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# TEENAGE PREGNANCY, PARENTING, AND ABORTION: LEGAL LIMITS ON ADOLESCENTS' REPRODUCTIVE RIGHTS<sup>☆</sup>

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 chapter 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*

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*ground that scholars have overlooked. The chapter compares the full spectrum of minors' reproductive rights and unmasks 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 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 chapter 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.*

**Keywords:** Teenage pregnancy; adolescents; abortion; reproductive rights

## INTRODUCTION

When does childhood end? The answer to this question determines the legal rights of youth in all arenas of life (Scott, 2000). 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 (Cunningham, 2006). Those categorized as children for most purposes can be criminally liable as adults. Those categorized as adults for most purposes cannot legally purchase alcohol. Those who many view as falling in between the categories of child or adult — adolescents — are invisible under the law (Mutcherson, 2006; Rebouché, 2011).

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. In contrast, states typically exempt other similarly sensitive medical care from parental involvement,

especially medical care related to sexual activity. All states allow minors to obtain treatment for sexually transmitted infections without notifying their parents, and many states allow minors to receive prescription contraceptives without involving a parent (Cunningham, 2006). 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 (Scott, 2000). Yet, these same states mandate parental notice or consent for abortion (Durcan & Appell, 2001; Wadlington, 1994). 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 chapter 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 chapter uses a wider lens to assess minors' reproductive rights and unmask deep similarities in the law on adolescent reproduction, in particular by comparing the law on minors' rights to obtain abortion care with minors' parental rights. Through this wider lens, this chapter reveals that in reality, the result of these superficially contradictory legal rules has been not so much that the two areas of law conflict, but instead that 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 fact 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 (Appleton, 2011; Borgmann, 2014; Sanger, 1996). The impact 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.

This chapter also 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. 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. 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.

The chapter considers potential policy reforms incorporating third parties and urges further conversation in this direction.

## **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 child-rearing” with parents, children, and the State standing at each point of the triangle (Rosenbury, 2007). 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. This chapter grounds the discussion that follows by providing the legal context for rules governing parents, minors, and minor parents.

*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. 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" (*Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923)). 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" (*Pierce*, 268 U.S. 510, 534, 535 (1925)). 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" (*Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944a); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972)).

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 (*Troxel*, 530 U.S. 57, 66 (2000)). 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 (Buss, 2002; Gregory, 2006; *Troxel*, 530 U.S. 57, 58 (2000)). 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" (*Troxel*, 530 U.S. 57, 63–64 (2000)). Minority communities in particular rely heavily on parental surrogates in childrearing, as a number of scholars have discussed (Kessler, 2007; Maldonado, 2003).

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 (Buss, 2002, pp. 635, 636; Richman, 2009, pp. 115, 116).

*Troxel* noted that a parent’s right to make decisions concerning the care of his or her children has never been unlimited. 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 (*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, 535 (1925)). 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 (*Prince v. Massachusetts*, 321 U.S. 158, 169, 170 (1944b)). 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” (*Prince*, 321 U.S. 158, 166).

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 (Hill, 2012; *Hodgson v. Minnesota*, 497 U.S. 417, 471 (1990); Mutcherson, 2005). The important governmental interest in protecting children’s health plays a large role in the debates on adolescents’ abilities to access sensitive medical treatment, particularly related to sexuality and reproduction.

### *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 (*Carey v. Population Services International*, 431 U.S. 678, 678 (1977)). *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," but nevertheless, the Court struck down a state law prohibiting distribution of contraception to those under 16 (*Carey*, 431 U.S. at 692). *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 (*Carey*, 431 U.S. at 694; Hill, 2015).

