

# IT’S NO “MINOR” ISSUE: REFRAMING TRADITIONAL UNDERSTANDINGS OF MINORS’ RIGHT TO BODILY AUTONOMY AND FREEDOM OF SEXUAL DECISION-MAKING

HOW MINORS’ REPRODUCTIVE RIGHTS FALL SHORT COMPARED TO THEIR OWN RIGHT TO SEXUAL FREEDOM IN MUCH OF THE UNITED STATES AND WHY THIS CURRENT FRAMEWORK SHOULD BE CRITICALLY EXAMINED

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I. INTRODUCTION

Individuals in the United States have broad rights explicitly established by the Constitution, and the U.S. Supreme Court has interpreted the Constitution to also include unenumerated rights, such as the right to privacy in the context of choices about bodily autonomy, and freedom of association in the context of consensual sexual, contraceptive, and reproductive decisions.<sup>1</sup> As Professor David B. Cruz once wrote, the body of cases on freedom of choice in sexuality and sexual association, contraception access and use, and reasonably unburdened abortion access are about “sexual freedom, or they are about more than just procreative

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<sup>1</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding laws prohibiting consensual private homosexual activity unconstitutional); *Planned Parenthood v. Casey*, 505 U.S. 833, 872–74 (1992) (upholding constitutional right to abortion decided in *Roe v. Wade*); *Roe v. Wade*, 410 U.S. 113, 155 (1973) (ruling pregnant woman’s liberty to have abortion a fundamental right to privacy); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (holding law prohibiting use of contraceptives violates right to marital privacy).

autonomy.”<sup>2</sup> These privacy rights, when considered together, create a sphere of privacy around personal, sexual, and bodily decisions that constitute an established constitutional principle that individuals possess significant discretion in their own decisions.

Some of these rights—such as the legal capability to be of age to consent to sexual activity, the right to access contraception, and, in a few U.S. states, the ability to independently decide to obtain an abortion—have been expanded to include minors.<sup>3</sup> However, the majority of states place restrictions on minors who seek to obtain an abortion—in fact, most states have an age of consent that is under eighteen, while the age to obtain an abortion without parental notification or consent is eighteen.<sup>4</sup> In other words, most states grant the legal ability to consent—and, thus, the right to freely make independent sexual decisions—but withhold the right to independently make certain decisions about a foreseeable potential result of those sexual decisions—namely, abortions.

This discrepancy is an issue because it is indicative of a larger problem: minors are given important rights and freedoms, but they lack full ability to independently handle the results or consequences. For example, a minor may choose to engage in consensual, lawful sexual intercourse or activity, and decide whether or not to utilize contraception. Critically, if the minor becomes pregnant, however, her options for managing that result are more limited than those of an adult woman. While many states have numerous restrictions on abortion for an adult woman, a minor must additionally either notify or obtain consent from one or both parents in most states.<sup>5</sup> Alternatively, a minor may go in front of a judge to explain why she seeks an abortion without consent of her parents, and only then may she obtain one at the judge’s discretion by proving that she is sufficiently mature to

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<sup>2</sup> David B. Cruz, “*The Sexual Freedom Cases*”? *Contraception, Abortion, Abstinence, and the Constitution*, H. C.L.-C.R. L. REV. 299, 381 (2000).

<sup>3</sup> For purposes of this Note, all references to “minors” will refer to individuals under the age of eighteen. This is done in order to maintain consistency and clarity, as there is significant discrepancy between states in terms of ages of consent and other laws. Similarly, the age of majority will be interchangeable with the age of eighteen.

<sup>4</sup> See *Parental Consent and Notification Laws*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/teens/preventing-pregnancy-stds/parental-consent-and-notification-laws> (last updated June 2018); *Statutory Rape: A Guide to State Laws and Reporting Requirements. Sexual Intercourse with Minors*, U.S. DEP’T OF HEALTH & HUMAN SERV. (Dec. 15, 2004), <https://aspe.hhs.gov/report/statutory-rape-guide-state-laws-and-reporting-requirements-summary-current-state-laws/sexual-intercourse-minors>.

<sup>5</sup> See PLANNED PARENTHOOD, *Parental Consent and Notification Laws*, *supra* note 4.

make this decision without their knowledge.<sup>6</sup>

This Note argues that minors should not need parental notification or consent in order to independently decide to obtain an abortion because, like adults, they are old enough to make independent sexual decisions, to independently choose to utilize contraceptive methods, and to choose to become parents. Accordingly, this Note will primarily focus on the peculiar discrepancy between the age of legal ability to consent to sexual activity and the age at which a minor no longer needs parental notification or consent in order to obtain an abortion in the relevant states. This Note will provide background on the rights of adults regarding bodily autonomy, including a discussion of the relevant and significant cases for the right of individual bodily autonomy, and what that looks like in terms of sexuality, contraceptive, and abortion rights. Then, this Note will contrast the rights and restrictions of minors with those of adults, and discuss various state laws pertaining to minors, including the age of consent, parental notification and consent. This Note will then discuss why parental notification and consent laws are often ineffective and harmful and, therefore, should be critically examined as to their actual value and importance in a free society. This Note will argue that the “judicial bypass” is an insufficient protection for minors because it effectively gives a third party a veto power over the minors’ abortion decisions. Finally, this Note concludes with a recommendation that these parental notification and consent laws be reviewed thoroughly on their implications for minors.

## II. BACKGROUND

### A. RESTRICTIONS AND RIGHTS PERTAINING TO MINORS

It is not controversial that minors and adults are traditionally thought to have separate roles and rights in society based on the age of an individual.<sup>7</sup> For example, adults are typically expected to work and pay taxes, vote in elections, follow the law,<sup>8</sup> and, if they so choose, marry have

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<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 550–55 (2000) (describing legal regulation based on conventional understanding of childhood).

<sup>8</sup> See John Gramlich, *What Makes a Good Citizen? Voting, Paying Taxes, Following the Law Top List*, PEW RESEARCH CTR. (July 2, 2019), <https://www.pewresearch.org/fact-tank/2019/07/02/what-makes-a-good-citizen-voting-paying-taxes-following-the-law-top-list>.

a family, or carry on the next generation.<sup>9</sup> Minors, on the other hand, are typically expected to receive education, and develop their mental and physical abilities in preparation to become the future adults of the next generation.<sup>10</sup> Thus, it is important to consistently and critically consider the granted and excluded rights of minors. For example, minors do not have the right to purchase alcohol throughout the United States;<sup>11</sup> this is a result of state laws increasing the drinking age a few decades ago, which the federal government encouraged by giving states an alternative to changing their laws: a loss of federal highway funds for those states that do not make the drinking age twenty-one.<sup>12</sup> Generally, the sentiment in the United States regarding the drinking age limit seems to be that it is an appropriate and reasonable restriction.<sup>13</sup>

Minors are not entitled to all rights that adults possess, but they are entitled to certain rights. For example, the Supreme Court has held that minors in juvenile criminal proceeding are also entitled to the due process of law and fair treatment as adults in criminal proceedings.<sup>14</sup> Nonetheless, minors are often treated differently from adults in the criminal justice system—generally, these differences may include separate courts, separate incarceration facilities, different sentencing guidelines, availability of diversion programs, and record expungement.<sup>15</sup> The Supreme Court has

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<sup>9</sup>See PEW RESEARCH CTR. PARENTING IN AMERICA 15 (2015), [https://www.pewresearch.org/wp-content/uploads/sites/3/2015/12/2015-12-17\\_parenting-in-america\\_FINAL.pdf](https://www.pewresearch.org/wp-content/uploads/sites/3/2015/12/2015-12-17_parenting-in-america_FINAL.pdf). Although outside the scope of this Note, it should be noted that regarding marriage, the minimum legal age for marriage differ among the states. See Fraidy Reiss, *Why Can 12-Year-Olds Still Get Married in the United States?* WASH. POST (Feb. 10, 2017, 9:03 AM), <https://www.washingtonpost.com/posteverything/wp/2017/02/10/why-does-the-united-states-still-let-12-year-old-girls-get-married>.

<sup>10</sup> See Gordon Berlin, Frank F. Furstenberg Jr., and Mary C. Waters, *Introducing the Issue*, 20 FUTURE OF CHILDREN 3, 4–5 (2010).

See *Age 21 Minimum Legal Drinking Age*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/alcohol/fact-sheets/minimum-legal-drinking-age.htm> (last updated Jan. 7, 2020) (“Minimum Legal Drinking Age (MLDA) laws specify the legal age when an individual can purchase alcoholic beverages. The MLDA in the United States is 21 years”).

<sup>12</sup> See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 205-07 (1987) (upholding Congress’ ability to reduce federal highway funds to states that had a minimum drinking age below twenty-one, under the spending powers).

<sup>13</sup> See Jeffery M. Jones, *Americans Still Oppose Lowering the Drinking Age*, GALLUP (July 24, 2014), <https://news.gallup.com/poll/174077/lowering-drinking-age.aspx>.

<sup>14</sup> *In re Gault*, 387 U.S. 1, 19–21 (1967).

<sup>15</sup> See *Juvenile Justice 2019 Year-End Report*, NAT’L CONFERENCE OF STATE LEGISLATURES (Feb. 12, 2020), <https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-justice-2019-year-end-report.aspx>; see generally *Youth in the Justice System: An Overview*, JUVENILE LAW CTR., <https://jlc.org/youth-justice-system-overview> (last visited Feb. 20, 2020).

also held that the death penalty may not be imposed upon any defendant under the age of eighteen because to do so would violate the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>16</sup> The reasons cited for this decision include general maturity-related differences between minors and adults, minors' diminished culpability, and the point where society draws the line between legal childhood and adulthood.<sup>17</sup>

Minors do not have all the rights or privileges of adults, but the rights that they lack—solely by nature of their age—become available to them upon turning the age of eighteen.<sup>18</sup> For example, minors in some states cannot purchase lottery tickets, gamble, consume intoxicating liquors, or enter into legally binding contracts on their own.<sup>19</sup> Additionally, adults may be subject to the application of the death penalty because the protection of the Eighth Amendment only applied to minors due to their minority age.<sup>20</sup> While some of these laws are mandated or enacted by the federal government, states are permitted to make certain legal distinctions based on minority age as long as they do not interfere with, or attempt to supersede, federal law.<sup>21</sup>

#### B. LAWS AND COURTS DISTINGUISH SEXUALITY AND PRIVACY RIGHTS BASED ON MINORITY STATUS

Another widely recognized and accepted restriction based on minority status is the age of consent for sexual intercourse (and, often, similar sexual activity).<sup>22</sup> Each state has a mandated age of consent at which a person can

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<sup>16</sup> *Roper v. Simmons*, 543 U.S. 551, 568, 574–75 (2005) (overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989) that upheld state laws imposing the death penalty on minors). The Court in *Roper* reasoned that a majority of states did not impose the death penalty on sixteen- and seventeen-year old defendants and that the petitioner failed to demonstrate a consensus in favor of imposing the death penalty on minors. *Id.* at 564-68.

