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When Sixteen ain't So Sweet: Rethinking the Regulation of Adolescent Sexuality

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WHEN SIXTEEN AIN'T SO SWEET:
RETHINKING THE REGULATION OF
ADOLESCENT SEXUALITY

*Nicole Phillis**

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INTRODUCTION

“It’s like we’ve given them the keys to the car . . . but haven’t taught them how to drive.”¹

In June 2008, a sleepy, working-class town in Massachusetts shocked the country when news of a teenage pregnancy pact exploded across the headlines.² At Gloucester High, the one public high school for the entire seacoast town of about 30,000, a record eighteen girls were pregnant at the end of the 2008 school year.³ That number was more than quadruple the three to four pregnancies Gloucester High averaged in years leading up to 2008.⁴ When news of a “pregnancy pact” amongst the Gloucester teenagers hit the papers, there was national outcry; representations of teenage girls high-fiving each other after positive pregnancy tests and proudly coordinating plans for baby showers and future play dates flooded the media.⁵ The bottom line was that Americans were shocked and horrified at the idea that these immature teenage

1. Belinda Luscombe, *The Truth about Teen Girls*, TIME, Sept. 11, 2008 (quoting Sharon Maxwell), available at <http://www.time.com/time/magazine/article/0,9171,1840556,00.html>.

2. See Kathleen Kingsbury, *Pregnancy Boom at Gloucester High*, TIME, June 18, 2008, available at <http://www.time.com/time/world/article/0,8599,1815845,00.html> (breaking the news of a pregnancy pact amongst Gloucester High School students).

3. See Paul Anderson, *Gloucester High School’s Day-Care Center Overflowing for September*, GLOUCESTER DAILY TIMES, June 19, 2008, available at http://www.gloucestertimes.com/punews/local_story_171221140.html (describing the impact of the Gloucester High teenage pregnancy pact on the high school’s day-care program).

4. See Kingsbury, *supra* note 2.

5. See *id.*

girls came together and encouraged—even promised—each other to get pregnant. Many were left asking, “Where were the parents in all this?”⁶

Ironically, the very fact that these girls sought to have babies was the reason why their parents were never required to be involved in the first place. In Massachusetts, statutory rape laws establish the age of consent at sixteen years old.⁷ This means that a teenager of sixteen can not only consent to have sex, but also choose to get pregnant, and there is absolutely nothing her parents, or the law, can do about it. Yet, if the same teenager seeks to terminate her pregnancy, she is required to obtain either parental consent or judicial bypass.⁸ The law in Massachusetts, like many other states around the country, allows for teenage girls to consent to sex, obtain contraception, accept or decline pre-natal care, bear children, and even put those children up for adoption, without any parental involvement, legal counsel, or medical consultation.⁹ Indeed, only in the context of abortion are minors required to obtain either parental consent or judicial bypass.¹⁰

6. See Kathleen Kingsbury, *Gloucester Pregnancy Plot Thickens*, TIME, June 23, 2008, available at <http://www.time.com/time/nation/article/0,8599,1817272,00.html>.

7. See MASS. GEN. LAWS ANN. ch. 265, § 23 (2008) (“Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under 16 years of age, shall be punished by imprisonment in the state prison for life or for any term of years or, except as otherwise provided, for any term in a jail or house of correction.”); see also Table I, *infra* pp. 65–66 (comparing statewide ages of consent to parental involvement statutes).

8. See Table I, *supra* note 7.

9. See Kingsbury, *supra* note 2 (describing the pregnancy pact in Gloucester and parental hostility towards the distribution of contraceptives without parental notification); STATE POLICIES IN BRIEF: MINORS’ RIGHTS AS PARENTS ALAN GUTTMACHER INST., (Apr. 1, 2009), available at http://www.guttmacher.org/statecenter/spibs/spib_MRP.pdf (presenting information on minor parenting and adoption regulations.) Somewhat ironically, many Gloucester parents had been involved in a recent campaign against the distribution of oral contraceptives at the high school without parental consent. Notably, no state in the country currently requires any form of parental notification or consent for the distribution of oral contraceptives to minors. Yet, the Gloucester High parents raised such outcry that the mayor of the town denounced the practice on the grounds of parental rights, stating that the health professionals engaging in this practice at the high school “had no right to decide this for our children.” The two health professionals who had sought to distribute the contraceptives, local pediatrician Dr. Brian Orr and nurse-practitioner Kim Daly, were so concerned about the reproductive health harms this prohibition would cause the teens at Gloucester High that they resigned in protest. See Kingsbury, *supra* note 2; Patricia Donovan, *Parental Notification: Is it Settled?*, 13 FAM. PLAN. PERSP. 243, 243–46 (1981).

10. See Table I, *supra* note 7 (comparing and describing age of consent and minor abortion restrictions statewide).

The situation in Gloucester exposes the underlying incoherence of laws regulating adolescent sexuality in the United States. Nationally, the median age of consent is sixteen,¹¹ with some states allowing for consent as young as fourteen.¹² The emblematic “coming of age” at sixteen instantly transforms a minor who was incapable of consent the day before into a sexually autonomous entity. Although ages may vary, every state has an age of consent law that vests in a minor the right to engage in sexual activity and to become pregnant without any parental involvement whatsoever.¹³ Yet in the majority of jurisdictions, a minor’s right to independently consent to sex, become pregnant, and bear a child fails to be matched by a corresponding right to terminate her pregnancy without parental involvement.¹⁴ As of 2004, twenty-six states have statutory schemes that set the age of consent below the age at which a minor can independently obtain an abortion.¹⁵ Read together, these statutes enable teenagers to have sex and become pregnant but then condition reproductive rights upon whether the minor chooses to proceed with the pregnancy. The law privileges the minor who chooses to have her baby with legal independence and decisional autonomy.¹⁶ In contrast, the law penalizes the minor who seeks an abortion by subjecting her reproductive decision to parental notification, consent, or judicial bypass.

Legally speaking, sexual maturity poses a significant enough liberty interest for a minor to make medical decisions regarding contraceptive medicine or to choose motherhood without parental involvement, but not quite enough for her to obtain an abortion independently.¹⁷ The law incentivizes teenage motherhood by only granting decisional autonomy to those minors who choose to have a child; the minor female’s right to

11. See Table I, *supra* note 7.

12. See *id.*

13. Every state in the United States fixes the age of consent in the form of statutory rape laws. Luisa A. Fuentes, *The 14th Amendment and Sexual Consent: Statutory Rape and Judiciary Progeny*, 16 WOMEN’S RTS. L. REP. 139, 140 (1994).

14. See Table I, *supra* note 7. Interestingly, only ten states require some form of third-party involvement where a minor parent seeks to place her child up for adoption; five states require legal counsel for a minor adoptee; four states require parental notification; and one state requires parental consent. See ALAN GUTTMACHER INST., *supra* note 9.

15. See Table I, *supra* note 7.

16. See ALAN GUTTMACHER INST., *supra* note 9.

17. See *Carey v. Population Servs. Int’l*, 431 U.S. 678, 682 (1977) (holding that any statute unconditionally prohibiting the sale of contraceptives to minors under the age of sixteen violates that minor’s right to privacy under the Fourteenth Amendment); *Doe v. Irwin*, 615 F.2d 1162, 1169 (6th Cir. 1980) (reasoning that a publicly operated family planning agency, providing contraceptives to minors, did not violate parental liberty interests in raising children).

procreate vests regardless of her individual maturity. The law discourages teenage abortions by using the choice to terminate a pregnancy to trigger a presumption of immaturity; the minor female's abortion right is pitted against personal autonomy via parental rights.¹⁸ Ultimately, this Article argues that sexually active minors, their children, and their parents all suffer in this reproductive catch-22.

This Article contends that the conflict between age of consent laws and minor abortion restrictions is just one illustration of state legislatures' struggles within the greater protectionist-versus-enablement paradigm. Specifically, this Article argues that laws regulating adolescent sexuality can generally be categorized into one of two types: (1) protectionist, enacting restrictions and protections designed to compensate for minors' categorical immaturity; or (2) enabling, recognizing adult-like capacity and rights in minors as they progress in their overall development. The result of this polarized statutory landscape can only adequately be described as "legislative schizophrenia"—although devoid of invidious intent, these statutes ultimately hurt minors because they are premised on a flawed paradigm that is unable to coordinate the different political and social goals of state legislatures.¹⁹

This Article argues that by recognizing consensual maturity for intercourse and pregnancy but then rescinding that presumptive maturity only for abortion, states both violate the Constitution and create dangerous public policy. Specifically, states violate legally-consenting minors' substantive due process rights by imposing undue burdens on their abortion access without any legitimate, countervailing immaturity interest.²⁰ While parental notification and consent laws have been upheld on the grounds of minor immaturity, this Article argues that the recognition of sexual maturity through age of consent laws should also trigger a presumption of maturity for minor abortion rights.²¹ This

18. It should come as no surprise that the abortion rate of women aged 15–19 is a mere 19.2%. See ALAN GUTTMACHER INST., IN BRIEF: FACTS ON INDUCED ABORTION IN THE UNITED STATES (May 2010), available at http://www.guttmacher.org/pubs/fb_induced_abortion.pdf. Abortions performed on women under the age of nineteen comprise only 18% of all abortions in the United States, the lowest rate of any age bracket other than that for women over forty years old. See ALAN GUTTMACHER INST., U.S. TEENAGE PREGNANCIES, BIRTHS, AND ABORTIONS: NATIONAL AND STATE TRENDS BY RACE AND ETHNICITY (January 2010), available at www.guttmacher.org/pubs/USTPTrends.pdf.

19. Christopher Aaron Jones, Note, *Legislative "Subterfuge"?: Failing to Insure Persons with Mental Illness Under the Mental Health Parity Act and the Americans with Disabilities Act*, 50 VAND. L. REV. 753, 783 (1997) (defining "legislative schizophrenia" vis-a-vis "legislative subterfuge").

20. See *infra* Part II.A.

21. See *id.*

Article further highlights five key policy concerns created by the inconsistent regulation of adolescent sexuality: (1) the encouragement of impulsive adolescent sexual behaviors; (2) the binding of decisional autonomy to pregnancy outcome; (3) the reinforcement of paternalistic gender stereotypes; (4) the punitive, rather than protective, nature of parental involvement and judicial bypass; and (5) the continued hysterization of adolescent sexuality.²²

To remedy both the specific conflict created by age of consent and parental involvement laws and the greater flawed paradigm of protectionism-versus-enablement, this Article argues for the adoption of an alternative regulatory framework, referred to as the Minor Consent Capacity (MCC) status proposal. Whereas the existing literature on reforming adolescent sexuality has generally focused on single statutory issues, such as the rejection or defense of parental involvement laws, this Article advances a novel proposal to overhaul the entire body of laws regulating adolescent sexuality.²³ Looking beyond the particular legal conflict created by inconsistent age of consent and parental involvement laws, the MCC status proposal fuses a system of sexual education and consent licensure to regulate minors' sexual and reproductive consent capacity. The MCC status proposal flatly rejects the current practice of recognizing maturity at the age of consent but then limiting the legal significance of that maturity in the context of abortion. Rather, the MCC status proposal licenses sexual and reproductive consent capacity once a minor has fulfilled certain objective educational and evaluative requirements.²⁴

Part I of this Article examines the historical development of age of consent statutes as "enabling" and parental involvement requirements as "protectionist." By comparing the two, this Part exposes how the parallel development of such laws has created conflicting notions of sexual and reproductive maturity. Part II of this Article lays out both the constitutional and public policy problems created by the conflict between age of consent laws and parental involvement requirements. Using the constitutional and public policy concerns presented in Part II, this Article then suggests an alternative statutory framework for the more comprehensive regulation of adolescent sexuality. Part III first explains how

22. See *infra* Part II.B.

23. See, e.g., Elisa Poncz, *Rethinking Child Advocacy After Roper v. Simmons: "Kids are Just Different" and "Kids are Like Adults" Strategies*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 273 (2008) (critiquing parental notification and consent laws); Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT'L J.L. POL'Y & FAM. 305, 311-12 (2004) (criticizing parental involvement and judicial bypass processes as "punishment" for minor sex).