With respect to abortion, since the Supreme Court's decision in *Bellotti v. Baird* (*Bellotti II*) in 1979, laws requiring parental involvement in minors' abortion decisions have been constitutional, provided that the laws offer judicial bypass as an alternative to parental involvement (*Bellotti II*, 443 U.S. 622 (1979); Dennis et al., 2009). *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." (*Bellotti II*, 443 U.S. at 634). 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 (*Bellotti II*, 443 U.S. at 634; Scarneccchia & Field, 1995). 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" (*Bellotti II*, 443 U.S. at 640, 649, 643–650).

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 (*Casey*, 505 U.S. at 899; Helling & Nam, 2010). The Court's refusal to allow a parental veto and its requirement of an alternative to parental consent are pivotal to understanding the Court's balancing of the interests at stake in parental involvement laws. *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 laws. 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 (Guggenheim, 2005).



The Supreme Court's 2016 decision in *Whole Woman's Health v. Hellerstedt*, while not addressing minors' abortion rights, could open a path toward reform of parental involvement laws by providing an opportunity to reassess whether parental involvement laws and the judicial bypass system actually serve their purported goals (*Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016)). *Whole Woman's Health* clarified the constitutional test for abortion rights established almost 25 years ago in *Casey*. *Casey* prohibited any abortion restrictions that act as an "undue burden" on a woman's right to access abortion care, and defined an undue burden as a law that has the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion" (*Casey*, 505 U.S. at 869).

*Whole Woman's Health* clarified that the undue burden test requires the government to prove that an abortion restriction actually serves its purported goals, and requires courts to balance a law's burdens on abortion access against its benefits (*Whole Woman's Health*, 136 S.Ct. at 2309, 2317, 2318). The opinion's careful analysis also demonstrated that courts must canvas the empirical evidence on both the benefits and burdens of an abortion regulation. Rather than deferring to a state legislature's unsupported assertion that an abortion restriction protects women's health, *Whole Woman's Health* stressed that the "Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake" (*Whole Woman's Health*, 136 S.Ct. at 2310).

*Whole Woman's Health's* emphasis on the need for the government to present empirical evidence supporting an abortion restriction's asserted benefits should prompt a rethinking of laws mandating parental or judicial involvement. As discussed below, empirical evidence suggests that these laws fail to achieve their purported goal of enhancing adolescent abortion decision making, while imposing heavy burdens especially on the most vulnerable minors. Particularly when less restrictive alternatives are available, such as involving third party adults like professional counselors, the judicial bypass system for minors seeking abortion care should be reconsidered.

The rules for judicial bypass hearings in abortion cases are well established. Judges in bypass hearings may authorize a minor's abortion care after determining (1) that the minor is sufficiently mature to choose an abortion without involving a parent or, in the alternative, (2) that the abortion is in her best interests (Scarnecchia & Field, 1995). 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. In fact, decades of studies on the efficacy of parental

involvement legislation demonstrate that these laws harm more than help adolescent girls (Manian, 2012).

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. Rather, the evidence indicates that mandated parental involvement with abortion is unnecessary in many cases and harmful in others (Manian, 2012; *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 637, 638 (N.J. 2000)). Studies also confirm what should be no surprise: that the judicial bypass hearings cause significant psychological distress (Ehrlich, 2003). 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 (Webster et al., 2010). 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 (Sanger, 2004).

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 (Raskin, 2002; Sanger, 2004). 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 (Silverstein, 2007). 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 (Sanger, 2009). 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. Professor Sanger succinctly summarizes the opinion of many critics of parental involvement mandates:

[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. (Sanger, 2004, p. 306)

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.

Despite evidence that mandated parental involvement and judicial bypass fail to improve minors' abortion decision-making, the vast majority of states impose these requirements. 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. One obvious explanation for this core contradiction – the law's privileging minors who choose to carry a pregnancy to term with decisional autonomy and punishing minors who choose abortion by subjecting their decisions to parental or judicial authority – is that these laws simply reflect an anti-abortion agenda (Scott, 2000). I agree with critics that a large part of the motivation for mandating parental involvement with abortion arises from anti-abortion advocacy (Ehrlich, 2003). Certainly, there are legislators and advocates of parental involvement 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 (Major et al., 2008; Munk-Olsen et al., 2011; Sanger, 2004, 2009).

