CONFIDED TO HIS CARE OR PROTECTION: THE LATE NINETEENTH-CENTURY CRIME OF WORKPLACE SEXUAL HARASSMENT

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INTRODUCTION

Catherine MacKinnon wrote in 1979, "Sexual harassment, the experience, is becoming 'sexual harassment, the legal claim.'"[1] In fact, just as the experience of sexual harassment far predated the first sexual harassment claims under Title VII,[2] so, too, did sexual harassment as a claim of legal injury. In recent years, legal historians have begun to examine American law's early responses to women's sexual exploitation at work. In a 1996 article, Professor Lea Vandervelde studied the nineteenth-century tort of seduction as a legal claim for sexual harassment.[3] The following year, Professor Jane Larson investigated the campaign to raise state age of consent laws at the end of the nineteenth century, concluding that it sought, in part, to provide women recourse against sexual abuse by employers and by others in positions of authority.[4]

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[1] Catherine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination 57 (1979). *See also* Susan Estrich, Sex at Work, 43 Stan. L. Rev. 813, 816 (1991) (discussing the "recent vintage of sexual harassment suits").

[2] *See* MacKinnon, *supra* note 1, at 65 (citing Bell v. Williams, 413 F. Supp. 654 (D.D.C. 1976), as the first time a federal judge held sexual harassment to be actionable sex discrimination under Title VII of 1964 Civil Rights Act).

[3] *See* Lea Vandervelde, The Legal Ways of Seduction, 48 Stan. L. Rev. 817 (1996).

[4] *See* Jane E. Larson, "Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century America, 9 Yale J. Law & Hum. 1, 4 (1997).

Nineteenth-century law addressed the emerging problem of workplace sexual harassment even more directly, however, in a unique state statute that focused particularly on sexual misconduct at work. Beginning in 1879, one state—Missouri—made it a crime for men to "defile . . . by carnally knowing" the young women "in their care, custody, or employment." Missouri's defilement statute provided:

> If any guardian of any female under the age of eighteen years, or any other person to whose care or protection any such female shall have been confided, shall defile her, by carnally knowing her while she remains in his care, custody, or employment, he shall, in cases not otherwise provided for, be punished by imprisonment in the penitentiary not exceeding five years or by imprisonment in the county jail not exceeding one year and a fine of not less than one hundred dollars.[5]

This article will analyze this early sexual harassment statute and the cases under it that reached the Supreme Court of Missouri between 1886 and 1900, at what appears to be the peak of the statute's application.[6] The article will first briefly explore the underlying shifts in women's work that occurred over the course of the nineteenth century, as increasing numbers of American women sought work outside their homes, giving rise to new possibilities for women's sexual independence but also to new threats of women's sexual abuse, most significantly workplace sexual harassment. The article will next examine the complex ways in which the law reacted to these changes in women's work, nationally, and then, in Missouri specifically, where the defilement statute formed the most targeted response to the problem of sexual harassment. The article will

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[5] Mo. Rev. Stat. § 1260 (1879).

[6] Between 1886 and 1900, the following twelve cases reached the Missouri Supreme Court under the statute as amended: State v. Buster, 2 S.W. 834 (Mo. 1887); State v. Young, 12 S.W. 642 (Mo. 1889); State v. Strattman, 13 S.W. 814 (Mo. 1890); State v. Terry, 17 S.W. 288 (Mo.1891); State v. Rogers, 18 S.W. 976 (Mo. 1892); State v. Lingle, 31 S.W. 20 (Mo. 1895); State v. Sibley, 33 S.W. 167 (Mo. 1895) (en banc); State v. Kavanaugh, 33 S.W. 33 (Mo. 1896) (en banc); State v. Hill, 36 S.W. 223 (Mo. 1896); State v. McClain, 38 S.W. 906 (Mo. 1897), *aff'd after remand*, 56 S.W. 731 (Mo. 1900); State v. Napper, 42 S.W. 957 (Mo. 1897) (en banc); State v. Summar, 45 S.W. 254 (Mo. 1898). Before 1886, four cases reached the Supreme Court under a version of the statute that did not explicitly apply to employment. State v. Acuff, 6 Mo. 54 (1839); State v. Arnold, 55 Mo. 89 (1874); State v. Willoughby, 76 Mo. 215 (1882); State v. Woolaver, 77 Mo. 103 (1882). After 1900, there were seven Supreme Court cases under the statute, spread over the course of the next three decades, the last in 1931. State v. Hesterly, 81 S.W. 624 (Mo. 1904); State v. Oakes, 100 S.W. 434 (Mo. 1907); State v. Nibarger, 164 S.W. 453 (Mo. 1914); State v. Kyle, 168 S.W. 681 (Mo. 1914); State v. Johnson, 225 S.W. 961 (Mo. 1920); State v. Sanders, 252 S.W. 633 (Mo. 1923); State v. Gant, 33 S.W. 2d 970 (Mo. 1930) (en banc).

demonstrate that the defilement statute represented both an extension of the law's pervasive concern with women's sexuality and sexual injury and also a retreat from the newly prevailing free labor approach to the master-servant relationship.

Turning to the Missouri Supreme Court cases interpreting the statute, the article will provide a picture of the law's parameters. It will show this particular law operated at the nexus between work and family, making it a crime for men to have sex with the young women and girls who lived in their families as domestic help, but offering no apparent recourse to other women workers or to the group of domestic servants, including African-American women, who worked in the late nineteenth century's more structured, class-defined arrangements. The article will argue that by prohibiting sex that was arguably consensual, as well that which was coerced, the statute worked to constrain young working women's prospects for sexual independence. However, the article will demonstrate that the defilement statute also provided a legal remedy for young women's workplace sexual abuse, and one that might have been otherwise unavailable under existing law. Finally, the article will argue that the statute's dual-edged strict liability regime manifested the particular vision of the crime it sought to prevent, namely, that of a man corrupting a young woman's virtue when he was the very person responsible for protecting it.

I. HISTORICAL CONTEXT

A. From Home to Work: Implications for Sexual Independence and Injury

Missouri's defilement statute must be understood against the backdrop of the significant shift in women's work that occurred over the course of the nineteenth century. During that time, as the locus of American production shifted from the household, to the workshop, to the mill, the factory, and the market, increasing numbers of young American women found work outside their homes to provide for themselves and to assist in the support of their families.[7] By 1890, approximately three-quarters of the nation's teenage girls were seeking paid

[7] *See generally* Alice Kessler-Harris, Out to Work: A History of Wage Earning Women in the United States (1982). *See also* Mary E. Odem, Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885-1920 22 tbl.2 (1995) (citing U.S. Bureau of the Census, Sixteenth Census of the United States, 1940: Comparative Occupational Statistics for the United States, 1870-1940 92 tbl.xv (1943)).

work.[8] In late nineteenth-century Missouri, most female workers were young unmarried women who contributed their wages to their families.[9]

The range of job opportunities available to women also expanded over the course of the nineteenth century.[10] Domestic service became a less common pursuit, as women increasingly found work in factories and mills, as clerks, saleswomen, and stenographers, and in other occupations.[11] Even at the end of the century, however, domestic service remained the most common nonagricultural occupation for women, and an especially common one for African-American women who were forced to work out of poverty but often barred from other positions because of their race.[12] In rural areas, farm daughters worked as help, temporarily living and laboring alongside family members in neighboring homes in exchange for room, board, and often wages.[13] Elsewhere, and for African-American women, a more formal, hierarchical model of domestic service prevailed, with servants working away from family and community and in

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[8] *See* Kessler-Harris, *supra* note 7, at 122.

[9] *See* David Thelen, Paths of Resistance: Tradition and Dignity in Industrializing Missouri 53 (1986).

[10] *See generally* Kessler-Harris, *supra* note 7, at 108-41. *See also* Odem, *supra* note 7, at 23 tbl. 3 (citing Joseph A. Hill, Women in Gainful Occupations, 1870-1920 45 (1929)). In Missouri, women constituted 5.9% of factory workers in 1869 and 29% in 1919. *See* Thelen, *supra* note 9, 52-53 (1986). By 1900, no occupation or profession was legally closed to women in Missouri; in the public schools, there were 5,979 male and 7,803 female teachers. 4 The History of Woman Suffrage 795 (photo. reprint 1985) (Susan B. Anthony & Ida Hustead Harper eds., 1902).

[11] *See* Odem, *supra* note 7, at 23 tbl. 3. Of women workers in nonagricultural occupations in 1870, 61% were servants or in related occupations; 1% were clerks, saleswomen, and stenographers; 6% were in the professions; 18% were mill or factory workers; and 15% were in all other nonagricultural occupations. In 1880, 47% were servants or in related occupations; 2% were clerks, saleswomen, and stenographers; 9% were in the professions; 21% were mill or factory workers; and 21% were in all other nonagricultural occupations. In 1890, 40% were servants or in related occupations; 5% were clerks, saleswomen, and stenographers; 10% were in the professions; 20% were mill or factory workers; and 25% were in all other nonagricultural occupations. In 1900, 33% were servants or in related occupations; 9% were clerks, saleswomen, and stenographers; 10% were in the professions; 22% were mill or factory workers; and 26% were in all other nonagricultural occupations. *See id.*

[12] *See id.*; Jacqueline Jones, Labor of Love, Labor of Sorrow: Black Women, Work, and the Family from Slavery to the Present 101, 128, 132 (1985).

[13] *See* Faye E. Dudden, Serving Women: Household Service in Nineteenth-Century America 12-43, 103 (1983).

households where the women family members supervised rather than sharing in servants' tasks.[14]

As women's work moved away from a household economy and therefore away from family supervision, young women workers found new possibilities for sexual independence. Thus, for example, early mill girls lived in all female boarding houses with elaborate sets of rules, but interacted socially with men in such a manner as to arouse popular suspicion regarding their collective moral character.[15] In urban areas, a youth leisure culture emerged where young working-class men and women intermingled freely in dance halls, theaters, and promenades, and elsewhere in the public space.[16] Domestic servants were free from direct family supervision, although in the more formal model of service, mistresses curtailed newfound freedom by attempting to effect their servants' moral uplift,[17] and help found themselves not far from their parents' homes and influence.[18]

As women's work moved outside their homes, they also faced new threats of sexual predation. Unsupervised courtship carried risks for young working women. Tacit exchanges of premarital sex for promises of marriage had long been part of the courtship ritual in settled rural and European communities.[19] When courtship proceeded beyond the reach of kinship networks and community

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[14] *See id.* at 33, 44-71, 130.

[15] *See* Thomas A. Dublin, Women at Work: The Transformation of Work and Community in Lowell, Massachusetts, 1826-1860 64, 142 (1979). *See also* Kessler-Harris, *supra* note 7, at 37-40; Mary Bularzik, Sexual Harassment at the Workplace: Historical Notes, Radical Am., July-Aug. 1978, at 25, 29 (noting newspaper accounts of mill girls' supposedly immoral activities).

[16] *See generally* John D'Emilio & Estelle Freedman, Intimate Matters: A History of Sexuality in America 194-95 (1988); Odem, *supra* note 7, at 24; Christine Stansell, City of Women: Sex and Class in New York, 1789-1860 83-101 (1982); Kathy Peiss, "Charity Girls" and City Pleasures: Historical Notes on Working-Class Sexuality, 1880-1920, *in* Unequal Sisters: A Multi-Cultural Reader in U.S. Women's History 158 (Ellen C. Dubois & Vicki L. Ruiz eds., 1990).

[17] *See* Stansell, *supra* note 16, at 156, 163-68; Dudden, *supra* note 13, at 167-68, 211. One historian has argued that domestic servants were more likely than other female wage earners to turn to prostitution because it afforded such freedom and such a high standard of living relative to the regime imposed by household mistresses. *See* Stansell, *supra* note 16, at 167-68, 186.

[18] *See* Dudden, *supra* note 13, at 38.

[19] *See* Stansell, *supra* note 16, at 87.

sanctions, young working women who became pregnant found that their suitors could not as easily be held to the bargain.[20]

Women "on the town" were associated with prostitution, and the mere fact of being unattended could be interpreted as an invitation to sex.[21] Forced sex became a more common incident of dating,[22] and group rape began to appear in the court records.[23]

Workplace sexual harassment emerged in a new way as well. Present since colonial days as an incarnation of family violence, it came to encompass interactions among strangers as well.[24] Women in all lines of employment were subjected to verbal suggestions and insults, to staring and touching, to attempted rape and rape as well.[25] Women workers were propositioned and promised money, jobs, and presents; if they declined their employers' advances, they were threatened with termination and blacklisting.[26] Department store managers instructed young women clerks to find a "gentleman friend" to buy them the clothes that they needed for the job.[27] Waitresses could earn higher tips if they countenanced the sexual advances of customers.[28] In factories where men and women worked together, men who ordinarily treated women with reserve made catcalls in unisex changing rooms.[29]

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[20] *See id.* at 87-88. *See also* Dudden, *supra* note 13, at 214 (noting that separation from their families made domestics vulnerable to seduction under the promise of marriage).