24. See *infra* Part III.D.

existing alternatives, such as statutory reform and status exemptions, fail to address the greater problems inherent in the protectionism-versus-enablement paradigm. Ultimately advocating the MCC status proposal to overhaul the entire regulation of adolescent sexuality, this Article proposes that we use consent licensure to facilitate more informed and socially responsible adolescent sexual behaviors.

I. THE CONFLICT BETWEEN AGE OF CONSENT LAWS AND PARENTAL INVOLVEMENT REQUIREMENTS

This Part offers brief histories of both age of consent laws and parental involvement requirements for minor abortions. Drawing on the language and purpose of statutory rape laws, this Part categorizes age of consent laws as “enabling” regulations, through which the state recognizes a minor’s sexual autonomy. Conversely, parental consent and notification requirements for abortion reflect “protectionist” limitations on adolescent sexuality. These regulations are protectionist because they justify the differential treatment of minor abortion rights from adult abortion rights on the basis of adolescent immaturity. Offering a state-by-state comparison of ages of consent to the ages at which a minor may independently obtain an abortion, this Part concludes with a summary of the legal implications of these two statutory schemes.²⁵

A. Age of Consent Laws: Enabling Adolescent Sexuality

States establish the age of sexual consent through statutory rape laws.²⁶ Statutory rape is the crime of sexual intercourse with a person under the age of consent, regardless of whether it is against that person’s will.²⁷ In virtually all jurisdictions, the age of consent is the defining element of statutory rape law; it establishes the threshold age at which a person may lawfully choose to engage in sexual intercourse.²⁸ In most jurisdictions, statutory rape is a strict liability crime, to which neither

25. See *infra* Table I.

26. See BLACK’S LAW DICTIONARY, *Age* (Black’s Law Dictionary Digital CD-ROM, 8th ed. 2004).

27. Statutory rape is defined as “Unlawful sexual intercourse with a person under the age of consent (as defined by statute), regardless of whether it is against that person’s will. Generally, only an adult may be convicted of this crime. A person under the age of consent cannot be convicted.” BLACK’S LAW DICTIONARY, *Statutory Rape*, (Black’s Law Dictionary Digital CD-ROM, 8th ed. 2004).

28. See 65 AM. JUR. 2d *Rape* § 14 (1972) (defining the legal implications of the “age limit” in statutory rape laws).

the willingness (non-legal “consent”) of the underage partner nor mistake of age is a defense.²⁹ American statutory rape law was based on standards for the age of consent established in England.³⁰ Following a common law tradition in which the “age of female discretion” was originally set at twelve years, the first age of consent regulation in England was established by parliamentary statute in 1576.³¹ This statute designated the age of consent at ten years and explicitly criminalized sexual relations with any child under the age of consent “without the benefit of clergy” as a felony.³² In the United States, all states have adopted some form of a statutory rape law,³³ fixing the age of consent between fourteen³⁴ and eighteen years of age.³⁵ In the American tradition, statutory rape laws have been the subject of much debate,³⁶ ranging from the constitutionality of gender-specific language,³⁷ to the mistake of age defense,³⁸ to the wisdom of using statutory rape law enforcement to prevent teenage pregnancies and reduce public assistance to teenage mothers.³⁹ The underlying rationale for statutory rape is often related

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29. See 75 C.J.S. *Rape* § 6 (1952) (explaining the unavailability of mistake of age defenses to statutory rape charges).
 30. See MARY E. ODEM, *DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885–1920* 13 (1995) (describing the history and evolution of American “age of consent” laws relating back to their English influences).
 31. See ODEM, *supra* note 30.
 32. See *id.*
 33. See Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 60 (1997) (presenting a table of ages of consent for penetration and sexual contact in the United States).
 34. Over the course of U.S. history, age of consent laws have permitted sexual consent as young as seven years old, although now the lowest age of consent in any U.S. jurisdiction is fourteen. See ODEM, *supra* note 30, at 13.
 35. See Phipps, *supra* note 33, at 60.
 36. See Charles A. Phipps, *Misdirected Reform: On Regulating Consensual Sexual Activity Between Teenagers*, 12 CORNELL J.L. & PUB. POL’Y 373, 375–76 (2003) (listing out the areas of contemporary scholarly debate on statutory rape law in the United States).
 37. See, e.g., Alice Susan Andre-Clark, Note, *Whither Statutory Rape Laws: Of Michael M., The Fourteenth Amendment, and Protecting Women from Sexual Aggression*, 65 S. CAL. L. REV. 1933 (1992). See generally *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981).
 38. See, e.g., Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105 (1965–1966); Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U.L. REV. 313, 316–17 (2003–2004).
 39. See Elizabeth Hollenberg, *The Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood*, 10 STAN. L. & POL’Y REV. 267, 277 (1999) (recognizing that statutory rape laws have increasingly been used to prevent teenage pregnancy but also arguing that there need to be additional social welfare mechanisms in place

back to the premise that “young people are incapable of understanding the full significance and consequences of certain acts in which they might willingly engage . . . [and where such] understanding is lacking . . . there can be no true ‘consent’ to it in the sight of the law.”⁴⁰

Recently, there has been notable scholarly debate about how well statutory rape laws actually regulate minor sexual activity.⁴¹ In particular, statutory rape laws have been criticized as ineffective means to address the risks inherent in adolescent sexual activity, a normal and healthy part of “coming of age.”⁴² Much of this debate focuses on the use of age as the legal indicator of sexual maturity, as compared to other developmental attributes.⁴³ While statutory rape laws may be categorically criticized for restricting otherwise mature minors from giving consent, the reverse implication is that such laws also unequivocally enable minors to consent to sexual activity at the given statutory age. Specifically, age of consent laws are *legally enabling* insofar as they confer upon adolescents the right to consent to sexual activity. Although it may be somewhat counterintuitive to categorize statutory rape law as enabling, statutory rape only exists as a crime because it establishes the baseline age at which a minor’s sexual consent becomes legally significant. When a minor reaches the age of consent, the law shifts from presuming immaturity to maturity so that minor becomes legally capable of consensual sexual

to effectively address the problem). Notably, several legislative initiatives designed to use statutory rape laws to curb teenage pregnancy and reduce public assistance to teenage mothers have also received significant attention in the general media. See generally Patricia Edmonds, *Teen Pregnancy Revives Laws on Statutory Rape*, U.S.A. TODAY, Mar. 28, 1996, at 1A; Sandra Gonzales, *State Officials Cracking Down on Statutory Rape*, L.A. DAILY NEWS, Sept. 1, 1996, at N21.

40. See LAUREN KROHN ARNEST, CHILDREN, YOUNG ADULTS, AND THE LAW: A DICTIONARY 276 (1998).
41. See generally Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 8 DEPAUL J. HEALTH CARE L. 109 (2004); Phipps, *supra* note 33 and note 36.
42. Statutory rape laws have been criticized as detrimental to the meaningful exercise of “girls’ autonomy in sexual decision-making.” See Oberman, *supra* note 41, at 177 (arguing for the “revival and reconfiguration” of statutory rape laws to affirm sexually active minor female autonomy and reinforce meaningful consent). While I acknowledge this contemporary debate and the recent criticism regarding “age of consent” laws in promoting adolescent sexual and moral agency, I will not address the merits of such qualitative debate in this Article. Rather I interpret statutory rape laws as legally enabling a person to make sexual decisions at a threshold age.
43. See Jennifer Ann Drobac, “Developing Consent”: Adolescent “Consent” at Work, at Law, and in the Sciences of the Mind, 10 U.C. DAVIS J. JUV. L. & POL’Y 1(2006) (arguing that adolescent development, adolescent sexuality, and child/adolescent sexual abuse should be central factors in informing the debate about adolescent consent).

activity.⁴⁴ Thus, as derived from statutory rape law, age of consent regulations formally confer consent-giving capacity, and therefore they illustrate an enablement-type regulation of adolescent sexuality.⁴⁵

*B. Parental Involvement Requirements: Protecting Immature Children*⁴⁶

Since recognizing a woman's fundamental right to an abortion in *Roe v. Wade*, the Court has treated minor abortion rights very differently from general adult abortion rights.⁴⁷ The Court has justified the differential treatment of minor abortion rights on two grounds: 1) presumptive minor immaturity and 2) parental rights to be involved in a minor child's abortion decision.⁴⁸ The Court most expressly addressed differential minor abortion rights in the 1979 case, *Bellotti v. Baird*.⁴⁹ There the Court specifically acknowledged the tension between protecting a woman's right to obtain an abortion and recognizing "the peculiar vulnerability of children."⁵⁰

While the Court found the particular statute at issue in *Bellotti* unconstitutional because it gave parents "potential veto power" over their daughter's ability to obtain an abortion,⁵¹ it also explained that "parental guidance" was a desirable counterweight to minor females' inherent inability "to make fully informed choices [taking into account] both

44. See 75 C.J.S. *Rape* § 57 (describing the shift in presumption of capacity when a minor reaches the age of consent but also describing that the presumption is still rebuttable even after the age of consent, depending upon incapacitation, helplessness, mental or physical disability, etc.).

45. Whether "age of consent" laws vitiating the meaningfulness of consent for minors who desire to have sex before they are legally permitted to do so is not the focus of this Article. Instead this Article categorizes statutory rape laws as "enabling" because they create the legal presumption of consent-capacity of minors who have reached a given age.

46. For a detailed background of the evolution of laws governing parental notification and consent for minor abortions, see J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 BERKELEY WOMEN'S L.J. 61 (2003); J. Shoshanna Ehrlich, *Shifting Boundaries: Abortion, Criminal Culpability and the Indeterminate Legal Status of Adolescents*, 18 WIS. WOMEN'S L.J. 77 (2003).

47. See *Roe v. Wade*, 410 U.S. 113, 163 (1973) (recognizing the right to obtain an abortion as grounded in "zones of privacy" protected by substantive due process); *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (finding a Massachusetts parental consent requirement unconstitutional, but explaining that parental involvement limitations on minor abortions could be constitutional if they included a judicial bypass option).

48. See *Bellotti*, 443 U.S. at 640-42.

49. See Ehrlich, *supra* note 46, at 64.

50. See Ehrlich, *supra* note 46, at 64 (quoting *Bellotti*, 443 U.S. at 643).

51. See *Bellotti*, 443 U.S. at 640-41.

immediate and long-range consequences” of an abortion.⁵² More specifically, the Court reasoned: “As immature minors often lack the ability to make fully informed decisions . . . a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor.”⁵³ To allow states the opportunity to require such parental involvement, the Court specifically permitted parental notification or consent requirements so long as there was also “an alternative procedure whereby authorization for the abortion [could be] obtained.”⁵⁴ This holding has served as the basis for the judicial bypass requirement for minor abortion restrictions.

