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### Minors, Parents, and Minor Parents

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# Minors, Parents, and Minor Parents

Maya Manian \*

## ABSTRACT

*As numerous scholars have noted, the law takes a strikingly incoherent approach to adolescent reproduction. States overwhelmingly allow a teenage girl to independently consent to pregnancy care and medical treatment for her child, and even to give up her child for adoption, all without notice to her parents, but require parental notice or consent for abortion. This Article argues that this oft-noted contradiction in the law on teenage reproductive decision making is in fact not as contradictory as it first appears. A closer look at the law's apparently conflicting approaches to teenage abortion and teenage childbirth exposes common ground that scholars have overlooked. This Article is the first to compare the full spectrum of minors' reproductive rights and the first to unmask deep similarities in the law on adolescent reproduction – in particular an undercurrent of desire to punish (female) teenage sexuality, whether pregnant girls choose abortion or childbirth. It demonstrates that in practice, the law undermines adolescents' reproductive rights, whichever path of pregnancy resolution they choose. At the same time that the law thwarts adolescents' access to abortion care, it also fails to protect adolescents' rights as parents. The Article's analysis shows that these two superficially conflicting sets of rules in fact work in tandem to enforce a traditional gender script – that self-sacrificing mothers should give birth and give up their infants to better circumstances, no matter the emotional costs to themselves. This Article also suggests novel policy solutions to the difficulties posed by adolescent reproduction by urging reforms that look to third parties other than parents or the State to better support adolescent decision making relating to pregnancy and parenting.*

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## INTRODUCTION

When does childhood end? The answer to this question determines the legal rights of youth in all arenas of life.<sup>1</sup> Yet, as many scholars have noted, the law lacks a coherent approach to defining the end of childhood, the beginning of adulthood, or a space in between.<sup>2</sup> Those categorized as children for most purposes can be criminally liable as adults.<sup>3</sup> Those categorized as adults for most purposes cannot legally purchase alcohol.<sup>4</sup> Those who many view as falling in between the categories of child or adult – adolescents – are invisible under the law.<sup>5</sup>

The law's incoherent approach to adolescent sexuality and reproduction is especially striking. For example, in states with parental notice or consent mandates, which represent 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.<sup>6</sup> In contrast, states typically exempt other similarly sensitive medical care from parental involvement, especially medical care related to sexual activity.<sup>7</sup> All states allow minors to obtain

1. Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 547–48 (2000) [hereinafter Scott, *The Legal Construction of Adolescence*] (“[T]he answer to the question, ‘When does childhood end?’ is different in different policy contexts. This variation makes it difficult to discern a coherent image of legal childhood. Youths who are in elementary school may be deemed adults for purposes of assigning criminal responsibility and punishment, while seniors in high school cannot vote and most college students are legally prohibited from drinking.”).

2. See, e.g., Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL’Y 275, 354–55 (2006).

3. *Id.* at 315.

4. *Id.* at 297–98.

5. Scott, *The Legal Construction of Adolescence*, *supra* note 1, at 556 (footnote omitted) (“Although lawmakers have occasionally recognized the distinctive character of adolescence, more typically this transitional stage is invisible, and adolescents are incorporated into the binary legal categories of childhood or adulthood.”); Rachel Rebouché, *Parental Involvement Laws and New Governance*, 34 HARV. J. L. & GENDER 175, 206–07 (2011) (noting the invisibility of adolescence in the law). In this Article, I use the term “minor” to refer to persons under the age of eighteen. In this Article, I use the terms “minors,” “children,” “juveniles,” and “youth” interchangeably to generally refer to persons under the age of eighteen. I use the terms “adolescent” or “teenager” to refer to persons approximately between the ages of thirteen and eighteen. See Kimberly M. Mutcherson, *Minor Discrepancies: Forging a Common Understanding of Adolescent Competence in Healthcare Decision-making and Criminal Responsibility*, 6 NEV. L.J. 927, 929 n.2 (2006) (discussing age-based differentiation in legal rules and noting important developmental differences between pre-adolescents and adolescents).

6. See Scott, *The Legal Construction of Adolescence*, *supra* note 1, at 572 & n.98.

7. See *id.* at 567–68.

treatment for sexually transmitted infections without notifying their parents, and many states allow minors to receive prescription contraceptives without involving a parent.<sup>8</sup> States also overwhelmingly allow a teenage girl to independently consent to pregnancy care and medical treatment for her child, and even to give up her child for adoption, all without notice to her parents.<sup>9</sup> Yet, these same states mandate parental notice or consent for abortion.<sup>10</sup> If teenagers are too immature to make the decision to obtain an abortion without parental or judicial supervision, how can states conclude that those same teenagers are mature enough to decide to continue a pregnancy and raise a child, or to relinquish the child for adoption, all without the guidance of an adult?

This Article argues that this oft-noted contradiction in the law on adolescent reproduction is in fact *not* as contradictory as it first appears. A closer look at the law's apparently conflicting approaches to teenage reproductive decision making reveals common ground that scholars have overlooked. This Article is the first to compare the full spectrum of minors' reproductive rights and the first to unmask deep similarities in the law on adolescent reproduction. Using a wider lens to assess minors' reproductive rights, this Article compares the law on minors' rights to obtain abortion care with minors' parental rights. Through this wider lens, this Article reveals that in practice, the result has been not so much that the two areas of law conflict, but instead, that in reality, the law undermines adolescents' rights, whichever path of pregnancy resolution they choose. At the same time that the law thwarts teenage girls' access to abortion care, it also fails to protect their rights as parents.

A more expansive inquiry into adolescents' reproductive rights demonstrates that the conflicting doctrines in practice work in tandem to enforce a traditional gender script: namely, self-sacrificing mothers should give birth and give up their children to better circumstances than teenage parenting presumably provides, regardless of the emotional pain these young mothers might suffer as a result of relinquishment. The notion that the law should mete out punishment onto sexually irresponsible women, such as by denying access to abortion or removing their children, has a long history.<sup>11</sup> The im-

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8. *See id.*; Cunningham, *supra* note 2, at 354.

9. *See* Scott, *The Legal Construction of Adolescence*, *supra* note 1, at 567–68.

10. *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, *Medical Decision Making For and By Children: Tensions Between Parent, State, and Child*, 1994 U. ILL. L. REV. 311, 323–24 (1994).

11. *See* Susan Frelich Appleton, *Reproduction and Regret*, 23 YALE J.L. & FEMINISM 255, 323–25 (2011) (describing gender scripts revealed by case law on reproduction and regret); Caitlin E. Borgmann, *Untying the Moral Knot of Abortion*, 71 WASH. & LEE L. REV. 1299, 1308–10 (2014) (discussing theme of punishing women's sexual irresponsibility in abortion restrictions); Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 377 (1996) [hereinafter Sanger, *Separating from Children*] (describing idealized notions of maternal sacrifice, in particular that moth-

pact of the law's punishment falls most harshly on adolescents from poor and struggling families, as these youth have the fewest resources to obtain either judicial bypass for an abortion or support for making parenting decisions.

While a superficial review of the law on adolescent reproduction suggests conflict and incoherence, a closer look at the reality of minor parents' parental rights unmasks a perverse coherence to the law. The conflicting doctrines on abortion and childbirth obscure how both abortion law and the law dealing with minors as parents take highly skeptical views of adolescents' rights to make reproductive decisions and mask how these laws serve as a means to enforce traditional gender norms. This Article uses family law doctrines and practices as a lens to shed light on the law's seemingly contradictory approaches to teenage sexuality, pregnancy, parenting, and abortion. Family law's prism helps to explain these conflicts in novel ways. This Article argues that the surface incoherence in the law regulating adolescent sexuality and reproduction stems, in part, from traditional rules governing parental rights. Current law in this context, although appearing to have made progress for adolescent rights, in fact maps onto conventional rules about parents' rights to control their children's upbringing and the narrow exemptions to those rules.

For example, the rule that adolescents can freely consent to medical treatment for sexually transmitted infections represents an application of the traditional exemption from parental control for medical emergencies, rather than a recognition of adolescents' right to sexual or health care autonomy. Similarly, this Article argues that the law grants minor parents full parental autonomy, at least in theory, because of a reflexive desire to assert the rights of persons categorized as parents – not out of respect for a minor's right to be a parent. In other words, the law resists any overt reduction of parental rights, including for minor parents, out of fear that explicitly undermining even minors' parental rights would also threaten the authority and certainty of the traditional parental rights model reserved for most adults.<sup>12</sup>

Yet, while paying lip service to the parental rights of minors in theory, the law fails to support adolescent parenting in substance. We can see this through a deeper examination of the areas of family law that deal directly with minors as parents: child welfare law and adoption law. Closer study of child welfare and adoption practices reveals that the rigid notions about parental rights that inform the law's superficial grant of autonomy to teenage parents do not carry through to substantively protect minor parents' abilities to parent their children. In some contexts, as in adoption law's right to relinquish, the law's grant of adult-like parental "rights" to minors may actually serve to undermine minors' parental interests by making it easier to remove

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ers who fail to separate when conditions call for it are regarded as "misguided, selfish, unnatural").

12. Although, in theory, adult parents' rights to custody and control of their children receive full constitutional protection, the parental rights of marginalized groups – particularly poor racial minorities – have long been threatened by state scrutiny under the child welfare system. See *infra* Part II.B.1 (discussing child welfare law).

infants from their care. Minor mothers especially face the worst of both worlds – the lack of governmental support endured by adult parents and the intensive oversight generally enforced upon minors.

The last part of this Article takes a prescriptive turn. It suggests that we could better support adolescents' decisions about pregnancy and parenting by turning to third party adults other than parents or state agents – such as judges and child welfare officials – who wield heavy-handed authority over minors. Depending on the context, third parties who might serve as beneficial resources for pregnant or parenting minors include extended family members, neighbors, and community members; health care professionals; and lawyers acting on behalf of the minor.

Abortion law, child welfare law, and adoption law all purport to serve two primary goals: to ensure sound decision making for pregnant or parenting adolescents and to protect the well being of children. Yet, in practice, the law too often fails to achieve these goals. Parents may be unsupportive or unavailable to adolescents, and state agents may be motivated by biases and concerns that conflict with pregnant or parenting minors' own interests. Although some adolescents can make sound reproductive decisions without being required to consult with an adult, political resistance to increased adolescent autonomy – particularly around sexuality and reproduction – remains formidable. Furthermore, scientific research on adolescence suggests that some adolescents would benefit from adult guidance when faced with difficult, consequential decisions. Therefore, law makers should consider more effective policy solutions beyond the parent/state binary to achieve the stated aims of securing sound reproductive decision making and protecting the well being of both pregnant adolescents and their infants. The final section of this Article considers potential policy reforms incorporating third parties and urges further conversation in this direction.

The analysis proceeds as follows. Part I grounds the discussion by providing a brief overview of the legal history of parental rights over children, primarily focusing on constitutional decisions on privacy rights within the family. These decisions set forth the parameters balancing parents' rights, children's rights, and the State's interest in protecting children that guide the laws governing adolescent autonomy. Part I then describes the law's inconsistent approach to whether and when it grants adolescents' autonomy in sexual and reproductive decision making, particularly with regard to teenage abortion versus childbirth.

Part II applies longstanding conventions on the scope of parental rights to help explain the inconsistencies in the law governing teenagers' sexual and reproductive autonomy and unmask the traditional gender scripts animating the law. Part II demonstrates the stronghold that traditional conceptions of parental control continue to exert, even in areas of the law that appear to expand adolescent autonomy. This Part also examines the treatment of minor parents in the child welfare system and in adoption law to demonstrate that the law in practice undermines minor parents' parental rights, both for marginalized adolescents and for some youth from less marginalized groups.

Strikingly, in their operation, the conflicting legal rules on adolescent abortion and parenting serve a similar end – the law acts as a means to punish female adolescent sexual transgression of purity norms.

Part III argues that interventions that look to third party adults may help to create space for adolescence in the law by addressing the absence of supportive parents and providing alternatives to overly restrictive state interventions that undermine minors' reproductive decision making. Although private family law doctrine has increasingly recognized the important role that adults other than parents play in children's lives, third parties have not been incorporated consistently or effectively in the law of adolescent abortion or adolescent parenting. Part III explores several possibilities for regulatory reform and generally urges a conversation about how the law could acknowledge the unique needs of adolescents by providing options between the extremes of autonomy and authority of parent or state.

## I. PARENTS, CHILDREN, AND THE STATE: A CONSTITUTIONAL BALANCING ACT

The conventional framing of the family within 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.<sup>13</sup> Balancing the interests of child, parent, and State has been an ongoing struggle at the federal and state levels across various family law issues. At times, the law portrays parents' and children's liberty interests as aligned against encroachment by the State. At other times, the law treats parents' and children's rights as in conflict, and the State acts as arbiter between the two.<sup>14</sup> In this Part, this Article grounds the discussion that follows by providing the legal context for rules governing parents, minors, and minor parents. First, this Article briefly summarizes the law on parental rights and children's rights, focusing primarily on constitutional decisions protecting privacy within the family. Next, this Article provides an overview of state law governing minors' sexual and reproductive decision making to demonstrate the law's inconsistent doctrinal approaches to granting minors autonomy.

### A. Privacy and Parents' Rights

Although the Supreme Court has recognized that children possess constitutional rights, minors' rights have long been curtailed based on the state's interest in protecting vulnerable and immature minors and the state's deference to parents' constitutional right to control their children's upbringing.

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13. See Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 833 (2007) (“Family Law in the United States has long embraced the image of a triangle to describe the allocation of legal authority over childrearing. Parents, children, and the state stand at the three points of this triangle.”).

14. See *id.*



The Court long ago established that parents possess a fundamental right to raise their children as they see fit. In 1923, in *Meyer v. Nebraska*, the Court struck down a state law forbidding education in a language other than English on the ground that due process protects parents' rights to "establish a home and bring up children" and "to control the education of their own."<sup>15</sup> Two years later, in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, the Court found that an Oregon law prohibiting parochial school education "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>16</sup> Over the years, the Court has repeatedly upheld parents' fundamental right of authority over their children, stating that "it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations that the state can neither supply nor hinder."<sup>17</sup>

Most recently, in *Troxel v. Granville*, the Court reaffirmed the extensive line of precedent granting parents the fundamental right to raise their children without interference from the government, although in a notably circumscribed manner.<sup>18</sup> 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 third party, non-parent visitation laws.<sup>19</sup> 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. . . . [P]ersons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing."<sup>20</sup> Minority communities in particular rely heavily on parental surrogates in childrearing, as a number

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15. *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923).

16. 268 U.S. 510, 534–35 (1925).

17. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). *See also* *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (upholding Amish parents' right to remove children from school).

18. 530 U.S. 57, 66 (2000).

19. *Id.* at 58. The various opinions in *Troxel* "scrupulously avoid[ed] any strong endorsement of parental rights." Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 639 (2002) [hereinafter Buss, "Parental" Rights]. The decision, therefore, has had limited practical impact and "induced no startling or radical changes with respect to third-party visitation." *See* John Dewitt Gregory, *The Detritus of Troxel*, 40 FAM. L.Q. 133, 144 (2006).

20. *Troxel*, 530 U.S. at 63–64.

of scholars have discussed.<sup>21</sup> 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.<sup>22</sup>

*Troxel* noted that a parent’s right to make decisions concerning the care of his or her children has never been unlimited.<sup>23</sup> The Court has consistently balanced parents’ rights against the state’s independent interest in protecting the welfare of its youth. The state’s *parens patriae* power gives it leeway to limit parental authority if the State has sufficient justification to conclude that a parental decision would be harmful to the child’s health and development.<sup>24</sup> For example, in *Prince v. Massachusetts*, the Court upheld the application of child labor laws to a nine-year-old girl who was soliciting for the Jehovah’s Witness religion at her parents’ direction.<sup>25</sup> The Court emphasized that the state possesses the authority to “guard the general interest in youth’s well being” and, therefore, can “restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor, and in many other ways.”<sup>26</sup>

The state’s power to circumscribe parents’ constitutional right to custody and control over their child’s upbringing has particularly been reinforced in cases where a parent’s decision making may place the child’s health in jeopardy. Numerous cases have upheld the state’s power to limit a parent’s decision-making authority where such authority presents a significant risk of harm to a child’s health.<sup>27</sup> The important governmental interest in protecting

21. See, e.g., Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL’Y 47, 57–63 (2007); 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).

22. Buss, “Parental” Rights, *supra* note 19, at 635–36 (criticizing *Troxel*’s approach); KIMBERLY D. RICHMAN, *COURTING CHANGE: QUEER PARENTS, JUDGES, AND THE TRANSFORMATION OF AMERICAN FAMILY LAW* 115–16 (2009) (discussing post-*Troxel* cases granting third parties rights to continue their relationship with a child against a biological parent’s wishes).

23. RICHMAN, *supra* note 22, at 87.

24. *Ginsberg v. New York*, 390 U.S. 629, 640 (1968); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (1925).

25. *Prince v. Massachusetts*, 321 U.S. 158, 169–70 (1944).

26. *Id.* at 166 (footnotes omitted).

27. *Hodgson v. Minnesota*, 497 U.S. 417, 471 (1990) (“[W]here parental involvement threatens to harm the child, the parent’s authority must yield.”). See also *In re Sampson*, 317 N.Y.S.2d 641, 654 (1970 N.Y. Fam. Ct.) (“[The] court’s authority to deal with the abused, neglected or physically handicapped child is not limited to ‘drastic situations’ or to those which constitute a ‘present emergency’, but that the Court has a ‘wide discretion’ to order medical or surgical care and treatment for an infant even over parental objection, if in the Court’s judgment the health, safety or welfare of the child requires it.”). See B. Jessie Hill, *Medical Decision Making by and on Behalf of Adolescents: Reconsidering First Principles*, 15 J. HEALTH CARE L. & POL’Y 37, 41–43 (2012) (discussing minors’ ability to consent to medical health

children's health plays a large role in the debates on adolescents' abilities to access sensitive medical treatment, particularly related to sexuality and reproduction.

### B. Privacy and Adolescents' Rights

In the context of sexual and reproductive decision making, the Court has struggled to find a way to balance the respective interests of child, parent, and state. Following the Court's decisions upholding adults' right to access contraceptives, in *Carey v. Population Services International*, the Court declared unconstitutional laws restricting minors' access to contraception.<sup>28</sup> *Carey* 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,"<sup>29</sup> but nevertheless, the Court struck down a state law prohibiting distribution of contraception to those under sixteen.<sup>30</sup> *Carey* 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.<sup>31</sup>

With respect to abortion, since the Supreme Court's decision in *Bellotti v. Baird* (*Bellotti II*) in 1979,<sup>32</sup> laws requiring parental involvement in minor

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care); Kimberly M. Mutcherson, *Whose Body Is It Anyway? An Updated Model of Healthcare Decision-Making Rights for Adolescents*, 14 CORNELL J.L. & PUB. POL'Y 251, 262 (2005) (noting that parents have both the right to consent to their children's healthcare and the responsibility to seek medical care for their children). States often intervene when parents deny children medical treatment based on religious beliefs, since "the State's interest in the safety and well-being of minors may compel medical treatment for a child despite objections by the parents that are based upon their religious beliefs." *Mercy Hosp. v. Jackson*, 489 A.2d 1130, 1133 (Md. Ct. Spec. App. 1985), *vacated*, 510 A.2d 562 (Md. 1986).

28. 431 U.S. 678, 678 (1977).

29. *Id.* at 692.

30. *Id.* at 681–82.

31. *Id.* at 694. See also B. Jessie Hill, *Constituting Children's Bodily Integrity*, 64 DUKE L.J. 1295, 1307–08 (2015) (analyzing various opinions of the justices in the *Carey* decision).

32. *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622 (1979) (plurality opinion). See also *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006) (holding unconstitutional New Hampshire law barring minor from obtaining abortion care without parental notice even in medical emergencies); *Lambert v. Wicklund*, 520 U.S. 292 (1997) (judicial bypass provision allowing waiver of notice requirement if notification was not in minor's best interest was sufficient to protect minor's right to abortion under a Montana statute); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (holding parental consent provision of the Pennsylvania abortion statute does not impose an undue burden); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (holding that a Minnesota statute requiring both parents be notified when a minor attempts to get an abortion was unconstitutional, but upholding the allowance of a judicial bypass for the requirement of parental notice); *Ohio v. Akron Ctr. for Reproductive Health*,

abortion decisions have been constitutional, provided that the laws offer judicial bypass as an alternative to parental involvement.<sup>33</sup> *Bellotti II* found that minors' right to access abortion could be restricted for three reasons: "[T]he 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."<sup>34</sup> The *Bellotti II* Court held that parental consent laws with an expeditious and confidential judicial bypass alternative appropriately balance the minor's constitutional right to access abortion with both the parental right to control their child's upbringing and the state's interest in protecting vulnerable and immature minors.<sup>35</sup> Importantly, *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 because "immature minors often lack the ability to make fully informed choices."<sup>36</sup>

In *Planned Parenthood v. Casey*, which reassessed and ultimately upheld aspects of the core right to access abortion established in *Roe v. Wade*, the Court reaffirmed the constitutionality of parental consent laws so long as those laws provided for judicial bypass.<sup>37</sup> Judges in bypass hearings have the authority to either grant consent for a minor's abortion care or to block access

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497 U.S. 502 (1990) (holding Ohio statute requiring parental notice be given by physician performing abortion constitutional); *H.L. v. Matheson*, 450 U.S. 398 (1981) (upholding a Utah statute requiring physician to notify the parents of a minor seeking an abortion); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (holding a blanket parental consent requirement for minors is unconstitutional).

33. *Bellotti II*, 443 U.S. 622 (plurality opinion); Amanda Dennis et al., *The Impact of Laws Requiring Parental Involvement for Abortion: A Literature Review*, GUTTMACHER INST. 3 (Mar. 2009), [www.guttmacher.org/pubs/ParentalInvolvementLaws.pdf](http://www.guttmacher.org/pubs/ParentalInvolvementLaws.pdf).

34. *Bellotti II*, 443 U.S. at 634 (plurality opinion).

35. *Id.* See also Suellen Scarnecchia & Julie Kuncie Field, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 MICH. J. GENDER & L. 75 (1995) (providing judicial framework for Michigan judges deciding whether a minor girl may have an abortion without the consent of a parent under the Michigan Parental Rights Restoration Act).

36. *Bellotti II*, 443 U.S. at 640 (plurality opinion). *Bellotti II* emphasized that no third party could veto a mature minor's abortion decision; therefore, a minor whose parent denied consent could then seek permission from a judge. *Id.* at 649. Furthermore, a judge could not substitute his or her own judgment if the minor was found to be sufficiently mature to make an informed decision. See *id.* at 643–50.

37. *Casey*, 505 U.S. at 899. See also *Ayotte*, 546 U.S. 320 (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 option, but it remains unclear whether parental notification laws for unemancipated minors constitutionally require judicial bypass procedures. See Erin Helling & Jenny Nam, *Eleventh Annual Review of Gender and Sexuality Law: Health Care Law Chapter: Abortion*, 11 GEO. J. GENDER & L. 341, 351 (2010).

to abortion care without parental involvement.<sup>38</sup> As discussed in the next Part, these requirements in the abortion context stand in contrast to the relatively greater autonomy granted to minors seeking medical care for sexual health, pregnancy, and childbirth.

### C. *Conflicts in the Law on Adolescent Sexuality and Reproduction*

Over the past several decades, states have greatly expanded minors' authority to consent to health care without involving their parents. Although minors generally must obtain parental consent prior to receiving medical treatment, states have permitted adolescents to more freely obtain treatment for sensitive medical care related to drug addiction, mental health, and sexuality.<sup>39</sup> The landscape of the law governing teenagers' autonomy in sexual and reproductive decision making is quite varied across the states and is often contradictory in its approach. This Part describes those inconsistencies across a wide range of activities related to adolescent sexuality and reproduction.

One useful way to divide up these issues is by assessing "pre-sexual activity" decisions versus "post-sexual activity" decisions, since that dividing line explains controversies over approaches to adolescent autonomy. Granting adolescents autonomy over their "pre-sexual activity" decisions – for instance, providing information or services that may help a minor who is considering engaging in sex, such as access to comprehensive sexual education and contraception – has been much more controversial. There continues to be controversy about whether teenagers should be permitted to avail themselves of comprehensive sex education and contraceptives without parental notice or consent.<sup>40</sup> In contrast, allowing teenagers to have greater decision-making autonomy with regard to "post-sexual activity" decisions, including treatment related to the consequences of having sex, such as medical care for sexually transmitted infections ("STIs"), pregnancy, and childbirth, has been much less controversial, with the exception of abortion.<sup>41</sup> Almost all states permit teens to make STI and pregnancy treatment decisions without parental involvement.<sup>42</sup> An overview of the law in this context shows the states' incon-

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38. See generally Scarnecchia & Field, *supra* note 35 (describing judicial bypass hearings in Michigan and in comparison with other states).

39. See Wadlington, *supra* note 10, at 323–24.

40. *State Policies in Brief: Sex and HIV Education*, GUTTMACHER INST. 1, 3 (Jan. 1, 2016), [http://www.guttmacher.org/statecenter/spibs/spib\\_SE.pdf](http://www.guttmacher.org/statecenter/spibs/spib_SE.pdf).

41. See *State Policies in Brief: Minors' Access to STI Services*, GUTTMACHER INST. 1, 2 (Jan. 1, 2016), [http://www.guttmacher.org/statecenter/spibs/spib\\_MASS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_MASS.pdf); *State Policies in Brief: Minors' Rights as Parents*, GUTTMACHER INST. 1, 1 (Jan. 1, 2016), [http://www.guttmacher.org/statecenter/spibs/spib\\_MRP.pdf](http://www.guttmacher.org/statecenter/spibs/spib_MRP.pdf).

