I call a “deconstruction framework,” will realize the goal of Title VII to remediate discrimination based on sex and race.¹⁸ Only after rebuilding the foundation can we delve into the complicated issues of adolescent workplace sexual harassment.

An examination of how race and gender *directly* affect the work and legal experience of adolescent workers experiencing workplace sexual harassment or adjudicating claims of sexual harassment is beyond the scope of this Article. Despite the EEOC’s Youth@Work initiative, the agency does not track sexual harassment charges of Title VII violations by age and race. To date, there is no published social science data on adolescent workers, race, and sexual harassment. Yet the law is at work—stabilizing and constructing racial and gender hierarchies—even in the absence of explicit racial references in the sexual harassment cases involving adolescent workers.

The task of dismantling the legal construction of race and gender in cases involving adolescent workers is a formidable one, but the danger of the current framework is not hypothetical. At present, the Seventh Circuit is the only circuit that has adolescent-specific sexual harassment doctrine. The first published opinion setting workplace sexual harassment precedent specific to adolescent workers is the Seventh Circuit opinion in *Doe v. Oberweis Dairy*.¹⁹ The *Oberweis Dairy* court took the radical step of altering the *prima facie* case for hostile work environment claims brought by teenaged workers.²⁰ The court held a jurisdiction’s age of consent should be used as a proxy for when a worker can “welcome” sexual harassment.²¹

At first glance, the *Oberweis Dairy* decision is promising. However, the Seventh Circuit proceeded to carve out a seemingly small distinction with

17. Courts must be at the front line of deconstruction. Litigants are not well situated to fully address deconstruction arguments. See Goldberg, *supra* note 11, at 636–37 (exploring difficulty in making social constructionist arguments from litigant’s perspective).

18. See Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Look Forward*, 43 CONN. L. REV. 1253, 1349 (2011).

19. *Oberweis Dairy*, 456 F.3d 704 (7th Cir. 2006).

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

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

profound practical impact—if there is evidence that the adolescent worker was a “siren,”²² then that evidence could be used to reduce the worker’s damages. Stated differently, if there is evidence that the teen worker was promiscuous, seduced her attacker, was not a virgin, dressed provocatively, spoke provocatively, or otherwise signaled she was sexually available, her monetary recovery could be reduced or completely barred. Given the endorsement of an adolescent worker’s “siren”-like qualities as relevant evidence, the “siren” exception effectively eviscerates any protection of the *Oberweis Dairy* holding and contradicts its purpose. The “siren” exception in *Oberweis Dairy* is therefore a poignant contemporary example of how the law revitalizes and stabilizes racial and gender hierarchies in legal doctrine.²³

Part I of this Article examines the legal construction of race and gender in the development of hostile work environment sexual harassment law. I argue that the law has constructed race and gender from slavery, through the passage of Title VII, and to the development of Supreme Court precedent limiting the ability of all plaintiffs bringing sexual harassment claims. This section emphasizes legal construction as a perpetuating force of race and gender hierarchies that support the current justification for excluding “unworthy” workers from protection against sexual harassment.

Part II explores the current research on the sexual harassment of working adolescents and its deleterious effects. The section concludes with research supporting the need for increased focus on protecting all working adolescents from workplace harassment and the need for special legal rules to adjudicate claims brought by adolescent workers.

Part III demonstrates how the law has constructed race and gender in the developing framework for adjudicating sexual harassment cases brought by adolescent workers. The section focuses on the adolescent-specific framework in the Seventh Circuit following *Oberweis Dairy*, as well as trends in other circuits.

Part IV briefly outlines a deconstruction framework for adjudicating sexual harassment claims brought by adolescent workers that centers the “siren.” Returning to Natasha’s story, I theorize how a deconstruction framework could have affected her litigation experience. The article concludes by advocating broad use of the deconstruction framework to dismantle racial and gender hierarchies in sexual harassment doctrine and other areas of the law.

22. *Oberweis Dairy*, 456 F.3d at 715.

23. See Drobac, *Sex and the Workplace*, *supra* note 8, at 540.

I. THE LEGAL CONSTRUCTION OF RACE AND GENDER

Race and gender are social constructions,²⁴ not biological categories.²⁵ That is, the categories of race and gender are what society makes them to be. Suzanne Goldberg theorized:

Social construction arguments . . . focus on the process by which traits are imbued with significance . . . these arguments contend that identity categories are ‘social creations’ that ‘result from social belief and practice, are themselves complex social practices, and may be evaluated in terms of whose interests they serve.’²⁶

In this way, both race and gender have been and will continue to be socially “constructed.”

While a full examination of the historical construction of race and gender is beyond the scope of this Article, it is critical to recognize that inherent in the constructions of race and gender is the establishment of a hierarchal structure meant to bolster “White” and “Male” and subordinate the racial construction of “Black” and the gender construction of “Female.” To say that race and gender are “socially constructed” is to examine the multitude of historical and modern ways that these constructions maintain racial and gender hierarchies. Thus, the process of “construction” is inherently hegemonic.

In addition to the social construction of race and gender, race and gender are also “mutually constructed.”²⁷ Throughout history, race has been a necessary component of the social construction of gender, and vice versa. In an important examination of the connection between the racial disparity among victims of sexual harassment and the international sex tourism industry, Professor Tanya Kateri Hernández explores the deployment of race

24. I use the term “race” to refer to the social construction of race, and the term “gender” to focus on the social and legal construction of the arguably biological category of “sex.” “Race” is commonly misused as a biological category, not a social construction. See Justin Desautels-Stein, *Race as a Legal Concept*, 2 COLUM. J. RACE & L. 1, 3–4 (2012).

25. There is agreement among modern scientists that there is no biological basis between “races.” *Id.* at 29–30. Of course, race science did and still does serve to justify differential treatment based on race in the legal system and society in general. See *id.* at 17–30, for a discussion of the history of race science and its role in shaping the law.

26. Goldberg, *supra* note 11, at 635.

27. Hernández, *supra* note 13, at 209 (“Inasmuch as Whiteness is used to define the masculine characteristic of autonomy and gender is implicated in who gets ‘treated White,’ one can say that race and gender construct one another.”).

and gender constructions to subordinate both women and people of color around the world:

In effect, White womanhood is constructed by its juxtaposition with stereotypes of non-White women. Tagging Whiteness as pure and racial difference as sexual is simultaneously implicated in policing racial differences and notions of gender difference all in the service of ‘hetero-sexist patriarchy.’

These stereotypes define true women as White women and true men as White men, with rightful access for the latter to White women and illicit access to women of color. In short, race and gender not only intersect—they construct one another.²⁸

Critical and outsider scholarship has focused on how the social construction of race and/or gender affects an employee’s experience with racial and sexual discrimination/harassment in the workplace.²⁹ Much of this important scholarship explicitly or implicitly incorporates the idea that race and gender are socially constructed concepts.

Legal constructionism is particularly helpful in examining the anti-discrimination statutory scheme in Title VII. Though at least one of the main goals of Title VII is anti-subordination, Title VII (and similar statutes) has been used by litigants and courts in an affirmatively subordinating fashion, supplanting the very foundation of the statute. Race and gender have been particularly vulnerable to the constructing force of law in employment discrimination doctrine. Stepping away from the historical view of race and gender as immutable biological categories and understanding the ways race and gender are legally constructed allows a more effective and nuanced look at how sexual harassment jurisprudence has developed to perpetuate, rather than prevent and remediate, discrimination on the basis of race and gender. By examining the way law has been and is deployed to maintain racial and gender subordination through sexual harassment law,³⁰ we can recognize and hopefully dismantle those hierarchies in developing areas of jurisprudence.

Ian F. Haney López argues there are three ways law as an ideology (as opposed to a coercive force) operates to construct race: (1) reification, (2) legitimization of socially constructed categories, and (3) helping social categories transcend their socio-historical development.³¹ This section analyzes each theoretical concept and then applies it to the development of sexual

28. *Id.* at 210–11.

29. See sources cited *supra* note 10.

30. See Hernández, *supra* note 13, at 214.

31. LÓPEZ, *supra* note 16, at 124, 126, 130.

harassment doctrine. In short, this section argues that the legal construction of race and gender in the development of hostile work environment sexual harassment law has relied upon and imported a racialized and racist gender hierarchy legally established and maintained during slavery, overtly formative in the inclusion of sex as a protected category in Title VII, and then embedded in the Supreme Court's recognition and subsequent interpretation of a cause of action for hostile work environment harassment.

A. Reification

Law reifies race and gender constructions, divorcing the consequences of those constructions from hegemony and labeling them as usual, logical, and ordinary. "To reify racial categories means to transform them into concrete things, making the categories seem natural, rather than human creations."³² Negative controlling images are transformed into unchallenged character traits confirmed by the environment. In this way, modern economic inequality is justified by the controlling image of lack of ambition, not lack of opportunity or economic persecution. Lack of intelligence, not segregation, justifies the achievement gap. And criminal propensity, not mass incarceration, justifies racial disparities in the prison system. "The law constructed 'whiteness' as an objective fact, although in reality it is an ideological proposition imposed through subordination. This move is the central feature of reification."³³

As an example, López powerfully illustrates how the legal structure supporting segregation has created, sustained, and justified economic inequality and poverty:

. . . [T]he significance of legally mandated segregation does not lie primarily in its power to police indeterminate identities through neighborhood affiliation, though this should not be discounted. It lies instead in the power of segregation to create and maintain the poverty and prosperity that society views as the results of innate racial character, rather than as predictable consequences of social and specifically legal discrimination.

[. . .] Race seems to explain, especially to Whites but also to minorities, the pathology so evident on U.S. streets. On these streets, racial differences seem fundamental, immutable, real and self-evident, confirming not only the existence of races, but also every negative suspicion about racial characteristics.³⁴

32. *Id.* at 130.

33. Harris, *supra* note 16, at 1730.

34. LÓPEZ, *supra* note 16, at 132.

Once entrenched, simply repealing offending legislation does little to hamper the reification process. The harm, having been legislated, enforced, litigated, interpreted, and upheld is now part of the invisible societal foundation existing alongside conscious, unconscious, and structural racism and sexism.³⁵ Thus, *Brown v. Board of Education*,³⁶ while formally outlawing government-sanctioned segregation in education, could not itself reverse the cycle of multi-generational economic and educational inequality. The legal structure supporting inequities in public education, economic opportunity, and employment persist, conveniently justified by controlling images of Blacks as lazy and mentally incapable.³⁷ The achievement gap in public education becomes inevitable and natural, instead of a direct accomplishment of a system of laws and jurisprudence designed to deprive educational opportunities and resources from non-Whites.³⁸ As Kimberlé Crenshaw has observed, reification helps Whites legitimize subordination by affirming that “those who should logically be on the bottom are on the bottom . . . if Blacks are on the bottom, it must reflect their relative inferiority.”³⁹

The poison of reification is that, over time, the underlying racial and gender constructions have a ripple effect, animating additional harms that are difficult to trace and even harder to remediate. Advocates of social change are forced into discourse concerning “whether” racial and gender hierarchies exist, and “where” the hierarchies originate. As time goes on, the dialogue drifts further away from the work of “how” to dismantle racial and gender hierarchies. As law reifies racial and gender constructions, de-construction of those constructions remains elusive.

Focusing on the law of sexual harassment, the American institution of slavery is a useful point of departure when examining law’s power to construct race and gender through reification. Certainly, the notion that some women are legally impervious to sexual violation is centuries old.⁴⁰ The colonial distinction of a woman worthy of being a wife versus a woman worthy of servitude⁴¹ gave way to a sophisticated legal system legitimizing the sexual exploitation of enslaved Black women.⁴² Cheryl Harris observed that slavery “configured and structured social and legal boundaries of both race

35. *Id.* at 133.

36. 347 U.S. 483 (1954).

37. LÓPEZ, *supra* note 16, at 132.

38. *Id.*

39. Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimization in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1380 (1988).

40. Paula Giddings, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 34 (1984) (“After all, it had been accepted as far back as Plato that women fell into three categories: whore, mistress, and wife . . .”).

41. *Id.*

42. See Harris, *supra* note 14, at 311–13.

and gender,” and serves as “the primordial site of the production of racial patriarchy.”⁴³

Professor Adrienne Davis has argued that slavery should be viewed both as a “sexual economy” and as an extreme form of sexual harassment.⁴⁴ In characterizing slavery as a sexual economy, Davis examined two ways enslaved women were sexually exploited for financial gain. First, slave women gave birth to enslaved children who became the property of the slave owner.⁴⁵ Thomas Jefferson offered chilling words about the economic value of a slave woman’s children to the slave owner when he wrote in 1819, “I consider a woman who brings a child every two years as more profitable than the best man on the farm; what she produces is an addition to capital.”⁴⁶ Second, enslaved women were forced into sexual labor in service to a broad client base—slave owners, relatives, friends, and business associates.⁴⁷ Gerda Lerner poignantly wrote, “[t]he sexual exploitation of black women by white men was so widespread as to be general.”⁴⁸

Davis further argues that slavery was sexual harassment because it operated both as a mechanism of coerced sexual pleasure and control, indeed “labor, sexual and racial control.”⁴⁹ Slavery was “widespread, institutionalized, state-sanctioned sexual harassment implemented in perhaps its most corrupt form.”⁵⁰ Viewing slavery as both a sexual economy and sexual harassment allows us to understand the especially “brutal racial and gender subordination” that slavery entailed.⁵¹

Importantly, understanding slavery as a sexual economy and as sexual harassment deepens our understanding of how race and gender came to be mutually constructed. “An enslaved woman might be socially constructed as ‘masculine’ for the purposes of productive work and brutal physical punishment, but very much a woman for the purposes of reproductive and sexual

43. *Id.*

44. See Adrienne D. Davis, *Slavery and the Roots of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 457 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

45. See Adrienne D. Davis, “Dont Let Nobody Bother Yo’ Principle”: *The Sexual Economy of American Slavery*, in SISTER CIRCLE: MEANINGS AND REPRESENTATIONS OF BLACK WOMEN’S WORK 103, 105 (Sharon Harley et al. eds., 2002).