Following a rash of state attempts to further limit abortion procedures, the Court revisited the constitutional test for substantive due process abortion rights in *Planned Parenthood v. Casey*.⁵⁵ There, while the Court reaffirmed the fundamental right to an abortion under *Roe*, it replaced *Roe*'s constitutional test, the strict scrutiny standard, with a new undue burdens test.⁵⁶ Specifically addressing the issue of minor abortion rights in *Casey*, the Court held that a “parental consent” provision with a judicial bypass option did not impose an “undue burden” on the abortion right.⁵⁷ In defense of its holding, the Court explained that parental involvement laws were “reasonably designed to further the State’s important and legitimate interest ‘in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.’”⁵⁸ In upholding the constitutionality of parental involvement laws, the Court’s reasoning further supported the legitimacy of parental protectionism in counterbalancing minor abortion rights.⁵⁹ While the Court may have “enabled” abortion rights for adult women, it has exponentially limited minor abortion rights in favor of parental involvement.⁶⁰ For the purposes of

52. See *Bellotti*, 443 U.S. at 640.

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

54. *Bellotti*, 443 U.S. at 643.

55. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

56. See *Casey*, 505 U.S. at 874.

57. *Casey*, 505 U.S. at 895.

58. See *Casey*, 505 U.S. at 970–71 (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990)).

59. See Ehrlich, *supra* note 46, at 65 (“Since 1979, the Court has not wavered from its belief in these interconnected assumptions about teen decisional incapacity and the ameliorative effect of parental engagement using this belief to justify limiting the reproductive rights of young women.”).

60. See *Bellotti*, 443 U.S. 622, 643 (1979) (reasoning that parental consent requirements were constitutional so long as there were some other alternatives by which a minor could obtain authorization for an abortion); *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 493 (1983) (holding that a parental consent statute was constitutional

this Article then, parental involvement requirements are treated as protectionist laws.

C. Comparing Age of Consent Laws and Parental Involvement Requirements

There is widespread statutory inconsistency between the age at which a minor may consent to sexual activity and the age at which a minor may obtain an abortion without parental involvement. Across the states, ages of consent range from fourteen years old to eighteen years old.⁶¹ Ages of consent sometimes further vary depending upon the sex, age-differential, and marital status of a minor.⁶² For unmarried minors, the youngest age of consent in any state is fourteen years old.⁶³ The most common age of consent across the states is sixteen years old.⁶⁴ A total of thirty-four states set the general age of consent for sexual intercourse at sixteen years old when no other contingencies apply.⁶⁵ Five of the states that generally set the age of consent at sixteen years old increase the age of consent to eighteen where there is a particular age difference between the two parties.⁶⁶

On the matter of minor abortions, thirty-four states in the U.S. require some form of parental involvement where a female under the age of eighteen seeks an abortion.⁶⁷ Of those, twenty-two require either one or both parents to consent to the procedure.⁶⁸ Eleven states require either one or both parents to be notified of the procedure.⁶⁹ Two states require both parental notification and consent for a minor to obtain an abortion.⁷⁰

where it included a judicial authorization provision); *Casey*, 505 U.S. at 899 (holding that a parental consent provision did not impose an undue burden on a minor's abortion).

61. Every state in the United States has some form of statutory rape law which fixes the legal age of consent. Fuentes, *supra* note 13, at 140.

62. See U.S. DEPT. OF HEALTH AND HUM. SERV., STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS (2004).

63. See *supra* note 62, at 6.

64. See *id.*

65. See *id.*

66. See AVERT, *Worldwide Ages of Consent*, <http://www.avert.org/aofconsent.htm> (last visited Nov. 7, 2010).

67. See ALAN GUTTMACHER INST., STATE OF POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS (2010), available at http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf.

68. *Supra* note 67.

69. *Id.*

70. *Id.*

Reading the two statutory schemes together, the problem becomes apparent: as of 2004, twenty-six of the thirty-four states requiring some form of parental involvement in minor abortions set the age of consent below the age at which a minor may obtain an abortion without parental involvement.⁷¹ In short, these states grant minor females the right to privately and independently consent to intercourse and even motherhood, but not the corresponding right to obtain an abortion without parental involvement.⁷² Part II of this Article examines the constitutional substantive due process claims and policy concerns that emanate from parental involvement requirements where the state has already recognized a minor's privacy right to sexual consent.

II. EVALUATING THE CONFLICT: CONSTITUTIONAL AND POLICY CONCERNS

This Part of the Article discusses both the constitutional violations and policy problems created by the inconsistent regulation of adolescent sexuality under statutory rape and parental involvement laws. After highlighting the substantive due process infringements and public policy concerns, this Article argues that states should consciously reject the protectionism-versus-enablement paradigm in the regulation of adolescent sexuality and adopt a more comprehensive and internally-consistent body of law.

A. Substantive Due Process Claims: Undue Burdens on the Sexually Mature Minor

The substantive due process problem created by conflicting age of consent and minor abortion restrictions rests on the undue burdens line

71. See *infra* Table 1 (state-by-state comparison of age of consent versus parental involvement statutes).

72. For a more in-depth discussion of the shifting legal status of adolescents with regard to abortion law discussed within a greater comparison to the legal status of adolescents to make decisions regarding abortion versus criminal liability see Ehrlich, *supra* note 46, at 91. Prof. Ehrlich reflects upon the shifting legal status of a pregnant minor depending upon her reproductive choice: "Assume for a moment that a young woman, upon learning she is pregnant, first considers motherhood. Not only is she free to make this decision on her own, but, by making this choice, she is vested with adult-like rights with respect to her medical care while pregnant and following the birth of her child. Now assume that she changes her mind and decides to abort. With this change her adult status is revoked, and her reproductive choice is instead subject to an adult involvement requirement."

of jurisprudence under *Casey*. The Court's affirmation of parental involvement restrictions for minor abortions should not apply to states where the age of consent is below the threshold age for parental involvement in minor abortions.⁷³ More specifically, this Article argues that the *Bellotti* and *Danforth* decisions upholding parental involvement statutes should only apply where the state retains its legitimate interest in balancing the rights of immature minors with parental rights.⁷⁴ States that have established legal maturity at sixteen have forfeited any parental interest in those minors' sexual and reproductive decisions above the age of consent. In taking *Casey* seriously, the Court should expressly re-examine parental involvement requirements under an undue burdens analysis and not under *Bellotti* and *Danforth*. Under the undue burdens test, parental involvement requirements for legally mature, consenting minors closely resemble the spousal notification requirements struck down in *Casey* and therefore violate minors' substantive due process abortion rights.

1. Adult Abortion Rights Under *Casey*: The Undue Burdens Test

Beginning with *Roe v. Wade*, the Court grounded its recognition of substantive due process abortion rights in the more general fundamental right of personal privacy.⁷⁵ Under *Roe*, restrictions must be narrowly drawn to express only the legitimate state interests at stake.⁷⁶ Since *Roe*, the Court has continued to decide abortion rights cases according to a substantive due process analysis, grounded in the fundamental right of privacy.⁷⁷ In the 1992 *Casey* decision, the Court reaffirmed *Roe*'s essential holding, recognizing a woman's right to an abortion as grounded in her right to privacy, yet also changed the constitutional test for upholding that right.⁷⁸ Specifically, the Court relaxed *Roe*'s strict scrutiny standard to a new undue burdens analysis.⁷⁹ The undue burdens standard is now the constitutional test for substantive due process abortion rights. Under this test undue burdens are those regulations "[having] the purpose or

73. *Casey* was decided in 1992, *Bellotti* was decided in 1979, and *Danforth* was decided in 1976.

74. See *infra* Part II.A.3.

75. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

76. *Roe*, 410 U.S. at 155.

77. See Helem M. Alvaré, Gonzales v. Carhart: *Bringing Abortion Law Back into the Family Fold*, 69 MONT. L. REV. 409, 431 (2008) (describing the substantive due process claims as the basis for *Roe*'s holding and its progeny).

78. *Casey*, 505 U.S. at 876–77.

79. *Casey*, 505 U.S. at 876–77.

effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”⁸⁰ In its most recent abortion decisions, namely *Stenberg v. Carhart* (2000) and *Gonzales v. Carhart* (2007), the Court expressly affirmed its adoption of the undue burdens test as the standard for abortion rights substantive due process claims.⁸¹

2. Minor Abortion Rights Under *Bellotti* and *Danforth*

Notwithstanding the undue burdens test for abortion rights generally, the Court has developed a unique subset of regulatory principles for minor abortion rights.⁸² These principles are grounded in concerns about minors’ immaturity and their inability to make important life decisions without parental support.⁸³ Most of these principles govern permissible restrictions on minor abortion rights through parental involvement requirements.⁸⁴ The array of Supreme Court decisions establishing minor abortion rights precedent spans nearly four decades and incorporates various the aspects of Court’s language from *Roe* through its most recent decisions in *Stenberg* and *Carhart*.⁸⁵ Collectively, this set of jurisprudence defines the constitutional parameters of parental involvement statutes.⁸⁶ Most basically, the Court has permitted parental involvement requirements where there are judicial bypass mechanisms to allow a minor the opportunity to petition and persuade a judge that it would be in her best interest, or that she is mature

80. *Casey*, 505 U.S. at 876–77.

81. *See Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (holding that a state law prohibiting “partial birth abortion” was unconstitutional under an undue burden analysis); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (applying the undue burdens test to the federal Partial-Birth Abortion Ban Act of 2007 and explaining that the undue burdens analysis in *Casey* rejected and replaced the strict scrutiny standard set forth in *Roe*).

82. *See infra* note 90 (comparing the parental consent statute considered in *Danforth* to the parental notification statute addressed in *Bellotti*). Notably, while the majority of the minor abortion cases were decided prior to *Casey*, the Court expressly reasoned in *Casey* that parental involvement laws were not inconsistent with the undue burdens test.

83. *See infra* note 91 and accompanying text (explaining that *Casey* was consistent with the Court’s holding in *Bellotti* and *Danforth* and that parental involvement requirements did not impose an “undue burden” on minor abortion rights).

84. *See infra* note 91.

85. *See supra* note 81 (describing the Court’s decisions in *Stenberg* and *Carhart* as new developments further shaping the application of the adult undue burdens analysis in *Casey*).

86. *See id.*

enough, to make the abortion decision independently.⁸⁷ In *Planned Parenthood of Central Missouri v. Danforth* (1976), the Court struck down a law requiring minors seeking an abortion to obtain either parental consent or physician certification that the abortion was necessary to protect the young woman's health.⁸⁸ However, in *Bellotti v. Baird* (1979), the Court permitted a range of limitations on a minor's abortion right, including a parental notification requirement, so long as there was a judicial bypass alternative or equivalent.⁸⁹ From the Court's decisions in *Danforth* to *Bellotti*, the availability of judicial bypass emerged as the dividing line on constitutional restrictions of minor abortion rights.⁹⁰

Citing *Danforth* and *Bellotti* in *Casey*, the Court explained, in dicta, that the prohibition on undue burdens was "in no way inconsistent" with past decisions upholding parental notification and consent requirements.⁹¹ Again emphasizing the fundamental immaturity of children, the Court affirmed the constitutionality of both *Danforth* and *Bellotti* by distinguishing adult abortion rights from minor abortion rights on the grounds that "minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart."⁹² Thus, even after *Casey* established the new undue burdens test for adults, the Court still recognized *Danforth* and *Bellotti* as defining the constitutional contours of minor abortion restrictions.⁹³

87. See Daniel K. Fink, *Refining Permissible Abortion Regulations: Mandatory In-Person, Informed Consent Meetings Held Constitutional, but Restriction on Number of Petitions by Minors for Judicial By-Pass of Parental-Consent Requirement Overturned—Cincinnati Women's Services, Inc. v. Taft*, 33 AM. J.L. & MED. 145 (2007) (analyzing a recent Sixth Circuit decision on minor judicial bypass proceedings in comparison to the traditional approach to minor judicial bypass).

88. *Danforth*, 428 U.S. at 72.

