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Save the Children: The Legal Abandonment of American Youth in the Workplace

Seymour Moskowitz

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SAVE THE CHILDREN: THE LEGAL ABANDONMENT OF AMERICAN YOUTH IN THE WORKPLACE

*Seymour Moskowitz**

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I. INTRODUCTION

“[I]f there is any matter upon which civilized countries have agreed . . . it is the evil of premature and excessive child labor.”¹

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The “evil” referred to by Justice Oliver Wendell Holmes, Jr. in his famous 1918 dissent was the effect of child labor upon minors, their families, and society in general.² In the late-nineteenth and early-twentieth centuries, agricultural and industrial production in the United States included masses of children working forty or more hours per week in mines, mills, factories, and on farms.³ A powerful American movement arose to end child labor, led by famous progressive reformers like Jacob Riis, Jane Addams, and Florence Kelley, aided by attorney and later Supreme Court Justice Louis Brandeis.⁴ After an extraordinary crusade spanning more than three-quarters of a century, Congress passed and the Supreme Court upheld, the Fair Labor Standards Act (FLSA) that included restrictions on child labor. This long-sought legislative prize was won only after repeated Supreme Court invalidations of federal and state statutes designed to limit or outlaw child labor and an unsuccessful campaign to pass a constitutional amendment on the topic.

The FLSA was enacted more than seventy years ago. Today, the mention of “child labor” brings forth nostalgic recollection of a distant struggle and the self-satisfied perception that, at least here in the United States, we have abolished this ancient evil. Tragically, this perception is only half true. With the exception of agriculture workers, minors under age 14 are in school and not engaged in paid work. Between three and five million adolescents, however, work after school; these numbers include several hundred thousand minors employed in agriculture.⁵ The United States has the highest percentage of working children of any developed nation; many children even work long hours during the school week.⁶

Employment presents potential benefits for the adolescent, including income, valuable lessons about responsibility and finances, and transferrable job skills. However, children’s work in the United

2010, for invaluable research assistance. Special thanks to Melissa Mundt for wordprocessing numerous drafts of this article.

1. *Hammer v. Dagenhart*, 247 U.S. 251, 280 (1918) (Holmes, J., dissenting).

2. I use the term “child labor” in this article to describe paid employment in the United States by persons under 18 years of age. At various points I use the terms “youth workers” or “young workers” synonymously. Eighteen is the normal age of majority in the United States today. DOUGLAS ABRAMS & SARAH RAMSAY, *CHILDREN AND THE LAW* 811 (2007).

3. *See, e.g.*, JOSEPHINE GOLDMARK, *IMPATIENT CRUSADER* 5 (1953).

4. *Id.*

5. Bureau of Labor Statistics, *Projected Total Labor Force in Thousands*, <ftp://ftp.bls.gov/pub/special.requests/ep/labor.force/clfa0616.txt> (last visited Sept. 12, 2009) [hereinafter *Projected Labor Force*].

6. NATIONAL RESEARCH COUNCIL, INSTITUTE OF MEDICINE, *PROTECTING YOUTH AT WORK* 3–4 (1998) [hereinafter *PROTECTING YOUTH AT WORK*].

States—especially “high intensity” work, i.e., more than twenty hours per week⁷—poses substantial immediate and long-term academic, safety, and health risks for youth workers. Adolescents with jobs, especially those working twenty or more hours, have less academic success in high school,⁸ increased absences and drop-out rates, and lower grade-point averages than those who do not work or those who work fewer hours.⁹ They are more likely to drop out or be suspended from school, use cigarettes and other harmful substances, have more traffic accidents and teenage pregnancies, and experience a wide variety of other negative outcomes.¹⁰ These jobs tend to weaken the social controls exerted by school and family restraining deviant behavior.¹¹ Many teenagers are killed on the job and approximately 100,000 to 200,000 are injured annually.¹²

The federal Fair Labor Standards Act¹³ and state law govern child labor in the United States. The FLSA has not been significantly amended since its adoption in 1938. Many youth workers are not covered; penalties for violation of the act are extraordinarily lax.¹⁴ Unlike most federal civil rights statutes, the FLSA gives no private right of action.¹⁵ The most affected parties—aggrieved minor employees and their parents—are unable to sue. Enforcement is left entirely to administrative processes, and it is clear that the Department of Labor’s (DOL) enforcement activities—both adjudicatory and rulemaking—are inadequate.¹⁶ The vast majority of state child labor laws and enforcement are also woefully weak.¹⁷ Children are *de facto* left without protection in the workplace, with disastrous consequences.

7. PROTECTING YOUTH AT WORK, *supra* note 6.

8. *See generally* Herbert W. Marsh & Sabina Kleitman, *Consequences of Employment During High School: Character Building, Subversion of Academic Goals, or a Threshold?*, 42 AM. EDUC. RES. J. 331 (2005).

9. *See infra* notes 67-72 and accompanying text.

10. *See infra* notes 73-82 and accompanying text.

11. *See infra* notes 83-84 and accompanying text.

12. *See infra* notes 90-97 and accompanying text.

13. 29 U.S.C. § 203 (2008).

14. *Id.*

15. *See e.g.*, *Henderson v. Bear*, 968 P.2d 144 (Colo. App. 1988); *Breitwieser v. KMS Indust., Inc.*, 467 F.2d 1391 (5th Cir. 1972); *infra* notes 237-51 and accompanying text.

16. *See* CHILD LABOR COALITION, PROTECTING WORKING CHILDREN IN THE UNITED STATES THE GOVERNMENT’S STRIKING DECLINE IN CHILD LABOR ENFORCEMENT ACTIVITIES 1 (2006), available at <http://www.stopchildlabor.org/pressroom/CLC%20report%20Sept%202006.pdf>.

17. *See* Child Labor Coalition, 2004 Child Labor State Survey, <http://www.stopchildlabor.org/USchildlabor/> (last visited Apr. 23, 2009) A total of only 360 compliance officers were responsible for enforcing all state labor laws including child labor and

Youth workers are particularly vulnerable in agriculture. From its inception, the FLSA excluded farm workers.¹⁸ As part of the rural labor force, children were not protected by the statute. Several amendments to the federal statute provided limited coverage, but even children working in agriculture today receive dramatically less protection than those working in all other economic sectors. Hundreds of thousands of children do farm work,¹⁹ one of the most dangerous jobs for youths. Minor farm workers are legally permitted to work in more hazardous occupations and for longer periods of time than other minor workers.²⁰ No maximum hours restrictions apply to their labor.²¹ They work before and after school, perform arduous physical labor, and risk illness, exposure to pesticides, serious injury, and permanent disability.²² Of work-related deaths in employees under 18, 41 percent occurred in agriculture and a staggering 20 percent were child farm workers 13 years of age or younger.²³

In addition to these academic and non-academic risks of child labor in the United States, in an ironic aberration, teenagers are given remarkable legal independence in decision-making regarding work and school. In almost every other area of law, adolescents are protected from imprudent choices because of their developmental stage. Parents are entrusted with decision-making power on matters with long-term

only nineteen inspectors in all of the United States were responsible for investigating child labor compliance and violations exclusively. *Id.*

18. Fair Labor Standards Act, ch. 676, 52 Stat. 1060. (Section 13(a)(6) of the Act flatly exempted “any employee engaged in agriculture.”).

19. Celeste Corlett, *Impact of the 2000 Child Labor Treaty on United States Child Laborers*, 19 ARIZ. J. INT’L & COMP. LAW 713, 713 (2002) (finding approximately 800,000 to 1.5 million children from the ages of 5 to 15 work in harsh conditions in the United States’ agriculture industry).

20. 29 U.S.C. § 213(c)(1)(C) (2006). For example, there are no restrictions on how early in the day child farmworkers can start or how late they can finish. *See id.* In non-agricultural sectors children may not work before 7 a.m. or after 7 p.m. U.S. Dep’t. of Labor, What Hours Can Youth Work?, <http://www.youthrules.dol.gov/hours.htm> (last visited Apr. 4, 2009).

21. 29 U.S.C. § 213(c)(B) (2006). *See generally* LEE TUCKER, FINGERS TO THE BONE: UNITED STATES FAILURE TO PROTECT CHILD FARMWORKERS (2000).

22. TUCKER, *supra* note 21, at 2, 48.

23. UNITED STATES GENERAL ACCOUNTING OFFICE, CHILD LABOR: LABOR CAN STRENGTHEN ITS EFFORTS TO PROTECT CHILDREN WHO WORK 23 (2002), available at <http://www.gao.gov/new.items/d02880.pdf> [hereinafter 2002 GAO REPORT]. Janice Windau et al., *Profile of Work Injuries Incurred by Young Workers*, MONTHLY LAB. REV., June 1999, at 3, 5. During 1992–1997, approximately 40 percent of fatal injuries for youth workers occurred while they performed agricultural work. *Id.* Most of these deaths were related to transportation, e.g., tractor accidents. *Id.*

consequences.²⁴ School and work choices, however, are treated in a dramatically different, laissez-faire manner. Twenty-four states set 16 as the minimum age to leave school, and seven states set the age at 17.²⁵ Seventeen of these states allow 16- and 17-year-olds to withdraw from school without parental consent.²⁶ The federal government and twenty-nine states do not require work or age permits for youths under 17.²⁷ Especially in the case of older teenagers, our law provides little legal protection for parental control or input. A teenager in the United States may make long-term education and labor decisions independently, at a time she could not legally buy a bottle of beer or a pack of cigarettes.

Moreover, the FLSA is directed at problems that characterized child labor in the 1930s, not in contemporary America. Most child labor during and prior to the Great Depression resulted from children leaving school to permanently enter the full-time labor force. Only 50 percent of teenagers finished high school then,²⁸ and nearly a quarter of the United States population lived on farms.²⁹ Today, a high school diploma is the minimum entry ticket into our current economic society, and agriculture is dominated by large corporations. The modern trend toward part-time rather than full-time adolescent work began in the 1950s and has continued until today when more than 80 percent of high school students report that they have worked during the school year.³⁰

In family law, child neglect is typically defined as “harm or threatened harm to a child’s health or welfare . . . by placing a child at unreasonable risk or by failure . . . to intervene to eliminate that risk when that person is able to so do and has, or should have, knowledge of the risk.”³¹ Such statutes are typically used by state welfare authorities against parents charged with neglect of their child. However, the same

24. *Parham v. J.R.*, 442 U.S. 584, 603–04 (1979) (“Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.”). *See also infra* Part IV.A.

25. *See infra* Appendix A.

26. *Id.*

27. *Id.*

28. PROTECTING YOUTH AT WORK, *supra* note 6, at 147.

29. *Id.* at 21. *See generally* UNITED STATES GENERAL ACCOUNTING OFFICE, CHILD LABOR IN AGRICULTURE: CHANGES NEEDED TO BETTER PROTECT HEALTH AND EDUCATIONAL OPPORTUNITIES. REPORT TO CONGRESSIONAL REQUESTERS. ch. 3 (1998).

30. ALEXIS M. HERMAN, UNITED STATES DEPARTMENT OF LABOR, REPORT ON THE YOUTH LABOR FORCE 74 (2002). *See also* ELLEN GREENBERGER & LAURENCE D. STEINBERG, WHEN TEENAGERS WORK: THE PSYCHOLOGICAL AND SOCIAL COSTS OF ADOLESCENT EMPLOYMENT 11 (1986).

31. MICH. COMP. LAWS ANN. § 7.22.622(j) (West 2006).

concept may be applied to societal neglect of working children in the United States. For more than a century, the Supreme Court has endorsed the pre-existing common-law doctrine of “*parens patriae*”; i.e., “the supreme power of every state . . . for the prevention of injury to those who cannot protect themselves.”³² As this article will demonstrate, both federal and state governments are guilty of neglect of adolescents who are at risk in the workplace. We have failed in our collective responsibility to these working youth, resulting in death, injury, disease, and blighted futures.

What has produced this scandalous situation? In brief, profits and legal stasis. First, many employers find child workers financially attractive because they provide an immense pool of cheap and easily managed labor. Adolescents almost invariably work for minimum or sub-minimum wage and almost never receive health insurance or other fringe benefits. They accept irregular work schedules, are impossible to organize into trade unions, and can be replaced with minimal retraining or other costs. In addition, adolescents are an enormous market for sellers of goods and services. In 2004, projected adolescent spending totaled \$169 billion with fashion items, electronics, restaurants, and entertainment capturing most of this money.³³

These powerful economic factors are undergirded by legal paralysis. Federal and state laws governing this labor market have not been substantially revised in generations despite enormous increases in the number of children employed and changes in the jobs they perform. There is no organized political force advocating reform. Americans simply do not recognize the problems associated with contemporary child labor. We see this teenage workforce in our daily lives and consume the products and services they create, but we do not “see” the issue. American child labor is a mighty river flowing downhill without obstacle.

Part II of the Article sets out the basic facts regarding children in the contemporary American economy. These youths labor in a wide variety of work settings but are concentrated in the retail, restaurant, and service sectors. The existing protective statutes exclude large blocks of working children and provide few effective deterrents for violations. The results are as tragic as they are predictable. Working youths,

32. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 US 1, 57 (1890).

33. Teenage Research Unlimited (TRU), *TRU Projects Teens Will Spend \$169 Billion in 2004* (2004), http://www.teenresearch.com/pressrelease.cfm?page_id=287 (last visited Sept. 12, 2009) (Sample includes 12- to 19-year-olds).

particularly those working more than twenty hours per week, suffer numerous academic, physical, and other detriments. An additional problem particular to young workers is sexual harassment on the job. Part III analyzes the legal rules governing child labor in the United States and their enforcement. The keystone protective statute, the FLSA, is riddled with exceptions, lacks effective remedies and, in any event, is not enforced by the DOL. Part IV explores the highly aberrant legal rules governing youth decision-making in work and school. While the traditional paradigm for making decisions with long-term consequences places responsibility squarely upon parents or guardians, the law regarding workforce participation and school attendance provides a dramatic exception to this long-established rule. This result is even more jarring given the developmental stage of adolescence during which physical and neurological maturation are ongoing. Part V proposes a series of changes needed to end our current legal neglect and to create a safety net for this vulnerable population.

II. CHILD LABOR IN CONTEMPORARY AMERICA

A. *Current State of Child Labor in the United States*

There were approximately 154 million Americans working in 2007.³⁴ Of this number, 7,273,000 were youths age 16 to 19.³⁵ The latter figure, of course, includes some adults. Millions of youths under 18 are in the contemporary American workforce but the precise number remains elusive. In 2007, an estimated six million 16- and 17-year-olds were employed, with participation rates of 75.3 percent of males and 62.1 percent of females.³⁶ Approximately 80 to 90 percent of youths work in paid jobs at some point while attending high school.³⁷

But many adolescents begin working much earlier. These younger adolescents are typically not included in government statistics. Although the federal government collects no information on children under the age of 16, the National Longitudinal Survey of Youth gathers information from children directly. Survey results find that almost half

34. Projected Labor Force, *supra* note 5.

35. *Id.* See also National Institute for Occupational Safety, Young Worker Safety and Health, <http://198.246.98.21/niosh/topics/youth> (last visited Sept. 12, 2009).

36. Projected Labor Force, *supra* note 5. The Child Labor Coalition (“CLC”), however, estimates 5.5 million youths age 12 to 17 are in the workforce. Child Labor Coalition, Youth Employment Statistics, <http://www.stopchildlabor.org/USchildlabor/statistics.htm> (last visited Sept. 15, 2009).

37. HERMAN, *supra* note 30, at 74. See also GREENBERGER & STEINBERG, *supra* note 30, at 11.

of all 12-year-olds report having some work experience and income through freelance work, suggesting that official estimates of teenagers in the workplace may be vastly underestimated.³⁸ Over half the youths interviewed by the DOL responded that they had held jobs at the age of 14; over 60 percent worked at age 15.³⁹ Once having begun paid employment they usually continue to work with increasing frequency and intensity. The likelihood of employment, as well as the average number of hours of paid work, increases each year during high school. For instance, while school is in session, working 15-year-olds average twelve hours of paid work per week and 17-year-olds average nearly eighteen hours per week.⁴⁰ In addition, approximately 6 percent of employed youths worked full-time (thirty-five hours or more per week) during the school year.⁴¹ Adolescents work both during the school year and during vacation.⁴² In general, parents tend to look favorably on this pervasive work pattern. In 2006, for example, only 10 percent of eighth graders believed their parents did not want them to work.⁴³

For many years retail trades such as department stores, groceries, restaurants, and retail outlets have employed about 60 percent of all working children.⁴⁴ As of 2006, one-third of working teenagers worked in eating and drinking establishments, an increase of 22 percent since 1977.⁴⁵ Twenty-six percent were employed in the service sector in fields such as education, recreation, health services, or private households.⁴⁶ These percentages remain constant during the school year and the

38. HERMAN, *supra* note 30, at 19.

39. *Id.* at 14–15.

40. *Id.* at 34.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 36.

45. BUREAU OF LABOR STATISTICS, 2006 LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (2006). HERMAN, *supra* note 30, at 36 (finding eating and drinking places accounted for the greatest share of employed youths, and about one-third of all employed 15- to 17-year-olds). Cashier is the most common job (16 percent of 15- to 17-year-olds) followed by cook, stock handler, bagger, and fast food server. *Id.* at 37. Over three quarters of youths ages 16 to 19 are currently employed in food service (primarily food preparation and serving), sales and office administration. Charles Hirschman & Irina Voloshin, *The Structure of Teenage Employment: Social Background and the Jobs Held by High School Seniors*, 25 RES. IN SOC. STRATIFICATION AND MOBILITY 189, 191 (2007).

