

# "Children Are Not Miniature Adults"

Representing Youth Accused of Sexual Offenses



Presented by: Monica Maio & Marina Peña, Utah Juvenile Defender Attorneys

# Roadmap

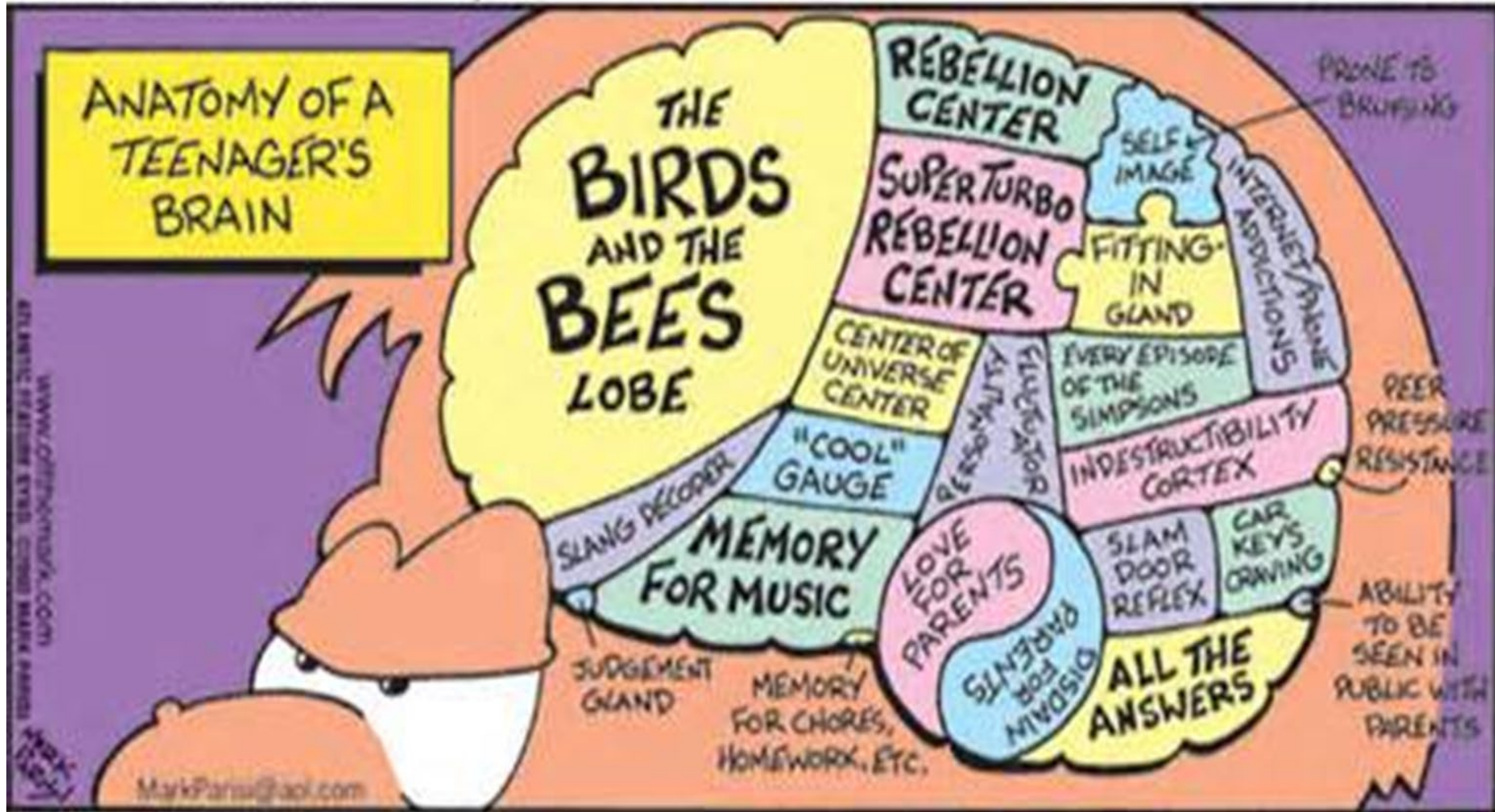
- Adolescent Brain Development
- Sexual Behavior in Children
- United State Supreme Court Cases Related to Adolescent Brain Development
- Utah Case Law
- Legislative Changes