89. See generally *Ohio v. Akron Center for Reprod. Health*, 497 U.S. 502 (1990) (upholding the constitutionality of a law requiring parental notification so long as there was the option of judicial bypass); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (upholding the constitutionality of a parental notification law requiring notice be given to both parents); *H.L. v. Matheson*, 450 U.S. 398, 409–11 (1981) (upholding a parental notification requirement so long as it did not impose a "blanket unreviewable veto power of parents" over the daughter's abortion).

90. Compare *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 72 (1976) with *Bellotti v. Baird*, 443 U.S. 622, 622 (1979).

91. *Casey*, 505 U.S. at 895.

92. *Casey*, 505 U.S. at 895.

93. See *Lambert v. Wicklund*, 520 U.S. 292, 295 (1997) (citing *Bellotti* to uphold the constitutionality of Montana's Parental Notice of Abortion Act where there was a judicial bypass provision to allow for waiver of the notice requirement where such notification would not be in the "best interests" of the minor).

3. The Undue Burden: Statutory Incongruence, Inconsistency and Irrationality

Of the thirty-four states with active and unenjoined parental involvement statutes, twenty-six states set the age of sexual consent younger than the age at which a minor may obtain an abortion without parental involvement.⁹⁴ Where the age of consent is years younger than the threshold age of a minor female seeking to obtain an abortion without parental involvement, the privacy right of a minor to legally consent to sexual intercourse directly conflicts with parental rights in child-rearing. The law's dependence upon the protectionism-versus-enablement paradigm inadvertently creates a statutory scheme where minor sexual enablement directly clashes with parental protectionism. The resulting statutory framework is legally incongruous, inconsistent, and irrational; most states establish sexual maturity for the purposes of consenting to intercourse and bearing a child at sixteen, but then restrict a minor's right to obtain an unencumbered abortion until eighteen.⁹⁵ Ultimately these restrictions violate the substantive due process rights of legally consenting minors and fail to pass muster under *Casey's* undue burden analysis.⁹⁶

The vesting of a minor's sexual consent capacity triggers the corresponding protection of that minor's privacy rights and seriously challenges the applicability of the immaturity justification for parental involvement.⁹⁷ The state acknowledges minor maturity at the age of consent by formally recognizing the ability to consent to, engage in, and reproduce as a result of, lawful sexual intercourse. Correspondingly, when a minor reaches the age of consent, the state concedes the expiration of its immaturity interest under *Bellotti* and is bound to the more stringent undue burdens standard for mature women's abortion rights.⁹⁸ The substantive due process issue arises from the state's forfeiture of its legitimate government interest in restricting minor abortion rights where it has already established the threshold for minor sexual and reproductive maturity at the age of legal consent.⁹⁹ Under *Casey's* undue

94. 28 of 35 states currently have active parental involvement laws. See *supra* Part I.C.

95. See Ehrlich, *supra* note 46, at 85 (explaining the differential treatment of minor abortion rights vis-à-vis parental rights).

96. This conflict may also raise significant state constitutional concerns. However this portion of the Article is focused solely upon addressing substantive due process claims.

97. See generally *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992); *Bellotti v. Baird*, 443 U.S. 622 (1979).

98. See *Casey*, 505 U.S. at 878.

99. See *Casey*, 505 U.S. at 878.

burden analysis, parental involvement requirements, absent the immaturity justification, more closely resemble the spousal notification and consent statutes struck down as unconstitutional in both *Danforth*¹⁰⁰ and *Bellotti*.¹⁰¹ The Court in *Casey* expressly addressed the difference between parental and spousal notification requirements. It explained that “minors will benefit from consultation with their parents” (presumably in a way that is different from the way a wife would benefit from consultation with her husband) and that “children will often not realize that their parents have their best interests at heart.” The palpable difference, in the Court’s eyes, between parental notification and spousal notification was minor child immaturity.¹⁰²

In *Casey*, the Court defined an “undue burden” as any state regulation having the “purpose or effect of placing substantial obstacle in path of woman who seeks abortion of nonviable fetus.”¹⁰³ Although never expressly defined, the Court’s characterization of an “undue burden” in *Casey* has generally been interpreted as any “regulation [that would] prevent women from receiving an abortion.”¹⁰⁴ Without the immaturity rationale to justify parental involvement, parental notification and consent regulations impose an undue burden for many of the same reasons as spousal notification provisions, leaving the minor exposed to the risk of: 1) physical reprimand and punishment by parents; 2) financial ostracization and withdrawal of economic support; 3) psychological abuse and intimidation by family and peers; 4) actual intervention by a parent to prevent a child from obtaining an abortion.¹⁰⁵ Further, many scholars have criticized parental involvement and judicial bypass requirements as having an indefensibly chilling effect on minor abortion rights.¹⁰⁶ These scholars argue that such requirements prevent many minors from ever even seeking abortions and so complicate the minor abortions that do occur so that they cannot be obtained without significant difficulty, danger, and cost.¹⁰⁷

100. See *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 67–69.

101. See *Bellotti*, 443 U.S. at 622.

102. See *Casey*, 505 U.S. at 895.

103. *Casey*, 505 U.S. at 877.

104. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: POLICIES AND PRINCIPLES* 830 (3rd ed. 2006) (characterizing the Court’s interpretation of the undue burdens test).

105. See *Casey*, 505 U.S. at 894. See generally Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT’L J.L. POL’Y & FAM. 305 (2004); J. Shoshanna Ehrlich, *Journey Through the Courts: Minors, Abortion and the Quest for Reproductive Fairness*, 10 YALE J.L. & FEMINISM 1 (1998); David Crary, *New Laws to Boost Hearings in Court*, CJ ONLINE (July 31, 2000), http://cjonline.com/stories/073100/new_hearings.shtml (quoting J. Shoshanna Ehrlich).

106. See Sanger, *supra* note 105, at 310.

107. See *id.*

Considering the inapplicability of the immaturity rationale to minors over the age of consent, *Casey's* undue burdens analysis and not the *Bellotti* and *Danforth* decisions ought to govern these minors' abortion rights. Without the immaturity rationale to distinguish legally consenting minor abortion rights from adult abortion rights, the test for permissible government restrictions on abortions becomes much more stringent.¹⁰⁸ Parental involvement laws for legally consenting minors are undue burdens because they arbitrarily require either parental invasions of minor privacy or additional subjective judicial evaluations of maturity before an abortion can be obtained.¹⁰⁹ The state cannot rationally maintain its legitimate interest in intruding upon a minor's privacy-based right to an abortion where it has already recognized that minor's sexual maturity. The substantive due process standard for legally-consenting minors should therefore be *Casey's* adult undue burdens analysis, and under such an analysis the imposition of parental involvement does, in fact, "place a substantial obstacle in the path of a woman seeking an abortion."¹¹⁰

B. Policy Concerns

The substantive due process claim caused by the conflicting ages of maturity in statutory rape and parental involvement laws demands change. However, the public policy concerns arising from this conflict should control the scope and shape of this change. Because this Article locates the constitutional conflict within a greater faulty paradigm, policy is particularly important in developing a solution that addresses both the specific substantive due process issue as and the greater systemic

108. In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), a pre-*Casey* decision, the Court struck down an Ohio parental consent statute as unconstitutional because "the statute made no provision for a mature or emancipated minor completely to avoid hostile parental involvement by demonstrating to the satisfaction of the court that she was capable of exercising her constitutional right to choose an abortion." There, the statute was deemed unconstitutional as applied to all *mature minors*. Thus, although technically overruled by *Casey* there is some precedent to indicate that maturity distinctions ought to further distinguish immature minor abortion rights from mature minor abortion rights. Jared H. Jones, Annotation, *Women's Reproductive Rights Concerning Abortion, and Governmental Regulation Thereof—Supreme Court Cases*, 20 A.L.R. FED. 2d 1 (2007) (§ 27: *Validity of particular parental notification provisions—Held unconstitutional*). To date there has yet to be any Supreme Court case that explicitly addresses the abortion rights of mature minors versus immature minors under *Casey's* undue burdens analysis.

109. See *Casey*, 505 U.S. at 878.

110. See *Casey*, 505 U.S. at 878.

flaws. This Article presents five policy problems directly caused by the inconsistent treatment of sexually active minors under conflicting age of consent and parental involvement laws: 1) the encouragement of impulsive minor sexual activity; 2) the linkage of reproductive decisional autonomy to pregnancy outcome; 3) the promotion of paternalism and gender stereotypes toward minor females; 4) the punishment of sexually active minor females through parental involvement and judicial bypass; and 5) the inhibition of parent-child communication about sexuality and reproductive decisions before a minor becomes sexually active. Ultimately, the policy concerns presented here, coupled with the constitutional violations previously addressed, guide the discussion of solutions presented in Part III.

1. Ambiguous Legal Identities Encourage Impulsive Behaviors

By divorcing responsibility for reproductive autonomy from sexual maturity, inconsistent sexual consent and parental involvement statutes promote impulsive sexual activity. Rather than basing sexual and reproductive rights upon the obtainment of a single legal marker, the current statutory scheme separates sexual consent capacity from reproductive decisional autonomy. More specifically, the law currently recognizes maturity for the purposes of coital consent but then rescinds that acknowledgment when a minor seeks an abortion. The conceptual severance of sexual consent from reproductive autonomy encourages minors to consider their decision to have sex within a vacuum, as separate and distinct from the risks and consequences of that decision. Without linking the ability to consent to sexual activity to the ability to independently terminate pregnancy, the law sanctions impulsive, short-sighted sexual consent decision-making among minors.

2. Minor Reproductive Rights Turn On Pregnancy Outcome

Inconsistent sexual consent and parental involvement statutes link reproductive decisional capacity to pregnancy outcome.¹¹¹ If a pregnant minor elects to carry a pregnancy to term, she may make that decision independent of her parents and may consent to reproductive and prenatal healthcare without any parental notification or support whatsoever.¹¹² In fact, in many states a minor may consent to medical care and

111. See Ehrlich, *supra* note 72, at 90.

112. See *id.*

pre-natal services even below the age of sexual consent without initially having to obtain parental notification and consent.¹¹³ Effectively, the minor is “[vested] with adult-like rights when the decision is to become a mother, but [denied] them...when the decision is to avoid (or perhaps postpone) motherhood.”¹¹⁴ The law therefore trusts pregnant minors to responsibly, maturely, and independently carry a pregnancy to term but distrusts their ability seek an abortion without parental involvement.

3. Parental Involvement Requirements Reinforce Stereotypes and Paternalism

Subjecting a legally-consenting, sexually-mature minor female to parental involvement requirements reinforces a paternalistic legal system and traditional gender stereotypes. The legally-consenting minor female is endowed with the right to consent to sex, pregnancy, medical care, and/or raising a child but prevented from independently choosing to terminate or postpone her “childbearing” role. Indeed, these requirements also serve to normalize the notion that child-bearing is the inherent and natural purpose of sex. These statutory inconsistencies undermine women’s autonomy and personal dignity. They serve to reinforce a paternalistic vision of the law as protecting immature minor women, except where maturity is obtained through the acceptance of pregnancy and motherhood. Where the consenting minor rejects motherhood, she forfeits her claim to maturity and is required to involve her parents in her abortion decision. These policy implications are consistent with general trends in abortion jurisprudence in the wake of both *Planned Parenthood v. Casey* and *Gonzales v. Carhart*, but most pointedly affect the sexual and reproductive autonomy of minor females.¹¹⁵ This paternalistic-protectionist understanding of abortion rights vis-à-vis a woman’s proper role as a mother undermine minor female dignity by basing such reproductive decisional autonomy on

113. While there may be reporting requirements regarding evidence of statutory rape or sexual abuse, a minor’s reproductive autonomy in deciding to carry the pregnancy itself is not pre-conditioned upon initial parental notification and/or consent. For a description of statutory rape reporting requirements and limitations, see U.S. DEPT. OF HEALTH AND HUM. SER., STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS (2004).

