Sixteen and Pregnant: Minors’ Consent in Abortion and Adoption

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ABSTRACT: A minor girl’s decision about how to handle an unplanned pregnancy is a highly contested issue. Especially contentious is the minor’s ability to consent to an abortion independently of an adult such as her parents or a judge. That issue has received substantial attention from policy makers, scholars, judges, and legislators. Almost no attention has been paid, however, to the decision of a pregnant minor to continue her pregnancy, relinquish her constitutionally protected parental rights, and place a child for adoption. In 37 states, a minor’s abortion decision is regulated differently than an adult’s, while in only 15 states is a minor’s decision to relinquish parental rights and consent to adoption treated any differently from an adult’s decision. New neuroscientific advances in the understanding of minors’ decisionmaking seem to justify protective regulation of the adoption placement decisions of minor mothers, as does the law’s traditional treatment of minors’ decisionmaking in areas other than abortion. The justifications often advanced for the need for parental involvement in a minor’s abortion decision—the physical/medical risks, the psychological/emotional effects, and the importance of the decision—apply with equal force to the decision about adoption placement. The decision about adoption placement also differs from the abortion decision in at least one crucial respect—the legal complexity of the adoption decision adds another layer to the medical and moral decisions present in abortion. All states should

† Professor of Law, Texas Wesleyan University School of Law. No one “builds” a law review article on her own. I would be remiss if I failed to acknowledge the contributions of many others to this project— I am grateful for the unflagging support of my faculty and helpful comments from faculty when I presented this topic, the lively engagement of my Adoption Law students, the helpful library staff, especially Laura McKinnon, who quickly and competently tracked down legal and non-legal sources alike, and the intellectually stimulating atmosphere of Texas Wesleyan University School of Law. And, as a single mother, I know it takes a village to raise a child; thanks to Mimi, Anne and Steve for their special assistance this summer, without which this article would not have been finished. This article is dedicated to my children’s birth mothers, who faced situations no mother should have to faceand made decisions no mother should have to make.

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require that minor mothers have independent legal counsel when making the decision about relinquishment of parental rights and consent to adoption placement.

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I was sixteen and pregnant. Frightened and so confused. I remember the pamphlet my school nurse handed me. Pregnant? Confused? We understand. We can help you decide which option is best for you and your baby. I needed that. An adult who would comfort me, help me and not judge. Blindly I walked into the adoption agency, seeking help and information, and my life was never the same. They used my age and my emotions for their own gain. Their offered comfort came with one agenda in mind - to make sure I chose adoption for my unborn baby. I walked in their doors as an unknowing, trusting child. I walked out as a battered mother who lost more than she could ever imagine.¹

A minor girl’s decision-making when facing an unplanned pregnancy is almost universally considered a decision about abortion, a highly contentious issue. Especially contentious is the minor’s ability to consent to an abortion without the interference of a substitute decisionmaker such as her parents or a judge. That issue has received substantial attention from policy makers, scholars, judges, and legislators. Almost no attention has been paid, however, to the decision of a minor parent to continue her pregnancy, relinquish her parental rights, and place a child for adoption. The assumption seems to be that, once a decision to forgo abortion is made, the decision to place a child for adoption rather than raising the child as a single teen parent is the only rational choice under the circumstances, so no protections are needed to protect that minor mother’s interests. Thus, in the vast majority of states, a pregnant minor can go through labor and delivery without her parents knowing. A pregnant minor can also relinquish her parental rights in order to place a child for adoption without her parents knowing. In fact, in all but fifteen states, a minor can make the consequential decision of voluntarily terminating her parental rights without the advice of legal counsel, without a guardian ad litem representing her interests, and without any adult in the room other than the

¹ Cassi Bella Ward, User Profile: Cassi, BLOGGER.COM, http://www.blogger.com/profile/00274531213087340905 (last visited Mar. 29, 2013). The dominant public discourse about adoption in America is from the viewpoint of adoptive parents. See, e.g., KRISTI BRIAN, REFRAMING TRANSRACIAL ADOPTION: ADOPTED KOREANS, WHITE PARENTS AND THE POLITICS OF KINSHIP 4 (2012). The work of legal scholars also tends to privilege the viewpoint of adoptive parents, while minimizing the perspective of birth parents. See, e.g., Shani King, Challenging Monohumanism: An Argument for Changing the Way We Think About International Adoption, 30 MICH. J. INT’L L. 413, 441-44 (2009) (identifying the “Invisible Birth Parents Narrative” in law review articles). As Twila Perry notes, most scholarship about adoption is from the perspective of adoptive parents, and “there is very little literature, legal or non-legal, which discusses the feelings of women who have given children up for adoption, or who have had their children taken from them through the involuntary termination of parental rights. The gap is a glaring one, and there is a clear need to remedy the situation.” Twila Perry, Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory, 10 YALE J.L. & FEMINISM 101, 157 (1998). As a small attempt to remedy the omission Perry identified, this Article includes the stories of birth mothers describing the decision to relinquish parental rights in their own words.
representative of an adoption agency or adoptive parents. By contrast, in the vast majority of states, a pregnant minor cannot terminate her pregnancy without her parents knowing, unless a judge approves.2

The difference between the treatment of minors’ abortion decisions and minors’ adoption decisions is in some ways inexplicable. The decisions share a number of similarities that suggest that similar protections against minors’ arguably less capable decisionmaking should be employed. In addition, the decisions are different in one significant way that suggests additional protections are necessary for the minor’s decision about relinquishing parental rights, regardless of whether minors are competent to make the decision about abortion. After all, the decision about whether to have an abortion is a medical decision, and in the eyes of many, a moral decision. The decision about relinquishing parental rights also implicates medical decisionmaking in carrying the pregnancy to term and moral decisionmaking in choosing adoption. In addition, the decision about adoption is one involving complex legal questions about constitutionally protected parental rights and responsibilities that the minor is choosing to forgo. The complexities of legal decisionmaking may require additional protections for minors relinquishing for adoption that may not be necessary for minors seeking an abortion.

One frequent argument for parental notification in teen abortions is that parents ought to know about medical procedures performed on their children. The same argument applies when minor children give birth, a medical procedure that the minor parent’s own parents would seem to have a similar interest in knowing about. The risk of death and medical complications is greater with childbirth than with abortion, after all.3 The other popular argument rests on the moral significance of the decision—deciding whether to have an abortion is so important that minors ought to have the advice of adults in making the decision. Parents can serve in that role, and if there is some reason why they should not be notified, then a judge can evaluate whether a minor is sufficiently mature to make the decision on her own.4 Why don’t we afford similar treatment to another extremely important and significant decision: whether to terminate parental rights and place a child for adoption?

One answer to the different treatment of these similar decisions rests in the purpose of abortion restrictions. The story of abortion restrictions is one of restricting the autonomy of women and girls. The real purpose of parental consent and notification statutes is not to promote informed decisionmaking by vulnerable minors, but to discourage abortion altogether—part of a larger

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2. For discussion of these laws, see infra notes 183-195.
3. See infra notes 245-260 and accompanying text.
4. See infra note 183-203 and accompanying text.
strategy to end abortion.\(^5\) Viewed in this way, parental involvement statutes are not just about parental rights, informed consent in medical procedures, or the decisionmaking capacity of minors. They are instead a curtailment of women's autonomy in sexual and reproductive matters. Requiring additional protections of minors in making the decision to relinquish parental rights and place a child for adoption, however, can be tailored to empower minors to make an intelligent, knowing, and voluntary choice.

This Article will explore the legal differences in the treatment of a minor's decision to have an abortion versus a minor's decision to place a child for adoption.\(^6\) Part I will examine attitudes toward teen pregnancy, teen parenting, and adoption, supporting the argument that these attitudes privilege adoption over child-rearing by teens and thereby mask the need for protection of minors' decisions around adoption. Part II will set out the scientific research on the ability of minors to engage in competent decisionmaking and the legal history of minors' decisionmaking in a number of areas. Part III will explore the legal limitations on minors' decisionmaking in abortion and adoption placement, highlighting the different legal treatment of these decisions. Part IV will explore various justifications for parental notification in minors' abortions and consider their applicability to minors' decisions about adoption placement. Finally, Part V will propose statutory reforms to ensure that a minor's decision about relinquishing parental rights and placing a child for adoption is well-informed and voluntary. This section proposes that, given the legal nature of the decision facing a teen considering relinquishing her parental rights and placing a child for adoption, states should require that all minors be represented by independent legal counsel during the placement process.

I. UNWED PREGNANCY, TEEN PREGNANCY & TEEN PARENTING

You couldn't be an unwed mother. Motherhood was synonymous with marriage. If you weren't married, your child was a bastard and those terms were used. I think I'm like many other women who thought, "It may kill me to do this, but my baby is going to have what everybody keeps saying is best for him." It's not because the child wasn't wanted. There would have been nothing more wonderful than to come home with my baby.\(^7\)


6. This Article deals only with voluntary relinquishment of parental rights, not with involuntary termination of parental rights for reasons of abuse or neglect. It is only in the first category where issues of consent occur.

We hear frequently about the "problem" of teen pregnancy. Most view teen pregnancy in a negative light, although there is, perhaps, less agreement on what is problematic about teen pregnancy. And what is considered problematic about teen pregnancy has differed over time, and often depended on the race of the minor mother. Thus, what we see as "teen pregnancy" is as much an issue of culture as biology. Race matters in how we define the problem and how we formulate the solution, as do attitudes toward sexuality, marriage, and adoption. The formulation of the problem as one of teen pregnancy also masks the involvement of men and boys—the focus is on the girl's pregnancy, not on how she became pregnant. The male partner in the pregnancy becomes important only when talk of a solution to the problem turns to marriage. Even when adoption is seen as the solution to teen pregnancy, the biological father is seen as largely irrelevant; it is only rarely that the unwed father's consent is required in adoption. In Lehr v. Robertson, the Supreme Court held that an unwed father was not granted constitutional protection as a father by reason of biology alone. He can only have an opportunity interest in becoming a father. To take advantage of that opportunity he must take affirmative steps, such as living with the mother and child as a family unit, developing a relationship with the child, providing financial and emotional support during pregnancy and child rearing, or filing in the state’s putative father's registry. Thus, the cultural, historical, and legal treatment of teen pregnancy is almost exclusively the "problem" of teen mothers.

11. Id. at 261.
14. See, e.g., In re Adoption of Baby E.A.W., 658 So. 2d 961, 967, 971 (Fla. 1995).
15. Lehr, 463 U.S. at 264-65.
A. The Problem

Is the problem of teen pregnancy one of early sexuality? Early childbearing? At certain points in our history, rates of early childbearing (which necessitates early sexuality) were substantially higher than today's rates. In the 1950s, for example, the teen birthrate reached 97 per thousand, while in 2010 the teen birthrate was only 34.3 per thousand. Of course, in the 1950s, almost all teenage mothers were married, at least by the time their babies were born. That is not the case today, given the decline in teen marriage.

So is the problem one of “unwed” pregnancy, representing the immorality of premarital sex, or one of the difficulty of single child-rearing? As to sex outside of marriage, there is nothing new about that. Even during the time of the Puritans, whose very name conjures up visions of being “prudish, ascetic, and antisexual,” prem marital sex existed. In seventeenth-century America, possibly one in three brides in the Chesapeake Bay Colony was pregnant when married, as was one in ten in Massachusetts. Still, unwed births remained low during this time, at one to three percent. So during this era, the solution for

16. Issues of morality aside, there are health risks associated with early sexuality. See Riittakerttu Kaltiala-Heino et al., Early Puberty and Early Sexual Activity Are Associated with Bulimic-Type Eating Pathology in Middle Adolescence, 28 J. ADOLESCENT HEALTH 346, 350 (2001) (observing that early sexual activity is linked to bulimia); Donald P. Orr et al., Premature Sexual Activity as an Indicator of Psychosocial Risk, 87 PEDIATRICS 141, 144-45 (1991) (finding that early sexual activity correlates with increased drug use, delinquency, and suicide attempts); Theo G.M. Sandfort et al., Long-Term Health Correlates of Timing of Sexual Debut: Results From a National US Study, 98 AM. J. PUB. HEALTH 155, 159 (2008) (associating early sexual debut with certain long-term negative sexual health outcomes, including increased sexual risk behaviors and problems in sexual functioning).

17. For a discussion of physical risks of early pregnancy and childbirth, see infra notes 255-260 and accompanying text.


20. LUKER, supra note 18, at 8. The rate of births to unmarried teen parents increased from the 1950s. In 1970, about 30% of teen births were to unmarried parents; in 1980, the rate was about 50%, and by 1995, 70%. Id. at 92. In 2010, 87% of teen births were to unmarried couples. Teen Births, CHILD TRENDS DATABASE, http://www.childtrendsdatabank.org/?q=node/52 (last visited July 17, 2012).


23. LUKER, supra note 18, at 17; Rhode, supra note 8, at 101 (citing D’EMILIO & FREEDMAN, supra note 22, at 10, 32).

an unwed pregnancy was typically marriage, thus avoiding single child rearing for the most part. 25 Historically, this varied in different communities. Legal marriage was not an option for most African American slaves, 26 giving a different connotation to “premarital sex;” sexual norms for them differed from those for whites. 27 While African American slaves “did not condone indiscriminate sexual relations, the slave community accepted rather than stigmatized children born outside of marriage.” 28

Even today, the connection between unwed pregnancy and single-parent child rearing is weaker than many assume. Much single-parent child rearing occurs because previously married partners are not sharing child-rearing responsibilities, not because the child is born to unmarried parents. 29 Even children born to unmarried parents are likely to be raised by two parents, given the rates at which unwed teen mothers subsequently marry. 30 And, in the 1990s, at the height of the teen pregnancy “epidemic,” one in three pregnant teens was actually married. 31

The rate of unwed pregnancy through the period of increased urbanization and industrialization of the late eighteenth and early nineteenth centuries is a contested matter, with historians disagreeing about when, whether, and why unwed pregnancy waxed and waned. 32 Some scholars estimate that at its highest point, an estimated thirty percent of brides were pregnant at the time of marriage. 33 At its lowest point in the mid-nineteenth century, the rate of premarital pregnancy declined to ten percent, fueled by religious revival and moral reform movements. 34 Again, a hastily arranged marriage was the

25. “Bastardy” resulted in punishment of the parents and attempts by civic and religious authorities to force marriage. D’EMILIO & FREEDMAN, supra note 22, at 32.
26. Marriages did occur, and were ritualized and celebrated, but they were not legal. Id. at 99.
27. Id. at 13, 97-98.
28. Id. at 65.
29. Divorce accounts for a large percentage of single-parent families. NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES xiii (1997) (claiming that sixty percent of single-parent families are previously married parents); America’s Families and Living Arrangements: 2010, U.S. CENSUS BUREAU tbl. FG6, http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html (showing that 44.8% of single mothers and 29.5% of single fathers never married).
30. LUKER, supra note 18, at 157 (reporting that in 1980-1981, 50% of teen pregnancies were to married couples, while 20% of the pregnant, unmarried teens were married within a year of the birth, and 40% married within three years). In addition, one survey found that 40% of unmarried teen fathers reported living with the child during the first year of the child’s life. Id. (citing William Marsiglio, Adolescent Fathers in the United States: Their Initial Living Arrangements, Marital Experience, and Educational Outcomes, 19 Fam. Plan. Persp. 240 (1987)). Data from the National Survey of Families and Households showed that 22% of children of unmarried teens had teen mothers living in a “stable relationship.” Id. (citing Larry Bumpass & James Sweet, Children’s Experience in Single-Parent Families: Implications of Cohabitation and Marital Transition, 21 Fam. Plan. Persp. 256 (1989)).
31. LUKER, supra note 18, at 142-43.
33. D’EMILIO & FREEDMAN, supra note 22, at 32; Rhode, supra note 8, at 101.
34. VINOVSKIS, supra note 32, at 10 (observing that the U.S., unlike European countries, experienced a sharp decline in unwed pregnancy in the early nineteenth century); Rhode, supra note 8,
solution for premarital sex that resulted in a pregnancy. The primary “problem” of unwed pregnancy at this time was one of morality; a woman was stigmatized by a nonmarital pregnancy because it constituted proof of nonmarital sex. During this period and continuing into later periods, middle-class African Americans also followed these stigmatizing norms, seeking to distance themselves from “the image of immorality that white culture projected onto the black lower class.” Poor urban and rural African Americans, on the other hand, tended not to stigmatize premarital sexual experience and accepted nonmarital births.

