

# **“Developing Capacity”: Adolescent “Consent” at Work, at Law, and in the Sciences of the Mind**

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## **Abstract**

No national consensus exists concerning adolescent capacity to consent to sex. The law gives differing legal significance to adolescent “consent” to teen-adult sex depending upon a variety of factors. In response to an increase in teen sexual harassment cases, this Article examines three subject areas that should inform the debate over the actual meaning of adolescent consent: adolescent development, adolescent sexuality, and child/adolescent sexual abuse. First, new neuroscientific and psychosocial science data suggest that adolescent physical and psychosocial development continue into the third decade of life. Studies reveal that adolescents’ activities influence their physical brain development and growth. In other words, adolescents “hard-wire” their experiences into their brains. Second, statistics regarding adolescent sexuality indicate that teens are having sex that is not always completely voluntary. Moreover, parents are often unaware that their children are having sex.

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Finally, evidence demonstrates that child sexual abuse can permanently and physically disable youth. This Article suggests that the new scientific and statistical evidence should prompt law reform pertaining to teen capacity and consent. It concludes that while adolescents need to exercise their decision-making skills as they mature, they still need protection from adult sexual predators. As the Supreme Court's recent decision in *Roper v. Simmons* suggests, we should not presume full capacity where science indicates adolescents are immature and still developing capacity. This Article recommends, in particular, that sexual harassment law should be revised to make teen consent to workplace sex with an adult supervisor voidable by the minor. Courts should find teen-adult sex unwelcome as a matter of law, when the minor alleges sexual harassment. This Article recommends a strict liability civil response to teen sexual harassment, whether or not the teenager once consented to sex with the adult supervisor.

In accordance with this Court's decisions in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), and *Stanford v. Kentucky*, 492 U.S. 361 (1989), the State of Alabama has established 16 as the age at which an individual should be held fully responsible for his crimes and subject, in appropriate circumstances, to capital punishment. . . . The other amici likewise authorize capital punishment in appropriate circumstances for offenders under the age of 18 . . .<sup>1</sup>

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<sup>1</sup> Brief of the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia as Amici Curiae in Support of Petitioner, *Roper v. Simmons*, U.S. (2004) (No. 03-633), 2004 WL 865268, at \*1; see also Brief for the Petitioner, *Roper v. Simmons*, U.S. (2004) No. 03-633, 2004 WL 903158, at \*33-34 ("There is certainly a point at which age is an appropriate proxy for determining whether imposing capital punishment on an individual makes sense, even without legislation. In the common law, it was age seven. . . . Under the consensus recognized in *Thompson* and *Stanford*, it is sixteen.")

Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See *Stanford*, 493 U.S., at 395 (Brennan, J., dissenting).<sup>2</sup>

## I. Introduction

Teenagers<sup>3</sup> with the same legal capacity as adults? Whom are we kidding? “Kidding,” an ironic word given this topic. We certainly are not “kidding”<sup>4</sup> our youth, not if we are treating them as adults. And we are not “kidding”<sup>5</sup> ourselves, since there is nothing funny about subjecting teenagers to the death penalty<sup>6</sup> or causing them to accept full financial and civil responsibility for the consequences of “consensual” sex, that in many jurisdictions, we label statutory rape.<sup>7</sup>

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<sup>2</sup> *Roper v. Simmons*, No. 03-633, 2005 WL 464890, at \*12 (U.S. Mo. March 1, 2005).

<sup>3</sup> While the term “teenager” technically includes eighteen- and nineteen-year-olds, I focus on minors in this Article. I also use the term “adolescents” when referring to minors, even though new research indicates that adolescence continues into the early twenties. See *infra* Part II.A.1.

<sup>4</sup> “**kid** : to bring forth young -- used of a goat or an antelope” Merriam Webster Online Dictionary, <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=kid>.

<sup>5</sup> “**kid 1** : to deceive as a joke <it's the truth; I wouldn't *kid* you> **2** : to make fun of” Merriam Webster Online Dictionary, <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=kid>.

<sup>6</sup> See Brief of the American Medical Association (AMA), American Psychiatric Association (APA), et al. as Amici Curiae Supporting Respondent [hereinafter AMA Brief], *Roper v. Simmons*, U.S. (2004) (No. 03-633), 2004 WL 1633549.

<sup>7</sup> See Jennifer Ann Drobac, *Sex and the Workplace: “Consenting” Adolescents and a Conflict of Laws* [hereinafter *Sex and the Workplace*], 79 WASH. L. REV. 471, 510-24, 527-33 (2004). I use quotations with the words consensual and consent because even explicit verbal consent by a minor may not constitute legal consent and may equate more realistically with acquiescence; *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986) (holding that acquiescence is not consent in an evaluation of the “unwelcomeness” of sexual conduct under Title VII).

This Article examines adolescent “consent” in the context of workplace sexual harassment by exploring three distinct subjects relevant to sexual harassment law: scientific research concerning adolescent development, adolescent sexuality, and adolescent sexual abuse. Part I reviews the conflict of laws, which currently address adolescent sexual activity, and suggestions for regulatory and statutory reform.<sup>8</sup> Part II surveys current neuroscientific, psychological, and sociological literature concerning the developmental abilities of adolescents.<sup>9</sup> It explores, for example, whether a typical fourteen year old<sup>10</sup> has the ability to make an informed judgment to engage in sexual activities. Can a minor recognize the potential risks, benefits, and consequences of such a decision? This section explores whether teenagers have the ability to consent, and whether the law should treat their “consent” as legally binding.

In Part III, the Article reviews statistical and survey information regarding adolescent sexuality.<sup>11</sup> Despite their psychosocial immaturity, adolescents are having sex. This section explores the recent information regarding that aspect of their lives. Part III also explores the impact of sexual abuse on adolescents. It discusses both the new neuroscientific evidence and the emotional and psychological consequences of childhood and adolescent sexual abuse. Adolescent developmental capacity and the potential consequences of sexual conduct should inform any discussion of the legal significance of adolescent “consent” to sexual conduct.

Finally, Part IV offers a synthesis of science and the law.<sup>12</sup> It explores how scientific evidence might inform the

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<sup>8</sup> See *infra* Part I.A-B.

<sup>9</sup> See *infra* Part II.

<sup>10</sup> Obviously, no one description can adequately characterize all fourteen-year-olds. For an explanation of essentialism in legal theory, see Angela Harris, *Race and Essentialism in Feminist Legal Theory*, in 42 STAN. L. REV. 581, 585 (1990) (explaining essentialism as “the notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.”).

<sup>11</sup> See *infra* Part III.

<sup>12</sup> See *infra* Part IV.

law’s treatment of adolescent “consent” in the workplace. This section revisits possible regulatory approaches, as well as litigation and statutory reform. It discusses the advantages and disadvantages of each approach against the backdrop of scientific findings to make final recommendations. It speaks again to the question: whether the law should, and how it might, permit teenagers to sue for sexual harassment regardless of consent.

*A. Adolescent Employment and Sexual Harassment*

When Sara was fifteen, the forty-year-old manager of the movie theater where she worked befriended her and gained her confidence. His attention became increasingly intimate and physical. At first, she rebuffed his physical advances. After several months, he told her that he had a brain tumor and was not sure how long he had to live. He told her he loved her. When she was sixteen, she agreed to have sexual intercourse with him. He promoted her to projectionist so that they could engage in sex more easily and frequently in the secluded projection room. She was soon pregnant. His adult girlfriend took her to have an abortion. Her manager was already in jail, serving time on a larceny conviction. Sara’s parents knew nothing about the affair. Sara wrote to him, believing he was wrongly convicted. When Sara’s parents finally discovered the cause of her plummeting grades and disturbing behavior, they notified police, who told Sara the man had no tumor and was a registered sex offender. Sara cooperated with the district attorney, who prosecuted him for statutory rape.<sup>13</sup>

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<sup>13</sup> Drobac, *Sex and the Workplace*, *supra* note 7, at 471-72 (referencing Complaint at 3-9, [Sara Doe] v. Culver Theaters (Santa Cruz County Superior Court Oct. 1999)(No CV139513)[hereinafter Sara Doe Complaint]). I note that I was personally involved in Sara Doe’s case but

Sara's case highlights the problem of the sexual harassment of teenagers and teen capacity to consent to sex at work. While adult capacity to consent to sex is typically not an issue in sexual harassment cases, the law treats adolescents differently than it does adults in many respects.<sup>14</sup> Earlier this year, the U.S. Supreme Court confirmed, "In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent."<sup>15</sup>

Adolescent employment also differs from adult employment and so may the nature of adolescent sexual harassment by adult workers. Both statistical and anecdotal evidence suggest that sexual harassment of teens is a problem.<sup>16</sup> Professor Susan Fineran conducted a study which found that thirty-five percent of high school students who worked part time had experienced it.<sup>17</sup> In the fall of 2004, the Equal Employment Opportunity Commission (EEOC) launched a training program in high schools to educate teens and began to address this problem.<sup>18</sup>

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did not negotiate her case's resolution which was handled by independent counsel.

<sup>14</sup> Drobac, *Sex and the Workplace*, *supra* note 7, at 473-76.

<sup>15</sup> *Roper*, 2005 WL 464890, at \*11.

<sup>16</sup> Drobac, *Sex and the Workplace*, *supra* note 7, at 477-84.

<sup>17</sup> Susan Fineran, *Adolescents at Work: Gender Issues and Sexual Harassment*, 8 VIOLENCE AGAINST WOMEN 953, 960 (2002); Amy Joyce, *Lawsuits Shed New Light on Sexual Harassment of Teens*, WASH. POST, Dec. 2, 2004, at A1. A study of students may not reveal the full scope of the problems since statistics reveal that adolescent workers who do not also attend school are almost twice as likely as working student to become sexually active at an early age; *see infra* Part III. (It is possible that those non-student workers may experience more harassment than working students. Additionally, Susan Fineran recently completed a new study in which she and James Gruber found that 46.3% of working students had been sexually harassed in the last year.); Susan Fineran & James Gruber, *Sexual Harassment and Teens at Work* 13 (2005) (unpublished manuscript, on file with the author).

<sup>18</sup> Joyce, *supra* note 17, at A1; The EEOC "Youth at Work" website can be found at <http://youth.eeoc.gov>; *see also* Cheryl Wittenauer, *Burger King*

### B. Conflicting Laws

While EEOC and employer training programs are an excellent step towards the eradication of teen sexual harassment, both criminal and civil laws should protect teen workers. Statutory rape and other sexual abuse laws offer only limited protection to some teens, whether or not those youth “consent” to sexual activity. For example, four states set the legal age of consent to sexual activity, absent special circumstances, at age fourteen.<sup>19</sup> Almost half of the states set the age of consent at below the age of majority and only seven set it at eighteen, absent special circumstances.<sup>20</sup> Furthermore, in a sampling of reported tort claim cases across the nation, about fifty percent of the courts permitted respondents to use “consent” as a defense to claims based on alleged sexual harassment.<sup>21</sup> There are currently no reported Title VII<sup>22</sup> cases and only one state Fair Employment Practice statute case that addressed the sexual harassment of a teenager. In that state case, the court admitted evidence of the teen’s “consent” as a defense.<sup>23</sup>

One can draw several conclusions from these and other facts regarding teen sexual harassment:

First, the law handles adolescent “consent” to sexual conduct inconsistently. The system

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*Franchisees Settle Sex Harassment Suit*, USA TODAY, December 7, 2004, available at [http://www.usatoday.com/money/industries/food/2004-12-07-bk-harassment\\_x.htm?POE=click-refer](http://www.usatoday.com/money/industries/food/2004-12-07-bk-harassment_x.htm?POE=click-refer). Again, student training is an excellent start but it will not alleviate the problems of non-student adolescent workers.

<sup>19</sup> Drobac, *Sex and the Workplace*, *supra* note 7, at 485. Special circumstances might include a significant age difference between the target and the adult, a perpetrator in a position of trust or authority, a relative, or a school employee; *id.* Many states would define Sara’s case as including special circumstances because of the age difference between her and her manager; *see* Drobac, *Sex and the Workplace*, *supra* note 7, at app. A.

<sup>20</sup> *Id.* at 486.

<sup>21</sup> *Id.* at 524-25.

<sup>22</sup> 42 U.S.C. § 2000e-2(a)(1) (2000).

<sup>23</sup> Drobac, *Sex and the Workplace*, *supra* note 7, at 510-24 (discussing *Doe v. Mama Taori’s Premium Pizza*, No. M1998-00992-COA-R9-CV, 2001 WL 327906 (Tenn. Ct. App. Apr. 5, 2001)).

(criminal or civil), the geographic region (or jurisdiction), and the particular claims alleged all influence the legal treatment of adolescent “consent.” A teenager in California can expect very different treatment than a teenager in Colorado, where the “age of consent” is three years lower. Second, common law claims may provide little or no relief to “consenting” teens. Preemption may bar tort claims in employment cases, or courts may conclude that a minor appreciated the consequences of her consent to specific conduct. On the other hand, depending upon where the minor works, state criminal law may pave the way for tort recovery via Restatement (Second) of Torts § 892C(2). Third, antidiscrimination laws [including Title VII<sup>24</sup>] always require that the minor worker find the activity “unwelcome,” and often require the alleged victim to report misconduct. Fourth, statutory rape laws draw bright-line rules determining the “age of consent” and denying capacity below that age. In sum, no national consensus exists regarding the age of consent or the treatment of adolescent “consent” to a broad variety of adult activities, including sex.<sup>25</sup>

This lack of consensus and conflicting approaches by criminal and civil courts leave many adolescents vulnerable to adult sexual predators at the workplace.

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<sup>24</sup> 42 U.S.C. § 2000e-2(a)(1) (2000) (Title VII prohibits discrimination against anyone “with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin.”); *see* Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998).

<sup>25</sup> Drobac, *Sex and the Workplace*, *supra* note 7, at 498. The Restatement (Second) of Torts § 892C (1979) advises, “If conduct is made criminal in order to protect a certain class of persons irrespective of their consent, the consent of members of that class to the conduct is not effective to bar a tort action.”

On the other hand, a system that treats teenagers either as children or as fully adult arguably promotes parental involvement and maximizes efficiency. Professor Elizabeth Scott suggested:

[B]y shifting the boundary and extending adult rights and duties at different ages for different purposes, lawmakers accomplish the transition from childhood to adulthood gradually, without creating an intermediate category for adolescence. Adolescents may benefit if they are allowed to make some adult decisions or perform some adult functions, but not others. . . . Indeed, the experience with the burdensome administrative and social costs of an intermediate category in the context of abortion regulation reinforces the conclusion that the transition to adulthood generally is regulated more efficiently through binary legislative categories—even if the crude classification of adolescents sometimes distorts developmental reality.<sup>26</sup>

In this passage, Scott highlighted the efficiency of the bright-line legal age demarcations. She also noted the administrative and other hassles of abortion laws, including judicial by-pass provisions<sup>27</sup> that treat adolescents as a separate and unique class.

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<sup>26</sup> Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 548-49 (2000).

<sup>27</sup> See *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979). The *Bellotti* Court held:

A pregnant minor is entitled in such a [judicial by-pass] proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or 2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.

*Id.*; see also Melinda Schmidt & N. Dickon Reppucci, *Children's Rights and Capacities*, in CHILDREN, SOCIAL SCIENCE, AND THE LAW 76, 84

Scott found fault with this binary approach, however, in the context of juvenile justice. She argued:

In some contexts, however, categorical assumptions that ignore the transitional stage of adolescence can lead to harmful outcomes. In particular, juvenile justice policy offers ample evidence of the costs of using crude categories to define legal childhood and adulthood. . . . In this context, effective legal regulation requires the (conventional) accommodation of youth welfare and social utility goals, and also (and this is less typical) a realistic account of adolescence.<sup>28</sup>

Scott explained in her work that the criminal justice system cannot function efficiently or fairly if it ignores the realities of adolescent physical, emotional, and psychosocial development.<sup>29</sup> With such high stakes, juvenile justice commands mandate a less crude and more individualized approach to the legal treatment of adolescents.

The question naturally arises whether other legal fields, such as sexual harassment law, need such an individualized approach. We should consider the efficacy of the binary approach at the workplace where parents cannot even monitor, let alone control, their children's interactions.