114. See Ehrlich, *supra* note 72, at 90.

115. Reva Siegel argues that the Court’s recent decision in *Gonzales v. Carhart* reflects an increasingly paternalistic tendency to regulate abortion rights on the basis of a fundamentally protectionist approach regarding what a woman’s personal sense of “dignity” should look like. See Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1705 (2008).

“stereotypical assumptions about women’s capacities and women’s roles.”¹¹⁶ Most basically, if a minor female elects to carry a pregnancy to term she is fulfilling her natural role of “woman as child bearer” and she is rewarded with adult, decision-making abilities. Yet if a minor female seeks to terminate her pregnancy, she is refusing the stereotype of “woman as child bearer” and consequently, presumed so immature as to require either parental or judicial approval of her decision.

4. Parental Involvement and Judicial Bypass Serve More to Punish Than to Protect

Requiring minor females who have legally consented to sex to obtain parental notification, consent or judicial bypass effectively punishes minor females for having sex, rather than encouraging responsible sexual activity.¹¹⁷ Parental involvement statutes, even with judicial bypass provisions, exemplify a reactive, rather than preventative, approach to both minor sex and teenage pregnancy. Instead of conditioning the legal recognition of a minor’s ability to consent to sexual activity and reproductive procedures (contraception, reproductive care, abortion, etc.) upon an initial demonstration of maturity, the state first presumes legal maturity for the purposes of having sex, and then reacts to the immature consequences of sex (unintended pregnancy) by requiring either parental involvement or judicial bypass to terminate a pregnancy. The minor is thus forced to either “own up” to her sexual irresponsibility by having to obtain parental notification, consent or judicial bypass for an abortion OR “take responsibility” for her pregnancy by carrying it to term. Because of her decision to seek an abortion, the minor female is particularly punished. She has two options: (1) seek the involvement of her parents and risk “being rejected [by her family], kicked out of the family home, or punished physically” or (2) petition a judge and subject herself to an inquisition of her purported “maturity” in which she is expected to provide information about “her grades and after-school jobs” as well as why she has chosen to circumvent the guidance of her parents.¹¹⁸ Ironically, parental involvement and judicial bypass requirements compel minor females to demonstrate their maturity in a moment of

116. *Supra* note 115.

117. For a persuasive analysis of judicial bypass and parental involvement statutes as punishments, see Sanger, *supra* note 105, at 314 (describing the “ordeal” of judicial bypass as “humiliating, risky, intrusive” and “properly understood as punishment”).

118. See Sanger, *supra* note 105, at 311–12 (discussing parental involvement and judicial bypass processes as “punishment” for minor sex).

crisis, a time at which most adult women would be challenged to put on a level-headed display of maturity.

5. The Hystericization of Adolescent Sexuality

The fragmented statutory treatment of sexual consent and minor abortion rights inhibits parent-child communication and reinforces a general hysteria about adolescent sexuality. A minor's right to consent to sex is implicitly created by statutory rape statutes that conceive of adolescent sexuality as independent from reproductive rights. Minor consensual sex above the age of consent is legally permissible but socially uncomfortable. Thus, a minor's decision to have sex is allowed to be made in private once she has reached the age of consent, with as little or as much parental support and/or intervention as deemed necessary by that minor. This reflects the law's great discomfort in acknowledging sexual development and exploration amongst adolescents.¹¹⁹ Indeed, until the minor gets "caught" through the incident of pregnancy for her sexual activity, the law shrouds minor sexuality in dark, protective privacy. This sense of sexual privacy is fragmented, illusory, and socially harmful to minors. It inhibits minors from openly discussing sexuality with their parents before undertaking the risks of sexual activity, but then forces them to disclose their sexual irresponsibility to their parents if they seek an abortion. Ironically, this disjointed scheme undermines the state's mandate in Title X of the Public Health Service Act to "encourage parent-child communication" regarding family planning services for sexually active minors.¹²⁰

These concerns all reflect the problematic dichotomy of protectionism-versus-enablement in the regulation of adolescent sexuality. By separating minor consent capacity from protectionist parental

119. See generally MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* (Robert Hurley trans., Vintage Books ed. 1990) (1978) (exploring the growth of discourse surrounding sexuality, particularly pathologizing early sexual play and childhood sexual development); see also R. Danielle Egan & Gail Hawkes, *Producing the Prurient Through the Pedagogy of Purity: Childhood Sexuality and the Social Purity Movement*, 20 J. HIST. SOCIOLOGY 443 (2007) (exploring the historical construction of childhood sexuality and the development of purity-focused hysteria surrounding childhood sexual play and development beginning in the Victorian era).

120. See generally Rachel K. Jones, *Do U.S. Family Planning Clinics Encourage Parent-Child Communication? Findings from an Exploratory Survey*, 38 PERSP. ON SEXUAL AND REPROD. HEALTH 155 (2006), <http://guttmacher.org/pubs/psrh/full/3815506.pdf> (examining trends in reproductive health clinics regarding promoting parent-child communication in sexual and reproductive decision-making and the conditioning of federal funds upon the promotion of parent-child communication).

involvement requirements, the state sanctions short-sighted, impulsive minor sexual decision-making. The protectionism-versus-enablement paradigm links decisional capacity to pregnancy outcome rather than to actual developmental maturity. By invoking a protectionist mindset, the state holds hostage a minor's reproductive future without regard for her sexual dignity. Indeed, this paternalistic protectionism allows both parents and the courts to procedurally punish minors when they are caught having sex in the form of an unintended pregnancy. Ultimately, the protectionism-versus-enablement paradigm undermines the potential for parent-child communication and shared decision-making before a minor's initial choice to become sexually active. To free jurisdictions from the protectionist-versus-enablement stranglehold, this Article next articulates a new framework, the MCC status proposal, that would reconcile the constitutional and policy concerns raised here through the comprehensive sexual regulatory reform for minors.

III. BEYOND PROTECTIONISM-VERSUS-ENABLEMENT: RETHINKING THE REGULATION OF ADOLESCENT SEXUALITY THROUGH EDUCATION AND LICENSURE

The legal quandary created by incongruous age of consent and parental involvement laws demonstrates the defective regulation of adolescent sexuality under the protectionist-versus-enablement dichotomy. Specifically, this conflict illustrates how the flawed paradigm produces a legal scheme that both infringes upon minors' substantive due process rights and constructs poor public policy. This Part begins by examining and ultimately rejecting possible solutions to this conflict through statutory reform and certain status exceptions. In particular, this Part argues that while status exceptions¹²¹ and statutory reform may address the singular legal conflict between age of consent and parental involvement laws, these remedies still preserve the problematic schema of protectionism-versus-enablement. Addressing the inconsistent regulation of adolescent sexuality on such a piecemeal basis therefore would only serve to further reify the dichotomized legal landscape. In response to the systemic shortcomings of such solutions, this Part outlines an innovative new framework to regulate adolescent sexuality, combining components of education and licensure, designed to reconcile the particular constitutional and policy problems outlined above and to escape

121. See *infra* Part III.B. (describing "status-based" exceptions as either "mature minor" or "emancipated minor" exceptions to the parental notification and consent requirements).

from greater systemic paradigm. By implementing a comprehensive, cooperative, and anticipatory model, the proposed consent capacity framework would create a more consistent system for the regulation of adolescent sexuality.

A. The Inability of Statutory Reform to Resolve Systemic Shortcomings

Perhaps the most instinctive solution to address the conflict between age of consent and parental involvement laws would be to amend the laws so that the age of consent matches the age at which an adolescent may independently obtain an abortion. Such reforms would involve either lowering the age at which a minor could obtain an abortion to the age of consent (likely between fourteen and sixteen) or raising the age of sexual consent to the age of majority (eighteen). Given the current trends in abortion law and the robust tradition of parental rights, it seems highly unlikely that states would look favorably upon lowering the age at which a minor may obtain an abortion without parental involvement. Because such reform would do little to adjust the pitting of adolescent autonomy against parental rights, states would likely face significant opposition if they were to attempt to reduce parental power and increase adolescent abortion rights. Given the general hostility of states toward the deregulation of adolescent sexuality,¹²² this section focuses on states' more probable attempts to reconcile this statutory conflict by increasing the legal age of consent for minors.

Admittedly, raising the age of consent to the threshold age for adult abortion rights would neutralize the constitutional concerns previously discussed because the state would maintain its rational interest in the regulation of adolescent sexuality until the age of eighteen.¹²³ By retaining this legal interest until the age of majority, the immaturity rationale would still apply to justify the more restrictive regulation of minor abortion rights. At the absolute least, there would be a conceptual parity between the state's recognition of a minor's sexual consent and reproductive maturity.

Despite the formal reconciliation of the constitutional concerns offered by such statutory reforms, raising the age of consent to eighteen to match parental involvement laws would result in poor public policy and the unrealistic criminalization of adolescent sexuality altogether. Studies indicate that nearly three of every ten teens between the ages of thirteen

122. See generally Ehrlich, *supra* note 105; Siegel, *supra* note 115.

123. See *supra* Part II.A. (discussing a rational basis analysis for substantive due process abortion claims).

and sixteen is already sexually active.¹²⁴ Every year, almost 750,000 teenage women between the ages of fifteen and nineteen become pregnant.¹²⁵ Indeed, about a third of adolescent females become pregnant before the age of twenty at least once.¹²⁶ The median age at first intercourse is 16.9 for adolescent males and 17.4 for adolescent females.¹²⁷ The criminalization of sexual activity for adolescents under the age of eighteen would likely have disastrous effects on sexually active teens. It would overflow the courts with criminal underage sexual activity for the sake of legal formalism, virtually ensuring widespread jury nullification and undermining the systemic regulation of adolescent sexuality altogether.

If states were to raise the legal age of consent to eighteen for the purposes of statutory consistency, this would also likely impact the willingness of underage teens to seek out contraceptives, STI treatments and reproductive care for fear of legal consequences. In a 2006 article, the Guttmacher Institute found that existing legal and educational prohibitions on teenage sexuality, such as abstinence-only education programs, abstinence pledges, and restricted access to contraceptives and reproductive care, proved “ineffective in delaying the initiation of sexual activity.”¹²⁸ Moreover, the same study found that there was significant evidence that “such programming . . . may be making it harder for young people to effectively engage in protective behaviors down the road.”¹²⁹ In attempting to obligate teens to practice abstinence, these programs may have inadvertently promoted furtive sexuality and risky sexual practices.

Statutory reform might resolve the formal conflict between age of consent and parental involvement laws, but it would do so at an unjustifiable cost to public health and society. Systemically, it still fails to fully reconcile the needs, responsibilities, and capabilities of the developmentally dynamic adolescent vis-à-vis her parents and the state. Therefore, this Article next considers more progressive alternatives, focusing on

124. See Ana Maria Arumi, *Nearly 3 in 10 Young Teens “Sexually Active,”* MSNBC.COM (January 31, 2005), <http://www.msnbc.msn.com/id/6839072>.

125. ALAN GUTTMACHER INST., U.S. TEENAGE PREGNANCY STATISTICS NATIONAL AND STATE TRENDS AND TRENDS BY RACE AND ETHNICITY (2006), available at http://www.guttmacher.org/pubs/state_pregnancy_trends.pdf.

126. See HENRY J. KAISER FAM. FOUND., U.S. TEEN SEXUAL ACTIVITY (Jan. 2005), available at <http://www.kff.org/youthhivstds/upload/U-S-Teen-Sexual-Activity-Fact-Sheet.pdf> (analyzing trends in sexual activity amongst high school aged students in public and private schools, between the 9th and 12th grades).

