

The Abortion Rights of Adolescents Should be Coextensive with those of Adults: a Theoretical Framework

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Abstract

The aim of this article is to argue that the abortion rights of adolescents should be coextensive with those of adults. The first section of the article reviews research in child development which has demonstrated that adolescents are able to make informed, mature decisions on procreative issues. The second section reviews cases which have defined the contours of adult women's abortion rights, and argues that the reasoning behind those holdings also applies to adolescents.

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Chad M. Gerson¹

I. INTRODUCTION

The aim of this article is to argue that the abortion rights of adolescents should be coextensive with those of adults. The view that the abortion rights of adolescents should be coextensive with those of adults is commonly held, but under-theorized. It may not be obvious why adolescents should have full control over procreative issues, because they do not have full control over themselves in many other aspects of their lives. For a number of reasons, however, procreative rights belong in a special category. Adolescents already tend to involve their parents in decisions of great magnitude such as those regarding procreation and sexuality. Adolescents who choose not to involve their parents usually have a good reason for avoiding parental involvement, such as an abusive or unsupportive family situation. Requiring adolescents to go through their parents to obtain contraception or abortion services, or allowing parents to force these measures, can create significant and long-term stress in the adolescent. Furthermore, much of the reasoning in cases granting or expanding women's rights to these services can also be applied to adolescents. By identifying cases and theory on point and with a bit of extrapolation, a theoretical framework will emerge to justify the including of abortion rights for this special category.

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This issue is especially timely because of new federal legislation. On July 27, 2006, the Senate passed a bill known as the Child Custody Protection Act sometimes referred to as the Teen Endangerment Act, which would create two new federal crimes.² On April 27, 2005, the House of Representatives passed a similar bill entitled the Child Interstate Abortion Notification Act,³ which would create the same two crimes. The first potential new federal crime is transporting a minor across state lines for the purpose of obtaining an abortion in violation of the minor's home state's parental involvement law.⁴ The second potential new federal crime is performing or inducing an abortion on an adolescent outside her state of residence without providing her parents with actual notice and delaying the procedure for 24 hours.⁵ Both sections contain an exception providing for a "judicial bypass."⁶ The bypass allows adolescents who do not wish to involve their parents in the decision to appear before a judge, who will then decide if she is competent to decide on her own to obtain an abortion, or to decide that the abortion is in her best interest,⁷ regardless of whether she is competent. The second section of the legislation imposes parental involvement on minors who for whatever reason travel to a different state to obtain an abortion, regardless of

² Child Custody Protection Act, S.8.IS, 109th Cong., 2d Sess. (2006). If passed, it will be codified at 18 U.S.C. §§ 2431-32.

³ Child Interstate Abortion Notification Act, H.R. 748, 109th Cong., 1st Sess. (2005). The text of the bill (House version) is available online at <<http://thomas.loc.gov/cgi-bin/query/D?c109:1:./temp/~c109vAaBPD::>>.

⁴ *Id.* § 2431(a)(2).

⁵ *Id.* § 2432(a)(2). This provision is not in the Senate version of the bill.

⁶ *Id.* §§ 2431(e)(2)(A)(ii), 2432(d)(4)(A)(ii).

⁷ In most states. (Citations to state laws omitted.)

whether her home state or the state where she seeks an abortion has any state parental involvement laws.⁸ The section allows physicians to ignore the parental notification requirement if the physician’s state of practice has its own parental involvement law, and the physician complies with the provisions of that law.⁹ Interestingly, “parental involvement laws” as defined by the legislation include only those state laws which require the involvement of a parent or guardian; they do not include those which allow other related and responsible adults (grandparents, aunts, uncles, etc) to be involved in place of the parents.¹⁰ This exclusivity in the definition of which state laws must be heeded by other states means that states that have tried to balance the perceived need for adult involvement in abortion decisions with the possibility that an adolescent might not be comfortable involving her actual parents will not have their laws respected in other states.¹¹ This selectivity shows the bias of the House bill toward parental involvement laws and its interest in making abortions generally more difficult to obtain.¹² A person who violates the interstate transport portion of the legislation,

⁸ Child Interstate Abortion Notification Act, § 2432(a)(2), *supra* note 3.

⁹ *Id.* § 2432(b)(1).

¹⁰ *Id.* §§ 2431(e)(4), 2432(e)(6).

¹¹ Ten states have such laws: Colorado (Colo. Rev. Stat. Ann. 12-37.5-102–104), Delaware (24 Del. Code Ann. §§ 1781–84), Iowa (Iowa Code Ann. § 135L.2–6), Maine (22 Maine Rev. Stat. Ann. § 1597-A), Maryland (Md. Health-General Code Ann. § 20-103), North Carolina (N.C. Gen. Stat. Ann. § 90-21.6), Ohio (Ohio Rev. Code Ann. § 2919.121), South Carolina (S.C. Code Ann. § 44-41-32), West Virginia (W. Va. Code Ann. § 16-2F-1–4), and Wisconsin (Wis. Stat. Ann. § 48.375).

¹² Typical are the remarks of Mr. McHenry, Member of Congress from North Carolina:

America as a nation must defend life from the moment of conception to natural death. . . . This bill will *protect* minors and their parents from inconsistent state laws. . . . This bill would prosecute anyone who transports a minor to a state without parental consent laws with the purpose of undermining *parental*

or a physician who violates the inducement portion of the legislation, faces a fine, up to one year in prison, or both.¹³ Additionally, the parental notification requirement in the legislation, or in the state laws to which it refers, are framed in terms of “parents’ rights.”¹⁴ The legislation provides a civil remedy for parents whose “rights” have been violated by a physician performing an abortion on their adolescent daughter or a person who assists in transporting their adolescent daughter across state lines.¹⁵ Given that many states recognize a tort for loss of consortium between parents and children,¹⁶ the creation of a new civil remedy

rights. . . [W]e need to make sure that we have serious parental involvement in these difficult and potentially dangerous decisions.

Congressional Record H2555, April 27, 2005 (emphasis added).

¹³ Child Interstate Abortion Notification Act, §§ 2431(a)(1), 2432(a)(1), *supra* note 3.

¹⁴ *Id.* §§ 2431(a)(2), 2432(a)(2).

¹⁵ *Id.* §§ 2431(d), 2432(c).

