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WHO ARE THE PARENTS? *IN LOCO PARENTIS*, *PARENS PATRIAE*, AND ABORTION DECISION-MAKING FOR PREGNANT GIRLS IN FOSTER CARE

Amy T. Pedagno †

INTRODUCTION

A fourteen-year-old resident of the State of Arizona was accompanied by a Planned Parenthood volunteer as she flew from her home state to Wichita, Kansas.[1] She was twenty-eight weeks pregnant.[2] The young girl, known to the courts as "Jackie Doe," was not only a ward of the State of Arizona, but also a juvenile detainee.[3] Too pregnant to obtain a legal abortion in Arizona, she "sought an order from the juvenile court permitting her to travel to Kansas . . . to obtain such medical treatment as may be appropriate . . . including a therapeutic abortion."[4] Though the trial judge approved the flight to

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1. *See, e.g.*, Doe v. Ryan, No. CV-99-0343-SA, at *3 (Ariz. Aug. 29, 1999) (Ariz. Judicial Branch, Supreme Court Orders 1999–2002); John Jakubczyk, *The Child in Janet Napolitano's Closet*, INTELLECTUAL CONSERVATIVE (July 26, 2004), http://www.intellectualconservative.com/2004/07/26/the-child-in-janet-napolitanos-closet.

2. Jakubczyk, *supra* note 1.

3. *Doe*, at *5 (Jones, V.C.J., dissenting) (Ariz. Judicial Branch, Supreme Court Orders 1999–2002).

4. *Id.* at *1. A "therapeutic abortion" is defined as:

> [T]he termination of a pregnancy where fetal heart tones are present at the time of the abortive procedure. The termination of a pregnancy may be induced medically (prostaglandin suppositories, etc.) or surgically (dilation and curettage, etc.). This includes the delivery of a non-viable (incapable of living outside the uterus) but live fetus, if labor was augmented by pitocin drip, laminaria suppository, etc.

N.C. DEP'T OF HEALTH & HUMAN SERVS., DIV. OF MED. ASSISTANCE, THERAPEUTIC AND NON-THERAPEUTIC ABORTIONS 1 (2007), *available at* http://www.ncdhhs.gov/dma/mp/1E2.pdf. This can be distinguished from a "non-therapeutic abortion," defined as "any termination of a pregnancy where there has been no manual or surgical interruption of that pregnancy (missed, incomplete, spontaneous, etc.)." *Id.*

Kansas,[5] the public soon learned that a judge had permitted a minor to leave the state to have a late term abortion, using public monies. "The public outcry [was] incredible."[6] The appellate court temporarily stayed the order. Nevertheless, the Supreme Court of Arizona heard oral arguments by telephone conference call at 9:30 on a Sunday morning. The girl was on a flight to Kansas later that same day.

Arizona Supreme Court Vice Chief Justice Jones' dissent raised critical concerns over such an order. He pointed out that "the state has a vested interest in her behavior and whereabouts and a responsibility at all times for her protection and care."[7] In response to the public outcry over the use of state funds, the trial judge, after reconsideration, ordered that state funds not be used in either transportation or performance of the abortion. The result, Vice Chief Justice Jones noted, was that a "critical dilemma" was presented "for the Department of Economic Security, for state agencies charged with care and maintenance of juvenile detainees and for the people of Arizona."[8]

The concerns raised by Vice Chief Justice Jones are not unfounded or even unique to the State of Arizona. The U.S. Department of Health and Human Services reports that approximately one-half million children are currently living in foster care in the United States.[9] Forty-seven percent of those children are girls.[10] One study has found that "by age 17, 33 percent of girls in foster care had been pregnant at least once. The proportion of girls in foster care who had been pregnant at least once increased to 48 percent by age 19, and *71*

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5. *Doe*, at *3 (Ariz. Judicial Branch, Supreme Court Orders 1999–2002).

6. Jakubczyk, *supra* note 1.

7. *Doe*, at *5 (Jones, V.C.J., dissenting) (Ariz. Judicial Branch, Supreme Court Orders 1999–2002).

8. *Id.* at *7 (Jones, V.C.J., dissenting).

9. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., FOSTER CARE STATISTICS 2009, at 1 (2011). For the purposes of this paper, "foster care" is used consistently with the definition provided in the Code of Federal Regulations:

> Foster Care means 24-hour substitute care for children placed away from their parents or guardians and for whom the State agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are made by the State or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made.

45 C.F.R. § 1355.20 (2010) (emphasis omitted).

10. CHILD WELFARE INFO. GATEWAY, *supra* note 9, at 11.

percent by age 21."[11] The statistics for these young girls are disheartening. Studies show that "[t]een girls in foster care are 2.5 times more likely than their peers not in foster care to get pregnant by age 19."[12] Considering that

> [y]oung teen mothers (aged 17 and younger at the time of birth) are 2.2 times more likely to have a child placed in foster care than mothers who delay child-bearing until age 20 or 21, and they are twice as likely to have a reported case of child abuse or neglect compared to mothers who delayed,[13]

it seems almost inevitable that a child born to a mother in foster care will also end up in the foster-care system. Indeed, "[n]ot only are adolescents in foster care more likely to become parents in their teen years, children born to teen parents are more likely to end up in foster care or have multiple caretakers throughout their childhood."[14]

When the topic shifts from *births* to children in foster care to *abortions*, the conversation meets an abrupt end. No one collects data on this topic. The Guttmacher Institute[15] reports that "[e]ach year, almost 750,000 women aged 15–19 become pregnant," and nearly twenty-seven percent of those pregnancies (200,420) end in abortion.[16] However, the Institute does not track whether the girls soliciting abortion services each year are juveniles under the care of the state. Absent hard data, legislators and policy-makers must work with logical inferences and anecdotal information about the prevalence of abortion among minors in foster care. Perhaps because of the absence of such data, very little research has been done across the nation to determine the overlap of abortion and teenagers in foster care. Using parental involvement for abortion laws as an example, this Note highlights marked areas of absent information and suggests questions

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11. THE NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, OPPORTUNITIES TO HELP YOUTH IN FOSTER CARE 1 (2009) (emphasis added) (footnote omitted), *available at* http://www.thenationalcampaign.org/resources/pdf/Briefly_Youth_Foster_Care.pdf.

12. *Id.*

13. *Id.*

14. THE NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, TEEN PREGNANCY AND CHILD WELFARE 1 (2010), *available at* http://www.thenationalcampaign.org/why-it-matters/pdf/child_welfare.pdf.

15. The Guttmacher Institute is an independent, not-for-profit corporation that does research on behalf of Planned Parenthood. *The History of the Guttmacher Institute*, GUTTMACHER INSTITUTE, http://www.guttmacher.org/about/history.html (last visited Feb. 20, 2012).

16. GUTTMACHER INST., FACTS ON AMERICAN TEENS' SEXUAL AND REPRODUCTIVE HEALTH 2–3 (2011), *available at* http://www.guttmacher.org/pubs/FB-ATSRH.pdf.

which can be used to start a policy discussion about how best to fill in those "gaps."

This Note recognizes four cognizable interests, which may or may not be competing, that are relevant to the abortion/foster-care discussion: (i) the fetus'; (ii) the pregnant minor's; (iii) the minor's parents'; and (iv) the State's. Since it is well known that the Supreme Court has denied recognition under law of any rights of the non-viable fetus,[17] this Note focuses on the rights of the last three parties, and, where relevant, highlights competing tensions and conflicts of interests. Part I of this Note lays a foundational basis for parental-involvement laws, including their constitutional evolution and their current status. Part II looks at the associated rights surrounding children in foster care, including the duty of the State towards its child citizens and its authority to delegate decision-making power, particularly as it relates to health care. Part III analyzes the overlap between the rights and obligations of parental-involvement laws and laws pertaining to children in foster care. Each section individually raises questions that should be used in evaluating and implementing policy on this sensitive issue, including asking which of the three parties (the state, the pregnant minor, or her parents) mentioned above is the relevant *parent* about whom the law is concerned.