127. Ehrlich, *supra* note 72.

128. See ALAN GUTTMACHER INST., *Legislating Against Arousal: The Growing Divide Between Federal Policy and Teenage Sexual Behavior*, 9 GUTTMACHER POL’Y REV. 3, 14-15 (2006).

129. *Supra* note 128.

status exceptions and objective demonstrations of minor maturity, to disentangle future policy from the protectionism-versus-enablement paradigm.

*B. Constitutional Violations and Policy Concerns
Persist with Status Exemptions*

Beyond the judicial bypass mechanism required under *Danforth* and *Bellotti*, a few states also recognize status exceptions to parental involvement requirements based upon categorical qualifications like marriage, military service, emancipation, and/or maturity.¹³⁰ These exceptions would allow an already-pregnant minor to obtain an abortion without parental involvement where the minor is legally married, enrolled in the military or legally emancipated. Legal emancipation requires that the petitioning minor does not live with her parents and is economically and personally self-sufficient.¹³¹ Legal emancipation is also granted where a minor's parents officially have surrendered their parental duties and rights.¹³² Emancipation is largely determined by financial independence and control rather than psychosocial indicators of developmental maturity.¹³³

A few states also recognize a "mature minor" status exemption to allow a minor to independently consent to medical procedures where she has proven herself to be "mature enough to understand the risks and benefits of [the] proposed medical treatment to give consent."¹³⁴ Unlike emancipation, the mature minor exception is based upon developmental competence rather than financial independence. However, even in the states that currently recognize the "mature minor" exemption for medical procedures in general, the exception may in fact be illusory in the

130. See Ehrlich, *supra* note 72, at 88 (describing status exceptions and maturity exemptions for minor abortions); Jennifer L. Rosato, *Let's Get Real: A Principled Approach to Adolescent Empowerment in Health Care Decision-Making*, 51 DEPAUL L. REV. 769, 776 (2002) (describing status exceptions generally).

131. See *supra* note 72, at 88–89.

132. See *id.*

133. See *id.*

134. See *supra* note 72, at 89 (highlighting an example of a mature minor exemption from Arkansas that reads: "[a]ny unemancipated minor of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment or procedures' may consent to his or her own medical care").

context of abortions, as it is often pre-empted by specific parental involvement requirements for minor abortions.¹³⁵

As a logical extension of the mature minor status exemption, one possible way to reconcile the age of consent and parental involvement laws would be to use anticipatory status exceptions in addition to the post-pregnancy judicial bypass option. Here, states would be required not only to ensure a post-pregnancy judicial bypass option for “immature” minors (minors under the legal age of consent) but also to require “mature minor” provisions for those adolescent females above the age of legal consent but under the age of majority. In accordance with a truly robust mature minor provision, a minor who reached the age of sexual consent would have the ability to petition the court to obtain “mature minor” status before ever becoming pregnant, based on a qualitative demonstration of her maturity. Once obtained, this “mature minor” status would recognize the legal right of that minor to consent to medical procedures, including abortions.

The most innovative characteristic of this reformed status exemption would be the ability of a minor to obtain the status declaration *before* pregnancy. The preemptive quality of this proposed mature minor exception would serve two primary functions: 1) to equalize the medical rights of minors both carrying a pregnancy to term and obtaining an abortion; and 2) to eliminate the mental, physical, and emotional dangers of additional notification/consent requirements where time may be of the essence.

Despite the social and individual benefits of such a mature minor exception, it would still fail to fully reconcile the constitutional violations and policy concerns outlined above. Ultimately it would work to preserve the flawed protectionist-versus-enablement paradigm and likely be criticized for creating new, additional policy problems. First, preemptive status exemptions would likely be criticized for unduly clogging the courts. Second, given the unplanned quality of most teenage pregnancies,¹³⁶ a mechanism that would require a great amount of additional forethought, planning, and extra-preventative steps would likely not be very useful. Third, the notion of the status exception still constructs the typical, consenting minor as presumptively immature. Fourth, the ex-

135. See Oberman, *supra* note 41, at 149 (analyzing the mature minor exemption and concluding “the bulk of the legal analysis and focus is cast ‘not in terms of protecting minors, but in recognizing independent rights of parents.’”)

136. See ALAN GUTTMACHER INST., IN BRIEF: FACTS ON AMERICAN TEENS’ SEXUAL AND REPRODUCTIVE HEALTH (Sept. 2006), available at http://www.guttmacher.org/pubs/fb_ATSRH.pdf (explaining that over 82% of U.S. teenage pregnancies are unplanned).

ception reinforces the divorce of meaningful sexual consent from reproductive maturity and autonomy. Thus, although status exceptions might encourage more consequential thinking by some sexually active minors, they are trapped within the protectionism-versus-enablement paradigm, pitting the autonomy of consenting minors against the paternalism of both the state and their parents.

C. Licensing Minor Consent Capacity (MCC) Status

Under the protectionism-versus-enablement paradigm, the aforementioned reforms would still fail to promote healthy, developmentally-appropriate, and socially responsible adolescent sexual behavior. Options to reform the existing law, either by raising the age of sexual consent or lowering the age at which a minor may obtain an abortion without parental involvement, do nothing to address the public policy failings of current sexual and reproductive rights law and would only serve to reaffirm this flawed system.¹³⁷ Indeed, even preemptive status exceptions would remain entrenched in the protectionist versus enablement polarity by constructing legally-consenting minors as sexually mature but unworthy of full reproductive autonomy.¹³⁸

Under any of these schemes, the decisional autonomy of sexually active minors remains pitted against a paternalistic protector (either the state or the parent). Sexually active minors are pre-constructed to understand their sexual identities and practices as in conflict with adult intervenors.¹³⁹ For this reason, the continued application of protectionist and enabling measures to regulate adolescent sexuality is detrimental to the promotion of a healthy, holistic view of adolescent sexuality.

In furtherance of a comprehensive and consistent legal framework for the regulation of adolescent sexuality, this Article advocates abandoning the fragmented approach of protectionism-versus-enablement. In the place of the current incoherent system, this Article proposes a new regulatory framework grounded in a necessary parity between sexual autonomy and reproductive responsibility. More specifically: (1) to facilitate better early communication between adolescents and their parents regarding sexual and reproductive decision-making; (2) to formally recognize and promote sexual maturity through education and legal

137. See *infra* Part III.B.

138. See *supra* note 137.

139. See Michelle Oberman, *Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Master's Tools to Reconfigure Statutory Rape Law*, 50 DEPAUL L. REV. 799, 803 (2001) (describing the regulation of adolescent sexuality through statutory rape laws as originating in protectionism and patriarchy).

consensual capacity; and (3) to promote consequential, prevention-oriented, socially-responsible adolescent sexual behavior, this Article proposes a new regulatory framework consisting of comprehensive sexual education and consent licensure. By conditioning legal consensual capacity upon education and objective assessment, states would construct a comprehensive way to regulate both adolescent sexuality and reproductive rights. This system moves beyond protectionism-versus-enablement by simultaneously encouraging shared parent-child-state cooperation and communication, while also using education to promote and assess sexual maturity and socially-responsible behaviors.

*D. MCC Status: Promoting Sexual Responsibility
Through Minor Consent Licensure*

This Article envisions a comprehensive regulatory system of minor sexuality that conditions a minor's ability to consent to sex and reproductive procedures upon the successful completion of an education program and a qualitative assessment. This system would explicitly link a minor's consensual capacity to an objective understanding of the consequences and risks of sexual activity, including knowledge of pregnancy, STIs, abortion procedures, adoption programs, etc. Conceptually, a minor's consensual capacity for both sex and reproductive procedures would flow directly from her understanding of sexual and reproductive health. Minor consent capacity would be conditioned upon an objective assessment of maturity and knowledge. In such a system, states would construct a sexual education and licensure program, to be available both in public schools as well as through private institutions (not unlike private driving schools), in which minors would first enroll in a sexual education course, and then have the option to seek legal "consent" status by passing a sexual education test. Thus, the legal recognition of minor consent capacity (hereinafter referred to as "MCC status") would be akin to obtaining a license, conditioned upon the demonstration of sexual and reproductive health knowledge. For minors between the ages of fourteen and eighteen, the legal recognition of meaningful sexual consent would turn on MCC status. Upon the age of majority (eighteen years in most states), both sexual and reproductive consensual capacity would become automatic and MCC status would become unnecessary.

1. Proposal Specifications

Procedurally, states would pass legislation both amending statutory rape laws to recognize the initial age of MCC status eligibility, and also indicating a second age, presumably the age of majority, at which consensual capacity would become automatic.¹⁴⁰ The purpose of the proposal is to create a legal system that matches the formal recognition of consensual capacity with some objective qualitative assessment of developmental sexual maturity in minors. Until reaching the age of majority, minor status would trigger a presumption of immaturity, which could be overcome by a qualitative assessment (consent license). Minors with MCC status would be presumed “legally mature” for consent purposes and therefore could not be victims of statutory rape. Attainment of the age of majority would trigger a shift in the presumption, from immaturity to maturity. Once a person has reached the age of majority, the legal presumption of mature consensual capacity would only be able to be overcome by some traditional demonstration of incapacity (mental illness, insanity, intoxication, etc.).¹⁴¹

Like a driver’s license, MCC status would be granted upon completion of an educational program and successful passage of an objective exam. The state-regulated MCC assessment exam would be offered at the end of the educational program and administered by the program workers. Both successful completion of the MCC educational program and passage of the exam would be required for a minor to obtain MCC status. Any minor seeking MCC status who did not initially pass the exam but had completed the MCC education program could re-take the exam until passage. Upon successful completion of both requirements, a minor could register for MCC status with the State Health Department. States would be free to determine whether MCC status registration would be granted automatically or whether an additional registration step by the minor would be required. The Health Department would retain a database of active MCC status minors that reproductive care providers would be required to check when working with minors who are seeking treatment or advice without parental notification, consent,

140. See generally 75 C.J.S. *Rape* § 57 (2010). Retaining the presumption of consensual capacity at the age of majority ensures that the consensual capacity licensure program for minors could not be used by states as a tool for discrimination and/or eugenics amongst adults.

141. *Supra* note 140.

or judicial bypass, depending upon the particularities of the state statute.¹⁴²

Because MCC status operates on the fundamental premise that the regulation of adolescent sexuality ought to facilitate consequentialist thinking about sexual decision-making, the educational program is the primary component of the MCC proposal. States with MCC schemes would be responsible for designing program curricula to serve as the parameters for MCC status educators and providers. The curriculum would focus on promoting healthy and responsible sexual/reproductive decision-making through communication (with parents/guardians, medical professionals and sexual partners),¹⁴³ prevention, contraception, regular health screenings, full disclosure of reproductive procedures, etc.¹⁴⁴ The primary venue for MCC education programs would be school sexual education programs. Districts seeking state funding for their sexual education programs would therefore have to comply with the basic requirements of the MCC program curricula and maintain current MCC program certification. For students enrolled in MCC-certified schools, the MCC education course would be offered as the compulsory sexual education program and successful passage of the edu-

142. This database would also be available to prosecutors considering charges in statutory rape cases.

143. The communication unit is a fundamental unit of this proposal for both conceptual and practical (funding) purposes. Conceptually speaking, the proposal has the potential to displace parents from involvement in the sexual and reproductive decision making of their children who have obtained MCC status. The communication component of the proposal works to offset this risk by using education to help minors better communicate *in advance* of unplanned pregnancy and/or sexual crisis. Practically speaking, Title X of the Federal Public Health Service Act (42 U.S.C. § 300 *et seq.*), the only piece of federal legislation dedicated solely to family planning, was amended in 1981 to require that “to the extent practical” grantees of federal funding “encourage family participation in the decision of minors to seek family planning services.” Because federal support of state educational programs would largely fund this proposal, this communication component is a significant piece of the proposal.