The rates of teen and unwed pregnancy fluctuated throughout the late eighteenth and early nineteenth century, peaked in 1957, and have been generally declining since then. This fact is surprising to many because of the rhetoric, starting in the 1970s, about an “epidemic” of teen pregnancy. One scholar persuasively argues that the “epidemic” of adolescent pregnancy in the 1970s was a myth, unmoored from any historical context that would have identified adolescent pregnancy as part of an ongoing historical trend rather than a modern-day crisis. Some demographic shifts at this time did, however, show marked changes in teen pregnancy. First, teen pregnancy rates declined between 1960 and 1977, although the number of pregnant teens did not decline because of the increased number of teenagers in the population. Second, teens were becoming pregnant at younger ages than in years past. The birthrate among 18- to 19-year-old women declined by one-third from 1966 to 1977, while the birthrate for 10- to 14-year-old girls increased by one-third. Also, during this time period, because of delayed marriage, the number of unmarried births among teenagers increased dramatically. These demographic shifts laid the groundwork for a shift of focus from the immorality of teen pregnancy to

at 102 (stating that the “growth of religious revival movements and moral reform societies” contributed to the decline in rates of premarital pregnancy).

35. Marriage was always an imperfect solution, of course. Indentured servants and slaves had no right to marry, and marriages between partners of different races were not legal until the 1960s in many states. Naomi Cahn, Birthing Relationships, 17 WIS. WOMEN’S L.J. 163, 174 (2002).


37. D’EMILIO & FREEDMAN, supra note 22, at 272-73.

38. VINOVSKIS, supra note 32, at 25 (“The rate of teenage childbearing increased sharply after World War II and reached a peak of 97.3 births per 1,000 women ages 15 to 19 in 1957. After 1957 the rate of teenage fertility declined.”).

39. Id. at 22-25; see also LUKER, supra note 18, at 81 (“In the early 1970s the phrase ‘teenage pregnancy’ was just not part of the public lexicon. By 1978, however, a dozen articles per year were being published on the topic.”).

40. VINOVSKIS, supra note 32, at 24-25, 36-37.

41. Id. at 25.

42. Id. at 26. This increase in birthrates in younger girls still represents a small portion of teen births. In 1983, girls fourteen years old and younger were responsible for 9,752 births, which represents only two percent of all teen births. Id. at 27.

43. Id. at 28-29 (noting that the number of out-of-wedlock births to girls ages fifteen to nineteen more than doubled between 1960 and 1977).
economic and social concerns about teen parenting and the consequent burden to society.

At this time, the "problem" of teen pregnancy tended to be seen as an increased burden to society, especially when taken together with expansions of government programs for poor families.\textsuperscript{44} In 1975, for example, the federal government disbursed $4.65 billion through the Aid to Families with Dependent Children (AFDC) program to households of mothers who were teens at the time of their first births.\textsuperscript{45} Unlike earlier periods when marriage solved the economic problem of supporting the progeny of teens, marriage for this age group was in decline. In addition, there was a substantial decline in unmarried mothers placing children for adoption. While at least half of unmarried mothers placed their children for adoption in the 1950s, in the 1970s, ninety percent of unmarried mothers chose to parent their children.\textsuperscript{46} As a backlash against this pattern of parenting, society constructed a counter-image: "The image of the young black mother on welfare relayed a message: sexual freedom extracted a high personal price.\textsuperscript{47}

The 1980s and 1990s brought more talk of an "epidemic" of teen pregnancy.\textsuperscript{48} Birthrates among teens did increase during these decades, but made marked declines in the twenty-first century.\textsuperscript{49} As the number of teenagers raising children, as opposed to placing them for adoption, increased, the "problem" of teen pregnancy became identified as the negative social consequences of teen pregnancy and childrearing on mothers and children. The litany is familiar: minor mothers complete, on average, fewer years of school, are less likely to graduate high school, and are less likely to go on to college.\textsuperscript{50} Minor mothers have more children in their lifetime than do mothers who delay first pregnancy to adulthood, and have those children at closer intervals.\textsuperscript{51} Fewer educational attainments and larger families mean that "adolescent

\textsuperscript{44} Id. at 30. These financial concerns were not novel; anti-bastardy laws in colonial America arose in part from a concern that the populace should not be burdened with the cost of raising fatherless children. LUKER, supra note 18, at 17.

\textsuperscript{45} VINOVSKIS, supra note 32, at 30. See also NAT'L RESEARCH COUNCIL, RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREGNANCY, AND CHILDBEARING 132-33 (1987) (noting that approximately 50-56% of AFDC funds in 1975 were directed to households in which the mother's first child was born while she was a teen).

\textsuperscript{46} VINOVSKIS, supra note 32, at 29-30 & n.14. One commentator notes that it is difficult to identify the precise cause of such a radical change in behavior but suggests that "[t]he rise of the women's movement, the sexual revolution, the greater availability of abortion (which made out-of-wedlock childbearing truly a choice), and the increasing fragility of marriage all no doubt contributed to the astonishing shift in the social meaning of illegitimacy." LUKER, supra note 18, at 97.

\textsuperscript{47} D'EMILIO & FREEDMAN, supra note 22, at 300.

\textsuperscript{48} LUKER, supra note 18, at 81.

\textsuperscript{49} GUTTMACHER INSTITUTE, U.S. Teenage Pregnancies, Births and Abortions: National and State Trends and Trends by Race and Ethnicity, tbl. 1.0 (2010) (finding the highest rates of teen pregnancy in 1989, 114.9 per 1,000; and 1990, 116.3 per 1,000; then a steady decline until 2005, to 69.5 per 1,000). HAMILTON & VENTURA, supra note 19 (finding a teen birthrate in 2010 of 34.3 per 1,000).

\textsuperscript{50} NAT'L RESEARCH COUNCIL, supra note 45, at 125-28.

\textsuperscript{51} Id. at 130.
mothers are less likely to find stable and remunerative employment than their peers who delay childbearing.152 Teen mothers are disproportionately poor and dependent on social welfare programs.153 Children raised by single teen mothers are likely to be raised in poverty, engage in drug use and other delinquent behavior, perform poorly in school, and repeat the cycle by becoming adolescent parents themselves.154

But it is less certain today that these problems are related to teenage childbearing rather than the underlying poverty that is a risk factor for teenage pregnancy. More recent studies reveal a more nuanced picture of whether teen childbearing is causative of these problems. When comparing teens from the same socioeconomic bracket, "a few pioneering studies have called into question the methodological error of assuming that teens who became mothers would have had the same life trajectories as teens who did not, had they delayed pregnancy."155 For example, when researchers compared similarly situated girls who parented to girls who experienced miscarriages, they found that many of the negative consequences of teen childbearing were less than expected and relatively short-lived:

By the time a teen mother reaches her late twenties, she appears to have only slightly more children, is only slightly more likely to be a single mother, and has no lower levels of educational attainment than if she had delayed her childbearing to adulthood. In fact, by this age teen mothers appear to be better off in some aspects of their lives. Teenage childbearing appears to raise levels of labor supply, accumulated work experience and labor market earnings and appears to reduce the chances of living in poverty and participating in the associated social welfare programs.156

As further support for findings that teen pregnancy does not cause poverty or other social ills, but instead arises in situations where poverty already exists, one study that followed teen mothers into their thirties found that mothers with childhood advantages fared better over time than impoverished mothers.157 In

52. Id.
53. Id. at 131-34 (noting that in 1985, the total welfare, food stamp, and Medicare outlay attributable to teen childrearing amounted to $16.6 billion).
54. Id. at 134-38.
other words, teens who were poor when they became pregnant remained poor, as did poor teens who miscarried, and less poor pregnant teens remained less poor. This research calls into question long-held assumptions that teen parenting creates a negative life trajectory for teens.

Other studies suggest some positive consequences of pregnancy and parenting for teen mothers. In a study focusing on inner city youth, pregnancy and childbearing led to a "heightened sense of purpose connected with increased health and safety-conscious behaviors."58 Teen mothers report that motherhood "provided them with a priority in life, together with a determination to achieve things for both themselves and their children."59 One study reveals that girls who parent their children have no different juvenile delinquency rates than never-pregnant girls, and that girls who have abortions or place their children for adoption have substantially higher rates of juvenile delinquency than those who parent.60 A number of legal and societal changes have also ameliorated some of the negative effects of teen pregnancy. For example, since 1972, it has been illegal for public schools to discriminate on the basis of pregnancy status, thereby allowing many pregnant girls to continue their education.61

As society struggles with identifying the problematic aspects of teen pregnancy, shifting from concerns about immorality and the impropriety of single parenthood to concerns about the financial costs of supporting single mothers and the negative societal consequences of teen pregnancy, unwed pregnancy, teen childbearing, and teen child rearing, it also struggles with identifying solutions for those problems.

58. Shanok & Miller, supra note 55, at 258. See also J.D. Arenson, Strengths & Self-Perceptions of Parenting in Adolescent Mothers, 49 J. PEDIATRIC NURSING 251 (1994) (showing major positive behavior changes during pregnancy continued post-natally); Linda Davies et al., Creating a Family: Perspectives From Teen Mothers, 12 J. PROGRESSIVE HUMAN SERVICES 83 (2001) (showing that mothers used pregnancy as an opportunity to thrive for a better life); Trina L. Hope et al., The Relationships Among Adolescent Pregnancy, Pregnancy Resolution, and Juvenile Delinquency, 44 SOC. Q. 555 (2003) (showing that, unlike adolescent girls who end pregnancy through abortion, girls who parent experience a dramatic reduction in smoking and marijuana use); Janna Lesser, Sometimes You Don’t Feel Ready to be an Adult or a Mom: The Experience of Adolescent Pregnancy, 11 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 7 (1998) (showing that pregnant teens stopped smoking, drinking alcohol and taking drugs as a response to their pregnancies); Lee SmithBattle, “I Wanna Have a Good Future:” Teen Mothers’ Rise in Educational Aspirations, Competing Demands, and Limited School Support, 38 YOUTH & SOC’Y 348 (2007) (showing that, regardless of pre-pregnancy school performance, motherhood motivated teens to get better grades, resolve to graduate, and aspire to attend college).


60. Hope et al., supra note 58, at 565.

61. 20 U.S.C. § 1681(a) (2000) ("[N]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."); 34 C.F.R. §106.40(b)(1) (2005) (a school “shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student’s pregnancy”). Even before passage of that law, some pregnant minors sued and won the right to attend public schools. See, e.g., Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971).
B. The Solution

Attitudes toward unwed pregnancies and teen pregnancies have changed over time, as have the perceived solutions for these identified problems. Social and public policy have always focused on prevention—either prevention of pregnancy, through abstinence or access to birth control (including sterilization of "unfit" parents), or prevention of childbirth through abortion. But once a pregnancy occurred, and was likely to be brought to term because of the unavailability of abortion, solutions varied over time. During the Puritan era, the solution for an unwed pregnancy was typically marriage, thus avoiding single child rearing in large part.62 Again, during the late eighteenth and early nineteenth centuries, a hastily arranged marriage was the solution for premarital sex that resulted in a pregnancy.63 With increased urbanization, industrialization, and mobility, it became easier for fathers to avoid marriage, so new solutions needed to be found.64

Adoption did not become a perceived solution to the problem of unwed or teen pregnancy until after World War II.65 Prior to that point, social and public policy called for keeping unwed mothers and their children together. "Family preservation was the creed of early-twentieth-century child welfare reformers."66 Separating mother and child was thought to be damaging to the child, harmful to the mother, and dangerous for the adoptive parents.67 Adoption would deny the child the "real mother love" it was entitled to, and

62. D’EMILIO & FREEDMAN, supra note 22, at 32 (describing steps the Puritans took to punish bastardy, including forced marriage); Rhode, supra note 8, at 101 (noting that rates of bastardy in Puritan America were as low as one to three percent, though an estimated one in three brides were pregnant at the time they married).

63. Marriage was always an imperfect solution, of course. Indentured servants and slaves had no right to marry, and interracial marriages were not legal. D’EMILIO & FREEDMAN, supra note 22, at 12 (noting that indentured servants could not marry), 34-37 (describing the legal prohibitions on interracial marriage), 99 (noting that, as the property of their masters, slaves did not have the legal right to marry).

64. Rachel F. Moran, How Second-Wave Feminism Forgot the Single Woman, 33 HOFSTRA L. REV. 223, 247-48 (2004). As Moran notes, "Urbanization and industrialization made men considerably more mobile than they had been in small, rural communities, and the bonds of marriage and family grew increasingly tenuous." Id. According to D’Emilio & Freedman, premarital pregnancy rates increased and marriages could no longer be forced because of greater geographic mobility, the breakdown of the traditional community, and familial regulation of marriage and sexuality, thus increasing the bastardy rates at this time. D’EMILIO & FREEDMAN, supra note 22, at 43-44. Indeed, women who were no longer protected by community enforcement of moral codes found it "harder to insure that premarital intercourse would lead to marriage in the event of pregnancy." Id. at 44.

65. "The number of nonfamily adoptions per year went from approximately 8,000 in 1937 to over 70,000 in 1965." FESSLER, supra note 7, at 183.


67. HERMAN, supra note 66, at 29. See also LUKER, supra note 18, at 37, for a social reformer’s description of the biological progenitors of a child born outside marriage: "The typical illegitimate child, then, may be said to be the offspring of a young mother of inferior status mentally, morally and economically; and of a father who is probably a little superior to the mother in age, mentality, and economic status, if not in morals."
would deny the birth mother an “incentive for right living.”68 Furthermore, there was little interest in adoption at that time because of strong beliefs in behavioral heredity—the children of women who had sex out of wedlock were thought to have “bad blood,” and consequently, “blood will tell.”69 Adoptive parents would be saddled with children genetically predisposed to bad behaviors “which cause family heartache.”70

Until the 1930s, unwed mothers were encouraged by social reformers, evangelical maternity homes, and social workers to keep their babies.71 Several states joined in, enacting legislation designed to discourage the separation of mother and infant.72 One form these laws took was mandatory breast-feeding and bonding laws that required unwed mothers in maternity homes to remain with their children for a number of months before the children could be relinquished for adoption.73 Even in states without such regulations, many maternity homes required expectant mothers to agree not to relinquish their children,74 or to remain in the maternity home for at least six months following birth even if they intended to relinquish the child for adoption.75 In Minnesota, adoption placement by unwed mothers was allowed only “if it seem[ed] necessary under all the circumstances.”76 Thus, the expectation before World War II was that teen and unwed mothers would parent their children. In the African American community, there had long been that expectation that teen and unwed mothers would parent their children. Some attributed this attitude to a “cultural acceptance” of illegitimacy that was either “rooted in preslavery African traditions,” or to patterns that were “born of the conditions of enslavement in the United States.”77 Others offer a more instrumental rationale for African American mothers parenting their children—there was little interest among majority-white adoptive parents in adopting black babies.78

As social workers professionalized in the 1930s and 1940s, there was a change in attitude toward adoption of white children by social workers. While social reformers saw the child of the unmarried mother as “a tool in the

68. HERMAN, supra note 66, at 29.
69. Id. at 30.
70. Id.
71. RICKIE SOLINGER, WAKE UP LITTLE SUZI: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE 21 (2d ed. 2000); Cahn, supra note 35, at 174.
72. Cahn, supra note 35, at 175. For example, Maryland enacted a law in 1916 that established criminal penalties for the separation of mothers from their children under six months old. Id. (citing U.S. CHILDREN’S BUREAU, THE WELFARE OF INFANTS OF ILLEGITIMATE BIRTH IN BALTIMORE AS AFFECTED BY A MARYLAND LAW OF 1916 GOVERNING THE SEPARATION FROM THEIR MOTHERS OF CHILDREN UNDER SIX MONTHS OLD 1, 12 (1925)). See also KUNZEL, supra note 36.
73. HERMAN, supra note 66, at 34; Cahn, supra note 35, at 174-75.
74. KUNZEL, supra note 36, at 33; Cahn, supra note 35, at 176.
75. KUNZEL, supra note 36, at 88-90.
76. Cahn, supra note 35, at 175.
77. KUNZEL, supra note 36, at 157.
78. LUKER, supra note 18, at 161; SOLINGER, supra note 71, at 57.
Minors' Consent in Abortion and Adoption

redemption of the mother,"79 social workers began to see their client as the child, separate from the interests of the mother.80 Increasingly, social workers saw adoption as serving the best interests of the child—or, at least, of white children.81

Social workers began to pressure unmarried mothers to surrender their children for adoption instead of parenting them:

When a Door of Hope resident expressed her desire to keep her baby, her social worker “worked with her, trying to show her how important it would be that the child be given every possible consideration. We tried to point out to her that possibly if the child was placed for adoption, it would get things that she could not possibly give to him.” Another unmarried mother recognized the influence social workers could exert, even when trying to remain neutral: “It’s not what Mrs. K. says exactly, it’s just that her face lights up when I talk about adoption the way it doesn’t when I talk about keeping Beth.”82

One scholar describes this time in American adoption history as a time of “pressure, coercion, and inhumanity in procuring consents.”83 The underlying attitude of adoption professionals was that an unmarried woman and her child did not constitute a family, as evidenced by the following quote from an agency head:

An agency has a responsibility of pointing out to the unmarried mother the extreme difficulty, if not the impossibility, if she remains unmarried, of raising her child successfully in our culture without damage to the child and to herself . . . . The concept that the unmarried mother and her child constitute a family is to me unsupportable. There is no family in any real sense of the word.84

In denying parent/child dyads the status of family, social workers privileged the normative family, and viewed these dyads as “‘a blow at the solidarity of the family’ itself.”85 Unmarried mothers were seen as unfit, and expected to relinquish their children. One agency head decried the lack of

79. KUNZEL, supra note 36, at 128.
80. Id.
81. Id. at 128-29; SOLINGER, supra note 71, at 57 (noting that, in 1958, only nine percent of all adoptions were of nonwhite babies).
82. KUNZEL, supra note 36, at 129.
83. David M. Smolin, Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime, 32 VT. L. REV. 1, 7 (2007) (citing FESSLER, supra note 7). See also SOLINGER, supra note 71, at 166 (“[W]hite unmarried mothers were defined by the state out of their motherhood.”).
84. Smolin, supra note 83, at 7.
85. KUNZEL, supra note 36, at 130.
"skills and techniques" to obtain relinquishments among his social worker staff, and the "fearfulness in being aggressive in securing a release, as I feel, for the best interests of the child, they should be in many instances." Thus, the expected outcome of an unwed pregnancy of a woman was placement for adoption, and social workers and agency professionals felt duty-bound to ensure that unmarried mothers relinquished their children for adoption.