42. See *State Policies in Brief: Minors' Access to STI Services*, *supra* note 41, at 2; *State Policies in Brief: Minors' Access to Prenatal Care*, GUTTMACHER INST. 1, 2 (Jan. 1, 2016), [http://www.guttmacher.org/statecenter/spibs/spib\\_MAPC.pdf](http://www.guttmacher.org/statecenter/spibs/spib_MAPC.pdf).

sistent approaches to granting adolescents autonomy over their sexual and reproductive decision making.

## 1. Sex Education

Whether teenagers should possess the ability to access comprehensive sex education and prescription contraceptives without parental involvement remains controversial, largely on the basis that these “pre-sexual activity” decisions fall within the scope of parents’ right to control their children’s upbringing.<sup>43</sup> With respect to sex education, some parents’ rights groups have argued that parents should determine whether their child should receive any sex education, abstinence-only education, or more comprehensive sex education.<sup>44</sup> Youth advocates, in contrast, assert that minors engage in sexual activity whether their parents consent or not, so the state has an obligation to accurately and comprehensively educate minors on sexual health.<sup>45</sup>

It is up to the states whether they choose to mandate sex education or leave it up to localities to provide as they see fit.<sup>46</sup> Only twenty states and the District of Columbia mandate sex education and HIV education.<sup>47</sup> Thirteen states mandate HIV education only.<sup>48</sup> Like the decision to provide sex education, it is similarly up to the states to mandate the scope of the content of the education or to leave it up to the localities.<sup>49</sup> Although recent studies have concluded that abstinence-only education is ineffective, the debate over sex education has led to a number of specific content requirements in favor of it.<sup>50</sup> Regardless of the state or local mandates regarding the provision of sex education, thirty-five states and the District of Columbia allow parents to opt their children out of sex education or HIV education.<sup>51</sup> Thus, in the majority

43. Hazel Glenn Beh & Milton Diamond, *The Failure of Abstinence-Only Education: Minors Have a Right to Honest Talk About Sex*, 15 COLUM. J. GENDER & L. 12, 49–50 (2006).

44. See, e.g., NYC PARENTS’ CHOICE COALITION, <http://www.nycparentschoice.org/> (last visited Jan. 21, 2016).

45. See Beh & Diamond, *supra* note 43, at 61–62; Cynthia Dailard, *Legislating Against Arousal: The Growing Divide Between Federal Policy and Teenage Sexual Behavior*, 9 GUTTMACHER POL’Y REV. 12 (2006).

46. See *State Policies in Brief: Sex and HIV Education*, *supra* note 40, at 3.

47. *Id.* (Delaware, Georgia, Iowa, Kentucky, Maine, Maryland, Minnesota, Montana, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, and West Virginia).

48. *Id.* (Alabama, California, Connecticut, Illinois, Indiana, Michigan, Missouri, New Hampshire, New York, Oklahoma, Pennsylvania, Washington, and Wisconsin).

49. See *id.*

50. CHRISTOPHER TRENHOLM ET AL., MATHEMATICA POL’Y RESEARCH, INC. IMPACTS OF FOUR TITLE V, SECTION 510 ABSTINENCE EDUCATION PROGRAMS 51, 59 (Apr. 2007), <http://www.mathematica-mpr.com/~media/publications/PDFs/impactabstinence.pdf>.

51. *State Policies in Brief: Sex and HIV Education*, *supra* note 40, at 3 (Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois,

of states, parents may exercise a complete veto power over their teenagers' access to sex education.<sup>52</sup>

## 2. Contraception

The Supreme Court has extended the constitutional right to access contraception to minors,<sup>53</sup> and many states have expressly allowed minors to consent to prescription contraceptive services without parental involvement.<sup>54</sup> Twenty-one states and the District of Columbia explicitly allow all minors to consent to prescription contraceptive services.<sup>55</sup> Twenty-five states explicitly permit minors to consent to prescription contraception if they meet certain requirements, such as being married, being a parent, having been pregnant before, or having a special health need.<sup>56</sup> The remaining four states have no explicit law on a minor's ability to obtain contraceptive services, but even where a state has no relevant law, physicians may commonly provide medical care to a mature minor without parental consent as a matter of practice.<sup>57</sup>

The policy debate surrounding adolescent access to contraception rages on today.<sup>58</sup> Those in favor of unfettered access to contraception argue that

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Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin).

52. *Id.*

53. *Carey v. Population Servs., Int'l*, 431 U.S. 678, 697–99 (1977).

54. *State Policies in Brief: Minors' Access to Contraceptive Services*, GUTTMACHER INST. 1, 2 (Jan. 1, 2016), [http://www.guttmacher.org/statecenter/spibs/spib\\_MACS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_MACS.pdf).

55. *Id.* at 2 (Alaska, Arizona, Arkansas, California, Colorado, Georgia, Idaho, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, Montana, New Mexico, New York, North Carolina, Oregon, Tennessee, Virginia, Washington, and Wyoming).

56. *Id.* Twenty-one states allow married minors to consent to contraceptive services. *Id.* Three states allow minors to consent to contraception upon advice from a physician to prevent physical hazard. *Id.* Six states allow minors with children to consent to contraception. *Id.* Six states allow minors who are or have been pregnant to consent to contraception. *Id.* Eleven states allow minors to consent that meet certain other eligibility requirements. *Id.* Four states have no explicit policy on the matter. *Id.*

57. *Id.* No state or federal laws require minors to get parental permission to access contraception, although some proposals to require parental permission have surfaced. See *Parental Consent and Notice for Contraceptives Threatens Teen Health and Constitutional Rights*, CTR. FOR REPROD. RTS. (Nov. 1, 2006), <http://www.reproductiverights.org/document/parental-consent-and-notice-for-contraceptives-threatens-teen-health-and-constitutional-rig>.

58. For example, the FDA's politically charged decision to limit adolescent access to emergency contraception led to a federal lawsuit – although emergency contraception blurs the pre-sex/post-sex dividing line it has been debated about similarly to traditional contraception regarding its use by teenagers, i.e., whether it will encour-

adolescents will engage in sexual activity with or without parental consent.<sup>59</sup> Many minors wish to protect themselves from unwanted pregnancy, but they will not discuss their sexual activities with their parents in order to do so.<sup>60</sup> Accordingly, youth advocates emphasize that allowing sexually active teens to obtain contraceptive services without parental involvement protects adolescent health and development.<sup>61</sup> Those opposed to granting teenagers greater autonomy in accessing contraception argue that giving a minor the right to consent to contraceptive services without parents' knowledge undermines parental authority and risks the minor's healthy development.<sup>62</sup>

The debate on adolescent access to comprehensive sex education and contraceptives seems unlikely to subside in the near future. In contrast, minors' unobstructed access to "post-sexual activity" medical treatments, with the exception of abortion, remains largely uncontroversial.

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age teenagers to engage in sex. See *Tummino v. Hamburg*, 936 F. Supp. 2d 162 (E.D.N.Y. 2013) (holding that the FDA could not mandate point-of-sale restrictions on emergency contraception); *Tummino v. Torti*, 603 F. Supp. 2d 519, 544–45 (E.D.N.Y. 2009) (finding that the FDA's decision to limit minors' access to Plan B contraception was an abuse of discretion). In 2013, the FDA approved emergency contraception for use without a prescription and without age restriction for all women of child-bearing potential. See *FDA Approves Plan B One-Step Emergency Contraceptive for Use Without a Prescription for All Women of Child-Bearing Potential*, FDA (June 20, 2013), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm358082.htm>.

59. *State Policies in Brief: Minors' Access to Contraceptive Services*, *supra* note 54, at 1.

60. Joshua A. Douglas, *When is a "Minor" Also an "Adult"? An Adolescent's Liberty Interest in Accessing Contraceptives from Public School Distribution Programs*, 43 WILLAMETTE L. REV. 545, 551 (2007).

61. *Id.* (footnotes omitted) ("Studies suggest that if a state requires prior parental approval before a minor may obtain contraceptives from a distribution program, many teenagers will forego availing themselves of this service. In one survey, 70% of teenagers said that if the law required parental notification, they would not visit a health clinic at all, and 20% stated that they would continue to have sex but would either rely on the withdrawal method or not use any contraceptives. Only 1% of those surveyed who currently use sexual health services said that they would stop having sex if parental involvement was mandated before the adolescents received contraceptives."). See also Rachel K. Jones & Heather Boonstra, *Confidential Reproductive Health Services for Minors: The Potential Impact of Mandated Parental Involvement for Contraception*, 36 PERSPS. ON SEXUAL & REPROD. HEALTH 182, 189 (2004) (explaining that mandated parental involvement threatens the right of minors to access reproductive health care).

62. Jones & Boonstra, *supra* note 61, at 182; Anna Pikovsky Krishtul, Comment, *The FDA's Recent About-Face: Plan B Age Restriction is Unlawful Rulemaking and Violates Minors' Due Process Rights*, 81 TEMP. L. REV. 303, 325 (2008) (arguing to the contrary that restricting minors' access to contraception results in a higher degree of harm to minor's health).



### 3. STI Treatment

All fifty states and the District of Columbia explicitly allow minors to consent to treatment for STIs.<sup>63</sup> A few states have special requirements if the minor is HIV positive, and some states have age prerequisites for consent, such as a minimum age of twelve.<sup>64</sup> Aside from these requirements, however, legislators uniformly agree that the law should not mandate parental notice or consent prior to a minor receiving STI services.<sup>65</sup> Although some states allow a physician to inform a minor's parents that she is receiving STI treatment, no state mandates parental notification.<sup>66</sup>

The policy behind this rule is undisputed. Physicians and public health advocates emphasize that hindering a minor's consent to STI treatment can increase the spread of STIs among adolescents, because minors are likely to conceal the presence of STI symptoms from their parents for fear of a negative reaction.<sup>67</sup> Accordingly, minors must be able to seek treatment on their own in order to promote broader adolescent sexual health.<sup>68</sup> Couched in the language of public health, this exception to the general rule requiring parental involvement with a minor's treatment decisions has generated little to no controversy.<sup>69</sup>

### 4. Pregnancy, Childbirth, and Medical Care for Minors' Children

In sharp contrast to most states' requirements of parental involvement in abortion decisions, states overwhelmingly grant minors the right to independently make decisions related to their pregnancy and to their children's medical care if they choose to carry a pregnancy to term.<sup>70</sup> Thirty-six states and the District of Columbia explicitly allow minors to consent to prenatal

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63. *State Policies in Brief: Minors' Access to STI Services*, *supra* note 41, at 2.

64. *Id.*

65. *See id.* at 1–2. Eleven states have age prerequisites for consent. *Id.* Eighteen states permit, but do not require, physicians to inform a minor's parents that he or she is seeking or obtaining STI services. *Id.* One state requires parental notification in the case of a positive HIV test. *Id.* One state requires a physician to report a positive STI test result for a minor younger than twelve. *Id.*

66. *Id.*

67. *See* Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 48 (1994) [hereinafter Oberman, *Turning Girls Into Women*].

68. Cunningham, *supra* note 2, at 354–55.

69. Similarly, statutes permitting minors to consent to substance abuse treatment are viewed not as an endorsement of minor capacity, but as an extension of the traditional rule that a doctor may treat a child without parental permission in medical emergencies because the law presumes that parents would consent to protect their child's health. *See* Oberman, *Turning Girls Into Women*, *supra* note 67, at 48; *infra* Part II (discussing treatment-based exceptions to parental consent).

70. *State Policies in Brief: Minors' Access to Prenatal Care*, *supra* note 42, at 2.

care.<sup>71</sup> Thirteen states have no explicit law on minors' prenatal care, and thus, minors commonly receive such care without parental involvement.<sup>72</sup> North Dakota is the only state that requires parental consent prior to a minor receiving prenatal care.<sup>73</sup>

The majority of states also respect a minor's right as a parent to make treatment decisions on behalf of her child.<sup>74</sup> Thirty states and the District of Columbia allow minors to consent to medical care for their children; the remaining twenty states have no explicit law on the matter.<sup>75</sup>

In sum, the vast majority of states have made the legislative policy decision that the health of a pregnant adolescent outweighs parents' rights to be involved in their adolescent's important treatment decisions. Accordingly, states permit minors to have autonomous access to care for pregnancy and childbirth and even give them the power to make major decisions that may arise during treatment, such as when and whether to consent to a C-section.<sup>76</sup> Much like a minor's access to STI treatment, some policymakers couch the rationale for a minor's unhindered access to prenatal care in the language of public health.<sup>77</sup> Less clear is the rationale for allowing minor parents to make medical treatment decisions for their children, which is discussed further in Part II.A.

## 5. Adoption

As with granting minor parents the right to consent to medical care for their children, the majority of states treat minors like adults when it comes to the decision to relinquish their child for adoption.<sup>78</sup> Forty states and the District of Columbia allow minors to relinquish their infants for adoption, either

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71. *Id.* at 2. Twenty-eight states and the District of Columbia allow all minors to consent to prenatal care. *Id.* Four states require the minor to be of a minimum age before she can consent to care. *Id.* Four states allow a "mature minor" to consent to prenatal care. *Id.*

72. *Id.* (Arizona, Connecticut, Indiana, Iowa, Louisiana, Maine, Nebraska, Ohio, Rhode Island, South Dakota, Vermont, Wisconsin, and Wyoming). "In states that lack relevant policy or case law, physicians may commonly provide medical care to a mature minor without parental consent, particularly if the state allows minors to consent to related health services." *Id.* at 1.

73. *Id.* at 2. North Dakota requires parental consent during prenatal visits in the second and third trimesters; the minor may consent to prenatal care during the first trimester and for the first visit after the first trimester. *Id.* See also N.D. CENT. CODE ANN. § 14-10-19 (West 2016).

74. *State Policies in Brief: Minors' Rights as Parents*, *supra* note 41, at 2.

75. *Id.*

76. Melissa Prober, Note, *Please Don't Tell My Parents: The Validity of School Policies Mandating Parental Notification of a Student's Pregnancy*, 71 BROOK. L. REV. 557, 569–70 (2005).

77. See *State Policies in Brief: Minors Access to Prenatal Care*, *supra* note 42, at 2.

78. *State Policies in Brief: Minors' Rights as Parents*, *supra* note 41, at 2.

explicitly by statute or by making no distinction between minor parents and adult parents.<sup>79</sup> Five states require minors to be represented by legal counsel in adoption hearings but have no requirement for involving the minor's parents.<sup>80</sup> Of the remaining five states, only four require parental consent to adoption of their minor's infant,<sup>81</sup> and one state requires parental notification.<sup>82</sup>

As discussed previously, a minor's autonomy with respect to sexuality and reproductive decisions relates, at least to some degree, to public health concerns. In sharp contrast, a minor's freedom to give up her child for adoption without parental involvement is difficult to justify as a matter of public health. This Article explores the likely motivations for the striking level of autonomy granted to minors relinquishing an infant for adoption in Part II.B.

## 6. Abortion Exceptionalism

Since the Supreme Court's decision in *Bellotti II*, laws requiring parental involvement in minor abortion decisions have been constitutional, provided that the laws offer an alternative, such as judicial bypass.<sup>83</sup> The Court's refusal to allow a parental veto and its requirement of an alternative to parental consent are both pivotal to understanding the Court's balancing of the interests at stake in parental involvement laws.<sup>84</sup> *Bellotti II*'s reasoning makes clear that the core justification for mandated parental involvement and judicial bypass is to ensure better decision making for the minor.<sup>85</sup> Although the Court recognized parents' rights to control their children's upbringing and to have a voice in abortion decisions, in balancing the various interests at stake, the Court refused to place the parents' rights above the minor's reproductive rights – otherwise, allowing judicial bypass or other alternatives would not make sense.<sup>86</sup> 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

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79. *Id.*; Joan H. Hollinger, *Consent to Adoption*, in 1 ADOPTION LAW AND PRACTICE § 2.05 (Joan H. Hollinger ed., 2013).

80. *State Policies in Brief: Minors' Rights as Parents*, *supra* note 41, at 2 (Connecticut, Kentucky, Missouri, Montana, and Washington).

81. *Id.* (Louisiana, Michigan, Minnesota, and Rhode Island).

82. *Id.* (Pennsylvania).

83. *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 643–44 (1979) (plurality opinion).

84. *See id.* at 639–41.

85. *Id.* at 640–41.

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

the abortion is in her best interests.<sup>87</sup> As discussed further below in Part II.A, 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.

As of March 1, 2012, thirty-eight states require parental involvement in a minor's decision to have an abortion or, in the alternative, provide for a judicial bypass as constitutionally required.<sup>88</sup> In addition, five states have parental involvement laws that are not in effect due to court injunction.<sup>89</sup> That leaves only seven states and the District of Columbia, which have no parental involvement laws, actual or attempted.<sup>90</sup> The popularity of legislation mandating parental involvement with abortion is quite striking, especially in contrast to the autonomy that almost all states grant to minors who choose to carry a pregnancy to term.

When analyzed in conjunction with statutory rape laws granting teenagers the right to consent to sex – typically at age sixteen – many states “grant minor females the right to privately and independently consent to intercourse and even motherhood, but not the corresponding right to obtain an abortion without parental involvement.”<sup>91</sup>

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Situating abortion within these decisions relating to sexuality and reproduction, a minor's right to access abortion in most states remains subject to either parental or state authority. In states with parental involvement laws, minors do not possess fully unfettered decision-making authority over abortion, as with treatment for STIs or pregnancy and childrearing. And yet, parents also do not possess a complete veto power over their teenagers' abortion

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87. See generally Scarnecchia & Field, *supra* note 35 (describing judicial determinations of “maturity” and “best interests” in Michigan and in comparison with other states).

88. *State Policies in Brief: Parental Involvement in Minors' Abortions*, GUTTMACHER INST. 1 (Jan. 1, 2016), [http://www.guttmacher.org/statecenter/spibs/spib\\_PIMA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf). Most states require consent or notification of only one parent, usually twenty-four or forty-eight hours before the procedure. *Id.* All thirty-eight states with parental involvement laws allow for judicial bypass as constitutionally required. *Id.* Thirty-three states permit a minor to obtain an abortion without parental involvement in a medical emergency. *Id.* Sixteen states permit a minor to obtain an abortion without parental involvement in cases of abuse, assault, incest or neglect. *Id.* Twenty-one states require parental consent only, three of which require both parents to consent. *Id.* Twelve states require parental notification only, one of which requires that both parents be notified. *Id.* Five states require both parental consent and notification. *Id.*

89. *Id.* (California, Montana, Nevada, New Jersey, and New Mexico).

90. *Id.* at 2 (Connecticut, Hawaii, Maine, New York, Oregon, Vermont, and Washington).

91. Nicole Phillis, *When Sixteen Ain't So Sweet: Rethinking the Regulation of Adolescent Sexuality*, 17 MICH. J. GENDER & L. 271, 283 (2011).

decisions as they may be able to with regard to sex education in many jurisdictions. The judicial bypass requirement for abortion gives minors an escape route from their parents, but as many commentators have noted, this is a very problematic and hazardous route.<sup>92</sup> The question remains: Why grant minors full authority over their pregnancy and parenting decisions while denying them similar authority to avoid parenthood?<sup>93</sup> The next Part seeks to explain these doctrinal inconsistencies.

## II. MINORS, PARENTS, AND MINORS AS PARENTS

This Part seeks to better understand the law's approach to minors' sexual and reproductive rights, both in theory and in practice. This Part looks to family law doctrines and practices to make sense of the law's unusual grant of adult-like rights to minor parents on the face of the law and to expose the reality that the law often tramples upon minor parents' parental rights in practice.

In Part II.A, this Article applies longstanding conventions on parental rights to help explain the conflicts in the law governing teenagers' sexual and reproductive autonomy. This Article shows that traditional conceptions of parental control continue to exert a strong influence, even in areas of the law that appear to expand adolescent autonomy. For example, the rule that adolescents can freely consent to STI treatment represents an extension of the traditional exemption from parental control for medical emergencies rather than a recognition of a right to sexual autonomy for adolescents. Similarly, this Part argues that the law grants minor parents full parental autonomy, at least in theory, because of a reflexive desire to assert the rights of persons categorized as parents – not out of respect for a minor's right to parent her child as she sees fit. In other words, the law resists explicitly limiting parental rights, even for minor parents, out of fear that it would risk adults' parental rights.

Part II.B argues that, in practice, the rigid notions about parental rights that influence the law on adolescent reproduction do not lead to substantive

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92. See *infra* Part II.A.

93. This disparity is particularly striking given that pregnancy and childbirth pose much more significant health risks than abortion. See Loren M. Dobkin et al., *Pregnancy Options Counseling for Adolescents: Overcoming Barriers to Care and Preserving Preference*, 43 CURRENT PROBS. PEDIATRIC & ADOLESCENT HEALTH CARE 96, 98 (2013) (footnotes omitted) (“Studies have consistently shown that there is a greater risk of a serious physical complication from childbirth than from abortion, with the risk of mortality on average 14 times greater for continuing a pregnancy to birth. Although this ratio has not been specifically calculated for adolescents, the risk of complications from abortion remains low at younger ages, including less than 20 years old.”); J. Thomas, *Teenagers and Young Adults Have Elevated Maternity-Related Risks*, 44 PERSP. SEXUAL & REPROD. HEALTH 207, 207 (2012) (concluding that teenagers are at “heightened risk of adverse outcomes” during maternity as compared with adults).

protection of minor parents' parental rights. The law on adolescent reproduction appears inconsistent in its surface treatment of abortion versus childbirth, but a deeper analysis exposes commonalities scholars have overlooked. Although the law grants parental rights to minor parents in theory, a closer examination of areas of family law that deal directly with minors as parents – namely, child welfare law and adoption law – reveals a similarly skeptical view of adolescent reproductive decision making and a desire to punish female teenage sexual transgression of purity norms, whether pregnant teenage girls choose abortion or childbirth. Even though the child welfare system also subjects adult parents from marginalized populations to high levels of scrutiny and disrespect of their parental rights, minor parents from marginalized families remain doubly vulnerable to state action stripping their parental rights.<sup>94</sup> Poor and racial minority minor parents particularly suffer under child welfare practices, but even teenage parents from less marginalized groups face risks to their parental rights under past and present adoption law practices.<sup>95</sup> Ultimately, this Part demonstrates that the superficially conflicting rules on adolescent abortion and childbirth work in tandem to enforce the traditional gender script of maternal self-sacrifice – women, and girls, should give birth and seek redemption for their sexual transgressions by giving up their children to better circumstances, no matter the emotional costs to themselves.<sup>96</sup>

### *A. Minor Parents' Parental Rights in Theory*

One obvious explanation for this core contradiction – the law's privileging of minors who choose to carry a pregnancy to term with decisional autonomy and punishing of minors who choose abortion by subjecting their decisions to parental or judicial authority – is that these laws reflect an anti-abortion agenda.<sup>97</sup> I agree with critics that a large part of the motivation for mandating parental involvement with abortion arises from anti-abortion advocacy.<sup>98</sup> Certainly, there are legislators and advocates of parental involve-

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94. See Maya Manian, *Functional Parenting and Dysfunctional Abortion Policy: Reforming Parental Involvement Legislation*, 50 FAM. CT. REV. 241, 250 (2012).

95. See Appleton, *supra* note 11, at 281 & n.144.

96. See, e.g., *id.* at 323–25 (discussing gender scripts related to motherhood and pregnancy).

97. See Scott, *The Legal Construction of Adolescence*, *supra* note 1, at 569.

98. As other scholars have demonstrated, inconsistencies in the law's treatment of minors based on pregnancy outcome unmask a pro-natalist agenda underlying parental involvement laws. See, e.g., 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, 149 (2003). Gender stereotypes also influence the disparate treatment of teenage girls who choose childbirth over abortion. See Phillis, *supra* note 91, at 292 (“[I]f a minor female elects to carry a pregnancy to term she is fulfilling her natural role of ‘woman as child bearer’ and she is rewarded with adult, decision-making abilities. Yet if a minor female seeks to terminate her

ment laws who are motivated by their anti-abortion stance, seeking to throw any obstacles in the way of girls' and women's access to abortion.<sup>99</sup>

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 the outcomes of health and well-being for pregnant teenagers. Yet, decades of studies on the efficacy of parental involvement legislation demonstrate that these laws harm more than help adolescent girls.<sup>100</sup> Public health research on the impact of parental involvement legislation on teenagers indicates that these laws do not improve parent-child communication, protect teenagers' health, or reduce the number of abortions.<sup>101</sup> "Instead, evidence suggests that mandated parental involvement with abortion is unnecessary in many cases and harmful in others."<sup>102</sup>

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pregnancy, she is refusing the stereotype of 'woman as child bearer' and consequently, presumed so immature as to require either parental or judicial approval of her decision."). See also Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of "Woman-Protective" Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 991-94 (2007) (discussing gender stereotypes animating legislation restricting access to abortion). The Supreme Court's decision in *Gonzales v. Carhart* has further fueled gender stereotyped reasoning in the abortion context, particularly with its admittedly unsubstantiated claim that women regret their abortions. See 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) (arguing that the "abortion regret" rationale in support of abortion restrictions reflects gender stereotypes, particularly as compared to the standard approach to informed consent); Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1688 (2008) [hereinafter Siegel, *The Right's Reasons*] (discussing *Carhart*'s reliance on claim of abortion "regret" to justify restrictions on abortion).

99. See Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT'L J. L. POL'Y & FAM. 305, 311-15 (2004) [hereinafter Sanger, *Regulating Teenage Abortion in the United States*] (arguing that the prime motivation behind parental involvement laws is to prevent access to abortion and punish those girls who seek it); Carol Sanger, *Decisional Dignity, Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409 (2009) [hereinafter Sanger, *Decisional Dignity*]. Advocates of parental involvement mandates often raise the specter of regret in the context of teenage abortion, although recent studies have thoroughly examined and debunked the notion of post-abortion trauma for both adult women and adolescents. See Trine Munk-Olsen et al., *Induced First-Trimester Abortion and Risk of Mental Disorder*, 364 NEW ENG. J. MED. 332 (2011); see also Brenda Major et al., *Task Force on Mental Health and Abortion*, AM. PSYCHOL. ASS'N (2008), <http://www.apa.org/pi/women/programs/abortion/mental-health.pdf>.

