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Maya Manian

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FUNCTIONAL PARENTING AND DYSFUNCTIONAL ABORTION POLICY: REFORMING PARENTAL INVOLVEMENT LEGISLATION*

Maya Manian

Abortion-related parental involvement mandates raise important family law issues about the scope of parents' power over their children's intimate decisions. While there has been extensive scholarly attention paid to the problems with parental involvement laws, relatively little has been said about strategies for reforming these laws. This article suggests using insights from family law relating to functional parenthood and third party caregiving as a basis for crafting more capacious methods of ensuring adult guidance for teenage girls facing an unplanned pregnancy. Recent developments in family law bolster the case for reforming parental involvement legislation to allow teenagers to consult with designated adults other than parents or judges. Enlisting other trusted members of the community to assist pregnant teenagers should assuage those who want to guarantee that adolescents consult with an adult in a time of crisis, while also protecting teenagers who reasonably fear discussing pregnancy with their parents.

Key Points for the Family Court Community:

- Many scholars have noted that abortion-related parental involvement mandates are in need of reform, but relatively little has been said about strategies for reforming these laws.
- Insights from family law relating to functional parenthood and third party caregiving provide a sound basis for reform, particularly by bolstering the case for rewriting parental involvement legislation to allow teenagers to consult with designated adults other than parents or judges.
- Enlisting other trusted members of the community to assist pregnant teenagers serves the dual goals of (i) assuaging those who want to guarantee that adolescents consult with an adult in a time of crisis, and (ii) protecting teenagers who reasonably fear discussing pregnancy with their parents.

Keywords: *abortion; minors; judicial bypass; parental consent; functional parent; third-party caregiver*

INTRODUCTION

The United States has the highest rate of teenage pregnancy, birth and abortion of any developed nation.¹ Both the federal and state governments have responded to the problem of teenage pregnancy with numerous legislative and policy proposals, many of which conflict with one another. Some advocate for abstinence-only education, while others push for comprehensive sex education. Some advocate for restricting access to contraception, while others push for expanding access to contraceptive services. Most controversially, many state legislatures have adopted parental consent or notice statutes for adolescents seeking abortion care. Abortion-related parental involvement laws raise important family law issues about the scope and limits of parents' right to exercise a veto over their children's intimate decisions.²

Under current law, how pregnancy affects an adolescent's autonomy within the family depends on which path she chooses. The law treats a pregnant teenager very differently if she chooses to terminate the pregnancy rather than give birth. In states with parental notice or consent mandates, which are the vast majority of states, teenage girls facing an unplanned pregnancy must obtain permission from a parent or alternatively from a judge to receive abortion care. In contrast, states typically exempt other similarly sensitive medical care from parental involvement, particularly exempting medical care related to sexual activity. All states allow minors to obtain treatment for sexually transmitted infection without notifying their parents and many states allow minors to receive contraceptive services without involving a parent. States overwhelmingly allow a teenage

Correspondence: mmanian@usfca.edu

girl to independently consent to pregnancy care and medical treatment for her child, and even to give up her child for adoption, without notice to her parents, yet require parental notice or consent for abortion.³

As of January 1, 2012, thirty-seven states mandate parental involvement in a minor's decision to have an abortion and permit a judicial bypass alternative, as constitutionally required.⁴ Only six states have never passed a parental involvement law.⁵ The popularity of legislation mandating parental involvement with abortion is quite striking, especially in contrast to the autonomy almost all states grant to minors who choose to carry a pregnancy to term.

Scholars have paid extensive attention to the problems with parental involvement legislation, but have said relatively little about strategies for reforming these laws, despite the fact that court challenges have failed in most jurisdictions and complete repeal seems politically unlikely.⁶ Whether or not one agrees that mandated parental involvement is a good idea, these laws are here to stay.⁷

This Article suggests using family law as a foundation for reforming parental involvement legislation. Family law can be used to shape abortion policy in ways that support both healthy family functioning and access to safe abortion care.⁸ Scholars who support abortion rights have thus far failed to link developments in family law with the debates about parental involvement in abortion law. I argue that family law's insights on functional parenting and third party caregiving provide a basis for crafting more capacious methods of ensuring adult guidance for teenage girls facing an unplanned pregnancy. Both the doctrinal changes family law has already undertaken to accommodate non-biological adult-child relationships and the scholarly literature on "community parenting" are resources that advocates for youth could tap into in the abortion context.⁹ Family law's recognition of pluralism in family life bolsters the case for recasting parental involvement laws in ways that would better reflect the complex structures of today's families. While family law scholarship and doctrine have increasingly acknowledged the variety of adults who play important roles in children's lives, abortion law remains stuck in an antiquated parent versus state binary.

More specifically, I argue that developments in family law bolster the case for amending parental involvement statutes to allow teenagers to consult with designated adults other than parents or judges. Enlisting other trusted members of the community to assist pregnant teenagers should assuage those who want to guarantee that adolescents consult with an adult in a time of crisis, while also giving leeway to the well-documented concern that some teenagers reasonably fear discussing sexuality and pregnancy with their parents. A number of state statutes have already expanded options for girls seeking abortion care, by permitting adolescents to consult with relatives or health-care professionals in lieu of a parent or a judge.¹⁰ These statutes recognize that a judge, who has no prior relationship with the minor and must conduct an interrogation in the context of a formal judicial proceeding, can offer pregnant teenagers little help or counseling. Although parental involvement laws are most likely motivated by a desire to thwart access to abortion and shame teenage girls,¹¹ I take the Supreme Court's justification—that these laws primarily aim to ensure sound decision-making for the pregnant minor—at face value in order to imagine a better compromise than judicial bypass. In many cases, other adults in the community will be better situated than judges to help a pregnant minor secure a sound decision-making process. Since parental involvement laws should serve the well-being of teenage girls, as the Supreme Court's rationale supporting such legislation reflects, these laws should be crafted to truly provide teenagers with adult counsel as opposed to mere judicial scrutiny.

This Article proceeds in three Parts. Part I explains the Supreme Court's rationale for upholding parental involvement legislation, which primarily rests on ensuring good decision-making for adolescents considering abortion. Part II argues that mandated parental involvement and the judicial bypass alternative fail to meet the goal of improved adolescent decision-making or otherwise to improve health outcomes for pregnant teenagers, as evidenced by numerous studies. Part III proposes building on family law's insights relating to functional parenting and third party caregiving to frame the case for amending parental involvement laws to include other adults. State legislatures should rewrite parental involvement statutes to allow teenage girls to consult with parental surrogates—designated adults other than parents or judges—prior to receiving abortion care. This

statutory reform would better protect the health and well-being of teenage girls considering abortion.

I. THE RATIONALE FOR MANDATED PARENTAL INVOLVEMENT AND JUDICIAL BYPASS

The conventional framing of the family in U.S. law “embrace[s] the image of a triangle to describe the allocation of legal authority over childrearing,” with parents, children and the state standing at each point of the triangle.¹² Balancing the interests of child, parent and state has been an ongoing struggle at the federal and state levels across various family law issues.

In the context of sexual and reproductive decision-making, the U.S. Supreme Court has struggled to balance the respective interests of child, parent and state. For example, in *Carey v. Population Services International*, the Court held that minors, like adults, possess a fundamental constitutional right to access contraceptives.¹³ The Court acknowledged that the question of the state’s power to regulate constitutionally protected conduct when engaged in by minors “is a vexing one, perhaps not susceptible of precise answer,”¹⁴ but nevertheless struck down a state law prohibiting distribution of contraceptives to those under sixteen.¹⁵ The Court found that the state’s desire to deter minors’ sexual activity “by increasing the hazards attendant on it” was insufficient justification to infringe upon a minor’s constitutional rights.¹⁶ Furthermore, the Court rejected the argument that an exception granting physicians the discretion to provide minors with contraceptives saved the statute. The Court emphasized that the state could not grant a third party the right to arbitrarily veto a minor’s exercise of her privacy rights, a thread of reasoning the Court later followed in the adolescent abortion cases.¹⁷

With respect to abortion, since the Supreme Court’s decision in *Bellotti v. Baird* (“*Bellotti II*”) in 1979,¹⁸ laws requiring parental involvement in minor abortion decisions have been constitutional, provided that the laws offer an alternative such as judicial bypass.¹⁹ *Bellotti II* found that minors’ right to access abortion could be restricted for three reasons: “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.”²⁰ *Bellotti II* held that parental consent legislation with an expeditious and confidential judicial bypass alternative appropriately balanced the minor’s constitutional right to access abortion with parents’ right to control their child’s upbringing and the state’s interest in protecting vulnerable and immature minors.²¹