46. *Id.* at 109 (citing Letter from Thomas Jefferson to Joel Yancy (Jan. 17, 1819), reprinted in THOMAS JEFFERSON’S FARM BOOK: WITH COMMENTARY AND RELEVANT EXTRACTS FROM OTHER WRITINGS 42, 43 (Edwin Morris Betts ed., 1953)).

47. *Id.* at 114.

48. BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 46 (Gerda Lerner ed., 1972).

49. Davis, *supra* note 44, at 463.

50. *Id.* at 464.

51. *Id.*

exploitation.”⁵² Black women were simultaneously sexually abused as women, yet excluded from the construction of gender as “feminine”; enslaved women performed much of the same grueling work as enslaved men.⁵³ White women performing “non-feminine” work on the slave plantation usually did so out of necessity (she tended to be related to the plantation owner) or punishment.⁵⁴ White women punished with fieldwork were divested of the title of “woman.”⁵⁵ Slavery thus converged the constructions of race and gender; while White men, White women, and Black men engaged in labor aligned with gender roles, enslaved Black women did not.⁵⁶ The role of sexuality within gender was also race-dependent. “Whereas the lady was deprived of her sexuality, the black woman was defined by hers.”⁵⁷

The legal structure supported slavery in every way. Slaves were defined as property, not human, under the law.⁵⁸ The law of *partus sequitur ventrum* (“the child follows the mother”) required a child to inherit the enslaved or free status of its mother, regardless of the father’s status; indeed, slaves were considered fatherless.⁵⁹ Enslaved black women could not legally be raped, and were not legally considered women at all, but property.⁶⁰ Nor could slave testimony be used as evidence against a White person in court.⁶¹ After

52. *Id.* at 468.

53. Davis, *supra* note 45, at 106.

54. *Id.* at 107 (“In the eyes of colonial white Americans, only debased and degraded members of the female sex labored in the fields.”).

55. *Id.* (citing BELL HOOKS, *AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM* 22 (1981)).

56. *Id.*

57. *Id.* at 115 (quoting KATHERINE FISHURN, *WOMEN IN POPULAR CULTURE: A REFERENCE GUIDE* 10–11 (1982)).

58. Harris, *supra* note 16, at 1720.

59. Davis, *supra* note 45, at 108 (citing *Frazier v. Spear*, 5 Ky. (2 Bibb) 385, 386 (1811) (“The father of a slave is unknown to our law.”) (citations omitted); see also Harris, *supra* note 16, at 1719 (describing passage of Virginia law in 1662 requiring a slave child to inherit the legal status of his mother).

60. See Davis, *supra* note 45, at 113 (discussing *State v. George*, 37 Miss. 316 (1859), which overturned the rape conviction of an enslaved girl and legal commentator Thomas Cobb’s agreement with the *George* court’s determination, writing “[t]he violation of the person of a female slave, carries with it no other punishment than the damages which the master may recover for the trespass upon his property.”); see also *id.* at 114 (noting that the majority of southern courts were in agreement with the holding in *State v. George*).

61. Aaron Schwabach, *Jefferson and Slavery*, 19 T. JEFFERSON L. REV. 63, 71–72 (1997) (describing laws regulating slaves in Virginia). The testimony of Black women is still considered less credible in court. See, e.g., Linda Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1066–67, 1067–68 n.229 (1995) (discussing negative juror and judicial attitudes toward Black women victims and witnesses and reviewing cases); Michèle Alexandre, “*Girls Gone Wild*” and Rape Law:

the abolition of slavery, the law stabilized the racial and gender hierarchies through Jim Crow laws, convict leasing, and the continued de-criminalization of violence against Black women and other women of color.⁶²

Legal construction as reification helps explain how and why sexual harassment doctrine has devolved in a way that supports, rather than supplants, race and gender hierarchies. The doctrine enforces a strict distinction between those worthy of legal protection on one hand and those legally incapable of experiencing sexual harm on the other. Having legitimized the protected/unprotected distinction in the maintenance of and justification for the institution of slavery, the legacy of those outside legal protection from sexual harm persists, and not just for Black women.⁶³

As will be discussed below in the specific context of adolescent workers, sexual harassment law in its current form still operates to discipline and punish those constructed outside of legal protection. Legal construction as reification makes it legally instinctual to distinguish and prevent some workers from seeking a legal remedy for sexual harassment not because of the worker's experience in the workplace, but because of the worker's characteristics. In short, engaging in certain conduct, however unrelated to the workplace or the workplace sexual harassment a worker experiences, may divest that worker of a right to legal relief.

B. Legitimization

Law also constructs race and gender by legitimizing racial and gender constructions; race and gender transform from societal creations to distinct legal categories. "Law thus defines, while seeming only to reflect, a host of social relations, from class to gender, from race to sexual identity."⁶⁴ Those seeking legal relief from persecution based on societal constructions are forced to self-define using the same system of oppression.⁶⁵ Through legitimization, gender and racial categories are both the mechanism for oppression and the sole opportunity for legal protection.

Revising The Contractual Concept of Consent & Ensuring An Unbiased Application of "Reasonable Double" When The Victim Is Non-Traditional, 17 AM. U. J. GENDER SOC. POL'Y & L. 41, 44–45 (2009) (stating that, although black women are more likely to be victims of sexual assault than white women, they are less likely to be believed in court).

62. Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1258–59 (2012).

63. See COLLINS, *supra* note 12, at 69–70 (controlling images of Black women "are designed to make racism, sexism, poverty, and other forms of social injustice appear to be natural, normal, and inevitable parts of everyday life.").

64. LÓPEZ, *supra* note 16, at 87.

65. See Harris, *supra* note 16, at 1763.

The most prevalent example of legal construction via legitimization in employment law is the anti-discrimination scheme established by the Civil Rights Act of 1964.⁶⁶ The Act prohibits discrimination on the basis of race, color, national origin, etc., in employment, education, voting and public accommodations.⁶⁷ López argues that the law’s treatment of race as a legal category (as opposed to a socially constructed one) has guaranteed the concept of race as a permanent fixture in American society; people of color are forced to use and conform to racial categories when seeking a legal remedy for discrimination.⁶⁸ Kimberlé Crenshaw has written that the antidiscrimination scheme in the Civil Rights Act “produc[es] apparent victories in the short run,” yet “ultimately legitim[izes] the very racial inequality and oppression” the Act was enacted to address.⁶⁹ Courts engage in intellectual gymnastics to construe racial categories in the most narrow manner possible, labeling narrowly-defined harms illegal and discarding the rest.⁷⁰ Similarly, courts reject most attempts to push beyond the boundaries of racial categories. And race, now legitimated, can be co-opted by Whites (who were not subject to historical discrimination) to entrench and retrench racial hierarchies.⁷¹

An example of legal construction as legitimization in sexual harassment doctrine is also found in the Civil Rights Act. Title VII of the Act (“Title VII”), the section prohibiting discrimination in employment, makes it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”⁷² The Civil Rights Act also created the Equal Employment Opportunity Commission.⁷³ Compensatory damages, unavailable under the original act, were added by the Civil Rights Act of 1991.⁷⁴

Courts and scholars have readily acknowledged the race and gender politics surrounding the addition of sex as a protected class under Title VII. The dominant historical narrative frames the sex amendment as a last-minute “race versus gender” struggle with opponents of the Civil Rights Act

66. Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (1964).

67. *Id.*

68. LÓPEZ, *supra* note 16, at 88.

69. Crenshaw, *supra* note 39, at 1334.

70. *See* LÓPEZ, *supra* note 16, at 125.

71. *See id.* at 129–33.

72. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1) (Westlaw through 2015).

73. § 2000e–4(a) (Westlaw).

74. § 1981a(b) (Westlaw). *See* RAYMOND F. GREGORY, THE CIVIL RIGHTS ACT AND THE BATTLE TO END WORKPLACE DISCRIMINATION: A 50 YEAR HISTORY 75–84 (2014), for a general discussion of amendments to Title VII.

proposing the addition of sex as a protected category in order to mock and defeat the civil rights bill.⁷⁵ The oft-repeated story is that liberal supporters of the civil rights legislation were forced into opposing the sex amendment to save the Act's protections against discrimination on the basis of race.⁷⁶ While some scholars have attempted to debunk the folklore surrounding the amendment adding sex, the characterization of the addition of sex to the Civil Rights Act as a "congressional joke" persists.⁷⁷

Missing from most accounts is the critical role Black women played as the antithetical reference to the rights of White women in passage of the legislation. While many have argued that the eventual passage of the sex amendment and the inclusion of sex in the Civil Rights Act ensured White women were not excluded, a legal constructionist reading of the debate transcripts reveals the real concern of many members of Congress was ensuring Black women were subjugated, subordinate to all men and particularly White women. From this perspective, the genesis of Title VII's prohibition on the discrimination on the basis of "sex" is revealed as a deliberate strategy to enshrine the social constructions of race and gender into a legal structure that perpetuates and legitimates the position of women of color at the bottom of the social and economic hierarchy. Supporters of the bill found themselves forced into a debate about which identity category deserved protection—race or gender—effectively conceding the legitimacy of those categories.

The floor debate on February 8, 1964 illustrates the legitimization process. On that day, Congressman Howard W. Smith, a staunch civil rights opponent, introduced an amendment to the proposed civil rights legislation adding sex as a protected class.⁷⁸ Smith had previously characterized the bill as being "as full of booby traps as a dog is full of fleas."⁷⁹ In introducing the proposed sex amendment, Smith made little effort to hide his true intention to defeat the bill and its corollary prohibition of racial discrimination.⁸⁰ Smith's satirical performance in introducing the sex amend-

75. See, e.g., *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 428 n.36 (E.D. Mich. 1984) ("This Court—like all Title VII enthusiasts—is well aware that the sex discrimination prohibition was added to Title VII as a joke by the notorious civil rights opponent Howard W. Smith.").

76. See Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 137–38, 154–55 (1997).

77. See *id.* at 149–50.

78. 110 CONG. REC. 2577 (1964) (statement of Rep. Howard Smith).

79. Bird, *supra* note 76, at 151 (citing CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT* 116 (1985)).

80. *Id.* at 151–52.

ment was successful; he had to stop speaking several times to allow for the laughter of his colleagues to die down.⁸¹

While Smith’s introduction of the amendment may have been a ploy designed to thwart the legislation,⁸² debate regarding the amendment quickly turned to the merits. Opponents of the “sex” amendment, primarily concerned with counteracting Smith’s efforts, argued that sex discrimination was fundamentally different than racial discrimination, and thus required separate legislation.⁸³ The statements of some members of Congress, however, reveal the underlying concern that omitting the category of “sex” from the legislation would disrupt the status quo of the racial and gender hierarchy by granting Black women more rights in the workplace than White women.

Consider, for example, the statement of Congressman L. Mendel Rivers, a well-known segregationist, in supporting the amendment adding “sex” as a protected basis under Title VII:

I rise in support of the amendment . . . making it possible for the white Christian woman to receive the same consideration for employment as the colored woman. It is incredible to me that the authors of this monstrosity – whomever they are – would deprive the white woman of mostly Anglo-Saxon or Christian

81. *See id.* (“Smith did not appear serious. . . . [a]udience members burst into laughter. The pandemonium was so loud that Smith had to stop many times to settle everyone.”)(citations omitted).

82. *See id.* at 149–50 (describing efforts of the National Women’s Party (“NWP”) to convince Smith to introduce an amendment prohibiting discrimination on the basis of sex to the Civil Rights Act). The NWP was well-known for advancing an agenda that excluded the concerns of women of color:

The NWP was not a “typical” women’s organization. Most NWP members came from middle or upper class backgrounds. Almost no women from the working class joined and the party admitted no male members. Unlike other feminist movements, which drew their strength from large membership, legacies and wealthy benefactors funded the NWP. As a result, the NWP did not sympathize with the working class, or non-white women.

Id. at 147–48.

83. For example, Congressman Emanuel Celler, leader of the bipartisan coalition to pass the bill, predicted adding sex as a protected category would likely defeat the entire bill:

I think the amendment seems illogical, ill timed, ill placed and improper. . . I say, wait, indeed until more returns are in before we attempt to do anything like this on this bill. In any event, it should not be done piecemeal, it should be done generally and universally.

110 CONG. REC. 2578 (1964) (statement of Rep. Emanuel Celler).

heritage equal employment opportunity before the employer. I know this Congress will not be a party to such evil.⁸⁴

In opposing the addition of “sex” as a protected basis under Title VII, Congressman Rivers deployed the construction and diametrical distinction between the “colored woman” and the “Anglo-Saxon or Christian” White woman to advocate for maintenance of the racial and gender hierarchy. He described the potential disruption of the hierarchy as “evil,” appealing to the normative ideal that race is nature and should be maintained. Rivers recognized the legitimacy granted to certain categories by the legislation. For the structure to be legitimate, it had to enforce the usual hierarchy of subordinating people of color.

The comments of Congresswoman Martha Griffiths, known for her work in advocating for passage of the Equal Rights Amendment, are also illuminating in this regard:

I rise in support of the amendment primarily because I feel as a white woman when this bill has passed . . . that white women will be last at the hiring gate.⁸⁵

. . . And if you do not add sex to this bill, I really do not believe there is a reasonable person sitting here who does not by now understand perfectly that you are going to have white men in one bracket, you are going to try to take colored men and colored women and give them equal employment rights, and down at the bottom of the list is going to be a white woman with no rights at all.⁸⁶

. . . [A] vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister.⁸⁷

Here, Congresswoman Griffiths appeals to the construction of “White woman” in order to advocate for the passage of Title VII. The reference to “wife,” “widow,” “daughter,” and “sister” is meant to remind all in attendance of the natural position of White women as higher in the gender and race hierarchy relative to Black women. Unintentionally or intentionally, Griffiths evokes the historical dichotomy between White and Black women to warn of potential disruption to the social hierarchy. Griffiths’ comments

84. 110 CONG. REC. 2583 (1964) (statement of Rep. L. Mendel Rivers).