<sup>17</sup> *Id.* at 555.

<sup>18</sup> See Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 *TULANE L. REV.* 55, 57 (2016).

<sup>19</sup> See, e.g., Hamilton, *supra* note 18, at 66–76; NATIONAL RESEARCH COUNCIL, *PATHOLOGICAL GAMBLING: A CRITICAL REVIEW* 283–312 (1999), <https://www.ncbi.nlm.nih.gov/books/NBK230619>.

<sup>20</sup> *Roper v. Simmons*, 543 U.S. 551 (2005) (holding imposing death penalty for crimes committed under the age of eighteen unconstitutional).

<sup>21</sup> See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 205–07 (1987) (discussing that the federal government was not permitted to require South Dakota to raise its minimum drinking age; however, it was within Congress's power to withhold federal funds).

<sup>22</sup> See *Statutory Rape: A Guide to State Laws and Reporting Requirements. Sexual Intercourse with Minors*, U.S. DEP'T OF HEALTH & HUMAN SERV. (Dec. 15, 2004),

legally be treated as an "adult," wherein they would be presumed to have the legal capacity to consent to sexual activity.<sup>23</sup> These laws are thought to protect minors from being taken advantage of by older adults and safeguard their decision-making skills, which are believed to be of a lesser capacity at certain ages.<sup>24</sup> While the primary purpose of age of consent laws are to protect innocent children, a secondary effect of these laws is determining the age at which an individual can make important decisions.<sup>25</sup> Thus, the age of majority can simultaneously also be a tool of individual empowerment in providing the right to personal bodily autonomy.<sup>26</sup> For this reason, the fundamental right to privacy can be additionally extended to individuals of various ages (typically older teenagers).<sup>27</sup>

### 1. State Laws: Ages of Consent and Reproductive Rights

The variance in state laws regarding the age of consent, as well as the age for independent abortion decisions, illustrates a central question for which there is no clear, uncontroversial answer: When does childhood end and adulthood begin?<sup>28</sup> Indeed, the world, as a whole, has long struggled to answer the question of what it means to be an adult and what it means to be a child.<sup>29</sup> The age of consent only within the United States, but also

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<https://aspe.hhs.gov/report/statutory-rape-guide-state-laws-and-reporting-requirements-summary-current-state-laws/sexual-intercourse-minors>.

<sup>23</sup> *Id.*

<sup>24</sup> See Jennifer Ann Drobac, *Wake Up and Smell the Starbucks Coffee: How Doe v. Starbucks Confirms the End of the "Age of Consent" in California and Perhaps Beyond*, 33 B.C. J.L. & SOC. JUST. 1, 15–16 (2013).

<sup>25</sup> For example, a seventeen-year-old's mother sued Planned Parenthood for allowing her daughter to have an abortion by giving false identification while the state's age of consent is sixteen. See *Lockett v. Planned Parenthood of Ind., Inc.*, 42 N.E.3d 119 (Ind. Ct. App. 2015).

<sup>26</sup> *See id.*

<sup>27</sup> *See generally* *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (establishing a right to sexual privacy as part of the general right to privacy). *Lawrence v. Texas* was decided in the context of consensual sexual activity between adults.) *See also* U.S. DEP'T OF HEALTH & HUMAN SERV., *supra* note 22 (containing states' ages of consent).

<sup>28</sup> See Lynne Marie Kohm & Maria E. Lawrence, *Sex at Six: The Victimization of Innocence and Other Concerns Over Children's "Rights"*, 36 BRANDEIS J. FAM. L. 361, 365–69 (1997) (discussing the evolution in Western society of what was typically considered to be age dividing childhood and adulthood). At one time, Western society saw the age of seven as the dividing line between childhood and adulthood. *Id.* at 366.

<sup>29</sup> *See* DAVID KENNEDY, *THE WELL OF BEING: CHILDHOOD, SUBJECTIVITY, AND EDUCATION* 1-25 (2006).

internationally,<sup>30</sup> and are not static even within countries.<sup>31</sup> In fact, the age of consent have changed over time, such as in France where the age of consent was recently increased to fifteen following public outcry.<sup>32</sup> Thus, regarding sexuality, the term “minor” has a different legal meaning depending upon the jurisdiction.<sup>33</sup> This is important because the age of consent law changes the rights and consequences of minors of the same age in different jurisdictions.<sup>34</sup>

Age of consent laws in the U.S. varies by state,<sup>35</sup> based on age requirements and legal implications,<sup>36</sup> with some states allowing minors to consent to individuals within a certain age range, while other states completely prohibit minors to consent to any sexual activity prior to reaching the age of majority.<sup>37</sup> The significant variance in state laws is curious, as there is no national consensus on what defines a legal “adult” in terms of consenting to sexual intercourse.<sup>38</sup> Additionally, there is a large discrepancy between the effects of the law regarding age of consent, and crossing a state line can make a considerable difference for individuals in this way.<sup>39</sup> Moreover, these discrepancies can be consequential for minors and the rights that they are afforded in the state in which they are present.<sup>40</sup>

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<sup>30</sup> See, e.g., *From 11 to 21: Ages of Consent Around the World*, THE WEEK, (Mar. 6, 2018), <http://www.theweek.co.uk/92121/ages-of-consent-around-the-world> (indicating different ages of consent around the world; for example, twelve in the Philippines, and eighteen in California).

<sup>31</sup> See U.S. DEP’T OF HEALTH & HUMAN SERV., *supra* note 22.

<sup>32</sup> Riley Morgan & Nick Baker, *What Are the Ages of Sexual Consent Around the World?*, SBS NEWS (Mar. 12, 2018), <https://www.sbs.com.au/news/what-are-the-ages-of-sexual-consent-around-the-world>.

<sup>33</sup> See, e.g., 45 C.F.R. 46.402 (stating that the law applies to children and the definition of children changes based on the age of consent per jurisdiction).

<sup>34</sup> *Id.*

<sup>35</sup> “State” in this paper refers to the fifty states in the United States, plus the District of Columbia, unless otherwise specified.

<sup>36</sup> Asehli Howe, *Legal Age of Consent in All 50 States*, SURVIVOR ALLIANCE (Nov. 8, 2017), <https://www.thesurvivoralliance.com/forallies/legal-age-consent-50-states/>. Ages of consent in different U.S. states range from sixteen to eighteen, with thirty-one states having an age of sixteen, eight states having an age of seventeen, and twelve states having an age of eighteen. *Id.* See also U.S. DEP’T OF HEALTH & HUMAN SERV., *supra* note 22.

<sup>37</sup> *Id.* (indicating, for example, that some states have different penalties for certain ages, and some utilize a method of an age differential—the difference between the defendant’s age and the victim’s age—in determining culpability or sentencing guidelines).

<sup>38</sup> See *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684–85 (1977) (acknowledging that the State/courts have had a wider authority to regulate the activities of children, under the law, when this is not the case for adults).

<sup>39</sup> Howe, *supra* note 36.

<sup>40</sup> *Id.*

Of course, this naturally happens with any area of law in which the states are given discretion, but it is certainly noteworthy in the discussion of a minor's personal bodily autonomy.

According to *Carey v. Population Services International*, minors may not be prevented from accessing birth control.<sup>41</sup> Furthermore, no state has a blanket requirement that minors must inform or confer with parents about contraceptive use, and minors can always access condoms, which are another method of pregnancy prevention.<sup>42</sup> This brought minors' rights of reproductive autonomy more in line with adults—here, in the context of contraceptives.<sup>43</sup> Thus, minors have the personal bodily autonomy right to legally engage in and consent to sexual conduct after the age of majority, and to legally use contraception and other pregnancy prevention methods.<sup>44</sup>

State laws also vary widely regarding minors and their rights to an abortion. Some states require parental notification, meaning a parent must be notified prior to the abortion, while others require parental consent, meaning that a parent must consent to the minor's abortion.<sup>45</sup> In addition, some states require both notification and consent from at least one parent.<sup>46</sup> Moreover, some states go even further to require both parents to give permission, which a judge may excuse.<sup>47</sup> Most states require either parental permission or notification before a doctor is legally allowed to perform an abortion.<sup>48</sup> Twenty-seven states have laws in which the age of consent is lower than the age at which a minor no longer needs parental permission to

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<sup>41</sup> *Carey*, 431 U.S. at 684–85.

<sup>42</sup> *See id.* at 681, 693 (citing *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976)).

<sup>43</sup> *Id.* at 684–85.

<sup>44</sup> *See id.*

<sup>45</sup> *See Abortion and Parental Involvement Laws*, ADVOCATES FOR YOUTH (Sept. 5, 2019), <https://advocatesforyouth.org/resources/fact-sheets/abortion-and-parental-involvement-laws>.