Nevertheless, a more expansive inquiry into the law on minors' reproductive decision-making reveals a more broadly 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. Minor parents from poor communities and, in particular, racial minorities, remain doubly vulnerable to disruption of their parental rights. The next Part more closely examines the reality of minor parents' ability to rear their children and unmasks similarities in the law's approach to adolescent abortion and adolescent parenthood.

## **MINORS, PARENTS, AND MINORS AS PARENTS**

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. 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.

This part focuses primarily on adolescent mothers given the greater likelihood of their involvement in parenting decisions. 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 (How the Child Welfare System Works, 2013; Issue Brief: Rebuild the Nation's Child Welfare System, 2009). 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 (Manian, 2012). Minor mothers encounter multiple layers of bias based on their age, as well as their race, poverty, and gender (Glesner Fines, 2011). 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 marginalized minors, as laws restricting access to abortion and child welfare practices disproportionately affect the poor and racial minorities.

While poor and racial minority minor parents particularly suffer under child welfare practices, even teenage parents from less marginalized groups face risks to their parental rights under past and present adoption law practices (Appleton, 2011). 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 (Siegel, 2008).

To sum up the analysis below, the examination of minor parents in the child welfare and adoption systems 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 traditional 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 (Borgmann, 2014).

### *Minor Parents and the Child Welfare System*

Experts generally agree that the child welfare system is broken (Stotland & Godsoe, 2006; Huntington, 2006). The vast majority of child welfare cases involve poverty-related neglect rather than severe abuse (Stotland & Godsoe, 2006). 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 (Stotland & Godsoe, 2006). 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 (*Fast Facts: Teen Birth Rates*, 2014; Glesner Fines, 2011). Each year, almost 750,000 girls between the ages of 15 and 19 become pregnant. Roughly 60 percent of these girls give birth (Glesner Fines, 2011; Martin et al., 2010). The lives of teenage mothers rarely resemble the nearly idyllic reality of teen motherhood portrayed in media depictions.

Although it is a common intuition that teenage parenthood is likely to lead to poverty, recent research shows that teenage parenthood may be *caused by* poverty (Glesner Fines, 2011; Merritt, 1996; Seymore, 2013). Poor young women are more likely to become pregnant than their economically better off peers (Merritt, 1996). 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 (Cahn & Carbone, 2010; Glesner Fines, 2011; Merritt, 1996). Adolescent mothers are also significantly less likely than their non-parenting peers to complete high school or obtain a GED by the age of 22 (Fact Sheet: American Teens' Sexual and Reproductive Health, 2014; Glesner Fines, 2011; Klepinger et al., 1995; Merritt, 1996; Perper et al., 2010). Furthermore, as with adult parents, poverty places minor parents at a greater risk of oversight from the child welfare system (Glesner Fines, 2011; Turcios et al., 2009). 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 (Stotland & Godsoe, 2006; Roberts, 2001).

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. For mothers age 15 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 20 and 21 years old (Glesner Fines, 2011; Goerge et al., 2008). Adolescents who are themselves wards of the state are more likely to become teen parents than their peers, presenting particularly thorny problems for the child welfare system (Glesner Fines, 2011; Stotland & Godsoe, 2006). This population of parenting wards “is nearly invisible in the academic literature of both law and the social sciences, in state policies, in practice guides for children’s attorneys and guardians ad litem, and in the demographic data on children in foster care” (Sheppard & Woltman, 2005; Stotland & Godsoe, 2006, p. 61). 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. Yet, the child welfare system does little to ensure that the cycle of abuse does not repeat itself (Stotland & Godsoe, 2006). 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 (Katz, 2006; Ng & Kelleen Kaye, 2013). 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. (Katz, 2006, p. 535)

