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## **A BEE LINE IN THE WRONG DIRECTION: SCIENCE, TEENAGERS, AND THE STING TO “THE AGE OF CONSENT”**

*Jennifer Ann Drobac\**

Most New Yorkers may not know that a 1933 New York case and its precedential line effectively erase “the age of consent” for New York civil cases. In that case, *Barton v. Bee Line, Inc.*, the New York Supreme Court held that fifteen-year-old Grace Barton, who allegedly consented to sex with a male bus driver, could not recover in a civil case for damages brought by Frank Barton, her guardian ad litem.<sup>1</sup> The court arrived at this conclusion even though New York had outlawed sex with a female under eighteen years old and barred all minors from bringing direct suits. The jury had found for Grace in the amount of \$3,000 (about \$50,500 today).<sup>2</sup> However, “[t]he court

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<sup>1</sup> *Barton v. Bee Line, Inc.*, 265 N.Y.S. 284, 284–86 (App. Div. 1933). This case is a classic “he said, she said” case. Grace Barton claimed forcible rape and the driver claimed that she consented to sex. This Article acknowledges the continuing problematic nature of credibility determinations in alleged rape cases and the bias against complaining women who sue for civil damages. I will address this particular bias more directly in another article. See Jennifer Ann Drobac, *Abandoning Teenage Consent for Legal Assent: Harmonizing Developmental Sciences and the Law* (unpublished manuscript) (on file with author).

<sup>2</sup> Samuel H. Williamson, *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount, 1774 to Present*, MEASURING WORTH, <http://www.measuringworth.com/uscompare/> (enter 1933 as the initial year, 3000 as the

set the verdict aside on the ground that, if plaintiff consented, the verdict was excessive . . . .”<sup>3</sup> The appellate court ruled that Grace could not recover civilly even though her seducer was criminally prosecuted “to protect the virtue of females and to save society from the ills of promiscuous intercourse.”<sup>4</sup> The court reasoned, “It is one thing to say that society will protect itself by punishing those who consort with females under the age of consent; it is another to hold that, knowing the nature of her act, such female shall be rewarded for her indiscretion.”<sup>5</sup> The court added:

The very object of the statute will be frustrated if by a material return for her fall “we should unwarily put it in the power of the female sex to become seducers in their turn.” Instead of incapacity to consent being a shield to save, it might be a sword to desecrate.<sup>6</sup>

Desecrate what? A society that righteously protects only “virtuous” (but still incapacitated) girls? The court’s opinion highlights its disapproval of possibly sexually active, “promiscuous” young women. It also heralded the end of the “age of consent” for civil cases in New York.<sup>7</sup>

This civil law evisceration of “the age of consent” is not unique to New York. One can trace similar patterns across the nation, particularly in Illinois and California.<sup>8</sup> The *Bee Line* case, juxtaposed against the new neuroscience and psychosocial

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initial amount, and 2011 as the desired year; then follow “Calculate” hyperlink) (last visited Nov. 13, 2011).

<sup>3</sup> *Bee Line*, 265 N.Y.S. at 284.

<sup>4</sup> *Id.* at 285.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* (quoting *Smith v. Richards*, 29 Conn. 232, 240 (1860)).

<sup>7</sup> The “age of consent” commonly refers to the age at which a minor (someone under eighteen years old) may legally consent to engage in sexual activity with an adult and, thereby, insulate that adult from criminal prosecution. *But see* *Donaldson v. Dep’t of Real Estate*, 36 Cal. Rptr. 3d 577, 588–89 (Ct. App. 2005) (discussing that “the age of consent” may refer to the age a minor can legally consent to marry).

<sup>8</sup> *See, e.g., Doe v. Starbucks, Inc.*, No. SACV 08-0582 AG (CWx), 2009 WL 5183773, at \*2, \*7–8 (C.D. Cal. Dec. 18, 2009) (granting in part and denying in part motions for summary judgment).

evidence of adolescent development, resurrects the question of whether a minor should be allowed to recover civilly for alleged damages following a violation of criminal law. This Article explores whether minors have the developmental maturity consistent with an assignment of full adult legal capacity. It also questions whether adolescent “consent”<sup>9</sup> should insulate alleged tortfeasors from liability. Are we, as a society, taking a *Bee Line* in the wrong direction?

This Article answers that question in the affirmative. It proposes that New York and sister states adopt a new stance in response to adolescent consent to sex with an adult. In particular, it offers the notion of *legal assent*, a mechanism that presumes no threshold *legal capacity* but affords teenagers autonomous decision making authority and protection following misguided decisions. Part I of this Article briefly reviews the neuroscience and psychosocial evidence regarding adolescent development to maturity. This research is new and reported conclusions vary, but a snapshot review of current understanding helps guide an evaluation of law first formulated in 1933. Part I concludes that adolescents are not younger, smaller adults but are fundamentally different in the ways they think and behave. Part II explores legal guidance concerning consent, assent, and juvenile incapacity. It highlights that legal authority cautions against attributing full legal capacity to minors—whether or not one affords them decision making autonomy. Part III reviews recent cases from New York to show how New York courts treat adolescent consent to unlawful sex with an adult inconsistently. It also notes several other cases from across the nation that replicate the New York inconsistencies. This Article concludes in Part IV by recommending a new approach to adolescent consent to sex with an adult—*legal assent*.

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<sup>9</sup> I use quotations with adolescent “consent” because even explicit verbal agreement by a minor may not constitute legal consent and may equate more realistically with acquiescence. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) (holding that acquiescence is not consent in an evaluation of the unwelcomeness of sexual conduct under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (2006)).

## I. ADOLESCENT NEUROLOGICAL, COGNITIVE, AND PSYCHOSOCIAL DEVELOPMENT<sup>10</sup>

While no set biological markers precisely define the beginning and end of adolescence as a stage of human development, most researchers agree that it occurs during the second decade of life.<sup>11</sup> Increasingly, scientists argue that adolescence (or “emerging adulthood”) extends to about age twenty-five.<sup>12</sup> Adolescents experience physical, cognitive, sexual, and psychosocial development during this long maturation phase.<sup>13</sup> The survey of changes discussed below indicates that transitional adolescent functioning differs significantly from adult behavior.

### A. Neurological Development

In 1999, the National Institute of Mental Health (NIMH) announced that the adolescent brain undergoes dramatic changes not before understood.<sup>14</sup> Dr. Jay Giedd, a NIMH neuroscientist,

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<sup>10</sup> For a thorough, detailed and updated discussion of the neurological and psychosocial development of teenagers, see JENNIFER ANN DROBAC, *WORLDLY BUT NOT YET WISE* (Univ. of Chi. Press, under contract); see also Jennifer Ann Drobac, *Consent, Teenagers, and (Un)Civil(ized) Consequences*, in *CHILDREN, SEX AND THE LAW* (Ellen Marrus & Sacha Coupet eds., forthcoming 2012); Jennifer Ann Drobac, *I Can't to I Kant: The Sexual Harassment of Working Adolescents, Competing Theories, and Ethical Dilemmas*, 70 ALB. L. REV. 675, 713–17 (2007). See generally Jennifer Ann Drobac, “Developing Capacity”: Adolescent “Consent” at Work, at Law and in the Sciences of the Mind, 10 U.C. DAVIS J. JUV. L. & POL’Y 1 (2006) (discussing new neuroscientific and psychosocial evidence regarding adolescent physical and psychosocial development).

<sup>11</sup> See, e.g., LINDA PATIA SPEAR, *THE BEHAVIORAL NEUROSCIENCE OF ADOLESCENCE* 5 (2010).

<sup>12</sup> *Id.* (citing JEFFREY JENSEN ARNETT, *EMERGING ADULTHOOD: THE WINDING ROAD FROM THE LATE TEENS THROUGH THE EARLY TWENTIES* (2004)).

<sup>13</sup> See generally *id.* at 36–190.

<sup>14</sup> NAT’L INST. OF MENTAL HEALTH, NIH PUBLICATION NO. 01-4929,

examined adolescent brains using advanced imaging technology.<sup>15</sup> He discovered that, over the span of a year, gray matter almost doubles in some brain sectors, including the prefrontal cortex.<sup>16</sup> An important element of the central nervous system, the gray matter consists of cells and neuron connections, synapses, which enable high cognitive functioning.<sup>17</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. Following the growth period, the body purges connections not required and reorganizes the functioning of the brain.<sup>18</sup> Scientists knew that such growth and reorganization phases occur during gestation and the first eighteen months after birth. They did not know about this second wave of overproduction and winnowing that occurs throughout puberty.<sup>19</sup>

The dramatic changes that occur during puberty influence adolescent reasoning and the ability to formulate consent because of the functions of the particular areas of the brain involved.<sup>20</sup> Neuroscientist Dr. Elizabeth Sowell and her colleagues explain, “Neuropsychological studies show that the frontal lobes are

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TEENAGE BRAIN: A WORK IN PROGRESS (2001) [hereinafter NIMH, *Teenage Brain*], available at <http://www.wvdhhr.org/bhhf/scienceonourminds/NIMH%20PDFs/04%20Teenage.pdf>.

<sup>15</sup> Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 861–63 (1999).

<sup>16</sup> Paul M. Thompson et al., *Growth Patterns in the Developing Brain Detected by Using Continuum Mechanical Tensor Maps*, 404 NATURE 190, 192 (2000).

<sup>17</sup> NIMH, *Teenage Brain*, *supra* note 14. See generally Judith L. Rapoport et al., *Progressive Cortical Change During Adolescence in Childhood-Onset Schizophrenia: A Longitudinal Magnetic Resonance Imaging Study*, 56 ARCHIVES GEN. PSYCHIATRY 649 (1999) (finding that study patients with early-onset schizophrenia have a significant decrease in cortical gray matter during adolescence, suggesting that the gray matter helps enable high cognitive functioning).

<sup>18</sup> SPEAR, *supra* note 11, at 81–83.

<sup>19</sup> *Interview: Jay Giedd, Inside the Teenage Brain*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html> (last visited Nov. 13, 2011) [hereinafter *Interview: Jay Giedd*].

<sup>20</sup> *See id.*

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>21</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. “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>22</sup> This understanding has serious implications regarding adolescent consent and legal capacity.

Other areas of the brain also influence teen judgment and behavior. Similar to the frontal cortex, the cerebellum matures well into adolescence.<sup>23</sup> Dr. Giedd believes that the cerebellum enhances functioning in all forms of higher thought, from mathematics to decision making and social skill.<sup>24</sup> The corpus callosum connects the two hemispheres of the brain and appears to influence creativity and problem solving.<sup>25</sup> A primitive area of the brain, the amygdala, likely governs emotional and “gut” responses during adolescence. While adults rely primarily on the frontal cortex when interpreting emotional information,

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<sup>21</sup> Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 860 (1999).

<sup>22</sup> Sarah Spinks, *Adolescent Brains Are Works in Progress, Inside the Teenage Brain*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/adolescent.html> (last visited Nov. 13, 2011) [hereinafter Spinks, *Works in Progress*] (focusing on Dr. Giedd’s research).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*; see also *Interview: Jay Giedd*, *supra* note 19. Dr. Geidd notes that the cerebellum, “involved in coordination of our cognitive process, our thinking processes[,]” does not finish changing until the 20s. He adds that “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.” *Id.* Dr. Todd Preuss commented here that Dr. Giedd’s view on the cerebellum is one not widely held by neuroscientists but one “held by a respected minority.” *Id.*

<sup>25</sup> *Interview: Jay Giedd*, *supra* note 19.

adolescents tend to use the amygdala.<sup>26</sup> Some scientists hypothesize that the use of the amygdala rather than the frontal cortex explains why teenagers experience trouble regulating their emotional responses.<sup>27</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>28</sup> The mechanism of synaptic pruning is not yet well understood. One might think that more gray matter means higher functioning. 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 [the] taking away and pruning down of certain connections themselves.”<sup>29</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>30</sup> Unused

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<sup>26</sup> Sarah Spinks, *One Reason Teens Respond Differently to the World: Immature Brain Circuitry, Inside the Teenage Brain*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/onereason.html> (last visited Nov. 13, 2011) (discussing Deborah Yurgelun-Todd’s study); see also *Interview: Deborah Yurgelun-Todd, Inside the Teenage Brain*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/todd.html> (last visited Nov. 13, 2011) (noting that Yurgelun-Todd’s results are from a very small pilot study, and that caution should be used in the interpretation of the results). See generally Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 195 (1999) (discussing Deborah Yurgelun-Todd’s study).

<sup>27</sup> Sowell, *supra* note 21, at 860.

