

Mind the Gap: Theorizing Asymmetry Between Parental Involvement and Statutory Rape Laws

Olivia Horton[†]

ABSTRACT: Within a single state, the age at which a minor can independently obtain an abortion rarely aligns with the age at which she can legally have sex. In the majority of states, parental involvement abortion laws constrain a minor for a year or longer beyond the age of consent. During this time, the law authorizes a minor to have sex while simultaneously declaring that, should she become pregnant, she must seek permission—from a parent or a judge—to obtain an abortion. Reasons supporting this status quo are outweighed by the particular harms and obstacles—expressive and practical—created by this dissonance. Minors who are “in the gap” are deprived of agency and choice on the basis that they apparently only meet one standard of maturity but not another. Minors who engage in legal sexual activity are being punished via the judicial bypass process. Additionally, the law currently exhibits a bias toward procreative over non-procreative sex, motherhood over non-motherhood. Closing the gap between these laws would help to secure consistent freedom of choice, prevent legal sexual contact from being controlled and punished, and correct the law’s default orientation toward stereotypical female roles. The ages should be aligned, or at the very least, a maturity presumption should be used to minimize the negative effects of this mismatch.

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INTRODUCTION

In most jurisdictions in the United States, the law authorizes a minor above a certain age to have sex while simultaneously declaring that, should she become pregnant, she must seek permission—from a parent or a judge—to obtain an abortion. Statutory rape laws dictate the age boundaries of sexual contact between two persons. Parental involvement laws require a minor seeking an abortion to first either obtain the consent of or notify an adult in her life, or, in the alternative, seek the permission of a judge through a “judicial bypass” hearing. The age at which each of these laws no longer constrains behavior rarely matches up in a single state; parental involvement laws typically act on a minor for a year or longer after she can legally consent to sex.¹ For those caught in this intersection, a legally consensual sexual

1. See *infra* Part II.

encounter can, through any combination of contraceptive failure or imperfect use, jettison a young, female-bodied person into the legal system. Having been deemed sufficiently competent to make decisions as a sexual person, her ability to control her body in a particular medical context remains conditioned on the permission of an adult. She may be forced to confront abuse, homelessness, unwanted pregnancy, and significant stigma, all for engaging in lawful activity.

The incongruence between these two types of laws should still concern those of us who will not personally have to confront these practical realities. The gap between the ages in these laws provokes questions of what should be expressed through the law's treatment of sex and its consequences. It raises concerns of the regulation of female bodies, the recognition of female capacity, and preferences for traditionally gendered roles. Abortion regulations and statutory rape laws have complex origins and have evolved over time in response to various political and social pressures.² They have each alternatively been touted as important protective measures and decried as repressive.³ Their current structure should be of great concern today insofar as these laws in combination express our collective normative orientation toward sex and maturity.

What should we make of the difference in age cutoffs for consent to sex and to abortion? It is argued that the differential treatment is appropriate because of the nature of the choices being made and the opinion of some that abortion entails a significant third-party harm to a fetus. Alternatively or in addition, what may be perceived as an unnecessary inconsistency could be an example of an "incompletely theorized agreement,"⁴ a form of implicit settlement important to the survival of a diverse community. Perhaps, the laws' unique histories alone justify the current mismatch. These laws are and have been subject to the influence of numerous interest groups over centuries and decades.

However reasonable some may believe this mismatch to be, and however beneficial it may be to allow controversial issues to rest where they have settled, there are also significant harms. The questions at the core of this inconsistency are playing out at great cost to young women and girls. The teens within this gap face particular harms and obstacles—expressive and practical—because of the dissonance created by the interrelation of these two regimes. The state sends two messages, one affirming a capacity to responsibly consent to the emotional and physical import of sexual conduct and another presuming an incapacity to assess the realities of an abortion. Through the discord between statutory rape and abortion laws, legal control over one's sexuality is divorced from the management of the physical results of that sexuality. Even apart from

2. *See infra* Part I.

3. *See infra* Part I.

4. *See infra* Section IV.A.

the normative arguments surrounding the existence of these laws, the ages included within them structure the lives of teens and our societal orientation toward sexuality and motherhood.

Given that minors' wellbeing hinges on our choices and important values are at stake, we must individually and collectively consider the appropriate stance to take on these questions. However historically grounded these laws are, the debates circling them continue, and lawmakers are divided.⁵ Faced with the current asymmetrical structure of ages to which minors' autonomy attaches, we must decide whether and when individual agency should outweigh state protection of youth.

I. HISTORY

Given its potential explanatory power, the historical evolution of these two strands of law is a good place to begin when considering whether reform is appropriate.

A. Statutory Rape Laws

Laws criminalizing sexual contact with young persons—traditionally female persons—have a long history, with some sources citing their origin back to Hammurabi's Code.⁶ The first statutory rape law in England outlined the punishment “of him that doth ravish a Woman” who is under the age of consent for marriage, then twelve years of age.⁷ The act was made a capital felony in 1285.⁸ A 1576 law lowered the age to ten years: “[I]f any person shall unlawfully and carnally know and abuse any woman child under the age of ten years, every such unlawful and carnal knowledge, shall be felony”⁹

5. Cf. *State Policy Updates: Major Developments in Sexual & Reproductive Health*, GUTTMACHER INST., <http://www.guttmacher.org/statecenter/updates/index.html> (describing the progress of recent and ongoing legislation, executive actions, and judicial decisions relating to abortion, sexuality, and teens, many of which are stymied in divided state governments) (last visited April 17, 2016); Jon O. Shimabukuro, RL33467, *Abortion: Judicial History and Legislative Response*, CONG. RESEARCH SERV. 10-16 (Jan. 15, 2016), <https://www.fas.org/sgp/crs/misc/RL33467.pdf> (describing recent federal legislative efforts related to abortion).

6. See Rita Eidson, Comment, *The Constitutionality of Statutory Rape Laws*, 27 UCLA L. REV. 757, 762 (1980) (citing C. EDWARDS, *THE HAMMURABI CODE* (1971)).

7. Statute of Westminster I, 1275, 3 Edw. 1 c. 13 (Eng.) (1 Statutes at Large 83) (“And the King prohibiteth that none do ravish, nor take away by force, any Maiden within Age (neither by her own Consent, nor without)”); see CAROLYN COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES* 10 (2004) (noting that females under twelve were “regarded as unable to consent”); Eidson, *supra* note 6, at 762 n.35.

8. Statute of Westminster II, 1285, 13 Edw. 1 c. 34 (Eng.) (“[I]f a Man from henceforth do ravish a Woman married, Maid, or other, where she did not consent, neither before nor after, he shall have Judgement of Life and of Member.”).

9. 18 Eliz. c. 7 (1576). The death penalty was maintained for sexual offenses against girls under the age of ten until 1841. See SENTENCING ADVISORY COUNCIL, *MAXIMUM PENALTIES FOR SEXUAL PENETRATION WITH A CHILD UNDER 16: REPORT* ¶ 7.4 n.272 (2009).

Blackstone clarified that this law was not meant “to create a new offense but to declare that a girl under the age of ten was incapable of judgment and discretion and thus unable to give legal consent.”¹⁰ The 1576 statute has been held to be included in the common law carried to the United States,¹¹ and indeed early American statutory rape laws mirrored this language.¹² Over time, individual states increased the ages of consent, often to eighteen or even higher.¹³

Despite Blackstone’s focus on consent, many sources have emphasized that female autonomy and protection of children were not the Parliament’s concerns in passing these laws.¹⁴ Rather, early laws regulating sex with girls were focused on preserving the father’s property interest in his daughter’s purity and eligibility for marriage.¹⁵ Although statutory rape was initially a strict liability offense, two defenses emerged in the American conception that, if accepted, would permit the offense to be downgraded to a less severe charge of fornication.¹⁶ These defenses were: (1) mistake as to the victim’s age—which was not generally accepted until the mid-1900s¹⁷—and (2) claiming that the victim was not “of previously chaste character”—a feature which was incorporated in most states early on and remained in some states as late as the 1990s.¹⁸ These defenses reflect a concern with the purity of the victim rather than her age. Over time, the driving force behind statutory rape laws shifted from concern about the father’s financial interests to protection of young

10. Eidson, *supra* note 6, at 762 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 212 (9th ed. 1783)); *see also* Nider v. Commonwealth, 131 S.W. 1024, 1026 (Ky. 1910) (stating that the law “was passed in aid of the common law, that is, to supply a deficiency or an omission in that law”).

11. Nider, 131 S.W. at 1026 (“That this parliamentary statute is a part of the common law in force in this state, except to the extent that it has been modified by section 1155 of the Kentucky Statutes, is apparent from a consideration of the section of the Constitution and the cases before mentioned.”).

12. *See* COCCA, *supra* note 7, at 11.

13. Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 403-04 (1984) (noting that individual states set their ages of consent as high as twenty-one).

14. *See* COCCA, *supra* note 7, at 11; SENTENCING ADVISORY COUNCIL, *supra* note 9, ¶ 7.5.

15. *See, e.g.*, COCCA, *supra* note 7, at 11; SENTENCING ADVISORY COUNCIL, *supra* note 9, ¶ 7.5; Eidson, *supra* note 6, at 767 (“Chaste young maidens were bought and sold in marriage, and a man who deprived a girl of her chastity was also depriving her father of a bride price.” (footnote omitted)).

16. *See* COCCA, *supra* note 7, at 11.

17. *See id.*; Note, *Statutory Rape: A Growing Liberalization*, 18 S.C. L. REV. 254, 265 (1966) (“The possible start of a new and liberal trend occurred recently in California, when the California court found that a specific statement negating the common law requirement of mens rea was needed in the statute in order to void a mistake of fact defense.” (citing *People v. Hernandez*, 393 P.2d 673 (Cal. Sup. Ct. 1964))).

18. *See* COCCA, *supra* note 7, at 11-12 (internal quotation marks omitted) (noting that the requirement persisted until a change to Mississippi’s code in 1998); *see also* Note, *Statutory Rape*, *supra* note 17, at 259 (“The benefits of a requirement of chastity of a prosecutrix over twelve are obvious. The requirement strikes to the very heart of the statutory rape problem by protecting only the innocent. It requires no great imagination to picture a situation in which a relatively inexperienced male becomes sexually involved with an underage female who is actually little better than a prostitute. Justice would seem to cry out against the ‘protection of the defiled.’” (quoting *State v. Snow*, 252 S.W. 629 (Mo. 1923))).

people from abuse by adults.¹⁹ However, as many of these laws were still gender specific, they particularly targeted male aggression toward vulnerable women and girls.²⁰ For feminists, these laws existed at a nexus of conflicting concerns: aggressive male sexuality on one hand and, on the other, the restriction of female sexual autonomy in a way that reinforced sexist stereotypes. The latter focus ultimately won out, as “[t]he nineteenth century concern with oppressive male initiative was replaced in the mid-twentieth century by concern with state repression of sexuality.”²¹ Feminist critiques were countered with reasons for gender-specific laws, including prevention of vaginal injury, risk of pregnancy, and welfare dependence.²² *Michael M. v. Superior Court of Sonoma County*,²³ the only U.S. Supreme Court case to address statutory rape laws, upheld California’s gendered statutory rape law against an Equal Protection Clause challenge.²⁴ The Court reasoned that the legislature was entitled to “provide for the special problems of women,”²⁵ including “illegitimate teenage pregnancies” and the associated heightened risk of abortion and need for state support,²⁶ as well as young girls’ particular susceptibility to “physical injury from sexual intercourse.”²⁷ The plurality opinion in *Michael M.* also accepted that gender-neutral laws were not necessary because these social, physical, and economic consequences would sufficiently deter young female persons from sexual contact, whereas male persons would not be adequately deterred without criminal consequences.²⁸ Even as states revised the language of their laws in accordance with feminist critiques in the latter half of the twentieth century,²⁹ teen sex continued to be associated with extramarital pregnancy and public assistance in the discourse around statutory rape laws.³⁰

19. See Daryl J. Olszewski, *Statutory Rape in Wisconsin: History, Rationale, and the Need for Reform*, 89 MARQ. L. REV. 693, 698-99 (2006).