¹⁶ Thirty states have statutes on the books specifically allowing loss of consortium claims by parents suffering emotionally because of a child’s death or emotional or physical injury: Alaska (Alaska Stat. Ann. § 09-55.580), Arizona (Ariz. Rev. Stat. Ann. § 12-641; *see also Reben v. Ely*, 705 P.2d 1360 (Ariz. Ct. App. 1985)), Arkansas (Ark. Code Ann. § 16-62-102), Colorado (Colo. Rev. Stat. Ann. § 13-21-203), Florida (Fla. Stat. Ann. § 768.21), Georgia (Official Code of Ga. Ann. § 51-4-4), Hawai’i (Haw. Rev. Stat. Ann. § 663-3), Idaho (Idaho Code Ann. § 5-310), Illinois (740 Ill. Comp. Stat. 180/2; *see also Lande v. Lande*, 567 N.E.2d 668 (Ill. App. 4 Dist. 1991)), Indiana (Ind. Code Ann. § 34-23-2-1), Kansas (Kan. Stat. Ann. § 60-1903), Kentucky (Ky. Rev. Stat. Ann. § 411.135), Louisiana (La. Civ. Code Art. 2315.2), Maryland (Md. Courts and Judicial Proceedings Code Ann. § 3-904), Massachusetts (Ann. Laws of Mass. GL ch. 231, § 85X), Michigan (Mich. Comp. Laws Serv. § 600.2922), Mississippi (Miss. Code Ann. § 11-7-13), Missouri (Mo. Rev. Stat. Ann. § 537.090), Montana (Mont. Code Ann. § 27-1-512; *see also In re Estate of Farnum*, 730 P.2d 391 (Mont. 1986)), New Hampshire (N.H. Rev. Stat. Ann. § 556:12), North Carolina (N.C. Gen. Stat. Ann. § 28A-18-2), North Dakota (N.D. Cent. Code § 32-03.2-04), Ohio (Ohio Rev. Code Ann. § 2125.02), Oklahoma (12 Okla. Stat. Ann. § 1053), Oregon (Or. Rev. Stat. Ann. § 30.020), Rhode Island (R.I. Gen. Laws Ann. § 9-1-41), Tennessee (Tenn. Code Ann. § 20-5-113), Vermont (14 Vt. Stat. Ann. § 1492), and Washington (Ann. Rev. Code Wash. § 4.24.010). Several others have recognized this tort judicially. Only five states have eliminated this tort: Alabama (*Smith v. Richardson*, 171 So.2d 96 (1965)), Delaware (*Cann v. Mann Constr. Co.*, 93 A.2d 741 (1952)), District of Columbia (D.C. Code Ann. § 16-2701; *see also Saunders v. Air Florida, Inc.*, 558 F. Supp. 1233 (D.D.C. 1983)), New York (N.Y. Cons. Laws Serv. Estates, Powers and Trusts Law § 5-4.1; *see also Archambeault v. Draper*, 101 F. Supp. 1004 (E.D.N.Y. 1951)), and South Dakota (S.D. Codified Laws Ann. § 21-5-7).

seems overly punitive and aimed at making abortion more difficult to obtain, regardless of the additional costs imposed. For physicians, this provision threatens to increase their already high malpractice insurance premiums, and threatens to create a conflict between their self-interest and their duty to assist patients to the best of their ability.¹⁷

In 2004, the First Circuit enjoined the enforcement of a New Hampshire parental notification statute.¹⁸ The law was challenged by Planned Parenthood because, although it makes an exception for the life of the young woman, it makes no exception for her health.¹⁹ This was the major reason the First Circuit struck the law.²⁰ The Supreme Court vacated the First Circuit's ruling, holding that the entire statute need not be invalidated because some portions of it are unconstitutional in medical emergencies, but declined to revisit its abortion precedents as some anti-abortion advocates had urged.²¹

¹⁷ See the remarks of Ms. Johnson, Member of Congress from Connecticut: "This bill requires physicians to reveal information that under HIPAA [the Health Insurance Portability and Accountability Act, 42 U.S.C. §§ 300gg *et seq.*] and all confidentiality laws, they are not allowed to reveal. So this puts a burden on physicians that is extraordinary, and they are small businesses, and we need to remember that." Congressional Record H2598, April 27, 2005.

¹⁸ See *Planned Parenthood of N. New England v. Heed*, 390 F.3d 53, 2004 U.S. App. LEXIS 24479 (1st Cir. 2004), *cert. granted sub nom. Ayotte v. Planned Parenthood of N. New England*, 2005 U.S. LEXIS 4192 (May 23, 2005), docket no. 04-1144.

¹⁹ See *id.* at 55–57.

²⁰ See *id.* at 65.

²¹ See *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. ____ (January 18, 2006). In so ruling, the Court resolved a circuit split concerning when abortion laws should be enjoined by federal courts. In the instant case, the District Court enjoined the law before it took effect. See *id.* at 56–57. New Hampshire had argued that an abortion law should be enjoined only when there is no conceivable set of circumstances under which the law could be constitutional, relying on *United States v. Salerno*, 418 U.S. 739 (1987), a criminal case unrelated to abortion. See 390 F.3d at 57. However, the First Circuit held that the "undue burden" test, propagated in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992), replaced *Salerno* with regard to abortion cases. See 390 F.3d at 57–59.

II. PSYCHOLOGICAL RESEARCH REGARDING PARENTAL INVOLVEMENT LAWS FOR ABORTION

The reason for any law restricting the rights of minors compared to adults is that minors are presumed to be less competent than adults in making most decisions. From birth through adulthood there is a development toward more complex reasoning, morality, and contextualizing in the human brain.²² The pace of this development is not constant. Adolescence, especially early adolescence, is a time of rapid development. Because reproductive issues are tied to sexuality, it is natural to assume that the ability of adolescents to deal effectively with reproductive issues develops rapidly during early adolescence, when their bodies are also developing rapidly. The consciousness of the transition to physical maturity often results in tremendous anxiety in adolescence, with a great deal of time spent on thinking about sexual and reproductive issues. Proper and effective sex education programs should assist adolescents in being able to effectively deal with these issues.

A. ADOLESCENTS AS A GROUP UNDERSTAND THE GRAVITY OF ABORTION AND CONSIDER IT CAREFULLY; THEY ALSO INVOLVE PARENTS WHEN NECESSARY, MAKING PARENTAL INVOLVEMENT LAWS UNNECESSARY

²² See generally Laura E. Berk, *Child Development* (Pearson 6th ed. 2003).

By middle adolescence, around age fourteen, most people have developed the ability to reason approximately as effectively as an adult.²³ They are able to generate and consider multiple alternatives, including the costs and benefits of each, and their effect on other people, about as well as adults.²⁴ They tend to use information logically and systematically. This ability is observed even when the dilemma faced is an hypothetical one. Adolescents use these skills effectively across a broad variety of situations, including moral dilemmas, interpersonal relationships, the potential waiver of *Miranda* rights, and even when dealing with abstract notions of social justice or public policy.²⁵

In the context of medical decisions, fourteen-year olds score nearly as well as adults on measures of their careful consideration of the risks and benefits of undergoing certain medical procedures.²⁶ Fourteen-year olds score significantly higher than nine-year olds, indicating that the capacity to consider medical decisions develops rapidly during early adolescence along with the capacity to carefully consider other types of decisions.²⁷ Interestingly, one hypothetical situation in which fourteen-year olds performed significantly below the level of adults involved a treatment that would cure a disorder but would have a significant negative impact on their physical appearance (attractiveness); this

²³ See B. Ambuel and J. Rappaport, *Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion*, 16 L. & Human Behavior 129 (1992).

²⁴ See *id.*

²⁵ See *id.*

²⁶ L.A. Weithorn and S.A. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 Child Development 1589 (1982).

²⁷ *Id.*

suggests that differences between middle adolescents and adults arise from insecurity rather than an actual difference in decisionmaking capability.²⁸

1. Adolescent Decisionmaking Capabilities in the Context of Abortion

Two studies have directly examined the ability of adolescents to make decisions regarding abortions. One study interviewed women while they were at their doctors' offices obtaining pregnancy tests to confirm unwanted pregnancies.²⁹ The investigators interviewed sixteen women between the ages of thirteen and seventeen and 26 women between the ages of eighteen and 25. The investigators measured the number of factors the women took into consideration when considering whether to have an abortion, whether they had positive feelings about mothering in general, their estimation of the likely impact of giving birth on their financial situation, and their estimation of the likely impact on of giving birth on their current lifestyle and future aspirations. Adolescents were found to score as well as adults during these interviews.³⁰

A second major study used structured interviews with counselors to measure the subjects' ability to consent.³¹ The counselors interviewed 34 adolescents between fourteen and seventeen years old and 40 adults between eighteen and 21 years old. The interviews were videotaped and scored by independently trained evaluators. The evaluation criteria were based on the legal

²⁸ *Id.*

²⁹ C.C. Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 *Am. J. of Orthopsychiatry* 446 (1980).