46. 2002 GAO REPORT, *supra* note 23.

summer months.⁴⁷ Another large segment of the child labor force is employed in agriculture.⁴⁸

A number of factors (e.g., gender, race and ethnicity, and socioeconomic background) influence the onset, intensity, and duration of paid work during adolescence.⁴⁹ In the United States, girls tend to work at an earlier age than boys, but boys typically average more hours of paid work than girls.⁵⁰ White youths are nearly twice as likely as Black and Hispanic youths to work during the school year, although Black and Hispanic teenagers average three to five more hours of employment during the school year when they are employed.⁵¹ Counter-intuitively, children from families with lower incomes are less likely to work than those from families with higher incomes.⁵² Youths in lower income households are also less likely to hold jobs at younger ages, partly because youths in poor urban neighborhoods face a limited and competitive job market.⁵³ However, youths from lower socioeconomic backgrounds average greater numbers of hours per week when they are employed than their more advantaged peers.⁵⁴

Youths seek paid work for many reasons: to gain autonomy from parental supervision and other authority figures, to save money for future education or other purposes, or to assert themselves as “adult-like” in the eyes of parents, teachers, or peers.⁵⁵ Often, youths seek employment because they want money to buy consumer products⁵⁶ and to spend on friends and social activities.⁵⁷ Many parents push their

47. HERMAN, *supra* note 30, at 45.

48. See Child Labor Coalition, Children in the Fields Campaign Fact Sheet (2007), <http://www.stopchildlabor.org/Consumercampaigns/fields.htm> (estimating over 400,000 children ages 12 to 17 work in agriculture). See also Corlett, *supra* note 19, at 713. (citing 800,000 to 1.5 million children ages five to 15 toil in harsh conditions in the U.S. agriculture industry).

49. HERMAN, *supra* note 30, at 15.

50. *Id.* at 3, 17, and 34.

51. *Id.* at 17. About 30 percent of White children worked in 2001, as compared to 14 percent of Black children and 17 percent of Hispanic children. See 2002 GAO REPORT, *supra* note 23, at 14.

52. 2002 GAO REPORT, *supra* note 23, at 14. The employment of children and family socioeconomic status appears to be directly related. *Id.* For example, in 2001 about 17 percent of children in families with annual incomes below \$25,000 a year worked, whereas 29 percent of children in families with incomes above \$75,000 a year were employed. *Id.* This trend stretches across racial boundaries. *Id.*

53. HERMAN, *supra* note 30, at 15–16.

54. 2002 GAO REPORT, *supra* note 23, at 14.

55. GREENBERGER & STEINBERG, *supra* note 30, at 88–89.

56. *Id.*

57. See *supra* note 33.

children into paid work because they believe that it helps youths become more responsible, independent, and hard-working.⁵⁸

B. The Impact on School and Development

Entry into the world of work is an important rite of passage for most adolescents. Early workforce involvement may benefit later employability, earnings, and occupational standing through on-the-job training and skill development. Positive traits such as responsibility, trustworthiness, good work habits, and dependability may be developed.⁵⁹ Adolescents can test whether a job experience represents a good fit for individual long-term career goals. New social relations are formed, and an important measure of independence is gained.

However, these positive aspects of an adolescent's entry into the workforce typically reflect the experience of a "real" job, one with adult supervision and the opportunity to acquire transferrable skills. This, unfortunately, is not the typical experience of American teenagers. The types of jobs youths currently hold are different from those in previous generations. Most of our youth workforce is concentrated in entry-level, age-segregated jobs⁶⁰ with few opportunities for meaningful interaction with adults, skill acquisition, or long-term employment. These are simply not career opportunities.⁶¹ Even full-time jobs in the service sector do not pay enough to allow young workers to become independent or self-supporting. This type of work during adolescence provides few benefits and can jeopardize a successful transition into adulthood. Those under 18 generally work for minimum wage and are used as a source of cheap labor.⁶² These jobs also present significant health risks and time and energy trade-offs, and correlate with a wide variety of negative outcomes.⁶³

58. Sarah Phillips & Kent L. Sandstrom, *Parental Attitudes Toward Youth Work*, 22 *YOUTH & SOC'Y* 160, 165 (1990).

59. Christopher J. Ruhm, *Is High School Employment Consumption or Investment?*, 15 *J. OF LAB. ECON.* 735, 738 (1997); DAVID STERN & YOSHI-FUMI NAKATA, *Characteristics of High School Students' Paid Jobs, and Employment Experience After Graduation*, in *ADOLESCENCE AND WORK: INFLUENCES OF SOCIAL STRUCTURE, LABOR MARKETS, AND CULTURE* 189, 190 (David Stern & Dorothy Eichorn eds., 1989).

60. GREENBERGER & STEINBERG, *supra* note 30, at 57.

61. *Id.* at 50–53.

62. PROTECTING YOUTH AT WORK, *supra* note 6, at 86.

63. Jerald G. Bachman & John E. Schulenberg, *How Part-Time Work Intensity Relates to Drug Use, Problem Behavior, Time Use, and Satisfaction Among High School Seniors: Are These Consequences or Merely Correlates?*, 29 *DEV. PSYCHOL.* 220, 228-29 (1993).

Young people now need post-secondary education to reach the wage levels a high school diploma obtained just twenty years ago.⁶⁴ Unskilled jobs that eventually lead to middle-class income security are almost non-existent. Automation continues to replace factory work, and computers continue to replace lower and middle management, as well as clerical and administrative positions.⁶⁵

More than twenty years ago, Professors Greenberger and Steinberg demonstrated the negative effects of adolescent employment, particularly high-intensity work. Their classic text, *When Teenagers Work*,⁶⁶ argued that the experience of working adolescents had changed; the majority of contemporary teenage jobs, especially those in fast food restaurants and retail settings, no longer provide skills and workplace knowledge as preparation for adult work. This work also negatively impacts teenagers academically and in other important ways. Subsequent studies have generally confirmed their conclusions. High-intensity work is correlated with numerous negative educational results, such as lower academic grades in high school, truancy,⁶⁷ increased school absences,⁶⁸ and a higher probability of school drop-out.⁶⁹ Young

64. GREENBERGER & STEINBERG, *supra* note 30, at 28-34. Information from the U.S. Census Bureau reinforces the value of a college education; workers with a bachelor's degree earn an average of \$51,206 a year, while those with a high school diploma earn \$27,915. *Id.* "Workers with an advanced degree make an average of \$74,602, and those without a high school diploma average \$18,734." U.S. Census Bureau, *College Degree Nearly Doubles Annual Earnings*, *Census Bureau Reports*, Mar. 28, 2005, <http://www.census.gov/Press-Release/www/releases/archives/education/004214.html>. See also U.S. Census Bureau, *More Education Pays off; As Do Certain Fields of Training*, Jan. 29, 2008, <http://www.census.gov/Press-Release/www/releases/archives/education/011392.html>. See generally JULIA OVERTURF JOHNSON ET AL., *CHANGES IN THE LIVES OF CHILDREN: 1990–2000* (2005).

65. Wes Iverson, *Outsourcing Not the Culprit in Manufacturing Job Loss*, Dec. 9, 2003, <http://www.automationworld.com/weonly-320>.

66. GREENBERGER & STEINBERG, *supra* note 30.

67. Rhoda Carr et al., *Effects of High School Work Experience a Decade Later: Evidence From the National Longitudinal Survey*, 69 *SOC. OF EDUC.* 66, 67-68 (1996); Ronald D'Amico, *Does Employment During High School Impair Academic Progress?*, 57 *SOC. OF EDUC.* 152, 161-62 (1984); Herbert W. Marsh & Sabina Kleitman, *Consequences of Employment During High School: Character Building, Subversion of Academic Goals, or a Threshold?*, 42 *AM. EDUC. RES. J.* 331, 337 (2005).

68. Jeylan T. Mortimer & Monica Johnson, *New Perspectives on Adolescent Work and the Transition to Adulthood*, in *NEW PERSPECTIVES ON ADOLESCENT RISK BEHAVIOR* 425 (Richard Jessor ed., 1998); Sharon Wofford Mihalic & Delbert Elliott, *Short- and Long-Term Consequences of Adolescent Work*, 28 *YOUTH & SOC'Y* 464, 467 (1997); Mark Schoenhals et al., *The Educational and Personal Consequences of Adolescent Employment*, 77 *SOC. FORCES* 723, 743 (1998).

69. Jennifer Lee & Jeremy Staff, *When Work Matters: The Varying Impact of Work Intensity on High School Dropout*, 80 *SOC'Y EDUC.* 158, 169 (2007). More limited employment during adolescence (twenty hours or less per week during school) has been associated with reduced high school drop-out rates. *Id.* D'Amico, *supra* note 67, at 152–64. Ralph McNeal, *Are Students Being*

workers spend less time doing homework and are more likely to go to school fatigued and unprepared for learning than other students.⁷⁰ High-intensity work detracts from time spent getting help from teachers, completing homework, and studying for examinations. The adverse educational effects of early high-intensity work extend far beyond high school,⁷¹ sharply reducing the likelihood of obtaining a college degree.⁷²

Working long hours interferes not only with school achievement but with positive adjustment and career development. The Institute of Medicine, the research arm of the National Academy of Sciences, concluded after a lengthy study that “high-intensity work . . . is associated with unhealthy and problem behaviors. . . .”⁷³ These youngsters have less time for activities taking place in school, the family, and other institutions,⁷⁴ weakening conventional social controls. As adolescents participate less in adult-monitored activities—sports, school, clubs and organizations, or church-related functions⁷⁵—they are more attracted to unstructured leisure activities, such as partying with peers, cruising in cars, and abusing drugs or alcohol.⁷⁶ A large body of

Pulled Out of High School? The Effect of Adolescent Employment on Dropping Out, 70 SOC. OF EDUC. 206, 214-16 (1997); John Warren & Jennifer Lee, *The Impact of Adolescent Employment on High School Dropout: Differences by Individual and Labor-Market Characteristics*, 32 SOC. SCI. RES. 98, 99 (2003).

70. Bachman & Schulenberg, *supra* note 63. Long hours of work are also associated with less sleep and exercise and greater frequency of skipping breakfast. *Id.* Deborah Safron et al., *Part-Time Work and Hurried Adolescence: The Links Among Work Intensity, Social Activities, Health Behaviors, and Substance Use*, 42 J. HEALTH & SOC. BEHAV. 425, 432 (2001).

71. The majority of the students who worked twenty hours per week or less had received some college education by the age of 30, while those who worked more than twenty hours per week were less likely to have achieved any college education by that age. Donna S. Rothstein, *Youth Employment During School: Results from Two Longitudinal Surveys*, MONTHLY LAB. REV., Aug. 2001, at 25 (2001).

72. PROTECTING YOUTH AT WORK, *supra* note 6, at 117; Jeremy Staff & Jeylan Mortimer, *Educational and Work Strategies From Adolescence to Early Adulthood: Consequences For Educational Attainment*, 85 SOC. FORCES 1169, 1172 (2007). Adolescents who engage in high-intensity work obtain fewer months of higher education than their non-working or moderately-working peers. Jeylan Mortimer et al., *Adolescent Work and the Early Socioeconomic Career*, in HANDBOOK OF THE LIFE COURSE 437, 448 (Jeylan T. Mortimer & Michael J. Shanahan eds., 2003).

73. PROTECTING YOUTH AT WORK, *supra* note 6, at 3.

74. Laurence Steinberg & Elizabeth Cauffman, *The Impact of Employment on Adolescent Development*, 11 ANNALS CHILD. DEV. 131-66 (1995).

75. D. Wayne Osgood, *Having the Time of Their Lives: All Work and No Play?*, in TRANSITIONS TO ADULTHOOD IN A CHANGING ECONOMY: NO WORK, NO FAMILY, NO FUTURE? 176 (Alan Booth et al eds., 1999); Stephen C. Peck et al., *Adolescent Pathways to Adulthood Drinking: Sport Activity Involvement is Not Necessarily Risky or Protective*, 103 ADDICTION 69-83 (2008) (showing the inverse relationship between work hours and participation in extracurricular sports, undermining a future healthy lifestyle).

76. Osgood, *supra* note 75; Deborah Safron et al., *Part-Time Work and Hurried Adolescence: The Links Among Work Intensity, Social Activities, Health Behaviors, and Substance Use*, 42 J.

research shows that young people working more than twenty hours per week are more likely to engage in delinquent behavior, substance abuse, and early sexual activity.⁷⁷

Increased independence, pay, and adult-like status from work worsen adolescent problem behaviors. Negative outcomes associated with high-intensity work may result from “precocious development,”⁷⁸ the assertion of independent adult-like status by teenagers assuming “adult” roles because of school completion, employment, and individual decision-making. Consistent with the precocious maturity thesis, more adult-like work roles can affect early sexual and other harmful behaviors.⁷⁹

Youth workers increasingly bear the burdens of evening and weekend hours,⁸⁰ especially in the fast food and sales sectors of the economy. Much adolescent work occurs in age-segregated jobs with minimal or absent adult supervisors,⁸¹ fostering more deviant behavior, especially for those working with delinquent peers.⁸² Prior delinquency, such as drinking, having sex, using drugs, and engaging in school

HEALTH & SOC. BEHAV. 425–49 (2001); D. Wayne Osgood et al., *Routine Activities and Individual Deviant Behavior*, 61 AM. SOC. REV. 635–55 (1996).

77. Robert Apel et al., *A Job Isn't Just a Job: The Differential Impact of Formal Versus Informal Work on Adolescent Problem Behavior*, 52 CRIME & DELINQ. 333, 347-48 (2006); Bachman & Schulenberg, *supra* note 63, at 220–35; Robert Bozick, *Precocious Behaviors in Early Adolescence: Employment and the Transition to First Sexual Intercourse*, 26 J. EARLY ADOLESCENCE 60–86 (2006); Barbara McMorris & Christopher Uggen, *Alcohol and Employment in the Transition to Adulthood*, 41 J. HEALTH & SOC. BEHAV. 276–94 (2000).

78. Bachman & Schulenberg, *supra* note 63, at 232 (describing “precocious adult-like identity” formation). See also GREENBERGER & STEINBERG, *supra* note 30, at 5 (describing pseudo-maturing); RICHARD JESSOR & SHIRLY L. JESSOR, *PROBLEM BEHAVIOR AND PSYCHOSOCIAL DEVELOPMENT: A LONGITUDINAL STUDY OF YOUTH* (1977) (describing alcohol use, smoking, drug use, and sexual activity as symbolic claims to adult status).

79. Intensive workers in the eighth grade, for example, have a greater likelihood of engaging in sexual intercourse than moderate workers and non-workers. Bozick, *supra* note 77. Young women may increase their chances of pregnancy if they work with older employees or if their work schedules facilitate unstructured and unsupervised socializing. *Id.*

80. Daniel S. Hamermesh, *Changing Inequality in Work Injuries and Work Timing*, MONTHLY LAB. REV., Oct. 1999, at 22, 29 (1999). In America, there is a growing inequality in labor markets because nonmonetary benefits of employment, e.g., safety and regular hours, have become more unequal over the last two decades.

81. Michael R. Frone, *Predictors of Work Injuries Among Employed Adolescents*, 83 J. APPLIED PSYCHOL. 565, 570 (1998); Ellen Greenberger, *Working in Teenage America*, in WORK EXPERIENCE AND PSYCHOLOGICAL DEVELOPMENT THROUGH THE LIFESPAN, 21–50 (Kathryn Borman ed., 1988).

82. Adolescents who are employed alongside delinquent co-workers tend to commit more workplace crimes and demonstrate more general deviance than do those who do not work with delinquent peers. See John Paul Wright & Francis T. Cullen, *Juvenile Involvement in Occupational Delinquency*, 38 CRIMINOLOGY 863, 878 (2000); Matthew Ploeger, *Youth Employment and Delinquency: Reconsidering a Problematic Relationship*, 35 CRIMINOLOGY 659, 672 (1997).

misconduct, may predispose some youths to enter work environments that offer less social constraints on these behaviors than do school and family.⁸³ Ninth-graders with higher rates of substance use, school-related deviance, and law violations report greater work hours in subsequent years of high school.⁸⁴

This extremely negative portrait of working youth may be disputed. I am not trying to prove to a legal certainty that high-intensity work causes these negative academic and non-academic results in all youths; correlation need not be equated with causation. Like most social science propositions and data, controversy surrounds the appropriate variables to be considered and the conclusions to be drawn.⁸⁵ There may even be positive results from youth work in certain categories; for young males in lower socio-economic groups, for example, early work may be an important source of human and social capital.⁸⁶ Moreover, more finely tuned studies may show that some of the association between work intensity and negative academic and non-academic outcomes may be attributable to pre-existing differences rather than work conditions.⁸⁷

83. MICHAEL D. NEWCOMB & PETER M. BENTLER, CONSEQUENCES OF ADOLESCENT DRUG USE: IMPACT ON THE LIVES OF YOUNG ADULTS 159-60 (1988).

84. JEYLAN T. MORTIMER, WORKING AND GROWING UP IN AMERICA (2003); Jeremy Staff & Christopher Uggen, *The Fruits of Good Work: Early Work Experiences and Adolescent Deviance*, 40 J. RES. IN CRIME & DELINQ. 263, 265-67 (2003).

85. For example, some of the "bad leisure" activities associated with high-intensity work become more common in young adulthood for youths who work less intensively during high school. These young people begin to catch up with their more precocious peers in alcohol use and binge drinking in their late teens and twenties. McMorris & Uggen, *supra* note 77, at 280. Some researchers suggest that for many adolescents, early problem behaviors are time-limited and are generally unlikely to continue long-term. Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 592-95 (2000) (citing and explaining several such studies). Some teenagers that balance paid work, school work, and extracurricular activities are more likely to attend college. Michael J. Shanahan & Brian P. Flaherty, *Dynamic Patterns of Time Use in Adolescence*, 72 CHILD. DEV. 385, 285-86 (2001). Work intensity may not have an adverse effect on school performance among those youths who are working to save money for college. Herbert W. Marsh & Sabina Kleitman, *Employment During High School: Character Building or Subversion of Academic Goals?*, 42 AM. EDU. RES. J. 331, 354 (1991).