144. One potential resource for states in this curriculum design would likely be SIECUS, the Sexuality Information and Education Council of the United States. SIECUS publishes *Guidelines for Comprehensive Sexuality Regulation: Kindergarten—12th Grade* (recognized as the leading national model for curriculum development in comprehensive sexual education in the United States) as well as numerous annual reports on current trends in comprehensive sexual education. The SIECUS model curriculum consists of six “key concepts”: (1) Human Development (“characterized by the interrelationship between physical, emotional, social and intellectual growth.”); (2) Relationships; (3) Personal/Interpersonal Skills; (4) Sexual Behavior; (5) Sexual Health; and (6) Sexuality and Culture. For more information see SIECUS, *GUIDELINES FOR COMPREHENSIVE SEXUALITY REGULATION: KINDERGARTEN—12TH GRADE* (3rd Ed. 2004), available at http://www.siecus.org/_data/global/images/guidelines.pdf.

cational program would therefore be required for graduation. Importantly, successful passage of the MCC educational course for school credit would be separate from passage of the MCC status exam for state registry purposes. In no way would school credit or graduation be contingent upon actual attainment of MCC status and registry with the state. Further, parents would not be provided with “opt out” provisions for children in schools with MCC sexual education programs because such “opt out” provisions would effectively allow parents to circumvent the entire MCC scheme and unilaterally prohibit their children from seeking MCC status.¹⁴⁵

To ensure access for home schooled minors, for minors attending schools that either declined or failed to comply with state MCC certification requirements, and for minors that may have dropped out of school, alternative MCC status programs would be offered through both public and private agencies with MCC certification. This model would be similar to models of drivers education programs offered across the states and would serve to ensure that MCC certification be available to all socioeconomic demographics. Potential alternative venues would include Planned Parenthood organizations, teen clinics, health insurance agencies, general healthcare providers (presumably adolescent pediatricians, gynecologists/obstetricians, and some general practitioners), and privately-owned MCC schools. Importantly, any alternative provider of MCC education courses would be required to comply with state guidelines and strict standard requirements for program certification to ensure statewide consistency. While these alternative venues would be required to match MCC program “course hours,” they would have some discretion as to the period over which the MCC education program would be offered and additional services provided. Some alternative MCC education programs would offer weekend-long MCC educational “seminars” to minimize disruption and time constraints placed on minors seeking MCC status outside their schools. Other medically-affiliated programs

145. Although absolute, the refusal to grant an opt-out provision for parents is essential to the internal consistency of the proposed statutory scheme and necessary to move laws regulating adolescent sexuality out of the protectionism-versus-enablement paradigm. Importantly, the proposal is similar to compulsory sexual education programs, which have been repeatedly upheld by several federal and state courts across the United States. See generally Laurent B. Frantz, *Validity of Sex Education Programs in Public Schools*, 82 A.L.R. 3d 579 (2008) (in § 3[b] describing compulsory sexual education programs without parental opt-out provisions held to be valid, citing *Davis v. Page*, 385 F. Supp. 395 (D.C. N.H. 1974); *Cornwell v. State Board of Educ.*, 314 F. Supp. 340 (D.C. Md. 1969); *Hopkins v. Hamden Board of Educ.*, 29 Conn. Supp. 397 (Conn. 1971)).

might choose to bundle additional services with their course enrollment, such as access to HPV vaccination services or STI screening.

Thus, while it is likely that most of these alternative low-cost venues would receive some form of public funding and/or be joined with other, larger reproductive and sexual healthcare providers (such as Planned Parenthood), it is also possible that private programs could seek MCC status certification and charge tuition. Private third-party providers could include private healthcare practices, health insurance companies, and local youth organizations. Ideally, these programs would be selected by parents and minor children together, not unlike enrollment in private driving schools, in conjunction with a comprehensive healthcare program and other supportive services for responsible sexual health practices. The opportunity for private, third-party vendors to offer MCC education and status programs would further facilitate parent-child communication regarding application for MCC status (as tuition for program enrollment would likely be covered by parents). It would also allow vendors to provide insurance and healthcare incentives depending upon MCC status registry. Indeed, it could even be used to manage more comprehensive sexual health care coverage throughout a minor's sexual decision-making process. Importantly, state regulation of foundational MCC program curricula would ensure uniformity amongst public and private MCC status programs.

According to this proposal, minors would have three primary venues from which they could obtain MCC education and status: (1) state-certified MCC status programs offered through publicly-funded school sexual education programs; (2) low or no-cost, state-subsidized MCC status sexual education seminars; and (3) private, third-party, state-certified institutions (including private healthcare providers, health insurance agencies, private clinics, etc.). Funding for these programs would likely derive from a variety of sources, including appropriations earmarked for "Family Planning Programs" under Title X of the Public Health Service Act¹⁴⁶ and the Prevention First Act¹⁴⁷ as well as subsidies

146. See 42 U.S.C. §§ 300–300a-6 (1970).

147. See Prevention First Act, H.R. 463, 111th Cong. (2009) (proposing to "expand access to preventive health care services that help reduce unintended pregnancy, reduce abortions, and improve access to women's health care"). For a brief description of President Obama's pledge to increase funding to prevent unintended pregnancy as one of the Agenda items particularly pertaining to women see White House, *Agenda: Women* (Feb. 2009), <http://www.whitehouse.gov/agenda/women/> (emphasizing President Obama's pledge to "expand access to contraception, health information, and prevention service to help reduce unintended pregnancies" through the enactment of the Prevention First Act, a piece of legislation to which President Obama was an original co-sponsor).

from related sources, such as the Centers of Excellence in Women's Health at the Department of Health and Human Services,¹⁴⁸ HIV/AIDS prevention funding,¹⁴⁹ etc. Indeed, given the Obama Administration's public commitment to the protection of abortion rights and the prevention of unintended pregnancies, more funding will likely be dedicated to the development of comprehensive sexual education programs, like the MCC status proposal, in the near future.¹⁵⁰

To be administered at the minor participant's option at the conclusion of the MCC sexual education course, the MCC status assessment would consist of an examination concerning the emotional, psychological, sociological, and physical consequences of sexual activity. The examination would not involve assessments of a minor's cognitive capacity or normative assessments of morality. Rather, it would objectively test substantive sexual and reproductive knowledge. Topics for testing could include legal standards for consent, effective contraceptive use, communication techniques for doctors, parents, and peers, STI transmission and treatment, and reproductive options in the face of an unintended pregnancy.

Upon successful completion of both the education program and the assessment exam, minors would have the option to register with the state for MCC status, like a license. Because a minor's capacity to consent to both sexual activity and reproductive care would be conditioned upon MCC status, any situation involving minor reproductive or sexual decisions would first require the provider to check the names of the involved parties against the MCC database. In the case of statutory rape, MCC status would affirm the decisional autonomy of sexually active minors and their partners. In the case of a minor seeking an abortion, MCC status would allow the pregnant minor to obtain an abortion without the psychological and physiological dangers of delay caused by parental involvement requirements. Minors without MCC status would be subject to the same requirements of judicial bypass or parental notification/consent, therefore ensuring some form of protection or support for minors who have not obtained MCC status.

148. In the *Agenda* portion of the White House website, President Obama has pledged his support for researching women's health issues through the Centers of Excellence in Women's Health at the Department of Health and Human Services. See White House, *supra* note 147.

149. White House, *supra* note 147.

150. *Id.*

II. CONSTITUTIONAL AND PRACTICAL JUSTIFICATIONS

The MCC status proposal is desirable because it resolves not only the specific problems created by conflicting age of consent and parental involvement laws, but also the greater systemic issues confronting the regulation of adolescent sexuality. By granting consensual capacity and legal maturity through one license status, the MCC status proposal does not place an irrational, arbitrary, and undue burden on a consenting minor's abortion right. As a matter of public policy, the MCC status proposal would promote more effective parent-child communication and informed decision-making through sexual education. Indeed, by ensuring parity between sexual consent capacity and reproductive autonomy, the MCC status proposal overcomes all the constitutional and policy problems created by conflicting age of consent and parental involvement laws.

Further, the MCC status proposal overcomes the legislative schizophrenia of the protectionism-versus-enablement paradigm. The MCC status proposal advocates a comprehensive theory of consent in which the law would be capable of recognizing differing levels of adolescent maturity. The proposal replaces age as the baseline for consent capacity with the voluntary manifestation of objective knowledge. In the same way that driver education and licensure is designed to produce a uniform standard of safety for the driving population, the MCC status proposal encourages minors to understand the consequences sexual activity within a grander public health context. The MCC status program is therefore fundamentally *proactive* and *preventative* rather than *reactive* and *retributive*. Instead of permitting minor sexual consent at an arbitrary age and then demanding further demonstrations of maturity in the crisis of an unwanted pregnancy, the MCC status recognizes sexual maturity and consent capacity objectively and preemptively.

A. Likely Criticism and Response

While the licensure of sexual consent proposed under the MCC proposal would likely be criticized as novel and unprecedented, state intervention in sex, marriage, and reproduction is firmly established both in the American tradition and around the world.¹⁵¹ In the United

151. It is important to note that the MCC status proposal accepts the basic premise that the state holds a historic stake in the regulation of adolescent sexuality. Thus, the MCC status proposal attempts not to address whether the state's involvement in the

States, marriages have been regulated by civil licensure since the founding of the New England colonies.¹⁵² In fact, regulations for marriage licenses have now been expanded to include blood test requirements, disease disclosures, waiting periods and even expiration windows.¹⁵³ States have further demonstrated a willingness to intervene in intimate affairs, particularly in the realm of adolescent sexuality, through the public design and funding of sexual education programs, sexual health awareness campaigns and reproductive health clinics across the United States.¹⁵⁴ Most recently, there has been a surge in the discussion of widespread HPV vaccination, a vaccine to prevent the spread of the sexually-transmitted infection that causes cervical cancer.¹⁵⁵ Many states are now also considering compulsory HPV vaccinations for girls enrolled in public schools.¹⁵⁶ Indeed, when matters of public health, social welfare, and government benefits are involved, the state demonstrates great comfort in the regulation of intimate affairs.

Around the world, state regulation of adolescent sexuality is even more prevalent, particularly in the form of comprehensive, and often compulsory, sexual education. Indeed, in many countries, not only is it generally accepted for the state to play an active role in the regulation of adolescent sexuality, but such regulation often begins very early in adolescence through the form of education and health care assistance. In Japan, compulsory sexual education commences in schools for children between the ages of ten and eleven.¹⁵⁷ In France, compulsory sexual

regulation of adolescent sexuality is paternalistic, but rather, how to use the state to cultivate sexual responsibility amongst minors.