I. AN OVERVIEW OF PARENTAL-INVOLVEMENT LAWS

Since the United States Supreme Court legalized abortion in the 1973 abortion case, *Roe v. Wade*,[18] the Court has dealt with a number of issues incident to the abortion decision.[19] Because abortion is deemed a fundamental right under the U.S. Constitution,[20] the Court has seemed loathe to uphold as constitutionally valid certain state provisions which seek to limit abortion access. However, the Court

17. Consistent with that precedent, the Florida Supreme Court has ruled that the appointment of a guardian ad litem for a fetus in an abortion case was improper. *In re* T.W., 551 So. 2d 1186, 1190 (Fla. 1989).

18. 410 U.S. 113 (1973).

19. *See* Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding the Partial Birth Abortion Ban Act of 2003); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (replacing the trimester model of *Roe* with an "undue burden" model which balances the state's and woman's interests); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (striking down, among other abortion restrictions, a provision of a Pennsylvania statute requiring doctors to use abortion techniques that maximize the chance of fetal survival); Harris v. McRae, 448 U.S. 297 (1980) (upholding the Hyde Amendment's ban on the use of federal Medicaid funds for abortion except when the life of the mother would be endangered by carrying the pregnancy to term).

20. *Carhart*, 550 U.S. at 144.

has recognized that states have more leeway when it comes to regulating minors' access to abortion. The primary mechanism for achieving this end has been to mandate parental involvement in a minor's decision to acquire an abortion. Such laws have met with widespread public support,[21] and indeed, "the Supreme Court has ruled consistently that states can require minors either to obtain consent or to notify their parents before obtaining an abortion."[22] State restrictions are not without limitations, of course, and the Court has simultaneously ruled that any parental-involvement provision must allow for a judicial-bypass procedure. Ostensibly, "[j]udicial bypass provisions are designed to give minors in abusive family situations the ability to receive permission to obtain an abortion from a judge."[23] In reality, such provisions shield from parental scrutiny any minor capable of demonstrating sufficient maturity or that an abortion would be in her "best interest."

A majority of states require some degree of parental involvement in a minor's decision to obtain an abortion. State laws must fall within the parameters laid out by the Supreme Court's jurisprudence, but even within those limitations, the varied laws of the states run the gamut. For example, on the more stringent end of the spectrum, "a handful of states require the [consent or] involvement of both parents. . . . On the other hand, several states allow grandparents or other adult relatives to be involved in place of the minors' parents."[24] Nevertheless, a state's parental-involvement laws can generally be grouped into three categories: requiring parental consent, requiring parental notification, or requiring both parental consent and notification.

Currently, thirty-seven states require some parental involvement in a minor's decision to have an abortion.[25] Twenty-two states require

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21. *See* Lydia Saad, *Americans Favor Parental Involvement in Teen Abortion Decisions*, GALLUP (Nov. 30, 2005), http://www.gallup.com/poll/20203/Americans-Favor-Parental-Involvement-Teen-Abortion-Decisions.aspx.

22. MICHAEL J. NEW, FAMILY RESEARCH COUNCIL, THE EFFECT OF PARENTAL INVOLVEMENT LAWS ON THE INCIDENCE OF ABORTION AMONG MINORS 3 (2008), *available at* http://downloads.frc.org/EF/EF10D59.pdf.

23. *Id.* at 4; *see also* AM. BAR ASS'N., FAMILY LEGAL GUIDE 692 (3d ed. 2004) (defining a judicial-bypass option).

24. GUTTMACHER INST., PARENTAL INVOLVEMENT IN MINORS' ABORTIONS (Feb. 3, 2012), *available at* http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf.

25. *Id.*

parental consent only,[26] three of which require both parents to consent.[27] Eleven states require parental notification only,[28] one of which requires that both parents be notified.[29] Four states require both parental consent and notification.[30] Six of the thirty-seven states permit a minor to obtain an abortion if a grandparent or other adult relative is involved in the decision.[31] Consistent with the Supreme Court's orders, thirty-six of the thirty-seven states that require parental involvement have an alternative process for minors seeking an abortion, including a judicial-bypass procedure, which allows a minor to obtain approval for the abortion from a court.[32]

A. *The Constitutional Evolution of Parental-Involvement Laws*

Parental-involvement laws have been contested in both state courts and inferior federal courts. This is unsurprising, considering that the Supreme Court itself has dealt with this issue no fewer than five times. The first time this issue was addressed was in *Planned Parenthood of Central Missouri v. Danforth*,[33] where the Court ruled that, notwithstanding laudable intent, a State may not use parental-involvement laws as an absolute bar to a minor's abortion.[34] However, the Court acknowledged that the State has more leeway with regards to regulating the rights of minors and thus left open the question of "whether there is any significant state interest in conditioning an

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26. *Id.* These states include: 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. *Id.*

27. *Id.* These states include: Kansas, Mississippi, and North Dakota. *Id.*

28. *Id.* These states include: Alaska, Colorado, Delaware, Florida, Georgia, Iowa, Maryland, Minnesota, New Hampshire, South Dakota, and West Virginia. *Id.*

29. *Id.* That state is Minnesota. *Id.*

30. *Id.* These states include: Oklahoma, Texas, Utah, and Wyoming. *Id.*

31. *Id.* These states include: Delaware, Iowa, North Carolina, South Carolina, Virginia, and Wisconsin. *Id.*

32. *Id.*

33. 428 U.S. 52 (1976).

34. *Id.* at 74. The Court's ruling was consistent with *Roe*'s basic thesis that abortion is a fundamental right. Because the right to abortion is constitutionally guaranteed,

> the State may not constitutionally impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy. . . . [T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

Id. (emphasis added).

abortion on the consent of a parent or person *in loco parentis* that is not present in the case of an adult."[35] Unfortunately, the Court dismissed the proffered policy reason for the state law (encouraging family unity) with nary an examination into its possible consequences. The Court made an assumption that a girl's unwillingness to tell her parents about her pregnancy is indicative of a fracturing of the family structure. It did not seem to take into account that parents' interest in the health and well-being of their daughter and grandchild may override any disappointment and consternation they feel as a result of the unplanned pregnancy.[36] Additionally, and perhaps more importantly as this topic relates to girls in foster care, the Court attributed to pregnant minors a maturity that they have not necessarily demonstrated. When discussing the weight of a parent's interest in being involved with his or her daughter's abortion decision, the Court said, "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor *mature enough to have become pregnant*."[37] Generally speaking, a teenager's pregnancy is more an indication of her physical age rather than a demonstration of her maturity level.

Danforth's ban on absolute vetoes is somewhat tempered by the Court's decision in *Bellotti v. Baird (Bellotti I)*,[38] handed down on the same day. There, the Court upheld a Massachusetts law requiring parental consent to a minor's abortion, which provided that a judge may consent to a minor's abortion "[i]f one or both of the [minor]'s parents refuse."[39] Since the statute did not create a "parental veto," the Court did not find it to impinge unreasonably on a minor's access to abortion.[40] The dual decisions of *Danforth* and *Bellotti I* thus

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35. *Id.* at 75. *See infra* text accompanying note 110 (providing an explanation of "in loco parentis," commonly translated from Latin as "in place of a parent").

36. Indeed, the Court simply said:

> It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure.

Danforth, 428 U.S. at 75.

37. *Id.* (emphasis added).

38. 428 U.S. 132 (1976).

39. *Id.* at 134.

40. *Id.* at 145.

hinted strongly at what would become the Court's bright-line rule: parental-involvement laws without a judicial-bypass provision do not pass constitutional muster.