85. *Id.* at 2578.

86. *Id.* at 2579.

87. *Id.* at 2580.

illustrate the force of legal construction via legitimization—without a category or “bracket” for White women, they would have “no rights at all.” Her comments also illustrate that the “bracket” occupied by White men was not to be disrupted by the legislation; there would always be a place for White men at the top of the gender and racial hierarchy.

Of course, the passage of Title VII and the corollary provisions of the Civil Rights Act was the result of long-standing advocacy meant to remediate historical discrimination. But the deployment of racial categorizations by Rivers and Griffiths in debating whether to add “sex” as a protected category under the Act illustrates the embedment of social constructions into Title VII, as well as the legal process of legitimizing racial and gender categories. Both Griffiths and Rivers were White. Griffiths was a proponent of the legislation and supported equal employments based on race and sex. Rivers was a staunch segregationist and opponent of the bill. Despite their distinct political views, both Rivers and Griffiths invoked the same construction of race and racial hierarchy to accomplish their goal.

In the end, “racism serv[ed] a consensus-building hegemonic role.”⁸⁸ Title VII went on to pass with a prohibition against discrimination based on sex. With the social constructions of race and gender imported directly into the protected bases of the statute, Title VII now legitimates and maintains the subordinating social constructions necessitating its passage. In the fifty years since the passage of Title VII, the statute and its judicial interpretation has necessitated strict adherence to the protected categories in order to vindicate employment rights.⁸⁹

Part III will demonstrate how, in the context of adolescent workers, the law constructs race and gender through legitimization. The history of Title VII reveals the embedded nature of racial and gender hierarchies in sexual harassment doctrine. The inclusion of “sex” as a protected category perpetuates the binary between workers who deserve legal protection, and those that remain marginalized.

88. Crenshaw, *supra* note 39, at 1370.

89. For example, intersectional claims alleging discrimination on a combined basis of race and sex have been rejected as not neatly fitting into either category, despite the reality of the intersectional plaintiff's experience of discrimination. See Crenshaw, *supra* note 10, at 1473, for a discussion of the difficulty in conceptualizing intersectional claims. Further, courts have struggled with how to define discrimination based on “sex.” See generally, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (establishing that gender stereotyping is actionable under Title VII as discrimination “based on sex”).

C. Transcendence

Another way the law constructs race and gender is through transcendence. Professor Ian Haney López theorizes that the use of case precedent and legal language provides new and obscured pathways for racial and gender subordination to transcend its historical roots in ways that appear neutral, natural, and non-subordinating.⁹⁰ Historical constructions of race and gender are revitalized and embedded in deceptively innocuous and neutral legal tests, terms, phrases, and doctrine.⁹¹

For example, López examines the deployment of the phrase “alien ineligible for citizenship” as a synonym for “Japanese” to avoid the equal protection clause of the Fourteenth Amendment.⁹² Between 1913 and 1947, eleven states prohibited an “alien ineligible to citizenship” from owning agricultural land.⁹³ In his concurrence in *Oyama v. California*, the 1948 Supreme Court case striking down a California statute forbidding land ownership by Japanese “aliens ineligible for citizenship,” Justice William Murphy characterized the California statute in question as “nothing more than an outright racial discrimination.”⁹⁴ Rejecting California’s argument that the law’s use of the phrase “alien ineligible to citizenship” lacked a racist purpose or intent, Justice Murphy examined the social and historical genesis of the California law’s 1913 enactment and wrote that despite the “cloak”⁹⁵ provided by the “alien ineligible for citizenship” phrase, “[t]he intention of those responsible for the 1913 law was plain. The ‘Japanese menace’ was to be dealt with on a racial basis.”⁹⁶

In this modern era of post-racial, post-identity, universalist, and color-blind politics, it is critical to identify and address the law’s role in constructing race and gender through transcendence. The cyclical interplay between law, race, and gender is an increasingly invisible and particularly destructive force. Through law, racial and gender subordination transcend and transform from socially unsavory beliefs into deceptively innocuous legal doctrine.⁹⁷ The effect of the racial and gender subordination is the same, but

90. LÓPEZ, *supra* note 16, at 90.

91. *Id.* at 90.

92. *Id.* at 90-92.

93. *Id.* at 90 (citing Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7 (1947)).

94. *Oyama*, 332 U.S. 633, 650 (1948) (Murphy, J., concurring).

95. *Id.* at 650-51.

96. *Id.* at 655.

97. LÓPEZ, *supra* note 16, at 91 (“Legal language can allow ideas of race to transcend their historical context through precedent, and also can contribute to the construction of race by providing a new vocabulary with which to take note of, stigmatize, and penalize putative racial differences . . . Law thus frees racial categories not only

the process is freed from societal disapproval and legal prohibition. Thus, the modern challenge is less about remembering racism and sexism and more about seeing what the law has obscured.

A salient example of the transcendent power of the law to construct race and gender in sexual harassment doctrine is evident in *Meritor Savings Bank v. Vinson*, the landmark Supreme Court decision first recognizing a Title VII claim based on hostile work environment sexual harassment.⁹⁸ Mechelle Vinson, a bank teller in Washington, D.C. at a predecessor bank of Meritor Savings Bank, brought a sexual harassment action against the bank and Sidney Taylor, the branch manager. Pervasive through the court record, yet absent from the Supreme Court’s opinion, was the fact that both Vinson and Taylor were Black.

Vinson alleged Taylor sexually harassed and assaulted her throughout her tenure at the bank from September 1974 until her termination for absenteeism in November 1978.⁹⁹ Vinson testified during the eleven-day bench trial before the District Court that Taylor hired her as a teller trainee.¹⁰⁰ Vinson described Taylor as “fatherly” during her 90-day probationary period, after which she was promoted from teller, to head teller, and eventually assistant branch manager.¹⁰¹ In May 1975, Taylor took Vinson out to dinner and propositioned her.¹⁰² When she refused, Taylor reminded Vinson that he hired her and that she “owed him.”¹⁰³ She eventually agreed to have sex with Taylor out of fear that she would lose her job at the bank.¹⁰⁴ Vinson testified she was forced to have sex with Taylor forty to fifty times between May 1975 and 1977, mostly at the bank, both during and after bank hours.¹⁰⁵ All of the encounters were against her will, and Taylor forcibly raped her on several occasions.¹⁰⁶ Her vaginal bleeding was so bad after one rape that she had to seek medical attention.¹⁰⁷ In addition to the sexual assault, Vinson endured Taylor’s touching and fondling (sometimes in front of other bank employees), him exposing himself to her, and his

from contextual bounds, but also from the bounds society places on the use of race . . . the law’s ability to provide seemingly neutral synonyms for race may be one of the most important legal mechanisms in the current processes of racial construction.”).

98. 477 U.S. 57 (1986).

99. *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37, *1 (D.D.C. Feb. 26, 1980).

100. *Meritor*, 477 U.S. at 59–60 (1986).

101. *Vinson*, 23 Fair Empl. Prac. Cas. (BNA) 37, at *1.

102. *Vinson*, 23 Fair Empl. Prac. Cas. (BNA) 37, at *1.

103. *Vinson*, 23 Fair Empl. Prac. Cas. (BNA) 37, at *2.

104. *Vinson*, 23 Fair Empl. Prac. Cas. (BNA) 37, at *2.

105. *Vinson*, 23 Fair Empl. Prac. Cas. (BNA) 37, at *2.

106. *Vinson*, 23 Fair Empl. Prac. Cas. (BNA) 37, at *2.

107. *Vinson*, 23 Fair Empl. Prac. Cas. (BNA) 37, at *2.

inappropriate sexual remarks.¹⁰⁸ Vinson also testified that she never reported Taylor's actions because he threatened to have her raped (as another bank employee had recently been raped) and had threatened her life.¹⁰⁹

Sidney Taylor denied all of Vinson's allegations, testifying that he never fondled or touched Vinson, made suggestive remarks, had a sexual relationship with her, or even asked Vinson for sex.¹¹⁰ He maintained that he only went to lunch with Vinson once with another employee.¹¹¹ Finally, he accused Vinson of making sexual advances towards him, which he declined.¹¹² The bank argued it was not liable for sexual harassment since Vinson never complained about Taylor's conduct or reported her allegations.¹¹³

After the bench trial, the United States District Court for the District of Columbia found for Taylor and the bank, finding that Vinson was not the victim of sexual harassment.¹¹⁴ Specifically, the court found Vinson's promotions and raises were based on merit alone and not as a condition of a sexual relationship with Taylor. The court found that Vinson was never required to endure the sexual assaults and harassment in order to maintain employment or be promoted at the bank, and, if there was a relationship with Taylor (a fact that Taylor denied throughout trial), then it was "voluntary."¹¹⁵

Vinson appealed and the United States Court of Appeals for the D.C. Circuit reversed.¹¹⁶ First, the court found the district erred in holding Vinson was not the victim of sexual harassment, as her allegations may have demonstrated a harassing work environment even if she did not experience a loss of tangible job benefits. Second, the court questioned the district court's finding that any relationship between Taylor and Vinson was "voluntary."¹¹⁷ Importantly, the court noted that the district court's finding of Vinson's voluntary participation in a sexual relationship with Taylor may have been based upon "the voluminous testimony regarding Vinson's dress and personal fantasies," and also that "a woman does not waive her Title VII rights by her sartorial or whimsical proclivities."¹¹⁸

108. *Vinson*, 23 Fair Empl. Prac. Cas. (BNA) 37, at *2.

109. *Vinson*, 23 Fair Empl. Prac. Cas. (BNA) 37, at *2.

110. *Vinson*, 23 Fair Empl. Prac. Cas. (BNA) 37, at *2.

111. *Vinson*, 23 Fair Empl. Prac. Cas. (BNA) 37, at *2.

112. *Vinson*, 23 Fair Empl. Prac. Cas. (BNA) 37, at *2.

113. *Vinson*, 23 Fair Empl. Prac. Cas. (BNA) 37, at *3.

114. *Vinson*, 23 Fair Empl. Prac. Cas. (BNA) 37, at *7-8.

115. *Vinson*, 23 Fair Empl. Prac. Cas. (BNA) 37, at *7-8.

116. *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985).

117. *Vinson*, 753 F.2d at 145.

118. *Vinson*, 753 F.2d at 146, n.36.

The Supreme Court of the United States granted certiorari and affirmed the court of appeals decision.¹¹⁹ Endorsing the EEOC regulations at the time, the Supreme Court recognized two ways to state a claim under Title VII: (1) *quid pro quo* harassment, and (2) harassment based upon a sexually hostile work environment.¹²⁰ The majority opinion, authored by Judge Rehnquist, held Title VII is violated when the sexual harassment is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”¹²¹

On the issue of “voluntariness,” the Supreme Court agreed with the D.C. Circuit that “welcomeness” was the correct standard to evaluate hostile work environment sexual harassment.¹²² The court held the district court’s focus on whether Taylor’s sexual advances were voluntary, “in the sense that the complainant was not forced to participate against her will,” was misplaced.¹²³ The correct inquiry is “welcomeness” which “presents difficult problems of proof and turns largely on credibility determinations.”¹²⁴ In evaluating that proof, the Supreme Court disagreed with the Circuit Court’s rejection of evidence concerning Vinson’s style of dress and sexual fantasies.¹²⁵ Relying upon the emphasis of the EEOC guidelines requiring the trier of fact to evaluate allegations of sexual harassment “in light of the record as a whole” and “the totality of circumstances, such as the nature of the sexual advances and context in which the alleged incidents occurred,” the Supreme Court found evidence of a plaintiff’s “sexually provocative speech or dress” to be “obviously relevant.”¹²⁶

Patricia Barry, Vinson’s attorney, offered key insight about the evidence offered at trial about Vinson:

What happened in [the] courtroom was not a rational, orderly attempt to get at the truth of what happened to Mechelle Vinson, but rather a ritualistic psychodrama based on enduring, but extremely hostile and even possibly subconscious, notions of who a woman is. At trial, we had a throwback, a lapse, to old defenses against a woman’s charge of sexual abuse by a man. The defenses are she deserved it because she asked for it; we know she

119. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

120. *Meritor*, 477 U.S. at 64–65.

121. *Meritor*, 477 U.S. at 67.

122. *Meritor*, 477 U.S. at 68.

123. *Meritor*, 477 U.S. at 68.

124. *Meritor*, 477 U.S. at 68.

125. *Meritor*, 477 U.S. at 68–69.

126. *Meritor*, 477 U.S. at 69.

asked for it, because she is a temptress, a seductress, a lascivious woman.¹²⁷

Interestingly, despite the clear assessment throughout the Circuit Court and Supreme Court opinion that the legal and factual findings of the district court were improper, the Supreme Court offered no evaluation or guidance on how lower courts should evaluate the relevance of a plaintiff's "sexually provocative speech or dress," and instead implicitly endorsed an inexplicably broad universe of potential evidence. Tellingly, none of the evidence about Vinson's speech, fantasies, or dress directly involved Sidney Taylor.¹²⁸ Throughout the trial, Taylor denied having any relationship with Vinson. Other than testifying that he rebuffed a sexual advance from Vinson, neither Taylor nor the bank appear to have argued that Vinson's speech or dress "welcomed" Taylor's conduct. In short, the trial testimony about Vinson's sexuality and style of dress offered no "context" whatsoever to her allegations of Sidney Taylor's repeated harassment.