100. See Manian, *supra* note 94, at 244-46.

101. See *id.*

102. See *id.*; see also *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 637-38 (N.J. 2000) (summarizing data on impact of the parental involvement mandates).

Studies also confirm what should be no surprise: that the judicial bypass hearings cause significant psychological distress.<sup>103</sup> Teenage girls who do not discuss their pregnancies with their parents often have weighty fears about forced disclosure, including fears of being kicked out of their family homes or fears of abuse.<sup>104</sup> These teenagers' only other option is equally distressing because, to prove their maturity to a judge, they must discuss the most intimate details of their lives to a complete stranger in a courtroom environment that would intimidate most adults.<sup>105</sup>

Scholars who have extensively analyzed the bypass process conclude that the judicial hearings operate primarily as a means to shame teenage girls for their transgression of gendered sexual purity norms.<sup>106</sup> 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 the individual had sex.<sup>107</sup> Professor Carol 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.<sup>108</sup> Parental involvement laws also 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.<sup>109</sup> Professor Sanger succinctly summarizes the opinion of many critics of parental involvement mandates:

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103. Ehrlich, *supra* note 98, at 173–74.

104. 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.” Robert D. Webster et al., Editorial, *Parental Involvement Laws and Parent-Daughter Communication: Policy Without Proof*, 82 CONTRACEPTION 310, 311 (2010). 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.” *Id.*

105. *See* Sanger, *Regulating Teenage Abortion in the United States*, *supra* note 99, at 311–12.

106. *See* Jamin B. Raskin, *The Paradox of Judicial Bypass Proceedings*, 10 AM. U. J. GENDER SOC. POL'Y & L. 281, 284 (2002) (stating “that these searching voyeuristic hearings function primarily to . . . humiliate and to shame the young woman”); *see also* Sanger, *Regulating Teenage Abortion in the United States*, *supra* note 99, at 314 (“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.”).

107. *See* NAT'L P'SHIP FOR WOMEN & FAMILIES, BYPASSING JUSTICE: PREGNANT MINORS AND PARENTAL INVOLVEMENT LAWS 28 (on file with author); *see generally* HELENA SILVERSTEIN, GIRLS ON THE STAND: HOW COURTS FAIL PREGNANT MINORS (2007).

108. *See* Sanger, *Decisional Dignity*, *supra* note 99, at 444–79.

109. *See* NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 107, at 58.



[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.<sup>110</sup>

In short, the law on adolescent abortion expresses a skeptical view of adolescent reproductive decision making and an intent to punish female teenage sexual expression. In comparison, the law's puzzling approach to the adolescent who chooses to become a parent reflects an odd blind spot. Scholars have noted that it is the law's approach to minors' parental rights – not abortion law – that is “out of step” with other areas of youth law, which generally restricts the rights of minors.<sup>111</sup>

This Article argues that the apparent expansion of adolescent rights with regard to the right to parent merely represents an application of long-standing rules benefitting adults rather than growing recognition of adolescents' autonomy interests. I argue that a family law perspective – in particular a focus on traditional rules related to parental rights – helps to explain the law's unusual approach to teenage childbirth and childrearing. Other than sentiments against abortion, deeply rooted notions about parental rights provide an additional angle for understanding the law's conflicting approaches to minor's autonomy in sexual and reproductive decision making. In particular, this Article shows that conventional categories long recognized in the law for *exempting* children from parental authority illuminate the law's contradictory approaches to teenage sexuality and reproduction.

As discussed in Part I, constitutional law recognizes and reinforces deeply felt conceptions of parental rights, including parents' rights to control decision making for their children. However, state common law and statutory law have long recognized exemptions from parental authority that fall into two broad categories: (1) medical emergencies and (2) special status-based exceptions.<sup>112</sup> The areas in which adolescents have been given greater autonomy over their sexual and reproductive decisions fall into one of these two long-standing exceptional categories in the public's eyes, while the others arguably do not.<sup>113</sup> In other words, apparent advancements in the law on adolescents' sexual and reproductive autonomy actually map onto the traditional scope of parental control.

The first category – exemption from parental consent for medical emergencies – reflects common sense. Because society wants to ensure that mi-

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110. Sanger, *Regulating Teenage Abortion in the United States*, *supra* note 99, at 306.

111. Emily Buss, *The Parental Rights of Minors*, 48 BUFF. L. REV. 785, 786 (2000) [hereinafter Buss, *The Parental Rights of Minors*].

112. See Hill, *supra* note 27, at 41–43. See also Mutcherson, *supra* note 27, at 267.

113. See Hill, *supra* note 27, at 42–43.

nors receive needed treatment, the law has always assumed that parents would consent in cases of a minor's urgent health needs. Generally speaking, minors are categorically incapable of giving informed consent to medical treatment.<sup>114</sup> However, even under the conventional rule requiring parental permission prior to medical treatment of a minor, physicians have long been given the authority to treat minors without first obtaining parental consent in

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114. See J. Shoshanna Ehrlich, *Shifting Boundaries: Abortion, Criminal Culpability and the Indeterminate Legal Status of Adolescents*, 18 WIS. WOMEN'S L.J. 77, 78–80 (2003) (discussing binary classification of child/parent; no separate legal status of adolescence); Rhonda G. Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1306–22 (2000) (minors cannot consent to most medical procedures or execute advanced directives); Scott, *The Legal Construction of Adolescence*, *supra* note 1, at 566. Parents generally possess the authority to decide when a child will receive medical treatment. See also *Parham v. J.R.*, 442 U.S. 584 (1979) (upholding a law permitting the voluntary commitment of a child by parents to a state mental hospital if the physician agrees). In addition to the exceptions to this rule for medical emergencies and status-based exceptions, the mature minor doctrine allows minors to seek medical care from a judge, who determines a minor's maturity on a case-by-case basis. See Hill, *supra* note 27, at 42–49 (“The mature-minor rule . . . generally calls for a case-by-case assessment of an individual minor's circumstances.”); Mutcherson, *supra* note 27, at 268; Michelle Oberman, *Minor Rights and Wrongs*, 24 J.L. MED. & ETHICS 127, 127 (1996) [hereinafter Oberman, *Minor Rights and Wrongs*] (discussing mature minor doctrine). Michelle Oberman has argued that maturity in the healthcare context “operates as a code word, invoked to permit minors access to treatments that society deems desirable, and to limit their access to treatments that carry the possibility of long-term negative consequences.” *Id.* Discussing the mature minor case law involving a minor's assertion of the right to refuse lifesaving medical treatment, Oberman argues that court decisions ultimately rested “on subjective judicial assessments of the patients' maturity” and that “the courts are remarkably ill equipped to make such determinations” of maturity. *Id.* at 128. Other scholars have reached similar conclusions with regard to case-by-case judicial assessments of maturity in the criminal context. See Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 836–37 (2003) (stating that determining maturity of young offenders in individual cases “is likely to be an error-prone undertaking, with the outcomes determined by factors other than immaturity”). Extensive analysis of judicial bypass hearings in the abortion context also reveals the arbitrariness of case-by-case judicial determinations of adolescent capacity for decision-making. See Manian, *supra* note 94, at 244–46 (summarizing literature criticizing judicial bypass hearings). Elizabeth Scott argues that the judicial bypass system in abortion law is a means of recognizing adolescence as a unique stage between childhood and adulthood, but one that is a “costly regulatory scheme [that] offers little in the way of social benefit.” Scott, *The Legal Construction of Adolescence*, *supra* note 1, at 569, 574–76 (critiquing judicial bypass process in abortion context). See also Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 413–14 (1997) (noting that in the abortion context teenage girls “have been granted a peculiar sort of burdened autonomy that substitutes state authority for parental authority, and that asks pregnant girls to show far more initiative and competence than the Court has asked of adult women seeking abortions”).

cases of medical emergencies.<sup>115</sup> Under the medical emergency exception, “the guardian’s consent to emergency care was implied, on the theory that any delay incurred in attempting to secure consent would jeopardize the minor’s health.”<sup>116</sup> The exemption for medical emergencies has, over time, become more broadly understood to include the unique medical needs of adolescents and a common list of treatment-based exemptions, such as treatment for drug dependency, mental health issues, and sexuality-related problems.<sup>117</sup> Scholars generally agree that the treatment-based exemptions to parental consent are an extension of the traditional exemption for medical emergencies, both of which are based on the desire to ensure that children receive needed medical care, rather than support for adolescent autonomy interests.<sup>118</sup>

We can map the modern rules granting adolescents greater autonomy in access to sexual and reproductive healthcare onto the traditional medical “emergency” exemption. For example, the universal rule across the fifty states that minors may independently consent to STI treatment falls within this first categorical exception to parental rights for children’s urgent health needs.<sup>119</sup> The exception to parental consent for prenatal care similarly appears to be grounded not on the belief that teenagers make particularly sound decisions in these matters, but rather on the understanding that adolescents are more likely to make the choice to seek treatment – the choice that legislators and parents view as best – if not required to reveal their need for treatment to their parents.<sup>120</sup> Couched in the neutral language of public health,

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115. Hill, *supra* note 27, at 41 (“[M]edical emergencies require no consent; indeed, this is true for adults as well as children.”).

116. Oberman, *Minor Rights and Wrongs*, *supra* note 114, at 130.

117. See Mutcherson, *supra* note 27, at 256–72.

118. See *id.* (noting that treatment-based exceptions were based on public health goals and concern about larger societal costs rather than notions of adolescent capacity or rights); Oberman, *Minor Rights and Wrongs*, *supra* note 114, at 130–31; Oberman, *Turning Girls Into Women*, *supra* note 67, at 47 (“[A] close examination of the line of cases which govern minors’ rights to consent to treatment . . . reveals that the changes in these rights have been driven not by a sense that minors are mature enough to make such decisions, but rather, by a belief that certain forms of treatment are so important that the law should facilitate access to them.”); MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* 129 (2010) (noting that laws granting minors treatment-based exceptions to parental consent for birth control, STIs, drug abuse, and mental health issues exist “not because minors have especially mature judgment in these areas; instead . . . the threat to children’s long-term welfare tips the scales in favor of allowing them decision making power”); Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607, 1617 (1992) [hereinafter Scott, *Judgment and Reasoning*] (“The policies dealing with medical decisionmaking [sic] also fit within a paternalistic framework. . . . There is little evidence that policymakers are moved by concern for minors’ autonomy interest in making decisions about sexual activity.”).

119. See Oberman, *Minor Rights and Wrongs*, *supra* note 114, at 130.

120. See Wadlington, *supra* note 10, at 323–24 (noting that state laws granting minors autonomy for specific types of medical treatment, such as drug abuse and

rather than in the language of advocacy for adolescent sexual autonomy, these parental consent exemptions granted to minors have generated little to no controversy.<sup>121</sup>

In comparison, where the public finds the urgency of the minor's health needs to be debatable, controversy continues over whether to deviate from the norm of deference to parents' right to authority over their children.<sup>122</sup> For example, with regard to sex education and contraceptive services, the public still vehemently debates whether more or less access will harm children's health and development.<sup>123</sup> Those jurisdictions that take the view that diminished access to contraception will better promote adolescent development,

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STIs, are not based on a state's interest in affording children greater autonomy but rather in ensuring that minors obtain important medical treatment they would otherwise delay or avoid if parental involvement were required); *see also* Oberman, *Minor Rights and Wrongs*, *supra* note 114, at 130 ("[T]he purposes underlying laws that treat minors like adults have almost nothing to do with the perceived maturity of the adolescent population. A critical evaluation of the mature minor doctrine reveals that these laws, like those before them, grow out of the traditional impulse to protect this population."); Scott, *Judgment and Reasoning*, *supra* note 118, at 1618–19 ("[T]he law cares about the quality of adolescent judgment and . . . policies extending the freedom to make choices are limited by paternalistic goals. . . . [T]he medical consent statutes, while they appear to endorse greater adolescent autonomy, are equally consistent with a response directed toward promoting adolescent welfare and reducing social cost.").

121. Mutcherson, *supra* note 27, at 269–71 (noting that treatment-based exceptions were based on public health goals rather than notions of adolescent capacity or rights); Oberman, *Minor Rights and Wrongs*, *supra* note 114, at 130 ("This public health concern [regarding spread of disease], coupled with a fear that teens would not seek treatment for these communicable conditions if their parents had to be notified of—let alone give consent for—such treatment, led states to pass 'minor treatment statutes.'").

122. Oberman, *Minor Rights and Wrongs*, *supra* note 114, at 131 ("Minor treatment statutes reflect a public consensus that ensuring minors' access to the given treatment outweighs parental interests in controlling the care a child receives. The focus of such exceptions rests not on an assessment of maturity, but on a calculus that grants minors autonomy only when the treatment is relatively low risk, and when denying access may cause the minor (or the public at large) to suffer permanent harm.").

123. Buss, *The Parental Rights of Minors*, *supra* note 111, at 791–92 (noting that legislation battling teenage pregnancy and other problems related to teenage sexuality takes conflicting approaches).

Laws provide for contraceptive counseling and services . . . and for sexual education, all on the theory that, if teenagers are having sex, information and contraceptives will reduce the bad consequences of their sexual activity. Other laws restrict minors' access to contraceptives and require the affirmative promotion of abstinence, on the theory that this approach will alter adolescent attitudes and diminish the prevalence of adolescent sex.

perhaps because they believe that access to contraception encourages sexual activity, emphasize the conventional family law exceptions to parental authority; as a result, they explicitly grant minors independent access to prescription contraceptive services where the minor demonstrates an urgent health need.<sup>124</sup> With regard to abortion, it appears that members of the public in many states, including those that otherwise lean in favor of abortion rights, find the health risks of delayed access to abortion care to be a debatable proposition, despite clear medical evidence of the harms of such delays.<sup>125</sup>

In sum, applying the law's traditional medical emergency exemption to the parental right of control over minors holds explanatory power for the variety of contradictory approaches that states take to granting minors autonomy in their sexual and reproductive healthcare decision making.<sup>126</sup> What this

124. For example, as discussed above, although about half the states explicitly by law allow minors to freely consent to prescription contraceptives, the remaining states follow a more traditional approach, explicitly by statute granting minors' an exemption from parental authority when they meet certain status based requirements (discussed further *infra*) or need unfettered access to protect their health. See *supra* Part I.C.2. Twenty-five states explicitly permit minors to consent to prescription contraceptive services if they are or have been pregnant, parenting or married, or have a medical need. See *supra* Part I.C.2. In those states with expanded access to prescription contraceptives, the push for expanded access to contraceptive services for minors "was cast not in terms of the minor's actual maturity, but instead, as a response to a public health threat—the increase in teen sex, and the consequent risks of venereal diseases, pregnancies, and illegitimate births." Oberman, *Turning Girls Into Women*, *supra* note 67, at 49.

125. See SILVERSTEIN, *supra* note 107, 1–4; Oberman, *Minor Rights and Wrongs*, *supra* note 114, at 131 ("The cumbersome route to permitting adolescents to consent to abortion reflects the politically divisive nature of the abortion debate, and the fact that, unlike contraception, there is less public consensus about whether it is in a minor's best interest to procure an abortion. This debate is not about adolescent capacity—it is about parental rights to control their children."). There is clear medical evidence on the harms of such delays. See 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. . . . [T]he 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 Maya Manian, *Rights, Remedies, and Facial Challenges*, 36 HAST. CONST. L.Q. 611, 621 (2009). Courts that have struck down parental involvement mandates have done so primarily on the ground that such laws harm teenage girls' health. See, e.g., *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. Ct. App. 1997); *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620 (N.J. 2000). See Rebouché, *supra* note 5, at 208 (discussing the 2008 defeat of the California Proposition 4 parental involvement law, where health arguments against the law succeeded).

126. Elizabeth Scott also demonstrates that "policies that appear to signal an erosion of the paternalistic legal framework in fact fit quite comfortably within it." Scott, *Judgment and Reasoning*, *supra* note 118, at 1612. Professor Scott further argues:

Article previously referred to as “pre-sexual activity” decisions about sex education and contraceptives may fall under a more broadly understood medical “emergency” exception to parental control, but controversy continues to rage on these issues depending on the view of which approach better protects adolescent health. The need for minors’ autonomy in “post-sexual activity” decisions relating to STI treatment and pregnancy services seems clearly grounded in the view that parental consent must be rejected out of medical necessity, a view that has not taken widespread hold with regard to abortion. Of course, politics surrounding teenage sexuality and abortion also influence the law here.<sup>127</sup> The key point is that where minors’ rights to independently access healthcare related to sexuality and reproduction have been expanded, this expansion of rights tends to be motivated by the traditional exemption from parental control for medical emergencies and public health needs, rather than by a concern for minors’ autonomy interests in decision making surrounding sex and reproduction.<sup>128</sup>

Turning to the second traditional exemption to parental authority for minors who fall into special statuses helps to explain the law’s conflicting approach to teenage childbirth versus abortion and, in particular, the law’s unusual grant of authority to minor parents. State law has long recognized status-based exceptions to parental authority for minors who are in some form “emancipated.”<sup>129</sup> Freedom from parental control can occur either by a formal emancipation process<sup>130</sup> or automatically by entering into certain status-

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[E]ven advocates of expanded rights for adolescents are generally instrumentalist in their approach to autonomy and are ultimately driven by paternalistic goals. At the heart of this paternalism is a commonly shared intuition that minors have poorer judgment than adults and that they are more likely than adults to make choices that are threatening to their health and well-being.

*Id.*

127. See GUGGENHEIM, *supra* note 86, at 23–40 (the law granting minors fairly liberal abortion rights is motivated by concerns about the public health problem, and not by concerns about minor’s rights); Elisa Poncz, *Rethinking Child Advocacy After Roper v. Simmons: “Kids are Just Different” and “Kids are Like Adults” Advocacy Strategies*, 6 CARDOZO PUB. L. POL’Y & ETHICS 273, 291 (2008) (discussing a child advocate’s moral, political, philosophical, and religious views as related to minor autonomy rights); Wadlington, *supra* note 10, at 324 (“These are situations where legislatures feared that minors would be unwilling to seek assistance or consent from their parents. If minors could not personally consent to treatment, they might not obtain medical care -- to the detriment of themselves, their families, and society.”).

128. See Scott, *Judgment and Reasoning*, *supra* note 118, at 1617.

129. See Carol Sanger & Eleanor Willemssen, *Minor Changes: Emancipating Children in Minor Times*, 25 U. MICH. J.L. REFORM 239, 262 (1992).

130. Minors who obtain the legal status of emancipation are treated as adults in most of their dealings with parents and third parties. See *id.* (discussing processes and consequences of emancipation and arguing that emancipation does not always serve stated end of benefitting mature minors). Thus, emancipated minors can freely consent to medical treatment – and otherwise ignore their parents’ commands – while

es.<sup>131</sup> In particular, these statuses include marriage, military service, and, to a lesser extent, becoming a parent.<sup>132</sup>

The rationale for this second category of status-based exemptions to parental authority is less clear than the medical emergency category. Some argue that minors who are married or in the military are exempted from parental authority for reasons of administrative expediency.<sup>133</sup> The status-based exceptions perhaps also reflect underlying notions traditional in family law of the child as the “property” of her parents or, traditionally, of her father.<sup>134</sup> In other words, only one person should be in charge of a minor, and marriage or military service transfers power to a new authority. This notion of child as property of her parents may further explicate the differential treatment of pregnant minors who choose childbirth rather than abortion. Although minor parents are not automatically “emancipated” from their own parents’ authority in most jurisdictions, they still possess full parental authority over their infants in all states, at least in theory.<sup>135</sup> Once the minor takes on the mantle

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conversely parents owe no duty of support to their emancipated minors. *See id.* A parent or minor can seek formal legal emancipation in court on a case-by-case basis, which typically requires that the minor demonstrate that she has established a separate domicile and financial independence. *See id.* at 245–46. *See also* Oberman, *Minor Rights and Wrongs*, *supra* note 114, at 130 (“The definition of *emancipation* varies from state to state, but it is generally limited to minors who are not living at home, who are not economically dependent on their parents, and whose parents have surrendered parental duties. In the past, this category consisted primarily of married minors and minors in the military service.”); Mutcherson, *supra* note 27, at 266–67 (explaining the processes for emancipation, either by court order or automatically by statuses such as marriage, military service, or parenthood).

131. *See* Mutcherson, *supra* note 27, at 267.

132. Both statutes and case law in most states declare that minors who marry or enlist in the military may be free from parental authority and obligation. *See* HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 326 (2d ed. 1988); Jennifer L. Rosato, *Let’s Get Real: Quilting a Principled Approach to Adolescent Empowerment in Health Care Decision-Making*, 51 *DEPAUL L. REV.* 769, 770–79 (2002) (discussing the general rule that minors cannot consent to medical treatment unless they qualify for the narrow treatment-based exceptions or qualify for traditional status-based exceptions, such as minors who are in the military, married, pregnant, or parenting).

133. *See* Hill, *supra* note 27, at 41–43 (discussing classes of minors deemed “sufficiently adult-like to consent to care as if they were adults,” including minors who are married or in the military); Sanger & Willemsen, *supra* note 129, at 258 (stating that statutory emancipation for minors who are married and enlisted in the military rests on the premise that the new social status is inconsistent with parental control).

134. Stuart N. Hart, *From Property to Person Status: Historical Perspective on Children’s Rights*, 46 *AM. PSYCHOLOGIST* 53 (1991) (discussing transition of children from property to personhood); Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents’ Rights*, 5 *GEO. J. FIGHTING POVERTY* 313, 313 (1998).

135. “In some jurisdictions, becoming a parent results in emancipation; in most it does not.” Barbara Glesner Fines, *Challenges of Representing Adolescent Parents in*

of parenthood herself, she obtains the full rights of parenthood over her child as her parents have over her – she achieves the status of parent.

On the surface, family law takes a seemingly categorical approach to parenthood. The law generally categorizes persons as either “parents” or “children”; the law does not explicitly recognize an in-between status for minor parents. Thus, a minor who seeks to terminate her pregnancy chooses to remain in the “child” category: her role vis-a-vis her parents remains unchanged. In contrast, a minor who gives birth falls into both categories. She is a child and a parent at the same time – still a child in her parents’ eyes yet now also a parent herself.<sup>136</sup>

The law seems unable, or perhaps unwilling, to grasp how to explicitly recognize both roles in the same person, at the same moment. Superficially, the law takes an indivisible approach to minor parenthood by granting the minor parent the full panoply of parental rights and duties, although it need not do so.<sup>137</sup> At least on its face, the law treats a minor who decides to carry her pregnancy to term as possessing all of the attendant rights and obligations of parenthood and relegates the minor’s parents to the role of grandparents with correspondingly limited rights.<sup>138</sup> According to conventional rules of family law, parents uniquely possess the fundamental right to make decisions for their children. Thus, to the extent that the minor is acting as a parent toward her own child, it follows from the familiar doctrines of family law that the minor should be allowed to make autonomous decisions relating to her infant, including making medical treatment decisions or relinquishing the infant for adoption.<sup>139</sup> From this parental rights perspective, it is logical to both deny autonomy to a minor who chooses abortion while at the same time granting a minor parent autonomy over her pregnancy and child, despite the possibility that in both cases, the minor may be equally immature. As discussed previously, none of these exceptions to parental authority – treatment-based or status-based – are in fact grounded on a notion of minor maturity or capacity for sound decision making.

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*Child Welfare Proceedings*, 36 U. DAYTON L. REV. 307, 324–25 (2011); see also Buss, *The Parental Rights of Minors*, *supra* note 111, at 830.

136. These rules on minor parenthood apply to minor fathers as well; however, my focus is on teenage girls since teenage parents rarely marry, and the father’s involvement is often minimal. See Buss, *The Parental Rights of Minors*, *supra* note 111, at 787–88.

137. See *id.* at 793–94 (arguing that granting minor parents the full panoply of parental rights is not constitutionally mandated since “rights afforded the highest level of constitutional protection for adults are circumscribed for all minors, based on their age alone”).

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

139. See *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 642 (1979) (plurality opinion) (“[T]he fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority.”).



The fact of pregnancy and motherhood does not make a teenager more mature, but the law has treated status-based grants of autonomy as grounds for independence based on “ease of application and a need for consistency, rather than a recognition of the minor’s [capacity for] autonomy.”<sup>140</sup> To be clear, I am not arguing that family law dictates the law’s inconsistent treatment of minors who choose childbirth versus abortion. In fact, modern family law parses out parental authority in much more nuanced ways.<sup>141</sup> Precedents on the scope of children’s rights indicate that states could constitutionally limit the rights of minor parents for the same three reasons that states may limit minors’ access to abortion: (1) the minors’ vulnerability, (2) the minors’ immaturity and resulting limited decision-making capacity, and (3) the parents’ important role in controlling their minor child’s upbringing.<sup>142</sup> Poor decision making in the context of minor parenting may lead to life-long detrimental impacts for the minor parent, for the minor’s parents, and for the minor’s child, which could provide sufficient constitutional justification for constraints on a minor’s parenting decisions as on decisions to terminate a pregnancy.<sup>143</sup> Arguably, the law should grant adult parents *more* control over

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140. Rosato, *supra* note 132, at 777; *see also Bellotti II*, 443 U.S. at 643 n.23 (“[T]he problem of determining ‘maturity’ makes clear why the State generally may resort to objective, though inevitably arbitrary, criteria such as age limits, marital status, or membership in the Armed Forces for lifting some or all of the legal disabilities of minority.”). For example, married minors are typically treated as emancipated even though many married minors continue to live with relatives and to receive financial assistance from their parents. *See Sanger & Willemsen, supra* note 129, at 304 n.263.

141. *See infra* Part III.B.

142. *See Buss, The Parental Rights of Minors, supra* note 111, at 797–822 (arguing that rationales for restricting minors’ access to abortion and other constitutional rights justify similar restrictions on minors’ parental rights); *see also Bellotti II*, 443 U.S. at 633–34 (plurality opinion).