Furthermore, *Bellotti II* made clear that parents could not exercise a veto over a minor’s decision to obtain an abortion; rather, parental or judicial involvement served to ensure better decision-making since “immature minors often lack the ability to make fully informed choices.”²² Therefore, a minor whose parent denied consent could nevertheless go on to seek permission from an alternative adult such as a judge.²³ Importantly, Justice Powell’s opinion explicitly noted that the alternative to parental consent need not be a formal judicial hearing, but rather could be a more informal alternative forum.²⁴

The Court’s refusal to allow a parental veto and its requirement of an alternative to parental consent is pivotal to understanding the Court’s balancing of the interests at stake in parental involvement laws.²⁵ *Bellotti II*’s reasoning indicates that the justification for mandated parental involvement and judicial bypass is to ensure better decision-making for the minor. Although the Court recognized parents’ right to control their children’s upbringing and to have a voice in the abortion decision, in balancing the various interests at stake it refused to place the parents’ right above the girl’s reproductive rights—otherwise allowing judicial bypass or other alternatives would make no sense.²⁶ *Bellotti II* presented judicial bypass as a workable compromise, one that would in theory ensure adult guidance to pregnant teenagers while still guaranteeing that minors could exercise their right to obtain abortion care.²⁷

Judges in bypass hearings may authorize a minor’s abortion care after determining: (1) that the minor is sufficiently mature to choose an abortion without involving a parent, or in the alternative (2)

that the abortion is in her best interests.²⁸ As discussed in the following section, studies analyzing the actual operation of parental involvement laws demonstrate the failure of judicial bypass to serve as a fair compromise that improves adolescent decision-making.

II. DYSFUNCTIONAL ABORTION POLICY

Taking the Supreme Court's justification for mandated parental involvement at face value, these laws should be improving adolescent decision-making and thereby, presumably, improving outcomes of health and well-being for pregnant teenagers. Assuming that the primary purpose of mandated parental involvement and judicial bypass is to ensure better adolescent decision-making, the evidence shows that parental involvement regimes fail to meet that objective. Part II argues that mandated (as opposed to voluntary) parental involvement, even with the judicial bypass alternative, does not generally improve adolescent decision-making or otherwise improve health outcomes for pregnant teenagers. Since others have extensively criticized the operation of parental involvement laws and judicial bypass, this Part briefly summarizes those critiques as well as public health studies on the effects of legally mandated parental involvement. Decades of studies on the efficacy of parental involvement legislation demonstrate that these laws harm more than they help adolescent girls.

Given the widespread and long-term existence of parental involvement laws, public health researchers, sociologists, and legal scholars have extensively studied the safety and efficacy of mandated parental involvement and judicial bypass procedures across various states. Although parental involvement laws vary in their details, minors seeking abortion care generally face a similar series of obstacles, both legal and practical. Adolescents often first discover the requirement of parental consent or notice upon contacting a clinic that provides abortion care.²⁹ Reproductive healthcare providers bear the responsibility of ensuring that the minor has met the laws' mandates—failure to do so subjects the healthcare provider to civil and even criminal liability.³⁰ Clinics differ in their protocols for validating parental notice or consent depending on state law, with some confirming by mail or telephone, some requiring the parent to sign a notarized form, and some requiring the presence of a parent while the minor is at the clinic.³¹ If a minor does not wish to involve a parent, typically clinic staff informs the minor about the bypass process. Some clinics facilitate minors' access to the courts or to a lawyer, but the level of assistance available to help adolescents navigate the bypass process varies widely.³² In addition to surmounting the parental consent or bypass procedures, minors also face the additional legal burdens placed on abortion access for all women, such as biased counseling, lengthy waiting periods, and mandatory ultrasounds.³³ Furthermore, minors must cope with practical obstacles to accessing abortion care, such as finding transportation to an abortion provider, gathering funds to pay for the services, and obtaining time off from school for clinic appointments and the bypass hearing.³⁴

If a minor manages to find her way to a bypass hearing, more stressors await. Minors who have been subjected to the bypass process describe the experience as traumatic and stress inducing, not as a space in which they can better process their decision.³⁵ The Supreme Court in *Bellotti II* demanded that bypass procedures be anonymous and expeditious, but research indicates that the bypass process often fails to satisfy these requirements. Instead, "[s]urveys have found judges and court personnel to be unaware of the existence and requirements of the judicial bypass procedure or insensitive to what might be a harrowing and traumatic experience for the minor."³⁶ Court personnel charged with helping minors through the bypass procedure have been shown to be ignorant of the law, to cause unnecessary delays in the process, and even to have engaged in outright misconduct. Court staff have sometimes denied the existence of the bypass process or declared that the minor must consider alternatives such as adoption. Judges have mandated pro-life counseling or appointed an attorney for the fetus at the bypass hearing. These practices undermine the notion that the judicial bypass alternative suffices to ensure both sound decision-making and access to abortion care.³⁷ Moreover, in spite of the Supreme Court's requirement of anonymity, the bypass process can expose a teenager's identity, particularly in

a small town.³⁸ Finally, it is important to recognize that the time from the initial filing of a bypass petition to a final ruling can take anywhere from one to three weeks, a significant delay in the context of abortion care.³⁹

Despite the various hurdles of the bypass process, studies have also shown that, for those minors who are able to navigate the system, the vast majority of bypass petitions are granted. The high rate of approval raises the question: what purpose does the bypass process serve?⁴⁰ Given that judges approve most bypass petitions (with the exception of some pro-life judges who consistently deny these petitions), Carol Sanger argues that bypass hearings are reminiscent of the sham divorce trials of the pre-no-fault divorce era.⁴¹ Judges face a perplexing problem in handling bypass petitions. The judge in a bypass hearing, often a family court judge,⁴² must determine whether a minor is mature enough to make the decision to seek abortion care on her own, or in the alternative, if she is immature whether obtaining an abortion is in her best interests. As judges themselves have noted, “the paradox” of the Court’s compromise is “there is nothing really to decide,” for “how can a girl or young woman be too immature to decide whether to have a baby, but mature enough to go through pregnancy, give birth, and make a thousand important decisions regarding how to nurture, raise and educate the child.”⁴³ Judges have repeatedly described the bypass hearing as a “rubber stamp” designed to “harass kids” and thwart access to abortion.⁴⁴ Many judges simply refuse to hear bypass petitions, recusing themselves from bypass cases altogether (in some cases out of concern for re-election), resulting in forum deprivation for teenage girls.⁴⁵

Scholars who have extensively analyzed the bypass process conclude that the judicial hearings operate primarily as a means to shame teenage girls seeking abortion care.⁴⁶ Carol Sanger succinctly sums up the view of many critics: “[P]arental involvement statutes, while often couched in the language of family togetherness and child protection, are less concerned with developing sound or nuanced family policies in the area of adolescent reproduction than with securing a set of political goals aimed at thwarting access to abortion, restoring parental authority, and punishing girls for having sex.”⁴⁷ Sanger argues that the harms that flow from judicial bypass include not only the risk of medical harm due to delay, but also the dignitary harms that arise from the humiliation inflicted by the bypass hearing itself.⁴⁸ Judges interrogate girls about the most intimate aspects of their lives, in some cases asking inappropriate and irrelevant questions such as demanding to know where and how often they had sex.⁴⁹

Moreover, public health research on the impact of parental involvement legislation on teenagers also indicates that these laws do not further the goal of better decision-making by teenagers dealing with an unplanned pregnancy. Neither do these laws improve parent-child communication, protect teenagers’ health, or reduce the number of abortions. Instead, evidence suggests that mandated parental involvement with abortion is unnecessary in many cases and harmful in some others.⁵⁰