³⁰ *Id.*

³¹ *See* 16 *L. & Human Behavior* 129, *supra* note 23.

concept of competence to consent.³² These criteria included consideration of immediate and future risks and benefits, quality and clarity of reasoning, factors considered in making a decision, and volition or freedom from coercion. The adolescents scored as well as the adults on all four measures of competence.³³

2. Adolescents' Voluntary Involvement of their Parents and Their Competence when They Choose Not to Do So

Most adolescents recognize that their parents have more experience than they do, and that their parents have their best interests at heart. Consequently, they tend to involve their parents in abortion decisions even when the law does not require that they do so.³⁴ About 60% of adolescents voluntarily involve at least one parent in abortion-related decisions.³⁵ This figure includes about 70% of fifteen-year olds and nearly 90% of those aged fourteen and under.³⁶ The nearly ubiquitous and voluntary involvement of an adolescent's parents at these younger ages indicates that the adolescent instinctively knows that she is incapable of making such decisions by herself. The drop-off in voluntary involvement at approximately age fifteen coincides with the age at which nearly all adolescents

³² See, e.g., 1 Am. Jur. 2d Abortion and Birth Control § 65.

³³ See 16 L. & Human Behavior 129, *supra* note 23.

³⁴ S.K. Henshaw and K. Post, *Parental Involvement in Minors' Abortion Decisions*, 24 Family Planning Perspectives 196 (1992); see also L.S. Zabin, M.B. Hirsch, M.R. Emerson, and E. Raymond, *To Whom do Inner-City Minors Talk about their Pregnancies? Adolescents' Communication with Parents and Parent Surrogates*, 24 Family Planning Perspectives 148 (1992).

³⁵ See *id.*

³⁶ See *id.*

have been found to be capable of making adult decisions and giving informed consent regarding abortion-related issues.³⁷ This contention is supported by the additional fact that whether an adolescent chooses to involve her parents is most powerfully predicted by her own confidence (measured by self-reporting) in her ability to make such decisions by herself.³⁸

In states with mandatory parental involvement laws, many adolescents who do not wish to involve their parents initiate court proceedings to obtain an abortion without parental consent. To do so in most states, the judge must find the adolescent competent to make the decision to obtain an abortion by herself and to give informed consent to the procedure. Alternatively, the judge must find that, regardless of the adolescent's competence, it will be in her best interest to obtain an abortion. In the vast majority of cases for which data are available, the judge has found the adolescent competent to make an informed decision and consent to the abortion.³⁹ This trend is surprisingly strong even among judges who personally oppose abortion.⁴⁰

B. PARENTAL INVOLVEMENT LAWS CAN HAVE HARMFUL CONSEQUENCES

The second most powerful predictor of voluntary parental involvement is whether the adolescent has a positive relationship with her parents and feels that

³⁷ See Section II.A.1 *supra*.

³⁸ See Henshaw and Post, 24 *Family Planning Perspectives* 196, *supra* note 34.

³⁹ National Academy of Sciences, *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing* (1987).

⁴⁰ See *id.*

her family environment is secure and supportive.⁴¹ This statistic is particularly important because it is adolescents in chaotic, unsupportive, or abusive homes that are the most likely to initiate intercourse early and to become pregnant unintentionally.⁴² An adolescent who grew up in such an environment and is forced to talk to her parents and an unplanned pregnancy will likely come under extreme mental distress. Statistically speaking, she probably did not feel comfortable discussing her sexual activity with her parents in the first place, even if she had no other way to obtain sex education or contraception, and was probably hiding it from them.⁴³ She may also have been using sexual activity as a form of escape or rebellion against her parents.⁴⁴ Mandatory parental involvement laws will force an adolescent to return to the very people who in some sense caused her conundrum (or at least, who she may perceive caused her conundrum).

Adolescents who become pregnant are much more likely than other adolescent girls to have been sexually abused and/or raped by a male relative.⁴⁵ When that relative is a parent or legal guardian, it is unconscionable and, it can be argued, a form of violence in itself, to require the adolescent to discuss the abortion with that parent. Even worse, and unfortunately all too common, is

⁴¹ *See id.*

⁴² D. Boyer and D. Fine, *Sexual Abuse as a Factor in Adolescent Pregnancy and Child Maltreatment*, 24 *Family Planning Perspectives* 4 (1992).

⁴³ B. Ambuel and C. Lewis, *Social Policy of Adolescent Abortion*, 15 *Child Youth and Family Services Quarterly* 2 (1992).

⁴⁴ *See* Boyer and Fine, 24 *Family Planning Perspectives* 4, *supra* note 42.

⁴⁵ *See id.*

when a father, step-father, or mother's boyfriend is actually the father of the adolescent's child. In such cases, the mandatory parental involvement laws in most states provide for an exception. Usually, this exception is part of the judicial bypass process. However, the judicial bypass process presents some problems in itself. It can sometimes be difficult for an adolescent even to learn about her legal right to seek a judicial waiver of the parental involvement requirement. Because teenage pregnancy is inversely correlated with wealth and educational opportunities, the adolescents who are most in need of the judicial bypass procedure are the least likely to know about it or to have the wherewithal to find out about it.⁴⁶ The majority of young women learn when they go to clinics to seek abortions,⁴⁷ meaning that they have to find time to come back to the clinic once they receive their waiver. Once she learns about her rights, she must go to court, which is usually open only when she ought to be in school. She has to file her paperwork and appear before the judge who will ask her questions regarding a topic about which she already feels uncomfortable and scared. Not only is this process intimidating, but it presents palpable physical risks for the adolescent. She will be nearly a month pregnant by the time she misses her period, and on average it takes several weeks to learn about one's rights and go through the judicial waiver process.⁴⁸ Every week that gestation continues brings the young woman closer to the time when a typical, on-demand first trimester abortion will

⁴⁶ See Zabin et al., 24 *Family Planning Perspectives* 148, *supra* note 34.

⁴⁷ See Ambuel and Lewis, 15 *Child Youth and Family Services Quarterly* 2, *supra* note 43.

⁴⁸ *Id.*

not be available.⁴⁹ Additionally, the longer gestation is allowed to continue, the higher the risk of abortion-related morbidity and mortality.⁵⁰ This is of particular concern for adolescents, whose maternal morbidity and mortality are already higher than those of adult women.⁵¹

The federal Child Interstate Abortion Notification Act also contains an exception allowing a physician to perform or induce an abortion without notifying the adolescent's parents if she has been a victim of parental abuse.⁵² However, the adolescent must sign a written declaration to that effect.⁵³ Furthermore, the physician must notify the state office charged with protecting children from abuse in the adolescent's home state of the alleged abuse.⁵⁴ The physician must file the report *before* he or she may perform the abortion.⁵⁵ To make an adolescent sign a legally binding paper is very intimidating and will make young women hesitant to follow through with the abortion even though it may be in her best interest. Though ideally, all cases of child abuse, particularly sexual abuse, should be reported, it is well-known that many, perhaps most, cases are not reported.⁵⁶ The reasons are complex, but frequently are due to the

⁴⁹ The minimum right to abortion that adult American women possess is the right to an on-demand abortion during the first trimester of pregnancy. *See Roe v. Wade*, 410 U.S. 113 (1973).