<sup>28</sup> Sharon Begley, *Getting Inside a Teen Brain*, NEWSWEEK (Feb. 27, 2000, 7:00 PM), <http://www.newsweek.com/2000/02/27/getting-inside-a-teen-brain.html> (quoting Dr. Jay Giedd).

<sup>29</sup> *Interview: Jay Giedd, supra* note 19.

<sup>30</sup> Spinks, *Works in Progress, supra* note 22. Some researchers caution against premature conclusions based on early scientific findings. See, e.g., Monica A. Payne, “Use-It-or-Lose-It”? *Interrogating an Educational Message from Teen Brain Research*, 35 AUSTRALIAN J. TCHR. EDUC., no. 5, 2010 at 79. In particular, Dr. Elizabeth Sowell commented, “‘Jay likes to say ‘use it or lose it’ and that we should put kids in enriched environments. That makes perfect intuitive sense, but we just don’t have the data to say that.’” Kendall Powell, *How Does the Teenage Brain Work?*, 442 NATURE 865, 866

connections “wither and die.”<sup>31</sup> “If a teen is doing music or sports or academics, those are the cells and connections that will be hardwired. If [he or she is] lying on the couch or playing videogames or MTV, those are the cells and connections that are going to survive.”<sup>32</sup>

During the gray matter pruning phase, white matter increases. The white matter supports neural connections in the brain.<sup>33</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>34</sup> More recently, scientists discovered that myelin also “modulates the timing and synchrony of the neuronal firing patterns that create functional networks in the brain.”<sup>35</sup> Evidence indicates that environmental experiences influence myelination.<sup>36</sup> According to Dr. Francine Benes, myelination levels increase into the early twenties. “During child development, myelination correlates with maturing patterns of behavior.”<sup>37</sup>

This new research confirms that adolescent brain

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(2006) (quoting Dr. Sowell).

<sup>31</sup> Interview: Jay Giedd, *supra* note 19.

<sup>32</sup> Spinks, *Works in Progress*, *supra* note 22 (quoting Dr. Giedd). Dr. Preuss stressed here that these assertions come from the scientists’ interpretations, not from empirically demonstrated fact. *Id.*

<sup>33</sup> *Adolescence, Brain Development and Legal Culpability*, JUV. JUST. NEWSL. (AM. BAR ASSOC./JUV. JUST. CTR., D.C.), Jan. 2004, at 2, available at [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_juvjus\\_Adolescence.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf).

<sup>34</sup> NIMH, *Teenage Brain*, *supra* note 14.

<sup>35</sup> Jay N. Giedd et al., *Anatomical Brain Magnetic Resonance Imaging of Typically Developing Children and Adolescents*, 48 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 465, 468 (2009).

<sup>36</sup> SPEAR, *supra* note 11, at 85 (citing R. Douglas Fields, *White Matter in Learning, Cognition and Psychiatric Disorders*, 31 TRENDS NEUROSCIENCE 361 (2008)).

<sup>37</sup> Elizabeth Gudrais, *Modern Myelination: The Brain at Midlife*, HARV. MAG. (May–June 2001), <http://harvardmagazine.com/2001/05/the-brain-at-midlife.html> (“Infants, for example, lack the fine motor coordination to move an index finger independently, since their nerves are insufficiently myelinated.”). Dr. Francine Benes has found that myelination growth increased again in the forties, growing an average of fifty percent again by the mid-fifties. *Id.*; see also NIMH, *Teenage Brain*, *supra* note 14.

development extends into the twenties, beyond “the age of consent” set in every state. Critical abilities—including impulse control, emotional regulation, planning, decision making, and organization—may not fully mature until the third decade of life. Additionally, behaviors and experiences may influence myelination and determine the winnowing and reorganization of gray matter during adolescence. It’s possible that teenagers subtly hard-wire experiences, such as algebra homework or sex in a Bee Line passenger car, into their brains.

### *B. Cognitive Development*

Adolescents mature cognitively as well as physically. Cognitive changes include the development of the ability to think more abstractly than children do. Adolescents engage in counterfactual reasoning, consider hypothetical situations, and can adopt a variety of perspectives on a subject.<sup>38</sup> They think introspectively, examining their own thoughts and emotions. The evolution of these cognitive skills happens in unpredictable ways. Some teenagers employ advanced reasoning skills earlier and more often than do their peers. Additionally, situational factors influence individual reasoning performance. For example, when they experience familiar environments and situations, teenagers tend to employ more advanced cognitive reasoning.<sup>39</sup> Dr. Linda Spear notes that some transient developmental declines appear for certain tasks, particularly for those involving stressful or anxiety provoking circumstances.<sup>40</sup>

This information, combined with the theory on hard-wiring, suggests that we should not shelter teens from experimentation and gradual learning regarding sexuality, workplace relationships, and other concrete skills and abstract issues. Instead, we should facilitate their learning and maturation under circumstances that safeguard their developmental vulnerabilities.

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<sup>38</sup> SPEAR, *supra* note 11, at 101–02 (citing Laurence Steinberg, *Cognitive and Affective Development in Adolescence*, 9 TRENDS COGNITIVE SCI. 69 (2005)).

<sup>39</sup> *Id.* at 102.

<sup>40</sup> *Id.* at 107–08.

Thus, attributing full capacity to minors may not safeguard them, just as insulating them from all experimentation could stunt their development.

One important factor to remember when examining adolescent cognitive development and capacity is context. Adults should not take one developmental or functional milestone and extrapolate to pronounce any given adolescent mature. For example, research from the 1980s suggested that adolescent cognitive development enabled youth to make hypothetical decisions comparable to those of adults.<sup>41</sup> Following the publication of these data and a number of high-profile violent crimes involving youth, prosecutors began trying more children as adults.<sup>42</sup> The increase in the number of adolescents tried in criminal court as adults at the end of the twentieth-century prompted researchers to revisit the issue of adolescent cognitive competence.<sup>43</sup> The MacArthur Juvenile Adjudicative Competence Study investigated whether adolescents are competent, intellectually and emotionally, to stand trial in adult criminal court.<sup>44</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>45</sup> Dr. Steinberg

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<sup>41</sup> See, e.g., Melinda G. Schmidt & N. Dickon Reppucci, *Children’s Rights and Capacities*, in CHILDREN, SOCIAL SCIENCE, AND THE LAW 76, 96 (Bette L. Bottoms et al. eds., 2002) (discussing Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589 (1982)).

<sup>42</sup> See, e.g., Tony Freemantle, *Lawmakers Get Tougher on Juvenile Offenders*, HOUS. CHRON., Apr. 26, 1998, at A26; see also Evelyn Nieves, *California’s Governor Plays Tough on Crime*, N.Y. TIMES, May 23, 2000, at A16.

<sup>43</sup> MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. & JUVENILE JUSTICE, THE MACARTHUR JUVENILE ADJUDICATIVE COMPETENCE STUDY SUMMARY 1 (2002) [hereinafter MACARTHUR COMPETENCE STUDY SUMMARY], available at [www.adjj.org/downloads/58competence\\_study\\_summary.pdf](http://www.adjj.org/downloads/58competence_study_summary.pdf).

<sup>44</sup> *Id.*

<sup>45</sup> Press Release, Temple Univ., Many Kids 15 and Younger May Lack Maturity Necessary to be Competent to Stand Trial, Juvenile Justice Study Finds (Mar. 3, 2003) (available at [https://www.temple.edu/news\\_media/bb0302\\_593.html](https://www.temple.edu/news_media/bb0302_593.html)).

noted that “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>46</sup> This last finding supports the neuroscience evidence regarding maturity in those brain sectors responsible for inhibition and decision making. According to this research, the competence of sixteen- and seventeen-year-olds to stand trial did not differ from the adults.<sup>47</sup> MacArthur researchers were quick to point out, however, that the functioning of older juveniles was not necessarily equivalent to that of adults.<sup>48</sup> Researchers emphasized that further inquiry into age differences in other capacities and abilities was ongoing for these older teenagers.<sup>49</sup>

Further scientific research concerning adolescent brain function confirmed findings that teenage brains continue to mature beyond mid-adolescence. In 2009, Dr. Kurt Fischer and his colleagues announced that adolescent cognitive development does not cease at sixteen. They argued that “[m]ore complex skills such as reflective judgment, logical reasoning, and even working memory for sophisticated concepts . . . do not plateau in the teenage years.”<sup>50</sup> Additionally, these skills vary dynamically across contexts. Factors such as stress, novelty, and self-organization drive variations. Fischer explained, for example:

Reasoning about abortion, where a doctor or health-care worker can support the teen’s thinking over a length of time, is very different from acting violently in the heat of the moment. Teenagers’ capabilities are tied to contexts and emotional states. Teenagers are not simply cognitively mature and psychosocially immature. Context is radically implicated in the nature of capabilities . . . . Depending on context and support, the same individual can function in drastically different

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<sup>46</sup> MACARTHUR COMPETENCE STUDY SUMMARY, *supra* note 43, at 2.

<sup>47</sup> *Id.* at 3.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Kurt W. Fischer et al., *Narrow Assessments Misrepresent Development and Misguide Policy*, 64 AM. PSYCHOLOGIST 595, 597 (2009).

ways, and there is not one condition that represents the true capacity.<sup>51</sup>

This passage highlights, as psychologists have determined, that emotional states and other factors influence cognitive capability. Spear summarizes that “brain development through adolescence may be characterized not so much by increases in task-associated activation of the PFC [prefrontal cortex] and other frontal regions, per se, but by an increased reliance on distributed brain regions that function in ‘collaborative’ networks of activity with frontal regions such as the PFC.”<sup>52</sup> Moreover, cognitive ability is not the only trait useful for effective function and decision making. Other traits come into play.

### *C. Psychosocial Development*

Evidence of psychosocial maturation supports the notion that adolescents experience significant changes during not only their teenaged years, but also into their early twenties and beyond. Steinberg describes four psychosocial traits that distinguish adolescents from adults: capacity for self-regulation, reward sensitivity, future orientation, and peer influence.<sup>53</sup>

#### *1. Self-Regulation and Reward Sensitivity*

Characteristics common in teenagers mark the transition period that ultimately leads to adulthood. We know, for example, that adolescents take more and greater risks than do adults.<sup>54</sup> Such behaviors include unprotected sex, drunk driving, use of illegal drugs, and criminal activity.<sup>55</sup> Scientists once believed that teenagers differed from adults in their ability to

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<sup>51</sup> *Id.* at 598.

<sup>52</sup> SPEAR, *supra* note 11, at 125.

<sup>53</sup> Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459, 468 (2009).

<sup>54</sup> SPEAR, *supra* note 11, at 130–54; *see also* Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision Making*, 68 TEMP. L. REV. 1763, 1767 (1995) (providing examples of adolescents’ frequent participation in dangerous activities).

<sup>55</sup> SPEAR, *supra* note 11, at 130.

perceive or calculate risks.<sup>56</sup> Neither a lack of information nor cognitive capacity explains their risk-taking tendencies, however. Additionally, studies have demonstrated that increasing knowledge does not necessarily lead people to make better decisions.<sup>57</sup> New evidence demonstrates that age differences in reward sensitivity may explain adolescent risk taking. Teens value rewards over risks more highly than do adults.<sup>58</sup>

Dr. Laurence Steinberg explains adolescent risk taking behavior by examining two interacting neurobiological systems: a socioemotional system, which governs the processing of social and emotional information, and a cognitive control system, which directs deliberative thinking, impulse control, foresight, and the evaluation of risks and rewards.<sup>59</sup> He suggests that a dramatic increase in dopaminergic activity within the socioemotional system at puberty leads to reward seeking.<sup>60</sup> This change precedes the structural maturation of the cognitive control system.<sup>61</sup> Steinberg argues that because the cognitive control system matures later in adolescence, the temporal gap in the development of these two systems “creates a period of heightened vulnerability to risk taking during middle adolescence.”<sup>62</sup>

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<sup>56</sup> Steinberg, *supra* note 53, at 469.

<sup>57</sup> Cauffman & Steinberg, *supra* note 54, at 1771–72.

<sup>58</sup> Steinberg, *supra* note 53, at 469; *see also* SPEAR, *supra* note 11, at 140 (defining sensation-seeking as “a complex trait associated with the desire for diverse, novel, complex, and intense experiences and the willingness to engage in risks to attain those experiences”).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Steinberg also distinguishes the maturation of the cognitive control system from the maturation of the frontal lobes through synaptic pruning. He notes that both result in improved thinking abilities but that they happen at different times with different implications for cognitive development. Steinberg, *supra* note 53, at 466.

<sup>62</sup> *Id.* While risk taking can be problematic or even life threatening, adaptive benefits also exist, including “opportunities to explore adult behaviors and privileges, to face and conquer challenges, to master the developmental difficulties of adolescence, and to increase status and peer affiliation within certain peer groups.” SPEAR, *supra* note 11, at 135 (citations omitted).

