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Inapplicability of Parental Involvement Laws to the Distribution of Mifepristone (RU-486) to Minors

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THE INAPPLICABILITY OF PARENTAL INVOLVEMENT LAWS TO THE DISTRIBUTION OF MIFEPRISTONE (RU-486) TO MINORS

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No woman can call herself free who does not own and control her own body. No woman can call herself free until she can choose consciously whether she will or will not be a mother.¹

I. INTRODUCTION

Approximately “forty-three percent” of all adult women in the United States have had an abortion.² Many of the women who comprise this forty-three percent had their abortions while they were under the age of eighteen.³ Roughly one million teenagers become pregnant each year,⁴ and of those, “about forty percent . . . choose abortion.”⁵ That so many women who have abortions are teenagers is significant because efforts to restrict a woman’s right to have an abortion led to the creation and implementation of parental involvement laws.⁶ These laws require a minor to notify or obtain consent from one or both of her parents before she can have an abortion.⁷ Alternatively, a minor can argue her case before a judge,

1. Creative Quotations from Margaret Sanger (1883-1966), available at <http://www.bemorecreative.com/one/1440.htm> (last visited March 24, 2002).

2. Symposium, *A Celebration of Reproductive Rights: Twenty-Five Years of Roe v. Wade*, 19 WOMEN’S RTS. L. REP. 247, 254 (1998) [hereinafter *A Celebration of Reproductive Rights*].

3. See THE ALAN GUTTMACHER INSTITUTE, FACTS IN BRIEF: INDUCED ABORTION (2000) [hereinafter INDUCED ABORTION] (showing that of the women seeking an abortion, 20% are minors).

4. See MARLENE GERBER FRIED, ABORTION WARS, A HALF CENTURY OF STRUGGLE, 1950-2000 215 (Rickie Solinger ed., 1998) [hereinafter ABORTION WARS] (emphasizing the significance of the fact that many of the women who become pregnant each year are teenagers).

5. *Id.*

6. See *Abortion – Parental Notification Statutes*, 104 HARV. L. REV. 247 (1990) (observing that the implementation of parental involvement laws “marks the most recent erosion of the fundamental right to terminate a pregnancy . . .”); see also MATTHEW E. WETSTEIN, ABORTION RATES IN THE UNITED STATES, THE INFLUENCE OF OPINION AND POLICY 57 (State University of New York Press 1996) (“[A]nalyzes at the state level do demonstrate significant impacts of some state policy changes on abortion utilization, [which] . . . reinforces the notion that state legislatures are the key to abortion policy in the United States”).

7. See THE ALAN GUTTMACHER INSTITUTE, THE STATUS OF MAJOR ABORTION-RELATED POLICIES IN THE STATES; STATE LAWS, REGULATIONS AND COURT DECISIONS AS OF OCTOBER 2000 3 (2000) [hereinafter THE STATUS] (noting that except in

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who can then give her permission to have the abortion.⁸ In states that enforce parental involvement laws, unless the minor comports with the law or uses the judicial bypass, she is prohibited from having an abortion.⁹ In addition, parental involvement laws are applicable, not only to the women who live in that state, but to anyone seeking to have an abortion in that state, regardless of her residential status.¹⁰

Even though parental involvement laws actually prevent minors from having safe, legal abortions,¹¹ these laws are not illegal.¹² *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹³ held that restrictions on abortions are constitutional, so long as the restriction does not place an “undue burden” on the woman.¹⁴ Even though many disagree, according to the Supreme Court, parental involvement laws do not constitute an undue burden because they do not keep the minor from deciding whether to terminate her pregnancy.¹⁵ Thus, any state may pass and enforce parental involvement laws without violating the Constitution.¹⁶

Connecticut, Hawaii, Maine, New Hampshire, New York, Oklahoma, Oregon, Vermont and Washington, a minor is required to notify or obtain the consent of one of her parents).

8. See *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (“[I]f the State decides to require a pregnant minor to obtain one or both parents’ consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained”). This procedure is commonly known as a judicial bypass. See *id.*; see also ABORTION WARS, *supra* note 4, at 215 (detailing how traumatic it is to obtain a judicial bypass).

9. See THE ALAN GUTTMACHER INSTITUTE, ISSUES IN BRIEF: MINORS AND THE RIGHT TO CONSENT TO HEALTH CARE (2000) [hereinafter MINORS AND THE RIGHT] (stressing that only Connecticut, Maine and the District of Columbia “have laws that affirm a minor’s ability to obtain an abortion on her own.”).

10. See National Abortion and Reproductive Rights Action League, *The “Child Custody Protection Act” Threatens Young Women’s Health*, available at http://www.naral.org/mediaresources/fact/ccpa_womenshealth.html (last visited Jan. 21, 2002) (explaining how in 1999, trying to further curb a minor’s right to have an abortion, opponents proposed The Child Custody Protection Act, which would make it a felony for anyone to bring a minor across state lines to have an abortion); see also Jan Erickson & Lisa Ensey, *Reproductive Rights Gains and Losses in Last Congress*, available at <http://www.now.org/nnt/winter-99/reprobr.html> (last visited Mar. 24, 2002) (asserting that the Child Custody Protection Act (S.1645) is also known as the “Teen Endangerment Act” because of the dangers it will pose to minors seeking an abortion).

11. See ABORTION WARS, *supra* note 4, at 215 (“these laws mainly create barriers for young women seeking abortions”).

12. See *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992) (holding that parental consent laws are constitutional).

13. 505 U.S. 833 (1992)

14. See *id.* at 877 (defining an undue burden as a regulation designed to prevent a woman from exercising her right to choose).

15. See *id.* at 899 (stating that the parental consent requirement with the judicial bypass was constitutional).

16. See *id.*; see also Center for Reproductive Law and Policy, *Restrictions on Young*

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At the time parental involvement legislation was drafted and enacted, the only type of abortion available to women in the United States was a surgical abortion.¹⁷ Because of all the restrictions on surgical abortions,¹⁸ the Food and Drug Administration's approval of mifepristone, also known as RU-486, on September 28, 2000, was hailed as a victory for American women.¹⁹ Pro-Choice groups and health care providers believed that mifepristone would increase access to safe abortion services.²⁰ Moreover, these groups also believed that mifepristone would increase a woman's privacy because "it would take early abortions out of clinics, where women can be harassed and doctors threatened, and bring them to private doctor's offices . . . [where] no one but a woman and her doctor would know that she had decided to terminate her pregnancy."²¹ However, this feeling of victory was short lived, for even though the distribution of mifepristone did not begin until November 2000, anti-choice advocates began proposing restrictions on its circulation as early as days after the FDA's ruling.²² In fact, some states²³ are already

Women's Access to Abortion Services, available at http://www.crlp.org/pub_fac_restrictions.html (last modified July 2001) (observing that the constitutionality of parental increment laws is being challenged in Arizona, Florida, and Idaho).

17. See Aaron Zitner, *FDA Approves Use of Abortion Pill: The Drug Will Allow More Doctors to Provide the Service and May Alter the Dynamics of the Debate*, L.A. TIMES, Sept. 29, 2000, at A1 [hereinafter *FDA Approves Use of Abortion Pill*] (stating after a twelve year fight, mifepristone, an alternative to surgical abortion, was finally approved by the Food and Drug Administration (FDA) for use in the United States on September 28, 2000). Mifepristone will allow women to have abortions earlier in their pregnancies and will also allow more doctors to provide abortion services. See *id.* See also National Abortion and Reproductive Rights Action League, *The Fight For Mifepristone (RU-486)*, available at <http://www.naral.org/mediaresources/fact/fight.html> (last modified Jan. 11, 2002) [hereinafter *The Fight*] (noting that the fight against mifepristone as an alternative to surgical abortions began before the drug was even approved by the FDA). In 1998, for example, "U.S. Rep. Tom Coburn (R-OK) offer[ed] an amendment to the fiscal year 1999 Agriculture Appropriations bill to bar the FDA from using funds to test, develop, or approve any drug for the chemical inducement of abortion, including mifepristone." *Id.*

18. See INDUCED ABORTION, *supra* note 3 ("the most common restrictions in effect are parental involvement requirements, mandatory counseling and waiting periods, and limitations on public funding").

19. See American Civil Liberties Union, *Mifepristone (RU-486): A Promise Worth Keeping*, available at <http://www.aclu.org/features/f013001a.html> (last visited March 24, 2002) [hereinafter *A Promise*] (calling FDA's approval of the drug a breakthrough in reproductive rights and healthcare for women in the United States).

20. See *id.* (pointing out that the approval will be worthless if anti-choice groups succeed in restricting access to the drug).

21. Gina Kolata, *Wary Doctors Spurn New Abortion Pill*, N.Y. TIMES, Nov. 14, 2000, at F1.

22. See *Lawmakers Propose Higher Standards for Abortion Pill*, L.A. TIMES, Oct. 5, 2000, at A15 (reporting that bills were already introduced that would effectively reduce the number of doctors who would be permitted to dispense the pill); see also National Abortion and Reproductive Rights Action League, *What You Should Know About Mifeprex®*, available at <http://www.naral.org/mediaresources/fact/>

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applying parental involvement legislation to the distribution of mifepristone.²⁴

Part II of this Comment gives the history of the right to have an abortion, as granted by *Roe v. Wade*,²⁵ and through *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁶ This section also briefly describes parental involvement laws and mifepristone. Part III of this Comment argues that because mifepristone is similar to emergency contraceptives and different from surgical abortions, and because minors are able to consent to many other medical treatments without involving a parent, parental involvement laws cannot be applied to the distribution of mifepristone.²⁷ However, abortion opponents believe mifepristone to be more like surgical abortions, thereby requiring the application of the undue burden standard adopted by *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁸ These opponents argue that based on the holding and the standard, parental involvement laws can be applied to all types of abortions, medical or surgical.²⁹ In response, this Comment argues that even if

mifeprex.html (last visited March 24, 2002) [hereinafter *What You Should Know*] (observing that “anti-choice advocates have vowed to have state bills introduced and to encourage amendment of existing abortion laws to restrict distribution of [mifepristone],” which would make it inaccessible to the women who would benefit from it the most); Zitner, *FDA Approves Use of Abortion Pill*, *supra* note 17, at A1 (informing of anti-choice groups’ decision to challenge the FDA’s ruling).