143. Obviously there are vastly differing opinions on the moral significance of the decision to abort versus carrying a pregnancy to term. Even those opposed to abortion, however, would likely concede that the decision to become a teenage parent has a dramatic effect on the course of a teenager’s life. Professor Emily Buss argues that, particularly given the potential long-term negative consequences of teenage motherhood for all three generations, it is striking that “where immature decision making produces a teenage mother, the law applies no protective brakes.” Buss, *The Parental Rights of Minors, supra* note 111, at 793 (discussing negative consequences of teenage parenthood to parents of the minor, the minor parent herself and her child). Professor Buss suggests a more nuanced approach that would recognize that the minor parent’s parents still have parental rights that could temper an adolescent’s own parental rights, such as by requiring shared custodial decision making between the minor parent and her parents. *See id.* at 806 (noting that when “minor and parent are collapsed into one individual,” there may be “two individuals hav[ing] potentially dueling parental claims,” namely the minor parent versus her parents). She also argues that states could constitutionally limit the scope of minor parents’ rights in ways similar to minors’ abortion rights or through other alternatives, such as shared custody with the minor’s parents until the minor parent comes of age. *See id.* at 817–18.

their teenagers by granting the adult parents greater rights over the teenage parent's infant and by explicitly crafting an in-between limited parental rights status for minor parents. Yet, *in theory*, the law protects minor parents' parental rights as strongly as it protects the rights of parents of minors seeking abortion. This contradiction appears to be rooted in family law's deeply held notions about parental rights, a notion that holds even when the parent is a minor.<sup>144</sup> My point is not that these rules are sensible or normatively appropriate. Nor am I claiming that anti-abortion sentiment has nothing to do with the popularity of parental involvement laws or that parental involvement with abortion is the correct policy approach.<sup>145</sup> Rather, this analysis demonstrates that the existing, conflicting rules governing adolescent pregnancy and parenting map directly onto the law's traditional, formal protection of adults' parental rights.<sup>146</sup>

As Elizabeth Scott has demonstrated, progress in the context of adolescent "rights" is an illusion, since "many of the reforms that expand adolescent self-determination are wholly consistent with traditional goals of promoting children's welfare, furthering social welfare and preserving parental authori-

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144. Professor Buss argues that "there is something about parental rights that makes them uniquely resistant to . . . regulation." *Id.* at 811. She notes that the notion of parental control runs so deep that no law in any of the fifty states "qualifies minors' legal rights to control the upbringing of their children, even if they give birth at the age of eleven." *Id.* at 792 (discussing the negative consequences of teenage parenthood to parents of the minor, the minor parent herself and her child).

Contrast the volume and variety of these approaches [to contraception and abortion] with the absolute lack of any legislation aimed at mitigating the three-generational harm imposed if and when the minor decides to keep the baby and take on parental responsibilities. In no state does the law require the minor to consult with her parents, let alone to obtain parental consent, before acting on these decisions.

*Id.*; see PATRICIA DONOVAN, OUR DAUGHTERS' DECISIONS: THE CONFLICT IN STATE LAW ON ABORTION AND OTHER ISSUES 17 (1992) ("[N]o state requires a minor to have parental consent to continue a pregnancy to term. Once a teenager has borne a child, she can decide whether to raise the child herself or put it up for adoption.").

145. See Sanger, *Regulating Teenage Abortion in the United States*, *supra* note 99, at 313. Professor Sanger also notes that parental involvement with abortion reasserts parental control over teenage sexuality, a control that was lost with changes in the law on juvenile delinquency. *Id.*

146. It is important to note that although in theory the law strongly protects parents' fundamental right to control their children's upbringing, poor and racial minority parents of all ages have long been subjected to state scrutiny and weakened parental rights within the child welfare system in particular and in "public" family law in general. See generally Jill E. Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004) (discussing welfare law as public family law). See *infra* Part II.B.1 (discussing child welfare).

ty.”<sup>147</sup> Just as the “expansion” of adolescents’ self-determination in the context of sensitive medical treatment actually serves traditional paternalistic and instrumentalist objectives – that adolescents should receive the medical care that adults would like them to have – so too do the expansive parental rights of minor parents perhaps merely reflect the law’s reflexive reaffirmation of parental authority to protect those who typically achieve the status of parent: adults. The law resists any overt reduction of parental rights, even for minors, because this reduction could pose a threat to the authority and certainty of the traditional model of parental rights. In other words, the law’s grant of parental rights to minor parents serves to protect the interests of adults, as in so many other areas of supposed advancements for children’s “rights.”<sup>148</sup>

The autonomy granted to minor parents – unusual in the context of a body of youth law that generally denies minors any adult-like rights – appears to be a superficial, reflexive assertion of the rights of persons who achieve the status of parent by childbirth. While paying lip service to the parental rights of minors, the law fails to support adolescent parenting in reality. The next Part examines areas of family law that, in practice, deal directly with minors as parents. In particular, this Part focuses on child welfare and adoption law. A closer study of what happens when minor parents come into contact with the law reveals that the formalist approach to parental rights that informs the law’s surface grant of autonomy to teenage parents does not carry through to substantively protect the rights of minor parents. In some contexts, as in adoption law, the law’s authorization of adult-like parental “rights” to minors may actually serve to undermine minors’ abilities to parent their children. Minor mothers, in particular, endure the worst of both worlds: the lack of governmental support faced by adult parents and the extensive state oversight enforced upon minors.

### *B. Minor Parents’ Parental Rights in Practice*

A more expansive inquiry into the law on minors’ reproductive decision making reveals a troubling approach to adolescent pregnancy and parenting. If we look at the whole picture of adolescents’ reproductive rights, comparing abortion law and the law on minor parents’ parental rights, we will see that the law undermines adolescents’ rights whichever path of pregnancy resolution they choose. At the same time that the law thwarts adolescents’ access to abortion care, it also fails to protect adolescents’ rights as parents. Although, in theory, minor parents possess the same rights as adults to bear and rear children, in reality, minor parents’ parental rights are tenuous.<sup>149</sup> Minor par-

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147. Scott, *Judgment and Reasoning*, *supra* note 118, at 1615–21 (analyzing legal reforms in juvenile justice and medical decision-making, and concluding that reform is an illusion).

148. See GUGGENHEIM, *supra* note 86, at xii–iii, 174–244 (discussing how rhetoric of children’s rights is used in law and politics to further adults’ interests).

149. *Id.* at 244.

ents from poor communities and, in particular, racial minorities, remain doubly vulnerable to disruption of their parental rights.

This Part more closely examines the reality of minor parents' abilities to rear their children and unmasks similarities in the law's approach to adolescent abortion and adolescent parenthood, similarities that scholars have previously overlooked. This Part focuses primarily on adolescent mothers, given the greater likelihood of their involvement in parenting decisions.<sup>150</sup> This Part examines how minor mothers fare when they come into contact with the legal system, particularly within the contexts of child welfare law and adoption law. This examination reveals two key insights. First, the law takes a highly skeptical view of adolescent girls' reproductive decision making, whether they seek to terminate their pregnancies or to parent their children. Second, legal rules that claim to protect adolescents' interests, such as judicial bypass in the abortion context and the right to relinquish in the adoption context, instead provide a means to punish female teenage sexuality and enforce gender norms. Rather than standing in conflict, the law on minor parents operates in conjunction with abortion law to enforce a traditional gender script – that self-sacrificing mothers should give birth and give up their infants to better circumstances than teenage parents can presumably provide.<sup>151</sup>

As this Part will show, adolescent parents remain at an especially high risk of oversight by the child welfare system and, therefore, of having the state remove their children from their custody.<sup>152</sup> Although ample research has shown that poor minority adult parents also face a high risk of scrutiny by child welfare agents, minor mothers encounter multiple layers of bias based on their age, as well as their race, poverty, and gender.<sup>153</sup> Girls in foster care who confront a higher risk of teenage pregnancy remain particularly vulnerable to the involuntary removal of their infants or pressure to surrender for adoption, due in part to state officials' skepticism of teenagers' abilities to parent. The tenuousness of minors' legal rights to access abortion or to parent their children is especially apparent for the most vulnerable groups of

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150. Other scholars have examined the ways in which adolescent fathers' rights are also given short shrift, particularly in the adoption context. See *infra* Part II.B.2.

151. See, e.g., Borgmann, *supra* note 11, at 1308–10 (discussing the consistent notion in anti-abortion law of punishing women's sexual irresponsibility).

152. The "child welfare system" refers to the government system responsible for preventing and addressing child abuse and neglect. *How the Child Welfare System Works*, CHILD WELFARE INFO. GATEWAY 1 (Feb. 2013), <https://www.childwelfare.gov/pubs/factsheets/cpswork.pdf>; *Issue Brief: Rebuild the Nation's Child Welfare System*, ANNIE E. CASEY FOUND. (Jan. 2009), <http://www.aecf.org/m/resource/doc/aecf-IssueBriefRebuildChildWelfareSystem-2009.pdf>. Parents and children in the child welfare system may receive services in their home, through foster care, or through adoptive placements. *How the Child Welfare System Works*, *supra*, at 3. Proceedings to adjudicate child abuse or neglect cases are also referred to as "dependency proceedings." *Id.* at 4.

153. See Glesner Fines, *supra* note 135, at 331.

minors, as laws restricting access to abortion and child welfare practices disproportionately affect the poor and racial minorities.

With regard to adoption law, opponents of abortion present adoption as a better alternative to abortion, but research on adoption practices presents a disturbing picture of unwarranted and less than voluntary removals of minor parents' infants by both private actors and state agents.<sup>154</sup> To be clear, this Article is not arguing for the removal of state oversight of teenage parents; protecting the well-being of adolescent parents and their infants remains a worthy goal. Rather, society needs more effective oversight that supports minors' reproductive decision making and seeks to preserve their parental rights if they wish to parent their infants. The analysis below demonstrates that, despite the formal grant of full parental rights to minor parents, the law often undermines rather than supports those rights.

### 1. Minor Parents and the Child Welfare System

Experts generally agree that the child welfare system is broken.<sup>155</sup> The vast majority of child welfare cases involve poverty-related neglect rather than severe abuse.<sup>156</sup> Thousands of children are removed from their parents' custody each year, even though few emerge better off than if they had remained in their homes.<sup>157</sup> Teenage parents present particularly difficult challenges for the system.

The United States has the highest adolescent pregnancy rate and birth rate of any industrialized nation.<sup>158</sup> Each year, almost 750,000 girls between the ages of fifteen and nineteen become pregnant. Roughly sixty percent of these girls give birth.<sup>159</sup> The lives of teenage mothers rarely resemble the nearly idyllic reality of teen motherhood portrayed in media depictions, such as the film, *Juno*, or the television show, *Glee*.

Although it is a common intuition that teenage parenthood is likely to lead to poverty, recent research shows that teenage parenthood may be *caused*

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154. Siegel, *The Right's Reasons*, *supra* note 98, at 1678 n.122 (describing the rise of contemporary arguments for adoption as preferable to abortion).

155. *See, e.g.*, Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 114 (2013); Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006).

156. *See* Godsoe, *supra* note 155, at 115 n.7.

157. *See id.* at 114.

158. Glesner Fines, *supra* note 135, at 308. *See also Fast Facts: Teen Birth Rates: How Does the United States Compare?*, NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY (Aug. 2014), <https://thenationalcampaign.org/resource/fast-facts-how-does-united-states-compare>.

159. Glesner Fines, *supra* note 135, at 308. For example, in 2008, 141,428 girls under the age of eighteen gave birth. *Id.* About four percent of these mothers were under the age of fifteen, twelve percent were age fifteen, and twenty-nine percent were age sixteen. *Id.*; Joyce A. Martin et al., *Births: Final Data for 2008*, 59 NAT'L VITAL STAT. REP. 7 (2010), [http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59\\_01.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_01.pdf).

by poverty.<sup>160</sup> Poor young women are more likely to become pregnant than their economically better off peers.<sup>161</sup> Teenage motherhood is a symptom of poverty that often cycles to the next generation. Generally speaking, teenage mothers are more likely to need public assistance compared to girls of similar socio-economic status who postpone childbirth.<sup>162</sup> Adolescent mothers are also significantly less likely than their non-parenting peers to complete high school or obtain a GED by the age of twenty-two.<sup>163</sup> Furthermore, as with adult parents, poverty places minor parents at a greater risk of oversight from the child welfare system.<sup>164</sup> Bias in the child welfare system has been the subject of extensive study and criticism, and ample evidence suggests that poverty and race place adult parents at a higher risk of state intervention.<sup>165</sup>

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160. Glesner Fines, *supra* note 135, at 309; see also Deborah Jones Merritt, *Ending Poverty by Cutting Teenaged Births: Promise, Failure, and Paths to the Future*, 57 OHIO ST. L.J. 441, 455 (1996) (“Teen mothers come overwhelmingly from disadvantaged socioeconomic backgrounds.”); Malinda L. Seymore, *Sixteen and Pregnant: Minors’ Consent in Abortion and Adoption*, 25 YALE J.L. & FEMINISM 99, 109–10 (2013) (discussing studies on a causal link between poverty and teen pregnancy).

161. See Merritt, *supra* note 160, at 443.

[S]tudies sound a warning that poor outcomes for the children of teenaged mothers may derive more from poverty than from the teenaged births themselves. And the studies raise the dispiriting prospect that these women and their children might not fare much better even if they deferred childbearing into their twenties.

*Id.* at 458–59.

162. Glesner Fines, *supra* note 135, at 309. Teenage mothers are disproportionately likely to be poor and to rely on welfare. Merritt, *supra* note 160, at 441–42. See also NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 166–67 (2010) (“[N]umerous studies find that delay in child bearing . . . increased mother and child prospects.”).

163. Glesner Fines, *supra* note 135, at 309 (sixty-six percent and ninety-four percent respectively). See Kate Perper et al., *Fact Sheet: Diploma Attainment Among Teen Mothers*, CHILD TRENDS (Jan. 2010), [http://www.childtrends.org/files/child\\_trends-2010\\_01\\_22\\_FS\\_diplomaattainment.pdf](http://www.childtrends.org/files/child_trends-2010_01_22_FS_diplomaattainment.pdf). Studies show teenage mothers are more likely to drop out of school. Merritt, *supra* note 160, at 441; Daniel H. Klepinger et al., *Adolescent Fertility and the Educational Attainment of Young Women*, 27 FAM. PLAN. PERSP. 23, 23 (1995) (analysis shows early childbearing lowers the education attainment of young women of all races). Other demographic factors also influence the likelihood of teenage motherhood, such as family structure. See *id.*; see also *Fact Sheet: American Teens’ Sexual and Reproductive Health*, GUTTMACHER INST. (May 2014), <http://www.guttmacher.org/pubs/FB-ATSRH.html>.

164. Glesner Fines, *supra* note 135, at 313; Erica Turcios et al., *Remaining vs. Removal: Preventing Premature Removal when Poverty is Confused with Neglect*, 12 MICH. CHILD WELFARE L.J. 20, 23 (2009).

165. See, e.g., Godsoe, *supra* note 155 (summarizing evidence of racial bias in the child welfare system); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2001) (arguing that the child welfare system is deeply racially biased);

However, teenage parents face additional hurdles to preserving their parental rights based on their minority. Multiple vectors of discrimination, including gender, race, and class, intersect with age-based concerns, leaving minor parents doubly vulnerable to disruption of their parental rights. Minor parents are generally more likely to come into contact with the child welfare system than adult parents.<sup>166</sup> For mothers age fifteen or younger, the risk of the state removing their child from their care due to neglect or abuse are nearly double that of mothers between twenty and twenty-one years old.<sup>167</sup> Adolescents who are themselves wards of the state are more likely to become teen parents than their peers,<sup>168</sup> presenting particularly thorny problems for the child welfare system.<sup>169</sup> This population of parenting wards “is nearly invisible in the academic literature of both law and the social sciences, in state pol-

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Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871 (2009) (debating the reasons for disproportionate numbers of minority families, particularly black families, in the child welfare system).

166. See Glesner Fines, *supra* note 135, at 310.

167. See *id.* (“Teen mothers between the ages of eighteen and nineteen are one-third more likely to have a child put in foster care and are nearly 40% more likely to have a case of abuse or neglect reported against them than women who waited until age twenty or twenty-one to have their first child.”); Robert M. Goerge et al., *Consequences of Teen Childbearing for Child Abuse, Neglect, and Foster Care Placement*, in KIDS HAVING KIDS: ECONOMIC COSTS & SOCIAL CONSEQUENCES OF TEEN PREGNANCY 276 (Saul D. Hoffman & Rebecca A. Maynard eds., 2d ed. 2008) (“[C]hildren born to mothers age 15 or younger as nearly two times (1.75) as likely as children born to mothers age 20–21 to have an indicated child abuse or neglect report, and children born to mothers age 16–17 are 1.41 times as likely to become victims of child abuse or neglect, even after controlling for the other demographic factors.”).

168. Glesner Fines, *supra* note 135, at 310–11; Eve Stotland & Cynthia Godsoe, *The Legal Status of Pregnant and Parenting Youth in Foster Care*, 17 U. FLA. J.L. & PUB. POL’Y 1, 6 (2006) (“[D]ata demonstrates not just that a significant number of foster youth are pregnant and parenting, but that the incidence of pregnancy and parenthood is higher among foster youth than among their peers.”). A national study found that the rate of teen parenthood for girls in foster care was almost double as compared to girls outside the system (17.2% and 8.2% respectively). *Id.*; see also *Briefly: Opportunities to Help Youth in Foster Care: Addressing Pregnancy Prevention in the Implementation of the Fostering Connections to Success and Increasing Adoptions Act of 2008*, NAT’L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY 1 (2009), [https://thenationalcampaign.org/sites/default/files/resource-primary-download/Briefly\\_Youth\\_Foster\\_Care.pdf](https://thenationalcampaign.org/sites/default/files/resource-primary-download/Briefly_Youth_Foster_Care.pdf) (showing that teenage girls in foster care are 2.5 times more likely to get pregnant by age nineteen than their peers not in foster care); PETER J. PECORA ET AL., FOSTER CARE ALUMNI STUDIES, ASSESSING THE EFFECTS OF FOSTER CARE: EARLY RESULTS FROM THE CASEY NATIONAL ALUMNI STUDY 23 (2003), [http://www.casey.org/media/AlumniStudy\\_US\\_Report\\_Full.pdf](http://www.casey.org/media/AlumniStudy_US_Report_Full.pdf).

169. Glesner Fines, *supra* note 135, at 310–14; Stotland & Godsoe, *supra* note 168, at 5–7 (discussing demographics and legal issues facing pregnant and parenting minors in foster care).

icies, in practice guides for children's attorneys and guardians ad litem, and in the demographic data on children in foster care."<sup>170</sup> An adolescent parent who herself was a victim of abuse and neglect remains accountable to the same extent as an adult to charges of child abuse or neglect of her child.<sup>171</sup> Yet, the child welfare system does little to ensure that the cycle of abuse does not repeat itself.<sup>172</sup> Research shows that adolescents in foster care are more likely to become teenage parents, and children born to teen mothers are more likely to end up in foster care.<sup>173</sup> Sarah Katz, a lawyer for parents in dependency cases, describes this double-edged system of "protection":

I am startled by how quickly the system turns the tables on young parents, holding them accountable for their lack of independent living skills or poor judgment as parents—the very proficiencies that the dependency and delinquency systems are supposed to provide in loco parentis.<sup>174</sup>

Minor parents in the foster care system are at a particularly high risk of having both inadequate access to abortion care, especially in states with parental involvement mandates, and of losing custody of their infants.<sup>175</sup> Although there are legal and economic incentives for the child welfare system to allow foster children to maintain custody of their infants, child welfare scholars have surfaced ample evidence that, in practice, state officials often ignore

170. Stotland & Godsoe, *supra* note 168, at 61. For example, one study in New York found that the New York City foster care system did not report any data on youth in their care who became parents. See Jill E. Sheppard & Mark A. Woltman, *Children Raising Children: City Fails to Adequately Assist Pregnant and Parenting Youth in Foster Care*, PUB. ADVOC. FOR CITY N.Y. 3 (May 2005), [http://www.nyc.gov/html/records/pdf/govpub/2708children\\_raising\\_children.pdf](http://www.nyc.gov/html/records/pdf/govpub/2708children_raising_children.pdf).

171. Stotland & Godsoe, *supra* note 168, at 2–3.

172. *Id.* at 3.

173. Alison Stewart Ng & Kelleen Kaye, *Why It Matters: Teen Childbearing and Child Welfare*, NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY (2013), <https://thenationalcampaign.org/sites/default/files/resource-primary-download/childbearing-childwelfare.pdf>; see also Sarah Katz, *When the Child is a Parent: Effective Advocacy for Teen Parents in the Child Welfare System*, 79 TEMP. L. REV. 535, 535–53 (2006) (describing failures of the child welfare system to protect the parental rights of minor parents in foster care).

174. Katz, *supra* note 173, at 535; see also Stotland & Godsoe, *supra* note 168, at 23 ("The pervasiveness of such threats [to remove infants from parenting wards] also reflects the foster care system's readiness to switch alliances as a ward reaches adolescence. Now that she has a child, the same system that cast the ward as a helpless victim is quick to cast her as the enemy.").

175. See Rebouché, *supra* note 5, at 194–96; NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 107, at 9; Kara Sheli Walis, Note, *No Access, No Choice: Foster Care Youth, Abortion, and State Removal of Children*, 18 CUNY L. REV. 119 (2014) (discussing difficulties of foster care youth in accessing abortion and maintaining custody of their infants).



minors' parental rights.<sup>176</sup> Historically, state agents often viewed parenting wards as inherently inadequate parents, and accordingly, they separated infants from their teenage mothers.<sup>177</sup> A combination of prejudices based on the age, class, and race of parenting wards worked against teenage mothers' rights to maintain custody of their infants.<sup>178</sup> Supposedly "voluntary" surrenders of infants to foster care or adoption frequently resulted from coercive pressures, including lack of financial resources, denial of housing unless the minor parent surrendered her legal rights to her infant, and lack of understanding of legal rights.<sup>179</sup> One commentator observes:

"[V]oluntary" separation of parenting wards [minor parents in foster care] from their children is frequently the result of coercive measures; specifically young mothers have been pushed into giving up their children because of a lack of available services and funding. Foster care staff may threaten removal of their children, coercing these mothers into following strict rules and into not complaining about inadequate care.<sup>180</sup>

Stories abound of child welfare workers unjustifiably removing children from teenage mothers under the guise of child protection.<sup>181</sup> For example, due to a shortage of placement availability for mother/child pairs in the foster care system, minor parents may suffer unwanted, and sometimes illegal, separations from their children.<sup>182</sup> In their study of parenting youth in foster care, Eve Stotland and Cynthia Godsoe find:

Most disturbingly, advocates across the country report that states and counties frequently violate parenting ward's due process rights by coercing teens into "voluntarily" placing their child in government custody, separating wards from their children absent proper judicial find-

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176. Stotland & Godsoe, *supra* note 168, at 14–25 (discussing policies in four states with regard to parenting wards and difficulties parenting wards face in maintaining custody of their children).

177. See Rebecca Bonagura, *Redefining the Baseline: Reasonable Efforts, Family Preservation, and Parenting Foster Children in New York*, 18 COLUM. J. GENDER & L. 175, 181 (2008).

178. *Id.* at 179–81.

179. See *In re C.*, 607 N.Y.S.2d 1014, 1015–16 (Fam. Ct. 1994); *In re Tricia Lashawanda M.*, 451 N.Y.S.2d 553, 554 (Fam. Ct. 1982) (describing "lightning quick maneuvers" used to separate minor parent from her infant immediately after child birth).

180. Bonagura, *supra* note 177, at 181–82.

181. Stotland & Godsoe, *supra* note 168, at 23 (discussing "a problem noted by advocates for parenting wards in all of the survey states – threats by foster care staff to remove a parenting ward's child if the parenting ward fails to follow program rules or the ward's service plan, even though the ward's behavior clearly does not rise to the level of abuse or neglect as defined by relevant state law").

182. *Id.* at 45–46.

ings, and threatening to remove infants from wards' care based on infractions which do not pose an imminent risk of harm to the baby.<sup>183</sup>

One study describes the rationale for removal as based on fear of teenage girls' abilities to parent:

The majority of caseworkers in the foster care system were terrified of being blamed for something happening to babies of teen mothers, and thus they tended to take the babies and put them in separate homes. They didn't worry that this was against the law, which permitted removal only in cases of imminent risk. For them imminent risk was synonymous with teenage mothers.<sup>184</sup>

Although reported cases in this context are few, one striking case illustrates the worst (one hopes) of these practices. In *In re Tricia Lashawnda M.*, a family court in New York found that child welfare workers improperly sought termination of a teenage girl's parental rights and had long denied her right to be united with her child.<sup>185</sup> The mother, Catherine Linda, declared to be a neglected child and was placed with the Commissioner of Social Services for shelter care prior to her fourteenth birthday.<sup>186</sup> The following year, she gave birth to her daughter, provoking a series of actions by state officials apparently aimed at thwarting her parental rights.<sup>187</sup> As the court described, "upon being wheeled out of the delivery room, less than a half hour after she regained consciousness, and while still under the effects of the anesthetic," Catherine Linda's own social worker had her sign a "consent" instrument surrendering her baby to the agency.<sup>188</sup> After a "series of lightning quick maneuvers," Catherine Linda "found herself no longer under the care of this agency which had now conveniently taken over her own child as its ward to her own exclusion."<sup>189</sup> Even though facilities did exist for co-residence of mothers and infants, the child welfare agents chose instead to keep mother and child separated.<sup>190</sup> The court found that Catherine Linda made numerous efforts to maintain a relationship with her daughter and to regain her custody, "in spite of every possible obstacle, in spite of the Commissioner's dismal failure to meet his statutory responsibilities to his ward to keep her united

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183. *Id.* at 61.

184. BETSY KREBS & PAUL PITCOFF, *BEYOND THE FOSTER CARE SYSTEM: THE FUTURE FOR TEENS* 82 (2006); *see also* Katz, *supra* note 173, at 536–37 (describing case in which minor parent's child was adjudicated dependent based solely on parent's status as a minor in foster care by the trial court, a decision which the appeals court later overturned).