# ADOLESCENT BRAIN DEVELOPMENT

off the mark

by Mark Parisi

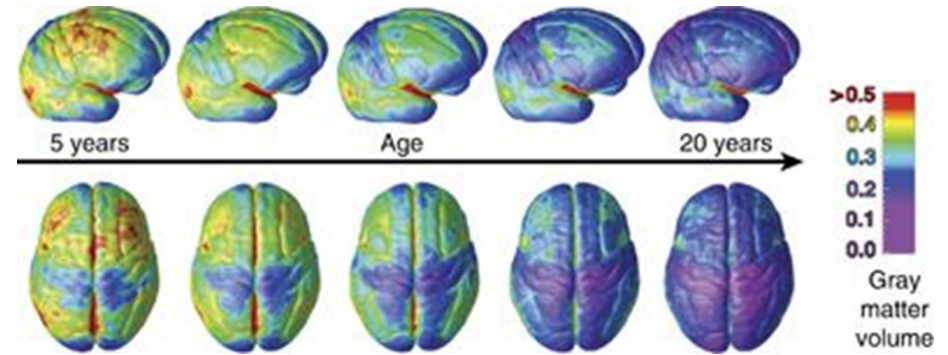
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As a society we enact laws to protect juveniles from their own immaturity and impulsivity:

- The legal age to consume alcohol is 21
- The legal age to smoke tobacco is 21
- The legal age to marry is 18
- The legal age to cast a ballot is 18
- The legal age to join the military is 18
- The legal age to get a tattoo is 18
- The legal age to enter into a contract is 18

# Brain Development



Gogtay et al., 2004

- Prefrontal Cortex
  - One of the last areas of the brain to develop
  - Does not fully develop until mid-20's
  - Responsible for:
    - Judgment, reasoning, problem solving, and rational decision making
    - Logic and understanding of consequences
    - Organizing thoughts and planning for the future
- Amygdala
  - Adolescents are more likely to rely on their amygdala (emotions) than their prefrontal cortex (reasoning) for information processing

# Brain Development Cont.

- Based on the stage of their brain development, not their age, adolescents are more likely to:
  - act on impulse
  - misread or misinterpret social cues and emotions
  - be reckless and get into accidents
  - be aggressive and get involved in fights
  - engage in dangerous or risky behavior
  - easily submit to peer pressure
- Adolescents are less likely to:
  - think before they act
  - consider the consequences of their actions
  - change their dangerous behaviors

# Sexual Behavior in Children

# Sexual Behavior Among Children Is Common

- More than 50% of children will engage in some type of sexual behavior (normative) with another child before age 13 (Larsson, 2002; American Academy of Pediatrics, 2009)
- In one study, 339 child welfare and mental health professionals were asked about their own sexual experiences before age 13 (Johnson, 2007)
  - 73% recalled engaging in sexual behaviors with other children
  - 34% recalled showing their genitals to another child
  - 16% recalled simulating intercourse with another child
  - 5% recalled inserting an object in the vagina or rectum of another child



# Normative Sexual Behavior

- Childhood sexual exploration in the form of play is natural and healthy, and involves behaviors that are:
  - exploratory
  - spontaneously and occasionally
  - not the sole focus of their play
  - involve children who are willing to engage in or are generally light hearted and playful
  - consensual/agreed upon (that is, no child is objecting to the behavior)
  - between children of same gender or between siblings
  - not accompanied by strong uncomfortable feelings, such as anger, shame, fear, or anxiety
  - not coercive
  - stopped with appropriate caregiver intervention when the child receives nurturing instructions to stop the behaviors

(Chaffin et al., 2006; Silovsky & Bonner, 2003; Silovsky & Swisher, 2008; Lamb & Coakley, 1993; Rutter, 1971)

# Non-normative Sexual Behavior

- Sexual behaviors are problematic if they:
  - occur frequently or more frequently than expected
  - take place between children with an age gap of 3 or more years
  - occur between children of different capacity (i.e. disparate physical size and strength or intellectual abilities or a position of authority)
  - are associated with strong, upset feelings, such as anger, anxiety or fear
  - causes harm or potential harm (physical or emotional) to any child
  - do not respond to typical parenting strategies (such as, instruction and supervision), and
  - involve coercion, force, or aggression, or threats thereof, of any kind

# Factors that Affect Frequency and Types of Sexual Behaviors

- developmental level
- child care environments (children in child care exhibit more behaviors)
- family sexuality and attitude towards nudity
- exposure to sexual acts or materials
- extent of supervision
- environmental stressors in the home (domestic violence, instability, etc.)
- parental absence
- sexual abuse

(Johnson, 2007)

# Labeling Theory

- Research shows that individuals who engage in sexually behavior as children or adolescents can and do grow up to be successful, fully functional and happy individuals.
- Children do not need punitive and shaming labels that follow them into adulthood and interfere with that ability to be happy and successful.