20. See *id.* at 694-95. Carolyn Cocca notes that this concern did not extend to non-white women: “Black females were generally formally enslaved, and for a variety of political, economic, social, and cultural reasons their sexuality was not deemed to be in need of legal protection.” COCCA, *supra* note 7, at 11.

21. Olsen, *supra* note 13, at 404.

22. See Eidson, *supra* note 6, at 760-61 (noting the perceived need for special protections for females against injury and possibility of pregnancy); Olszewski, *supra* note 19, at 699-700 (listing among the reasons most commonly cited for statutory rape laws the related concerns of teen pregnancy and welfare dependence).

23. 450 U.S. 464 (1981).

24. *Id.* at 476.

25. *Id.* at 469 (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975)).

26. *Id.* at 470-71.

27. *Id.* at 475.

28. See *id.*

29. See Olsen, *supra* note 13, at 404 (“Partly in response to these criticisms and partly to avoid constitutional challenge, most states revised their statutory rape laws to make them gender-neutral, and many states decriminalized sex among teenagers.”). For a more detailed account of the various forces shaping American statutory rape law, see COCCA, *supra* note 7, at 9-28.

30. COCCA, *supra* note 7, at 27 (“The link forged between statutory rape, the number of births to teen mothers, and public assistance expenditures served to reinvestigate funding and prosecutorial efforts

B. Parental Involvement Laws

In 1973, the Supreme Court in *Roe v. Wade*³¹ prohibited states from restricting abortion during the first trimester of pregnancy, overturning laws in forty-six states.³² In response, many states sought ways to limit the scope of the newly declared abortion right by passing parental involvement laws.³³ Such laws require a minor under a designated age to either notify or obtain consent from a parent (or, in some cases, another adult authority figure). These laws are promoted on numerous grounds, including minors' physical and mental wellbeing, informed consent, and protection from coercion and abuse.³⁴

The Supreme Court first ruled on the validity of a parental consent statute three years after *Roe* in *Planned Parenthood of Central Missouri v. Danforth*.³⁵ There, the Court struck down a law that conditioned a minor's access to abortion on consent from a parent or guardian unless the abortion was necessary to save her life.³⁶ It held that a 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."³⁷ The Court applied and clarified the *Danforth* standard in *Bellotti v. Baird*.³⁸ In *Bellotti*, a Massachusetts parental consent statute was held to be constitutionally infirm because of two elements: (1) the statute did not give minors the option to seek judicial authorization without first consulting an available parent, and (2) the law permitted a judge to deny an abortion to a minor who has been found to be mature and competent.³⁹ The court concluded that "if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the

toward the crime, while also undermining the gender-neutral language of the laws by focusing on young women as victims.").

31. 410 U.S. 113 (1973).

32. See Anna C. Bonny, *Parental Consent and Notification Laws in the Abortion Context: Rejecting the "Maturity" Standard in Judicial Bypass Proceedings*, 11 U.C. DAVIS J. JUV. L. & POL'Y 311, 314 (2007); Steven F. Stuhlberg, Note, *When Is a Minor Mature? When Is an Abortion in Her Best Interests? The Ohio Supreme Court Applies Ohio's Abortion Parental Notification Law*: In Re Jane Doe I, 566 N.E.2d 1181, 60 U. CIN. L. REV. 907, 909 (1991).

33. See Bonny, *supra* note 32, at 314; Stuhlberg, *supra* note 32, at 909.

34. See, e.g., Mary E. Harned, *Consent Denied: The Need for Informed Consent and Parental Involvement*, DEFENDING LIFE 2014 (Americans United for Life, D.C.), Jan. 12, 2016, at 34; Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT'L J.L., POL'Y & FAMILY 305, 306 (2004) (citing a 1997 Alaska statute, which includes a representative explanation of its purposes: "protecting minors against their own immaturity; fostering the family structure and preserving it as a viable social unit; protecting the rights of parents to rear children who are members of their household; and protecting the health of minor women").

35. 428 U.S. 52 (1976).

36. *Id.* at 58.

37. *Id.* at 74.

38. 443 U.S. 622 (1979).

39. *Id.* at 651.

abortion can be obtained.”⁴⁰ Parental involvement laws across the country now echo the requirements for this “alternative procedure” articulated by four members of the *Bellotti* Court:

A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents’ wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the “absolute, and possibly arbitrary, veto” that was found impermissible in *Danforth*.⁴¹

The Court did not define “maturity” or “best interests,” providing little guidance to lower courts as to which factors may appropriately be considered.⁴² Other Supreme Court opinions have noted the troublesome vagueness of this wording,⁴³ but they remain the standards by which minors’ requests for abortion are judged.

The Court has also had ample opportunity to rule on the constitutionality of parental notification statutes. In *H.L. v. Matheson*, the majority held that “a statute setting out a ‘mere requirement of parental notice’ does not violate the constitutional rights of an immature, dependent minor.”⁴⁴ Justices Powell and Stewart wrote separately to emphasize that, although the judgment was correct in this case, the state must make an alternative judicial bypass option available to an individual who “believes that she is mature enough to make the abortion decision independently or that notification otherwise would not be in her best

40. *Id.* at 643.

41. *Id.* at 643-44.

42. See Suelyn Scarnecchia & Julie Kunce Field, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 MICH. J. GENDER & L. 75, 78 (1995).

43. See *Hodgson v. Minnesota*, 497 U.S. 417, 474 (1990) (Marshall, J., concurring) (“The constitutional defects in any provision allowing someone to veto a woman’s abortion decision are exacerbated by the vagueness of the standards contained in this statute. The statute gives no guidance on how a judge is to determine whether a minor is sufficiently ‘mature’ and ‘capable’ to make the decision on her own.”); *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring in judgment) (“[The best interest] standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores . . .”).

44. 450 U.S. 398, 409 (1981); see also *Hodgson*, 497 U.S. at 420 (Kennedy, J., concurring in judgment and dissenting in part) (“[T]he Court [in *H.L. v. Matheson*] held that a two-parent notice statute without a bypass was constitutional as applied to immature minors whose best interests would be served by notice.”).

interests.”⁴⁵ Noting this tension in *Matheson*, Justice Kennedy later encouraged the use of judicial bypass procedures:

If a two-parent notification law may be constitutional as applied to immature minors whose best interests are served by the law, but not as applied to minors who are mature or whose best interests are not so served, a judicial bypass is an expeditious and efficient means by which to separate the applications of the law which are constitutional from those which are not.⁴⁶

In *Hodgson v. Minnesota*, a majority of the Court held that the existence of a judicial bypass option saved an otherwise constitutionally objectionable requirement that a minor notify both parents.⁴⁷ In *Ohio v. Akron Center for Reproductive Health*, the Court held that “a bypass procedure that will suffice for a consent statute will also suffice for a notice statute” because consent statutes were more intrusive.⁴⁸ The Court declined to decide whether parental notification laws *must* contain the same procedures as are required for parental consent statutes.⁴⁹ In practice, states have created similar methods of judicial bypass in both contexts.

The Supreme Court considered a parental notification statute most recently in *Ayotte v. Planned Parenthood of Northern New England*.⁵⁰ Below, the District Court, affirmed by the Court of Appeals, invalidated the act because it did not contain a health exception and constrained physicians’ medical judgment.⁵¹ The Supreme Court considered the propriety of striking down the law rather than enjoining its application only where it would threaten the mother’s health.⁵² Ultimately, the Court remanded the case without creating a remedy, deferring to the lower courts and state government.⁵³

In the decades since *Roe*, statutes have been introduced at the state and federal levels to encourage parental involvement in the abortion decision⁵⁴ and

45. *Matheson*, 450 U.S. at 420 (Powell, J., concurring).

46. *Hodgson*, 497 U.S. at 500 (Kennedy, J., concurring in judgment and dissenting in part).

47. *Id.* at 455 (Kennedy, J., dissenting on that point).

48. 497 U.S. 502, 511 (1990).

49. *Id.* at 510. *But see id.* at 526 (Blackmun, J., dissenting) (stating that “a parental-notice statute is tantamount to a parental-consent statute” in practical effect and thus must also contain a bypass procedure).

50. 546 U.S. 320 (2006).

51. *Id.* at 325.

52. *Id.* at 328-29.

53. *Id.* at 331-32. The 2003 New Hampshire law was repealed by the state legislature in 2007, before the lower court could rule on remand. *See Ayotte v. Planned Parenthood for Northern New England*, CTR. FOR REPROD. RIGHTS (2008), <http://www.reproductiverights.org/case/ayotte-v-planned-parenthood-for-northern-new-england>; Karen Dandurant, *Planned Parenthood to Have Attorney’s Fees Paid*, SEACOASTONLINE.COM (Sept. 4, 2008), <http://www.seacoastonline.com/apps/pbcs.dll/article?AID=/20080904/NEWS/80904028>.

54. *See Abortion: Parental Consent, Opposing Viewpoints Online Collection*, GALE GROUP (2014), <http://ic.galegroup.com/ic/ovic/ReferenceDetailsPage/DocumentToolsPortletWindow?displayGroupNa>

have been enacted in the vast majority of states.⁵⁵ These laws have been justified on the basis that they improve minors' safety and choices.⁵⁶ As evidenced by the long line of Supreme Court cases considering the validity of parental involvement statutes, abortion-rights advocates have persistently challenged these laws as unduly burdensome and dangerous to girls' health and safety.⁵⁷

II. CURRENT STATE OF THE LAW

The majority of states—thirty-eight—actively enforce some degree of parental involvement in a minor's abortion decision. Eight states do not require any parental involvement,⁵⁸ and five have passed laws that are currently enjoined by a court order and thus not in effect.⁵⁹ All but two states' parental notice or consent requirements apply to all pregnant persons under eighteen.⁶⁰

The age of consent ("at which an individual can legally consent to sexual intercourse under any circumstances") is generally lower: sixteen years old in thirty-three states plus Washington, D.C.; seventeen years old in six states.⁶¹ Only eleven states set the age of consent at eighteen, and further, only three of those eleven prohibit sexual intercourse for unmarried minors under eighteen in *all* circumstances.⁶² Additionally, many states permit legal sexual intercourse with someone under the age of consent in *some* circumstances—when the other party is under a certain age, for example.⁶³ Some states permit some sexual

me=Reference&jsid=72623589f42589c93f9c65277ddf6416&action=2&catId=GALE%7C00000000LVYB&documentId=GALE%7CPC3021900129&u=some22415&zid=f9c53c94419f4f88d2a69def8f1b706c.

55. See Sanger, *supra* note 34, at 305 & 316 n.1 (noting that over 44 states have enacted parental involvement laws, with at least 10 states' laws being held unconstitutional).

56. See, e.g., Hamed, *supra* note 34, at 34-36.

57. See, e.g., *Mandatory Parental-Involvement Laws Threaten Young Women's Safety*, NARAL PRO-CHOICE AMERICA (2016), <http://www.prochoiceamerica.org/media/fact-sheets/abortion-young-women-parental-involvement.pdf>; *New Research Confirms Harmful Impact of Texas Abortion Restrictions*, JANE'S DUE PROCESS BLOG (Oct. 7, 2015), <http://janedueprocess.org/new-research-confirms-harmful-impact-of-texas-abortion-restrictions>.

58. These states are Connecticut, Washington, D.C., Hawaii, Maine, New York, Oregon, Vermont, and Washington. *State Policies in Brief: Parental Involvement in Minors' Abortions*, GUTTMACHER INST. (2016), http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf [hereinafter *Parental Involvement in Minors' Abortions*].

59. These states are California, Montana, Nevada, New Jersey, and New Mexico. *Id.*

60. The exceptions are Delaware, which has a parental notification law that applies to those under sixteen, and South Carolina, which has a consent requirement that applies to those under seventeen. See *id.*; *Parental Consent and Notification Laws*, PLANNED PARENTHOOD (last visited May 10, 2016), <https://www.plannedparenthood.org/learn/abortion/parental-consent-notification-laws>.