<sup>46</sup> *Parental Consent and Notification Laws*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/teens/preventing-pregnancy-stds/parental-consent-and-notification-laws> (last visited Sept. 7, 2019) Specifically, the states with these requirements are Oklahoma, Texas, Utah, Virginia, and Wyoming. *Id.*

<sup>47</sup> *Id.* Specifically, the states with these requirements are Kansas, Minnesota, Mississippi, and North Dakota. *Id.* If the parents are divorced, then only one of them would be likely required to give permission. *Id.*

<sup>48</sup> *Id.* Specifically, the states with these requirements are Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. *Id.*

obtain an abortion.<sup>49</sup>

All state laws are required to have some safeguard for minors with a compelling reason not to obtain parental permission prior to an abortion.<sup>50</sup> For example, most states have an avenue—called a judicial bypass—where a minor may prove to a judge her reasons for not obtaining her parents’ permission for an abortion, and a judge may grant her some form of waiver for the requirement.<sup>51</sup> Additionally, Maryland allows a doctor to waive the parental-permission requirement.<sup>52</sup> These safeguards have previously been considered to be sufficient protections for minors who have compelling reasons not to obtain permission from their parents prior to an abortion.<sup>53</sup>

## 2. Minors’ Rights: Privacy in Sexual and Reproductive Decisions

“Each child is an individual person, not merely an adjunct to the adult world; children are neither supplements to the lives of adults nor accessories to surrounding adults. Children are not merely passive recipients of environmental and parental impact.”<sup>54</sup> Examining the applicable case history shows that the Supreme Court’s strongest interest is in protecting personal and bodily autonomy of an individual, such as contraception and abortion access.<sup>55</sup> From a constitutional standpoint, the individual seeking to exercise this fundamental right is a secondary concern.<sup>56</sup> Moreover, subsequent decisions have complicated this, in cases in which the Court has

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<sup>49</sup> *Id.* Specifically, the states with lower ages for which parental notification or consent is required than the required ages for consent to sexual intercourse are Alabama, Arkansas, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, and West Virginia. *Id.*

<sup>50</sup> *Ohio v. Akron Ctr. For Reprod. Health*, 497 U.S. 502, 510-511 (1990) (citing *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976)).

<sup>51</sup> *PLANNED PARENTHOOD*, *supra* note 46.

<sup>52</sup> *Id.* The judicial bypass allows for a minor to go through some form of an “appeal” process to make a showing that she is sufficiently mature to independently decide to get an abortion. *Id.* This procedure often requires the minor to petition to a judge and speak in person, giving evidence or reasons as to why she should not seek the notification or consent of a parent. *Id.*

<sup>53</sup> *See Planned Parenthood v. Casey*, 505 U.S. 833, 899-900 (1992).

<sup>54</sup> Kohm & Lawrence, *supra* note 28, at 369.

<sup>55</sup> *See, e.g., Roe v. Wade*, 410 U.S. 113, 155 (1973) (explaining that the right to privacy, including the right to choose an abortion, is “fundamental”).

<sup>56</sup> Kohm & Lawrence, *supra* note 28, at 370-74 (discussing *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), *Bellotti v. Baird*, 443 U.S. 622 (1979), *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977), *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)).

upheld the implementation of parental consent and notification laws when these laws are sufficiently narrowly tailored to allow a minor to bypass the parental consent or notification requirement.<sup>57</sup> This underscores the Supreme Court's willingness to restrict the fundamental right to privacy when it comes to abortion, particularly when it comes to minors seeking abortions.<sup>58</sup>

While differing in subject matter, *In re Lori M.* is persuasive in its language and application of the constitutional rights of minors.<sup>59</sup> In this case, a New York court held that a minor has the right to decide and express one's own sexual orientation without parental interference.<sup>60</sup> This right for minors somewhat mirrors the constitutional rights for adults to engage in consensual sexual behavior (assuming the parties are acting lawfully).<sup>61</sup> *In re Lori M.* extends an important right to minors—exemplifying that there is a point at which they attain the legal capacity to decide their own sexual choices, including their sexual preferences—while still not being considered an “adult” for other purposes such as voting.<sup>62</sup> The holding of *In re Lori M.* suggests that decisions about personal and bodily autonomy do not depend upon an age of majority, but rather, something much more fundamental.

In addition, states' increased willingness to implement “sex-positive,” rather than “abstinence-only,” sexual education programs, the increased recognition of these programs' importance, as well as the state and societal interest in an educated public, indicate the emerging recognition of minors' bodily integrity.<sup>63</sup> State laws also recognize the bodily autonomy of minors in age of consent laws, as most states give sixteen- and seventeen-year-olds the legal right to consent and engage in sexual conduct.<sup>64</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> See generally *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>59</sup> *In re Lori M.*, 130 Misc. 2d 493 (1985).

<sup>60</sup> *Id.* at 495–96 (1985). *In re Lori M.* is not about abortion, but rather it is about an adolescent female who would like her sexual orientation covered under her right to privacy, after her mother objected to her association with a lesbian who was several years her senior. *Id.* at 493–94. The court upheld her right to decide and express her own sexual orientation. *Id.* at 495–97.

<sup>61</sup> Compare *In re Lori M.*, 130 Misc. 2d 493 (upholding right to decide and express own sexual orientation), with *Lawrence v. Texas*, 539 U.S. 558 (2003) (upholding right to privacy in private consensual homosexual activity).

<sup>62</sup> See U.S. CONST. amend XXVI § 1. This amendment provides that the age at which an individual obtains the legal right to vote in the United States is eighteen. *Id.*

<sup>63</sup> See SAMUEL DAVIS, ELIZABETH SCOTT, & WALTER WADLINGTON, *CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS* 1–2, 39–42 (3d ed. 2004).

<sup>64</sup> Howe, *supra* note 36.

Fittingly, the Supreme Court's decisions have held that "a mature child's right to make her own decision regarding abortion and contraception is constitutionally protected from state or parental interference."<sup>65</sup> A blanket parental consent law violates the constitutional rights of minors, given that constitutional "rights do not suddenly arise at the age of majority;"<sup>66</sup> and "any parental interest in the pregnancy [does] not outweigh the minor's right to privacy."<sup>67</sup> A minor's right to privacy gives them the right to make specific decisions without outside interference.<sup>68</sup> A minor's right to privacy was "again explicitly recognized and extended to include decisions by minors regarding procreation."<sup>69</sup> In order to survive constitutional review, state restrictions must "serve a significant state interest that is not present in the case of an adult,"<sup>70</sup> and in the *Carey* and *Danforth* cases, "no such interest justified state intervention in a minor's decision to have an abortion or obtain contraception."<sup>71</sup> Moreover, the Supreme Court has affirmed that the most important interest in a minor's pregnancy and the termination of that pregnancy is, above all, her own: "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."<sup>72</sup> This affirms the idea that minors, while retaining fewer and more limited rights than adults, still have an important right to privacy in their own personal decisions.<sup>73</sup>

### 3. The Supreme Court Upholds Limits on Minors' Abortion Rights

The Supreme Court in *Roe v. Wade* held that while a fundamental right to privacy—which encompasses the right to obtain an abortion—exists, states may restrict that right at the point in which they are deemed to have a legitimate interest in the pregnancy.<sup>74</sup> Building on *Roe*'s precedent, *Planned*

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<sup>65</sup> *In re Lori M.*, 130 Misc. 2d at 495 (discussing *Carey v. Populations Servs. Int'l*, 431 U.S. 678 (1977)).

<sup>66</sup> *Id.* at 494 (discussing *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)).

<sup>67</sup> *Id.* at 494 (discussing *Danforth*, 428 U.S. at 75).

<sup>68</sup> *Id.* at 495 (discussing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)).

<sup>69</sup> *Id.* (discussing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 (1977)).

<sup>70</sup> *Id.* (discussing *Carey*, 431 U.S. at 694).

<sup>71</sup> *Id.* (discussing *Carey*, 431 U.S. 678).

<sup>72</sup> *Danforth*, 428 U.S. at 75.

<sup>73</sup> *Id.*

<sup>74</sup> *Roe v. Wade*, 410 U.S. 113, 155 (1973).

*Parenthood v. Casey* considered the issue of abortion rights for minors.<sup>75</sup> In *Casey*, abortion clinics and a physician sued the state of Pennsylvania over the passage of the Pennsylvania Abortion Control Act of 1982.<sup>76</sup> The issue relevant to minors in the case was the Pennsylvania Abortion Control Act of 1982 specified that minors must get the informed consent of their parents, with a judicial bypass exception.<sup>77</sup>

The Supreme Court in *Casey* analyzed the case under the “undue burden” standard—deviating from *Roe*’s trimester framework that prohibits abortion restrictions during the first trimester, to framework that prohibits abortion restrictions that pose an “undue burden” on a woman seeking an abortion.<sup>78</sup> In other words, an abortion restriction is unconstitutional only if the purpose or effect of the law is to place a substantial obstacle in the path of a woman seeking an abortion.<sup>79</sup> The Court found that parental consent for minors was not an undue burden, therefore upholding the provision in Pennsylvania Abortion Control Act of 1982.<sup>80</sup> Thus, *Casey* held that third-party involvement in a minor’s decision on whether or not to obtain an abortion was constitutional.

One of the major cases regarding parental consent laws for abortion is *Planned Parenthood v. Danforth*.<sup>81</sup> In this case, the Court struck down a Missouri provision that required minors to obtain written parental consent within the first twelve weeks of pregnancy for abortions.<sup>82</sup> The Court held that the state may not institute a blanket provision mandating parental consent to minors seeking abortions.<sup>83</sup> The Court noted that “[a]ny independent interest the parent may have in 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.”<sup>84</sup> Recognizing

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<sup>75</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 872–74 (1992).

<sup>76</sup> *Id.* at 844.

<sup>77</sup> *Id.* In *Planned Parenthood v. Casey*, the plaintiffs raised five issues: (1) women seeking abortions must give informed consent; (2) women must receive state-published information prior to the abortion; (3) women must wait 24 hours after receiving the information before undergoing the abortion; (4) minors must get the informed consent of their parents, with a judicial bypass exception; and (5) married women must show the notification of their husbands, with a potential exemption. *Id.*

<sup>78</sup> *Id.* at 874–75.

<sup>79</sup> *Id.* at 876.

<sup>80</sup> *Id.* at 899–900.

<sup>81</sup> *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

<sup>82</sup> *Id.* at 55.

<sup>83</sup> *Id.* at 74.

<sup>84</sup> *Id.* at 75.

that requiring special consent from a parent effectively acts as an “absolute veto” on a minor’s abortion decision, the Court found that there was no sufficient justification put forth for restricting a minor in this manner.<sup>85</sup> While later qualified by *Casey*,<sup>86</sup> *Danforth* illustrates the importance of abortion rights for minors.<sup>87</sup> Moreover, the Court recognized the validity of the idea that a minor who is mature enough to become pregnant should also be mature enough to consent to an abortion.<sup>88</sup>

*Bellotti v. Baird (II)* was another case that challenged a parental consent law for abortion.<sup>89</sup> The Court in *Bellotti II* gave three reasons for refusing to recognize that the constitutional rights of a child were equivalent to those of an adult: “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”<sup>90</sup> However, the Court in this case also recognized that “[a] child, merely on account of his minority, is not beyond the protection of the Constitution,”<sup>91</sup> and forcing a girl to become a mother is “exceptionally burdensome for a minor.”<sup>92</sup> The *Bellotti II* decision narrowed *Danforth*, allowing state regulations requiring parental notifications or consent as long as additional protection for the minor exists, thus preventing the parents from having absolute veto power on the abortion over the minors.<sup>93</sup> Nonetheless, this decision further showcased the Court’s recognition of a minor’s individual autonomy as distinctly separate from her parents.<sup>94</sup>

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<sup>85</sup> *Id.* (rejecting the suggestion that justification would be protecting the family unit and parental authority, as there is much to suggest that absolute power would further fracture the family structure at a time when it is already fragile).