This line of reasoning was upheld three years later, in *Bellotti v. Baird (Bellotti II),*[41] when the Court invalidated a Massachusetts statute requiring parental consent before an abortion could be performed on a minor and providing that an abortion could be obtained under a court order upon a showing of good cause.[42] For the first time, however, the Court suggested that the constitutional requirements for restricting juvenile access to abortion applied to laws that dealt with more than just parental *consent.*[43] Justice Powell's plurality opinion emphasized that the problem with the Massachusetts statute was that it required minors to *notify* their parents in all cases.[44] Justice Stevens concurred with the decision, but his opinion utilized the more traditional analysis: that the problem was the requirement of third party *consent* (i.e., parental or judicial) in all cases.[45]

The Court seemed to take a slightly different, though not inconsistent, approach in *H.L. v. Matheson*,[46] where a Utah statute requiring a physician to "notify, if possible" the parents of a minor upon whom an abortion is to be performed, was held not violative of constitutional rights of unemancipated minor dependents.[47] The Court noted that the statute allowed reasonable flexibility and took into account the careful balancing of different interests at stake in a minor's abortion decision.[48] Over the next few years, the Court continued to rule that minors are not entitled to unfettered access to abortion, but neither may they be met with an absolute veto. In

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41. 443 U.S. 622 (1979).

42. *Id.* at 651.

43. *Id.* at 647.

44. *Id.* ("We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents.").

45. *Id.* at 655 (Stevens, J., concurring).

> As a practical matter, I would suppose that the need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of a parent.

Id.

46. 450 U.S. 398 (1981).

47. *Id.* at 413.

48. *See id.* at 404–05.

Planned Parenthood Ass'n of Kansas City, Missouri v. Ashcroft,[49] the Court upheld a Missouri requirement that minors secure either parental or judicial consent, since the statute also provided an alternative procedure whereby a pregnant minor could demonstrate that she was sufficiently mature to make the abortion decision herself or to demonstrate that the abortion would be in her best interest.[50]

In *Ohio v. Akron Center for Reproductive Health*,[51] the Supreme Court upheld an Ohio law that required parental notification at least twenty-four hours before the abortion was performed with a judicial-bypass provision.[52] Importantly, the Court declined to decide whether a parental-notification statute must include some sort of bypass provision to be constitutional.[53] That same day, the Court struck down a *two-parent* notification requirement without a judicial-bypass option but upheld the same requirement with a judicial-bypass provision in *Hodgson v. Minnesota*.[54] *Hodgson* shows a clear divergence in the thinking of the members of the Court regarding the issue of parental notification. Justice Kennedy, writing for four justices, indicated that a two-parent notification requirement would be upheld with or without judicial bypass on the ground that parental notification is distinguishable from and less burdensome than a parental-consent requirement.[55] Justice Stevens, also writing for four justices, indicated that two-parent notification is so irrational that it would be unconstitutional even with judicial bypass.[56] Justice O'Connor expressed the view that the two-parent notification requirement passes constitutional muster with the judicial bypass but fails without it.[57] *Hodgson* then suggested a line of demarcation between judicial-bypass options in parental-consent and parental-notification laws, but did not fully clarify where that line should be drawn or what impact it might have on states or minors.

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49. 462 U.S. 476 (1983).

50. *Id.* at 477.

51. 497 U.S. 502 (1990).

52. *Id.* at 502.

53. *Id.* at 510.

54. 497 U.S. 417, 417 (1990).

55. *Id.* at 479 (Scalia, J., concurring and dissenting) (summarizing the different Justices' holdings).

56. *Id.* at 423–25. Commenting on what he believes to be the irrationality of the two-parent notification requirement, Justice Stevens notes that "[n]o exception is made for a divorced parent, a noncustodial parent, or a biological parent who never married or lived with the pregnant woman's mother." *Id.* at 424–25.

57. *Id.* at 461 (O'Connor, J., concurring).

Planned Parenthood of Southeastern Pennsylvania v. Casey,[58] widely regarded as marking a shift in the Court's abortion jurisprudence, had little effect on parental-involvement laws, and thus did little to clarify the Court's *Hodgson* consent/notification parameters. In *Casey*, the Court upheld Pennsylvania's law requiring the informed consent of one parent but allowing for judicial bypass if the minor chose not to or could not obtain such consent.[59] There again the Court focused on the role of parental consent in its "undue-burden" analysis, but did not discuss the role of parental notification.

Lambert v. Wicklund[60] represents a more recent Supreme Court case dealing with parental-involvement laws. Here again, the Court touched on parental-notification laws while not answering whether or not such laws require a judicial-bypass provision. The statute at issue allowed judicial waiver of the notification requirement only if the court determined that notification—not the abortion itself—was not in the minor's best interests.[61] The Supreme Court focused its analysis on whether the "best-interests" standard in the state statute was either identical to or substantively indistinguishable from the best-interests provisions which the Court had previously upheld. It found that it was.[62] Whether parental-notification laws demand judicial-bypass provisions is yet unanswered. The trend of the Court's abortion jurisprudence, however, suggests that should this issue be presented to the Supreme Court, a bypass provision will be deemed a necessary component of constitutionality.

The Court's line of cases dealing with abortion and minors demonstrates that there are few "hard lines" when it comes to the issue of parental-involvement laws. The fluctuation of the Court's jurisprudence, as well as the fact that some questions have not yet been answered, is a model that carries down throughout the rest of the American legal system. Abortion decision-making for minors involves balancing the rights of parents, children, and the states as evidenced by the vast number of cases on the issue. These competing tensions are certainly not lessened when the child in question is in foster care.

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58. 505 U.S. 833 (1992).
59. *Id.* at 899.
60. 520 U.S. 292 (1997).
61. *Id.* at 294.
62. *Id.* at 295.

B. *Underlying Basis for Parental-Involvement Laws*

Children, though fully citizens of the United States, are not afforded rights identical to those of their adult contemporaries. This is in part a recognition that civic and moral development occurs over time and that the best interests of the child and the citizenry are not necessarily furthered by immediately affording all people all rights regardless of age. As noted above, this idea has transcended the Supreme Court's abortion jurisprudence, despite the fact that abortion is considered a near-fundamental right. Consequently, states may

> limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, 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.[63]

Statements such as this show the extreme importance that the Supreme Court has afforded the "right" to an abortion. This statement, were it referring to a state's right to mandate parental consent for a minor's desire to have plastic surgery[64] or to join the military,[65] would meet with very little constitutional argument. However, when it refers to that same minor's desire to terminate a pregnancy, she is afforded more "perspective" and "judgment" to make that decision independently, solely because of the nature of the abortion decision. The Supreme Court cases discussed above do not regard parental-involvement laws as being ultimately for the interest of the pregnant minor. Rather, the Court couches that interest as being primarily one of the *state*,[66] and balances it against a girl's constitutional right to get an abortion on demand. Thus, the maturity and perspective that the Court ascribes to minors is hinged not on the individual girl herself, but rather on what right she is seeking to enforce.

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63. Bellotti v. Baird (*Bellotti II*), 443 U.S. 622, 635 (1979).

64. *See, e.g.*, *Plastic Surgery for Teenagers Briefing Paper*, AMERICAN SOCIETY OF PLASTIC SURGEONS, http://www.plasticsurgery.org/news-and-resources/briefing-papers/plastic-surgery-for-teenagers.html (last visited Feb. 21, 2012).

65. *See, e.g.*, *10 Steps to Joining the Military: Step 4: Meet the Recruiter*, MILITARY.COM, http://www.military.com/Recruiting/Content/0,13898,rec_step04_splash,,00.html (last visited Feb. 21, 2012).

66. *See infra* Part II (explaining the State's interest in keeping families intact).