23. See, e.g., KY. REV. STAT. ANN. § 311.732(1)(c) (Banks-Baldwin 2000) (including medicine and drugs, in addition to surgery, in the definition of abortion); see also *Granholm Ruling Puts Abortion Pill on Par With State Law*, GRAND RAPIDS PRESS, Mar. 14, 2001, at D5 (reporting that in Michigan, existing regulations on surgical abortions will also be applied to medical abortions), Jennifer Lenhart, *Va. Curbs RU-486 Use By Minors; Law Appears Strictest In Area On Abortion Pill*, WASH. POST, Oct. 10, 2000, at B1 (recounting that Virginia’s parental notification laws also apply to the distribution of mifepristone to minors), Tom Sharp, *RU-486 Use May Mean Abortion in Some Cases*, COM. APPEAL, Mar. 13, 2001, at B5 (stating that in Tennessee, RU-486 may be included in certain laws that regulate abortions, including parental consent laws), Bob Mims, *Clinics On Utah Campuses Decline To Offer RU-486 Abortion Pill*, SALT LAKE TRIB., Mar. 12, 2001, at B1 (providing that RU-486 falls under Utah’s parental notification laws).

24. See Center for Reproductive Law and Policy, *Providing Medical Abortion Within the Limits of the Law*, available at http://www.crlp.org/pub_fac_medabor.html (last modified May 2001) [hereinafter *Providing Medical Abortion*] (explaining that the parental involvement laws already in existence will apply to medical abortions).

25. 410 U.S. 113 (1973).

26. 505 U.S. 833 (1992).

27. See *infra*, Part III.

28. See Renee C. Wyser-Pratte, *Protection of RU-486 as Contraception, Emergency Contraception and as an Abortifacient Under the Law of Contraception*, 79 OR. L. REV. 1121, 1129 (2000) [hereinafter *Protection of RU-486*] (explaining that if mifepristone was categorized only as an abortifacient, all state regulations permissible under *Casey* would be applicable to its distribution).

29. See *supra*, note 23.

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Casey were to apply to the distribution of mifepristone, parental involvement laws would fail the undue burden test and would be found unconstitutional. This Comment concludes with a recommendation of how mifepristone ought to be dispensed.

II. BACKGROUND

A. *From Eisenstadt to Roe*

While *Roe v. Wade*³⁰ legalized abortion,³¹ the holding would not have been possible had it not been for preceding privacy cases.³² The significance of these privacy cases cannot be understated, for they established the “zone of privacy.”³³ *Eisenstadt v. Baird*³⁴ was particularly important, for not only did it reaffirm the existence of the zone of privacy, but it specifically recognized the importance of “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”³⁵ The Court’s holding in *Eisenstadt* became the foundation for the Court’s holding in *Roe*.³⁶

Roe v. Wade challenged the constitutionality of a Texas statute outlawing abortion, except as was necessary to save the life of the woman.³⁷ Giving the history of abortion restrictions, the Court explained that abortion was made illegal to protect the mother, not the fetus, as abortion used to be a dangerous procedure.³⁸ Because of

30. 410 U.S. 113 (1973).

31. See *id.* at 163 (holding that women have the right to determine for themselves whether to terminate a pregnancy).

32. See *Skinner v. Oklahoma*, 316 U.S. 535, 543 (1942) (striking down, as unconstitutional, a statute requiring the sterilization of certain convicted persons), *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (deciding that distributing contraceptives to married people is not unconstitutional), *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (ruling that the law forbidding the sale of contraceptives only to married couples is unconstitutional, for the right to privacy extends to all people, be they married or single).

33. See *Griswold*, 381 U.S. at 485 (declaring that rights falling within this zone of privacy are protected by constitutional guarantees, and that the state cannot impair these fundamental rights without applying strict scrutiny); see also *Roe*, 410 U.S. at 155 (requiring a compelling state interest before allowing a restriction on a fundamental right).

34. 405 U.S. 438 (1972).

35. *Eisenstadt*, 405 U.S. at 453.

36. See *Roe*, 410 U.S. at 152-53 (citing to *Eisenstadt* when acknowledging that the Court has always recognized certain areas of personal privacy existing under the Constitution).

37. See *id.* at 139. Until this time, abortion was illegal in the United States. *Id.*

38. See *id.* at 148-149 (asserting that one of the reasons states established

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the advances in medicine, the Court determined that these restrictions no longer served a valid purpose, because abortion became safer for the mother than childbirth.³⁹

Having established that the restrictions were unnecessary, the Court went on to discuss whether the right to have an abortion was included under personal privacy rights.⁴⁰ Using the holdings and analyses in the privacy cases precedent, the Court in *Roe* held that “this right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”⁴¹ Moreover, the Court held that a woman’s right to decide whether to terminate her pregnancy is a “fundamental right.”⁴² Because the Court deemed the right to choose to have an abortion to be a fundamental right, strict scrutiny would apply to any restriction the State would try to place on this right.⁴³

The Court heard several cases after *Roe* to decide issues relating to the regulation of a woman’s right to choose to have an abortion.⁴⁴ At first, the Court struck down the regulations, thereby reaffirming that restrictions on this fundamental right had to pass strict scrutiny in order to be held constitutional.⁴⁵ However, this action by the Court

regulations outlawing abortion was to protect the mother from subjecting herself to a life-threatening procedure). The Court also noted that the other reasons for making abortion illegal was to discourage premarital sex and to protect the life of the fetus. *Id.* See also Cheryl Brownstein-Santiago, *Stories That Shaped the Century*, L.A. TIMES, Dec. 8, 1999, at B4 (stressing “in the early and mid-1800s [abortion] was seen as a perfectly acceptable birth control method . . .”).

39. See *Roe*, 410 U.S. at 149 (maintaining that because abortion had become such a safe procedure, the state’s interest in protecting the health of the mother during the first trimester no longer existed).

40. See *id.* at 152-53 (discussing previously established privacy rights and holding that these privacy rights include the right to have an abortion).

41. *Id.* at 153.

42. *Id.* at 155.

43. See *id.* (clarifying that strict scrutiny requires that only compelling state interests justify restricting a woman’s right to choose and that this restriction must be narrowly tailored to meet only that specific interest).

44. See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 418 (1990) (contesting the constitutionality of a two-parent notification requirement); *Planned Parenthood Ass’n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 479 (1983) (objecting to provisions of an abortion statute, including a parental consent requirement); *Planned Parenthood v. Danforth*, 428 U.S. 52, 56 (1976) (challenging the constitutionality of a Missouri abortion statute that regulated abortions during all stages of pregnancy).

45. See *Doe v. Bolton*, 410 U.S. 179, 201 (1973) (holding the Georgia law prohibiting abortions except in cases of medical necessity, rape, incest, and fetal abnormality, unconstitutional because it violated a woman’s right to choose, as established by *Roe*); *Danforth*, 428 U.S. at 75 (declaring the restrictions on abortion unconstitutional).

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was not always consistent.⁴⁶

Through *Bellotti v. Baird*,⁴⁷ the Court established that in order for parental involvement laws to be valid, they must have a bypass provision.⁴⁸ However, the pro-choice community recognized that even with the bypass procedure, parental involvement laws significantly impaired a minor's right to have an abortion, and therefore, the pro-choice community continued to challenge the parental involvement requirement.⁴⁹ The battle over the constitutionality of parental involvement laws came to a head in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁵⁰

B. *Planned Parenthood of Southeastern Pennsylvania v. Casey*

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁵¹ the Court had to decide whether certain provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989, were constitutional.⁵² One of the provisions required parental consent.⁵³ The Court ultimately upheld all the provisions of the statute, except for the one requiring spousal notice.⁵⁴ However, before discussing

46. Compare *H. L. v. Matheson*, 450 U.S. 398, 413 (1981) (upholding the Utah law requiring notification of one parent), with *Hodgson*, 497 U.S. at 423 (rejecting, as unconstitutional, the Minnesota parental involvement law requiring the notification of both parents because the state's interest is sufficiently protected by notifying one parent).

47. 443 U.S. 622 (1979).

48. See *id.* at 643-44 (holding that a minor is entitled to prove to a judge either that she is mature enough to decide for herself whether to have an abortion, or that even if she is not mature enough to make the decision for herself, that having an abortion is in her best interest).

49. See *Matheson*, 450 U.S. at 413 (finding the parental notification law constitutional); see also *Ashcroft*, 462 U.S. at 493 (holding that the State's interest in protecting immature minors is compelling enough to justify a parental consent requirement).

50. See *Casey*, 505 U.S. at 899-900 (1992) (discussing the constitutionality of the parental consent requirement).

51. 505 U.S. 833 (1992).

52. See *id.* at 902-12 (listing the provisions of the statute considered by the Court, which included an informed consent provision requiring a 24-hour waiting period, parental consent, spousal notice, record-keeping and reporting).

53. See *id.* at 899 (acknowledging that the statute had a judicial bypass provision).

54. See *id.* at 893-94. But see *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1396 (E.D. Pa. 1990) (declaring that all portions of the statute were unconstitutional, including the parental consent requirement). The district court explained that parental consent laws, even with the judicial bypass procedure, created an undue burden on the minor's right to have an abortion. *Id.* at 1384. More specifically, the court found fault with the fact that parental consent laws allowed a parent to "attempt to exercise an absolute veto over his or her daughter's decision to obtain an abortion." *Id.* at 1383.

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the merits of the case, the Court first discussed *Roe v. Wade*, finally stating that *Roe*'s holding was comprised of three parts, all of which the Court claimed to reaffirm.⁵⁵

To determine the constitutionality of the five provisions in the Pennsylvania Statute, the Court abolished the trimester policy created by *Roe*,⁵⁶ and established the "undue burden test."⁵⁷ As Justice O'Connor, writing for the Court, explained, "a finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."⁵⁸ However, "not all burdens on the right to decide whether to terminate a pregnancy will be undue."⁵⁹ In fact, regulations that make an abortion more expensive or more difficult to obtain will not be struck down if they serve a valid purpose.⁶⁰ Only those regulations that impose "an undue burden on a woman's ability to make this decision," will be considered to have "reach[ed] into the heart of the liberty protected by the Due Process Clause."⁶¹ Justice O'Connor somehow found that parental involvement laws did not constitute this undue burden.⁶²

55. *But see* THE CHOICES WE MADE, TWENTY-FIVE WOMEN AND MEN SPEAK OUT ABOUT ABORTION xxi (Angela Bonavoglia ed., 2001) [hereinafter THE CHOICES WE MADE] (contending that the Court's decision in *Casey* to reaffirm *Roe* was an imaginary victory for the pro-choice movement, because *Casey* essentially "authorized states to institute abortion regulations throughout pregnancy in order to discourage the procedure").