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 (Rebouché, 2011; Walis, 2014). 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 minors’ parental rights (Stotland & Godsoe, 2006). Historically, state agents often viewed parenting wards as inherently inadequate parents, and accordingly, they separated

infants from their teenage mothers. 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 (Bonagura, 2008). 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 (*In re C.*, 607 N.Y.S.2d 1014–1016 (Fam. Ct., 1994); *In re Tricia Lashawanda M.*, 451 N.Y.S.2d 553, 554 (Fam. Ct. 1982)). 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. (Bonagura, 2008, pp. 181, 182)

Stories abound of child welfare workers unjustifiably removing children from teenage mothers under the guise of child protection. 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 (Stotland & Godsoe, 2006). 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 findings, and threatening to remove infants from wards' care based on infractions which do not pose an imminent risk of harm to the baby. (Stotland & Godsoe, 2006, p. 61)

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. (Krebs & Pitcoff, 2006, p. 82)

Other research on parenting wards describes similar stories of the child welfare system's failure to provide needed resources to minors who wish to parent their children – a lack of support that often results in the deprivation of parental rights (Roberts, 2001; Sheppard & Woltman, 2005). 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” (Stotland & Godsoe, 2006, p. 25). 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” (Stotland & Godsoe, 2006, p. 60). 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” (Stotland & Godsoe, 2006, p. 60). 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” (Stotland & Godsoe, 2006, p. 61).

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 (Fershee, 2012). 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 (Fershee, 2012; Katz, 2006). 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 children of minor parents are at risk simply by virtue of the parents’ minority (Bonagura, 2008; Glesner Fines, 2011; Stotland & Godsoe, 2006). Once subject to review by child welfare workers, skepticism toward girls’ reproductive and parenting decision-making drives a tendency to disrupt their parental rights (Katz, 2006).

One other common strain of thought underlies these practices and threads through both child welfare and adoption law. 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. 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 (Buss, 2002; Carothers et al., 2006). 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 (Stotland & Godsoe, 2006). 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 (Buss, 2002; Glesner Fines, 2011; Stotland & Godsoe, 2006). Involuntary removal of a child from his or her parents may have long-term negative consequences for both the teenage parent and her infant. 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. (Glesner Fines, 2011, pp. 317, 318)

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" (Stotland & Godsoe, 2006, p. 23). 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 (Buss, 2002; Perez, 1998). To the contrary, poor and racial minority minor parents and their infants have much more limited opportunities for stable adoptive placements (Roberts, 2001, 2003, 2007).

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 (Bonagura, 2008). 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" (Bonagura, 2008, p. 178). 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" (Glesner Fines, 2011, p. 326). 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.

### *Minor Parents and Adoption Law*

The child welfare system's disregard of minors' parental rights has parallels in adoption law. 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 adoption (Harding, 2001). 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 (Seymore, 2013). 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 (Demarce, 1996). As discussed above, 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.

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" (Glesner Fines, 2011, p. 313). 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" (Glesner Fines, 2011, p. 313). Moreover, "The degree to which these mothers' decisions are voluntary is difficult to assess" (Glesner Fines, 2011, p. 313). As described above, 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 (Stotland & Godsoe, 2006). 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, 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. 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 (Caterina, 2010). 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 (Appell, 2010; Gaddie, 2009). 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 (Durcan & Appell, 2001).

Typically, due to the permanence of terminating parental rights and a high esteem 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 (Durcan & Appell, 2001). 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 (Beck, 1998). 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 (Durcan & Appell, 2001).

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 mother can give a valid consent (Durcan & Appell, 2001). 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 (Mich. Comp. Laws Ann. § 710.44 (West 2016)). In Colorado, a parent must receive counseling before consenting to adoption (Durcan & Appell, 2001).