61. Asaph Glosser et al., *Statutory Rape: A Guide to State Laws and Reporting Requirements*, LEWIN GROUP 5-7 (Dec. 15, 2004), <https://aspe.hhs.gov/sites/default/files/pdf/75531/report.pdf>. This collection of state data was compiled by the Lewin Group under contract with the U.S. Department of Health and Human Services (HHS). Although its information is from 2004, statutory rape laws have fluctuated less than minors' abortion laws, and the report continues to be regularly cited.

62. *Id.*

63. *Id.*

activities with an unmarried minor as young as twelve or thirteen (or even ten in South Dakota) provided the age differential between parties is within a particular window and/or other conditions are met.⁶⁴

Combining these data, it appears that twenty-nine states set their age of consent below their parental involvement requirement age (the age at which the requirement is no longer applicable).⁶⁵ Eight states have an age of consent that is the same as their parental involvement requirement age of eighteen.⁶⁶ Of those eight, Arizona, Florida, North Dakota, Tennessee, Utah, and Virginia have a minimum age of victim that is lower than their age of consent, thus allowing that there will be circumstances in which a minor can have legal sex without being able to access an abortion until she turns eighteen.⁶⁷ Only one outlier state, Delaware, has an age of consent that is above its parental involvement law.⁶⁸ In sum, the current regime is characterized by states which allow minors to have legal sex earlier, and often much earlier, than they allow minors to access abortion without involvement by an adult or another authority figure.

III. LITERATURE REVIEW

Many academics have discussed either statutory rape or parental involvement laws, but their intersection has been explored less thoroughly. As discussed above, liberal and radical feminists have struggled with and debated the merits and risks of statutory rape laws and the state's involvement in the regulation of sex.⁶⁹ Specific formulations of state laws have been targeted for reform or defended as necessary protections, as have the ages deemed appropriate for regulation.⁷⁰ Likewise, parental involvement laws have been

64. *Id.* at 5-8.

65. According to the Lewin Group and Guttmacher Institute data, the following states fall into this category: Alabama, Alaska, Arkansas, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, West Virginia, and Wyoming. See *Parental Involvement in Minors' Abortions*, *supra* note 58; Glosser et al., *supra* note 61, at 5-7. See also *infra* Appendix A.

66. These states are Arizona, Florida, Idaho, North Dakota, Tennessee, Utah, Virginia, and Wisconsin. See *Parental Involvement in Minors' Abortions*, *supra* note 58; Glosser et al., *supra* note 61, at 5-7.

67. Glosser et al., *supra* note 61, at 5-7. The fact that these six states allow minors under their age of consent to have legal sex in some circumstances means that only Idaho and Wisconsin's laws treat minors' ability to consent to abortion and sex in a consistent manner.

68. *Parental Involvement in Minors' Abortions*, *supra* note 58; Glosser et al., *supra* note 61, at 5-7.

69. See *supra* notes 21 and 56-57 and accompanying text; see also Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL'Y & L. 287, 287-88 (1997) (discussing feminist debates over the more recent shift toward gender neutral statutory rape laws with age gap provisions); Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313 (2003); Eidson, *supra* note 6.

70. See, e.g., COCCA, *supra* note 7 (examining age-span provisions, gender-neutral language, and prosecution of partners of pregnant teens); JUDITH LEVINE, *HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX* 68-89 (2002); Olszewski, *supra* note 19; Lisa Pearlstein, Note,

assessed by courts, practitioners, advocacy groups, and academics. Some writers have critiqued the very existence of parental involvement laws⁷¹ or the “maturity” requirement.⁷² Others, like Helena Silverstein,⁷³ have focused their critiques on the implementation of these statutes, while arguing the theoretical value of parental involvement laws as safeguards. The merits, failures, and detriments of both statutory rape laws and parental involvement statutes have been explored numerous times over many decades.

However, these laws, both of which bear on the sexual lives of teens and their autonomy, have only rarely been studied jointly, as I have attempted to do in this piece. Where they are discussed together, authors typically do so only briefly, using one category of laws as a baseline to which a reader should compare the other. For example, Michelle Oberman classifies the “presumption underlying modern law governing adolescent girls’ sexuality” as “that girls are mature enough to make autonomous decisions regarding sexuality”; she challenges that assumption by contrasting the statutory rape regime with other comparable laws.⁷⁴ Oberman discusses a variety of “mature minor” consent laws, including abortion, contraception, STI treatment, and sterilization.⁷⁵ She suggests that modern statutory rape laws “emerge as puzzling exceptions to the legal system’s general skepticism about minors’ capacity to consent. . . . [T]he modern application of statutory rape laws focuses on cases of non-consensual sex. Thus, the criminal law seems to suggest that at least some minors are capable of rendering a meaningful consent to sex”—although, she adds, literature on adolescent development indicates that that is generally not the case.⁷⁶ Malinda Seymore focuses on the inconsistency between the law’s

Walking the Tightrope of Statutory Rape Law: Using International Legal Standards To Serve the Best Interests of Juvenile Offenders and Victims, 47 AM. CRIM. L. REV. 109, 111 (2010) (advocating minimum ages of prosecution, rehabilitation over incarceration, and consideration of a minor’s preferences).

71. See, e.g., Jennifer Blasdel, *Mother, May I?: Ramifications for Parental Involvement Laws for Minors Seeking Abortion Services*, 10 AM. U. J. GENDER SOC. POL’Y & L. 287 (2002); Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409 (2009); Sanger, *supra* note 34; Alexandra Rex, Note, *Protecting the One Percent: Relevant Women, Undue Burdens, and Unworkable Judicial Bypasses*, 114 COLUM. L. REV. 85 (2014); *Abortion and Parental Involvement Laws: A Threat to Young Women’s Health and Safety*, ADVOCATES FOR YOUTH, <http://www.advocatesforyouth.org/storage/advfy/documents/abortion%20and%20parental%20involvement%20laws.pdf> (last visited Apr. 17, 2016); JANE’S DUE PROCESS, <http://janesdueprocess.org> (last visited Jan. 12, 2016) (a legal services and advocacy organization that assists Texas minors in accessing abortion via judicial bypass).

72. See, e.g., Bonny, *supra* note 32; Scarnecchia & Field, *supra* note 42.

73. See generally HELENA SILVERSTEIN, *GIRLS ON THE STAND: HOW COURTS FAIL PREGNANT MINORS* (2008).

74. Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 22 (1994).

75. *Id.* at 46-53.

76. *Id.* at 53; see also Lewis Bossing, Note, *Now Sixteen Could Get You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentence Enhancement*, 73 N.Y.U. L. REV. 1205 (1998). Bossing’s note briefly mentions abortion, among other “mature minor” rules allowing minors to independently consent to medical care, to indicate that teens are often found able to make autonomous

treatment of a minor's abortion decision and her freedom to carry to term and place her child up for adoption.⁷⁷ In the course of her analysis, Seymore raises statutory rape as one of several examples of the law's differential treatment of minors.⁷⁸ She cites specifically how the laws are justified on the basis of minors' vulnerability in their interactions with adults⁷⁹ and on the importance of parental authority.⁸⁰ Although many authors have drawn comparisons between statutory rape laws and abortion access as examples of the law's treatment of minors, it is less common to find pieces that deeply analyze both types of statutes.

Even more difficult to find among existing literature is an analysis or critique of the ages in these two contexts or a consideration of how these two regimes interact. Nicole Phillis's article is one of the rare sources to identify and directly challenge the incongruity between ages of consent and parental involvement laws. She articulates the tension of this incongruity as an example of a "protectionist-versus-enablement paradigm."⁸¹ Phillis argues that recognizing a minor's maturity through age of consent laws while depriving her of independent access to abortion imposes an undue burden on her right—as a legally mature person—to abortion access under *Casey*.⁸² Her proposed remedy is the creation of a "Minor Consent Capacity" (MCC) status, a form of consent capacity licensure, which would be based on minors' satisfaction of sexual education requirements.⁸³

Phillis's article most closely addresses the concerns highlighted in this piece, illuminating the conflicting orientation toward teenagers' sexual and reproductive maturity and raising policy issues associated with the current regime. Phillis focuses on a constitutional critique under *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁸⁴ and raises important expressive and practical concerns,⁸⁵ some of which intersect with my arguments against the

choices. *Id.* at 1229-30, 1229 n.121, 1230 n.122. Interestingly, he uses abortion as a context in which minors are granted freedom to choose and uses this characterization to suggest the opposite of Oberman's premise—that statutory rape law is an outlier in presuming nonconsent—and propose a modification. *Id.* at 1231.

77. Malinda L. Seymore, *Sixteen and Pregnant: Minors' Consent in Abortion and Adoption*, 25 *YALE J.L. & FEMINISM* 99, 103 (2013).

78. *Id.* at 124.

79. *Id.* at 124-25 ("The vulnerability of young girls in the face of seduction efforts of older men informs statutory rape laws.").

80. *Id.* at 126 ("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.").

81. Nicole Phillis, *When Sixteen Ain't So Sweet: Rethinking the Regulation of Adolescent Sexuality*, 17 *MICH. J. GENDER & L.* 271, 275-76 (2011).

82. *Id.* at 289.

83. *Id.* at 300.

84. 505 U.S. 833 (1992).

85. Phillis, *supra* note 81, at 289-94. Phillis offers five policy concerns that she argues necessitate changes to the existing structure: "(1) the encouragement of impulsive adolescent sexual behaviors; (2)

current regime.⁸⁶ Ultimately, however, Phillis's proposal differs from my proposed reforms, offered in Part VI. Although her licensure-style framework rightfully seeks to link legal maturity with meaningful education, the plan's reliance on states to design MCC status programs overlooks the wild divergence in views on topics she labels objectively testable⁸⁷ and ignores the political infeasibility of mandating such a program with no opt-out provision.⁸⁸ A proactive education and licensure program could have many benefits, but I worry that, if subjected to similar pressures as existing sexual education programs⁸⁹ and/or implemented poorly, it could provoke further societal discord without substantive gains in knowledge. My suggested reforms work toward an internal consistency that may be more palatable to larger segments of a diverse constituency.

In the following Part, I discuss three possible arguments in favor of maintaining the current structure of statutory rape and parental involvement laws: conceiving of inconsistency as a form of collective compromise; as a product of historical happenstance that does not necessarily require reform; and as a justified expression of the uniqueness of the abortion decision as compared to other significant and personal choices. I then discuss my arguments in favor of changing the regime despite those status-quo arguments: the need to preserve abortion access for minors; the impropriety of punishing otherwise legal sexuality through abortion laws; and the stereotypically sexist messages evinced by the current regime. In Part VI, I offer my preferred reforms, which include aligning the ages at which minors may have legal sex and access abortion, or at least creating a presumption in favor of finding "maturity" for those above the age of consent.

the binding of decisional autonomy to pregnancy outcome; (3) the reinforcement of paternalistic gender stereotypes; (4) the punitive, rather than protective, nature of parental involvement and judicial bypass; and (5) the continued hystericalization of adolescent sexuality." *Id.* at 276.

86. See *infra* Part V.

87. Phillis, *supra* note 81, at 305. The MCC exam would focus on "the emotional, psychological, sociological, and physical consequences of sexual activity." *Id.* She notes that, rather than examining cognitive ability or subjective moral standards, the test would address "substantive sexual and reproductive knowledge. Topics for testing could include legal standards for consent, effective contraceptive use, communication techniques for doctors, parents, and peers, STI transmission and treatment, and reproductive options in the face of an unintended pregnancy." *Id.* Unfortunately, many of these topics are in fact hotly debated, and views on what some may consider scientific facts are often politically and/or religiously inflected.

88. Phillis, *supra* note 81, at 303.

89. See, e.g., Heather D. Boonstra, *Advocates Call for a New Approach After the Era of "Abstinence-Only" Sex Education*, 12 GUTTMACHER POL'Y REV. 6 (2009), <https://www.guttmacher.org/pubs/gpr/12/1/gpr120106.pdf> (discussing the role of politics and advocacy in the rise of often medically inaccurate abstinence-only education programs); Amelie Meltzer, *Sex, Science, and Social Stigma: Why American Schools Fail at Sex Education*, MORAL COMMUNITIES PROJECT (May 4, 2015), <http://moralcommunities.com/why-american-schools-fail-at-sex-education> (discussing the "polarized and politicized" debates around sex education).