Nevertheless, several policy reasons are proffered as to the wisdom of parental involvement with abortion laws, even by organizations such as the American Medical Association, which generally view such laws with disfavor:

> The decision to terminate a pregnancy is, of course, an extremely serious one, and minors will often lack the maturity and judgment necessary to reach a sound decision on their own. It is important for minors to receive comprehensive counseling about the issues involved in pregnancy and guidance regarding the different reproductive options.
>
> Moreover, parents are ordinarily the people most concerned with a minor's welfare, and they generally act in their child's best interests. In working through the difficult decision about abortion, minors will generally benefit from the mature advice and emotional support of their parents. Their parents will usually be in the best position to understand their needs and concerns and to help them as they apply their values to the abortion decision.[67]

This statement is consistent with the Supreme Court's finding that there are three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the guiding role of parents in the upbringing of their children.[68]

So much of the abortion debate language focuses on the right of the "woman" to make this decision independently and privately. Yet, oftentimes, the discourse ignores the fact that many of these "women" are in fact "girls"—otherwise unable to get their ears pierced[69] or even take an over-the-counter medication at the school nurse's office[70] without parental consent. A minor's right to terminate her pregnancy is one of the few instances when she may make medical decisions independently, absent a judicial determination that she is a "mature minor" (i.e., emancipated).[71]

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67. Am. Med. Ass'n, *Mandatory Parental Consent to Abortion*, 269 JAMA 82, 82–83 (1993).

68. *Bellotti II*, 443 U.S. at 633–39.

69. *See, e.g.*, *Tattoos and Body Piercings for Minors*, NCSL, http://www.ncsl.org/Default.aspx?TabId=14393 (last updated Oct. 2011).

70. *See, e.g.*, Am. Acad. of Pediatrics, *Guidelines for the Administration of Medication in School*, 112 PEDIATRICS 697, 697 (2003).

71. *See* THEODORE J. STEIN, CHILD WELFARE AND THE LAW 272–74 (3d ed. 2006) (discussing the limited constitutional, status-based, condition-based, and common law exceptions).

Advocates on both sides of the abortion debate bandy about statistics and studies which emphasize or de-emphasize the negative side effects of abortion. It is not within the purview of this Note to examine too deeply what the consequences of abortion are. For now, it is sufficient to note that even Planned Parenthood, the nation's largest abortion provider, acknowledges that some women do experience negative consequences of abortion, especially if they were not emotionally healthy prior to the abortion or if they had mixed feelings about or pressure to get the abortion.[72] Young girls in the foster-care system are particularly vulnerable, both to pressure to have an abortion and to negative side effects from the abortion procedure.

A supervisor of volunteers with the Guardian ad Litem program for Florida's Twentieth Judicial Circuit revealed that many of the pregnant teenagers in the foster-care system whom she had encountered had suffered from conflicting feelings about their pregnancies.[73] On the one hand, they recognized that there was a high probability that their child would end up in the "system," a consequence that they wanted to avoid at all costs.[74] On the other hand, they viewed their unborn child as a source of boundless love, something that many of these girls had never before experienced in their lives.[75] Thus, regardless of how a girl's pregnancy was terminated (naturally, with childbirth, or artificially, by abortion), she was especially vulnerable to future psychological trauma. It seems that a girl in such a position would benefit from receiving the kind of guidance that parental-involvement laws are meant to ensure.

C. *Questions for Consideration*

The U.S. Supreme Court's case law has spoken about the proper balance of the pregnant minor's rights with the rights of her parents. However, case law generally assumes a family situation where the minor girl has regular contact with at least one of her parents. For many teenagers in foster care, this may be far from the case. Even states which have abuse, assault, incest, or neglect provisions in their

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72. PLANNED PARENTHOOD FED'N OF AM., THE EMOTIONAL EFFECTS OF INDUCED ABORTION 2–4 (2007), *available at* http://www.plannedparenthood.org/files/PPFA/emoteffectsabort_01-07_(spot_revised_05-25-07).pdf.

73. Interview with Barbara Spotts, Volunteer Supervisor, Guardian ad Litem Program of Sw. Fla., in Fort Myers, Fla. (Sept. 16, 2010).

74. Interview with Barbara Spotts, *supra* note 73.

75. *Id.*

parental-involvement statutes still assume that the minor is living with or accessible to her abuser or attacker. For girls who have already been removed from their parents' home before they get pregnant (oftentimes for reasons unrelated to abuse, such as parental drug use), this provision may not apply. Even the justifications for judicial bypass overlook an entire population of teenage girls who are perhaps most in need of the support that these laws seek to ensure. For example, the judicial-bypass statutes were meant to allow a girl who was raped and impregnated by her father the opportunity to avoid having to seek his consent for abortion. However, these laws do not necessarily help the girl removed to the foster-care system and then impregnated by her boyfriend. This young girl's pregnancy represents another jolting event in her development. Should she be allowed to obtain an abortion, further compounding the trauma, without anyone, other than a judge, being notified?

Further, in its abortion jurisprudence, the Supreme Court has framed the rights of the minor girl to be solely her right to an abortion. However, pregnant minors also have the right to care, support, and information. This is more than just a "valid interest" that a State may use to justify its parental-involvement laws. Are children receiving the proper support and information about the consequences of their decisions regarding their pregnancy when they apply for a judicial bypass? Is any child actually mature enough to choose abortion, adoption, or child-rearing independently?

II. FOSTER CARE: CORRESPONDING RIGHTS AND OBLIGATIONS

The Supreme Court's abortion cases speak of a state interest in the protection of minors. For the most part, that line of cases takes this interest as a given one, in part because a separate line of cases has further expounded on this idea. The care and protection of children has generally been deemed to fall within the jurisdiction of the state court system.[76] However, since no state has developed its family law independently, federal law influences state law. Several federal acts set minimum standards for the care and protection of foster-care children that must be followed by the states.[77] However, since family

76. *See infra* note 79 and corresponding discussion of the "domestic relations exception."

77. *See, e.g.*, Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, 117 Stat. 818 (codified as amended in scattered sections of 42 U.S.C.); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.); Child Abuse, Domestic Violence, Adoption, and Family Services Act of 1992, Pub. L. No. 102-295, 106 Stat. 187 (codified as amended in scattered sections of 42 U.S.C.); Child Abuse

law is inherently local,[78] the study of family law in America is really a matter of comparative law—how one state's methods differ from another state's. Thus, enforcement of family law is left primarily to state courts, and the bulk of the governing rules are state, not federal, laws. The federal courts have traditionally adhered to the "domestic relations exception" (the idea that federal courts will decline diversity jurisdiction when the case implicates matters of family law) because of the belief that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."[79] This exception stems from the belief that "[a]s a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts."[80]

A. *From Whence the Obligation for Foster Care Arises*

Since at least the nineteenth century, even state courts are hesitant to delve into internal family matters. The family is now viewed as a haven, worthy of its own privacy and autonomy. This idea can be traced through a series of twentieth century U.S. Supreme Court decisions. In *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*,[81] the Supreme Court held that an Oregon law requiring parents of children between ages 8–16 to send their children to public school was unconstitutional.[82] In *Prince v. Massachusetts*,[83] though the Court upheld the conviction of a woman under Massachusetts child labor laws who allowed her nine-year-old niece and legal ward to join her in selling religious tracts on public sidewalks, they nevertheless extended great respect for parental prerogatives in child-rearing and emphasized family privacy: "It is cardinal with us that the custody, care and nurture of the child reside

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Prevention, Adoption, and Family Services Act of 1988, Pub. L. No. 100-294, 102 Stat. 102 (codified as amended in scattered sections of 42 U.S.C.).

78. Though the foster-care system involves more than just family law—indeed, criminal law is frequently implicated as well—in most states, issues pertaining to foster care are dealt with by a family court judge.

79. Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992) (citing *Ex parte* Burrus, 136 U.S. 586, 593–94 (1890)).

80. *Ankenbrandt*, 504 U.S. at 704.

81. 268 U.S. 510 (1925).