⁵⁰ *See* Ambuel and Lewis, 15 *Child Youth and Family Services Quarterly* 2, *supra* note 43.

⁵¹ *Id.*

⁵² Child Interstate Abortion Notification Act § 2432(b)(3), *supra* note 3.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See* Boyer and Fine, 24 *Family Planning Perspectives* 4, *supra* note 42.

victim's fear of the abuser and the likelihood of repeated and intensified abuse after reporting.⁵⁷ An adolescent who might have her reasons for not coming forward will be forced either to do so or to carry the child to term. Because a state agency notified of child abuse by a physician will almost certainly investigate the matter, the young woman's parents will still become involved in her abortion decision against her wishes, albeit after the fact. An adolescent's shame, discomfort, and fear of her parents will not decrease after she has had her abortion. Physically and legally, their involvement might be a moot point after the fact, but the potential for renewed or increased abuse is still very real. Thus it is hard to see how the exception in the federal statute is an exception at all. It adds increased pressure to an already difficult situation for the young woman, and prohibits physicians from using their best judgment and serving the needs of their patients. If anything, this provision will actually make it more, not less, difficult for an adolescent to obtain an abortion without the knowledge of her parents.

Proponents of mandatory parental involvement laws claim that they are interested in protecting vulnerable adolescents, who are incapable of making their own decisions. But it seems that those adolescents are more capable of making such decisions than is commonly believed, and in many cases those proponents are hurting the young women they claim to wish to protect.

III. CASES IN SUPPORT OF COEXTENSIVE RIGHTS

⁵⁷ *See id.*

I separate cases in support of coextensive rights into two categories. The first category is cases regarding children's rights in contexts unrelated to procreation. If cases, especially in more modern times, have tended to endow adolescents with rights equal to those to adults, this suggests that procreative rights should be no different. The second category is cases regarding procreation itself, both for minors and for adult women. I believe that a synthesis of these cases will lead to the conclusion that denying adolescents less than coextensive procreative rights is inconsistent and unsustainable.

A. LAYING THE GROUNDWORK: CASES REGARDING CHILDREN'S RIGHTS OUTSIDE THE PROCREATIVE CONTEXT HAVE TENDED TO ACCORD MINORS RIGHTS EQUAL OR NEARLY EQUAL TO THOSE OF ADULTS

Perhaps the most important case affecting the rights of children generally, and the foundation of much jurisprudence concerning the extent of adolescent rights, is *In re Gault*.⁵⁸ In that case, the Supreme Court decided that adolescent defendants at criminal trials retain the same basic constitutional protections as adult defendants. The Court's concern was that requiring juvenile criminal proceedings to be identical to those for adults might hamper the rehabilitative goal that is in theory the major goal of the juvenile justice system. The Court did not seriously consider the possibility that adolescents might be entitled to fewer constitutional protections than adults. In fact, the Court famously announced that "neither the Fourteenth Amendment nor the Bill of Rights is for adults

⁵⁸ 387 U.S. 1 (1967).

alone.”⁵⁹ This important holding embodies the basis for many other adolescent civil rights decisions, including those that announced coextensive rights regarding freedom to speak and express political opinions,⁶⁰ freedom to refrain from speaking,⁶¹ and entitlement to the rudiments of due process if they might be suspended from school.⁶²

In *Wisconsin v. Yoder*,⁶³ Amish parents who had been convicted of violating the state’s compulsory school attendance law appealed to the Supreme Court. The Yoders argued that their fundamental liberty interest in raising their children as they saw fit should trump the state’s interest in educating children to function in mainstream society. The Court ruled in favor of the Yoders, accepting this reasoning.⁶⁴ Justice Douglas, however, felt that the majority was too deferential to the parents’ wishes for their children.⁶⁵ Although he agreed that the state’s interest in educating its youth should not be immune to individual exemptions on religious grounds, he “disagree[d] with the Court’s conclusion that the matter is within the dispensation of the parents alone.”⁶⁶ He criticized the majority for framing the issue as a contest between the state’s interest and the parents’ interest, saying that “[D]espite the Court’s claims, the parents are

⁵⁹ *Id.* at 13.

⁶⁰ *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969).

⁶¹ *W. Va. Sch. Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

⁶² *Goss v. Lopez*, 419 U.S. 655 (1975).

⁶³ 406 U.S. 205 (1972).

⁶⁴ *See id.* at 229–36.

⁶⁵ *See id.* at 241–49 (Douglas, J., dissenting in part).

⁶⁶ *See id.* at 241.

seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.”⁶⁷ He did not doubt the standing of parents to raise the religious liberty interests of their children as a defense at trial, but he felt it was an error to “assume an identity of interest between parent and child.”⁶⁸ He further expressed concern that “[i]f the parents in this case are allowed an exemption, the inevitable effect is to impose the parents’ notion of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child’s rights to permit such an imposition without canvassing his views.”⁶⁹ This concern led him to the conclusion that “if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents’ religiously motivated objections. Religion is an individual experience. . . . [It is unacceptable to] analyze[] similar conflicts . . . with little regard for the views of the child.”⁷⁰

In *New Jersey v. T.L.O.*,⁷¹ a high school student was held to have the same privacy rights against unreasonable search and seizure as an adult.⁷² Interestingly, the Court rejected the argument that school officials have authority to search students based upon less than probable cause because schools act *in*

⁶⁷ *See id.*

⁶⁸ *See id.* at 241–42 and 242 n.1.

⁶⁹ *Id.* at 242.

⁷⁰ *Id.* at 242–43 (comparing the instant case with *Prince v. Massachusetts*, 321 U.S. 158 (1944), which held that a Jehovah’s Witness who had her nine-year old niece and ward distribute religious literature on the public streets was not in violation of a child labor law).

⁷¹ 469 U.S. 325 (1984).

⁷² *See id.*

loco parentis.⁷³ Instead, the Court ruled that a teenager's Fourth Amendment rights are the same as those of an adult.⁷⁴ This is relevant because the Fourth Amendment is a major source of adult privacy rights against state interference. If cases that are decided on Fourth Amendment grounds tend to line up in favor of coextensive rights, it stands to reason that procreative rights ought to be included.

From these cases we can observe that during the Warren era and on through the time of *Roe v. Wade*, the Supreme Court was moving away from the conception of minors as entitled to much less constitutional protection than adults. Instead, it seems that the Court began to move toward a conception of minors as having as many rights equal to those of adults, to the extent that their capacity would reasonably allow. Although this formulation has not been the holding or among the dicta of any case, it serves as a reasonable synthesis of the Court's more recent rulings on this matter.

One case that seems to weigh in against coextensive rights for adolescents is *Parham v. J.R.*⁷⁵ In that case, the Supreme Court acknowledged that children have a fundamental interest in liberty such that parents cannot decide alone to institutionalize their children.⁷⁶ Rather, due process requires that some neutral factfinder or investigator must determine whether the minor is in fact mentally ill

⁷³ *See id.* at 336.