## 2. Future Orientation

Other studies suggest that adolescents hold different priorities than do adults. In particular, teens “view long-term consequences as less important than short-term consequences.”<sup>63</sup> For example, teenagers engage in more delay discounting than do adults, preferring smaller immediate awards over larger but delayed rewards.<sup>64</sup> Self-regulation develops “through adolescence, with gains continuing through the high school years and into young adulthood.”<sup>65</sup> Research suggests that development of future-time orientation “continues beyond mid-adolescence, at least through the last year of college.”<sup>66</sup> New evidence links future orientation with “brain structure and function, especially in the prefrontal cortex.”<sup>67</sup>

Teenagers also engage in more impulsive behavior than average adults. Spear defines impulsivity as the “tendency to react spontaneously without thinking much beforehand as to the consequences.”<sup>68</sup> Preliminary studies of juvenile impulsivity suggest that it remains relatively stable until age sixteen when it increases and then again stabilizes at age nineteen. Impulsivity declines during adulthood. More investigation is needed regarding the relation between impulsivity, sensation-seeking, and judgmental maturity. Stress and mood state also influence temperate decision making. Studies indicate that older teenagers exhibit greater mood volatility than do adults.<sup>69</sup>

## 3. Peer Influence

Researchers (and most parents) know that peers heavily influence teenagers. Steinberg reports that as juveniles form a sense of their own identity during adolescence and young

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<sup>63</sup> Cauffman & Steinberg, *supra* note 54, at 1773.

<sup>64</sup> SPEAR, *supra* note 11, at 143.

<sup>65</sup> Steinberg, *supra* note 53, at 470.

<sup>66</sup> Cauffman & Steinberg, *supra* note 54, at 1787.

<sup>67</sup> Steinberg, *supra* note 53, at 469.

<sup>68</sup> SPEAR, *supra* note 11, at 142.

<sup>69</sup> Cauffman & Steinberg, *supra* note 54, at 1781–82.

adulthood, they “develop a greater capacity for autonomous decision making and begin to resist peer influence.”<sup>70</sup> Until a sense of adult identity and autonomy matures, teenagers make choices influenced both directly and indirectly by peers. Direct coercion affects some decisions, but many others result from an adolescent’s concern for peer approval and fear of rejection.<sup>71</sup> Evidence confirms that teens are preoccupied with social status.<sup>72</sup> Dr. Elizabeth Cauffman and Dr. Laurence Steinberg report that adolescents are most susceptible to peer influence at about age fourteen, after which that influence declines. Studies, however, indicate that a coherent sense of identity does not emerge until about age eighteen. Ego development or individuation, according to some studies, increases throughout adolescent years.

As teens individuate, other people exert influences that affect various aspects of adolescent life. For example, parents influence adolescents in matters of religion and career choice, whereas peers sway choices regarding daily concerns such as clothing and music preferences.<sup>73</sup> Cauffman and Steinberg suggest that “adolescents’ display of independence—and hence, maturity of judgment—may be highly situation-specific, with youngsters being influenced more on some topics than others, and by different sources of influence to differing degrees, depending on the decision in question.”<sup>74</sup>

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<sup>70</sup> Steinberg, *supra* note 53, at 468.

<sup>71</sup> *Id.* at 469.

<sup>72</sup> Cauffman & Steinberg, *supra* note 54, at 1773.

<sup>73</sup> *Id.* at 1774–75.

<sup>74</sup> *Id.* at 1775. In 1995, when theorizing about traits other than cognition that operate in mature decision making, Steinberg and Cauffman defined “maturity of judgment”:

These psychosocial traits comprise what we call “maturity of judgment” . . . [M]aturity of judgment can be further broken down into three core components: (1) responsibility, which includes healthy autonomy, self-reliance, and clarity of identity; (2) perspective, or the ability to acknowledge the complexity of a situation and see it as part of a broader context; and (3) temperance, which refers to the ability to limit impulsive and emotional decision making, to evaluate situations thoroughly before acting (which may involve seeking the advice of others when appropriate), and to avoid decision making extremes.

As with the new neuroscience, the research regarding psychosocial traits, various specific ages, and maturity of judgment is quite new. Understandably, psychologists hesitate to draw specific conclusions for the practical application of what they now know.<sup>75</sup> This new information, however, raises several important questions for our purposes. For example, who influences an adolescent's decision to have sex with an adult bus driver (assuming that she does actually consent)? A parent? Her peers? Social media? Only the driver? Moreover, if she has not formed a coherent independent identity, should we consider her "consent" to sex with an adult service provider, teacher, or co-worker legally significant? Do adolescent impulsivity and moodiness combine with stress (including pressure for sex) to influence a teen's decision making process? Should the law regard teen "consent," given impulsively and under stress, as significant and legally binding? In light of what we know about teen priorities, including social status and immediate rewards, one can see how sex with an adult, for example a teacher, might seem like a good idea. De-emphasizing the long-term academic career, reputation, and health risks, a teen might choose an exciting sexual relationship and the concomitant status increase with an older, more "sophisticated" man offering such a prize.

#### 4. Adolescent Capacity and Physical Appearance

The research regarding adolescent neurological, cognitive, and psychosocial development is new and ongoing. We cannot draw many firm conclusions about physical changes and behavior. Nor do we fully understand the subtle dynamics of behavior, emotions, environment, and physiology. Does any of this really matter, though?

Assume for a moment that adolescent "consent" should not be legally binding because adolescents do not have the power, (equal) status, and/or competence to consent to sex with an

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*Id.* at 1764-65. These three core components correspond to the four traits about which Steinberg later writes: peer influence, future orientation, reward sensitivity, and the capacity for self-regulation. Steinberg, *supra* note 53, at 468.

<sup>75</sup> Cauffman & Steinberg, *supra* note 54, at 1780.

adult. Will jurists account for the adolescent's developing capacity, status, and power in their allocation of rights and liabilities?

Donald Kramer and Jennifer Soper suggest that while many people claim to base the attribution of rights on competency, they often judge competency and assign rights based on physical appearance.<sup>76</sup> Thus, society treats the children who look physically mature as adults, whether or not those adolescents are emotionally, neurologically, or psychosocially mature. According to neuroscientist Dr. Bea Luna, "An adolescent can look so much like an adult, but cognitively, they are not really there yet . . . ."<sup>77</sup> Referring to appearances of physical maturity in adolescents, Dr. Yurgelun-Todd cautions, "[T]hey may not appreciate [] consequences or weigh information the same way as adults do. So we may be mistaken [that someone is emotionally and psychosocially mature. Even though] we think [he or she] looks physically mature, [his or her] brain may in fact not be mature . . . ."<sup>78</sup>

For an example of this phenomenal assumption of maturity, examine the statutory rape defenses. Under this criminal scheme, a minor lacks capacity even if she "consents," so her "consent" is no defense. Her physical maturity, however, might constitute one. In California, the perpetrator's mistake of age, particularly of older victims—arguably based on physical maturity—can be a defense.<sup>79</sup>

Even if we cannot yet make firm conclusions regarding adolescent "developing capacity"<sup>80</sup> and judgmental maturity, we

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<sup>76</sup> Jennifer Soper, *Straddling the Line: Adolescent Pregnancy and Questions of Capacity*, 23 LAW & PSYCHOL. REV. 195, 199 (1999).

<sup>77</sup> Powell, *supra* note 30, at 865 (quoting Dr. Bea Luna) (internal quotation marks omitted).

<sup>78</sup> *Adolescence, Brain Development and Legal Culpability*, *supra* note 33 (quoting Dr. Deborah Yurgelun-Todd) (internal quotation marks omitted).

<sup>79</sup> Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 52 n.219 (1997) (citing *People v. Hernandez*, 393 P.2d 673 (Cal. 1964)).

<sup>80</sup> In 2004, I first introduced the notion of "developing capacity." Jennifer Ann Drobac, *Sex and the Workplace: "Consenting" Adolescents and a Conflict of Laws*, 79 WASH. L. REV. 471, 518 (2004). I distinguished the concept from "diminished capacity" because "diminished" carries a negative connotation and suggests that capacity should exist or may once have existed.

should at least avoid confusing physical maturity with neurological and psychosocial maturity when we assign legal rights and duties. Neither the blooming of the adult body nor its withering with disease or old age necessarily equates with mental maturity or acuity.

A brief review of adolescent development permits us to come back to the law's treatment of adolescents with a fresh perspective. At the very least, we can begin to evaluate whether the law takes us in the right direction. I argue that it does not.

## II. APPLICABLE LEGAL PRINCIPLES AND GUIDANCE RELEVANT TO JUVENILES

Before examining case law and the factors that might guide legal reform concerning civil law's treatment of adolescent "consent," we should explore the definitions of some key legal terms.

### A. *Consent, Assent, and Acquiescence*

Consent means "to give permission for something to happen; agree to do something."<sup>81</sup> Slightly different from consent, assent means "to express approval or agreement."<sup>82</sup> By this definition, assent denotes cooperation or secondary status. Both terms arguably include two prerequisites: knowledge regarding the choice, and volition. In the first aspect, consent and assent must be informed and correspond to the activity they legitimate. Ignorant cooperation does not indicate consent or assent. Additionally, any misrepresentation taints responsive consent or assent. The individual must also possess the cognitive ability to reason about a choice. In the second aspect, consent and assent must indicate freedom of choice and volition. The individual must be able to guide her own responsive choices. To acquiesce

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*Id.* I argued, "[m]ost teenagers suffer not from impairment but from immaturity—a blameless condition and a natural phase of growth." *Id.* at 518–19.

<sup>81</sup> THE NEW OXFORD AMERICAN DICTIONARY 362 (Erin McKean ed., 2d ed. 2005).

<sup>82</sup> *Id.* at 94.

means “to accept something reluctantly but without protest”<sup>83</sup> and indicates neither full consent nor assent.

In distinguishing acquiescence, we add a third requirement for consent and assent: a measure of power and autonomy. For example, if someone has no opportunity or authority to dissent, can we value that person’s consent? Consent and assent must be free of coercion and duress. Arguably, they assume a level of equality and mutuality between those persons making a bargain or coming to an agreement. Consent carries with it a presumption of intellectual, emotional, and developmental capacity. These characteristics are what undergird legal capacity.

### *B. Legal Consent and Capacity*

This elucidation of consent is consistent with its interpretation in Section 892A of the Second Restatement of Torts. Subsection (2)(a) specifies that in order to extinguish tort liability, consent must be “by one who has the capacity to consent.”<sup>84</sup> A comment to this subsection provides:

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 unless the parent, guardian, or other person empowered to consent for the incompetent has given consent, in which case the consent of the authorized person will be effective even though the incompetent does not consent . . . .<sup>85</sup>

This passage clarifies that one who consents must understand what he or she is doing and be able to anticipate results. Such appreciation requires counterfactual thinking or “what if” reasoning. This explanation focuses on the cognitive aspects of consent.

Contract law has also examined the notions of legal consent and capacity. Contract law has long held that minors lack the capacity to consent.<sup>86</sup> This conclusion results, in part, from the

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<sup>83</sup> *Id.* at 14.

<sup>84</sup> RESTATEMENT (SECOND) OF TORTS § 892A(2)(a) (1979).

<sup>85</sup> *Id.* § 892A cmt. b (emphasis added).

<sup>86</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 12(2)(a) (1981).

fear that adults may take legal advantage of minors who make contractual agreements. Contract law, therefore, typically makes contracts by minors voidable by those minors.<sup>87</sup>

Contract law also distinguishes between cognitive and volitional incapacity, especially in the context of mental disabilities. Section 15(1) of the Second Restatement of Contracts states that:

A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect

(a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or

(b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.<sup>88</sup>

Subsection (a) mirrors the torts guidance above. However, (b) relates to volitional incapacity or the inability to regulate one's responses in a social context. Some incapacitated individuals may understand the nature of a transaction or conduct but not be able to control their responsive behavior reasonably.

Comment b. to section 15 explains:

Even though understanding is complete, *[an incapacitated man] may lack the ability to control his acts in the way that [a] normal individual can and does control them*; in such cases the inability makes the contract voidable only if the other party has reason to know of his condition. Where a person has some understanding of a particular transaction which is affected by mental illness or defect, the controlling consideration is whether the transaction in its result is one which a reasonably competent person might have made.<sup>89</sup>

This passage naturally prompts the question whether some teenagers may suffer from a similar volitional incapacity or

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<sup>87</sup> See, e.g., *Jones v. Dressel*, 623 P.2d 370, 373 (Colo. 1981); JEFF FERRIELL, UNDERSTANDING CONTRACTS 603-04 (2d ed. 2009).