82. *Id.*

83. 321 U.S. 158 (1944).

first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[84]

In *Wisconsin v. Yoder*,[85] the Court affirmed the overturning of compulsory-education-law convictions of three Amish parents who refused to send their fourteen and fifteen-year-old eighth-grade graduated children to school.[86] Again, the Court reaffirmed parental autonomy, stating: "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[87] In *Parham v. J.R.*,[88] where the Supreme Court reversed a federal district court ruling that parents could not commit their children to state mental-health facilities for treatment without an adversarial hearing before a formal tribunal,[89] they again emphasized the importance of parental authority: "For centuries it has been a canon of the common law that parents speak for their minor children. So deeply imbedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it."[90]

However, as the Supreme Court has acknowledged, "the family itself is not beyond regulation in the public interest."[91] Though the courts want very much to respect family autonomy, there are times (far too prevalent) where individuals use that autonomy as a shield to hide heinous and gruesome crimes. When parents abuse and neglect their children the State has a duty to intervene. The Supreme Court has summarized these tensions:

> First, there is a presumption, strong but rebuttable, that parents are the appropriate decisionmakers for their infants. Traditional law

84. *Id.* at 166. Courts are always looking to strike a balance between the state's interest in protecting children and a parent's religious beliefs, especially with regard to the withholding of medical treatment for children. As the *Prince* Court itself acknowledged, profound respect for the role of parents does not mean freedom from all interference: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Id.* at 170.

85. 406 U.S. 205 (1972).

86. *Id.*

87. *Id.* at 232.

88. 442 U.S. 584 (1979).

89. *Id.*

90. *Id.* at 621 (footnote omitted).

91. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

> concerning the family, buttressed by the emerging constitutional right of privacy, protects a substantial range of discretion for parents. Second, as persons unable to protect themselves, infants fall under the *parens patriae* power of the state. In the exercise of this authority, the state not only punishes parents whose conduct has amounted to abuse or neglect of their children but may also supervene parental decisions before they become operative to ensure that the choices made are not so detrimental to a child's interests as to amount to neglect and abuse.[92]

Unlike the Court's abortion jurisprudence, the Court does not frame this as a matter of constitutional rights. Nevertheless, the Court has found the State's duty to protect children to be consistent with constitutional principles. To that end, the idea of child welfare in modern society reflects a tension between the rights of the family and the duty of the state.

B. Parens Patriae *and the Foster-Care System*

The State's obligation to ensure the welfare of its children authorizes foster care and the removal of children from their homes. However, this power should not be considered an unlimited one. Indeed, the Court has made a point to assure the opposite:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" . . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.
>
> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. The statist notion that governmental power

92. Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 627 n.13 (1986).

> should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.[93]

Consistent with the *parens patriae* doctrine,[94] every U.S. state has its own governmental organization dedicated to child welfare. These agencies are responsible for investigating allegations of abuse and neglect of children in a timely manner, and, if necessary, removing children from their homes and placing them in adequate shelter.[95] In an effort to ensure consistency among the states, and also to make sure that state actors are not trampling on parents' rights, the federal government mandates state reporting and consistency with federal guidelines.

The Adoption and Safe Families Act ("ASFA")[96] was passed by the United States Congress in 1997.[97] Under ASFA, after a child is removed, the appropriate court must make a finding that it is contrary to the child's welfare to remain in the home. If the child can safely remain in the physical custody of his or her parents, the child should be returned home with services rather than placed in out-of-home care.[98] To prevent arbitrary removal by state actors, ASFA requires that the court make a finding that reasonable efforts were made by the department to prevent the child's removal.[99] To facilitate the return of the child to his or her home, the regulations under ASFA also requires that the department develop a case plan within sixty days after the removal of the child from the home.[100]

ASFA emphasizes that the main objective of state agencies should be the reunification of children and their parents. Perhaps contrary to popular thought, children fare better when residing with their biological parents (despite even severe issues in the home) than they

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93. *Parham*, 442 U.S. at 602–03 (internal citations omitted).

94. This is the principle that makes the protection of the best interests of any child the first and single most important concern of the courts.

95. These agencies are known by a myriad of names, such as the Department of Children and Families, Child Protective Services, etc.

96. 42 U.S.C. §§ 670–679 (2010). Additionally, relevant regulations relating to ASFA are found at 45 C.F.R. § 1356 (2010), and comments to the regulations by the Department of Health and Human Services are found at Regulations Concerning Child and Family Services, 65 Fed. Reg. 4,020 (Jan. 25, 2000) (to be codified at 45 C.F.R. pts. 1355–1357).

97. Though it is not the sole federal authority for foster care, it is cited frequently in foster-care issues because statewide compliance with ASFA is necessary; failure to comply allows the U.S. Department of Health and Human Services to eliminate or reduce federal funding to that state.

98. 42 U.S.C. § 671(a)(15)(B)(i).

99. *See id.*

100. 45 C.F.R. § 1356.21(g)(2).

do in foster care. Removal of children to foster care is considered a necessary but undesirable step to the ultimate strengthening of families. This emphasis is realized throughout the Act in several ways. First, ASFA requires that states make reasonable efforts to reunify families.[101] The only exceptions to this provision are where: the child is an abandoned infant;[102] the parent has subjected the child to "aggravated circumstances" such as torture, chronic abuse, sexual abuse, or abandonment;[103] the parent has committed, or assisted in the committing of, the murder or voluntary manslaughter of one of the parent's other children;[104] the parent has committed a felony assault resulting in serious injury to the child or another child of the parent;[105] the parent has had his or her parental rights involuntarily terminated to another child;[106] or the State has determined that another reason exists that justifies not using reasonable efforts to reunify the family, with the child's health and safety as the paramount concern.[107]

ASFA seeks to give children stability and permanency in their lives. Thus, when a child has been in foster care for fifteen of the last twenty-two months, the department "shall file a petition to terminate the parental rights of the child's parents" unless certain conditions exist.[108] Notwithstanding this provision, ASFA still acknowledges the importance of state and local authority in this area. Comments to the regulations relating to ASFA by the Department of Health and Human Services clearly indicate this.

> We would like to clarify that a State continues to have the discretion to file a petition for [Termination of Parental Rights ("TPR")] whenever it is in the best interests of the child to do so. In addition, Congress passed a Rule of Construction at section 103(d) of Public Law 105-89 reaffirming a State's ability to file a petition for TPR before it is mandated by Federal statute or for reasons other than those indicated in Federal law. Therefore, States should view the Federal statutory time frames of 15 out of 22 months of a child's stay in foster care as

101. 42 U.S.C. § 671(a)(15)(B).
102. 42 U.S.C. § 675(5)(E).
103. 42 U.S.C. § 671(a)(15)(D)(i).
104. 42 U.S.C. § 671(a)(15)(D)(ii)(I)–(III).
105. 42 U.S.C. § 671(a)(15)(D)(ii)(IV).
106. 42 U.S.C. § 671(a)(15)(D)(iii).
107. *See* 42 U.S.C. § 671(a)(15)(A); 42 U.S.C. § 671(a)(15)(D)(i).
108. 42 U.S.C. § 675(5)(E).

> the maximum length of time that can elapse before a State agency must file a petition or document an exception for TPR.[109]

During the time that a child is in the custody of the state (and in certain instances even after the child has been returned to the home), the state is considered to be acting *in loco parentis* ("in place of" or "on behalf" of the parents). *In loco parentis* is commonly understood to refer to "a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties."[110] State actors thus have a duty to ensure that they act in the best interests of any child in foster care. This parallels the presumption, mentioned previously, that a parent's concern naturally rests in securing the best interests of his or her child.

C. *Delegation of Power Under* Parens Patriae

The right to stand *in loco parentis* allows an authorized state agency to further delegate this power. This allows the state agency and the foster parents to enroll the child in school, consent to field trips, take the child to the doctor, and otherwise act on behalf of the best interests of the child.[111] However, it is important to note that the simple act of removing the child from the home does not automatically terminate the rights of the biological parents over their child. Indeed, as discussed previously, ASFA lays out the general procedures which must be followed for the State to move to terminate the rights of the biological (or in some cases, simply the custodial) parent. The terminology is different from state to state,[112] but

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109. Regulations Concerning Child and Family Services, 65 Fed. Reg. 4,020, 4,060 (Jan. 25, 2000) (to be codified at 45 C.F.R. pt. 1356).