In her recent examination of plaintiff Mechelle Vinson's experience litigating her sexual harassment claim in *Meritor Savings*, Professor Tanya Hernandez identifies the court's importation of socio-historical racial and gender constructions into jurisprudence affecting all women litigating sexual harassment suits:

(T)he Supreme Court's decision to make a complainant's "sexually provocative speech or dress" relevant to a finding of sexual harassment embeds unconscious historical presumptions about the wantonness of Black women into the legal doctrine. The examination of the attire of Black women (such as Mechelle Vinson) dovetails with stereotypic notions of the sexual availability of Black women. By ignoring the race of the plaintiff, the Supreme Court was able to overlook the significance of racial stereotypes that pervade the question of appropriate evidence of welcomeness. The insistence on a color-blind assessment in the Supreme Court analysis obstructed recognition of the speech and dress portion of the welcomeness assessment as a problematic racial construct. As a result, all sexual harassment plaintiffs are now unfairly burdened with an inquiry into whether their

127. Tanya K. Hernández, "What Not to Wear"-Race and Unwelcomeness in Sexual Harassment Law: The Story of *Meritor Savings Bank v. Vinson*, in *WOMEN AND THE LAW STORIES* 301 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011).

128. *Id.* at 285, 286 n.49.

apparel and speech welcomed sexual advances, and this evidence may be used to eviscerate their claims of sexual harassment.¹²⁹

The legacy of *Meritor*'s endorsement of whether an evaluation of a plaintiff is “promiscuous,” is an incredibly difficult hurdle for sexual harassment plaintiffs to clear. Although the Federal Rules of Evidence try to limit the use of character evidence (and specifically evidence concerning a plaintiff's sexual history) at trial, the evidence is vulnerable to discovery.¹³⁰ The Supreme Court's 1998 decisions in *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton* established an affirmative defense to liability often used by employers in hostile work environment cases;¹³¹ transcendence operates in the analysis of the *Ellerth/Faragher* defense to cloak constructions of race and gender into the “reasonable” actions of the employee in reporting the alleged harassment.¹³² Phrases like “alien ineligible for citizenship,” “sexually provocative speech or dress” and even “reasonable” work in similar ways to stabilize racial and gender hierarchies. Legal construction through transcendence has guaranteed that the constructions of race and gender remain a permanent fixture in sexual harassment doctrine.

129. Hernández, *supra* note 127, at 303–04.

130. FED. R. EVID. 412.

131. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

132. The affirmative defense is a two-prong test that aims to assess whether: (a) the plaintiff “reasonably” responded and worked to halt the harassing behavior, and (b) whether the employer had appropriate mechanisms in place to prevent harassment and quickly correct harassing behavior. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Scholars have noted the unreasonable nature of the affirmative defense and its mismatch with social science data on how victims of sexual harassment actually respond to harassing behavior. *See, e.g.*, Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008). Other scholars have criticized the defense for allowing employers the benefit of an affirmative defense for having mechanisms in place like anti-sexual harassment training which may do little to actually prevent harassment. *See, e.g.*, Susan Bisom-Rapp, *Fixing Watches With Sledgehammers: The Questionable Embrace of Sexual Harassment Training By The Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 162–63 (2001) (“Given the prevalence of sexual harassment training, one might assume that its utility is beyond dispute. Yet very little empirical research has been conducted on the effects of these programs.”). Prof. Hernández has argued that women of color specifically are more limited by the *Ellerth/Faragher* affirmative defense because they are less likely to report harassment internally (for various reasons), which may prejudice their ability to bring a harassment claim. Hernández, *supra* note 10, at 1269. I argue, as illustrated through discussion of the adolescent hostile work environment case of *Fenton v. Portillo's Hot Dogs*, Part III.C.1. *infra*, that the *Ellerth/Faragher* defense is a demonstration of the legal construction of race and gender through transcendence.

II. WORKPLACE SEXUAL HARASSMENT AND ADOLESCENT WORKERS

This section begins by reviewing the empirical evidence of the age disparity in sexual harassment victims. Research shows that adolescent workers experience a higher level of harassment than their adult counterparts despite a shorter tenure in the workplace.¹³³ Adolescent workers also experience more severe workplace harassment.¹³⁴ This section briefly examines some of the federal and state intervention strategies. The section concludes by examining some of the deleterious effects workplace sexual harassment can have on adolescent workers and arguing that special legal protection for adolescent workers can help mitigate some of these harmful repercussions.

A. *The Empirical Data*

American teenagers today are active participants in the labor market. Data from the United States Department of Labor, Bureau of Labor Statistics (“BLS”) for July 2014 (historically the highest month for adolescent employment)¹³⁵ indicates that 20.1 million 16-24 year-olds were employed, which translates to a labor force participation rate of 51.9%.¹³⁶ Almost 2.6 million young workers during the same month were ages 16–17.¹³⁷ The number of adolescent workers has been higher in the past and is increasing again.¹³⁸ Other estimates suggest higher levels of adolescent employment; 75% of respondents to the National Youth Longitudinal Survey 1997 reported working at some point during their senior year of high school.¹³⁹ The actual prevalence of adolescents working is likely higher; the National

133. Fineran & Gruber, *supra* note 5, at 555.

134. *Id.* at 553–55.

135. Bureau of Labor Statistics, U.S. Dep’t of Labor, *Youth Employment and Unemployment, July 2014*, http://www.bls.gov/opub/ted/2014/ted_20140819.htm (last visited Sept. 1, 2014).

136. News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, *Employment and Unemployment Among Youth - Summer 2014* (Aug. 13, 2014), http://www.bls.gov/news.release/archives/youth_08132014.htm [hereinafter, News Release, Youth Employment Summer 2014].

137. Bureau of Labor Statistics, U.S. Dept. of Labor, *Labor Force Statistics from the Current Population Survey*, BLS.GOV, <http://beta.bls.gov/dataViewer/view/timeseries/LNU01000086> (last visited Mar. 24, 2015).

138. *See* News Release, *Youth Employment Summer 2014*, *supra* note 136 (describing a peak in the summer labor force participation rate in July 1989, a decline through the 1990s, and a current upward trend).

139. News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, *Work Activity of High School Students: Data From The National Longitudinal Survey of Youth 1997*, <http://www.bls.gov/nls/nlsy97r6.pdf>.

Youth Longitudinal Survey does not measure informal “freelance” employment such as housekeeping, babysitting, and gardening.¹⁴⁰

Adolescent workers may be more vulnerable to sexual harassment because of the types of jobs young workers tend to hold. Of the 20.1 million youth employed, 25% worked in hospitality (including food services) and 19% worked in retail.¹⁴¹ Generally, teenagers are more likely to be employed in these two industries.¹⁴² Researchers have found that both tolerable (consensual flirting) and intolerable (sexual harassment) forms of sexual behaviors are more prevalent in hospitality and retail industries.¹⁴³ Teen workers may also be perceived as easy targets for sexual harassment; workers that are young, unmarried, and have low seniority status tend to experience higher rates of sexual harassment.¹⁴⁴

Only recently, however, have social scientists examined the prevalence of sexual harassment of adolescent workers.¹⁴⁵ In 2002, Professor Susan Fineran, a professor of social work and gender studies at the University of Southern Maine, published a study finding 35% of working adolescents surveyed experienced some form of sexual harassment at work.¹⁴⁶ Of the working teenagers reporting sexual harassment, 63% were female and 37% were male.¹⁴⁷ In a follow-up study published in 2009 focused solely on adolescent women, Fineran along with sociology Professor James Gruber found that 52% of working adolescent women reported being the target of sexually harassing behavior in the preceding 12 months.¹⁴⁸ In a separate study of college students recalling adolescent work experiences published in

140. *Id.*

141. News Release, Youth Employment Summer 2014, *supra* note 136.

142. Christopher Uggen & Amy Blackstone, *Sexual Harassment as a Gendered Expression of Power*, 69 AM. SOC. REV. 64, 68 (2004).

143. *Id.*

144. *Id.*; Fineran & Gruber, *supra* note 5, at 551–52.

145. *See id.*, at 551 (discussing how the limited empirical data available on adolescent workers and sexual harassment makes it “apparent that research has not kept pace with rising legal and social concerns over this issue.”); *see also* Karen L. Sears et al., *Sexual Harassment and Psychosocial Maturity Outcomes Among Young Adults Recalling Their First Adolescent Work Experiences*, 64 SEX ROLES: J. RES. 491, 492 (2011) (discussing how, despite scholarship on work stressors for adolescent workers, there is an absence of literature on the sexual harassment of teens in their early work experiences).

146. Fineran, *supra* note 5, at 960.

147. *Id.* Fineran’s 2002 study sampled 712 high school students, 393 of whom worked. Of those 393 working students, 137 or about 35%, reported experiencing some type of sexually harassing behavior. *Id.* at 958, 960.

148. Fineran & Gruber, *supra* note 5, at 554. The researchers analyzed responses from 260 female high school students at a private high school for girls in New England. The overall response rate was high at 90% of enrolled students, and represented all grade levels. Fifty-eight percent of the students reported working outside school, all

2011, psychologists Karen Sears, Robert Intrieri, and Dennis Papini found 61% of young women and 46% of young men reported experiencing sexually harassing behavior.¹⁴⁹

When compared with adult workers working full-time, the prevalence of sexual harassment reported by adolescent workers is alarmingly high, especially when considering that most adolescent workers have a much shorter tenure in the workplace and work part-time.¹⁵⁰ It is difficult to compare the prevalence of sexual harassment involving teen workers to adult workers due to differences between survey timeframes, questionnaire design, and variations in how respondents characterize and label sexually harassing behaviors.¹⁵¹ However, the general trend in social science data is that adult

part-time. Of those working, 44% worked in food service and 36% in retail sales. *Id.* at 552, 554.

149. Sears et al., *supra* note 145, at 500. The researchers surveyed 586 introductory psychology students at a Midwestern university, 316 women and 270 men. The study had a 43% response rate, and participants were ages 18–24. The majority of participants (73%) were freshman. *Id.* at 495–96.

150. As the focus of this work is the legal construction of sexual harassment doctrine involving adolescent workers, racial disparities in the work experience of teen workers versus adult workers is beyond the Article's scope. It is striking, though not surprising, that little data exists examining adolescent workers of color and workplace sexual harassment. For example, the respondents in Fineran & Gruber's research of working adolescents and workplace sexual harassment were overwhelmingly white; non-white female students were 4% of the student population and 5% of the sample. Fineran & Gruber, *supra* note 5, at 552. In the study published in 2011 by Sears et al., 15% of participants were non-white. Sears et al., *supra* note 145, at 496. No large study has yet examined the experience of young women of color with workplace sexual harassment. Research does support that adult women of color may experience workplace sexual harassment more often than their White peers. In 2005, Hernández published a law review article discussing her empirical work in analyzing EEOC complaints alleging sexual harassment. See Hernández, *supra* note 10. Hernández summarized empirical research to explore whether women of color may be disproportionately targeted as victims of sexual harassment. *Id.* at 110. Hernández found a racial disparity in the EEOC charge data, and theorized that women of color are more likely to file formal charges with an outside agency than use internal complaint procedures due to concerns like fear of retaliation lack of confidentiality. *Id.* at 105, 128.

Research does support that adult women of color may experience workplace sexual harassment more often than their White peers. In 2005, Hernandez published a law review article discussing her empirical work in analyzing EEOC complaints alleging sexual harassment. Hernández, *supra* note 10. She explored whether women of color may be disproportionately targeted as victims of sexual harassment. *Id.* at 110 (summarizing empirical research). She found a racial disparity in the EEOC charge data, and theorized that women of color are more likely to file formal charges with an outside agency than use internal complaint procedures due to concerns like fear of retaliation lack of confidentiality. *Id.* at 105, 128.

151. See Beiner, *supra* note 9, at 10 (discussing difficulties in interpreting social science data on sexual harassment for legal purposes); Fineran & Gruber, *supra* note 5, at

workers report the same or less sexual harassment over a much-longer tenure in the workplace. In the landmark survey of federal employees by the United States Merit Systems Protection Board, 44% of women and 19% of men reported experiencing harassing behaviors in the preceding two years.¹⁵² Fineran and Gruber compared their results to similar studies involving adult workers and concluded that “when compared to research on adult women, teenage girls not only experienced more harassment but also [that it] occurred in a shorter time period.”¹⁵³

Teenagers in the workplace are also experiencing more severe harassment when compared to adult workers. The adolescent women in Fineran & Gruber’s study reported a 47% prevalence of gender harassment (e.g. inappropriate sexual remarks or jokes), a 38% prevalence of unwanted sexual attention (e.g. offensive touching, requests for sex), and a 5% prevalence of sexual coercion (sexual bribery and assault), the most egregious form of sexual harassment.¹⁵⁴ Fineran and Gruber concluded that adolescent women may experience gender harassment and unwanted attention more frequently than adult workers.¹⁵⁵ While the researchers could not calculate a statistical analysis on the prevalence of sexual coercion of adolescent girls, they found

551 (noting variations among number of workers reporting sexual harassment in different studies). Fineran & Gruber suggest that increased use of the Sexual Experiences Questionnaire (“SEQ”) is improving social scientists’ ability to compare data across studies. The researchers note that the SEQ “has been used in a number of occupational and educational contexts” and “used extensively cross-culturally. From their perspective, the SEQ is considered highly reliable. *Id.* at 551, 553.