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(Bette L. Bottoms et al. eds., 2002) (explaining that recent court decisions have upheld parental notification statutes and waiting periods such that “[n]o consensus exists in the Supreme Court on the issue of adolescent abortion . . .”).

<sup>28</sup> Scott, *The Legal Construction of Adolescence*, *supra* note 26, at 549.

<sup>29</sup> Scott, *The Legal Construction of Adolescence*, *supra* note 26, at 586-96; *see also* Schmidt, *supra* note 27, at 88 (citing G. B. Melton, *Are Adolescents People? Problems of Liberty, Entitlement, and Responsibility*, in *THE ADOLESCENT AS DECISION-MAKER: APPLICATIONS TO DEVELOPMENT AND EDUCATION* 281-306 (J. Worrell & F. Danner eds., 1989)); F. E. Zimring, *THE CHANGING WORLD OF ADOLESCENCE* (1982); and F. E. Zimring, *AMERICAN YOUTH VIOLENCE* (1998) (noting that “the age at which autonomous rights are first given to minors might rightfully be lower than the age at which they are first held fully responsible for their conduct.”).

One might find that any efficiency in a binary approach fails to counterbalance the harms suffered by sexually exploited adolescent workers.

We know that the law already creates a special category for adolescent workers. The federal Fair Labor Standards Act sets a minimum work age of fourteen for non-agricultural workers and child labor standards.<sup>30</sup> Additionally, federal law allows employers to pay workers under twenty less than the minimum wage for the first ninety days of their employment.<sup>31</sup> This law effectively discounts adolescent summer labor. Given that the law already treats adolescent workers differently, I suggest that we need to consider protecting adolescent workers in a consistent manner from sexual exploitation by adult supervisors. A brief review of adolescent civil rights and legal limitations, however, supplies only part of the background information necessary for an analysis of sexual harassment law as it pertains to adolescents. Other important facts may influence how we regulate adolescent employment and address teen sexual harassment.

## II. Adolescent Development and Capacity

When children reach ten to fourteen years of age, they enter puberty.<sup>32</sup> Adolescents experience physical, cognitive,

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<sup>30</sup> 29 U. S. C. §§ 203, 212, 213 (2005).

<sup>31</sup> U.S. DEPT. OF LABOR, *Wages, Youth & Labor*, <http://www.dol.gov/dol/topic/youthlabor/wages.htm> (last visited April 24, 2004).

<sup>32</sup> Elizabeth Vemer, University of Missouri-Columbia Department of Human Development and Family Studies, *Starting Early--Sexuality Education for Children Ages 10 to 14 (Early Adolescence)*, Human Environmental Sciences Publication GH 6004, at 1, <http://www.muextension.missouri.edu/xplorpdf/hesguide/humanrel/GH6004.htm> (reviewed October 1, 1993) (last visited February 8, 2004); see also Aarogya, *Teen's Health, Psychosocial Development*, The Wellness Site, at <http://www.aarogya.com/Familyhealthlifestyle/teens/psycho.asp> (2004) (marking early adolescence from approximately 10 to 13 years of age); ARIZONA PREVENTION RESOURCE CENTER, *Adolescent Psychosocial Development*, at [http://www.azprevention.org/Prevention\\_In\\_Practice/What\\_Works/What\\_Works\\_Adolescents\\_psychosocial.htm](http://www.azprevention.org/Prevention_In_Practice/What_Works/What_Works_Adolescents_psychosocial.htm) (2002) (last

sexual, and psychosocial development during this long maturation phase.<sup>33</sup> The survey of changes discussed below indicates that transitional adolescent functioning differs significantly from adult behavior. More particularly, “[a]dolescents’ behavioral immaturity mirrors that anatomical immaturity of their brains.”<sup>34</sup>

*A. Physical Development—The New Neuroscientific Evidence*

Physical changes, in adolescents, include rapid height and weight gain, the development of secondary sex characteristics, and continued brain development.<sup>35</sup> New evidence released in 1999 by the National Institute of Mental Health suggests that the adolescent brain undergoes dramatic changes.<sup>36</sup> Dr. Jay Giedd, a neuroscientist at the National

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visited February 8, 2004) (listing early adolescence for girls at between 11 and 14 and for boys at between 13 and 15). The American Medical Association sets the age of early adolescence for the purposes of recommended sexual health services at 11-14. SEXSMARTS, *Sexual Health Care and Counsel* 3 (2001), available at <http://www.kff.org/youthhivstds/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13797>.

SEXSMARTS is a public information partnership formed by SEVENTEEN magazine and THE HENRY J. KAISER FAMILY FOUNDATION [hereinafter KAISER FAMILY FOUNDATION]. I note here that I serve on the Board of Trustees of the Kaiser Family Foundation and am a Kaiser family member. My affiliations as a trustee and family member have no impact on the results of any survey evidence reported by the Foundation. Additionally, I do not conceive of projects nor set the research goals of the Foundation. Finally, I receive no compensation tied to particular research projects or outcomes.

<sup>33</sup> Angela Huebner, VIRGINIA COOPERATIVE EXTENSION, *Adolescent Growth and Development*, Family and Child Development Publication 350-850 (2000), <http://www.ext.vt.edu/pubs/family/350-850/350-850.html>.

<sup>34</sup> AMA Brief, *supra* note 6, at \*10 (citing Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROCEEDINGS NAT’L ACAD. SCI. 8174, 8177 (2004)).

<sup>35</sup> Huebner, *supra* note 33.

<sup>36</sup> NATIONAL INSTITUTE OF MENTAL HEALTH [hereinafter NIMH], *Teenage Brain: A Work in Progress*, NIMH Publication No. 01-4929, <http://www.nimh.nih.gov/publicat/teenbrain.cfm> (last visited October 13, 2005); see also Judith Rapoport et al., *Progressive Cortical Change During Adolescence in Childhood-Onset Schizophrenia*, 56 ARCHIVES OF GEN. PSYCHIATRY No. 7 (July 1999), available at <http://archpsyc.ama->

Institute of Mental Health, examined adolescent brains using advanced imaging technology.<sup>37</sup> He discovered nearly a doubling of grey matter in some brain sectors within a year.<sup>38</sup> The gray matter consists of cells that enable high cognitive functioning.<sup>39</sup> Depending upon the brain sector, non-linear increases in gray matter peak between ages eleven and sixteen for girls and about a year later, respectively, for boys.<sup>40</sup> Following the growth period, the body purges cells not used and reorganizes the functioning of the brain.<sup>41</sup> Scientists knew that such growth and reorganization phases occur during gestation and the first 18 months after birth. They did not

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<sup>37</sup> N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861-63 (October 1999). Starting in 1991, Giedd and other neuroscientists at the University of California at Los Angeles and at McGill University in Canada began taking images of 1000 children, including two of Giedd’s own children. MICHAEL J. BRADLEY, YES, YOUR TEEN IS CRAZY! 6 (2002)); *see also Interview: Jay Giedd, INSIDE THE TEENAGE BRAIN*, at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html> (last visited February 8, 2004). The advanced imaging technology includes the use of magnetic resonance imaging that differentiates gray matter from white matter. NIMH, *New Views on Brain Development*, at <http://www1.od.nih.gov/gpra/gpragoalaFY2000.pdf> (appearing on page 92)(last visited October 13, 2005)(citing Giedd, *supra*).

<sup>38</sup> Board on Children, Youth and Families [hereinafter BOCYF], *New Research on Brain Development During the Adolescent Years*, at [http://www7.nationalacademies.org/bocyf/Brain\\_Development.html](http://www7.nationalacademies.org/bocyf/Brain_Development.html) (last visited October 13, 2005).

<sup>39</sup> NIMH, *New Views on Brain Development*, *supra* note 37; *Interview: Jay Giedd*, *supra* note 37.

<sup>40</sup> *Interview: Jay Giedd*, *supra* note 37; NIMH, *New Views on Brain Development*, *supra* note 37; NIMH, *Teenage Brain: A Work in Progress*, *supra* note 36, at 1.

<sup>41</sup> *Interview: Jay Giedd*, *supra* note 37; BOCYF, *supra* note 38; *see also* Paul M. Thompson et al., *Growth Patterns in the Developing Brain Detected By Using Continuum Mechanical Tensor Maps*, 404 NATURE 190, 191 (March 9, 2000) (referring to Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 860 (October 1999)); BBC News, *Brain blamed for teen stropiness*, May 18, 2004, at <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/health/3724615.stm> (last visited Sept. 12, 2005).

know about this second wave of overproduction and winnowing that occurs throughout puberty.<sup>42</sup>

The dramatic changes that occur during puberty may also influence adolescent reasoning and the ability to formulate consent because of the functions of the particular areas of the brain involved.<sup>43</sup> Neuroscientist Dr. Elizabeth Sowell and her colleagues explain, “Neuropsychological studies show that the frontal lobes are essential for such functions as response inhibition, emotional regulation, planning and organization. Many of these aptitudes continue to develop between adolescence and young adulthood.”<sup>44</sup> The more mature the frontal cortex, “the area of sober second thought,” the better teenagers can reason, control their impulses, and make considered judgments.<sup>45</sup> “Thus, there is fairly widespread agreement that adolescents take more risks at least partly because they have an immature frontal cortex, because this is the area of the brain that takes a second look at something and reasons about a particular behavior.”<sup>46</sup>

Other areas of the brain also influence teen judgment and behavior. Similar to the frontal cortex, the cerebellum matures well into adolescence.<sup>47</sup> Dr. Giedd believes that the

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<sup>42</sup> Interview: Jay Giedd, *supra* note 37; BOCYF, *supra* note 38; *see also* AMA Brief, *supra* note 6, at \*18-\*20.

<sup>43</sup> Interview: Jay Giedd, *supra* note 37; *but see How Much Do We Really Know About the Brain?*, in INSIDE THE TEENAGE BRAIN, at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/how.html> #1 (last visited February 8, 2004) (interviewing Dr. Fischer). Dr. Kurt Fischer of the Harvard Graduate School of Education cautions, “Ultimately, neuroscience research will contribute enormously to our knowledge about raising and educating children, but right now we know too little to build public policy or advice on brain findings.” *How Much Do We Really Know About the Brain?*, *supra*.

<sup>44</sup> Sowell, *supra* note 41, at 860; *Anatomy of a Teen Brain*, in INSIDE THE TEENAGE BRAIN, at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/anatomy.html> (last visited February 8, 2004).

<sup>45</sup> Sarah Spinks, *Adolescent Brains Are Works in Progress*, in INSIDE THE TEENAGE BRAIN, at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/adolescent.html> (last visited February 8, 2004) (focusing on Dr. Giedd’s research).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

cerebellum enhances functioning in all forms of higher thought, from mathematics, to decision-making and social skill.<sup>48</sup> The corpus callosum connects the two hemispheres of the brain and appears to influence creativity and problem solving.<sup>49</sup> A primitive area of the brain, the amygdala, likely governs emotional and “gut” responses during adolescence.<sup>50</sup> While adults rely primarily on the frontal cortex when interpreting emotional information, adolescents tend to use the amygdala.<sup>51</sup> Scientists hypothesize that the use of the amygdala rather than the frontal cortex explains why teenagers experience trouble regulating their emotional responses.<sup>52</sup>

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<sup>48</sup> *Id* (Giedd notes that the cerebellum, “involved in coordination of our cognitive process, our thinking processes,” does not finish changing until the 20s. He adds, “And this ability to smooth out all the different intellectual processes to navigate the complicated social life of the teen . . . seems to be a function of the cerebellum.”); *Interview: Jay Giedd, supra* note 37 (Dr. Todd Preuss commented here that Giedd’s view on the cerebellum is one not widely held by neuroscientists but one “held by a respected minority.”).

<sup>49</sup> Spinks, *Adolescent Brains Are Works in Progress, supra* note 45.

<sup>50</sup> Sarah Spinks, *One Reason Teens Respond Differently to the World: Immature Brain Circuitry*, in *INSIDE THE TEENAGE BRAIN*, at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/onereason.html> (last visited February 8, 2004) (discussing Yurgelun-Todd’s study).

<sup>51</sup> *Id.*; see also AMA Brief, *supra* note 6, at \*12-\*15. The American Medical Association explained:

The emotional center of the brain is the limbic system. Within the limbic system is the amygdala, which is associated with aggressive and impulsive behavior. The amygdala is “a neural system that evolved to detect danger and produce rapid protective responses without conscious participation.” It dictates instinctive gut reactions, including fight or flight responses. . . . New research suggests that the limbic system is more active in adolescent brains than adult brains, particularly in the region of the amygdala and that the frontal lobes of the adolescent brain are less active. More generally, as teenagers grow into adults, they increasingly shift the overall focus of brain activity to the frontal lobes.

AMA Brief, *supra* note 6, at \*12-\*13,\*15 (footnotes omitted).

<sup>52</sup> Sowell, *supra* note 41. Because neuron connections remain incomplete until late in adolescence, Professor Angela Huebner suggested, “This could explain why some teens seem to be inconsistent in controlling their

Neuropsychologist Dr. Deborah Yurgelun-Todd studied the responses of adults and children, eleven to seventeen years of age, to the pictures of faces exhibiting emotions, including fear. In response to the fear face, adults correctly identified the emotion.<sup>53</sup> Teens answered correctly only about fifty percent of the time, identifying the emotion as shock, surprise, or anger.<sup>54</sup> Teens also used different parts of their brains to evaluate the face and process their own emotions during the test.<sup>55</sup> While adult responses came from the frontal cortex, teen responses originated in the amygdala.<sup>56</sup>

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emotions, impulses and judgments.” Huebner, *supra* note 33, at 1. The AMA explained:

When it comes to “response inhibition, emotional regulation, planning and organization,” the so-called executive functions, the most important components of the brain are the frontal lobes. . . . The frontal lobe modulates synaptic transmissions from the amygdala to which it is strongly connected. A still maturing frontal lobe exerts less control over the amygdala and has less influence over behavior and emotions than a fully mature frontal lobe. In other words, if the frontal lobe is immature or underdeveloped, there is less of a check on the amygdala.

AMA Brief, *supra* note 6, at \*13, \*14-\*15 (footnotes omitted).

<sup>53</sup> Spinks, *One Reason Teens Respond Differently to the World: Immature Brain Circuitry*, *supra* note 50 (discussing Yurgelun-Todd’s study); see also *Interview: Deborah Yurgelun-Todd*, in *INSIDE THE TEENAGE BRAIN*, at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/todd.html> (last visited February 8, 2004) (Yurgelun-Todd noted that hers was a very small pilot study. She urged caution in the interpretation of the results.).

<sup>54</sup> *Interview: Deborah Yurgelun-Todd*, *supra* note 53. Yurgelun-Todd explained further:

[W]hen they’re relating to their parents or to their friends’ parents or to their teachers, they may be misperceiving or misunderstanding some of the feelings that we have as adults . . . . [T]heir own behavior is not going to match that of the adult. So you’ll see miscommunication, both in terms of what they think the adult is feeling, but also what the response should then be to that.

*Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD.

“As teens grow older, their brain activity during this task tends to shift to the frontal lobe, leading to more reasoned perceptions and improved performance.”<sup>57</sup>

Yurgelun-Todd and her team made several preliminary conclusions. First, they confirmed that the frontal cortex enables adults to discern subtle facial expressions.<sup>58</sup> Teen use of the amygdala produced reactions rather than rational thought.<sup>59</sup> This result led researchers to conclude that immature teen brains produce impulsive and even “risk-taking behavior.”<sup>60</sup> Yurgelun-Todd commented, “[T]his study suggests that perhaps decision-making in teenagers is not what we thought. . . . Just because they’re physically mature, they may not appreciate the consequences or weigh information the same way as adults do.”<sup>61</sup>

The pruning and organization of the new neural connections in the brain continue throughout the teen years. Giedd asserts, “Maturation does not stop at age 10, but continues into the teen years and even the 20s.”<sup>62</sup> One might think that more gray matter cells mean higher functioning.

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CHILD ADOLESCENT PSYCHIATRY 195, 198 (1999); *Interview: Deborah Yurgelun-Todd*, *supra* note 53 (Dr. Preuss commented here that adults presumably use both the amygdala and the frontal cortex. He explained that the “amygdala is activated in studies of adult emotion recognition, especially fear.”).