As social workers changed their attitudes about unmarried mothers placing children for adoption, there was a concomitant growth in interest in adoption after World War II. The American eugenics movement tapered off, taking with it notions of biological determinism that had deterred adoption. Adoptive parents were offered an image of "transplanted flowers" that would thrive in the new family, and not revert to the "bad blood" of the birth parents. The importance of parenting—especially mothering—emerged with the post-war baby boom. Infertile couples wanted in on the baby boom, and with less concern that behavior was biologically determined, adoption became an appealing option. While maternity homes prior to the war worked to prepare unwed mothers for single parenting, after the war the homes anticipated that the girls would place their children for adoption by infertile couples. This was different for African American unwed mothers, who were largely excluded from maternity homes and expected to parent their children long after the expectations that white unwed mothers would relinquish their children for adoption. Thus, from the period following World War II until Roe v. Wade ushered in legalized abortion, a legal solution for white minors' pregnancy was adoption. By placing a child for adoption, an unwed mother could redeem her transgression and contribute to her own rehabilitation.

While some African American teen and unwed mothers did place children for adoption in this period, most did not:

86. SOLINGER, supra note 71, at 156. In response to the desire for "skills and techniques" in separating mothers from their babies, social workers were trained to take an active role to steer the young mother toward acceptance of adoption. Id. at 157. Social workers were trained to believe, "[r]ealistically [the unwed mother] is in no position to make any kind of decision, to know what her feelings are, to evaluate any plan." Id. at 158.

87. Id. at 156 (describing a speech delivered by Henrietta Gordon of the Child Welfare League, declaring it the duty of social workers to "help the mother to see the facts" that adoption was the best option for her baby).

88. FESSLER, supra note 7, at 183.

89. HERMAN, supra note 66, at 29.


91. Id. at 141.

92. SOLINGER, supra note 71, at 17 ("White illegitimate babies could be a resource for childless couples who wanted to achieve a proper family."). See also id. at 24.

93. Id. at 6. There were, however, a few integrated homes and some maternity homes exclusively for African American mothers. Id. at 65-68.

94. FESSLER, supra note 7, at 183.

95. SOLINGER, supra note 71, at 17. See also Smolin, supra note 83, at 7.
For the most part, black families accepted the pregnancy and made a place for the new mother and child. As one Chicago mother of a single black teenager said at the time, "It would be immoral to place the baby [for adoption]. That would be like throwing away your own flesh and blood."96

While African American teen mothers received considerable family support, they received very little welfare assistance. Even when legally eligible for such benefits, many states and localities sanctioned "informal welfare practices that denied or harassed black unwed mothers."97 In some localities those informal practices became formal policy: in Illinois, for instance, the Public Aid Commission mandated that African American mothers on welfare must be warned that having another illegitimate child could lead to jail time.98

With Roe v. Wade, abortion became an additional option for unmarried women's unintended pregnancies.99 Adoption placement continued, but there was a significant decline starting in the late 1970s. Whether the availability of legal abortion caused that decline is a highly contested matter, since the legalization of abortion did not occur in a vacuum. At the same time that abortion became legal, stigma associated with unwed pregnancy and illegitimate birth started to decline as well:

Social scientists may eventually understand fully why attitudes toward sex and marriage changed so profoundly. Whatever the mechanisms, in less than a decade a shameful condition was transformed into a personal choice. The rise of the women's movement, the sexual revolution, the greater availability of abortion (which made out-of-wedlock childbearing truly a choice), and the increasing fragility of marriage all no doubt contributed to the astonishing shift in the social meaning of illegitimacy.100

By the end of the Roe v. Wade decade, ninety percent of unmarried mothers were choosing to parent their children rather than place them for adoption.101 By the late 1980s, ninety-seven to ninety-nine percent of unmarried mothers were choosing to parent their children.102 Given the

96. SOLINGER, supra note 71, at 6.
97. Id. at 51.
98. Id.
100. LUKER, supra note 18, at 97. Given the social stigma and expense of abortion, childbearing may not realistically be "truly a choice," but the availability of legal abortion has changed perceptions such that many believe an unmarried woman who gives birth has done so by choice.
101. Id. at 162.
102. Id.
availability of legal abortion, "choosing to continue a pregnancy means choosing to raise a child. Today the decision to keep a child is one that tends to be made before the baby is born." 103

With this changing landscape, fewer pregnant minors are relinquishing parental rights and consenting to adoption. One scholar describes as most common the view of adoption expressed by this 16-year-old mother:

Sure I thought about it, but I never could do it. I know a lot of people could do a better job than me of being a mother and they can't get pregnant, but that's not my fault. I'm not going to go through nine months and then give someone else the benefit. 104

With the decrease in stigma associated with out-of-wedlock birth, minor mothers feel less pressure to relinquish parental rights. Placing a child for adoption appears to them to be privileging material gain over the familial love that a poor and young mother might feel is the only thing she can supply. 105 This reluctance to place a child for adoption can been seen in a positive light: "These young mothers express a commitment to moral values over material advancement, a passionate attachment to children, and a willingness to try to sustain a family (albeit a nontraditional one) whatever the social and financial cost." 106

While the increase in adoption placement after World War II coincided with the increase in adoption demand, the opposite has occurred in recent times. With delayed childbearing and increased infertility, 107 the demand for adoption has increased while the supply of children has decreased. 108 In this environment, some adoption professionals are returning to the potentially

103. Id.
104. Id. at 163.
105. Id. at 164.
106. Id.


108. In 2002, 560,000 women had taken some steps to adopt. CTR. FOR DISEASE CONTROL AND PREVENTION, ADOPTION EXPERIENCES OF WOMEN AND MEN AND DEMAND FOR CHILDREN TO ADOPT BY WOMEN 18-44 YEARS OF AGE IN THE UNITED STATES, 2002, VITAL AND HEALTH STATS., Ser. 23, No. 27, Fig. 2 (2008). In that same year, "the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted had become virtually nonexistent." Id. at 16. In particular, the number of white infants available for adoption is far lower than the demand for such infants. Barbara Fedders, Race and Market Values in Domestic Infant Adoption, 88 N.C. L. REV. 1687, 1687 (2010). The far greater demand for white infants allows private adoption agencies to charge higher fees for placement of white infants. Id. at 1688. In surveying online marketing materials from adoption agencies, Fedders discovered that "approximately eighteen percent charge higher fees for the adoption of white infants than black infants. One adoption expert estimates that up to one-half of all agencies employ race-based pricing." Id. at 1697-98. See also Michele Goodwin, The Free-Market Approach to Adoption: The Value of a Baby, 26 B.C. THIRD WORLD L.J. 61, 65-66 (2006). Perversely, this market reality may insulate mothers of African-American or bi-racial/African American infants from potentially coercive tactics used to ensure relinquishment.
coercive “skills and techniques” of the past to encourage teen mothers to relinquish their infants. The National Council for Adoption (NCFA) spearheaded legislation to create and fund the Infant Adoption Awareness Program, which seeks to encourage adoption by offering free training to those who might come into contact with pregnant teens at health clinics. The NCFA also offers the training to school nurses, abstinence program personnel, and crisis pregnancy center counselors to encourage women & girls to consider adoption placement. Although the law requires counseling to be nondirective, there is considerable evidence in the training materials that the counselor is expected to direct the girl toward adoption.

One method suggested in the training materials is that a girl resistant to adoption is self-deceived, selfish, and behaving “inhumanely.” Consider this statement from the training materials:

Of course, if others are living inhumanely, they will not benefit from what we offer until they change their hearts—until they give up their self-deceptions. At the least, our humane obligation is to be relentless in showing those seeking help how to create and maintain a humane way of being in the midst of their seemingly overwhelming circumstance.

So before answering these kinds of questions, we must also be living in the principles and assumptions that guide our adoption philosophy. For example, this curriculum invites adoption counselors, unmarried

109. See supra notes 79-87 and accompanying text.

110. I describe the tactics as potentially coercive, though there is no case law considering these particular tactics. Adoption consent must be voluntary to be valid, and coercion can render consent involuntary. However, once a mother consents to adoption, the burden is on her to establish that the consent was involuntary. Courts are not usually receptive to these claims. See Susan Stefan, Silencing the Different Voice: Competence, Feminist Theory and Law, 47 U. MIAMI L. REV. 763, 804-08 (1993). Stefan argues that coercion doctrine is unable “to provide an adequate remedy for women’s injuries” in the adoption context, ignoring the reality of women’s lives. Id. at 806. “[C]ourts specifically refuse to consider either the individual or cumulative effects of ‘parental threats, pressure by the surrendering mother’s family, advice by the surrendering parent’s physician and mother, emotional distress or depression’ as sufficient to constitute ‘the ‘kind of force’ which would sustain a finding of duress.” Id. at 806.


114. Id. at 2.
young women who are pregnant or have borne a child out of wedlock, biological fathers not married to the woman, parents of the young woman, and potential adoptive parents to consider the best interests of the infant as paramount. This principle stands in contrast to granting every person connected to the infant equal claim on the child. We are pursuing adoption as a process that provides parents for a child who needs them. It is meeting that need in the best possible way for the child that invites us to take the adoption option seriously.\(^{115}\)

The nondirective adoption counseling starts from the proposition that birth mothers must “change their hearts” and recognize that they have no better claim to the child than any other person—any other attitude is self-deceptive and self-centered.\(^{116}\) This is a shocking statement, given the way we ordinarily frame parenthood and parental rights. Indeed, if the decision of who was the rightful parent of the child rested solely on “best interests of the child,” any number of biological parents would lose their children to “better” parents—and in a best interest of the child analysis, that “better” parent often means one who is wealthier, older, and more stable.\(^{117}\) Of course, it is offensive to equate the “best interests of the child” with the wealth of the parenting families. But the reality in adoption is that adoptive parents are usually financially far better positioned than birth families.\(^{118}\)

What does the training material suggest to put these ideas in practice? Recall the statement illustrative of why so many teens are resistant to adoption:

Sure I thought about it, but I never could do it. I know a lot of people could do a better job than me of being a mother and they can’t get pregnant, but that’s not my fault. I’m not going to go through nine months and then give someone else the benefit.\(^{119}\)

The training materials suggest that the counselor respond as follows:

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115. Id.
116. Id.
117. See Annette Ruth Appell, *Virtual Mothers and the Meaning of Motherhood*, 34 U. MICH. J.L. REFORM 683 (2001). Professor Appell argues for the importance of biology in the legal construction of parenthood. Critics of that basis for parental authority, she says, challenge “the integrity of those families who do not easily fit dominant norms of family.” *Id.* at 686. Supplanting biology with a broad “best interest of the child” standard for parenthood ignores “the self-referential nature of assigning value to families who resemble one’s own family.” *Id.* at 685. The position of the NCFA training materials harks back to the 1940s and 1950s when adoption professionals refused to recognize mother-child dyads as family. See *supra* notes 79-82 and accompanying text.
118. See Perry, *supra* note 1, at 101 (noting the financial disparity in adoption such that adoption is often the transfer of a child from a less advantaged woman to a more advantaged one, especially in transracial and international adoption).
This statement can be declared from a self-centered or other-centered perspective. A variety of starting points are possible here, and must fit the counselor’s own sense of how to discuss realistic possibilities . . . .

Counselor: “It sounds as if that is a statement where you are acknowledging the value of this baby—that the child means something to you. Is that right?”

If the young woman acknowledges her meaning is that she would have become attached to the child, you could ask, “When you first made the decision to carry the child, do you sense you did it for the child or for you?” [This is, of course a question that can be answered in four ways: I did it for the child; I did it for me; I did it for both; I don’t know (or none of the above).]

A humane decision will always include being for the other, and being for the other in a humane way will always reveal that you are simultaneously “for” yourself.120

And in a pamphlet entitled, What Do I Say to a Client Who Says . . . , counselors are told to answer the statement, “I could never give my baby away,” by encouraging adoption: “Adoption can be a courageous and unselfish decision because you are putting the child above yourself.”121 A video of a birth mother discussing her decision to put the baby up for adoption illustrates how the technique is employed.122 She describes telling her counselor emphatically that she was not at all interested in adoption placement because she felt like it would be a selfish choice.123 But it seems her “nondirective” counselor encouraged the adoption choice, because she found herself working through an “adoption workbook” and eventually realizing that adoption would be the best choice to give her child the best life.124 It is hard to square this with the “nondirective” approach to counseling touted by the training materials.

It is against this backdrop of history, social practice, and ideology about teen pregnancy, unwed pregnancy, teen parenting, and attitudes toward adoption that a pregnant minor is asked to make a decision about adoption placement. Thus, it is instructive to consider how minors’ decision making differs from the decision making of adults, how the law has traditionally

120. NAT’L COUNCIL FOR ADOPTION, supra note 113, at 9-10.
123. Id.
124. Id.
viewed the decisions of minors, and how the law treats the decisions of minors in abortion and adoption.

II. MINORS' DECISIONMAKING

Lisa, 17, became pregnant at 15 and kept her pregnancy so secret that her mother didn’t even know when she went into hospital to have her daughter, Summer Leigh. . . . “I thought I’d just go to hospital and give the baby up for adoption. It was only when I got to the hospital that I found out you can’t until you’re 18 [in England]. . . . I didn’t want to give her away. I just didn’t want my mum to find out. It was a good job she found out. I would have regretted it.”

A. Adolescent Development and Decisionmaking

Studies of adolescent development and decision making abilities almost always start with Jean Piaget’s 1958 book, The Growth of Logical Thinking From Childhood to Adolescence. Piaget posited four stages of development for children: the sensorimotor stage (birth to age 2), the preoperational stage (ages 2 to 7), the concrete operational stage (ages 7 to 11), and the formal operational stage (age 11 to adult). It is only in this final stage, Piaget concluded, that adolescents acquire logical reasoning and abstract thinking. In addition, an adolescent in the formal operational stage “becomes capable of introspection and is able to think about his or her own thoughts and feelings as if they were objects.” By age fifteen, according to Piaget, children become capable of reasoning like adults. “Both adults and adolescents with formal operations reason using the same logical processes.”

More recent studies question Piaget’s stages of development, and note significant differences in the way adults and adolescents think that are not recognized in the age-based stages-of-development approach of Piaget.

125. SUZIE HAYMAN & HELEN ELLIOTT, IT HAPPENED TO ME: TEENAGE PREGNANCY 18-19 (2002). Lisa’s story is set in England, which differs substantially from the U.S. in its policies regarding minors’ ability to relinquish a child for adoption.


128. Id. at 111.

129. Id. at 112.

130. Id. at 111.

131. Id. This is not to say that Piaget did not recognize differences in adolescent thought; he attributed some of the differences to adolescents’ “disquieting megalomania and conscious egocentricity.” Id. at 131 (citing JEAN PIAGET, SIX PSYCHOLOGICAL STUDIES 66 (1967)).

132. See, e.g., ROBERT S. SIEGLER, EMERGING MINDS: THE PROCESS OF CHANGE IN CHILDREN'S THINKING 11 (1996) (“Unfortunately, [age-based stages-of-development models] have proved to be inconsistent with a great deal of data.”).
Advances in brain imaging have allowed scientists to identify physical differences in the brains of adults and adolescents, revealing that a person’s brain does not finish growing until early adulthood. “The human brain does not settle into its mature, adult form until after the adolescent years have passed and a person has entered young adulthood.”