[21] *See* Stansell, *supra* note 16, at 97.

[22] *See id; see also* Odem, *supra* note 7, at 58.

[23] *See* Stansell, *supra* note 16, at 97-98.

[24] *See* Bularzik, *supra* note 15, at 28. *See* Part III.A for additional evidence that sexual harassment remained an incident of family violence.

[25] *See* Bularzik, *supra* note 15, at 28.

[26] *See id.*

[27] *See* Peiss, *supra* note 16, at 160. Turn of the century department stores seem to have been particularly risky placements for young women. *See* Kessler-Harris, *supra* note 7, at 102-03; Bularzik, *supra* note 15, at 31 (citing Maud Nathan, The Story of an Epoch-Making Movement 7 (1926)).

[28] *See* Peiss, *supra* note 16, at 160.

[29] *See id.*

African-American women were frequently subjected to sexual exploitation at work.[30] For that reason, after the Civil War, freed slave women sought as much as possible, although with limited success, to keep their work within their households.[31] Domestic service, particularly in the South, made African-American women especially vulnerable to employers' unwanted sexual advances.[32] Sexual exploitation under slavery had left freed African-American women with a reputation among whites for licentiousness and promiscuity, creating, in some white men, the perception that they could take any desired liberties with the African-American women who worked in their households.[33] Objecting to what they termed "the slave conditions of service," including sexual demands from the men of the house, African-American women sought to avoid service[34] or at least to find positions in the North.[35] To these women, sexual harassment often appeared to be a manifestation of racism rather than sexism.[36]

White female domestic servants were often subjected to sexual demands by their employers as well. Investigations of prostitution revealed that many urban prostitutes were former domestic servants, impregnated and abandoned by

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[30] *See* Kessler-Harris, *supra* note 7, at 103.

[31] *See* Jones, *supra* note 12, at 45-79. *See also* Kessler-Harris, *supra* note 7, at 123; Melton A. McLaurin, Celia, A Slave 24-35, 237-43 (1991) (telling the story of a slave tried for killing her master after years of sexual molestation). *See generally* Peter W. Bardaglio, Rape and the Old South: "Calculated to Excite Indignation in Every Heart," 60 J.S. Hist. 749 (1994).

[32] *See* Dudden, *supra* note 13, at 226.

[33] *See* Larson, *supra* note 4, at 48-49.

[34] *See* Bettina Berch, "The Sphinx in the Household": A New Look at the History of Household Workers, 16 Rev. Radical Pol. Econ. 105, 115 (1984).

[35] At the turn of the century, Fannie Barrier Williams, a middle-class African-American woman from New York, observed:

> It is a significant and shameful fact that I am constantly in receipt of letters from the still unprotected women in the South, begging me to find employment for their daughters . . . to save them from going into the homes of the South as servants as there is nothing to save them from dishonor and degradation.

Paula Giddings, When and Where I Enter: The Impact of Black Women on Race and Sex in America 86-87 (1984) (citing Black Women in White America: A Documentary History 165 (Gerda Lerner ed., 1972)).

[36] *See* Bularzik, *supra* note 15, at 30.

employers.[37] Surveying the women's syphilitic ward of the Philadelphia almshouse in 1848, Elizabeth Blackwell reported: "Most of the women are unmarried, a large proportion having lived at service and been seduced by their masters. . . ."[38] Similarly, records of the Anchorage home for unwed mothers in Elmira, New York revealed a number of cases where girls came to the home pregnant from service and named a member of the employing family as the father.[39]

For nineteenth-century women the consequences of sexual harassment at work could be devastating. The ramifications of reporting the harassment were often as bad as the incident itself.[40] If it became known that a woman had had a "sexual connexion," she could be disgraced and dishonored, her reputation destroyed, her prospects for marriage diminished, and with them her greatest hope for future financial security.[41] Working-class communities where youth leisure culture thrived were somewhat more forgiving in this respect than white middle-class observers; in working-class circles, women who had "gone to ruin" had some chance of finding their way back before they were too old to marry.[42] Similarly, while African-American communities attached stigma to unwed motherhood, that scorn was tempered with sympathy for weakness.[43] Whatever their race and class, single women suspected of unchastity could have difficulty

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[37] *See* Dudden, *supra* note 13, at 212-16.

[38] *See id.* at 215 (citing Elizabeth Blackwell, Pioneer Work in Opening the Medical Profession to Women 79 (photo. reprint 1977) (1895)).

[39] *See id.* (citing Records of the Anchorage, Chemung County Historical Society, Elmira, New York). In her investigation of records of statutory rape prosecutions from 1910-1920 in Alameda County, California, Mary Odem similarly found a disproportionate number of forcible assault cases involving male employers of domestic servants. *See* Odem, *supra* note 7, at 58-59.

[40] *See* Bularzik, *supra* note 15, at 29 ("To admit that sexual contact, even conversation occurred, was to be blamed for it."). *See also* State v. Lingle, 31 S.W. 20, 128 Mo. 528, 535 (Mo. 1895) (noting complainant initially agreed not to tell anyone of employer's sexual assault because she "didn't like to be talked about").

[41] *See* Odem, *supra* note 7, at 57-58; *see also* State v. Sibley, 33 S.W. 167, 171 (Mo. 1895) (en banc) (observing that a reputation for unchastity "destroys the standing of [women] in all the walks of life.").

[42] *See* Stansell, *supra* note 16, at 179; *cf.* Odem, *supra* note 7, at 38-62, 157-84 (discussing working-class parents' efforts to limit their young working daughters' sexual independence).

[43] *See* Giddings, *supra* note 35, at 151.

finding and maintaining employment.[44] Moreover, in the absence of reliable birth control, women who had sex faced the serious risks of pregnancy—the danger of illegal abortion, the possibility of death or injury in childbirth, the trauma of giving a child up for adoption, and the limited life alternatives for women who became pregnant or had children out-of-wedlock.[45]

B. Reactions in Law

The sexual dangers and temptations that surrounded young working women created a great deal of middle-class anxiety,[46] and nineteenth-century middle-class reformers, of which household mistresses were a only subset,[47] set out to save young women from their own destruction. Reformers established clubs, supervised residences, and surrogate homes for young working girls, as

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[44] *See* Vandervelde, *supra* note 3, at 827. In the cases brought under Missouri's defilement statute, at a minimum, the young women involved lost the domestic positions they had held . *See, e.g.*, State v. Strattman, 13 S.W. 814, 815 (Mo. 1890) (pregnant complainant left or was sent away seven months after assaults allegedly began); State v. Young, 12 S.W. 642, 643 (Mo. 1889) (defendant gave pregnant complainant eight dollars and she left); *cf.* State v. Hill, 36 S.W. 223, 224 (Mo. 1896) (complainant stayed on through birth of her child and long enough for defendant to boast to others that "all grounds for the belief that he *'wouldn't breed'* had been entirely removed").

[45] *See* Odem, *supra* note 7, at 57-58; Vandervelde, *supra* note 3, at 827-28 (noting pregnancy and childbirth were the leading causes of death for women).

Louisa Harris, a police matron in St. Louis's courts from 1884-1893, observed the plight of young women in that city who had become pregnant out of wedlock. *See* Louisa Harris, Behind the Scenes or Nine Years at the Four Courts of St. Louis 20-25 (1893) Their travails included: committing "the sin of infanticide," "a life of infamy," suicide, and giving a child up for adoption, resulting for the mother in a "haunted, hunted life burdened by fear and dread, and perhaps the bitterest maternal longings for her first born." *Id.*

Several defilement cases noted illegal attempts to abort pregnancies. *See* State v. Sibley, 33 S.W. 167, 170 (Mo. 1895) (en banc) (recounting complainant's testimony that after becoming pregnant "she began to take medicine, camphor, gum, turpentine, and something else, she did not know what it was, but that it was liquid," with the assistance of the defendant, and that its effect was "[t]hat one day she was ironing, and when she got up she was out on the street and did not know anything"); State v. Kavanaugh, 33 S.W. 33, 34 (Mo. 1896) (en banc) (noting defendant administered medicines and used a catheter in an attempt to induce abortion); State v. McClain, 38 S.W. 906, 906 (Mo. 1897), *aff'd after remand*, 56 S.W. 731 (Mo. 1900) (noting defendant's attempt to induce abortion using "spirits of turpentine").

[46] *See* Kessler-Harris, *supra* note 7, at 105 ("The temptations to which young girls were exposed at work, a well as the less tangible effects of leaving the protected home environment, seemed to threaten all women and thus all of society."); Odem, *supra* note 7, at 1.

[47] *See supra* text accompanying note 17.

well as travelers' aid societies, and homes for unwed mothers.[48] They produced a barrage of investigations and reports and conducted nationwide campaigns for purity.[49]

Concern about working women's sexual license manifested itself in increasing regulation of sexuality across the country. In the late nineteenth and early twentieth centuries, laws proliferated throughout the United States prohibiting the dissemination of obscene literature, criminalizing abortion, outlawing prostitution, and regulating homosexuality.[50] Between 1885 and 1900, because of a campaign by the Women's Christian Temperance Union, statutory ages of consent to sex were raised throughout the United States, so that by 1900, only three states retained the common law age of ten years.[51] Twenty-one states raised the age of consent to age sixteen and eleven others to eighteen by 1900.[52]

Throughout the nation, the law also responded to the problem of women's vulnerability to sexual predation, including their sexual harassment at work. In successive waves of agitation for protective legislation, first before the Civil War and then in the 1870s, reformers sought to preclude women from certain occupations and from night work, ostensibly, in part, at least, to protect them from the dangers of sexual exploitation on the job.[53]

Moreover, as Professor Vandervelde argues, the tort of seduction offered women legal recourse from their employers' sexual abuse.[54] The common law tort of seduction allowed fathers to sue men who had sex with their daughters for loss

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[48] *See* D'Emilio & Freedman, *supra* note 16, at 150-52.

[49] *See* Odem, *supra* note 7, at 1. African-American women, as well as white middle-class reformers, attempted to address the sexual implications of young women's work outside of the home. However, African-American women reformers' primary concern in the area of moral uplift was dispelling the myth that African-American women were licentious and holding white men responsible for sexual violence against them. *See* Giddings, *supra* note 35, at 85-86; *see also* Thelen, *supra* note 9, at 144-46 (describing African-American women's clubs in Missouri and the establishment in St. Louis of settlement house for African-American women and a home for friendless African-American girls who migrated to city).

[50] *See* Odem, *supra* note 7, at 2.

[51] *See* Larson, *supra* note 4, at n.9. *See generally* Odem, *supra* note 7.

[52] *See* Larson, *supra* note 4, at n.9.

[53] *See* Bularzik, *supra* note 15, at 31.

[54] *See* Vandervelde, *supra* note 3.

of their daughters' services, generally occasioned by pregnancy.[55] During the course of the nineteenth century, reforms associated with codification changed the gravamen of the tort of seduction to loss of chastity.[56] In addition, the tort incorporated a requirement that sexual relations be obtained by some form of intentional deceit.[57] In eleven states, changes in standing law ultimately allowed women to bring suits for their own seduction.[58]

Vandervelde's investigation reveals that seduction actions often arose out of employment situations. Of the 287 nineteenth-century reported seduction cases she studied from all over the nation, in forty-six, the seducer was either the woman's employer or his son.[59] She argues that once women had standing to sue for seduction in their own right, "the coercive force of words of economic threat [became] sufficient to render . . . sexual predation redressible."[60] In the 1874 Iowa case of Brown v. Kingsley, an action for seduction, a woman factory worker recovered nearly eight years' wages from the employer who got her pregnant after threatening to dismiss her unless she consented to his sexual advances.[61]

As Professor Jane Larson demonstrates, the Women's Christian Temperance Union's late nineteenth-century campaign to reform age of consent laws manifested another legal response to women's sexual harassment at work.[62] While Larson, like others, faults the campaign for racism, nativism, and cultural conservatism, she also credits it for attempting to ameliorate the difficulty of proving forcible rape under existing law.[63] She claims that, in advocating higher statutory ages of consent, the movement sought to enable girls and young women

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[55] *See* Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction, 93 Colum. L. Rev. 374, 382-83 (1993).