86. MERCER L. SULLIVAN, GETTING PAID: YOUTH CRIME AND WORK IN THE INNER CITY 102-03 (1989) (demonstrating that a sample of delinquent teenagers in New York City who worked had higher quality employment opportunities in subsequent years). For young, economically disadvantaged males, paid work has been shown to increase their chances of high school completion. Doris R. Entwisle et al., *Urban Teenagers: Work and Dropout*, 37 YOUTH & SOC'Y 3, 25 (2005); Lee & Staff, *supra* note 69, at 172 (finding work hours do not encourage high school drop-out among certain youth). Even fast-food jobs provide a way for teenagers in dangerous neighborhoods to avoid street violence and participation in illegal activities. KATHERINE S. NEWMAN, NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY 109 (1999).

87. Jerald G. Bachman et al., *Wishing to Work: New Perspectives on How Adolescents' Part-Time Work Intensity Is Linked with Educational Disengagement, Substance Use, and Other Problem Behaviors*, 27 INT'L J. BEHAV. DEV. 301, 301-02 (2003); Osgood, *supra* note 69.

Youths already performing poorly in school, or those susceptible to risky and deviant behavior, may have already “opted out” of traditional academic and occupational paths.⁸⁸ Some adolescent jobs can decrease the unstructured leisure associated with problem behaviors, e.g., family businesses or adult or school-supervised employment.⁸⁹ Beyond academic and developmental consequences, however, are the very tangible dangers of American child labor.

C. *The Body Count: Physical Hazards of Youth Work*

An important aspect of the neglect of youth workers in the United States is the failure of our society, and of our legal system in particular, to attend to and remedy the physical hazards of this work. This is highlighted by considering the number of youths killed and injured on the job each year. The naked statistics, however, fail to consider the long-term health and economic consequences to the injured individuals and their families, the burden placed on our medical and public insurance systems, and the overall reduction in economic productivity from death, injury, and disease. In addition, the lack of accurate statistical evidence gathered by the DOL prevents informed debate on the public policy issues presented by these losses.

The known amount of deaths and injuries is extraordinarily high and there is good reason to believe our count is lower than the actual number. Fatalities of working youths are far too common, and they have the highest rates of injury of any age group.⁹⁰ Work-related injury rates for juvenile workers have consistently been found to be between 60 to 70 percent higher than the rates for workers of all ages and second only to rates for workers 18 to 24 years of age.⁹¹ There is a desperate need

88. Prior engagement in drinking, drugs, and youthful sexual behavior may predispose some youth to enter work environments that offer fewer constraints on these behaviors. Prior poor school performance, low educational aspirations, and antecedent delinquent acts also correlate with high-intensity work during high school. NEWCOMB & BENTLER, *supra* note 83.

89. David M. Hansen et al., *Adolescent Part-Time Employment in the United States and Germany: Diverse Outcomes, Contexts, and Pathways*, in HIDDEN HANDS: INTERNATIONAL PERSPECTIVES ON CHILDREN’S WORK AND LABOR 121, 122 (Phillip Mizen et al. eds., 2001).

90. Paul A. Schulte et al., *Integrating Occupational Safety and Health Information Into Vocational and Technical Education and Other Workforce Preparation Programs*, 95 AM. J. PUB. HEALTH 404, 404 (2005).

91. Center for Disease Control and Prevention, *Nonfatal Occupational Injuries and Illnesses Among Workers Treated in Hospital Emergency Departments—United States, 2003*, MORBIDITY & MORTALITY WKLY. REP., Apr. 28, 2006, at 449, 449-50. Center for Disease Control and Prevention, *Nonfatal Occupational Injuries and Illnesses Among Workers Treated in Hospital Emergency Departments—United States, 2004*, MORBIDITY AND MORTALITY WKLY. REP., Apr. 7, 2008, at 393, 393-94. NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, NIOSH

for better and more specific data in order to calculate the number of youth work-related harms. Estimates project that over 200,000 adolescent workers suffer job-related injuries and illnesses each year, a staggering number.⁹² The workplace is the fourth most common cause of harm among American youth age 10 to 19—behind motor vehicle accidents, violence, and recreation.⁹³ Many of the work injuries that youths sustain have dramatic health and economic consequences. For example, 15 to 26 percent of injured workers under age 18 report permanent impairments such as chronic pain, scarring, sensory loss, and loss of range of motion.⁹⁴

Youth workers face the same workplace dangers as adults in similar occupations but are far less prepared to confront these hazards.⁹⁵ Today, teenagers are “congregated in jobs characterized by the absence of opportunities for significant promotion, low pay, high turnover, little on-the-job training, wide variation in hours, and few benefits.”⁹⁶ Jobs with these characteristics are, in general, more dangerous than other jobs.⁹⁷

Our workplace surveillance systems now provide reasonably reliable information about the number of workers killed. The Census of Fatal Occupational Injuries (CFOI) is produced by the DOL’s Bureau of Labor Statistics (BLS) and the states, using multiple sources.⁹⁸ An accurate count, however, still depends on identification of the incident as

ALERT: PREVENTING DEATHS, INJURIES AND ILLNESSES OF YOUNG WORKERS, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL (NIOSH) (2003) [hereinafter NIOSH Alert].

92. NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, NIOSH RECOMMENDATIONS TO THE U.S. DEPARTMENT OF LABOR FOR CHANGES TO HAZARDOUS ORDERS 7 (2002) [hereinafter NIOSH 2002 RECOMMENDATIONS]. Work-related illness data is even more difficult to document than injuries because of the long latency period often associated with these pathologies. *Id.*

93. Danielle Laraque et al., *Prevention of Youth Injuries*, 91 J. NAT’L MED. ASS’N, 557, 557 (1999).

94. David L. Parker et al., *Characteristics of Adolescent Work Injuries Reported to the Minnesota Department of Labor and Industry*, 84 AM. J. PUB. HEALTH 606, 609-10 (1994); David L. Parker et al., *Nature and Incidence of Self-Reported Adolescent Work Injury in Minnesota*, 26 AM. J. IND. MED. 529-41 (1994).

95. *See supra* Part IV. B.

96. PROTECTING YOUTH AT WORK, *supra* note 6, at 86.

97. *Id.* at 72-74. Many of the businesses that employ large numbers of adolescents—grocery stores, hospitals, nursing homes, and fast food establishments—have higher than average injury rates for workers of all ages. *Id.* at 53, 74. *See also* 2002 GAO REPORT, *supra* note 23, at 28.

98. Work-related deaths are identified by using death certificates, OSHA records, coroners’ reports, etc., and news media reports. *See generally*, Janice Windau & Samuel Myers, *Occupational Injuries Among Young Workers*, MONTHLY LAB. REV., Oct. 2005, at 11, 11.

work-related.⁹⁹ Since teenagers are typically not identified as workers, some deaths of children and adolescents may not be reported as work-related and thus, not included. While the death toll varies by year, approximately seventy youths under the age of 18 die annually from work-related injuries—an average of one every five days.¹⁰⁰ Agriculture and construction produce the largest number of juvenile fatalities.¹⁰¹

In contrast with workplace deaths, there is currently no reliable way of determining how many child workers are injured each year. Surveillance of non-fatal incidents is fragmented and contains significant gaps.¹⁰² There are two main sources of national population-based data, the Annual Survey of Occupational Injuries and Illnesses (Annual Survey) and the National Electronic Injury Surveillance System (NEISS). Each is incomplete and is subject to significant undercounting. Like the CFOI, the Annual Survey is a collaboration between the federal BLS and the states. Data is obtained from a survey generated by the Occupational Safety and Health Administration (OSHA) that is mailed to a sample of private sector employers required to provide information on all work-related injury and illness.¹⁰³ The Annual Survey, however, has important deficiencies; many workers are not included,¹⁰⁴ and it is believed its undercount ranges from 20 to 70 percent.¹⁰⁵ An even more

99. Census of Fatal Occupational Injuries, available at <http://www.bls.gov/iif/oshefoil.htm> (last visited Dec. 19, 2008).

100. NIOSH Alert, *supra* note 91.

101. Janice Windau et al., *supra* note 23, at 3, 5, 7. During 1992–1997, approximately 40 percent of fatal injuries for youth workers occurred while performing agricultural work. Most of these deaths were related to transportation, e.g., tractor accidents. *Id.* at 5. Forty percent of children killed during the past decade worked in agriculture, primarily in crop production. *Id.* at 23. Retail trade and construction accounted for 20 percent and 14 percent of all fatalities, respectively. *Id.* at 22.

102. See generally NATIONAL ACADEMY OF SCIENCES, COUNTING INJURIES AND ILLNESSES IN THE WORKPLACE, PROPOSAL FOR A BETTER SYSTEM (Earl Pollock and Deborah Keimig, eds 1987).

103. Ann Fingar et al., *Work Related Injuries in Athens County 1982–1986: A Comparison of Emergency Department and Workers' Compensation*, 34 J. OCCUPATIONAL. MED. 779, 779–84 (1982).

104. E.g., public sector employees, workers on small farms, etc. The sample size is also small. Leslie Boden & Al Ozonoff, *Capture-Recapture Estimates of Nonfatal Workplace Injuries and Illnesses*, 18 ANNALS OF EPIDEMIOLOGY 500, 500 (2008).

105. John Ruser, *Examining Evidence on Whether BLS Undercounts Workplace Injuries and Illnesses*, MONTHLY LAB. REV., Aug. 2008, at 20, 20; Kenneth D. Rosenman et al., *How Much Work Related Injury and Illness is Missed by the Current National Surveillance System?*, 48 J. OCCUPATIONAL & ENVTL. MED., 357, 357 (2006). The Survey missed up to 68 percent of work-related injuries and illnesses occurring annually in Michigan from 1999 to 2001; OSHA logs captured only about 31 percent of illnesses and 33 percent of injuries reported in other databases. *Id.* Another study that compared the Survey with workers' compensation records in six states estimates that the Survey missed almost 340,000 lost-time injuries in the sampled industries from 1998 to 2002. Boden & Ozonoff, *supra* note 104, at 261.

fundamental limitation is that the Annual Survey has not historically provided rates of injuries sustained by teenagers.¹⁰⁶

In contrast to the Annual Survey, the NEISS, maintained by the Consumer Product Safety Commission (CPSC), gathers information on persons treated in hospital emergency departments (EDs).¹⁰⁷ The data is collected from a national probability sample of hospitals.¹⁰⁸ Work-related injuries are identified by chart reviews of patient files at these hospitals. The NEISS totals, however, are also suspect. Only injuries treated in emergency departments are recognized and these are estimated to represent only one-third of all workplace injuries requiring medical treatment among workers of all ages.¹⁰⁹ In addition, with injuries to adolescents, ED staff may not ask about the work-relatedness of an injury or may not note that fact in the medical records.¹¹⁰ In addition, youths covered by their parents' insurance are less likely than adults to file for workers' compensation, one of the key factors examined in medical records to identify work-related cases.¹¹¹

In a recent comprehensive review of the DOL safety regulations, the National Institute of Occupational Safety and Health (NIOSH) found that both the Annual Survey and NEISS underestimate the total number of injuries suffered by working youths, and that the figures from both overlap.¹¹² NIOSH noted that in 1998 approximately 77,000 youths under the age of 18 were treated in emergency departments for work-related injuries,¹¹³ but this may be only 34 percent of total workplace injuries; "[t]herefore, the total number of youth work injuries may exceed 200,000 each year."¹¹⁴

Many adolescents are hurt while doing illegal and unsupervised work. Four of the hazards found by a recent study causing numerous

106. Injury and illness rates are generated using data on hours of employment provided by the employers participating in the survey. The information was, until 2007, not broken down by age, precluding computation of age specific rates. Boden & Ozonoff, *supra* note 104, at 261.

107. PROTECTING YOUTH AT WORK, *supra* note 6, at viii.

108. *Id.* The number of participating hospitals can vary from year to year.

109. Larry A. Layne et al., *Adolescent Occupational Injuries Requiring Hospital Emergency Department Treatment: A Nationally Representative Sample*, 84 AMER. J. PUB. HEALTH, 657, 659–60 (1994) (citing multiple studies).

110. *Id.*

111. Many injured workers never apply for workers' compensation and teenagers, in particular, are far less likely to apply than adults. Daniel Brooks et al., *Work-Related Injuries Among Massachusetts Children: A Study Based on Emergency Department Data*, 24 AM. J. OF IND. MED. 313, 313–14 (1993); Fingar et al., *supra* note 103.

112. NIOSH 2002 RECOMMENDATIONS, *supra* note 92, at 7.

113. *Id.*

114. *Id.* (citing unpublished data from computer tapes of the Current Population Survey.)

injuries are explicitly prohibited by federal law for workers under the age of 18.¹¹⁵ Fifty-two percent of male workers and 43 percent of female workers in the retail and service industries reported having performed at least one federally prohibited task.¹¹⁶ Twenty-two percent of females and 30 percent of males reported that in a typical work week they worked at least one day without adult supervision.¹¹⁷

A number of particular risk factors have been identified as relevant to occupational injury and disease for youth. Specific industries present elevated risk; teenagers working in restaurants, construction, and agriculture—all industries with high concentrations of youth workers—have particularly high injury rates.¹¹⁸ Being a member of a racial or ethnic minority increases the danger of harm; both Latino and Black youths are more likely to sustain injury compared to their White peers.¹¹⁹

Other specific factors that predispose one to workplace harm include the number of hours worked, the pace of work, equipment used and tasks assigned, and whether the work is prohibited by federal or state law. The association between high-intensity work and injury is demonstrable, and the number of hours worked per week increases as youths grow older.¹²⁰ Youths who work more than twenty hours per week during the school year have increased risk of injury as well as greater exposure to illicit substances, precocious sexual behaviors, and a

115. Carol W. Runyan et al., *Work-Related Hazards and Workplace Safety of US Adolescents Employed in the Retail and Service Sectors*, 119 *PEDIATRICS* 526, 531 (2007). The four federally prohibited tasks are the operation of box crushers, the operation of balers or compactors, the operation of power slicing tools or grinders, and the operation of dough mixers. *Id.*

116. *Id.*

117. *Id.*

118. Carol W. Runyan et al., *Potential for Violence Against Teenage Retail Workers in the United States*, 36 *J. ADOLESCENT HEALTH* 261, 261 (2005). Agriculture has the highest or second highest injury rate for teenagers. Renate Belville et al., *Occupational Injuries Among Working Adolescents in New York State*, 269 *J. AM. MED. ASS'N* 2754, 2754 (1993); Irwin B. Horwitz & Brian P. McCall, *Occupational Injury Among Rhode Island Adolescents: An Analysis of Workers' Compensation Claims, 1998 to 2002*, 47 *J. OCCUPATIONAL & ENVTL. MED.* 473, 480 (2005); Douglas Kruse & Douglas Mahoney, *Illegal Child Labor in the United States: Prevalence and Characteristics*, 54 *INDUS. & LAB. REL. REV.* 17–40 (2000) (showing that restaurants and construction present high rates of injury).

119. *See, e.g.*, Kristina Zierold & Henry Anderson, *Racial and Ethnic Disparities in Work-Related Injuries Among Teenagers*, 30 *AM. J. HEALTH BEHAV.* 5, 525–32 (2006); Kimberly Rauscher & Douglas Myers, *Socioeconomic Disparities in the Prevalence of Work-Related Injuries Among Adolescents in the U.S.*, 42 *J. OF ADOLESCENT HEALTH* 50, 51 (2008).

120. Fifty-six percent of sixth- through eighth-grade students reported working an average of 7.7 hours per week. Nancy Weller et al., *Work-Related Injury Among South Texas Middle School Students: Prevention and Patterns*, 96 *S. MED. J.* 1213, 1213 (2003). By age 17, youths average nearly eighteen hours of work per week. HERMAN, *supra* note 30, at 34.

host of other health-compromising behaviors.¹²¹ In their seminal work, *When Teenagers Work*, Greenberger and Steinberg reported that most teenagers work in jobs where they are under “a great deal of time pressure and are expected to repeat a limited number of highly routinized tasks quickly [and] efficiently”¹²² Perceived work-pace pressures and exposure to hazards are positively associated with the types of injuries adolescents experience.¹²³ Moreover, the type of work performed is significant. Many youth workers report using dangerous equipment, including power tools, motor vehicles or forklifts, food slicers and fryers, ladders, and scaffolding.¹²⁴ The size of equipment and machinery may be inappropriate for children and adolescents, as most of this equipment is designed for adults. Teenagers who perform tasks that are prohibited by the FLSA are at much higher risk for work-related injury,¹²⁵ as are teenagers who have not received safety or health training,¹²⁶ work at night, handle cash, and interact with angry customers in retail and service settings.¹²⁷

A more general consideration linked to work-related deaths and injuries is the incomplete mental and emotional development of youth workers. Neuromaturation is not completed until the mid-twenties. Important choices made by adolescents are often characterized by immaturity of thought or action.¹²⁸ Specifically, the prefrontal cortex is the last part of the brain to develop fully before adulthood, and it is responsible for executive functions, emotional regulation, impulse

121. NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, CHILD LABOR RESEARCH NEEDS: RECOMMENDATIONS FROM THE NIOSH CHILD LABOR WORKING TEAM, DHHS, NIOSH, SPECIAL HAZARD REVIEW. Publ. 97-143, (Dep. Health Hum. Serv., Washington DC) (1997).

122. GREENBERGER & STEINBERG, *supra* note 30, at 67.

123. Christian Evensen et al., *The Downside of Adolescent Employment: Hazards and Injuries Among Working Teens In North Carolina*, 5 J. ADOLESCENCE 545, 556-57 (2000).

124. Youth workers are exposed to hot stoves, boiling grease, and power machinery—all dangerous, especially when supervision and training are minimal or absent. *Id.* Runyan et al., *supra* note 115; Ronda C. Zakocs et al., *Improving Safety for Teens Working in the Retail Trade Sector: Opportunities and Obstacles*, 34 AM. J. INDUS. MED. 342, 345 (1998); Kathleen Dunn et al., *Teens at Work: A Statewide Study of Jobs, Hazards, and Injuries*, 22 J. ADOLESCENT HEALTH 19, 22 (1998).