Few states limit the ability of a minor parent to consent to her child’s adoption (Durcan & Appell, 2001; Seymore, 2013). 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 (Durcan & Appell, 2001). 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 (Durcan & Appell, 2001). 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 (Durcan & Appell, 2001, p. 77).

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. 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. 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 (Thompson & Hollinger, 2013). Revocation generally depends on timing and whether the consent was taken in court or extra-judicially (Cal. Fam. Code § 9005(d) (West, 2016); Durcan & Appell, 2001). Notably, “[A] mother’s minority is not a per se ground for revocation of consent, even before the completion of the adoption” (Durcan & Appell, 2001). 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 (*Kathy O. v. Counseling & Family Servs.*, 438 N.E.2d 695 (Ill. App. Ct. 1982); Thompson & Hollinger, 2013). 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 (Durcan & Appell, 2001; *In re Duarte's Adoption*, 229 Cal. App. 2d 775 (Cal. Ct. App. 1964); *In re Adoption of Baby C.*, 480 A.2d 101 (N.H. 1984); *Martin v. Ford*, 277 S.W.2d 842 (Ark. 1955)). 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 (Durcan & Appell, 2001; *Graves v. Graves*, 288 So. 2d 142 (Ala. Civ. App. 1973); *In re D.*, 408 S.W.2d 361 (Mo. Ct. App. 1966); Thompson & Hollinger, 2013. 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 (*Bellotti v. Baird (Bellotti II)*, 443 U.S. 622 (1979)). Yet, courts generally have not considered what this analysis means for minor parents' voluntary relinquishment of their children for adoption (Appleton, 2011; Seymore, 2013; *In re Adoption of T.B.*, 232 P.3d 1026 (Utah, 2010)).

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 (Durcan & Appell, 2001). 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 (Samuels, 2005).

One adoption revocation case, decided prior to *Roe v. Wade*, openly articulates this rationale — that unmarried minor girls should *not* possess parental rights (*Martin v. Ford*, 277 S.W.2d 842 (Ark. 1955)). 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 16-year-old birth mother, Katherine, to set aside her consent to adoption of her infant (Martin, 277 S.W.2d 113, 844, 845). 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 (Martin, 277 S.W.2d 113, 844). 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 Katherine's sexual behavior and the infant's illegitimacy (Martin, 277 S.W.2d 113, 843, 844, 846).

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 (Martin, 277 S.W.2d 113, 845). 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” (Martin, 277 S.W.2d 113, 845). As Professors Durcan and Appell note, the court “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” (Durcan & Appell, 2001, p. 75). 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.

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. Professor Appleton notes that adoption law and practice have long treated unmarried mothers as deviant and, hence, unfit to parent (Appleton, 2011). 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 (Appleton, 2011; Fessler, 2006; Solinger, 2001). 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 17-year-old birth mother reclaim her baby, despite a troubling set of facts that the dissent characterized as “coercion” of the birth mother (*In re Adoption of D.N.T.*, 843 So. 2d 690 (Miss. 2003)). 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 showed, had pressured Camille 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 (*In re Adoption of D.N.T.*, 843 So. 2d 690 (Miss. 2003)).

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" (Appleton, 2011; *In re Adoption of D.N.T.*, 843 So. 2d, 708). Notably, the court relied on the lower court's logic that when Camille gave birth, she became a parent and thus achieved emancipation (*In re Adoption of D.N.T.*, 843 So. 2d, 709, 710). 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. (*In re Adoption of D.N.T.*, 843 So. 2d, 709)