<sup>57</sup> NIMH, *Teenage Brain*, *supra* note 36, at 2 (discussing the Yurgelun-Todd study); Spinks, *One Reason Teens Respond Differently to the World: Immature Brain Circuitry*, *supra* note 50 (explaining the Yurgelun-Todd study); Misia Landau, *Deciphering the Adolescent Brain*, FOCUS, April 21, 2000, [http://focus.hms.harvard.edu/2000/Apr21\\_2000/psychiatry.html](http://focus.hms.harvard.edu/2000/Apr21_2000/psychiatry.html) (discussing the Yurgelun-Todd study).

<sup>58</sup> Spinks, *One Reason Teens Respond Differently to the World: Immature Brain Circuitry*, *supra* note 50 (explaining the Yurgelun-Todd study).

<sup>59</sup> See JUVENILE JUSTICE CENTER, *Adolescence, Brain Development and Legal Culpability 2* (January 2004), <http://www.abanet.org/crimjust/juvjus/Adolescence.pdf> (last visited February 19, 2005).

<sup>60</sup> Spinks, *One Reason Teens Respond Differently to the World: Immature Brain Circuitry*, *supra* note 50 (explaining the Yurgelun-Todd study); *Interview: Deborah Yurgelun-Todd*, *supra* note 53.

<sup>61</sup> *Interview: Deborah Yurgelun-Todd*, *supra* note 53.

<sup>62</sup> Sharon Begley, *Getting Inside a Teen Brain*, NEWSWEEK, February 28, 2000, [http://www.loni.ucla.edu/media/News/NW\\_02282000.html](http://www.loni.ucla.edu/media/News/NW_02282000.html) (quoting Dr. Jay Giedd).

Not so says Giedd. “Bigger isn’t necessarily better, or else the peak in brain function would occur at age 11 or 12. . . . The advances come from actually taking away and pruning down of certain connections themselves.”<sup>63</sup> Drawing conclusions from the research, some scientists suggest that the pruning occurs on a “‘use it or lose it’ principle,” such that used connections survive.<sup>64</sup> Unused connections “wither and die.”<sup>65</sup> “If a teen is doing music or sports or academics, those are the cells and connections that will be hardwired. If they’re lying on the couch or playing videogames or MTV, those are the cells and connections that are going to survive.”<sup>66</sup>

During the gray matter pruning phase, white matter increases. The white matter supports neural connections in the brain.<sup>67</sup> “A layer of insulation called myelin progressively envelops these nerve fibers, making them more efficient, just like insulation on electric wires improves their conductivity.”<sup>68</sup> According to Dr. Francine Benes, myelination levels increase into the early twenties. “During child development, myelination correlates with maturing patterns of behavior.”<sup>69</sup>

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<sup>63</sup> Interview: Jay Giedd, *supra* note 37.

<sup>64</sup> Spinks, *Adolescent Brains Are Works in Progress*, *supra* note 45.

<sup>65</sup> Interview: Jay Giedd, *supra* note 37.

<sup>66</sup> Spinks, *Adolescent Brains Are Works in Progress*, *supra* note 45. Dr. Preuss stressed here that these assertions come from the scientists’ interpretations, not from empirically demonstrated fact.

<sup>67</sup> JUVENILE JUSTICE CENTER, *Adolescence, Brain Development and Legal Culpability*, *supra* note 59, at 2.

<sup>68</sup> NIMH, *Teenage Brain: A Work in Progress*, *supra* note 36, at 2; *see also* A.M. White, *Substance Use and Adolescent Brain Development: An Overview of Recent Findings with a Focus on Alcohol*, *YOUTH STUDIES AUSTRALIA* 22, 39-45 (2003), available at <http://www.duke.edu/~amwhite/adolescence.html#braindevelopment> (citing Giedd’s studies).

<sup>69</sup> *Id.* Elizabeth Gudrais, *Modern Myelination: The Brain at Midlife*, 103 *HARV. MAG.* 9 (2001), available at <http://www.harvardmagazine.com/online/050153.html> (discussing the Dr. Francine Benes’ research) (Benes further explained, “Infants, for example, lack the fine motor coordination to move an index finger independently, since their nerves are insufficiently myelinated.” Benes found that myelination growth increased again in the forties, growing fifty percent again by the mid fifties.). The AMA concluded:

This new research confirms that adolescent brain development extends into the twenties, beyond “the age of consent” set in every state.<sup>70</sup> Critical abilities—including impulse control, emotional regulation, planning, decision-making, and organization—may not fully mature until the third decade of life, if then.<sup>71</sup> Additionally, behaviors and experiences may determine the winnowing and reorganization of gray matter during adolescence.<sup>72</sup> It’s possible that teenagers subtly hard-wire experiences, such as algebra homework or sex in the projection booth, into their brains.<sup>73</sup>

*1. Neuroscience and the Law*

Because this research is so new, we must exercise caution in drawing conclusions or formulating legal policy.<sup>74</sup> At the same time, we cannot ignore facts. A wise approach might be to take this early data and re-evaluate existing law to see if we have gone wrong or are heading in the right direction. For example, I propose that this evidence proves

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As measured by myelination, different parts of the brain mature at different rates. The new brain imaging data, supported by data gathered through the older autopsy technique, provides credible evidence that the frontal lobes, which are still developing well into adolescence and beyond, are among the last portions of the brain to mature. In other words, the region of the brain associated with impulse control, risk assessment, and moral reasoning is the last to form, and is not complete until late adolescence or beyond.

AMA Brief, *supra* note 6, at \*18 (citations omitted).

<sup>70</sup> Compare the foregoing discussion of adolescent development with the review of the legal age of consent in Drobac, *Sex and the Workplace*, *supra* note 7, at app. A (noting that the highest age of consent is 18).

<sup>71</sup> See *infra* Part II.B.; JUVENILE JUSTICE CENTER, *Adolescence, Brain Development and Legal Culpability*, *supra* note 59, at 2.

<sup>72</sup> See *Interview: Jay Giedd*, *supra* note 37.

<sup>73</sup> Dr. Preuss commented here that this conclusion may be an overstatement. He suggested that experience might influence brain organization in less specific ways. He wrote, “This discussion implies a kind of imprinting, rather like language; [it is] not at all clear that other functional systems are language-like in this respect.”

<sup>74</sup> See Semir Zeki & Oliver R. Goodenough, *Law and the Brain Introduction*, 359 PHIL. TRANS. R. SOC. LOND. B 1661 (2004).

the fallacy of the “Rule of Sevens.”<sup>75</sup> This rule explicitly posits the capacity in most teenagers to consent. Under this traditional rule, a minor under age seven cannot give consent, be held liable for negligent conduct, or formulate the requisite mental state to engage in criminal conduct.<sup>76</sup> From seven to fourteen, the law presumes that a minor lacks capacity.<sup>77</sup> From fourteen to twenty-one (now eighteen), a rebuttable presumption declares that minors are competent to consent and responsible for criminal and negligent conduct.<sup>78</sup> Certainly, developmental stages exist. However, the “Rule of Sevens” mandates a presumption of full legal capacity for fourteen to eighteen-year-olds. The new research not only fails to support this presumption, but also demonstrates that these teens have not finished maturing physically or psychosocially.

A wiser, better-supported approach might be to acknowledge “developing” capacity (because of less than full capacity) until at least age eighteen. “Developing capacity is not the same as “diminished capacity”:

I find the term “diminished capacity” inappropriate because the word “diminished” carries a negative connotation. Additionally, it suggests that full capacity should exist or may once have existed. Most teenagers suffer not from impairment but from immaturity—a blameless condition and a natural phase of

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<sup>75</sup> In the criminal system, this rule is also known as the infancy defense. See generally Martin R. Gardner, UNDERSTANDING JUVENILE LAW 180-81 (1997) (discussing the infancy defense and capacity to commit a crime); W. LaFave & A. Scott, HANDBOOK ON CRIMINAL LAW 351 (1972).

<sup>76</sup> Gardner, *supra* note 75, at 180.

<sup>77</sup> *Id.* at 181.

<sup>78</sup> See Drobac, *Sex and the Workplace*, *supra* note 7, at n.130 and accompanying text (citing *Doe v. Mama Taori's Premium Pizza*, No. M1998-00992-COA-R9-CV, 2001 Westlaw 327906, \*5 (Tenn.Ct.App., April 5, 2001)) (Another bright line rule similar to the “Rule of Sevens” is the “mature minors” doctrine. The *Mama Taori's* court recognized that some mature minors may consent to conduct reserved for adults. *Mama Taori's*, 2001 WL 327906, at \*5). See generally Gardner, *supra* note 75, at 6 (discussing the “mature minor” and consent to medical treatment).

growth. I prefer the term “developing capacity” because of a teenager’s transitional status from childhood to adulthood and his or her developing maturity.<sup>79</sup>

Dr. Jay Giedd confirms that “[t]eenagers’ brains are not broken; they’re just still under construction.”<sup>80</sup> Let those people who would hold juveniles as competent as adults prove that the myelination of the fibers of all needed synapses has occurred.

This concept of applying new neuroscience evidence to law is gaining interest. For example, state legislators are using brain development research to support legislation directed at teenaged drivers.<sup>81</sup> Both legislators and researchers hope to reduce the number of teen crashes and fatalities.<sup>82</sup> A study at Temple University by Professor Steinberg used a driving-style test to prove that distractions, such as friends in the car, cause teenagers to take greater driving risks. Dr. Giedd noted, “We can determine what is the relationship between brain development and driving ability and what we can do to make it better.”<sup>83</sup> Steinberg supports the passage of well-considered laws “to limit the harm adolescents” suffer.<sup>84</sup>

## 2. *Further Inquiry*

As we compare scientific discoveries with existing law and use it to support new legislation or judicial opinions, we need to revisit certain questions and add new ones. First, if adolescents are “works in progress,” are they capable of formulating legal consent? I suspect not, but perhaps they are in any given moment. Is a moment of mature clarity

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<sup>79</sup> See Drobac, *Sex and the Workplace*, *supra* note 7, at n.240 and accompanying text.

<sup>80</sup> Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, WASH. POST, Feb. 1, 2005, at A1.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* Williamson reported that according to the Institute for Highway Safety, crashes involve teenagers at four times the rate of adults and those teens are three times as likely to die in a crash.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

sufficient? What about a half hour every other odd day? I would give adolescents the benefit of the doubt (and our protection) until they have at least finished growing. If later research supports attributing to adolescents greater capacity and giving them more responsibility, we can always up the ante.

The fact that adolescents may not possess full capacity does not mean, however, that we should not offer them opportunities to make legally significant decisions. Even if they do not possess full capacity, we may want to afford adolescents the ability to consent in narrowly tailored circumstances, designed to further their best interests. We know adolescents need to keep and develop those decision-making gray matter connections. Certain medical treatment decisions may constitute one set of such opportunities. The narrow circumstances need careful review and description, however.

Second, even if they can formulate legal consent (as we define it), are they mature enough to deal with the physical and emotional consequences, including, for example, the consequences of workplace sexual activity? We can explore this question later when we discuss the effects of sexual abuse. Third, even if adolescent behaviors do not cause the hard-wiring of their brains, we know that their emotional trauma and depression can negatively affect brain structure and function.<sup>85</sup> Given this information, should we allow our youth to engage in teen-adult sex, even if they are capable of formulating consent? Again, this analysis may require careful consideration of the alternatives and the best interests of any given adolescent. Before exploring these questions further, however, we should consider other changes that occur during adolescence.

### *B. Cognitive Development*

In association with the physical changes in the brain, adolescents mature cognitively. Cognitive changes include

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<sup>85</sup> Comment to 3/22/05 draft from Dr. Todd Preuss to author (on file with author).

the development of advanced reasoning and thinking skills.<sup>86</sup> Adolescents also develop “meta-cognition,” the ability to understand why they think and feel the way they do.<sup>87</sup> Dr. Kurt Fischer explains that adolescent cognitive and emotional capabilities continue to transition into early adulthood:

At 9 to 10 years children become able to construct flexible abstract concepts, such as conformity, responsibility, and the operation of multiplication; but when they try to relate two abstractions to each other, they muddle them together. At about age 15 they can build flexible relations between a pair of abstractions and thus stop muddling them so badly. At age 19 or 20 they can build complex relations among multiple abstractions, and at 25 they can connect systems of abstractions to understand principles underlying them. Each of these developments involves the capacity to build a new kind of understanding, but that capacity is evident only in areas where young people work to construct their understanding—the new abilities do not appear in all skills but only in

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<sup>86</sup> University of Virginia Health System, *UVA Pediatric Health Topics A to Z: Cognitive Development*, [http://www.healthsystem.virginia.edu/UVAHealth/peds\\_adolescent/cogdev.cfm](http://www.healthsystem.virginia.edu/UVAHealth/peds_adolescent/cogdev.cfm) (last visited February 19, 2005); Huebner, *supra* note 33; ARIZONA PREVENTION RESOURCE CENTER, *supra* note 32 (The Arizona Prevention Resource Center website says that young adolescents do not anticipate delayed consequences of actions. They operate very much in the present. In mid-adolescence (15-17 for females and 16-19 for males), youth develop inductive and deductive reasoning skills. They appreciate later consequences of behavior. They also tend to be quite self-absorbed and introspective, with a rich fantasy life. Not until late adolescence (18-25 for females and 20-26 for males) do men and women think abstractly. They may also develop idealist attitudes regarding love, religion and social issues); SEXSMARTS, *Sexual Health Care and Counsel*, *supra* note 32, at 3.

<sup>87</sup> Huebner, *supra* note 33, at 2.

those where the individual demonstrates optimal performance.<sup>88</sup>

This passage leads to the conclusion that adolescents practice and learn cognition, at least in part, once they become developmentally capable. This information, combined with the research on hard-wiring, suggests that we should not shelter teens from experimentation and gradual learning regarding sexuality, workplace relationships, and other abstract issues. Instead, we should facilitate their learning and maturation under circumstances that safeguard their developmental vulnerabilities. Thus, attributing full capacity to minors may not safeguard them, just as insulating them from all experimentation could stunt their development.

Cognitive developments affect teens in several ways pertinent to our discussion. First, adolescents exhibit a heightened level of self-consciousness.<sup>89</sup> They may imagine people watching them, noticing their behavior and appearance.<sup>90</sup> They worry about being different from their peers and conformity becomes extremely important.<sup>91</sup> Second, “[a]dolescents, as a group, ‘are risk takers.’”<sup>92</sup> They demonstrate a belief in their own invincibility. This belief,

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<sup>88</sup> *How Much Do We Really Know About the Brain?*, *supra* note 43 (Isn’t it ironic that Americans once set the age of majority at 21, an age of maturity now supported by scientific evidence.).

<sup>89</sup> Huebner, *supra* note 33, at 3.

<sup>90</sup> *Id.*

<sup>91</sup> Stephen Russell & Rosalie J. Bakken, *Development of Autonomy in Adolescence*, NEB. COOPERATIVE EXTENSION G02-1449-A, <http://ianrpubs.unl.edu/family/g1449.htm> (April 2002). In 2003, The Kaiser Family Foundation reported that sixty-five percent of adolescents (15-17) expressed concern about discrimination because of race, ethnicity or sexual orientation for people their age. Tina Hoff et al., KAISER FAMILY FOUNDATION, *National Survey of Adolescents and Young Adults: Sexual Health Knowledge, Attitudes and Experiences* 6 Table 1 (2003) at <http://www.kff.org/youthhivstds/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=14269>. Thus, teenagers are not only concerned about conforming, they are worried that they will suffer discrimination for their differences.

<sup>92</sup> AMA Brief, *supra* note 6, at \*5 (quoting L. P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEH. REVS. 417, 421 (2000)).

that negative influences cannot affect them, causes them to engage in risky behaviors such as unprotected sex, drunk driving, and smoking.<sup>93</sup> Third, teens experience an exaggerated sense of their own emotions, thinking that others have not felt the way they do.<sup>94</sup> They may conclude that other people cannot understand them.<sup>95</sup> How many parents over the ages have observed this phenomenon: “*But, you don’t understand!*”

Research from the 1980s suggested that adolescent cognitive development enabled youth to make hypothetical decisions comparable to adults.<sup>96</sup> The recent increase in the number of adolescents tried in criminal court as adults prompted researchers to revisit the issue of adolescent competence. The MacArthur Juvenile Adjudicative Competence Study investigated whether adolescents are competent, intellectually and emotionally, to stand trial in adult criminal court.<sup>97</sup> Dr. Laurence Steinberg reported, “Our findings indicate that significant numbers of juveniles who are 15 and younger are probably not competent to stand trial as adults.”<sup>98</sup>

The MacArthur Study researchers drew several specific conclusions. First, eleven to thirteen-year-olds were “seriously impaired” in competence relevant abilities more than three times more often than adults (18-24).<sup>99</sup> Second,

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<sup>93</sup> Huebner, *supra* note 33, at 2.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See, e.g., Schmidt, *supra* note 27, at 96 (discussing L.A. Weithorn & S.B. Cambell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589-98 (1982)).