185. *In re Tricia Lashawanda M.*, 451 N.Y.S.2d 553, 554 (Fam. Ct. 1982).

186. *See id.*

187. *See id.* at 554–56.

188. *Id.* at 554.

189. *Id.*

190. *See id.*

with her child.”<sup>191</sup> The court ultimately concluded that the “best interests of this infant would appear to be served by uniting her with her mother.”<sup>192</sup>

While Catherine Linda’s story may represent an extreme case of mistreatment, more recent research on parenting wards describes similar stories of the child welfare system’s denial of resources to support minors who wish to parent their children – a lack of support that often results in the deprivation of parental rights.<sup>193</sup> Overall, evidence indicates that minor parents in foster care “face an up-hill struggle to maintain custody of their children even where no one has accused them of being unfit to parent.”<sup>194</sup> In addition, in child welfare law generally, and especially with adolescent parenting wards, the “overlay of racial bias and economic inequality is impossible to ignore.”<sup>195</sup> When youth in foster care, who are disproportionately poor and racial minorities, “lose their children to the system, the social inequalities that contributed to the wards’ initial placement are revisited upon a second generation.”<sup>196</sup> Thus, the child welfare system’s “failure to support parenting wards creates foster care ‘legacy’ families, every generation of which is raised in the state-controlled environment of foster care.”<sup>197</sup>

Unwarranted removal of their children remains an ongoing hazard, especially for minor parents in the foster care system, but teenage parents from less marginalized populations still confront similar risks.<sup>198</sup> The disabilities of minority, such as the inability to form a contract, place minor parents at a greater risk of losing their children in a dependency proceeding.<sup>199</sup> A number of commentators have noted that teenage parents are likely to have their parenting more closely scrutinized and are more likely to interact with individuals who are mandated reporters of abuse and neglect who may assume that

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191. *Id.* at 561.

192. *Id.* at 562.

193. *See, e.g.,* SHEPPARD & WOLTMAN, *supra* note 170, at 3 (describing a survey that found “a significant number of young women served by the foster care system have children and uncovered major lapses in the City services for these young mothers”); ROBERTS, *supra* note 165, at 87–88 (describing reports of New York City’s child welfare agency pressuring teen mothers to give up infants to relieve shortages in foster homes); YOUTH ADVOCACY CTR., INC., CARING FOR OUR CHILDREN: IMPROVING THE FOSTER CARE SYSTEM FOR TEEN MOTHERS AND THEIR CHILDREN 7–9 (1995) (on file with author) (describing parenting wards’ struggles while in foster care to maintain relationships with their children and prejudices they faced from child welfare agents); YOUTH ADVOCACY CTR., INC., THE FUTURE FOR TEENS IN FOSTER CARE (2001) (on file with author) (discussing foster care system’s focus on controlling or punishing parenting wards rather than supporting their futures).

194. Stotland & Godsoe, *supra* note 168, at 25.

195. *Id.* at 60; *see also* ROBERTS, *supra* note 165.

196. Stotland & Godsoe, *supra* note 168, at 60.

197. *Id.* at 61.

198. *See* Kendra Huard Fershee, *A Parent Is a Parent, No Matter How Small*, 18 WM. & MARY J. WOMEN & L. 425, 427 (2012).

199. *Id.* at 432–33 (2012); Katz, *supra* note 173, at 544 (discussing how disabilities of minority may negatively affect minor parents’ ability to parent their children).

children of minor parents are at risk simply by virtue of the parents' minority.<sup>200</sup> Once subject to review by child welfare workers, skepticism toward girls' reproductive and parenting decision making drives a tendency to disrupt their parental rights.<sup>201</sup>

One other common strain of thought underlies these practices and threads through both child welfare and adoption law.<sup>202</sup> The common conception that appears to animate resistance to supporting teenagers' parental rights is that termination of a minor parent's parental rights and placement of the infant for adoption will serve the best interests of both children: the minor parent and her infant.<sup>203</sup> In theory, the minor parent would be free to pursue educational and career opportunities, and her child could be raised in a more stable home by experienced adults desiring to parent.<sup>204</sup> However, evidence does not support the contention that, generally speaking, termination of parental rights results in positive consequences for both the adolescent parent and her child.<sup>205</sup> Even if it is generally true that children of teenage parents do not fare as well as those of adult parents, it does not follow that those children will necessarily fare better or even find alternative placements, especially if parents or state officials coerce removal of the minor parent's infant.<sup>206</sup>

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200. Glesner Fines, *supra* note 135, at 311–12; Stotland & Godsoe, *supra* note 168, at 6–7; Bonagura, *supra* note 177, at 181–82.

201. Katz, *supra* note 173, at 554 (“Courts, advocates, and social service providers often assume that the teenager is a per se unfit parent or may bypass the teenager’s parental rights simply because of her youth.”).

202. *Id.* at 555.

203. *Id.*

204. See Buss, *The Parental Rights of Minors*, *supra* note 111, at 816 (noting policy reasons for terminating rights of minor parents); Shannon S. Carothers et al., *Children of Adolescent Mothers: Exposure to Negative Life Events and the Role of Social Supports on Their Socioemotional Adjustment*, 35 J. YOUTH & ADOLESCENCE 827, 828 (2006) (discussing negative consequences that adolescent parenting has on both the minor parent and her child). It is also true that child welfare law more generally prioritizes adoption above all other solutions for children in the system. See Godsoe, *supra* note 155, at 114; ROBERTS, *supra* note 165.

205. See Godsoe, *supra* note 155, at 146.

206. Glesner Fines, *supra* note 135, at 333–34 (discussing negative aspects of termination of parental rights for minor parents); see also Buss, *The Parental Rights of Minors*, *supra* note 111, at 825–26 (“We know that many children do not fare particularly well with minor parents, but we do not know how they would fare with others, especially if they knew that they were taken from their birth mothers against their will.”). Complicated issues arise when the minor parent, herself a ward of the state, is charged with neglect or abuse of her child:

After all, which child do we seek to protect – the struggling teen or vulnerable infant? In many situations, the minor parent’s and child’s interests are aligned in remaining together, presenting the possibility of a mutually beneficial outcome. Nevertheless, hard cases exist in which the interests of the ward and her child clearly diverge.

Involuntary removal of a child from his or her parents may have long-term negative consequences for both the teenage parent and her infant.<sup>207</sup> As Barbara Glesner Fines explains:

For teen parents, that loss is not less than when adults have their parental rights terminated. A relinquishment is not cost free to any parent. . . . One can presume that the loss is equal if not more profound when the parent has her rights terminated. For teen parents, the loss and grief of relinquishing or losing a child is aggravated by the circumstances of fewer resources to make these decisions and less emotional maturity to cope with the emotional fallout.<sup>208</sup>

For a minor parent in foster care who typically has little family other than her own children, “[t]he possibility that her child will relive her fate may be particularly devastating.”<sup>209</sup> Furthermore, there is no guarantee that a minor parent pressured into giving up her child will have educational or career opportunities that will improve her economic circumstances, or that her child will find an adoptive placement rather than languish in foster care.<sup>210</sup> To the

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Stotland & Godsoe, *supra* note 168, at 60. These situations could be better addressed through alternatives to complete termination of parental rights, as discussed further *infra* Part III.B.

207. Glesner Fines, *supra* note 135, at 333–34 (children removed from teen parents can suffer with life-long identity issues, while the teen parents often also struggle with loss of self-worth and identity with profound consequences on future ability to parent, resulting in cutting themselves off from various low skill job opportunities such as child care and medical assisting); *see also infra* Part II.B.2 (discussing negative consequences to minor parents pressured into giving up their children).

208. Glesner Fines, *supra* note 135, at 317–18 (quoting Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers’ Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509, 529 (2005)) (“Research presents ‘a growing body of recent research data which has supported the claims of birth parents that relinquishing a child is indeed a profound loss experience, and that this loss even can have long-term deleterious results.’ These negative effects can be mitigated with ‘sufficient resources and support to make an informed and deliberate choice.’”). “The termination of parental rights has been characterized as tantamount to a ‘civil death penalty.’” *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004) (en banc) (quoting *In re N.R.C.*, 94 S.W.3d 799, 811 (Tex. App. 2002); *In re Parental Rights as to K.D.L.*, 118 Nev. 737, 58 P.3d 181, 186 (2002)). “It is a drastic intrusion into the sacred parent-child relationship.” *Id.* (quoting *In re P.C., B.M., & C.M.*, 62 S.W.3d 600, 603 (Mo. Ct. App. 2001)).

209. Stotland & Godsoe, *supra* note 168, at 23. California passed legislation recognizing the unique problems faced by parenting wards and that both children’s best interests are served by efforts to keep minor parents and their infants together. *See S.B. 1178*, 2004 Leg., Reg. Sess. (Ca. 2004); *see also Bonagura, supra* note 177, at 226–31 (describing California legislation on rights of parenting wards).

210. *See Buss, The Parental Rights of Minors, supra* note 111, at 825–26 (“We might also worry whether it is realistic to expect the state to find alternative families for babies whose relinquishment is compelled. This would be a particular concern for

contrary, poor and racial minority minor parents and their infants have much more limited economic opportunities for stable adoptive placements.<sup>211</sup>

Although, in theory, minor parents possess the same rights as adult parents to rear their children, child welfare practices indicate that, in reality, the law allows for a deep skepticism toward the rights of minor parents to parent their children.<sup>212</sup> Particularly for minor parents in foster care, social workers and judges “too often take a policing approach toward [parenting wards] that is adversarial and punitive, rather than supportive, educational, and preventative.”<sup>213</sup> Yet, “Just as poverty should not be confused with neglect, so too a parent’s youth should not be taken as synonymous with an imminent risk of harm to their child.”<sup>214</sup> Reflecting the problem of under-funding and racial and class bias endemic to the child welfare system, the law often responds by taking adolescent mothers’ children away from their care, rather than by providing needed resources to support their parenting.<sup>215</sup>

## 2. Minor Parents and Adoption Law

The child welfare system’s disregard of minors’ parental rights has parallels in adoption law.<sup>216</sup> Adoption occurs by two methods: (1) the state can terminate parental rights based on severe abuse or neglect and place the child for adoption, or (2) parents can voluntarily relinquish their child for adop-

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babies who are members of racial minority groups whose placement prospects are generally more limited.”); see also Amanda T. Perez, *Transracial Adoption and the Federal Adoption Subsidy*, 17 YALE L. & POL’Y REV. 201, 203 (1998) (describing the “severity of the gap in placement rates between minority and non-minority children”).

211. See ROBERTS, *supra* note 165. See also Dorothy E. Roberts, *Child Welfare’s Paradox*, 49 WM. & MARY L. REV. 881 (2007) (discussing child relocation services in a black community and the affect it has on the community and the children); Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171 (2003).

212. Bonagura, *supra* note 177, at 202.

213. *Id.* at 178 (footnote omitted). Cost savings are another possible motivation for the state’s desire to pressure minor parents to relinquish their infants for adoption, in order for the state to have one less minor to support and in line with the theory that family law seeks to “privatize dependency.” See, e.g., Deborah Dinner, *The Divorce Bargain: The Father’s Rights Movement and Family Inequalities*, 102 VA. L. REV. 79 (2016) (describing the law’s push in both private and public family law domains to privatize dependency).

214. Glesner Fines, *supra* note 135, at 326.

215. See Godsoe, *supra* note 155, at 170; ROBERTS, *supra* note 165; Bonagura, *supra* note 177, at 176 (“The complicated reality behind these numbers [of higher rates of pregnancy and foster care for parenting wards] is that because of state failure to provide the placements, services, and support necessary to function successfully as a family, parenting wards and their children are often denied the opportunity to remain together.”); see also DOROTHY ROBERTS, *KILLING THE BLACK BODY* (1998).

216. See Seymore, *supra* note 160, at 153–54.

tion.<sup>217</sup> Strikingly, there are generally no special protections for minor parents in either circumstance; most state laws treat adult parents and minor parents exactly the same in rules for involuntary termination and voluntary relinquishment.<sup>218</sup> Abortion opponents often present adoption as the better alternative to abortion, but research on the adoption of minor parents' infants presents a troubling picture of unwarranted terminations of parental rights, less-than-voluntary relinquishments, and difficulty finding placements for racial minority children.

The first method of adoption – the involuntary termination of parental rights – arises in the context of a child welfare dependency proceeding, such as a child abuse or neglect case.<sup>219</sup> As discussed previously, in many cases, the child welfare system's failure to adequately support minor parents leads to a higher incidence of adolescent parents being charged with abuse or neglect and a higher risk of losing their infant, either through an involuntary termination proceeding or through pressure to "voluntarily" relinquish their child.<sup>220</sup>

The second method of adoptive placement – voluntary relinquishment or "surrender" of a child – also raises special concerns in the context of adolescent parenting. In addition to those minors whose parental rights are at risk for termination by the child welfare system, "5% of teen birth mothers affirmatively relinquish their children for adoption."<sup>221</sup> The overall picture of voluntary relinquishment by minor parents remains quite murky because "[t]hese processes of relinquishment are less visible, with less certain rights to representation, than involuntary termination processes."<sup>222</sup> Moreover, "The degree to which these mothers' decisions are voluntary is difficult to assess."<sup>223</sup> As described in Part II.B.1, evidence from the child welfare context suggests that parenting wards may be coerced into "voluntarily" surrendering their children, sometimes due to a lack of services.<sup>224</sup> While child welfare law disproportionately impacts poor minority parents, adoption law practices, both historically and with modern day revocation rules, suggest that even less marginalized groups of adolescent mothers remain subject to disdain for their parental rights. Revocation case law, discussed further below,

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217. See Tracey B. Harding, Note, *Involuntary Termination of Parental Rights: Reform is Needed*, 39 BRANDEIS L.J. 895, 895 (2001).

218. See Seymore, *supra* note 160, at 129.

219. See Karl A.W. Demarce, Note, *Stepparent Adoption and Involuntary Termination of Parental Rights: When Petitioners Come to Court with Unclean Hands*, 61 MO. L. REV. 995, 1000–01 (1996).

220. Glesner Fines, *supra* note 135, at 310.

221. *Id.* at 313.

222. *Id.*

223. *Id.* ("Programs, parents, and even potential adoptive parents may create subtle or overt pressures for voluntary relinquishment.").

224. See Stotland & Godsoe, *supra* note 168, at 61; *In re C.*, 607 N.Y.S.2d 1014, 1015–16 (N.Y. Fam. Ct. 1994) (discussing ways in which parenting wards may be coerced into "voluntarily" relinquishing their infants).

indicates that some teenage mothers “voluntarily” relinquish their infants as a result of pressure from their own family, adoptive families and agencies, or state officials, and these mothers face extreme difficulties getting their infants back when they wish to set aside their consent to the adoption.

For the most part, state law governs adoption, and therefore, technical requirements vary. In a traditional or “closed” adoption, adoption terminates all legal and social contact between a child and his or her biological family.<sup>225</sup> The move to “open” adoption in the United States has shifted this practice somewhat, because open adoptions allow varying degrees of ongoing social contact between the adopted child and his or her biological family.<sup>226</sup> However, open adoptions still sever the legal parental tie between the biological parents and their child, and moreover, agreements for ongoing contact with the birth parents may not be enforceable.<sup>227</sup> Adoption requires the consent of both parents to relinquish the child and terminate parental rights or, alternatively, proof that a parent is unfit in an involuntary termination proceeding. Consent to adoption is generally irrevocable, with a few statutory exceptions examined further below.<sup>228</sup>

Typically, due to the permanence of terminating parental rights and “a veneration for the maternal-child bond,” state law extensively regulates the timing, procedures, and formal requirements for birth mother relinquishment to ensure that consent is voluntary.<sup>229</sup> Generally, adoption statutes require a biological parent’s written consent to relinquish the child and that the consent be made before a third party, such as a judge, notary, or other disinterested witness.<sup>230</sup> Rules for the timing and revocation of consent vary among the states, but generally, consent cannot be revoked outside of the established time window unless the biological parent proves fraud or duress.<sup>231</sup>

Almost every state provides that maternal consent for adoption cannot be given until after the birth of the child, and a number of states prescribe the number of hours or days that must pass after the child’s birth before the

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225. See Jessica R. Caterina, Note, *Glorious Bastards: The Legal and Civil Birth-right of Adoptees to Access Their Medical Records in Search of Genetic Identity*, 61 SYRACUSE L. REV. 145, 150 (2010).

226. *Id.*

227. Leigh Gaddie, *Open Adoption*, 22 J. AM. ACAD. MATRIMONIAL L. 499, 501 (2009) (discussing the current status and development of open adoption law in the United States); see also Annette Ruth Appell, *Reflections on the Movement Toward a More Child-Centered Adoption*, 32 W. NEW ENG. L. REV. 1 (2010).

228. Durcan & Appell, *supra* note 10, at 72.

229. *Id.* See Hollinger, *supra* note 79, at § 2.11[2].

230. See, e.g., Mary M. Beck, *Adoption of Children in Missouri*, 63 MO. L. REV. 423, 450 (1998).

231. Durcan & Appell, *supra* note 10, at 72; Hollinger, *supra* note 79, at § 2.12 (citing Katherine G. Thompson & Joan H. Hollinger, *Contested Adoptions: Strategy of the Case*, in 2 ADOPTION LAW AND PRACTICE § 8.02[1][a]–[b] (Joan H. Hollinger ed., 2013)).



mother can give a valid consent.<sup>232</sup> A few states provide additional protections to ensure the validity of the biological parents' consent. For example, Michigan does not allow a biological parent to grant consent for adoption until an investigation occurs and a judge fully explains her rights to the parent.<sup>233</sup> In Colorado, a parent must receive counseling before consenting to adoption.<sup>234</sup>

Few states limit the ability of a minor parent to consent to her child's adoption.<sup>235</sup> A small number of states require either a minor mother's parents to consent to or a judge to approve the surrender of her parental rights.<sup>236</sup> Other than a limited number of exceptions, most states' adoption laws either explicitly provide that the minority status of a parent does not affect her competency to consent or make no mention of treating minor parents differently.<sup>237</sup> In sum, "with near uniformity, adoption law reinforces the autonomy of a minor's decision to finally and irrevocably relinquish a child," ignoring the developmental conditions of youth that courts so emphasize in the abortion context.<sup>238</sup>

A number of commentators have argued that the differential treatment of abortion and adoption highlights the law's disfavor of abortion.<sup>239</sup> Unlike STI treatment or pregnancy-related care, adoption generally does not involve a medical situation posing physical health risks to the pregnant minor or her child that would justify eliminating the general requirement of parental consent.<sup>240</sup> Given the recognition that parents have a strong interest in involve-

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232. Durcan & Appell, *supra* note 10, at 73; Hollinger, *supra* note 79, at § 2.11[1][a] (noting that typical times for consent after birth are twelve, forty-eight, or seventy-two hours after childbirth or ten days after childbirth); *see also State Statutory Provisions Relating to Adoption*, in 1 ADOPTION LAW AND PRACTICE, *supra* note 79, at §§ 1-A.01–1-A.51 (state by state summary of the time at which consents may be executed and at the time of which consents become irrevocable).

233. Durcan & Appell, *supra* note 10, at 73; MICH. COMP. LAWS ANN. § 710.44 (West 2016); *see also State Statutory Provisions Relating to Adoption*, in 1 ADOPTION LAW AND PRACTICE, *supra* note 79, at § 1-A.23.

234. Durcan & Appell, *supra* note 10, at 73; *see also State Statutory Provisions Relating to Adoption*, in 1 ADOPTION LAW AND PRACTICE, *supra* note 79, at § 1-A.09.

235. Durcan & Appell, *supra* note 10, at 72; Seymore, *supra* note 160, at 129–33 (summarizing state laws on minor parents and adoption relinquishment).

236. Durcan & Appell, *supra* note 10, at 73.

237. *Id.*

238. *Id.* at 77.

239. *See, e.g., id.* at 69 ("The disparities between the legal treatment of adults and minors are highlighted when a pregnancy occurs, when one choice (adoption) elevates a minor's legal status to that of an adult, while another choice (abortion) treats the minor as a child whose decision is subject to parental or judicial approval.").

240. *Id.* at 77. It is possible that requiring parental consent or notice prior to a minor parent's decision to relinquish a child for adoption could delay the adoption, and states generally have a policy of ensuring that adoption occurs speedily after the birth of a child. However, most states impose parental consent or notice requirements for minors' abortion care despite evidence that delays in accessing abortion care can

ment with their minor child's decision to have an abortion, surely parents also have a strong interest in a minor child's decision to give up her child – their grandchild – for adoption. Relinquishment of a child is a major life decision that leads to cutting off all ties with blood relatives in a closed adoption, and it may cause deep regret in some birth parents.<sup>241</sup> Minor unwed mothers may especially be subject to inappropriate pressures to relinquish their infants for adoption and may need additional support through the decision-making process.<sup>242</sup> Yet, the possibility of youthful regret does not limit a minor parent's decision to relinquish her infant for adoption. In fact,

[R]egardless of whether a state's adoption statute mentions minor birth mothers, the general rule is that the minority of a birth parent will not free her from the consequences of her relinquishment, alt-

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also have negative health consequences. *See supra* note 125 and accompanying text (citing references to evidence on harms of delayed access to abortion care). Regarding states' interest in securing speedy adoption, courts have upheld laws that limit the rights of unwed fathers to prevent mothers from giving up their child for adoption against constitutional challenge based on the need for timely adoptions. *See* Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 82–83 (1995) (discussing case law limiting rights of unwed fathers to prevent adoption of their children). Statutes offering extremely limited parental rights to unwed fathers in the adoption context have been upheld as serving the important state interest in expediting the secure adoption of children. *See, e.g., In re Adoption of Baby Girl H.*, 635 N.W.2d 256, 262 (Neb. 2001). State courts addressing the rights of unwed fathers in the adoption context have emphasized that the “immediate secure adoption of children is an important state interest,” which is best served by “the placement of children as soon after birth as possible.” *Id.* at 265; *see also Wells v. Children's Aid Soc'y of Utah*, 681 P.2d 199 (Utah 1984), *abrogated on other grounds by In re Adoption of J.S.*, 358 P.3d 1009 (Utah 2014). The parents of minor unwed fathers also have no right to notice that their grandchild may be given up for adoption by the unwed mother, even if the result is termination of parental rights to the child. *See In re Adoption of Baby Girl H.*, 635 N.W.2d at 266 (noting that the adoption statutes governing unwed father's rights do not require notice to be served on parents of a minor unwed father). Hollinger explains that rules on consent are always balancing tension between wanting valid consent and wanting speedy adoption. Hollinger, *supra* note 79, at § 2.11[1][a] (“The legal rules on the timing of consents are ultimately a compromise between the interest in protecting biological mothers from making hasty or ill-informed decisions at a time of great physical and emotional stress, and the interest in expediting the adoption process for newborns.”).

241. *See* Shanley, *supra* note 240, at 96–97 (describing cases where bio-mom regretted her decision to relinquish her child for adoption and voided adoption years later with help from bio-dad whose rights were not properly terminated).

242. *See* Susan Frelich Appleton & Robert A. Pollak, *Exploring the Connections Between Adoption and IVF: Twibling Analyses*, 95 MINN. L. REV. HEADNOTES 60, 64 (2011) (footnote omitted) (“[W]e can find in the case law and literature on domestic adoption reasons to question the voluntariness of birth parents' consent to adoption, especially when the parent is a young, sexually active female or an unmarried father.”).

though had the same young woman entered into a commercial contract, she could void it at any time.<sup>243</sup>

Thus, despite similar sets of interests at stake in a minor's decision to terminate her pregnancy or to terminate her parental rights through adoption, the law mandates parental or judicial consent only when a teenager chooses abortion.<sup>244</sup> However, this apparent contrast on the surface of the law masks the similar underlying motivations and parallel effects of these legal rules. A closer study of adoption law reveals two key similarities in both the rules denying autonomy to girls seeking abortion and granting autonomy to girls relinquishing their infant for adoption. First, both areas of law evince skepticism toward adolescent girls' reproductive decision making, whether they seek to terminate a pregnancy or to carry it to term. Second, in practice, both areas of law operate as a means to punish teenage girls who transgress sexual purity norms. I aim to emphasize here not the superficial conflicts in the law, but the deeper similarities in these legal rules that scholars have tended to overlook. Although in some cases, adoption law likely protects the interests of minor parents who have good reasons to relinquish their infants for adoption, in other cases, the grant of "rights" to minor parents to surrender their infants serves to undermine rather than protect minor parents' parental rights.<sup>245</sup> The case law on revocation of consent illustrates this point.

All states have promulgated statutory rules for revocation of consent, but states take a variety of approaches to revocation.<sup>246</sup> Revocation generally depends on timing and whether the consent was taken in court or extrajudicially.<sup>247</sup> Notably, "[A] mother's minority is not a per se ground for rev-

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243. Durcan & Appell, *supra* note 10, at 74; Thompson & Hollinger, *supra* note 231, at § 8.02 [1][b].