56. *See Casey*, 505 U.S. at 873 (declaring the Court's decision not to use the trimester framework created in *Roe*). *See Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (establishing the trimester framework). Under the trimester framework the State may not place any restrictions on a woman's right to have an abortion during the first trimester of pregnancy. *Id.* During the second trimester, the State's interest in potential life is stronger and it may "regulate the abortion procedure in ways that are reasonably related to maternal health." *Id.* During the third trimester, after viability, the State may prohibit all abortions, unless it is necessary to preserve the mother's life. *Id.*

57. *See Casey*, 505 U.S. at 877 (explaining the new standard upon which the finding of constitutionality or unconstitutionality would be based).

58. *Id.*

59. *Id.* at 876.

60. *See id.* at 877 (clarifying that an interest in protecting the "potential life" is valid).

61. *Id.* at 874.

62. *See Casey*, 505 U.S. at 899 (1992) (upholding the constitutionality of the parental consent requirement and judicial bypass procedure). According to the Court there is no undue burden "provided that there is an adequate judicial bypass procedure." *Id.*

C. Parental Involvement Laws

1. Parental Notification and Parental Consent Laws

Parental involvement laws refer generally to laws that prohibit minors from acting without consulting a parent.⁶³ These laws exist in two forms: parental notification laws, which require “clinics to give advance notice to one or both parents,”⁶⁴ and parental consent laws, which require the minor to obtain the written consent of one of her parents before she can have an abortion.⁶⁵ Parental involvement laws vary from state to state;⁶⁶ thus the ability of a minor to exercise her constitutional right as a woman, to decide whether or not to terminate her pregnancy, depends upon where she lives.⁶⁷

2. The Judicial Bypass

If a minor cannot ask a parent for consent to have an abortion, she must go to court.⁶⁸ In court, a judge will determine whether she is “mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents’ wishes.”⁶⁹ If the judge thinks that she is immature, the judge

63. See ABORTION WARS, *supra* note 4, at 215 (describing how certain involvement laws require physicians to notify at least one parent either in person, by phone, or in writing, and that health care providers face losing their licenses and sometimes criminal penalties for failure to comply).

64. FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 168 (Marlene Gerber Fried ed., 1990) [hereinafter FROM ABORTION TO REPRODUCTIVE FREEDOM].

65. See Robin Abcarian, *How a Law That Sounds OK on Paper Killed A Girl*, L.A. TIMES, Apr. 14, 1996, at E1 (explaining the requirements set forth by parental consent laws).

66. See Center for Reproductive Law and Policy, *Restrictions on Young Women's Access to Abortion Services*, at http://www.crlp.org/pub_fac_restrictions.html (last visited Feb. 8, 2002) (noting that forty-three states have some sort of parental involvement requirement); see also FROM ABORTION TO REPRODUCTIVE FREEDOM, *supra* note 64, at 168 (explaining that “the degree to which each state complies with the laws varies”).

67. See Susan R. Estrich & Kathleen M. Sullivan, *Colloquy: Webster v. Reproductive Health Services, Abortion Politics: Writing For An Audience of One*, 138 U. PA. L. REV. 119, 122 (1989) (discussing how allowing the states to write legislation restricting abortion rights will mean that “the ability to choose will once again depend upon who you are and where you live and how much money you have; and young and poor women, for whom the burden of an unwanted pregnancy is most crushing, will have the fewest rights of all”).

68. See FROM ABORTION TO REPRODUCTIVE FREEDOM, *supra* note 64, at 168 (relating that “in Massachusetts, about 5,000 teenage girls have gone to the Superior Adult Court since 1981” to seek a judicial bypass, and that “before 1986, when its law was struck down, Minnesota had the second largest record of experience – approximately 3,500 girls went through the courts over the course of five years”).

69. Bellotti v. Baird, 443 U.S. 622, 643 (1979).

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will then decide whether having an abortion is in her best interest.⁷⁰ However, the Court did not establish any criteria to guide the judges in making either of these determinations.⁷¹

D. Mifepristone⁷²

One way to terminate a pregnancy medically, that is, without surgery, is by taking mifepristone.⁷³ Mifepristone blocks progesterone,⁷⁴ without which “the lining of the uterus softens, breaks down and bleeding begins.”⁷⁵ Although the window of time during which a woman can use mifepristone to terminate her pregnancy is small,⁷⁶ mifepristone has been proven safe and effective, and satisfaction rates are high.⁷⁷ Even though mifepristone was only recently made available in the United States,⁷⁸ women in other countries⁷⁹ were having medical abortions⁸⁰ for years.⁸¹ The FDA

70. See *id.* at 644 (emphasizing that the bypass procedure exists to ensure that the parental involvement requirement is not a veto over the minor’s right to have an abortion).

71. See ABORTION WARS, *supra* note 4, at 215-16 (explaining that the judges are left to use their own discretion).

72. For purposes of this Comment, mifepristone refers to the entire regimen; that is, the first dosage of the pills actually called mifepristone, as well as the second set of pills called misoprostol.

73. See *What You Should Know*, *supra* note 22 (clarifying that mifepristone will be distributed under the brand name MifeprexTM). Throughout this Comment, the pill will be referred to as mifepristone.

74. See Danco Laboratories, *MifeprexTM, The Early Option*, at http://www.earlyoptionpill.com/hcp_faqs.php3 (last visited Feb. 8, 2002) (explaining that progesterone is “a naturally produced hormone that prepares the lining of the uterus for a fertilized egg and helps maintain pregnancy”).

75. *Id.* Two days after taking mifepristone, women must also take misoprostol, a “prostaglandin that causes the uterus to contract, which helps to complete the process.” *Id.*

76. See Helen O’Neill, *Abortion Pill Means More, But Not Easier, Choices*, L.A. TIMES, Oct. 22, 2000, at A1 [hereinafter *Abortion Pill*] (commenting that mifepristone is only available to women during the first 49 days of pregnancy).

77. See *What You Should Know*, *supra* note 22 (reporting a rate of effectiveness of 92-96% and a recommendation rate of 96%).

78. See National Abortion and Reproductive Rights Action League, *RU-486/Mifepristone*, available at http://www.naral.org/issues_ru486.html (last visited Feb. 8, 2002) (suggesting that although mifepristone was proven safe and effective over a decade ago, the strength of the anti-choice movement is what kept it from being made available in the United States).

79. See American Civil Liberties Union, *Mifepristone (RU-486): Myths and Facts*, at http://www.aclu.org/issues/reproduct/ru486_factsheet.html (last visited Feb. 8, 2002) [hereinafter *Myths and Facts*] (reporting that mifepristone has been used in approximately nineteen countries, including France, China, the United Kingdom and Sweden).

80. See *What You Should Know*, *supra* note 22 (distinguishing between medical abortions and emergency contraceptives). Emergency contraceptives prevent, rather than terminate, a pregnancy. *Id.*

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engaged in very thorough testing of the drug, which accounts for part of the reason why mifepristone was just recently made available in the United States.⁸² However, another reason why women in this country had to wait so long was because anti-choice groups threatened potential manufacturers with physical violence.⁸³

III. LEGAL ANALYSIS

A. Parental Involvement Laws Cannot Apply to the Distribution of Mifepristone

Anti-choice groups are succeeding in their efforts to apply existing abortion restrictions to the distribution of mifepristone.⁸⁴ However, this existing legislation is inapplicable.⁸⁵ States have the authority to enact parental involvement laws because *Planned Parenthood of Southeastern Pennsylvania v. Casey* specifically granted them this right.⁸⁶ But, as surgical abortions were the only type of abortion available to women in the United States when *Casey* was decided,⁸⁷ the authority to enact these involvement laws applies only to surgical abortions and cannot automatically extend to mifepristone.⁸⁸ Rather, to determine

81. See *id.* (observing that mifepristone has been used since 1981); see also, *Myths and Facts*, *supra* note 79 (confirming that RU-486 was first approved in France and China in 1988).

82. See Planned Parenthood, *Mifepristone: Expanding Women's Options for Early Abortion*, available at http://www.plannedparenthood.org/library/ABORTION/Mif_fact.html (last visited Feb. 8, 2002) (suggesting that lobbying efforts against FDA approval added to the delay).

83. See Eric Schaff, *Redefining Violence Against Women: The Campaign of Violence and the Delay of RU 486*, 8 TEMP. POL. & CIV. RTS. L. REV. 311, 322 (1999) (adding that these anti-choice groups also threatened to boycott whichever company decided to distribute mifepristone).

84. See DENNIE WOLF & MARY CROWE, *OUR BODIES, OURSELVES* 402 (The Boston Women's Health Book Collective ed., Simon & Schuster 1998) (recognizing the anti-abortion movement is working to outlaw all abortions, be they surgical or medical), SUZANNE POIRIER, *WOMEN, HEALTH, AND MEDICINE IN AMERICA* 234 (Rima D. Apple ed., Rutgers Univ. Press 1992) [hereinafter *WOMEN, HEALTH*] (commenting that mifepristone is challenging "not only the medical system, but the legal and regulatory systems that are also involved in controlling access to abortion").

85. See *Providing Medical Abortion*, *supra* note 24 (arguing laws applicable to surgical abortions "do not make sense in the context of medical abortion" because the laws were drafted before medical abortions became available).

86. See *Casey*, 505 U.S. at 899 (reaffirming that states can enact parental involvement laws).

87. See Center for Reproductive Law and Policy, *Medical Abortion: An Alternative for Women*, available at http://www.crlp.org/pub_fac_medabor.html (last visited Mar. 20, 2002) (stating that the FDA approved the use of mifepristone on September 28, 2000, eight years after *Casey* was decided).

88. See Gwendolyn Prothro, *RU 486 Examined: Impact Of A New Technology On An*

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what laws should apply to distribution, mifepristone should be categorized as an emergency contraceptive, thereby prohibiting the application of parental involvement laws.⁸⁹

1. *Mifepristone Is More Like Emergency Contraceptives Than Surgical Abortions*

Though clear differences exist between mifepristone and emergency contraceptives,⁹⁰ the two have similar characteristics as was even recognized by state law.⁹¹ Most importantly, some women actually use mifepristone as an emergency contraceptive.⁹² Additionally, both mifepristone and emergency contraception are in pill form and do not require surgery.⁹³ According to the FDA,⁹⁴

Old Controversy, 30 U. MICH. J.L. REFORM 715, 741 (1997) [hereinafter *RU 486 Examined*] (concluding that “legally, RU 486 blurs the line between contraception and early abortion.”).