<sup>97</sup> THE JOHN D. AND CATHERINE T. MACARTHUR FOUNDATION [hereinafter MACARTHUR FOUNDATION], *The MacArthur Juvenile Competence Study Summary of Findings* [hereinafter *Competence Study Summary*], at <http://www.mac-adoldev-juvjustice.org/competence%20study%20summary.pdf> (last visited February 8, 2004).

<sup>98</sup> Press Release, Temple University, *Many Kids 15 and Younger May Lack Maturity Necessary to be Competent to Stand Trial, Juvenile Justice Study Finds* (March 2, 2003), [http://www.temple.edu/news\\_media/bb0302\\_593.html](http://www.temple.edu/news_media/bb0302_593.html).

<sup>99</sup> *Id.*; MACARTHUR FOUNDATION, *Competence Study Summary*, *supra* note 97, at 2.

fourteen and fifteen-year-olds were twice as likely to be so impaired.<sup>100</sup> Third, the performance of sixteen and seventeen-year-olds did not differ from the adults.<sup>101</sup> Fourth, performance correlated with age and intelligence but not with other characteristics, such as gender, ethnicity, class, or prior experience in the legal system.<sup>102</sup> Finally, “younger individuals were less likely to recognize the risks inherent in different choices and less likely to think about the long-term consequences of their choices . . . .”<sup>103</sup> This last finding supports the neuroscience evidence regarding maturity in those brain sectors responsible for inhibition and decision-making.<sup>104</sup>

Can we conclude from the MacArthur Study that sixteen and seventeen-year-olds are cognitively as competent as adults? Perhaps. The MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice is conducting other studies regarding adolescent competence and decision-making. We can expect to see more evidence on the subject in the coming years.<sup>105</sup>

The problem for older teenagers may not rest with their cognitive skills, however, but with their “judgment.” According to Professors Elizabeth Scott, N. Dickon Reppucci, and Jennifer Woolard, three factors, that do not similarly affect adults, may influence adolescent decision-making: “peer and parental influence, temporal perspective and risk perception.”<sup>106</sup> Sound familiar? The idea is that psychosocial

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<sup>100</sup> MACARTHUR FOUNDATION, Competence Study Summary, *supra* note 97 at 2.

<sup>101</sup> *Id.* at 3.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 2. See also AMA Brief, *supra* note 6, at \*6 (citing Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 223 (1995)).

<sup>104</sup> See *supra* notes 44-46, 70-73 and accompanying text.

<sup>105</sup> MACARTHUR FOUNDATION, Competence Study Summary, *supra* note 97, at 3.

<sup>106</sup> Jennifer L. Woolard, *Capacity Competence, and the Juvenile Defendant*, in CHILDREN, SOCIAL SCIENCE, AND THE LAW 270, *supra* note 27, at 283 (citing Scott, *Evaluating Adolescent Decision Making in Legal Contexts*, *supra* note 103, at 221-44); see also, AMA Brief, *supra* note 6, at

development profoundly affects cognition and decision-making.

### *C. Psychosocial Development*

Adolescents explore at least five psychosocial avenues during their maturation: individual identity, autonomy, interpersonal intimacy, sexuality and personal achievement.<sup>107</sup> They may not work on these issues consciously. Over time, they adopt the attitudes, values, and behaviors of others as they identify what feels comfortable for themselves.<sup>108</sup>

#### 1. Responsibility, Temperance, and Perspective

Teen exploration of these aspects of full personhood causes a variety of behavioral changes. First, adolescents spend more time with their friends and less with their families.<sup>109</sup> Teens practice social skills with their friends, who validate “acceptable” behavior and sanction unpopular conduct.<sup>110</sup> Adolescents may succumb to peer pressure in order to preserve or improve their peer group status.<sup>111</sup>

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\*7 (citing Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 742-45 (2000)).

<sup>107</sup> *Id.* The Aarogya site lists four different psychosocial issues: the ability to separate from parents and retain family bonds, the ability to set vocational goals, the development of sexual maturity, and the development of an accurate, positive self-image. Aarogya, *supra* note 32, at 1. The Arizona Prevention Resource Center provides a useful chart of psychosocial development that lists cognitive changes as well as four arenas of psychosocial change: family independence, social/sexual peer relations, school/vocation, and self-perception (including identity, social responsibility and values). This site sets late adolescence at 18-25 for females and 20-26 for males. ARIZONA PREVENTION RESOURCE CENTER, *supra* note 32.

<sup>108</sup> See Huebner, *supra* note 33, at 3.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*; AMA Brief, *supra* note 6, at \*8-\*9 (citing Jeffery Jensen Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 354-55 (1992)).

<sup>111</sup> Woolard, *supra* note 106, at 283; see also ELIZABETH S. SCOTT, *Criminal Responsibility in Adolescence: Lessons from Developmental*

Young adolescents also embarrass quickly.<sup>112</sup> As their need for independence develops, they may not want to be seen with their parents.<sup>113</sup> While they still have strong attachments to their parents, they feel the need to disengage.<sup>114</sup> They may vacillate between child-like dependence and fierce overconfidence.<sup>115</sup> Their growing need for independence from their parents and for a sense of personal autonomy may further influence the decisions they make.<sup>116</sup>

Adolescents may become more elusive about their social plans and friends.<sup>117</sup> Consistent with exploring their own identity, they may begin keeping a journal or diary.<sup>118</sup> They may express a greater need for privacy and begin closing or locking their bedroom doors.<sup>119</sup> As they grow older, teenagers become more argumentative, questioning adult values and decisions.<sup>120</sup>

Even older teenagers tend to focus on short-term results rather than long-term consequences of their behavior. Uncertain about the future, they may feel more confident concentrating on the present or immediate future. As they consider primarily the near-term, adolescents also take greater risks, focusing on the potential gains and minimizing the potential losses.<sup>121</sup>

Professors Laurence Steinberg and Elizabeth Cauffman agree that psychosocial factors influence adolescent judgment

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*Psychology*, in YOUTH ON TRIAL 291, 304 (Thomas Grisso & Robert G. Schwartz eds., 2000).

<sup>112</sup> Aarogya, *supra* note 32, at 1.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*; Huebner, *supra* note 33, at 4.

<sup>115</sup> LAURENCE STEINBERG & ROBERT G. SCHWARTZ, *A Developmental Perspective: Developmental Psychology Goes to Court*, in YOUTH ON TRIAL 7, *supra* note 111, at 27.

<sup>116</sup> Woolard, *supra* note 106, at 283.

<sup>117</sup> Huebner, *supra* note 33, at 4.

<sup>118</sup> *Id.* at 3.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 2-3.

<sup>121</sup> Woolard, *supra* note 106, at 283-84.

and decision-making.<sup>122</sup> They assert that adolescent responsibility, temperance, and perspective distinguish teen from adult judgment.<sup>123</sup> Steinberg and Cauffman’s notion of responsibility resembles the emphasis other experts place on peer influences.<sup>124</sup> Steinberg and Cauffman say that, when making decisions, adolescents are less self-reliant and more influenced than adults would be by others.<sup>125</sup> Temperance refers to the risk-taking tendency displayed more by adolescents than adults.<sup>126</sup> Steinberg and Cauffman find that adolescents exhibit more impulsivity and sensation-seeking behavior.<sup>127</sup> They have more volatile mood swings.<sup>128</sup>

Finally, perspective relates to future time orientation and reasoning.<sup>129</sup> Adolescents are just developing the ability to consider other people’s perspectives.<sup>130</sup> Experts agree that situational forces and context affect these psychosocial skills that in turn influence decision-making.<sup>131</sup> Cauffman and Steinberg conclude, “In other words, although adults tended to

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<sup>122</sup> ELIZABETH CAUFFMAN & LAURENCE STEINBERG, *Researching Adolescents’ Judgment and Culpability*, in YOUTH ON TRIAL 325, *supra* note 111, at 331-33.

<sup>123</sup> *Id.*; Woolard, *supra* note 106, at 284 (discussing L. Steinberg & E. Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249-272 (1996)).

<sup>124</sup> See ARIZONA PREVENTION RESOURCE CENTER, *supra* note 32, at 1 (explaining middle adolescence and the need to please peers).

<sup>125</sup> CAUFFMAN, *supra* note 122, at 333; Woolard, *supra* note 106, at 284 (discussing Steinberg. *Maturity of Judgment in Adolescence*, *supra* note 123).

<sup>126</sup> CAUFFMAN, *supra* note 122, at 331; Woolard, *supra* note 106, at 284 (discussing Steinberg. *Maturity of Judgment in Adolescence*, *supra* note 123).

<sup>127</sup> Woolard, *supra* note 106, at 284 (discussing Steinberg. *Maturity of Judgment in Adolescence*, *supra* note 123).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Woolard, *supra* note 106, at 283 (discussing Steinberg. *Maturity of Judgment in Adolescence*, *supra* note 123); see also STEINBERG, YOUTH ON TRIAL, *supra* note 115, at 26; SCOTT, YOUTH ON TRIAL, *supra* note 111, at 304-05; AMA Brief, *supra* note 6, at \*7.

<sup>131</sup> Woolard, *supra* note 106, at 284; see also ALAN E. KAZDIN, *Adolescent Development, Mental Disorder, and Decision Making of Delinquent Youths*, in YOUTH ON TRIAL 45, *supra* note 111, at 47.

make more socially responsible decisions than adolescents, this difference in decision-making was due to differences in psychosocial maturity. On average, adolescents make poorer (more antisocial) decisions than adults because they are more psychosocially immature.”<sup>132</sup>

## 2. Psychosocial Development and the Law

Just as legislators are using neuroscience studies to support proposed legislative changes, so the Supreme Court recently used scientific evidence to change the law regarding juveniles. In *Roper v. Simmons*, the Court overruled the *Stanford v. Kentucky* plurality decision.<sup>133</sup> *Roper* held that the imposition of the death penalty on 16 and 17 years old juvenile criminal offenders was a violation of the Eighth Amendment protection against cruel and unusual punishment.<sup>134</sup> Looking in part to scientific studies, the *Roper* Court explained three differences between juveniles and adults justified limiting the application of the death penalty.<sup>135</sup>

First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” *Johnson, supra*, at 367; see also *Eddings, supra*, at 115-116 (“Even the normal 16-year-old customarily lacks the maturity of an adult”). It has been noted that “adolescents are overrepresented statistically in virtually every category of reckless behavior.” Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Review* 339 (1992).<sup>136</sup>

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<sup>132</sup> CAUFFMAN, *supra* note 122, at 333.

<sup>133</sup> *Roper*, 2005 WL 464890, at \*15.

<sup>134</sup> *Id.* at \*18.

<sup>135</sup> *Id.* at \*11.

<sup>136</sup> *Id.*

In this passage, the Court acknowledged the developing sense of responsibility in adolescents identified by Professors Steinberg and Cauffman. The Court’s concern with impetuous and ill-considered actions mirrors that expressed by Professors Scott, Reppucci, and Woolard. It also supports Steinberg and Cauffman’s conclusions about adolescent temperance. The *Roper* Court fully accepted that adolescents engage in reckless behavior, a conclusion drawn by Professor Woolard as she evaluated the tendency of adolescents to focus on the near-term and discount any potential for injury or losses.

The *Roper* Court continued by explaining:

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings, supra*, at 115 (“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage”). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1014 (2003) (hereinafter Steinberg & Scott) (“[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting”).<sup>137</sup>

With this finding, the Court highlighted the importance of peer group pressure and influence on adolescents. Relevant to both individual identity and autonomy, peer group pressure disables many teens who cannot extricate themselves from criminal or potentially harmful activity. The *Roper* Court agreed that

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<sup>137</sup> *Id.* at \*12.

such susceptibility to influence can lead to psychological damage. In this discussion, the Court cited researchers showcased in this Article to support its conclusion that the death penalty is not appropriate for minors.

As its final point in its discussion of juvenile development, the *Roper* Court determined that “personality traits of juveniles are more transitory, less fixed.”<sup>138</sup> The Court held that a juvenile’s character “is not as well formed as that of an adult.”<sup>139</sup> In sum, the Court agreed that juveniles are under construction. Because they are works in progress, the Court found, “From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”<sup>140</sup>

This brief review of *Roper* demonstrates that the Supreme Court has accepted the developmental differences between adolescents and adults for purposes of invalidating the death penalty for adolescent criminal offenders. The question arises whether this Supreme Court precedent finds application in sexual harassment law and particularly to the issue of adolescent capacity to consent to sex at the workplace. More information regarding adolescent sexuality provides valuable background for the evaluation of that question.

### III. Adolescent Sexuality

Statistics that may surprise many of us reveal certain facts regarding adolescent sexuality. Table 1 provides 2002 statistics concerning sexual activity of 15-19 year-olds by gender and other characteristics.<sup>141</sup>

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> J. C. Abma, G. M. Mosher, et al., National Center for Health Statistics [hereinafter NCHS], *Teenagers in the United States: Sexual Activity, Contraceptive Use, and Childbearing, 2002*, at 16 (Vital and Health Statistics, Series 23, No. 24, December 2004), [http://www.cdc.gov/nchs/data/series/sr\\_23/sr23\\_024.pdf](http://www.cdc.gov/nchs/data/series/sr_23/sr23_024.pdf). A recent synthesis of three nationally

This table shows that approximately thirty percent of older minors have sex by the time they are seventeen.<sup>142</sup> Poverty, sex, and race correlate with early sexual activity.<sup>143</sup> Black female teens are 10% more likely to have sex than white female teens.<sup>144</sup> That differential increases to more than 20% for black males.<sup>145</sup>

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representative data sets finds that nearly 20% of adolescents have had sex *before* turning 15. NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY [hereinafter NCPTP], *in* 14 AND YOUNGER: THE SEXUAL BEHAVIOR OF YOUNG ADOLESCENTS 4 (B. Albert et al. eds., 2003).

<sup>142</sup> NCHS, *supra* note 141, at 16. The 2001 Youth Risk Behavior Surveillance Summary published by the Centers for Disease Control [hereinafter CDC] noted that 45.6% of high school students had experienced sexual intercourse. Jo Anne Grunbaum et al., CDC, *Youth Risk Behavior Surveillance -- United States 2001*, 51 Morbidity and Mortality Weekly Report No. 22-4 (June 28, 2002), at 13, <http://www.cdc.gov/mmwr/PDF/ss/ss5104.pdf>. The more recent 2003 Kaiser Family Foundation Survey reports that 42% of male adolescents (15-17) and 33% of females have had intercourse. Additionally, 40% of males and 32% of females have had oral sex. Finally, 65% of males and 47% of females have been sexually intimate in some way. Hoff, *supra* note 91, at 15 Table 10.

<sup>143</sup> NCHS, *supra* note 141, at 16. In the 2001 CDC study, male students were also significantly more likely to engage in sex than female students (48.5% compared to 42.9%). Grunbaum, *supra* note 142, at 13. I relate the differences concerning gender, race, and socioeconomic status because I wonder whether these factors correlate with sexual harassment of working youth.

<sup>144</sup> NCHS, *supra* note 141, at 16.

<sup>145</sup> NCHS, *supra* note 141, at 16. The 2001 CDC study also found a similar correlation between race and sexual activity. Almost sixty-one percent (60.8%) of Black students were sexually active while the percentage of Hispanic and White students figured at 48.4% and 43.2%, respectively. Black male students were the most likely to have sex (68.8%). Grunbaum, *supra* note, 142 at 13, 48.