IV. POSSIBLE JUSTIFICATIONS FOR AGE DIFFERENTIALS

There are legitimate reasons why these laws should arguably not be aligned, particularly given the difficulties of democracy, the statutes' complicated and separate histories, and the unique implications of abortion. Although I ultimately conclude that these reasons are outweighed by the practical impacts on girls and the expressive effects of these laws in combination, it is worth exploring arguments for retaining the current structure in order to determine what we may be giving up or disrupting through reform.

A. *"Inconsistency" Is a Useful Reflection of Societal Heterogeneity*

What may appear to be an unjustified variance that counsels reform may just be one of many instances where a complicated assemblage of civil and criminal laws are not internally consistent. Apparent inconsistencies may not necessitate a move to overarching explanatory theories; rather, the current regime may be an example of what Cass Sunstein has termed "incompletely theorized arguments."⁹⁰ This phenomenon explains circumstances in which persons may be able to agree upon the "what," even while they have divergent views on the "why."⁹¹ Sunstein argues that "incompletely theorized judgments are an important and valuable part of both private and public life. They help make law possible; they even help make life possible."⁹² Where society is deeply divided on an issue, the most efficient and perhaps only way forward to a tacit consensus may be to allow incongruity to exist, to not focus on it too closely.

Sunstein discusses several merits of allowing these forms of compromise to persist. He posits,

Most of [the virtues of incompletely theorized agreements] involve *the constructive uses of silence*, an exceedingly important social and legal phenomenon. Silence—on something that may prove false, obtuse, or excessively contentious—can help minimize conflict, allow the present to learn from the future, and save a great deal of time and expense.⁹³

In this view, to reform would risk opening the issue to tumultuous scrutiny by both sides and provoking disputes, perhaps without any ultimate improvement. Also among the benefits described by Sunstein are "the promotion of stability, the reduction of costs of disagreement, and the demonstration of humility and mutual respect," all particularly important to the

90. CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 4 (1996).

91. *See id.* at 5.

92. *Id.* at 39.

93. *Id.*

formulation of agreement in a pluralistic society.⁹⁴ This may very well be one such case of deep societal division that would only be exacerbated by an attempt to create a theoretically consistent result. Gallup's historical data on trends in opinion on abortion indicate consistent divisions over the past several decades.⁹⁵ Although certain situations or proposals have garnered a greater consensus from poll respondents,⁹⁶ the polling population has remained starkly split on other specifics and on broader questions of the legality and morality of abortion.⁹⁷ Here, with regard to such personal and morally fraught subjects as sex and abortion, allowing ages of consent to diverge from ages of abortion may be beneficial.

Sunstein also notes that allowing agreements to go under-theorized creates flexibility that may be useful in a forward-looking society. Thus, even if it were possible to create a more specific result in the current moment, doing so may hinder "moral evolution and progress over time."⁹⁸ Where debate exists, one side's success could risk "calcifying" one particular view of many. A modified legal structure that is fully theorized "would be unable to accommodate changes in facts or values."⁹⁹ According to this view, the collection of laws that exists, while perhaps not ideal from the perspective of either side, is a form of implicit compromise that allows a conflicted and multifarious society to persist and evolve. To insist upon completely theorized legal regimes would not only be practically difficult (if not impossible), but would also stir a great deal of unrest as two or more conflicting visions seek to be fully or consistently affirmed.

94. CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 62 (2002).

95. *Abortion*, GALLUP, <http://www.gallup.com/poll/1576/abortion.aspx> (last visited May 17, 2016).

96. Examples include responses to questions on whether abortion should be legal when a woman's physical health is endangered (in the most recent data, 82% said yes, 15% said no); whether abortion should be legal when her life is endangered (83% said yes, 13% said no); whether respondent favors a law requiring doctors to inform patients of risks prior to performing an abortion (87% favor, 11% oppose); and whether he/she favors requiring doctors to inform patients of alternatives (88% favor, 11% oppose). *Id.*

97. For example, in 2015 responses, pro-choice and pro-life camps were divided roughly in half (49% or 50% classified themselves as pro-choice, and 44% considered themselves pro-life). *Id.* In May 2015, 45% of those responding said that they personally believed that abortion was generally morally acceptable, 45% responded that they believed it was morally wrong, and 8% volunteered that it depended on the situation. *Id.* Fifty-one percent of those polled believed that abortion should be legal only under certain circumstances, whereas 29% believed that abortion should be legal under any circumstances, and 19% believed that abortion should be illegal in all circumstances. *Id.* (as of May 2015; polls have revealed a roughly consistent division of opinion over many years).

Looking toward reform, divisions in the public do not clearly indicate a way forward. Respondents were asked whether they were "very satisfied, somewhat satisfied, somewhat dissatisfied, or very dissatisfied" with the nation's policies on abortion. Those who responded that they were dissatisfied were asked whether they "would like to see abortion laws in this country made more strict, less strict, or remain as they are." In January 2015, 34% of those polled responded that they were satisfied to some degree, 24% were dissatisfied and wanted stricter abortion laws, 12% were dissatisfied and wanted laws to be less strict, 12% were dissatisfied and wished the laws to remain the same; and 18% had no opinion. *Id.*

98. SUNSTEIN, *supra* note 94, at 60.

99. *Id.*

However, Sunstein's promotion of incompletely theorized agreements raises the question of which cases are appropriate to leave vague. When should compromise be prioritized and when is it important to engage in a struggle over values? Sunstein acknowledges that "[w]hen people theorize, by raising the level of abstraction, they do so to reveal bias, or confusion, or inconsistency"—and they are sometimes successful in doing so.¹⁰⁰ He also notes that, although social consensus is an important justification for permitting these vague agreements to persist, it is not "a consideration that outweighs everything else. Usually it would be much better to have a just outcome, rejected by many people, than an unjust outcome with which all or most agree. A just constitution is more important than an agreed-upon constitution."¹⁰¹ In the context of minors, where protections and rights are in many cases limited and where those limitations have time and again been accepted by our legal and political system (we do not, for example, have uproars over tattoo restrictions for minors), perhaps each side may decide to cede some ground and focus on other fronts of the culture war. However, if the stakes are high enough for minors and their rights, it may be worth devoting resources and accepting the destabilization that may accompany increased focus. Even accepting the value of Sunstein's "incompletely theorized agreements," we must still decide whether the age gaps between statutory rape laws and parental involvement laws are important for social cohesion or demand action.

B. The Laws Developed Separately, So May Not Require Alignment

The "inconsistency" we observe today may be nothing more insidious than an artifact of divergent political and legal pressures over the course of centuries. Passed at different times, by different state legislatures,¹⁰² and in response to a variety of pressure groups, laws may often seem perplexingly misaligned. However, this may not necessitate reform. Mismatches in ages at which laws apply may simply be an overlooked result of historical happenstance, a common result of a federalized, democratic system.

Viewed in one way, each law's goal is different. Statutory rape law regulates and deems criminal the conduct not of teens but of those who engage sexually with them. It was shaped by the concerns of parents and later by feminists and those concerned with the costs associated with teen motherhood. Parental involvement laws may be seen as an affirmation of family unity and an assurance of informed consent by one with the proper capacities to make an independent decision. A perspective that insists upon reading these laws alongside one another is only one of several viewpoints and is unique to a

100. SUNSTEIN, *supra* note 90, at 38-39.

101. SUNSTEIN, *supra* note 94, at 65.

102. *See infra* Part I.

particular historical moment in which both sex and abortion can be envisioned as linked along an axis of bodily autonomy.

As evidenced by the shifts in these laws' motivations over time, this has not always been—and for many still is not—the way these laws are and should be read. The fact of their current application may be merely coincidental; it may not warrant changes to either or both so long as they function independently on their objects. Whether they do so effectively, without unduly harming those to whose conduct they apply, should determine our views on whether this incidence of history should be allowed to remain.

C. Abortion Exceptionalism May Be Justified

A third argument accepts the distinctive treatment of abortion on the basis that it *is* different. The perspective that is troubled by an inconsistency between treatment of abortion and other decisions, the perspective that assumes their comparability, is neither universally held nor necessarily correct. Many believe that abortion possesses a unique moral dimension that is not present in other medical decisions. Pro-life groups are particularly concerned with the third-party harms that result from an abortion decision; this alone may justify disparate treatment of abortion relative to other procedures or choices.

This treatment is not unprecedented. The Supreme Court has implicitly accepted this differentiation in several cases, allowing the abortion decision to be singled out for additional burdens.¹⁰³ The *Danforth*¹⁰⁴ Court, ignoring plaintiffs' arguments that Missouri allowed minors to consent to other significant medical decisions, left open the possibility that a less intrusive parental consent law would be acceptable.¹⁰⁵ In *Bellotti I*,¹⁰⁶ the Court remanded a Massachusetts parental consent law that existed alongside a newly enacted law that granted minors "considerable medical self-consent rights," excluding abortion.¹⁰⁷ The Court declined to consider the issue of "impermissible distinction" until the state courts had interpreted the statute on remand.¹⁰⁸ Upon second review in *Bellotti II*,¹⁰⁹ the Court did ultimately invalidate the law, but without attention to the differential treatment of teens seeking to terminate their pregnancies versus those carrying to term or making other medical decisions.¹¹⁰ Even in these cases, where plaintiffs directly

103. J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 BERKELEY J. GENDER L. & JUST. 61, 79-87 (2013).

104. *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976).

105. Ehrlich, *supra* note 103, at 80-81.

106. *Bellotti v. Baird (Bellotti I)*, 428 U.S. 132 (1976).

107. Ehrlich, *supra* note 103, at 82.

108. *Id.* at 83; *Bellotti I*, 428 U.S. at 149.

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

110. Ehrlich, *supra* note 103, at 84-85.

problematized the contrast between minors' abortion rights and other rights to consent, the Court has allowed opponents to target abortion.

Abortion has also received particularized attention in lawmaking beyond statutes restricting minors. States have singled out abortion to institute various forms of restrictions applicable to adult women and medical providers.¹¹¹ This case law is potentially in flux,¹¹² but as it currently stands, such differential treatment persists in many states. The promotion and frequently successful passage of these laws, without a similar push in other arenas of law regulating minors or medical practice, indicates the prevalence of this view on abortion.

When abortion appears to be a moral rather than medical concern, its legality and commonness may justify, even demand, targeted attention. Assuming this, the current regime that allows teens to have sex and make other decisions but imposes burdens on the abortion decision is not a problem. The "inconsistency" rather reflects the unique moral heft of the abortion decision. As with many cases in which morality blends with the secular legal, however, the question becomes whether and when it is proper for one view of abortion to dictate the accessibility of the procedure.

V. REASONS THE AGES OF ABORTION AND OF SEXUAL CONTACT SHOULD BE ALIGNED

Notwithstanding any value in the above arguments, the age at which a minor can obtain an abortion without involving her parents should be aligned with the age at which she can have legal sex. The reasons underlying and bolstering the current regime are not strong enough to justify constraining

111. See, e.g., *State Policies in Brief: An Overview of Abortion Law* GUTTMACHER INST. (Jan. 1, 2016), https://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf (indicating the prevalence of various abortion-specific laws, including funding restrictions and mandated counseling language); *State Policies in Brief: Targeted Regulation of Abortion Providers*, GUTTMACHER INST. (Jan. 1, 2016), https://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf (outlining regulations imposed on abortion facilities and providers).

Several courts have flagged this tactic of targeting abortions. See, e.g., *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 915 (9th Cir.) (noting that a law requiring doctors to prescribe abortion medication in accordance with FDA protocols deviated from the typical expectations of off-label use in medical practice), *cert. denied*, 135 S. Ct. 870 (2014); *Nova Health Sys. v. Pruitt*, 292 P.3d 28, *as corrected* (Dec. 5, 2012) (affirming a lower court's decision to strike down a mandatory ultrasound law that was focused specifically on those connected with abortion rather than with other procedures); *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252, 269 (Iowa 2015) ("The Board appears to hold abortion to a different medical standard than other procedures.").