89. See Center for Reproductive Law and Policy, *Parental Consent and Notice for Contraceptives Threatens Teen Health and Constitutional Rights*, available at http://www.crlp.org/pub_fac_parentalconsent.html (last visited Mar. 21, 2002) [hereinafter *Parental Consent*] (indicating that minors are not required to involve, or receive consent from, their parents before receiving contraceptives).

90. See Planned Parenthood of New York City, Inc., *Issues and Trends in Reproductive Health: Emergency Contraception* (2000), available at <http://www.ppnyc.org/facts/facts/contraception.html> (last visited March 21, 2002) (reporting that emergency contraceptive pills are available in one of three basic forms: either ordinary birth controls taken in increased dosages, Preven, a hormonal pill regimen, or Plan B, a progestin-only pill). Preven and Plan B are manufactured exclusively for use as emergency contraceptives. *Id.*

91. See N.C. GEN. STAT. § 58-3-178 (2001) (defining both RU-486 and Preven as “prescribed contraceptive drugs or devices”), R.I. Gen. Laws § 27-18-57 (2001) (including RU-486 under the heading “FDA approved prescription contraceptive drugs and devices” to determine whether it would be covered by insurance companies).

92. See *Protection of RU-486*, *supra* note 28, at 1134 (“RU-486 can also be used as a safe and highly effective form of emergency contraception.”); see also CHRISTIANE NORTHRUP, M.D., *WOMEN’S BODIES, WOMEN’S WISDOM* 386 (Bantam Books 1998) [hereinafter *WOMEN’S BODIES, WOMEN’S WISDOM*] (calling mifepristone “the newest morning-after pill”); *RU 486 Examined*, *supra* note 88, at 730-31 (noting that in addition to its use as an emergency contraceptive and as a means to terminate pregnancy, mifepristone has also proven to be an effective treatment for different kinds of tumors, breast cancer, skin wounds, and Cushing’s Syndrome, and has also proven helpful during difficult births).

93. See *OUR BODIES, OURSELVES*, *supra* note 84, at 325 (illustrating that emergency contraceptives prevent pregnancy by changing hormone levels, which disrupts “the process of ovulation, egg transport, fertilization, and implantation”).

94. See United States Food and Drug Administration; Center for Drug Evaluation and Research, *Mifepristone Questions and Answers*, available at <http://www.fda.gov/cder/drug/infopage/mifepristone/mifepristone-qa.htm> (last visited Mar. 22, 2002) [hereinafter *Mifepristone Questions and Answers*] (providing that those who dispense mifepristone must “have the ability to date pregnancies accurately and to diagnose tubal pregnancies . . . be qualified to provide any necessary surgery, or have made arrangements for any necessary surgery . . . [and]

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doctors and health care providers may administer mifepristone.⁹⁵ Similarly, any health care provider can administer emergency contraceptives.⁹⁶ In neither case did the FDA specify that minors could not receive either of these pills.⁹⁷ Finally, both mifepristone and emergency contraceptives must be taken within a short period of time.⁹⁸

Because mifepristone is an abortifacient, opponents are trying to restrict women's access to the drug, but the differences between mifepristone and surgical abortions⁹⁹ are significant.¹⁰⁰ As previously stated, although mifepristone is a drug, administered in a doctor's office, the abortion itself actually occurs at home.¹⁰¹ On the other hand, legal surgical abortions always take place in a doctor's office or clinic.¹⁰² Additionally, only certain doctors can perform surgical abortions,¹⁰³ whereas currently, as long as the doctors or health care workers meet the requirements set forth by the FDA, they can

ensure that women have access to medical facilities for emergency care . . .").

95. See *id.* (explaining that the provider must meet the requirements set forth, but that the FDA does not require that the provider be a doctor, rather that is left to state laws and regulations); see also WOMEN'S BODIES, WOMEN'S WISDOM, *supra* note 92, at 386 (affirming that mifepristone may be dispensed by a health care practitioner).

96. But see Center for Reproductive Law and Policy, *The Facts, Emergency Contraception Advances Women's Rights*, available at http://www.crlp.org/pub_fac_ecdomestic.html [hereinafter *The Facts*] (last visited Mar. 22, 2002) (declaring that the Washington State Emergency Contraception Pharmacy Pilot Project allows women to obtain emergency contraception directly from pharmacists).

97. See *Mifepristone Questions and Answers*, (explaining that the FDA, itself, is not specifying that the woman be of a certain age in order to have access to mifepristone). Instead, the FDA decided to allow states to make that decision. *Id.*

98. See THE FACTS, *supra* note 96 (stating that emergency contraceptives, must be taken within seventy-two hours of having unprotected sex).

99. See OUR BODIES, OURSELVES, *supra* note 84, at 390 (mentioning that the surgical abortion procedure used during the first trimester is called a vacuum aspiration).

100. See Karen F. Richards, *RU 486: A Promising Birth Control Device Entangled In The Abortion Debate*, 6 J. PHARMACY & L. 117, 128 (1997) (proposing mifepristone should have been approved and made available as a contraceptive); see also *Protection of RU-486*, *supra* note 28, at 735 (discussing how medical abortions are different from surgical since medical abortions only involve taking a pill).

101. See *Protection of RU-486*, *supra* note 28, at 1133 ("One of the benefits of [mifepristone] is that it . . . 'can be done within the privacy of one's home.'").

102. See OUR BODIES, OURSELVES *supra* note 84, at 393 (advising that surgical abortions must be performed in a clinic or doctor's office); see also WOMEN, HEALTH, *supra* note 84, at 234 (noting that surgical abortions are performed in hospitals or clinics).

103. See WOMEN, HEALTH, *supra* note 84, at 234 (informing that today, physicians provide almost all legally performed surgical abortions). But cf. OUR BODIES, OURSELVES, *supra* note 84, at 396 (telling how the number of abortion providers, as well as those willing to be trained to perform abortions, has decreased significantly in recent years, making abortion providers significantly more difficult to find).

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dispense mifepristone.¹⁰⁴ Finally, mifepristone must be taken within the first seven weeks of pregnancy, while a surgical abortion can be performed as late as the second trimester.¹⁰⁵ Thus, because of the significant differences between mifepristone and surgical abortions, existing parental involvement laws cannot apply to the distribution of mifepristone.¹⁰⁶

2. *Minors Can Consent to Other Medical Procedures Without Consent from or Notification of a Parent, Thus Parental Involvement For Mifepristone Is Unnecessary*

The irony of parental involvement laws is that a minor can, independent of her parents, make every other decision related to her pregnancy and subsequent birth and child care arrangements, yet she has no power to terminate her pregnancy.¹⁰⁷ Perhaps one of the most interesting examples is that no laws exist requiring parental involvement if the minor wants to continue her pregnancy.¹⁰⁸ Nor do parental involvement laws exist regarding the minor's right to consent to delivery or to prenatal care.¹⁰⁹ If the minor decides to have and keep the baby, she is free to consent to medical care for the child without involving her parents, and if the minor decides to put the baby up for adoption, again, she may do so without involving her parents.¹¹⁰

Minors can consent to other medical procedures without parental

104. See OUR BODIES, OURSELVES, *supra* note 84, at 402 (suggesting that in the future "physician assistants, nurse-midwives, and nurse-practitioners will be able to provide the services [distribute mifepristone], which is primarily a matter of prescribing the medications").

105. See OUR BODIES, OURSELVES *supra* note 84, at 392 (advising that surgical abortions may be performed through the twenty-fourth week of pregnancy).

106. See Prothro, *supra* note 88, at 733 (arguing that mifepristone does not fit into the already established framework).

107. See MINORS AND THE RIGHT, *supra* note 9, at 1 (contending that minors are given the right to make other health care decisions without involving their parents).

108. See Abcarian, *supra* note 65 (indicating that a minor who decides to have a baby can do so without consent from a parent).

109. See MINORS AND THE RIGHT, *supra* note 9, at 5 (highlighting the illogicality of the fact that a minor must involve a parent if she wants to terminate her pregnancy, but that she need not obtain consent from a parent for any other decision she makes relating to prenatal care and delivery).

110. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 73-77 (1976) (observing that in Missouri, a minor who became pregnant and wanted to have an abortion, if married, was free to do so without having to comply with the parental consent laws, while a minor of the same exact age, if single, was forced to comply with the parental consent laws).

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consent or notification.¹¹¹ For example, at the time that *Planned Parenthood of Central Missouri v. Danforth* was decided, “no other Missouri statute specifically require[d] the additional consent of a minor’s parent for medical or surgical treatment, and that in Missouri a minor legally may consent to medical services for pregnancy (excluding abortion), venereal disease, and drug abuse.”¹¹² Thus, because minors can consent to surgery without involving a parent,¹¹³ parental involvement laws are inapplicable to the distribution of mifepristone, which is not only proven safe, but which is also non-surgical.¹¹⁴

B. Even if Casey Were to Apply to the Distribution of Mifepristone, Parental Involvement Laws Would Still be Found Unconstitutional

Roe v. Wade held, and *Casey* reaffirmed, that “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”¹¹⁵ Relying on this concept, New Jersey’s Supreme Court found that parental involvement laws “can operate as a functional bar to a minor’s exercise of her constitutional right to make her own reproductive decisions,” and therefore held them to be illegal.¹¹⁶ While parental involvement laws, as applied to surgical abortions, already cause substantial problems, the application of parental involvement laws to medical abortions would exacerbate these problems, placing teenagers in even greater

111. See Christine M. Hanisco, *Acknowledging the Hypocrisy: Granting Minors The Right To Choose Their Medical Treatment*, 16 N.Y.L. SCH. J. HUM. RTS. 899, 900 (2000) (recognizing that some states, having abolished the parental consent requirement, allow “mature minors” to make (their) own medical treatment decisions”). Also, “many states have enacted statutes that allow minors to obtain treatment for sexually transmitted diseases, and alcohol and substance abuse . . . without parental knowledge or consent.” *Id.*

112. *Danforth*, 428 U.S. at 73.

113. See MINORS AND THE RIGHT, *supra* note 9, at 4 (asserting that twenty-two states permit minors to consent to medical treatments, including surgery, without involving a parent).

114. See *Myths and Facts*, *supra* note 79 (last visited Mar. 22, 2002) (rejecting the argument that mifepristone is not safe by explaining that because mifepristone is used earlier in a pregnancy, a medical abortion is actually safer than a surgical abortion).