The biological immaturity of the adolescent brain is especially acute in the prefrontal cortex, which plays a critical role in the higher functions of the brain, which are called the executive or “CEO” functions.

When it comes to “response inhibition, emotional regulation, planning and organization,” the so-called executive functions, the most important components of the brain are the frontal lobes. In particular, “the neocortex at the top of the brain[] mediate[s] ‘more complex’ information-processing functions such as perception, thinking, and reasoning,” and the prefrontal cortex is associated with a variety of cognitive abilities, including decisionmaking, risk assessment, ability to judge future consequences, evaluating reward and punishment, behavioral inhibition, impulse control, deception, responses to positive and negative feedback, and making moral judgments.

The prefrontal cortex is one of the last areas of the brain to mature. “Because they are at a more primitive developmental stage, adolescents lack judgment . . . and cannot understand the consequences of their actions.”

Other areas of the adolescent brain are also less developed than in the adult brain. The cerebellum continues to change through adolescence, and plays a significant role in “[a]nything we can think of as higher thought, mathematics, music, philosophy, decision making, [and] social skill.” The immaturity of the adolescent brain produces judgments, thought patterns, and emotions that are different from adults. Adolescents are more likely to focus on short-term
consequences rather than future consequences,140 more likely to discount the perspectives of others,141 and less likely to consider all available alternatives.142

Emotional volatility is a hallmark of adolescence, and has an effect on the cognitive ability and decision making of teens:

The interplay among stress, emotion, and cognition in teenagers is particularly complex—and different from adults. Stress affects cognitive abilities, including the ability to weigh costs and benefits and to override impulses with rational thought. But adolescents are more susceptible to stress from daily events than adults, which translates into a further distortion of the already skewed cost-benefit analysis.

Emotion, like stress, also plays an important role in cognition, influencing decision making and risk-taking behavior. Because of both greater stress and more drastic hormonal fluctuations, adolescents are more emotionally volatile than adults—or children, for that matter. They tend to experience emotional states that are more extreme and more variable than those experienced by adults.143

In assessing information with high emotive content, adolescent brains react differently from adult brains, relying more on the amygdala, the portion of the brain dedicated to emotion, than the prefrontal cortex, which is dedicated to the executive functions:

One of the implications of this work is that the brain is responding differently to the outside world in teenagers compared to adults. And in particular, with emotional information, the teenager’s brain may be responding with more of a gut reaction than an executive or more thinking kind of response. And if that’s the case, then one of the things that you expect is that you’ll have more of an impulsive behavioral response, instead of a necessarily thoughtful or measured kind of response.144

140. Id. (citing Elizabeth S. Scott et al., Evaluating Adolescent Decision Making in Legal Contexts, 19 LAW & HUM. BEHAV. 221, 231 (1995)).
141. Brief of APA, supra note 133, at 7 (citing Elizabeth Cauffman & Laurance Steinberg, (Im)maturity and Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults, 18 BEHAV. SCI. & L. 741, 757 (2000)).
142. Id. at 9.
143. Brief of AMA, supra note 135, at 8.
Thus, it would be “unfair to expect [teens] to have adult levels of organizational skills or decision making before their brain is finished being built.”

Even before this scientific evidence was available to judges, the law recognized the impaired decisionmaking abilities of minors. Of course, the law is not completely consistent on this point—preventing capital punishment for minors, while allowing minors to be tried criminally as adults; insisting on parental involvement in minors’ decisions about abortion, while allowing pregnant minors to voluntarily relinquish parental rights. There are even inconsistencies that cross these dyads, like those who applaud lesser culpability for young offenders while decrying restrictions on minor girls’ ability to consent to abortion. The basic proposition of law, however, is that underage persons cannot consent to a wide range of activities.

B. The Law

“Children are constitutionally different from adults.” The law has long recognized that legal rights and liabilities of minors are different from adults. For example, minors are not able to enter into binding contracts; vote in elections; buy tobacco or alcohol; get a tattoo; marry without parental consent; consent to sex in some states; or consent to or refuse medical

145. ABA CRIMINAL JUSTICE SECTION, ADOLESCENCE, BRAIN DEVELOPMENT AND LEGAL CULPABILITY (2004).
147. J. Shoshanna Ehrlich tries to resolve this conundrum, arguing that minor girls should be allowed to consent to abortion without parental involvement, but that young offenders are deserving of different treatment from adults because of their minority. Shifting Boundaries: Abortion, Criminal Culpability and the Indeterminate Legal Status of Adolescents, 18 WIS. WOMEN’S L.J. 77, 116 (2003). Ehrlich argues that adolescents have sufficient cognition to make the abortion decision, since it is quintessentially a medical decision, while issues of criminal culpability include psychosocial considerations irrelevant in the abortion decision. Id. at 105-08.
151. Joni Hersch, Teen Smoking Behavior and the Regulatory Environment, 47 DUKE L. J. 1143, 1144 (1998) (“All states currently forbid the sale of tobacco products to minors under age eighteen.”)
153. E.g., CAL. PENAL CODE § 653 (West 2012) (making it a misdemeanor to tattoo or offer a tattoo to a person under age eighteen).
procedures, including abortion. A minor in California cannot even use a tanning salon. The Supreme Court has recognized that minors who commit crimes lack the level of culpability of adults, making it unconstitutional to punish them with death or with life sentences without the possibility of parole. As the Court has noted, the law’s differential treatment of children is justified by three reasons: “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.”

1. Vulnerability of Minors

In any number of areas, the law treats minors differently because of their vulnerability when interacting with adults. For example, the well-known limitation on the enforceability of minors’ contracts is often justified on the basis of the vulnerability of minors in interacting with adults in matters involving money and property. Over-reaching and fraud by adults might go undetected by minors, thus they are protected from the consequences of their decisions by being able to void their contracts. In addition, minors are thought to be more suggestible than adults, and thus less capable of resisting high-pressure sales tactics. This problem of suggestibility informs other differential treatment of minors; the Supreme Court argued that one reason minors should not be put to death, even for serious crimes, is their malleability and susceptibility to peer pressure. The vulnerability of young girls in the

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158. David M. Vukadinovich, Minors’ Rights to Consent to Treatment: Navigating the Complexity of State Laws, 37 J. HEALTH L. 667, 670 (2004) (“As recognized by Justice Cardozo, competent adults have the right to consent to or refuse medical treatment. That same right does not extend to minors, who generally are not considered mature enough to make informed healthcare decisions without the involvement of an adult.”).

159. Id. See also Martin T. Harvey, Adolescent Competency and the Refusal of Medical Treatment, 13 HEALTH MATRIX 297, 298-300 (2003) (describing the traditional view that minors and other “incompetents” should not have the right to refuse medical treatment when death or disability would result).


164. Bellotti, 443 U.S. at 634.


166.See Dodson v. Shrader, 824 S.W.2d 545, 547 (Tenn. 1992); Elizabeth S. Scott, The Legal Construction of Adolescence, 29 HOFSTRA L. REV. 547, 553 (2000).


face of seduction efforts of older men informs statutory rape laws. Limitations on police interrogation of minors are justified on the basis of the increased suggestibility of minors.

2. Immature Decisionmaking

"The State commonly protects its youth from adverse governmental action and from their own immaturity," because "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." One scholar argues that the law views minors the same way Saint Paul did, as "impaired adults, unable to perceive and understand until transformation to adulthood." Restrictions on possession of alcohol and tobacco are obviously justified on the basis of minors lacking the experience or perspective to avoid deleterious choices. Restrictions on voting and jury service for minors rest on the presumption that minors lack the necessary life experience to participate in these decisionmaking activities in a meaningful way.

167. Michelle Oberman, Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape, 48 BUFF. L. REV. 703, 704 (2000) (arguing that "minors, because of their inexperience, are vulnerable to exploitation and coercion in their sexual interactions," and noting that "29.2% of babies born to girls under age sixteen were fathered by men over age twenty-one, and the younger the girls, the older the average age of the father").

168. See, e.g., In re Gault, 387 U.S. 1, 44-45 (1967); Haley v. Ohio, 332 U.S. 596, 598 (1948); Commonwealth v. A Juvenile, 449 N.E.2d 654, 657 (Mass. 1983) (holding that a parent or interested adult must be present before a juvenile confession is valid); State v. Fincher, 305 S.E.2d 685, 692 (N.C. 1983) (holding that a juvenile defendant must be informed he had a right for a parent or guardian to be present during interrogation); In re E.T.C., 449 A.2d 937, 940 (Vt. 1982) (holding that a juvenile cannot waive rights against self-incrimination without the presence of an interested adult); see also Patrick M. McMullen, Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles, 99 Nw. U. L. REV. 971, 972 (2005) (exploring "the power of the police to deceive juvenile suspects in criminal interrogations, and the effects such deception can have on impressionable and immature children").


170. Id. at 635.


3. Parental Authority

"[T]he guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors." Parental authority over children is a concept that had existed long before the creation of the Republic. Parents have the constitutional right "to direct the upbringing and education of children under their control." The law allows and expects parents to teach, guide, and inspire their children as they "grow into mature, socially responsible citizens." That parental authority is not simply a matter of rights—it is instrumental and good for children:

Parents' strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their children’s best interests in most circumstances. In contrast, the state’s knowledge of and commitment to any particular child is relatively thin. A scheme of strong constitutional rights shields the parent expert from the intrusive second-guessing of the less expert state.

While parental authority is not absolute, it serves as an important limitation on minors' autonomy. The origin of statutory rape laws, for example, rested in the father's ownership of his daughter, as with laws relating to parental consent for early marriage. The justification for laws limiting a minor's right to consent to or refuse medical treatment rests on this concept of parental authority.

175. See 1 WILLIAM BLACKSTONE, COMMENTARIES *452; JOHN LOCKE, TWO TREATISES OF GOVERNMENT 348-49 (1698); SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS 112 (1703).
177. Bellotti, 443 U.S. at 638 (observing that raising children is "beyond the competence of impersonal political institutions").
179. See Gonzales v. Reno (The Elian Gonzales Case), 212 F.3d 1338, 1352 n.20 (11th Cir. 2000) ("Especially because the best interests of a child and the best interests of even a loving parent can clash, parental authority over children—even where the parent is not generally 'unfit'—is not without limits in this country.").
181. Alicia Ouellette, Shaping Parental Authority over Children's Bodies, 85 IND. L.J. 955, 956-57 (2010) (noting that parental authority has allowed parents to "westernize the eyes of their adoptive Asian children, to modify the facial features of children with Down Syndrome, to inject human growth hormone (HGH) into healthy children, to enlarge the breasts of or suck the fat from teenagers, to
Of course, these three justifications for limitations on minors—their vulnerability, their immaturity in decision making, and their parents' authority—are interrelated. We grant parents authority over children because of children’s vulnerability, and their immature decision making often creates that vulnerability. These justifications are easily seen in the regulation of minors’ abortion decisionmaking, yet are entirely absent in the way most states regulate minors’ decisionmaking in the context of relinquishment of parental rights and consent to adoption placement.

III. REGULATION OF MINORS’ ABORTION AND ADOPTION DECISIONMAKING

Well, first, I was happy. I was like, “Oh my god, I have a little baby growing inside of me.” I was happy, and then... I was thinking how my family would react... and that’s when I was like, “Nope, I can’t have the baby.”

A. Abortion and Minors

In 1976, the Supreme Court extended to at least some minors the privacy protection to make decisions about abortion, acknowledged for adults a few years earlier. The Court held that a statutory scheme that gave parents an absolute veto over a minor’s decision to terminate her pregnancy was unconstitutional, while “signaling that the Court might uphold a less intrusive law.” The court revisited the issue four years later in Bellotti v. Baird, holding that a minor’s ability to obtain an abortion could be limited in certain respects. In particular, a state could prevent a minor from having an abortion absent parental consent, so long as the state provided a judicial bypass exception. In so doing, the Court “simultaneously recognized and curtailed the liberty and interest of young women in their own bodies.” Since that ruling, 43 states have passed statutes requiring parental notification or consent prior to a minor’s abortion, though in 5 of those states the parental involvement laws are temporarily or permanently enjoined.

182. EHRLICH, supra note 5, at 84 (quoting an interview with Stephanie Paul, age 17).
183. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). The Court noted, however, that “[O]ur holding... does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy.” Id. at 75.
184. EHRLICH, supra note 5, at 43.
186. Id. See also EHRLICH, supra note 5, at 15.
187. EHRLICH, supra note 5, at 33.
188. GUTTMACHER INST., STATE POLICIES IN BRIEF: AN OVERVIEW OF MINORS’ CONSENT LAW (2013) (stating that parental involvement is enjoined in California, Illinois, Nevada, New Jersey, and New Mexico).
one parent consent to a minor’s abortion, while 11 states require prior notification of at least one parent. 5 states require both notification of and consent from a parent prior to a minor’s abortion.

In all states with parent involvement laws, statutes also provide for judicial bypass as required by the Constitution. The judicial bypass provision is designed to preserve decisional privacy for minors and to prevent parental consent requirements from amounting to an absolute veto. Some statutes provide specific direction to the court on factors to consider in allowing a minor to have an abortion without parental notification or consent. For example, Arizona law requires the court to allow the abortion if it determines that the pregnant minor is mature and capable of giving informed consent, or that the abortion without parental notice or consent would be in her best interests. In Louisiana, a minor seeking judicial bypass may be required to attend an evaluation and counseling session with a mental health professional, designed to produce “trustworthy and reliable expert opinion concerning the minor’s sufficiency of knowledge, insight, judgment, and maturity.”

B. Adoption and Minors

In all U.S. jurisdictions, a minor’s status as a minor does not impair her consent to relinquish her parental rights, so long as statutory requirements are met. In some jurisdictions, adoption statutes say explicitly that a minor parent can relinquish parental rights and consent to adoption. Even where the

189. Id. at 2 (describing laws in Alabama, Arizona, Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, and Wisconsin).
190. Id. (describing laws in Alaska, Colorado, Delaware, Florida, Georgia, Iowa, Maryland, Minnesota, New Hampshire, South Dakota, and West Virginia).
191. Id. (describing laws in Oklahoma, Texas, Utah, Virginia, and Wyoming).
193. Bellotti, 443 U.S. at 642; see also EHRlich, supra note 5, at 46-47.
194. ARIZ. REV. STAT. § 36-2152(B) (LexisNexis 2011). See also IDAHO CODE ANN. § 18-609A(2) (2010) (allowing judicial bypass for maturity or best interests reasons); IND. CODE ANN. § 16-34-2-4 (LexisNexis 2011) (same); KY. REV. STAT. ANN. § 311.732(3) (West 2010) (allowing that courts shall hear evidence relating to “emotional development, maturity, intellect, and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful”); LA. REV. STAT. ANN. § 40:1299.35(B) (2011).
196. See, e.g., FLA. STAT. ANN. § 63.082 (West 2010) (holding that a minor parent has the power to consent to adoption, and may not revoke that consent upon reaching the age of majority); HAW. REV. STAT. ANN. § 578-2(e) (LexisNexis 2010) (“The minority of a child’s parent shall not be a bar to the right of such parent to execute a valid and binding consent to the adoption of such child.”); MISS. CODE ANN. § 93-15-103(2) (2003) (“The rights of a parent . . . may be relinquished [by signed affidavit] . . . regardless of the age of the parent”); In re Adoption of D.N.T., 843 So. 2d 690, 706-07 (Miss. 2003) (holding that a minor mother can consent to adoption pursuant to the statute, which overrides a rule of
Minors' Consent in Abortion and Adoption

statutes are silent, however, courts generally hold that the minor mother can consent. In Nelson v. Gibson, the Minnesota Supreme Court held that the seventeen-year-old mother, who had since married the father of the child and was then seeking to prevent the adoption, had consented under a silent statute:

The statute as then worded provided for the consent of the unwed mother without any limitation upon the giving of that consent by reason of her minority. In the same section it is specifically provided that no child over the age of 14 years shall be adopted without his consent. In other words, the Legislature was not unmindful of age qualifications, but chose to make none as to the illegitimate mother. The age of legal capacity is wholly a matter of legislative regulation, and the disabilities of infancy may be removed for certain purposes at an earlier age than for others. It follows that the mother, though a minor—as the law then existed—had the capacity to consent to the adoption of her child.

In a majority of U.S. jurisdictions, a minor's decision to relinquish a child for adoption is not only valid, but is regulated exactly the same as an adult's decision. In only fifteen states are there different or additional requirements for a minor's decision to place a child for adoption. In four states, a minor must be provided independent legal counsel. In another four states, a court must appoint a guardian ad litem for the minor parent. In five states, a minor's parent must consent to the relinquishment.