A 2009 literature review identified twenty-nine studies of parental involvement legislation’s impact on a range of outcomes for teenagers’ sexual and reproductive health.⁵¹ The clearest impact of parental involvement laws “is the increase in the number of minors who travel outside their home state to obtain [abortion] services in states that do not have [parental involvement] laws or that have less restrictive ones.”⁵² The studies also suggest that “parental involvement laws have little impact on minors’ abortion rate and, by extension, on birthrates and pregnancy rates.”⁵³ A recent national study assessed whether depression and low self-esteem follow abortion among adolescents, an especially popular claim after the Supreme Court emphasized concern for alleged post-abortion trauma in *Gonzales v. Carhart*.⁵⁴ The study found that adolescents do not appear to be at elevated risk for depression or low self-esteem after having an abortion.⁵⁵

Furthermore, a number of studies show that more than half of all teenagers already notify at least one parent about their pregnancy and decision to seek an abortion.⁵⁶ Evidence demonstrates that the younger the minor, the more likely she will notify a parent or other adult; even in states without parental involvement laws, parents know of abortion decisions for ninety percent of minors under age fifteen.⁵⁷ Minors are more inclined to discuss a pregnancy with a parent in families with “open communication about sex and contraception prior to pregnancy.”⁵⁸ Research indicates that minors subject to parental involvement mandates are more likely to notify their parents of a pregnancy rather than relying on the judicial bypass option “if they perceived maternal support.”⁵⁹ Instead of legal

interventions, “in the long run, parents themselves, not the courts, can best ensure that they are involved in time to make a difference.”⁶⁰

Concerns that mandated parental involvement will delay access to various kinds of medical treatment have led to widespread law reform on minors’ access to sensitive medical care. With the exception of abortion, the trend in the last thirty years has been to increase minors’ access to sensitive healthcare such as contraceptive services, treatment for sexually transmitted infections, prenatal care, drug treatment, and mental health treatment.⁶¹ Twenty of the leading medical and health care organizations have policies supporting parental involvement in adolescent abortion care, but not at the expense of a minor’s right to confidentiality.⁶² For adolescent girls, delays can be particularly problematic since teenagers are often slow to recognize their pregnancies and the health risks of abortion increase significantly at later stages of pregnancy.⁶³

Studies also confirm what should be no surprise—that the bypass hearings cause significant psychological distress.⁶⁴ Teenage girls who do not discuss their pregnancy with their parents often have weighty fears about forced disclosure, including fear of being kicked out of their family home or fear of abuse.⁶⁵ Their only other option is equally distressing, since to prove her maturity to a judge, the girl must discuss the most intimate details of her life to a complete stranger in a courtroom environment that would intimidate most adults.⁶⁶

The Supreme Court presented the judicial bypass alternative to parental consent as a workable compromise that would improve adolescent decision-making, but analysis of the actual operation of mandated parental involvement and the bypass process attests to the contrary. Given that repeal of these laws remains politically unlikely in the many jurisdictions where court challenges have failed, we must find a better alternative than judicial bypass. Of course, political realities could make even mere amendment as opposed to complete repeal of parental involvement statutes difficult—but insights from family law may help reframe and push forward reform. Recent developments in family law suggest that expanding the pool of adults adolescents may consult prior to receiving abortion care may succeed where judicial bypass has failed.

III. FAMILY LAW AND FUNCTIONAL PARENTING—A FOUNDATION FOR REFORM

Family law provides a rich—but underutilized—resource to instigate reform of parental involvement legislation. This Part recommends using insights from family law on the importance of “functional” parents and other third parties to help us develop safer and more effective methods to satisfy the perceived need to mandate adult approval for teenagers seeking abortion care. Reproductive rights advocates have long considered third party, non-parental consent an improved option for minors seeking abortion care, but have not made much headway pushing that claim from an abortion rights perspective. Family law provides another foundation for generating alternatives to the strict binary of parental or judicial sanction for minors’ abortion care. In particular, family law buttresses calls for reformulating parental involvement legislation to permit adolescents to obtain consent from trusted adults other than parents and in lieu of a formal judicial interrogation.

Family law doctrine has increasingly recognized the important role that adults other than parents play in children’s lives. This is not a new trend, nor is the recognition of the importance of adults outside the nuclear family a novel proposition. In 1977, in *Moore v. City of East Cleveland*, the Supreme Court struck down a housing ordinance limiting occupancy to members of a single family and defining family in narrow and formalistic terms.⁶⁷ *Moore* declared: “Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”⁶⁸

Family law’s acknowledgment of the importance of adults who are not parents, historically referred to as “third parties” or “legal strangers” to the child, has extended to the point that today functioning in a parent-like role can lead to becoming a parent. Although it remains clear that only parents possess the constitutional right to control their children’s upbringing, who counts as a parent has become

increasingly complex.⁶⁹ In family law, “[c]ase law, statutes, and the literature now comfortably discuss a variety of types of parents—foster parents, birth parents, biological parents, intended parents, adoptive parents, legal parents, genetic parents, gestational parents (or mothers), surrogate parents (or mothers), de facto parents, parents by estoppel, and psychological parents—to name the most prominent examples.”⁷⁰ Adults who formerly might have been considered a legal stranger to a child may now be recognized by the law as having rights and obligations towards a child with whom they have no biological or formal legal connection. The case law employs various legal formulations to describe functional parents and differing tests to screen out who qualifies as a functional parent.⁷¹ Some jurisdictions employ the term “psychological parent” or “*de facto* parent” to confer a parent-like status on an adult who has undertaken significant day-to-day caretaking of a child and established a close bond. Courts also speak of “equitable parenthood” or the *in loco parentis* doctrine “to create parental rights analogous to those of a biological parent” where an adult has held himself or herself out as a parent to the child.⁷² Modern family law’s “functional turn” has exploded the notion that children have only two “natural” parents who must be their sole caregivers, with the state as the only alternative in the absence of parents.⁷³ This functional approach to the family exemplifies family law’s ongoing efforts “to reflect more accurately the reality of family life.”⁷⁴

For example, case law has not only accorded legal recognition to those who function in traditional parental roles, but has even recognized more than two legal parents for one child. In *Jacob v. Shultz-Jacob*, a Pennsylvania court found that three adults—the two biological parents and a third functional parent—could jointly exercise parental rights to custody and obligations of child support upon dissolution of the relationship between the biological parent and functional parent.⁷⁵ In *A.A. v. B.B.*, an Ontario court recognized three parents to a child conceived by a same-sex couple and their male friend while the relationship between the couple was still ongoing.⁷⁶ The two women in the relationship wanted to be recognized as parents while retaining ties with the child’s genetic father who played a beneficial role in the child’s life, an increasingly common phenomenon.⁷⁷ Although legal recognition of “multiparentage” is unusual, these cases represent family law’s growing acknowledgement that often more than two adults, and adults other than parents as traditionally understood, serve important functions in children’s lives.⁷⁸

The American Law Institute’s (ALI) *Principles of the Law of Family Dissolution* also recognize that third parties can play a significant role in a child’s life by establishing two alternative parental statuses, “parent by estoppel” and “*de facto* parent.”⁷⁹ The ALI *Principles*’ recognition of a “*de facto* parent,” defined as a third party who has undertaken significant caretaking responsibilities for a child, particularly illustrates family law’s acceptance of the value of parental surrogates in children’s lives.⁸⁰ A “parent by estoppel” holds the child out as his or her own and thereby obtains the full obligations and rights of a biological parent.⁸¹ In contrast, *de facto* parents have no biological or legal connection to a child and need not hold out the child as their own, but nevertheless retain parent-like rights to maintain a relationship with the child through visitation—despite the major intrusion on parental control that visitation rights entail.⁸²

Moving beyond functional parenthood, even adults who might not qualify as a *de facto* parent may assert rights to a relationship with a child. All fifty states have statutes allowing for third parties to seek visitation against a parent’s wishes—grandparents being the paradigmatic example. The Supreme Court’s ruling in *Troxel v. Granville*, a notably circumscribed decision on a parent’s right to block grandparent visitation, did little to undercut these third-party visitation statutes.⁸³ In *Troxel*, Justice O’Connor’s controlling plurality opinion held that courts must give “special weight” to a fit parent’s determination of her child’s best interests, but otherwise established no broad rule limiting non-parent visitation laws.⁸⁴ The various opinions in *Troxel* “scrupulously avoid[ed] any strong endorsement of parental rights.”⁸⁵ The decision therefore has had limited practical impact and “induced no startling or radical changes with respect to third-party visitation.”⁸⁶ Although *Troxel* granted a sliver of deference to parental rights, the plurality also acknowledged the “changing realities of the American family” and confirmed the important role that third parties play in today’s pluralistic families: “The demographic changes of the past century make it difficult to speak of an average American family. . . . persons outside the nuclear family are called upon with increas-

ing frequency to assist in the everyday tasks of childrearing.”⁸⁷ Minority communities in particular rely heavily on parental surrogates in childrearing, as a number of scholars have discussed.⁸⁸ Numerous cases post-*Troxel* permit nonparents to exercise “custodial fragments”—most importantly visitation rights—which represent a significant intrusion upon parental control over their child’s upbringing.⁸⁹