<sup>88</sup> RESTATEMENT (SECOND) OF CONTRACTS § 15(1).

<sup>89</sup> *Id.* § 15 cmt. b (emphasis added).

“defect.” One might argue that a teenager “may lack the ability to control his acts in the way that [a] normal individual [adult] can and does control them . . . .”<sup>90</sup> For example, she may understand the facts regarding sexual activity but not be able to control her conduct the way an adult would.

Different disciplines use a variety of terms to express the notion of adolescent behavior as markedly dissimilar to adult behavior. Psychologists refer to this phenomenon as psychosocial immaturity.<sup>91</sup> Legal scholars sometimes refer to this difference as “diminished capacity.”<sup>92</sup> 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 growth. I prefer the term “developing capacity” because of a teenager’s transitional status from childhood to adulthood and her developing maturity. Semantics aside, the question remains whether contract law’s guidance on incapacity accurately describes many adolescents, at one point or another in their development. I suggest later that it does.

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

<sup>91</sup> See, e.g., Kathryn Lynn Modecki, “It’s a Rush”: Psychosocial Content of Antisocial Decision Making, 33 LAW & HUM. BEHAV. 183, 183–84 (2009).

<sup>92</sup> See, e.g., Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 829–36 (2003). Because of the need to protect society from crimes committed by adolescents, I endorse Professors Elizabeth Scott and Laurence Steinberg’s proposal that the juvenile justice system recognize adolescent “diminished responsibility” due to diminished culpability. However, I reassert that adolescents—even adolescent criminal offenders—lack full adult legal capacity. Moreover, I do not suggest a “diminished culpability” or “diminished responsibility” parallel for the civil system because my focus is the protection of youth, and their developing capacity, from exploitation by adults. I would still shield adolescents from legal responsibility for their immature choices because adult exploitation causes their injury. 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.

*C. Medical Assent*

While this discussion of key terms has highlighted the similarities between consent and assent, government regulation of human-subject medical research brings nuanced meaning to assent as it applies to children in that context.<sup>93</sup> The Code of Federal Regulations mandates that Institutional Review Boards (IRBs) may approve research on children if “adequate provisions are made for soliciting the assent of the children and the permission of their parents or guardians.”<sup>94</sup> The IRB decides whether the child is even “capable of providing assent” by considering the child’s age, maturity, and psychological state.<sup>95</sup> IRBs may waive parental permission only under special circumstances.<sup>96</sup> No additional guidance suggests how IRBs should weigh these factors. Thus, medical assent does not equate with legal consent since parental permission—consent—typically bolsters a child’s assent. Moreover, Cauffman and Steinberg caution, “Adolescents who demonstrate that they meet the criteria for informed [medical] consent may nevertheless lack the psychosocial maturity required to make consistently mature judgments.”<sup>97</sup> Additionally, one might argue that capacity for medical assent does not equate with legal capacity since the decisions contemplated are so narrowly defined and well-informed. The responsibility for any decision to conduct medical research on a minor typically is shared by the researchers, IRB, the parents, and lastly by the juvenile.

*D. Juvenile “Consent” and Capacity*

People considering juvenile legal autonomy might agree that teenagers are capable of assent and acquiescence. Similarly, even a six-year-old may “know” or recognize Barack Obama and Mitt Romney and may “voluntarily” pick one or the other

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<sup>93</sup> I thank Professor Lois Weithorn for her guidance on this topic.

<sup>94</sup> 45 C.F.R. § 46.404 (2010).

<sup>95</sup> § 46.408(a).

<sup>96</sup> § 46.408(c).

<sup>97</sup> Cauffman & Steinberg, *supra* note 54, at 1766.

for President. We do not allow that child to cast a political vote, however.<sup>98</sup> Additionally, we might agree that many juveniles understand the concept of sexual intercourse.<sup>99</sup> Their knowledge of the mechanics of sexual activity does not necessarily qualify them, however, as competent decision makers or as ready to engage in the behavior. Many adults, judges, and courts disagree. For them, relative cognitive maturity, or even apparent physical maturity, equates with adult capacity. They ignore or are ignorant of the level of psychosocial maturity required for competent decision making.

### *E. General Legal Principles and the Scientific Research*

Common law and legal treatises have guided the law's treatment of teenagers for years. The new science of adolescent development arguably undermines some of this legal "wisdom."

#### *1. The "Rule of Sevens" and the Restatements*

Current law, embodied in the "rule of sevens,"<sup>100</sup> explicitly posits that most teenagers have the legal capacity 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. From seven- to fourteen-years-old, the law presumes that a minor lacks capacity. From fourteen to twenty-one (now eighteen), courts operate under a rebuttable presumption that minors are

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<sup>98</sup> I would, however, permit high school students, who have successfully completed a high school U.S. government or civics class and who have passed a basic knowledge test (similar to a written driver's license test), to participate in elections.

<sup>99</sup> *See, e.g.,* *People v. Hillhouse*, 1 Cal. Rptr. 3d 261, 268 (Ct. App. 2003) ("[W]e would not assume—nor would we infer a legislative presumption—that the average 14 year old in our current society does not possess the intelligence capable of understanding the nature and consequences of a sexual act.").

<sup>100</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).

competent to consent and are responsible for criminal and negligent conduct.<sup>101</sup> Thus, in the context of a civil claim for damages and absent evidence to the contrary, the bright-line rule allows a trier of fact to presume that a child over fourteen consents to sexual contact.

As noted above, legal treatises and guidance also acknowledge that children may lack legal capacity to make binding legal decisions and offer legal consent. Section 15 of the Second Restatement of Contracts addresses volitional incapacity, suggesting that some incapacitated persons who cannot conform their behavior to societal norms may void their contracts. Section 892A comment 2(b) of the Second Restatement of Torts explains, however, that “[i]f 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 . . . .”

The new scientific data concerning adolescents calls into question whether young teenagers possess full legal capacity and, in particular, whether most teenagers are capable of knowing and voluntary consent to sex with an adult. What neuroscientists and psychologists have said regarding capacity informs this issue. Dr. Abigail Baird, who specializes in adolescent neurological development, suggests that “. . . it may be physically impossible for adolescents to engage in counterfactual reasoning and as a result of this are often unable to effectively foresee the possible consequences of their actions.”<sup>102</sup> This statement directly undermines tort guidance that children may have legal capacity.

Dr. Silvia Bunge has compared the prefrontal cortex of children with those adults suffering from injuries, who take more risks than do healthy adults. She has determined that children make riskier choices than adults, in part because they enjoy doing so. She tied these choices to activity in the prefrontal cortex. Bunge suggests that teens are less able to

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

<sup>102</sup> Abigail Baird & Jonathan Fugelsang, *The Emergence of Consequential Thought: Evidence from Neuroscience*, in *LAW & THE BRAIN* 254 (Semir Zeki & Oliver Goodenough eds., 2006).

resist the temptation of a new reward. She explains, “If your friend says, ‘Hey let’s try this drug; it will be fun,’ you might not be able to use the information you know about the possible negative consequences to resist . . . .”<sup>103</sup> Bunge’s research suggests that even knowing participation in an activity might not justify the attribution of full legal capacity.

These legal examples, when viewed side-by-side with science, suggest that we need to pay serious attention to traditional legal presumptions about adolescents and consider incorporating more about what we now know concerning adolescent development. A few federal and state courts are doing just that.

## 2. Science and the United States Supreme Court Precedents

Even the United States Supreme Court has noticed the importance of the new science on adolescent development.<sup>104</sup> The Supreme Court’s recent *Graham v. Florida* opinion, which relied on *amici* briefing regarding adolescent neurological and psychosocial development, provides valuable guidance relevant to adolescent maturity, “consent,” and legal capacity.<sup>105</sup> The *Graham* decision holds that a life sentence without the possibility of parole for particular juvenile offenders violates the Eighth Amendment protection against cruel and unusual punishment.<sup>106</sup> This decision also reaffirms evidence regarding adolescent neurological and psychosocial development, discussed in *Roper v. Simmons*,<sup>107</sup> which invalidated the death penalty for minors.

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<sup>103</sup> *The Adolescent Brain*, SCI. TODAY U.C. (Nov. 17, 2008), <http://www.ucop.edu/sciencetoday/article/18977>.

<sup>104</sup> For the most recent discussion of the science regarding adolescent conduct and behavior, see *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2761–79 (2011) (Breyer, J., dissenting) (citing recent scientific research correlating playing violent video games with aggressive behavior in adolescents to support the contention that the first amendment does not disable the government from placing statutory restrictions upon the sale of video games to minors).

<sup>105</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2026–27 (2010).

<sup>106</sup> *Id.* at 2033–34.

<sup>107</sup> *Roper v. Simmons*, 543 U.S. 551, 569–71 (2005).

The *Graham* Court noted that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.”<sup>108</sup>

The *Graham* Court found that society might still hold a teenager responsible for his behavior but that “his transgression ‘is not as morally reprehensible as that of an adult.’”<sup>109</sup> This distinction between responsibility and moral culpability is important. If a toddler knocks over a vase while stumbling to a table, we might find him responsible but not morally culpable because he did not intend to break the vase and lacked the motor coordination to control his steps and body. Extend this example to a teenager who may be technically “responsible” for saying “yes” to sex, or who may even initiate sexual activity, but who cannot fully anticipate the consequences of her conduct and may lack the psychosocial skills to control her behavior in context.

The *Graham* Court highlighted several developmental factors that might influence our decision to spare adolescents from *legal* responsibility for their behavior, even as we recognize their *personal* responsibility. The Court affirmed, “As compared to adults, juveniles have a “‘lack of maturity and an underdeveloped sense of responsibility’; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed.’”<sup>110</sup> The Court also noted “‘juveniles’ ‘lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions . . . .’”<sup>111</sup>

The *Graham* Court recognized that even a psychological evaluation of a given adolescent, of the type necessitated by some of the cases discussed below, might not yield enough information for jurists to make critical legal determinations

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<sup>108</sup> *Graham*, 130 S. Ct. at 2026 (citations omitted).

<sup>109</sup> *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)).

<sup>110</sup> *Id.* (quoting *Roper*, 543 U.S. at 569–70).

<sup>111</sup> *Id.* at 2028 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

about a particular youth. The Court stated that ““even expert psychologists’” might find it difficult to differentiate between adolescent conduct that results from “transient immaturity” and that which reflects “irreparable corruption.”<sup>112</sup> This finding suggests that a case-by-case determination of adolescent maturity in a criminal or civil case might produce unsatisfactory or flawed results concerning the capacity of a teenager to control his behavior or consent to sex.

Recent Supreme Court focus on adolescent neurological and psychosocial development and the differences between adolescent and adult conduct emphasizes the need to consider these differences and adolescent capacity in contexts other than criminal trials. We need to explore further whether adolescent development and psychosocial maturity should also guide the development of civil law and particularly the law regarding “the age of consent.”

### III. “CONSENT” VERSUS CONSENT IN CRIMINAL LAW AND CIVIL LAW

In *Doe v. Starbucks*,<sup>113</sup> a California federal district court analyzed whether a minor could bring a civil sexual harassment case against her supervisor and employer when she “consented” to some or most of the alleged offensive conduct.<sup>114</sup> While this case arose in California and was decided using California civil law regarding “the age of consent,” this controversy could have easily arisen at a Starbucks in New York. We will return to *Starbucks* to explore its relevance for the nation after discussing relevant New York law. For now, however, we focus on the legal significance of the “consent” that was pivotal in *Starbucks*,

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<sup>112</sup> *Id.* at 2029 (quoting *Roper*, 543 U.S. at 573) (internal quotation marks omitted).

<sup>113</sup> *Doe v. Starbucks, Inc.*, No. SACV 08-0582 AG (CWx), 2009 WL 5183773, at \*1 (C.D. Cal. Dec. 18, 2009) (granting in part and denying in part motions for summary judgment). This case was set to go to trial the week of June 15, 2010. However, according to the court clerk, the case settled. E-mail from Lisa Bredahl, Court Clerk to the Honorable Andrew J. Guilford, to author (Aug. 24, 2010) (on file with author).

<sup>114</sup> *Starbucks*, at \*4–5, \*7–8.

as it is in any sexual harassment case involving an adult. In *Faragher v. City of Boca Raton*, the United States Supreme Court emphasized that, in a sexual harassment case under Title VII of the Civil Rights Act of 1964 (Title VII),<sup>115</sup> 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>116</sup> One might refer to the objective component as the “reasonableness” standard and to the subjective element as the “unwelcomeness” requirement. Every state fair employment practice statute (FEPS) that similarly prohibits sexual harassment also makes “unwelcomeness” an element of the *prima facie* case.<sup>117</sup> Thus, if Doe’s “consent” garners legal significance, she loses her sexual harassment case because the conduct is not subjectively “unwelcome.”