**Table 1.**  
**Percent of never-married males and females 15-19**  
**years of age who have ever had sexual intercourse,**  
**2002**

Characteristic	Female	Male
Total	45.5	45.7
Age		
15-17	30.3	31.3
18-19	68.8	64.3
Race and Ethnicity		
Hispanic	37.4	54.8
White, non-Hispanic	45.1	40.8
Black, non-Hispanic	56.9	63.3
Mother's Education		
No High School or GED	43.9	48.0
High School Diploma or GED	50.8	51.4
Some College or Higher	42.2	41.8

In 2003, national estimates suggest that almost two thirds of high schools seniors will have had sex by the time they graduate.<sup>146</sup> The Kaiser Family Foundation explains, “Nearly two-thirds of adolescents (15-17) and young adults (18-24) think that delaying sex may be a ‘nice idea, but nobody really does.’ And over half agree that once you do have sex it is harder to say ‘no’ the next time.”<sup>147</sup>

A 2001 survey conducted by the Centers for Disease Control and Prevention (CDC) examined sexual intercourse by students before age 13.<sup>148</sup> Table 2 displays these results.<sup>149</sup>

<sup>146</sup> KAISER FAMILY FOUNDATION, *Fact Sheet, Teen Sexual Activity*, January 2003, available at <http://www.kff.org/youthhivstds/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13521>; Hoff, *supra* note 91, at 12.

<sup>147</sup> Hoff, *supra* note 91, at 11; *see id.* at 11 Table 7, 12 Table 8.

<sup>148</sup> Grunbaum, *supra* note 142, at 48; *see also* ELIZABETH TERRY-HUMEN & JENNIFER MANLOVE, *Dating and Sexual Experiences Among Middle School Youth: Analyses of the NLSY97*, in 14 AND YOUNGER 17, *supra* note 141, at 20 Table 3 (drawing statistics from the National Longitudinal Survey of Youth 1997 (NLSY97) and confirming that 4% of girls and 6% of boys had had sex before age 13); HANNAH BRÜCKNER & PETER

These statistics support the correlation between sex and race and early sexual intercourse. More than a quarter of Black male students have engaged in sexual intercourse before age thirteen.<sup>150</sup> Additionally, the numbers reflect a trend toward earlier sexual involvement. While only 5% of the 12th grade males in the study had had sexual intercourse before they were thirteen, more than twice that many ninth grade males (13.7%) had before that age.<sup>151</sup> Thus, 6.6% of students had not reached the “age of consent” (even as defined by the most permissive states) when they first engaged in sexual intercourse.<sup>152</sup>

**Table 2.**  
**Percent of students under 13 who have had sexual intercourse, by race/ethnicity and grade, 2001**

	Female	Male	Total
Race and Ethnicity			
Hispanic	4.1	11.4	7.6
Black	7.6	25.7	16.3
White	3.3	6.2	4.7
Grade in School			
9th	5.4	13.7	9.2
10th	4.7	10.6	7.5
11th	2.9	6.4	4.6
12th	2.2	5.0	3.6

BEARMAN, *Dating Behavior and Sexual Activity of Young Adolescents: Analyses of the National Longitudinal Study of Adolescent Health*, in 14 AND YOUNGER 31, *supra* note 141, at 41-42, 41 Table 11, (relying on the 1994-96 NAT’L LONGITUDINAL STUDY OF ADOLESCENT HEALTH [hereinafter ADD HEALTH] and stating that 6% of girls and 13% of boys younger than 13 had engaged in sexual intercourse).

<sup>149</sup> Grunbaum, *supra* note 142, at 48.

<sup>150</sup> According to NLSY97, 10% of black youth younger than 13 had engaged in sex as compared to 3% of white youth and 4% of Hispanic youth. Terry-Humen, *supra* note 148, at 21 Table 4. The Add Health figures included prevalence of sex before 15 for minorities, including Asians. Asian percentages were the lowest among all race categories, with Asian females being the only group of girls that were more sexually active than their counterpart males. Brückner, *supra* note 148, at 41 Table 12.

<sup>151</sup> Grunbaum, *supra* note 142, at 48.

The Kaiser Family Foundation presents other interesting facts about the sexual experiences of adolescents (15-17). “The younger a girl is when she has sex for the first time, the greater the average age difference is likely to be between her and her partner.”<sup>153</sup> The younger she is, the more likely the sex is unwanted or non-voluntary.<sup>154</sup> Additionally, pregnancy rates, for adolescents with partners more than six years older, were 3.7 times the rate for those adolescents dating someone no more than two years older.<sup>155</sup> Jacqueline Darroch and her colleagues at the Alan Guttmacher Institute suggest:

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<sup>152</sup> *Id.* The more recent Kaiser Family Foundation Survey found that nine percent of sexually active adolescents (15-17) reported that they were 13 or younger when they first had intercourse. Hoff, *supra* note 91, at 3.

<sup>153</sup> Hoff, *supra* note 91, at 18 (citing K. A. Moore & A. Driscoll, NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, PARTNERS, PREDATORS, PEERS, PROTECTORS: MALES AND TEEN PREGNANCY: NEW DATA ANALYSES OF THE 1995 NATIONAL SURVEY ON FAMILY GROWTH (1997)); *see also* Brückner, *supra* note 148, at 38-39 & 38 Table 6 (reporting that when partners were more than 3 years older, 46% of girls (12-14) and 59% of boys engaged in sex); CHRISTINE M. FLANIGAN, *Sexual Activity Findings Among Girls Age 15: Finals from the National Survey of Family Growth*, in 14 AND YOUNGER 57, *supra* note 141, at 61-62 (stating that “more than half of girls who had first voluntary sex at 14 or younger report that their partner was *at least* 3 years older”). In one study, researchers found that adolescents were much more likely than older women to have a sexual partner who was 3-5 years older. Jacqueline E. Darroch et al., *Age Differences Between Sexual Partners in the United States*, 31 FAM. PLAN. PERSP. 160, 163 (1999) (finding that 29% of minors versus 18-21% of women older than 19 had partners 3-5 years older than they were).

<sup>154</sup> Hoff, *supra* note 91, at 18 (citing K. A. Moore et al., A STATISTICAL PORTRAIT OF ADOLESCENT TEEN PREGNANCY (1998)). “Among teen girls aged 15-19 who have had sexual intercourse, 69 percent described their first time as ‘voluntary and wanted;’ 24 percent as ‘voluntary but unwanted;’ and 7 percent as ‘nonvoluntary.’”; *see also* Flanigan, *supra* note 153, at 58 (reporting that “[a]mong girls who had sex before age 15, first sex as nonvoluntary for 13 percent”).

<sup>155</sup> Darroch, *supra* note 153, at 164. The pregnancy rate for teens dating someone 3-5 years older was 1.4 times as high as for those dating someone closer in age. *Id.* Darroch and her colleagues raise “the concern that the age difference may make it more difficult for young women to resist pressure to have sex and to become pregnant.” *Id.* at 167.

[W]hen adolescents younger than 18 are involved with men who are substantially older than they are, differences between partners in such factors as maturity, life experience, social position, financial resources and physical size may make such relationships inherently unequal, and the young women may therefore be vulnerable to abuse and exploitation by their partners.<sup>156</sup>

Based on the statistics, the National Campaign for the Prevention of Teen Pregnancy (NCPTP) cautions:

Parents should be concerned about their young teenagers dating, in general, and very cautious about letting their children date someone much older, in particular. One of the most striking and clear findings from this collected research is the great risk [of increased early sex] inherent in young teens dating older partners. . . . Although most sexual activity among young teens is voluntary, there is evidence from small area studies that some young teens, like older teens, can get into situations where they feel sexual pressure or coercion. By virtue of their young age, however, they may be less able to handle these situations effectively than older teens.<sup>157</sup>

These passages raise another interesting question. What is voluntary? As noted earlier, in sexual harassment law, acquiescence does not necessarily equate to consent.<sup>158</sup> Moreover, what we now know about adolescent cognition, psychosocial maturity, and brain function at least should inform our conclusion about teen volition.

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<sup>156</sup> *Id.* at 160.

<sup>157</sup> NCPTP, 14 AND YOUNGER, *supra* note 141, at 11.

<sup>158</sup> *See supra* note 7.

More statistics shed light on this issue of volition. According to the Kaiser Family Foundation, 31% of adolescent females (15-17), compared to 18% of males, report that they “have done something sexually they didn’t really want to [do].”<sup>159</sup> Thirty-three percent of females, compared to 18% of males, report engaging in oral sex “to avoid having sexual intercourse.”<sup>160</sup> According to the Kaiser Family Foundation, “Nearly half of 12-17 year olds (48%) say teens today face ‘a lot’ of pressure when it comes to sex and relationships, and another 38% say they face ‘some’ pressure.”<sup>161</sup>

Finally, Table 3 takes figures from the 1995 National Survey of Family Growth, Cycle V to correlate sexual activity, employment and school attendance.<sup>162</sup> Surveyors asked women between the ages of 20 to 24 whether they had engaged in sexual intercourse before the age of fifteen. These percentages again support the correlation between race and economic status and early sexual relations.

The statistics regarding employed female workers and students reveal two startling facts.<sup>163</sup> First, employed female teens, who do not attend school, are almost twice as likely as female students to have had sexual intercourse by the age of fifteen. That percentage remains true when comparing female teen workers and female students who were also employed. Second, unemployed females who are not in school are even more likely to have had sex. Adolescent female students postponed sex. Educational attainment also varied inversely with early sexual intercourse. Thirty-three percent of those females who had had sex by the age of fifteen failed to finish high school. Seventeen percent completed high school but

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<sup>159</sup> Hoff, *supra* note 91, at 20.

<sup>160</sup> *Id.*

<sup>161</sup> KAISER FAMILY FOUNDATION, *Fact Sheet*, *supra* note 146, at 2.

<sup>162</sup> Jennifer J. Frost et al., The Alan Guttmacher Institute, *Teenage Sexual and Reproductive Behavior in Developed Countries, Occasional Report No. 8, Country Report for the United States 10* (November 2001), [http://www.agi-usa.org/pubs/us\\_teens.pdf](http://www.agi-usa.org/pubs/us_teens.pdf), at 11 Table 5.

<sup>163</sup> *Id.* All of the statistics that follow in this paragraph are drawn from Table 3.

**Table 3.****Percent of women 20-24 who had sexual intercourse by the age of 15 years, by selected characteristics, 1995**

Characteristic	Intercourse by Age 15
<b>Poverty Status</b>	
0-149%	16.3
150-299%	15.6
300+%	10.5
<b>Race and Ethnicity</b>	
Hispanic	11.7
Black, non-Hispanic	21.5
White, non-Hispanic	12.8
Other	15.6
<b>School/Work Status</b>	
Employed & in school	8.1
In school only	8.7
Employed only	15.2
Neither	20.9
<b>Educational Attainment</b>	
< High school	33.7
High school	17.3
< College	9
College 4+	2.6

less than three percent of those youth finished college and graduate studies.<sup>164</sup> These statistics prompt questions about the relevance of gender, race, socioeconomic class, employment, and risk of sexual harassment.

#### *A. Adolescent Communication Concerning Sexuality*

While adolescents are having sex, they are not always talking about it in a meaningful way—even to each other. A May 2001 Kaiser Family Foundation and *seventeen* magazine survey report revealed that only 26% of 12-17 year olds had talked to a health care provider about their decision to have sex.<sup>165</sup> Only 30% had ever discussed birth control and protection.<sup>166</sup> According to the 2003 Kaiser Family

<sup>164</sup> *Id.*

<sup>165</sup> SEXSMARTS, *Sexual Health Care and Counsel*, *supra* note 32, at 2.

<sup>166</sup> *Id.*

Foundation survey of women's sexual health, one third of adolescents and young adult women (15-24) say that they strongly or somewhat agree with the statement that "buying condoms is embarrassing . . . ." Just over one quarter said that "it is hard to 'bring up' the subject of condoms."<sup>167</sup> Not surprisingly, the percentage of teens reporting embarrassment increases for younger teens.<sup>168</sup>

Additionally, and perhaps more important, adolescents are not talking to their parents about their sexual activity. Most parents—almost 75%—do not know that their children (14 or younger) are having sex.<sup>169</sup> The statistics are only moderately better for parents of sexually active teens fifteen and older. Only about half of them (54%) know.<sup>170</sup>

Finally, parents and their teenagers disagree concerning their communications about sex. In one California study, 69% of parents said that they had spoken with their children about sex or birth control.<sup>171</sup> Only 41% of their children confirmed those conversations had occurred.<sup>172</sup>

Dr. Yurgelun-Todd concludes from her study:

[T]he teenager is not going to take the information that is in the outside world, and organize it and understand it the same way we do. [W]hatever conversation you have with them, if you're assuming they understood everything you said—they may not have. Or they may have understood it differently.<sup>173</sup>

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<sup>167</sup> Hoff, *supra* note 91, at 4, 34.

<sup>168</sup> CYNTHIA A. GÓMEZ ET AL., *The Development of Sex-Related Knowledge, Attitudes, Perceived Norms, and Behaviors in a Longitudinal Cohort of Middle School Children*, in 14 AND YOUNGER 67, *supra* note 141, at 72 Table 5.

<sup>169</sup> Brückner, *supra* note 148, at 54 & Table 31.

<sup>170</sup> *Id.*

<sup>171</sup> SUSAN PHILLIBER, *Community Concerns and Communication Among Young Teens and Their Parents: Data From California Communities*, in 14 AND YOUNGER 91, *supra* note 141, at 98.

<sup>172</sup> *Id.*

<sup>173</sup> Interview Deborah Yurgelun-Todd, *supra* note 53.

Again, the expert confirms what many “inexpert” parents suspect; they are often talking to the wall.

### *B. Sexuality and Psychosocial Development*

The psychosocial changes that occur during adolescence appear to bear directly upon developing sexual maturity.<sup>174</sup> Professor Angela Huebner suggests, “[h]ow teens are educated about and exposed to sexuality will largely determine whether they develop a healthy sexual identity.”<sup>175</sup> She asserts that teens (and others) equate intimacy with sex.<sup>176</sup> Huebner explains:

In fact, intimacy and sex are not the same. Intimacy is usually first learned within the context of same-sex friendships, then utilized in romantic relationships. Intimacy refers to close relationships in which people are open, honest, caring and trusting. Friendships provide the first setting in which young people can practice their social skills *with those who are their equals*. . . . Rather than exploring a deep emotional attachment first [in sexual relationships], teens tend to assume that if they engage in the physical act, the emotional attachment will follow.<sup>177</sup>

In this passage, Huebner describes how teens, with their equals, practice social skills that build intimacy. Ideally, teens will practice social skills with peers, with equals, through their friendships. Additionally, Huebner highlights that teens engage in sex, hoping to find intimacy.

A 2000 Kaiser Family Foundation and *seventeen* magazine survey of teens lends support for this last

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<sup>174</sup> Huebner, *supra* note 33, at 3; ARIZONA PREVENTION RESOURCE CENTER, *supra* note 32; Aarogya, *supra* note 32.

<sup>175</sup> Huebner, *supra* note 33, at 3.

<sup>176</sup> *Id.*

<sup>177</sup> Huebner, *supra* note 33, at 3, 2 (italics added).

contention.<sup>178</sup> Their survey polled 510 teens between the ages of 12 to 17. In response to a question regarding the “major reason” sexually active teens<sup>179</sup> chose to have sex the first time, twenty-eight percent “hoped it would make the relationships closer.”<sup>180</sup> Thus, more than a quarter of sexually active teens were searching for a more intimate relationship through sexual intercourse. Forty-five percent, almost half, answered that a “major reason” they had sex was because the “other person wanted to.”<sup>181</sup> This response suggests that many teens succumb to pressure by their romantic partners and indicates a clear lack of mutuality, at least with respect to first time sexual experiences.

The Kaiser survey noted several other “major reason[s]” teens decided to have sex. Thirty-two percent expressed that they were “just curious.”<sup>182</sup> Sixteen percent listed that “many friends already had” had sex, which prompted them to have sex.<sup>183</sup> Alcohol influenced five percent of teens.<sup>184</sup> Finally, fifty-one percent noted they had “met the right person.”<sup>185</sup> While this last and most common reason reflects a sense of readiness, most of the other reasons alert us to external pressures brought to bear by friends and partners. Almost half of the teens have sex, not because they desire it, but because a partner does.<sup>186</sup> Teens support this conclusion when eighty-six percent agree, “young people

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<sup>178</sup> SEXSMARTS, *Decision Making About Sex* (2000), available at <http://www.kff.org/youthhivstds/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13538>.