1. Independent Legal Counsel

Independent legal counsel for a prospective birth mother is not universally required in the United States. In four states, however, when the prospective birth mother is a minor she is required to have independent legal counsel,

procedure requiring service of process in civil case to be served on the parent of that minor mother); Tex. Fam. Code Ann. § 161.103(a)(1) (West 2010) (holding that an affidavit of voluntary relinquishment of parental rights may be signed "by the parent, whether or not a minor, whose parental rights are to be relinquished");
197. 50 N.W.2d 278 (Minn. 1951).
198. Id. at 283 (citations omitted).
199. This article discusses those few states that have separate treatment for minor mothers. See infra notes 204-243 and accompanying text. In all other states, there are no statutes providing for different treatment of minors.
200. See infra discussion accompanying notes 204-243.
201. Kansas, Maryland, Montana, and Vermont. See infra notes 204-220 and accompanying text.
203. The states are Louisiana, Michigan, Minnesota, New Hampshire, and Rhode Island. See infra notes 236-43243 and accompanying text.
meaning that the attorney cannot also represent the adoptive parents or the adoption agency facilitating the placement.

Prior to 1990, Kansas statutes addressed the minority of the placing parent by simply stating that minority shall not invalidate a parent’s consent. After a study of the Family Law Advisory Committee of the Kansas Judicial Council, several changes were proposed to protect minor parents. The committee stated:

Minors are afforded legal protection in regard to other decisions and it appears to the committee that the decision to give up a child merits attempts at protection as well. The proposed subsection would require independent legal counsel for a minor and the presence of the minor’s attorney at the time the instrument is executed.

Kansas statutes now provide that the minor parent must first have the advice of independent legal counsel as to the consequences of the consent prior to the execution of the consent affidavit. Counsel must also be present when the affidavit is executed. In Kansas, the prospective adoptive parents or the child-placing agency are solely responsible for the expense of providing independent counsel.

The statutory requirement of independent counsel does not mean that a minor parent must be provided with counsel to represent her throughout the adoption proceeding, however. In a case where a minor parent was afforded counsel at the time of consent, then sought out the same attorney to represent her in challenging her consent in court and was refused, the court held that it was sufficient that counsel represent the minor parent “immediately prior to and at the time consent is executed.”

In Montana, a relinquishment executed by a minor parent “is not valid unless the minor parent has been advised by an attorney who does not represent the prospective adoptive parent” in a direct placement adoption. In 2006, the Montana Supreme Court addressed whether this provision applied in a case

205. Id.
206. Id. at 614-15.
208. Id. The Family Law Advisory Committee of the Kansas Judicial Council, in proposing this requirement, spoke to the necessity of counsel’s presence at the time the affidavit was executed: “The proposal requires the minor’s attorney to be present at the time of execution in light of the fact that advice provided at an earlier time may diminish in value due to the intervening passage of time and birth of the child.” N.A.P., 930 P.2d at 615.
210. N.A.P., 930 P.2d at 614. The court further stated, “It was not intended that the minor be provided legal representation for the adoption proceeding to follow. If the legislature would have intended full-blown legal representation for a minor, it would have said so.” Id.
211. MONT. CODE ANN. § 42-2-405(2) (West 2011).
where the birth mother misstated her age and all parties believed that the
mother was over eighteen at the time of the adoption. The court concluded
that the statute "exists to protect minor parents from making legally binding
direct parental placement adoptions without counsel’s advice and
representation." Noting that the minor mother had difficulty understanding
the paperwork related to the adoption, that the prospective adoptive mother
called her once a day to encourage her to sign and promised that she could see
her child anytime she wanted, and that the minor mother did not know this
promise was not enforceable, the court concluded that this was precisely why
the statute existed—to protect minor mothers like this one. Therefore, the court
invalidated the mother’s consent.

In adoption proceedings where a minor parent relinquishes parental rights
or consents to adoption, Maryland law requires the court to appoint an attorney
to represent the parent. Furthermore, consent of a minor parent is not valid
unless accompanied by an affidavit of appointed counsel stating that the minor
consents knowingly and voluntarily. The statute does not explicitly require
that counsel for minor birth parents be independent of the prospective adoptive
parents or child-placing agency. The statutes provide that an attorney may
represent more than one party to the adoption if the Maryland Lawyers’ Rules
of Professional Conduct would allow that dual representation.

Vermont notes that a parent who is a minor is competent to execute a
consent or relinquishment if the parent has had the advice of an attorney who
does not represent the adoptive parents or the agency to which the parent is
relinquishing the child. The attorney must be present when the consent is
executed. The person before whom the consent or relinquishment is taken
must certify that a minor parent was advised by an independent attorney.

2. Guardian Ad Litem

Four states—Alabama, Arkansas, Connecticut, and Kentucky—require a
court to appoint a guardian ad litem to represent a minor parent in an adoption
proceeding. A minor mother in Alabama can relinquish her parental rights, and
the fact of minority does not provide grounds for revocation of that consent.
However, the court must appoint a guardian ad litem to represent the interests

213. Id. at 546.
214. Id.
216. Id. § 5-339.
217. Id. § 5-307(c). The Maryland Rules of Professional Conduct contain a general “conflict of
interest” provision. MD. RULES OF PROF’L CONDUCT R. 1.7 (2013).
218. VT. STAT. ANN. tit. 15A § 2-405(c) (West 2012).
219. Id.
220. Id. § 2-405(d)(5).
221. ALA. CODE § 26-10A-8(b) (LexisNexis 2012).
of the minor parent. A minor over the age of thirteen can nominate the guardian ad litem she wishes to represent her. A minor father must also have a guardian ad litem appointed, unless the court finds that he has impliedly consented to the adoption by his actions.

Though the statute requires the appointment of a guardian ad litem to represent the interests of the minor mother, it does not, apparently, require that appointment to occur prior to the mother’s consent to the adoption. In Anderson v. Hetherington, the appellate court found that during the course of the adoption hearing, “the [adoption] court discovered that the mother was a minor at the time of giving birth, at the time of signing the consent, and at the time of the hearing.” At that point, “[t]he court appointed a guardian ad litem to protect the mother’s interests and continued the hearing.” The mother was not personally present at the hearing and appeared never to have met with the guardian ad litem; thus, the belatedly appointed guardian ad litem was the only representation of the mother’s interests at the adoption hearing. Nevertheless, the court found the mother’s consent to be valid. The mother filed a motion to reconsider, and after hearing additional testimony, the court reaffirmed its prior decision and granted the petition for adoption. As the reviewing court failed to even discuss the fact that the guardian ad litem was appointed belatedly and was not required to consult with the mother prior to representing her interests, the court appeared to accept the limited role of the guardian ad litem in this context.

If a relinquishing parent is a minor, Arkansas requires that consent be signed by a court-ordered guardian ad litem. The guardian ad litem is appointed to appear on behalf of the minor parent for the purpose of executing consent. In Connecticut, when a minor parent petitions for voluntary termination of parental rights, the trial court shall appoint a guardian ad litem for such parent. The statute further provides that the guardian ad litem must be a licensed Connecticut attorney or an officer of a child placement agency who is not the petitioner. The guardian ad litem is entitled to reasonable compensation, and if the minor parent cannot afford to pay, the guardian ad

222. Id. § 26-10A-8(a).
223. Id.
224. Id. § 26-10A-8(c).
225. 560 So. 2d 1078 (Ala. 1990).
226. Id. at 1079.
227. Id.
228. Id.
229. Id.
230. ARK. CODE ANN. § 9-9-208(c) (West 2010).
231. Id.
232. CONN. GEN. STAT. ANN. § 45a-708(a) (West 2011).
233. Id.
litem will be paid from state funds. Kentucky also provides that a guardian ad litem must be appointed for a minor parent.

3. Parental Consent

In five states—Louisiana, Michigan, Minnesota, New Hampshire and Rhode Island—parental consent or notification is a necessary prerequisite to a minor’s relinquishment of parental rights. Louisiana requires parental consent of the minor parent in private adoptions, but not in agency adoption. In private adoption, a minor parent surrendering a child for adoption must have a parent or guardian join in the surrender unless the minor has been emancipated. The statute further provides that if the minor’s parent refuses consent, the court may authorize the surrender by the minor if it finds that 1) the minor is sufficiently mature and well-informed to surrender, and 2) the surrender is in the child’s best interest.

Michigan does not recognize an unemancipated minor parent’s consent to adoption as valid unless her parent, guardian, or guardian ad litem consents. Though Minnesota has recognized since 1951 that a minor mother can consent to adoption, it requires that the minor mother’s parents or guardian also consent. New Hampshire statutes require that a birth mother to surrender parental rights in adoption, but if she is under eighteen, the court may require the assent of her parents or legal guardian as well. In Rhode Island, “no minor parent may give a binding consent to any adoption petition or to any termination of rights except with the consent of one of the parents, guardian, or guardian ad litem of the minor parent.”

IV. ARE THE DECISIONS ABOUT ABORTION AND ADOPTION SIMILAR?

I have given a baby up for adoption, and I have had an abortion, and while anecdotes are not evidence, I can assert that abortions may or may not cause depression—it certainly did not in me, apart from briefly mourning the path not taken—but adoption? That is an entirely different matter. I don’t doubt that there are women who were fine after adoption, and there is emphatically

234. Id. § 45a-708(b)-(c).
235. KY. REV. STAT. ANN. § 199.500(2) (West 2010).
236. LA. CHILD. CODE ANN. arts. 1113(A), 1113(E), 1122(B)(3) (West 2011).
237. Id. art. 1113(A).
238. Id. arts. 1113(C), 1122(B)(3).
239. MIC. COMP. LAWS ANN. § 710.43(4) (West 2011).
241. MINN. STAT. ANN. § 259.24(2) (West 2012). The statute requires that a minor also be offered the opportunity to consult with an attorney, clergy member, or doctor, but does not render consent invalid if the minor declines the offer. Id.
243. R.I. GEN. LAWS ANN. § 15-7-10(b) (West 2012).
nothing wrong with that or with them; but I want to point out that if we're going to have a seemingly neverending discussion about the sorrow and remorse caused by abortion, then it is about goddamn time that we hear from birth mothers too.

Believe me when I say that of the two choices, it was adoption that nearly destroyed me—and it never ends.244

The differential treatment of a minor's decision to have an abortion and a minor's decision to relinquish parental rights and consent to adoption is striking. Are the decisions so dissimilar as to justify this difference? Three reasons are commonly given for why minors should not be making the decision about abortion on their own: 1) health risks associated with all medical procedures, including abortion, 2) emotional fallout after abortion, and 3) the seriousness of the decision. The decision about relinquishment of parental rights and consent to adoption seem to share these characteristics with the abortion decision.

A. Physical Health and Safety

1. Abortion

One frequent argument for parental notification in teen abortions is that parents ought to know about medical procedures performed on their children, given that all medical procedures involve some health risks. A parent informed of a minor's abortion can help the minor evaluate the medical risks and can provide aftercare with an awareness to watch for adverse consequences.245 One can make the same argument about childbirth by minor children. The risk of death and medical complications is greater with childbirth than with abortion, and since childbirth is riskier for teens than for adults, abortion for teens is significantly safer than childbirth for teens.246 Indeed, in Roe v. Wade,247 the Court noted the following about the risk of abortion versus the risk of childbirth:

[A]bortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe.

Mortality rates for women undergoing early abortions, where the

245. See SILVERSTEIN, supra note 5, at 5-6.
246. Willard Cates, Jr., Abortion for Teenagers, in ABORTION AND STERILIZATION: MEDICAL AND SOCIAL ASPECTS 139, 147 (Jane E. Hodgson ed., 1981) (nothing that the mortality rate for teen pregnancy is five times higher than the mortality rate for teen abortion).
procedure is legal, appear to be as low as or lower than the rates for normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared.\textsuperscript{248}

More recent statistics support the Court’s assessment of the low medical risks associated with abortion, especially when compared to the risks associated with continued pregnancy and childbirth.\textsuperscript{249} Not only are mortality risks lower for teen abortion,\textsuperscript{250} the risk of serious complications is also lower for teens.\textsuperscript{251} Abortion for teens does not pose long-term health risks, either—not for breast cancer,\textsuperscript{252} future infertility,\textsuperscript{253} low-weight babies in the future,\textsuperscript{254} or increased risk of miscarriage in subsequent pregnancies after abortion.\textsuperscript{255}

\section*{2. Pregnancy and Childbirth}

Pregnancy poses health risks for adolescents at a higher rate than for adults.\textsuperscript{256} Teenage girls who are pregnant are less likely to get adequate prenatal care, which could screen for medical problems for both mother and

\begin{itemize}
  \item \textsuperscript{248} Id. at 149.
  \item \textsuperscript{249} Linda A. Bartlett et al., \textit{Risk Factors for Legal Induced Abortion-Related Mortality in the United States}, \textit{103 Obstetrics \\& Gynecology} 729, 729 (2004) ("During 1988-1997, the overall death rate for women obtaining legal abortions was 0.7 per 100,000."); C.J. Berg et al., \textit{Pregnancy-Related Mortality in the United States, 1998-2005}, \textit{116 Obstetrics \\& Gynecology} 1302, 1302 (2010) (stating that the aggregate pregnancy-related mortality ratio for 1997-2005 was 14.5 per 100,000 live births). But see David C. Reardon et al., \textit{Deaths Associated with Abortion Compared to Childbirth—A Review of New and Old Data and the Medical and Legal Implications}, 20 \textit{J. Contemp. Health L. \\& Pol'y} 279, 287 (2004) (arguing that the statistics fail to capture all the deaths attributable to abortion).
  \item \textsuperscript{250} NAT'L RESEARCH COUNCIL, \textit{ supra} note 45, at 125 (noting that teenagers have lower death rates from legal abortion than all other age groups); Herschel W. Lawson et al., \textit{Abortion Mortality, United States, 1972 Through 1987}, \textit{171 AM. J. Obstetrics \\& Gynecology} 1365 (1994) (finding women over thirty-nine years old have three times the risk of death during an abortion as teenagers).
  \item \textsuperscript{251} Willard Cates, Jr. et al., \textit{The Risks Associated with Teenage Abortion}, \textit{309 NEW. ENG. J. MED.} 621 (1983) (finding lower morbidity associated with teen abortions); NAT'L RESEARCH COUNCIL, \textit{ supra} note 45, at 125 (noting that complications following abortion were lower for teens than adult women, regardless of the gestational stage at which abortion is performed and regardless of the method used).
  \item \textsuperscript{252} Michael J. Goldacre et al., \textit{Abortion and Breast Cancer: a Case-Control Record Linkage Study}, \textit{55 J. Epidemiology \\& Community Health} 336 (2001) (finding that women with breast cancer are less likely to have had an abortion than those in the control group); Maya Mahue-Giangreco et al., \textit{Induced Abortion, Miscarriage, and Breast Cancer Risk of Young Women}, \textit{12 Cancer Epidemiology Biomarkers \\& Prevention} 209 (2003) (finding that induced abortion does not increase the breast cancer risk of young women).
  \item \textsuperscript{253} Peter I. Frank et al., \textit{The Effect of Induced Abortion on Subsequent Fertility}, \textit{100 BRITISH J. Obstetrics \\& Gynecology} 575 (1993); B. Kaplan et al., \textit{Future Fertility Following Conservative Management of Complete Abortion}, \textit{11 Hum. Reprod.} 92 (1996).
  \item \textsuperscript{254} Janet R. Daling \\& Irvin Emanuel, \textit{Induced Abortion and Subsequent Outcome of Pregnancy in a Series of American Women}, \textit{297 NEW ENG. J. MED.} 1241 (1977).
  \item \textsuperscript{255} NAT'L RESEARCH COUNCIL, \textit{ supra} note 45, at 125.
  \item \textsuperscript{256} \textit{Id.} at 123.
baby, and are more likely to have poor eating habits during pregnancy.\textsuperscript{257} Pregnant teens also have a higher risk of having pregnancy-induced hypertension than pregnant adult women.\textsuperscript{258} These health conditions also predispose pregnant adolescents to premature birth and low-birth-weight babies, and to higher rates of miscarriages and stillbirths.\textsuperscript{259} Postpartum depression may also be higher for adolescents than for adults.\textsuperscript{260}