# The United State Supreme Court's Take on Adolescent Brain Development

- Johnson v. Texas, 509 U.S. 350 (1993)
- Roper v. Simmons, 543 U.S. 551 (2005)
- Graham v. Florida, 560 U.S. 48 (2010)
- J.D.B. v. North Carolina, 564 U.S. 261 (2011)
- Miller v. Alabama, 567 U.S. 460 (2012)



Johnson v. Texas, 509 U.S. 350  
(1993)

“The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.”

## Roper v. Simmons, 543 U.S. 551 (2005)

“The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”

# Graham v. Florida, 560 U.S. 48 (2010)

“[D]evelopments 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.

Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults.”



# J.D.B. v. North Carolina, 564 U.S. 261 (2011).

“We have observed that children generally are less mature and responsible than adults, that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them, that they are more vulnerable or susceptible to outside pressures than adults.”

- In J.D.B., the Supreme Court held that a child suspect’s age was relevant to determining when and whether the child was in custody and therefore entitled to a Miranda admonition. The Court further noted that other legal questions of liability routinely take account of age.

## Miller v. Alabama, 567 U.S. 460 (2012)

“We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child’s moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed.”

# Common Issues In Juvenile Sex Cases

- Challenging intent to arouse or sexually gratify.
- What to do when both children are under the age of consent.
- Challenging strict liability statutes.

# Challenging Sexual Intent

- The juvenile must act “with the intent to arouse or gratify the sexual desire of any individual”
- Utah Code § 76-5:
  - Section 401.1                      Sexual abuse of a minor.
  - Section 404                        Forcible sexual abuse.
  - Section 404.1                      Sexual abuse of a child --  
Aggravated sexual abuse of a child.

# Sexual Intent

- Intent is “rarely susceptible of direct proof and . . . therefore the prosecution usually must rely on a combination of direct and circumstantial evidence to establish this element.” State v. Whitaker, 2016 UT App 104, ¶ 9, 374 P.3d 56.
- Proof of the physical act or touch does not amount “to prima facie evidence of an intent to do so for the purpose of arousing or gratifying sexual desire.” Whitaker, 2016 UT App at ¶17. Rather, “[w]here a specific intent is an element of a crime, the specific intent must be proven as an independent fact and cannot be presumed from the commission of the unlawful act.” State v. Steed, 2014 UT 16, ¶ 22, 325 P.3d 87.

# In re G.D.B., 2019 UT App 29, 40 P.3d 706

- 11-year-old client accused of touching 6-year-old niece
- Charged with Sexual Abuse of a Child, a second degree felony if committed by an adult
- Utah Code § 76-5-404.1 (2)
  - “A person commits sexual abuse of a child if . . . the actor touches the anus, buttocks, or genitalia of an child, the breast of a female child, or otherwise takes indecent liberties with a child . . . with the intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of the participant.”
- Only evidence against G.D.B. was the child-victim’s account that G.D.B. had touched her “privates” over her clothes

## In re G.D.B. (cont.)

- Is this enough to show a specific intent to sexually gratify?
  - In Utah, yes, but the Utah Court of Appeals has indicated it is willing to revisit this issue given the national trend.

“We note, as G.D.B. acknowledged at oral argument, that G.D.B. did not argue below and has not asserted in his briefs on appeal that we should overturn, modify, or otherwise revisit In re D.M., 2013 UT App 220. We recognize that arguments to do so may exist in light of recent decisions such as J.D.B. v. North Carolina, 564 U.S. 261 (2011), which held that a minor’s age must be considered in determining custody status and entitlement to a Miranda admonition. But such issues are not squarely before us here.”

# Case Law in Other Jurisdictions

- In re Davontay A., 2013 IL App (2d) 120347, ¶ 19, 3 N.E.3d 871 (agreeing with Respondent’s assertion that “while a fact finder may infer that an adult offender intended sexual gratification or arousal” from act of exposing genitals and masturbating, “such an inference is not reasonable when the accused is a child.”)
- In re S.A.A., 795 S.E.2d 602, 605 (N.C.App. 2016) (concluding that “intent to arouse or gratify sexual desires may not be inferred in children under the same standard used to infer sexual purpose to adults.”)