152. GEORGE ELLIOTT HOWARD, *A HISTORY OF MATRIMONIAL INSTITUTIONS* 127–32 (1904).
153. *State Marriage License and Blood Test Requirements*, FINDLAW.COM, (2006), <http://family.findlaw.com/marriage/marriage-laws/marriage-blood-test.html>.
154. HENRY J. KAISER FAM. FOUND., *ISSUE UPDATE; Sex Education in the United States: Policy and Politics* (Oct. 2002), available at <http://www.kff.org/youthhivstds/upload/Sex-Education-in-the-U-S-Policy-and-Politics.pdf>.
155. In July 2008, the United States Citizenship and Immigration Service added the HPV vaccine to five vaccination requirements for all applicants to become legal permanent residents of the United States. See USCIS, *USCIS Update: USCIS Changes Vaccination Requirements to Adjust Status to Legal Permanent Resident* (July 24, 2008), available at www.uscis.gov/files/article/Vaccine%20Req_Ajust_Stat_LPR_20080724.pdf (announcing the USCIS' revisions to their vaccination requirements for permanent resident status following recommendations from the CDC and the Department of Health and Human Services).
156. See, e.g., Deana Pollard Sacks, *Elements of Liberty*, 61 SMU L. REV. 1557, 1599 (2008); Lane Wood, *A Young Vaccine for Young Girls: Should the Human Papilloma-virus Vaccination Be Mandatory for Public School Attendance?*, 20 HEALTH LAW. 30, 31 no. 5 (June 2008).
157. Anastasia Toufexis, *Sex Has Many Accents*, TIME, May 24, 1993, at 66, available at <http://www.time.com/time/magazine/article/0,9171,978575-1,00.html>.

education in schools includes thirty to forty hours of instruction, the dissemination of contraception, and public awareness components.¹⁵⁸ Germany has implemented compulsory sexual education as “a matter of law by government duty” since 1992 and their program covers a broad range of topics from the biological changes of puberty to the emotional impact of abuse and STI transmission.¹⁵⁹ Perhaps one of the most world-renowned sexual education programs, the Netherlands’ “Lang leve de liefde” (“Long Live Love”) package was developed and subsidized by the Dutch government in the 1980s to promote the development of strong communication and decision-making skills, backed by substantive, scientific knowledge of reproductive health.¹⁶⁰ The program has been applauded by several international health organizations as the reason why the Netherlands has the lowest teen pregnancy rate in Europe and the highest use of contraceptive devices by adolescents.¹⁶¹ Like the United States, ages of consent in these countries range from fourteen to eighteen years old.¹⁶²

Notably, most of the international sexual education programs described above are implemented in countries that do not have parental involvement requirements for minor abortions.¹⁶³ The legal problem of balancing parental rights with minor sexual autonomy is therefore less problematic in many of these European countries than it is in the United States. The MCC status proposal accounts for the more robust tradition of parental rights in the United States by preserving parental involvement requirements for minors who have not obtained MCC status. This requirement balances the state’s interest in the promotion of

158. Jon Slater, *Britain: Sex Education Under Fire*, THE UNESCO COURIER, July/Aug. 2000, at 17, available at http://www.unesco.org/courier/2000_07/uk/apprend2.htm (*Across the Channel*).

159. Press Release, Pressemeldung Bundesministerium für Familie, Senioren, Frauen und Jugend [Press Release by the Federal Administration for Families, Seniors, Women, and Children], *Sexualaufklärung in Europa* [Sex Education in Europe] (Nov. 14, 2006), available at <http://bildungsklick.de/pm/35091/sexualaufklaerung-in-europa/>.

160. Guus Valk, *The Dutch Model*, THE UNESCO COURIER, July/Aug. 2000, at 19, available at http://www.unesco.org/courier/2000_07/uk/apprend2.htm.

161. Valk, *supra* note 160.

162. See AVERT, *Worldwide Ages of Consent*, <http://www.avert.org/aofconsent.htm> (last visited Nov. 1, 2010) (presenting a chart comparing age of consent laws worldwide that regulate male-to-female intercourse, male-to-male intercourse, and female-to-female intercourse).

163. BBC, *Europe’s Abortion Rules*, BBC NEWS (Feb. 12, 2007), <http://news.bbc.co.uk/2/hi/europe/6235557.stm>. See also INT’L PLANNED PARENT-HOOD FED’N EUR. NETWORK, *ABORTION LEGISLATION IN EUROPE* (Updated Jan. 2007), http://www.ippf.org/NR/rdonlyres/2EB28750-BA71-43F8-AE2A-8B55A275F86C/0/Abortion_legislation_Europe_Jan2007.pdf (describing abortion regulations in Europe, including minor parental involvement restrictions).

minor sexual and reproductive maturity with the parental interest in being involved in the reproductive decision making of children. The primary difference, then, between the MCC status proposal and the comprehensive sexual education programs practiced throughout Europe, is that the MCC status proposal incorporates an objective and preemptive way to assess minor consensual capacity while still providing for parental involvement when necessary.

Distinguished from the risks of adult consensual sex, minor sexual activity has long been specifically recognized as the legitimate subject of state regulation and intervention in the United States. This regulation has appeared in the form of public awareness campaigns, statutory rape laws, contraceptive access laws, sexual education programs, and specific public assistance for organizations dedicated to addressing teenage family planning and unintended pregnancy.¹⁶⁴ Framed in this light, licensing minor consent capacity is consistent with a history of state regulation of adolescent sexuality. However, unlike traditional regulatory measures, the MCC status proposal is uniquely equipped to account for the fluidity of adolescent maturity vis-à-vis the strong American tradition of parental rights.

Unlike previous regulations, MCC status allows the law to individually assess and condition a minor's legal consent capacity upon a qualitative demonstration of his or her own sexual knowledge. The state has a legitimate social and financial interest in the promotion of responsible adolescent sexual activity. Most recently, after Speaker of the House Nancy Pelosi was criticized for the inclusion of contraceptive and family planning funding in the recent stimulus package proposal, studies actually reaffirmed the economic benefits of comprehensive family planning and the social costs of unintended pregnancies.¹⁶⁵ In fact, research by National Bureau of Economic Research found that changes to a state-level Medicaid policy that expanded eligibility for family planning services reduced the number of unintended pregnancies by 4%, facilitating a greater earning potential for women who did not face unintended pregnancies at an estimated increase of \$6,800 per every

164. See, e.g., ALAN GUTTMACHER INST., <http://www.guttmacher.org> (last visited Oct. 10, 2010) (research institute on family planning and reproductive care, with special programs dedicated to researching public policy affecting the sexual health of minors); HENRY J. KAISER FAM. FOUND., <http://www.kff.org> (last visited Oct. 10, 2010) (reproductive health care research and reform agency, with special publications on minors' sexual health); PLANNED PARENTHOOD, <http://www.plannedparenthood.org> (last visited Oct. 10, 2010) (leading family planning organization providing contraceptive services and reproductive care).

165. See Nancy Folbre, *Sex and the Stimulus*, N.Y. TIMES BLOG (Feb. 5, 2009, 4:16 PM), <http://economix.blogs.nytimes.com/2009/02/05/sex-and-the-stimulus/>.

averted unintended pregnancy.¹⁶⁶ Such findings are consistent with now-classic economic studies of the educational, career, and social benefits to women who have access to contraception, directly linking access to contraceptives to access to women's higher education and, correspondingly, better paying jobs.¹⁶⁷ All of this research supports the conclusion that states have significant fiscal interests in the implementation of teenage sexual education and pregnancy prevention programs, in addition to the aforementioned constitutional, public health and social policy concerns.

The state has both historical precedent, in the form of existing age of consent and reproductive rights laws, and a rational basis, in the form of the unique social costs and benefits of teenage sex, to justify the regulation of adolescent sexuality through the MCC status proposal. In the same way that the state regulates and implements comprehensive drivers' education and licensure to avoid personal injuries and maintain a stable infrastructure, the state should to minimize the institutional costs of minor sexual activity through the MCC status proposal. Likewise, in the same way that the state organizes and confers benefits through the grant of marriage licenses, a relationship of comparable privacy and intimacy, so too can it organize, promote and support the social and public health benefits of the comprehensive regulation of adolescent sexuality. Indeed, the historical precedent, rational interest, and social need to evolve beyond the protectionist-versus-enablement paradigm all justify the adoption of the MCC status proposal.

CONCLUSION

The inherent dynamism of adolescent sexual maturity poses a unique challenge for the law. The existing legal system governing adolescent sexuality fails to effectively regulate minor sexuality because laws are polarized between enabling minors as adults and protecting them as children. The sexual rights of minors are further complicated because most regulations are enacted on a piecemeal basis without reference to other laws regulating adolescent sexuality. Inconsistent legal recognition of maturity under conflicting age of consent and parental involvement

166. Melissa S. Kearney & Phillip B. Levine, *Subsidized Contraception, Fertility, and Sexual Behavior* (Nat'l Bureau of Econ. Research, Working Paper No. W13045, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=986895.

167. See generally Martha J. Bailey, *More Power to the Pill: The Impact of Contraceptive Freedom on Women's Life Cycle Labor Supply*, 121 Q.L. ECON. 289, 295 (2006); Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730, 747 (2002).

laws demonstrates the particular constitutional and practical harms of this flawed system. This Article argues that a system licensing minor consent for both sexual and reproductive rights would overcome the flaws of the protectionist-versus-enablement paradigm. It would also ensure the type of consistent and rational regulation of adolescent sexuality necessary for constitutionality. By promoting responsible sexual behaviors through education and communication, the MCC status proposal creates a system in which minors control their own consensual capacity. The MCC status proposal shifts the marker for consensual capacity from the mere attainment of an age to the objective demonstration of knowledge and maturity. Through the MCC status proposal, the state assumes a holistic stance toward the regulation of adolescent sexuality that would support minors' sexual *and* reproductive privacy rights under the Fourteenth Amendment. The MCC status proposal requires that teens demonstrate a threshold amount of sexual knowledge and maturity before recognizing the privilege of full decisional autonomy. Thus, in the process of giving them the "keys" to their sexual and reproductive autonomy, the MCC status also equips minors with the information necessary to choose their own safe, fulfilling, and socially-responsible journeys. ❧

TABLE I
AGE OF CONSENT AND PARENTAL INVOLVEMENT
NOTIFICATION REQUIREMENTS

State	Age of Consent ¹⁶⁸	Parental Involvement for Minor Abortion ¹⁶⁹
Alabama	16	Consent enforced
Alaska	16	Consent enjoined not enforced
Arizona	18	Consent enforced
Arkansas	16	Consent enforced
California	18	Consent enjoined not enforced
Colorado	17	Notification enforced
Connecticut	16	
Delaware	18	Notification enforced at 16
D.C.	16	
Florida	18	Notification enforced
Georgia	16	Notification enforced
Hawaii	16	
Idaho	18	Consent enforced
Illinois	17	Notification enjoined not enforced
Indiana	16	Consent enforced
Iowa	16	Notification enforced
Kansas	16	Notification enforced
Kentucky	16	Consent enforced
Louisiana	17	Consent enforced
Maine	16	
Maryland	16	*mature
Massachusetts	16	Consent enforced
Michigan	16	Consent enforced
Minnesota	16	Notification enforced
Mississippi	16	Consent enforced
Missouri	17	Consent enforced
Montana	16	Notification enjoined not enforced
Nebraska	16	Notification enforced
Nevada	16	Notification enjoined not enforced
New Hampshire	16	Notification enjoined not enforced
New Jersey	16	Notification enjoined not enforced
New Mexico	16	Consent enjoined not enforced
New York	17	
North Carolina	16	Consent enforced
North Dakota	18	Consent enforced
Ohio	16	Consent enforced
Oklahoma	16	Notification and consent enforced
Oregon	18	

168. See U.S. DEPT. OF HEALTH AND HUMAN SERVS., STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS 6 (2004).

169. See ALAN GUTTMACHER INST., *supra* note 9.

State	Age of Consent ⁶⁸	Parental Involvement for Minor Abortion ⁶⁹
Pennsylvania	16	Consent enforced
Rhode Island	16	Consent enforced
South Carolina	16	Consent enforced at 17
South Dakota	16	Notification enforced
Tennessee	18	Consent enforced
Texas	17	Consent enforced
Utah	18	Notification and Consent enforced
Vermont	16	
Virginia	18	Consent enforced
Washington	16	
West Virginia	16	Notification enforced
Wisconsin	18	Consent enforced
Wyoming	16	Consent enforced

States with Age of Consent Below Parental Involvement Req. (unenjoined): 26

States with Parental Involvement Req.: 34

States with Parental Involvement Req. = Age of Consent :8