[56] *See* Vandervelde, *supra* note 3, at 885-86.

[57] *See* Larson, *supra* note 55, at 387.

[58] *See* Vandervelde, *supra* note 3, at 893. On the tort of seduction, *see also* M.B.W. Sinclair, Seduction and the Myth of the Ideal Woman, 5 Law & Ineq. J. 33 (1987).

[59] *See* Vandervelde, *supra* note 3, at n.90.

[60] *See id.* at 895.

[61] *See id.* (citing Brown v. Kingsley, 38 Iowa 220 (1874)).

[62] *See* Larson, *supra* note 4.

[63] *See id.* at 4-10.

to challenge their sexual exploitation by employers and by others in positions of authority.[64]

For domestic servants, the law seemed to provide some protection from employers' sexual abuse.[65] According to the records of the Anchorage home for unwed mothers, when a sixteen-year-old girl arrived there pregnant claiming her master was the father of her child, the police were called and her master arrested.[66] William Avery Rockefeller, father of John D. Rockefeller, had to flee the family home in 1849 after being indicted for raping the family's hired girl.[67] Other hired girls pressed cases in church proceedings and civil actions, for example, by suing for seduction under breach of promise to marry.[68] In jurisdictions where women lacked standing to sue for their own seduction, however, fathers' common law suits for seduction, based on the loss of their daughters' services, could be difficult to win. Household employers were able to claim as a defense that the daughters' services actually belonged to the seducing employers, and not to their fathers, at the time of the acts in question.[69]

The law seemed blind to the problem of sexual harassment of African-American women. Just as white men's sexual violation of African-American women had been ignored by the law under slavery,[70] it remained unaddressed by laws that might have protected other working women from sexual harassment at work. Rape law in the latter half of the nineteenth century offered little recourse to African-American women who were raped by white men.[71] Similarly, seduction

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[64] *See id.* at 4.

[65] *See* Dudden, *supra* note 13, at 216 (speculating that the possibility of being forced into marriage might have deterred masters from seeking sexual relations with servants).

[66] *See id.* at 215.

[67] *See id.* at 216.

[68] *See id.*

[69] *See* Vandervelde, *supra* note 3, at 877-79.

[70] *See* Bardaglio, *supra* note 31, at 757 (noting that, under slavery, the law in the South had not held masters accountable for rape of female slaves).

[71] *See* Gary D. La Free, Rape and Criminal Justice: The Social Construction of Sexual Assault 238-39 (1989) ("[P]rior to the Civil War, some . . . distinctions were actually written into law. But even when there were no explicit distinctions in the written law, white men were rarely prosecuted for the rape of black women . . . .")

litigation almost always involved whites;[72] when African-American women were seduced by white men, the law took little if any notice.[73] When white age of consent advocates painted a picture of the female victim of sexual predation, their sympathy cut across class lines to poor white working women and girls but failed to recognize the pervasiveness of sexual violence against women who were African American.[74]

II. THE LEGAL REGIME IN MISSOURI

Late nineteenth-century Missouri law responded similarly to women's emergence from their homes to work, although it also identified and targeted workplace sexual harassment directly with the defilement statute. The defilement statute must be seen both as an extension of Missouri law's general concern with women's sexuality and sexual abuse and as a statutory retreat from trends in the common law of master and servant that increasingly depicted the relationship as that of free contracting among equals.

A. Regulation of Sexuality

As in other states, the law of late nineteenth-century Missouri was deeply concerned with the regulation of sexuality and the sexual activities of women. Sodomy[75] and miscegenation[76] were crimes. It was a misdemeanor to commit adultery[77] or to "be guilty of open, gross lewdness or lascivious behavior, or of any open and notorious act of public indecency, grossly scandalous."[78]

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[72] *See* Mary Frances Berry, Judging Morality: Sexual Behavior and Legal Consequences in the Late Nineteenth-Century South, 78 J. Am. Hist. 844, 848-49 (1991) (noting that she found only three reported cases of seduction of African-American women, all of which featured African-American male defendants).

[73] *See id.*

[74] *See* Larson, *supra* note 4, at 31; Odem, *supra* note 7, at 26.

[75] Mo. Rev. Stat. § 3796 (1889).

[76] *See id.* § 3797.

[77] Adultery was defined in the same way for men and women. The statutory prohibition encompassed: "every man and woman, one or both of whom are married, and not to each other." *See id.* § 3798.

[78] *See id.*

Performing an abortion was also a misdemeanor, unless the woman died, in which case the crime was second degree murder.[79] Under a provision of the code with the heading "obscene literature," it was illegal to sell products designed to prevent conception or to induce abortion, and it was illegal to disseminate information about such products or how they could be obtained.[80] A provision of the code specifically devoted to infanticide identified the perpetrator as "every *woman* who shall be delivered of a child, and shall endeavor, privately, or by drowning, or secretly burying the same or in any other way, directly or indirectly to conceal the birth thereof so that it many not be known whether it was born alive."[81] Statutes regulated the location[82] and leasing[83] of "bawdy houses," establishments that sold cheap liquor and catered to sexual license, male rowdiness, and working people's appreciation for drinking and dancing.[84] A statute on bawdy houses passed in 1897 made it illegal to permit girls under the age of eighteen to be found in them.[85] Under Missouri law, it was a misdemeanor to "falsely and maliciously charge[] or accuse[] any female of incest, fornication, adultery, or whoredom by falsely speaking of [her] in the presence of [others]."[86]

The law was particularly concerned with prostitution. Taking a female under the age of eighteen away from her parents or legal guardians for the

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[79] *See id.* § 3495.

[80] *See id.* § 3799. Several statutes passed in 1881 prescribed a fine or jail for various related crimes. *See id.* § 3801 (prohibiting the sale or circulation of medicines for abortion or contraception, and advertisements describing how to obtain them); *id.* § 3804 (prohibiting the publication in newspapers of information about methods of abortion or contraception, or how to obtain them).

[81] *See id.* § 3497 (emphasis added). The concern with women secretly killing their babies that this suggests was similarly reflected in the memoirs of Mrs. Louisa Harris, the police matron at the Four Courts of St. Louis from 1884 to 1893. *See* Harris, *supra* note 45, at 20-21 (describing the "sin of infanticide" committed by young country girls who came to St. Louis "to hide their shame").

[82] Mo. Rev. Stat. § 3812 (1889).

[83] *See id.* §§ 3813, 3816.

[84] *See* Stansell, *supra* note 16, at 14-15 ("At one end of the spectrum bawdy houses shaded into groceries, retreats where people stopped to relax and gossip; at the other, into brothel-like establishments that rented rooms for illicit sex.").

[85] Mo. Rev. Stat. § 2202 (1899).

[86] Mo. Rev. Stat. § 3868 (1889).

purposes of "prostitution or concubinage" was punishable by imprisonment of up to five years,[87] as was enticing a female "of previous chaste character" to "a house of ill-fame" or elsewhere for the purpose of prostitution.[88] Vagrancy laws facilitated women's arrests for prostitution,[89] but as early as the 1860s, police were routinely arresting unattached women for vagrancy before any problems had surfaced.[90] As the result of agitation by the Women's Suffrage Association and the Women's Christian Temperance Union,[91] young girls arrested for vagrancy in St. Louis, Kansas City, and St. Joseph were brought to police matrons who attempted to reform these "unfortunates."[92] Saving them from the workhouse,[93] police matrons located girls' fathers,[94] or found places for them to stay, either in

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[87] *See id.* § 3484. A related crime was abducting a woman with the intention either of compelling her to marry or defiling her. *See id.* § 3483.

[88] *See id.* § 3485.

[89] One such statute prescribed a fine and/or imprisonment for:

> every person who may be found loitering around houses of ill fame. . . without any visible means of support, or engaged in practicing any trick or device to procure money or any other thing of value, or . . . engaged in any unlawful calling whatever, . . . and every person found tramping or wandering from place to place without any visible means of support.

Id. § 3841. *See also, e.g., id.* §§ 8846, 8848, 8849. The memoirs of St. Louis police matron Louisa Harris during the years of 1884-1893 tell of two girls on a visit to the city being arrested and brought to the Four Courts of St. Louis for going "directly and deliberately" to "a house of ill fame." *See* Harris, *supra* note 17, at 69.

[90] *See* Jeffrey S. Adler, Streetwalkers, Degraded Outcasts and Good-for-Nothing Huzzies: Women and the Dangerous Class in Antebellum St. Louis, 25 J. Soc. Hist. 737, 745 (1992); *see also, e.g.*, Harris, *supra* note 45, at 204 (telling the story of Carrie, a young girl arrested after she came to a police officer's attention because she "stood gazing away into vacancy, evincing that uncertainty a timid girl left alone in a strange city would naturally show"). Women "of age" could be arrested for vagrancy but could not be kept in custody. *See id.* at 66.

[91] *See* 4 The History of Woman Suffrage, *supra* note 10, at 795 (describing genesis of position of police matron).

[92] *See* Harris, *supra* note 45. Louisa Harris reflected on her nine years as police matron at the Four Courts in St. Louis: "I have succeeded in almost every instance in [arrested women's] reform—unless their fall was the result of heredity." *Id.* at 15

[93] *See id.* at 57-58 (telling charge that if not for police matron's intervention she would have gone to the workhouse).

homes for young women[95] or in positions of domestic service, which were considered more wholesome than others girls could expect to find.[96]

Missouri law also provided a number of avenues for obtaining legal redress for women's sexual injury that might have been applicable to women's sexual abuse at work. Under Missouri law, rape was punishable by death or imprisonment,[97] and sex with an unmarried woman below the age of consent was illegal. The age of consent was raised from twelve[98] to fourteen[99] between 1879 and 1889, and raised again to eighteen in 1895.[100] Until 1895, the punishments for forcible rape and statutory rape were the same.[101] After 1895, statutory rape of a girl aged 14 to 18 incurred the lesser punishment of no more than two years in prison, and the girl had to be "previously chaste."[102] There were civil actions for rape under Missouri law as well.[103] It was attempted rape for a man to "place his hand upon a woman" or "retain his hold upon her against her will for a lustful and immoral purpose."[104]

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[94] *See. e.g.*, *id.* at 69 (noting father telegraphed); *id.* at 64-67 (noting a father arrived the day after his daughter was sent to the Convent of the Good Shepherd).

[95] *See, e.g.*, *id.* at 64-67 (noting a girl was arrested for vagrancy and sent to the Convent of the Good Shepherd).

[96] *See, e.g.*, *id.* at 49-50 (remembering a judge's instruction that a young woman arrested for wearing male attire be remanded to care of police matron who would "clothe her and try to find her a position in a family"). *See also* Kessler-Harris, *supra* note 7, at 105

[97] *See* Mo. Rev. Stat. § 3480 (1889). *See also id.* § 3481 (treating sex obtained by drugging a woman as rape).

[98] *See* Mo. Rev. Stat. § 1253 (1879). *See also* 4 The History of Woman Suffrage, *supra* note 10, at 795 (briefly recounting changes in Missouri's age of consent in the late nineteenth century).

[99] *See* Mo. Rev. Stat. § 3480 (1889). *See also* State v. Whitesell, 142 Mo. 467 (1898).

[100] *See* Mo. Rev. Stat. § 1838 (1899).

[101] *See id.* § 3480.

[102] *See* Mo. Rev. Stat. § 1838 (1899); *see also* 4 The History of Woman Suffrage, *supra* note 10, at 795 (noting the decrease in punishment and imposition of a chastity requirement in 1895).

[103] *See, e.g.*, Robinson v. Musser, 78 Mo. 153 (1883).

[104] *See, e.g.*, State v. White, 52 Mo. App. 285 (1893).

In addition, Missouri law imposed both criminal and civil sanctions for seduction. Criminally, the law established: "If any person shall, under or by promise of marriage, seduce and debauch any unmarried female of good repute, under eighteen years of age, he shall be deemed guilty of a felony."[105] After 1897, the seduced female needed only to be under twenty-one.[106] The punishment for criminal seduction was two to five years in the penitentiary or a fine of up to $1,000 and imprisonment in the county jail for up to one year.[107] A man could escape prosecution by marrying his alleged victim.[108]

On the civil side, women in Missouri did not have standing to bring suits for their own seduction;[109] however, their fathers could bring such actions. A father could sue for seduction any man who used a false pretense or artifice to obtain his daughter's consent to sex, provided that she was chaste at the time he approached her.[110] The damages for seduction included the father's loss of his daughter's services, for example, in the event she became pregnant or contracted a disease, and also compensation for "the anguish of mind resulting from the ignominy inflicted on [the father] and his family."[111] In a related action, a father could also seek redress for debauchment, or carnal knowledge, of his daughter without the added requirement that her consent be obtained through deceit.[112] In

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[105] *See* Mo. Rev. Stat. § 3486 (1889).