152. U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES* 13 (1995).
153. Fineran & Gruber, *supra* note 5, at 555. The researchers noted two studies in which adult workers reported a higher incidence of harassment, up to sixty-seven percent; however, the study sought experiences over a 24-month time period, rather than a 12-month time period, and most of the workers were employed full-time, rather than part-time. *Id.* at 554–55 (citing K. Schneider et. al, *Job Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. APPLIED PSYCHOL. 401–15 (1997)).
154. Fineran & Gruber, *supra* note 5, at 553, 555. Fineran’s 2002 study also found adolescent workers to be experiencing severe types of harassment: 67% reported being told sexually offensive jokes, 18% were shown sexually offensive pictures or messages, 43% were “grabbed” sexually, 36% were “pressured” for a date, 7% experienced sexual pressure, and 2% experienced rape or attempted rape. The prevalence of attempted rape or rape between the young women and women was equal. While slightly more of the young men reported being shown sexually offensive pictures and messages, touched sexually, and pressured for a date, the young women in the study were more likely to be called sexually offensive names, experience negative comments about their body or clothing, hear sexually offensive jokes, and experience unwanted sexual pressure. Fineran, *supra* note 5, at 961.
155. Fineran & Gruber, *supra* note 5, at 555 (contrasting data with a 1999 study of maintenance workers, clerical staff, and employed college students who reported

it “disturbing” that the girls in the study (who all worked part-time) reported sexual coercion at rates comparable to earlier studies on adult women working full-time.¹⁵⁶

Another theme in the social science is the broad age disparity between perpetrator and victim. In Fineran & Gruber’s 2009 study of adolescent girls, 46% described the perpetrator as over 30.¹⁵⁷ When asked about the employment status of the harassers in Fineran’s 2002 study, 19% named a supervisor, 61% identified a co-worker, and 18% reported unidentified others.¹⁵⁸ The results for the girls in Fineran and Gruber’s 2009 study were similar: when asked about the “most upsetting” harassment experience, 56% of the perpetrators were co-workers, with the remaining perpetrators being a supervisor or other.¹⁵⁹

B. Current Intervention Strategies

The Equal Employment Opportunity Commission (“EEOC”) is the federal agency charged with investigating workplace sexual harassment charges under Title VII, including those brought by adolescent workers. In 2004, in response to the growing number of Title VII charges lodged by adolescent workers, the EEOC launched the Youth@Work initiative. The initiative is a broad educational and outreach campaign designed to address issues of discrimination against teenage employees and to increase awareness of their employment rights and responsibilities, including sexual harassment.¹⁶⁰ Youth@Work has three components: (1) educational outreach events, (2) partnerships with businesses and advocacy organizations, and (3) a website.¹⁶¹ The Youth@Work website contains a video designed to educate adolescent workers about the workplace environment, educational materials available for download aimed at both teen workers and adult workshop facilitators, descriptions of example enforcement actions brought by the EEOC on behalf of adolescent workers, and information about filing an EEOC charge.¹⁶² Similarly, state employment agencies and advocacy orga-

gender harassment at a rate of 29%, 27%, and 29%, respectively, and unwanted sexual attention at a rate of 15%, 14%, and 10%, respectively).

156. *Id.* at 555.

157. *Id.* at 554.

158. Fineran, *supra* note 5, at 961.

159. Fineran & Gruber, *supra* note 5, at 554.

160. EEOC Youth@Work Press Release, *supra* note 7.

161. *Id.*

162. EEOC Youth@Work homepage, *supra* note 7.

nizations are beginning to develop educational efforts aimed at protecting teen workers from sexual harassment.¹⁶³

In addition to the Youth@Work initiative, the EEOC brings enforcement suits on behalf of adolescent workers.¹⁶⁴ Between 2001 and 2004, the number of EEOC sexual harassment charges brought by adolescent workers quadrupled from 2% to 8% of total EEOC harassment charges.¹⁶⁵ Of the 165 cases the EEOC filed between September 30, 1999 and September 30, 2008 involving adolescent workers, 135 (almost 82%) involved a sexual harassment claim.¹⁶⁶

Despite the social science data indicating that the sexual harassment of adolescent workers is an increasing problem, not enough is known about sexual harassment cases brought by teenagers. The EEOC does not track the ages of employees filing charges of harassment. It is therefore difficult, if not impossible, to know how many of these cases are actually litigated, given the lack of an agency or entity tracking sexual harassment litigation by age.¹⁶⁷

C. *The Need For Adolescent-Specific Doctrine*

One of the most developed arguments for aggressively protecting adolescent workers comes from the brain science research on adolescent development. Jennifer Drobac argues that teen workers are especially vulnerable to sexual abuse in the workplace due to an under-developed ability to make decisions.¹⁶⁸ This under-development affects the ability of adolescent workers to appropriately engage in appropriate workplace conduct, recognize inappropriate behaviors, and respond to workplace harassment.¹⁶⁹

163. *E.g.*, *Youth@Work: Talking Safety*, MASS.GOV, <http://www.mass.gov/eohhs/gov/departments/dph/programs/admin/dmoa/ohsp/injuries-workers-under-18/educational-materials/youth-work-talking-safety.html> (last visited Mar. 14, 2015).

164. *See, e.g.*, Press Release, U.S. Equal Emp’t Opportunity Comm’n, Everdry Waterproofing To Pay \$585,000 For Teen Harassment; Jury Returns Verdict in EEOC Sex Bias Suit (Oct. 27, 2006), <http://www.eeoc.gov/eeoc/newsroom/release/10-27-06.cfm> (discussing jury verdict in EEOC v. Everdry Mktg. & Mgmt.).

165. Cathleen Flahardy, *EEOC Responds To Sexual Harassment Complaints From Teens*, INSIDE COUNSEL (Nov. 1, 2005), *available at* <http://www.insidecounsel.com/2005/11/01/eeoc-responds-to-sexual-harassment-complaints-from>.

166. *See*, EEOC Teen Litigation Report, SCHUSTER INSTITUTE FOR INVESTIGATIVE JOURNALISM, BRANDEIS UNIV., <https://www.brandeis.edu/investigate/teenSH1/EEOCyouthatwork.html> (follow “EEOC Teen Litigation Report” hyperlink) (last visited Mar. 26, 2014).

167. *See* Gunderson, *Deepest Scars*, *supra* note 6 (criticizing the EEOC and Oregon BOLI for failing to track sexual harassment charges by age).

168. Drobac, *Developing Capacity*, *supra* note 8, at 11–32 (discussing neurological, developmental, and psychosocial research).

169. *Id.*

A second reason to scrutinize protection for adolescent workers is due to their relative lack of experience in the workplace. Adolescent workers need to be socialized into the workplace, and pervasive sexual harassment can result in negative socialization. Researchers have found that adolescent workers are more likely to engage in “greater jostling, flirting and teasing,”¹⁷⁰ and need assistance learning the “meaning and acceptability” of workplace relationships and interactions.¹⁷¹ Despite a familiarity with sexual harassment as an abstract concept, adolescents are “less experienced in distinguishing between acceptable and problematic workplace conduct.”¹⁷² For example, one worker witnessing sexually inappropriate jokes and comments at the diner where she worked as a teenager initially found it humorous.¹⁷³ It was only upon describing the incident to friends and family that the young woman understood the conduct to be improper.¹⁷⁴ Reflecting upon the manager’s comment as an adult, the same worker found the conduct offensive.¹⁷⁵ This young woman had a supportive network that helped her distinguish between proper and improper work behavior. Many adolescent workers are not as lucky.¹⁷⁶

Another adult worker describing her adolescent employment recounted how, because of her youth, she simply did not know how to react when assaulted by a much older coworker:

170. Uggen & Blackstone, *supra* note 142, at 68 (citing ESTER REITER, *MAKING FAST FOOD: FROM THE FRYING PAN INTO THE FRYER* (1991)).

171. *Id.* (citing JEYLAN MORTIMER, *WORKING AND GROWING UP IN AMERICA* (2003)); see also Laurence Steinberg et al., *Early Work Experience: A Partial Antidote for Adolescent Egocentrism*, 10 J. YOUTH AND ADOLESCENCE 141, 143–44 (1981).

172. Uggen & Blackstone, *supra* note 142, at 60 (citing Vicky Schultz, *The Sanitized Workplace*, 112 YALE L. J. 2061 (2003)).

173. See Amy Blackstone et al., *Legal Consciousness and Responses to Sexual Harassment*, 43 LAW & SOC’Y REV. 631, 655 (2009).

174. *Id.*

175. *Id.*

176. Often, older workers discourage young workers from recognizing and reporting harassment. Another adolescent restaurant worker was convinced by an older female worker to ignore harassment by a customer:

That was really the first time I experienced that blatant sexual propositioning. I was pretty innocent and a naïve Catholic girl, so I really felt unsafe for a while after that.

I told [an adult] waitress. She was a lot older. . . . She basically just said that it was a pattern [this customer] had, that when he came in he would talk to other waitresses that way. She was kind of nonchalant. She had worked there for probably 15 years. I think it was just part of daily life for her in a sense.

Id. at 656.

He asked me to go in the freezer and get him something. So I went in there and grabbed it and when I turned around with the box he was there and he tried to kiss me. And I was like, 'Whoa! You can't kiss me! I don't like you! I'm only 14!' I told him, I said, 'No!'¹⁷⁷

When asked during the interview how she would react as an adult in the same situation, the same worker believed she would possess the maturity to label her co-worker's conduct as inappropriate and act more forcefully.¹⁷⁸ Indeed, psychologists Karen Sears, Robert Intrieri, and Dennis Papini concluded that adolescent workers have lower rates of recognizing and responding to workplace sexual harassment when compared to adult workers.¹⁷⁹

A third reason to protect adolescent workers from sexual harassment is that adolescent victims of workplace sexual harassment may experience long-term detrimental mental health effects. Social scientists have long emphasized the importance of healthy early work environments for adolescent workers.¹⁸⁰ And it is well documented that workplace sexual harassment generally has a detrimental effect on a worker's mental health.¹⁸¹ Interestingly, the studies involving adolescent workers and sexual harassment have shown limited short-term effects on the teenager's mental health.¹⁸² However, new research shows that the experience of early-career sexual harassment is a stressor that increases the likelihood of depression symptoms later in adulthood for both male and female workers.¹⁸³ Adolescent men who resist and report workplace harassment have been found to experience negatively impacted psychosocial development.¹⁸⁴ Women in the same study were more likely to report being upset by an incident of sexual harass-

177. Uggen & Blackstone, *supra* note 142, at 86.

178. *Id.*

179. Sears et al., *supra* note 145, at 501.

180. *See id.* at 491-92.

181. *See* Fineran & Gruber, *supra* note 5, at 552.

182. *Id.* at 557. The researchers hypothesized that the lack of immediate mental health impact may be due to the small sample size in the most serious forms of harassment, as well as other factors such as academic support and involvement and economic advantage. *Id.* at 558. Sears, Intrieri & Papini similarly found exposure to sexual behavior at work to not necessarily be an upsetting experience among adolescents in the United States. Sears et al., *supra* note 145, at 501.

183. Jason N. Houle et al., *The Impact of Sexual Harassment on Depressive Symptoms during the Early Occupational Career*, 1 SOC'Y & MENTAL HEALTH 89, 97 (2011). The study found a positive correlation between early-career harassment and increased depressive symptoms even after controlling for past depression, other harassment experiences, and other workplace stressors. *Id.*

184. Sears et al., *supra* note 145, at 499.

ment.¹⁸⁵ Other studies have shown early work experiences can impact personality development.¹⁸⁶

Fourth, although adolescent workers may not report immediate mental health problems, workplace sexual harassment may detrimentally affect the teenager's academic environment and performance. The harassed girls in Fineran and Gruber's study had statistically significantly higher levels of school avoidance and academic withdrawal.¹⁸⁷ The researchers theorized that the effects of workplace sexual harassment may be a detriment to academic performance and negatively impact an adolescent's future.¹⁸⁸

Fifth, research also shows that many victims of harassment are more likely to be harassed later in life. In a study published in 2004 by sociologists Christopher Uggen and Amy Blackstone, the researchers discovered a striking correlation between workers' harassment as adolescents and later harassment as adults.¹⁸⁹ Uggen and Blackstone looked at the prevalence of the "syndrome of behavioral sexual harassment," which they defined as "harassing behaviors" that are "severe or pervasive and concurrent in time and place," thus approximating the legal test for actionable sexual harassment.¹⁹⁰ Seventy-two percent of the survey respondents experiencing the behavioral syndrome in adolescence experienced it as adults.¹⁹¹ For adolescents generally (both male and female), adolescent workers who experience sexual harassment are ten times more likely than their non-harassed counterparts to experience harassment as adults.¹⁹² The risk is especially great for male adolescent workers, who are twenty times more likely to experience harassment as adults if they experienced workplace sexual harassment as an adolescent worker.¹⁹³

Sixth, experiencing workplace sexual harassment may negatively impact an adolescent worker's future employment opportunities. Fineran and Gruber found that girls experiencing workplace sexual harassment reported more stress from work, lower satisfaction with both their coworkers and supervisors, and were more likely to consider leaving their job.¹⁹⁴ Fineran theorized that an early experience with sexual harassment may put girls at risk for normalizing future sexually harassing behavior, inhibit the develop-

185. *Id.* at 500.

186. *Id.* at 491–92.

187. Fineran & Gruber, *supra* note 5, at 555.

188. *Id.* at 557.

189. Uggen & Blackstone, *supra* note 142, at 76.

190. *Id.* at 68.

191. *Id.* at 82.

192. *Id.*

193. *Id.*

194. Fineran & Gruber, *supra* note 5, at 555.

ment of future career goals, and lower expectations about income.¹⁹⁵ One young victim of sexual harassment demonstrates the risk for adolescent women: After being groped by her supervisor at a fast-food restaurant and struggling to find assistance in remedying the problem, she was “totally disgusted” and quit despite needing the job to support two children and finish high school.¹⁹⁶

III. SEXUAL HARASSMENT JURISPRUDENCE & ADOLESCENT WORKERS

A. *Doe v. Oberweis Dairy: Genesis of Adolescent-Specific Doctrine*

The development of adolescent-specific sexual harassment jurisprudence under Title VII began with the Seventh Circuit’s opinion in *Doe v. Oberweis Dairy* (7th Cir. 2006). *Oberweis Dairy* involved the sexual harassment claim of a sixteen-year-old ice cream scooper at an ice cream parlor in Bartlett, Illinois. Matt Nayman, a twenty-five-year-old shift supervisor had a penchant for the teenaged women working at the store.¹⁹⁷ He was known to “grope, kiss, grab butts, hug and give tittie twisters,” to these women, and invite the women to his apartment.¹⁹⁸ He had engaged in sexual intercourse with another adolescent employee at his apartment before he did so with Doe.¹⁹⁹ There was some level of factual dispute as to the level Doe may have “welcomed” Nayman’s advances, but no dispute that Nayman committed “statutory rape” not “forcible rape,” and that Doe was “an active participant in, rather than a passive victim of . . . the act of sexual intercourse with Nayman.”²⁰⁰ The district court granted the employer’s motion for summary judgment, finding Nayman’s advances were not unwelcome and that the work-related contact was not severe or pervasive.²⁰¹

Judge Richard Posner authored the opinion for the panel on appeal.²⁰² Despite evidence that the sexual relationship between Doe and Nayman was consensual, the *Oberweis Dairy* court declined to apply the *prima facie* case for hostile work environment claims under *Meritor*, fashioning instead a special rule for hostile work environment claims under Title VII brought by

195. *Id.* at 557.