244. Durcan & Appell, *supra* note 10, at 76–77.

245. See Glesner Fines, *supra* note 135, at 326.

246. Thompson & Hollinger, *supra* note 231, at § 8.02 [1][a].

247. *Id.* at § 8.02 [1][a][i]. Some states give explicit time frames during which revocation is permitted. Durcan & Appell, *supra* note 10, at 73. Others allow revocation only if the biological parent proves that consent was obtained through fraud or duress. *Id.* Some states explicitly require that consent conform strictly to statutory guidelines and, thus, allow revocation for deviation from the statutory guidelines. *Id.* Yet others allow revocation only if it serves the best interests of the child placed for adoption. *Id.* at 73–74; see also Thompson & Hollinger, *supra* note 231, at § 8.02 [1][a][i] & n.18; CAL. FAM. CODE § 9005(d) (West 2016) ("If the court finds that withdrawal of the consent to adoption is reasonable in view of all the circumstances and that withdrawal of the consent is in the child's best interest, the court shall approve the withdrawal of the consent. Otherwise the court shall withhold its approval."); HAW. REV. STAT. § 578-2(f) (West 2016) ("A consent to adoption . . . may not be withdrawn . . . without . . . a written finding that such action will be for the best interests of the individual to be adopted."); N.Y. DOM. REL. LAW § 115-b(3)(b) (McKinney 2016) ("[T]he court . . . has determined that the best interests of the child will be served by giving force and effect to such revocation.").

ocation of consent, even before the completion of the adoption.”<sup>248</sup> As mentioned above, this means that the minority of a birth mother is not grounds for revocation of her consent, even though under the infancy doctrine, she could revoke a commercial contract. Although courts may take into account the birth mother’s minority in assessing the voluntariness of her consent, the majority of reported decisions reject revocation on the basis of the birth mother’s minority.<sup>249</sup> Courts tend to rely on an analysis focusing on the best interests of the adopted child, and courts tend to conclude that the mother’s minority weighs against revocation because, based on her age, the court assumes that she cannot adequately care for the child.<sup>250</sup> A few cases have permitted revocation but primarily because the court found that revocation served the best interests of the prospective adoptee rather than based on the minor birth mother’s vulnerability.<sup>251</sup> In the abortion context, the Supreme Court specifically relied on notions of minors’ presumed immaturity and vulnerability as justifications for requiring either parental or judicial approval of the minor’s decision to seek abortion care.<sup>252</sup> Yet, courts generally have not considered what this analysis means for minor parents’ voluntary relinquishment of their children for adoption.<sup>253</sup>

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248. Durcan & Appell, *supra* note 10, at 74; Thompson & Hollinger, *supra* note 231, at § 8.02 [1][a][i].

249. See Thompson & Hollinger, *supra* note 231, at § 8.02[1][A][ii][b] nn.52–53; see, e.g., *Kathy O. v. Counseling & Family Servs.*, 438 N.E.2d 695 (Ill. App. Ct. 1982) (fifteen-year-old parent’s consent to adoption was not revocable based on minority).

250. Durcan & Appell, *supra* note 10, at 74. See Thompson & Hollinger, *supra* note 231, at § 8.02; see, e.g., *Martin v. Ford*, 277 S.W.2d 842 (Ark. 1955) (natural mother was considered “still very young [...] . . . not married and is untrained in any kind of work” in determining the order of adoption was valid); *In re Duarte’s Adoption*, 229 Cal. App. 2d 775 (Cal. Ct. App. 1964) (denying a fourteen-year-old mother’s request to revoke her consent to a private adoption, even where the child was later legitimized by the natural mother marrying natural father); *In re Adoption of Baby C.*, 480 A.2d 101 (N.H. 1984) (natural mother’s minor age considered in determining that natural parents were totally unprepared for child rearing and withdrawal of consent for adoption was not invalidated).

251. See Durcan & Appell, *supra* note 10, at 74; Thompson & Hollinger, *supra* note 231, at § 8.02[1][a][i]. See, e.g., *Graves v. Graves*, 288 So. 2d 142 (Ala. Civ. App. 1973) (holding that the best interest of the child is served by returning her to her mother and revoking the consent of adoption to the grandparents even when there is no duress, fraud, or coercion at time of consent); *In re D.*, 408 S.W.2d 361 (Mo. Ct. App. 1966) (finding that it was in the best interest of two daughters to withdraw consent to adoption by grandparents but no duress, fraud, or coercion found). But see *Janet G. v. N.Y. Foundling Hosp.*, 403 N.Y.S.2d 646 (N.Y. Fam. Ct. 1978) (permitting a minor mother’s revocation of consent based on evidence that the mother had not voluntarily, informally, and knowingly surrendered her child for adoption, and noting the special vulnerability minors experience when making important decisions).

252. See *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622 (1979) (plurality opinion).

253. See Appleton, *supra* note 11, at 282; Seymore, *supra* note 160, at 154–55. Courts also give short shrift to minor fathers’ interests in the adoption of their chil-

So why declare minors to be immature for purposes of abortion consent, but mature for purposes of adoption consent? First, as in child welfare law, a skeptical view of an adolescent's decision to become a teenage parent drives the law, in practice. Scholars suspect that the belief that adolescent parents should *not* exercise the right to parent their children explains why the law treats minor birth parents like adults rather than like children within the adoption context.<sup>254</sup> Expanding minors' rights by permitting them to consent to their infants' adoptions ensures easier enforcement of supposedly voluntary relinquishments, even in questionable circumstances. Cases in which birth mothers have lost their attempts to revoke their consent, while only offering a limited window into voluntary relinquishments, are illuminating here.<sup>255</sup>

One adoption revocation case, decided prior to *Roe v. Wade*,<sup>256</sup> openly articulates this rationale – that unmarried minor girls should *not* possess parental rights.<sup>257</sup> In many cases, however, this pernicious purpose for denying minor parents' parental rights remains hidden from view. In 1955, an Arkansas court refused to allow a sixteen-year-old birth mother, Katherine, to set aside her consent to adoption of her infant.<sup>258</sup> Katherine had granted consent for the adoption two days after giving birth and changed her mind only four months thereafter, prior to a final adoption decree.<sup>259</sup> The facts also suggested that Katherine's physician pressured her into relinquishing her baby for adoption based on her age, poverty, and the shame surrounding the infants' illegitimacy and her sexual behavior.<sup>260</sup> The court rejected revocation of consent on the ground that allowing the adoption to stand would serve the best interests of both Katherine and her infant.<sup>261</sup> The court emphasized that without her baby, the teenage mother "could lead a normal life" and would not have to face her small town "where everyone in the community would know of her plight."<sup>262</sup> As Professors Durcan and Appell note, the court

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dren. See *In re Adoption of T.B.*, 232 P.3d 1026 (Utah 2010) (assuming the responsibilities of parenthood does not give a putative father a constitutionally protected right to consent to the adoption of his child); see also Hollinger, *supra* note 79, at § 2.05.

254. Durcan & Appell, *supra* note 10, at 75 (arguing that the desire to make it easier to remove infants from teenage parents' care is perhaps the rationale behind treating minor birth parents like adults and not children in adoption cases).

255. See Samuels, *supra* note 208, at 571 (noting that revocation case law provides a window into voluntariness of consent for adoption and reviewing case law where mothers' sought to set aside their relinquishments).

256. 410 U.S. 113 (1793).

257. *Martin v. Ford*, 277 S.W.2d 842 (Ark. 1955).

258. *Id.* at 844–45.

259. *Id.* at 844.

260. See *id.* at 843–44, 846 (stating that doctor suggested adoption given Katherine's circumstances, arranged for adoption with an infertile couple that he knew, and offered her free medical care "for the purpose of influencing the decision she later made").

261. *Id.* at 845.

262. *Id.*

“substituted its judgment of what was in the mother’s best interest for her own assessment, giving rise to the apparent anomaly that the same minor is mature enough to decide to relinquish her baby, but not to decide to keep the child.”<sup>263</sup> A number of other revocation cases also imply skepticism toward adolescent girls’ decisions to parent their infants, and such cases enforce the normative view that minor parents should not possess parental rights.<sup>264</sup>

Second, not only does the apparent expansion of adolescent rights within the adoption context serve to undermine minor parents’ parental rights in some cases, but revocation case law also reveals that granting minor parents an unfettered “right” to relinquish provides a means to punish teenage female transgression of sexual mores. Susan Frelich Appleton conducted an extensive and fascinating study of reproduction and regret in the law with some particularly poignant insights into the law of relinquishment and revocation.<sup>265</sup> Professor Appleton notes that adoption law and practice have long treated unmarried mothers as deviant and, hence, unfit to parent.<sup>266</sup> Several authors have recounted the long history of narratives of trauma and regret for women pressured or forced to give up their infants for adoption in the pre-*Roe* era, particularly white mothers who could meet the demand for white babies from infertile couples.<sup>267</sup> This narrative continues to some extent today, most strikingly, in cases involving young birth mothers’ attempts at revocation.

For example, in a recent case from the Mississippi Supreme Court, *In re Adoption of D.N.T.*, the court declined to let a seventeen-year-old birth mother reclaim her baby, despite a troubling set of facts that the dissent characterized as “coercion” of the birth mother.<sup>268</sup> The birth mother, Camille, changed her mind about the adoption only two weeks after signing her consent and after almost two years of raising her daughter. Camille consented to the adoption while she was living with the adoptive couple who, evidence

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263. Durcan & Appell, *supra* note 10, at 75.

264. See cases cited *infra* notes 274–78. The push to privatize dependency may also provide an additional explanation for the urge to have minor parents relinquish their infants if courts are generally skeptical that minors can financially support an infant and believe that minor mothers would be more capable of self-support upon relinquishment.

265. Appleton, *supra* note 11, at 255.

266. *Id.* at 275.

267. *Id.*; see also ANN FESSLER, *THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE ROE V. WADE* (2006); RICKIE SOLINGER, *BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES* 69–70 (2001). It is important to note that the law has differed significantly in its treatment of white single mothers versus women of color. See generally Roberts, *supra* note 211. Women of color have long been viewed as inherently deviant and often face different kinds of challenges to their parental rights. See generally *id.* (addressing child relocation services in black communities).

268. *In re Adoption of D.N.T.*, 843 So. 2d 690 (Miss. 2003).

showed, had pressured her to sign the adoption papers without having her own lawyer or consulting with her own mother who had helped her raise her daughter. The evidence showed that Camille believed she would have continued contact with her daughter, which the adopting couple denied almost immediately post-adoption. Camille's mother joined her in the suit to revoke Camille's consent and nullify the adoption.<sup>269</sup>

Despite these compelling facts, the Mississippi Supreme Court ruled against Camille and her mother in a revealing opinion. To justify its decision, the court used several different tactics, including relying on "the state adoption consent statute that makes the parent's age irrelevant, construing Camille's initial surrender as an abandonment sufficient to justify termination of parental rights and condemning Camille's bad decisions and immaturity, including . . . her sexual relationship with her new boyfriend."<sup>270</sup> Notably, the court relied on the lower court's logic that when Camille gave birth, she became a parent and thus achieved emancipation.<sup>271</sup> In response to Camille's contention that because minors must obtain parental or judicial consent for abortion, the same should apply for adoption, the court replied:

A minor who is contemplating an abortion has not yet become a parent and there is a clear distinction in the law between the way a minor child contemplating an abortion is treated and the way that a minor child contemplating an adoption is considered and it's the fact of that child's parenthood that makes that decision different.<sup>272</sup>

In other words, when Camille gave birth, she achieved the status of parent, and thus, as described in Part II.A, the court superficially treated her like an adult in her decisions about her child, in theory "respecting" her parental rights. Yet, at the same time the court asserted that Camille should be treated like an adult parent and held to her decision to relinquish, it also emphasized Camille's "immature" behavior, particularly her sexual behavior, which the court gave as a reason that she should not continue to parent her daughter.<sup>273</sup> The *D.N.T.* court's rigidly formalistic analysis presents a striking example of how courts can apply both the parent and child categories at the same time to minor parents, but in a punitive rather than supportive manner. Because of her formal status as "parent," the court deems Camille to be mature enough to

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269. *Id.* at 695–96.

270. Appleton, *supra* note 11, at 279. See *In re Adoption of D.N.T.*, 843 So. 2d at 708.

271. See *In re Adoption of D.N.T.*, 843 So. 2d at 709–10; Appleton, *supra* note 11, at 282.

272. See *In re Adoption of D.N.T.*, 843 So. 2d at 709.

273. *Id.* ("The record is replete with bad decisions Camille has made her entire life. She has proven herself immature beyond understanding, as evidenced adequately by her own testimony of leaving [the baby] with almost strangers . . . while she spent the nights at her new boyfriend's house having sex and smoking marihuana with him.").

consent to adoption, but by virtue of her age and sexual behavior, also deems her too immature to parent her child. Other courts have engaged in strikingly similar analyses in revocation cases.<sup>274</sup>

As Professor Appleton explains, although today most unmarried mothers who choose to give birth also choose to keep their child, “one still sees stories of deep and anguished regret in reported cases of attempted revocations of adoption plans.”<sup>275</sup> Yet, birth mothers typically can only prevail in a revocation case when they can prove coercion or duress, and many courts have set a high legal threshold to establish such a finding.<sup>276</sup> For example,

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274. See, e.g., *Fowler v. Merkle*, 564 So. 2d 960, 96–62 (Ala. Civ. App. 1989) (denying revocation of consent); *Kayla P. v. Morgan C.*, No. 1 CA-JV 09-0190, 2010 WL 987071 (Ariz. Ct. App. 2010); *Kathy O. v. Counseling & Family Servs.*, 438 N.E.2d 695 (Ill. App. Ct. 1982) (fifteen-year-old parent’s consent to adoption was not revocable based on minority); *In re Minor Child David*, 256 A.2d 583, 587–88 (Me. 1969); *Grafe v. Olds*, 556 So. 2d 690 (Miss. 1990) (denying revocation of consent during period of placement of child with prospective parents and entry of adoption decree); *In re Adoption of A.D.A.*, 789 S.W.2d 842 (Mo. Ct. App. 1990) (denying revocation of consent); *In re Baby Boy L.*, 534 N.Y.S.2d 706 (N.Y. App. Div. 1988); *In re Adoption of J.H.*, No. 06CA008902, 2006 WL 3257525, at \*1, \*4 (Ohio Ct. App. Nov. 13, 2006) (denying withdrawal of consent by seventeen-year-old); *In re Adoption of Morrison*, 560 P.2d 240 (Okla. Civ. App. 1976) (holding that consent executed by sixteen-year-old mother is effective even though she did not have counsel or guardian ad litem and opining that requirement of court approval adequately protected minor parents); *Sigurdson v. Wash. Dep’t of Soc. & Health Serv. (In re Dependency of M.S.)*, 236 P.3d 214, 218 (Wash. Ct. App. 2010) (quoting *In re Adoption of Baby Girl K.*, 615 P.2d 1310, 1316 (Wash. Ct. App. 1980)). But see *Ex parte Sullivan*, 407 So. 2d 559 (Ala. 1981) (returning child to seventeen-year-old birth mother even after passage of significant period of time due to failure to follow statutory requirements of adoption consent); *A.F. v. Spence-Chapin Agency*, 537 N.Y.S.2d 752 (N.Y. Fam. Ct. 1989) (questioning whether minor father’s consent to adoption was voluntary but nevertheless concluding that father’s consent was not required); *Janet G. v. Foundling Hosp.*, 403 N.Y.S.2d 646 (N.Y. Fam. Ct. 1978) (permitting minor mother’s revocation of consent based on evidence that mother had not voluntarily, informally, and knowingly surrendered her child for adoption, and noting the special vulnerability minors experience when making important decisions); see also Gary D. Spivey, Annotation, *What Constitutes “Duress” in Obtaining Parent’s Consent to Adoption of Child or Surrender of Child to Adoption Agency*, 74 A.L.R.3d 527 (1976); Jack W. Shaw, Annotation, *What Constitutes Undue Influence in Obtaining A Parent’s Consent to Adoption of Child*, 50 A.L.R.3d 918 (1973).

275. Appleton, *supra* note 11, at 281.

276. *Id.* Whether there has been sufficient fraud or duress to warrant revoking a birth parent’s consent is left up to the discretion of the courts. See Thompson & Hollinger, *supra* note 231, at § 8.02[1][b]. “Generally, . . . a challenge will not be permitted for duress of circumstances, or for what some courts refer to as a mere ‘transient situational disturbance,’ particularly if an adoptive placement has already been made.” *Id.* See *In re Baby Boy R.*, 386 S.E.2d 839 (W. Va. 1989) (holding that mother who signed voluntary relinquishment in hospital before a social worker and notary, after being told about significance of her actions, cannot revoke her consent for mere “duress of circumstances”). For example, a teenage mother in Florida con-



one court openly declared, “‘proof of inexperience, indecisiveness, uncertainty, emotional stress and a failure to fully comprehend the effect of surrender’ is insufficient to justify revocation.”<sup>277</sup> Thus, “Even when circumstances raise serious questions about the voluntariness of the initial consent or surrender – as in *D.N.T.*, when the birth mother is a minor and especially eager prospective adopters have exploited her vulnerabilities – simple regret, no matter how intensely felt, typically fails to carry the day in court.”<sup>278</sup> Professor Appleton shows that the adoption case law and literature “suggest that

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sent to a private placement without the use of an adoption agency or the statutorily required pre-consent interview by an adoption entity. *J.S. v. S.A.*, 912 So. 2d 650, 656–57 (Fla. Dist. Ct. App. 2005). Nevertheless, the court upheld the consent although the reliability was “open to grave question” and the third party’s conduct was possibly criminal. *Id.* at 659. The record also showed that the mother’s consent resulted from social and financial pressures, which the court held did not amount to fraud or duress. *Id.* “Neither emotional distress nor mistake of fact will ordinarily constitute a sufficient ground to vitiate a consent to an adoption.” Thompson & Hollinger, *supra* note 231, at § 8.02.

277. *In re Dependency of M.S.*, 236 P.3d at 218 (alteration in original) (quoting *In re Adoption of Baby Girl K.*, 615 P.2d at 1310). See *In re Baby Boy L.*, 534 N.Y.S.2d at 707 (citations omitted) (“It has also been recognized, in this regard, that suggestions, persuasion, arguments or entreaties in favor of adoption do not constitute the ‘kind of force’ which would sustain a finding of duress and thereby warrant the vacatur of a natural parent’s consent to an adoption. Thus, parental threats, pressure by the surrendering mother’s family, advice by the surrendering parent’s physician and mother, and emotional distress or depression have all been cited as insufficient to overturn a consent to the surrender of a child for adoption.”); *In re Adoption of Baby Girl K.*, 615 P.2d at 1315 (“We hold that a lack of full understanding of the consequences, coupled with inexperience, emotional stress, uncertainty and indecisiveness are insufficient findings to allow repudiation of the surrender.”); see also Appleton, *supra* note 11, at 281–82 (discussing adoption revocation cases).

278. Appleton, *supra* note 11, at 281; see also *Kayla P.*, 2010 WL 987071 (juvenile mother failed to prove undue influence and duress when giving consent even though she claimed to have not fully read or understood the adoption papers in adoptive parents’ attorney’s office and was not independently represented by counsel); *In re Minor Child David*, 256 A.2d at 587–88 (“We conclude that the execution of the surrender-release is, when all statutory requirements have been met, a completed act of solemn import, irrevocable by the mother . . . . We arrive at this conclusion fully aware of the probability that some mothers, experiencing the pain of actual separation from their children, may regret their surrender even though it was arrived at after careful deliberation.”); *In re Baby Boy L.*, 534 N.Y.S.2d 706 (consent forms were not executed under duress even though seventeen-year-old minor’s mother told her she would no longer be able to live at home if she kept the baby); ROBERTS, *supra* note 165 (discussing the frequency of state interventions in minority families, often including pressure to “voluntarily” terminate parental rights); Mary Lyndon Shanley, *Toward New Understandings of Adoption: Individuals and Relationships in Transracial and Open Adoption*, in *NOMOS XLIV: CHILD, FAMILY, AND STATE* 15, 38 (Stephen Macedo & Iris Marion Young eds., N.Y. Univ. Press 2003).

regret has no legal traction because the initial requirement of voluntary consent itself receives only lip service, as illustrated by *D.N.T.*”<sup>279</sup>

Strikingly, the revocation cases from private adoption law echo the similarly facile dispatch of voluntary consent requirements in child welfare law.<sup>280</sup> While child welfare law disproportionately impacts racial minority families and doubly impacts minority adolescent parents within the system, adoption practices appear to undermine the parental rights of white adolescent mothers as well.<sup>281</sup> Comparing these two areas of law demonstrates that, as a whole, the law in practice resists granting minors the right to parent their children, even though in theory minors possess the same parental rights as adults.

Comparing adoption law to abortion law also yields interesting insights. The courts’ treatment of regret in adoption law bears a striking contrast to the use of regret in abortion cases.<sup>282</sup> In *Gonzales v. Carhart*, the Supreme Court “makes generalizations about women’s post-abortion regret legally relevant” and deploys the Court’s conception of abortion regret as a method for “reproaching” non-normative women.<sup>283</sup> However, in the adoption context, women’s (or girls’) post-surrender regret “often carries no such legal weight.”<sup>284</sup> Instead, courts treat the pain of regret as “well-deserved punishment for women who have transgressed prevailing sexual norms.”<sup>285</sup> As Professor Appleton persuasively argues, “[A]doption practice and case law often treat regret as a regulatory device, part of the price of illicit sex and also the start of the road to redemption.”<sup>286</sup> The law’s deployment of regret in this manner fits within traditional gender scripts and family law’s preoccupation with sexual discipline.<sup>287</sup>

The upshot is that the “right” of minor parents to relinquish their children for adoption serves the interest, in some cases, of denying the minor her rights and imposing a kind of punishment for her sexual transgressions, simi-

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279. Appleton, *supra* note 11, at 281. “Surely, Camille’s status as a minor and the surrounding circumstances raise significant questions about the voluntariness and genuineness of her consent, questions the dissenting judges would find fatal.” *Id.* at 281.

280. *See infra* Part II.B.2.

281. *See generally* FESSLER, *supra* note 267.

282. Appleton, *supra* note 11, at 280 (“Despite the similar settings, however, the legal responses to assertions of regret diverge sharply in the context of abortion, on one hand, and adoption, on the other.”).

283. *Id.* (“[N]o legal authority has suggested, parallel to *Gonzales*’s reasoning, that prospective regret ought to preclude altogether particular options for birth parents, namely surrender, even if certain anti-adoption support groups might embrace this preference.”). *See generally* SOLINGER, *supra* note 267, at 103–38 (describing anti-adoption advocacy of Concerned United Birthparents (CUB)).

284. Appleton, *supra* note 11, at 280.

285. *Id.* at 282–83.

286. *Id.* at 283.

287. *Id.* at 323–32.

larly to judicial bypass in the abortion context.<sup>288</sup> The conflicts in the law on adolescent adoption versus abortion lie at the surface while at a deeper level, the conflicting rules serve similar latent purposes: expressing skepticism toward adolescents' reproductive decision making and punishing teenage girls' deviations from sexual purity norms.

Other scholars have noted that the conflicting rules on adoption and abortion appear to be motivated not by "any unified theory of child development, the protection of pregnant teenagers, or the nature and long term effects of the decisions," but instead by societal policies, including "the promotion of live births and control of minors' sexuality."<sup>289</sup> As currently structured, the law both thwarts minors' access to abortion on the basis that adolescent girls are too immature to make important reproductive decisions on their own, and undermines minors' parental rights on the basis that adolescent girls are not mature enough to parent their children. A closer study of adolescents' reproductive rights thus demonstrates that both aspects of the law – the law on abortion rights and parental rights – work in tandem to enforce traditional gender scripts about sexuality and motherhood.<sup>290</sup> In particular, the law reinforces the notion that a self-sacrificing young mother should give birth and surrender her child for adoption – no matter the emotional costs – as a means to redemption for her sexually irresponsible behavior.

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As the analysis in Part II illustrates, there is a striking difference between the rights of minor parents in theory and in reality. A superficial review of the law on adolescent reproduction suggests conflict and incoherence, restricting teenage girls' access to abortion while allowing unfettered rights over childbirth and parenting. A closer look at the reality of minor parents' parental rights unmasks a perverse coherence to the law. Both abortion law and family law take a highly skeptical view of adolescents' rights to make reproductive decisions, and in practice, the law operates as a means to punish sexual transgression and enforce traditional gender norms. The judicial bypass system for abortion, the child welfare system, and adoption practices undermine adolescents' reproductive rights, whichever path of pregnancy

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288. See generally Sanger, *Separating from Children*, *supra* note 11 (describing marginalization of birth mothers in adoption practice).

289. Durcan & Appell, *supra* note 10, at 77; see also Oberman, *Turning Girls Into Women*, *supra* note 67, at 22; J. Shoshonna Ehrlich, *Journey Through the Courts: Minor Abortion and the Quest for Reproductive Fairness*, 10 YALE J.L. & FEMINISM 1, 2 (1998).

290. See, e.g., Courtney Megan Cahill, *Abortion and Disgust*, 48 HARV. C.R.-C.L. L. REV. 409, 414 (2013) (arguing that rejection of "the idea that women would renounce motherhood given the opportunity to embrace it" drives feelings of abortion disgust).

resolution they choose.<sup>291</sup> Each of these systems of law claims to serve children's best interests. Instead, in too many cases, the law merely inflicts shame and punishment, rather than ensuring sound adolescent decision making and a path to well-being for both generations of children.

### III. A THIRD WAY: THIRD PARTY SUPPORT FOR PREGNANT OR PARENTING ADOLESCENTS

So what are we to do given the law's suspicion of teenage girls who transgress sexual norms and end up pregnant or parenting? It may be that pregnant or parenting adolescents need no special protection, and that we should advocate for greater legal autonomy, both in theory and in practice. While this approach has some appeal, this Article argues that it is practically and politically unachievable. Furthermore, there is significant evidence that some adolescents would benefit from supportive adult guidance when facing difficult, consequential decisions.

Adolescents occupy a unique space between childhood and adulthood.<sup>292</sup> The debates about youth capacity for sound decision making continue to rage, and the law reflects these debates. Youth law scholars have extensively dissected the inconsistencies in the law's treatment of adolescents.<sup>293</sup> The growing body of scientific research on child development has only added fuel to the fire. Science does not provide a simple answer to questions as to whether or when children might obtain adult-like capacities for sound decision making. What the scientific research suggests, putting it all together, is that adolescents' cognitive functioning is more like that of adults than of younger children, but adolescents may not exercise "judgment"

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291. It is notable that, in contrast to decisions about pregnancy and parenting, minors can generally access contraception without parental or state involvement. *See supra* Part I.A. It may be that preventing teenage pregnancy is generally viewed as a public health good that, although still controversial, requires access to contraception. However, once a girl is pregnant, she deserves punishment for her "irresponsible" decision to have sex and, perhaps, for failing to use contraception.