115. *Casey*, 505 U.S. at 879; see also *Roe*, 410 U.S. at 163 (holding that during the first trimester, the state cannot restrict a woman’s right to have an abortion); *Danforth*, 428 U.S. at 66 (reiterating that “*Doe* [the Georgia companion case to *Roe*] and *Roe* clearly establish the State may not restrict the decision of the patient and her physician regarding abortion during the first stage of pregnancy”).

116. *Planned Parenthood of Central New Jersey v. Farmer*, 165 N.J. 609, 635 (2000).

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danger.¹¹⁷

1. *Parental Involvement Laws Prevent The Minor From Making The Ultimate Decision*

The first part of *Roe* that *Casey* reaffirmed held that “before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure.”¹¹⁸ However, parental involvement laws create this substantial obstacle.¹¹⁹ Indeed, many judges agree that the only thing parental involvement laws actually do is to “make it as difficult as possible for these young ladies to have abortions.”¹²⁰

a. *Parental Involvement Laws Increase the Cost of an Abortion*

In *Casey*, Justice O’Connor said that cost cannot be a factor in determining whether a restriction creates an undue burden.¹²¹ However, O’Connor also said that when the state’s regulation imposes an undue burden on the woman’s right to decide for herself whether to terminate her pregnancy, that regulation is invalid.¹²² Parental involvement laws strike at one of the most vulnerable groups of citizens in the country, minors.¹²³ Teenagers do not typically earn a

117. See *id.* (noting how difficult parental involvement laws already make having an abortion).

118. *Casey*, 505 U.S. at 846.

119. See *A Celebration of Reproductive Rights*, *supra* note 2, at 254 (attributing “the real purpose and effect of these infringements is to foreclose the right to abortion altogether to less powerful women”).

120. See FROM ABORTION TO REPRODUCTIVE FREEDOM, *supra* note 64, at 167 (noting that the “six state court judges who heard at least ninety percent of the minors’ abortion petitions in Minnesota, and who testified at the 1986 trial challenging the constitutionality of Minnesota’s law” agree with Massachusetts Superior Court Judge Joseph Mitchell who said, “I believe the hearings don’t have any value at all”); see also Planned Parenthood, *Teenagers, Abortion, and Government Intrusion Laws*, available at <http://www.plannedparentood.org/library/ABORTION/laws.html> (last visited Mar. 24, 2002) [hereinafter *Teenagers*] (emphasizing that for those minors who decide to get consent from one of their parents, obtaining an abortion is still difficult because some parental consent laws require that “teenagers either obtain notarized evidence that parents have been notified, or present a death certificate for a deceased parent, [which] may present impossible logistical barriers for a young teenager or cause serious delay.”) Additionally, other laws require the physician to “personally locate and notify the parents,” which also “delays the procedure and increases the cost.” *Id.*

121. See *Casey*, 505 U.S. at 874 (suggesting that a regulation that has “the incidental effect of making it . . . more expensive to procure an abortion cannot be enough to invalidate it”).

122. See *id.* at 877 (explaining when a regulation creates an undue burden).

123. See *Estrich & Sullivan*, *supra* note 67, at 137 (reiterating that minors are one

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significant amount of money.¹²⁴ Already, the cost of a first trimester surgical abortion ranges from \$300 to \$450,¹²⁵ and the cost of a medical abortion using mifepristone is approximately \$375.¹²⁶ Parental involvement laws increase these costs to even higher amounts.¹²⁷

This increase in cost can be attributed to travel expenses.¹²⁸ Not all counties in the United States have hospitals or clinics that perform abortions;¹²⁹ similarly, not all doctors who can distribute mifepristone are doing so at present.¹³⁰ Thus, if the minor does not live near the clinic, or if she decides to leave the state to avoid having to notify or obtain the consent of one or both of her parents, she must travel.¹³¹ Costs incurred include not only the price of the bus or train ticket, but also the cost of a hotel and meals, for if the clinic is a good distance from her home, she may have to stay overnight.¹³² An

of the most vulnerable groups in society, in part because of their economic standing).

124. See *Farmer*, 165 N.J. at 633 (reiterating that the minors' lack of money is, in itself, an obstacle).

125. See National Women's Health Organization, available at <http://www.gynpages.com/nwho/index.html> (last visited Feb. 2, 2002) (giving the cost of an abortion at their clinics in several different states).

126. See Planned Parenthood of New York City, Inc., *Planned Parenthood of NYC Health Centers Begin Offering New Early Option Abortion Pill*, available at <http://www.ppnyc.org/new/releases/earlyoptionoffer.html> (last visited Mar. 24, 2002) (giving the price of the mifepristone regimen); see also Mande Silverman, *RU-486: A Dramatic New Choice or Forum for Continued Abortion Controversy?*, 57 N.Y.U. ANN. SURV. AM. L. 247, 261 (2000) ("[f]or many women . . . the cost may present an insurmountable barrier in the absence of financial assistance . . . [for] the complete medical abortion . . . can cost up to \$450 in a clinic and \$700 in a private doctor's office . . .").

127. See National Women's Health Organization, *supra* note 125 (noting that the price of the surgical abortion does not include a follow-up exam).

128. See FROM ABORTION TO REPRODUCTIVE FREEDOM, *supra* note 64, at 168 (emphasizing that traveling out of state for an abortion is very costly).

129. See Stanley K. Henshaw, *Abortion Incidence and Services in the United States, 1995-1996*, 30 FAM. PLAN. PERSP. 263 (Nov./Dec. 1998) (establishing that "between 1992 and 1996 . . . 86% of all U.S. counties had no known abortion provider"); see also Silverman, *supra* note 126, at 247 ("[s]ome states have only one doctor willing to perform abortions . . . women in certain areas of Michigan have to travel eleven hours to the nearest abortion provider . . . [and] in many rural areas of Texas, the closest provider is often 300 miles away.").

130. See *Providing Medical Abortion*, *supra* note 24 (suggesting that because doctors may be forced to publicize the fact that they dispense mifepristone, those doctors who once said they would distribute mifepristone are now reconsidering).

131. See, e.g., Stanley K. Henshaw, *The Impact of Requirements for Parental Consent On Minors' Abortions in Mississippi*, 27 FAM. PLAN. PERSP. 121 (May/June 1995) (indicating that upon the enactment of parental consent laws in Mississippi, the number of minors who traveled to other states to obtain abortion procedures increased).

132. See *Farmer*, 165 N.J. at 637 (acknowledging how frequently minors travel great distances to obtain an abortion). But see Aaron Zitner, *Abortion Pill's Effect In U.S. Hard To Predict*, L.A. TIMES, Sept. 30, 2000, at A1 [hereinafter Zitner, *Abortion Pills*].

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employed minor who has to travel may be deprived of income earned, but more importantly, she may lose her job.¹³³ For minors who have to travel to receive mifepristone, the cost will increase dramatically, for recipients of mifepristone must make three separate trips to the doctor's office.¹³⁴

Additionally, minors who attempt to obtain a judicial bypass are also often forced to travel, for not all counties have judges who are willing to hear bypass petitions.¹³⁵ Therefore, the application of parental involvement laws to the distribution of mifepristone may increase the number of minors who will be forced to travel.¹³⁶ Even more pertinent, the judicial bypass procedure is, itself, costly and time consuming.¹³⁷ As discussed in more detail below, parental involvement laws also delay the abortion, which then increases the cost, for if the delay pushes the minor into her second trimester, at which point the abortion must be surgical, not medical, the abortion becomes much more expensive.¹³⁸

Thus, even though Justice O'Connor claims that cost cannot be a factor, parental involvement laws increase the cost of an abortion, both surgical and medical, so substantially that they do prevent women from even being able to consider abortion as an option.¹³⁹ Therefore, these laws create the requisite undue burden to make them unconstitutional.¹⁴⁰ On the other hand, if parental involvement

Effect] (stating that mifepristone will decrease the distance and number of times women will travel).

133. See Center for Reproductive Law and Policy, *Defending The Rights Of Young Women*, available at http://www.crlp.org/rfn_01_02.html (last visited Feb. 2, 2002) (noting that traveling can also raise parents' suspicions).

134. See *Abortion Pill*, *supra* note 76, at A1 (explaining that the woman receives the mifepristone pills during her first trip to her doctor, the misoprostol during her second trip, and that twelve days after that, she must return to her doctor's office to make sure her pregnancy has been successfully terminated).

135. See *Hodgson v. Minnesota*, 497 U.S. 417, 440 (1990) (stating that in Minnesota, a number of judges refuse to hear bypass petitions). Therefore, minors must travel to other cities in order to find judges who are willing to hear their petitions. *Id.*

136. See *Henshaw*, *supra* note 129, at 270 (noting that mifepristone has the potential to decrease the need for interstate travel).

137. See *Farmer*, 165 N.J. at 636 (recognizing that the minor may need assistance of counsel, and may need to travel to get to the courthouse).

138. See National Women's Health Organization, *supra* note 125 (noting that the price of a second trimester abortion can be as much as \$1000, or more). Some second trimester abortions may take two days. *Id.*

139. See *Farmer*, 165 N.J. at 633 (acknowledging how burdensome finding the money for all these additional expenses, as well as for the actual abortion, can be on the woman).

140. See *id.* at 613 (holding that the notification requirement violated New Jersey's Constitution).

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laws are not applied to mifepristone, thereby increasing accessibility, the burdens will be greatly reduced, and may even be eliminated entirely.¹⁴¹

b. The Requirements Parental Involvement Laws Impose Make Compliance Almost Impossible

The notification and consent requirements sound deceptively simple, when, in fact, they impose significant burdens.¹⁴² One example of how these laws create such hardships is that oral consent is not sufficient, as many states require the consent be notarized.¹⁴³ In other instances, the parental consent laws essentially force the parent granting consent to accompany his/her daughter to the clinic, which may require the parent to take time off from work.¹⁴⁴ In cases of notification, clinics are not permitted to take the word of the minor who tells them that she told her parent of her decision.¹⁴⁵ All these requirements, in addition to burdening both the daughter and her parent, also delay the procedure, thereby increasing anxiety and health risks.¹⁴⁶

In addition to creating substantial obstacles, these requirements also significantly delay the abortion.¹⁴⁷ Moreover, if the minor tries to avoid the parental involvement law, the abortion will be delayed while she attempts to either go through the court system to obtain a

141. See National Abortion and Reproductive Rights Action League, *Mifepristone and the Impact of Abortion Politics on Scientific Research*, available at <http://www.naral.org/mediaresources/fact/research.html> (last visited Feb. 2, 2002) (emphasizing that mifepristone has the potential to greatly increase access to abortion services, for many of those doctors and health care workers who refuse to perform surgical abortions now, said they would be willing to distribute mifepristone).