125. Carol W. Runyan et al., *Epidemiology and Prevention of Injuries Among Adolescent Workers in the United States*, 21 AM. REV. PUB. HEALTH 247, 262 (2000).

126. Studies have found that over half of work-injured adolescents did not have any health and safety training. Runyan et al., *supra* note 118.

127. *Id.* (noting that percentages varied widely among teenagers who reported having been trained to deal with angry customers (35 to 76 percent); to deal with a robbery (34 to 53 percent); and to deal with sexual harassment (21–33 percent)). *Id.*

128. *See* Part IV.B.

control, complex reasoning, and other skills.¹²⁹ It is thus not surprising that adolescents, particularly males, exhibit the highest rates of occupational injuries¹³⁰—precisely because they lack adult decision-making skills.

D. *Sexual Harassment on the Job*

Young workers, particularly females, are especially susceptible to sexual harassment in the workplace because of their developmental stage, the part-time or temporary nature of their employment, and the power imbalances endemic to this work situation. Many teenagers are new to the workforce and uncertain or ignorant of their rights. Although the vulnerable, formative, and malleable nature of adolescence requires special protection of young workers, it is often lacking.

More than one-half of the youth workforce is teenage girls.¹³¹ While the total number of sexual harassment cases—adult and youth—filed with the Equal Employment Opportunity Commission (EEOC) and state agencies has begun to drop after spiking during the 1990s,¹³² cases involving young workers are rising sharply. Complaints of youth sexual harassment accounted for only 2 percent of cases filed with the EEOC in 2001, but by 2004 youth complaints accounted for 8 percent of all cases filed.¹³³ The available evidence indicates that only a fraction of the harassment situations in the workplace are reported.¹³⁴

129. See *infra* notes 319-21.

130. A study of Oregon workers' compensation claims data, reported that while the overall claims rate for adolescent injuries was 134.2 per 100,000, males had more than twice the rate as females. Brian McCall et al., *Adolescent Occupational Injuries in Workplace Risks: An Analysis of Oregon Workers' Compensation Data 1990-1997*, 41 J. ADOLESCENT HEALTH 248, 250 (2007). See also F. Curtis Breslin & Peter Smith, *Age-Related Differences in Work Injuries: A Multivariate, Population-Based Study*, 48 AM. J. IND. MED. 50, 52-54 (2005).

131. See HERMAN, *supra* note 30, at 15.

132. See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SEXUAL HARASSMENT CHARGES—EEOC & FEPAS COMBINED FY 1997-FY 2008, available at www.eeoc.gov/stats/harass.html. In 1992, 10,532 charges were filed; by 2000, that number had increased to 15,836. But in fiscal year 2007, 12,510 cases were filed with employment discrimination agencies, a drop of 21 percent. *Id.*

133. Jill Schachner Chanen, *New Troubles for Teens at Work*, ABA J., Apr. 2008, at 22, 22. In response, the EEOC launched an educational program—the Youth at Work initiative—featuring high school visits and other means of educating youth about their workplace rights. *Id.* The EEOC reports up to thirty lawsuits per year on behalf of teenage employees, 80 percent of which were sexual harassment claims. Valerie Jablow, *Foley Scandal Spotlights Sexual Harassment of Teens*, 43 TRIAL 12 (2007).

134. A study of several hundred high school girls revealed that almost 47 percent of those who worked experienced sexual harassment on the job. Susan Fineran & James E. Gruber, *The Impact*

Sexual harassment of youths is aggravated by several factors. Teenagers often physically appear to be adults, but do not have the coping mechanisms that accompany developmental maturity.¹³⁵ The fact that they can perform jobs competently and responsibly does not mean they will exercise mature judgment when decisions must be made under stressful circumstances or when social norms promote undesirable behavior.¹³⁶ Teenagers lack the emotional maturity and life experience necessary to weigh likely consequences.

Adolescents also lack the bargaining power to protect themselves from overreaching adults. They almost invariably work for low pay, sometimes for subminimum wage,¹³⁷ and typically occupy the lowest rung in the workplace hierarchy. The harasser's position of authority and the structure of the workplace encourages young employees to believe that supervisors have absolute authority over the business operation and that the teenage employee's objections would be ineffective to stop the harassment.

The EEOC itself has recognized "through charges filed and anecdotal evidence, that discrimination is a problem for many in this group."¹³⁸ A particularly dangerous environment exists in restaurants, movie theaters, and retail stores, where the business atmosphere furthered by the employer is deliberately social. More than half of EEOC harassment complaints between 1999 and 2007 were against restaurants,¹³⁹ where more than half of the 12 million workers are under the age of 25, and several million are between the ages of 15 and 19.¹⁴⁰ Restaurants paid out more than \$7.3 million to settle sexual harassment lawsuits involving teenage workers with some awards totaling hundreds

of Bullying and Sexual Harassment on Middle School and High School Girls, 13 VIOLENCE AGAINST WOMEN 627, 637 (2007).

135. See, e.g., HANDBOOK OF ADOLESCENT PSYCHOLOGY (Vincent Van Hasselt & Michael Hersen eds., 1987); Gary B. Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. FAM. L. 445, 465–66 (1984); Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decision Making*, 37 VILL. L. REV. 1607, 1607 (1992). See Part IV.B. *infra*.

136. Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD. RTS. J. 16, 17, 19–20 (1999); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 155–56, 160–64 (1997); Jeffrey Fagan, *Context and Culpability in Adolescent Crime*, 6 VA. J. SOC. POL'Y & L. 507, 516–17, 524 (1999).

137. Many youth workers are paid sub-minimum wage. 29 C.F.R. § 520 (2008).

138. EEOC FY 2007 PERFORMANCE BUDGET (2007), available at www.eeoc.gov/abouteeoc/plan/2007budget.

139. Dina Berta, *EEOC: Industry Sued Most in Claims of Teen Harassment*, NATION'S RESTAURANT NEWS, Feb. 5, 2007, available at http://findarticles.com/p/articles/mi_m3190/is_6_41/ai_n17217095.

140. *Id.*

of thousands of dollars.¹⁴¹ Seventy-two of 127 EEOC complaints between 1999 and 2008 involving teenagers were against eating establishments.¹⁴² Almost all of the complaints were based on sexual harassment charges.¹⁴³

Two types of actionable discrimination claims are recognized under Title VII: “quid pro quo” harassment, and “hostile work environment.”¹⁴⁴ To establish either, young employees must prove they were subject to unwelcome sexual conduct based upon their sex.¹⁴⁵ Conduct is unwelcome if the juvenile did not request or invite it and regarded it as undesirable or offensive.¹⁴⁶ The employer’s defense that the behavior was not unwelcome has often proved difficult to rebut, even for teenagers sophisticated enough to complain and litigate the issue. Adolescence is a time of sexual awakening and teenagers are highly susceptible to conforming to group norms.¹⁴⁷ Their supervisors are often young adults and the atmosphere at work is often similar to social non-work contexts where sexual language, gestures, and behavior are common.

Supervisors in the venues where teenage girls work are typically the perpetrators of harassment and employers are vicariously liable for hostile work environments, even without “tangible employment action.”¹⁴⁸ The employer, however, has an affirmative defense based on its conduct in seeking to prevent and correct harassing conduct. Courts must thus determine the reasonableness of the young employee’s conduct in seeking to avoid harm and to mitigate damages. These issues have been difficult for youth workers because of the failure of courts to

141. *Id.*

142. *Id.*

143. For example, two McDonald’s franchises had to each pay about a half-million dollars to settle claims that male supervisors subjected teenage girls to unwanted touching and lewd comments. *Id.*

144. 42 U.S.C. § 2000e-2(a)(1) (2003) (prohibiting discrimination based upon sex); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65–66 (1986).

145. *Meritor Sav. Bank*, 477 U.S. at 68. See also 29 C.F.R. § 1604.11(a) (2003) (requiring that sexual conduct be unwelcome to qualify as sexual harassment).

146. *Meritor Sav. Bank*, 477 U.S. at 68. The Supreme Court has held that courts must ask whether plaintiff “by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participating in sexual intercourse was voluntary.” *Id.*

147. Helen E. Garnier & Judith A. Stein, *Values and the Family: Risk and Protective Factors for Adolescent Problem Behaviors*, 30 YOUTH & SOC. 89, 108, 112 (1998). See generally Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799 (2003); Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763 (1995); Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEV. REV. 1, 1–12 (1992).

148. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998).

appropriately judge the reasonableness of a teenager's failure to file a complaint.¹⁴⁹

Some federal courts have now taken a more realistic view of a number of critical legal issues in juvenile sexual harassment cases. Judge Richard Posner has perceptively recognized that consent to sexual activity does not necessarily provide a defense to an employer in a Title VII action.¹⁵⁰ In *Doe v. Oberweis Dairy*,¹⁵¹ a teenager had actively participated in sexual behavior with an adult supervisor, culminating in intercourse at the supervisor's apartment.¹⁵² The court, nonetheless, found the intercourse nonconsensual; under the state-determined statutory age of consent, the minor could not lawfully consent to the intercourse and the behavior was thus not voluntary or welcomed.¹⁵³ Although the intercourse occurred off work premises, it was the culmination of on-the-job conduct, and the employer was thus liable.¹⁵⁴

In *EEOC v. V&J Foods, Inc.*,¹⁵⁵ the Seventh Circuit held that an employer's affirmative defense is only available where the employer exercised reasonable care to prevent or correct any harassment and the young employee failed to avail herself of preventive or corrective measures available to her.¹⁵⁶ An employer's duty to protect its young workers is increased because of the worker's immaturity and education;¹⁵⁷ procedures and rules appropriate for adults are not necessarily suitable for a 16-year-old girl in her first paying job. Similar to many other U.S. employers, the restaurant was consistently and consciously employing part-time, inexperienced teenage workers and thus had a duty to tailor rules and procedures to their level of understanding.¹⁵⁸ Employing a characteristic cost-benefit analysis,

149. For example, in *Reed v. MBNA Marketing Systems, Inc.*, the court found neither the minor employee's age, nor her asserted reasons, including embarrassment and intimidation, excused her delay in reporting harassing comments and actions. Without discussing the plaintiff's age or vulnerability, the court refused to excuse the plaintiff from following the procedures adopted for her protection. 231 F. Supp. 2d 363, 375 (D. Me. 2002). In *Madrid v. Amazing Pictures*, a store manager and his replacement consistently made statements regarding a young female worker's anatomy. No. Civ. 99-1565, 2001 WL 837922 (D. Minn. 2001). She was told that if she would lift up her shirt, she would attract more sales. *Id.* at 4. The court dismissed the claim, finding she unreasonably failed to take advantage of preventative or corrective opportunities. *Id.* at 10.

150. *See generally*, *Doe v. Oberweis Dairy*, 456 F.3d 704 (7th Cir. 2006).

151. *Id.*

152. *Id.* at 713.

153. *Id.* at 716-18.

154. *Id.*

155. 507 F.3d 575 (7th Cir. 2007).

156. *Id.* at 578.

157. *Id.*

158. *Id.*

Judge Posner found any additional cost to Burger King must be measured against the benefits it would receive in terms of reduction in workplace harassment.¹⁵⁹ Available to the employer were simple and inexpensive measures such as posting notices, toll-free numbers for sexual harassment complaints, etc.¹⁶⁰

Employers may not only be liable under Title VII, but also under a variety of state tort law theories. Common-law assault, battery, and intentional infliction of emotional distress are just a few of the potential available actions.¹⁶¹ State courts have also fashioned new theories, e.g., the tort of sexual harassment.¹⁶² Moreover, an employer may be financially responsible because of its failure to adequately supervise the workplace, or its negligent hiring and retention of fellow employees or supervisors.¹⁶³ Although harassment may sometimes lead to physical injury, its impact is more typically emotional and psychological.¹⁶⁴ Embarrassment, shame, fear, and diminished self-image are common.¹⁶⁵

III. THE LEGAL STRUCTURE OF CHILD LABOR

A. *Pre-FLSA History*

Child labor is not new in the United States. In the Massachusetts Bay Colony, children worked to produce clothing for the colony¹⁶⁶ and pauper children were sent to Virginia as forced laborers.¹⁶⁷ At common law, children owed services to their parents who could assign their child's labor to others.¹⁶⁸ In the nineteenth century, master craftsmen

159. *Id.*

160. *Id.*

161. *See, e.g.,* Manning v. Metro. Life Ins. Co., 127 F.3d 686, 691 (8th Cir. 1997) (holding that the tort of outrage was a question for the jury, and if the defendants' sexual harassment did constitute such a tort, compensatory damages would be upheld); Murillo v. Rite Stuff Foods, Inc., 65 Cal. App. 4th 833, 850 (2d Dist. 1998) (emotional distress was compensable under traditional theories of tort law).

162. Kerans v. Porter Paint Co., 575 N.E.2d 428, 435 (Ohio 1991).

163. *Id.*

164. MICHELLE A. PALUDI & RICHARD B. BARICKMAN, ACADEMIC AND WORKPLACE SEXUAL HARASSMENT 27 (1991).

165. *See, e.g.,* Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1244 (10th Cir. 1999) (discussing a young sexual harassment victim who engaged in self-destructive and suicidal behavior).

166. HERMAN, *supra* note 30, at 3.

167. *Id.*

168. "It is a rule as old as the common law that the father is entitled to the custody and control of his minor children, and to receive their earnings." Eustice v. Plymouth Coal Co., 13 A. 975, 976 (Pa. 1888).

often contracted with parents to train children in a trade or craft in exchange for years of the children's services.¹⁶⁹

More importantly, the post-Civil War industrial revolution in the United States fostered the use of young workers. While children's work on farms or as apprentices was seen as an integral part of education and the family's overall well-being, industrial child labor presented a new reality—mass employment of children underground in the mines or in huge mills and factories filled with noise, pollution, and physical danger.¹⁷⁰ In 1900, one out of every six children between the age of 10 and 16 was gainfully employed—one million more than in 1870.¹⁷¹ Child labor persisted in the twentieth century and continues to the present day.¹⁷²

Attempts to regulate child labor have an extraordinarily lengthy and complex history in the United States. Massachusetts passed the first child labor law in 1836¹⁷³ and an asymmetrical web of state laws spread during the next 100 years.¹⁷⁴ By 1913, all but nine states had enacted laws setting 14 as the minimum age for factory work,¹⁷⁵ and a majority had extended this minimum age to many other places of work.¹⁷⁶ But in response, employers wanting cheap child labor could simply move to another state or threaten such a move to blunt these reforms. Clearly, an irregular web of state laws was not adequate to deal with this national problem.

Congress passed the first federal statute, the Keating-Owen Act on Child Labor, in 1916.¹⁷⁷ Under the act, neither mines that employed

169. See generally MARILYN IRVIN HOLD, *THE ORPHAN TRAINS* (1992).

170. There is extensive literature on child labor during the late nineteenth and early twentieth centuries. See, e.g., EDWARD CLOPPER, *CHILD LABOR IN THE CITY STREETS* (1912); KATHARINE DUPRE LUMPKIN & DOROTHY WOLF DOUGLAS, *CHILD WORKERS IN AMERICA* (1937); MARKHAM ET AL., *CHILDREN IN BONDAGE* (1969); JOHN SPARGO, *THE BITTER CRY OF CHILDREN* (1908).

171. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE & LABOR, *OCCUPATIONS AT THE TWELFTH CENSUS* cxliii (1904). A total of 1,750,178 children were employed, an increase of one million children since 1870. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970 75-84* (1975). This figure represented 6 percent of the total labor force. *Id.*

172. WILLIAM AIKMAN & LAWRENCE KOTIN, *LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE* 49-53 (1980) (describing how nationalization of the American child labor movement at the turn of the twentieth century placed the issue of young American workers in textile and other mills into public consciousness).

173. 1 *CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY: 1600-1865* 921 (1970) [hereinafter *CHILDREN AND YOUTH*, VOL. I].

174. *Id.*

175. HERMAN, *supra* note 30, at 3.

176. *Id.*

177. Keating-Owen Act on Child Labor, ch. 432, 39 Stat. 675 (1916).

children under age 16, nor factories that employed children under age 14, could ship their products in interstate commerce.¹⁷⁸ The Act also limited the total working hours of 14- to 16-year-olds. During the *Lochner* era,¹⁷⁹ the federal judiciary, led by the U.S. Supreme Court, aggressively utilized economic rights discovered in the Due Process Clause to limit state progressive legislation,¹⁸⁰ concomitantly, federal courts used concepts of state rights to limit Congress's ability to regulate the economy.¹⁸¹ In this judicial climate, the Supreme Court in *Hammer v. Dagenhart* unsurprisingly declared the Keating-Owen Act unconstitutional as an invasion of state sovereignty.¹⁸²

The year after *Hammer v. Dagenhart* was decided, Congress once again sought to regulate child labor—this time under its taxing power. The Child Labor Tax Law¹⁸³ assessed a 10 percent tax on the profits of manufacturing establishments that used child labor in violation of minimum-age requirements and of youth worksites.¹⁸⁴ Like the Keating-Owen Act, the Child Labor Tax Act was short-lived. In 1922, in *Bailey v. Drexel*,¹⁸⁵ the Supreme Court declared the tax invalid as an unconstitutional federal regulation of a state function.¹⁸⁶

With the nation in economic crisis and President Franklin Roosevelt's New Deal proposals before it, Congress passed the National

178. *Id.* Violations of these provisions were punishable by a fine of up to \$200 per offense for a first conviction, and a fine of up to \$1000 or imprisonment for subsequent convictions. *Id.*

179. *Lochner v. N.Y.*, 198 U.S. 45, 65 (1905) (declaring unconstitutional a New York law that set the maximum hours bakers could work because it interfered with freedom of contract and was not justified by a legitimate policy purpose). The term *Lochner* Era is commonly used to describe the period, between the late 1890s and 1937, when the U.S. Supreme Court struck down many state and federal laws as unconstitutional because they interfered with the "freedom of contract" or expanded congressional power at the expense of state prerogatives. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 522–31 (2d ed. 2005).