It is important to note that, in spite of these advances in the doctrine, functional definitions of parentage and recognition of third-party rights remain hotly contested in a number of jurisdictions. There are some who resist granting legal rights to functional parents and other third parties, particularly in the context of same-sex families.⁹⁰ Even scholars who favor more expansive definitions of parentage acknowledge that granting legal rights to third parties has costs to both parents and children.⁹¹ Nevertheless, legal recognition of functional parents and of third party caregiving generally has become more widely employed and firmly entrenched in the past two decades.⁹² Family law’s future lies in recognizing diverse family forms.⁹³

Family law scholarship has elaborated on these doctrinal trends and urged even greater “recognition of all the relevant adults in a child’s life.”⁹⁴ The literature on what one scholar calls “community parenting” investigates not only the legal recognition of multiple forms of parentage and multiple parents, but also explores the significance of parental “outsourcing” of childrearing functions to third parties.⁹⁵ Although multiple actors besides parents have always been involved in childrearing, the greater demands of the modern workforce and women’s increased participation in that workforce has accelerated the outsourcing of parental functions.⁹⁶ In modern family law, “parenthood, as practiced and understood, consists of many parts that can be disaggregated and delegated.”⁹⁷ This disaggregation and delegation means that many children, and particularly adolescents who may be more engaged with the outside world than their world at home, have multiple adults who figure in their lives as sources of advice and counsel. Much of modern childrearing takes place “between home and school by individuals other than parents [or] state actors.”⁹⁸

Scholars assessing the child welfare system have also rejected the false dichotomy between parents and the state, particularly in cases involving poverty-related neglect as opposed to severe abuse. Rather than abandoning struggling parents to their “privacy” until they default on their parental role and the state intervenes to remove the children, these scholars urge greater recognition of the importance of extended community to parents and children.⁹⁹ Dorothy Roberts reminds us that “communities affect children’s development, well-being, and life chances.”¹⁰⁰ Clare Huntington proposes employing a collaborative process in juvenile dependency law that would involve “conven[ing] a conference with immediate and extended family members, and other important people in the child’s life, such as teachers or religious leaders, to decide how to protect the child and support the parents.”¹⁰¹ A more collaborative approach, rather than the adversarial approach modeled in court processes, recognizes “the community as a resource for the family” in ways that would allow children to remain with adults with whom they have a meaningful relationship.¹⁰²

In sum, family law scholars have unmasked numerous existing examples of community parenting, and highlighted the need for wider reforms throughout the law that move beyond the parent/state binary in addressing children’s needs.¹⁰³ Both the doctrinal changes already well underway accommodating nonbiological adult-child relationships and the scholarly literature advocating further reform are resources that advocates could mine to support legal reform in the abortion context. Family law’s recognition of pluralism in family life bolsters the case for modernizing parental involvement laws to better reflect the complex structures of today’s families. While family law scholarship and doctrine acknowledge the variety of adults who play important roles in children’s lives, abortion law remains entrenched in an antiquated parent/state binary.

A few scholars have suggested restructuring parental involvement mandates to permit pregnant teenage girls to consult with other designated adults as an alternative to parental consent and judicial bypass.¹⁰⁴ One scholar who conducted extensive studies of the judicial bypass process argues that “if the focus of these laws is truly to enhance the decision-making of minors, utilization of trusted and knowledgeable adults is a more appropriate option than forcing minors into the legal system, a process that is burdensome, frightening, and of no demonstrable benefit.”¹⁰⁵ Even *Bellotti*

II noted that “much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction.”¹⁰⁶ Enlisting other members of the community should assuage those who want to ensure that minors have adult guidance prior to receiving abortion care, but also address the reality that not all teenagers can safely discuss an unplanned pregnancy with a parent. Older adolescents especially may find talking to a trusted adult other than their parent a better source of support than a stranger in judges’ robes, particularly when discussing sensitive issues related to pregnancy resolution.

Of course, adding other adults to “parental” involvement laws will not satisfy those who wish to reassert parental control or those opposed to abortion. Further, perhaps for some parents expanding parental involvement legislation to include parental surrogates may feel like more of a diminishment of parental rights than allowing judicial bypass. However, as discussed above in Part I, the Supreme Court in *Bellotti II* made clear that the *constitutionally* defensible purpose for allowing parental involvement mandates while also requiring a bypass alternative is to ensure better decision-making—helping minors “make fully informed choices that take account of both immediate and long-range consequences”—not to merely reinforce parental authority or thwart access to abortion.¹⁰⁷ Options other than just parents and judges would truly serve to provide adult guidance as opposed to mere judicial scrutiny.¹⁰⁸ As Naomi Cahn has emphasized, “Instead of reifying a dichotomy between the interests of parents and the interests of children, we should recognize that, in most cases, they overlap significantly.”¹⁰⁹ Both parents and children benefit from a better decision-making process. Employing the notion of functional parenting in the abortion context protects the well-being of adolescents and should not be seen as a greater threat to parental rights than a judicial bypass.

A small minority of states with parental involvement laws have expanded options for girls beyond the parent/state authoritarian binary, but typically in a very limited fashion. Currently, six states with parental involvement laws permit a minor to obtain an abortion if she involves an adult other than a parent in the decision.¹¹⁰ A few states allow adolescent girls to obtain consent or notice from relatives other than parents, such as grandparents, aunts and uncles, or siblings over a certain age threshold, but otherwise mandate judicial bypass.¹¹¹ Several of these states that permit involvement of extended family require that the minor have lived with the relative for six months prior to her request for abortion care, which is a significant limitation.¹¹² Four states allow girls to obtain consent from a healthcare professional in lieu of parental consent or judicial bypass.¹¹³ Connecticut takes a different approach, eschewing parental consent entirely and instead mandating extensive counseling prior to a minor receiving an abortion. Connecticut’s law requires the counseling to be noncoercive, objective, and to explore all pregnancy options and the possibility of parental involvement.¹¹⁴

Building on family law’s recognition of extended networks of caregivers in children’s lives, we could develop more creative solutions to the perceived need to mandate that teenagers seeking abortion care consult with an adult. Statutes could be amended to authorize minors to notify or obtain permission for abortion care from statutorily designated adults other than parents or judges, but without additional limitations such as cohabitation requirements or a showing of past abuse. Although one possibility would be to allow minors to determine which adult they would involve in their decision-making process, a minor-driven selection may raise concerns such as wayward teenagers choosing inappropriate third parties or choosing a predatory older male who caused the pregnancy. Instead, following family law’s functional turn, we could consider which other adults typically function in parent-like roles in many adolescents’ lives. These should be adults who likely have established relationships with teenagers or who can be trusted to serve in a counseling role at a time of crisis. A definitive analysis of all possible parental surrogates that could be included in a reformed parental involvement statute is beyond the scope of this article. Below, I sketch out three categories of other adults, ideally all of whom should be included as alternatives to parents and judges: (1) functional parents and extended family members; (2) community members such as school counselors, school nurses, and clergy; (3) licensed counselors and mental health professionals. Teenagers should be able to consult with any one of these designated adults to obtain the necessary permission prior to receiving abortion care, without having to go through the ordeal of a formal judicial hearing.