The complicating factor for employers defending sexual harassment cases (or tort claims like the one in *Barton v. Bee Line, Inc.*) and the jurists evaluating those cases arises from state sex crime statutes that specifically prohibit sexual conduct with minors. Typically, “consent” provides no defense for the criminally-accused adult. So, what happens when criminal and civil claims stem from the same conduct? Is the minor’s “consent” treated consistently? Not in all states, including New York and California. A review of several cases decided since *Bee Line* superbly showcases the conflicts that can lead to bizarre results.

#### A. New York Criminal Law

Section 130.05(3)(a) of the New York Penal Law states, “A person is deemed incapable of consent when he or she is: (a) less than 17 years old . . . .”<sup>118</sup> Section 130.25 (2) prohibits

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<sup>115</sup> Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (2006).

<sup>116</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993)).

<sup>117</sup> *See, e.g.*, CAL. GOV’T CODE § 12940–12951 (West 2010); N.Y. EXEC. LAW § 290–301 (McKinney 2010).

<sup>118</sup> N.Y. PENAL LAW § 130.05(3) (McKinney 2009).

sexual intercourse between an adult twenty-one or older and a youth under seventeen.<sup>119</sup> According to the New York Court of Appeals, this code section “creates an irrebuttable presumption that a child less than [seventeen] years of age cannot consent to sexual intercourse with an adult . . . .”<sup>120</sup> Other New York criminal statutes similarly prohibit adults from engaging in sexual acts with youth under seventeen years old.<sup>121</sup> New York courts view a juvenile involved in such conduct as “victimized, regardless of whether or not she or he actually consents or even initiates the sexual encounter.”<sup>122</sup>

In *People v. Gonzalez*,<sup>123</sup> the defendant challenged on constitutional grounds a New York statute that proscribed oral and anal sexual acts with a minor under seventeen. The County Court acknowledged that minors enjoy most constitutional rights afforded adults, including some privacy rights. The court explained, however, that a state’s interest in protecting juveniles justifies limitations on certain rights. The court noted in particular that “the state has the authority to regulate the sexual conduct of its minors by setting age limits to establish whether the individual is sufficiently mature to make intelligent and informed decisions and to consent to certain activities.”<sup>124</sup>

These New York criminal cases lead one to believe that the New York statutory rape laws are relevant and controlling precedent in every New York court. After all, if a juvenile lacks the capacity to consent to sex in the criminal context, what would miraculously enable him or her to develop legal capacity

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<sup>119</sup> N.Y. PENAL LAW § 130.25(2) (McKinney 2009).

<sup>120</sup> *People v. Cratsley*, 653 N.E.2d 1162, 1165 n.3 (N.Y. 1995).

<sup>121</sup> *See, e.g.*, N.Y. PENAL LAW § 130.40 (McKinney 2009) (prohibiting an adult over twenty-one from engaging in oral or anal sexual conduct with a minor under seventeen); N.Y. PENAL LAW § 263.05 (McKinney 2008) (prohibiting the use by an adult of a child under seventeen in a sexual performance).

<sup>122</sup> *In re Rosaly S.*, No. NA-00012, 2010 WL 1493147, at \*15 (N.Y. Fam. Ct. Mar. 26, 2010).

<sup>123</sup> *People v. Gonzalez*, 561 N.Y.S.2d 358 (Cnty. Ct. 1990).

<sup>124</sup> *Id.* at 361 (citing *People v. Dozier*, 417 N.E.2d 1008 (N.Y. 1980); *Michael M. v. Superior Court Sonoma Cnty.*, 450 U.S. 464, 473 n.8 (1981)).

in a civil case? If an adult victimizes a minor, even if that youth initiates the conduct, how is the victimization any less cognizable in civil court? Was *Barton v. Bee Line, Inc.* an unfortunate bumble, which has since been overruled? Anyone who thinks so is mistaken.<sup>125</sup>

### *B. New York Civil Law*

New York civil cases since *Bee Line* have held regularly that consent, including juvenile consent, may insulate alleged tortfeasors from liability. For example, in *O'Connor v. Western Freight Association*, a 1962 civil assault and battery case involving two males in a fight, the court cited *Bee Line* for the proposition that consent operates as a complete defense in a tort action.<sup>126</sup> Fast forward to 1993 and *Stavroula S. v. Guerriera*, a civil assault and battery case brought on behalf of a female under fourteen who allegedly consented to sex with the defendant.<sup>127</sup> The court denied a motion for partial summary judgment because the associated statutory rape case had not resolved whether the plaintiff had consented. Consent was not at issue or relevant in the criminal case involving the strict liability prosecution under Penal Law section 130.30. The court reasoned that “the doctrine of collateral estoppel does not bar the defendant from litigating the issue of whether he touched the plaintiff without her consent, which is the gravamen of the tort of battery.”<sup>128</sup> The court did not address the question of how the plaintiff could have consented if she lacked the legal capacity to consent.

In *C. Roe v. Barad*, a similar 1996 battery and intentional infliction of emotional distress case, the New York Supreme Court reversed a lower court decision, granting the fifteen-year-old plaintiff partial summary judgment.<sup>129</sup> The appellate court

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<sup>125</sup> See, e.g., Drobac, *supra* note 80, at 508 n.206 (discounting cases decided before 1945 because of the prevailing sexual norms).

<sup>126</sup> *O'Connor v. W. Freight Ass'n*, 202 F. Supp. 561, 565 (S.D.N.Y. 1962).

<sup>127</sup> *Stavroula S. v. Guerriera*, 598 N.Y.S.2d 300, 301 (App. Div. 1993).

<sup>128</sup> *Stavroula S.*, 598 N.Y.S.2d at 301 (citations omitted).

<sup>129</sup> *Roe v. Barad*, 647 N.Y.S.2d 14 (App. Div. 1996).

ruled that Penal Law section 130.05(3), which declares that a minor cannot consent to sex with an adult, had no application in the tort action. The court found that the defendant could argue both consent and lack of emotional distress.<sup>130</sup> The court cited to both *Stavroula S.* and *Bee Line* to support its conclusion.<sup>131</sup> Again, the court did not address the apparent conflict between the treatment of legal capacity in the criminal and civil contexts. The court also failed to explain why “Roe” wasn’t a named plaintiff. If Roe was such a capable and calculating actor, why allow her to sue under an alias?

More recently, in *Doe v. Board of Education of Penfield School District*,<sup>132</sup> suit was filed on behalf of a fifteen-year-old student against the school district for negligent supervision after a sexual assault perpetrated by a seventeen-year-old fellow student. The court held, “A school may not be liable where older minors, who are capable of understanding and appreciating their conduct, intentionally avoid detection to go to a prohibited and secluded portion of the school building and engage in consensual sex.”<sup>133</sup> The court emphasized, “The Penal Code § 130.05 precluding sexual consent by children under 17 years of age may not be applicable in a civil suit.”<sup>134</sup> The court cited *O’Connor* and *Barad* for support.<sup>135</sup> It cited no scientific journals or articles for the proposition that a fifteen-year-old is capable of understanding and appreciating her conduct concerning sexual activity such that she can give legal consent. Doe may have been capable in this case, but we have no information that an evaluation of her capacity to consent was even contemplated or attempted. The irony is that society believes her incapable of suing in her own capacity. The caption

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<sup>130</sup> *Id.* at 16. The defendant had pled guilty to a violation of Penal Law § 263.05 which prohibited the use of a child under seventeen in a sexual performance. However, that conviction also did not estop defendant from asserting consent. *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Doe v. Bd. of Educ.*, No. 04/6902, 2006 WL 2406532 (N.Y. Sup. Ct. Feb. 10, 2006).

<sup>133</sup> *Id.* at \*3.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

begins “In the Matter of the Claim of Jane Doe . . . .” The court did not address the conflict between criminal and civil tort law, the use of the alias, nor the court procedural rules, which mandate suit by adults on behalf of these otherwise capable minors.

Only a concurring opinion in a 2002 civil case calls into question the *Bee Line* precedent. In *Colon v. Jarvis*, a mother filed suit on behalf of her fifteen-year-old daughter who had engaged in an allegedly consensual sexual relationship with a high school teacher.<sup>136</sup> He was ultimately convicted of “six counts of sodomy in the third degree, three counts of rape in the third degree, and two counts of endangering the welfare of a child . . . .”<sup>137</sup> Citing to *Bee Line*, the school district argued that it could not be held liable on a theory of *respondeat superior* because Colon, who had consented to sex with Jarvis, could not recover from him. The majority pointed out that Colon had relied not on a theory of *respondeat superior* against the district but on theories of negligent hiring, retention, and supervision, of Jarvis. Thus, her consent was not really at issue and the court denied summary judgment.

In a concurring opinion, Judge Sondra Miller criticized *Bee Line* as “contrary to the contemporaneous weight of authority from New York and from many other jurisdictions which did not preclude civil recovery by an under-aged victim for an adult’s sexual predations.”<sup>138</sup> She cited a number of cases from other jurisdictions that permit recovery and noted that only one New York case, *Aadland v. Flynn*,<sup>139</sup> was decided upon *Bee Line*’s precedential authority (*Doe v. Bd. of Edu. of Penfield Sch. Dist.* had yet to be decided). It is not clear why Judge Miller failed to acknowledge *Barad*. Judge Miller concluded, “In my opinion, *Barton* was of questionable merit when it was decided, and its holding should be re-examined at the

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<sup>136</sup> *Colon v. Jarvis*, 742 N.Y.S.2d 304, 304–05 (App. Div. 2002).

<sup>137</sup> *Id.* at 305.

<sup>138</sup> *Id.* at 306 (Miller, J., concurring) (citations omitted).

<sup>139</sup> *Aadland v. Flynn*, 211 N.Y.S.2d 221, 224–25 (Sup. Ct. 1961), *aff’d*, 218 N.Y.S.2d 527 (App. Div. 1961) (rejecting a claim for moral debauchery and corruption as a seduction claim which was abolished by New York statute).

appropriate time.”<sup>140</sup> Judge Miller was the only woman on this judicial panel. One wonders whether her gender influenced her opinion of *Barton*.

This review of New York criminal and civil law permits us to return to the *Starbucks* case to evaluate how a teenaged New York franchise worker might fare in a sexual harassment suit against her employer.

### C. Starbucks New York Style

Starbucks hired Jane Doe in July 2005 when she was sixteen years old. She worked closely with her supervisor, Timothy Horton, who was then twenty-four years old. After her hire, Horton allegedly asked Doe out on dates repeatedly and she initially rebuffed his advances.<sup>141</sup> In pleadings, Doe declared that Horton made “‘perhaps hundreds’” of sexually explicit or profane statements to her at work in front of coworkers concerning his sexual interest in her.<sup>142</sup> Later, she “‘finally said ‘yes,’ hoping it would make him stop.’”<sup>143</sup> They ultimately engaged in sexual activity in November or December 2005.<sup>144</sup> Doe declared,

[Horton] demanded that I perform oral sex on him, which I did. I felt like I had to—that I had no choice . . . I felt that, because he had given me marijuana and I had smoked it with him, I had to do what he said, because he was my Supervisor and I didn’t want to lose my job.<sup>145</sup>

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<sup>140</sup> *Colon*, 742 N.Y.S.2d at 307 (Miller, J., concurring).

<sup>141</sup> *Doe v. Starbucks, Inc.*, No. SACV 08-0582 AG (CWx), 2009 WL 5183773, at \*1–5 (C.D. Cal. Dec. 18, 2009).

<sup>142</sup> *Id.* at \*2 (quoting Starbucks’s Objections to Plaintiff’s Evidence at 9:9–10:8, *Starbucks*, 2009 WL 5183773).

<sup>143</sup> *Starbucks*, 2009 WL 5183773, at \*1 (quoting Doe Declaration ¶ 4, *Starbucks*, 2009 WL 5183773).

<sup>144</sup> *Id.* at \*2.

<sup>145</sup> *Id.* at \*3 (quoting Doe Declaration, *supra* note 143, ¶ 20) (internal quotation marks omitted). Doe and Horton engaged in sexual activities regularly through June 2006. In addition to “vaginal intercourse and oral copulation” at work and offsite, “[t]hey exchanged explicit sexual comments

Horton told Doe not to tell anyone about their relationship.