<sup>86</sup> Compare *id.* at 75 (suggesting that an independent interest of a parent for a minor in having an abortion is no more important than that of the daughter), with *Casey*, 505 U.S. at 899–900 (upholding a parental consent law for minors wishing to obtain an abortion provided that the state allow for some sort of bypass for this requirement).

<sup>87</sup> See *Planned Parenthood v. Danforth*, 428 U.S. 52, 74–75 (1976).

<sup>88</sup> See *id.* at 75.

<sup>89</sup> *Bellotti v. Baird*, 443 U.S. 622, 624 (1979).

<sup>90</sup> *Id.* at 634.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 642.

<sup>93</sup> *Id.* at 642–45 (citing *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976)).

<sup>94</sup> *Id.* at 637–39.

### III. MINORS OLD ENOUGH FOR SEXUAL FREEDOM SHOULD HAVE FULL REPRODUCTIVE RIGHTS

*Bellotti* raises fundamental questions about the legitimacy of the state's interest in protecting minors. The Court finds that "[s]tates validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences."<sup>95</sup> The Court continued, "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."<sup>96</sup> However, this discussion leads to the following inquiry: if minors are deemed old enough to use contraception to engage in sexual intercourse, and subsequently give birth, and presumably raise a baby, then why are they not deemed old enough to independently have an abortion? Why is an abortion being characterized as more "detrimental" than becoming a parent as a minor? Adults are presumed to have experience, perspective, and judgment to effectively decide if their children have abortions but their daughters are presumed to have lacked these same skills.<sup>97</sup> Yet, these young mothers, who supposedly lack the decision-making ability to obtain an abortion independently because of their minority age, are then responsible for raising a child.<sup>98</sup>

The distinction between the age of consent and the age at which a woman can decide to have an abortion without third-party interference is incoherent at best. If minors are of sufficient age to independently engage in sexual activity, the right to privacy and bodily autonomy—including the right to independently choose to utilize contraception and the right to choose to have an abortion without third-party interference—should necessarily follow from that principle. It is inconsistent to explicitly extend the right of independent sexual freedom without also extending the right to independently decide the outcome of that freedom, including having an abortion.

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<sup>95</sup> *Id.* at 635.

<sup>96</sup> *Id.*

<sup>97</sup> *See, e.g.* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (upholding state-mandated parental involvement in a minor's abortion, while striking down, for example, a married woman's husband's mandatory involvement in the decision).

<sup>98</sup> *Id.*

## A. BODILY AUTONOMY &amp; THE FUNDAMENTAL RIGHT TO PRIVACY

Individual bodily autonomy is at the core of the fundamental right to privacy that has been reaffirmed time and again by the Supreme Court. In *Lawrence v. Texas* the Supreme Court explicitly articulated what has long been strongly implied by its jurisprudence in privacy cases: the right to make personal bodily choices without governmental intrusion is essential to the autonomy of the individual and is a fundamental liberty right protected by the U.S. Constitution.<sup>99</sup> The Court declared that “[f]reedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>100</sup>

*Lawrence* explicitly affirmed the right to engage in private sexual conduct, which was inferred from the right to personal bodily autonomy prior to the decision.<sup>101</sup> By explicitly affirming this right, the Court extended the right to engage in private sexual conduct to include individuals engaging in homosexual sexual conduct as these individuals are “entitled to respect for their private lives.”<sup>102</sup> Thus, the Court determined that states “cannot demean [homosexual individuals’] existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention from the government.”<sup>103</sup> The Court was clear that this was not merely a right to homosexual conduct, but rather, more generally, the right to make private, intimate decisions such as with whom to engage in private sexual conduct with consenting adults.<sup>104</sup> Thus, *Lawrence* necessarily affirmed the right of legally consenting individuals to engage in private sexual conduct based on their right to privacy and personal autonomy.<sup>105</sup>

In fact, this was not the first time the right to privacy was articulated by the Supreme Court—the opinion begins with a case law discussion of the groundbreaking privacy case *Griswold v. Connecticut*.<sup>106</sup> The Court in *Griswold* outlined that the right to privacy, while not explicitly enumerated

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<sup>99</sup> *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

<sup>100</sup> *Id.* at 562.

<sup>101</sup> *See Id.*

<sup>102</sup> *Id.* at 578.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 574.

<sup>105</sup> *See id.*

<sup>106</sup> *Id.* at 564–65.

in the Constitution, is logically inferred from multiple amendments in the Bill of Rights because specific Constitutional rights have “penumbras, formed by emanations from those guarantees that give them life and substance” which must be protected in order to guarantee the enumerated rights.<sup>107</sup> The Court noted that in addition to the enumeration of certain rights in the Constitution, such as the First Amendment right of association, the Third Amendment right prohibiting mandatory quartering of soldiers, and the Ninth Amendment right to protection of the rights of the people, the Constitution also contains implied constitutional rights under the penumbra of these enumerated rights.<sup>108</sup> For example, the Fourth and Fifth Amendment’s prohibitions against unreasonable searches and seizures and self-incrimination strongly imply a privacy protection.<sup>109</sup> The legitimization of the right to privacy was an integral aspect of *Griswold*, where the Court found a broad privacy right in disallowing states to ban access to contraceptives for married couples.<sup>110</sup> In fact, the Court found the right of privacy within the marriage and familial sphere to be “older than the bill of rights—older than our political parties, older than our school system.”<sup>111</sup>

While departing from the majority in their reasoning, the concurring opinions in this case all expressed that the right to privacy is fundamental.<sup>112</sup> In his concurring opinion, Justice Goldberg recognized that “the right of privacy is a fundamental personal right, emanating ‘from the totality of the constitutional scheme under which we live.’”<sup>113</sup> Justice Harlan’s concurrence found the statute at issue in *Griswold* to violate “basic values ‘implicit in the concept of ordered liberty’” and the due process clause of the Fourteenth Amendment.<sup>114</sup> Justice White also thought that the Fourteenth Amendment applied in *Griswold*, and wrote that the law “as applied to married couples deprives them of ‘liberty’ without due process of law.”<sup>115</sup> The fact that concurring Justices found some sort of right to privacy or liberty within or in the penumbra of the Constitution is significant. The agreement by the majority and the concurrence shows that

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<sup>107</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>108</sup> *Id.* See also U.S. CONST. amend. I, U.S. CONST. amend. III, U.S. CONST. amend. IX.

<sup>109</sup> *Griswold*, 381 U.S. at 484–85.

<sup>110</sup> *Id.* at 485–86.

<sup>111</sup> *Id.* at 486.

<sup>112</sup> See *id.* at 499, 519, 530.

<sup>113</sup> *Id.* at 494.

<sup>114</sup> *Id.* at 500.

<sup>115</sup> *Id.* at 502.

the Court understood the right as one of privacy, despite not being enumerated in the Constitution, indicating that the Court views privacy as a fundamental right.<sup>116</sup> Moreover, the right to privacy has been reaffirmed numerous times over several decades since this decision, which further indicates that the right to privacy is fundamental.<sup>117</sup>

The Court interpreted the right to abortion under this right to privacy as a fundamental right framework in *Roe v. Wade*. Prior to *Roe*, Texas had passed a law prohibiting and criminalizing abortions with the narrow exception in situations in which a doctor deemed that it was necessary to save the life of the mother.<sup>118</sup> Jane Roe, an unmarried pregnant woman in Dallas County, Texas, brought a lawsuit asserting that the Texas criminal abortion statutes were facially unconstitutional because they abridged her right of personal privacy under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.<sup>119</sup>

In *Roe v. Wade*, the Court found that the state's proclaimed interest in protecting prenatal life to be a reasonable consideration in establishing that a state might have some interest in protecting *potential* life.<sup>120</sup> To clarify, however, the Court rejected the idea that a fetus is a person, and therefore that a fetus has the Fourteenth Amendment rights of a person.<sup>121</sup> The Court articulated that a fetus has no personhood prior to actual birth.<sup>122</sup> The Court

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<sup>116</sup> *Id.* at 521, 527.

<sup>117</sup> The right has also been upheld for unmarried women in *Eisenstadt v. Baird* showing that because the right of privacy is not limited to individuals who are married, thus the right is not based on marital status, but is rather a broad privacy right to use contraceptives. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). *Carey v. Populations Services International* also reaffirmed this right in holding that decisions on childrearing are private and restrictions on distribution of contraceptives are not allowed if they place a significant burden on those wanting to obtain them. 431 U.S. 678, 694 (1977). Moreover, the statute that anyone under sixteen could not obtain contraception was struck down because the Court found that there was no good reason to deny individuals contraception regardless of age. *Id.* The Court did not find persuasive the idea that disallowing contraception from those under sixteen would discourage those individuals from engaging in sexual intercourse. *Id.* The court recognized the value of contraceptives and their importance of availability to individuals regardless of age, and regardless of an age of consent law. *Id.* Thus, a blanket ban on minor contraceptive use is unconstitutional. *See also Minors' Access to Contraceptive Services*, GUTTMACHER INSTITUTE, <https://www.guttmacher.org/state-policy/explore/minors-access-contraceptive-services> (last visited Feb. 14, 2019) (noting that no state has a blanket prohibition on minors independently, without parental consent, accessing contraceptives).

<sup>118</sup> *Roe v. Wade*, 410 U.S. 113, 117–18 (1973).

<sup>119</sup> *Id.* at 120.

<sup>120</sup> *Id.* at 150.

<sup>121</sup> *Id.* at 158.