First, at a minimum, a reasonable compromise between total repeal and maintaining the status quo in parental involvement laws would be to permit minors to involve not only legally recognized functional parents but also extended family members, such as grandparents, aunts or uncles, siblings, or cousins who meet threshold age requirements.¹¹⁵ For example, Wisconsin's parental consent law permits minors to obtain consent from an adult family member at least twenty-five years old, including a grandparent, aunt or uncle, or sibling.¹¹⁶ Particularly in minority communities, adolescents turn to adult relatives other than parents in times of crisis. Studies suggest that African-American and Hispanic teens are significantly overrepresented among minors seeking a judicial bypass.¹¹⁷ In one study conducted with African-American minors, more than ninety-five percent of study participants consulted either a parent or other adult about the decision to have an abortion; of the ninety-five percent, close to thirty percent turned to a "parent surrogate" (usually a close relative) rather than a parent.¹¹⁸ The study authors noted, "The fact that so many of the young women in our study whose parents did not fulfill their appropriate roles had clearly identifiable adults to whom they could turn is evidence of strong, not weak, family systems."¹¹⁹

Second, statutes should also designate other trusted adults who have training or experience counseling adolescents in crisis and who are likely to have existing relationships with teenagers in their community, such as school guidance counselors, school nurses, social workers, and clergy members, as additional resources for teenagers deciding how to resolve their pregnancy.¹²⁰ Child welfare law provides a useful analogy here. In the child welfare context, "[r]esearch has demonstrated that ties to the community are particularly important to help an at-risk child overcome difficult family circumstances and that emotional support outside of the immediate family can be a crucial protective factor for children who grow up in high-risk environments."¹²¹ California adopted a statute recognizing the importance of community to children in dependency proceedings, by allowing placement with a "nonrelative extended family member."¹²² The statute allows placement with "any adult caregiver who has an established familial or mentoring relationship with the child," including teachers, medical professionals, clergy, neighbors, and family friends, in order to encourage placement of children "with competent familiar adults, in familiar surroundings."¹²³

Similarly, many pregnant teenagers are likely to feel more comfortable discussing intimate issues with a familiar adult rather than with a judge who is a complete stranger.¹²⁴ Allowing teenagers to mobilize existing support networks in the face of a crisis is especially important for those youth in at-risk environments who are least likely to be able to involve their parents.¹²⁵ Minors in detention, or in foster homes or group homes, are "one of the most vulnerable and disadvantaged populations in terms of access to the bypass" and often have no way of contacting parents who may be deported, imprisoned, or whose whereabouts are unknown.¹²⁶ Expanding the pool of adults to include trusted community members with whom teenagers already have a relationship would also reflect the help-seeking behavior most teenagers considering abortion typically engage in.¹²⁷

Third and finally, for the protection of those minors who lack approachable relatives or other adults in their community, statutes should permit minors to consult a licensed mental health professional in lieu of a judge. A few states have already taken this approach.¹²⁸ For example, Delaware permits a licensed mental health professional to consent to abortion care as long as the counselor certifies that she has evaluated all of the circumstances of the minor and determined that an abortion is in her best interests.¹²⁹ Studies suggest that a professional counseling option would better serve many teenagers,¹³⁰ since "[c]ounseling, instead of a judicial procedure, might be a more sensitive and readily utilized procedure that better determines a teen's maturity, best interests and decision-making skills."¹³¹ Parental involvement laws most heavily punish the most vulnerable and marginalized minors—those who lack supportive parents, parental surrogates, or the resources to readily access the court system.¹³² A counseling option could assist those minors who need it most.

While adding third parties to parental involvement laws would be an improvement, this reformulation nevertheless remains problematic. There are at least three possible criticisms based on the limits of this reform proposal. First, adolescents would still face delays resulting from having to obtain notice or consent from a third party. Currently, parental involvement laws typically require that the adult consultation take place separately from the informed consent process for the abortion itself, *i.e.*,

24 or 48 hours before the minor receives abortion care.¹³³ If similar rules carried over (which seems likely), teenagers will continue to confront delays to obtaining abortion care that could negatively impact their health. Second, even with an expanded pool of adults, teenage girls may still face obstacles locating qualified third parties whom they trust to maintain confidentiality.¹³⁴ Based on legislative concern about bias if the counseling takes place through the clinic providing the abortion care, laws sometimes require that the counselor or mental health professional not be affiliated with the abortion provider.¹³⁵ These kinds of restrictions could make it harder for teenagers to find confidential and affordable counselors. Third, if the law gives the third party decision-making power, rather than limiting the third party to a counseling role, minors could still be subjected to unwarranted delays, bureaucratic red tape, and, ultimately, shame and humiliation, much like with judicial bypass. The aunt, school counselor, or other non-parent could arbitrarily obstruct access to abortion care.

Despite these potential pitfalls, granting adolescents more options of adults to consult would at least increase fairness and a sense of control over the process.¹³⁶ Instead of a total repeal of parental involvement statutes or the status quo, compromise reform along the lines outlined above takes into account proponents' goal of ensuring adult involvement, the needs of adolescents, and the complex realities of family life. Policies encouraging parental involvement, while allowing for alternative adults other than judges to grant consent for abortion care, could actually furnish pregnant minors with guidance and support that, unlike judicial bypass, would serve not as a barrier to either childbirth or abortion but as the means for better decision-making that parental involvement laws are purported to be. In an ideal world, perhaps we would transform abortion-specific parental involvement legislation into a mandate for better resources to guarantee that all pregnant teenagers receive the counseling and compassion they need regardless of how they choose to resolve their pregnancy.¹³⁷

CONCLUSION

We all want good decision-making for our daughters, especially with regard to sexuality and reproduction. Parental involvement laws fail us in this goal because, as our law recognizes in other areas related to sexuality, not all teenagers are able to seek the help they need from their parents. Furthermore, judges are typically not in a position to provide the kind of counseling and emotional support we would like girls struggling with an unplanned pregnancy to receive, and formal legal hearings do not provide the space to secure a sound decision-making process. A family law perspective on adolescents' access to reproductive healthcare yields new strategies for reform of parental involvement laws. Family court judges, lawyers, and other professionals should endorse state legislative reform giving designated non-parent adults the authority to advise minors considering abortion care. This is a sensible compromise that reflects where family law stands today. A strategy that recognizes how trusted adults in the community can help guide and support pregnant teenagers, and already do assist parents in this kind of childrearing as recognized by family law, could aid the push for reform.

NOTES

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1. UNICEF INNOCENTI RESEARCH CENTRE, A LEAGUE TABLE OF TEENAGE BIRTHS IN RICH NATIONS, 2 (2001).

2. See GUTTMACHER INST., STATE POLICIES IN BRIEF, PARENTAL INVOLVEMENT IN MINORS' ABORTIONS 1 (2012) (parental involvement is an umbrella term covering both parental consent and parental notice laws).

3. See Jennifer Durcan & Annette R. Appell, *Minor Birth Mothers and Consent to Adoption: An Anomaly in Youth Law*, 5 ADOPTION Q. 69 (2001); Walter Wadlington, Professor of Law, Univ. of Va., David C. Baum Memorial Lecture: *Medical Decision Making For and By Children: Tensions Between Parent, State, and Child*, Lecture for David C. Baum Memorial Lectures on Civil Liberties and Civil Rights at the Univ. of Ill. College of Law (September 26, 1991), in 1994 U. ILL. L. REV. 311, 323–24.

4. See GUTTMACHER INST., *supra* note 2, at 1, 2. Most states require consent or notification of only one parent, usually 24 or 48 hours before the procedure. All states with parental involvement laws in effect allow for judicial bypass as constitutionally required. 33 states permit a minor to obtain an abortion without parental involvement in a medical emergency. 15 states permit a minor to obtain an abortion without parental involvement in cases of abuse, assault, incest or neglect. 22 states require parental consent; 3 of which require both parents to consent. 11 states require parental notification only; 1 of which requires that both parents be notified. 4 states require both parental consent and notification. In addition, California, Illinois, Montana, Nevada, New Jersey, and New Mexico have parental involvement laws that are not in effect due to court enjoinder. New Hampshire passed, later repealed, and then recently reenacted a parental notification law. See H.B. 329, 2011 Leg., Reg. Sess. (N.H. 2011).

5. See Rachel Rebouche, *Parental Involvement Laws and New Governance*, 34 HARV. J.L. & GENDER 175, 179 (2011).

6. See *id.* at 177 (noting that scant scholarly attention has been paid to strategies for reforming parental involvement legislation).

7. National polls have consistently found that approximately three quarters of those surveyed are in favor of parental involvement legislation. See Robert D. Webster, et al., *Parental Involvement Laws and Parent-Daughter Communication: Policy Without Proof*, 82 CONTRACEPTION 310 (2010).

8. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 897 (1992) (striking down spousal notification law in part on the ground that modern family law rejects “the common law understanding of a woman’s role within the family”).

9. See Laura T. Kessler, *Community Parenting*, 24 WASH. U. J. L. & POL’Y 47 (2007) (describing the use of extended networks of care for raising children particularly in minority communities). The notion of “community parenting” is discussed further *infra* Part III.