110. Niewiadomski v. United States, 159 F.2d 683, 686 (6th Cir. 1947).

111. *See, e.g.*, CAL. DEP'T OF CHILDREN & FAMILY SERVS., OUT-OF-HOME CAREGIVERS: LEGAL CONSENT AUTHORITY (2010), *available at* http://dcfs.co.la.ca.us/policy/hndbook%20cws/0100/010052040v0610.doc; OR. DEP'T OF EDUC., GUIDELINES FOR CONSENT FOR CHILDREN IN FOSTER CARE (2007), *available at* http://www.ode.state.or.us/pubs/sped/fosterconsentchart.doc.

112. For example, Virginia uses the term "residual parental rights and responsibilities" to refer to "all rights and responsibilities remaining with the parent after the transfer of legal custody or guardianship of the person, including but not limited to the right of visitation, consent to adoption, the right to determine religious affiliation and the responsibility for support." VA. CODE ANN. § 16.1-228 (2010). In contrast, Washington does not separately define the remaining rights of the biological parents; but rather, emphasizes that

> [i]n an attempt to minimize the inherent intrusion in the lives of families involved in the foster care system and to maintain parental authority where appropriate, the

generally, removal of a child from the home merely suspends a biological parent's physical custody of the child, but does not affect his or her legal custody of the child. The court, however, may suspend or terminate one or both of those if the situation warrants it and it is done in compliance with state and federal guidelines.

> [P]arents have a Constitutional right to: (a) receive notice that an action has been filed against them, (b) respond at a hearing to the allegations that they are not a fit custodian, (c) have counsel (but not always the right to court-appointed counsel), and (d) hold the state to a higher burden of proof than in a neglect proceeding by requiring the state to prove by clear and convincing evidence that parental rights should be terminated.[113]

These procedural safeguards should be met because "[i]nvoluntary termination of parental rights is the most extreme form of state intervention in family life."[114]

Termination of parental rights, then, is not an automatic procedure. While the children are in foster care, rights are balanced between the biological parents and those who are providing care for the children.[115] This balance frequently becomes an issue when a child in foster care is in need of medical assistance. However, not all states specifically enumerate what procedures require parental consent. A state agency generally is authorized to consent to certain medical procedures for a minor child under the *in loco parentis* doctrine.[116] This ability may be needed, for example, if the biological parent refuses to consent to a procedure. Then, the agency may be authorized by statute to consent irrespective of the parents' wishes (e.g., when a parent refuses to consent to a physical examination of their child to search for signs of abuse), or the court may be able to

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> department, absent good cause, shall follow the wishes of the natural parent regarding the placement of the child with a relative or other suitable person pursuant to RCW 13.34.130. Preferences such as family constellation, sibling relationships, ethnicity, and religion shall be considered when matching children to foster homes. Parental authority is appropriate in areas that are not connected with the abuse or neglect that resulted in the dependency and shall be integrated through the foster care team.

WASH. REV. CODE ANN. § 13.34.260(1) (West 2011).

113. STEIN, *supra* note 71, at 165.

114. *Id.* at 146.

115. REBECCA GUDEMAN, NAT'L CTR. FOR YOUTH LAW, CONSENT TO MEDICAL TREATMENT FOR FOSTER CHILDREN: CALIFORNIA LAW 2 (2008).

116. *See id.* at 3.

authorize it for them (e.g., when a doctor opines that it is in the best interest of the child to begin a regimen of psychotropic drugs).[117]

Obtaining judicial consent for medical procedures is usually a wise decision, since parents have a legal right to be informed about and present at proceedings relating to their children while in foster care. Additionally, obtaining judicial consent also provides a reference for judges elsewhere in the state, leading to greater procedural consistency among the jurisdictions. For example, the Florida District Court of Appeals found in *Department of Children and Family Services v. G.M.*[118] that surgery is neither ordinary medical care nor medical treatment, and thus judicial authorization was needed before a doctor could perform surgery on a minor in the custody of the Department of Children and Family Services.[119] The court ruled that "[a] routine medical examination is one thing, but surgery is another altogether, as it is much more inherently invasive by nature."[120]

Of course, there are certain exigent circumstances where it is not prudent to wait for the biological parents to be located to consent to a medical procedure. Thus, states will authorize individuals acting *in loco parentis* to consent in emergency circumstances. However, the requirements and conditions for this authority vary between the states. For example, one type of authorizing code provides:

> Notwithstanding any other provision of the law, in cases of emergency in which a minor is in need of immediate hospitalization, medical attention or surgery and after reasonable efforts made under the circumstances, the parents of such minor cannot be located for the purpose of consenting thereto, consent for said emergency attention may be given by any person standing in loco parentis to said minor.[121]

Yet other states might approach this slightly differently. Whereas the type of statute above only allows consent to be given by someone standing *in loco parentis* in an emergency situation where the parent cannot be reached, other states would ordinarily allow an individual standing *in loco parentis* to consent to a medical procedure.[122]

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117. *See, e.g.*, Charles G. Childress, *The Rights of Children Regarding Medical Treatment*, 25 GPSOLO, no. 3, 2008 at 44, 46.

118. 816 So. 2d 830 (Fla. Dist. Ct. App. 2002).

119. *Id.* at 832.

120. *Id.*

121. ARIZ. REV. STAT. ANN. § 44-133 (2010).

122. *See, e.g.*, VA. CODE ANN. § 16.1-241(C) (2010).

Traditionally, foster parents are not considered the official *in loco parentis* entity over foster children. Though "[f]oster parents have physical custody of the child[, i]n most cases they do not have a formal legal relationship such as legal custody of, or guardianship, over the child."[123] Because the child welfare agency has legal custody over the child, "[f]oster parents have little real authority regarding medical care."[124] For instance, though they could bring a child for emergency care, foster parents likely would not be able to authorize treatment. "There is very little law on the legal relationship between the foster parent and the foster child,"[125] but the general understanding is that foster parents are not state actors.[126] Undoubtedly, though, the child welfare agency and its employees are state actors. This designation is important when the medical care in question is neither "routine" nor "emergency" but is instead "abortive" in nature.

D. *Questions for Consideration*

The State's duty to provide for the health and well-being of its most vulnerable citizens is at its peak for children in foster care. Research indicates that across the nation there is very little state-wide legislation regarding the delegation of the State's *parens patriae* power as it pertains to the medical care of foster children. Future research is suggested to inquire as to whether the ad hoc system truly serves the best needs of the child, as ASFA requires. When the idea of "health care" is expanded to include abortion services, even less consistent policy exists throughout the nation, and even more research is needed. It is not clear whether a minor's "best interests" under ASFA (where she is treated like a child) are the same as her "best interests" under current abortion laws (where she is treated like an adult woman).

Health care also marks a point of overlap between race, abortion, and foster care. "Poverty remains the largest risk factor for poor health and well-being outcomes for children, and for entry into the

123. HARVEY SCHWEITZER & JUDITH LARSEN, FOSTER CARE LAW 31 (2005).

124. *Id.* at 34.

125. *Id.* at 31.

126. *See* Howard v. Malac, 270 F. Supp. 2d 132, 144 (D. Mass. 2003) (concluding that, usually, foster parents are not state agents for 42 U.S.C. § 1983 purposes, but also explaining that there are certain situations in which the foster parent/private actor can be so closely "entwined" in the state's conduct that the private actor can be a state actor under 42 U.S.C. § 1983).

foster care system,"[127] and children of color are disproportionately represented in the child welfare system.[128] After all,

> [a] higher rate of poverty, challenges in accessing support services, and racial bias were identified as factors contributing to the higher proportion of African American children entering foster care. . . . [O]nce African American children are removed from their homes, they tend to stay in foster care longer. Their lengths of stay in foster care average nine months longer than those of white children . . . .[129]

Taken in conjunction with the fact that African-American women have abortions at nearly 3.5 times the rate of their white contemporaries,[130] the prevalence of African-American children in foster care suggests that there might be a link worthy of further investigation and research. With so much attention currently focused on health-care reform, it is timely to take a hard look at how foster children can be best benefited by proposed policy changes. As ASFA suggests, changes that will affect foster-care children will have to be made at a national and state level. Such a system-wide overhaul, if it occurs, should consider how abortion decisions play into health care, too.