⁷⁴ *See id.* at 334.

⁷⁵ 442 U.S. 584 (1979).

⁷⁶ *See id.* at 596–601.

to the extent that it is appropriate to curtail his liberty.⁷⁷ Still, the Court held that the parents nevertheless retained most of the power to make such a decision for their children because of the fundamental right to raise their children.⁷⁸ But *Parham* can be distinguished from parental involvement laws because, while *Parham* involved the forced administration of medical care, parental involvement laws involve the potential denial of medical care. I believe most people would not want parents to have the power to deny their children commonly available life-saving medical treatments. While abortion is rarely a life-or-death decision, forced parental involvement introduces the possibility that a young woman will be forced to carry her pregnancy to term, and that her life will take a radically different course than it otherwise would have. Furthermore, while *Parham* discussed the impaired decisionmaking skills of the minors involved, it was in the context of mental health-related decisions. Minors who are the subject of institutionalization proceedings are probably at least somewhat mentally ill whether or not they are reasonable candidates for institutionalization. Adolescent women who wish to obtain abortions might be under great stress, but there is no reason to believe *a priori* that they are impaired in their decisionmaking skills, particularly in light of the studies discussed in Section II *supra*. Finally, there is the issue of fundamental rights. Both physical freedom and procreation-related decisions have been recognized as fundamental liberty interests. As mentioned earlier, *Parham* recognized physical freedom as a fundamental liberty interest for children. If children are endowed

⁷⁷ See *id.* at 606–17.

⁷⁸ See *id.* at 602–06.

with some fundamental liberty interests, then there ought to be at least a stated reason why they are to be denied other fundamental liberty interests. For adults, it is difficult for the government to surmount a fundamental liberty interest to impose restrictions. Therefore, it seems to me that there ought to be at least some level of scrutiny to which restrictions of an adolescent's fundamental liberty interests are also subject.

Another case that might seem at first to weigh in against coextensive rights is *Hazelwood Sch. Dist. v. Kuhlmeier*.⁷⁹ In that case, the Court decided that a high school principal could remove an article from a school newspaper because it revealed the pregnancy of a fellow student.⁸⁰ In fact, although the case contains a great deal of discussion about the role of schools,⁸¹ it doesn't seem that the case is much different than an invasion of privacy involving adults. In this case it seems to me that the real issue was not so much the free speech rights of high school students but a balancing of harms between free speech rights and privacy rights—a balancing that would occur even if the parties involved were adults. Furthermore, it is telling that the sensitive issue for the potential victim in this case was a *pregnancy*.⁸² This suggests that a pregnant adolescent has important privacy interests that ought to be respected not just in the context of school journalism but by the state as well.

⁷⁹ 484 U.S. 260 (1988).

⁸⁰ *See id.* at 276.

⁸¹ *See id.* at 266–70.

⁸² *See id.* at 274–76.

B. CASES REGARDING PROCREATIVE RIGHTS

In recent years the Supreme Court has made a number of important rulings regarding procreative rights, both for adults and for adolescents. From studying cases regarding adolescents, we can derive a clear understanding of the Court's policy in this area. But examining the cases regarding adult women's procreative rights, it is difficult to conceive why adolescents' rights should be any different. It is important to examine the genesis of these rights in the first place, because of the contention advanced in Section III.A, *supra*, that the Court has steadily moved toward a conception of adolescence as a time when constitutional rights should only be less extensive than those of adults when there is some compelling state interest at stake, or when the adolescent's right is outweighed by the liberty interest of a parent in raising his or her child as he or she sees fit.⁸³ I will examine whether the logic underpinning these cases referring to adults' rights can also be applied equally to adolescents. If this is indeed the case, we must query whether these rights are outweighed by parents' fundamental liberty interests in controlling their families and raising their children as they see fit. If not, the distinction between the procreative rights enjoyed by adults and those enjoyed by minors is illogical and unsustainable.

1. Cases Involving Adolescents' Procreative Rights

⁸³ See *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). These two cases are considered the bedrock jurisprudence of family autonomy. They ruled that the ability to privately order one's own family is a fundamental liberty interest—one that, since time immemorial, has been considered the province of one's own free will and, indeed, synonymous with adulthood. "The Fourteenth Amendment [encompasses] . . . the right of the individual . . . to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer*, 262 U.S. at 399. See also *infra* p. 23 n.86.

After *Roe v. Wade*, a number of states that wished to restrict access to abortion in any way possible passed statutes placing a myriad of conditions and hurdles in the way of women seeking abortions. This effort continues today, and nearly every such statute that is passed is met immediately with court challenges by pro-choice advocacy groups. Even regressive statutes that are clearly unconstitutional have a good chance of passing in some states, in part because many legislators wish to test the boundaries of *Roe v. Wade*, and additionally to bring the issue in front of the Court again and again in the hopes that *Roe* will be overturned. It is not surprising then that much legislation regulating abortions to be performed on minors have been passed and litigated in the courts. The Supreme Court has decided several important cases on point.

The first, decided just three years after *Roe*, is *Planned Parenthood of Cent. Mo. v. Danforth*.⁸⁴ Missouri had passed legislation prohibiting physicians from performing abortions on unmarried minors without the consent of a parent. This law contained no judicial bypass procedure. The Court struck down this rule, saying that because a state may not restrict a woman's access to abortion during the first trimester, it also may not grant a third party a veto over a woman's abortion during that same period.⁸⁵ The state of Missouri tried to argue that it was simply assuring the safety and welfare of minors.⁸⁶ In response, the Court noted that Missouri law did not require the consent of a parent in order for a minor to obtain any other medical or surgical procedure, and that minors were

⁸⁴ 428 U.S. 52 (1976).

⁸⁵ *Id.* at 74.

⁸⁶ *Id.* at 72.

deemed legally competent even to seek other procreation-related services.⁸⁷ Although admitting that the state had a compelling interest in safeguarding minors and that the state's authority over minors was greater than its authority over adults, the Court held that a minor's privacy rights could only be restricted if the restriction serves "any significant state interest . . . *that is not present in the case of an adult.*"⁸⁸ Finally, the Court rejected the notion that the parental consent requirement helped maintain family cohesion:

It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.⁸⁹

However, the Court did not go so far as to say that adolescents' rights to obtain abortions must be coextensive with those of adults: "We emphasize that our holding . . . does not suggest that every minor, regardless of age or maturity, may

⁸⁷ *Id.* at 73.

⁸⁸ *Id.* at 75 (emphasis added). This sentence is particularly important because it supports the contention, stated in Section III.B *supra*, that the Court is moving toward coextensive rights for adolescents, modifiable only when the state can show that stakes include either the parent's fundamental child-rearing rights or a compelling state interest that differentiates adults from minors.

⁸⁹ *Id.* at 75.

give effective consent for termination of her pregnancy.”⁹⁰ This left open the possibility that some form of mandatory parental involvement law would pass constitutional muster, as suggested by Justice Stewart in his concurring opinion,⁹¹ which was joined by Justice Powell.