142. See *Farmer*, 165 N.J. at 634 (stressing that the requirements are complicated because of the financial and procedural difficulties).

143. See *Teenagers*, *supra* note 120 (evaluating the notarization requirement and deducing that it "may present impossible logistical barriers for a young teenager or cause serious delay"). If a parent is deceased, some laws require the minor to provide a death certificate. *Id.*

144. See *Farmer*, 165 N.J. at 634 (emphasizing that forcing minors to tell parents they are pregnant puts strains on their relationship).

145. See *Teenagers*, *supra* note 120 (indicating that clinics or physicians are often required to notify the parent themselves).

146. See Stanley K. Henshaw and Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSP. 196, 206-07 (Sept./Oct. 1992) (restating forced parental involvement is to the detriment of minors).

147. See American Medical Association, *Induced Termination of Pregnancy Before and After Roe v. Wade*, *Trends in the Mortality and Morbidity of Women*, J. AM. MED. ASS'N, Jan. 6, 1993, at 83 (indicating parental involvement laws delay the abortion).

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judicial bypass, or to travel out of state.¹⁴⁸ One of the most important benefits of mifepristone is that it will increase access to abortion services, because fewer and fewer doctors are willing to perform surgical abortions.¹⁴⁹ Yet many doctors who now refuse to perform abortions have said they would be willing to distribute mifepristone.¹⁵⁰ However, by applying parental involvement laws to the distribution of mifepristone, mifepristone may become completely inaccessible to minors.¹⁵¹ Moreover, once the minor realizes she will not be able to get mifepristone, she will have to begin the process of finding out how to have a surgical abortion, but by then, she may find herself facing the health risks of a second trimester abortion.¹⁵²

2. *The Judicial Bypass Places An Undue Burden On The Minor*

Proponents of parental involvement laws claim that the judicial bypass prevents the restrictions from placing an undue burden on the minor, because through the bypass procedure she can avoid the parental consent or notification requirement.¹⁵³ However, this statement is not accurate.¹⁵⁴ In fact, instead of eliminating any burden parental involvement laws may create, the judicial bypass acts to increase this already existing burden.¹⁵⁵

148. See Henshaw, *supra* note 131, at 122 (documenting that once parental consent laws were implemented in Massachusetts there was "a significant increase in the number of Massachusetts minors who traveled to neighboring states for abortion services"); see also FROM ABORTION TO REPRODUCTIVE FREEDOM, *supra* note 64, at 171 (suggesting that minors who have abortions out of state to avoid parental involvement laws are less likely to receive follow-up care, thereby further endangering their own health).

149. See Dr. Eric Schaff, Symposium, *Redefining Violence Against Women: The Campaign of Violence and The Delay of RU 486*, 8 TEMP. POL. & CIV. RTS. L. REV. 311, 311 (1999) (recognizing that because anti-choice groups threaten physical violence upon, terrorize and kill those who provide abortions, the number of providers is continually decreasing, thereby increasing the difficulty of finding a doctor who performs the service).

150. See *A Promise*, *supra* note 19 (reiterating that mifepristone will increase access to abortion services to those who do not live near a provider).

151. See Silverman, *supra* note 126, at 290 ("In order to make the accessibility of medical abortion a reality it will be necessary to prevent state legislatures from enacting laws that effectively act as outright bans . . .").

152. See WILLARD GATES, JR. & DAVID GRIMES, MORBIDITY AND MORTALITY OF ABORTION IN THE UNITED STATES 158 (1981) (stressing that even though abortion is safer than childbirth, health risks, including death, increase dramatically every week after the eighth week).

153. See *Casey*, 505 U.S. at 899 (arguing that the judicial bypass procedure is sufficient).

154. See *Defending the Rights of Young Women*, *supra* note 133 (stressing that the judicial bypass procedure is complicated).

155. See National Abortion and Reproductive Rights Action League, *The "Child*

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As previously noted, the judicial bypass procedure delays the abortion, and can push the surgery into the second trimester.¹⁵⁶ For instance, some courts require “medical affidavits and legal counsel.”¹⁵⁷ Again, not all judges are willing to hear bypass petitions, which may force the minors to travel.¹⁵⁸ Additionally, even those judges who are willing to hear the petitions must have the time to do so.¹⁵⁹ Assuming a minor finds a judge who is even willing to hear her case, she is then subject to the biases of that judge.¹⁶⁰ While many judges are able to separate their own beliefs from the case at hand, it is not a rare occurrence for a minor to find herself before a judge who is not pro-choice,¹⁶¹ and who, therefore, bases the decision on personal beliefs, rather than on the particulars of the situation.¹⁶² For example, a Missouri judge said that

[d]epending upon what ruling I make, I hold in my hands the

Custody Protection Act” and the Inadequacy of Judicial Bypass Procedures, available at http://www.naral.org/mediaresources/fact/ccpa_procedures.html (last visited Mar. 24, 2002) (analyzing how the judicial bypass procedure makes trying to have an abortion more difficult for minors).

156. See SUSAN FALUDI, BACKLASH, THE UNDECLARED WAR AGAINST AMERICAN WOMEN 419 (1991) [hereinafter BACKLASH] (describing how the bypass hearings can be postponed for as long as a month, which is problematic for those teens who were already close to the end of the first trimester). “One judge waited a month to issue a ruling; another judge ordered the court stenographer not to type out the transcript, in an attempt to hold up a girl’s appeal of his decision denying her an abortion.” *Id.* at 420.

157. *Id.* at 419.

158. See *id.* (noting that in Massachusetts, for example, “twelve of the sixty Superior Court judges routinely refused to hear teenage girls’ appeals for abortions [and] in Minnesota, bypass hearings were available at only two locations”). In Indiana, only about six to eight bypasses were granted each year. *Id.*

159. See *Farmer*, 165 N.J. at 636 (disapproving of the bypass procedure, in part because it can delay the abortion).

160. See ABORTION WARS, *supra* note 4, at 215 (revealing that judges who decide whether to grant the minor permission to have the abortion “have a great deal of leeway”).

161. See Center for Reproductive Law and Policy, *Mandatory Parental Consent and Notification Laws*, available at http://www.crlp.org/pub_fac_mandconsent.html (last visited Mar. 24, 2002) (pointing out that judges deny minors’ bypass petitions because of their own opinions about abortion); see also National Abortion and Reproductive Rights Action League (NARRAL), *Mandatory Parental Consent and Notice Laws and the Freedom to Choose*, available at <http://www.naral.org/mediaresources/fact/consent.html> (last visited Feb. 2, 2002) [hereinafter NARRAL, *Mandatory Parental Consent*] (agreeing that those minors who “manage to arrange a hearing face judges who are vehemently anti-choice and who routinely deny petitions, despite rulings by the U.S. Supreme Court that a minor must be granted a bypass if she is mature or if an abortion is in her best interests”).

162. See National Organization for Women (NOW), *Young Women and Abortion*, available at <http://www.now.org/issues/abortion/ywabort.html> (last visited Mar. 24, 2002) [hereinafter *Young Women and Abortion*] (stating that minors are subject to the whim of the judge). “Many times a judge will refuse to even hear a young woman’s request.” *Id.*

power to kill an unborn child. In our society it's a lot easier to kill an unborn child than the most vicious murderer . . . I don't believe that this particular juvenile has sufficient intellectual capacity to make a determination that she is willing to kill her own child.¹⁶³

In addition, the judges who hear these cases are not trained to handle judicial bypass procedures, nor does a special court exist for these cases.¹⁶⁴ When a minor is seeking access to mifepristone, she will not have an additional two weeks to spare for the bypass procedure, thus the time required to go through the process will effectively prevent her from obtaining the pills.¹⁶⁵

The lack of confidentiality is another problem facing minors going through the judicial bypass procedure.¹⁶⁶ Teenagers try to obtain judicial bypasses in order to hide unwanted pregnancies from their parents; therefore, confidentiality is essential.¹⁶⁷ One reason why mifepristone is so appealing is because of the increased privacy it provides.¹⁶⁸ However, some courts forced minors to argue their cases

163. Excerpt, St. Charles County Juvenile Court, *reprinted in* T.L.J. v. Webster, 792 F.2d 734, 738-739 n.4 (1986); *see also* Tamar Lewin, *Parental Consent to Abortion: How Enforcement Can Vary*, N.Y. TIMES, May 28, 1992, at A1; (giving an example of a judge in Ohio who refused to grant the petition of a seventeen-year old, "A" student who planned to attend college, but who "testified she was not financially or emotionally prepared for college and motherhood at the same time, stating that the girl had 'not had enough hard knocks in her life'"); *In re Jane Doe 1*, 566 N.E.2d 1181, 1185 (Ohio 1991) (upholding the denial of a bypass petition of a seventeen-year-old who testified that her father beat her in the past and was afraid he would do so again if he found out she was pregnant). She was a high school senior with a 3.0 grade point average who was active in team sports, worked 20-25 hours a week, and paid for her automobile expenses and medical care. *Id.* at 1182. *See also* FROM ABORTION TO REPRODUCTIVE FREEDOM, *supra* note 64, at 167 (citing an example of a judge who based his decision that the minor before him was not mature enough to decide for herself whether to terminate her pregnancy and that having the abortion would not be in her best interest, on 'her looks,' despite the fact that she wanted to keep her pregnancy a secret because she was afraid that if her stepfather found out that he would beat her mother).

164. *See* FROM ABORTION TO REPRODUCTIVE FREEDOM, *supra* note 64, at 168 (commenting that the judges who hear these cases are the same ones who "hear cases of fraud, blackmail, armed robbery, felony assault, rape, and murder").

165. *See Farmer*, 165 N.J. at 633 (pointing out that the time requirement is much more stressful for minors because as they often have irregular menstrual cycles, it takes them longer to realize they are pregnant).

166. *See* ABORTION WARS, *supra* note 4, at 215 (recounting the experience of one minor who "seeking the court's permission to have a confidential abortion had to threaten legal action to prevent the judge from bringing her parents into the proceedings").

167. *See* NARRAL, *Mandatory Parental Consent*, *supra* note 161 (arguing that the judicial bypass procedure does not protect minors because of the risk of a breach of confidentiality).