III. WHEN RIGHTS AND DUTIES INTERSECT: PARENTAL-INVOLVEMENT LAWS AND WARDS OF THE STATE

States have not addressed the situation of a pregnant minor in foster care seeking abortion from a systemic standpoint. Indeed, this seems to be an issue that is dealt with on a case-by-case basis. Very few states have a published protocol. The state examples given in this section are representative of the various approaches. For example, Florida code makes it clear that

> [i]f a parent or legal custodian of the child is available but refuses to consent to the necessary treatment, including immunization, a court order shall be required unless the situation meets the definition of an emergency . . . or the treatment needed is related to suspected abuse,

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127. Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 FUTURE CHILD. 75, 80 (2004).

128. *Id.* at 77.

129. RONALD L. BRAITHWAITE ET AL., HEALTH ISSUES IN THE BLACK COMMUNITY 46–47 (3d ed. 2009).

130. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 75 tbl.100 (2011).

> abandonment, or neglect of the child by a parent, caregiver, or legal custodian. In such case, the department shall have the authority to consent to necessary medical treatment. This authority is limited to the time reasonably necessary to obtain court authorization. *In no case shall the department consent* to sterilization, *abortion*, or termination of life support.[131]

Florida currently requires parental notification (but not consent) for abortion forty-eight hours prior to the procedure.[132] Since the statute discussing consent to medical procedures for minors in foster care gives no guidance on parental *notification*, it is unclear if the Department of Children and Families is an authorized recipient of notification if her parents cannot be reached. If not, it seems that a minor must solicit a judicial bypass of notification. Alaska gives even less guidance. Its Child and Protective Services Manual simply states: "If the pregnant teen (in custody) requests an abortion, parental consent may be required. Seek advice from your Assistant Attorney General."[133] Incidentally, Alaska currently requires parental notification, as a result of an August 2010 ballot initiative.[134] Here, similar to Florida, it is unclear who should be notified on behalf of a pregnant girl in foster care.

Virginia's statutory law is more explicit, but no less muddled. Ordinarily, a minor girl seeking an abortion must obtain consent from an "authorized person," defined as "(i) a parent or duly appointed legal guardian or custodian of the minor or (ii) a person standing in loco parentis . . . with whom the minor regularly and customarily resides and who has care and control of the minor."[135] If a minor seeks a judicial bypass, the abortionist must notify an authorized person of the impending abortion at least twenty-four hours in advance, unless "the judge finds that such notice would not be in the best interest of the minor."[136] However, the statute does not expressly require that the *parent* be the only party capable of consenting. Thus, it seems that a minor girl in foster care could acquire an abortion with the permission of her foster parent against the express wishes of her biological parent. If the abortion provider is made aware of the

131. FLA. STAT. ANN. § 39.407(2)(c) (West 2008) (emphasis added).

132. *Id.* § 39.0114(2)(a).

133. ALASKA OFFICE OF CHILDREN'S SERVS., CHILD PROTECTIVE SERVICES MANUAL 505 (2012), *available at* http://www.hss.state.ak.us/ocs/Publications/CPSManual/cps-manual.pdf.

134. ALASKA DIV. OF ELECTIONS, INITIATIVES APPEARING ON THE BALLOT IN ALASKA (2011), *available at* http://www.elections.alaska.gov/doc/forms/H26.pdf#page=1.

135. VA. CODE ANN. § 16.1-241(V) (2010).

136. *Id.*

conflicting opinions of both the biological and foster parents, there seems to be no way to ethically resolve this conflict absent a court order pursuant to a judicial bypass.

A. *Conflicts of Interest*

As suggested above, an abortion provider might be faced with conflicting viewpoints when performing an abortion for a pregnant foster child. However, the abortion provider is not the only party who could suffer a conflict of interest in such a situation. Another potential conflict of interest arises in the very court which would be called on to resolve such conflicts, since the same court which would be ruling on the judicial-bypass issue is also the court that would have jurisdiction over the foster-care case.[137] Sitting as the presider in the dependency case, the judge might be privy to information in both cases of which he or she normally would not be aware as the presider in the abortion case, and vice versa. This raises a red flag. A minor girl could come to court on Monday asking for a judicial bypass and demonstrating that it is not in her "best interest" for the state agency/foster-care parents to be notified of/required to consent to her decision to terminate her pregnancy. That same week, the same girl could be present in the same courtroom, this time for a dependency hearing, while the same agency/foster parents argue that it is in the minor's "best interest" that some other event happen, like her medications be altered or that her counseling be terminated. No one has suggested what happens if those purported "best interests" conflict with one another. The judge is prevented from revealing the minor's abortion decision, yet he also has an obligation to her and her family concerning the provision of a safe and healthy foster-care environment.

The judge is not the only individual who might face such a conflict of interest. State actors who have been entrusted with the care of minor children might have statutory reporting obligations that conflict with constitutionally-protected privacy concerns surrounding abortion. For example, Texas Family Code requires the appointment of a guardian ad litem when a pregnant minor applies to the court for judicial approval of the minor consenting to an abortion.[138] That guardian may be an appropriate employee of the Department of

137. *See, e.g.*, *id.* § 16.1-241(A).

138. TEX. FAM. CODE ANN. § 33.003(e) (West 2008).

Protective and Regulatory Services.[139] The Department of Family and Protective Service's ("DFPS") handbook notes that

> [i]f the minor is in DFPS conservatorship, the DFPS guardian ad litem (GAL) must immediately inform his or her supervisor and notify the regional attorney in the area where the court petition was filed. *An inherent conflict of interest* is raised when DFPS is the minor's managing conservator and the minor is seeking a judicial bypass to avoid the notification but DFPS has been notified through the GAL appointment.[140]

Here, then, the concern is not that a DFPS actor might not be able to separate his or her own interests (though nothing necessarily precludes such a conflict), but rather that the girl's privacy rights have been violated since "unless otherwise ordered, DFPS is obligated to notify the minor's parents, foster parent, adoptive parents, relative caretaker, and so on."[141]

B. *Competing Policy Concerns*

Alas, privacy concerns are not the only conflict raised in such a situation. There is no doubt that teen pregnancy bears a high cost to the public sector—"that is, to federal, state, and local governments and the taxpayers who support [teen parents and their children]."[142] In 2004, alone, the cost of teen pregnancy to the child-welfare system was 2.3 *billion* dollars.[143] Among the general population, young teen mothers (age seventeen or younger) were "2.2 times more likely . . . to have a child placed in foster care during the first five years after a birth compared to women who had a first birth at age 20–21."[144] States have a strong incentive in reducing births to teen moms. A study by the National Campaign to Prevent Teen Pregnancy

> suggest[s] that successfully delaying first births to age 20–21 would reduce the number of children in foster care by about 45,000 and the number of incidents of abuse or neglect by almost 600,000 annually. Annual total costs for foster care, adoption, and associated child

139. *Id.* § 33.003(f)(3).

140. TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., CPS HANDBOOK § 5512 (2007) (emphasis added), *available at* http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_5500.jsp.

141. *Id.*

142. SAUL D. HOFFMAN, BY THE NUMBERS: THE PUBLIC COSTS OF TEEN CHILDBEARING 1 (2006).

143. *Id.* at 2.

144. *Id.* at 13.

> welfare programs would fall by $1.8 billion if young teen mothers delayed their first birth to age 20 or 21.[145]

When those numbers are considered in conjunction with the fact that "[t]he available data demonstrates not just that a significant number of foster youth are pregnant and parenting, but that the incidence of pregnancy and parenthood is higher among foster youth than among their peers[,]"[146] it seems like the State would have a high incentive to prevent births of children to teen moms in foster care. Studies show that girls in foster care are more than twice as likely as their non-foster-care peers to experience a teenage pregnancy.[147]

It thus seems likely that state foster-care agencies feel a great deal of pressure to prevent the births of children to teen mothers who are themselves in foster care. This pressure might go so far as to encourage, or even facilitate, a teenager in procuring an abortion. It has been suggested that this happened in Philadelphia in early 2010, when "[a] Department of Human Services caseworker pressured a pregnant . . . teenager to undergo a late-term abortion by threatening to take away either her toddler or her unborn baby if she had the child."[148] The sixteen-year-old girl was pulled from school by her caseworker and transported from Philadelphia to New Jersey to have the abortion, since abortions in Pennsylvania are illegal at twenty-four weeks.[149] Although the Department has oversight of abortions procured by children in its custody, the agency "is supposed to take a neutral position."[150] Nevertheless, "[b]etween September 2006 and March 31, [2010] . . . 335 minors under DHS care became pregnant. Of those, 119 resulted in abortions. Of those abortions, 54 were done by judge's order. Eight of the abortions were performed out of state . . . ."[151]

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145. *Id.* at 14.