On the same day as the *Danforth* decision, the Court ruled on a similar Massachusetts statute in a companion case, *Bellotti v. Baird*.⁹² However, because it was unclear just how absolute the parental consent requirement in that statute was, the Court certified several questions to the Supreme Judicial Court of Massachusetts.⁹³ Upon its return to the Supreme Court, the statute was struck down by two plurality opinions.⁹⁴ The major defect was that, although Massachusetts’ statute contained a judicial bypass procedure, that procedure effectively inserted the judge into the position of the parents in deciding whether the abortion was in the young woman’s best interest; the state was delegating to the judge the same power that it could not permissibly delegate to the adolescent’s parents under *Danforth*.⁹⁵ Justice Powell’s concurring opinion, however, provided the states with a middle ground. He wrote that it should be permissible to allow judges to approve an adolescent’s abortion if he or she decided that the young woman was mature enough to be able to consent to the

⁹⁰ *Id.*

⁹¹ *Id.* at 89 (Stewart, J., concurring).

⁹² 428 U.S. 132 (1976) (“Bellotti I”).

⁹³ *See id.* at 151–52.

⁹⁴ *Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality opinion) (“Bellotti II”).

⁹⁵ *See id.* at 653–56 (Stevens, J., plurality opinion).

procedure.⁹⁶ This way, the state would not be delegating anyone an absolute veto over an adolescent's decision, but could still protect *individual* minors from making decisions they were not competent to make.

It seems that Justice Powell was struggling to balance two competing interests. First was the interest of the adolescent woman to make a decision for herself, because bearing a child is one of the most serious things anyone can do. The other interest was the interest of parents in guiding their child through to maturity and adulthood. He concluded that neither interest could carry the day:

The abortion decision differs in important ways from other decisions that may be made during minority. . . . The pregnant minor's options are much different [than those] facing a minor in other situations . . . [a] pregnant adolescent . . . cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy. . . . Moreover, the potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like the attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible. Yet, an abortion may not be the best choice for the minor. . . . [A]lternatives . . . may be feasible and relevant to the minor's best interests.⁹⁷

⁹⁶ See *id.* at 633-51 (Powell, J., plurality opinion).

⁹⁷ See *id.* at 642-43 (Powell, J., plurality opinion).

Justice Powell felt that the best way to balance the competing interests was to allow mandatory parental involvement laws but give adolescents a way to avoid parental involvement if it could be independently assessed that she was mature enough to do so or had good cause for doing so. In effect, he adopted into law the Justice Stewart's suggestion from his *Danforth* plurality decision.⁹⁸ While it is a step in the right direction to give adolescents a way of obtaining an abortion without involving their parents, it is still unsatisfactory in that it makes doing so more difficult. Justice Stewart hit the nail on the head when he said that having a child endows a young woman with adult legal responsibilities. If carrying the child to term results more or less in the status of adulthood, but an adult-like competence is expected of an adolescent woman who wishes to abort the fetus, what is the difference? If the young woman is not allowed to make a decision requiring adult capacity, the consequence is that she will become an *actual* adult in forty short weeks.⁹⁹ This seems a bit like cutting off one's nose to spite one's face.

The most important case dealing with the right of minors to use contraception is *Carey v. Population Servs. Int'l*.¹⁰⁰ That case, in relevant part, dealt with a law not only banning the sale of contraceptives to minors, but to

⁹⁸ See 428 U.S. at 89 (Stewart, J. concurring).

⁹⁹ In most states, she would not actually become an adult. But she would become a de facto adult due to the tremendous responsibility that comes with carrying a child to term and raising it after giving birth (including some responsibilities normally reserved for legal adults). Even with a supportive family her life has substantially changed and her childhood has effectively ended.

¹⁰⁰ 431 U.S. 678 (1977).

adults as well, unless distributed by a physician.¹⁰¹ The law was invalidated on several grounds. Justice Brennan first noted that

[I]t is clear that among the decisions an individual may make without unjustified government interference are personal decisions “relating to marriage, procreation, contraception, family relationships, and child rearing and education.” The decision whether or not to bear or beget a child is at the very heart of this cluster of constitutionally protected choices.¹⁰²

Carey also continued the line of reasoning from *Danforth* that a state has to surmount significant barriers before restricting the privacy interests of adolescents any more than they can restrict those of adults, ruling that the restrictions on minors purchasing contraception should be as close as possible to those placed on adults, because contraception and abortion are two manifestations of the same basic right to privacy.¹⁰³ This effectively removed all restrictions on the sale of “non-hazardous” contraceptives to minors, because earlier in the opinion *Carey* outlawed the restriction of contraceptive distribution to licensed pharmacists.¹⁰⁴ The Court did not accept New York’s argument that

¹⁰¹ *See id.* at 681.

¹⁰² *Id.* at 684–85 (internal citations omitted) (*quoting Roe*, 410 U.S. at 152–53, *supra* note 49).

¹⁰³ *Id.* at 693–97. In particular, “[T]he right to *privacy* in decisions regarding procreation extends to minors as well as adults.” *Id.* at 693 (emphasis added). Furthermore, “the state does not have the authority to give a third party an absolute, and possibly arbitrary, veto’ . . . [rather, s]tate restrictions inhibiting *privacy rights* of minors are valid only if they serve ‘any significant state interest . . . that is not present in the case of an adult.’” *Id.* at 693, *quoting Danforth*, 428 U.S. at 74–75 (emphasis added). Because Planned Parenthood found no significant state interest was served by parental consent requirements, and identical reasoning was used to strike down consent and notification requirements for adult women, this seems to suggest that no significant state interest is served by parental notification requirements for adolescents.

¹⁰⁴ *Id.* at 684–91.

the law was justifiable to protect the morality of minors or to make it more difficult for minors to engage in sexual intercourse. Justice White wrote separately to express his doubt that the law would have a significant effect on either.¹⁰⁵ Justice Stevens wrote separately to express his view that even if the law could positively further these goals, it was far too broad to accomplish these narrow objectives.¹⁰⁶ Justice Stevens also wrote that it seems hypocritical of the state to profess concern for the welfare of minors but deny them the easiest method of preventing unwanted pregnancies and venereal diseases:

It is almost unprecedented . . . for a state to require that an ill-advised act by a minor give rise to a greater risk of irreparable harm than a similar act by an adult. Common sense indicates that many young people will engage in sexual activity regardless of what the New York legislature does; and further, that the incidence of venereal disease and premarital pregnancy is affected by the availability or unavailability of contraceptives. Although young persons theoretically may avoid those harms by practicing total abstention, inevitably many will not. The statutory provision denies them a choice which, if available, would reduce their exposure to disease or unwanted pregnancy.¹⁰⁷

He compared the law to a hypothetical regulation that expressed disapproval of motorcycles by outlawing the sale of helmets: “One need not posit a

¹⁰⁵ *Id.* at 702–03 (White, J., concurring).

¹⁰⁶ *Id.* at 712–17 (Stevens, J. concurring).

¹⁰⁷ *Id.* at 714 (Stevens, J., concurring).

constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse.”¹⁰⁸

The state had in fact conceded that the law probably would not significantly reduce the number of teenagers who chose to engage in sexual activity, or even enter their minds when making such decisions.¹⁰⁹ This makes sense because there is little incentive to educate adolescents about contraceptives if they cannot obtain them; it’s difficult to miss or wish for something to which you have no access and with which you have no experience. “Rather, [the state of New York’s] central argument is that the statute has the important symbolic effect of communicating disapproval of sexual activity by minors. In essence, therefore, the statute is defended as a form of propaganda, rather than a regulation of behavior.”¹¹⁰ It seems unlikely that a state could restrict the rights of adults for endorsement or propaganda purposes, and public health concerns weigh strongly against doing so to adolescents.