292. Mutcherson, *supra* note 27, at 256 ("Adolescence, then, is less a place of being as it is a place of being in-between."); Scott, *The Legal Construction of Adolescence*, *supra* note 1, at 556 ("Conventional wisdom about adolescence generally tracks scientific knowledge about human development--individuals in this group are proceeding through a developmental stage between childhood and adulthood--they are neither children nor adults."). There is some debate about whether adolescence is a cultural creation, rather than an inevitable biological stage of development. Regardless, in American law there has long been a "conviction that adolescents, despite their adult-like appearances, were somehow different and in need of adult guidance and legal protection." *See Oberman, Minor Rights and Wrongs*, *supra* note 114, at 130.

293. *See, e.g.,* Cunningham, *supra* note 2, at 277; Jennifer Rosato, *What Are the Implications of Roper's Dilemma for Adolescent Health Law?*, 20 J.L. & POL'Y 167 (2011); Scott, *Judgment and Reasoning*, *supra* note 118.

in the same manner as adults.<sup>294</sup> In other words, adolescents can engage in rational thought processes but may nevertheless engage in poorer quality decision making due to age-related tendencies, such as impulsiveness, a focus on short-term versus long-term consequences, and undue emphasis on appearance and peer approval.<sup>295</sup> Thus, although society recognizes that adolescents can engage in adult-like rational thought processes<sup>296</sup> and adult-like biological behaviors, such as sex and reproduction,<sup>297</sup> society still feels the need to protect adolescents from their own poorer quality decision making. Such concerns are especially salient when the well-being of another generation – the infants of minor parents – depends upon the sound judgment of responsible parties. Yet, in the context of sexuality and reproduction, society knows that many teenagers will not or cannot involve parents in their decision making, and that forced parental or governmental involvement does not always serve either generation of children’s best interests. Given the tension between the need to make room for adolescents’ growing sense of autonomy and the desire to provide them with adult guidance in important decisions, this Part proposes regulatory reforms that involve third parties, other than parents or the state, in adolescents’ decisions about pregnancy and parenting.

First, this Part summarizes the debates surrounding scientific evidence on adolescent decision making and its impact on the law. Many scholars have noted that science does not impart definitive guidance for the law in this context. Given the strong political resistance to expanding adolescent autonomy in general, this Part suggests solutions beyond the parent/state binary for providing more effective adult guidance to pregnant or parenting teenagers.

Next, this Part briefly explores possible policy solutions involving third party adults within the contexts of child welfare, abortion, and adoption law that would better serve the goals of ensuring sound decision making for teenagers and protecting the well-being of minor parents and their infants. The solutions I propose aim to value increased adolescent autonomy, to the extent feasible, and to support adolescents’ reproductive choices whether they choose abortion, parenting, or adoption. In this Article, “third parties” means adults other than parents or state officials who have authority over the minor,

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294. See Scott, *Judgment and Reasoning*, *supra* note 118, at 1659; see discussion *infra* Part III.A.

295. See *infra* Part III.A.

296. For example, family law custody decisions include adolescents in the decision-making process. Mutcherson, *supra* note 27, at 289–90 (“[F]amily courts routinely allow or even require that older children participate in decisions about custody, visitation, and adoption.”).

297. See *supra* Part II.A (discussing medical treatment exemptions for minors seeking STI treatment or prenatal care). See also Steve James, Comment, *Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform*, 78 UMKC L. REV. 241 (2009) (discussing “Romeo & Juliet” statutory rape exemptions); Chauntelle R. Wood, *Romeo and Juliet: The 21st Century Juvenile Sex Offenders*, 39 S. U. L. REV. 385 (2012).

such as judges or child welfare agents.<sup>298</sup> Depending on the context, third parties who might serve as resources for pregnant or parenting minors include extended family members, neighbors, and community members; health care professionals; and lawyers acting on behalf of the minor.<sup>299</sup> Although private family law has expanded its understanding of the importance of third party adults to children's well being, a similar shift has not been taken up as extensively in child welfare law.<sup>300</sup> Similarly, an alternative to parental involvement – judicial bypass – has long been used in abortion law, but it has been an ineffective and punitive third party alternative.<sup>301</sup> More effective third party solutions could be deployed both in the abortion context and in adoption relinquishment cases – for example, requiring third party counseling in both circumstances. Such solutions would better align the law in those areas as well.

*A. Science, Politics, and Youth Law: Do Adolescents Need Adult Guidance?*

This Part provides a brief overview of existing scientific data on adolescents' capacities for sound decision making and the literature on the implications of this scientific evidence for legal policy. Scientific evidence on adolescent decision making appears to be in conflict in some respects, although scholars have attempted to reconcile the data.<sup>302</sup> This Part argues that, given the scientific uncertainties and political realities surrounding policymaking in the context of teenage sexuality and reproduction, society must find more effective solutions to address the dilemma of the gradual maturity of pregnant or parenting adolescents.

In recent decades, scientific research on adolescent development has grown exponentially. This science has been used in conflicting ways in legal

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298. Private 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. See Susan Frelich Appleton, *Parents By the Numbers*, 37 HOFSTRA L. REV. 11, 19, 25–26 (2008); see also Manian, *supra* note 94, at 246–47 (summarizing law and literature on private family law's increasing recognition of third parties in family life). Although it remains clear that only parents possess the constitutional right to control their children's upbringing, the question of *who* counts as a parent has become increasingly complex. See generally Appleton, *supra*; Manian, *supra* note 94.

299. I do not attempt a detailed analysis of reform proposals incorporating third parties in this last Part. Instead, I aim to sketch out the idea generally and urge a conversation about how to create space for adolescence in the law by providing options between the extremes of adolescent autonomy versus subjection to the authority of parent and state.

300. See Manian, *supra* note 94, at 247.

301. See *id.* at 245.

302. See Scott, *Judgment and Reasoning*, *supra* note 118, at 1609.

advocacy. Research in developmental psychology has shown that adolescents as young as fourteen have cognitive abilities similar to adults.<sup>303</sup> Advocates for abortion rights have relied on this research to argue that minors should not be required to obtain parental or judicial consent prior to obtaining abortion care.<sup>304</sup> In contrast, other areas of research, such as neuroscience, suggest that adolescents differ in fundamental ways in the quality of their decision making.<sup>305</sup> Advocates for youth within the context of juvenile crime

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303. See, e.g., Thomas Grisso & Linda Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 PROF. PSYCHOL. 412, 423 (1978); David G. Scherer, *The Capacities of Minors to Exercise Voluntariness in Medical Treatment Decisions*, 15 LAW & HUM. BEHAV. 431, 436 (1991); Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1595–96 (1982). See generally Mutcherson, *supra* note 5, at 935–39 (discussing research on adolescent decision-making capacity in healthcare contexts); Rosato, *supra* note 293, at 177–79.

304. See generally Mutcherson, *supra* note 5, at 938–41 (discussing abortion rights advocates use of scientific evidence to argue for adolescent autonomy in abortion decision making and noting that “[t]here is a significant body of literature that stands for the proposition that young women are, in fact, largely capable of making decisions about terminating a pregnancy without the assistance of their parents”). See also Bruce Ambuel & Julian Rappaport, *Developmental Trends in Adolescents' Psychological & Legal Competence to Consent to Abortion*, 16 LAW & HUM. BEHAV. 129, 140–42 (1992) (study indicated no difference between adolescents and adults considering abortion); Catherine C. Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 AM. J. ORTHOPSYCHIATRY 446, 446–51 (1980) (study of a small group of adults and adolescents awaiting pregnancy results found few age related differences). The American Psychological Association has submitted multiple briefs to the Supreme Court supporting the right of pregnant teenagers to make abortion decisions, as well as issuing a policy statement supportive of adolescent abortion rights. Scott, *Judgment and Reasoning*, *supra* note 118, at 1607–08 n.3, 1630 n.91; Interdivisional Comm. on Adolescent Abortion, *Adolescent Abortion: Psychological and Legal Issues*, 42 AM. PSYCHO. 73 (1987).

305. See *Miller v. Alabama*, 132 S. Ct. 2455, 2455 (2012) (imposing mandatory life imprisonment without parole sentences for minors under the age of eighteen at the time of their crimes, including crimes involving homicide, violates the Eighth Amendment's prohibition on cruel and unusual punishment); *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) (holding that imposing life without parole on a juvenile offender for non-homicide crimes violates the 8th Amendment, and relying explicitly on “developments in psychology and brain science [that] continue to show fundamental differences between juvenile and adult minds”); *Roper v. Simmons*, 543 U.S. 551, 551, 569–70 (2005) (holding that juveniles cannot be subject to the death penalty under the Eighth Amendment, and discussing scientific evidence, including recent neuroscience research, on adolescent decision making and implications for adolescents' lesser criminal culpability). See Rosato, *supra* note 293, at 169–77 (discussing recent neuroscience literature on adolescent brain development and the *Roper* and *Graham* decisions); Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 55, 55 (2007); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty By Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile*

have relied on this research to argue that minors should not be subject to the death penalty or life without parole and, generally, that adolescents are less culpable in the criminal context.<sup>306</sup> The Supreme Court has struggled in both areas of youth law to incorporate the scientific evidence on child development and balance the interests of adolescents, their parents, and the state.<sup>307</sup> In both abortion and juvenile criminal law decisions, the Supreme Court has consistently taken the view of young people as “flawed and generally immature whether they are committing capital crimes or seeking to terminate an unwanted pregnancy.”<sup>308</sup>

Scholars have also examined the tensions within the law created by the scientific evidence and conflicting advocacy positions.<sup>309</sup> Part of the difficulty in reconciling the scientific evidence and varying policy positions in the healthcare versus criminal contexts lies in the concept of “competence,” which does not have a simple definition.<sup>310</sup> Elizabeth Scott has argued that the studies on adolescent competence in the healthcare context have overly

*Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1011 (2003); see also Mutcherson, *supra* note 5, at 938–53 (summarizing literature on adolescent capacity for decision-making in criminal law context); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 138 (1998).

306. See Mutcherson, *supra* note 5, at 942–53 (discussing strategies of advocates for youth in the context of the juvenile criminal system).

307. See *Bellotti v. Baird (Belotti II)*, 443 U.S. 622, 635–36 (1979) (plurality opinion); see also *Miller*, 132 S. Ct. at 2482–83; *Graham*, 130 S. Ct. at 2026; *Roper*, 543 U.S. at 569. See generally, Mutcherson, *supra* note 5, at 939–54 (discussing Supreme Court decisions on minors access to abortion care and juvenile criminal culpability).

308. Mutcherson, *supra* note 5, at 954 (discussing Supreme Court decisions on minors access to abortion care and juvenile criminal culpability).

309. For example, Professor Kimberly Mutcherson argues that the positions of advocates for youth who argue that adolescents are competent to make decisions about abortion, but not culpable in the same manner as adults for criminal acts, do contain an underlying consistency. *Id.* at 929. She explains that the context of decision-making, i.e., formal versus informal settings, affects the quality of decision-making. See *id.* at 958–64. Therefore, “it is logical to conclude that the decision-making process in formal healthcare settings lead to better decisions than the law should support than is the case in the informal settings in which young people decide to participate in criminal activities.” *Id.* at 929. Others have also taken this contextual view of adolescent decision-making capacity. See, e.g., Ehrlich, *supra* note 114, at 108–14; Rosato, *supra* note 293, at 179–81; Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop,”* 64 AM. PSYCHOLOGIST 583, 592 (2009).

310. Mutcherson, *supra* note 5, at 929–34 (discussing definitions of competence or capacity for decision making in healthcare, lawyer-client, and criminal law settings); see also Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1146 (2011) (discussing related concept of “maturity” and arguing that maturity is a cultured concept rather than a scientific one).



focused on the informed consent doctrine and thus, have excluded other important factors in decision making:

[I]nformed consent doctrine has shaped the discourse and provided the standard for comparing the capabilities of minors with those of adults. This framework for assessing competence focuses on two aspects of cognitive functioning: the capacity for understanding and the capacity for reasoning. The doctrine, and thus the framework, exclude inquiry into aspects of decisionmaking [sic] that have to do with the quality of *judgment*; an inclination to make “poor” choices does not signify incompetence under informed consent tests.<sup>311</sup>

Professor Scott’s distinction between cognitive abilities and abilities to exercise sound judgment is useful for understanding the conflicting uses of scientific research on adolescent decision making in the law. While the studies focused on cognitive abilities show that by age fourteen, many adolescents have adult-like cognitive functioning, other studies focusing on psychosocial development and more recent neuroscience research suggest that adolescents may nevertheless have poorer decision-making outcomes.<sup>312</sup> Thus, the scientific research supports two different kinds of intuitions: that adolescents are more advanced in their reasoning abilities than younger children but also less advanced than adults in the quality of their decision making. In particular, adolescents differ from adults in attitude toward risk, in impulsiveness, in greater weight attached to short-term rather than long-term consequences, and in the importance attached to personal appearance and peer influence.<sup>313</sup>

In addition, although there is “unassailable evidence that adolescents do not act or think like young children,” Professor Scott argues that the tests of cognitive ability alone are unpersuasive to policymakers “because [they] do[]

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311. Scott, *Judgment and Reasoning*, *supra* note 118, at 1609 (emphasis added) (footnote omitted). For example, in the healthcare context, studies have found that “minors aged 14 years and higher make decisions regarding the waiver of rights or consent to medical procedures in generally the same manner that adults do;” however, researchers have noted that this research also “need[s] to consider judgment factors (e.g., consideration of social consequences) as well as cognitive and reasoning ability in determining adolescents’ legal capacities.” Preston A. Britner et al., *Evaluating Juveniles’ Competence to Make Abortion Decisions: How Social Science Can Inform the Law*, 5 U. CHI. L. SCH. ROUNDTABLE 35, 46 (1998). See also Oberman, *Minor Rights and Wrongs*, *supra* note 114, at 134 (“[A]dolescents experience a chronic disjuncture caused by varying levels of biological development, cognitive ability, and experiential knowledge. Rather than mistaking one of these markers, such as cognitive ability, as indicative of adult-like capacity, the health care system’s response to adolescents should reflect our awareness of this disjuncture.”).

312. See Scott, *Judgment and Reasoning*, *supra* note 118, at 1622–42.

313. *Id.* at 1642 n.126, 1643–47.

not respond to important concerns underlying paternalistic policies.”<sup>314</sup> In particular, with regard to minors, society cares not only about whether they engage in rational *processes* of decision making, but also whether they are capable of exercising good judgment such that the *results* of their decisions are good ones.<sup>315</sup> For example, Professor Scott notes that “few would argue, on ‘competence’ grounds, that twelve year olds who can pass the legally required written and performance tests should be awarded a license to drive a motor vehicle.”<sup>316</sup> From the perspective of the public and policymakers, “Protecting minors from the harm that can result from their own poor judgment seems important in order to preserve the options of youthful decision makers for a future when it is presumed, they will make sounder choices.”<sup>317</sup> Thus, despite evidence on the adult-like cognitive abilities of adolescents, “resistance to reformulating the premises of legal policy toward children is formidable.”<sup>318</sup> Professor Scott concludes, “The paternalistic goal of protecting minors and society from the costs of immature judgment is an even more powerful constraint on initiatives to extend adolescent self-determination than is usually acknowledged.”<sup>319</sup>

In a similar vein, Jennifer Rosato emphasizes that even as neuroscience and other disciplines develop more research on the adolescent brain, “core values underlying public policies, not science, ultimately will help resolve this dilemma” on the law’s approach to adolescent capacity and culpability in

314. See *id.* at 1610. See also Lois Weithorn, *Children’s Capacities in Legal Contexts*, in CHILDREN, MENTAL HEALTH AND THE LAW 25, 25–50 (N. Dickon Reppucci et al. eds., 1984) (discussing legal standards of competency in various contexts and applicability of psychological studies on capacity evaluations for minors).

315. Scott, *Judgment and Reasoning*, *supra* note 118, at 1656 (“Moreover, if the values that drive risky choices are associated with youth, and predictably will change with maturity, then our paternalistic inclination is to protect the young decisionmaker—and ourselves—from his or her bad judgment. This impulse is not quelled by the knowledge that, in making the ‘poor’ decision, the youthful decisionmaker has engaged in a rational process.”).

316. *Id.* at 1638. Even if some adolescents have adult-like abilities in their decision-making, evidence suggests that teenagers “have widely varying levels of competency that depend not only on their biological stage of development, but also on their life experience.” Oberman, *Minor Rights and Wrongs*, *supra* note 114, at 133. Research establishing the onset of adult-like cognitive functioning for older adolescents “also indicates that these abilities are acquired gradually, and that they reflect both a biological and an environmental component.” See *id.* Scholars generally agree that “maturity occurs on a continuum.” Todres, *supra* note 310, at 1161.

317. Scott, *Judgment and Reasoning*, *supra* note 118, at 1639.

318. *Id.* at 1612.

319. *Id.*; see also Emily Buss, *What the Law Should (And Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 44 (2009) [hereinafter Buss, *What the Law Should (And Should Not) Learn*] (noting that focusing solely on children’s developmental capacities “runs the risk of failing to account from some of the real reasons we support special rights and protections for children,” such as an opportunity to learn how exercise their rights well).

various contexts.<sup>320</sup> Of course, what these values should be remain hotly debated, particularly around abortion. Several other scholars also argue that tying law to developmental theories about children raises numerous risks, including serious questions about the reliability of recent scientific evidence, how science should be translated into legal policy, and how legal rules themselves affect child development.<sup>321</sup>

Given the scientific uncertainties surrounding adolescent development and the public's strong intuition that adolescents make decisions differently than adults, it remains extremely difficult to convince the public in general and state officials in particular that adolescents should have a right to make autonomous decisions in any arena, and particularly in controversial areas related to sexuality, reproduction, and teenage parenting.<sup>322</sup> Rather than ignoring adolescence as a distinct category between childhood and adulthood, the law could acknowledge adolescence as an in-between status – neither child nor adult – by seeking solutions between the parent/state binary, and in particular solutions that are supportive of adolescents' sexual and reproductive decisions rather than punitive. The next Part briefly sketches out possibilities for reform and urges further conversation along these lines.

### *B. Third Parties in Private Family Law and Possibilities for Reform*

Policy solutions involving third party adults could accommodate both scientific evidence and popular intuitions about adolescents' need for adult guidance, while also supporting adolescents' reproductive decision making whether they seek to terminate a pregnancy, parent their infants, or relinquish for adoption. It is important to reiterate that I am not arguing that teenage parents should have no oversight whatsoever. Expanding the list of kinds of adults who might become involved with pregnant or parenting youth's decision making could provide more effective oversight. We could establish interventions that provide pregnant or parenting teenagers with support from trusted third party adults in situations where now, those adolescents must either submit to parental or state authorities who might undermine the adolescents' reproductive decisions or are given no support until a crisis occurs. A third party approach could also assist those adolescents who would benefit from adult counsel while avoiding the potential harms of enforced parental or

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320. Rosato, *supra* note 293, at 171; see also Scott, *The Legal Construction of Adolescence*, *supra* note 1, at 564 (discussing the Twenty-Sixth Amendment and noting that “legal childhood and adulthood are social and political constructs, rather than simply products of scientific understanding of human development”).

321. See Clare Huntington, *Neuroscience and the Child Welfare System*, 21 BROOKLYN J. L. & POL'Y 37, 52–57 (2012) (discussing potential concerns with relying on neuroscience for developing child welfare policy); Buss, *What the Law Should (And Should Not) Learn*, *supra* note 319, at 53.

322. *Id.* at 56.

state involvement in the sensitive arena of adolescent sexuality and reproduction.<sup>323</sup>

A number of scholars and researchers have noted that third parties could help to ensure sound decision making for adolescents.<sup>324</sup> For example, in the healthcare context, Jennifer Rosato argues that given individual variation in development, healthcare providers should be permitted to assess a minor's maturity and, if appropriate, provide care as the minor wishes without involving a parent.<sup>325</sup> In a similar vein, Kimberly Mutcherson argues for a model of shared decision making between adolescents and parents in the healthcare context.<sup>326</sup> Her model would allow exceptions from shared adolescent-parent healthcare decision making if an adolescent does not wish to include a parent, such as in decisions about abortion care.<sup>327</sup> Dean Rosato and Professor Mutcherson essentially argue for a third party solution with regard to sexual and reproductive healthcare, with the healthcare provider serving as the third-party adult advisor.<sup>328</sup> As Franklin Zimring argued in his seminal work, adolescence could be treated as a period of "semi-autonomy," and youths should be given the freedom to make choices in a protective setting, so that they have a kind of "learners permit" for full participation in society.<sup>329</sup>

Who that third party should be will vary by the context. A thorough analysis of various kinds of third party interventions, as well as their pros and cons, is beyond the scope of this Article. Below, this Part explores a few possibilities for legal reform involving third party adults who could more effectively support pregnant or parenting minors. While requiring involvement of third party adults does not grant adolescents full autonomy, these proposals aim to value teenagers' own reproductive decisions and support their choices whether they seek abortion care, to maintain the (minor) parent-child bond, or to relinquish their infant for adoption. These recommendations are made tentatively and with the understanding that third party solutions may

323. See Mutcherson, *supra* note 27, at 300–24.

324. See Steinberg et al., *supra* note 309, at 586–87, 592–93 (emphasis added) (“[W]here emotional and social influences on judgment are minimized or can be mitigated, and where there are consultants who can provide objective information about the costs and benefits of alternative courses of action, adolescents are likely to be just as capable of mature decision making as adults, at least by the time they are 16.”).

325. See Rosato, *supra* note 293, at 181–89.

326. See Mutcherson, *supra* note 27, at 300–24.

327. *Id.* at 304; see also Mutcherson, *supra* note 5, at 963–64 (“Though there may be disagreement about how to interpret available science, it is indisputable that there are consequential differences between adults and adolescents when it comes to making decisions. . . . A young person’s decision-making skills can be enhanced when coupled with opportunities to engage with responsible adults before making a decision whereas the deficiencies in adolescent decision-making are brought painfully to light in other circumstances that play to the weakest elements of the adolescent experience.”).

328. Mutcherson, *supra* note 27, at 301; Rosato, *supra* note 293, at 179–81.

329. FRANKLIN ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 89–101 (1982).

be expensive, politically charged, difficult to implement, and bear risks of their own. Nonetheless, it is important to generate a conversation in this direction. More openness to incorporating third party adults into adolescent decision making on reproduction and parenting could potentially benefit many struggling adolescents.

First, with regard to child welfare law, the expansion of third party rights in private family law suggests models for incorporating third parties into public family law in ways that would support the minor parent-child relationship, even if the minor parent cannot care for her infant.<sup>330</sup> In private family law, as many scholars have noted, parental rights have become disaggregated in numerous ways. The rise of joint custody and corresponding emphasis on “shared parenting” and growing recognition of functional parents all indicate a move away from an “all or nothing” approach to parenthood.<sup>331</sup> In contrast, in public family law, the “all or nothing” approach still prevails.<sup>332</sup> If abuse or neglect has occurred, advocates for minor parents should focus on obtaining appropriate services for the minor so that she can exit the child welfare system with her parental rights intact.<sup>333</sup> For those adolescent parents who cannot maintain custody of their children, the law could look to alternatives that allow the minor parent to maintain a relationship with her infant, even though the infant’s primary custody may be transferred to a third party non-parent adult. Options like subsidized guardianship and open adoption could allow for an ongoing relationship between the minor parent and her infant, while also providing appropriate care for the infant.<sup>334</sup> Yet, in child welfare law, the dyadic parental model still dominates over a triadic model.<sup>335</sup> Placements incorporating third party adults into the minor parent’s

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330. Private family law refers to disputes in the context of the private distribution of wealth and child custody determinations that do not involve public benefits; public family law concerns state public benefits systems, including the child welfare system, which primarily affects poor families. See Gosdoe, *supra* note 155, at 116. See generally *How the Child Welfare System Works*, CHILD WELFARE INFO. GATEWAY (May 2012), <https://www.childwelfare.gov/pubs/factsheets/cpswork.pdf>.

331. See Manian, *supra* note 94 (summarizing recent trends to recognize children’s relationships with third party adults in private family law).

332. See Godsoe, *supra* note 155, at 170 (arguing that child welfare should parse out parenthood in public families in the same way as in private families).

333. Stotland & Godsoe, *supra* note 168, at 45.

334. Godsoe, *supra* note 155, at 145–48 (discussing subsidized guardianship as reform with potential to solve some of the underlying problems of the child welfare system); Josh Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare*, 66 ALA. L. REV. 1, 17 (2013) (discussing the possibilities of open adoption arrangements in the child welfare system). In the context of subsidized guardianship or open adoption, the minor parents’ parent (grandparent) could serve as the guardian or adoptive parent. *Id.* at 14. These options may be preferable since the grandparent would not have to terminate his or her own child’s parental rights to assist with the care and custody of the grandchild. *Id.*

335. Godsoe, *supra* note 155, at 146.

relationship with her infant remain underutilized in favor of the traditional path of termination of parental rights and closed adoption.<sup>336</sup>

Third party guardianship or custodial placements that allow for the minor parent to continue her parental relationship present a better alternative than termination of parental rights, but these options typically come too late. Even more importantly, we need to emphasize policy solutions to prevent abuse or neglect by minor parents.<sup>337</sup> Supportive adult guidance in the form of a third party adult mentor presents one promising type of third party early intervention.<sup>338</sup> An extensive literature on the benefits of adult mentoring for at-risk youth indicates that third party adult support can improve outcomes for teenage mothers and their infants.<sup>339</sup> Numerous studies on various forms

336. See Cynthia Godsoe, *Permanency Puzzle*, 2013 MICH. ST. L. REV. 1113, 1120 (describing underutilization of subsidized guardianship and open adoption in child welfare law).