<sup>122</sup> *Id.* at 156–57.

recognized that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>123</sup> The Court further found that it is clearly detrimental to deny a woman this choice altogether, and to do so may cause, among other problems, medically diagnosable harm, distress, imminent psychological harm, and/or negative consequences to mental and physical health.<sup>124</sup>

However, the Court found that the right to privacy in obtaining an abortion is not absolute and must be balanced against the state's interest.<sup>125</sup> Despite this finding, the Court acknowledged the right to privacy in obtaining an abortion as "fundamental" and, thus, limitations on this right could only be placed with a "compelling state interest."<sup>126</sup> In balancing the state's interest with the fundamental right to privacy, the Court decided that after the first trimester the state's interest protecting the viability of the fetus overcame the personal interest to subject the individuals to state regulation.<sup>127</sup> Thus, the state could not impose regulations prior to the first trimester without infringing upon a woman's right to privacy.<sup>128</sup>

B. MINORS' PRIVACY RIGHTS (AND LACK THEREOF) EXEMPLIFY THE  
INCONSISTENCY OF ALLOWING SEXUAL INTERCOURSE, CONTRACEPTIVES,  
AND BIRTH, WHILE EXCLUDING ABORTION

The reason for emphasizing the right to privacy is that the aggregate of the right to sexual autonomy, the right to birth control, and the right to abortion access creates a full picture of the individual liberty rights that a person in the United States is entitled to and protected by under the U.S. Constitution. The framework established by *Griswold*, *Roe*, and *Lawrence* shows that privacy is an integral and fundamental right of individuals.<sup>129</sup> Importantly, it must be qualified that this framework specifically applies to *adults* in the United States.<sup>130</sup> For minors, this framework only extends the right to sexual autonomy and the right to birth control, and does not include

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<sup>123</sup> *Id.* at 153.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 154.

<sup>126</sup> *Id.* at 155.

<sup>127</sup> *Id.* at 163.

<sup>128</sup> *Id.*

<sup>129</sup> See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003); *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>130</sup> See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003); *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

the right to abortion access or independent decision-making in terms of abortion.<sup>131</sup>

These rights are significant to both adults and minors because they give individuals the freedom of choice when it comes to some of the most personal and intimate decisions in life. The freedom to associate with, fraternize with, and engage in sexual relations with other consenting adults of one's choice is crucial to individual liberty regardless of race<sup>132</sup> or gender<sup>133</sup>. Furthermore, the right to control and prevent one's own conception of a potential fetus is another important right in the scheme of privacy. The choice of whether or not to birth children is a significant life choice.<sup>134</sup> Moreover, in close connection with the contraception right is the right to terminate a pregnancy, which also empowers individuals to choose whether or not to bear children.<sup>135</sup> The rights to consent to sexual intercourse, to prevent conception using birth control, and to terminate a pregnancy are all integral to the individuality and personal autonomy that people highly value.<sup>136</sup>

#### IV. MINORS SEEKING ABORTIONS SHOULD NOT NEED TO NOTIFY OR GET CONSENT FROM THEIR PARENTS

The apparent purpose of parental notification and parental consent laws is to encourage parental involvement in minors' decisions due to perceived lack of maturity.<sup>137</sup> While most teenagers do, in fact, involve their parents in the decision, "laws preventing teens from obtaining health care unless they talk to a parent put their health and safety at risk and do not

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<sup>131</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 899–900 (1992).

<sup>132</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down a state ban on interracial marriage).

<sup>133</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>134</sup> See, e.g., Peter Hoffenaar et al, *The Impact of Having a Baby on the Level and Content of Women's Well-Being*, 97 SOC. INDICATORS RES. 279 (2010).

<sup>135</sup> See Brief of Amici Curiae American College of Obstetricians and Gynecologists et al. in Support of the Government, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).

<sup>136</sup> *NPR/PBS NewsHour/Marist Poll Results: The Abortion Debate in the United States*, MARIST POLL, [http://maristpoll.marist.edu/wp-content/uploads/2019/06/NPR\\_PBS-NewsHour\\_Marist-Poll\\_USA-NOS-and-Tables-on-Abortion\\_1906051428\\_FINAL.pdf](http://maristpoll.marist.edu/wp-content/uploads/2019/06/NPR_PBS-NewsHour_Marist-Poll_USA-NOS-and-Tables-on-Abortion_1906051428_FINAL.pdf) (last visited Feb. 18, 2020) (indicating that 77% of Americans do not want *Roe v. Wade* to be overturned).

<sup>137</sup> See *Bellotti v. Baird*, 443 U.S. 622, 643–44 (1979); see also Melody G. Embree & Tracy A. Dobson, *Parental Involvement in Adolescent Abortion Decisions: A Legal and Psychological Critique*, 10 L. & INEQ. 1, 65–75 (1992) (discussing studies that show minors generally understand their abortion decisions).

increase family communication.”<sup>138</sup> Thus, although the purported intention behind the parental notification and parental consent laws is the protection of minors, these laws do not seem to help in the ultimate safeguarding of the minor.<sup>139</sup>

#### A. THESE LAWS CAN PUT ADOLESCENTS IN DANGER

In *Casey*, the Court declared the spousal notification provision unconstitutional, writing a detailed discussion including multiple reasons including domestic violence,<sup>140</sup> pointing out that “victims of spousal sexual assault are extremely reluctant to report the abuse to the government; hence, a great many spousal rape victims will not be exempt from the notification requirement imposed.”<sup>141</sup> Meanwhile, the Court upheld the parental consent requirement of the state law, writing just three paragraphs and citing to four cases that they believed sufficiently explained their reasoning—a sharp contrast to the lengthy discussion of the spousal notification provision, which had cited several concerns about the impacts of the provision.<sup>142</sup> Thus, the Court found that a parental *consent* provision was not an undue burden, whereas the spousal *notification* provision was an undue burden.

Notably, the Court mentioned nothing about sexual assault or violence concerns in the section about parental consent,<sup>143</sup> despite the fact that the spousal notification and parental consent provisions both mandated involving a third party in the abortion decision.<sup>144</sup> It is worth noting that the Supreme Court did not consider the possibility that a minor could also be a victim of domestic violence and/or sexual assault, and the perpetrator could be her own parent(s), which would potentially put her in the same danger as a woman with an abusive husband, which the court *did* consider in its decision on spousal notification.<sup>145</sup>

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<sup>138</sup> *Laws Restricting Teenagers' Access to Abortion*, ACLU, <https://www.aclu.org/other/laws-restricting-teenagers-access-abortion> (last visited Feb 14, 2019).

<sup>139</sup> *See id.* (discussing the detrimental health impacts of mandating minors discuss their abortion decisions with their parents, such as delaying abortions, making them riskier, and forcing minors to continue pregnancies against their will, causing financial, emotional, educational, mental, and physical suffering).

<sup>140</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 888–99 (1992).

<sup>141</sup> *Id.* at 893.

<sup>142</sup> *Id.* at 899–900.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 844.

<sup>145</sup> *Id.* at 888–99.

Sexual abuse of children by parents is more common than these states likely considered in passing these abortion laws. Between 2009 and 2013, Child Protective Services verified or found strong evidence to indicate that, “63,000 children a year were victims of sexual abuse . . .”<sup>146</sup> and “80% of perpetrators were a parent.”<sup>147</sup> This should raise questions about whether or not minors should need parental notification or consent in order to obtain an abortion—perhaps not all parents possess the presumed good judgment and intentions implied behind these laws.<sup>148</sup> If a parent abuses their child and that abuse results in pregnancy, the very last thing that the child should need to do is notify her abuser that she intends to end the pregnancy or ask for her abuser’s permission to terminate that pregnancy.<sup>149</sup> While the mandated judicial bypass protection might help with this problem, the fact that this girl would need to go to a judge and disclose her abuse is far too large a burden to impose upon her.<sup>150</sup> An abused young girl likely has much to fear from approaching an authority figure in such a situation.<sup>151</sup> Clearly, there is a consideration to be made here for these numerous children, for whom the law should accord significant governmental protection, as it does in other areas.<sup>152</sup> Instead, the majority of U.S. states seem to have failed to consider these individuals, perhaps assuming that a judge would be understanding, but not giving as much weight to the impact on the abused girl of seeking this measure in the first place.<sup>153</sup>

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<sup>146</sup> *Children and Teens: Statistics*, RAPE, ABUSE & INCEST NAT’L NETWORK, <https://www.rainn.org/statistics/children-and-teens> (last visited Feb. 14, 2019) (citing U.S. DEP’T OF HEALTH AND HUMAN SERVS. ET AL., CHILD MALTREATMENT SURVEY 2016 (2018)).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *See, e.g.* Padma Bhate-Deosthali & Sangeeta Rege, *Denial of Safe Abortion to Survivors of Rape in India*, HEALTH & HUM. RTS. (2019) (finding enormous damage inflicted on victims by misinterpretation of abortion and rape laws).

<sup>150</sup> *See, e.g.*, ACLU, YOUNG WOMEN’S STORIES, [https://www.aclu-il.org/sites/default/files/field\\_documents/mandatory\\_parental\\_involvement\\_laws\\_can\\_impose\\_serious\\_and\\_irreversible\\_harm.pdf](https://www.aclu-il.org/sites/default/files/field_documents/mandatory_parental_involvement_laws_can_impose_serious_and_irreversible_harm.pdf) (last visited Feb. 20, 2020) (discussing the thirteen-year-old who was raped by her mother’s boyfriend; too afraid to speak in front of a judge for an abortion, she told her mother, who called her a “slut” and threw her out of the house).

<sup>151</sup> *See id.*

<sup>152</sup> A simple example is the existence of state-run foster care systems, to which children may be referred in cases of suspected abuse or neglect. *See What Is Foster Care?*, ANNIE E. CASEY FOUND. (Jun. 6, 2019), <https://www.aecf.org/blog/what-is-foster-care>.

<sup>153</sup> *Id.*

B. MINORS OLD ENOUGH TO HAVE SEX SHOULD BE INDEPENDENTLY  
ABLE TO GET ABORTIONS

Anyone old enough to legally engage in sexual activity should be able to deal with the consequences. Minors under eighteen, but at or past the age of consent in their states, can legally become parents at young ages without their parents' consent, but cannot make the decision to terminate a pregnancy without parental consent in more than half of the states. This tells a young woman that she is old enough to carry the pregnancy to term and become a teen parent, but she is insufficiently mature to terminate the pregnancy.