180. *See, e.g.*, *Tipaldo ex rel. Morehead v. New York*, 298 U.S. 587, 618 (1936) (invalidating state law that set a minimum wage for women); *Williams v. Standard Oil Co.*, 278 U.S. 235, 244 (1929) (declaring unconstitutional state maximum prices for gasoline); *Weaver v. Palmer Bros.*, 270 U.S. 402, 415 (1926) (invalidating state law that prohibited the use of rags and debris in manufacturing bedding); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924) (striking down state-required standardized weights for bread loaves).

181. *See, e.g.*, *Adkins v. Children's Hosp.*, 261 U.S. 525, 562 (1923) (invalidating a federal minimum wage for women).

182. *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918). *See also* Panel Discussion, *A Transcript Featuring William H. Harbaugh, E. Barrett Prettyman, Jr., Mark O. Tushnet, Leland B. Ware, John O. Cole, Moderator, and a Special Video Presentation by Oliver W. Hill*, 52 MERCER L. REV. 581, 596 (2001).

183. Child Labor Tax Acts, ch. 18, 40 Stat. 1057 (1919).

184. *Id.*

185. 259 U.S. 20 (1922).

186. *Id.* at 44.

Industrial Recovery Act (NIRA) in 1933.¹⁸⁷ The Act empowered trade associations, organized by industry and unions, to create voluntary regulations that, when approved by the President, would become enforceable industrial codes.¹⁸⁸ Most of the codes that were adopted had child labor provisions, including minimum-age requirements and prohibitions on “hazardous work” for children.¹⁸⁹ Once more, however, the Supreme Court declared this statute unconstitutional.¹⁹⁰

But Lochnerism’s legal principles crumbled before the economic realities of the Great Depression.¹⁹¹ In 1938, when Congress enacted the FLSA, including its child labor provisions, there were still substantial doubts about the constitutionality of such legislation. After President Roosevelt’s 1936 landslide victory, and with the nation still mired in the greatest depression of its history, the constitutional dam broke with Justice Robert’s famous “switch in time that saved nine.”¹⁹² In *NLRB v. Jones & Laughlin Steel Corp.*,¹⁹³ the Court upheld the National Labor Relations Act, effectively overruling the limits the Court had previously placed on Congress’s power to legislate under the Commerce Clause.¹⁹⁴ By 1941, in *United States v. Darby*,¹⁹⁵ the Supreme Court expressly overruled *Hammer v. Dagenhart* and approved the FLSA in its entirety.¹⁹⁶ Indeed, the Court noted later that the FLSA was to “keep the arteries of commerce free from pollution by the sweat of child labor.”¹⁹⁷ Even today, as the Supreme Court has once again begun to restrict Congress’s powers under the Commerce Clause, it is clear that “oppressive child labor” is within Congress’s constitutional power to forbid.¹⁹⁸

187. National Industrial Recovery Act (NIRA) of 1933, Pub. L. No. 67, (codified as amended at 15 U.S.C. § 703), *invalidated by* Schechter Poultry Corp. v. U.S., 295 U.S. 495, 551 (1935).

188. NIRA § 3, 48 Stat. at 196.

189. Andrew J. Samset, *Child Labor and the New Millennium*, 21 WHITTIER L. REV. 69, 75 (1999). The elimination of child labor in cotton mills was particularly significant. Margaret H. Schoenfeld, *Analyses of the Labor Provisions of the NRA Codes*, MONTHLY LAB. REV., Mar. 1935, at 591, 595.

190. A.L.A. Schechter Poultry Co. v. United States, 295 U.S. 495 (1935).

191. CHEMERINSKY, *supra* note 179, at 540.

192. Roosevelt’s “court packing” plan would have allowed the president to add as many as six new justices to the Court. *Id.* at 541.

193. 301 U.S. 1 (1937).

194. *Id.* at 49.

195. 312 U.S. 100 (1941).

196. *Id.* at 116-17.

197. *W. Union Tel. Co. v. Lenroot*, 52 F. Supp. 142, 147-48 (S.D.N.Y. 1943), *rev’d*, 323 U.S. 490 (1945).

198. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995). The basis of federal regulation of child labor, however, remains firm; goods sent into interstate commerce made by children definitely

Darby was an enormous step toward legitimizing potential federal power over youth employment, but in practice, large numbers of children continued to work despite the FLSA.¹⁹⁹ Approximately 850,000 children under the age of 16 were gainfully employed in 1938, but only 50,000 were subject to the FLSA.²⁰⁰ Various exemptions built into the law meant that the act created few real barriers to the employment of youths.²⁰¹ Moreover, with the onset of World War II, school enrollment fell by 24 percent for 15- to 18-year-olds while the number of employed 14- to 17-year-olds increased by 200 percent.²⁰²

B. *The FLSA and Its Deficiencies*

The child labor provisions of the FLSA have been amended numerous times since the Act was enacted in 1938, but the Act's basic provisions have remained substantially unchanged. The Act is complex and often opaque without examining administrative interpretation. The critical statutory prohibitions are contained in Sections 203 and 212.²⁰³ Employers subject to the Act may not ship goods manufactured by "oppressive child labor"²⁰⁴ through interstate commerce (the "hot goods" prohibition),²⁰⁵ nor employ oppressive child labor in commerce or in the production of goods for commerce, or in any "enterprise" engaged in these activities.²⁰⁶

Oppressive child labor is defined by both the Act²⁰⁷ and by DOL regulations and varies with age, industry, nature of the job, and other factors. In particular, youths under 18 years of age (16 in agriculture)²⁰⁸ may not be employed in mining or manufacturing or "in any occupation

affect interstate commerce. *Id.* at 559 (oppressive child labor may be regulated under the Commerce Clause).

199. Jeremy P. Felt, *The Child Labor Provisions of the Fair Labor Standards Act*, 11 LAB. HIST. 468, 478-79 (1970).

200. JAMES S. COLEMAN ET AL., YOUTH: TRANSITION TO ADULTHOOD, REPORT OF THE PANEL ON YOUTH OF THE PRESIDENT'S SCIENCE ADVISORY COMMITTEE 36 (1974).

201. Felt, *supra* note 199, at 478-79.

202. See Natsuki Aruga, "An 'Finish School': Child Labor During World War II", 29 LAB. HIST. 498, 498 (1988). During the Second World War, school enrollment for 15- to 18-year-olds fell by 1.2 million, and employment of 14- to 17-year-olds increased by over two million. *Id.*

203. 29 U.S.C. § 203, 212 (2008). See also 29 C.F.R. § 570.102 (2008).

204. Defined in 29 U.S.C. § 203(d)(2008).

205. 29 U.S.C. § 212(a)-(c) (2008). See also 29 C.F.R. § 570.114.

206. 29 U.S.C. § 212(c) (2008).

207. 29 U.S.C. § 203(l)(1) and (2). In 1949, the definition was amended to include an occupation found by the Secretary of Labor to be "particularly hazardous for the employment of children between [the ages of 16 and 18] or detrimental to their health or well-being." 63 Stat. 911 (1949).

208. 29 U.S.C. § 213(c)(2) (2006).

found and declared by the Secretary of Labor to be particularly hazardous for the employment of minors or detrimental to their health or well-being.”²⁰⁹ Although the act prohibits adolescents from working in hazardous occupations, adolescents over 16 years of age have no federal restrictions on the number of hours or the time of day they may work.²¹⁰ Adolescents under 16 may not work during school hours,²¹¹ before 7 a.m., or after 7 p.m.,²¹² and are limited to no more than three hours per day and eighteen hours per week.²¹³

While the child labor provisions of the FLSA provide some limits, a tangle of exemptions guarantees both complexity and non-coverage of many youth workers. In fact, it was recognized from the time of the FLSA’s enactment that the vast majority of child labor remained outside its scope:

So far as coverage was concerned, all proponents were aware that any of the suggested versions of legislation would reach only a small fraction of existing child labor, and the chief concern seems to have been to eliminate child labor in mining and manufacturing industries . . . which was the most objectionable use of child labor.²¹⁴

When originally enacted, the FLSA contained an explicit exclusion of agriculture, which in 1938 accounted for approximately one-half to two-thirds of all child labor.²¹⁵ Additionally, the FLSA does not apply to adolescents employed in activities in an “enterprise” with less than \$500,000 per year in operations²¹⁶ or those not affecting interstate commerce. Those workers, however, may be protected by state statutes.²¹⁷ In addition, the jurisdictional thresholds of the Act also exclude children employed by a “parent or a person standing in place of

209. 29 C.F.R. § 570.2(a)(i)(i) (2006); 29 U.S.C. § 203 (l) (2006).

210. *See* Schmidt v. Reich, 835 F. Supp. 435, 444 (N.D. Ill. 1993).

211. 29 C.F.R. § 570.35 (a)(1) (2009).

212. 29 C.F.R. § 570.35 (a)(6) (2009).

213. During school vacations, a minor under 16 may work a maximum of eight hours per day and forty hours per week. 29 U.S.C. § 203(l); 29 C.F.R. § 570.35 (a)(2)&(4) (2009).

214. *W. Union Tel. Co. v. Lenroot*, 323 U.S. 490, 495–98 (1945).

215. 29 U.S.C. § 213(c) (2006); *see also* *Western Union Tel. Co.*, 323 U.S. at 499.

216. 29 U.S.C. § 203(c)(1)(A)(ii) (2009).

217. Section 18 of the act allows state or local laws to create higher standards than those established by the FLSA. 29 U.S.C. § 218 (2008). There is thus no preemption of the field by the federal authorities. 29 U.S.C. § 218 (a) (2008).

a parent” or in a variety of other kinds of employment.²¹⁸ As a result, millions of American youth work lawfully under the FLSA.²¹⁹

The Wage-Hour Division (WHD), a unit of the Employment Standards Administration in the U.S. Department of Labor, has exclusive responsibility for administration of the FLSA’s child labor provisions.²²⁰ Neither a child worker nor her parents may sue to enforce the act, a glaring exception to the many civil rights acts, and even to other provisions of the FLSA, that allow private enforcement.²²¹ The agency has a number of sanctions available to police the act. Injunctions may be sought to enjoin the shipment of “hot goods,” i.e., those produced in violation of child labor restrictions,²²² and “willful” violators are subject to criminal penalties including fines and imprisonment for up to six months for repeat offenders.²²³

Civil penalties of \$1,000 per violation were first added in 1974 because the injunctive and criminal sanctions were determined to be “insufficiently flexible.”²²⁴ In 1990, while increasing the civil penalty provision to \$10,000 per violation, the sums collected were ordered to be deposited with the general fund of the Treasury, rather than retained by the DOL to defray the cost of enforcement.²²⁵ These penalty provisions

218. 29 U.S.C. § 203(l)(1); 29 C.F.R. § 570.2(a)(2) (2006). Additional specific exemptions relate to the employment of child actors, 29 U.S.C. § 213(c)(2) (2006), newspaper deliverers, 29 U.S.C. § 213(d) (2006), and some others.

219. These jobs include many of the visible parts of the youth workforce; kitchen and other work involved in preparing and serving food and beverages, 29 CFR § 570.34(a)(7); cashiering, § 570.34(a)(3); price making and tagging, § 570.34(a)(3); cleaning and grounds maintenance, § 570.34(a)(6); office and clerical work, § 570.34(a)(1); work in connection with cars and trucks, § 570.34(a)(8).

220. In 1946, § 3(l) was amended to transfer enforcement responsibility from the Chief of the Children’s Bureau to the Secretary of Labor for declaring an occupation to be particularly hazardous to the employment of children or detrimental to their health or well-being. 1946 Reorg. Plan No. 2, § (b); 11 Fed. Reg. 7873, 60 Stat. 1065 (codified as amended at 29 U.S.C. § 203(l)).

221. Compare the enforcement provisions of the child labor provisions, 29 U.S.C. § 215(a), 216, and 217 (2008), and cases such as *Henderson v. Bear*, 968 P.2d 144, 147 (Colo. App. 1998) (refusing to infer a private civil remedy for violation of child labor provisions of the FLSA) with analogous provisions of civil rights statutes such as Title VII, 42 U.S.C. § 2000(e)-5(g) (2003) (provides suit for reinstatement, back pay allowed); the Age Discrimination in Employment Act, 29 U.S.C. § 626(b) (same); the Americans with Disabilities Act, 42 U.S.C. § 1201 (same); the Equal Pay Act, 29 U.S.C. § 206(d) (2008) (same) or the minimum wage and maximum hours provisions of the FLSA. 29 U.S.C. § 206(b) (2008).

222. 29 U.S.C. § 217 (2008).

223. 29 U.S.C. § 216(a) (2008) (“Any person who willfully violates any of the provisions of section 215 shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment of not more than six months, or both.”).

224. Section 25(E). Pub. L. No. 93-259 (codified as amended at 29 U.S.C. 216(e)). *Marshall v. Jerrico*, 446 U.S. 238, 244 (1980).

225. Pub. L. No. 101-508 (codified as amended at 29 U.S.C. § 216(e)).

were again amended in 2008 to increase the civil penalty to \$11,000 and to create a new \$50,000 penalty for a violation resulting in death or serious injury, which may be doubled if the violation was willful.²²⁶ In determining the amount of a penalty, the Act requires the WHD to consider the size of the business, the gravity of the violation, history of prior violations, and other factors.²²⁷

Many issues are not addressed by the act at all. There is no standardized reporting requirement of work-related injuries and deaths, an omission that leads to extraordinary difficulty in determining the incidence of those events.²²⁸ Nor are working youths required to have a work permit or certificate.²²⁹ Hours of employment are restricted only for minors 15 or younger; 16- and 17-year-olds may work any amount of time in any occupation not found to be “particularly hazardous.”²³⁰ These older youths may thus be required to work long hours and during the night, with almost certain negative academic and other consequences.²³¹ This statutory gap is even more egregious given that many of these working youths are already doing poorly in school.²³² Many teenagers give work priority over their studies, despite the critical role education plays in achieving economic and other success in society.²³³ Moreover, even in jobs deemed “hazardous” by the DOL, if

226. 29 U.S.C. § 216(e) (2008). In support of the amendment, Rep. Phil Hare (D-IL) stated in relevant part that the bipartisan legislation was “designed to address the most serious child labor violations, deter repeat occurrences, and strengthen the enforcement laws to protect our Nation’s most vulnerable workers.” Statement of Rep. Hare, *available at* <http://www.govtrack.us/congress/record.xpd?id=110-h20070612-42&bill=h110-2637>.

227. 29 U.S.C. § 216(e)(3) (2008); 29 C.F.R. 579.5(e)(c). After an initial determination of violation, administrative assessments are “final” unless the employer files an exception within fifteen days; administrative hearings before an administrative law judge are available to those disputing the Department’s findings. 29 C.F.R. 579.5 (e).

228. *See supra* notes 98-111 and accompanying text.

229. The DOL, however, accepts state-issued work permits and certificates as proof of age. If a state does not issue permits or certificates, the DOL will issue age certificates on request. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, CHILD LABOR: WORK PERMIT AND DEATH AND INJURY REPORTING SYSTEMS IN SELECTED STATES 2 (1992).

230. *See, e.g.,* *Schmidt v. Reich*, 835 F. Supp. 435, 442 (N.D. Ill. 1993).

231. The court in *Schmidt* declared:

Although we share the plaintiff’s concern about the plight of full-time students compelled to labor late into the night and to work hours almost certain to impair their studies, and while we recognize that education plays a key role in achieving success in today’s society, the bounds of our authority are clear. Any change must, as [Labor] Secretary Martin observed, come from the legislature.

Id. at 444.

232. MARVIN LEVINE, CHILDREN FOR HIRE 177–78 (summarizing numerous studies demonstrating poor academic performance). *See supra* notes 67-72 and accompanying text.

233. *See Schmidt*, 835 F. Supp. at 437–38.

employers fall outside the jurisdiction of the FLSA, youth workers receive no protection from federal law.²³⁴ Despite the large number of workplace accidents,²³⁵ federal law does not require youth workers to be provided with safety training or adult supervision. Notably, 41 percent of workplace deaths occur while an adolescent is doing work prohibited by federal child labor laws.²³⁶

The FLSA provides no relief for youth killed or injured while working in violation of the law. In *Henderson v. Bear*,²³⁷ for example, a 15-year-old boy was electrocuted while doing work alleged to violate both the Colorado and federal child labor laws.²³⁸ His parents sued for damages alleging extreme and outrageous conduct by the employer.²³⁹ The Colorado Court of Appeals held that the Worker's Compensation Act provided the exclusive remedy,²⁴⁰ despite the fact that the parents received only reimbursement for medical expenses and a \$4,000 funeral benefit.²⁴¹ Using the Supreme Court's four-factor *Cort v. Ash*²⁴² test to discern congressional intent, the court found that the FLSA violation provided no basis for implying a private cause of action.²⁴³ The court even found that the parents' suit and appeal "lacked substantial justification" and awarded attorney fees to the employer for defending the appeal.²⁴⁴ In fact, the amount of the attorney fees awarded equaled what the parents received under workers' compensation.²⁴⁵ Numerous other state appellate decisions have produced similar results.²⁴⁶ Federal

234. For example, enterprises whose gross volume sales are less than \$500,000 annually are exempted from the "oppressive child labor" provision of the FLSA. 29 U.S.C. § 203(s)(1)(A)(ii) (2008), 212(c) (2008).

235. See *supra* notes 90–127 and accompanying text.

236. Dawn N. Castillo et al., *Occupational Injury Deaths of 16- and 17-Year Olds in the United States*, 84 AM. J. PUB. HEALTH 646, 648 (1994).