- In re K.C., 742 S.E.2d 239, 244 (N.C. App. 2013) (“[Sexual] purpose does not exist without some evidence of the child’s maturity, intent, experience, or other factor indicating his purpose in acting. Otherwise, sexual ambitions must not be assigned to a child’s actions. The element of purpose may not be inferred solely from the act itself. . . The mere act of touching is not enough to show purpose.”)
- In re Jerry M., 59 Cal.App. 4th 289, 299 (1997) (reversing 11-year-old boy’s adjudication for sexual abuse of a child based on insufficient evidence that a child his age was capable of forming sexual intent and concluding that age is a relevant factor in determining sexual intent and that “the younger the minor the less likely his acts are with the specific intent of sexual arousal.”)

# Beware of Burden Shifting

- State v. Whitaker: Only evidence presented was victim's testimony that defendant grabbed her hand and placed it palm side up on his penis. This was insufficient evidence to prove intent to arouse or sexually gratify beyond a reasonable doubt. More specifically, the court said it would be unconstitutional burden shifting in violation of the Due Process Clause because it essentially allowed an inference of intent if the State could establish some type of sexual touching occurred.

# Due Process Clause

- The Due Process Clause of the Fourteenth Amendment “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364. “This bedrock, axiomatic and elementary constitutional principle prohibits the State from using evidentiary presumptions ... that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime.” Francis v. Franklin, 471 U.S. 307, 313 (brackets, citation, and internal quotation marks omitted); see also State v. Whitaker, 2016 UT App 104, ¶ 17.

# Children under age of consent

- In re Z.C., 2007 UT 54,165 P.3d 1206
  - 13-year-old girl and 12-year-old boy engaged in sexual intercourse that led to a pregnancy.
  - Police became involved and State charged both of them with sexual abuse of a child. The juvenile court adjudicated Z.C.
  - Utah Supreme Court reversed, holding that interpreting the statute in that manner produced an absurd result.
  - The legislature did not intend to treat both children as perpetrators.
  - The statute presupposes that there is a victim, which the statute protects, and a perpetrator, which the statute punishes.

# Strict Liability

- In re T.S., 2015 UT App 307, 365 P.3d 1221
  - Client was 15-year-old boy who otherwise had no juvenile history.
  - Victim was client's 13-year-old girlfriend.
  - Client had not been sexually active. Girlfriend was sexually active.
  - T.S. walked to girlfriend's house. The parents knew T.S. and knew that he was girlfriend's partner.
  - Once there, she and T.S. went to a trailer on her parents' property.
  - After assuring T.S. that she had had sexual intercourse before, she and T.S. engaged in consensual sex.
  - Father of girlfriend later found her journal where she detailed the sexual encounter.
  - Police became involved and T.S. was charged with Rape of a Child, a First Degree Felony if committed by an adult.

## In re T.S. (cont.)

- We argued that, given adolescent brain development scientific research, the strict liability nature of the rape of a child statute violated T.S.'s due process right to fundamental fairness.
- Court of Appeals upheld his conviction, but the case did lead to changes in the law.
- T.S. is now registerable as a sex offender in approximately 38 other jurisdictions.

# Statutory Changes

# Utah Code §76-5-401.3

## Unlawful Adolescent Sexual Activity

- Adolescent” means a person in the transitional phase of human physical and psychological growth and development between childhood and adulthood who is 12 years of age or older, but under 18 years of age
- Juvenile engages in “consensual” sexual activity



Degree of Offense	Age	Age
3 <sup>rd</sup> degree of felony	18 y/o or older	14 or 15 y/o
<i>Class B misdemeanor</i>	<i>If defendant can prove less than four years older at time of sex act</i>	
3 <sup>rd</sup> degree felony	17 y/o	12 or 13 y/o
3 <sup>rd</sup> degree felony	16 y/o	12 y/o
Class A misdemeanor	16 y/o	13 y/o
Class A misdemeanor	14 or 15 y/o	12 y/o
Class B misdemeanor	17 y/o	14 y/o
Class B misdemeanor	15 y/o	13 y/o
Class C misdemeanor	12 or 13 y/o	12 or 13 y/o
Class C misdemeanor	14 y/o	13 y/o

# Contact Information

- Monica Maio
  - Managing Appellate Attorney, Utah Juvenile Defender Attorneys
  - [mmaio@ujda.org](mailto:mmαιο@ujda.org)
- Marina Peña
  - Appellate Attorney, Utah Juvenile Defenders Attorneys
  - [mpena@ujda.org](mailto:mpena@ujda.org)