It is crucial for anyone who is of legal age to consent to sex to be able to make decisions about their bodies to the same extent accorded to the rights of their slightly older "adult" counterparts. The rights of adults to bodily autonomy—including the right to freely engage in consensual, legal sexual activity, the right to utilize contraceptives to prevent pregnancies resulting from this sexual decision, and the right to make decisions about continuing or ending pregnancies (typically a result of this freedom of sexual choice)—has been consistently upheld under the constitutional right to privacy. These rights have been continually reaffirmed as creating a fundamental right to privacy that is necessary to individual freedom and protection from unwarranted governmental intrusion.

Adults have a three-pronged right to sexual freedom, including the right to choose legally consenting sexual partners, the right to access and use birth control regardless of marital status, and the right to be free from regulations that unduly burden them from obtaining an abortion of unviable fetus. These rights have become essential to the overall right to sexual freedom, bodily autonomy, and individual privacy—and have been consistently upheld by the Supreme Court.<sup>154</sup>

Despite these essential rights, thirty-eight states have laws involving parental consent for minors seeking abortions.<sup>155</sup> The age at which a minor must obtain parental consent is higher than the age of consent in twenty-seven of these states.<sup>156</sup> This means that in a state like Illinois, a minor aged

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<sup>154</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 574 (2003); *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>155</sup> See *Parental Consent and Notification Laws*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/teens/preventing-pregnancy-stds/parental-consent-and-notification-laws> (last visited Sept. 7, 2019).

<sup>156</sup> *Id.* See also *Howe*, *supra* note 36.

seventeen may legally consent to sexual activity but may not obtain an abortion without notification.<sup>157</sup> This notification—which may be to a parent, stepparent, or grandparent unless a judge excuses her from the requirement—must also be made within forty-eight hours prior to obtaining the abortion.<sup>158</sup> Regulations like this essentially gives the parent the right to the minor’s bodily autonomy despite becoming pregnant due to legally engaging in consensual sexual activity. In other words, the parents in these twenty-seven states who do not wish that their minor child obtain an abortion, have the ability to force the minor to carry on with a pregnancy. This removes bodily autonomy from the minors, despite the fact that the state has decided that seventeen-year-olds are old enough to decide to engage in sexual activity. The state also may not prevent seventeen-year-olds from obtaining contraception to prevent pregnancy. However, this may, in effect, prevent pregnant seventeen-year-olds from obtaining abortions by giving parents the information that their daughters have sought an abortion—the parents then can prevent them from attending their abortion appointment. Thus, the parents can still infringe on their bodily autonomy by removing that choice.

The negative consequences of mandatory parent notification are illustrated in the following situation:

One of the very first teens who was forced to notify a parent under Colorado’s parental notice law was kicked out of her home when her mother learned of the pregnancy. Her mother took the money the teen had saved for the abortion and threatened to disown her if she went through with the procedure. When the teen called the clinic to reschedule her appointment, she was living in a friend’s car. Far from strengthening her family and helping her make an informed decision, the law ruined her relationship with her mother and left her homeless with an unwanted pregnancy.<sup>159</sup>

This story is not uncommon.<sup>160</sup> Even with a judicial bypass, negative consequences can result from simply attending a court hearing—such as the

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<sup>157</sup> Allie Carter, *Understanding the Illinois Parental Notice of Abortion Act*, ACLU (Nov. 13, 2013), <https://www.aclu-il.org/en/news/understanding-illinois-parental-notice-abortion-act>.

<sup>158</sup> *Id.*

<sup>159</sup> ACLU, *Laws Restricting Teenagers’ Access to Abortion*, *supra* note 138.

<sup>160</sup> *Id.* See also ACLU, *YOUNG WOMEN’S STORIES*, [https://www.aclu-il.org/sites/default/files/field\\_documents/mandatory\\_parental\\_involvement\\_laws\\_can\\_impose\\_serious\\_and\\_irreversible\\_harm.pdf](https://www.aclu-il.org/sites/default/files/field_documents/mandatory_parental_involvement_laws_can_impose_serious_and_irreversible_harm.pdf) (last visited Feb. 27, 2020).

Massachusetts teenager whose godmother spotted her in the court, or the anti-abortion activists who stood outside courthouses, circling names in the yearbook of those they saw walk into the courthouse.<sup>161</sup> While the Supreme Court has not upheld state regulations that allow for a full parental veto on a minor's abortion decision,<sup>162</sup> the laws they have upheld standing in the way of minors seeking abortions actually have the *effect* of giving parents significant power, which often amounts to a veto "because mandating parental involvement in a teen's abortion decision can prevent teens from getting the abortions they want."<sup>163</sup>

### C. MINORS CAN INDEPENDENTLY MAKE DECISIONS OTHER THAN ABORTION

According to the Centers for Disease Control and Prevention, the "US teen pregnancy rate is substantially higher than in other western industrialized nations."<sup>164</sup> This is a major issue because "teen pregnancy and childbearing bring substantial social and economic costs through immediate and long-term impacts on teen parents and their children."<sup>165</sup> For example, in 2010, teen pregnancy and childbirth cost U.S. taxpayers at least \$9.4 billion for increased health and foster care, increased incarceration rates for children of teen parents, and lost tax revenue due to lower education and income of teen mothers.<sup>166</sup> Moreover, pregnancy and birth are significant predictors high school dropout for girls. Only about 50% of teen mothers graduate high school by age twenty-two, as compared to a 90% graduation rate for their peers who did not give birth during their teenage years.<sup>167</sup> In addition, children of teenage mothers are more likely to have lower educational attainment and to drop out of high school, have more health

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<sup>161</sup> *Id.*

<sup>162</sup> See *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976) ("It is difficult, however, to conclude that providing a parent with absolute power to veto a determination . . . 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 . . . .").

<sup>163</sup> *Id.*

<sup>164</sup> *Reproductive Health: Teen Pregnancy*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/teenpregnancy/about/index.htm> (last updated Mar. 1, 2019) [hereinafter *Reproductive Health*]

<sup>165</sup> *Id.*

<sup>166</sup> Denise Witmer, *How Common Is Teen Pregnancy and How Can We Prevent It?*, VERYWELL FAMILY, <https://www.verywellfamily.com/how-common-is-teen-pregnancy-2611272> (last updated Feb. 13, 2018).

<sup>167</sup> *Reproductive Health*, *supra* note 164.

problems, be incarcerated during youth, have a child as a teenager, and be unemployed as a young adult.<sup>168</sup> Notably, these are present even after adjusting for the factors that increased the teenager's risk for pregnancy to begin with, such as poverty, having parents with low levels of education, having a single-parent household, and performing poorly in school.<sup>169</sup> These costs to the teenage girl are significant, especially if she wanted an abortion to avoid becoming a teenage mother, but was prevented from doing so. In addition,

[n]o state requires a young woman to obtain parental consent for prenatal care and delivery services; no state requires parents to be notified of their daughter's positive pregnancy test; all but five states allow for a minor to place her child for adoption without parental involvement; and all states allow adolescents to consent to treatment for sexually transmitted diseases.<sup>170</sup>

This is yet another indication that minors have the ability to make important health choices without their parents' consent.<sup>171</sup> However, they do not have the unfettered ability to obtain an abortion.

Despite these significant costs and the obvious benefits to preventing childbearing among teenagers, including the Center for Disease Control's own commitment to prevention, most states have used this obstacle as a way of potentially reducing the birth rates among teenage girls by making it more difficult for teenagers to obtain abortions without parental notification

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> ACLU, *Laws Restricting Teenagers' Access to Abortion*, *supra* note 138.

<sup>171</sup> See *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 314 (1997). While this is a state law dealing with the California Constitution rather than the United States Constitution, it is an interesting case holding that a minor's right to privacy is violated by parental consent laws. *Id.* In fact, other states have proposed repealing their existing laws—others are typically doing so under their legislative branches in their respective states, rather than the state courts. *Id.* See also S.B. 179, 2019 Leg., 80th Sess. (Nev. 2019); Agnie Leventis Lourgou, *Illinois Democrats Propose Laws Expanding Abortion Access—Including Repeal of Parental Notification for Minors*, CHI. TRIB. (Feb. 12, 2019), <https://www.chicagotribune.com/news/ct-met-illinois-abortion-bills-20190214-story.html>; Katharine White, *Should Massachusetts Repeal the Law Requiring Parental Consent for a Minor to Have an Abortion?*, BOS. GLOBE (Jan. 4, 2019), <https://www.bostonglobe.com/metro/globalocal/2019/01/04/should-massachusetts-repeal-law-requiring-parental-consent-for-minor-have-abortion/EG5HK32oTXJ0gujYZNx1JL/story.html>. It is of no small significance that two out of three of these states are those in which an individual of a certain minority age is old enough to engage in sexual intercourse but is not old enough to independently, without parental notification and/or consent, make the decision to terminate a pregnancy—likely resulting from sexual intercourse that she is legally of sufficient age to consent to. *Id.*

or consent.<sup>172</sup> It is unclear how many teenagers would obtain abortions were it not for these laws, but of the approximately 350,000 teenagers who become pregnant each year, 55% give birth, 14% have miscarriages, and 31% have abortions.<sup>173</sup> This indicates that nearly a third of pregnant teenagers get abortions—not an insignificant proportion. Thus, laws in the relevant states could have a significant impact on whether or not those teenagers have an unencumbered decision and ability to obtain an abortion.

#### D. THE JUDICIAL BYPASS IS INSUFFICIENT PROTECTION FOR MINORS

The judicial bypass is insufficient because although it allows pregnant teenagers to obtain abortion with a judge's permission, the dangers of having to go to a judge in the first place are high.<sup>174</sup> A minor could easily be discovered while going to a judge for an abortion, and the delay in making this decision could be unduly burdensome.<sup>175</sup> For example, a minor may live far from the courts and may not have access to public or private transportation, in addition to the fact that many minors cannot take a day off of school without their parents' knowledge in order to go to the court on a weekday.<sup>176</sup> This does not include the possibility that the medical access necessary to get an abortion may also be inconveniently located.<sup>177</sup> Many teens are also afraid to go to a court and talk to a judge about their personal lives, calling into question whether the judicial bypass is a realistic alternative to parental involvement.<sup>178</sup> Obstacles abound in the way of minors seeking abortions through the judicial bypass, from distance to the courthouse, lack of financial resources, and judges who refuse to grant these petitions—in some states, this procedure is an "insurmountable barrier."<sup>179</sup> These scenarios are, in fact, very realistic:

[I]n Massachusetts, a young woman's intention to obtain an abortion was exposed when her sister's civics class came through the courthouse; another teen ran into a neighbor at the courthouse; another encountered her godmother who worked in the court. In Minnesota, anti-

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<sup>172</sup> See *Reproductive Health*, *supra* note 134.