237. 968 P.2d 144 (Colo. App. 1998).

238. *Id.* at 145.

239. *Id.*

240. *Id.* at 146.

241. "If the injury comes within coverage of the [Worker Compensation] Act, an action for damages is barred even though compensation is not provided for a particular element of damages." *Id.* at 146.

242. 422 U.S. 66, 80-84 (1975).

243. *Henderson*, 968 P.2d at 146.

244. *Id.* at 147.

245. *Id.* Ironically, the Hendersons could have sued a non-employer allegedly responsible for their son's death, such as a manufacturer of the car wash equipment. Worker's compensation laws do not affect suits against non-employers. ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKER'S COMPENSATION*, ch. 14. [hereinafter *LARSON'S WORKER'S COMP.*]

246. See, e.g., *Jensen v. Sport Bowl, Inc.*, 469 N.W. 2d 370, 373 (S.D. 1991) (injured 14-year-old employed in violation of federal regulations prohibiting type and time of work is relegated to

courts have proven to be just as inhospitable to suits on behalf of injured youths who are illegally employed.²⁴⁷

Particularly damaging to the argument that the FLSA should be interpreted to create a private cause of action is the ancient maxim, *expression unius est exclusion alterius*, i.e., “when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.”²⁴⁸ Other portions of the FLSA explicitly provide for private suits for damages; e.g., adult employees may sue for back wages, liquidated damages, attorney fees and litigation costs under § 16(b) of the act,²⁴⁹ and the statute provides for a jury trial in these actions.²⁵⁰ Absent an amendment to the FLSA, it is unlikely injured youth workers can use the act for private actions. Since the FLSA provides no federal remedy for youths killed or injured while working in prohibited jobs,²⁵¹ the only recourse for these victims is state law.

State workers’ compensation systems often provide the exclusive remedy.²⁵² These systems grant employers immunity from tort actions in exchange for limited compensation for injuries that arise out of and in the course of employment.²⁵³ Under the exclusive remedy provisions, employees receive fixed levels of compensation.²⁵⁴ The benefits received by injured employees are determined by state formulae that disadvantage injured minors. For example, awards are typically based on a fraction of the employee’s average weekly wage during the year

state worker compensation and remedies). *Kube v. Kube*, 227 N.W. 2d 860, 862 (Neb. 1975) (14-year-old injured on tractor in violation of 29 C.F.R. § 570.71 has no private cause of action).

247. In *Breitwieser v. KMS Indust., Inc.*, 467 F.2d 1391 (5th Cir. 1972), for example, a 16-year-old boy was crushed to death by the forklift he was illegally operating. *Id.* at 1392. Under the Georgia Worker’s Compensation statute, GA. CODE ANN. § 114–103 (1972), the recovery given to beneficiaries of deceased workers with no dependents was \$750. *Breitwieser*, 467 F.2d at 1394. The Fifth Circuit Court of Appeals refused to imply a cause of action from the FLSA on behalf of the child, despite the obvious inadequacy of the state workers’ compensation award. The court found that the FLSA already contained a “comprehensive” administrative enforcement scheme and thus could not be used to sue the employer for damages. *Id.* at 1392. “Congress’ determination that 16 year olds shall not be assigned to forklifts will not be subverted if we fail to read a civil damages remedy into the Act. The criminal sanctions found in the Act are substantial enough to serve as an adequate deterrent to violations of the Act’s child labor provisions.” *Id.* at 1393.

248. *Nat’l R.R. Passenger Corp. v. Nat’l Assoc. of R.R. Passengers*, 414 U.S. 453, 458 (1974).

249. 29 U.S.C. § 216(b) (2008).

250. *Lorillard v. Pons*, 434 U.S. 575, 580 & n.7 (1978).

251. *See, e.g., Henderson v. Bear*, 968 P.2d 144, 147 (Colo. App. 1998) (refusing to infer a private, civil remedy for violation of FLSA); *Kube*, 227 N.W.2d at 861 (Neb. 1975) (same).

252. *Henderson*, 968 P.2d at 146.

253. *Id.*

254. LARSON’S WORKER’S COMP, *supra* note 245.

preceding the date of the injury.²⁵⁵ Minors' earnings are likely to be low or minimum wage and the weekly wage typically reflects only part-time work.²⁵⁶ Most young workers, of course, have no spouse or dependents and thus the death of an illegally employed minor typically provides only minimal compensation.²⁵⁷

C. *Lack of Effective Criminal Sanctions*

The existing criminal provisions of the FLSA send an alarming message of immunity for employer behavior that endangers young workers' lives and future health. Dozens of youths are killed on the job each year and hundreds of thousands are injured.²⁵⁸ Yet, civil penalties for violations of the child protection portions of the FLSA and its regulations remain the size of small claim judgments, and criminal prosecutions are non-existent. An economically rational employer, motivated to maximize profit, will calculate the chance of detection as negligible and the cost of the sanction, if detected, as an eminently affordable cost of doing business. As Professor Lynn Rhinehart's work has shown, there are far stronger penalties for violations of environmental laws.²⁵⁹ Young workers receive less protection than endangered species.

Although FLSA Section 216(a) provides a criminal sanction,²⁶⁰ the statute is functionally useless. The willfulness required by the statute consists of "deliberate, voluntary and intentional conduct," or actions with reckless indifference to, or disregard for, the act's requirements.²⁶¹

255. See, e.g., ILLINOIS WORKERS' COMPENSATION COMMISSION: FY2007 ANNUAL REPORT 15 (2007). There is a striking lack of cases brought on behalf of minors appealing their workers' compensation claim. A Lexis Search using terms and connectors "minor employee" in the "worker's compensation decisions" database disclosed only eight cases in the entire United States between 2000 and 2008.

256. See *infra* Part II.A & B.

257. Arthur J. Amchan, "Callous Disregard" for Employee Safety: *The Exclusivity of the Worker's Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 683-84 (1983). Some states provide that awards for permanent disability may take into account what the minor would have earned after attaining maturity. LARSON'S WORKER'S COMP. § 81.05[2] (2008).

258. See *supra* notes 90-127 and accompanying text.

259. Lynn K. Rhinehart, *Would Workers Be Better Protected if They Were Declared an Endangered Species? A Comparison of Criminal Enforcement Under the Federal Workplace Safety and Environmental Protection Laws*, 31 AM. CRIM. L. REV. 351, 363-73 (1994).

260. 29 U.S.C. § 216(a) (2008) ("Any person who willfully violates any of the provisions of section 215 shall . . . be subject to a fine of not more than \$10,000, or to imprisonment for more than six months, or both." Imprisonment, however, is only available for a second conviction).

261. Willfulness is deliberate and purposeful failure to comply with the Fair Labor Standards Act. *Darby v. U.S.*, 132 F.2d 928, 930 (5th Cir. 1943). Violation is willful if the act of the defendant is deliberate, voluntary, and intentional; mere mistake or inadvertency is insufficient to

Limiting prosecution to “willful” violation ignores the general principle that ignorance of the law is no defense.²⁶² Moreover, even if such prosecutions were brought, the penalty is a fine of not more than \$10,000 or imprisonment for not more than six months, the latter only after a prior criminal conviction.²⁶³ Violators are thus accorded “one free bite” before there is even the possibility of a misdemeanor conviction with the possibility of jail time. Given the essential mental requirement, the need for a repeat offense, and the minimal penalty, criminal enforcement is effectively ruled out. In fact, there has not been a federal prosecution under this section since the Act was adopted seventy years ago.²⁶⁴ A protective statute for an extremely vulnerable group of workers thus informs violators they will face only a modest monetary penalty if the agency does in fact enforce the statute. Deterrence is removed even for the risk of death or serious injury.

The extraordinary laxity of the FLSA may be illustrated by comparing it to sanctions available for violations of other regulatory provisions. Environmental statutes like the Clean Water Act, RCRA, or Clean Air Act²⁶⁵ provide stiff penalties for any person who “knowingly places another person in imminent danger of death or serious bodily harm.”²⁶⁶ Sentences up to fifteen years and fines up to \$250,000 are possible for natural persons.²⁶⁷ Organizational defendants are subject to

show willfulness. *Nabob Oil Co. v. U.S.*, 190 F.2d 478, 480 (10th Cir. 1951). Violation is willful only if the employer knew or showed reckless disregard as to whether its conduct was prohibited by Fair Labor Standards Act; although meaning of “willful” is not fixed or determinate, willfulness is akin to intentionality, and a willful act requires deliberate effort, more than mere negligence. *Brock v. Richland Shoe Co.*, 799 F.2d 80, 82 (3rd Cir. 1986).

262. See Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 342-43 (1998) (tracing the history of the criminal law underpinning that ignorance of the law is no excuse).

263. 29 U.S.C. § 216(a) (2008).

264. Ran LEXIS terms and connectors search of the following: “29 pre/5 216a” retrieving sixteen results, none of which dealt specifically with child labor law violations (last search Sept. 12, 2008).

265. 33 U.S.C. § (c)(3)(A) (2009) (The Clean Water Act); 42 U.S.C. § 6925(e) (2008) (RCRA); and 42 U.S.C. § 7413(c)(5)(A) (2009) (the Clean Air Act).

266. See e.g., Clean Water Act, 33 U.S.C. § 1319(c)(3)(A) (1977). (“Any person who knowingly violates [this act] . . . and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$ 250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall . . . be subject to a fine of not more than \$1,000,000.”)

267. *Id.* See also, RCRA, 42 U.S.C. § 6925(e) (2009) (stating that “[a]ny person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subtitle “who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$ 250,000 or imprisonment for not more than fifteen years, or both.”) A defendant that is an

finest up to \$1,000,000.²⁶⁸ Second convictions carry the possibility of twice the fine or jail time.²⁶⁹ The Clean Air Act even contains a negligent endangerment provision.²⁷⁰

IV. EXCEPTIONALISM IN JUVENILE DECISION-MAKING REGARDING WORK AND SCHOOL

A. *The Traditional Paradigm*

The FLSA and state child labor and school attendance laws provide adolescents unprecedented decision-making powers, an anomaly in American law. This Part sets out the normal premises regulating the parent-child-state triad and describes the exceptional nature of legal rules regarding work and education.

As a general matter, Anglo-American law presumes minors are incompetent to make major life decisions and parents are to make these choices for their children. Long-standing constitutional and family-law doctrine provides that parents have a “fundamental” right to the “control or charge or custody” of their children.²⁷¹ These rights inhere in parents in relations with both the state and their children. The rule is undergirded by the presumption that “the natural bonds of affection leave parents to act in the best interests of their children.”²⁷² This paradigm is present in almost all legal areas: constitutional law, statutes, and common-law rules. Courts typically analyze children’s “interests” rather than “rights” because the latter inhere in a person who is *sui juris*,

“organization shall, upon conviction of violating this subsection, be subject to a fine of not more than \$ 1,000,000.” Clean Water Act, 33 U.S.C. § 1319(c)(3)(A) (1977) (same).

268. RCRA, 42 U.S.C. § 6928(e) (2008).

269. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1319(c)(4) (1977) (fine and jail sentence may be doubled for second conviction).

270. 42 U.S.C. § 7413(c)(4) (2009) (“Any person who negligently releases into the ambient air any hazardous air pollutant . . . and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18 [of the United States Code], or by imprisonment for not more than 1 year, or both.”). In addition, numerous criminal U.S. Code provisions provide penalties for making false statements, 18 U.S.C. § 100, obstruction of justice, 18 U.S.C. § 1503 (1996), 18 U.S.C. § 1505 (2004), 18 U.S.C. § 1512 (2008), and 18 U.S.C. § 1519 (2002) and conspiracy to defraud the United States by impeding the effective implementation of government regulatory programs. 18 U.S.C. § 371.

271. *See* *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 536 (1925); *Myer v. Nebraska*, 262 U.S. 390, 399 (1923).

272. *Parham v. J.R.*, 442 U.S. 584, 602 (1979). “Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.” *Id.* at 603. *See also* *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (discussing the tradition and development of parental authority over the lives of their children).

i.e., fully capable of making mature choices. Time after time, the Supreme Court has noted “immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences . . .”²⁷³

These family rules are not only present when constitutional issues are in play. Statutory and common-law rules reflect, in almost all instances, the same legal authority of parents over their children and the law’s unwillingness to give minors decision-making authority over major life choices. Many activities of particular significance to adolescent daily life are restricted by law or placed directly under parental control. In the United States, for example, driving is a significant rite of passage for teenagers, yet minors may drive only after a parent or custodian signs the license application as a sponsor.²⁷⁴ In recent years, states have even gone beyond this parental consent requirement and structured a system of “graduated” driving privileges that provides teenagers access to automobiles only under even more

273. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 640 (1979). The same basic theme is reflected in decisions regarding schools, which act in a *parens patriae* role. Constitutional ability to censor library books, student newspapers, and other activities would be decided differently if adults were involved. *Bd. of Educ. v. Pico*, 457 U.S. 853, 875 (1982) (granting school boards discretion to choose which books are to remain in school library); *Bethel Sch. Dist. v. Frazier*, 478 U.S. 675, 686 (1986) (school officials may discipline and prohibit lewd student speech); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 572 (1988) (the school, in capacity of publisher of student newspaper, may prohibit the publication of some student speech if it would interfere with the duty of the school and affect the immature audience it would reach); *Ingreham v. Wright*, 430 U.S. 651, 676–77 (1977) (upholding Florida law allowing corporal punishment as a disciplinary measure in schools where reasonably necessary and not excessive).

274. See, e.g., Colorado: Every applicant under the age of 18 must submit an “Affidavit of Liability and Guardianship” signed by a parent, step-parent, guardian or grandparent with Power of Attorney. See COLORADO DEPARTMENT OF REVENUE, DIVISION OF MOTOR VEHICLES, www.colorado.gov/cs/Satellite/Revenue-MV/RMV/1177024843056 (last visited Feb. 4, 2009). Delaware: Every applicant under the age of 18 must be accompanied by a sponsor, who has the final authority to determine if the minor is capable of handling the responsibility of operating a motor vehicle. The sponsor may withdraw endorsement at any time until the minor reaches age 18, canceling the minor’s driving privileges. See DELAWARE DIVISION OF MOTOR VEHICLES www.dmv.de.gov/services/driver_services/drivers_license/dr_lic_grad_dl.shtml (last visited Feb. 4, 2009). Georgia: Applicants under the age of 18 must have a parent or legal guardian sign their driver’s license application. Applicants may not retain or apply for a driver’s license if they have withdrawn from school and are under the age of 18. See GEORGIA DEPARTMENT OF DRIVER SERVICES, www.dds.ga.gov/drivers (last visited Feb. 4, 2009). Maryland: “A parent or guardian must co-sign the learner’s permit application if the applicant is under eighteen.” See MARYLAND MOTOR VEHICLE ADMINISTRATION <http://mva.state.md.us/DriverServ/ROOKIEDRIVER/bggenerallearners.htm> (last visited February 4, 2009). Tennessee: Applicants who are not yet 18 must have an adult sign a Minor/Teen-age Driver affidavit and cancellation form. Proof of school attendance/progress is required for those under 18. See TENNESSEE DEPARTMENT OF SAFETY, www.tennessee.gov/safety/driverlicense/gdfaq.htm (last visited Feb. 4, 2009).

restricted circumstances.²⁷⁵ Currently all but three states have such laws.²⁷⁶

There are countless other instances of statutes restricting adolescents' choices. Today, the minimum drinking age, statutorily created, is 21 in all states.²⁷⁷ Tobacco use by children, another hot button issue, is routinely regulated: All states now prohibit the sale of tobacco products to persons under 18²⁷⁸ and in some states, the minimum age is even higher.²⁷⁹ Adolescents may not vote until they are 18,²⁸⁰ and many cities forbid children to be on the street at night without accompanying adults.²⁸¹

275. ALLAN F. WILLIAMS, LICENSING AGE AND TEENAGE DRIVER CRASHES: A REVIEW OF THE EVIDENCE (Sept. 2008) available at www.ihs.org. These Graduated Driver Licensing (GDL) programs require youths to gain safe driving experience before obtaining full driving privileges. Most programs include three stages—Learner Stage: supervised driving, culminating with a driving test; Intermediate Stage: limiting unsupervised driving in high-risk situations; and Full Privilege Stage: a standard driver's license. In 1996, Florida became the first state to implement a three-stage GDL requirement. In 1998, federal incentives were provided for states that passed GDL laws. See also H.R. 2400 § 3101(L)(1)(F) (Apr. 3, 1998). 105 H.R. 2400 provided grants to assist states to reduce alcohol-related driving problems including mandating a graduated driver's licensing law, restricting new drivers from operating a vehicle at night for the first two stages of driving, and making it unlawful for those under 21 to drive with a Blood Alcohol Content (BAC) of .02 percent or greater.

276. Forty-five states and the District of Columbia restrict nighttime driving during the intermediate stage; forty states and the District of Columbia restrict the number and type of passengers during the intermediate stage. See www.ghsa.org (describing GDL Laws).

277. See Ken Sternberg, Alcohol Consumer Must Be 21 Years Old in All States; Concerns Remain About Drunk Driving, 260 J. AM. MED. ASS'N 2479, 2479 (1988) (noting that all states have raised their minimum drinking age to twenty-one). In 1995, Congress enacted a "zero tolerance" statute, encouraging states to enact legislation that "considers an individual under the age of 21 who has a blood alcohol concentration of 0.02 percent or greater while operating a motor vehicle in the State to be driving intoxicated or driving under the influence of alcohol." 23 U.S.C. § 161 (1998). States failing to comply face losses of federal highway funds. *Id.*

278. CENTERS FOR DISEASE CONTROL, STATE LAWS ON TOBACCO CONTROL—UNITED STATES 1998, 48 MORBIDITY & MORTALITY WEEKLY REP. 21, 26 (June 25, 1999) available at <http://www.cdc.gov/mmwr/pdf/ss/ss4803.pdf> (summarizing various state laws addressing the harmful effects of tobacco use). See Jamie Peal Kave, *The Limits of Police Power: State Action to Prevent Youth Cigarette Use After Lorillard v. Reilly*, 53 CASE W. RES. L. REV. 203, 203–04 (2002) (questioning the effectiveness of laws prohibiting the use of tobacco by minors considering the widespread problem of underage smoking). For examples of state statutes regulating tobacco use by minors, see FLA. STAT. ANN. § 569.11 (West 2003); IND. CODE ANN. § 35-46-1-10.5 (Michie 1998); Tex. Health & Safety Code Ann. § 161.252 (Vernon 2001).