112. The Supreme Court has agreed to hear *Whole Woman's Health v. Cole*, 136 S. Ct. 499 (2015) (granting certiorari), a challenge to a restriction on abortion providers that does not apply to providers of other medical procedures. Judge Posner of the Seventh Circuit recently struck down a similar law, in part on the grounds that it singled out abortion for requirements not applied to other doctors or providers. *Planned Parenthood of Wis. v. Schimel*, 806 F.3d 908, 914 (7th Cir. 2015) ("No other procedure performed outside a hospital, even one as invasive as a surgical abortion, is required by Wisconsin law to be performed by doctors who have admitting privileges at hospitals within a specified radius of where the procedure is performed.").

access. These laws' practical and expressive effects, as elaborated in this Part, demand reform.

A. Abortion Access Must be Preserved for Otherwise Mature Minors

Minors who are “in the gap”—above the age of legal sex but still not able to obtain an abortion—should not be deprived agency and choice on the basis that they apparently only meet one standard of maturity but not another. Consider the following example:

Jane, a seventeen-year-old girl in Tennessee, is in a sexual relationship with her eighteen-year-old partner, John. Jane has been on hormonal birth control prescribed by her doctor for the past year, but due to imperfect usage, she becomes pregnant. Jane has not had contact with her mother since she was a young child, and her relationship with her father is strained. He regularly makes derogatory comments about “slutty” girls and “irresponsible teen moms.” Jane does not know how her father would react if she were to tell him about her pregnancy, but she knows that he will be disappointed in her and is concerned that he may turn violent. In Tennessee, a person over thirteen can legally have sexual intercourse with a partner who is no more than four years older than her,¹¹³ so Jane and John's sexual relationship is legal. Jane has never been legally restricted from obtaining contraceptives¹¹⁴ and STI testing¹¹⁵ without her father's knowledge. Faced with a positive pregnancy test, however, she has been told by her health care provider that, because she is under eighteen, she cannot obtain an abortion without her father's permission unless she goes through a process called “judicial bypass” to get approval from a judge.¹¹⁶ This process involves taking time off from school, traveling to the courthouse, and facing a judge who will ask probing questions about her grades, her relationships with her parents and boyfriend, her decision-making process, and possibly her sexual or romantic history. Knowing that her sexual relationship was legal and having faced no barriers to accessing other forms of healthcare, Jane was unaware of this requirement and feels unprepared for the choice between two daunting options: telling her disapproving father or going through the court system (itself not a guarantee). She delays her decision several weeks and her pregnancy enters the second trimester, in which the

113. Glosser et al., *supra* note 61, at 107 (citing TENN. CODE ANN. § 39-13-506 (2012)).

114. *State Policies in Brief: An Overview of Minors' Consent Law*, GUTTMACHER INST. (Mar. 1, 2016), http://www.guttmacher.org/statecenter/spibs/spib_OMCL.pdf [hereinafter *Overview of Minors' Consent Law*]; *State Policies in Brief: Minors' Access to Contraceptive Services*, GUTTMACHER INST. (Mar. 1, 2016), http://www.guttmacher.org/statecenter/spibs/spib_MACS.pdf.

115. *Overview of Minors' Consent Law*, *supra* note 114; *State Policies in Brief: Minors' Access to STI Services*, GUTTMACHER INST. (Mar. 1, 2016), http://www.guttmacher.org/statecenter/spibs/spib_MASS.pdf.

116. *Overview of Minors' Consent Law*, *supra* note 114; *Parental Involvement in Minors' Abortions*, *supra* note 58.

health risks of abortion are higher.¹¹⁷ If Jane were to decide to carry her pregnancy to term, none of these conditions would apply; in Tennessee, a minor can gain access to prenatal care without informing a parent.¹¹⁸ Having given birth, Jane may also, without the consent of her father, make the decision to place the child for adoption.¹¹⁹ Caught in the middle of this matrix of laws, Jane possesses an autonomous decisional ability in the contexts of contraception, STI testing, and childbirth, but she cannot access an abortion. The law has deemed her mature enough to carry to term and either raise the child or give the child up for adoption. Jane has control over her body only conditionally, and her available paths forward are limited once she becomes pregnant. The law recognizes Jane's capacity to consent to sexual contact and grants her nearly all of the tools to address the consequences of that sexual contact—except abortion.

Parental involvement laws have been justified on several grounds.¹²⁰ First, the Court has considered this to be one of many contexts in which a parent's right to have input in their children's lives must be weighed.¹²¹ Second, courts have determined that children benefit from parental guidance in a way that contributes to a state interest in the welfare of minors.¹²² Third, the state has recognized an interest in the cohesion and health of the "family unit."¹²³ These

117. See *Rex*, *supra* note 71, at 112-13.

118. *Overview of Minors' Consent Law*, *supra* note 114; *Parental Involvement in Minors' Abortions*, *supra* note 58.

119. *Overview of Minors' Consent Law*, *supra* note 114; *State Policies in Brief: Minors' Rights as Parents*, GUTTMACHER INST. (Mar. 1, 2016), http://www.guttmacher.org/statecenter/spibs/spib_MRP.pdf.

120. See *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) ("Three separate but related interests—the interest in the welfare of the pregnant minor, the interest of the parents, and the interest of the family unit—are relevant to our consideration of the constitutionality of the [parental involvement law in question]."). The Court in *Hodgson* did not articulate a majority position on this issue, but multiple separate opinions acknowledged the various interests at stake.

121. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 938 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("[T]he State has an interest in encouraging parental involvement in the minor's abortion decision . . ."); *Hodgson*, 497 U.S. at 483 (Kennedy, J., concurring in the judgment in part and dissenting in part) (citing *H.L. v. Matheson*, 450 U.S. 398, 409-11 (1981); and *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 640-41 (1979)) ("Protection of the right of each parent to participate in the upbringing of her or his own children is a further discrete interest that the State recognizes by the statute. The common law historically has given recognition to the right of parents, not merely to be notified of their children's actions, but to speak and act on their behalf.").

122. See *Casey*, 505 U.S. at 895 ("Those enactments [of parental involvement laws], and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart."); *Hodgson*, 497 U.S. at 483 (Kennedy, J., concurring in judgment in part and dissenting in part) ("Age is a rough but fair approximation of maturity and judgment, and a State has an interest in seeing that a child, when confronted with serious decisions such as whether or not to abort a pregnancy, has the assistance of her parents in making the choice. If anything is settled by our previous cases dealing with parental notification and consent laws, it is this point.").

123. *Hodgson*, 497 U.S. at 484 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("A State pursues a legitimate end under the Constitution when it attempts to foster and preserve the parent-child relationship by giving all parents the opportunity to participate in the care and nurture of

interests have been held to be legitimate bases for requiring parental involvement in a minors' abortion decision, given a presumption that young persons' "immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."¹²⁴ Examining these arguments more closely, however, makes clear that there is little, if any, reason to restrict abortion when the minor is otherwise deemed mature.

With respect to a right of parental input, abortion is an outlier among critical sex- and reproduction-related decisions made by minors. As the Tennessee example illustrates, minors are granted autonomy in other contexts—including several alternatives to abortion—earlier than the age at which they can access an abortion without parental involvement.¹²⁵ Malinda L. Seymore offers several examples to highlight the inconsistency of the current consent regimes for minors:

[I]n 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 that 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 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.¹²⁶

Relatedly, although most states have implemented laws requiring minors to receive approval to terminate a pregnancy, parental "guidance" has not been deemed so critical for other significant and related choices. In fact, many of those parental-involvement states have explicitly granted minors the right to consent to other serious medical and personal decisions.¹²⁷ It is not evident why a minor deemed mature enough to make all of those decisions is in such need of guidance and input in her abortion decision that legislatures may force her to navigate significant emotional and logistical obstacles to access the procedure. Further, there is no indication that parental involvement betters the minors'

their children. We have held that parents have a liberty interest, protected by the Constitution, in having a reasonable opportunity to develop close relations with their children.").

124. *Id.* at 444-45 (Stevens, J.) (citing *Bellotti II*, 443 U.S. at 634-39 (1979); and *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944)).

125. See *Overview of Minors' Consent Law*, *supra* note 114.

126. Seymore, *supra* note 77, at 101-02; see also Bonny, *supra* note 32, at 329-30 (highlighting several contexts in which minors are given the freedom to make decisions without parental involvement, including giving birth, obtaining prenatal care and STD treatment, and giving a child up for adoption.).

127. See Bonny, *supra* note 32, at 329-30.

decision or familial bonds.¹²⁸ Indeed, as in Jane's case, mandating parental involvement in abortion decisions may negatively affect the family unit.¹²⁹

Minors' relative inexperience also fails to provide a legitimate reason for denying them independence in the abortion context. Although in some cases minors are only gradually granted full access to the rights and liberties afforded to adults,¹³⁰ such differential treatment is not justified for minors in the gap between ages of consent and parental involvement laws.¹³¹ The current parental involvement law regime restricts the rights of these minors in a way that would be impermissible if applied to adult women. This is not per se improper; the Court has indeed "acknowledged that states may restrict the rights of minors in ways that would be unconstitutional if applied to adults."¹³² However, states' reasoning for doing so is less persuasive where those minors are deemed capable of deciding to carry to term or putting their child up for adoption, and regulation must be warranted by important interests. "Although the Court 'has recognized that the State has somewhat broader authority to regulate the activities of children than of adults,' the State nevertheless must demonstrate that there is a '*Significant state interest* in conditioning an abortion . . . that is not present in the case of an adult.'"¹³³ This "significant state interest" is surely not present if a minor is allowed to make so many other comparably complex and permanent choices upon discovering a pregnancy.

As Scarnecchia and Field note, the inverse of the Court's differential treatment of minors is that "[a] pregnant minor who *is* mature enough to make

128. "Not only does '[n]o evidence exist[] that legislation mandating parental involvement against the adolescent's wishes has any added benefit in improving productive family communication,' evidence alternatively tends to show that 'such legislation may have an adverse impact on some families.'" Rex, *supra* note 71, at 112 (discussing empirical evidence of the potential detrimental effects of parental involvement laws on children seeking abortions).

129. *Id.*

130. The Court has compared parental involvement laws to consent requirements imposed on minors seeking an "operation, marrying, or entering military service." *Hodgson v. Minnesota*, 497 U.S. 417, 444-45 (1990). However, other opinions have acknowledged the "peculiar nature of the abortion decision," which necessitates a more flexible form of regulation than the bright line age cutoffs used in other contexts. *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 643-44 n.23 (1979) (opinion of Powell, J.). As Suellyn Scarnecchia and Julie Kunce Field summarize:

Justice Powell is referring to the fact that a state may arbitrarily set an age that defines maturity for various rights and privileges, such as marriage, where the risk of requiring a mature minor to wait until she reaches the age of majority is relatively low. On the other hand, the urgency of the abortion decision requires an immediate determination of the minor's maturity: she cannot simply wait until she is eighteen and have the abortion at that time.

Scarnecchia & Field, *supra* note 42, at 79.

131. See *Hodgson*, 497 U.S. 4at 435 ("Thus, the constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors as well as adult women."); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."); see also *Bellotti II*, 443 U.S. at 633 (plurality opinion) ("A child, merely on account of his minority, is not beyond the protection of the Constitution.")

132. Scarnecchia & Field, *supra* note 42, at 78 (citing *Bellotti II*, 443 U.S. at 635-39).

133. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 938 (1992) (citing *Danforth*, 428 U.S. at 74-75).

the decision on her own is deserving of the same constitutional protection available to an adult woman."¹³⁴ This allowance should apply not just to those who prove their maturity through a judicial bypass proceeding, but also extend to those who have already been deemed mature enough to opt for an alternative choice.