In other words, when Camille gave birth, she achieved the status of parent, and thus, 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 (*In re Adoption of D.N.T.*, 843 So. 2d, 709). 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 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>1</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” (Appleton, 2011, p. 281). 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 (Appleton, 2011; *In re Baby Boy R.*, 386 S.E.2d 839 (W. Va. 1989); *J.S. v. S.A.*, 912 So. 2d 650, 656, 657 (Fla. Dist. Ct. App. 2005); Thompson & Hollinger, 2013). For example, 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” (*In re Dependency of M.S.*, 236 P.3d, 218; see also *In re Adoption of Baby Girl K.*, 615 P.2d 1310, 1315 (Wash. Ct. App. 1980); *In re Baby Boy L.*, 534 N.Y.S.2d 707; *Kayla P.*, 2010 WL 987071; *In re Minor Child David*, 256 A.2d, 587, 588; *In re Baby Boy L.*, 534 N.Y.S.2d 706). 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” (Appleton, 2011, p. 281). Professor Appleton shows that the adoption case law and literature “suggest that regret has no legal traction because the initial requirement of voluntary consent itself receives only lip service, as illustrated by *D.N.T.*” (Appleton, 2011, p. 281).

Strikingly, the revocation cases from private adoption law echo the similarly facile dispatch of voluntary consent requirements in child welfare law. 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 (Fessler, 2006). 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. 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 (Appleton, 2011, p. 280). However, in the adoption context, women’s (or girls’) post-surrender regret “often carries no such legal weight” (Appleton, 2011, p. 280). Instead, courts treat the pain of regret as “well-deserved punishment for women who have transgressed prevailing sexual norms” (Appleton, 2011, pp. 282, 283). 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” (Appleton, 2011, p. 283). The law’s deployment of regret in this manner fits within traditional gender scripts and family law’s preoccupation with sexual discipline (Appleton, 2011).

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, similarly to judicial bypass in the abortion context (Sanger, 2009). 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.

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 (Cahill, 2013). 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.

To be clear, this chapter is not arguing for the removal of state oversight of teenage parents, since 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. This chapter’s analysis demonstrates that, despite the formal grant of full parental rights to minor parents, the law often undermines rather than supports those rights.

### **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, it is also likely 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 (Mutcherson, 2005; Oberman, 1996). 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 (Cunningham, 2006; Rosato, 2011; Scott, 1992). 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" in the same manner as adults (Scott, 1992). 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. Thus, although society recognizes that adolescents can engage in adult-like rational thought processes (Mutcherson, 2005) and adult-like biological behaviors, such as sex and reproduction (James, 2009), 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, evidence shows 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 legal reforms that involve third parties, other than parents or the state, in adolescents' decisions about pregnancy and parenting.

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 chapter, "third parties" means adults other than parents or state officials who have authority over the minor, such as judges or child welfare agents (Appleton, 2008; Manian, 2012). 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. 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. 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 (Manian, 2012). 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.

Policy solutions involving third party adults could accommodate 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 state involvement in the sensitive arena of adolescent sexuality and reproduction.

A number of scholars and researchers have noted that third parties could help to ensure sound decision-making for adolescents. 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 (Rosato, 2011). In a similar vein, Kimberly Mutcherson argues for a model of shared decision-making between adolescents and

parents in the healthcare context (Mutcherson, 2005). 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 (Mutcherson, 2005, 2006). Professor 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 (Mutcherson, 2005; Rosato, 2011). 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 (Zimring, 1982).

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 chapter. 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 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. 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 (Manian, 2012). In contrast, in public family law, the “all or nothing” approach still prevails (Gosdoe, 2006). 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 (Stotland & Godsoe, 2006). 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 (Stotland & Godsoe, 2006; Gupta-Kagan, 2013). Yet, in child welfare law, the dyadic parental model still dominates over a triadic model. Placements incorporating third party adults into the minor parent's relationship with her infant remain underutilized in favor of the traditional path of termination of parental rights and closed adoption (Godsoe, 2013a).