10. See *infra* Part III.

11. See Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT’L J. L. POL’Y & FAM. 305 (2004).

12. See Laura Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 833 (2007).

13. *Carey v. Population Services, Int’l*, 431 U.S. 678, 678 (1977).

14. *Id.* at 692.

15. *Id.* at 699.

16. *Id.* at 679.

17. See *id.* at 693, 697–699.

18. *Bellotti v. Baird*, 443 U.S. 622 (1979) [hereinafter *Bellotti II*].

19. *Id.* at 643. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which reassessed and ultimately upheld aspects of the core right to access abortion established in *Roe v. Wade*, 410 U.S. 113 (1973), the Court reaffirmed the constitutionality of parental consent laws as long as those laws provide for judicial bypass. *Casey*, 505 U.S. at 899. See also *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006) (reaffirming that parental involvement laws must also have a health exception for medical emergencies). The Court has made it clear that parental consent laws must have a judicial bypass alternative, but it remains unclear whether parental notification laws must also allow for bypass. See Erin Helling & Jenny Nam, eds., *Eleventh Annual Review of Gender and Sexuality Law: Health Care Law Chapter: Abortion*, 11 GEO. J. GENDER & L. 341, 351 (2010).

20. *Bellotti II*, 443 U.S. at 634.

21. *Id.* at 634–37. In *Bellotti II*, a plurality of the Court, in an opinion by Justice Powell, agreed that appropriate waiver procedures would satisfy the constitution. The *Bellotti II* criteria for judicial waiver provisions were later endorsed by a majority of the Court in *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 510–14 (1990) [hereinafter *Akron II*].

22. *Bellotti II*, 443 U.S. at 640.

23. See *id.* at 643–50. Moreover, a judge could not substitute his or her own judgment about abortion care if the minor was found to be sufficiently mature to make an informed decision herself.

24. *Id.* at 643 n.22; see also Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 497 (2009) (noting that *Bellotti II* did not require that the bypass alternative be a judicially managed court hearing).

25. See *Bellotti II*, 443 U.S. at 639–41.

26. See MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 238–44 (2005) (arguing that judicial bypass alternative undercut parental rights and was meant to ensure minors’ access to abortion care).

27. See J. Shoshanna Erlich, *Minors as Medical Decision Makers: The Pretextual Reasoning of the Court in the Abortion Cases*, 7 MICH. J. GENDER & L. 65, 68 (2000).

28. See generally Suellyn Scarnecchia & Julie Kunce Field, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 MICH. J. GENDER & L. 75 (1995) (describing judicial determinations of “maturity” and “best interests” in Michigan and in comparison with other states).

29. NAT’L PARTNERSHIP FOR WOMEN & FAMILIES, BYPASSING JUSTICE: PREGNANT MINORS AND PARENTAL INVOLVEMENT LAWS, at 36 (on file with author).

30. See *id.* at 36–37; see, e.g., ARIZ. REV. STAT. ANN. § 36-2152 (I-J) (West 2011); IND. CODE ANN. § 16-34-2-7 (b) (West 2011); W. VA. CODE ANN. § 16-2F-8 (West 2011).

31. See NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, *supra* note 29, at 37–39.

32. See *id.* at 39–40; see also Rebouche, *supra* note 5, at 188–217 (arguing that the judicial bypass system rarely operates functionally and proposing reform through education of gatekeepers and better informal networks of support for minors).

33. See Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy*, 16 WM. & MARY J. WOMEN & L. 291, 309–324 (2010) (discussing various statutory hurdles to accessing abortion care); Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 351–63 (2008) (discussing burdens of mandatory ultrasound laws).

34. See NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, *supra* note 29, at 41–43.

35. See *id.* at 27; see also J. SHOSHANNA EHRLICH, WHO DECIDES? THE ABORTION RIGHTS OF TEENS 130–137 (2006).

36. Jeanette M. Soares, ed., *Health Care Law Chapter: Abortion*, 7 GEO. J. GENDER & L. 1099, 1107 (2006); see also Helena Silverstein & Leanne Speitel, "Honey, I Have No Idea": Court Readiness to Handle Petitions to Waive Parental Consent for Abortion, 88 IOWA L. REV. 75 (2002) (arguing that Alabama juvenile courts display widespread inadequacies in the handling of judicial waiver inquiries and fail to secure the rights of pregnant minors).

37. See HELENA SILVERSTEIN, GIRLS ON THE STAND: HOW COURTS FAIL PREGNANT MINORS 52–131 (2007).

38. See Lisa R. Pruitt, *Toward a Feminist Theory of the Rural*, 2007 UTAH L. REV. 421, 478–82 (discussing confidentiality and transportation difficulties for rural girls seeking a judicial bypass); Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 440–44 (describing risks of exposure caused by judicial hearing itself).

39. See Sanger, *Decisional Dignity*, *supra* note 38, at 429; Judge S., *The Effect of Parental Involvement Laws on the Timing of Teenagers' Abortions*, 84 CONTRACEPTION 302, 307 (2011) (abstract describing results of study showing that parental involvement laws in several states may have contributed to delays in minors' abortions and to the percentage of those abortions occurring after 12 weeks' gestation).

40. See Sanger, *Decisional Dignity*, *supra* note 38, at 418 (arguing that bypass hearings primarily serve to shame and punish teenage girls); *Planned Parenthood v. Farmer*, 165 N.J. 609, 637 (2000) (noting that in several jurisdictions almost all bypass petitions are granted and that, "Those numbers compellingly suggest that New Jersey's waiver procedure serves only to delay abortions, and raises the question whether [parental involvement laws] further the expressed state interests.").

41. See Sanger, *Decisional Dignity*, *supra* note 38, at 480–84.

42. See, e.g., VA. CODE ANN. § 16.1-241 (2010).

43. Jamin B. Raskin, *The Paradox of Judicial Bypass Proceedings*, 10 AM. U. J. GENDER & SOC. POL'Y & L. 281, 281–82 (2002).

44. See EHRLICH, WHO DECIDES, *supra* note 35, at 137. One judge who took responsibility for hearing bypass cases testified about the experience: "[R]eally the judicial function [in bypass cases] is a rubber stamp. The decision has already been made before they have gotten to my chambers. The young women I have seen have been very mature and capable of giving the required consent." *Hodgson v. Minn.*, 648 F. Supp. 756, 766 (D. Minn. 1986), *rev'd* 853 F.2d 1452 (8th Cir. 1988).

45. See Sanger, *Decisional Dignity*, *supra* note 38, at 454–56; see also Caroline A. Placey, Comment: *Of Judicial Bypass Procedures, Moral Recusal, and Protected Political Speech: Throwing Pregnant Minors Under the Campaign Bus*, 56 EMORY L. J. 693, 717–20 (2006).

46. See Raskin, *supra* note 43, at 284 (stating "that these searching voyeuristic hearings function primarily to . . . humiliate and to shame the young woman"); see also Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT'L J.L. POL'Y & FAM. 305, 314 (2004) ("Understanding the hearings as a means of imposing control over teenage sex and abortion helps explain why bypass statutes are so popular among legislatures despite the fact that so few petitions are denied.").

47. Sanger, *supra* note 46, at 306; see also NAT'L PARTNERSHIP FOR WOMEN AND FAMILIES, *supra* note 29, at 54 (noting that lawyers, judges, and other professionals who assist minors with bypass view the judicial bypass process "as intended not to protect minors but to prevent abortion, punish (female) adolescent sexuality, and bolster parental authority").

48. See Sanger, *Decisional Dignity*, *supra* note 38, at 444–79.

49. See NAT'L PARTNERSHIP FOR WOMEN AND FAMILIES, *supra* note 29, at 28.

50. See *Farmer*, 165 N.J. at 633–42 (summarizing data on impact of parental involvement mandates).

51. See AMANDA DENNIS ET AL., THE IMPACT OF LAWS REQUIRING PARENTAL INVOLVEMENT FOR ABORTION: A LITERATURE REVIEW 3 (GUTTMACHER INST., 2009).

52. *Id.* at 1.