In February 2006, however, Doe told her mother that she was having sex with Horton. Doe's mother requested an investigation and that Starbucks take steps to protect her daughter. Store Manager Lina Nobel did not ask Horton about a sexual relationship "because she thought it was not her place to do so."<sup>146</sup> Nobel informed Doe's mother that Horton had "denied any wrongdoing with [Doe], . . . and if she fired him or terminated him, she was afraid that she was going to have a wrongful termination claim on her hands."<sup>147</sup> Thereafter, Doe requested a transfer to a different Starbucks store "because she 'felt like she had to.'"<sup>148</sup> Finally, in 2006, Doe left her job and "enrolled in a treatment facility out of state to address mental and emotional problems . . . ."<sup>149</sup> Horton ultimately pled guilty to criminal unlawful sexual intercourse with a minor under California Penal Code Section 261.5(a).<sup>150</sup> In that associated criminal case, Doe's "consent" to sex failed to provide Horton with a legal defense.

In the civil sexual harassment case later filed on behalf of Doe, however, the federal court left open the possibility that Doe's "consent" might serve to insulate Starbucks and Horton from civil liability. The *Starbucks* federal court relied on California state legal authority, quoting the California Supreme Court decision in *People v. Tobias*:<sup>151</sup>

In 1970, the Legislature created the crime of unlawful sexual intercourse with a minor (§ 261.5) and amended the rape statute (§ 261) so that it no longer included sex

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and text messages at work." *Id.* at \*5 (internal quotation marks omitted) (quoting Plaintiff's Statement of Material Facts ¶¶ 20, 25, *Starbucks*, 2009 WL 5183773).

<sup>146</sup> *Id.* at \*5.

<sup>147</sup> *Id.* at \*6 (quoting J.M. Deposition at 187:18–24, *Starbucks*, 2009 WL 5183773) (internal quotation marks omitted).

<sup>148</sup> *Id.* (quoting Plaintiff's Statement of Material Facts, *supra* note 145, ¶ 40).

<sup>149</sup> *Id.* (quoting Plaintiff's Statement of Material Facts, *supra* note 145, ¶ 59).

<sup>150</sup> *Id.* (citations omitted).

<sup>151</sup> *People v. Tobias*, 21 P.3d 758 (Cal. 2001).

with a minor in the definition of rape. As a result, the circumstances surrounding sexual intercourse with a minor became highly relevant, because this conduct might in some cases be a distinct and less serious crime than rape, particularly where the minor engages in the sexual act *knowingly and voluntarily*.<sup>152</sup>

Oddly, neither section 261.5 nor section 261 refers to a minor acting “*knowingly and voluntarily*.” The Court continued:

In making this change [declassifying the behavior as rape], the Legislature implicitly acknowledged that, *in some cases at least, a minor may be capable of giving legal consent to sexual relations*. If that were not so, then every violation of section 261.5 would also constitute rape under section 261, subdivision (a)(1). Of course, a minor might still be found incapable of giving legal consent to sexual intercourse in a particular case, but [the legislature] abrogate[ed] the rule that a girl under 18 is in all cases incapable of giving such legal consent . . . .<sup>153</sup>

Whether or not the California Court accurately interpreted the legislature’s statutory reforms is beyond the scope of this article.<sup>154</sup> This passage makes clear, however, that Doe’s “consent” to have sex with her supervisor may bar her sexual harassment and tort claims.

Suppose for a moment that *Starbucks* Doe had been a New York teenaged barista rather than a California one. Arguably, *Bee Line* would have applied and a similar federal court would have been compelled to deny summary judgment even though Horton would have been convicted under New York criminal law. Why have a criminal statutory rape law if we think that older teenagers have the capacity to consent? More importantly, why do we think that a rule that anticipates that adolescents have adult-like capacity

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<sup>152</sup> *Starbucks*, 2009 WL 5183773, at \*7 (emphasis added) (quoting *Tobias*, 21 P.3d at 761–62) (citations omitted) (comparing CAL. PENAL CODE § 261.5(b)–(d) [offense classification and punishment for unlawful sexual intercourse with a minor], with CAL. PENAL CODE § 264(a) [punishment for rape])).

<sup>153</sup> *Starbucks*, 2009 WL 5183773, at \*7.

<sup>154</sup> For a thorough discussion of this case and the controlling California law, see Drobac, *supra* note 1.

is still appropriate given the new neuroscientific and psychosocial evidence and the adoption of that evidence by the United States Supreme Court? *Starbucks* and its east coast hypothetical give new meaning to “wake up and smell the coffee!”

*D. The Seventh Circuit and Doe v. Oberweis Dairy*

The civil law results in California and New York are not coastal aberrations. Other case law involving teen workers indicates that treatment of a minor’s consent in criminal cases is very different from how it is in civil cases. What explains this discrepancy? The Seventh Circuit Court of Appeals was one of the first to address the conflicts between criminal and civil laws in *Doe v. Oberweis Dairy*.<sup>155</sup>

*Starbucks* Doe cited *Oberweis* in support of her contention that minors lack the capacity to consent to sex with adults. The *Starbucks* court found that *Oberweis* had “little persuasive effect” since it was a Seventh Circuit case that contradicted *Tobias* and did not consider California law. A closer look at *Oberweis*, however, may lead others to believe that it had more to offer in the *Starbucks* sexual harassment case than the *Starbucks* California federal district court determined.

Like *Starbucks*, *Oberweis* was a sexual harassment case involving a sixteen-year-old teenager and her twenty-four-year-old supervisor.<sup>156</sup> Like New York, Illinois prohibits sex between minors under seventeen and adults.<sup>157</sup> The Illinois federal district court in *Oberweis* found that the “unwelcomeness” requirement applies in employment cases involving minors and that the conduct about which Doe complained was not “unwelcome.”<sup>158</sup>

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<sup>155</sup> *Doe v. Oberweis Dairy*, 456 F.3d 704 (7th Cir. 2006).

<sup>156</sup> *Doe v. Oberweis Dairy*, No. 03 C 4774, 2005 WL 782709, at \*1 (N.D. Ill. Apr. 6, 2005), *rev’d*, 456 F.3d 704 (7th Cir. 2006).

<sup>157</sup> 720 ILL. COMP. STAT. 5/12–15(c), 16 (2011) (defining criminal sexual abuse for victims under seventeen).

<sup>158</sup> *Oberweis Dairy*, 2005 WL 782709, at \*6–7. The district court also found the conduct was not severe or pervasive, another requirement of the *prima facie* case. The court stated:

Here, it is undisputed that through Plaintiff’s approximately eight-month employment with Defendant, Nayman only touched Plaintiff

The court stated:

It is undisputed that Plaintiff voluntarily visited Nayman's [the supervisor's] apartment alone the day of the encounter. It is also undisputed that Plaintiff asked Nayman to put a condom on [which he did not<sup>159</sup>] before they had sex. 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.<sup>160</sup>

The district court clearly equated voluntariness or acquiescence with legal consent. Because Doe did not resist or otherwise indicate that the conduct was unwelcome, the court dismissed her sexual harassment case against *Oberweis Dairy*.

The appellate court reversed.<sup>161</sup> It found that while Nayman

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

*Id.* at \*7.

<sup>159</sup> E-mail from H. Candace Gorman, Esq., Counsel for Doe, in *Oberweis Dairy*, to author (Apr. 29, 2010) (on file with the author).

<sup>160</sup> *Oberweis Dairy*, 2005 WL 782709, at \*6.

<sup>161</sup> *Doe v. Oberweis Dairy*, 456 F.3d 704 (7th Cir. 2006). The appellate court described in much more detail how Nayman operated:

Construing the evidence as favorably to her [Plaintiff] as the record permits, as we must, we assume that Nayman, the shift supervisor, regularly hit on the girls (most of the employees were teenage girls) and young women employed in the ice cream parlor. He would, as

had not committed forcible rape, he had committed “statutory rape,”<sup>162</sup> “which is made a crime because of a belief that below a certain age a person cannot (more realistically, is unlikely to be able to) make a responsible decision about whether to have sex.”<sup>163</sup> The *Oberweis* court emphasized the age disparity between Nayman and Doe. It explained, “In Illinois as elsewhere the crime is considered more serious the greater the disparity in ages between the parties. The theory is that a young girl (or boy) is likely to have particular difficulty resisting the blandishments of a much older man.”<sup>164</sup> Note how this recognition of juvenile limitation resembles the incapacity defense enumerated in section 15 of the Second Restatement of Contracts, discussed above.

Because of the belief that minors may not make responsible decisions about sex, the *Oberweis* court devised a plan for dealing with adolescent “consent” to sex under Title VII. The court held that litigants should look to the “age of consent” set under state law to determine whether the plaintiff’s “consent” will have legal significance under Title VII.<sup>165</sup> The court explained:

To avoid undermining valid state policy by reclassifying sex that the state deems nonconsensual as consensual . . . and to avoid intractable inquiries into maturity that legislatures invariably pretermitt by basing entitlements to public benefits (right to vote, right to drive, right to drink, right to own a gun, etc.) on specified ages rather than on a standard of “maturity,” federal courts, rather than deciding whether a particular

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one witness explained, “grope,” “kiss,” “grab butts,” “hug,” and give “tittie twisters” to these employees, including the plaintiff. These things he did in the store, but he would also invite the girls to his apartment. He had sexual intercourse in the apartment with two of them, one of them a minor, before it was the plaintiff’s turn. He was 25 when he had intercourse with her.

*Id.* at 712–13.

<sup>162</sup> The court cited to the Illinois statutory rape law. 720 ILL. COMP. STAT. 5/12-15(c), 16(d).

<sup>163</sup> *Oberweis Dairy*, 456 F.3d at 713.

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

<sup>165</sup> *Id.*

Title VII minor plaintiff was capable of “welcoming” the sexual advances of an older man, should defer to the judgment of average maturity in sexual matters that is reflected in the age of consent in the state in which the plaintiff is employed. That age of consent should thus be the rule of decision in Title VII cases.<sup>166</sup>

In this passage, the *Oberweis* appellate court also referred to the need to avoid maturity evaluations. A serious problem with this plan becomes obvious immediately, though. Which system, criminal or civil, marks the age of consent?

In California, a civil case interpreting *Tobias, Donaldson v. Department of Real Estate*,<sup>167</sup> arguably gives us the answer. In *Donaldson*, the court considered whether the California Department of Real Estate had wrongfully revoked the real estate license of a twenty-four-year-old licensee who had seduced his sixteen-year-old sister-in-law. Donaldson had pled “no contest” to charges brought under Penal Code section 261.5. When the California Real Estate Commissioner revoked his license, she interpreted his actions to be “[s]exually related conduct causing physical harm or emotional distress to a . . . non-consenting participant in the conduct.”<sup>168</sup> In reversing the Commissioner, the *Donaldson* court held, “Just as there is no longer any “statutory rape” in this state, so there is no “age of consent” as concerns sexual relations, and references to such a concept can only muddy the analytical waters.”<sup>169</sup> For states such as California, with no “age of consent,” adolescent “consent” garners legal significance, whether or not the minor has legal capacity in the criminal context. But what is the age of consent in New York? Is it determined by the criminal code or by the *Bee Line* cases which might necessarily lead to a maturity evaluation of the plaintiff? If the civil cases control, how will judges (or juries) conduct a maturity evaluation of a youth months or even years after the alleged conduct occurred?

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

<sup>167</sup> *Donaldson v. Dep’t of Real Estate*, 36 Cal. Rptr. 3d 577 (Ct. App. 2005).

<sup>168</sup> *Id.* at 583 (quoting CAL. CODE REGS. tit. 10, § 2910(a)(5) (2011)).

<sup>169</sup> *Id.* at 589, 592.

The *Oberweis* appellate court acknowledged that its approach would necessarily mean that “the protection that Title VII gives teenage employees will not be uniform throughout the country, since the age of consent is different in different states, though within a fairly narrow band.”<sup>170</sup> This federal appellate court clearly did not know in 2006, however, that only a few months earlier in California, the *Donaldson* state district court had declared the end of the “age of consent” in California civil cases.

Thus, the Seventh Circuit court offered the nation a logical, if imperfect, formula for responding to adolescent “consent” in sexual harassment and sexual abuse cases. Conceivably, this standard produces different results in the case of the seduction of a sixteen-year-old Starbucks barista (or, for example, a Bee Line passenger) depending on where she lives. In Indiana, where the age of consent is sixteen, she loses her Title VII sexual harassment case.<sup>171</sup> In Illinois and Wisconsin, where the ages of consent are seventeen and eighteen respectively,<sup>172</sup> she may get beyond the summary judgment phase. Within the Seventh Circuit, Starbucks and other employers of teenagers navigate three different ages of consent. A random age demarcation alone does not make logical or legal sense. Moreover, this formula provides no clear guidance in states where criminal and civil law conflict in the way they treat adolescent non-resistance or “consent.”