In sum, the proffered justifications for parental involvement laws ring hollow for minors above the age of consent. Given the similarity between other mature minor laws and the abortion decision, the interests that encourage parental involvement for this limited segment of teens—who are authorized to have sex but not terminate a pregnancy—are weak. Even assuming that parental rights are strong enough to authorize parental involvement laws for *some* minors, the weakened interest in regulating minors who are deemed mature in comparable contexts is not adequate to permit the law to infringe upon their right to abortion.

B. Minors Should Not Be Punished for Legal Sex

However coincidental the convergence of abortion and statutory rape laws, the mismatch of their age boundaries constrains the lawful sexuality of teens. States effectively punish young girls who opt to engage in sexual activity before the age at which they can independently terminate a resulting pregnancy. Applied together, these laws simultaneously grant legal approval to teens' sexual conduct and obstruct efforts to obtain an abortion. Even if a teen is ultimately able to access the procedure through either parental involvement or a judicial bypass, the law subjects her to per se-unwanted attention, scrutiny, and judgment. As several authors have argued, the process required by the laws serves as punishment in and of itself.

A teenager confronting an unwanted pregnancy must, in most states, determine whether she will discuss the pregnancy with her parent(s) or seek a waiver from a judge. Those who are unwilling or unable to speak with their parent(s)¹³⁵ must prepare for a court hearing. With a time-sensitive procedure like abortion, the bypass process also imposes medical risks, presenting a physical concern in addition to other social and economic concerns.¹³⁶ Although the bypass process is constitutionally required to be conducted

134. Scarnecchia & Field, *supra* note 42, at 78 (emphasis added).

135. Teens may opt not to notify their parents for any number of reasons, including fear of abuse or rejection, of revealing sexual activity or a sexual partner, and of disappointing the adults in their lives. *See, e.g.*, Sanger, *supra* note 34, at 311.

136. *See* Rex, *supra* note 71, at 112 (noting the advice of the American Medical Association and Pediatrics Association); Sanger, *supra* note 34, at 310 (citing the agreement among the AMA, the American College of Obstetricians and Gynecologists, and the American Academy of Pediatricians that the judicial bypass system leads to problematic delays).

speedily,¹³⁷ requesting a bypass and (if applicable) appealing a denial necessarily entails delay.¹³⁸ That delay may have medical consequences, forcing an eventual abortion to be performed at a later stage of pregnancy, during which more invasive and riskier methods are more likely to be necessary.¹³⁹ If a delay is too severe, the pregnancy may progress past when a legal abortion may be performed. Even in an expedited process, the delays of the legal system (or deliberation about whether to resort to the legal waiver) involve physical risks.

Further, minors face logistical barriers often stemming from adult oversight and a lack of financial independence.¹⁴⁰ Teens must typically find a way to take time off from school to attend a hearing and discreetly travel to and from the courthouse.¹⁴¹ With narrow exceptions, anonymity is constitutionally required, but the practical reality of the process may still threaten teens' privacy.¹⁴² Once in the hearing itself, a young woman is required to divulge intimate information to evidence her decision-making capacity and the need to waive parental involvement:

Bypass petitioners must testify as to the most private matters in a teenage life: the fact of sexual intercourse; the predicament of pregnancy; the structure or disarray of home life that makes her believe she should not involve her parents; her views on motherhood; her success (or not) in life so far; and her idea of her future.¹⁴³

These judicial inquiries, intended to probe "maturity" and the propriety of abortion in the case at hand,¹⁴⁴ are a "significant intrusion" into a minor's private life by an authoritative and intimidating figure.¹⁴⁵ There are numerous anecdotes in which a young woman was denied an abortion because a judge

137. See *Bellotti v. Baird*, 443 U.S. 622, 644 (1979) ("[Bypass hearings] must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained."); Sanger, *supra* note 71, at 426, 428-29; Sanger, *supra* note 34, at 309.

138. Sanger, *supra* note 34, at 311.

139. *Id.* at 311.

140. These difficulties compound the challenges teens face in going through with the abortion procedure, which also requires time and resources to obtain.

141. See Sanger, *supra* note 71, at 426-28; Sanger, *supra* note 34, at 309.

142. See Sanger, *supra* note 34, at 309.

143. *Id.* at 311-12.

144. See Sanger, *supra* note 71, at 429-30 ("Bypass judges are charged with resolving two basic questions. The first is whether the petitioning minor has proven that she is mature and informed enough to make an abortion decision. If the judge finds that she has, he must grant her petition. If the judge finds that she has not, then he must resolve a second question: even if the minor's decisional competence is lacking, is an abortion nonetheless in her best interest?"); see also Bonny, *supra* note 32, at 322 ("State courts have measured 'maturity' in a variety of ways. In evaluating a pregnant minor's maturity, courts have examined factors such as the minor's age, academic performance, intellectual capacity, participation in extracurricular activities at school, plans for the future, and the ability to handle her own finances.").

145. See Sanger, *supra* note 34, at 312.

deemed her answers inadequate according to his subjective standard—regardless of how thoroughly a teen had reflected upon the implications of her decision.¹⁴⁶ Scarnecchia and Field raised concerns with the degree of discretion granted to judges in these hearings: “Appearing before judges who hear parental consent cases subjects minor girls to the individual beliefs of those judges. This level of judicial discretion poses threats to the petitioning minor even greater than might be expected.”¹⁴⁷

Although the potential for judicial abuse is concerning, the typical outcome of hearings is not the biggest “red flag” of the bypass process. It appears that, “[a]mbiguous legal standards and potential unworkability aside, filed bypass petitions are almost always approved.”¹⁴⁸ Instead, it is the procedure outlined above that has been the locus of critique by many of those involved with the bypass process. Carol Sanger has argued,

[I]njustice attaches even to the ‘successful’ cases where the petition is granted. . . . [T]he hearings themselves—and not just their outcomes—are an improper use of law. For whatever the disposition of the petition, *all* minors who fear telling their parents about their pregnancy or their decision to abort must participate in the bypass hearing process, a process that creates its own set of harms.¹⁴⁹

Forced participation in the process itself is viewed as the untenable burden on pregnant teens.¹⁵⁰ Fears for safety, the intimidation of inserting the legal into the medical realm, and the risk of being publicly shamed or harassed are the true burdens imposed by these laws. In some states, authorization is becoming less certain and the risks attendant to bypass proceedings more severe. In 2014, Alabama’s legislature passed H.B. 494, which, among other newly burdensome provisions, allows hearings to be transformed into adversarial proceedings.¹⁵¹ Texas’ H.B. 3994, which took effect January 1, 2016, amended the state’s judicial bypass procedures to add additional obstacles to accessing abortion efficiently and anonymously.¹⁵²

146. See, e.g., Sanger, *supra* note 71, at 486; Sanger, *supra* note 34, at 310; *id.* at 312; Scarnecchia & Field, *supra* note 42, at 90-91.

147. Scarnecchia & Field, *supra* note 42, at 86.

148. Rex, *supra* note 71, at 121; see Oberman, *supra* note 74, at 52 (referring to judicial bypass hearings as “largely a ‘rubber stamp’ process”); Sanger, note 34, at 309.

149. Sanger, *supra* note 34, at 310.

150. Rex, *supra* note 71, at 121 (citing common acceptance among professionals of Sanger’s “process as punishment” perspective).

151. ALA. CODE § 26-21-4 (West 2015). The new law calls for the involvement of the district attorney, who may examine the petitioner and any witnesses and request a delay. *Id.* at § 26-21-4(i), (k). It also provides, “In the court’s discretion, it may appoint a guardian ad litem for the interests of the unborn child of the petitioner who shall also have the same rights and obligations of participation in the proceeding as given to the district attorney’s office.” *Id.* at § 26-21-4(j).

152. TEX. FAM. CODE ANN. § 33.003 (West 2015). The Guttmacher Institute offered this summary of Texas’ amended law:

Sanger has further focused on the intentionality of these process burdens. Classifying the judicial bypass process as “a unique and rather clever form of punishment,”¹⁵³ she has focused not on the “humiliation or harassment that is *incidental* to a process but rather [on] the intentional use of legal process to punish in cases where the petitioner has committed no legal wrong.”¹⁵⁴ In this view, the psychological and logistical burdens to which minors are subjected are not an unfortunate side effect of an otherwise well-intentioned law—they are rather the very purpose of the law. She argues, “Parental involvement statutes have little to do with improving the quality of a minor’s decision and much to do with dissuading her from abortion and punishing her if she proceeds.”¹⁵⁵ While typically framed in terms of parental rights, familial unity, and child protection, these laws are a means to pursue a particular agenda, “a set of political goals aimed at thwarting abortion, restoring parental authority, and punishing girls for having sex.”¹⁵⁶

Through parental involvement laws, anti-abortion groups accomplish or seek to accomplish several goals through this one blunt method. Where the process intimidates a girl out of seeking an abortion or delays her until beyond when an abortion would be feasible, they succeed in limiting the number of abortions performed. However, given the generally small number of girls who rely on this process and the relative infrequency of denials, the deterrent effect does not explain why this particular type of law is so popular.¹⁵⁷ Instead, the true appeal of these statutes is the assertion of control over female sexuality.¹⁵⁸ They “serve to reassert a form of legal authority over the sexual behavior of daughters that was more clearly under parental control.”¹⁵⁹ Where minors are forced to go through the hearings, they must confront—implicitly, or perhaps

In June, Gov. Greg Abbott (R) signed a bill that amends the legal process through which a minor may obtain a court order to waive the state’s parental consent requirement. Under the new requirements, the minor can file for a judicial bypass only in a court in her county of residence and must appear at the court in person. The law also requires the court to follow a stricter standard of evidence and use specific criteria when weighing the petition. Furthermore, the court has five business days to issue judgment, instead of two and if a judgment is not rendered within the time frame, the petition is denied. The court is permitted to order a mental health evaluation of the minor and examine her familiarity with state-published counseling materials. Also, the law requires all women seeking an abortion to provide government-issued identification. If a woman cannot provide identification that proves she is an adult, she must be treated as a minor and must obtain parental consent. The law takes effect in 2016.

Major Developments in Sexual & Reproductive Health, supra note 5.

153. Sanger, *supra* note 34, at 312.

154. *Id.*

155. *Id.* at 315.

156. *Id.* at 306.

157. GALLUP, *supra* note 95 (reporting the results of a question asking for opinions on “a law requiring women under 18 to get parental consent for any abortion,” to which 71% said that they favored such a law, 27% opposed, and 2% had no opinion, in July 2011).

158. Sanger, *supra* note 34, at 314 (noting that the “process as punishment” theory helps to explain the popularity of parental involvement requirements despite the low number of petitions that are actually denied).

159. *Id.* at 313.

explicitly, from a judge or a parent—hostility or disapproval of their actions. This is true even when other statutes deem their behavior legally acceptable. The sheer fact that a minor must be instructed by a provider or legal advocate that a judicial bypass proceeding is necessary informs her that an abortion decision is “serious,” “risky,” and perhaps beyond her capacity to comprehend independently. In any or all of these ways, young people are being punished and harmed emotionally, mentally, and maybe physically.

The procedural obstacles are arguably particularly concerning when imposed upon those in the “gap”—teenagers who have been deemed mature enough to have sex but must still be subjected to these judicial bypass burdens. For this specific population, laws do not prevent sex or pregnancies from occurring, but rather only function to assure that young people are not guaranteed “consequence-free” sex. Teens may understandably receive the message, and must deal with the practical reality, that—even if extramarital sex is legally sanctioned—their sex warrants punishment. The burdens and risks inherent to sexual activity are made more severe by laws that restrict the options of legally consenting minors.

These laws implicitly impose moralistic views of sexual conduct; girls who engage in even legal sex must seek approval before terminating a pregnancy. Additional process is imposed to complete what statutory rape law does only partially: control and punish extra-marital (and particularly non-procreative) sexuality. Placing so many obstacles in front of those seeking to address the consequences of legal sex has concerning effects. These laws inform teens that, although they may legally have sex, they are not *free* to have sex; the law still has a role in punishing such behavior, and courts have affirmed that role as legitimate.