\textbf{B. Emotional Health and Wellbeing}

\textbf{1. Abortion}

In \textit{H.L. v. Matheson},\textsuperscript{261} the Court justified parental notification by arguing that "[t]he . . . emotional[] and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature."\textsuperscript{262} Some studies do, indeed, support the proposition that minors' reactions after abortion differ from adults' reactions.\textsuperscript{263} For example, younger

\begin{itemize}
\item \textsuperscript{257} \textit{Id.} at 124; see also Daniel Bluestein & M. Elizabeth Starling, \textit{Helping Pregnant Teenagers}, 161 W.J. MED. 140, 140 (1994) (noting that pregnant teens delay health care because it is unavailable, inaccessible, and unaffordable, and noting poor nutrition as a factor in negative pregnancy outcomes in adolescents).
\item \textsuperscript{258} Robert Miller, \textit{Preventing Adolescent Pregnancy and Associated Risks}, 41 CAN. FAM. PHYSICIAN 1525, 1528 (1995) (finding that pregnant adolescents experience a whole litany of complications, including pregnancy-induced hypertension, at rates higher than older women).
\item \textsuperscript{259} \textit{NAT'L RESEARCH COUNCIL}, \textit{supra} note 45, at 123-25; see also Catherine Stevens-Simon & Elizabeth R. McAnarney, \textit{Adolescent Pregnancy}, in \textit{HANDBOOK OF ADOLESCENT HEALTH RISK BEHAVIOR} 314, 314 (Ralph J. DiClemente et al. eds., 1995). But see Debbie A. Lawlor & Mary Shaw, \textit{Too Much Too Young? Teenage Pregnancy Is Not a Public Health Problem}, 31 INT'L. J. EPIDEMIOLOGY 552, 552, 553 nn.13-15, 554 n.16 (2002) (citing studies that found that adverse pregnancy outcomes for teens were attributable to socio-economic factors and smoking, not age).
\item \textsuperscript{260} See Robyn Birkeland et al., \textit{Adolescent Motherhood and Postpartum Depression}, 34 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 292 (2005) (noting that in a previous study, "adolescent mothers were twice as likely as adult mothers to be depressed"); Zachary N. Stowe & Charles B. Nemeroff, \textit{Women at Risk for Postpartum-Onset Major Depression}, 173 AM. J. OBSTETRICS & GYNECOLOGY 639, 640 (1996).
\item \textsuperscript{261} 450 U.S. 398 (1981).
\item \textsuperscript{262} \textit{Matheson}, 450 U.S. at 411 n.20 ("The emotional and psychological effects of the pregnancy and abortion experience are markedly more severe in girls under 18 than in adults.") (citing Judith S. Wallerstein et al., \textit{Psychosocial Sequelae of Therapeutic Abortion in Young Unmarried Women}, 27 ARCHIVES GEN. PSYCHIATRY 828 (1972)); Hrair M. Babikian & Adila Goldman, \textit{A Study in Teen-Age Pregnancy}, 128 AM. J. PSYCHIATRY 755 (1971)).
women are more likely to feel guilt instead of relief after an abortion, and these increased feelings of guilt and depression for younger women persisted six months post-abortion. Two to three months after abortion, younger women were more likely to experience shame, guilt, fear of disapproval, regret, anxiety, depression, doubt, and anger than older women. Another study, of women selected from a post-abortion support group for those experiencing difficulties, reported that adolescents were more likely to "feel forced by circumstances to have the abortion," and reported "greater severity of psychological stress."

In a study specifically designed to test the Supreme Court's premise that "minors are particularly susceptible to psychological distress following abortion," researchers found significant differences between the reactions of minors and adults one month following abortion, but no differences two years after abortion. The study tested for depression, decision satisfaction, benefit-harm appraisals, and specific emotions related to the abortion. The

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142 (1984) (noting that, five hours post-abortion, there is no significant relationship between age and anxiety, depression, or hostility); D.T. Moseley et al., Psychological Factors that Predict Reaction to Abortion, 37 J. CLINICAL PSYCH. 276, 277 (1981) (finding, in the recovery room, there is no significant correlation between age and post-abortion hostility, depression, or anxiety); Joy D. Osofsky & Howard J. Osofsky, The Psychological Reaction of Patients to Legalized Abortion, 42 AM. J. ORTHOPSYCHIATRY 48, 56 (1972) (finding no statistically significant relationship between age and guilt over a abortion).


265. Edmund C. Payne et al., Outcome Following Therapeutic Abortion, 33 ARCHIVES GEN. PSYCHIATRY 725, 729 (1976). Although the Payne study did not involve minor women, it nonetheless found that youth was a significant factor in negative psychological outcomes post-abortion.

266. Nancy E. Adler, Emotional Responses of Women Following Therapeutic Abortion, 45 AM. J. ORTHOPSYCHIATRY 446, 450 (1975). The Adler study focused on "young" women, which the study defined as women aged seventeen and older. As a result, the study encompasses both minors and young women who have reached the age of majority.

267. Franz & Reardon, supra note 263, at 163. While the selection of study subjects from a group already seeking help makes the sample biased, which may make it difficult to assess how many adolescents suffer negative psychological effects from abortion and how many do not, the study does offer important information about differences between the reactions of adolescents and adults. And for comparison purposes, it is important to note that the empirical data about women who have emotional difficulties following adoption suffer from the same sampling bias. See supra note 178.


269. Id. at 498 (asking how much six depressive symptoms bothered study participants since having the abortion).

270. Id. (asking "[a]ll in all, how do you feel about your decision to have an abortion?"); respondents answered on a scale of one ("it was definitely the wrong decision") to five ("it was definitely the right decision").

271. Id. at 498-99 (asking harm-based questions one month following the abortion. Respondents were asked to respond on a five-point strongly-agree to strongly-disagree scale to the following statements: "I feel stressed about having had this abortion," "I think this abortion has had a negative effect on me," and "I feel this abortion has had harmful (or bad) consequences for me." At the two-year appraisal, the first question was replaced with: "I feel my life is worse today because I had the abortion." Benefit questions were asked, using the same strongly-agree/strongly-disagree scale: "I think the abortion has had a positive (good) effect on me;" "I have become a stronger person because of having had the abortion," and "I have grown as a person from the experience.").
researchers then asked respondents two years after the abortion whether, under the same circumstances that existed two years ago, they would make the same decision to have the abortion.273

The results of the study showed no difference between adolescents and adults on measurements of depression related to the abortion two years following the abortion.274 However, the study revealed statistically significant differences between minors and adults on decision satisfaction and benefit-harm appraisal one month following abortion.275 At the two year follow-up, those differences had disappeared, with no significant difference between adults and minors on any factor.276

2. Adoption

While the majority of birth parents report general satisfaction from their adoption decision, a significant portion experience long-term psychological symptoms, as well as psychological symptoms prior to relinquishment and immediately after placement.277 During the prerelinquishment period, a mother experiences emotional issues in adjusting to pregnancy, as well as difficulties in making complex decisions about relinquishment.278 Mothers considering relinquishment report “conflicting feelings of shame, pride, desolation, excitement, fear, terror, and denial,” which “can be overwhelming and disruptive.”279

In the period immediately following relinquishment,280 birth mothers report that relinquishment brings “a powerful sense of loss and isolation.”281 Birth mothers reported traumatic dreams, sleep disruption, and “a sense that the experience is surreal.”282 One study reported that fifty-five percent of birth mothers found signing the adoption papers to be “one of the most difficult parts

272. Id. at 499. Respondents were asked about emotions specific to the abortion experience: happy, satisfied, good, pleased, contented, sorry, sad, guilty, grief, regret, feelings of loss, blue, low, angry at myself, angry at someone else, disappointed with myself, and relieved. Respondents were asked to answer on a 5-point scale from one (not at all) to five (a great deal).
273. Id. at 499. Again, respondents were asked to answer on a five-point scale from one (definitely no) to five (definitely yes.).
274. Id. at 501.
275. Id.
276. Id.
278. Id. at 16.
280. This period is defined in the psychological literature as the first two years following relinquishment. Wiley & Baden, supra note 277, at 26.
281. Id. (citing Anne Brodzinsky, Surrendering an Infant for Adoption: The Birthmother Experience, in THE PSYCHOLOGY OF ADOPTION 293 (Anne Brodzinsky & Marshall Schechter eds., 1990)).
of the adoption process," and sixty-five percent of birth mothers reported feeling grief six months after birth. 283 In comparing adolescents who chose to parent to those who chose to relinquish for adoption, those who relinquished were less comfortable with their decision than those who parented. 284 Another study, however, showed no significant difference in psychological outcomes between adolescents who placed and adolescents who parented. 285 In one study of birth mothers who returned to school after relinquishment, researchers found that the negative emotions felt by birth mothers adversely affected school performance. 286 The birth mothers who experienced the most deterioration in school performance were preoccupied with grief and regret concerning the relinquishment decision and thought frequently about their personal loss. The majority of birth mothers expressed negative expectations about the future, expecting the bleakness they currently experienced to continue into the future. 287 The feelings interfered with motivation, and, as a result, negatively affected school performance. "The greatest deterioration in school performance was noted when birth mothers felt there was nothing to live for." 288

Birth mothers also experience long-term effects of adoption relinquishment on emotions and well-being. 289 While some researchers found that birth mothers reported feelings of satisfaction four years after birth and positive outcomes on some socio-demographic and social psychological outcomes, 290 most also experience continuing grief and loss. 291 Long-term effects include ongoing depression, shame, and negative self-image. 292 Birth mothers report

283. Id. at 27 (citing Linda F. Cushman et al., Placing an Infant for Adoption: The Experiences of Young Birthmothers, 38 SOC. WORK 264 (1993)).
285. Steven D. McLaughlin et al., To Parent or Relinquish: Consequences for Adolescent Mothers, 33 SOC. WORK 320 (1988).
286. Theron & Dunn, supra note 279, at 495.
287. Id. at 496. See also Wiley & Baden, supra note 277, at 26 (noting that birth mothers "consistently report that their hope to be able to 'get on with their life' doesn't reach fruition").
288. Theron & Dunn, supra note 279, at 497.
289. Wiley & Baden, supra note 277, note that research on the long-term effects of adoption relinquishment tend to be based on self-selecting samples or on samples from birth mothers seeking treatment. Id. at 30. Because of this sampling bias, "[n]o data were found in either the clinical or empirical literature on birth parents that suggest that birth parents cope well with their decision to relinquish." Id. While this sampling bias may make it difficult to assess how many birth parents suffer long-term effects and how many do not, the studies do offer important information about negative effects that birth mothers may experience long-term. As with women who experience emotional difficulties following abortion, it is important to note that the empirical data about women who have emotional difficulties following abortion suffer from the same sampling bias. See discussion supra note 267.
feeling unlovable. These feelings can cause birth mothers future difficulties in forming attachments to romantic partners and subsequent children. Issues with future parenting include “intense attachment to and overprotection of children born to and raised by birthmothers after the placement of a child for adoption.” Birth mothers who kept their relinquishment a secret feared that others would reject them if the secret were discovered. Birth mothers experienced what one researcher calls the “psychological presence” of the relinquished child, discrediting the frequently asserted notion that birth mothers would forget about the relinquishment experience and continue on their pre-pregnancy life trajectory. Birth mothers also experience a higher rate of secondary infertility (an inability to become pregnant after a previous pregnancy) than the population at large, and many have no other children. In one study, the majority of birth mothers reported “no decrease in feelings of sadness, anger, and guilt since their relinquishment up to 30 years [before].”

C. Importance of the Decision

Parental involvement in a minor’s decision about abortion is often justified by the consequential nature of the decision. The hypothesis seems to be that while minors might be able to make decisions about less important matters—what courses to take in school, who to date, whether they agree or disagree on matters of politics and morality and religion—the abortion decision is different. Some of the differences are incorporated into the two prior justifications for parental involvement—the health risks and the emotional risks. But the Supreme Court has described the decision as important, separate and apart from these issues. What marks the decision as important can be unraveled into three strands: 1) the immediacy of the decision, 2) the permanence of the decision, and 3) the effect of the decision beyond the interests of the minor

293. Wiley & Baden, supra note 277, at 29.
294. Id. at 29-30.
297. De Simone, supra note 296, at 65; Deborah Lewis Fravel et al., Birthmother Perceptions of the Psychologically Present Adopted Child: Adoption Openness and Boundary Ambiguity, 49 FAM. REL. 425 (2000).
birth mother. Decisions about relinquishment of parental rights and adoption placement share these concerns with decisions about abortion.

1. Immediacy

In *Bellotti v. Baird*, the Supreme Court noted that the immediacy of the decision about abortion made it different from other decisions that might face a minor:

The pregnant minor’s options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it. A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.301

The Court further noted that if those short weeks were to pass, then the minor mother might have to face the enormous consequences of teen parenting.302

The decision about adoption placement shares a similar, if not identical, sense of immediacy. Professor James Dwyer writes of “the urgency to act immediately after birth to get babies into permanent families,” because of the importance of the infant attaching to the adoptive parents.303 Professor Elizabeth Samuels has noted, in an article titled *Time to Decide*, that an expectant mother’s decision about adoption placement is time-sensitive.304 In looking at cases where a birth mother seeks to regain her child, Professor Samuels writes:

Perhaps most starkly, they highlight the very short periods of time that are provided under a majority of state laws after which a mother’s consent may effectively be given and become irrevocable. In a number of other countries—including a majority of European countries and Australian states—consent may not be given or does not become final for a period of approximately six weeks. In approximately half the

301. Id.
302. Id.
U.S. states, however, irrevocable consent can be established in as short a period as less than four days after birth.\textsuperscript{305}

And the time within which a placing mother has to decide or to change her mind is growing shorter with each legal reform of adoption laws. Professor Samuels notes that a number of states have sharply limited consent or revocation periods in recent years. For example, at one time Louisiana allowed a birth mother to revoke her consent at any time before a final decree of adoption was entered. Then in 1960, the time was shortened, allowing for revocation only until an interlocutory decree of adoption was entered. Then in 1979, the time period for revocation was reduced to thirty days, and the revocation did not automatically provide for the return of the child to the birth mother, but only if the return served the best interests of the child.\textsuperscript{306} That thirty-day period is generous compared to other states' alternatives. According to Professor Samuels, in Colorado, a birth mother's consent is irrevocable after four days.\textsuperscript{307} Thus, the law creates a sense of immediacy for the decision about relinquishment of parental rights and consent to adoption.

Another source for the immediacy of the adoption placement decision is prospective adoptive parents. Adoptive parents typically desire to adopt an infant as soon after birth as possible.\textsuperscript{308} Indeed, it is not uncommon for the adoptive parents to be in the delivery room for the birth of the infant, and for one of the adoptive parents to cut the umbilical cord.\textsuperscript{309} And adoptive parents have a great deal of control over the system of adoption, including early relinquishment and short revocation requirements. Professor Samuels notes that adoptive parents, as the "paying customers," are given great deference by child placing agencies.\textsuperscript{310} In addition, child placing agencies are likely to defer to the adoptive parents "because they usually bring greater social and financial advantages compared to those of most birth parents."\textsuperscript{311}

2. Permanence

The Supreme Court has also noted that the decision about abortion is important because of its permanence. Once the abortion is obtained, there is no
other option. And once the decision to forgo the abortion is made, and the time to obtain an abortion has passed, the decision to give birth is equally permanent. The Court said in Bellotti v. Baird:

Moreover, the potentially severe detriment facing a pregnant woman, is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. . . . In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.312

Because of the adoption option not mentioned by the Court, the decision to forgo abortion does not make teen parenting inevitable. However, as noted in the earlier discussion of the medical, emotional, and psychological effects of adoption placement for the birth mother, one’s status as a birth mother has indelible consequences.313 Moreover, given the difficulty of revoking a decision to relinquish parental rights and consent to adoption, that decision is permanent.314

The birth parent’s relinquishment of parental rights marks a permanent change in the parent’s rights, but the relinquishment works the same degree of permanent change on the adoptee’s relationship to that parent. The adoptee can no longer rely on the parental obligations that law creates, including the parent’s obligation of financial support.315 Termination of parental rights is, therefore, permanent.

3. Effects Beyond the Mother

With regard to the decision about abortion, one must acknowledge that many people believe that the fetus represents a human life, and has the same status as a person who is born.316 Thus, they are concerned about the effect of

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313. See supra notes 256-260, 277-299 and accompanying text.
314. See supra notes 303-307 and accompanying text.
315. 2 AM. JUR. 2, Adoption § 170 (2013). In some stepparent adoptions, termination of the parental rights of a parent so that the spouse of the other parent can adopt the child does not extinguish child-support obligations.
316. Resolving this highly contested issue is beyond the scope of this Article. As the Court noted in Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992), “Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage.” For the attempts of others to resolve the question, see LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990); Mark T. Brown, The Morality of Abortion and the Deprivation of Futures, 26 J. MED. ETHICS 103 (2000); Ruth Colker, Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom, 77 CALIF. L. REV. 1011 (1989); Don Marquis, Why Abortion is Immoral, 86 J. PHIL. 183 (1989); THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES (John T. Noonan, Jr., ed., 1970); Judith Jarvis
the minor’s abortion decision on that life. The law does not recognize the fetus as a person. Nonetheless, the Supreme Court has acknowledged that a state has an interest, beyond the health of the mother, in the potential for life that the fetus represents. Because of that interest, a state can enact laws informed by a preference that the pregnancy be continued rather than terminated. In this way, the law recognizes the effect of the abortion decision beyond the minor mother herself, and concerns itself with the effect of the abortion in ending the potential for life.