[106] *See* Mo. Rev. Stat. § 1844 (1899).

[107] *See* Mo. Rev. Stat. § 3486 (1889).

[108] *See id.*; Mo. Rev. Stat. § 1844 (1899).

[109] *See* Jordan v. Hovey, 72 Mo. 574, 576 (1880) ("It is settled that a woman cannot maintain an action for damages against her seducer . . . . Such is the rule at common law, and in the absence of any legislative enactment giving a right of action, the common law is declared to be the rule of decision in this state.") (citations omitted).

[110] *See* Bailey v. O'Bannon, 28 Mo. App. 39, 50 (1887) (upholding jury instruction that "in law, seduction means to deceive, to corrupt, to draw aside from the path of virtue one who at the time she is approached is honestly pursuing that path, and that seduction can only operate upon one who was previously chaste").

[111] *See* Morgan v. Ross, 74 Mo. 318, 323 (1881). This anguish included the father's "anxiety, as the parent of other children, whose morals may be corrupted" by the daughter's seduction. *See id.* On damages, see also Smith v. Young, 26 Mo. App. 575 (1887).

[112] *See* Hartman v. McCrary, 59 Mo. App. 571, 577 (1894). In discussing the criminal statute that required a woman be both seduced and debauched, the court explained the distinction between seduction and debauchment. According to the court, for a woman to be seduced meant she

a suit for debauchment, a father could obtain compensation only for any loss of his daughter's services.[113]

Both the seduction and the debauchment actions were predicated on the legal construction that the father-daughter relationship was one of master and servant. The master-servant relationship was constructively established if the daughter was under the age of twenty-one.[114] If she was over twenty-one, it had to be proved.[115] In Missouri, the fact that a woman was employed by someone else was not a defense to a father's suit for seduction; as long as the father could show that he had a right to his daughter's work, he could prevail, regardless of whether his daughter actually worked for him during the time period when the alleged seduction took place.[116]

B. Labor Law

Missouri's late nineteenth-century labor law also confronted the changes in women's work and its implications for women's sexual freedom and vulnerability. By the late nineteenth century, Missouri had labor legislation directed at women workers. Perhaps out of concern for women's virtue, it was a misdemeanor to employ a woman in a dramshop or other "place where spirituous, malt or vinous liquors are sold at retail," unless the woman was a close relative of the store's owner.[117] Statutes enacted because of agitation by women reformers mandated that employers provide seats for female employees and allow them to

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must be "corrupted, deceived, drawn aside from the path of virtue which she was pursuing; her affections must be gained, her mind and thoughts polluted," and for a woman to be debauched meant she must be "carnally known." State v. Reeves, 10 S.W. 841, 845 (Mo. 1888).

[113] *See* Hartman v. McCrary, 59 Mo. App. at 577; Morgan v. Ross, 74 Mo. at 323; Smith v. Young, 26 Mo. App. at 575 (discussing damages). The existence of both a debauchment action for loss of services and a seduction action that also compensated for loss of virtue suggests that Missouri's treatment of seduction was undergoing the same transition that was occurring in other states in the latter half of the nineteenth century, whereby seduction was changing from being a cause of action about loss of services to one about loss of chastity. *See* Vandervelde, *supra* note 3, at 885-86.

[114] *See* Hartman v. McCrary, 59 Mo. App. at 577.

[115] *See id.*

[116] *See id.* (rejecting a defense by a victim's employer's son that her father had no claim for loss of her services because her services belonged to her employer and not to her father); *cf. supra*, text accompanying note 69.

[117] *See* Mo. Rev. Stat. § 3806 (1889).

be used.[118] These first applied only to mercantile establishments,[119] but were later extended to manufacturing and mechanical workplaces as well.[120]

The judge-made law of master and servant, which governed nineteenth-century labor relations generally,[121] clearly applied to women workers but may have done little to respond to the sexual implications of women's emergence from their homes to work. In the 1880 case of Jordan v. Hovey,[122] a young woman hotel worker sued her employer for damages because he "advised and encouraged" her to have sex with his son who, she claimed, later breached his promise to marry.[123] After dismissing for lack of standing her claim for aiding and abetting seduction, the Missouri Supreme Court concluded that the employer's conduct did not breach any duties of master to servant:

> [W]e [do not] perceive how any right of action can accrue to the plaintiff by reason of the fact that the relation of master and servant existed between defendant and herself at the time of the alleged misconduct. She was under no lawful constraint, as servant, either to hear or heed his corrupt counsel, and while, in a moral point of view, the existence of that relation undoubtedly adds to the turpitude of his conduct, yet neither the common law nor any statute of this state will warrant us in holding that such conduct on the part of the master constitutes a violation of his legal obligation to the servant.[124]

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[118] *See* 4 The History of Woman Suffrage, *supra* note 10, at 792 (noting a bill "has been secured compelling employers to provide seats for female employes").

[119] *See* Mo. Rev. Stat. § 3500 (1889) (enacted 1885).

[120] *See* Mo. Rev. Stat. §§ 1859, 1860 (1899) (enacted 1891). Missouri had other labor statutes as well, not directed particularly at women. *See, e.g.*, Mo. Rev. Stat. § 6353 (1889) (requiring an eight-hour work day unless parties otherwise contracted); *id.* § 7058 (mandating mining employees be paid monthly); *id.* §§ 6354-58 (establishing an arbitration board for worker disputes); *id.* § 3583 (regulating practices of employment agents); Mo. Rev. Stat. § 2156 (1899) (protecting certain employees' right to unionize) (enacted 1893). *But see* Karen Orren, Belated Feudalism: Labor, the Law, and Liberal Development in the United States 60 (1991) (arguing statutory labor laws were generally unenforced in nineteenth century).

[121] *See* Orren, *supra* note 120, at 60.

[122] 72 Mo. 574 (1880).

[123] *See id.* at 575-76.

[124] *Id.* at 577.

The Court's limited view of the reciprocal obligations attending the master-servant relationship reflected changes in master-servant law that had evolved earlier in the nineteenth century. Ideologically troubled by dependency, Americans in the first half of the nineteenth century worked to dismantle the feudal system of master-servant relations that had existed at common law, building in its place a system of free labor.[125] Under the emerging contractarian paradigm of employment, one now familiar to us, employers' interests in their employees' labor became determinable at the will of the employees, and employers lost the ability to enforce rights to employee labor by the use of corporal punishment.[126] Employment relationships changed from a paternalistic or household model to one based on contract.[127]

The rise of free labor meant not only that servants had fewer obligations to masters, but also that masters had fewer duties to their servants. The relationship of master and servant under the traditional model was conceived in terms of household imagery,[128] although the household model of service must be understood in light of what was in some sense a service model of the household.[129] The household model of the master-servant relationship was particularly pronounced in the case of residential service.[130] Like wives and children, servants who resided with their master were considered to be the legal dependents of the head of the household, subject to his jurisdiction.[131] Residential servants had an obligation to obey the master's reasonable commands, but he had a reciprocal obligation to maintain them, to provide for their support.[132] By the middle of the nineteenth century, residential servants were no longer treated as

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[125] *See* Robert J. Steinfeld, The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870 (1991); *cf.* Orren, *supra* note 120 (arguing that the feudal system persisted into twentieth century).

[126] *See* Steinfeld, *supra* note 125, at 15.

[127] *See generally id.*

[128] *See id.* at 59-60.

[129] *See* Orren, *supra* note 120, at 102.

[130] *See* Steinfeld, *supra* note 125, at 56-60, 154-55.

[131] *See id.* at 56.

[132] *See id.* at 154-55.

their masters' legal dependents, and masters no longer had this duty to care for them.[133]

The Court's conception of the master-servant relationship in Jordan v. Hovey, reflects its transformation from a paternalistic relationship to one based on contract. For legal purposes, at least, if not, notably, for moral ones,[134] the master and servant in that case were treated as equals in a contractual arrangement. He was not depicted as having breached any duty to care for her, nor was she depicted as having had any preexisting duty to take his advice or to follow what may have been his command.

Missouri preserved elements of the common law master-servant relationship by statute, however. Nationwide, apprenticeships continued to be governed by traditional conceptions of master-servant relations until late in the nineteenth century.[135] Similarly, in the first decade of the nineteenth century, Missouri formally defined the mutual responsibilities of employer and apprentice by enacting a statute governing apprenticeships that patterned the relationship after that of parent and child.[136]

The defilement statute also codified elements of the traditional master-servant relationship, by extending obligations from a master to a servant "confided to his care or protection."[137] Thus, it represented a retreat from the free

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[133] *See id.* at 154-56.

[134] The Court noted, "in a moral point of view, the existence of th[e master-servant] relation undoubtedly adds to the turpitude of [the master's] conduct." Jordan v. Hovey, 72 Mo. 574, 577 (1880).

[135] *See* Steinfeld, *supra* note 125, at 174-75 (noting Fugitive Slave Acts of 1793 and 1850 were held to apply to runaway apprentices).

[136] *See* Thelen, *supra* note 9, at 19. In 1889, the statute made it a crime punishable by a fine and/or imprisonment of up to three years for a:

> master or mistress of an apprentice, or other person having the legal care and control of any infant . . . , without lawful excuse, [to] refuse or neglect to provide for such apprentice or infant necessary food, clothing, or lodging or . . . unlawfully and purposely [to] assault such apprentice or infant whereby his life shall be endangered or his health shall have been or shall be likely to be permanently injured . . . .

Mo. Rev. Stat. § 3499 (1889). West's Missouri Digest and Missouri's annotated code reference no reported cases under this provision. *See* Missouri Digest, 1821-Date (West 1957); Mo. Rev. Stat. § 3499 (1889).

[137] *See* Mo. Rev. Stat. § 1260 (1879). For further discussion of the gendered implications of free labor, *see* Lea Vandervelde, Hidden Dimensions in Labor Law History: Gender Variations on the Theme of Free Labor, *in* Labor Law in America: Historical and Critical Essays 99

labor paradigm that had emerged in other areas of labor law, while at the same time manifesting the law's broader concern with women's sexuality and sexual abuse.

III. THE DEFILEMENT STATUTE

With the codification of the defilement statute in 1879, Missouri identified and addressed a significant aspect of what we would now term workplace sexual harassment, making it illegal for employers to have sexual relations with the young domestic help who lived and worked in their homes.[138] Before 1879, Missouri law already called for a fine or imprisonment "[i]f any guardian of any female under the age of 18 years, or any other person to whose care or protection any such female shall have been confided, shall defile her, by carnally knowing her."[139] As amended, the statute added, by carnally knowing her

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(Christopher Tomlins & Andrew King eds., 1992), and Lea Vandervelde, The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity, 101 Yale L.J. 775 (1992).

[138] *See* Vicki Schultz, Reconceptualizing Sexual Harassment, 107 Yale L.J. 1683 (1998) (arguing that many of the most common and debilitating forms of workplace sexual harassment are not at all sexual in nature).

[139] *See* Mo. Stat. vol. 1, art. 8, § 9 (Wagner 1872). The same basic statute, although initially restricted to white females, had existed under Missouri law since 1835:

> If any guardian of any white female under the age of 18 years or of any other person to whose care or protection any such female shall have been confided, shall defile her by carnally knowing her, he shall, in cases not in this act otherwise provided for, be punished by imprisonment in the penitentiary not less than two years, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

Mo. Rev. Stat. art. 8, § 9 (1835). Kansas had a statute that was similar in some respects but did not explicitly apply to employment. It provided:

> If any guardian of any white female under the age of eighteen years, or any other person to whose care or protection any such female shall have been confided, shall defile her by carnally knowing her, he shall, in cases not in this act otherwise provided for, be punished by confinement and hard labor not less than two years, or by imprisonment in a county jail not less than six months, and a fine not exceeding one thousand dollars.