<sup>179</sup> The survey polled only fifteen to seventeen-year olds on personal sexual experiences.

<sup>180</sup> SEXSMARTS, *Decision Making*, *supra* note 178, at 2.

<sup>181</sup> *Id.* More recently, the Kaiser Family Foundation reported that nearly a third of adolescents (15-17) said “that they have experienced pressure to have sex.” Hoff, *supra* note 91, at 3; *see also* Hoff, *supra* note 91, at 7-8.

<sup>182</sup> SEXSMARTS, *Decision Making*, *supra* note 178, at 2.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> In 2003, the Kaiser Family Foundation reported that one-third of survey respondents said that sexual activity had progressed faster than they desired in at least one relationship. Hoff, *supra* note 91, at 3.

today face pressure when it comes to sex and relationships.”<sup>187</sup> The Kaiser survey supports the MacArthur Network hypothesis that psychosocial factors such as peer pressure influence adolescent decision-making. The statistics prove what many of us have “known” for years.

### C. Society and Adolescent Sexuality

As we review what we know about teen psychosocial development and sexuality, we must also consider the society in which our teens function. Because we still live in a predominantly patriarchal culture, we must acknowledge its impact on adolescent females. Professor Michelle Oberman summarizes the psychological literature on this subject. She says “that among girls, adolescence is a time of acute crisis, in which self-esteem, body image, academic confidence, and the willingness to speak out decline precipitously.”<sup>188</sup> The theory is that our patriarchal culture creates a stereotype of women that portrays them in sexual terms and as less valuable than men. As girls change physically and psychosocially, they adopt the cultural stereotype. Oberman asserts that “the most significant external manifestation . . . [of their gendered psychosocial development] is their increasing unwillingness to speak their opinions or voice their desires. . . . Girls equate compliance and cooperation with ‘niceness,’ and they perceive that being nice is central to being ‘feminine.’”<sup>189</sup>

Sexual objectification, low self-esteem, and the desire to be feminine may impair girls’ ability to fend off or recover from unwanted sexual attention.<sup>190</sup> For example, while both boys and girls experience sexual harassment in school (83% and 79% respectively), more often girls report feeling its negative effects.<sup>191</sup> According to research conducted by the American Association of University Women:

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<sup>187</sup> SEXSMARTS, *Decision Making*, *supra* note 178, at 1.

<sup>188</sup> Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 55-56 (1994).

<sup>189</sup> *Id.* at 57.

<sup>190</sup> *Id.* at 58.

<sup>191</sup> AMERICAN ASSOCIATION OF UNIVERSITY WOMEN [hereinafter AAUW] EDUCATIONAL FOUNDATION, *HOSTILE HALLWAYS: BULLYING TEASING,*

- Girls are far more likely to feel “self conscious” (44% to 19%), “embarrassed” (53% to 32%), and “less confident” (32% to 16%) because of an incident of sexual harassment;
- Girls are more likely than boys to change behaviors in school and at home because of the experience, including not talking as much in class (30% to 18%) and avoiding the person who harassed them (56% to 24%);
- Girls were consistently more likely to say that they would be “very upset” by all 14 incidents of sexual harassment, with the exception of being called gay or lesbian (boys — 74%, girls — 73%).<sup>192</sup>

These psychosocial factors combined with the prevalence of sexual harassment in schools paint a bleak picture regarding female teen psychosocial, sexual development.

Add to this picture cultural attitudes about children who engage in sexual behavior. “In 1996, 69% of U.S. adults indicated that it was ‘always wrong’ for adolescents between the ages of 14–16 to have sex.”<sup>193</sup> The Alan Guttmacher Institute elaborated:

For adults in the United States . . . the fact that young people are having sex is more often considered to be, per se, the “problem.” Because teens are often regarded and portrayed as being incapable of using contraception

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AND SEXUAL HARASSMENT IN SCHOOL 4, 32 (2001), available at [http://www.aauw.org/member\\_center/publications/HostileHallways/hostile\\_hallways.pdf](http://www.aauw.org/member_center/publications/HostileHallways/hostile_hallways.pdf) (last visited February 19, 2005).

<sup>192</sup> AAUW, Review of Hostile Hallways: Bullying Teasing, and Sexual Harassment in School (2001), [http://www.aauw.org/research/girls\\_education/hostile.cfm#below](http://www.aauw.org/research/girls_education/hostile.cfm#below) (last visited October 27, 2005).

<sup>193</sup> Frost, *supra* note 162, at 18. Seventy-eight percent disapproved of extramarital sex generally.

effectively, having sex is often equated with becoming pregnant and a teen parent; the slogan of one state’s current teen pregnancy campaign is “You play, you pay.” Moreover, the United States is the only country with formal policies directing state and federal funds toward educational programs that have as their sole purpose the promotion of abstinence.<sup>194</sup>

In 2000, Dr. Suzanne M. Sgroi, whose research focused on child sexual abuse, explained:

There was also widespread belief (then [during the 1970s] as now) that engaging in sexual interaction was a transforming experience that marked an individual’s rite of passage into adulthood. A sexually experienced child was viewed as an anomaly by most of the general public, who believed that youthful victims of sexual abuse had “lost their innocence” and become contaminated in a way that made them seductive and dangerous.<sup>195</sup>

These views help to explain court decisions that credit adolescent “consent” to sexual activity as adult-like and, therefore, legally significant.<sup>196</sup> They explain why we might make adolescents “pay” for “playing” at the workplace. They account for court opinions that treat a sexually active teen as a seductress, “a voluntary participant, with strong financial

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<sup>194</sup> Heather Boonstra, *Teen Pregnancy: Trends and Lessons Learned*, 5 The Guttmacher Report, Feb. 2002, at 6, available at <http://www.guttmacher.org/pubs/tgr/05/1/gr050107.html>.

<sup>195</sup> Suzanne M. Sgroi, M.D., *Discovery, Reporting, Investigation, and Prosecution of Child Sexual Abuse*, 29 *Siecus Report*, Oct./Nov. 2000, at 6. One of the tort opinions that I reviewed in *Sex and the Workplace* treated the mentally challenged female victim as a conniving seductress. Drobac, *Sex and the Workplace*, *supra* note 7, at 530-31.

<sup>196</sup> See, e.g., Drobac, *Sex and the Workplace*, *supra* note 7, at 527-33.

incentive to shape evidence that determines the outcome.”<sup>197</sup> These attitudes do not emphasize the power, age, and maturity disparities between adolescents and their workplace supervisors. They do not acknowledge psychosocial immaturity that might prompt a different response to “developing capacity.”

Sexual exploration and experimentation is a natural part of the human maturation process.<sup>198</sup> However, if an adolescent does not or cannot consent to specific sexual conduct with an adult, that conduct should be labeled sexual abuse. In order to map a strategy for dealing with adolescent consent to sex under the law, we must understand the consequences of child and adolescent sexual abuse.

#### *D. Child and Adolescent Sexual Abuse*

Sexual abuse is contact with a child where the child is being used for sexual stimulation by the other person. The abuser is older than the child and in a position of authority over the child (*Child Sexual Abuse Manual*, 1989).<sup>199</sup>

A 1995 Gallup poll of parents revealed that twenty-three percent had been sexually abused as children.<sup>200</sup> The National Center for Child Abuse and Neglect estimated 130,000 cases of sexual abuse in that same year.<sup>201</sup> Dr. Sgroi explained, “The tenfold discrepancy in these estimates is not surprising, since it reflects the disparity between what parents were willing to disclose in an anonymous phone survey (the

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<sup>197</sup> *Doe by Roe v. Orangeburg County School District*, 518 S.E.2d 259, 261 (S.C. 1999) (quoting *Barnes v. Barnes*, 603 N.E.2d 1337, 1342 (Ind. 1992); see also, Drobac, *Sex and the Workplace*, *supra* note 7, at 529-31.

<sup>198</sup> See Huebner, *supra* note 33, at 1-2.

<sup>199</sup> INGER J. SAGATUN & LEONARD P. EDWARDS, *CHILD ABUSE AND THE LEGAL SYSTEM* 21 (1995).

<sup>200</sup> Sgroi, *supra* note 195, at 7.

<sup>201</sup> *Id.*

Gallup Poll) versus official reporting of suspected abuse to police or Child Protective Services.”<sup>202</sup>

Children often do not report their abuse.<sup>203</sup> Even in cases involving children with confirmed sexually transmitted diseases, over forty percent denied any sexual contact.<sup>204</sup> Experts describe some behaviors common to child abuse victims as “child sexual abuse accommodation syndrome.” This syndrome explains the behavior of children who feel they cannot escape or who adapt to survive.<sup>205</sup> Secrecy, delayed disclosure, and retraction are three of five purported syndrome characteristics.<sup>206</sup> Recall that Sara did not report her seduction by the movie theater manager even after he impregnated her and had his adult girlfriend take her to have an abortion.<sup>207</sup> Not until police told Sara that the manager had no brain tumor and was a registered sex offender did she agree to cooperate with the district attorney.<sup>208</sup> Whether or not Sara was “in love” with her manager or suffered from sexual abuse is debatable. The fact remains that she did not discuss her problems with her parents or any adult besides her manager.<sup>209</sup>

Teen concealment of workplace sexual abuse may relate to how the perpetrators operate. The ABA (American Bar Association) Center on Children and the Law suggested:

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<sup>202</sup> *Id.*

<sup>203</sup> ABA [AMERICAN BAR ASSOCIATION] CENTER ON CHILDREN AND THE LAW, A JUDICIAL PRIMER ON CHILD SEXUAL ABUSE 3 (Josephine Bulkley & Claire Sandt, eds., 1994) [hereinafter A JUDICIAL PRIMER].

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 4; see also SAGATUN, *supra* note 199, at 220.

<sup>206</sup> SAGATUN, *supra* note 199, at 220.

<sup>207</sup> Sara Doe Complaint, *supra* note 13, at 9; see Report of Deputy R. Mitchell #73-2801, Nov. 1, 1999, at 4 (on file with author & Santa Cruz County Sheriff’s Department) [hereinafter Mitchell, Nov. 1, 1999].

<sup>208</sup> Drobac, *Sex and the Workplace*, *supra* note 7, at 471-72; see Report of Deputy R. Mitchell, #73-2801, Oct. 29, 1999, at 4-7 (on file with the author & Santa Cruz County Sheriff’s Department) [hereinafter Mitchell, Oct. 29, 1999].

<sup>209</sup> Sara Doe Complaint, *supra* note 13, at 9; Report of Deputy R. Mitchell, #73-2801, Aug. 9, 1999, at 3 (on file with the author & Santa Cruz County Sheriff’s Department) [hereinafter Mitchell, Aug. 9, 1999].

In other cases, [sexual abuse] offenders achieve compliance through the abuse of adult authority. They may disguise the meaning of the abuse (e.g. sex education, hygiene), normalize the behavior, (e.g., all fathers show love this way), conceal the intent (e.g., accidental contact during play), or offer tangible or intangible rewards (e.g., money, gifts, attention). . . . Child sexual abuse victims are kept from reporting the abuse because offenders threaten harm or persuade them; offenders may also convince children that they will not be believed or they will be responsible for negative consequences to themselves, their families, or offenders.<sup>210</sup>

Take this description and compare it to Sara's case. Sara's manager clearly wielded adult authority; he was approximately twenty-five years her senior.<sup>211</sup> He was also her workplace supervisor and carried additional authority conferred by the theater owner.<sup>212</sup> He could terminate her employment and did on one occasion.<sup>213</sup> Arguably, her manager disguised the meaning of his sexual overtures when he told her that he loved her and had a brain tumor and did not know how long he had to live.<sup>214</sup> He implied that he wanted to share a level of intimacy and bonding with her before he died, not just have sex.<sup>215</sup> He also normalized this workplace behavior by suggesting that a mature, romantic involvement existed, that they were "in love."<sup>216</sup> He concealed his relationship with his adult girlfriend, his prior conviction as a sex offender, and additional facts to conceal his true sexual,

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<sup>210</sup> A JUDICIAL PRIMER, *supra* note 203, at 3.

<sup>211</sup> Sara Doe Complaint, *supra* note 13, at 2; *see* Mitchell, Aug. 9, 1999, *supra* note 209, at 3.

<sup>212</sup> Sara Doe Complaint, *supra* note 13, at 3.

<sup>213</sup> Sara Doe Complaint, *supra* note 13, at 6.

<sup>214</sup> *See* Mitchell, Oct. 29, 1999, *supra* note 208, at 4.

<sup>215</sup> *See* Sara Doe Complaint, *supra* note 13, at 6.

<sup>216</sup> *Id.*

predatory intentions.<sup>217</sup> He offered tangible and intangible rewards: a workplace promotion, driving lessons, gifts, cash, and adult guidance and attention.<sup>218</sup> This guy used every trick in the ABA book.

For her part, Sara exhibited classic teen characteristics. She took huge risks: having unprotected sex, undergoing an abortion without the support of (not to mention consent of or notice to) her parents.<sup>219</sup> She suggested in her letters to her manager, who was in jail at the time, that she wanted to emancipate herself from her parents.<sup>220</sup> Upon his release, she would run away with him to Canada where she would have his baby.<sup>221</sup> We cannot know for sure what Sara was actually thinking. It does not seem a stretch to suggest, however, that she felt that her parents would not “understand.” Why else would she prefer that her lover’s adult girlfriend drive her to the abortion clinic?

Possibly, Sara felt shame, embarrassment, and humiliation that she did not protect herself from an unwanted pregnancy (not to mention potentially fatal sexually transmitted diseases). Those feelings might have prevented her from approaching her parents or other counselors. Those feelings might also have combined with a heightened level of self-consciousness to cloud her judgment about her “boyfriend.” After all, she actually believed his story about the brain tumor! At the very least, Sara’s conduct with her manager was uninhibited. This former “A” student demonstrated poor judgment and made tragic choices.<sup>222</sup>

Because Sara “played,” some states would have her “pay.” Pay she may. Experts confirm that sexually abused children and adolescents suffer long term negative effects. In

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<sup>217</sup> See Sara Doe Complaint, *supra* note 13, at 4, 6-7.

<sup>218</sup> Sara Doe Complaint, *supra* note 13, at 5-7; Mitchell, Aug. 9, 1999, *supra* note 209, at 3.

<sup>219</sup> Sara Doe Complaint, *supra* note 13, at 9; Mitchell, Nov. 1, 1999, *supra* note 207, at 4.

<sup>220</sup> Letter from Sara Doe to Michael Cosio, (Aug. 12, 1999) (on file with the author & Santa Cruz County Sheriff’s Department).

<sup>221</sup> *Id.*

<sup>222</sup> See Mitchell, Aug. 9, 1999, *supra* note 209, at 3.

2000, McLean Hospital researchers described four types of brain abnormalities linked to child abuse and neglect.<sup>223</sup> Dr. Martin Teicher, director of the McLean Developmental Biopsychiatry Research Program, explained, ““These changes are permanent. This is not something people can just get over and get on with their lives.””<sup>224</sup> Other studies detail behavioral and psychiatric disorders, including depression, and post-traumatic stress disorder (PTSD).<sup>225</sup>

### 1. *Brain Damage*

The abnormalities documented by McLean scientists included limbic irritability, arrested development of the left hemisphere, deficient integration of the right and left hemispheres, and increased vermal activity.<sup>226</sup> The limbic system, also known as the “emotional brain” controls emotions associated with survival responses.<sup>227</sup> Evidence suggests that child abuse may cause electrical disturbances in limbic nerve cell communication.<sup>228</sup> Such disturbance can result in seizures or abnormalities on measures of brain waves, EEGs.<sup>229</sup> Follow-up studies at McLean documented that abused children were twice as likely as non-abused patients to have an abnormal EEG.<sup>230</sup> Researchers associated these

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<sup>223</sup> Press Release, McLean Hospital, McLean Researchers Document Brain Damage Linked to Child Abuse and Neglect (Dec. 14, 2000) [hereinafter McLean Researchers] (on file at [http://mcleanhospital.org/PublicAffairs/20001214\\_child\\_abuse.htm](http://mcleanhospital.org/PublicAffairs/20001214_child_abuse.htm)).

<sup>224</sup> *Id.* at 1.

<sup>225</sup> See DAVID P.H. JONES & PAUL RAMCHANDANI, CHILD SEXUAL ABUSE: INFORMING PRACTICE FROM RESEARCH 15-16 (1999)(finding that about half of children studied suffered such symptoms).