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 (Appell, 2011; Garrison, 2005; Guggenheim, 2005; Gupta-Kagan, 2014; Huntington, 2014). Supportive adult guidance in the form of a third party adult mentor presents one promising type of third party early intervention (Godsoe, 2013b). 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 (Klaw et al., 2003; Sipe, 2002; Yancey et al., 2011). Numerous studies on various forms of mentoring as an intervention for pregnant and parenting teenagers have indicated positive effects (Black et al., 2006; Klaw et al., 2003). 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" (Klaw & Rhodes, 1995; Klaw et al., 2003). For example, the nurse-family 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 (Huntington, 2014). Importantly, researchers have emphasized, "By relying on nonparent adults, adolescent mothers can gain some autonomy while simultaneously obtaining much needed emotional support and advice" (Klaw & Rhodes, 1995). 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 (Flynn, 1999; Klaw & Rhodes, 1995; Klaw et al., 2003; Rhodes et al., 1992, 1994).

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 and employment opportunities (Klaw & Rhodes, 1995). 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.

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. 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 (Manian, 2012). 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. 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 (Seymore, 2013). Reforms 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 (Samuels, 2005).

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 (Manian, 2012).

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 (*Adoption of J.M.M. v. New Beginnings of Tupelo, Inc.*, 796 So. 2d 975, 983 (Miss. 2001); *Gaughan v. Gilliam*, 401 N.W.2d 687 (Neb. 1987); Hollinger, 2013; Wier, 2003). While mandatory parental or judicial approval may prove arbitrary, the absence 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 (Appleton, 2011; Samuels, 2005). 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>2</sup> In addition, adoption law critics often suggest that independent legal representation for birth parents is a crucially needed reform, especially for minor parents (Glesner Fines, 2011; Sankaran, 2009, 2010). 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” (Hollinger, 2013; Unif. Adoption Act § 2-405(a)(4) (1994)). Thus, adoption law experts have long advocated for independent legal representation for minor parents considering executing a voluntary consent for adoption (Unif. Adoption Act § 2-405(c); Samuels, 2005). Particularly given the complexity of open adoption, the current form of many if not most domestic adoptions (Appell, 2010; Appleton, 2011; Gaddie, 2009), minor parents would likely benefit from having their own lawyer who could accurately describe their rights post-adoption (Seymore, 2013).

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 (Sanger & Willemsen, 1992). There is an extensive literature debating the lawyers' role in representing adolescents and children (Elrod, 2007; Glesner Fines, 2011; Hollinger, 2013; Sankaran, 2010). 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.

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.

Finally, critics of proposals to involve third party adults in adolescent reproductive decisions may challenge some types of legal reform as unduly interfering with parents' constitutional right to control their children's upbringing. Particularly in the politically charged context of abortion, for some parents expanding parental involvement legislation to include parental surrogates may feel like more of a diminishment of parental rights than allowing a judicial bypass. Some states have gone so far as to enact legislation authorizing civil law suits against persons who assist minors in obtaining an abortion without parental consent or judicial bypass as required by state law (*Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732 (Mo. 2007); *Wyatt v. McDermott*, 725 S.E.2d 555 (Va. 2012)). In vehemently anti-abortion states, law reform to expand minors' access to abortion care through third party support could be an upstream battle and require significant changes to multiple statutes.

Despite the challenges, 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 (Oberman, 1996; Scott, 2000). 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.

## 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 as a means to the purported goals of ensuring sound adolescent decision-making and protecting children's well-being.

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 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 decision-making. 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.

## NOTES

1. For additional cases, see, for example, *Fowler v. Merkle*, 564 So. 2d 960, 96–162 (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) (15-year-old parent's consent to adoption was not revocable based on minority); *In re Minor Child David*, 256 A.2d 583, 587, 588 (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 17-year-old); *In re Adoption of Morrison*, 560 P.2d 240 (Okla. Civ. App. 1976) (holding that consent executed by 16-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 17-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).

2. 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. Borgmann, C. (2010). Abortion: The undue burden standard, and the evisceration of women's privacy. *William & Mary Journal of Women and the Law*, 16(2), 291 (discusses 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.

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). 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 and adoption contexts.

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