Kan. Terr. Stat. § 9 (1855). While this statute was never amended to include relationships of employment, *see* Kan. Gen. Stat. § 224 (1862); Kan. Gen. Stat. § 233 (1868); Kan. Gen. Stat. § 233 (1876); Kan. Gen. Stat. § 248 (1897), the Kansas Supreme Court did apply it in at least one work situation. *See* State v. Jones, 16 Kan. 608 (1876) (upholding conviction of employer for sex with domestic servant). The Missouri Supreme Court looked to this Kansas precedent in applying

"while she remains in his care, custody, or employment."[140] According to the Missouri Supreme Court, this amendment was intended, in part, to overrule the case of State v. Arnold and, in part, to clarify that the statute governed men's conduct with their young domestic workers. In an 1891 case, the Court explained, "the evident intent of the legislature was to meet the decision in the Arnold case, and to extend the protection of the statute to girls who were simply employed as domestic family servants. If it has not this operation, it has no significance whatsoever."[141]

State v. Arnold,[142] decided in 1874, was the first case under the defilement statute to reach the Supreme Court since 1839.[143] The alleged victim's father had given her permission to help the defendant plant corn for the day, and they had had sexual relations. The Missouri Supreme Court held that the girl was not "confid[ed] to [the defendant's] care and protection," as required for him to be convicted under the statute.[144] To the extent that the amendment codified in 1879 was meant to overrule Arnold, it might have criminalized sex between men and their young women employees in a broad range of late nineteenth-century work situations. In fact, however, the reported cases concern prosecutions of

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the Missouri statute. *See, e.g.*, State v. Young, 12 S.W. 642, 643 (Mo. 1889). In addition, Iowa had a statute that applied to "those with whom a girl resides as a member of the family, and who have her wholly under their care and protection," although it required the defendant to have legal charge over the complainant. *See* State v. Buster, 90 Mo. 514, 515 (1887) (attorney general's brief)) (citing State v. Rabsuhl, 8 Iowa 447 (1859)).

[140] Mo. Rev. Stat. § 1260 (1879). The amendment also changed the penalties from those under the 1872 statute, which provided for a sentence of "imprisonment in the penitentiary, not less than two years, or . . . imprisonment in a county jail, not less than six months, and a fine, not exceeding one thousand dollars." Mo. Stat. vol. 1, art. 8, § 9 (Wagner 1872). Under the amendment, the punishment became: "imprisonment in the penitentiary not exceeding five years or . . . imprisonment in the county jail not exceeding one year and a fine of not less than one hundred dollars." *See* Mo. Rev. Stat. § 1260 (1879).

[141] State v. Terry, 17 S.W. 288, 289 (Mo. 1891). *See also* State v. Buster, 90 Mo. 514, 514 (1887) (brief of attorney general arguing amendment meant to overrule Arnold); State v. Young, 99 Mo. 284, 285-86 (1889) (brief of attorney general arguing amendment meant to overrule Arnold). Unfortunately, no formal legislative history of the amendment has been maintained.

[142] 55 Mo. 89 (1874).

[143] State v. Acuff, 6 Mo. 54 (1839).

[144] *See* Arnold, 55 Mo. at 90.

employers, rather than nonemploying relatives,[145] only where the alleged victims worked as live-in domestic servants.[146] After upholding the amended statute's application to domestic service in several cases,[147] the Missouri Supreme Court established that, as a rule, the amended statute governed conduct between a man and a female under the age of eighteen who lived in his home as his servant.[148]

A. Regulating the Space Between Work and Family

In its enforcement, the statute may not have reached all of the classes of women who worked as domestic servants. Although the reported appellate cases define the contours of the legal claim, they offer only a glimpse of how the statute was actually prosecuted. It was not until 1886 that the first conviction under the amended statute was appealed to the Missouri Supreme Court, and therefore found a place in the reporters.[149] Between 1886 and 1900, the Court heard a total of twelve cases under the statute, ultimately affirming convictions in nine of them and reversing and remanding in the others, predominantly for technical reasons.[150] In the nine that grew out of employment relationships, the complainants were

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[145] *See* State v. Sibley, 33 S.W. 167 (Mo. 1895) (en banc) (stepfather prosecuted for defiling stepdaughter); State v. Napper, 42 S.W. 957 (Mo. 1897) (en banc) (cousin's mother's husband prosecuted for defiling orphan charge).

[146] *See* State v. Young, 12 S.W. 642 (Mo. 1889); State v. Strattman, 13 S.W. 814 (Mo. 1890); State v. Terry, 17 S.W. 288 (Mo. 1891); State v. Rogers, 18 S.W. 976 (Mo. 1892); State v. Lingle, 31 S.W. 20 (Mo. 1895); State v. Kavanaugh, 33 S.W. 33 (Mo. 1896) (en banc); State v. Hill, 36 S.W. 223 (Mo. 1896); State v. McClain, 38 S.W. 906 (Mo. 1897), *aff'd after remand*, 56 S.W. 731 (Mo. 1900); State v. Summar, 45 S.W. 254 (Mo. 1898). The other reported case under the statute, State v. Buster, 2 S.W. 834 (Mo. 1887), does not reveal anything about the relationship between the complainant and the defendant.

[147] *See* State v. Young, 12 S.W. 642 (Mo. 1889); State v. Strattman, 13 S.W. 814 (Mo. 1890).

[148] *See* State v. Terry, 17 S.W. 288, 289 (Mo. 1891).

[149] *See* State v. Buster, 2 S.W. 834 (Mo. 1887).

[150] *See supra* note 6. The Court reversed and remanded in State v. Buster, 2 S.W. 834 (Mo. 1887), because of deficiencies in the indictment; in State v. Young, 12 S.W. 642 (Mo. 1889), for lack of venue; and in State v. Sibley, 33 S.W. 167 (Mo. 1895) (en banc), because of erroneous evidentiary rulings. It initially reversed and remanded in State v. McClain, 38 S.W. 906 (Mo. 1897), because the defendant was absent when judgment was rendered, but it ultimately affirmed the conviction, 56 S.W. 731 (Mo. 1900).

household servants.[151] These nine cases suggest that the statute reached white female help of differing degrees of economic need, but may not have been applied in cases of sex between men and servants in more formal domestic arrangements, such as those held by servants who were African American. The cases say less about the defendants. They, too, appear to have been white, and in several cases, they were related, by marriage at least, to the young women and girls involved.

The complainants in these cases seem to have come from the ranks of help, although some appear to have worked out of fairly serious economic need. Many of the girls in these cases were prototypical help, working casually and temporarily in neighbors' homes alongside members of the employing family.[152] For example, sixteen-year-old Eliza Smith was working at a neighboring house "in the capacity of a kitchen girl" when she was allegedly defiled by her employer.[153] She had initially gone there to assist during his wife's illness but stayed on after the wife's recovery.[154] Smith's parents were close at hand. During the course of her term as a "regular inmate of the defendant's family,"[155] her father admonished the defendant several times not to overwork her.[156] The father further testified, "I did not want him to let her go out at night except to church; he said all right, she would be treated just like one of the family."[157]

Similarly, Lucy Steele, a fifteen-year-old,[158] was working as help during the events that led to the state's prosecution of her uncle. Initially, she had gone to stay with her aunt so that her uncle could assist her father "to move his home."[159] She was induced to remain for her aunt's confinement and finally agreed to stay on under an arrangement whereby the uncle was "to furnish her

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[151] *See supra* note 146.

[152] *See* Dudden, *supra* note 13, at 12-43.

[153] State v. Young, 12 S.W. 642, 642 (Mo. 1889).

[154] *See id.*

[155] *Id.* at 643.

[156] *See id.* at 642.

[157] *Id.*

[158] *See* State v. Summar, 45 S.W. 254, 255 (Mo. 1898).

[159] *See id.* at 255.

books and let her go to school and she could help do his work night and morning."[160]

The complainant in State v. Kavanaugh was the defendant's sister-in-law. She was at his house attending to the household duties while the appellant's wife was absent, nursing another sister.[161] Emma Pierce, another complainant, was the sister of the defendant's wife's brother-in-law.[162] She went to live with them following a conversation where the defendant's wife said "she liked her better than the girl she had, that is, a girl Mrs. Hill kept to work for her, for her board and clothes."[163] Pierce worked as a household servant,[164] but in conversation with others the defendant described her as a member of his family.[165]

Other complainants seem to have been more marginalized young women, working as domestic servants out of necessity great enough to belie any pretense of obliging. Celia Steele, whose mother was a widow, began working for the defendant at the age of twelve in order to earn her keep.[166] Over the next five years, she worked in his household from time to time.[167] Mary Berhorst went into service with the defendant, her uncle, at the age of ten after her mother died.[168] She lived with him for six or seven years, working in exchange for his promise to "give [her] nice clothes, board [her], send [her] to school and treat [her] as a

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[160] *See id.*

[161] 33 S.W. at 33.

[162] *See* State v. Hill, 36 S.W. 223, 223 (Mo. 1896).

[163] *Id.* at 223-24.

[164] *See id.* at 224-25.

[165] *See id.* at 224. Clara Wheatley may also have been help. She did the housework in the defendant's family while his wife was sick and later returned to help them pack for a move. *See* State v. Lingle, 31 S.W. 20, 21 (Mo. 1895). The defendant promised her parents, at least, that "she would be treated just as if she were home." *See* 31 S.W. at 21. In State v. Rogers, 18 S.W. 976, 977 (Mo. 1892), Catherine Shooey's parents confronted her employer after the events giving rise to the prosecution, suggesting that they may have played the type of protective role that the parents of help often did. *See* Dudden, *supra* note 13, at 38.

[166] *See* State v. Terry, 17 S.W. 288, 290 (Mo. 1891).

[167] *See id.*

[168] *See* State v. Strattman, 13 S.W. 814, 815 (Mo. 1890).

child."[169] Finally, fifteen-year-old Flora Coggin was "a poor country girl . . . living at home with her widowed mother"[170] in Texas when she accepted the defendant's offer to work for him in Missouri in order to earn her keep. Mary Berhorst worked for her uncle in a house described as having only two rooms,[171] and Flora Coggin was motivated by the defendant's offer to "board, clothe, send her to school, and take care of her until she was married, if she would stay with his wife and help her about the house."[172] While these arrangements seem to have been market transactions, necessitated by the young women's poverty, they did not fit the formal, class-conscious model of service that prevailed at the time in urban areas and in the East.[173]

Perhaps in part for this reason, none of the complainants in the reported cases were identified as African-American women and girls.[174] African-American women and girls did work in domestic service, in St. Louis at least, at this time,[175] but domestic arrangements there, particularly those involving African-American women, may have followed the formal model that seems perhaps not to have been covered by the statute.[176]

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[169] *See id.* at 815.

[170] *See* State v. McClain, 38 S.W. 906, 906 (Mo. 1897), *aff'd after remand*, 56 S.W. 731 (Mo. 1900).

[171] *See* Strattman, 13 S.W. at 815.

[172] *See* McClain, 38 S.W. at 906.

[173] *See* Dudden, *supra* note 13, at 48. Just as the employee complainants were treated as family members to some degree, the family member complainants were in some sense treated as employees. *See* State v. Sibley, 33 S.W. 167, 168 (Mo. 1895) (en banc) (noting stepdaughter complainant "live[d] with defendant as a member of his family, assisting her mother in her domestic affairs.")

[174] The cases do not mention race at all, which, in light of conventions of the day, indicates that all of the complainants were white. *See, e.g.*, State v. Grant, 53 S.W. 432 (Mo. 1899) (mentioning criminal defendant was African American); State v. Alexander, 24 S.W. 1060 (Mo. 1894) (same); Jackson v. Grand Ave Ry. Co., 24 S.W. 192 (Mo. 1893) (stating plaintiff in tort action was African American); State v. Lowe, 5 S.W. 889 (Mo. 1887) (noting victim in criminal prosecution was African American); State v. Robb, 2 S.W. 1 (Mo. 1886) (same).

[175] *See* Lorenzo J. Greene et al., Missouri's Black Heritage 115 (2d ed. 1993) (noting that between Reconstruction and the Civil War, more than 90% of African-American wage earners in St. Louis worked as domestics, factory workers, and common laborers.)

[176] Outside the East, although help was the predominant model of service, more formal models of service existed in urban areas. *See* Dudden, *supra* note 13, at 96-97. African-American women's domestic service followed this more formal model. Free African-American women

At the same time, it would not be surprising if the statute simply was not enforced when African-American female servants were the potential complainants.[177] As originally written in 1835, the statute had explicitly governed relations only with young white women and girls.[178] Indeed, the first case to interpret the statute as reaching defendants other than legal guardians (long before it was explicitly amended to cover employment) rejected an alternative statutory construction that would have broadened the statute's application to females other than "white female[s] under the age of eighteen years."[179] The explicitly raced language in the statute was removed at the time of the Civil War,[180] but indictments, prosecutions, and convictions under the statute may well have continued along the old racial lines.