<sup>173</sup> ACLU, *Laws Restricting Teenagers' Access to Abortion*, *supra* note 138.

<sup>174</sup> See, e.g., ACLU, *YOUNG WOMEN'S STORIES*, *supra* note 160.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Embree & Dobson, *supra* note 137.

abortion activists sat in the court hallways and used yearbooks from the local high schools to identify the teens who came in for judicial waivers and expose their decisions to have abortions.<sup>180</sup>

These situations are not as rare as one might like to think, and the laws that seemingly protect minors from having to tell their parents often do not effectively do so.<sup>181</sup> The risk that these teenagers face from having to tell their parents is very serious—minors likely know their own parents and family situation better than a judge does.<sup>182</sup> Thus, the minor is in a better position to evaluate whether or not pursuing an abortion would lead to detrimental effects to her family situation—or even her health or safety—as a result of having to consult with parents to obtain an abortion.<sup>183</sup> In fact, teens who do not voluntarily consult with a parent generally have good reasons not to, often coming from already dysfunctional families, and have fears of being kicked out of the house or physical abuse; some do not live with their parents or have parents who abuse alcohol or drugs.<sup>184</sup> Moreover, “experience shows that teens’ fears are well-founded.”<sup>185</sup> These and other safety and health reasons have led the leading medical groups to oppose parental involvement in minors’ abortion decisions, “including the American Medical Association, the American Academy of Pediatrics, the Society for Adolescent Medicine, the American College of Obstetricians and Gynecologists, and the American Public Health Association.”<sup>186</sup> Teenagers likely have well-founded reasons for fearing disclosure of their situation, given that it would likely be traumatic.<sup>187</sup> Adolescents, who would feel safe and comfortable confiding in their parents about obtaining an abortion, would do so regardless of the law.<sup>188</sup> On the contrary, those that would not feel safe or comfortable in confiding in a parent or guardian will not feel any better about doing so when forced to under the law.<sup>189</sup> Moreover, forcing this interaction will likely do nothing to improve family communication or relationships, and may, in fact, put them in jeopardy by

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<sup>180</sup> ACLU, *Laws Restricting Teenagers’ Access to Abortion*, *supra* note 138.

<sup>181</sup> See ACLU, *YOUNG WOMEN’S STORIES*, *supra* note 160.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> See ACLU, *YOUNG WOMEN’S STORIES*, *supra* note 160.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

causing significant conflict in the household.<sup>190</sup> Thus, although the Supreme Court has upheld the judicial bypass as a reasonable alternative to, and a protection against, parental involvement for certain teenagers who meet the judges' criteria, this is an ineffective safeguard in practice.<sup>191</sup>

Furthermore, the consequences do not even fall on those with the ultimate decision-making power.<sup>192</sup> The laws are not supposed to allow for a "veto;" however, if a parent or relevant notifying or consenting party bars the adolescent from obtaining an abortion, and a judge does not approve an override, then this has effectively become a veto on the adolescent seeking an abortion.<sup>193</sup> A third-party is, essentially, given the power to unilaterally decide whether a pregnant girl must carry a pregnancy to term against her wishes and will, but this same third party does not bear the consequences of that decision.<sup>194</sup> Neither the parents nor the judge have to raise and support the resulting child, go through pregnancy, or give birth, or make decisions about the child's future. Instead, the consequences of a third party's decision about the minor's body fall onto the shoulders of the pregnant minor, who did not want to shoulder the responsibility in the first place.

The question is, if an adolescent female is sufficiently old enough to legally consent to sexual intercourse, to get birth control, to go through childbirth, to become a teenage mother, and to put up a baby for adoption—why is she not old enough to decide to terminate the pregnancy? Why is this choice only not available for abortion? Certainly, there must be something that the state feels is inherently unique in the decision to have an abortion that makes it substantially different from every other decision in that chain of events. Is it because it is a difficult or complex decision? Surely it could not be more difficult than the decision to put a baby up for adoption or the decision to become a teenage mother and raise a child.<sup>195</sup> Is it because the state feels that it is a dangerous procedure? Childbirth is substantially more dangerous than modern abortion methods.<sup>196</sup> Thus, the justification of

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> See generally Embree & Dobson, *supra* note 137 at 70–71 (discussing studies that show minors have more negative emotions generally after both childbirth and abortion, but the vast majority who had an abortion would make the same decision again).

<sup>196</sup> E.G. Raymond, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (Feb. 2012), <https://www.ncbi.nlm.nih.gov/pubmed/22270271>.

protecting adolescent females from making dangerous or life-threatening decisions—as a justification for parental notification and consent laws for abortion—is unsubstantiated; as compared to abortion, childbirth is far more dangerous.<sup>197</sup>

Moreover, the fact that a young, adolescent woman must shoulder a significant burden that a young adult who is of the age of majority can bypass—despite engaging in the same consensual activity—is not justified by purported benefits.<sup>198</sup> There is not a significant enough benefit that exists to outweigh the burdens that these laws create.<sup>199</sup> In a time of extreme uncertainty like that of an unplanned pregnancy, an adolescent should be able to go to whomever she trusts—be that her parents, her doctor, or another trusted person—and the choice of whom to confide in, if she wants to go to speak with anyone at all, should certainly not be dictated by the government.<sup>200</sup>

The state governments' purported intent for parental notification and/or consent laws—family communication—is not a sufficient justification.<sup>201</sup> Parents do not have to sign a consent form for their teenage children (within the age of consent in their state) to engage in sexual intercourse; the most they could do, short of physically being present for every moment of the adolescent's daily life, is to discourage or forbid sexual activity.<sup>202</sup> In the more likely scenario, parents would do the latter and likely make “ground rules” for the house, such as leaving bedroom doors open or other forms of increased monitoring.<sup>203</sup> Parents who make this decision for their daughters may not be making the best decision for their daughter—but rather for themselves.<sup>204</sup> As a minor must go to a third party for permission,

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<sup>197</sup> *Id.*

<sup>198</sup> See generally ACLU, *YOUNG WOMEN'S STORIES*, *supra* note 160.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> See *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976) (“It remains, then, to examine whether there is any significant state interest in conditioning an abortion on the consent of a parent or person *in loco parentis* that is not present in the case of an adult. One suggested interest is the safeguarding of the family unit and of parental authority . . . . It is difficult, however, to conclude that providing a parent with absolute power to veto a determination . . . 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 . . . .”).

<sup>202</sup> See generally Embree & Dobson, *supra* note 137.

<sup>203</sup> See *id.* (discussing parental reactions after finding out about a daughter's pregnancy, including heightened parental control, decreased trust of the teen by her parents, and attempts to sever her relationship from the person who got her pregnant).

<sup>204</sup> *Id.* at 71–75.

her only independently-decided options are to give birth to the resulting baby and become a teenage mother or to put the baby up for adoption.<sup>205</sup> The options available to her, independent from her parents or a judge, remove an important third decision from the equation entirely.<sup>206</sup>

If these parental notification and consent laws' true purpose was well-intentioned, such as to encourage family communication, this could be more effectively accomplished long before a pregnancy—such as an open conversation about the consequences of unprotected sexual intercourse.<sup>207</sup> Encouraging communication about sexual activity would likely begin with requiring sexual education in schools; however, only twenty-four states and Washington, D.C. even mandate any form of sexual education in schools.<sup>208</sup> States that truly want to encourage parents to talk to their children about sexual activity would be much better served with a law mandating age-appropriate, accurate, and non-judgmental or demeaning sexual education programs in schools, as comprehensive sex education has been shown to be an effective way of preventing unintended teenage pregnancies.<sup>209</sup>

States continually pass laws that restrict abortion access and attempt to get around *Roe v. Wade*, aiming to strike down laws by making them impermissibly restrictive.<sup>210</sup> Minority age has been a sufficient justification

<sup>205</sup> See generally *id.* at 59.

<sup>206</sup> *Id.*

<sup>207</sup> *Help Your Teen Make Healthy Choices About Sex*, CTR. FOR DISEASE CONTROL, <https://www.cdc.gov/teenpregnancy/parent-guardian-resources/index.htm> (last updated Feb. 27, 2020) (discussing parents' strong impact on teens making healthy decisions).

<sup>208</sup> *What's the State of Sex Education in the U.S.?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/for-educators/whats-state-sex-education-us> (last visited Feb. 14, 2019). This information does not include what types of sexual education that the schools mandate, whether it includes information that is medically or scientifically accurate, or if the information is taught in a way that discourages sexual activity altogether, or is "abstinence-only." *Id.* Moreover, this information does not specify whether or not the information uses scare or shame tactics to attempt to discourage teenagers from engaging in sexual intercourse through demeaning exercises or presentations, or whether the education actually teaches teenagers how to prevent unplanned pregnancy and sexually transmitted infections). *Id.*; see also Emma Gray, *Sex Ed Horror Stories: 10 Stories of Sexual Misinformation*, HUFFINGTON POST (Apr. 17, 2013), [https://www.huffingtonpost.com/2013/04/16/sex-ed-horror-stories-sexual-education-misinformation\\_n\\_3095039.html](https://www.huffingtonpost.com/2013/04/16/sex-ed-horror-stories-sexual-education-misinformation_n_3095039.html) (using user-submitted personal accounts of various experiences of sexual education around the U.S.).

<sup>209</sup> *Why Support Comprehensive Sexuality Education?*, PLANNED PARENTHOOD, [https://www.plannedparenthood.org/files/6914/0080/0572/2013-04UpdatedWhyCompeSexEd\\_handout.pdf](https://www.plannedparenthood.org/files/6914/0080/0572/2013-04UpdatedWhyCompeSexEd_handout.pdf) (last visited Mar. 5, 2019).