#### *E. National Treatment of Adolescent “Consent”*

As noted earlier, the controversy involving the legal significance of adolescent “consent” exists across the nation. New York, California, and Illinois serve as just three examples of how different courts within those respective states treat

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<sup>170</sup> *Oberweis Dairy*, 456 F.3d at 714.

<sup>171</sup> IND. CODE § 35-42-4-9 (2011) (sexual misconduct with a minor, establishing the age of consent at sixteen).

<sup>172</sup> 720 ILL. COMP. STAT. 5/11-1.50 (2011) (criminal sexual abuse, establishing the age of consent at seventeen); WIS. STAT. § 948.09 (2011) (sexual intercourse with a child age sixteen or older, establishing the age of consent at sixteen).

adolescent non-resistance or acquiescence to sex. In 2004, I reviewed the conflicting laws across the United States and evaluated what kind of chance a sixteen-year-old, such as *Starbucks Doe*, might have in pursuing a sexual harassment or other related tort case. At that time, I concluded that the answer depended on where she consented and filed suit. The claims she brought would also influence the outcome. In the then twenty-four states that set the age of consent at sixteen or lower, she had almost no chance for success under antidiscrimination law or tort law. That number increased to thirty-five if certain courts rejected or ignored the alleged special aggravating facts of her case.<sup>173</sup> Those states would treat her as an adult and her consent would bar most claims. Even a successful statutory rape prosecution against the perpetrator might not assist her in states like Wisconsin, Tennessee, Louisiana, and California where civil legal precedent muddied the legal waters.<sup>174</sup>

My 2004 analysis and summary review of developments in New York, California, and Illinois, highlight the inconsistencies and problems facing “consenting” minors across the United States. Now that California has rejected the proffered *Oberweis* plan in favor of the *Tobias* dicta, one can anticipate that more courts will grant summary judgment for employers like Starbucks against acquiescing or cooperative teenagers. So where does this discussion of legislative intent and case law interpretation leave us? Are the inconsistencies problematic and why do they persist? What can we say about the current state of the law in New York and California, as well as the prospects for the nation?

### *1. Inconsistent Results*

Inconsistent treatments do not always lead to illogical results. For example, we can understand that a criminal jury might acquit O.J. Simpson of the murder of his wife and that a civil jury might find him liable.<sup>175</sup> Those outcomes are inconsistent but they are not

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<sup>173</sup> Drobac, *supra* note 80, at 538–39.

<sup>174</sup> *Id.* at 539.

<sup>175</sup> I thank Martin Drobac, Esq. for exploring this thought with me.

illogical. The burden of proof for criminal conviction, proof “beyond a reasonable doubt,” is much more rigorous than that for civil liability, proof by “a preponderance of the evidence.”<sup>176</sup> The O.J. criminal trial jury apparently did not have enough evidence to convict on the higher standard. If the burdens are stricter in a criminal case, however, the adult respondent who engages in sexual intercourse with a teenager should be more likely to face liability in civil court. Since 2001, that outcome does not necessarily follow in California if the teenager “consented.” Now California’s criminal laws function much more restrictively than do the civil laws regarding the same episode. One wonders whether there is any other area of law in which civil liability attaches much less readily than criminal guilt. And, if not, one wonders why.

## 2. Conflicts Stemming from Misguided Confusion

One might suggest that this problem is a simple one of misguided interpretation and confusion. *Starbucks* relied on dicta from the *Tobias* California Supreme Court case that was arguably internally inconsistent in its treatment of sex crimes against minors. The *Tobias* Court was not reviewing Penal Code section 261.5 nor a civil sexual harassment claim. When it announced that minors might consent to sexual intercourse in 2001, the *Tobias* majority set California civil and criminal law completely at odds. Either the California legislature or the California Supreme Court can respond and ameliorate this resulting situation. However, ten years later, neither has moved to do so. As the precedent grows, scholars will find it less plausible to attribute the resulting conflicts between civil and criminal law to continuing confusion or misunderstanding.<sup>177</sup>

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<sup>176</sup> A jury acquitted O.J. Simpson of charges for the murder of his ex-wife, Nicole Brown Simpson, and her friend Ronald Goldman. Following a civil trial for wrongful death and survival statute damages, the jury found Simpson liable by a preponderance of the evidence. *See Rufo v. Simpson*, 103 Cal. Rptr. 2d 494, 497 (Ct. App. 2001) (affirming judgments in wrongful death and survival case brought by family members of Nicole Brown Simpson and Ronald Goldman against O.J. Simpson). This case highlights how differing criminal and civil law burdens can lead to seemingly contradictory results.

<sup>177</sup> For a fuller discussion of this issue regarding the age of consent, see

### 3. Teenagers on “Trial”

The *Starbucks* case settled shortly before trial.<sup>178</sup> However, had it not settled, Doe would have faced a trial of her maturity and “consent” under the “unwelcomeness” standard of the California FEPS. As a minor plaintiff, *she* would have been essentially “on trial” despite the fact that her adult consort was prosecuted under the applicable state sex crime law.

How can one predict such a dire outcome in *Starbucks*? Compare *Doe* with *Roe v. Orangeburg County School District*.<sup>179</sup> In that case, a sixteen-year-old mentally handicapped student allegedly sexually assaulted a fourteen-year-old girl after the coach left them alone in the school gym. The plaintiff, through her parents—since juveniles do not have capacity to sue in court—sued the school district and the coach.<sup>180</sup> The *Orangeburg* court relied on *Barnes v. Barnes*,<sup>181</sup> a challenge to the Indiana Rape Shield Statute.<sup>182</sup> The *Orangeburg* court ruled to admit evidence of Doe’s “consent” and, quoting *Barnes*, reasoned:

Unlike the victim in a criminal case, the plaintiff in a civil damage action is “on trial” in the sense that he or she is an actual party seeking affirmative relief from another party. Such plaintiff is a voluntary participant, with strong financial incentive to shape the evidence that determines the outcome. It is antithetical to principles of fair trial that one party may seek recovery from another based on evidence it selects while precluding opposing relevant evidence on grounds of prejudice.<sup>183</sup>

This passage highlights the court’s focus on fairness. The court ignored, however, that prejudice regularly justifies the exclusion

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Drobac, *supra* note 1.

<sup>178</sup> E-mail from Lisa Bredahl, Court Clerk, to author (Aug. 24, 2010) (on file with author).

<sup>179</sup> *Doe ex rel. Roe v. Orangeburg Cnty. Sch. Dist.*, 518 S.E.2d 259 (S.C. 1999).

<sup>180</sup> *Id.* at 259.

<sup>181</sup> *Barnes v. Barnes*, 603 N.E.2d 1337 (Ind. 1992).

<sup>182</sup> *Id.* at 1342.

<sup>183</sup> *Orangeburg*, 518 S.E.2d at 261 (quoting *Barnes*, 603 N.E.2d at 1342).

of probative evidence.<sup>184</sup> Additionally, the court missed the point of exclusion. The main reason for excluding the consent was not the prejudice potentially created, but the minor's incapacity that rendered the consent legally invalid. Moreover, it was not the minor who sued in this case but her adult guardian. This court did not even hesitate to put the consenting minor "on trial."

No matter what might have resulted had the Starbucks case gone to trial, other teenagers (and their prosecuting parents) should anticipate that defense lawyers will find the *Starbucks* summary judgment opinion and use it to defend sexual harassment and other civil rights and tort cases across the nation. Judges are already using this recent precedent outside of the employment context. For example, a new California Title IX case foreshadows future issues for teenagers in every jurisdiction. Title IX of the Education Amendments of 1972 prohibits discrimination in educational institutions.<sup>185</sup> In *Doe v. Willits Unified School District*,<sup>186</sup> the magistrate judge ruled on a defense motion regarding discovery of the fifteen-year-old student's sexual history, sexual conduct with her thirty-eight-year-old teacher, and her "consent." Following a sexual liaison with her teacher, Clint Smith, Doe had alleged a Title IX claim and various tort claims against him, the school district, and her principal. During Doe's deposition, suspended because of discovery conflicts, defense counsel pursued questions concerning Doe's sexual history and other topics. The court denied discovery regarding Doe's sexual history<sup>187</sup> but granted limited discovery regarding whether she "consented" to or "welcomed" Smith's sexual overtures.

In making its ruling, the *Willits* court acknowledged that other circuits had explored whether the "unwelcomeness requirement" is appropriately part of a *prima facie* case

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<sup>184</sup> See FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.").

<sup>185</sup> 20 U.S.C. § 1681 (2006).

<sup>186</sup> *Doe v. Willits Unified Sch. Dist.*, No. C-09-03655-JSW (DMR), 2010 WL 2524587, at \*1 (N.D. Cal. June 23, 2010).

<sup>187</sup> *Id.* at \*3 (discussing FED. R. EVID. 412, which protects against admission of evidence regarding a plaintiff's sexual history).

involving the sexual harassment of a minor at school. The court found:

[C]ases outside the Ninth Circuit specifically have considered whether consent is an element of a Title IX case. Each of these cases has held that consent is *not* part of the cause of action. . . . The common theme of *Mary M.* and *Chancellor* is that consent or welcomeness should not be conflated with capacity to consent, and that where capacity is absent, any evidence of consent or welcomeness is irrelevant as a matter of law.<sup>188</sup>

This analysis confirms that the court well understood the complexity of the issue. Here, we see the distinction between “voluntary and willing participation” noted in *Chancellor*, and capacity to consent, which can produce true, legally significant consent. In this *Willits* passage, the court seemed inclined to adopt the reasoning of sister courts regarding capacity to consent and adolescent “consent” to sex with an adult teacher.

In footnote four following this passage, however, the *Willits* court explained that “California case law is unsettled on this point [regarding the relevance of ‘consent’].”<sup>189</sup> The court cited both *Tobias* and *Donaldson*. The court then ruled on the discovery of *Willits Doe’s* “consent”:

To the extent that cases squarely have addressed the question of whether “consent” or “welcomeness” is an element of a Title IX claim, the answer has been a resolute “no.” However, because the law in this circuit is unsettled, and because this Court does not wish to prematurely define the

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<sup>188</sup> *Id.* at \*4 (citations omitted). The court cited the Seventh Circuit’s reasoning that a “thirteen-year-old student could not ‘welcome’ advances of twenty-one-year-old school employee; if ‘children cannot be said to consent to sex in a criminal context, they similarly cannot be said to welcome it in a civil context. To find otherwise would be incongruous.’” It also cited the Eastern District of Pennsylvania’s holding that “notwithstanding [a] high school senior’s voluntary and willing participation in sexual relations with a teacher, the student cannot ‘welcome’ the teacher’s sexual advances if she lacks the capacity to consent.” *Id.* at \*4 (quoting *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220 (7th Cir. 1997); *Chancellor v. Pottsgrove Sch. Dist.*, 501 F. Supp. 2d 695 (E.D. Pa. 2007)).

<sup>189</sup> *Id.* at \*4 n.4.

elements of the causes of action in this case (a question more properly addressed by the trial judge), this Court will allow limited questions on the issue of whether plaintiff welcomed or consented to her sexual encounters with Smith.<sup>190</sup>

This compromise and the footnote acknowledgement of the *Tobias* dicta, later adopted in *Donaldson*, virtually guaranteed that *Willits* Doe would face humiliating and perhaps traumatizing questions by defense counsel at her deposition's resumption.

In order to discredit Doe, defense counsel would have focused on whether Doe set limits with her thirty-eight-year-old teacher or welcomed his sexual overtures. If she failed to rebuff his advances or even encouraged them, defense counsel might have cast her as more "responsible." She might have appeared, to those reading her deposition testimony, as more capable and legally accountable than one who resisted sexual advances by a teacher. Counsel could have posed deposition questions to portray Doe as more blameworthy if she "voluntarily" engaged in sexual conduct with her teacher. Ignoring the impact on *Willits* Doe, one can anticipate the chilling effects of this case on other teenagers who might report inappropriate sexual advances by teachers and on their parents who might consider prosecuting such cases on behalf of their teenagers.

With the exception of *Oberweis Dairy*, these decisions arguably assume that the teenaged plaintiffs are fully "capable of appreciating the nature, extent or probable consequences of the conduct" and conforming their behavior in an adult-like fashion to meet the demands of a particular situation. They beg the question, however, of whether teenagers *really do* think and function like adults. An understanding of adolescent development informs any evaluation of whether teenagers are capable of making wise choices concerning sexual activity. Simply put, do teenagers have the capacity to opt for and cope with the repercussions of sex with a work supervisor such as Tim Horton, a teacher such as Clint Smith, a brother-in-law such as Robert Donaldson, or a Bee Line bus driver?

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<sup>190</sup> *Id.* at \*5.