168. *See* Planned Parenthood, *Mifepristone: A Brief History*, available at <http://www.plannedparenthood.org/library/ABORTION/Mifepristone/html> (last visited Mar. 24, 2002) (explaining that mifepristone gives women more privacy); *see also* *What You Should Know*, *supra* note 22 (indicating that satisfaction rates were so

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in open court, in front of as many as two dozen strangers, while other courts, in violation of the involvement laws, enter the minor's name and address into record.¹⁶⁹

3. Parental Involvement Laws Put Minors In Danger

In theory, parental involvement laws do not seem to be harmful.¹⁷⁰ In fact, parental involvement law proponents have even found support among pro-choice Americans.¹⁷¹ Those who believe parental consent laws should be upheld claim the laws help "foster better parent-daughter communication."¹⁷² They also stress the "importance of parental rights"¹⁷³ in deciding "what medical services their minor children receive."¹⁷⁴ Finally, they argue that minors are often not mature enough to make such an important decision without the guidance of a parent.¹⁷⁵ While these arguments are not without merit, they ignore the fact that not all minors can tell a parent about their unplanned pregnancies.¹⁷⁶

high in part because mifepristone gives women more control over their bodies, as well as over the process itself).

169. See BACKLASH, *supra* note 156, at 419 (reiterating that confidentiality is often violated).

170. See Center for Reproductive Law and Policy, *Defending the Rights of Young Women*, available at http://www.crlp.org/rfn_01_02.html (last visited Mar. 24, 2002) [hereinafter *Defending the Rights*] (suggesting that without an examination of the ramifications of parental involvement laws, involving parents in major decisions and encouraging communication between them and their children is seemingly beneficial).

171. See Margaret Carlson, *Abortion's Hardest Cases*, TIME, July 9, 1990 [hereinafter *Abortion's Hardest Cases*] (recognizing that those who are undoubtedly pro-choice, but who support parental involvement laws do so because they are bothered by "the notion of a girl's right to choose").

172. ABORTION WARS, *supra* note 4, at 215; see also FROM ABORTION TO REPRODUCTIVE FREEDOM, *supra* note 64, at 168 (revealing that according to a parental involvement proponent, a benefit of the parental involvement laws is that they force "children to deal with the consequences of their sexual activity"); NARRAL, *Mandatory Parental Consent*, *supra* note 160 (arguing that in situations where a teenage daughter is unable to go to a parent for help when facing an unplanned pregnancy, forcing dialogue where one never existed before is unlikely to improve the relationship, and may even damage their relationship, as well as relations with other family members).

173. ABORTION WARS, *supra* note 4, at 215; see also FROM ABORTION TO REPRODUCTIVE FREEDOM, *supra* note 64, at 169 (adding "a belief that parents should be involved in the medical treatment of their children, a desire to increase parent-child communication about sex, and a desire to maximize the role of the family in the teenager's life," to reasons why people support parental involvement laws).

174. See *Teenagers*, *supra* note 120.

175. See *Bellotti v. Baird*, 443 U.S. 622, 640 (1979) (weighing the argument that minors may not be mature enough to make the decision without advice from a parent).

176. See Melissa Healy, *Abortion Consent Bill Passes in House*, L.A. TIMES, July 1, 1999, at A13 (stressing that not all teenagers can turn to a parent when faced with an

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a. *Violence*

While the majority of teenagers do tell a parent of the pregnancy,¹⁷⁷ those who decide to keep the pregnancy private often do so out of fear.¹⁷⁸ As even the Supreme Court has recognized, “many minors. . . ‘live in fear of violence by family members’ and ‘are, in fact, victims of rape, incest, neglect and violence.’”¹⁷⁹ In fact, in one study, approximately 14% of the minors having an abortion did not tell a parent because they thought they would be physically abused.¹⁸⁰ Being forced to discuss an unplanned pregnancy in such a volatile situation, in which the teenager is subjected to the wrath of a parent, is likely to make the situation worse, and will further endanger the minor.¹⁸¹

The Supreme Court in *Casey* recognized and placed great value upon the fact that the fear of family violence could prevent married women from choosing whether to terminate a pregnancy.¹⁸² In fact, the Supreme Court in *Casey* struck down the spousal notification requirement because of this fear.¹⁸³ As in both situations, it is the reaction to the unplanned pregnancy that causes this violence, not the ultimate decision of what to do, requiring a minor to involve a parent before she can have access to mifepristone will result in the same fear and violence the Supreme Court already found so

unplanned pregnancy); *Young Women and Abortion*, *supra* note 162 (concluding that fear of abuse, either physical or emotional, is the main reason why many minors want to keep their pregnancies a secret).

177. See Henshaw & Kost, *supra* note 146, at 199 (commenting that approximately 61% of the teenagers having an abortion told at least one parent of the pregnancy). Moreover, the younger the teen, the more likely she is to talk to a parent. *Id.*

178. See American Civil Liberties Union, *Parental Involvement Laws*, available at <http://www.aclu.org/library/parent.html> (last visited Mar. 24, 2002) (listing the common fears, including “fac[ing] physical abuse, violence between their parents . . . [and] exacerbating a parent’s drug or alcohol problem”); see also THE CHOICES WE MADE, *supra* note 55, at xxxi (observing minors also seek to keep pregnancies a secret “to spare their parents stress, worry, or shame”).

179. *Hodgson v. Minnesota*, 497 U.S. 417, 439 (1990) (reiterating the findings of the District Court); see also NARRAL, *Mandatory Parental Consent*, *supra* note 160 (recognizing that other teens do not want to involve a parent because “their pregnancies are the result of incest”).

180. See *Hodgson*, 497 U.S. at 438 (emphasizing that the announcement of an unwanted pregnancy will result in abuse; either physical, sexual or psychological).

181. See *id.* (stressing that “notification of the minor’s pregnancy and abortion decision can provoke violence”).

182. See *Casey*, 505 U.S. at 897 (using this fear of family violence, the Supreme Court struck down the spousal notification requirement).

183. See *id.* at 894 (noting that the State argued that the spousal notification requirement only affected 1% of the women seeking abortions). But see INDUCED ABORTION, *supra* note 3, at 1 (reiterating that 20% of women obtaining abortions are minors).

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abhorrent.¹⁸⁴

b. Illegal and Self-Induced Abortions

The harms these parental involvement laws cause are not only inflicted by parents.¹⁸⁵ Another way in which parental involvement laws place these young women in danger is that to avoid telling a parent of an unplanned pregnancy, many teens will resort to having illegal abortions.¹⁸⁶ While mifepristone was proven safe,¹⁸⁷ illegal abortions are quite dangerous.¹⁸⁸ Indeed, "America does not face a choice between legal abortion and no abortion. It faces a choice between legal abortion, which is usually safe, and illegal abortion, which often maims or kills."¹⁸⁹ Complications caused by these illegal and unsafe abortions include death, infertility and chronic illness.¹⁹⁰

Nothing will stop a teenager who wants to terminate her pregnancy from doing so.¹⁹¹ If she cannot find someone to perform an abortion, she will do it herself.¹⁹² These desperate teens will use anything

184. See Henshaw & Kost, *supra* note 146, at 203 (stressing that minors also fear being forced to leave home).

185. See LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME; WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973 252 (1997) (recognizing that many of the women dying from illegal abortions, which are reemerging, are minors who are trying to avoid parental involvement laws).

186. See BACKLASH, *supra* note 156, at 419 (discussing the case of Becky Bell, a 17-year old, who was the first girl to die from an illegal abortion in an attempt to avoid parental involvement laws). Even though Becky came from a loving and supportive family, she did not want to tell her parents she needed an abortion because she did not want them to be disappointed in her. *Id.*

187. See Planned Parenthood, *Mifepristone: Expanding Women's Options For Early Abortion*, available at http://www.plannedparenthood.org/library/ABORTION/Mif_fact.html (last visited Mar. 24, 2002) (stating that no one has ever died from taking mifepristone).

188. See Farmer, 165 N.J. at 634 (stressing that illegal abortions are performed by unlicensed doctors); SUSAN BROWNMILLER, IN OUR TIME, MEMOIR OF A REVOLUTION 103 (1999) [hereinafter IN OUR TIME] (relating how illegal abortions killed approximately five thousand women every year before abortion was legalized); Estrich & Sullivan, *supra* note 67, at (concluding that "mishandled criminal abortions were the leading cause of maternal deaths in the 1960s").

189. Anna Quindlen, *RU-486 and the Right to Choose: Cheering, Wailing, Hailing, Damning - The Abortion Pill is Important, but no Panacea* NEWSWEEK 86 (Oct. 9, 2000).

190. See also IN OUR TIME, *supra* note 188, at 103 (relating other possible complications arising from illegal abortions, including puncturing the uterus and septic infections).

191. See FROM ABORTION TO REPRODUCTIVE FREEDOM, *supra* note 64, at 171 (concluding that "parental involvement laws put such girls in 'a terrible position . . . that's when kids get desperate and may try to abort themselves'"); see also OUR BODIES, OURSELVES, *supra* note 84, at 408 (remarking that women who are determined to abort have "resorted to dangerous, sometimes deadly methods, such as inserting knitting needles or coat hangers into the vagina and uterus, douching with dangerous solutions like lye, or swallowing strong drugs or chemicals").

192. See Hodgson, 497 U.S. at 466 (Marshall, J., dissenting) (noting that "9% of

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available on themselves to try to induce abortion, with drastic results.¹⁹³

By having illegal and self-induced abortions, minors are literally dying in order to avoid telling a parent about an unplanned pregnancy.¹⁹⁴ These acts of desperation will continue, and may increase, if parental involvement laws are applied to the distribution of mifepristone; for once a minor is denied legal access to mifepristone and she realizes that she must then begin to research how to have a surgical abortion, feelings of helplessness will take over.¹⁹⁵ The fact that minors are left with no option but to have illegal and self-induced abortions, and that they are willing to risk their own lives demonstrates that parental involvement laws do place an undue burden on minors.¹⁹⁶

4. *Forcing The Mother To Carry To Term Harms Both The Mother And the Child*

Another way in which parental involvement laws¹⁹⁷ burden the minors is that by preventing access to safe, legal abortions, many teenagers are forced to carry their pregnancies to term.¹⁹⁸ Childbirth is much more dangerous for teenagers than is having an abortion.¹⁹⁹ In addition to the physical health risks, forcing minors to have a baby

minors attending family planning clinics said they would have a self-induced abortion rather than tell a parent”).