C. The Current Regime Expresses a Bias Toward Stereotypical Roles

In addition to the impact on the practical choices of teens, these laws in combination, have a particular expressive value. Even if applied neutrally, the structure of these laws sends a mixed message to those “in the gap” that expresses preferences for traditional feminine roles and assumptions about the capacity of women. The laws’ asymmetry—placing obstacles in front of female-bodied persons seeking abortion but not those planning to carry to term—reinforces particular narrow understandings of gender roles. Regardless of the intent of legislators who crafted each of the laws independently, the coalescence of these laws has the effect of paving paths to certain choices while expressing ambivalence toward others. Young women are free to become parents without any adult oversight, but are not permitted to independently delay or opt out of motherhood. By rendering certain choices more difficult, these laws may be interpreted as expressing a presumption that certain choices

are inherently valid and valued, whereas others must be “earned” by persuading an outside party that one is fit to make the decision. This inconsistency sends messages to minors and illustrates American society’s equivocal relationship to non-marital sexuality. For those teenagers who can legally consent to sexual contact but not abortion, procreative sex is implicitly accepted, whereas the termination of a resulting pregnancy is labeled as fraught and problematic. With these laws, states effectively put their evaluative force behind certain roles: those that fit stereotypical molds of womanhood and femininity.

The notion that the law may carry expressive weight in addition to its actual constraints on persons is widely discussed.¹⁶⁰ Substantive due process jurisprudence and the extension of protections to marginalized groups are largely founded on this premise. Central to the Supreme Court’s decision in *Brown v. Board of Education* was its determination that a “feeling of inferiority as to [Black children’s] status in the community” resulted from de jure segregation.¹⁶¹ The Court stressed that “[t]he impact [of the detrimental effect on children] is greater when it has the sanction of the law.”¹⁶² Sixty years later, the Supreme Court again discussed stigmatic harm and the importance of legal and societal recognition in the context of same-sex relationships.¹⁶³ Justice Kennedy wrote for the *Obergefell* majority: “[When] sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.”¹⁶⁴ These opinions assert the law’s capacity to communicate meaning. They declare and operate with the understanding that the law’s embrace can exalt conduct and statuses, that its rebuke can degrade others.

In the case of parental involvement and statutory rape laws, the expressive value stems not simply from a single law’s treatment of a class of persons, but from the interaction of different legal regimes. The state’s bias¹⁶⁵ toward one type of action is highlighted when one form of law is directly contrasted with a different, parallel law’s treatment of an alternative action. For instance, although thirty-eight states require parental involvement in a minor’s abortion

160. See, e.g., Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397, 401 (1965) (“That the expression of the community’s condemnation is an essential ingredient in legal punishment is widely acknowledged by legal writers.”); Cass R. Sunstein, *On the Expressive Function of Law*, 144 *U. PA. L. REV.* 2021, 2024 (1996) (discussing the “expressive function of law—the function of law in ‘making statements’ as opposed to controlling behavior directly”).

161. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494 (1954).

162. *Id.* (quoting findings from the court below).

163. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-02 (2015).

164. *Id.* at 2602.

165. Of course, examining the motivations of “the state” is complicated by the many inputs and forces that construct statutes’ content. However, it is worth noting the expressive capacity of the law when examined as a frozen cross-section. At the very least, these laws still exist, and regardless of intent upon passage, lawmakers have not since questioned the entrenched assumptions about women’s roles.

decision,¹⁶⁶ similar interventions are not generally required for decisions about prenatal care. Forty-five states either explicitly allow minors to consent to prenatal medical care or do not have a related policy.¹⁶⁷ In those thirty-eight states with enforceable statutes limiting abortion access, thirty-three allow all minors to independently consent to prenatal care.¹⁶⁸ In many states, young women may independently opt to become mothers and make medical decisions attendant to that choice, but, should they decide to seek an abortion, must go to court for permission from an outside power. Ehrlich discusses how, “in states with parental involvement laws, a young woman most likely will be able to embrace, but not to reject, motherhood on her own. The law treats her as competent to make one, but not the other, decision without adult involvement.”¹⁶⁹ A girl permitted to legally have sex and carry a pregnancy to term can accept a traditionally feminine maternal role, but should she attempt to reject that role, the state puts outside authorities in a decisional position on her behalf. Minors are deemed to benefit from input when bucking stereotypical roles, but not otherwise—perhaps suggesting that the maternal role and procreation are so natural that the state should automatically grant permission.

The regulation of youth on the cusp of adulthood is a particularly intriguing place to focus. Although privacy concerns and case law have placed some *adult* conduct beyond the law’s control, minors have remained permissible targets of regulation. Laws regulating minors may become the hub of people’s anxieties toward what we believe should be present in our society more generally. That which is declared inappropriate for those near adulthood is only reluctantly allowable adult behavior. As Malinda Seymore notes, the differential treatment of abortion—as compared to other significant decisions left to minors—points to the goals underlying parental involvement laws.¹⁷⁰ Promoted by advocacy groups devoted to a broader anti-abortion agenda, parental involvement laws are only one arm of a legal strategy that seeks to chip away at the abortion right.¹⁷¹ One leading group, the Americans United for Life (AUL), took an

166. See *supra* note 58 and accompanying text.

167. See *Overview of Minors’ Consent Law*, *supra* note 114, at 1. Thirteen of these states allow, but do not require a doctor to notify a minor’s parents. *Id.* The remaining four states that do not allow all minors to consent allow some minors to consent under certain conditions. *Id.*

168. See *id.* at 2. This number combines both those states that *explicitly* allow all minors age seventeen and under to consent (of which there are twenty-three) and those states that do not have any relevant policies or case law and thus allow minors to consent by default (of which there are ten). Eight of those thirty-three permit physicians to inform a minor’s parents, although they are not required to do so. *Id.*

169. Ehrlich, *supra* note 103, at 146. Ehrlich explores the “absurdity of linking decisional capacity to the pregnancy outcome.” *Id.* at 147.

170. Seymore, *supra* note 77, at 102-03.

171. See Jeanne Cummings, *In Abortion Fight, Little-Known Group Has Guiding Hand*, WALL ST. J. (Nov. 30, 2005), <http://www.wsj.com/articles/SB113331435902109731> (“Americans United’s step-by-step approach set several targets. They included pushing provisions in state abortion laws to recognize and protect unborn children such as mandating a second physician be assigned to treat the

incremental approach toward overturning *Roe v. Wade* that included promoting, and then defending in court, various abortion restrictions bearing on the lives of both minors and adult women.¹⁷² AUL's model language was successfully incorporated into more than thirty states' parental-notification laws as of 2004.¹⁷³ As part of a larger anti-choice strategy, parental involvement laws align more closely with abortion restrictions imposed upon adult women than other laws relating to minors' consent.¹⁷⁴ Seymore asserts, "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 strategy to end abortion. . . . [These statutes are] a curtailment of women's autonomy in sexual and reproductive matters."¹⁷⁵ The combined application of these laws creates a regime that permits sexual contact and allows private decision-making in some arenas while constraining autonomy in others, demonstrating ambivalence about (female) sexuality.

Many have brought attention to American society's uncertain orientation toward sexuality; sexualized images are ubiquitous even as non-monogamous or non-procreative sexuality are scorned.¹⁷⁶ The comparative ages at which actions are permitted may be seen as an imperfect heuristic for a society's feelings toward those actions. The variability in age permissions within and among states may illustrate tensions and disagreements around sexual behavior (or at least views on who may appropriately engage in that behavior). Through constraints on teens' choices, the laws express a broader preference for sex-with-consequences and for the linkage of sex with procreation. Teens' relative vulnerability and pliability permits the state to regulate their lives in a way that would be deemed too intrusive if applied to adults.¹⁷⁷ For example, whereas the constitutionality of parental involvement laws is "based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at

fetus in late-term abortions. The group sought expansion of parental rights in cases of minors—first pressing for parental notification and then pushing for a parental consent. And it helped pass 24-hour waiting periods for minors, and then adult patients, and then began expanding them to 48 hours.”)

172. *Id.*

173. *Id.*

174. *Id.*

175. Seymore, *supra* note 77, at 102-03.

176. See, e.g., Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 715 (2000) (“When it comes to issues of sexuality, in spite of several decades of sexual ‘liberation,’ including effective contraception and legalized abortion, this remains a society rife with sexual double-standards.”); Harriet F. Pilpel, *Sex vs. the Law: A Study in Hypocrisy*, HARPER’S MAGAZINE, Jan. 1965, at 35 (“For surely the sex laws of the United States today reflect a formidable mass schizophrenia. The split between our society’s permissive—even obsessive—sexual behavior and attitudes, and our punitive, puritanical statutes is indeed scarcely credible.”).

177. The precise boundaries of the state’s control of adult sexuality are unclear. However, consider, for example, the Supreme Court’s language in *Lawrence v. Texas* acknowledging an “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” 539 U.S. 558, 572 (2003). See also Cass R. Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059 (2004) (discussing the potential implications of *Lawrence*).

heart,” the Supreme Court has ruled that it “cannot adopt a parallel assumption about adult women.”¹⁷⁸ Many have protested and challenged this differential treatment,¹⁷⁹ but adolescents apparently remain a valid target for restrictions even as courts have been more skeptical of constraints on adult women. As a result, examining laws regulating teen sexuality makes apparent the continued imposition of traditionalist views of gender and sexuality in a way that would be obscured by looking at more generally applicable restrictions.

To the extent that American courts have deemed promoting procreation a legitimate state interest, the means here are unacceptable. The state should not promote childbearing on the backs of young women who are less than willing or who did not consent independently to the pregnancy. The law should be neutral on this question insofar as it speaks to gender roles. Because of a history of gender relations that assumed women’s homemaker status, the law should not impose such asymmetrical obstacles. Legislatures should express a preference for childbirth—if they desire to do so—through a means that does not constrain choice relative to other options, but enhances it.¹⁸⁰

Even beyond the practical effects of laws on the lives of teens, we should be concerned about the messages being sent to young women—that sex should be punished, that they are more properly mothers than autonomous, potentially non-maternal persons. When a pregnant teen surveys her options, abortion is not positioned as one of several equal choices. Rather, accessing the procedure may very well be the path of most resistance:

[A]s the decision not to become a mother must be actualized through an abortion, both the reproductive choice and the effectuating medical procedure of a young woman seeking to avoid maternity are subject to adult scrutiny, whereas a teen wishing to become a mother enjoys

178. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992).

179. *See, e.g., Planned Parenthood of Cent. Mo. v. Danforth*, 392 F. Supp. 1362, 1376 (E.D. Mo. 1975) (Webster, J., dissenting in part) (“I cannot see why [a minor] would not be entitled to the same right of self-determination now explicitly accorded to adult women, provided she is sufficiently mature to understand the procedure and to make an intelligent assessment of her circumstances with the advice of her physician.”), *aff’d in part, rev’d in part*, 428 U.S. 52 (1976); Rex, *supra* note 71, at 108-18 (citing empirical evidence, including testimony on child abuse, to challenge “the Court’s prior refusal to find parental consent provisions unduly burdensome for pregnant minors” even as it struck down notification requirements for adult women).

This is not to suggest that conservative groups have abandoned attempts to limit adult women’s sexual and reproductive agency. Professor Reva Siegel has documented the ascension and success of “woman-protective abortion arguments.” Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008).

180. *Cf. Linda Greenhouse & Reva B. Siegel, Casey and the Clinic Closings: When “Protecting Health” Obstructs Choice*, 125 YALE L.J. 1428, 1437 (2016) (discussing how, under *Casey*, “[i]f government wants to protect unborn life, it has to respectfully enlist women in this project and cannot simply commandeer women’s lives for these purposes”). This logic from *Casey*, although focused upon adult women, should apply equally to minors—particularly those who are already granted significant autonomy in other comparable spheres.

decisional autonomy over her reproductive choice as well as its effectuation through pregnancy-related medical care.¹⁸¹

The independence that age of consent laws grant, which is retained should a minor choose to carry to term, is revoked if she decides she wants to terminate her pregnancy. Whatever the reasons for the law's development, the current asymmetry communicates the relative value and dangers of particular choices. This expressive element should be of particular concern and justifies reform of the current regime of teen sexuality laws.