For those who believe the fetus is a person, the comparison to the effects of adoption on an adoptee may not seem apt. However, there is little doubt that the adoptee is a person, and is affected significantly by the adoption placement decision:

Adopted children are thought to face some unique developmental challenges. “[U]nlike children growing up with their birth parents,” Triseliotis observes, “those adopted have to accomplish or be aided to accomplish a number of additional psychological tasks, which most of them do successfully.” Those tasks include attaching to new parents, understanding the meaning of adoption, acknowledging the differences involved in having two sets of parents, and “dealing with the sense of loss of the original parents and the element of rejection that it conveys.”

While adoption often has a positive effect on adoptees, especially when compared to those who are raised in institutions or in foster care and never adopted, there are also lifelong issues, some quite negative, that face many


317. See Roe v. Wade, 410 U.S. 113, 158 (1973) (stating that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn”).

318. Id. at 150 (rejecting the notion that the Court must decide that life begins at conception, accepting “the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone”). See also Casey, 505 U.S. at 869 (observing that the state’s “concern for the life of the unborn” has “at a later point in fetal development... sufficient force so that the right of the woman to terminate the pregnancy can be restricted”).

319. Casey, 505 U.S. at 872 (noting that a state may enact laws designed to encourage a pregnant woman “to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term”); Poelker v. Doe, 432 U.S. 519, 521 (1977) (observing that “[t]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth”).

320. Samuels, supra note 304, at 530-31 (quoting John Triseliotis Et Al., Adoption: Theory, Policy and Practice 35 (1997)).

321. Evan B. Donaldson Adoption Institute, Beyond Culture Camp: Promoting Healthy Identity Formation in Adoption 14 (2009); David M. Brodzinsky, Long-Term Outcomes in Adoption, 3 Adoption 153, 153 (1993).
adoptees.322 Many adoptees’ struggles with adoption identity, while not reaching the level of psychopathology, may explain high levels of behavioral problems observed in adopted children and adolescents.323 In addition, while adoptees represent less than two percent of the childhood population in the United States, they represent ten to fifteen percent of those in mental health care facilities.324

Adoptees may not see adoption as the happy event adoptive parents and society suggest that it is, but as a more ambivalent experience.325 Adoptees may experience adoption as a profound loss, despite the “replacement” of the lost birth family by adoptive family.326 Adoptees can have problems with fears of abandonment and rejection, and with trust and attachment that affect future relationships.327 Because of cultural biases that favor biological families, adoptees may face stigma associated with being adopted.328 Thus, the effect on the adoptee of a birth mother’s decision to place a child for adoption cannot be denied.

322. EVAN B. DONALDSON ADOPTION INST., supra note 321, at 29-30. This study found that, against expectations that adoption issues would taper off for adults, for both same-race and interracial adoptees, adoptee identity continued into adulthood. The study “[r]esult suggests the lifelong nature of identity work and the reality that adulthood is a crucial period in which adoptive and racial/ethnic identities continue to be salient for adopted persons.” Id. at 30. Almost one-fourth of same-race adoptees reported, as adults, that they felt extremely or somewhat uncomfortable with their identity as an adopted person. Id. at 32.


324. David M. Brodzinsky, A Stress and Coping Model of Adoption Adjustment, in THE PSYCHOLOGY OF ADOPTION 3 (David M. Brodzinsky & Marshall D. Schechter eds., 1990). See also Michael Wierzbicki, Psychological Adjustment of Adoptees: A Meta-Analysis, 22 J. CLINICAL CHILD PSYCHOL. 447 (1993) (finding that adoptees are significantly overrepresented in clinical populations). It is possible that the overrepresentation of adoptees in clinical populations is not because of increased incidences of psychological problems, but because of increased rates of referrals by adoptive parents and professionals who are aware of issues relating to adoption and, therefore, might be more inclined to refer. See Brodzinsky, supra note 321, at 154.


326. Partridge, supra note 325, at 199.


328. Consider this description of the stigma of being adopted: “Adopted children are seen as coming from a defective biological line; their birth parents either did not want them or were immoral and dysfunctional. Adopted children are seen as damaged goods, presumed to have suffered maltreatment after birth before being rescued and processed by the child protective system, and therefore, likely to have lifelong struggles. . . . Adopted children also appear atomistic, because they are disconnected from their extended biological family and because we suspect their extended adoptive family keeps them at arms length, never treating them as full or equal members of the family. They are persons with no real family. Because of this perception, adopted children are often uncomfortable revealing that they were adopted. This perception is a major reason why many adoptees undertake a search for their birth parents: we communicate to them that they are deficient, lacking something of great importance, and as a result, they go to great lengths to try to become complete.” Dwyer, supra note 303, at 295-96.
The many similarities between minors' decisionmaking about abortion and about adoption placement—physical and emotional risks to the mother and effects beyond the mother—suggest that similar treatment of those decisions is called for. To the extent that minors have impaired decisionmaking capacity in one arena, they lack it in similar arenas. Similar treatment, however, does not mean identical treatment. There is at least one significant difference between the abortion and adoption decisions—the legal complexity of the adoption decision—that suggests that parental notification may not be an adequate protection of a minor's interests in the course of decisionmaking about adoption.329 This is reflected in the few states that treat a minor's decision to terminate parental rights and consent to adoption differently from an adult's decision. In lieu of parental notification, those states provide for appointment of a guardian ad litem or an independent attorney for the minor parent.330 The following section discusses the appropriate remedy among remedies and proposes statutory reform.

V. PROPOSED STATUTORY REFORM

Stephanie Bennett was a 17-year-old mother and student, living at home in Ohio with her supportive mom and step-dad when she revealed concerns about motherhood to guidance counselor Thomas Saltsman...[who] immediately arranged for her to meet with [an]... adoption agency on school grounds, during school hours.

Days after their first meeting, Stephanie took baby Evelyn and ran away from home. Hours later, she signed the paperwork allowing the agency to take her daughter away.331

A. Choosing a Remedy Among Remedies

States that have provided additional protections for minors making the decision about adoption placement offer one of three protections: consent or notification of the minor's parent (the child's grandparent), appointment of a guardian ad litem for the minor parent, or a requirement that the minor parent be represented by legal counsel independent of the adoptive parents or adoption agency. While each has its benefits, the appropriate solution rests on the legal nature of the decision a minor parent is being asked to make, not with parental involvement or the best interests protection of a guardian ad litem.

329. See infra notes 331-353 and accompanying text.
330. See supra notes 183-243 and accompanying text.
While there can be disagreement over parental involvement in minors' abortion decisions, it seems that at least parental involvement is tailored to addressing issues relevant to the decision. A parent may be able to help weigh the medical and psychological effects of abortion and adoption placement, but a parent is not as capable at helping a teen navigate the multitude of complex legal issues related to adoption. There are also practical and constitutional considerations related to parental consent in a minor’s adoption decision that do not exist with a minor’s abortion decision. What, for example, would happen if a minor parent wanted to relinquish parental rights and the minor’s parent refused to consent to that decision? A minor cannot be compelled to parent any more than she can be compelled not to parent. Ordinarily, when the minor’s parent refuses to consent it is because that minor’s parent (the child’s grandparent) is interested in parenting the grandchild. But if that is not the case, a judge will be called upon to resolve the dispute and would need to appoint counsel and/or a guardian ad litem for all involved.

Though a guardian ad litem is often a licensed attorney, the role of a guardian ad litem is not the same as independent legal counsel:

An attorney and a guardian ad litem, however, are bound by very different professional standards defining each one’s obligations towards their clients. The representative serving in the role of an attorney is generally bound by guidelines of professional responsibility, while a representative serving as a guardian ad litem is not necessarily bound by the same client obligations. In general, a guardian ad litem is not bound by the client’s expressed wishes and is able to advocate for a result that he or she believes to be in the minor’s best interests. By contrast, an individual serving as an attorney is obligated under professional and ethical rules to advocate for a minor’s expressed preferences, irrespective of what the attorney believes to be in the minor’s best interests. Furthermore, an attorney is obligated to maintain client confidentiality under ethical guidelines, while a guardian ad litem generally does not have any confidentiality obligations towards his or her minor client.

332. This is not to suggest that parents are unimportant in the decision. Most studies show that successful teen parents have a support system, including parents. See Sarah E. Oberlander et al., African American Adolescent Mothers and Grandmothers: A Multigenerational Approach to Parenting, 39 AM. J. COMMUNITY PSYCHOL. 37 (2007).

The distinctive role of guardian ad litem is not adequate protection of a minor parent’s decision about the complex legal matters involved in the adoption placement decision.\(^{334}\)

Adoption is a legally created and regulated enterprise. The hallmark of adoption law, traced to the first “modern” adoption statute in 1851, is the complete replacement of the biological family with the adoptive family:

The early adoption statutes provided a mechanism for the transfer of full parental control from one person to another. The statutes carefully specified that the adoptive parents stood in the shoes of the biological parents with respect to custody, obedience, and care. They explicitly transferred “all” parental rights from the biological parents to the adopting parents, with a corresponding transfer of the child’s legal obligations of obedience, support, and maintenance. Thus, although the parent-child relationship was transformed with respect to the parent’s identity, the nature of parental rights and authority remained unchallenged. Adoption thus confirmed the indivisibility of parental rights by allowing new parents to replace legally the birth parents.\(^{335}\)

For that replacement to be effectuated, a court must first terminate the parental rights of the birth parents before granting parental rights to the adoptive family.\(^{336}\)

The Supreme Court has long recognized parental rights as fundamental rights under the Constitution.\(^{337}\) Because of the fundamental nature of parental rights, the Supreme Court has said that a state cannot lightly revoke those rights. When a state seeks to terminate parental rights involuntarily (without the parent’s consent), the Constitution requires a heightened standard of clear and convincing evidence.\(^{336}\) Despite the fundamental nature of parental rights, a parent can voluntarily relinquish these rights.

Voluntary relinquishment of parental rights cuts off all parental rights, including “the parent’s right to the custody of the child and his right to visit the child, his right to control the child’s training and education, the necessity for the parent to consent to the adoption of the child and the parent’s right to the


\(^{335}\) Naomi Cahn, Perfect Substitute or the Real Thing?, 52 Duke L.J. 1077, 1125 (2003).


earnings of the child, and the parent’s right to inherit from or through the child." ³³³ A minor birth parent may not know or understand what rights parents have and thus, does not fully understand the rights she is relinquishing. ³⁴⁰ Consider the case of seventeen-year-old LaTonya Chienta Anderson, who signed a relinquishment and consent that read as follows:

Know all men by these presents, that I, LaTonya Chienta Anderson, the mother of [the child] . . . do hereby consent to the adoption of my said child . . . in order that said child may have all the privileges which may accord her by the Laws of Alabama upon her legal adoption. And I do hereby consent and request that the Probate Judge make all such orders and decrees as may be necessary or proper to legally effectuate said adoption. ³⁴¹

The consent form made no mention of the termination of LaTonya’s rights, only that the child would acquire certain unnamed legal privileges. The affidavit gives permission to the judge to make all orders necessary to legally effectuate the adoption but does not inform LaTonya that one of those necessary orders would be the permanent and irrevocable termination of her parental rights. ³⁴² The child was being adopted by the parents of the putative father, and the mother had been freely visiting the child while in the custody of the grandparents, but nothing in the affidavit informs LaTonya that she would no longer have a legal right to visit her child. ³⁴³ There was evidence from the social worker conducting an investigation prior to finalization of the adoption that the mother did not understand the finality of the adoption and the legal implications. After the social worker explained these applications to the mother, she said she wanted to withdraw her consent. ³⁴⁴ The appellate court held, however, that the consent was valid because the mother “freely and willingly” signed the consent form after reading it and “cho[se] not to question anything.” ³⁴⁵ Seventeen-year-old LaTonya was not represented by counsel; the adoptive parents were. ³⁴⁶

This case illustrates perfectly why a minor needs additional protections in signing a consent to adoption. It is easy to imagine that LaTonya saw the adoption as a way to make the custody “legal” without understanding the implications for her own parental rights. All that is encompassed in her request

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³⁴¹ Id. at 1080.
³⁴² Id.
³⁴³ Id.
³⁴⁴ Id.
³⁴⁵ Id.
³⁴⁶ Id.
that the judge “make all such orders and decrees as may be necessary or proper to legally effectuate said adoption,” was likely just so much mumbo-jumbo to the minor mother.347

Relinquishment of parental rights and consent to adoption must be knowingly and voluntarily given.348 Because of the complexity of the legal decisions involved in adoption, it is difficult to see how a minor’s actions in this regard could be knowingly, intelligently, and voluntarily given—at least without support from a legal professional. Consider a student in my Adoption Law class.349 Now an adult, she had relinquished a child for adoption when she was sixteen years old. She shared that information with the class, and said that being given a choice of adoptive parents and the promise of continuing contact was key to her decision to place her child for adoption. During the course of the class, she was dismayed to learn that the promise of continuing contact—an “open adoption” agreement—was not legally enforceable in the state in which she entered into it.350 When she looked with adult eyes at her relinquishment affidavit, she realized that she had relinquished the child to the adoption agency, not to her chosen adoptive parents, and that the agency could have placed her child with other adoptive parents.351 She learned during the course of the class that her child’s right to inherit from her had been terminated.352 She discovered that she could not have access to her child’s original birth certificate, even though her name was on it as mother.353 This birth mother was obviously intelligent, as evidenced by her graduation from high school and

347. Id.
349. This story is shared with the student’s permission, though her identity is not included to protect her privacy.
350. That state, Texas, did not allow legally enforceable postadoption contact agreements until 2003, years after the student’s adoption placement decision. For more about the complexity of the enforcement of post-adoption contact agreements, see supra notes 289-299 and accompanying text.
351. See TEX. FAM. CODE ANN. § 161.103(b)(12) (West 2010), which provides that the affidavit of relinquishment of parental rights may name the prospective adoptive parent but need not do so. Instead, a child placement agency can be named as the managing conservator of the child. The managing conservator can then consent to the adoption with no consent of the biological parent needed under TEX. FAM. CODE ANN. § 162.010 (West 2010).
352. The law student had been pleased to learn in her course on wills and intestate succession that under TEX. PROBATE CODE ANN. § 40 (West 2010), her child could inherit from her. She did not realize, however, that the trial court in her adoption placement had cut off the right of inheritance in the decree terminating her parental rights, as permitted by TEX. FAM. CODE ANN. § 161.206 (West 2010). She did not attend the hearing, and as a sixteen-year-old, it is unlikely she would have understood what was happening since she was not represented by counsel.
353. Only the court that granted the adoption may grant access to the original birth certificate. TEX. HEALTH & SAFETY CODE ANN. § 192.008 (West 2010). Any other information about the adoption, including current information about the identity and location of the adopted child, would only come about from the mutual consent registry in Texas, TEX. FAM. CODE ANN. § 162.407 (West 2010), and only if both birth mother and adopted child registered and were matched. Absent a match, the student would only be able to get the information by going to court and showing good cause. TEX. FAM. CODE ANN. § 162.022 (West 2010); see also Dan Tilly, Confidentiality of Adoption Records in Texas: A Good Case for Defining Good Cause, 57 BAYLOR L. REV. 531, 557-58 (2005) (observing that simply desiring a reunion between birth mother and adopted child is not good cause).
college and her admission to law school. But at age sixteen, she was not aware of the legal intricacies of the adoption placement decision.

The issue of open adoption, or post-adoption contact, is a particularly thorny legal issue in adoption placement. Since adoption requires termination of the parental rights of the biological parents, they possess no residual rights to insist on post-adoption contact. Only in the minority of states where there is legislation on point does a birth parent have an enforceable right to post-adoption contact. It is still common practice in states without enforceable open-adoption agreements, however, for agencies and adoptive parents to enter into such unenforceable “agreements.” For example, Amazing Grace Adoption Agency, based in Raleigh, North Carolina, offers the following services to birth parents: choosing and meeting with an adoptive family, “different levels of openness with the adoptive family,” and receiving information and pictures of your baby following an adoptive placement. If you visit the website of a Missouri adoption agency, a page will describe open


355. See, e.g., McCabe v. McCabe, 78 P.3d. 956, 958 (Okla. 2003) (holding that the termination of parental rights cuts off all parental rights); Tammy M. Somogye, Opening Minds to Open Adoption, 45 KAN. L. REV. 619, 623 (1997) (holding that adoption in Kansas severs all rights of the biological parents, without an exception for establishing visitation rights).