The reported cases reveal less about the defendants in these prosecutions. They, too, were white,[181] and they were in a position to support household help.[182] Their most notable characteristic, however, is that they were often related, by marriage, if not by blood, to the alleged female victims.[183] A

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servants in this period were not help, although they sometimes developed close client relations with employers that offered some of the protections associated with helping. *See id.* at 33-35.

[177] *See supra* text accompanying notes 70-74 (discussing law's failure nationally to address sexual predation of African-American women).

[178] *See* Mo. Rev. Stat. art. 8, § 9 (1835).

[179] *Id.*; *see* State v. Acuff, 6 Mo. 54 (1839). Similarly under slavery, white men in Missouri were not held accountable for rape of African-American women. *See* Greene et al., *supra* note 175, at 38 ("Sexual assault of a slave woman by a white man was not considered an offense against the woman: it was only a case of trespassing on the master's 'property.'").

[180] Language about race persisted in the statute in 1855. Mo. Rev. Stat. vol. 1, art. 8, § 9 (1835). However, references to race had been removed by 1870. Mo. Stat. vol. 1, art. 8, § 9 (Wagner 1870).

[181] None of the reported cases mention the race of any of the defendants, which again indicates that they were white. *See supra* note 174.

[182] There is no evidence that any of the defendants had more than one household worker, except in State v. Strattman, 13 S.W. 814, 815-16 (Mo. 1890), where the defendants' field hands testified on his behalf.

[183] *But see* State v. Terry, 17 S.W. 288 (Mo. 1891); State v. Rogers, 18 S.W. 976 (Mo. 1892); State v. Lingle, 31 S.W. 20 (Mo. 1895); State v. McClain, 38 S.W. 906 (Mo. 1897), *aff'd after remand*, 56 S.W. 731 (Mo. 1900) (defendants not related to their domestic servants).

Prosecutions were also brought under the statute against men who had sex with relatives in the absence of a formal employment relationship. *See* State v. Sibley, 33 S.W. 167 (Mo. 1895) (en banc) (stepfather prosecuted for defiling stepdaughter); State v. Napper, 42 S.W. 957 (Mo.

couple of the defendants were uncles by marriage;[184] one was a brother-in-law;[185] and one was the complainant's brother's sister-in-law's husband.[186] The men were married themselves, and in several cases, their wives testified in their favor.[187]

The statute sought to regulate an employment relationship that resided, during this period of transition, in the realm between work and family. The complainants, out of varying levels of economic need, had left their homes to work, but they continued to work within a family, whether their own or someone else's. Their employers were strangers, neighbors, and relatives. The statute governed the sexual conduct that occurred at this middle ground.[188] This middle ground, residential service, was notably, where the traditional master-servant relationship had most clearly defined a servant's dependency and a master's custodial obligations.

1897) (en banc) (cousin's mother's husband prosecuted for defiling orphan charge). For a particularly disturbing account of such abuse, see State v. Sibley, 33 S.W. 167 (Mo. 1895) (en banc), which recounts a stepdaughter's repeated rape by her stepfather, her mother's knowledge of it, the girl's travel to St. Louis to stay with a disapproving cousin of her mother's for the duration of her pregnancy, the girl's harrowing attempts to illegally abort the fetus using medications provided by the stepfather, and finally, the birth of her stillborn child. Sexual abuse of women by their male relatives was also common in statutory rape prosecutions of about the same time period. *See* Odem, *supra* note 7, at 21-38 (discussing frequency of family sexual abuse in statutory rape cases before Alameda County, California court from 1910 to 1920).

The defilement statute may not have reached incestuous sexual relations between fathers and daughters. One Supreme Court Justice commented in dissent:

> If the relations existing between stepfather and stepdaughter are sufficient to sustain this prosecution, then, under the same section, a father would also be subject to the same provisions; but no one would contend that a father is subject to such a prosecution, and this because his daughter has not been confided to his care and protection within the meaning of the statute.

See Sibley, 33 S.W. at 171 (Sherwood, J., dissenting).

[184] *See* State v. Strattman, 13 S.W. 814, 815 (Mo. 1890); State v. Summar, 143 Mo. 220, 225 (1898).

[185] *See* State v. Kavanaugh, 33 S.W. 33, 33 (Mo. 1896) (en banc).

[186] *See* State v. Hill, 36 S.W. 223, 223 (Mo. 1896).

[187] *See, e.g.*, State v. Terry, 17 S.W. 288, 290 (Mo. 1891); State v. Lingle, 31 S.W. 20, 22 (Mo. 1895); State v. Hill, 36 S.W. 223, 225 (Mo. 1896).

[188] Similarly, Professor Vandervelde argues that the father's common law tort of seduction preserved working women's "sexual safety only if they remained confined to the household or continued to be submissive to one patriarchal status regime or another." *See*

B. Strict Liability

By imposing a strict liability regime, the statute both restricted young women's sexual freedom and protected them from workplace sexual abuse. It criminalized any sex between a man and his servant, whether an exercise of sexual freedom, an incident of sexual abuse, or something in between. The crime was "defil[ing] . . . by carnally knowing," no matter how that was achieved.[189] And the penalties could be significant. The statute punished violations with imprisonment in the penitentiary of up to five years or imprisonment in the county jail of not more than one year and a fine of not less than $100.[190] In the reported cases, sentences ranged from twenty-four hours in the county jail and a $100 fine, in a case that appeared to be consensual,[191] to the more common two to three years in the penitentiary, imposed without any particular correlation to coercion or consent.[192]

Vandervelde, *supra* note 3, at 822. She claims that when women obtained standing to sue for their own seduction, they were finally able to obtain legal redress for sexual injury without being conceptually tethered to their father's households. *See id.* at 821-27.

[189] The Court held numerous times that the woman's consent was not a defense. *See* State v. Strattman, 13 S.W. 814 (Mo. 1890); State v. Rogers, 18 S.W. 976 (Mo. 1892); State v. Hill, 36 S.W. 223 (Mo. 1896).

[190] *See* Mo. Rev. Stat. § 1260 (1879); Mo. Rev. Stat. § 3487 (1889); Mo. Rev. Stat. § 1845 (1899). These penalties indicate that wealthier men could avoid incarceration or curtail any period of it by paying a fine. Unfortunately, the reported cases do not shed light on whether poorer men suffered harsher penalties for defilement.

[191] *See* State v. Young, 12 S.W. 642, 642 (Mo. 1889).

[192] *See* State v. Buster, 2 S.W. 834 (Mo. 1887) (sentence of two years, question of consent/coercion unclear); State v. Terry, 17 S.W. 288 (Mo. 1891) (sentence of two years, question of consent/coercion unclear); State v. Sibley, 33 S.W. 167 (Mo. 1895) (en banc) (sentence of two years, complainant alleged force); State v. Lingle, 31 S.W. 20 (Mo. 1895) (sentence of three years, complainant alleged nonconsent, defendant alleged consent); State v. Hill, 36 S.W. 223 (Mo. 1896) (sentence of two years, defendant alleged consent); State v. McClain, 38 S.W. 906 (Mo. 1897), *aff'd after remand*, 56 S.W. 731 (Mo. 1900) (sentence of two and one half years, question of consent/coercion unclear); State v. Summar, 45 S.W. 154 (Mo. 1898) (sentence of two years, question of consent/coercion unclear). In two other cases, defendants received sentences lower than two to three years in the penitentiary. *See* State v. Strattman, 13 S.W. 814 (Mo. 1890) (sentence of three months in county jail and $100 fine, victim alleged force but Court believed there was consent); State v. Napper, 42 S.W. 957 (Mo. 1897) (en banc) (sentence of nine months and $500 fine, question of consent/coercion unclear, but Court doubted defendant's guilt). In State v. Kavanaugh, 33 S.W. 33 (Mo. 1896) (en banc) and State v. Rogers, 18 S.W. 976 (Mo. 1892), the defendants' sentences are not disclosed.

Like the age of consent statutes that reformers were advocating during this period,[193] this statute prohibited sex even if the young woman was a willing participant, thereby reigning in any sexual independence that might have been facilitated by girls' distance from parental supervision. Sixteen-year-old Eliza Smith may well have consented to sex with her employer during her engagement as a kitchen girl in his household.[194] The Court notes only that he flirted with her and gave her presents and that subsequently "he put his arm around her, and they then had sexual intercourse," which they continued to do two or three times a week during the time that she resided there.[195] In discussing the evidence required to prove guilt, the Court comments, "it makes no difference how readily or how often she consented to have sexual intercourse with the defendant."[196] The defendant was convicted, even though, from this description, the young female servant may have been a willing sexual partner.

Other reported cases similarly lack evidence that the sexual relations at issue resulted from force or coercion, although this may be attributable to the Court's disinterest in drawing such distinctions. In State v. Kavanaugh, for example, we know only that the "defendant took the prosecutrix [aged fifteen] from her bed, and carried her to his own, and had carnal connection with her" and that this continued "at intervals," during her stay over the next four or five months.[197] The defendant was again convicted.

In addition to criminalizing arguably consensual sex, the statute purported not to apply in circumstances where sex was forced. Rape was a defense to a prosecution for defilement. In State v. Woolaver, the Supreme Court held erroneous a jury instruction that told the jury to convict if they found that carnal knowledge was had "with or without force."[198] This was because juries had a duty to acquit if it was shown that the defendant had committed a higher crime

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[193] *See generally* Larson, *supra* note 4; Odem, *supra* note 7.

[194] *See* State v. Young, 12 S.W. 642, 642 (Mo. 1889).

[195] *See id.*

[196] *See id.*

[197] *See* 33 S.W. at 33.

[198] *See* State v. Woolaver, 77 Mo. 103 (1882). *See also* State v. Strattman, 13 S.W. 814 (Mo. 1890); State v. Lingle, 31 S.W. 20 (Mo. 1895).

than that proscribed by the statute.[199] Thus, on one level, at least, the statute acted to constrain any attempts by young women to exercise newfound sexual freedom.

At the same time, however, the statute offered young women protection from sexual abuse at work. Men's sexual relations with young live-in help could be seen as inherently coercive.[200] The Court recognized, in State v. Terry, "A master has more opportunities to accomplish his purposes when the girl lives and works in his own house, than when she is elsewhere."[201] Even with parents living nearby, help depended on their male employers for support during the time of their service. The more marginalized domestic servants who worked out of abject poverty were particularly poorly positioned to decline (or consent freely to) employers' sexual advances. Perhaps this explains why a teenager who had entered her employer's service as a ten-year-old orphan testified in his prosecution for defilement, "[H]e gave me all my things."[202]

Like criminal and civil actions for seduction, the defilement statute also may have provided legal recourse for women whose acquiescence to sex was obtained through their employers' deceit. At least one of the reported defilement cases may have concerned sex in the context of a breached promise of marriage. In State v. Hill, there is no evidence that the sex was forced. "Within a few weeks after her arrival at her new home," according to Emma Smith, "the defendant had sexual intercourse with her at his barn, and frequently thereafter at his house in the same room where his wife was sleeping in another bed."[203] However, the girl testified that after she became pregnant and had a child, he promised to "leave his wife and . . . marry her," if she would swear the child was not his.[204] It is unclear whether he made similar representations earlier in their relationship.

Finally, the statute gave women legal recourse for outright sexual assault that could not have been prosecuted as rape. Sixteen-year-old Clara Wheatley was

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[199] *See* Woolaver, 77 Mo. at 104; Strattman, 13 S.W. at 817; Lingle, 31 S.W. at 22-23. In 1923, the Court held that rape was no longer a defense to defilement, but that was after the peak of the statute's application, at a time when its focus had shifted away from employment. *See* State v. Sanders, 252 S.W. 633 (Mo. 1923) (interpreting Mo. Rev. Stat. § 3260 (1919)).

[200] Susan Estrich suggests that all employer-employee sexual relationships may be inherently coercive. *See* Estrich, *supra* note 1, at 826, 831, 860.

[201] 17 S.W. 288, 289 (Mo. 1891).

[202] *See* Strattman, 13 S.W. at 815.

[203] *See* State v. Hill, 36 S.W. 223, 224 (Mo. 1896).