196. Heather McLaughlin et al., *Social Class and Workplace Harassment During the Transition to Adulthood*, in 199 NEW DIRECTIONS FOR CHILD AND ADOLESCENT DEVELOPMENT 85, 87 (J.T. Morimer ed., 2008).

197. *Doe v. Oberweis Dairy*, 456 F.3d 704, 712–13 (7th Cir. 2006).

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

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

200. *Oberweis Dairy*, 456 F.3d at 715.

201. *Doe v. Oberweis Dairy*, No. 03-C-4774, 2005 WL 782709, at *6–7 (N.D. Ill. Apr. 6, 2005).

202. *Oberweis Dairy*, 456 F.3d at 707.

adolescent workers.²⁰³ The Seventh Circuit found that a minor employee, one who is under the state jurisdiction's age of consent, could not "welcome" sexual advances.²⁰⁴ Thus, if the other elements were satisfied (severity, pervasiveness, subjectively and objectively offensive), and the claim was brought by a minor employee, the *prima facie* case for hostile work environment harassment is met and the employer is liable for harassment, even if the adolescent worker arguably consented to or "welcomed" the conduct. The *Oberweis Dairy* standard therefore appears to significantly lower the bar for adolescent workers bringing hostile work environment claims. If the harassment otherwise met the *prima facie* case for harassment under Title VII (which sexual intercourse often does), a minor worker could easily state a claim even if they arguably "consented" to the interaction or "welcomed" the harassers advances.

Judge Posner cited three reasons for the need for a bright-line test when analyzing sexual harassment claims by teen workers. First, fixing the "welcomeness" standard to the age of majority in a particular state defers to state policy and avoids making what a state legislature designates as a non-consensual act in the criminal context (sexual intercourse while a minor) a consensual one in a civil lawsuit. Citing the Restatement (Second) of Torts, the opinion emphasized that consent to conduct criminalized to protect a class of litigants cannot then operate to bar a tort action premised upon the same conduct.²⁰⁵ The court reasoned that the inconsistency of state standards governing the age of majority in various contexts was outweighed by the deference agenda.²⁰⁶ Second, the court cited simplification of employment discrimination jurisprudence. Third, and apparently most important to Judge Posner, the *Oberweis Dairy* court sought to avoid the "arbitrary" process of inquiring into the "maturity" of each adolescent worker and the ability of that worker to welcome sexual advances.²⁰⁷

Just when it seemed the Seventh Circuit was to take a promising step away from the embedded race/gender construction, Judge Posner acted to quickly revitalize it:

At the damages stage of this proceeding, should it get that far, the defendant. . . should be permitted to put Nayman's conduct in perspective. If Doe was sneaking around behind her mother's – and her employer's – back and thus facilitating Nayman's be-

203. *Oberweis Dairy*, 456 F.3d at 713–14.

204. *Oberweis Dairy*, 456 F.3d at 713–14.

205. *Oberweis Dairy*, 456 F.3d at 713 (citing RESTATEMENT (SECOND) OF TORTS § 892C (1979)).

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

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

havior, the employer may be able to show that the harm she suffered that was caused by its violation of Title VII (if such a violation is found on remand), rather than by Nayman, was minimal. . .

Though inquiries into the maturity of individual minors are, as we said earlier, bound to be fraught with uncertainty, a jury should be able to sort out the difference between an employer’s causal contribution *to the statutory rape by its employee of a sixteen-year-old siren* (if that turns out to be an accurate description of Doe) and to similar conduct toward, say, a twelve-year-old.²⁰⁸

Here, Judge Posner makes an astonishing leap in logic. There is a huge difference between placing the behavior of a supervisor “in context” by examining whether a plaintiff contributed to her own harm (here, by sneaking around behind her mother’s back) and “facilitating” behavior, and determining whether the plaintiff was a whore who deserved what she got. Notably, Oberweis Dairy defended the action by claiming Doe was lying (other employees contradicted her factual allegations), that the two were “friends,” and that the sexual encounter happened at Nayman’s home with no impact on the workplace. Oberweis Dairy did not argue that Doe was promiscuous or a seductress.

Instead of focusing on the conduct and context at issue, the Seventh Circuit re-imports a judgment of a plaintiff’s character. Stated differently, if there is evidence that the teen worker was promiscuous, seduced her attacker, was not a virgin, dressed provocatively, spoke provocatively, or otherwise signaled she was sexually available, she could be barred from any monetary remedy. If the adolescent plaintiff is a “siren,” she should be held responsible for causing her own damages.²⁰⁹ Posner uses the construction of unworthy woman as “siren”²¹⁰ to justify withholding legal protection for sexual harassment.

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

209. *Oberweis Dairy*, 456 F.3d at 715. Judge Posner’s choice of the word “siren” is seemingly deliberate. In a prior Seventh Circuit opinion authored by the Chief Judge, the term is so offensive that the Seventh Circuit has previously held that calling a woman a “siren” can be the basis for a sexual harassment claim. *See McDonnell v. Cisneros*, 84 F.3d 256, 259–60 (7th Cir. 1996) (“Unfounded accusations that a woman worker is a ‘whore,’ a siren, carrying on with her coworkers, a Circe, ‘sleeping her way to the top,’ and so forth are capable of making the workplace unbearable for the woman verbally so harassed, and since these are accusations based on the fact that she is a woman, they could constitute a form of sexual harassment.”).

210. The court’s one example of “relevant” conduct by a “mature” adolescent plaintiff relies upon a familiar binary between an underage “siren” versus an innocent and naïve young worker. *Oberweis Dairy*, 456 F.3d at 715. The image of a “siren” is a

Given the endorsement of an adolescent worker's "siren"-like qualities as relevant evidence, the "siren" exception effectively eviscerates any protection of the *Oberweis Dairy* holding.²¹¹ Endorsing the inquiry into the "maturity" of an individual adolescent plaintiff for the damages phase to decipher "causal contribution" instead of the liability phase is an operative distinction without a difference. Discovery is rarely bifurcated, so the adolescent victim is effectively on trial throughout the case. Instead of avoiding inquiries into the relative "maturity" of individual teenagers, the "siren" caveat endorses fishing expeditions into the sexual maturity of the minor employee.²¹²

Tellingly, *Oberweis Dairy* demonstrates how law constructs race and gender. Indeed, the court undermined its articulated goals underlying the special bright-line "welcomeness" test for adolescent workers. Allowing inquiry into the adolescent worker's "siren"-like qualities certainly does not further state policy to protect minor workers, nor does it simplify employment discrimination litigation.

Legal construction analysis explains the *Oberweis Dairy* opinion. Reification is certainly at work: The embedded construction of Black women as "unworthy" and White women as "worthy" have left us in a place where it is natural to make such distinctions about a woman's character instead of asking whether or not she was harassed and focusing on the conduct of the

woman who is cunning, overtly sexual, dishonest. She is not fully human, but is part bird, and not capable of being raped. Her actions divest men of their free will, leading (through no fault of their own) to their demise and destruction.

211. See Drobac, *I Can't to I Kant*, *supra* note 8, at 685:

[W]hile the [*Oberweis Dairy*] court did not close the door completely to money damages, it did invite a trial of the plaintiff's conduct on the matter. . . The court did not elaborate on what evidence defense counsel might introduce to prove that an ice cream scooper was a 'siren.' Nor is the opinion clear on why a sixteen-year-old might be a 'siren' while a twelve-year-old experiencing similar conduct would not. One can anticipate, however, the chilling effect that this ruling may have on 'consenting' underage teens and their parents who want to protect them from further trauma.

212. The court's reliance on the Restatement Second of Torts for the legal proposition that employers should only be liable for the amount of damages proximately caused by their conduct in adolescent worker cases is unconvincing for two reasons. First, the *Oberweis* opinion recognized that courts generally decline to use a comparative fault defense to damages in Title VII cases since it risks "blaming the victim." *Oberweis Dairy*, 456 F.3d at 714–15. The *Oberweis* court found the instant case "unusual" because Doe was an "active participant" in pursuing a relationship with the manager. *Id.* at 715. So bothered by evidence that the plaintiff fit into a historical construction of race and gender deeming her unworthy of legal protection, the court created a fantasy brightline test where adolescent workers cannot "welcome" sexual advances (and sexual maturity is not evaluated), while simultaneously making the sexual maturity of the adolescent worker the critical inquiry. *See id.*

alleged harasser. Reification explains the Seventh Circuit’s willingness to protect the “blushing violet” and punish the “siren.” Protecting the “siren” is not a legal necessity, even if she is a young girl who may not possess the work experience or maturity to make an informed decision.

Categorization is also present. As discussed above, the protected category of “sex” embeds racist and subordinating constructions of a racial hierarchy preserved by Title VII, which positions White men on top and Black women at the bottom. When race is seemingly taken out of the equation (the most obvious example being a case between a White harasser and victim), race still constructs gender, and the law still constructs both. The victim has to litigate a character portrayal that generates legal protection.

Finally, transcendence is at work. As discussed above, the *Meritor* court deployed the “speech/dress” phrase as a proxy for the worthy/unworthy binary in recognizing the hostile work environment cause of action. Here, the loaded phrases from *Oberweis* are many: “causal contribution,” “sexual maturity,” etc.—all cloaks to allow the worthy/unworthy binary and racial and gender hierarchies to persist.

B. EEOC v. V & J Foods: *Alteration of the Employer’s Affirmative Defense*

The Seventh Circuit evaluated another sexual harassment claim brought by an adolescent worker in *EEOC v. V & J Foods*.²¹³ The EEOC alleged that Anthony Wilkins, manager at a Burger King owned by the defendant, sexually harassed Samethia Merriweather.²¹⁴ Wilkins, who was apparently having sex with several employees at the restaurant, focused on Merriweather since she was a “young girl” with a body that was not “all used up.”²¹⁵ Wilkins would rub against Merriweather and try to kiss her.²¹⁶ He offered to pay her for sex, commenting that she should not give away her body to her boyfriend “for free” when he was willing to pay her.²¹⁷ Merriweather refused her manager’s advances, but felt that she was working with a “stalker.”²¹⁸

The defendant moved for summary judgment, arguing that Merriweather was a bad employee,²¹⁹ and claimed she was lying about her allegations due to being angry about her work schedule.²²⁰ V & J’s Statement of

213. 507 F.3d 575 (7th Cir. 2007).

214. *EEOC v. V & J Foods*, 507 F.3d 575, 577 (7th Cir. 2007).

215. *V & J Foods*, 507 F.3d at 577.

216. *V & J Foods*, 507 F.3d at 577.

217. *V & J Foods*, 507 F.3d at 577.

218. *V & J Foods*, 507 F.3d at 577.

219. Defendant’s Motion for Summary Judgment at 2, *EEOC v. V & J Foods*, No. 05-C-0194, 2006 WL 3203713 (E.D. Wis. 2005), ECF No. 44.

220. *Id.* at 3.

Undisputed Facts in support of its motion is rife with characterizations of Merriweather as from the “ghetto,” deceitful, opportunistic, and sexually promiscuous.²²¹ The defendant first argued that Wilkins’ actions were not actionable as harassment because the alleged harassment was not severe, and Merriweather was not subjectively offended by Wilkins’ advances.²²²

Next, the defendant focused on the *Ellerth/Faragher* affirmative defense,²²³ arguing that the company had preventative policies/procedures in place and that Merriweather failed to report the harassment.²²⁴ Citing *Oberweis Dairy*, the district court rejected V & J’s argument that Wilkins’ alleged conduct did not constitute actionable harassment.²²⁵ There was little dispute that Merriweather considered Wilkins’ conduct unwelcome, and there was no allegation of sexual intercourse.²²⁶ Thus, the district court was not bound by *Oberweis Dairy*’s bright-line rule governing welcomeness. However, the district court imported the reasoning underlying the *Oberweis Dairy* analysis to deny summary judgment on the balance of the *prima facie* case: the age disparity between Wilkins and Merriweather, Wilkins’ “repeated physical contact” with Merriweather, and his “direct solicitation of sex” pushed the case over the line on the *prima facie* case for hostile work environment harassment.²²⁷

The case was not to proceed to trial, however, because the district court upheld V & J’s reliance upon the *Ellerth/Faragher* affirmative defense and did not find a genuine issue of material fact on the retaliation claim.²²⁸ The portion of the district court opinion analyzing the *Ellerth/Faragher* defense reads more like an order after a bench trial than a summary judgment decision. The court described Merriweather as an irresponsible employee; although she testified that the sexual harassment policy was not explained during orientation, the court focused on the fact that she was “obligated” to

221. Defendant’s Motion for Summary Judgment, Statement of Uncontroverted Material Facts at 2–3, 5, 7–8, EEOC v. V & J Foods, No. 05-C-0194, 2006 WL 3203713 (E.D. Wis. 2005), ECF No. 44-10.

222. *Id.* at 5.

223. *Id.* at 10–11.

224. *Id.*

225. EEOC v. V & J Foods, No. 05-C-0194, 2006 WL 3203713, at *6–7 (E.D. Wis. Nov. 3, 2006).

226. *V & J Foods*, 2006 WL 3203713, at *2.