53. See *id.* at 28. Furthermore, studies that have specifically looked at the impact of parental involvement laws on minors' pregnancy rates have not definitively shown a reduction in teen pregnancy rates. One Texas study suggested that parental involvement laws lower abortion rates and raise birthrates if minors must travel long distances to access out-of-state providers. See *id.* (stating that "the Texas study illustrates that in some cases, the laws may compel a small proportion of minors to continue unwanted pregnancies").

54. *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) ("While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."); see also Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. &

POL'Y 223 (2009) (criticizing the Supreme Court's "abortion regret" reasoning for justifying abortion restrictions); Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1688 (2008) (discussing the rise of the claim of abortion "regret" to justify restrictions on abortion).

55. Jocelyn T. Warren, S. Marie Harvey & Jillian T. Henderson, *Do Depression and Low Self-Esteem Follow Abortion Among Adolescents? Evidence from a National Study*, 42 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 230 (2010).

56. See Robert D. Webster & Amy N. Neustadt et al., *Parental Involvement Laws and Parent-Daughter Communication: Policy Without Proof*, 82 CONTRACEPTION 310 (2010).

57. See Farmer, 165 N.J. at 641; Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSP. 196, 199–200 (Sept-Oct, 1992) (reporting that parents know of abortion decisions for 90% of minors 14 years old and younger, 74% of 15-year-olds, and 61% of minors total).

58. See Webster & Neustadt, *supra* note 56, at 311; see also Farmer, 165 N.J. at 641 ("A recurring theme in the record is that a law mandating parental notification prior to an abortion can neither mend nor create lines of communication between parent and child. Instead, it is the parties' pre-existing relationship that determines whether a young woman involves a parent in the difficult decision whether to seek an abortion.").

59. Webster & Neustadt, *supra* note 56, at 311.

60. Laurie S. Zabin, et al., *To Whom Do Inner-City Minors Talk About Their Pregnancies? Adolescents' Communication with Parents and Parent Surrogates*, 24 FAM. PLAN. PERSP. 148, 154 (1992).

61. See Borgmann, *supra* note 33, at 316.

62. See Webster & Neustadt, *supra* note 56, at 310. The American Medical Association, the American College of Obstetricians and Gynecologists, and the American Academy of Pediatricians all agree, and have testified, that parental involvement mandates and the judicial bypass process delays access to abortion care and thereby increases medical risks. See Sanger, *supra* note 46, at 310–11; see also AMERICAN ACADEMY OF PEDIATRICS, COMMITTEE ON ADOLESCENCE, *The Adolescent's Right to Confidential Care When Considering Abortion* 97, PEDIATRICS, NO. 5, 1996 at 746, available at http://pediatrics.aappublications.org/content/97/5/746.abstract?ijkey=81e085cb713b40e16cfd7f78f899e8f2f37e50c&keytype=tf_ipsecsha.

63. Studies show that women seeking second-trimester abortions are typically very poor, very young or very sick. See Diana G. Foster et al., *Predictors of Delay in Each Step Leading to an Abortion*, 77 CONTRACEPTION 289–93 (2008); Phillip G. Stubblefield et al., *Methods for Induced Abortion*, 104 OBSTETRICS & GYNECOLOGY 174, 179 (2004) (noting that women seeking second trimester abortion are medically "a very important group, including virtually all patients who have antenatal diagnosis of congenital anomalies, many women with serious illness, and a disproportionate share of very young women"). Delay in abortion care significantly increases medical risks. See Diana G. Foster et al., at 289 ("Second-trimester abortions carry an increased incidence of complications"); Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 731 (2004) ("[T]here is a 38% increase in risk of death for each additional week of gestation . . . the increase in the risk of death due to delaying the procedure by 1 week is much higher at later gestational ages than at earlier gestational ages."); see also Farmer, 165 N.J. at 634 (noting that delays caused by the bypass process increase medical costs and health risks to the minor and "can operate as a functional bar to a minor's exercise of her constitutional right to make her own reproductive decisions").

64. J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision without Involving Their Parents*, 18 BERKELEY WOMEN'S L. J. 61, 173–174 (2003).

65. Those minors who choose not to notify a parent fear "family conflict, physical harm, or other abuse if they told a parent about the pregnancy." Webster & Neustadt, *supra* note 56, at 311. One study specifically demonstrated that mandated communication could be physically harmful to some minors, reporting higher rates of physical violence or being beaten in cases where parents became aware of the pregnancy without the minors' consent. See *id.* In general, the literature suggests "that forced parent-daughter communication around abortion could be harmful or perceived as harmful for some youth." See *id.*

66. See Sanger, *Regulating Teenage Abortion in the United States*, *supra* note 11, at 311–12.

67. See *Moore v. City of East Cleveland*, 431 U.S. 494, 504–06 (1977).

68. *Id.* at 504.

69. See Susan Frelich Appleton, *Parents By the Numbers*, 37 HOFSTRA L. REV. 11, 25–26 (2008).

70. *Id.* at 27.

71. See *id.* at 16–17, 27–30; see also Deborah L. Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality*, 40 FAM. L. Q. 23 (2006) (describing different theories courts have used to categorize and accord rights to functional parents and open questions relating to definitions of functional parenting).

72. KIM RICHMAN, *COURTING CHANGE: QUEER PARENTS, JUDGES, AND THE TRANSFORMATION OF AMERICAN FAMILY LAW* 36–38 (2008).

73. See Frelich Appleton, *supra* note 69, at 16–22; see also Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J. L. & GENDER 37, 65–67 (describing family law's turn to functionalism more generally).

74. See Rosenbury, *supra* note 12, at 875 (arguing that family law should recognize the diverse forms of childrearing that occur by persons other than parents or the state in the spaces "between home and school").

75. See *Jacob v. Shultz-Jacob*, 923 A.2d 473 (Pa. Super. Ct. 2007).

76. A.A. v. B.B., [2007] 278 D.L.R. (4th) 519 (Can.), *leave to appeal denied sub nom.* Alliance for Marriage & Family v. A.A., [2007] 3 S.C.R. 124.

77. See Laura Nicole Althouse, *Three's Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN'S L.J. 171, 171–72 (2008).

78. See Nancy D. Polikoff, *The Impact of Troxel v. Granville On Lesbian and Gay Parents*, 32 Rutgers L.J. 825, 828 (2001) (“Mainstream family law scholars and practitioners, and an increasing number of courts, have recognized that the rigid parent-nonparent dichotomy fails to reflect the reality of family life.”).

79. ALI Principles of the Law of Family Dissolution §2.03(1).

80. See *id.* at §2.03(1)(c).

81. See *id.* at §2.03(1)(b)(iii).

82. Emily Buss, “Parental” Rights, 88 VA. L. REV. 635, 641–42 (2002); see also MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS, *supra* note 26, at 108.

83. *Troxel v. Granville*, 530 U.S. 57 (2000).

84. *Id.* at 58.

85. Buss, *supra* note 82, at 639.

86. See John Dewitt Gregory, *The Detritus of Troxel*, 40 FAM. L. Q. 133, 144 (2006).

87. *Troxel*, 530 U.S. at 63–64.

88. See, e.g., Solangel Maldonado, *When Father (or Mother) Doesn’t Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865, 869–72 (2003); Kessler, *Community Parenting*, *supra* note 9, at 57–63.

89. Buss, “Parental” Rights, *supra* note 82, at 635–36 (criticizing *Troxel*’s approach); RICHMAN, *supra* note 72, at 115–16 (discussing post-*Troxel* cases granting third parties rights to continue their relationship with a child against a biological parent’s wishes).

90. See, e.g., COUNCIL ON FAMILY LAW, INST. FOR AM. VALUES, THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA 6–7 (2005).

91. See, e.g., Polikoff, *supra* note 78, at 855 (arguing that definitions of parentage should be expanded to include functional parents but rights of third-parties who do not qualify as functional parents should be limited); Buss, “Parental” Rights, *supra* note 82, at 636 (arguing that states should be free to expand definition of who counts as a parent but then must defer to rights of those parents to exclude third parties).

92. RICHMAN, *supra* note 72, at 37–38 (noting that same-sex couples began to successfully take advantage of functional parent doctrines developed for non-traditional heterosexual families in the 1990s).

93. See Laura T. Kessler, *New Frontiers in Family Law* at 234, in TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY (Martha Albertson Fineman ed. 2011).

94. Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. & FAM. STUD. 309, 312–13 (2007) (arguing for a “scheme of relative rights” that would allow us to “disaggregate the many aspects of parenthood to permit all of the relevant adults to participate in a child’s life, while still maintaining continuity and stability for the child”).