[204] *See id.*

a domestic servant in a neighboring household when her employer, Oscar Lingle, attacked her.[205]

> She testified that one day in July, 1892, Mrs. Lingle, the wife of the defendant had gone [out,] that witness had been ironing and about the middle of the afternoon had gone to her room and lain down and fallen asleep and was awakened by defendant coming into her room and he threw himself on her bed and had intercourse with her. She testified she resisted all she could. He put his hand over her mouth and told her not to say anything . . . .[206]

After he had accomplished his purposes, he talked to her. He "[s]aid he had never done such a thing before and never would again if she would not tell it and said it would be a disgrace to the church. She testified she didn't like to be talked about, so she promised him she would not say anything about it."[207] Clara Wheatley became pregnant, however, and the matter could not remain a secret.[208] Oscar Lingle was prosecuted under the defilement statute and sentenced to three years in prison.[209]

At the time, in order to demonstrate that a woman had been raped under Missouri law, it had to be proved that she had offered the "utmost resistance."[210] Because rape was thought to be, as the often quoted Lord Hale admonished, "an accusation easily made, hard to be proved, and still harder to be defended by one ever so innocent,"[211] a charge of rape could only be supported if it was demonstrated that the woman resisted "as one battling for her chastity, and only losing it when it is torn from her by a force or a terror stronger than her powers of defense."[212] If she resisted to the extent of her physical abilities and resisted to the last, she would be believed; however, if at any time during the attack she

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[205] *See* State v. Lingle, 31 S.W. 20 (Mo. 1895).

[206] *Id.* at 21.

[207] *Id.*

[208] *See id.*

[209] *See id.*

[210] *See* State v. Burgdorf, 53 Mo. 65 (1873); State v. Perkins, 11 Mo. App. 82 (1881).

[211] *See* Burgdorf, 53 Mo. at 67 (quoting with approval Lord Hale's admonition).

[212] Perkins, 11 Mo. App. at 85.

succumbed, she might be found to have consented to sex, and her attacker might be acquitted.[213]

Clara Wheatley, testified that "[s]he never yielded until she thought she had to," but "[a]fter he pulled up her clothes and put his hand over her mouth she made no further resistance."[214] Under the defilement statute, Lingle was punished precisely because the jury determined that rape could not have been proved. He attempted a rape defense. On appeal, the Missouri Supreme Court upheld the following lower court instruction to the jury that resulted in Lingle's conviction:

> The court instructs the jury that before they can acquit because a higher degree of crime has been shown, they will have to believe from the evidence that, if the defendant were on trial for a much higher degree of crime, it would be their duty from such evidence to convict the defendant of such higher degree of crime, if they believe such evidence to be true . . . . [I]f you believe that the defendant did use force to accomplish his purpose, yet if you further believe from the evidence that the witness Wheatley did yield her consent to his embraces, however reluctantly, before the carnal act was accomplished, the defendant would not be guilty of such higher crime.[215]

Under the defilement statute, employers who sexually assaulted their servants could be convicted when their actions fell short of what a jury determined could actually be punished as rape.

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[213] *See* Burgdorf, 53 Mo. at 65 (holding proof of any consent on part of complainant, however reluctant, rebuts presumption of rape); *cf.* State v. Cunningham, 12 S.W. 376, 379 (Mo. 1889) (holding "a consent induced by fear of personal violence is no consent"); State v. Dusenberry, 20 S.W. 461, 466 (Mo. 1892) ("'The utmost resistance' doctrine does not apply where the woman is put in fear of personal violence, and her will thus overcome, or where intercourse is had with her by fraud, as by impersonating her husband, or where she is insensible from intoxication or drugs."). These cases suggest that Missouri's application of the utmost resistance standard may have been somewhat less stringent than other states'. *See* Larson, *supra* note 4, at n.76 (describing the utmost resistance standard generally and stating that succumbing from fear of violence was treated as consent).

The utmost resistance standard was not the only obstacle to proving rape. The lower court had to interrupt the defense counsel's closing argument in State v. Lingle at the point where he was telling the jury that the Clara Wheatley must have consented to sex, since she otherwise could not have become pregnant. *See* State v. Lingle, 31 S.W. 20, 23 (1895). Relying on old English treatises debunking that theory, the Supreme Court upheld the propriety of the court's interruption. *See id.*

[214] Lingle, 31 S.W. at 22.

[215] *See id.*

Clara Wheatley was a sympathetic victim. The Court apparently recognized the "reluctan[ce]" of her consent, and the community outcry over her case was such that it had to be removed to another county.[216] However, even unsympathetic victims could obtain legal recourse under the statute when their employers sexually assaulted them but would not have been convicted of rape. Mary Berhorst claimed that beginning at age sixteen, she was repeatedly assaulted by the man in whose household she had worked since she was ten.[217] She testified:

> [H]e told me such things; I told him I would not do such things; he took hold of me, threw me down and did it; . . . . he said he would give me his farm if I would let him do it; I said I did not want his farm; he took hold of me and threw me down . . . he did it a good many times.[218]

The Supreme Court dismissed her testimony as the kind of lies that women tell:

> The testimony of the girl when contrasted with her actions; her failure to make complaint, although forced "a good many times," only furnishes one in the long list of instances of which that profound philosopher of human nature, Shakespeare, speaks:
>
> The wiles and guiles that women work
> Dissembled with an outward show.[219]

Nonetheless, the Court upheld the employer's conviction under the defilement statute, determining that he could not be acquitted as a rapist because there had been no rape.[220] Under the statute, Mary Berhorst could accuse her employer of rape, not be believed, and still have him punished for his conduct.

Because consent was not a defense in prosecutions under the defilement statute, young women could obtain legal redress for sexual assault, without having to contend with the baseline assumption of consent that made it so difficult to prove an accusation of rape. Eventually, Missouri's age of consent

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[216] *See id.*

[217] *See* State v. Strattman, 13 S.W. 814, 815 (Mo. 1890).

[218] *Id.*

[219] *Id.* at 817.

[220] At the trial court level, the defendant did receive one of the lowest sentences in any of the reported cases, three months in jail and a one-hundred-dollar fine. *See id.* at 815.

statute might play a similar role since it also imposed a strict liability regime.[221] But in 1879, when the defilement statute was amended to apply to employment, Missouri's age of consent was just twelve.[222] In 1889, it was fourteen,[223] and it was not until 1895 that it was raised to eighteen,[224] so that it reached the entire age group of young women covered under the defilement law.[225]

The defilement statute also omitted, for the most part, the chastity inquiry that hampered women's suits for seduction, barred later prosecutions for statutory rape, and, in cases of forcible rape, provided further evidence in support of the underlying assumption of consent. Both civil and criminal actions for seduction required that the woman be chaste at the time she was seduced. The criminal statute prohibited seduction under promise of marriage only of a woman of "good repute,"[226] or a good reputation for chastity.[227] A civil action for

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[221] *See* Larson, *supra* note 4.

[222] *See* Mo. Rev. Stat. § 1253 (1879); *see also* 4 The History of Woman Suffrage, *supra* note 10, at 795 (briefly recounting changes in Missouri's age of consent in late nineteenth century).

[223] *See* Mo. Rev. Stat. § 3480 (1889); *see also* State v. Whitesell, 142 Mo. 467 (1898).

[224] *See* Mo. Rev. Stat. § 1838 (1899).

[225] *See id.* § 1838. Moreover, while statutory rape, like forcible rape, was a capital crime until 1895, *see* Mo. Rev. Stat. § 1253 (1879), Mo. Rev. Stat. § 3480 (1889), after 1895, the punishment for statutory rape of a woman aged 14 to 18 was changed to a maximum of two years in prison, *see* Mo. Rev. Stat. § 1838 (1899), less than the maximum of five years imprisonment allowed under the defilement statute, *see id.* § 1845.

[226] *See* Mo. Rev. Stat. § 3486 (1889).

[227] *See* State v. Sharp, 33 S.W. 795, 796 (Mo. 1896); State v. Patterson, 88 Mo. 88 (1885). This did not require that the woman always have been chaste, but merely that she have a good reputation for chastity at the time of her seduction. *See* Sharp, 33 S.W. at 796-97. The Court explained:

> The authorities clearly show that because a female may at some period of her life have so far forgotten her sphere and self-respect as to have yielded to temptation on one single occasion, about which no one knows save and except she and the other person engaged, she, by reason thereof, does not become of bad repute, entitled to no protection under the law, a prey to the lust of man, who, by reason of her misfortune, becomes licensed to deceive and betray her, and find justification for his conduct or impunity from punishment for his crime, because, forsooth, she had on some former occasion been guilty of illicit intercourse.

See id. at 796-97. *See also* Patterson, 88 Mo. at 104 (Henry, C.J., dissenting).

seduction likewise required that at the time she was approached, the woman be "honestly pursuing [the path of virtue]" and that she be "previously chaste."[228] When Missouri raised the age of consent to eighteen in 1895, it provided that sex with an unmarried woman aged fourteen to eighteen years was only illegal if she was "of previously chaste character" as well.[229] In a forcible rape prosecution, evidence of the complainant's unchastity went to the issue of her consent. The Court explained: "Wherever by the nature of the proceeding, or the character of the prosecution, the chastity of the prosecutrix is brought into question, any evidence which tends to impeach her chastity and to render it less probable that she was ravished . . . is competent and relevant."[230]

Under the defilement statute, the young woman's chastity was not at issue. According to her testimony, Catherine Shooey had worked as a servant at the defendant's house for less than one week when he "made a[n] assault on her"[231] that resulted in pregnancy. When prosecuted for defilement, the defendant claimed she was lying and alleged that he had "intercepted her on that night in the fulfillment of an illicit engagement with another man."[232] The Supreme Court held such evidence to be inadmissible: "The criminality of the act of which defendant was accused does not depend upon the character or reputation of the female defiled as in the case [of] a prosecution for seduction."[233] Nor, the Court added, "does it depend upon the want of consent on the part of the girl to the act of defilement as in the case of rape."[234] Instead, the Court affirmed, "The crime

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[228] *See* Bailey v. O'Bannon, 28 Mo. App. 39, 50 (1887).

[229] *See* Mo. Rev. Stat. § 1838 (1899).

[230] *See* Patterson, 88 Mo. at 91-92. The Missouri Supreme Court reversed itself on whether, in a forcible rape prosecution, only evidence of the complainant's general reputation for unchastity could be admitted or whether evidence of her specific acts of unchastity were admissible as well. *Compare* State v. White, 35 Mo. 500 (Mo. 1865) (holding only evidence of general reputation for unchastity admissible), *and* Patterson, 88 Mo. at 91-92 (holding evidence of specific acts of unchastity also admissible).

[231] *See* State v. Rogers, 18 S.W. 976, 976 (Mo. 1892).

[232] *See id.* at 976.

[233] *Id.* at 976-77.

[234] *Id.* at 977.

consists in the act of defilement."[235] Accordingly, the Court upheld the defendant's conviction.

In another case, where the defendant claimed that the help had not been a virgin, the Court held, "Under the statute upon which this prosecution is based it is utterly immaterial whether a female . . . is chaste or unchaste."[236] Responding to allegations of Mary Berhorst's unchastity, the Court explained, "[u]nchaste to all the world beside, she must be pure to him. This is the evident policy and central idea of the statute."[237]

The Court even summoned indignation at accusations of unchastity that in other areas of the law might have disproved sexual injury. In the closing arguments of State v. Summar, the prosecutor called the defendant an "infamous scoundrel"[238] for his efforts to impugn the virtue of the complainant, Lucy Davis, the niece who worked in his home in exchange for room, board, and schooling.[239] The Court commented:

> [W]e agree with the learned counsel that if the defendant did debauch this girl, who bore the relation of a niece by marriage, and was the father of her illegitimate offspring, and her character for chastity was thereby destroyed among her neighbors, and when she appeared as a witness against him, sought to destroy her evidence by proving she had a bad reputation for chastity, we know of no language more befitting his conduct, or descriptive of his character than that used by counsel.[240]

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[235] *Id.*

[236] *See* State v. Summar, 45 S.W. 254, 257 (Mo. 1898).

[237] *See* State v. Strattman, 13 S.W. 814, 817 (Mo. 1890) (emphasis omitted). *See also* State v. Sibley, 33 S.W. 167, 171 (Mo. 1895) (en banc) ("whatever acts of lewdness she may have been guilty of with others, if any, were not justification or excuse for defendant in having carnal connection with her . . . while she was under his care and control and protection").

[238] 45 S.W. at 258.

[239] *See id.* at 257.

[240] *Id.* at 258.