193. See *id.* at 466-67 (recounting the story of one minor who, to avoid telling a parent of her pregnancy, “tried to induce an abortion with the help of her friends by inserting a metallic object into her vagina, thereby tearing her body, scarring her cervix and causing bleeding . . . because of the damage to the patient’s cervix, doctors had to perform a hysterectomy”). Thus, the dangers and health risks of self-induced abortions are just as serious as are those of illegal abortions. *Id.*

194. See NARRAL, *Mandatory Parental Consent*, *supra* note 161 (recognizing that “laws mandating parental notice or consent actually harm the young women they purport to protect by increasing illegal and self-induced abortion, family violence, suicide, later abortions, and unwanted childbirth”).

195. See *Farmer*, 165 N.J. at 635 (maintaining that when minors believe time is running out, they will seek alternate ways of terminating their pregnancies).

196. See ABORTION WARS, *supra* note 4, at 86 (pointing out that parental consent laws “are placing onerous and sometimes dangerous restrictions on abortion”).

197. See FROM ABORTION TO REPRODUCTIVE FREEDOM, *supra* note 64, at 168 (emphasizing that certain anti-choice groups have guides to writing bills so that they will survive a legal attack).

198. See *Abortion’s Hardest Cases*, *supra* note 171 (indicating that many teenagers end up having to go through with an unwanted pregnancy).

199. See *id.* at 22 (reporting that “teenage girls are twenty-four times as likely to die of childbirth as of a first-trimester abortion”); see also FROM ABORTION TO REPRODUCTIVE FREEDOM, *supra* note 64, at 174 (outlining health problems pregnant teenagers face, and concluding that teenage mothers have “higher rates of . . . toxemia, and anemia”). Teenage mothers also have higher instances of “complications at birth.” *Id.*

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has significant psychological effects on the teenage mother as well.²⁰⁰

Having a baby at a young age has other significant effects on the mother, as well on her child.²⁰¹ For example, teenage mothers are more likely to drop out of school.²⁰² Also, teenagers with babies are much more likely to be poor, not only in their teenage years, but throughout their entire lives.²⁰³ The mother's financial position has a great effect on her baby, for children who grow up in poverty tend to be undernourished, "undereducated and poorly housed."²⁰⁴

Finally, babies born of teenage mothers are 30% more likely to die during their first year of life than are babies born to women in their twenties,²⁰⁵ and they tend to have lower birthweights.²⁰⁶ Babies born to teenage mothers are also much less likely to be raised in a loving and supportive family.²⁰⁷ Studies show that "children of teenage parents are more likely to become teenage parents themselves, thus perpetuating the cycle of poverty."²⁰⁸ The harmful effects of forcing teenagers to have babies demonstrate that parental involvement laws,²⁰⁹ which effectively codify the continuation of a pregnancy, burden the minor. The instances of forced teenage pregnancy could increase if parental involvement laws are applied to mifepristone, as the laws will delay access to the drug.²¹⁰

200. See *Roe*, 410 U.S. at 153 (commenting that being forced to have a child can cause psychological and physical harm to the mother, as well as "the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it . . . the difficulties and continuing stigma of unwed motherhood . . ."); see also *Casey*, 505 U.S. at 852 (evaluating the State's argument and concluding that the State should not be able to completely ban abortion because of the harmful effects involved in carrying a child to term).

201. See *Abortions Hardest Cases*, *supra* note 171 (discussing additional complications arising from forcing teenagers to have babies).

202. See *id.* at 22 (reporting that "eight out of ten girls who have babies at seventeen or younger drop out of high school").

203. See NARRAL, *Mandatory Parental Consent*, *supra* note 161 (arguing that teenage mothers and their children will be economically underprivileged).

204. *Abortion's Hardest Cases*, *supra* note 171.

205. See *id.* at 22 (affirming that the infant mortality rate is higher for babies born to teenagers).

206. See FROM ABORTION TO REPRODUCTIVE FREEDOM, *supra* note 64, at 175 (reporting that these babies are also "more likely to be premature, and have higher rates of birth injury . . . and neurological problems").

207. See *Abortion's Hardest Cases*, *supra* note 171, at 22 (remarking that babies born to teenage mothers tend to be "raised in resentment and rage").

208. NARRAL, *Mandatory Parental Consent*, *supra* note 161.

209. See FROM ABORTION TO REPRODUCTIVE FREEDOM, *supra* note 64, at 197 (pointing out that anti-choice groups are the largest supporter of parental involvement laws).

210. But see, *Myths and Facts*, *supra* note 79 (dispelling the notion that the number of abortions will increase because of mifepristone).

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III. RECOMMENDATIONS

This Comment was argued within the framework of *Casey*, as it is currently governing law. Under the restrictions permitted by *Casey*, permitting mifepristone to be categorized as an abortifacient will subject it to all existing regulations, including parental involvement laws.²¹¹ Therefore, the only way to prevent the application of parental involvement laws, and to ensure that minors have timely access to mifepristone is to categorize the drug only as an emergency contraceptive.²¹²

However, another argument is that the distribution of mifepristone should be afforded all the protections granted by *Roe*, because *Casey* cannot apply.²¹³ As the differences between mifepristone and surgical abortions are so substantial, the analysis the Court applied to decide *Casey* cannot automatically be transferred to mifepristone merely because it, too, has the potential to terminate a pregnancy.²¹⁴ Rather, the distribution of mifepristone needs to be studied and decided independently of *Casey*.²¹⁵ That the distribution of mifepristone needs to be reevaluated without *Casey* is especially true because by severely restricting what the Supreme Court already determined was a fundamental right, *Casey* does not reaffirm the central holding of *Roe*, as it purports,²¹⁶ and was, therefore, wrongly decided.²¹⁷

Because the Court in *Roe* expressly stated that the right to have an abortion was not absolute, the Court established a trimester framework to help decide when a state may impose regulations on

211. See *Protection of RU-486*, *supra* note 28, at 1129 (“Classifying [mifepristone] solely as an abortifacient, regardless of its safe and practical use as contraception and emergency contraception, will result in abortion opponents pushing the current *Casey* timeline back to nine weeks. Therefore . . . state regulation of all uses of [mifepristone] would be allowed . . .”). Moreover, “the use of [mifepristone] governed by abortion law would require a woman to know whether or not a fertilized egg in her womb had achieved implantation . . . [which] is an incredibly invasive and unworkable process.” *Id.* at 1131.

212. See *id.* at 1121 (explaining “[t]he law needs to embrace this new technology and protect women’s access to it under the law of contraception.”).

213. See *A Promise*, *supra* note 19 (arguing that access to mifepristone needs to be protected because anti-choice groups are proposing legislation that would place more restrictions on the pill than those required by the FDA).

214. See *Richards*, *supra* note 100, at 127 (contending that despite the controversy, women know about and want access to mifepristone).

215. See *Prothro*, *supra* note 88, at 741 (agreeing that a reevaluation is necessary).

216. See *Casey*, 505 U.S. at 853 (concluding that *Roe* should not be overruled due to concerns of stare decisis and individual liberties).

217. See David J. Garrow, *Abortion Before And After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 845-46 (1999) (stressing that *Casey* gave the “upper hand” back to the anti-choice movement).

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this fundamental right.²¹⁸ The Court explained that the time at which the interest in protecting the health of the mother becomes compelling²¹⁹ is at the end of the first trimester and that before that time, a woman and her doctor are “free to determine, without regulation by the state . . . that the . . . pregnancy should be terminated.”²²⁰

Casey abolished the trimester framework and replaced it with the undue burden test.²²¹ In so doing, the Court declared that *Roe* “recogni[z]ed the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State.”²²² However, the *Roe* Court never said “undue interference;” rather, the Court in *Roe* specifically stated that until the end of the first trimester, the State is not justified in imposing any restrictions on a woman’s right to choose to have an abortion.²²³ This means that any restriction is unconstitutional, not that, as Justice O’Connor read *Roe* to mean, only restrictions that prevent a woman from being able to decide for herself, are unconstitutional.²²⁴

Even though *Roe v. Wade* was decided before mifepristone was even in existence, the decision can be applied and should be applied to the distribution of mifepristone.²²⁵ *Roe* gave women the right to decide for themselves whether or not to terminate a pregnancy.²²⁶ The Court saw the issue to be one of privacy, which is equally as applicable to the distribution of mifepristone as it is to a surgical

218. See *Roe*, 410 U.S. at 155 (explaining that at some point the State’s interest in the prenatal life prevails).

219. See *id.* at 155 (reiterating that a fundamental right may only be limited by a compelling state interest).

220. *Id.* at 163. The determinations regarding restrictions on the right to have an abortion later in the pregnancy, though important when applied to surgical abortions, are not necessary for this analysis because mifepristone must be taken during the first trimester. See *supra* note 76.

221. See *Casey*, 505 U.S. at 872 (rejecting the trimester framework claiming it was too rigid).

222. *Id.* at 846.

223. See *id.* at 872 (reiterating that *Roe* held that during the first trimester a state cannot regulate a woman’s right to choose).

224. See *Roe*, 410 U.S. at 164 (restating that during this time, the decision is to be left to the woman and her doctor).

225. See *The Fight*, *supra* note 17 (emphasizing that in 1992 mifepristone was still banned in the United States).

226. See *Roe* 410 U.S. at 153 (declaring the right to choose whether or not to terminate a pregnancy to be legal); see also *Protection of RU-486*, *supra* note 28, at 1142-43 (“Choice is unavoidably central to women’s bodily integrity. [Mifepristone] offers women an opportunity to privately claim full control over their bodies and their lives. . .”).

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 abortion.²²⁷

IV. CONCLUSION

Mifepristone has to the potential to liberate millions of American women who, because of the laws of the states in which they live, are essentially without access to safe, legal abortion services.²²⁸ The women who would benefit most from this pill are those the anti-choice groups are successfully keeping it from: minors.²²⁹ Because of parental involvement laws, minors already face often insurmountable obstacles in their searches to obtain safe, legal abortions.²³⁰ As the application of existing laws to mifepristone will make this already bad situation even worse, mifepristone should be available to minors without parental involvement, for only then will minors truly be protected.²³¹

227. See *The Fight*, *supra* note 17 (recounting the story of Leona Bente, who brought mifepristone to the United States from Europe, for her own personal use, but because of the ban, it was seized by customs agents).

228. See Zitner, *supra* note 132, at A1 (indicating that mifepristone will greatly increase access to millions of women).

229. See *Farmer*, 165 N.J. at 632 (pointing out that parental involvement laws burden minors).

230. See *Defending the Rights*, *supra* note 170 (asserting that minors face harsh restrictions, which harm, instead of help, these young women).

231. See *Myths and Facts*, *supra* note 79 (affirming that mifepristone allowed women to have safer abortions).