It is hard to imagine a restriction on adolescents’ procreative rights that would be narrowly tailored enough to advance these goals and not unnecessarily infringe on their privacy rights. A better idea would be for the state through its schools to educate adolescents to carefully consider sexual activity.

¹⁰⁸ See *id.* at 715 (Stevens, J., concurring). This sentence is the main point of contention between the concurring Justices, who did not join in Part IV of the majority opinion, and Justice Powell. Justices White and Stevens, in particular, did not want to leave open the question of whether a state can regulate the sexual activity of unmarried minors (such as with age of consent laws), and felt that the issue need not be reached to invalidate the statutes at question in the instant case. See *id.* at 702–03 (White, J., concurring), 713 (Stevens, J. concurring).

¹⁰⁹ See *id.* at 715 (Stevens, J., concurring).

¹¹⁰ See *id.* (internal footnotes omitted).

2. Cases Regarding Adult Women's Procreative Rights Also Argue for Adolescents' Procreative Rights

Danforth also ruled on a portion of the Missouri statute that required spousal consent before an abortion may be performed.¹¹¹ The Court struck down the statute on many of the same grounds upon which it struck down the parental consent provision as written.¹¹² The state of Missouri claimed that its legislature had enacted the provision because of its “perception of marriage as an institution,” and its perceived duty to protect that institution by ensuring that such important decisions be made jointly by both partners.¹¹³ The state also argued that it imposes a number of other statutory limitations on important decisions frequently made by married couples, including those related to procreation,¹¹⁴ and that the decision to terminate a pregnancy was not substantially different than those other decisions, the state’s regulation of which has not been seriously challenged.

The Court reasoned, however, that requiring the consent of both spouses to an abortion gives the husband an effective veto over the decision and de facto control over his wife’s body.¹¹⁵ The Court was not oblivious to the argument that a

¹¹¹ See 428 U.S. at 67–68, *supra* note 84.

¹¹² See *id.* at 69.

¹¹³ See *id.* at 68.

¹¹⁴ Examples include the requirement that both spouses consent to the adoption of a child born in wedlock, that both spouses consent to the artificial insemination of the woman, and the criminalization of polygamy and adultery. See *id.* at 68. The state argued that, because the events that led to the pregnancy were set in motion by mutual consent, that the pregnancy ought to be terminated only by mutual consent. See *id.*

¹¹⁵ See *id.* at 68–69, 71.

husband ought to be involved in such an important decision, but felt that ultimately the choice had to belong to the woman:

We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying. Neither has this Court failed to appreciate the importance of the marital relationship in our society. . . . Moreover, we recognize that the decision whether to undergo or to forgo an abortion may have profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious. . . . It seems manifest that, ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and her husband. No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue. But it is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all. . . . [I]t is not at all likely that such action would further, as the District Court majority phrased it, the "interest of the state in protecting the mutuality of decisions vital to the marriage relationship." We recognize, of course, that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.¹¹⁶

¹¹⁶ *Id.* at 69–71 (internal citations omitted).

Interestingly, this type of analysis, that the party who will bear the greatest burden should make the final decision, is absent from the section of the decision that strikes down the parental consent law as written.¹¹⁷ This omission is striking if the weight of the burden carried is considered realistically. In theory, according to the idealized “concept of marriage as an institution” envisioned by the Missouri legislature, a married woman will have the financial and emotional support of her husband, a completed education, the capacity for employment if necessary, and security. An adolescent who bring a child to term will have none of these advantages, or will have them to a much lesser degree than her married counterpart. Yet the Court made it easier for the married woman to terminate her pregnancy free of third-party interference than for the adolescent woman. This is entirely illogical. This difference in burdens was even recognized in Justice Powell’s opinion in *Bellotti II*,¹¹⁸ but the Court never made the direct comparison between the two that might have brought them to the realization that parental consent laws are even worse than spousal consent laws.

Furthermore, it is curious that the state’s interest in maintaining and protecting the husband-wife relationship is rejected as a justification for a spousal consent requirement, while the state’s interest in maintaining and protecting the parent-child relationship is accepted as a justification for at least some (rebuttable) parental consent requirement. It is difficult to say that one type of relationship has deeper or longer-lasting emotional bonds than the other. But it is clear that, in theory, the husband-wife relationship lasts from marriage until

¹¹⁷ See *id.* at 72–75.

¹¹⁸ See 443 U.S. at 642–43 (Powell, J., plurality opinion); see also *supra* Section III.B.1 and n.97.

death, whereas many aspects of the parent-child relationship end when the child reaches the age of majority. Most American children leave their parents' homes shortly after reaching the age of majority. At this age, parents also cease to be legally responsible for the care and maintenance of their children.¹¹⁹ The child's property interests are no longer bound with the parents', and the parties have little or no legal responsibility left toward one another. Of course, we would hope that in a loving family nothing significant would change in an emotional sense simply because a child reaches the age of majority. But compare the transition to adulthood with a marital relationship which, unlike the parent-child relationship, is entered into of one's own free will. Spouses have joint financial and property interests. They usually live under the same roof throughout the marriage. They have legal obligations to one another. Marriages are convenient units for the ordering of public and private pension plans, demographic data, and insurance policies. And unlike minority status, a marriage is theoretically indefinite. An adolescent who has an unwanted pregnancy will probably live with her parents for only a few short years more.¹²⁰ These are examples of why, if a state is concerned about the fundamental importance of certain relationships, the institution of marriage might even justifiably be encumbered with *more* restrictions than the parent-child relationship, not fewer. The purpose of this article is not to advocate this. It simply observes that it is intellectually

¹¹⁹ It should be noted that in some states, child support payments have been extended until the child is 21 or 22, particularly if they attend college. (Citations omitted.) Nevertheless, the legal obligation of a parent for his child will end at some defined point in time.

¹²⁰ This is especially true considering that the majority of adolescent pregnancies occur at age sixteen or seventeen, and are extremely rare below age fourteen. See Ambuel and Lewis, 15 *Child, Youth, and Family Services Quarterly* 2, *supra* note 43.

inconsistent to cite the protection of a special relationship as justification for a third-party involvement requirement for abortion when there are relationships that might be considered even closer and more legally constricting which cannot be used as a justification for such third-party involvement requirements.

Roe implemented a framework for when a woman had a constitutional right to abortion on demand that was based on the trimester status of her pregnancy.¹²¹ These guidelines were modified, with additional justification for the constitutional right to abortion, by *Planned Parenthood of S.E. Pa. v. Casey*.¹²² The Court left intact the absolute right of a woman to obtain an abortion before fetal viability.¹²³ *Roe* had found the constitutional right to terminate a pregnancy based in an individual's privacy rights.¹²⁴ The Court in *Casey* built upon this conclusion to invalidate state laws that place an "undue burden" on a woman's right to seek an abortion.¹²⁵ The Court decided that an undue burden exists if the purpose or effect of the law in question is to place substantial obstacles in the path of a woman seeking an abortion.¹²⁶ The Court reflected that psychological harm could be included in the concept of the undue burden.¹²⁷ Because this is the case, the Court decided that there were limits on the information the state could

¹²¹ See *Roe*, 410 U.S. at 164–65, *supra* note 49.

¹²² 505 U.S. 833 (1992).