Evidence of complainants' unchastity was introduced to impeach their credibility generally,[241] almost certainly much to the young women's embarrassment, but unchastity under the defilement statute was no defense to employer wrongdoing.

Where claims of rape, seduction, and statutory rape might have failed them, the defilement statute offered young domestic servants recourse against employers who coerced or forced them into sex. However, this was only because it imposed the strict liability regime that at the same time may have curtailed their prospects for sexual independence.[242]

To the extent that the statute both protected domestic servants from sexual abuse and constrained their sexuality, it did what it was intended to do. In explaining the statute's purpose, the Court acknowledged these dual concerns:

> There is a relation of confidence and trust between master and servant that does not exist between strangers. A master has more opportunities to accomplish his purposes when the girl lives and works in his own house, than when she is elsewhere, and it was no doubt the intent of the statute *to give protection to females* who, not having reached years of maturity, are compelled to leave their homes and home influences and parental care and protection, and work out for a livelihood, *and to shield them from the new temptations that thus environ them.*[243]

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[241] *See, e.g.*, State v. Terry, 17 S.W. 288, 290 (Mo. 1891) ("Mrs. Terry, defendant's wife, testified on behalf of her husband, that Celia Steele admitted to her before she left their house that she had had intercourse with another man."); State v. McClain, 38 S.W. 906, 906-07 (Mo. 1897), *aff'd after remand*, 56 S.W. 731 (Mo. 1900) ("Upon the part of defendant, there was evidence tending to show that Flora Coggin was of unchaste character at the time of the commission of the alleged offense."). Evidence of chastity was admissible to impeach both male and female witnesses. *See* State v. Sibley, 33 S.W. 167, 171-72 (Mo. 1895) (en banc) (Gantt, J., dissenting in controlling opinion on the point).

[242] Susan Estrich argues that a strict liability regime would be preferable to Title VII's approach to sexual harassment, for reasons that should be familiar after this analysis of the defilement statute. *See* Estrich, *supra* note 1, at 860. Estrich argues that Title VII's insistence that workplace sexual behavior must be unwelcome to give rise to liability, *see* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), unnecessarily shifts the focus of inquiry to the victim, importing some of the most pernicious aspects of rape law into the regulation of sexual harassment. *See* Estrich, *supra* note 1, at 826. She claims that it leads to the questions, as in rape law, of whether the victim asked for it, whether she really meant "no," and whether her dress, appearance, and social habits might have led the perpetrator on. *See id.* at 826-33 (noting holding in Meritor v. Vinson, 477 U.S. at 69, that "complainant's sexually provocative speech or dress" is "obviously relevant" to determination of whether she found sexual behavior unwelcome).

Estrich's argument, on some level, is that by straying away from strict liability, we import nineteenth-century prejudices about women into the law. To the extent that the defilement statute protected women from sexual harassment, it did so in large part because its strict liability regime allowed women a reprieve from those prejudices even in their day.

[243] State v. Terry, 17 S.W. at 289 (emphasis added).

With a certain nostalgia for the traditional master-servant relationship, the statute reflected the anxiety about women's sexuality and sexual predation that was characteristic of the times.

C. The Essence of the Crime and Its Vision of Female Agency

The defilement statute's strict liability regime stemmed from its particular vision of the harm caused by sexual misconduct in the domestic workplace. The statute punished employers who had sex with their servants on the theory, hearkening back to the traditional model of master-servant relations, that the employers were "person[s] to whose care or protection" the young women "shall have been confided."[244] Servants could be confided to their employers' care by their fathers or other relatives[245] or even through their own contracting.[246] The employer's very exercise of authority over his servant could give rise to the requisite relationship.[247] "The purpose of the law," according to

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[244] *See* Mo. Rev. Stat. § 1260 (1879).

[245] *See, e.g.*, State v. Strattman, 13 S.W. 814, 815 (Mo. 1890) (father contracted with defendant); State v. Lingle, 31 S.W. 20, 21 (Mo. 1895) (father contracted with defendant); State v. Kavanaugh, 33 S.W. 33, 34 (Mo. 1896) (en banc) (brother-in-law confided complainant to care of defendant).

[246] *See, e.g.*, State v. Terry, 17 S.W. 288, 290 (Mo. 1891) (complainant contracted with defendant to work for him through the harvest in exchange for a cow).

[247] *See* State v. Hill, 36 S.W. 223, 224 (Mo. 1896) ("It is not necessary that [the complainant] should have been confided to him by any particular person or by any legal proceeding in order to constitute her within his care. It is sufficient for the purposes of this prosecution if he exercised care or custody over her."). *See also* State v. Sibley, 33 S.W. 167, 169 (Mo. 1895) (en banc) (inferring statutory relationship from surrounding facts and circumstances, including defendant's "assum[ption] of control" over complainant).

The requisite relationship may also have been established by the fact that a woman lived in a man's house and, by law, the man of the house was the household head. In State v. Napper, 42 S.W. 957 (Mo. 1897) (en banc), a case that apparently did not involve employment, the Court rejected the defendant's argument that an orphan living in his household had been confided to the care and protection of his wife. The Court explained:

> While the rights of the wife as they existed at common law have been greatly enlarged by courts and statutory enactments, and the rights of the husband correspondingly diminished, he has not become entirely a nonentity, and is yet regarded as the head of the family with power to control the same.

Id. at 958.

the Court, "was to prevent guardians, employers and others occupying confidential relations to girls of tender years from abusing such confidence."[248]

At their core, these "confidential relations,"[249] carried an obligation for the employer to guard his domestic servant's virtue. Sometimes the obligation to protect the woman from sexual temptation arose through direct conversation with the young woman's father. For example, Oscar Lingle promised Clara Wheatley's father that "he would see that she didn't get to running around or anything of that kind."[250] Eliza Smith's father secured a promise from the defendant, her brother-in-law, that he would not "let her go out at night, except to church."[251]

Sometimes the employer's duty to guard his hired girl's virtue seemed to grow out of a reciprocal relationship, created, like the traditional relationship between a master and his residential servant, by her acquiescence to his authority. In State v. Kavanaugh, where the complainant "was confided by her sister and brother-in-law . . . to [the defendant's] care and protection,"[252] the Court noted: "It was her duty to conform to the regulations of his family and his plain duty to afford her protection."[253] In another case, the Court explained: "In various ways defendant exercised control over the girl . . . , and [she] obeyed him. He chose her associates and proscribed those of them whom he did not like."[254]

The crime targeted by the defilement statute was in being the person charged with guarding a young woman's virtue and then leading her astray. Thus, not surprisingly, the evil was the same, whether accomplished by coercion or collaboration.[255]

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[248] *See* State v. Rogers, 18 S.W. 976, 977 (Mo. 1892).

[249] *See id.*

[250] *See* Lingle, 31 S.W. at 21 (emphasis omitted).

[251] *See* State v. Young, 12 S.W. 642, 642 (Mo. 1889).

[252] *See* 33 S.W. 33, 34 (Mo. 1896) (en banc).

[253] *Id.*

[254] *See* State v. Hill, 36 S.W. 223, 224 (Mo. 1896).

[255] In late Victorian ideology, a man proved his very fitness for this role of protector in part by controlling his own sexual passions. See Larson, *supra* note 4, at 44-45; *see also*, Gail Bederman, The White Man's Civilization on Trial: Ida B. Wells, Representation of Lynching, and Northern Middle-Class Manhood *in* Manliness and Civilization: A Cultural History of Gender and Race in the United States, 1880-1917 (1995).

This understanding of workplace sexual misconduct reflected a vision of female sexual agency that was common among reformers of the time.[256] The statute punished only men, and it punished them for their failure to perform the manly duty of controlling the sexuality of the women in their charge. Their servant girls were treated as passive, without control over their sexual behavior. In the Victorian scheme, these young hired girls could be categorized neither as pure and passionless nor as sexually aggressive and promiscuous.[257] Rather they stood at a crossroads in Victorian ideology: they could remain on the path of virtue or yet fall victim to the darker impulses of female sexuality. As the statute perceived the crime of defilement, it was men who controlled their destinies. Accordingly, it was men who were punished in order to protect them[258] and "shield them from the new temptations that . . . environ[ed] them."[259]

CONCLUSION

After its peak in the 1890s, use of the defilement statute appears to have declined, at least as a response to the sexual conditions of women's employment. After 1900, seven more cases reached the Supreme Court under the statute, the last in 1931.[260] Only one arose out of employment—again domestic service[261]—as the statute addressed emerging forms of sexual misconduct, such as relations

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[256] It is especially similar to the view of sexual agency promoted by age of consent reformers. *See* Odem, *supra* note 7, at 20-21, 25; *see also* D'Emilio & Freedman, *supra* note 16, at 153; Kessler-Harris, *supra* note 7, at 153.

The police matron who ministered to female vagrants in St. Louis's Four Courts from 1884 to 1893, expressed a similar point of view on female sexual agency when she described her "unfortunates" as "more sinned against than sinning." *See* Harris, *supra* note 45, at 22. For further evidence of this view's embodiment in Missouri law, see supra note 227, quoting the Supreme Court's understanding of women's vulnerability to seduction.

[257] *See* D'Emilio & Freedman, *supra* note 16, at 37-46, 85-100 (discussing Victorian thinking on women's sexuality).

[258] *See* State v. Terry, 17 S.W. 288, 289 (Mo. 1891).

[259] *Id.*

[260] *See* State v. Hesterly, 81 S.W. 624 (Mo. 1904); State v. Oakes, 100 S.W. 434 (Mo. 1907); State v. Nibarger, 164 S.W. 453 (Mo. 1914); State v. Kyle, 168 S.W. 681 (Mo. 1914); State v. Johnson, 225 S.W. 961 (Mo. 1920); State v. Sanders, 252 S.W. 633 (Mo. 1923); State v. Gant, 33 S.W. 2d 970 (Mo. 1930) (en banc).

[261] *See* State v. Nibarger, 164 S.W. 453 (Mo. 1914).

between teachers and students.[262] The early decades of the twentieth century had brought a shift in thinking about female sexual agency; in other areas of the law, women began to be punished for conduct that once would have been blamed on their male sexual partners.[263]

Today, few would advocate prohibitions on sexual harassment premised on the conception that an employer has a duty to guard his employee's sexual virtue. In addition, strict liability for employers' sexual relations with employees has been rejected by Title VII in favor of a ban on unwelcome workplace sexual conduct which preserves a space for consensual interactions.[264]

While legal approaches to sexual harassment have evolved, since the Missouri defilement statute was codified in 1879, they have certainly been long in the making. Almost a century before Title VII, this peculiarly nineteenth-century statute identified and outlawed workplace sexual harassment. Just as sexual harassment, the problem existed then, so did efforts at a legal solution.

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[262] *See* State v. Hesterly, 81 S.W. 624 (Mo. 1904); State v. Oakes, 100 S.W. 434 (Mo. 1907).

[263] *See* Odem, *supra* note 7, at 3 (discussing the shift in early twentieth century reform to a focus on female delinquency). As a result of this change in notions of women's sexual agency, seduction statutes also fell into disfavor at the beginning of the nineteenth century. As women's autonomy grew, male defendants began to be perceived as targets of blackmail, and, at the same time, a new generation of female reformers began to view the tort of seduction as an expression of antiquated values that impeded women's sexual liberation. *See* Larson, *supra* note 55, at 393-401.

Views of the degree to which women exercise sexual agency seem to ebb and flow, so that even today, a debate exists between "dominance feminists," like Catherine MacKinnon, who believe women's experience is defined by their subordination to men, and critics like popular essayists Camille Paglia, Naomi Wolf, and Katie Roiphe, who challenge this depiction of women as victims. *See* Kathryn Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory, 95 Colum. L. Rev. 304, 304 (1995).

[264] *See* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). Strict liability persists only in limited contexts, such as, in the military, where rules on fraternization restrict even purportedly consensual sexual relations between superiors and subordinates. *See generally*, Major David S. Jonas, Fraternization: Time for a Rational Department of Defense Standard, 135 Mil. L. Rev. 37 (1992). Interestingly, the military would seem to provide an obvious example of a modern-day employment relationship where the employee truly is confided to the employer's "care and protection." Strict liability can also be found in the realm of office policy, where the chilling effect also occasioned by the defilement statute remains a subject of debate. *See, e.g.*, Crosier v. United Parcel Service, Inc., 150 Cal. App.3d 1132, 1140 (1983) (upholding UPS no fraternization policy for management and nonmanagement employees).