356. According to the Child Welfare Information Gateway, supra note 354, the following states have some form of enforceable continuing post-adoption contact: Alaska, Arizona, California, Connecticut, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin. Six states have statutes that explicitly provide that while open adoption agreements may be entered into, they are not enforceable by the court: Missouri, North Carolina, Ohio, South Carolina, South Dakota, and Tennessee. In all other states, statutes are silent about the enforceability of open adoption agreements.

357. According to the Child Welfare Information Gateway, supra note 354, six states have statutes that explicitly provide that while open-adoption agreements may be entered into, they are not enforceable by the court: Missouri, North Carolina, Ohio, South Carolina, South Dakota, and Tennessee. Yet, in those states, adoption agencies still offer “open adoption agreements.”

358. Types of Adoption, AMAZING GRACE ADOPTIONS AND ORPHAN CARE, http://www.agadoptions.org/sample-page/types-of-adoption/ (last visited Mar. 20, 2013) (describing open adoptions and stating that “the amount of contact (phone, face-to-face, email, letters, etc.) between parties in an open adoption should be agreed upon before any legal documents are signed,” implying that such an agreement is legally enforceable); id. at http://www.agadoptions.org/sample-page/questions/ (last visited Mar. 20, 2013) (stating that “adoptive families send pictures and reports of the child once a month for the first year and then once a year until the child is 18 years old,” without mentioning that there is no way to legally enforce that arrangement). See N.C. GEN. STAT. § 48-3-610 (2010) (noting that though the parties could enter into an agreement regarding visitation and communication, “the agreement itself shall not be enforceable”).
adoptions, and includes a testament by a birth mother describing her contact with her relinquished child: "It was my desire to have an open adoption and this has worked beautifully for all of us." At Spirit of Faith Adoption Agency in Ohio, the agency describes open adoption as an option: "After entrusting your child to his/her adoptive parents, you will receive photos and written updates within the first few weeks and every few months afterward. The Adoption Coordinator will help to facilitate contact with the adoptive parents. The agency further assures prospective birth parents that "arrangements can be made with the assistance of Spirit of Faith Adoptions to stay in touch with your child's adoptive parents throughout his/her lifetime." The birth parents may not be aware that the openness promised by these agencies will not be legally binding.

In those states with enforceable open-adoption agreements, there are complex legal requirements that serve to limit the parties who can enter into such agreements and to limit the types of adoptions in which such agreements are enforceable. For example, in Connecticut, post-adoption contact agreements are only enforceable in adoptions from foster care, not in private adoptions. In Nebraska, court-approved contact agreements are only renewable for two-year terms. In Vermont, open adoption agreements are enforceable in stepparent adoptions. In Indiana, the agreement is enforceable only if the child is over age two at the time of the adoption or upon the agreement of the adoptive parents and a birth parent, while in Oregon, if the child is under age one, the child must have spent at least half his or her life with the birth relative seeking an open adoption agreement. Similarly, in Oklahoma, the agreement

359. KENTUCKY & MISSOURI ADOPTION SERVICES, ALLBLESSINGSINTERNATIONAL, http://www.allblessings.org/birthparent/typesofadoption.shtml (describing open adoption and making two unenforceable promises: "[y]ou [the birth mother] choose the level of future contact you want" and "[t]he families that our agency works with are required to provide regular updates and photographs of the child they adopt"). The website does not mention that open-adoption agreements are unenforceable in Missouri. See MO. ANN. STAT. § 453.080(4) (West 2010) (stating that upon completion of an adoption, further contact is solely at the discretion of the adoptive parents).

360. What to Expect, SPIRIT OF FAITH ADOPTIONS, http://www.spiritoffaithadoptions.org/supportforpregnancy/what-happens-next (last visited Mar. 20, 2013) (in describing what to expect after a birth mother contacts the agency, Step 8 promises: "[a]fter entrusting your child to his/her adoptive parents, you will receive photos and written updates within the first few weeks and every few months afterward. The Adoption Coordinator will help to facilitate contact with the adoptive parents"). Ohio does not provide for enforcement of open adoption agreements. See OHIO REV. CODE ANN. § 3107.65(A)(5) (West 2010) (all terms of open adoptions are voluntary, and any party can withdraw at any time).


362. CONN. GEN. STAT. § 45a-715(h) (2010). Providing the opportunity for open-adoption agreements for children in state custody is used to incentivize parents whose rights are likely to be involuntarily terminated to instead choose to voluntarily relinquish parental rights.


364. VT. STAT. ANN. tit. 15A, § 4-112 (West 2010).


is enforceable only if the child resided with the birth parent prior to the adoption. In Montana, a court can refuse enforcement of an open adoption agreement if enforcement would be detrimental to the child or undermine the adoptive parent’s parental authority, or if due to changed circumstances, compliance with the agreement would be unduly burdensome. Even without these limitations, most states with enforceable agreements require careful attention to intricacies of the statutes. In most states that enforce open adoption agreements, those agreements are enforceable only when approved by a court and/or included in an adoption decree. In Texas, a post-adoption contact agreement is enforceable only if a judge incorporates it in the termination of a parental rights order; it is not enforceable if it is only included in the affidavit for voluntary relinquishment of parental rights, or if it is only included in the adoption decree. These are not requirements that a minor birth mother is likely to know.

Minor birth parents may not be aware of legal rights associated with revocation of consent, with inheritance rights, with the right of access to

368. MONT. CODE ANN. § 42-5-301 (2010).
369. See, e.g., ALASKA STAT. §§ 25.23.180(j), 47.10.089(e) (2011); MINN. STAT. ANN. § 259.58 (West 2010); OR. REV. STAT. § 109.305 (2011).
371. For example, all consents to adoption in Massachusetts are irrevocable. MASS. GEN. LAWS. Ch. 210, § 2 (2008). In Hawaii, consent is irrevocable unless a court finds it would be in the child’s best interest to allow the revocation. HAW. REV. STAT. § 578-2(f) (2012). In other states, there are revocation periods of various lengths. In Arkansas, for example, a birth mother has ten days in which to revoke consent. ARK. CODE ANN. § 9-9-209(b)(1) (2001). Birth mothers in Kentucky have twenty days to revoke consent. KY. REV. STAT. ANN. § 199.590 (West 2012). In California, a birth mother may withdraw her consent within ninety days, but only if she establishes by clear and convincing evidence that her consent was obtained by fraud or duress. CO. REV. STAT. § 19-5-104(7)(a) (2010). In Colorado, a birth mother may withdraw her consent within ninety days, but only if she establishes by clear and convincing evidence that her consent was obtained by fraud or duress. CO. REV. STAT. § 19-5-104(7)(a) (2010). And in all states, if the child is an American Indian child, “the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption.” Indian Child Welfare Act, 25 U.S.C. § 1913(c) (2006). See also Samuels, supra note 304, at 509.
372. In Alaska, for example, all inheritance rights of the adopted child derived from the birth parents or relatives of the birth parents are terminated, unless the adoption decree specifically continues them. ALASKA STAT. ANN. §§ 13.12.114, 25.23.130 (West 2012). In Kansas, an adoption decree terminates the right of the birth parent to inherit from the adopted child, but the adopted child may still inherit from the birth parent. KAN. STAT. ANN. § 59-2118 (West 2012). Upon the death of an adoptee in Illinois, the birth parents can inherit from the adoptee “property that the child has taken from or through the natural parents or the lineal or collateral kindred of the natural parent by gift, by will or under intestate laws.” 755 ILL. COMP. STAT. ANN. § 5/2-4(b), (d) (West 2012). In Texas, one statute gives
information and/or contact in the event of a medical emergency, or with any of the other multitude of rights and obligations affected by the legal relinquishment of parental rights and consent to an adoption. If the only adults with whom the relinquishing minor interacts are the adoptive parents or the lawyer or agency representing the adoptive parents, a minor will have little access to information crucial to voluntary and knowing consent. The judge overseeing the adoption is not usually in the position to serve this function. Though adoption is a legal process, it is not uncommon for a birth mother never to set foot in the courtroom. Statutes allow a birth parent to waive notice of any and all hearings at the same time the affidavit of voluntary relinquishment is signed. Thus, there is no opportunity for a birth parent to ask questions in court, or for a judge to assess the maturity of the minor birth parent or what the birth parent understands about the legal parental rights she is waiving.

Judicial involvement in the adoption does not necessarily allow for judicial oversight of the minor's decision about adoption placement. Only appointment of legal counsel, independent of the adoptive parents or adoption agency, can ensure that a minor mother fully understands her legal rights before she relinquishes them.

B. Proposed Statute

In order to adequately protect a minor parent's constitutionally protected right to parent, a state's adoption statutes must require the appointment of legal counsel for minor parents. That counsel must be independent of the adoptive

what another taketh away: the Probate Code provides that an adopted child can inherit from birth parents, TEX. PROB. CODE ANN. § 40 (West 2012), while the Family Code provides that a birth child inherits from birth parents only if the court does not terminate those inheritance rights in the decree terminating parental rights. TEX. FAM. CODE ANN. § 161.206 (West 2011).

373. ALASKA STAT. ANN. § 18.50.500 (West 2012) (if an adult adoptee consents, the birth parent can receive their current name and address); CAL. FAM. CODE § 9201 (West 2012) (if an adoptee is age twenty-one or older and consents, the birth parent can receive identifying information). Many states provide a mechanism for a birth parent, without being identified, to supply updated medical information to an adoptee who requests it. Thus, a birth parent who develops a disease that may be inherited by her birth child can supply that information even after the adoption is finalized. See, e.g., COLO. REV. STAT. § 19-5-305 (West 2013). However, most do not provide a mechanism for an adoptee to provide medical information to the birth parent. Thus, an adoptee who develops a disease likely inherited from a birth parent cannot inform the birth parent, thus preventing early diagnosis and treatment of that birth parent or other children of that birth parent. In those jurisdictions, a birth parent would only be able to access such information by applying to the court. See, e.g., ARIZ. REV. STAT. ANN. § 8-121 (West 2012) (allowing disclosure only on showing of “compelling need”); TEX. FAM. CODE ANN. § 162.022 (West 2011) (allowing disclose only on showing of “good cause”); Tilly, supra note 353 (collecting “good cause” cases from multiple jurisdictions). And without knowing that the adopted child has developed any such condition, the birth parent would be hard pressed to establish good cause.

374. See, e.g., TEX. FAM. CODE ANN. § 161.103 (West 2011) (noting that an affidavit of voluntary relinquishment of parental rights may contain a waiver of process in a suit to terminate the parent-child relationship and formalize an adoption); MD. CODE ANN., FAM. LAW § 5-339(a)(1)(ii) (West 2013) (consent may include a waiver of right to notice of further proceedings).
parents and/or the adoption agency so as to avoid any conflict of interest. The statute must also consider the financial status of the minor parent, and provide for independent legal counsel at no cost to the minor parent, either through government appointment and payment or through attribution of the cost to the adoption agency or adoptive parent. An appropriate statute should also ensure that a minor parent be provided adequate information about resources available to aid her in parenting, similar to that given before making a decision about abortion in many states, before she makes a decision to terminate her parental rights and consent to an adoption.

A statute should read as follows:

1. A parent who is a minor may relinquish parental rights to the minor parent's child, and that relinquishment is not invalid because of the minority of the minor parent.

2. A relinquishment and consent to adoption executed by a minor parent is not valid unless the minor parent has been advised by an attorney who does not represent the prospective adoptive parents or the child placing agency involved in the adoption.

3. An attorney advising a minor parent shall certify for the court in writing that the minor parent has been advised by the attorney of the:
   a. legal rights and responsibility of parents;
   b. consequences of termination of parental rights for the legal rights and responsibility of parents, including rights of inheritance, confidentiality of adoption records, and legal requirements for future contact between parent and child;
   c. circumstances in which the relinquishment of parental rights can be revoked and consent to adoption can be withdrawn;
   d. availability or unavailability of post-adoption contact agreements in the relevant jurisdiction and the legal enforceability of such agreements;
   e. legal obligation of both parents to provide financial support for their child and the availability of state services to determine paternity and enforce child support orders;
   f. eligibility of birth parent and child for state and federal welfare assistance;

375. Dual representation of adoptive parents and a birth parent inherently involves a conflict of interests. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1523 (1987). See also In re Michelman, 616 N.Y.S. 2d 409 (N.Y. App. Div. 1994) (holding that representing adoptive parents and biological parent was a conflict of interest and suspending the attorney for three years). But see In re J.M.P., 528 So. 2d 1002, 1010 (Ca. 1988) (holding that a birth mother represented by a law partner of an attorney representing the adoptive parents received adequate advice, and there was no need for an attorney to be completely independent of adoptive parents).
g. right of the parent to be present in court for termination of parental rights and/or finalization of adoption and the right to waive such right; and
h. limitation on any representation of the parent, including a statement that the attorney will not be representing the parent in any contested adoption.

4. An attorney advising a minor parent shall further certify to the court in writing that the minor parent has been informed that he or she has the right not to relinquish parental rights or consent to the adoption, and freely and voluntarily relinquishes parental rights and consents to the adoption.

5. An attorney advising a minor parent shall not charge the minor parent for services. A court may appoint and pay an attorney to represent a minor parent in the same manner that an attorney is appointed and paid to represent a parent in an involuntary termination of parental rights hearing.

6. If a court fails to appoint an attorney to advise a minor parent, the adoptive parents and/or child placing agency shall bear the costs of such representation. The attorney shall disclose to the minor parent who is paying for the attorney’s services. Regardless of the source of payment, the attorney shall solely represent the minor parent.

VI. CONCLUSION

I don’t know where we went to. It could have been the agency; it could have been a lawyer’s office. I think that either Jeanne or Liz from the agency was there. And someone else . . . a judge, a lawyer?? I have no idea . . . . I HATED this part. I wanted it to be over. I don’t know how I could have done it either. I know that they read it all to me, over and over again hearing the words:

“You will no longer be the legal mother of this child . . . no more . . . forever, forever, forever”

It rang though my ears like a harsh tolling bell of death. The words cut me like razors, I just wanted them to shut up and be done with it. Yes, yes, whatever . . . just be quiet, stop saying that, where is the pen? I signed . . . . I disassociated from it all, and just went on automatic. I would be strong and do what I ought, what would make them all happy and cleanse me, make them proud. No tears, no wavering, determination.376

A teen’s unintended pregnancy is a social concern, but more importantly, it is an individual situation—one that may be of crisis or joy. In the midst of this emotional circumstance, a minor has to make countless decisions, large and small, at a developmental stage marked by impaired decisionmaking. It is likely the adolescent’s tendency to live in the “now” and not think of future consequences that lead to the unintended pregnancy in the first place. And now, the minor mother has to consider that future in a way unparalleled by any other decision a teen girl faces.

The dearth of protections given to minor parents before making the decision to terminate constitutionally protected parental rights and consent to adoption is inexplicable, especially when considering the solicitude of states to minor mothers facing the decision to terminate a pregnancy, and the similarities in the decisions. The lack of regard for the parental rights of unmarried and teen mothers arises from skepticism about the parenting abilities of young mothers and the disregard of the mother-child dyad, absent a marriage, as a family. Negative attitudes about teen pregnancy, unwed pregnancy, and teen and single parenting invest the decision to terminate parental rights and consent to adoption by a minor mother with seeming rationality. What other decision but to terminate parental rights and place for adoption could be made? If that is the only decision that is rational, we need not concern ourselves with layers of protection to ensure that the decision is truly intelligently and voluntarily made. Relinquishment and adoption may well be the right decision, but with the assistance of counsel for the minor mother, we can ensure that its rationality is based on the situation of this teen, rather than assumptions about teen parenting that might be unfounded.

The failure to recognize the mother-child dyad as a family suggests we need not protect that dyad as we would the normative family. We can then unmoor the rights of the mother from biology, and insist instead that we focus only on the best interest of the child, and do so from the proposition that being raised by a teen mother can never be in the best interest of a child. This is how we have come to the current state of the law where minor mothers are relinquishing constitutionally protected parental rights with little consideration for the decision making deficits of teens. This position ignores demographic changes in the “normative” family—the norm is less and less the two-parent, heterosexual household. We must recognize that a single mother and child is a family worthy of legal protection, including providing legal assistance to that mother before allowing that family to be broken apart.

Given the legal complexity of the adoption decision, and its lifelong effect on birth parents and adoptees, all birth parents, regardless of age, should be provided legal counsel in the process. But at a minimum, minor birth parents, whose immaturity and inexperience may impair decision making, should have
the assistance of independent legal counsel when making the adoption placement decision.