279. Alabama, Alaska, and Utah set the minimum age at 19. State Laws on Tobacco Control, *supra* note 278, at 26. More than half of the states license retailers that sell tobacco products and provide penalties for licensees that sell to children. CDC, *supra* note 402, at 27. At least eleven of the states provide for license suspension or revocation. *Id.* at 16.

280. See U.S. CONST. amend. XXVI.

281. The Harvard Law Review Association, *Juvenile Curfews and the Major Confusion over Minor Rights*, 118 HARV. L. REV. 2400, 2400–04 (2005) (describing history and juvenile curfew laws and contemporary cities with them).

Common-law rules are similar. Classic contract doctrine holds that minors may disaffirm their contractual obligations based on minority status alone.²⁸² Adolescents, even upon reaching 18, may either disaffirm or ratify a contract in most instances, even when the adult contracting party relied upon the agreement to her detriment.²⁸³ This same concern for, and incapacity of, adolescents is seen in health care where providers must obtain the consent of a parent or legal guardian for medical treatment or surgical procedures upon a minor.²⁸⁴

We may contrast this web of constitutional, statutory, and common-law rights of parents and the corresponding disability of adolescents with the situation presented in child labor and school attendance laws. Legal rules in these subject areas are starkly different, giving extraordinary decision-making capacity to adolescents. Labor market participation choices are given to the minor. As a matter of federal law, for example, no parental consent, or even notice to parents, is required before a child may lawfully work.²⁸⁵ The FLSA does impose some minimal hour and

282. See Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope*, 43 GONZ. L. REV. 239, 241 (2008).

283. The power of disaffirmance thus constitutes both a sword and shield, protecting adolescents against improvident judgments and impaired decisional ability for decisions that would bind adults. See NATIONAL SURVEY OF STATE LAWS 564–74 (Richard A. Leiter ed., 6th ed. 2008). See also JOHN E. MURRAY, JR., MURRAY ON CONTRACTS, § 23 (3d ed. 1990).

284. Susan D. Hawkins, Note, *Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes*, 64 FORDHAM L. REV. 2075, 2075 (1990). It is unconstitutional, however, for a state to give parents “an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient’s pregnancy, regardless of the reason for withholding the consent.” *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976). The Supreme Court’s response to state statutory allocation of authority for making this decision allows states to subject adolescents to procedural requirements regarding abortion that would not be allowed for adults. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 634 (recognizing “the constitutional rights of children cannot be equated with those of adults [because of] the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing”). At the same time, the Court has made clear that abortion is different from other medical decisions and that pregnant teenagers cannot be simply classified as children subject to their parents’ authority. *Id.* at 649 (holding that if parental consent is denied, the minor must have recourse to a prompt judicial determination of her maturity). A judicial bypass hearing provides an opportunity for a judge to evaluate the minor’s maturity and whether the pregnant adolescent is “mature and well enough informed to make intelligently the abortion decision on her own. . . .” *Id.* at 647. I note here that in the area of termination of pregnancy, the Supreme Court prohibits categorical classification of pregnant teenagers as children solely on the basis of age. This may have more to do with conflicting attitudes about abortion itself than with views on parental and state authority or the autonomy interests of adolescents. See, e.g., *H.L. v. Matheson*, 450 U.S. 398 (1981).

285. No employment certificate or permit is issued by the Department of Labor. Child Labor Regulations, Orders and Statements of Interpretation, 72 Fed. Reg. 19337 (Apr. 17, 2007).

safety limits for youths under 16 in non-agricultural labor.²⁸⁶ Once a child reaches 16, only jobs or equipment designated “hazardous” by the Department of Labor are off-limits.²⁸⁷ No other federal limits are imposed on the work of 16- and 17-year-olds.²⁸⁸ Outside these limited restrictions, federal law gives the child freedom to make her own choices.

Child labor is also regulated by the states,²⁸⁹ but this laissez-faire pattern dominates at that level as well. Astonishingly, a mere twenty-one states limit children under the age of 16 to three hours of work per day during the school year,²⁹⁰ and only thirty-eight jurisdictions require parental consent for children under age 16 to work.²⁹¹ Only sixteen states mandate parental consent for 16- and 17-year-old adolescents to work, three of which only mandate consent during school hours.²⁹² Forty-four states allow children aged 16 and 17 to work forty or more

286. 29 U.S.C. § 212(c) (2008). “Oppressive child labor” interferes with “health or welfare” or schooling of the child. The FLSA allows children under 16 to work not more than three hours per day and eighteen hours per week during school time. 29 U.S.C. § 216 (2008); 29 C.F.R. § 570.35 (2002). When school is not in session, the maximum hours increase to eight per day and forty per week. 29 U.S.C. § 203(l).

287. If the occupation has been declared hazardous by the Secretary of Labor, 18 is the minimum age to work in that job. 29 U.S.C. §203(l). Hazardous occupations are defined by the Secretary of Labor. *See* 29 U.S.C. § 203(b); 29 C.F.R. 570.120; NIOSH 2002 RECOMMENDATIONS, *supra* note 92.

288. *Schmidt v. Reich*, 835 F. Supp. 435 (N.D. Ill. 1993).

289. The FLSA expressly allows for greater protection of child workers by state law. 29 U.S.C. § 218(a) (2008).

290. ALA. CODE § 25-8-36 (2008); ARIZ. REV. STAT. §23-233 (LexisNexis 2008); CAL. LAB. CODE § 1391 (West 2003); FLA. STAT. §450.081 (2008); LA. REV. STAT. ANN. § 23:251 (2008); 26 ME. REV. STAT. ANN. § 775 (2008); MO. REV. STAT. § 294.024 (2008); N.H. REV. STAT. ANN. § 276-A:4 (2008); N.J. STAT. ANN. § 34:2-21.2 (West 2008); N.Y. LAB. LAWS § 132 (2008); N.C. GEN. STAT. § 95-25.5 (2008); N.D. CENT. CODE § 34-07-02 (2008); OHIO REV. CODE ANN. § 4109.02 (LexisNexis 2008); 40 OKLA. STAT. tit. § 71 (2008); OR. REV. STAT. ANN. § 653.010 (West 2008); S.C. CODE ANN. § 41-13-5 (2008); TENN. CODE ANN. § 50-5-102 (2008); 21 VT. STAT. ANN. tit. § 431 (2008); VA. CODE ANN. § 40.1-78 (2008); W. VA. CODE § 21-6-3 (2008).

291. U.S. Department of Labor, Employment/Age Certificate February 23, 2009, <http://www.dol.gov/esa/whd/state/certification.htm> (last visited Apr. 23, 2009) [Hereinafter Employment Certificate]. The thirteen states which do not require parental consent for children under 16 to work are Arizona, Florida, Idaho, Kentucky, Montana, Nevada (parental consent is only required up to age 14), Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming. *Id.*

292. *Id.* The sixteen states mandating parental consent are Alabama, Alaska (only for those selling liquor), California (for school hours only), Delaware, Georgia, Indiana, Louisiana, Maryland, Michigan, New Jersey, New York, North Carolina, Ohio (for school hours only), Pennsylvania, Washington, and Wisconsin. *Id.*

hours during weeks while school is in session.²⁹³ Thirty states do not even require work or age permits for youths aged 16 or 17.²⁹⁴

The unique decision-making power granted to adolescents regarding work decisions is mirrored in educational choices as well. Historically, compulsory school attendance laws developed in tandem with state child labor laws. Both types of laws reflect societal values regarding education and work for minors. Massachusetts enacted the first general compulsory attendance statute in 1852.²⁹⁵ During the late nineteenth century and especially in the twentieth century, all states adopted laws requiring children to acquire a minimum education needed to function as citizens and employees.²⁹⁶

But these statutes were, and are, quite limited and, like the child labor laws, reflect a dramatic departure from the normal legal rules governing the parent-child-state relations described above.²⁹⁷ In 2008, twenty states permitted children to leave school at the age of 16; of those, fifteen did not require the minors to obtain parental, guardian, or school permission to discontinue schooling.²⁹⁸ Eight states allowed children to withdraw from school at the age of 17; seven of those eight did not require parental, guardian, or school permission for that decision.²⁹⁹ Seventeen states allowed a minor to withdraw from school without parental permission before the law allowed these minors to enjoy their full driving privileges.³⁰⁰

The upshot is that teenagers in many instances may choose if, when, and where to work and whether to attend school or not at ages when they would not independently be allowed to apply for a learner's permit to drive and could not legally buy a bottle of beer or a pack of cigarettes. To be sure, in the real world, parent and child often make

293. Department of Labor, Wage and Hour Division, Selected Child State Labor Standards Affecting Minors Under 18 in Non-farm Employment as of February 23, 2009, *available at* <http://www.dol.gov/esa/whd/state/nonfarm.htm> (last visited May 1, 2009). The six states not allowing 16- and 17-year-olds to work more than forty hours a week are California, Connecticut, Florida, Indiana, New Hampshire, New York. *Id.*

294. Employment Certificate, *supra* note 285. The states that do not require work permits are Arizona, Arkansas, Colorado, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming.

295. MASS. GEN. LAWS CH. 240, §§ 1, 2, 4 (1852).

296. MICHAEL S. KATZ, A HISTORY OF COMPULSORY EDUCATION LAWS 18 (1980) (discussing the struggle for states to not only pass compulsory attendance statutes, but enforce them as well).

297. *See supra* notes 271-84 and accompanying text.

298. *See* Appendix A.

299. *Id.*

300. *Id.*

joint decisions about work and school attendance after reasoned discussion. But as any parent who has experienced adolescence with a child can attest, teenagers often behave in ways contrary to their parents' guidance and, in many instances, a child's wishes are actually the decisive factor. Parents are often ignorant of large blocks of their children's time and behavior.³⁰¹

B. Adolescent Development and Decision-Making Capacity

At varying times between ages 10 and 15, children experience puberty and enter adolescence.³⁰² During this turbulent period, a number of critical developments occur in teenagers' physical, hormonal, cognitive, sexual, and psychosocial areas. As most parents and adults realize, teenagers are works-in-progress; they tend to engage in risk-creating behavior, often motivated by defiance and self-gratification.³⁰³ While adolescents may appear mature physically, their choices are often characterized by immaturity of thought and behavior.³⁰⁴ Comprehensive legal restrictions on teenage driving, dangerous substances, voting, business transactions, and the like reflect this awareness of the adolescent's developmental stage.³⁰⁵ Similarly, children's reduced responsibility for otherwise criminal behavior reveals this same

301. According to a report by the National Campaign to Prevent Teen Pregnancy, two-thirds of the parents of sexually active 14-year-olds surveyed had no idea their children were sexually active. National Campaign to Prevent Teen Pregnancy, 14 and Younger: The Sexual Behavior of Young Adolescents: Summary, 9, 14-15 (2003), available at <http://www.teenpregnancy.org/resources/reading/pdf/14summary.pdf> (last visited Sept. 3, 2003). This lack of knowledge is also present for many types of substance abuse. A 2001-2002 study surveyed 1219 parents across the country. The survey reported that while 12 percent of teenagers in the country (2.8 million teenagers) reporting using Ecstasy only 1 percent of parents believe their teen might have tried the drug. PARTNERSHIP FOR A DRUG-FREE AMERICA, PARTNERSHIP ATTITUDE TRACKING STUDY, available at <http://www.drugfreeamerica.org/Templates/pats.asp?> (2003).

302. The American Medical Association sets the age of early adolescence for the purposes of recommended sexual health services at 11 through 14. SEXSMARTS, *Sexual Health Care and Counsel* 3 (2001), available at <http://www.kff.org/youth/hivstds/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13797>; see also Aarogya, *Teen's Health, Psychosocial Development*, The Wellness Site, at <http://www.aarogya.com/Familyhealthlifestyle/teens/psycho.asp> (2004) (marking early adolescence from approximately 10 to 13 years of age); Arizona Prevention Resource Center, *Adolescent Psychosocial Development*, at http://www.azprevention.org/Prevention_In_Practice/What_Works/What_Works_Adolescents_psychosocial.htm (2002) (last visited Feb. 8, 2007) (listing early adolescence for girls to be between ages 11 and 14 and for boys to be between 13 and 15).

303. See generally Cauffman & Steinberg, *supra* note 147. See also Beyer, *supra* note 136; Fagan, *supra* note 136.

304. Scott & Grisso, *supra* note 136.

305. See *supra* notes 271-84 and accompanying text.

consciousness of immaturity.³⁰⁶ Given these developmental limitations, the legal autonomy accorded teenagers regarding school and work decisions outlined in Part IV:A is especially surprising and dangerous.

The years between ages 10 and twenty are a time of rapid physical growth; it is the only period in life in which the rate of growth is accelerating.³⁰⁷ For example, 15 to 20 percent of an individual's height occurs during this period.³⁰⁸ Ironically, as a result of this rapid growth, adolescents are more vulnerable to injuries of the back, ligaments, and growth plates, all characteristic of workplace injuries.³⁰⁹ Body mass, height, and weight are often correlated with the tendency for injury.³¹⁰

As important as physical development is for the youth workplace experience, brain development is even more critical. While it was previously believed that cognitive development was completed at an early age in childhood, new neural imaging techniques have radically changed our understanding of brain growth and change.³¹¹ It is now generally accepted that neural maturation is not completed until the mid-twenties.³¹² During adolescence there are extended periods of rapid change in the frontal cortex and the cerebellum;³¹³ mental processes that rely on these areas of the brain are changing as well.³¹⁴ Executive function—the ability to control and coordinate thoughts and behaviors—

306. In its most recent significant discussion on this topic, the Supreme Court reaffirmed that the law should regard adolescents as immature and in the process of developing the capacity to make decisions, rather than as fully competent individuals. *Roper v. Simmons*, 543 U.S. 551, 578 (2008).

307. PROTECTING YOUTH AT WORK, *supra* note 6, at 3.

308. *Id.*

309. *Id.*

310. Keshia M. Pollack et al., *Association Between Body Mass Index and Acute Traumatic Workplace Injury in Hourly Manufacturing Employees*, 166 AM. J. EPIDEMIOLOGY 204, 204 (2007).

311. The advanced technology included the use of magnetic resonance imaging (MRI) that differentiates gray matter from white matter. NIMH, *New Views on Brain Development*, <http://www1.od.nih.gov/gpra/gpragoalaFY2000.pdf> (last visited Oct. 13, 2008) (citing Giedd, *infra* note 317). See also Paul M. Thompson et al., *Growth Patterns in the Developing Brain Detected by Using Continuum Mechanical Tensor Maps*, 404 NATURE 190, 191 (2000) (referring to Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 860 (1999)).

312. Board on Children, Youth and Families, *New Research on Brain Development During the Adolescent Years*, available at http://www7.nationalacademies.org/bocylf/Brain_Development.html (last visited Oct. 13, 2008); *Anatomy of a Teen Brain*, in INSIDE THE TEENAGE BRAIN, <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/anatomy.html> (last visited Jan. 30, 2009) [hereinafter *Anatomy of a Teen Brain*].

313. See, e.g., Sarah Jayne Blakemore & Suparna Choudhury, *Development of the Adolescent Brain: Implications for Executive Function and Social Cognition*, 47 J. CHILD PSYCH. & PSYCHIATRY 296, 296 (2006).

314. *Id.* at 301.

is in the process of development.³¹⁵ The prefrontal cortex of the frontal lobe, the control center for selecting and acting on an accumulated knowledge, is a major site of growth.³¹⁶ During adolescence, the body purges unused brain cells and reorganizes the functioning of the brain.³¹⁷ If this pruning did not occur, excessive synaptic connections in the prefrontal cortex would eventually decrease cognitive functioning.³¹⁸

The frontal lobes, essential for such functions as response inhibition, emotional regulation, planning, and organization, are a major focus of growth in adolescence.³¹⁹ Many of these aptitudes continue to develop between adolescence and young adulthood.³²⁰ The more mature the frontal cortex, the better a teenager can reason, control impulses, and make sound judgments.³²¹ In addition, the cerebellum continues to mature during adolescence.³²² During this developmental period, a more primitive area of the brain, the amygdala, processes information and governs emotional responses.³²³ The use of the amygdala rather than the frontal cortex helps explain why teenagers are less able to delay gratification, learn from negative consequences, and plan for or anticipate the future.³²⁴ In contradistinction to adults, adolescents typically act impulsively, reacting to choices without appropriately considering future consequences.³²⁵ This results from reliance on the less mature part of the brain, the amygdala, to process information.³²⁶

An accompanying neurological development during adolescence, myelination, is also consistent with this new understanding of adolescent

315. *Id.*

316. JANE M. HEALY, *YOUR CHILD'S GROWING MIND: A GUIDE TO LEARNING AND BRAIN DEVELOPMENT FROM BIRTH TO ADOLESCENCE* 104 (1994).

317. Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 *NATURE NEUROSCIENCE* 861, 861–62 (1999).

318. *Id.* at 863.

319. *Anatomy of a Teen Brain*, *supra* note 312.

320. *Id.*

321. Sarah Spinks, *Adolescent Brains Are Works in Progress*, in *INSIDE THE TEENAGE BRAIN*, at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/adolescent.html> (last visited Jan. 30, 2009) (analyzing Dr. Giedd's research).

322. *Id.*

323. Sarah Spinks, *One Reason Teens Respond Differently to the World: Immature Brain Circuitry*, in *INSIDE THE TEENAGE BRAIN*, at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/onereason.html> (last visited January 30, 2009) (discussing Yurgelun-Todd's study).