## IV. CIVIL LAW'S TREATMENT OF "CONSENT"

The neuroscience and psychosocial studies regarding adolescent development continue to influence our perceptions of adolescents as legal actors. Society can expect to hear impressive new revelations in the coming years. Our teenagers cannot wait, however, if waiting means a continuation of the legal status quo. Even if we cannot draw clear causal connections between neuroscience and behavior, we can evaluate whether the law is at least congruent with what we know about adolescent development. This Article suggests it is not and that, as a society, we can do better for our teenagers. The question remains: how do we adapt the law regarding adolescent consent to match their developmental capabilities and needs—at least until we know more?

*A. Create a National "Age of Consent"*

One proposal for dealing with adolescent "consent" involves nationally synchronizing the "age of consent" with the age of majority at eighteen.<sup>191</sup> We might deny juvenile legal capacity until eighteen, even though we may agree that some minors demonstrate sufficient maturity to constitute legal capacity before that age. Several reasons support this move. First, it is more efficient to draw a bright line in a logical place. While we might disagree about where to draw the line, (at 16, 18, or 21), few will dispute that rules are easier to enforce than maturity evaluations are to conduct.

Second, anything but a consistent bright line might lead to a maturity evaluation which puts a minor "on trial." Anticipation of such a trial might cause many minors not to complain later about coercive and exploitative conduct to which they "consented" initially. Third, who knows how to do an effective

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<sup>191</sup> All states but four set the age of majority at eighteen. In Alabama and Nebraska, persons reach their majority at nineteen. In Pennsylvania and Mississippi, the age is twenty-one. Heather Boonstra & Elizabeth Nash, *Minors and the Right To Consent to Health Care*, GUTTMACHER REP. PUB. POL'Y, Aug. 2000, at 4, 7, available at <http://www.guttmacher.org/pubs/tgr/03/4/gr030404.pdf>.

maturity evaluation? No such fool-proof test exists or every department of motor vehicles might use it before issuing a driver's license to a teenager. As noted above, *Graham* confirmed that psychological evaluations to link behavior and maturity may not produce robust results. Additionally, who can say that a minor who is mature on the test date was mature on the day she "consented"?

Fourth, many adults would rather err on the side of protecting all of our teenagers, even the relatively mature ones, than risk traumatizing or sacrificing the immature ones. The point of the law is to protect those persons who need the protection the most, not to sacrifice those youth because we are concerned about protecting a few who do not really need protection. However, a rule that eighteen marks the beginning of adulthood, such as most states have adopted, makes little sense given the neuroscience of late adolescent development. According to Dr. Ruben Gur, neuropsychologist and Director of the Brain Behavior Laboratory at the University of Pennsylvania:

The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable. Therefore, a presumption arises that someone under 20 should be considered to have an underdeveloped brain. Additionally, since brain development in the relevant areas goes in phases that vary in rate and is usually not complete before the early to mid-20s, there is no way to state with any scientific reliability that an individual 17-year-old has a fully matured brain . . . . Indeed, age 21 or 22 would be closer to the "biological" age of maturity.<sup>192</sup>

This passage highlights that bright line rules sometimes fail to track scientific advances.

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<sup>192</sup> Declaration of Ruben C. Gur, Ph.D. at 15, *Patterson v. Texas*, 528 U.S. 826 (1999) (No. 98-8907), available at [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_juvjus\\_Gur\\_affidavit.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Gur_affidavit.authcheckdam.pdf).

Therefore, I join opponents of bright line demarcations for the reservation of most rights because our children need maturing experiences. By setting the “age of consent” at a particular age, we deny younger teenagers many of the experiences that will lead to their neurological and psychosocial development. We also deny them important rights to which they are entitled and which they may need, such as the right to procreate, or not. If we infantilize them until they are eighteen, we may harm the very teenagers we would hope to protect.

*B. Eliminate the “Age of Consent”*

While one might craft a variety of solutions to address the concern that adolescent “consent” is different from adult consent, some responses seem patently irrational. The *Tobias* dicta which eliminates the age of consent in the context of civil liability creates more problems than it solves and appears inconsistent with what we know from the expert scientists regarding adolescent development and psychosocial maturity. This chapter’s brief review of conflicting laws and United States Supreme Court acceptance of the developmental differences between adults and teenagers suggests that the elimination of the “age of the consent” places teenagers at risk— of sexual predation, at least.

*C. Create New Multifactor Standards For Legal Consent*

Another approach involves a tripartite or multifaceted scheme.<sup>193</sup> Society might use particular age requirements in certain contexts or for particular privileges, such as smoking or gaming, as the law does now. Where juveniles have less familiarity with the activity, where power imbalances exist, and where more serious consequences (than, for example, a financial loss on a lottery ticket) might result for a teenager, the law might set a higher age requirement tied to an objective criterion. Professor R. George Wright notes that a focus on the age of

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<sup>193</sup> I thank Professor R. George Wright for exploring this approach with me.

consent might simply be a distraction.<sup>194</sup> He suggests that where no discernible disparity in power or subtle coercion complicates a relationship or situation, we might eliminate age requirements.<sup>195</sup>

The risk of mandated maturity evaluations still poses a problem under this tripartite approach. As the Doe cases demonstrate, when jurists set fixed age barriers, judges make exceptions, sometimes to remain consistent with other legal doctrines. As noted, science does not yet provide definitive, comprehensive guidance on any given adolescent's maturity, and evaluator bias can skew results of psychosocial evaluations. I worry that law makers will eliminate age of consent requirements to the detriment of youth, as I argue was done in *Tobias*. However, I agree that liability for Romeo and Juliet (or Romeo and Romeo) makes no sense and have suggested as much previously.<sup>196</sup>

Not all adolescent "consent" requires formal legal analysis. When a six-year-old steals a kiss from a classmate, the child needs adult supervision and age-appropriate parenting guidance, not legal intervention.<sup>197</sup> Arguably, Romeo and Juliet need similar and age-appropriate adult supervision and parenting guidance. By relying on responsible parenting and other informal strategies (such as peer counseling, mentoring by qualified youth leaders, teachers, and coaches), one can sidestep formal legal intervention to avoid the misplaced application of law regarding the "age of consent." The wholesale elimination of these rules does more harm than good, however. In New York and across the nation, legal reform must remedy haphazard and misguided treatment of adolescent "consent" when power imbalances, adult-teen sexual predation, and more serious forms

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<sup>194</sup> See E-mail from Professor R. George Wright, Ind. Sch. of Law-Indianapolis, to author (Apr. 30, 2010) (on file with author).

<sup>195</sup> *Id.*

<sup>196</sup> See Drobac, *supra* note 80, at 543 n.373.

<sup>197</sup> See, e.g., Adam Nossiter, *Six Year Old's Sex Crime: Innocent Peck on the Cheek*, N.Y. TIMES (Sept. 27, 1996), <http://www.nytimes.com/1996/09/27/us/6-year-old-s-sex-crime-innocent-peck-on-cheek.html?pagewanted=all&src=pm> (reporting on a six-year-old boy who was charged with sexual harassment for kissing a classmate on the cheek).

of youth exploitation put adolescents at risk of injury and trauma.

*D. Legal Assent*

Rather than eliminate default guidance or attempt to implement myriad separate rules for the regulation of adolescent activities and “consent,” society might give adolescent “consent” legal significance when it is in a minor’s best interests to do so. To that end, I recommend a concept I call *legal assent*. Unlike medical assent, it requires no associated parental consent or permission. Unlike legal consent, it carries no associated threshold level of legal capacity. Similar to consent by a minor under contract law, legal assent is voidable by the minor.

However, legal assent operates somewhat differently from traditional, voidable contract consent by a minor. If a minor gives legal assent, that “consent” is legally binding unless the minor voids her assent during her minority, or during a reasonable time thereafter. Parents cannot void a minor’s assent for her. If she successfully voids her assent, a court cannot even admit it into evidence or permit discovery on the matter. A criminal prosecutor might still prosecute an adult who has sex with an assenting minor, however, because the legal assent operates only for the benefit of the *minor*. Voters, legislators, and district attorneys might still act in *society’s* best interests. Additionally, parents still would have the authority to discipline their children—even in the context of an assent of which the parents disapproved.

Consider an example. Suppose a minor, Doe, assents to sex with her teacher. The district attorney can prosecute him for statutory rape or, in California, unlawful sex with a minor. A successful case results in a vindication for a society that does not want its teachers having sex with students. If Doe reaffirms her assent, there is no parallel civil case; the legal controversy ends. Certainly, Doe’s parents can act domestically to comfort, guide, or discipline their daughter, as they see fit.

If, on the other hand, Doe determines that she was duped, coerced, or made a mistake in assenting, she can void her legal assent and bring (through her guardian) a sexual harassment or

tort claim against her teacher to recover for her injuries. Arguably, sexual intercourse with an adult (teacher, supervisor, or bus driver) is not in her best interests. The court will affirm her revocation, deny any discovery, and exclude admission of evidence (at any phase of trial) regarding Doe's assent if the adult raises it as a civil defense in a Title IX or tort case. Society allows Doe to void her assent and hopes that teachers will take warning and stay away from teenaged girls and boys. Criminal sanctions for adults clearly suggest that sexual activities with an adult are not in a minor's best interests.

Thus, Doe makes the first and second choices: whether to assent and whether to void her assent. Society permits her the second choice to protect her from the bad choices we anticipate she might make *and to facilitate her own correction of her mistake*. If an adult (such as Smith, Horton, Donaldson, or the Bee Line driver) challenges the abrogation, the court evaluation focuses not on the moral purity or maturity of the minor but upon whether the *original* assent was in her best interests. The evaluation focuses on the circumstances, not on the individual minor.

Under this approach, all our Does, including South Carolina's *Orangeburg* Doe, could have voided their assent. The *Orangeburg* court could not have allowed evidence of Doe's assent at a subsequent civil trial unless it first determined that it was in fourteen-year-old Doe's best interests to assent to sex with her sixteen-year-old classmate while the coach was gone. Absent that determination, the court would have had to validate Doe's abrogation of assent and allowed Roe to pursue the case without the prejudice of Doe's proffered "consent." Similarly, in order to admit evidence of adolescent "consent," a California court would have had to find that it was in Doe's best interests to have sex with Donaldson, her older brother-in-law. An Illinois court would have had to conclude that it served Doe's best interests to engage in sex with Nayman, the shift supervisor who was also seducing other teenaged workers. Aside from use in a "best interests" determination, this doctrine of legal assent would otherwise bar evidence of "consent" as too prejudicial and not sufficiently probative that an individual teenager necessarily understood the nature and consequences of the conduct at issue.

This theory of legal assent and its proposed use in sexual harassment or civil tort sex cases is consistent with what we know about adolescent development; teenagers need maturing experiences and the opportunity to practice their skills. They may not have the capacity to make every decision, but this approach permits teenagers to make some and avoid those that they later believe were unwise, foolish, or mistaken.<sup>198</sup>

## V. CONCLUSIONS

The existing conflicts between criminal and civil law treatment of adolescent “consent” leave teenagers vulnerable, especially to sexual predators. Court conflation of acquiescence, consent, and capacity highlights the need for legal reform and intervention. The new neuroscience evidence and studies concerning adolescent cognitive and psychosocial development confirm that adolescents are not the physical or functional equivalents of adults. Scientific studies that demonstrate that teenagers are developing capacity support the call for legal reform. Until we can assess adolescent maturity and capacity accurately, we need a way to protect teenagers while affording them some measure of legal autonomy and maturing experiences.

An approach that credits *legal assent* by adolescents empowers teenagers to take responsibility for their choices. It also permits them to recover from poor choices by voiding their assent within a reasonable period of time.<sup>199</sup> By showing how our criminal and civil laws conflict and fail to protect our maturing teenagers adequately, this Article has justified a response that includes the recognition and implementation of legal assent.

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<sup>198</sup> Legal assent makes sense for contexts in addition to those involving adolescent consent to sexual activity with an adult. Such situations are beyond the scope of this chapter, however, and will be explored in future academic papers. See, e.g., Drobac, *supra* note 1.

<sup>199</sup> I would advocate an appropriate limitations period for suit and recovery. See Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 782–83 (2000) (noting the tolling of the reporting time limitation under some statutory rape statutes until the victim reaches her majority).

Arguably, we must model the behavior that we wish to see from our older children. Therefore, we should reconsider our past legal decisions and implement a system, which corrects for obvious errors and inconsistencies, and which challenges, nurtures, and protects teenagers. Such a system includes the recognition of legal assent. Having explored a *Bee Line* in the wrong direction, this Article recommends a new path of reform and innovation, one congruent with the scientific evidence of adolescent development.