95. See Laura T. Kessler, *Community Parenting*, 24 WASH. U. J. L. & POL’Y 47 (2007) (describing the use of extended networks of care for raising children particularly in minority communities); see also Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 413–31 (2008) (arguing for need to recognize care networks and reviewing existing laws and policies that already recognize extended family, friends, and community members as caregivers); Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & Fam. Stud. 231 (2007) (analyzing possibility of recognizing multiple parents and in particular multiple fathers).

96. See Rosenbury, *supra* note 12, at 878–79.

97. Frelich Appleton, *supra* note 69, at 25.

98. Rosenbury, *supra* note 12, at 835; see *id.* at 877 (“If a goal of family law is to support families according to the realities of contemporary family life, then family law scholars and reformers must consider not only family composition, but also how—and where—family functions are performed.”).

99. See, e.g., Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 HOFSTRA L. REV. 23 (2005); Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006).

100. Roberts, *supra* note 99, at 26; see David B. Mitchell, *Building a Multidisciplinary, Collaborative Child Protection System: The Challenge to Law Schools*, 41 FAM. CT. REV. 432, 436 (2003).

101. Huntington, *supra* note 99, at 641.

102. *Id.* at 679.

103. Kessler, *supra* note 9; see Murray, *supra* note 95.

104. See, e.g., Sanger, *supra* note 11, at 314; J. SHOSHANNA EHRLICH, WHO DECIDES?: THE ABORTION RIGHTS OF TEENS 159 (2006).

105. EHRLICH, *supra* note 104, at 159.

106. *Bellotti II*, 443 U.S. at 643 n.22.

107. *Id.* at 640.

108. See MAXINE EICHNER, THE SUPPORTIVE STATE 131 (2010) (“If the ultimate goal of parental notification laws is to ensure that teens think through their decisions and have abortions when it is truly in their best interest to do so, but not to have abortions when it is not in their best interest, requiring parental involvement in all cases falls short of this goal.”).

109. Naomi R. Cahn, *Children’s Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L. J. 1189, 1206 (1999).

110. See GUTTMACHER, *supra* note 2, at 2 (Delaware, Iowa, North Carolina, South Carolina, Virginia and Wisconsin).

111. See DEL. CODE ANN. tit. 24, § 1783 (2010) (grandparent); IOWA CODE ANN. § 135L.3m(2)(a) (West 2010) (grandparent only); NC. GEN. STAT. ANN. § 90-21.7(a) (West 2010) (legal guardian; grandparent with whom the minor has been living for at least 6 months prior); S.C. CODE ANN. § 44-41-31(A)(1) (2010) (legal guardian, person standing *in loco parentis* for at least 60 days prior); VA. CODE ANN. § 16.1-241 V (2010) (legal guardian, person standing *in loco parentis* to the minor including but not limited to grandparents or adult siblings); WIS. STAT. ANN. § 48.375 (West 2010) (legal guardian, foster parent, adult family member at least 25 years old including a grandparent, aunt or uncle, or sibling).

112. See NC. GEN. STAT. ANN. § 90-21.7 (West 2010); S.C. CODE ANN. § 44-41-31 (2010); VA. CODE ANN. § 16.1-241 (2010).

113. DEL. CODE ANN. tit. 24, § 1783 (2010) (notification can be given to licensed mental health professional who must certify that she has evaluated all of the circumstances of the minor and determined that an abortion is in her best interest); MD. CODE ANN., HEALTH-GEN. § 20-103 (c) (West 2011) (physician can waive parental involvement if in his or her professional judgment notice to the parent may lead to physical or emotional abuse of the minor, minor is mature and capable of giving informed consent, or notification would not be in minor's best interests); W. VA. CODE ANN. § 16-2F-3 (c) (West 2011) (health-care provider other than the physician to perform the abortion assesses maturity and best interests prior to minor's abortion care); ME. REV. STAT. ANN. tit. 22, § 1597-A(2)(A-C), (6) (West 2011) (minor may seek bypass hearing or state-mandated counseling).

114. CONN. GEN. STAT. ANN. § 19a-601 (2010).

115. Although it can be burdensome to establish that an adult qualifies as a functional parent, for those adolescents who already have documentation or can otherwise readily establish that the adult whom they wish to involve qualifies, the statutory expansion is warranted. See, e.g., VA. CODE ANN. § 16.1-241 V (2010) (allowing person standing *in loco parentis* to minor to approve minor's abortion care).

116. See WIS. STAT. ANN. § 48.375(2)(b) (West 2010).

117. See Erlich, *Grounded in the Reality of Their Lives*, *supra* note 64, at 93 n.157.

118. See Laurie S. Zabin et al., *To Whom Do Inner-City Minors Talk About Their Pregnancies? Adolescents' Communication with Parents and Parent Surrogates*, 24 FAM. PLAN. PERSP. 148, 151 (1992).

119. *Id.* at 173.

120. However, in public schools, state workers may be reluctant to be involved with abortion decisions. See NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, *supra* note 29 at 50.

121. Huntington, *supra* note 99, at 683.

122. See CAL. WELFARE & INSTITUTIONS CODE §362.7 (2011).

123. *Samantha T. v. Superior Court*, 197 Cal.App.4th 94, 108 (2011) (discussing history and purpose of Nonrelative Extended Family Member ("NREFM") statute).

124. See NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, *supra* note 29, at 49 (noting that school personnel are an important source of assistance for pregnant minors and are likely to be among the adults a minor may confide in regarding an unplanned pregnancy).

125. See Huntington, *supra* note 99, at 683.

126. NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, *supra* note 29, at 50; see Rebouche, *supra* note 5, at 194 (noting that most parental involvement laws make no exception for minors whose parents are missing or unavailable).

127. EHRlich, *supra* note 104, at 102-03.

128. See, e.g., DEL. CODE ANN. tit. 24, § 1783 (2010); ME. CODE ANN. tit. 22, § 1597-a (2010); CONN. GEN. STAT. ANN. § 19a-601 (2010).

129. DEL. CODE ANN. tit. 24, § 1783 (2010).

130. EHRlich, *supra* note 104, at 102-03 (stating that "studies have likewise found that most teens who terminate a pregnancy without parental involvement turn to other trusted sources of support during the course of the decision-making process," particularly professionals like nurses, doctors, school counselors, and social workers, as well as other adult relatives or parental figures; some data suggests that black teens are significantly more likely than white teens to turn to relatives or adults who functioned as a parental surrogate in their lives).

131. Helling & Nams, *supra* note 19, at 350.

132. See NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 29, at 58.

133. See *Hodgson v. Minnesota*, 497 U.S. 417, 448 (1990) ("We think it is clear that a requirement that a minor wait 48 hours after notifying a single parent of her intention to get an abortion would reasonably further the legitimate state interest in ensuring that the minor's decision is knowing and intelligent.").

134. EHRlich, *supra* note 104, at 102 (noting that fear of disclosure can inhibit adolescents from confiding in adults who otherwise could have served as a source of support).

135. See, e.g., DEL. CODE ANN. tit. 24, § 1783(1) (2010) (allowing minor to give notice to a licensed mental health professional "who shall not be an employee or under contract to an abortion provider").

136. NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, *supra* note 29, at 9 (describing the judge selection process for bypass in some jurisdictions as "little more than a game of roulette" since some judges routinely deny bypass petitions).

137. Sanger, *supra* note 24, at 473 (noting that "to the extent that anything good has come out of the bypass process, it may be the extrajudicial system of assistance for pregnant minors that has in some places arisen in its wake").

Maya Manian, professor of law at the University of San Francisco School of Law, received her undergraduate degree from the University of Michigan and her law degree magna cum laude from Harvard Law School, where she served on the Harvard Law Review. Her research focuses on access to reproductive healthcare and explores the relationship between reproductive rights and gender equality. She publishes and presents regularly on abortion rights and related constitutional issues. Her publications include The Irrational Woman: Informed Consent and Abortion Decision-Making (Duke Journal of Gender Law & Policy, 2009); Rights, Remedies, and Facial Challenges (Hastings Constitutional Law Quarterly, 2009); and Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies (Temple Law Review, 2007). She previously served as a Blackmun Fellowship Attorney at the Center for Reproductive Rights in New York City, where she is a visiting scholar for a series of events during the 2011–2012 academic year.