<sup>226</sup> McLean Researchers, *supra* note 223.

<sup>227</sup> *Id.* at 1.

<sup>228</sup> *Id.* Drs. Martin Teicher and Deborah Yurgelun-Todd have researched the effects of abuse on the brain. Landau, *supra* note 57. A recent study demonstrated that adults, physically and/or sexually abused before they were 18, more frequently suffered from “olfactory hallucinations, visual disturbances, and feelings of déjà vu or jamais vu (familiar situations seeming unfamiliar)—symptoms found in temporal lobe epilepsy and associated with abnormal limbic system activity.” Landau, *supra* note 57, at 3.

<sup>229</sup> McLean Researchers, *supra* note 223, at 2.

<sup>230</sup> *Id.*

abnormalities “with more self-destructive behavior and more aggression.”<sup>231</sup>

The second condition, arrested development of the left hemisphere, suggests that the right hemisphere of abused children may be more active than that in non-abused children.<sup>232</sup> The left hemisphere controls language.<sup>233</sup> The right hemisphere controls perception and “expression of negative affect,” among other functions.<sup>234</sup> Researchers hypothesize that the imbalance “may contribute to the development of depression and increase the risk of memory impairments.”<sup>235</sup>

In making the third finding pertaining to brain integration, McLean researchers noticed an abnormally small corpus callosum in abused children.<sup>236</sup> The corpus callosum acts as the brain’s information highway between the hemispheres. McLean administrators explained:

After reviewing the medical records, the researchers found that neglect was associated with a 24 percent to 42 percent reduction in the size of various regions of the corpus callosum in boys, but sexual abuse had no effect. In girls, sexual abuse was associated with an 18 to 30 percent smaller size in the corpus callosum, but neglect had no effect. . . . They theorize that a smaller corpus callosum leads to less integration of the hemispheres. This in turn can result in dramatic shifts in mood or personality.<sup>237</sup>

These studies did not explain why sexual abuse affected girls but not boys in this manner.

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<sup>231</sup> *Id.*  
<sup>232</sup> *Id.*  
<sup>233</sup> *Id.*  
<sup>234</sup> *Id.*  
<sup>235</sup> *Id.*  
<sup>236</sup> *Id.*  
<sup>237</sup> *Id.*

Finally, McLean researchers noted an increased level of vermal activity in abused children.<sup>238</sup> The cerebellar vermis helps regulate the limbic system and control emotions and attention.<sup>239</sup> By studying blood flow to this area, researchers concluded that higher vermal activity levels served to “quell electrical irritability within the limbic system.”<sup>240</sup> They speculated that abuse interfered with the ability to maintain emotional balance.<sup>241</sup> McLean researchers also used animal studies to explain the possible impact of child abuse.<sup>242</sup> They suggested that abuse and neglect may “trigger the release of hormones and neurotransmitters while inhibiting others, in effect remolding the brain so that the individual is ‘wired’ to respond to a hostile environment.”<sup>243</sup> How ironic that we call a workplace replete with sexual harassment a hostile environment.<sup>244</sup>

Am I suggesting that an adolescent like Sara will suffer brain damage because of workplace sex? No, however, I raise several questions based on new evidence and collected statistical information. We now know that child sexual abuse can negatively impact brain development.<sup>245</sup> We also know that adolescent brains are works in progress.<sup>246</sup> We know that young teens are having sex, some at the workplace.<sup>247</sup> Many teen sexual encounters involve peer pressure.<sup>248</sup> Some teen-adult liaisons, if not many, involve deception, subtle coercion, and may not be completely voluntary for the teens.

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 2-3.

<sup>243</sup> *Id.* at 3.

<sup>244</sup> JENNIFER ANN DROBAC, SEXUAL HARASSMENT LAW 48-51 (2005).

<sup>245</sup> McLean Researchers, *supra* note 223; *see also* Society for Neuroscience, Brain Briefings (2003), *available at* [http://apu.sfn.org/content/Publications/BrainBriefings/child\\_abuse.html](http://apu.sfn.org/content/Publications/BrainBriefings/child_abuse.html).

<sup>246</sup> Landau, *supra* note 57, at 3 (quoting Dr. Teicher, “Your experiences are going to affect your hardware”); *see also supra* Part II.A.1.

<sup>247</sup> Sara Doe Complaint, *supra* note 13; *see also supra* note 160 and accompanying text.

<sup>248</sup> *See supra* notes 159-161 and accompanying text.

Is it possible that a less than voluntary sexual encounter can produce permanent brain changes? If not after just one encounter, then what about after six or twelve or fifty? Is it possible that even voluntary sexual encounters by a young adolescent (by definition immature) with an adult can produce negative neurological consequences? Even if such encounters will not produce permanent neurological changes, can they produce temporary or chronic disabilities that lead to other problems? For example, might sex at the workplace create emotional or psychological conditions that could in turn affect performance on standardized academic tests or college entrance examinations? Can and should the law deal with these issues?

We have statutory rape laws because we believe that it is harmful for minors below a certain age to engage in sex, particularly with adults. We have concluded that they do not have the capacity to consent. Should we discourage, both legally and financially, workplace teen-adult sex for the same reason and because of what might be true, given the new evidence? Or do we risk hard-wiring immaturity if we do not allow for sexual experimentation—including mistakes? We need more information to answer these questions with confidence.

## 2. Other Negative Effects

In addition to critical changes in brain development, child sexual abuse results in a variety of other negative consequences. First, sexually abused children suffer a variety of psychiatric disorders.<sup>249</sup> While a full discussion of the effects of child sexual abuse is beyond the scope of this paper, research suggests that sexually abused children experience more post traumatic stress disorder (PTSD), depression, and

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<sup>249</sup> JONES, *supra* note 225, at 16; A JUDICIAL PRIMER, *supra* note 203, at 5-6. For further discussion of the effects of child sexual abuse, see SAGATUN, *supra* note 199, at 24-25 and 220 (describing “Child Sexual Abuse Accommodation Syndrome”); WILLIAM E. PRENDERGAST, SEXUAL ABUSE OF CHILDREN AND ADOLESCENTS 69-102 (1996); ELIZABETH ADAMS, UNDERSTANDING THE TRAUMA OF CHILDHOOD PSYCHO-SEXUAL ABUSE 34-39 (1994); SEXUALIZED VIOLENCE AGAINST WOMEN AND CHILDREN 153-154 (B. J. Cling, ed., 2004).

anxiety than non-abused children.<sup>250</sup> Children tend to internalize their negative emotions rather than act aggressively or violently.<sup>251</sup> Anxiety, depression, and withdrawal are common symptoms.<sup>252</sup>

Second, sexually active youth, approximately four million of them each year, contract a sexually transmitted disease (STD).<sup>253</sup> While infection rates for teen males have dropped in the last thirty years, those for teen females have increased.<sup>254</sup> Statistics reveal that following one incident of unprotected sex, a girl faces “a 1% risk of acquiring HIV, a 30% risk of getting genital herpes, and a 50% chance of contracting gonorrhea.”<sup>255</sup> Sexually active females under twenty are two to four times more likely than their male peers to contract an STD.<sup>256</sup> In 1992, Professor Mike Males emphasized that 90% of the HIV infections, caused when minors have heterosexual sex, occur in females.<sup>257</sup> From his research, he concluded ““that HIV and AIDS transmission to teens may be less due to teenage sexual practices, on which it is often blamed, than on the pattern of liaison between teenage girls and adult men.””<sup>258</sup>

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<sup>250</sup> JONES, *supra* note 225, at 16; A JUDICIAL PRIMER, *supra* note 203, at 5.

<sup>251</sup> A JUDICIAL PRIMER, *supra* note 203, at 5.

<sup>252</sup> *Id.*

<sup>253</sup> KAISER FAMILY FOUNDATION, *U.S. Teen Sexual Activity* (#3040-02, January 2005), at <http://www.kff.org/youthhivstds/3040-02.cfm>.

<sup>254</sup> ABA CENTER ON CHILDREN AND THE LAW, *SEXUAL RELATIONSHIPS BETWEEN ADULT MALES AND YOUNG TEEN GIRLS 2* (Sharon G. Elstein & Noy Davis, eds., 1997) [hereinafter *SEXUAL RELATIONSHIPS*] (citing M. A. Males, *Adult Liaison in the ‘Epidemic’ of ‘Teenage’ Birth, Pregnancy, and Venereal Disease*, *J. SEX RESEARCH* 29 (1992)).

<sup>255</sup> *SEXUAL RELATIONSHIPS*, *supra* note 254, at 2 (citing THE ALAN GUTTMACHER INSTITUTE, *SEX AND AMERICA’S TEENAGERS* (1994)). Kaiser reports that “an estimated half of all new HIV infections occur in people under age 25. KAISER FAMILY FOUNDATION, *U.S. Teen Sexual Activity*, *supra* note 253, at 2.

<sup>256</sup> *SEXUAL RELATIONSHIPS*, *supra* note 254, at 2 (citing M. A. Males, *Adult Involvement in Teenage Childbearing and STD*, *THE LANCET* 346 (1995)).

<sup>257</sup> *SEXUAL RELATIONSHIPS*, *supra* note 254, at 3.

<sup>258</sup> *Id.* (quoting Males, *Adult Liaison*, *supra* note 254).

During her “affair” with her forty-year-old manager, Sara withdrew from family and friends.<sup>259</sup> She locked herself in her room.<sup>260</sup> She quit the swim team and lost interest in continuing her education.<sup>261</sup> After she found out about how her lover deceived her, she had nightmares and anxiety attacks.<sup>262</sup> She exhibited many of the symptoms of sexual abuse. Was she a “normal,” withdrawn, and self-conscious teen or an abused adolescent? We cannot know for sure. One thing is certain: Sara was lucky that she did not get an incurable or fatal sexually transmitted disease.<sup>263</sup>

#### IV. Conclusions Regarding “Developing Capacity”

With emerging medical technologies, we are entering a new phase of understanding regarding adolescent physical, cognitive, and psychosocial development. We should not predict where future studies might lead in order to change current law. However, we can evaluate the law using newly gathered scientific facts and social science evidence to determine whether the law provides an adequate structure for safeguarding our youth. Having reviewed the new evidence, this Article now reviews the law of consent, and more particularly legal capacity, to make specific recommendations concerning adolescent employment and sexual harassment law.

##### A. Legal Capacity

The law affords consent legal significance when she who consents has the capacity to do so.<sup>264</sup> I found an amazing dearth of legal guidance regarding the nature and definition of

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<sup>259</sup> Mitchell, August 9, 1999, *supra* note 209, at 3.

<sup>260</sup> Sara Doe Complaint, *supra* note 13, at 9.

<sup>261</sup> Sara Doe Complaint, *supra* note 13, at 11.

<sup>262</sup> Sara Doe Complaint, *supra* note 13, at 18; *see* Sara Doe, *Forgiveness* (a surrealistic poem) (Sept. 2, 1999)(on file with the author and with Santa Cruz County Sheriff’s Department).

<sup>263</sup> *See* Sara Doe Complaint, *supra* note 13, at 17-18.

<sup>264</sup> *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 892A(2)(a) (1979).

capacity. The Restatement (Second) of Torts § 892A(2)(a) and its affiliated comment offer the best discussion:

§ 892A. Effect of Consent

.....

(2) To be effective, consent must be

(a) by one who has the capacity to consent or by a person empowered to consent for him, and

(b) to the particular conduct, or to substantially the same conduct.

.....

**Comment on Subsection (2):**

*b. Capacity.* To be effective, the consent must be given by one who has the capacity to give it or by a person empowered to consent for him. If the person consenting is a child or one of deficient mental capacity, the consent may still be effective if he is capable of appreciating the nature, extent and probable consequences of the conduct consented to, although the consent of a parent, guardian or other person responsible is not obtained or is expressly refused. If, however, the one who consents is not capable of appreciating the nature, extent or probable consequences of the conduct, the consent is not effective to bar liability . . . .

.....

Even when a person is in fact competent to give consent a statute may prevent the consent from being effective, if the statute is found to be intended to give special protection against certain kinds of harm. Thus under statutes intended to protect young children from entering upon employment dangerous to their health and safety, the consent of the child or the parent does not bar an action by the child resulting from the employment . . . . So likewise one guilty of statutory rape upon a girl under the specified age has no defense to a civil

action brought by her, even though she did in fact consent, and was in fact fully competent to do so. (See § 892C).<sup>265</sup>

Comment b. clarifies that the minor must appreciate the nature, extent, and probable consequences of the conduct to which she consents for her consent to carry legal significance. Second, the comment specifies that even if the child possesses the requisite capacity, statutory law can nullify the effectiveness of that consent. How appropriate that the two examples the comment uses to explain this information concern juvenile employment and statutory rape.

*B. Legal Compared to “Developing” Capacity*

If we compare what we know about adolescent psychosocial and sexual development to the underlying requirements of the law of consent, we can explore whether we can harmonize adolescent “developing capacity” and law. As noted, the facts concerning adolescent development suggest that while minors are capable of adult reasoning, their brains do not finish developing until late adolescence – when they reach their early to mid-twenties. If adolescents cannot “build complex relations among multiple abstractions” until they reach 19 or 20,<sup>266</sup> can we expect them to appreciate the nature, extent, and probable consequences of teen-adult, subordinate-supervisor, workplace sex?

Before we answer that question, let’s add to the calculation (and make it a true complex relation among multiple abstractions). Figure in that teenagers have trouble regulating their emotional responses, mistake sex for intimacy, discount risks, believe in their own invincibility, feel strong peer pressure, and ineptly evaluate other people’s motivations and perspectives. I am tempted to joke that it is amazing teenagers survive to adulthood, except adolescent survival is

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<sup>265</sup> *Id.* § 892A cmt. b.

<sup>266</sup> *See supra* Part II.B.

no joking matter. The youth group (13-24) is one of the fastest growing HIV infected populations.<sup>267</sup>

I am also tempted to ask how a sixteen year old, who has never had sex, can possibly appreciate the consequences of her decision to have sex (even protected sex) with her boss. However, I run the risk with that question of inviting a chastity cross-examination at the trial of every teen worker who later alleges sexual harassment. I want to avoid placing a teen's sexual history in controversy when she "consents" to sex with her supervisor. Many state rape shield evidentiary statutes do not apply to minors who sue civilly.<sup>268</sup> Moreover, it is beyond rationality to suggest that just because a teen has engaged in sexual activity with her fifteen-year-old boyfriend, she understands the consequences of sex with her forty-year-old boss.

Finally, even as a forty-five year old academic, I am having trouble making sense out of this posed complex relation of multiple abstractions to "connect systems of abstractions to understand [legal] principles underlying them."<sup>269</sup> In sum, I doubt most adolescents can truly appreciate the nature, extent, and probable consequences of sex with their boss, though I do not know for sure. The answer probably depends on the individual adolescent and all associated environmental factors. In its analysis of juveniles, the *Roper* Court concluded, "If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver

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<sup>267</sup> See KAISER FAMILY FOUNDATION, *HIV/AIDS Policy Fact Sheet 2* (#3029-04, December 2004) (noting that half of all new HIV infections occur in youth under 25), at <http://www.kff.org/hiv/aids/upload/The-Global-HI-AIDS-Epidemic-December-2004-Fact-Sheet.pdf>.

<sup>268</sup> See, e.g., *Barnes v. Barnes*, 603 N.E.2d 1337, 1342- 43 (Ind. 1992) (holding that in a tort action, the Indiana Rape Shield Statute did not preclude the defendant from introducing evidence of plaintiff's other sexual activities); *Doe by Roe v. Orangeburg County Sch. Dist.*, 495 S.E.2d 230, 233 (S.C. Ct. App. 1997) (finding that the South Carolina rape shield statute did not apply in civil cases).

<sup>269</sup> See *supra* Part II.B.

condemnation--that a juvenile offender merits the death penalty.”<sup>270</sup> Similarly, I would argue that the law should protect rather than penalize those adolescents who determine that they have been sexually abused by their adult workplace supervisors.