VI. RECOMMENDATIONS

In my view, in a society dedicated to prioritizing the equality of women and girls over other values, abortion restrictions would not be imposed upon young women, and feminists would debate the propriety and severity of statutory rape laws, attentive to minors' autonomy and protection. However, such an admittedly subjective utopia is unlikely to emerge in the United States. Parental involvement laws have remained popular among members of both major parties.¹⁸² Further, there is division in attitudes about the morality and legality of abortion, and at least widespread tacit acceptance that laws may legitimately single out abortion.¹⁸³ Thus, despite the dangers of wide judicial discretion and risk of sexist administration, reform is likely a more palatable option. If these laws are to be maintained, they should be altered to minimize the harm specific to the gap between the ages at which one can legally have sex with one's partner and when one can independently obtain an abortion. If laws are going to permit young people to have sex, they should give female-bodied minors access to all of the choices to manage its consequences. We have recognized the importance of minors' independent consent in many other medical and sex-related contexts, and should do so with regard to abortion as well.

There are some who argue that more wholesale reform of statutory rape laws, including higher ages of consent or a reassessment of the relevance of age, may be important for the protection of female persons.¹⁸⁴ These

181. Ehrlich, *supra* note 103, at 146.

182. See GALLUP, *supra* note 95; 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>.

183. See *supra* notes 95-97 and accompanying text; see also *supra* Section IV.C.

184. See Kitrosser, *supra* note 69, at 289 (concluding "that the solution to substantive inequality in sexual relations between boys and girls and men and women is no longer the per se criminalization of sexual activity with young girls"); Oberman, *supra* note 74, at 42 ("Despite the fact that statutory rape laws are premised upon the belief that young girls are too easily coerced to effectively consent to sex, they largely ignore the sources of girls' vulnerability, and the relative power of the parties having sex with them. . . . Instead, the law focuses on factors more readily identified, such as age differences, and whether the victim was a 'virgin' or 'promiscuous.' This approach is compelling only if a girl, by virtue

considerations may play a role in debates over the proper elements of laws, and some states may, having evaluated the impact of altering various minor consent laws, decide that some intermediate, unified age is the most appropriate. This compromise—perhaps a lowered abortion age paired with an increased age of consent—is not ideal for reasons outlined below, but would at least partially vindicate important autonomy values. If members of the public and government engage in these debates in a way that is attentive to female autonomy and subsequently determine that a higher age is appropriate for both legal sex and independent abortion access, then at least the asymmetry of the current regime will be remedied.

A. Align Ages at the State's Age of Sexual Consent

Within a single state, the age at which a minor can legally obtain an abortion without mandated adult involvement should be aligned with the age at which she can legally consent to sex. Doing so will help minimize burdens to access for those minors already permitted to act like adults in many related contexts. Aligning the ages will also prevent those engaging in legal sex from being forced to confront the obstacle of judicial bypass. At a minimum, it will ensure that the punishing hearing process will be imposed only upon a smaller group consisting of minors whose decision-making the law consistently dictates may benefit from adult intervention. Further, matching a state's age of consent and parental involvement laws will ensure that the law is oriented neutrally toward the various life options available to sexually active girls. Such a change guarantees that, just as motherhood is immediately available to an adolescent engaged in legal sex, so too is a procedure that declines motherhood. Aligning the ages will address the practical obstacles to access, punitive procedures following legal sex, and biased orientation of the law toward traditionally feminine, maternal roles.

In aligning these two laws, the age of independent abortion should be lowered to the age of consent, not vice versa. This arrangement would better correspond with other statutory affirmations of minors' ability to medically consent and would avoid undermining the goals of health policies. This is important both for ease of enforcement and protection of public health. Raising the age of consent to match abortion laws would have ramifications for mandatory reporters and would re-classify a variety of previously legal sexual relationships as criminal. Further, "[i]f states were to raise the legal age of consent to eighteen for the purposes of statutory consistency, this would also likely impact the willingness of underage teens to seek out contraceptives, STI

of becoming sexually active, suddenly gains all of the power and control necessary to give a meaningful consent (or refusal) to sex." (footnotes omitted)); Olsen, *supra* note 13 (discussing feminist debates about rights and the meaning of sexuality in the context of statutory rape laws).

treatments and reproductive care for fear of legal consequences.”¹⁸⁵ To avoid confusing the current organization of statutory rape laws and their enforcement, and to encourage teens to access health care, the age of consent should not be raised to match parental involvement laws, many of which are set at the age of eighteen. Doing so would have consequences for adolescents that would undermine the benefits of reform.

Expressively and morally, there is also a value to promoting bodily autonomy by granting sexual and reproductive agency to more young girls rather than fewer. Raising the age of consent simply to align with abortion restrictions would exacerbate the paternalism of parental involvement laws and further expand state control of sexuality.¹⁸⁶ Given the current structure of other medical consent laws, including access to prenatal care, it is important that girls have access to a full range of choices at as young an age as they may legally have sex. If the laws are to be matched, as would be ideal, it should be done in a way that intervenes in the agency of minors as minimally as possible.

B. Align Ages at the State's Minimum Age of Sexual Conduct

The above recommendation is complicated by the fact that the majority of states do not have a unitary age at which they permit sexual activity. Most states allow some form of sexual conduct with minors who are below the age of consent when certain conditions are met.¹⁸⁷ For example, a state that sets its age of consent at sixteen may permit sexual intercourse with a fourteen-year-old when the partner is within a certain age range or below a set maximum age. As a result, for some younger minors, the legality of their sexual conduct is conditioned on the age of their partner.

This reality does not lend itself easily to a system that bases the age of independent abortion on when sexual activity is deemed legal. Because conditioning one's access to health care on the age of a third party is undesirable, these minors must all be either granted the right to an independent abortion or subjected to parental involvement laws. For the reasons enumerated above, including the need to provide the full array of health care options to sexually active minors, states should opt for the former. Expanding abortion access without a parental involvement requirement to younger minors, although consistent with principles of autonomy, is likely a political non-starter. Those on either side of a political debate may opt to distinguish minors whose sex is only legal under narrow circumstances from those above the age of consent.

185. Phillis, *supra* note 81, at 296.

186. See, e.g., *id.* at 291 (“They serve to reinforce a paternalistic vision of the law as protecting immature minor women, except where maturity is obtained through the acceptance of pregnancy and motherhood.”); Eidson, *supra* note 6, at 766-67 (noting that “statutory rape laws invoke the benevolent *parens patriae* power of the state to ‘protect’ young females and punish male ravishers”).

187. See generally Glosser et al., *supra* note 61.

The provisions that do not punish sexual conduct with this subset of younger minors are often more concerned with when prosecution is appropriate than with minors' maturity or capacity.¹⁸⁸ Even if the age at which adult abortion rights should attach is debated (as is likely given the current variation state-to-state), the "gap" between legal sex and abortion access should be closed.

C. Presume "Maturity" for Those Above the Age of Consent

If state governments are reluctant to alter the ages within parental involvement laws or, as is likely given our current political climate, unable to garner the political support for such a measure, then the way these laws are implemented should be changed. Altering the standards used to decide whether to grant a bypass petition could achieve several of the same goals. Suellen Scarnecchia and Julie Kunce Field, practitioners in the field of judicial bypass, propose presumptions that they argue, "if adopted by the court, will simplify the decision, make it more predictable, and still protect both the interests of parents and the constitutional rights of the affected minor girls."¹⁸⁹ They suggest, among others, a presumption of maturity based on age, "[f]or instance, teens sixteen and over should be presumed mature. These teens are at an advanced level of cognitive development and are at the age of consent for sex."¹⁹⁰ An age-based maturity presumption would prevent a minor who decides to have sex from facing an inconsistent legal regime in which the presumption of her maturity depends on whether she opts to become a mother or not. At the very least, such a presumption would lessen the evidentiary burden on those who face a pregnancy as a result of their legal sex.

Ultimately, this regulation-based presumption framework would not address as many concerns as more overt amendments. Given the high likelihood that a petition will be granted even under the current system,¹⁹¹ the practical effect of this change would be small. Implementing a presumption could potentially, for those over the age of consent, lessen the stress and uncertainty accompanying the hearings, but it would still require them to confront barriers to abortion when there are no such legal hurdles to becoming a parent. Even with a built-in presumption, the law would still require minors who have implicitly been deemed mature enough to have sex to go through a punishing hearing process before accessing an abortion. However, a primary reason to favor an age presumption over no action is the expressive shift that may result from publicizing such a presumption. A publicly known presumption of maturity for those who can consent to sex would signal to girls

188. *Id.* at 6-7. For example, through either minimum ages of defendants or age-gap provisions, many states establish a minimum age at which a would-be defendant may be prosecuted.

189. Scarnecchia & Field, *supra* note 42, at 98.

190. *Id.* at 111.

191. *See supra* note 148 and accompanying text.

that the law assumes they should be able to access abortion as easily as they can access motherhood—that is to say, as soon as the law grants them the right to have sex.

CONCLUSION

Mandating that pregnant minors go through a strenuous judicial bypass procedure for years after the state recognizes the legality of their sex deprives them of agency that they should be afforded. The current structure imposes burdens beyond what is justified by parental and state interests, punishes legal sex, and evinces messages about the roles of female persons. Granted, there are benefits to retaining the existing formulations of these laws, and many hold views of abortion and sex that do not demand alterations.

Still, a structure of law that presumptively grants a right to become a mother but puts hurdles in the path of those seeking to halt gestation confines the possibilities for young women. I have argued for a formulation that works to respect the sexual autonomy of adolescents rather than provide opportunities to moralize teenage sexuality—especially when there is a risk of that evaluation being done through a gendered lens. A regime that structures the options of girls in a way that is preferentially weighted toward traditionally feminine roles has implications even beyond those particular cases, implications that are troubling and should prompt us to challenge our current acceptance of the status quo. To the extent that an argument in this register is normative and seeks to vindicate only a particular set of values, consider this a plea for an emphasis on equality and respect for bodily autonomy, even for adolescents. Looking forward, whether these values win out over others—indeed, whether the intersection of these laws is discussed at all—must and will be collectively determined. What debates do occur among adults—in legislative chambers, in courtrooms, in strategy sessions—should pay great attention to the impact on adolescents whose “maturity” is context-specific and whose choices are unbalanced.

APPENDIX A: THE AGE GAP, STATE BY STATE

State	Age of Independent Abortion	Age of Consent to Sexual Intercourse*
Alabama	18	16
Alaska	18	16
Arizona	18	18
Arkansas	18	16
California	Law Enjoined	18
Colorado	18	17
Connecticut	No Restriction	16
Delaware	16	18
D.C.	No Restriction	16
Florida	18	18
Georgia	18	16
Hawaii	No Restriction	16
Idaho	18	18
Illinois	18	17
Indiana	18	16
Iowa	18	16
Kansas	18	16
Kentucky	18	16
Louisiana	18	17
Maine	No Restriction	16
Maryland	18	16
Massachusetts	18	16
Michigan	18	16
Minnesota	18	16
Mississippi	18	16
Missouri	18	17
Montana	Law Enjoined	16
Nebraska	18	16
Nevada	Law Enjoined	16
New Hampshire	18	16
New Jersey	Law Enjoined	16
New Mexico	Law Enjoined	16
New York	No Restriction	17
North Carolina	18	16
North Dakota	18	18

State	Age of Independent Abortion	Age of Consent to Sexual Intercourse*
Ohio	18	16
Oklahoma	18	16
Oregon	No Restriction	18
Pennsylvania	18	16
Rhode Island	18	16
South Carolina	17	16
South Dakota	18	16
Tennessee	18	18
Texas	18	17
Utah	18	18
Vermont	No Restriction	16
Virginia	18	18
Washington	No Restriction	16
West Virginia	18	16
Wisconsin	18	18
Wyoming	18	16
<p>*Most states permit sexual intercourse or sexual contact with persons younger than the age of consent under certain circumstances, usually dependent on the age difference between the parties</p>		