146. Eve Stotland & Cynthia Godsoe, *The Legal Status of Pregnant and Parenting Youth in Foster Care*, 17 U. FLA. J.L. & PUB. POL'Y 1, 6 (2006).

147. *See* PETER J. PECORA ET AL., ASSESSING THE EFFECTS OF FOSTER CARE: EARLY RESULTS FROM THE CASEY NATIONAL ALUMNI STUDY 23 (2003); Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth:* Outcomes at Age 19, at 52–54 (Chapin Hall Ctr. for Children at Univ. of Chi., Working Paper, 2005).

148. Regina Medina, *'Shameful' Pressure?*, PHILA. DAILY NEWS, May 3, 2010, at 3.

149. *Id.* On a related note, though not at issue here since the abortion was ordered by a judge, it is unclear whether the individuals who transported the minor across state lines for the purpose of securing an abortion were authorized individuals under Pennsylvania's law requiring parental consent or even New Jersey's law requiring parental notification. *See* GUTTMACHER INST., *supra* note 24.

150. Medina, *supra* note 148 (quoting Donald F. Schwartz, Philadelphia's Deputy Mayor for Health and Opportunity).

151. *Id.*

Even where the State does not exert overt pressure on a pregnant minor in foster care with regard to the decision to terminate her pregnancy, such pressure very well may exist. Florida, as stated above, for example, lacks an official policy for dealing with a pregnant minor in foster care. However, resources provided by the Department of Children and Families are biased in favor of the abortion decision.[152] A girl who is directed to a Planned Parenthood clinic to obtain a pregnancy test may likely feel as though she is being encouraged to have an abortion should the test come back positive.[153]

For an issue as controversial as abortion, it is very hard to maintain a truly "neutral" position, official policy notwithstanding. State actors must balance many things: department policy with department financing, their own moral beliefs with constitutionally-protected actions, and their understanding as to the minor's best interests with the expressed viewpoints of others who love and care for the minor. When the stakes are as high as they are in this decision-making balancing act, it seems that it is undoubtedly in the best interest of the pregnant minor that everyone understand her respective rights and obligations and that support networks be established for the minor and for state actors unsure of their roles in the decision.

The decision about whether to have an abortion deserves to be an informed one. Teenagers, especially those in foster care, are not generally known for their mature judgments. Therefore, in order to facilitate informed decision-making about life or death choices, the state should actively encourage that teenagers seek guidance before making their choice. When teenagers lack the basic family structure as a source of support, the State should clearly delineate who may

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152. *See, e.g.*, AM. BAR ASS'N & FLA.'S CHILDREN FIRST, ON YOUR OWN, BUT NOT ALONE: A HANDBOOK TO EMPOWER FLORIDA YOUTH LEAVING FOSTER CARE 29 (2008) (referring teens to the websites of Planned Parenthood or to the Path Project, whose "Pregnancy Options" tab similarly refers teens back to Planned Parenthood).

153. *See id.* at 28. Though Planned Parenthood offers adoption referral services, its

> "services" for its pregnant clients are overwhelmingly abortions. While [Planned Parenthood Federation of America ("PPFA")] reported performing 332,278 abortions in 2009 (8,270 more than it reported in 2008), it only reported 977 adoption referrals to outside agencies. Thus, for every adoption referral PPFA makes, it performs 340 abortions. During the same period, PPFA only had 7,021 clients receiving prenatal care. In sum, abortion represented over 97 percent of PPFA's pregnancy-related services in 2009.

AMS. UNITED FOR LIFE, THE CASE FOR INVESTIGATING PLANNED PARENTHOOD 2 (2011) (internal citations omitted).

legally stand in that role. Pregnant teens in foster care deserve more attention and support from the State, not less.

C. *Questions for Consideration*

A mother's desire for what is best for her child is not automatically severed if her child is removed from the home because of the mother's dependence on drugs or alcohol. She still has a right to be involved in decisions in her child's life (like, for instance, the choice to abort a baby). Yet, she may not be in the best position to offer her child advice at the time her pregnant daughter needs it. Is it fair to require that she be the one to consent on behalf of her daughter? Obviously, nothing precludes a pregnant minor from voluntarily seeking advice from third parties not involved in the consent decision (such as her foster parents, case worker, teachers, etc.). Yet the basic purpose behind parental-involvement laws is that minors may not be able or willing to turn to sources of good advice. Thus, the State is authorized to ensure that a girl speaks to at least one person who presumably has her best interests at heart (i.e., her parent or a judge) before having an abortion.

The Supreme Court has talked about the State's interests in promoting life and how those interests interplay with the abortion decision. However, when the fetal life will be born to a girl in foster care, the State's interests are somewhat conflicted, since statistics show that the baby will almost certainly end up in foster care, and will, at the very least, cost the child-welfare system large sums of money over the course of his or her minority. This conflict calls into question a state actor's ability to offer unbiased information regarding consent to an abortion for a foster-care child. On the other hand, though, do budget impositions preclude a state actor who may be in the position to consent to a minor's request for an abortion from considering the best interests of the minor girl? Do those budget impositions differ all that greatly from the thoughts that must run through the average parent's head when contemplating how he or she will be able to help raise a grandchild on their current income? Does it make a difference? Should it? No one has sufficiently answered these questions. In fact, there is very little evidence that any state legislature has properly considered these questions. Future research is absolutely necessary. In order to uphold their duties under ASFA, the State must ask the questions. More than that, however, they must actively try to answer them.

CONCLUSION

There is a lack of consistency and policy with regards to the issue of abortion among the foster-care population. The evidence clearly points to the fact that minor girls in foster care are getting pregnant and having abortions. It is a rare instance when the public hears about these cases. This stems in part from the immense privacy that these girls are afforded. It also stems from a general reluctance to address this issue at its root cause. There is wide consensus that teen pregnancy is an undesirable condition. Yet there is no such consensus when it comes to preventing or terminating those pregnancies. Foster-care girls are, in many ways, set up to fail as parents. They do not have the familial support which is necessary to raise a young child. Yet advocating for the termination of these pregnancies does not take into consideration the mother's right to keep her child or the baby's absolute right to life. Providing her with the support necessary to raise her child without repeating the vicious foster-care cycle is a costly and timely endeavor. Because most jurisdictions do not have the resources needed to undertake such a project, it is largely left to individuals to help pregnant girls on a case-by-case basis. However, such an approach ignores the conflicts of interest that are inherent in such a scenario. It allows, also, for the manipulation and coercion of minors to obtain abortions that they may not want.[154] It cuts off the biological parents of the pregnant minor from the decision-making process. Worst of all, it superimposes upon these girls an obligation to be "sufficiently mature" to obtain a judicial bypass so that all of these considerations can be avoided. This obligation hardly seems to be in any girl's "best interest," let alone girls in foster care who have already experienced much trauma in their young lives.

Girls in foster care fail as mothers primarily because they do not have a strong maternal example. The system needs to be reorganized so that individuals willing to serve as that example for these girls are legally able to do so. The decision between abortion, adoption, and parenting is a difficult one, with each choice wrought with its own pain and consequences. How can society expect minor girls to make sound parenting decisions without the minor's parents (whether biological, foster, or otherwise) similarly able to do so?

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154. *See* the Arizona and Pennsylvania examples provided *supra*.