¹²³ See *Roe*, 410 U.S. at 154, *supra* note 49.

¹²⁴ See *Casey*, 505 U.S. at 879, *supra* note 122.

¹²⁵ See *id.* at 876–79.

¹²⁶ See *id.* at 876–78.

¹²⁷ See *id.* at 881–87.

require physicians to provide to a woman seeking an abortion, and limits on what the state could require a woman to do to obtain an abortion, beyond signing informed consent documents.¹²⁸ But if a woman who seeks an abortion is entitled to be free from psychological harm at the hands of the state, how can the state require an adolescent to inform her parents or to require the consent of parents in order to obtain an abortion? There are probably few things that could cause an already emotional pregnant adolescent more psychological harm than revealing her sexual activity and her pregnancy to her parents, if for some reason she wishes not to involve them.

Another interesting facet of *Casey* is that it revisited the issue of spousal involvement.¹²⁹ *Danforth* had already outlawed spousal consent requirements. *Casey* now dealt with a requirement that a married woman seeking an abortion must provide her physician with a signed statement that she has informed her husband of her intentions,¹³⁰ and a requirement that a minor inform her parents of her intentions.¹³¹ The Court struck the spousal information requirement down for two reasons.

The first reason for striking down the requirement was the high stress under which women often find themselves when attempting to seek abortions.¹³² Frequently, communicating with their husbands results in increased stress and

¹²⁸ *See id.*

¹²⁹ *See id.* at 887–99.

¹³⁰ *See id.* at 887.

¹³¹ *See id.* at 899–900.

¹³² *See id.* at 887–95.

increased conflict. Furthermore, women in strong, supportive, and healthy marriages almost invariably consult their husbands before deciding whether to terminate the pregnancy.¹³³ If a woman chooses not to consult her husband, there is usually a good reason. The opinion cites numerous scientific studies attesting to these facts.¹³⁴ Those studies cited also warn that a spousal notification requirement poses a particularly grave danger to women who are victims of spousal abuse:

The 'bodily injury' exception could not be invoked by a married woman whose husband, if notified, would, in her reasonable belief, threaten to (a) publicize her intent to have an abortion to family, friends or acquaintances; (b) retaliate against her in future child custody or divorce proceedings; (c) inflict psychological intimidation or emotional harm upon her, her children or other persons; (d) inflict bodily harm on other persons such as children, family members or other loved ones; or (e) use his control over finances to deprive her of necessary monies for herself or her children. . . . Women of all class levels, educational backgrounds, and racial, ethnic and religious groups are battered. . . . Wife-battering or abuse can take on many physical and psychological forms. The nature and scope of the battering can cover a broad range of actions and be gruesome and torturous. . . . Married women, victims of battering, have been killed in Pennsylvania and throughout the United States. . . . Battering can often involve a substantial amount of sexual abuse, including marital rape and sexual mutilation. . . . Mere notification of pregnancy is frequently a flashpoint for battering and violence within the family. The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy. . . . Even when confronted directly by medical personnel

¹³³ See *id.* at 888.

¹³⁴ See *id.* at 888–91 (citations omitted).

or other helping professionals, battered women often will not admit to the battering because they have not admitted to themselves that they are battered. . . . Because of the nature of the battering relationship, battered women are unlikely to avail themselves of the exceptions . . . of the Act, regardless of whether the section applies to them.¹³⁵

All are excellent reasons why married women should not be forced to notify their husbands that they plan to seek an abortion, and the Court ruled properly. However, in the above quotation, if the word “woman” were replaced with “girl,” “wife” replaced with “daughter,” and “husband” with “father” or “parents,” all of the statements therein would remain true. Again, like the comparison between *Danforth* and *Bellotti II*, the Court had all the facts it needed at hand and failed, or refused, to understand that when it comes to unwanted pregnancies, a teenager’s situation is nearly identical to an adult woman’s. What makes this instance even more frustrating is that both requirements were considered in the same case.

Amazingly, the Court went on to discuss the spousal information requirement as an anachronism from the era when a married woman ceased to have her own legal existence and was considered a dependent of her husband or even as her husband’s property.¹³⁶ The Court concluded that the spousal information requirement is inconsistent with the evolution of our jurisprudence, which has abandoned common-law conceptions of the status of women in

¹³⁵ See *id.* (citations omitted).

¹³⁶ See *id.* at 896–98.

society.¹³⁷ But in this regard, women and children were treated approximately equally by the common law. If the common-law disability and coverture rules as applied to adult women are an anachronism, then it is reasonable to conclude that at least *some* (perhaps most) of those rules as applied to minor children are equally anachronistic. It is logically inconsistent and cruelly ignorant to recognize the serious dangers posed to women forced to inform their husbands of their intention to terminate a pregnancy and to ignore the equally serious dangers posed to teenagers forced to inform their parents of the same thing. The Court's refusal to examine the parental information requirement more critically is inconsistent with the momentum of the Court's view of children toward a concept of children's rights as lesser than those of adults only to the extent that they must be to protect them and account for their lesser capacities.¹³⁸

Because of this evolution of the Court's view of children, and the substantial harm that results from such laws, it is time for the Court to rectify its inconsistencies and recognize the justifications that apply to adult women's freedom from third-party constraints also apply to adolescent women.

IV. A NOTE ON THE CONSEQUENCES OF MY ARGUMENT

If adolescent women are to have the same rights as adult women to procreative decisions, particularly abortion, they must also bear adult responsibility for the consequences of their actions. In a few states, bearing a child and living in a conjugal relationship with the father results in the automatic

¹³⁷ See *id.* at 898.

¹³⁸ See Section III.B.1 *supra*.

emancipation of the minor.¹³⁹ I believe that a minor female who bears a child should become an adult upon childbirth, in order for the law to remain logically consistent with my suggestion about endowing teenage women with coextensive procreative rights. I hope that her family will be loving and supportive and that this emancipation will not significantly affect family relations. However, a woman who bears a child needs to have the full-fledged rights of an adult in order to care for the family she has established, and states' family laws ought to evolve to reflect this.

V. CONCLUSION

A great deal of psychological research has shown that adolescent women are, generally speaking, able to consider and make procreative decisions with effectiveness comparable to that of adult women. This is particularly true at the ages when most adolescent pregnancies occur. In fact, it can be taken as a hallmark of maturity that most young women involve their parents in such decisions. Furthermore, the same body of research has shown that when adolescent women choose not to involve their parents, they do so for valid and powerful reasons.

The Supreme Court's jurisprudence regarding adolescents has come a long way in the past five decades. It has laudably recognized that minors, especially adolescents, have some capacities similar to adults, and furthermore that some individuality and freedom is necessary to socialization and maturing into a functioning adult member of society. The Court has properly recognized that

¹³⁹ See 59 Am. Jur. 2d Parent and Child § 80.

reaching the age of majority is not an on-off switch for most rights. Furthermore, the Court has recognized that in the particularly sensitive area of procreative rights, adolescents ought to be free to make their own decisions at least to some extent, because of the gravity of the decisions and the consequences of involving third parties, particularly their parents.

Now it is time for the Court to clean up its jurisprudence in this critical area. The interests at stake for the adolescent are too high, and the results of bad laws too destructive, to allow the current incoherent policies to continue. This is particularly important in the face of new restrictions being considered by the U.S. Congress. I hope the Court will fulfill what I believe to be its obligation to grant adolescents coextensive abortion rights.