227. *V & J Foods*, 2006 WL 3203713, at *7.

228. The district court granted summary judgment on the retaliation claim in part on the grounds that Merriweather could not allege retaliation based on a report of harassment by her mother. *V & J Foods*, 507 F.3d at 577 (7th Cir. 2007). The Seventh Circuit reversed this holding as well, finding that in cases involving minor workers, a parent may act as a child’s agent in engaging in a protected activity such as reporting harassment. *Id.* at 580–81.

review the handbook.²²⁹ The court rejected her informal complaints to shift supervisors and assistant managers as unreasonable as a matter of law.²³⁰ Perhaps persuaded by V & J’s characterization of Merriweather as deceitful and opportunistic, the court characterized her attempt to report the harassment to visiting executives as calculating and cunning.²³¹ In evaluating Merriweather’s allegation that an assistant manager gave her the wrong number at corporate headquarters to report harassment, and was unable to provide a correct one, the district court concluded, “[i]t does not matter that the number ended up being incorrect. A *reasonable* person in Merriweather’s position should have pursued the matter further and discovered the correct number.”

On appeal, the Seventh Circuit reversed the district court opinion, characterizing the trial court’s weighing of disputed facts on summary judgment as “simply wrong.”²³² In another opinion authored by Judge Posner, the court altered an employer’s reliance on the *Ellerth/Faragher* defense for sexual harassment claims brought by adolescent workers. On the first prong, the Seventh Circuit held that an adolescent employee’s reasonable actions must be evaluated considering the “capabilities of the class of employees in question.”²³³ On the second prong of the affirmative defense, the Seventh Circuit held that employers must tailor their complaint procedures to the understanding of their workforce:

An employer is not required to tailor its complaint procedures to the competence of each individual employee. But it is part of [an employer’s] business plan to employ teenagers, part-time workers often working for the first time. Knowing that it has many teenage employees, the company was obligated to suit its procedures to the understanding of the average teenager. Here as elsewhere in the law the known vulnerability of a protected class has legal significance.²³⁴

C. District Court Stabilization

Taken together, the Seventh Circuit’s adolescent-specific framework for litigating sexual harassment cases brought by teenage workers had potential to deconstruct (or at least de-stabilize) race and gender hierarchies. So

229. *V & J Foods*, 2006 WL 3203713, at *7.

230. *V & J Foods*, 2006 WL 3203713, at *7–8.

231. *V & J Foods*, 2006 WL 3203713, at *8.

232. *V & J Foods*, 507 F.3d at 578.

233. *V & J Foods*, 507 F.3d at 578.

234. *V & J Foods*, 507 F.3d at 578 (citations omitted).

far, only two cases have been litigated under the Seventh Circuit's adolescent-specific framework for sexual harassment cases brought by teenage workers. Both demonstrate the power of the law to maintain, rather than deconstruct, gender and racial hierarchies.

1. *Fenton v. Portillo's Hog Dogs*

The first case was *Fenton v. Portillo's Hot Dogs*, an unreported case in the Northern District of Illinois.²³⁵ Fenton was a sixteen-year-old teenager who sued her former employer, Portillo's Hot Dogs, for sexual harassment.²³⁶ She alleged one of the restaurant's managers, Terence Murphy, harassed her repeatedly during her few months of employment.²³⁷ Specifically, Murphy rubbed up against plaintiff, placed his hand in her pocket in order to stroke her private parts, touched her lips, asked for a kiss, and told Fenton she was "sexy."²³⁸

Fenton waited six weeks before reporting Murphy's conduct to another manager at the restaurant.²³⁹ Even then, Fenton only reported what Murphy was doing when another manager noticed she appeared upset and asked about it.²⁴⁰ Fenton claimed Murphy, who weighed about 300 pounds and was over six feet tall, was very intimidating.²⁴¹ In investigating Fenton's allegations against Murphy, the restaurant discovered three additional young female employees who claimed Murphy had behaved inappropriately, and a prior warning in Murphy's file about inappropriate sexual comments towards an employee at another store.²⁴² It took several weeks for the restaurant to complete its investigation of Murphy; he was allowed to continue as store manager during that time period but was instructed to minimize his contact with Fenton and the other female employees.²⁴³ Fenton resigned

235. *Fenton v. Portillo's Hot Dogs*, No. 07-cv-01686, 2008 WL 4899533 (N.D. Ill. Nov. 13, 2008).

236. *Fenton*, 2008 WL 4899533, at *1.

237. *Fenton*, 2008 WL 4899533, at *1.

238. *Fenton*, 2008 WL 4899533, at *1.

239. *Fenton*, 2008 WL 4899533, at *2.

240. Defendant's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment at ¶ 22, *Fenton v. Portillo's Hot Dogs*, No. 07-cv-01686, 2008 WL 4899533 (N.D. Ill. Nov. 13, 2008), ECF No. 40 [hereinafter Defendant's Statement of Undisputed Material Facts].

241. *Fenton*, 2008 WL 4899533, at *2.

242. *Fenton*, 2008 WL 4899533, at *2; Defendant's Statement of Undisputed Material Facts, *supra* note 240, at ¶ 44 (describing allegations that Murphy rubbed himself against one young female worker's buttocks and asked another if she wanted "to see how big his dick" was).

243. *Fenton*, 2008 WL 4899533, at *4.

before the investigation was complete.²⁴⁴ Murphy was later fired.²⁴⁵ Fenton refused to return to work or cooperate further with the restaurant’s investigation.²⁴⁶

The sole issue before the court on Fenton’s sexual harassment claim was the applicability of the *Ellerth/Faragher* affirmative defense.²⁴⁷ The district court was tasked with evaluating the *V & J Foods* test. On the first prong, the court held the employer’s policies sufficient under *Ellerth/Faragher* as a matter of law without analyzing, as required by the new Seventh Circuit standard articulated in *V & J Foods*, whether those policies were suited to Portillo Hot Dog’s largely adolescent workforce.²⁴⁸ Notably, none of the young women at the restaurant came forward to report Murphy’s actions unprompted. Fenton only reported the alleged harassment to a manager when directly asked.²⁴⁹ Several young women reported Murphy having engaged in inappropriate sexual conduct, but only during direct questioning in the restaurant’s investigation of Fenton’s allegations.²⁵⁰ The court may have found Portillo’s harassment policies reasonable as a matter of law,²⁵¹ but in reality, it is clear the restaurant’s policies were not effective at preventing the harassment of these young women.

In evaluating the second prong of the *Ellerth/Faragher* affirmative defense, the *Portillo’s Hot Dogs* court concluded the plaintiff acted unreasonably because she delayed reporting the physical contact, refused to return to work after the manager was fired, and refused to meet the district human resources manager at an off-site location to assist the investigation.²⁵² The court cited, but seemed not to consider, Fenton’s claim of being intimidated by Murphy, or any of his efforts to intimidate her once she reported the harassment.²⁵³ Fenton alleged that Murphy would intentionally bump into her, frown and glare at her, and reduce her hours; the court simply dismissed these claims as “incidental contact.”²⁵⁴ Therefore, despite the *V & J*

244. *Fenton*, 2008 WL 4899533, at *2.

245. *Fenton*, 2008 WL 4899533, at *4.

246. *Fenton*, 2008 WL 4899533, at *2.

247. The *Ellerth/Faragher* affirmative defense was the only basis of Defendant’s motion for summary judgment. Defendant’s Memorandum in Support of Motion for Summary Judgment at 1, *Fenton v. Portillo’s Hot Dogs*, No. 07-cv-01686, 2008 WL 4899533 (N.D. Ill. Nov. 13, 2008), ECF No. 39 [hereinafter Defendant’s Brief in Support].

248. *Fenton*, 2008 WL 4899533, at *5.

249. Defendant’s Statement of Undisputed Material Facts, *supra* note 240, at ¶ 21.

250. Defendant’s Statement of Undisputed Material Facts, *supra* note 240, at ¶¶ 42-44.

251. *Fenton*, 2008 WL 4899533, at *5.

252. *Fenton*, 2008 WL 4899533, at *6.

253. *Fenton*, 2008 WL 4899533, at *2.

254. *Fenton*, 2008 WL 4899533, at *2.

Foods directive, the court failed to consider whether Fenton's actions were reasonable in light of the capabilities of Portillo's adolescent workforce.²⁵⁵

In sum, the court failed to analyze, as contemplated by *V & J Foods*, how the *Elleth/Faragher* defense should accommodate and respond to an adolescent workforce. Instead, the *Portillo's Hot Dogs* court simply reinvigorated the existing framework for adult workers.

To fully understand how legal construction shaped the *Portillo's Hot Dogs* decision, it is useful to look beyond the court's dismissive treatment of Fenton to the court records underlying the dispute. Once examined, a different picture of Fenton emerges. Tellingly, there is reason to question the trial court's conclusion that Fenton acted unreasonably. Both managers at the restaurant, one who was the harasser, were male.²⁵⁶ Fenton testified she feared Murphy might "do something" to her if she reported the harassment.²⁵⁷ Fenton was moved to a different area of the restaurant but still came into contact with Murphy three to four times a week, and she testified he made "intimidating and scary" faces at her and told other employees that she was "lying" and "backstabbing."²⁵⁸ Frustrated with the restaurant's inaction, Fenton and her parents visited the local police, who went to the restaurant to investigate.²⁵⁹ Fenton testified that she resigned because she was humiliated, embarrassed, and "terrified."²⁶⁰ Murphy knew where Fenton lived and had called her at home previously.²⁶¹ After the police visit, the district manager continued the restaurant's investigation and terminated Murphy.²⁶² Fenton's mother would not allow her to attend an off-site meeting alone with the district human resources manager when other employees alleging concerns about Murphy were interviewed at the restaurant.²⁶³ None of the context for Fenton's actions made it into the court's opinion or the resulting characterization of her as unreasonable.

255. *Fenton*, 2008 WL 4899533, at *2.

256. Plaintiff's Answer Brief in Opposition to Defendant's Motion for Summary Judgment at 2, *Fenton v. Portillo's Hot Dogs*, No. 07-cv-01686, 2008 WL 4899533 (N.D. Ill. Nov. 13, 2008), ECF No. 48 [hereinafter Plaintiff's Brief in Opposition].

257. Plaintiff's Brief in Opposition, *supra* note 256, at ¶ 4; Plaintiff's Counter-Statement of Facts, *Fenton v. Portillo's Hot Dogs*, No. 07-cv-01686, 2008 WL 4899533 (N.D. Ill. Nov. 13, 2008), ECF No. 49 [hereinafter Plaintiff's Counter-Statement of Facts].

258. Appendix to Defendant's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment, *Fenton v. Portillo's Hot Dogs*, No. 07-cv-01686, 2008 WL 4899533 (N.D. Ill. Nov. 13, 2008), ECF No. 41–6.

259. Plaintiff's Brief in Opposition, *supra* note 256, at ¶ 2; Plaintiff's Counter-Statement of Facts, *supra* note 257, at ¶ 13.

260. Plaintiff's Counter-Statement of Facts, *supra* note 257, at ¶ 25.

261. Plaintiff's Counter-Statement of Facts, *supra* note 257, at ¶ 10.

262. Plaintiff's Brief in Opposition, *supra* note 256, at ¶ 2.

263. Plaintiff's Counter-Statement of Facts, *supra* note 257, at ¶ 31.

Invisible from the court opinion, but explicit in the party’s arguments, is the defendant’s portrayal of Fenton as an opportunist interested only in money damages.²⁶⁴ Fenton testified, however, that she retained an attorney only after reporting the harassment to Portillo’s and reporting Murphy’s conduct to the police for assistance.²⁶⁵ A broad reading of *V & J Foods* would arguably require a court to analyze whether Fenton and her parents acted reasonably given the “vulnerability” of Fenton as an adolescent worker.²⁶⁶ Instead, the *Portillo’s Hot Dogs* court simply reincorporated the adult framework as its corollary maintenance of race and gender hierarchies.²⁶⁷

As an unreported case with little precedential value, however, the *Portillo’s Hot Dogs* opinion is most important as an illustration of the process of legal construction. Faced with a plaintiff that the court judged in some ways undeserving (perhaps because she hired an attorney), the court simply ignored the mandate of precedent. Specifically, the district court used the concept of “reasonableness” in the second prong of the *Ellerth/Faragher* affirmative defense to perpetuate racial and gender hierarchies through transcendence. The reasonableness inquiry here allows racism and sexism to transcend history despite the Seventh Circuit’s directive in *V & J Foods* that courts should contextualize the inquiry and scrutinize the “capabilities” of the adolescent in question.

2. EEOC v. Taco Bell & EEOC v. Management Hospitality of Racine

In *EEOC v. Management Hospitality of Racine*,²⁶⁸ the EEOC brought an enforcement action against the owners of an International House of Pancakes in Racine, Wisconsin, based on the claims of two adolescent female waitresses.²⁶⁹ Before the district court, the case on plaintiffs’ sexual harassment claims proceeded directly from discovery to trial.²⁷⁰ Thus, while the

264. See Defendant’s Statement of Undisputed Material Facts, *supra* note 240, at ¶ 52 (“Fenton and her parents had decided to get a lawyer rather than continue to cooperate with Portillo’s investigation.”) (record citations omitted); Defendant’s Brief in Support, *supra* note 247, at ¶ 15 (accusing Fenton of rushing to litigation).

265. Defendant’s Statement of Undisputed Material Facts, *supra* note 240, at ¶ 27.

266. *EEOC v. V & J Foods*, 507 F.3d 575, 578 (7th Cir. 2007).

267. See *Fenton v. Portillo’s Hot Dogs*, No. 07-cv-01686, 2008 WL 4899533, at *6 (N.D. Ill. Nov. 13, 2008).

268. *EEOC v. Mgmt. Hosp. of Racine*, 666 F.3d 422 (7th Cir. 2012).

269. *Racine*, 666 F.3d at 427.