337. See CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW FAMILY LAW UNDERMINES FAMILY RELATIONSHIPS* 93 (2014) (describing how child welfare law “suffers from a fundamental misorientation” away from prevention and instead to “wait for a crisis and then intervene in a heavy-handed manner”). A number of scholars have advocated a public health approach to child welfare, which focuses on evidence based identification of risk factors and interventions to prevent child maltreatment. See, e.g., GUGGENHEIM, *supra* note 86, 174–81; Annette Appell, *The Myth of Separation*, 6 NW. J. L. & SOC. POL’Y 291, 298 (2011); Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 VA. J. SOC. POL’Y & L. 590, 599 (2005); Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897, 899 (2014). As numerous scholars of child welfare law have noted, best practices for minor parents should include interventions that avoid teenage parents being charged with abuse or neglect at the outset. Stotland & Godsoe, *supra* note 168, at 45. Early intervention is particularly important for minor parents who are already wards of the state:

Parenting wards present a crucial point of intervention in the foster care cycle. Failure to meet the needs of this population places both the foster youth and their children at increased risk of homelessness and poverty, and sets the stage for yet another generation of children to be removed from their parents and raised by the state.

*Id.* at 7.

338. See Godsoe, *supra* note 336, at 1134 (noting mentoring programs as potentially useful intervention for youth in foster care).

339. See Cynthia L. Sipe, *Mentoring Programs for Adolescents: A Research Summary*, 31 J. ADOLESCENT HEALTH 251, 251–60 (2002) (summarizing research on youth mentoring programs from the mid-1980s through the late-1990s). The research has focused on various issues such as documenting the benefits of mentoring, analyzing the nature of mentoring relationships and the practices of effective mentors, and defining best practices for programs. See *id.* Generally, the literature defines “mentors” as *persons* who deliberately “support, guide, and shape individuals younger or less experienced than themselves as they weather difficult periods, enter new arenas, or undertake challenging tasks.” Antronette K. Yancey et al., *Role Modeling, Risk, and Resilience in California Adolescents*, 48 J. ADOLESCENT HEALTH 36, 37 (2011).

of mentoring as an intervention for pregnant and parenting teenagers have indicated positive effects.<sup>340</sup> Researchers have concluded that “it appears that guidance and support from an adult outside of the home can be extremely influential in the lives of young mothers.”<sup>341</sup> For example, the Nurse-Family

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Mentors do not include peers or romantic partners, but nonparent relatives can serve as mentors. See Elena L. Klaw et al., *Natural Mentors in the Lives of African American Adolescent Mothers: Tracking Relationships Over Time*, 32 J. YOUTH & ADOLESCENCE 223, 226 (2003). In addition to formal mentors assigned through mentoring programs, youth report nonparent-mentoring relationships with extended family members (e.g., grandparents and aunts/uncles), adults in professional roles (e.g., teachers, guidance counselors, and ministers), and adults in more informal capacities (e.g., coaches, friends’ parents, and co-workers). See *id.* at 231.

340. See Klaw et al., *supra* note 339, at 231. For example, one study of a home-based formal mentoring program found that formal mentors were effective in preventing rapid repeat births among the study participants, who were all low-income, African American adolescent mothers living with their mothers (the infants’ grandmothers). Maureen M. Black et al., *Delaying Second Births Among Adolescent Mothers: A Randomized, Controlled Trial of a Home-Based Mentoring Program*, 118 PEDIATRICS 1087, 1096 (2006). The study authors hypothesized that since mentoring “operates through the formation of a relationship that enable participants to look to the mentor for support,” it would be an ideal intervention for preventing rapid second births. *Id.* at 1096–98. The authors noted the limits of the study, including the small number of participants and the difficulty of determining whether those who participated were more motivated to avoid second births in the first place, but nevertheless concluded that the “findings suggest that a mentorship model that includes structured intervention, along with a strong focus on building a supportive relationship, may be an effective strategy in reducing second births.” *Id.* at 1097.

341. See Klaw et al., *supra* note 339, at 230. Researchers have also studied the protective influence of natural mentors (as opposed to formal mentors assigned through a program), such as special aunts, neighbors, or teachers, on pregnant and parenting teenagers. *Id.* at 223. Several studies focusing on African-American teenagers concluded that natural mentors are an important resource for adolescent mothers. *Id.* at 231. One study suggested that natural mentors may help to improve the career development of pregnant and parenting African-American adolescents. Elena L. Klaw & Jean E. Rhodes, *Mentor Relationships and the Career Development of Pregnant and Parenting African-American Teenagers*, 19 PSYCHOL. WOMEN Q. 551, 551 (1995). The results of the study provided “further evidence that natural mentors are an important protective resource for pregnant and parenting, African-American adolescents.” *Id.* at 558. The authors concluded that the study results have important implications for interventions with young women of color. *Id.* at 560. The study provides “indirect evidence for the potential value of programs that pair volunteer mentors with at-risk adolescents,” since, like natural mentors, volunteer adult mentors may be able to offer at-risk youth protection against the many stressors in their lives. *Id.* Although the study findings are limited, the authors emphasized that “we should not minimize the potentially protective influence of natural mentors in the lives of inner-city teenagers.” *Id.* Similarly, another study on natural mentors in the lives of African-American adolescent mothers found that adolescents with mentor relationships over the course of two years were more likely to have remained in school or graduated than those without mentors. Klaw et al., *supra* note 339, at 223. Ultimate-

Partnership, which involves intensive home visits by a nurse during a mother's pregnancy and for the following two years, has shown that third party adult intervention can lead to demonstrably positive results.<sup>342</sup> Importantly, researchers have emphasized, "By relying on nonparents adults, adolescent mothers can gain some autonomy while simultaneously obtaining much needed emotional support and advice."<sup>343</sup> In sum, the literature on the benefits of nonparent adult mentoring for adolescents reinforces the notion that third party adults can provide effective support for pregnant and parenting teenagers.<sup>344</sup>

Obviously, mentoring programs and other solutions incorporating third party adults into the minor parent-child relationship, such as subsidized guardianship and open adoption, do not provide a panacea for the many ills of the child welfare system. The child welfare system is extremely complicated, and no single simple solution can address its myriad problems. The well-being of pregnant and parenting adolescents also strongly depends on other resources, such as adequate healthcare, child care, housing, and educational

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ly, the study findings suggested that the support of an enduring natural mentor may help facilitate young mothers' school retention and completion. *See id.* at 229–31.

342. *See* HUNTINGTON, *supra* note 337, at 187–90.

343. Klaw & Rhodes, *supra* note 341, at 552.

344. The literature overall suggests benefits to mentoring adolescent mothers over time. Klaw et al., *supra* note 339, at 230. Furthermore, despite several studies' focus on natural mentors, researchers have noted that many adolescent mothers have no such support in their lives, and therefore, providing young mothers with volunteer mentors may be a beneficial intervention: "Skillful, persistent volunteers could potentially earn the trust of adolescent mothers and offer adolescents some of the benefits that natural mentors seem to afford." *Id.* at 231. Another study found that African-American adolescent mothers who identified natural mentors (defined as a supportive non-parent or non-peer) derived more benefits from their social networks and reported lower levels of depression than similar youth without a mentor. *See* Jean E. Rhodes et al., *Natural Mentors: An Overlooked Resource in the Social Networks of Young, African American Mothers*, 20 AM. J. COMMUNITY PSYCHOL. 445, 445 (1992). One intervention study based on the principles of mentorship indicated that intensive home visitation by nursing paraprofessionals indigenous to the community may be effective in reducing infant mortality, low birthweight, and child maltreatment within a sample of high-risk, low-income, urban-residing adolescents. *See* Linda Flynn, *The Adolescent Parenting Program: Improving Outcomes Through Mentorship*, 16 PUB. HEALTH NURSING 182, 188 (1999). A study examining factors affecting drinking patterns of pregnant adolescents found that those who identified either nonparent mentors and/or parents who provided high levels of support were less likely to have consumed alcohol during pregnancy. *See* Jean E. Rhodes et al., *Risk and Protective Factors for Alcohol Use Among Pregnant African-American, Hispanic, and White Adolescents: The Influence of Peers, Sexual Partners, Family Members, and Mentors*, 19 ADDICTIVE BEHAVIORS 555, 555 (1994). Reports of mentors' protective qualities are also corroborated by the literature on resilience, which has highlighted the positive influence of nonparental adults in the lives of at-risk children and adolescents. Klaw & Rhodes, *supra* note 341, at 552.



and employment opportunities.<sup>345</sup> Thinking about solutions that look to third party adults to assist minor parents in their parenting, rather than heavy-handed state intervention, represents just one move in the right direction to provide substance to minors' parental rights. Third party adult support could help to ensure that minor parents in the system can maintain a parental relationship with their children if they wish, and most importantly, this support can help to keep minor parents and their infants out of the child welfare system in the first place.<sup>346</sup>

Second, with regard to the abortion and adoption contexts, providing pregnant or parenting teenagers with the option to seek guidance from third party adults offers much promise for more effective protection of adolescents' well-being.<sup>347</sup> I have argued elsewhere that developments in private family law bolster the case for amending statutes requiring parental involvement with abortion to allow teenagers to consult with designated adults other than parents or judges.<sup>348</sup> In particular, private family law's increasing recognition of the importance of non-parent third party adults in children's lives buttresses calls for reformulating parental involvement legislation to permit adolescent girls to obtain consent from trusted adults other than parents and in lieu of a formal judicial interrogation.<sup>349</sup> As in the abortion context, we should consider whether adult support – and what kinds of adult support – would better serve the well-being of minor parents considering relinquishment of their infant for adoption. Regulatory reform of both abortion and adoption law to include involvement by third party non-parent, non-state adults, would also make for a more obviously coherent body of law on pregnant teenagers who choose to avoid parenting either through abortion or adoption.<sup>350</sup> Re-

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345. Klaw & Rhodes, *supra* note 341, at 560.

346. For example,

Research indicates that involvement of adults with teen parents improves decision-making and outcomes. In fact, one of the most important variables in determining whether a teen mother will become the respondent in an abuse and neglect action tends to be her living situation. Adolescent mothers living with an adult relative were much less likely to have their children removed for abuse and neglect than those who were not living with an adult relative.

Glesner Fines, *supra* note 135, at 330 (citing Patricia Flanagan et al., *Predicting Maltreatment of Children of Teenage Mothers*, 149 PEDIATRICS & ADOLESCENT MED. 451, 451–55 (1995)). Of course, sometimes the involvement of relatives can be detrimental rather than helpful. *Id.* (noting that attorneys should be watchful of the involvement of relatives of minor parents in child welfare proceedings if the family members are not supporting or are interfering with the client's decision making).

347. See Manian, *supra* note 94, at 241.

348. See *id.* at 246–51.

349. See *id.* at 246.

350. See Seymore, *supra* note 160, at 134–46 (arguing that similarities between abortion and adoption decisions calls for alignment of the law on minors' decision making in these contexts).

forms looking to third parties could also more effectively serve the law's purported goal of ensuring sound decision making for pregnant teenagers choosing abortion or adoption, rather than surreptitiously operating as a means of punishment.<sup>351</sup>

For example, perhaps offering adolescents who are considering either abortion or adoption relinquishment a menu of options to choose from in terms of seeking adult guidance in their decision making would grant adolescents some autonomy while still ensuring adult oversight. In the abortion context, states could allow teenage girls to choose between involving a parent, an adult family member, a counselor, or a judge prior to receiving abortion care. Scholars have proposed such reforms to parental involvement legislation, and a few states have adopted laws that allow for third parties other than judges to approve adolescent girls' abortion care.<sup>352</sup>

Similarly, adoption law could provide a list of adults that a minor parent choosing relinquishment would consult prior to a final consent to relinquishment. Birth parent advocates, scholars, and courts have argued for various kinds of adoption law reforms, particularly for minor parents consenting to voluntary relinquishment. Adoption case law and literature suggest that mandatory parental or judicial involvement in minor parents' relinquishment decisions could present many of the same problems of shaming and imposition of the adults' own normative judgments as in the abortion context.<sup>353</sup> While mandatory parental or judicial approval may prove arbitrary, the ab-

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351. See Samuels, *supra* note 208, at 509 (arguing that adoption law generally fails to promote its stated goal of ensuring birth mothers' informed decision making with respect to relinquishment for adoption).

352. See Manian, *supra* note 94, at 246–51.

353. As with abortion decisions, parents or judges could coerce the minor to conform to the adults' own normative view of the correct decision rather than supporting and guiding the minor's decision-making process. Some revocation cases indicate that family members have put pressure on teenagers to consent to relinquish their infant. See, e.g., *Adoption of J.M.M. v. New Beginnings of Tupelo, Inc.*, 796 So. 2d 975, 983 (Miss. 2001) (denying revocation of adoption decree even though facts indicated sixteen-year-old mother was pressured into consenting by her parents); *Gaughan v. Gilliam*, 401 N.W.2d 687 (Neb. 1987) (holding that mere fact that birth mother might be pressured by friends or family does not amount to "undue influence" sufficient to invalidate her relinquishment for the child even when birth mother is sixteen years old). Similarly, requiring judicial approval for a minor parent's consent to relinquishment may result in unwarranted scrutiny, rather than skilled and unbiased counseling toward a decision that serves the well-being of the minor parent and her infant. See Hollinger, *supra* note 79, at § 2.11[2] ("Risks are posed, however, even by this [court process for voluntary relinquishment]. Not the least of these is that the biological mother's resolve to relinquish her child could be subject to extensive and inappropriate scrutiny."). Of course, some birth mothers may also feel pressure *not* to relinquish their infants for adoption. See Kyle Wier, *Promoting Adoption as a Solution to Teen Pregnancy: A Study and Model*, 5 J.L. & FAM. STUD. 319 (2003) (conducting small study of teen mothers in a group home and finding various pressures for teen parents to select child rearing over adoption).

sence of any adult guidance in some cases leaves the minor parent vulnerable to coercive influence from others, as the revocation case law demonstrates.

Instead of enforced parental or judicial involvement prior to relinquishment, the law could also give minors the option of seeking professional counseling or independent legal representation, along with procedural reforms, such as longer time frames post-birth for obtaining consent for relinquishment.<sup>354</sup> As in abortion law, counseling by health care professionals could serve as a more effective means of supporting sound decision making than a judicial interrogation.<sup>355</sup> In addition, adoption law critics often suggest inde-

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354. "Reforming the law to give birth mothers more time to change their minds or ensure them legal counsel, as some have proposed, could help reshape the emotional landscape." Appleton, *supra* note 11, at 285 (citing *Janet G. v. N.Y. Foundling Hosp.*, 403 N.Y.S.2d 646, 651 (N.Y. Fam. Ct. 1978)); Samuels, *supra* note 208, at 509.

355. Of course, requiring independent counseling and the waiting periods that typically go along with such counseling in the adoption context would echo standard techniques of anti-abortion advocacy. Caitlin Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy*, 16 WM. & MARY J. WOMEN & L. 291, 291 (2010) (discussing the "undue burden" of abortion regulations, including waiting periods, "informed consent" and independent counseling, as "physical, familial, and spiritual invasions of women's privacy"). If such requirements make sense in adoption law, then those opposed to abortion might argue, why not also in abortion law? In other words, can advocates for minors' reproductive rights coherently argue in favor of counseling and waiting periods in adoption law while resisting such requirements in abortion law? One argument is that more involvement by third party adults might be needed in the adoption context than in the abortion context. In abortion care, the physician is already obligated to ensure the patient's informed consent and can serve as third party support for the minor. See Mutcherson, *supra* note 27, at 304 (arguing that health care provider can serve as third party adult advisor for minor seeking abortion care). In adoption law, the minor parent may have no one to represent her interests. Adoption is also legally more complicated, particularly given the confusion surrounding open adoption and the number of revocation cases where false promises of ongoing visitation have induced birth mothers to relinquish their children and led to revocation disputes. See, e.g., *In re S.O.*, 795 P.2d 254, 254 (Colo. 1990) (holding that biological mother and stepfather's unenforceable and false promise of visitation rights did not constitute fraud sufficient to invalidate the consent); *In re Adoption of J.H.G.*, 869 P.2d 640, 648–49 (Kan. 1994) (holding that birth mother failed to establish that adoptive parents had fraudulently promised that she would have post-adoption visitation); *In re Adoption of D.N.T.*, 843 So. 2d 690, 711–12 (Miss. 2003) (denying minors' request for revocation of consent despite facts showing minor parent was denied promise of visitation); *Kathleen G. v. Saint Lawrence Cty. Dep't of Soc. Servs.*, 565 N.Y.S.2d 875, 877 (N.Y. App. Div. 1991) (holding that birth mother would be held to her voluntary surrender of child even though she had mistaken belief she would be entitled to visitation); see also Thompson & Hollinger, *supra* note 231, at § 8.02 [1][b] ("[A] biological parent's mistake regarding the effect of the consent will not be a ground for revocation, particularly where the effect of the consent was explained."). Nevertheless, given political resistance to abortion rights, it might be most feasible to seek statutory reforms requiring that independent counseling professionals guide teenage decision making in both the abortion

pendent legal representation for birth parents as a crucially needed reform, especially for minor parents.<sup>356</sup> Many states permit out-of-court consents to be executed before a notary public or even the attorney representing the prospective adoptive parents – procedures that are “often criticized as providing insufficient evidence that the parent executing the consent or relinquishment did so knowingly and voluntarily.”<sup>357</sup> Adoption law experts have long suggested independent legal representation for minor parents considering executing a voluntary consent for adoption.<sup>358</sup> Particularly given the complexity of open adoption, the current form of many if not most domestic adoptions,<sup>359</sup> minor parents would likely benefit from independent legal counsel who could accurately describe their rights post-adoption.<sup>360</sup>

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and adoption contexts. See Manian, *supra* note 94, at 251 (arguing that third party counseling would be better compromise than judicial bypass, particularly given political resistance to adolescent abortion rights).

356. Vivek S. Sankaran, *A Hidden Crisis: The Need to Strengthen Representation of Parents in Child Protective Proceedings*, 89 MICH. B. J. 36, 37 (2010) [hereinafter Sankaran, *A Hidden Crisis*] (“A national consensus is emerging that zealous legal representation of parents is crucial in ensuring that the child welfare system produces just outcomes for children.”). Studies show that when parents have the right to counsel hearings are faster saving millions of dollars to the government. Vivek S. Sankaran, *Protecting a Parent’s Right to Counsel in Child Welfare Cases*, 13 MICH. CHILD WELFARE L. J. 2, 3 (2009); see also Glesner Fines, *supra* note 135, at 317 (“Children need legal counsel when making the decision to relinquish their infant or when facing termination of parental rights.”).

357. Hollinger, *supra* note 79, at § 2.11[2]; cf. UNIF. ADOPTION ACT § 2-405(a)(4) (1994) (“A consent or relinquishment executed by a parent or guardian must be signed or confirmed in the presence of . . . a lawyer other than a lawyer who is representing an adoptive parent or the agency to which a minor is relinquished . . .”).

358. For example, the Uniform Adoption Act provides that “[a] parent who is a minor is competent to execute a consent or relinquishment if the parent has had access to counseling and has had the advice of a lawyer who is not representing an adoptive parent or the agency to which the parent’s child is relinquished.” UNIF. ADOPTION ACT § 2-405(c). Ideally, best practices for minor parents considering placing their infants for adoption should incorporate all of these suggestions for reform: sufficient time post-birth to make a final decision; skilled and unbiased counseling from trained professionals unaffiliated with adoptive parents or agencies; and independent legal counsel to provide adequate advice on the legal consequences of adoption. See Samuels, *supra* note 208, at 566–72 (summarizing best practices for voluntary relinquishments regardless of age of the birth parent).

359. Open adoption is commonplace today in the United States. See Gaddie, *supra* note 227; Appell, *supra* note 227, at 4. Although open adoption has potential pitfalls, “evidence indicates that open adoption has decreased some of the negative emotions that birth parents once felt in closed adoptions.” Appleton, *supra* note 11, at 320.

360. See Seymore, *supra* note 160, at 151–53 (arguing that legal complexity of adoption adds additional reason to grant minor parents special protections that may be unnecessary for minors seeking abortion care).

Of course, adequate counseling and legal advice do not provide a silver bullet for the variety of concerns surrounding minor parents' relinquishments, particularly given the ethical complexities involved when lawyers represent minors.<sup>361</sup> There is an extensive literature debating the lawyers' role in representing adolescents and children.<sup>362</sup> In many cases, it remains uncertain whether the lawyer should represent the minors' expressed wishes or determine the best interests for the minor. In the case of minor parents, the best interests of both generations of children must be considered, complicating matters further.

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361. See Sanger & Willemsen, *supra* note 129, at 337–38 (“But appointment or retention of legal counsel does not necessarily ensure greater protection for the minor. The standard problem for lawyers representing minors, whether in custody cases, delinquency actions, neglect proceedings, or civil commitments is what model of representation should be used: advocating the child’s wishes; determining the child’s best interests and advocating those; or presenting options to the court as a neutral fact finder.”).

362. A comparison to legal representation in the child welfare system is illustrative on this point. Although the Supreme Court has not recognized a federal due process right to counsel for indigent parents in proceedings to involuntarily terminate parental rights, most states guarantee such counsel. See Hollinger, *supra* note 79, at § 2.10[2]. Despite the general guarantee of legal representation, the role of the attorney or guardian ad litem representing a minor parent charged with abuse or neglect remains uncertain. Professor Barbara Glesner Fines describes minor parents in the child welfare system as caught in a “netherworld between protected and prosecuted, between child and adult.” Glesner Fines, *supra* note 135, at 336. Professor Glesner Fines discusses the various challenges of this kind of representation, including “the uncertainty of the client’s legal rights, the questions of the capacity of the child to direct representation, the role and influence of other parties in these disputes, and the systemic and personal biases present in representing teen parents.” *Id.* at 322; see also Sankaran, *A Hidden Crisis*, *supra* note 356, at 38. Numerous scholars have argued for client-directed representation for minor parents in involuntary termination or adoption relinquishment proceedings. See Seymore, *supra* note 160, at 147–55 (arguing that law should be reformed to require that minors relinquishing an infant for adoption have independent legal counsel who represents her expressed wishes, and that such counsel is preferable to appointment of guardian ad litem who makes his or her own decisions about best interests for the minor parent).

Teen parents, even more than other children involved in the child welfare system, need to have a voice in the process and to be spared the most negative psychological and legal consequences of a termination in which they were not empowered to make decisions about the representation. When these same teenagers are the subjects of custody or adoption actions, courts consider their preferences, especially the choices of older teenagers.

Glesner Fines, *supra* note 135, at 327. See also Linda D. Elrod, *Client-Directed Lawyers for Children: It is the “Right” Thing to Do*, 27 PACE L. REV. 869, 902–05 (2007) (child-centered standard used in placement for abuse and neglect cases and in custody litigation).

This question – what role should the third party adult play in the minor’s decision making – is a pitfall for any type of third party intervention. If the law gives the third party adult decision-making power rather than limiting him or her to a counseling role, then minors could still be subjected to restrictions on their rights and shamed for their sexual behavior. The aunt, counselor, or lawyer could arbitrarily obstruct access to abortion care or pressure a minor to relinquish her infant for adoption as much as a parent or judge. Furthermore, if reformed laws provided adolescents with a menu of options for adult guidance, it would be necessary to ensure that the state provided the resources to cover the costs of independent counselors and attorneys. In child welfare law, a lack of sufficient resources to support teenage and adult parents remains an endemic problem within the system. The resources question makes it especially difficult to support options like mentoring programs in the child welfare context.

Despite the risks and costs of implementing policy reforms incorporating third party adults into laws governing pregnant and parenting minors, it is worth exploring these solutions in more detail. The law already recognizes that in decisions related to sexuality and reproduction, parents may not be able to fulfill their commonly understood role of acting in their children’s best interests.<sup>363</sup> Third party parental surrogates can serve as an alternative that accounts for the in-between state of adolescence in particularly sensitive contexts. In addition, third party parental surrogates could better effectuate the stated goals of ensuring sound decision making and protecting children’s well-being in situations where parental or state intervention may not serve those goals.

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The public and policy makers remain gripped by the intuition that many adolescents would benefit from adult guidance in making consequential decisions. The law reflects this intuition in practices that force parental or state oversight when minors choose abortion or parenthood. Although some adolescents can make decisions about abortion, parenting, and relinquishing their child for adoption without being required to consult an adult, legal reforms that incorporate third party adult involvement in these decisions could satisfy the perceived need for pregnant or parenting teens to receive adult support

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363. Oberman, *Minor Rights and Wrongs*, *supra* note 114, at 133 (“[A]dolescents may not want their parents involved in certain health care decisions, and, as a result, they will avoid seeking treatment if parental consent is required. It is precisely this fear that gave rise to the ‘mature minor’ exception . . . .”); Scott, *The Legal Construction of Adolescence*, *supra* note 1, at 570 (“But should parents be legally excluded from their traditional role of making important decisions for their minor children? In many regards, the arguments for allowing minors to consent to abortion without involving their parents are similar to those made in support of minors’ consent statutes. Here, as in the context of treatment for sexually transmitted diseases or substance abuse, the interests of parents and children may conflict.”).

and would provide options other than parental or state authority. Policy reforms that look to third party adults could help the law to explicitly acknowledge and make room for the unique needs of adolescents by addressing the absence of supportive parents and providing alternatives to overly restrictive state interventions that undermine minors' reproductive rights.

## V. CONCLUSION

Advancements in minors' rights to autonomy in their reproductive decisions remain illusory. In its operation, the law takes a highly skeptical view of adolescents' reproductive decision making, whether they choose abortion or childbirth. As enforced by state officials, the law on adolescent reproduction serves as a means to punish teenage girls' sexuality and impose traditional gender norms, rather than a means to the purported goals of sound adolescent decision making and protecting children's well-being.

While recent scientific research suggests that teenagers differ in their decision-making abilities from adults, "research also indicates that, when guided by caring and competent adults, adolescents can make critical decisions for themselves and their children."<sup>364</sup> Within the context of sexuality and reproduction, those caring adults may not always be the adolescents' parents. Incorporating third party adults into laws governing pregnant or parenting adolescents offers much potential. By considering options that reside between the extremes of complete autonomy or complete subjection to the authority of parent and state, we could create much needed space for adolescence in the law.

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364. Glesner Fines, *supra* note 135, at 328.