<sup>210</sup> *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2297–2299 (2016); See also Pete Williams, *Supreme Court Blocks Louisiana Abortion Law as John Roberts Joins Liberal Justices in 5-4 Ruling*, NBC NEWS (Feb. 9, 2019), <https://www.nbcnews.com/politics/supreme->

for the Supreme Court, in fact, as these laws have generally been upheld as long as a parent does not have an “absolute veto” on the abortion.<sup>211</sup> While appearing to reasonably balance the minor’s interests against the state’s and parental interest, in reality, these laws have a damaging impact.<sup>212</sup> Thus, it is important to reexamine such laws, keeping in mind the actual effects of the laws, not just the theoretical impacts.<sup>213</sup> In fact, some states have already taken this step by reevaluating their own parental notification and parental consent laws.<sup>214</sup>

Since minors do not need parental consent or notification for most other decisions having to do with their bodies, abortion should not be an exception—there is no logical reason why abortion requires parental intervention, while having a child and becoming a teenage mother, or continuing the pregnancy and putting the resulting baby up for adoption are not sufficiently serious decisions that should warrant parental intervention.<sup>215</sup> Instead, in those cases, the minors’ rights to bodily autonomy and trust in their decision-making skills are not questioned or

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court/supreme-court-blocks-louisiana-abortion-law-1st-major-ruling-abortion-n968766 (discussing the Supreme Court overturning a state’s abortion law that would likely have left the state with only one abortion provider).

<sup>211</sup> See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

<sup>212</sup> See generally ACLU, *YOUNG WOMEN’S STORIES*, *supra* note 160.

<sup>213</sup> *Id.*

<sup>214</sup> See, e.g., *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 314 (1997) (holding that a California statute requiring minors to receive parental consent or judicial authorization for abortion was unconstitutional because it infringed upon rights to privacy under the California Constitution); *Lourgos*, *supra* note 141 (discussing the Illinois legislature’s proposal to repeal parental notification of abortions for minor requirements); *White*, *supra* note 141 (arguing that Massachusetts should repeal its law requiring parental consent for a minor);. As of recent, these states are starting to reexamine their laws typically at a state level via their legislative branch. See *Lourgos*, *supra* note 141; *White*, *supra* note 141. In contrast, however, California struck down a statute’s parental consent and judicial authorization requirements in a decision by its Supreme Court years ago. *Lungren*, 16 Cal. 4th at 314, 323–24 (discussing how the requirements were ruled unconstitutional in prior cases); see also *Am. Acad. of Pediatrics v. Van De Kamp*, 214 Cal. App. 3d 831, 846–47 (1989) (affirming a preliminary injunction on a statute that required minors to receive parental consent or judicial authorization, as it violated the minor’s fundamental constitutional rights). However, the reasoning behind these changes ultimately goes back to the same principle: that minors who seek abortions have a right to privacy. Compare *Lourgos*, *supra* note 141, and *White*, *supra* note 141, with *Lungren*, 16 Cal. 4th at 314, 323–24. Abortion is critical in the right to privacy, and states are beginning to look at their laws and question whether or not the laws are actually taking away more than they are providing. See *Lourgos*, *supra* note 141; *White*, *supra* note 141. Is it worth having these requirements as opposed to allowing minors to make these decisions? See *Lungren*, 16 Cal. 4th at 314, 323–24; *Lourgos*, *supra* note 141; *White*, *supra* note 141. States are beginning to consider that the answer to that question might be “no.” See *id.*

<sup>215</sup> See generally ACLU, *Laws Restricting Teenagers’ Access to Abortion*, *supra* note 138.

mandated to have parental involvement.<sup>216</sup> This, again, goes back to the fact that the minor has a right to independently decide what to do about an unplanned pregnancy, including whether to raise the resulting child, to put the baby up for adoption (in most states), or any other decision she wants to make regarding the subsequent choices during pregnancy and childbirth—except in the case that she wants to have an abortion.<sup>217</sup>

Moreover, ironically, if a minor is forced to carry a pregnancy to term, she will have to make decisions for the resulting child, while, also, simultaneously not being allowed to make all of her own health decisions independently.<sup>218</sup> If she becomes pregnant again prior to turning eighteen, she still would have to consult a parent to obtain an abortion—despite being a parent herself. In fact, statistics show that a number of minors who are already parents still fail to use the most effective birth control, and a number become pregnant again.<sup>219</sup> It is ironic that these young mothers are expected to take full responsibility for raising a child and making decisions, including very important health decisions for their children—yet they are not allowed to independently make their own health decisions regarding abortion, even when those decisions would also impact the health of their children.<sup>220</sup>

The decision on whether to have an abortion should be between a woman and her doctor—and ultimately, in the hands of the woman.<sup>221</sup> Women should be trusted to make the decision that is best for their lives and their futures; no one should have the power to make a choice for a woman that is so vital and impactful on her life.<sup>222</sup> While adolescent females might not be considered “women” in the traditional sense of the term, they

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *See id.*

<sup>219</sup> *Vital Signs: Preventing Repeat Teen Births*, CTR. FOR DISEASE CONTROL AND PREVENTION, (Apr. 2013), <https://www.cdc.gov/vitalsigns/teenpregnancy/index.html> [hereinafter *Vital Signs*]. This data shows that nearly one in five births to teenagers aged fifteen through nineteen are second children; that is, they are already teenage mothers of a child and are continuing to have children. *Id.* Additionally, only about one in five teenage mothers who are sexually active use the most effective birth control method available. *Id.* Moreover, only about twenty percent—one in five—teenage mothers who became pregnant again in the year after they had their first child planned the second pregnancy. *See* Ford K., *Second Pregnancies Among Teenage Mothers*, 15 FAM. PLAN. PERSP. 268 (1983).

<sup>220</sup> *See generally* ACLU, *Laws Restricting Teenagers' Access to Abortion*, *supra* note 138.

<sup>221</sup> *See id.* (discussing the AMA's opposition to these laws).

<sup>222</sup> *See generally id.* (discussing differences in laws on abortion for minors as opposed to other reproductive and pregnancy decisions).

are old enough to legally consent to sexual intercourse,<sup>223</sup> legally access birth control, to become parents and raise children, and, in most states, to put up a baby for adoption without parental involvement.<sup>224</sup>

Parental notification and consent laws deny adolescent women the right to choose whether to have an abortion solely based on their age, even though they are allowed to make other pregnancy-related choices that can affect the resulting child before and after birth.<sup>225</sup> These decisions are equally important—that is, the decision to obtain an abortion is no more serious than the decision to continue a pregnancy and raise a child or to put a baby up for adoption.<sup>226</sup> These laws create a significant obstacle to teenagers obtaining abortions.<sup>227</sup> While there should not be a third-party veto on the abortion decision, in reality, either a parent or a judge has a veto on the abortion.<sup>228</sup> Moreover, these laws do not necessarily increase family communication, given that teenagers who are open with their parents already feel comfortable going to them, irrespective of these legal rules.<sup>229</sup> On the other hand, those who are afraid to tell their parents often have good reasons to be concerned.<sup>230</sup> Moreover, an abortion is far less dangerous than childbirth;<sup>231</sup> however, the delay in an abortion puts the teenager's health and safety at a higher risk than if she were allowed to make the decision and act independently of her parents.<sup>232</sup> Finally, at a fundamental level, anyone who is old enough to legally consent to sexual intercourse and become pregnant should be allowed to make decisions regarding a potential pregnancy.<sup>233</sup>

## V. CONCLUSION

Minors should have equal rights to privacy afforded to adult

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<sup>223</sup> PLANNED PARENTHOOD, *Parental Consent and Notification Laws*, *supra* note 46.

<sup>224</sup> *See, e.g.*, ACLU, *Laws Restricting Teenagers' Access to Abortion*, *supra* note 138.

<sup>225</sup> *See generally id.*

<sup>226</sup> *See e.g.*, Embree & Dobson, *supra* note 137, at 70–71 (discussing studies that show the psychological consequences of abortion are minimal in a vast majority of cases).

<sup>227</sup> *See id.* at 76.

<sup>228</sup> *See generally* ACLU, *YOUNG WOMEN'S STORIES*, *supra* note 160.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Embree & Dobson, *supra* note 137.

<sup>232</sup> ACLU, *YOUNG WOMEN'S STORIES*, *supra* note 160.

<sup>233</sup> *See e.g.* *Carey v. Populations Servs. Int'l*, 431 U.S. 678, 684–85 (1977) (holding that bans on contraceptive decisions could not be justified by minority age).

individuals under the United States Constitution. Adults have the right to choose their consensual sexual partners, to choose to use and access contraception, and to choose to obtain abortions without an undue burden placed upon them. In contrast, minors typically have the first two rights but lack the third right to independently make the decision on whether to get an abortion. Rather, in most states, minors must notify their parents or get their parents' consent, or they must obtain a judge's permission. While the Supreme Court has held this requirement to be constitutional, it denies minors rights that are necessary to their bodily autonomy. Anyone who is able to become pregnant should also be able to independently make the decision to get an abortion. This necessarily follows from the numerous decisions that the Supreme Court has issued time and again during the past half-century.

The Supreme Court has, for many decades, upheld the right to privacy in the bedroom. By affirming the right to sexual freedom and contraception as well as abortion, the Court has created a whole body of law surrounding the rights of individuals in the United States. These rights should not be limited merely to adults; they must be extended to all who may be impacted by the laws. This means that anyone who can become pregnant should be able to get an abortion, without interception by a third party, who would make the decision for them. The judicial bypass is an insufficient protection against the parental veto because it merely shifts the veto power to yet another third party. An abortion decision should only involve a woman and her doctor, unencumbered by third parties.

Minors—who clearly have the ability, capacity, and maturity to independently make decisions to engage in sexual activity and whether or not to use contraception—should certainly be allowed to independently decide whether or not to give birth to a child. Pregnant minors can independently make the decision to have a baby and become a parent and, in nearly every state, independently make the decision to place a baby up for adoption. However, in most states, minors cannot independently make the decision to terminate a pregnancy in the early weeks. This is a serious threat to the individual bodily autonomy that the Supreme Court has affirmed time and again in the context of sexual privacy.

Parental notification and consent laws regarding abortion should be critically examined for their negative impact on minors, including the privacy implications. It is crucial that lawmakers consider the importance of the minors' well-being when making policy decisions. Parental notification and parental consent laws for abortion are not justified by the purported reasoning of promoting family communication, given that no

other pregnancy-related laws require consultation with a parent and no other laws promote this interest. The lack of family communication promotion raises the question of whether these laws protect minors and their families, or whether they are just another avenue for states to disguise abortion restrictions? Laws restricting abortion, including those restricting abortions for minors, should therefore be reexamined to address and acknowledge the actual impacts that they have on minors by fixing their logical inconsistency.