270. See Decision and Order, *EEOC v. Mgmt. Hosp. of Racine*, 780 F. Supp. 2d 802 (E.D. Wis. 2010) (No. 06-cv-0715), ECF No. 87 (order denying Defendant’s Motion for Partial Summary Judgment); Order, *EEOC v. Mgmt. Hosp. of Racine*, 780 F. Supp. 2d 802 (E.D. Wis. 2010) (No. 06-cv-0715), ECF No. 88 (order for trial to begin Nov. 16, 2009); Court Minutes of Trial, *EEOC v. Mgmt. Hosp. of Racine*,

trial court was bound by the precedential framework established by the Seventh Circuit in *Oberweis Dairy* and *V & J Foods*, the trial court did not have the opportunity to evaluate the issues as a matter of law before trial.

After a trial in the Eastern District of Wisconsin, a jury found the defendants liable for sexual harassment.²⁷¹ The defendants filed a post-trial motion for judgment as a matter of law.²⁷² First, the trial court rejected, and the Seventh Circuit upheld, the defendants' argument that the evidence failed to support a jury finding that the harassment was severe and pervasive as a matter of law.²⁷³ Both young women were subjected to frequent verbal abuse and inappropriate sexual touching.²⁷⁴ Second, the Seventh Circuit upheld the trial court's rejection of the defendants' reliance on the *Ellerth/Faragher* affirmative defense.²⁷⁵ Citing *V & J Foods* in analyzing the first prong of the affirmative defense, the Seventh Circuit found that the restaurant failed to "provide a clear path for reporting harassment."²⁷⁶ The Seventh Circuit did not specifically analyze *V & J Foods* on the second prong of

780 F. Supp. 2d 802 (E.D. Wis. 2010) (No. 06-cv-0715), ECF No. 144 (minutes of first day of trial held on Nov. 16, 2009). Defendants had unsuccessfully moved for partial summary judgment on two grounds: (1) punitive damages; and (2) retaliatory discharge of one of the young women. Defendants' Motion For Partial Summary Judgment, *EEOC v. Mgmt. Hosp. of Racine*, 780 F. Supp. 2d 802 (E.D. Wis. 2010) (No. 06-cv-0715), ECF No. 70.

271. *Racine*, 666 F.3d at 427.

272. *Racine*, 666 F.3d at 431. Since the trial court was bound by the Seventh Circuit precedent set in *Oberweis Dairy*, the jury could not consider whether either of the girls "welcomed" sexual advances, since both were under the Wisconsin age of majority. See *Doe v. Oberweis Dairy*, 456 F.3d 704, 713 (7th Cir. 2006). And, in order to take advantage of the *Ellerth/Faragher* defense, the restaurant had to prove it complied with the *V & J Foods* standard. *EEOC v. V & J Foods*, 507 F.3d 575, 579–80 (7th Cir. 2007). It does not appear, from a review of the post-trial briefing, that Defendants ever argued that the young women "welcomed" the alleged harassment. See generally Defendants' Motion For Partial Summary Judgment, *EEOC v. Mgmt. Hosp. of Racine*, 780 F. Supp. 2d 802 (E.D. Wis. 2010) (No. 06-cv-0715), ECF No. 70.

273. *Racine*, 666 F.3d at 432.

274. *Racine*, 666 F.3d at 429–30. The young women testified at trial they were subjected to a litany of harassing comments such as "I want to take you in the back and fuck you over the pancake batter," and "I bet you're kinky." The manager told one young worker he wanted to "eat her out" and "do her from behind." He left one a voicemail message asking to "hook up" with her and also groped both girls on their breasts and buttocks, pulled one's ponytail while saying "you like it rough." *Id.*

275. *Racine*, 666 F.3d at 435–37.

276. *Racine*, 666 F.3d at 436. It is questionable whether the employer's policies in *Racine* would have been sufficient as a matter of law even under the adult framework given evidence that restaurant management failed to elevate the young women's reports of harassment, the sexual harassment training offered by the restaurant was "inadequate," and the restaurant delayed beginning its investigation for several months after the first complaint of harassment. See *id.* at 435–36.

the affirmative defense, but did find both young women acted reasonably in reporting the harassment.²⁷⁷

Faced with egregious facts, the protective Seventh Circuit framework for adjudicating cases brought by adolescent workers, and a negative jury finding, the Management of Racine defendants retreated to familiar territory in their post-trial motion—arguing that one of the plaintiffs was not the type of woman who could experience sexual harassment. The defense argued that one of the plaintiffs could not have been subjectively offended by the harassment.²⁷⁸ First, the teen worker testified in her deposition that she was initially “flattered” by the manager’s attention.²⁷⁹ Second, she posted a video of young males “masturbating” on the social networking site Myspace.com and commented the video was “funny as hell.”²⁸⁰ Both the district and the Seventh Circuit rejected the defendants’ argument.²⁸¹ The Seventh Circuit observed, “sharing jokes with friends in an online community is vastly different than being propositioned for sex by a supervisor at work.”²⁸²

The implications of the *Management Hospitality of Racine* defense strategy are important when considering that the supposed goal of the Seventh Circuit standard is to protect adolescent workers. Because the case was litigated in the Seventh Circuit, the defendants were unable to argue this young woman welcomed the manager’s advances under *Oberweis Dairy*. The “welcomeness” bar also meant that the defendants were unable to take advantage of the approach endorsed by *Meritor*—that a plaintiff’s sexually provocative speech or dress are relevant context for the welcomeness inquiry. As discussed above, *Meritor*’s “sexually provocative speech” inquiry is a classic example of legal construction as transcendence in sexual harassment law; the neutral phrase allows historical racial and gender construction to experience continued viability in the law.

Although the strategy ultimately failed in the *Management Hospitality of Racine* case, perhaps because of the horrible evidence of sexual harassment involved, the viability of the strategy has been endorsed by the *Oberweis Dairy* court’s “siren” exception. The hole opened by the *Oberweis Dairy* court on damages has clearly widened the *prima facie* bar for hostile work

277. *Racine*, 666 F.3d at 437.

278. Defendant’s Brief in Support of FRCP 50(b) Motion for Judgment as a Matter of Law or Alternatively for a New Trial or Remittitur at 25-26, *EEOC v. Mgmt. Hosp. of Racine*, 780 F. Supp. 2d 802 (E.D. Wis. 2010) (No. 06-cv-0715), ECF No. 174.

279. *EEOC v. Mgmt. Hosp. of Racine*, 780 F. Supp. 2d 802, 810-11 (E.D. Wis. 2010).

280. *Racine*, 780 F. Supp. 2d at 811.

281. *Racine*, 780 F. Supp. 2d at 811; *EEOC v. Mgmt. Hosp. of Racine*, 666 F.3d 422, 433 (7th Cir. 2012).

282. *Racine*, 666 F.3d at 433 (quoting *Racine*, 780 F. Supp. 2d at 811).

environment claims to include the subjective offense prong. Legal construction as reification means cases brought by adolescent workers will be litigated in ways that invoke historical racial and gender hierarchies.

IV. A DECONSTRUCTION FRAMEWORK

A. *What About Natasha?*

This section returns to the narrative of Natasha, who faced a difficult litigation experience in bringing her workplace sexual harassment claim against her former employer, Taco Bell, and against the convicted rapist whose child she bore. There were many troubling themes evident in Natasha's experience with workplace sexual harassment, themes that have been well explored by legal scholarship. For example, although her manager eventually pled guilty to forcible rape, she initially failed to report the rape to the criminal authorities or her employer; the EEOC only discovered the incident when investigating another harassment allegation against the same manager. This Article, however, sought to explore the legal experience of adolescent workers bringing workplace sexual harassment claims, like Natasha, as well as the ways the law affirmatively constructs race and gender hierarchies. I argued that this legal construction of race and gender affects adolescent workers in their ability to remediate hostile work environment claims.

As it stands, even the more protective Seventh Circuit approach under *Doe v. Oberweis Dairy* and *EEOC v. V & J Foods* would have left Natasha vulnerable had the case proceeded to trial instead of settlement. Recall that Taco Bell obtained deposition testimony that Natasha had sex with another teenager before being raped by Terence Davis. The defense for Taco Bell also sought to introduce evidence that Natasha pled guilty to a misdemeanor shoplifting charge and was involved in an assault incident that did not lead to criminal charges. Ultimately, Taco Bell argued that Natasha welcomed Davis' sexual advances. Applying the *Oberweis Dairy* approach, Taco Bell would be precluded from making the argument, as a matter of law, that Natasha welcomed sexual advances from Davis, a manager 18 years her senior.²⁸³ Since Natasha was under Tennessee's age of consent of 18, she could

283. *Oberweis Dairy* fixed a teenager's ability to "welcome" sexual intercourse to the jurisdiction's age of consent. *Doe v. Oberweis Dairy*, 456 F.3d 704, 713 (7th Cir. 2006). Tennessee, the state where Natasha lived, worked and was raped, has a tiered statutory rape scheme dividing the categorizing the offenses into three categories based on the age of the victim and relative age of the defendant: mitigated statutory rape, statutory rape, and aggravated statutory rape. TENN. CODE ANN. § 39-13-506(c) (Westlaw through end of the 2014 Second Reg. Sess.) Applying the current statutory rape statute to an otherwise "consensual" sexual relationship between a 16-year-old

not welcome Davis’ sexual advances.²⁸⁴ However, the *Oberweis Dairy* “siren” exception leaves Natasha exceedingly vulnerable when seeking to establish a *prima facie* case for hostile work environment sexual harassment. First, the *Oberweis Dairy* “siren” exception means Taco Bell could seek to establish that Natasha was a sexually mature adolescent responsible for her own harm. The strategy used by the *Racine* defendants is another possibility—Natasha has her own criminal history, was not credible, and could not have subjectively been harmed by Davis’ advances. The reality of Taco Bell’s litigation strategy, which focused on painting Natasha as unworthy, is preserved.

Even if Natasha could establish a *prima facie* case of hostile work environment harassment, Taco Bell retains an argument that Natasha acted unreasonably. Although *V & J Foods* required companies to tailor policies and procedure to the understanding of the company’s adolescent work force, the district courts have failed to enforce this mandate. And, as discussed above, the transcendence of the historical racism and sexism embedded in the “reasonableness” inquiry leaves victims like Natasha, who never reported her rape to her employer, vulnerable to dismissal under the *Ellerth/Faragher* defense.

B. Deconstruction-Conscious Decisionmaking

A deconstruction framework is necessary for Natasha and other adolescent workers experiencing and bringing workplace sexual harassment claims. Given the operation of legal construction, a deconstruction framework in the context of hostile work environment claims for adolescent workers needs to counteract the process of reification, challenge legal construction through categorization and legitimization, and end the transcendence of social and legal constructions sustaining social hierarchies.

Law acts to construct race and gender through reification. Negative stereotypes and controlling images have shaped the law and sexual harassment doctrine since the times of slavery. In turn, the law has functioned to stabilize race and gender hierarchies. Through law, race and gender become real, natural, inevitable, justified, and enforceable bases for subordination. In modern sexual harassment doctrine, it seems natural to deprive sexual harassment plaintiffs remedies based on personal behaviors and characteristics instead of a legal measure of the harassment. Instead of identifying and punishing those who commit sexual harassment, the law identifies and dis-

victim and 34-year-old defendant would be considered aggravated statutory rape. *See id.*

284. TENN. CODE ANN. § 39-13-506(c) (Westlaw through end of the 2014 Second Reg. Sess.).

ciplines certain workers judged incapable of experiencing sexual harm. As shown, the current structure supports hegemony, not the remediation of sexual harassment.

Law also acts to entrench race and gender by legitimizing the very identity categories created in subordination. The Civil Rights Act was premised upon identity categories that are inherently subordinating and hierarchical. Embedded in the history of the addition of sex as a protected basis under the act was the maintenance of racial and gender hierarchies.

Finally, law constructs race and gender by providing a vehicle for overt racism and sexism to live on under the guise of neutral legal language and tests. Within the context of sexual harassment doctrine, judicial inquiry into a plaintiff's speech and dress (under *Meritor*) or reasonable actions (under the *Ellerth/Faragher* affirmative defense) allow racist and sexist decisions to be made, cloaked in neutral legal concepts.

One way to counteract legal construction is through deconstruction-conscious decision-making. The phrase "deconstruction-conscious decision-making" is a somewhat lengthy term for a complex process with a very precise goal, which is to disentangle the socio-historical constructions of race and gender from legal doctrine in a way that dismantles, rather than perpetuates, social hierarchies. It is a separate inquiry and analysis by first *acknowledging* the way law constructs race and gender, and then seeking to remediate that process by permanently *dismantling* racial and gender hierarchies going forward.

Using *Oberweis Dairy* as a hypothetical, this two-step deconstruction-conscious decision-making would have: (a) acknowledged the ways sexual harassment doctrine has constructed race and gender and rejected offending precedent when attempting to craft a new protective framework for adolescent workers, and (b) once crafted, evaluated whether the new framework would dismantle racial and gender hierarchies going forward. Had the court done so, it is likely that the "siren" exception would not have been part of the test, avoiding the familiar binary between the deserving and undeserving plaintiff based on sexual maturity. The additional possibilities are even more promising. Perhaps, at least for adolescent workers, the *Oberweis Dairy* court could have led the movement away from *Meritor's* speech/dress inquiry.

Deconstruction-consciousness offers much improvement for *V & J Foods* as well. There is good reason to dispose completely of the *Ellerth/Faragher* defense in cases involving adolescent workers. At a minimum: (a) the reasonableness of the adolescent plaintiff's actions must be highly contextualized (e.g. to avoid the *Fenton* result), and (b) the *V & J Foods* standard should be strictly applied to require employers with a substantial teenaged work force to tailor their policies and procedures. Had the *V & J*

Foods court engaged in deconstruction-conscious decision-making, aimed at acknowledging the legal construction of race and gender and dismantling race and gender hierarchies, it is likely the results in *Fenton* and *Racine* would have been much different. ✱