324. See generally Valerie F. Reyna & Frank Farley, *Risk and Rationality in Adolescent Decision Making: Implications for Theory, Practice, and Public Policy*, 7 *PSYCH. SCI. IN PUB. INT.* 1 (2006).

325. *Id.* at 29.

326. SHERYL FEINSTEIN, *PARENTING THE TEENAGE BRAIN: UNDERSTANDING A WORK IN PROGRESS* 9 (2007).

behavior. Myelin is a fatty substance that insulates neurons and allows “communication between areas of the brain to occur more efficiently and quickly.”³²⁷ The frontal lobe is among the last areas of the brain to receive myelin.³²⁸ As a result, as teenagers grow into full adulthood they increasingly shift brain activity to the frontal lobes, increasing their ability to organize information and make more reasonable choices.³²⁹

With a more scientific appreciation of the neurological development of the brain, we can better understand why teenagers consistently incur high automobile accident rates, have disproportionately high death and occupational injury rates, and experience other negative consequences.³³⁰ Teenagers also make poor decisions in school contexts, and, in general, “act immature.” Their decision-making skills are simply not sufficiently developed to make the work and educational choices the law presents them. Giving teenagers autonomy in these realms leaves them at risk for lifelong negative consequences.

V. RX FOR CREATING A SAFETY NET FOR YOUNG WORKERS

The preceding portions of this article have demonstrated the perils confronting millions of youth workers in our country today. This Part prescribes specific changes, both statutory and administrative, which would begin to construct a safety net to end the neglect of these children. Some of these statutory changes have been proposed in bills previously introduced to Congress; others are new. Administrative change could begin with deployment of greater resources to the DOL and an agency commitment to enforce statutory protections.

327. *Id.* at 7.

328. *Id.*

329. Brief for the American Medical Association et al. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633). The American Medical Association explained:

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

Id.

330. *See supra* notes 90–117 and accompanying text.

A. Statutory Changes

A major problem is the failure to effectively limit adolescent working time. Congress should not permit minors to work more than fifteen hours per week during the school year. Restricting the number of hours that high school students may work would improve worker safety and ameliorate the academic and other detriments resulting from high-intensity work detailed in Part II: B and C. Limiting the amount of time children work would have the additional benefit of creating opportunities for adult workers, a significant opportunity in our current economic situation. Congress should also not permit 16- and 17-year-olds to work more than twenty hours per week while attending school or more than forty hours per week when school is not in session. Currently, 16- and 17-year-olds have no restrictions upon their work except a prohibition against “particularly hazardous work.”³³¹

The anomalous decision-making powers granted to teenagers should be reversed. The FLSA should require any employer to have a work permit signed by a child’s parent, acknowledging the amount and type of work to be performed and consenting to that employment. The permit should also require the signature of a designated school official attesting that the student has, at a minimum, satisfactory grades and that the type and amount of work would not prove detrimental to the student’s academic performance. Such permissions should be explicitly conditional, allowing either the parent or the school official to revoke consent if circumstances change. State labor departments should be the front-line agencies in administering these requirements, with WHD as the default enforcer.

The FLSA should be amended to eliminate differentiations based on age, occupational hazards, or other differentials between agricultural and non-agricultural child labor. Little justification exists for this unequal treatment except for the traditional exemptions of agricultural workers from the federal statutory protections. Passage of the proposed Children’s Act for Responsible Employment (CARE), a separate statute, would also achieve this end.³³² Currently, youths working in farm labor are legally permitted to work at younger ages, in more hazardous jobs, and for longer periods of time than other minor workers.³³³ Children

331. See *supra* notes 209-10.

332. H.R. 2674, 110th Cong. (2007). Representative Roybal-Allerd

333. 29 U.S.C. § 213(c)(1)(C) (2006). There are, for example, no restrictions on how early in the day child farmworkers may start, how late they may finish, or the number of hours they may work. *Id.*

who work on their parents' farms might be exempted from restrictions but those who work for hire in agriculture, such as migrant and seasonal farmworkers, are entitled to the protection the FLSA provides children in other jobs.

The FLSA should be amended to create an explicit private right of action for minor employees and their parents for damages resulting from violation of the act. All courts that have considered this issue have concluded that no right to sue can be implied from the act as it is presently drafted.³³⁴ Lack of an opportunity for the most aggrieved individuals—youth workers and their parents—to sue cripples enforcement of the existing limited protective provisions of the FLSA because the DOL is somnolent. In 2006, for example, the DOL brought only 3 percent—143 of 4,207—of FLSA lawsuits in the federal courts.³³⁵ The right to sue provision should also allow the recovery of attorney fees and costs to prevailing plaintiffs.³³⁶ The creation of such a remedy for injured or dead youth workers and their parents would bring the child labor portions of the FLSA into accord with the right to sue granted to employees complaining of wage-hour violations under the statute.³³⁷ A private right of action would enhance administrative enforcement, deter unlawful employment and make the child labor sections of the FLSA comparable to provisions in a host of similar protective and regulatory statutes.³³⁸

The FLSA should be altered to mandate that the DOL compile data on the types of occupations in which minors work and serious work-

334. See *supra* notes 237-51 and accompanying text.

335. Remarks Prepared for Delivery by Sally Greenberg, Executive Director, National Consumers League, Before the Subcommittee on Workforce Protections of the US House Committee on Education and Labor, *available at* http://www.nclnet.org/news/2008/child_labor_house_09232008.htm (last visited October 21, 2009).

336. In the United States, the prevailing litigant is ordinarily not entitled to collect attorney fees from the loser. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Only Congress can authorize such an exception to this rule and create this incentive for private attorneys to take these cases. *Id.* at 260.

337. Employers found to have violated these provisions “shall be liable” to the employees affected for wages, overtime, and “an additional equal amount as liquidated damages.” 29 U.S.C. § 216(b)(2008). In an absence of a good faith defense, the award of liquidated damages is mandatory in § 16 suits either by DOL or employees for unpaid minimum wages or overtime compensation. See, e.g., *Avitia v. Metro. Club*, 49 F.3d 1219, 1232 (7th Cir. 1995) (“double damages are the norm, single the exception”). Liquidated damages are also available to employees as part of their remedy for unlawful retaliation in violation of § 15(a)(3).

338. Compare 29 U.S.C. § 216(b) (providing numerous other cases with liquidated damages) with 29 U.S.C. § 216(c) and private suits to enforce civil rights and labor statutes enumerated in *supra* note 221).

related injuries or deaths. The pending Youth Worker Protection Act,³³⁹ if enacted, would also accomplish these needed reforms.³⁴⁰ Passage of the proposed Young American Worker's Bill of Rights would also make any person or entity willfully violating child labor provisions more than once ineligible for federal grants, loans, or contracts.

Despite being increased in 2008, civil penalties for violations of the FLSA are still far too low to provide effective deterrence. These penalties should be increased to match the fines available in other protective and regulatory statutes.³⁴¹ In addition, § 16(e) was amended in 1990 to provide that civil penalties collected as the result of child-labor violations be deposited in the general fund of the U.S. Treasury instead of being retained by the DOL to defray the costs of enforcement.³⁴² The previous reimbursement to an enforcement agency is not a violation of due process.³⁴³ Section 16(e) should be reformed to allow use of fines collected from adjudicated violators of the act to fund additional operations of the DOL, a logical means of increasing resources for enforcement.

An enhanced criminal sanction for serious violations of the FLSA would beam a clear message to employers that compliance with the law and protection of child workers must become a priority, particularly where corporate officials could face the prospect of public trial and imprisonment. As discussed in Part III: C, the current criminal provisions are utterly ineffective. There has not been a criminal conviction in seventy years. A credible threat of prosecution would make employers more responsive to voluntary compliance and easier to deal with in civil administrative cases. Passage of the pending Child Labor Safety Act³⁴⁴ would increase the criminal sanctions on employers that exploit children.

The FLSA should also require the DOL to periodically re-evaluate the Hazardous Orders (HOs)³⁴⁵ and justify decisions to not revise

339. HR 3139, 110th Congress (2008) § 205.

340. *Id.*

341. *See supra* notes 265-70 and accompanying text.

342. Pub. L. No. 101-508 (codified as amended at 29 U.S.C. § 216(e) (1990)).

343. *Marshall v. Jerrico*, 446 U.S. 238, 242-52 (1980).

344. A press release and the full text of the act can be found at Congressman Bruce Braley's website. Braley Introduces Bill to Increase Federal Penalties for Dangerous Child Labor Violations, *available at* http://www.braley.house.gov/index.php?option=com_content&task=view&id=213&Itemid=41. (last visited Oct. 21, 2009) The Child Labor Safety Act of 2008 was referred to the House Committee of Education and Labor.

345. Since its adoption in 1938, the FLSA has required that the DOL promulgate regulations, called Hazardous Orders, barring children from working in non-agricultural jobs "particularly

existing regulations or to not promulgate new ones based on evidence present in a notice and comment rulemaking. This statutory addition, when paired with the requirement that the DOL gather statistics about areas of primary danger for youth workers, would ensure that safety regulations for young workers are kept up to date and meet the problems presented by the contemporary workplace.

B. Administrative Changes

Additional responsibilities and vigorous enforcement by the DOL will require increased funding by Congress, primarily for wage and hour inspectors. The agency administers numerous statutes and cannot possibly fulfill its responsibilities as currently staffed.³⁴⁶ Less than 750 investigators are currently available for all labor law enforcement—the equivalent of one investigator for tens of thousands of employers in the United States.³⁴⁷ Vulnerable children in the workplace disproportionately bear the burden of this impossible situation.

On the other hand, the DOL could, within its current authority and resources, do much to improve the current problems. It should disseminate information about child labor law violators that would alert parents and their children to dangerous jobs and employers. Penalties for violations should be increased to make them more than the functional equivalent of parking tickets. Significant minimum fines should be established. The National Institute for Occupational Safety and Health recommendations for updating current HOs should be rescued from their current limbo status, evaluated, and promulgated as final rules.

VI. CONCLUSION

The foregoing parts of this article demonstrate how outdated legal rules and abdication of administrative responsibilities have left much of our youth workforce at great risk. None of this could occur without the combination of profits for employers and sellers of consumer goods

hazardous or detrimental to the health or well-being of children.” 29 U.S.C. § 203(e); 29 C.F.R. § 570.50–68. HOs in agriculture are separately issued. 29 C.F.R. § 570.2(b) (2008).

346. *Department of Labor Budget Summary FY 2009*, http://www.dol.gov/_sec/budget2009/BIB.pdf, at 1 (accessed July 17, 2008) [hereinafter “DOL Budget”]. I note here that the WHD can only use the resources Congress has given it. The DOL, like other regulatory agencies, has not had an increase in the already inadequate funding it receives for the past eight years. See VERONIQUE DE RUGY & MELISA WARREN, *REGULATORY AGENCY SPENDING REACHES NEW HEIGHTS: AN ANALYSIS OF THE U.S. BUDGET FOR FISCAL YEARS 2008 AND 2009* (2008) available at http://wc.wustl.edu/09-regulator/wc-regulators_budget_09.pdf.

347. DOL Budget, *supra* note 346.

combined with public lack of information and indifference. This indeed constitutes the neglect of children—“harm or threatened harm to a child’s health or welfare . . . by placing a child at unreasonable risk or by failure . . . to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk.”³⁴⁸

The tragic results of this neglect are evident in the death, injury, and blighted futures of our youth. The law in this area demonstrates the failure to effectuate the most basic premise of labor law—the protection of weaker parties. Statutes like the depression-era National Labor Relations Act³⁴⁹ and the Fair Labor Standards Act are explicitly premised on the fact that workers and capital do not face each other on a level playing field. The law has a protective function in these areas. The “abandonment” of American youth in the title of this article refers to the loss of this protective function by both federal and state law, the loss of which places our children at risk physically, academically, socially, and developmentally. The time for remedial action is long overdue.

348. *See supra* note 31.

349. 49 Stat. 449 (1935) (addressing in Section 1 “the inequality of bargaining power between employees . . . and employers . . .”).

Appendix A

State	Full Driving Privileges Granted³⁵⁰	Compulsory School Attendance Age³⁵¹	Consent Needed to Withdraw From School: Parent (P) School (Sch)	Age Below Which Work Permit is Required³⁵²	Age for Valid Contract³⁵³
Alabama	17	18	None	18	15
Alaska	16 & 6 mos.	16	None	17	16
Arizona	16 & 6 mos.	16	None	Not issued	18 ³⁵⁴
Arkansas	16	17	None	16	18+ ³⁵⁵
California	17	18	None	18 ³⁵⁶	18
Colorado	17	17	None	16 during school hours	18
Connecticut	18 – night 17 & 4 mos. passenger	18	P (16, 17)	16	None
Delaware	17	16	None	18	18
Florida	18	16	P & Sch	Not issued	16
Georgia	18	16	P & Sch	18	18+
Hawaii	17	18	None	16	18+
Idaho	16 – night 15 & 6 mos. passenger	16	None	Not issued	15

350. Governors Highway Safety Association, http://www.ghsa.org/html/stateinfo/laws/license_laws.html (last viewed February 12, 2009).

351. Department of Labor (Wage and Hour Division), <http://www.dol.gov/esa/whd/state/schoolattend.htm> (last updated December 2007).

352. Department of Labor (Wage and Hour Division), <http://www.dol.gov/esa/whd/state/certification.htm> (last updated August 2008).

353. RICHARD A. LEITER, NATIONAL SURVEY OF STATE LAWS 564-574 (6th ed. 2008).

354. At age 16 or over, one may contract for educational loans and may make contracts if a veteran or married.

355. The symbol “+” represents that child may rescind contract made under the age of 18 at a reasonable time after the age of 18 is attained.

356. For minors enrolled in school.

State	Full Driving Privileges Granted ³⁵⁰	Compulsory School Attendance Age ³⁵¹	Consent Needed to Withdraw From School: Parent (P) School (Sch)	Age Below Which Work Permit is Required ³⁵²	Age for Valid Contract ³⁵³
Illinois	18 – night 17 – passenger	17	P	16	18+
Indiana	18 – night 16 & 4 mos. passenger	18	P & Sch (16, 17)	18	16
Iowa	17	16	None	16	18+
Kansas	14 & 6 mos.	18	None	16	18+
Kentucky	17	16	P	Not issued ³⁵⁷	18
Louisiana	17	18	P (16, 17)	18	18
Maine	16 & 6 mos.	17	P & Sch (15, 16)	16	18
Maryland	17 & 9 mos. – night 16 & 8 mos. – passenger	16	None	18	18
Massachusetts	18 – night 17– passenger	16	Sch(14, 15)	16	18
Michigan	17	16	None	18	18
Minnesota	16 & 6 mos. – night 17 – passenger	16	P & Sch	16	18
Mississippi	16 & 6 mos.	17	None	16 ³⁵⁸	18
Missouri	17 & 11 mos.	16 ³⁵⁹	P & Sch (14, 15)	16	18+
Montana	16	16	None	Not issued	18+
Nebraska	17 – night 16 & 6 mos. – passenger	18	P (16, 17)	16	None
Nevada	18 – night 16 & 3 mos.	18	Sch (14- 17)	None	None

357. Employers of children under age 18 must maintain a proof of age certificate.

358. Only in canneries, workshops, and factories.

359. Metropolitan School Districts may increase the age to 17.

State	Full Driving Privileges Granted ³⁵⁰	Compulsory School Attendance Age ³⁵¹	Consent Needed to Withdraw From School: Parent (P) School (Sch)	Age Below Which Work Permit is Required ³⁵²	Age for Valid Contract ³⁵³
	passenger				
New Hampshire	17 & 1 mos. – night 16 & 6 mos. – passenger	18	P & Sch (16, 17)	16	None
New Jersey	18	16	None	18	15
New Mexico	16 & 6 mos.	18	None	16	None
New York	17 (w/ driv. ed) 18 (w/o driv. ed)	16	None	18	18+
North Carolina	16 & 6 mos.	16	None	18	18+
North Dakota	14 & 6 mos.	16	None	16	18+
Ohio	18 – night 17 – passenger	18	None	16; 17 during school hrs.	18+
Oklahoma	16 & 6 mos. (w/ driv. ed) 17 (w/o driv. ed)	18	P (16, 17)	16	18+
Oregon	17	18	None	Not issued ³⁶⁰	18
Pennsylvania	17 (w/ driv. ed) 18 (w/o driv. ed)	18	None	18	18
Rhode Island	17 & 6 mos.	18	P (16, 17)	16	18
South Carolina	16 & 6 mos.	17	None	Not issued	18+

360. Minors age 14 to 17 are not required to obtain work permits. Instead, employers are required to apply for annual certificates to employ these minors.

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SAVE THE CHILDREN

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State	Full Driving Privileges Granted ³⁵⁰	Compulsory School Attendance Age ³⁵¹	Consent Needed to Withdraw From School: Parent (P) School (Sch)	Age Below Which Work Permit is Required ³⁵²	Age for Valid Contract ³⁵³
South Dakota	16	17 ³⁶¹	None	Not issued	18+
Tennessee	17	17	None	Not issued ³⁶²	18+
Texas	16 & 6 mos.	18	None	Not issued	18+
Utah	17 – night 16 & 6 mos. – passenger	18	None	Not issued	18+
Vermont	16 & 6 mos.	16	None	16 during school hrs.	18
Virginia	18	18	None	16	18
Washington	18	18	None	18	18+
West Virginia	17	16	None	16	18
Wisconsin	16 & 9 mos. (Probationary license requires a sponsor until age 18)	18	None	18	18+
Wyoming	16 & 6 mos. (w/ driver's ed.) 17 (w/out driver's ed)	16	None	Not issued	None

361. Effective July 1, 2009, mandatory age is through age 18.

362. Employers of minors under age 18 must obtain and keep on file proof of the minor's age.