Adolescents are, in every way, embryonic human adults. Since we cannot tell whether an adolescent behaves maturely at any given time, we cannot tell which “consent” we should treat as legally binding. The question therefore remains how we should construct our legal systems to respond to what we know about adolescent development and ability. What public policy considerations should guide us? To be sure that sexual intercourse was truly consensual, we might have to set the age of consent much higher than it currently is.<sup>271</sup> If we raise the age of consent, however, we may preclude adolescents from engaging in the experimentation that they need to build wisdom. How do we protect and nurture at the same time?

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<sup>270</sup> *Roper*, 2005 WL 464890, at \*14.

<sup>271</sup> Given the scientific evidence, I favor setting the age of majority back to 21. However, I see that goal as politically impossible. I cannot imagine and do not advocate taking the right to vote from 18-20 year-olds. I cannot endorse restricting the voting age to those 21 and older when this nation requires 18 year old males to register for selective military service. Thus, I advocate for legal protection of minors until *at least* age 18.

The *Roper* Court similarly chose 18. The Court held: Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

*Id.*

### C. Law Reform

The scientific evidence is clear on one point: adolescents are works in progress until they reach at least their early twenties. And until someone develops an accurate maturity test for our children, we cannot presume that they understand the full nature, extent, and probable consequences of their conduct at any given moment in time. We should not attribute legal capacity to them, unless doing so places them in a better position than our failure to do so would.<sup>272</sup> Therefore, we should not give legal weight to their “consent” unless it is in their best interests, such as when they are “consenting” to treatment for STDs.

This course of protection does not negate the importance of nurturing our youth. However, nurturing our children becomes much more difficult if they are already psychologically disabled or HIV positive. Nurturance becomes a moot point if these teens are dead. In *Roper v. Simmons*, the Court overruled *Stanford* and invalidated the juvenile death penalty to insure the survival of even our criminal youth to maturity. The *Roper* Court concluded that criminal law needed reform to account for adolescent developmental differences.

The *Roper* Petitioner argued that the law did not need reform because of protections at the sentencing phase in criminal trials.<sup>273</sup> The Court acknowledged that the youth of a juvenile offender could be considered a mitigating factor at the sentencing phase. However, the Court reasoned:

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<sup>272</sup> I adhere to the distinction I made in *Sex and the Workplace* between “diminished responsibility” due to “diminished culpability” important in the criminal system and “developing capacity” applicable in both the civil and criminal arenas. Drobac, *Sex and the Workplace*, *supra* note 7, at 519 and n.259. As I stated there, “The need to protect society (and individual victims) from crimes committed by adolescents, however, justifies the different treatment in the criminal system of adolescent ‘developing capacity’ and the different level of legal responsibility (and culpability) attributed to adolescent criminal offenders.” *Id.* at 519.

<sup>273</sup> See generally, Brief for Petitioner, *Roper v. Simmons*, *supra* note 1.

The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him. In this very case, as we noted above, the prosecutor argued Simmons' youth was aggravating rather than mitigating.<sup>274</sup>

This comment highlights the Court's concern that a judge and jurors might be overwhelmed by the brutality of a crime such that they could not properly credit a juvenile's immaturity. It also points to the prosecutor's clever use of youth to play to societal fears about juvenile offenders and to suggest that such violent offenders are so different from other youth that they *deserve* the death penalty.

One can draw an analogy between this reasoning and societal attitudes regarding sexually active teens. We know from our discussion that adults disapprove of sexually active teens. Seventy-eight percent of adults disapprove of extra-marital sex generally.<sup>275</sup> We also know that adults hold punitive attitudes directed at sexually active teens, endorse abstinence only policies, and succumb to the notion that sexually abused youth have “become contaminated in a way that made them seductive and dangerous.”<sup>276</sup> Can we risk that judges and jurors will set aside these beliefs to credit the “developing capacity” of our adolescents? No. Just as we

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<sup>274</sup> *Roper*, 2005 WL 464890, at \*14.

<sup>275</sup> See *supra* note 193.

<sup>276</sup> See *supra* note 195 and accompanying text.

must consider the “diminished culpability”<sup>277</sup> of juvenile offenders and protect them from cruel and unjust punishment, so we must credit the “developing capacity” of minors and protect them from the harsh results of tort and anti-discrimination laws that currently give legal significance to adolescent consent to sex at the workplace. The laws regarding adolescent sexual activity need revision. Americans now need to address adolescent sexual activity without getting embarrassed, overly moralistic, or dogmatic.

1. State Statutory Rape Laws and the “Rule of Sevens”

The inconsistency in state statutory rape laws makes no logical sense. “[S]cientific evidence does not suggest that minors in Colorado develop physically, emotionally, and mentally any earlier than do those in California or New York. We are talking about developmental capacity, not about moral judgments concerning sex or local attitudes about ‘deviant’ sexual behavior.”<sup>278</sup> States should set the age of consent at the age of majority. Make consent legally significant for the purposes of criminal statutory rape laws only when adolescents reach legal adulthood. We thereby insure (for at least a little longer) the protection of our adolescents who have not finished developing, physically, sexually, or psychosocially.

I should explain that I briefly considered making adolescent “consent” voidable by the minor for purposes of criminal statutory rape and sex crimes prosecution but I think that strategy places too much of a burden on the adolescent and takes too much discretion from the state prosecutor.<sup>279</sup> Adolescents should not feel as though they alone are responsible for the criminal prosecution of an adult perpetrator. Additionally, one can imagine adult predators who wield such psychological influence that their adolescent

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<sup>277</sup> *Roper*, 2005 WL 464890, at \*13.

<sup>278</sup> Drobac, *Sex and the Workplace*, *supra* note 7, at 540.

<sup>279</sup> See Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 *BUFF. L. REV.* 703, 777-78 (2000); Drobac, *Sex and the Workplace*, *supra* note 7, at 502-03 and n.173.

targets never void the consent once given. Prosecutors should retain the ability to prosecute those adults who exploit adolescents, whether or not those adolescents recognize their own exploitation.

As also previously discussed, the “Rule of Sevens” must go.<sup>280</sup> Scientific evidence discredits the rule’s presumption that fourteen to seventeen-year-olds have the ability to appreciate fully and completely the nature and consequences of their conduct.<sup>281</sup> This scientific challenge to the foundational basis of the “Rule of Sevens” has huge implications for all of tort law as it pertains to teens, a discussion which is beyond the scope of this Article. For the limited review of adolescent “consent” to sexual conduct, however, the law should make adolescent “consent” to teen-adult sex voidable by the minor.<sup>282</sup> If an adult is so sure that the minor is mature enough, let the adult assume the risks, including the risk of criminal prosecution. Alternately, we should say to adults what ironically we tell our children, “Just say ‘no’!” or “You play, you pay!”

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<sup>280</sup> In *Sex and the Workplace*, I paired the “Rule of Sevens” with the “mature minors” doctrine. For all the reasons discussed there and herein, both rules are inconsistent with the science concerning adolescent development.

<sup>281</sup> See *supra* Part II.C.

<sup>282</sup> I recognize the moral hazard of affording adolescents the opportunity to withdraw consent in the context of teen-adult sexual conduct. I intend to deal with this issue more fully in my next paper, “I Can’t To I Kant: The Transition To Maturity And The Meaning Of Adolescent Consent In The Workplace.” For now, let me suggest that most adolescents, who are not informed regarding the nuances of sexual harassment law, will not be influenced by a reform that provides them more protection. Second, since adolescents tend to focus on the short term aspects of their conduct, I doubt many will engage in a long term strategy to disadvantage their employers. For those who do, however, I recommended in my last paper “making evidence of consent admissible in any second (or successive) trial for money damages if the minor had successfully sued for similar injuries on a prior occasion.” Drobac, *Sex and the Workplace*, *supra* note 7, at n.375.

## 2. Title VII and State Fair Employment Practice Statutes

Whether or not adolescents are hard-wiring their brains, we want them to develop work skills and a strong work ethic. We need to afford our youth the chance to apprentice as they continue their academic education, or to excel in the workplace if their academic training is complete. Because their brains and psyches have not finished maturing, however, we need to protect minors at work.

Sexual harassment law works to penalize sexually exploited teenagers. In *Meritor Savings Bank v. Vinson*, the Supreme Court held that severe or pervasive sexual harassment violates Title VII when it alters the worker's conditions of employment and creates an abusive work environment.<sup>283</sup> Arguably, a supervisor does not create an abusive work environment if he can get an adolescent to "consent" to sex. In *Faragher v. City of Boca Raton*,<sup>284</sup> the Court emphasized that the "objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."<sup>285</sup> We (reasonable people) might find Sara's manager's advances disgusting and heinous; however, she ostensibly welcomed his attention for a time. Under *Faragher*, she arguably had no sexual harassment claim when she later realized that her manager had exploited her.<sup>286</sup>

One might suggest that a judge and a jury could evaluate a teenager's "consent" to determine whether it should assume legal significance.<sup>287</sup> For example they might focus

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<sup>283</sup> *Meritor*, 477 U.S. at 67.

<sup>284</sup> *Faragher*, 524 U.S. 775, 807-08 (1998).

<sup>285</sup> *Faragher*, 524 U.S. at 787 (citing *Harris v. Forklift Sys., Inc.* 510 U.S. 12, 21-22 (1993)).

<sup>286</sup> In *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982), the court clearly enumerated the elements of the plaintiff's prima facie case. The *Henson* court held that the plaintiff must find the behavior unwelcome. *Id.*

<sup>287</sup> I thank Professor James Pfander for his suggestion that I explore the possibility of reform via the judiciary. We agreed that a congressional

on the fact that Sara’s manager lied to her. The misrepresentations could render her “consent” non-binding. Additionally, a judge and jury could evaluate whether Sara’s youth impaired her ability to perceive the manager’s behavior as offensive. I reject these suggestions, not because I do not think it possible to reach a fair outcome and find Sara’s “consent” legally inadequate. Rather, I want to avoid a traumatic trial over Sara’s “consent.” We should not revictimize our teens by putting them (and their immature “consent”) on trial.

Several factors dictate against putting teens on trial. First, no scientific test for adolescent maturity exists. We have no way to tell whether the “consent” given at any moment is the product of adult-like reasoning. Given the scientific evidence regarding adolescent development, we can only conclude that teens are incomplete adults. A trial of their maturity and capacity will not prove anything beyond that.

Second, the trial of a teen might further traumatize her. For example, defense counsel in any sexual harassment case might try to prove a teen’s maturity by introducing evidence of her sexual history. Exceptions to federal and state evidentiary rules allow for the introduction of this evidence under certain circumstances.<sup>288</sup> Such evidence only prejudices a teen and says nothing regarding her neural or psychosocial development. The fact that a teen has engaged in sexual intercourse does not mean that the myelination of all her needed nerve fibers has occurred. Moreover, think about the chilling effect, even the prospect of such a trial maneuver, will have on teen reporting and prosecution of sexual harassment cases.

Finally, people often blame teenagers for not being more emotionally and mentally mature when they look physically mature. In *Sex and the Workplace* I explained:

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response and amendment of Title VII would be more explicit, and therefore neater, but perhaps not politically feasible.

<sup>288</sup> See Drobac, *Sex and the Workplace*, *supra* note 7, at notes 207-98, 307 and accompanying text.

Think how many times . . . you have thought to yourself, “Oh, that is so immature!” If behavior is truly the product of immaturity, there should be no associated “blame.” A person cannot help his or her immaturity. Immaturity is a natural stage of development. We do not condemn the mentally challenged for their failure to comprehend. Similarly, we should not blame the immature for their failure to act maturely. However, we do all the time.<sup>289</sup>

For these reasons, I argue against judicial evaluation of the teen’s “consent” which may invite further abuse and traumatization. If I could guarantee that all judges would reject, as a matter of law, an adolescent’s voided consent to sex, I could endorse a case by case response to this problem.<sup>290</sup> I fear, however, that societal perspectives regarding sexually active adolescent girls find rest even with a well educated judiciary.<sup>291</sup> Given that conclusion, I sadly cannot trust our

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<sup>289</sup> *Id.* at 542.

<sup>290</sup> In *Doe v. Oberweis Dairy*, No. 03 C 4774, 2005 WL 782709 at \*6 (N.D. Ill. April 6, 2005), the judge found that a sixteen year old girl was competent to consent to an adult manager’s request for sex despite the fact that Illinois sets the age of consent at seventeen. In an amicus brief filed by the National Employment Lawyers Association, co-counsel and I argued that “sexual activity with minors criminalized by state law must be held severe and unwelcome as a matter of law.” Brief of Amici Curiae The National Employment Lawyers, et al., *Doe v. Oberweis*, Nos. 04-3680, 05-1998, July 11, 2005, at 4. I thank Paul W. Mollica, Charlotte Fishman, Michelle Oberman, Robin Potter, Melissa Josephs, Lyn Schollett, and Marissa M. Tirona for their contributions on this brief and to that analysis.

<sup>291</sup> In *Oberweis Dairy*, the judge found:

It is undisputed that Plaintiff voluntarily visited Nayman’s apartment alone the day of the encounter. It is also undisputed that Plaintiff asked Nayman to put a condom on before they had sex [although Nayman ignored this request]. It is further undisputed that after the sexual encounter, Plaintiff voluntarily interacted with Nayman in social situations outside of the workplace. As such, no genuine issue of material fact exists as to whether the sexual harassment was not unwelcome either in fact or law.

judges to safeguard our teen girls and boys absent clear legal guidance. Title VII must direct judges to find teen-adult sex severe and unwelcome as a matter of law.

The unwelcomeness requirement is not the only aspect of sexual harassment law that poses problems for teens. In both *Faragher* and *Burlington Industries v. Ellerth*,<sup>292</sup> the Supreme Court ruled that a victim’s unreasonable failure to avail herself of an employer’s preventive or corrective procedures insulates the employer from liability for sexual harassment that does not result in a tangible employment detriment.<sup>293</sup> Obviously, employers expect targets to report harassment. We know from the literature concerning child sexual abuse, however, that children often do not report abuse.<sup>294</sup> The American Academy of Child & Adolescent Psychiatry confirmed, “It is common for children and adolescents to conceal these offenses [sexual harassment] because they feel afraid, ashamed, vulnerable, and humiliated. They may actually believe their own behavior may have precipitated the sexual harassment. These incidents are often not revealed for many years, if ever.”<sup>295</sup> Given the conclusions of experts, sexual harassment law unfairly penalizes adolescents when the law accepts the failure to report or complain as an affirmative defense.

Sexual harassment and discrimination against minors at work by their adult supervisors should be strict liability offenses. “Consent” and failure to report the conduct should not insulate the perpetrator or principal from liability. As I recommended in *Sex and the Workplace*, “Lawmakers should amend Title VII, state fair employment practice statutes, and

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*Oberweis*, *supra* note 290, at \*6. Thus, Judge Darrah found Doe welcomed Nayman’s conduct at law, even though the law of aggravated criminal sexual abuse declared his conduct illegal and her consent invalid. *Id.* at \*2.

<sup>292</sup> 524 U.S. 742 (1998).

<sup>293</sup> *Faragher*, 524 U.S. at 807-08; *Burlington*, 524 U.S. at 765.

<sup>294</sup> See *supra* note 210 and accompanying text.

<sup>295</sup> AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, POLICY STATEMENT—SEXUAL HARASSMENT (Oct. 1992), available at <http://www.aacap.org/publications/policy/ps28.htm>.

tort law to account for adolescent workers, their developmental abilities, and the phenomenon of their sexual exploitation.”<sup>296</sup> Specifically, anti-discrimination laws should prohibit any reference to the adolescent target’s consent, if repudiated within a reasonable period.<sup>297</sup> The affirmative defense constructed by the Court in *Faragher* and *Burlington Industries* should not apply in teen sexual harassment cases. The scientific research regarding adolescent development and the statistics concerning non-voluntary teen sex amply justify changes to current anti-discrimination laws. Our youth should be hard-wiring valuable work experiences into their brains, not sex in the projection booth. To deter predatory sexual exploitation and protect the “developing capacity” of every teen worker, American anti-discrimination laws must keep pace with the sciences of the adolescent mind.

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<sup>296</sup> Drobac, *Sex and the Workplace*, *supra* note 7, at 543. I also supported the amendment of Title IX to address the sexual harassment of minors by adults at school.

<sup>297</sup> As I did in *Sex and the Workplace*, I still advocate an appropriate limitations period for suit and recovery and toll that period until the target reaches her majority. Drobac, *Sex and the Workplace*, *supra* note 7, at note 377.