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Under Eighteen: Applying the Classification of Juveniles as Inherently Less Mature than Adults in Roper v. Simmons to Laws Restricting the

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Under Eighteen: Applying the Classification of Juveniles as Inherently Less Mature than Adults in *Roper v. Simmons* to Laws Restricting the Rights of Minors Seeking an Abortion

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I. INTRODUCTION

In 2005, the Supreme Court in Roper v. Simmons held the execution of juveniles under the age of eighteen unconstitutional.\(^1\) Classifying all juveniles as less mature and criminally culpable than adults, the Court prohibited the imposition of its harshest sentence on juvenile offenders.\(^2\) This categorization of juveniles as a separate class from adults could significantly impact other constitutional rights of minors, such as the right of a pregnant minor to obtain an abortion.\(^3\) If the Court took a bright line rule approach to

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\(^1\) See Roper v. Simmons, 543 U.S. 551, 568 (2005) (asserting that a majority of the states have prohibited the death penalty for minors, and the Supreme Court now holds that the Eighth Amendment prohibits the death penalty for minors).

\(^2\) See id. at 575 (supporting its holding that the juvenile death penalty is an excessive sanction because the United States is the only country in the world to sanction it officially).

\(^3\) See, e.g., Bellotti v. Baird, 443 U.S. 622, 639 (1979) (explaining that the state is trying to reconcile the constitutional right of a woman to choose with the special interest of the state to encourage an unmarried minor to seek the advice of her parents, as established by Roe v. Wade, 410
parental notifications laws, as it does with the juvenile death penalty in Roper, the Court could hold that all minors are incapable of making an independent decision to obtain an abortion without parental involvement. Consequently, instead of evaluating each female minor on a case-by-case basis, the Court could require all female minors to notify or obtain the consent of their parents or guardian before obtaining an abortion.

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4 See, e.g., Zbaraz v. Hartigan, 584 F. Supp. 1452, 1459 (D.C. Ill. 1984) (invalidating a parental consent ordinance because it contained a blanket provision that all minors under the age of fifteen are too immature to make an independent decision to terminate their pregnancy). But see Ayotte v. Planned Parenthood of Northern New England, 126 S. Ct. at 966 (2006), (citing to Hodgson v. Minnesota, 497 U.S. 417, 444-445 (1990) asserting that states have the right to require parental involvement because of their interest in the welfare of minors who may be too immature to wisely exercise their rights).

5 See generally Elizabeth S. Scott, The Legal Construction of Adolescence, 29 Hofstra L. Rev. 547, 569 (2000) (explaining that many states do not evaluate adolescents seeking abortions according to the usual boundary lines between child and adult, but rather establish judicial hearings to classify teens on an
This Casenote argues that the Court should not apply its categorization of all minors as inherently immature in Roper to laws addressing the rights of minors seeking abortions. Part II.A of the Casenote discusses the Eighth Amendment and constitutional privacy rights of minors. Part II.B describes how the Roper Court established a bright line rule to distinguish juvenile and adult offenders, rendering the imposition of the death penalty on juveniles unconstitutional. Part II.C examines the influence of the Court’s ruling on the constitutionality of the death penalty for individuals with mental retardation on the juvenile death penalty. Part III argues that after Roper the Court should not apply an analogous bright line rule to young women seeking abortions because it

6 See discussion infra Part II.A (elaborating on the courts’ gleaning of the right to privacy from several amendments).
7 See discussion infra Part II.B (explaining that by deeming all juveniles as inherently immature, the Court was able to find that as a class juveniles are less criminally culpable than adults).
8 See discussion infra Part II.C (charting the evolution of the Court’s jurisprudence on the death penalty for individuals with mental retardation, culminating in its absolute prohibition).
would diminish the constitutional privacy right of female minors.\textsuperscript{9} Part III argues against the categorization of all juveniles seeking an abortion as inherently immature, and advocates that the Court require all parental involvement statutes to provide for an alternative if the minor can prove she is sufficiently mature to make her own decision, or that required notification or consent of her parents would not be in her best interests.\textsuperscript{10} The Casenote concludes that the Court should refrain from categorizing all young women seeking an abortion as inherently immature and incapable of making an independent decision, because parental involvement in this decision may not always be in the minor’s best interest.\textsuperscript{11}

\textsuperscript{9} See discussion \textit{infra} Part III.A (arguing that the privacy rights of minors are already more tenuous than their Eighth Amendment rights because the Eighth Amendment is written explicitly in the Constitution while the Court has interpreted the right to privacy from various amendments).

\textsuperscript{10} See discussion \textit{infra} Part III (explaining that the condition of pregnancy may warrant an expedited maturation in female minors who are then capable of making an independent decision).

\textsuperscript{11} \textit{Compare} Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976) (holding that minors, as adults, have constitutional rights), \textit{with} Prince v. Massachusetts, 321 U.S.
II. BACKGROUND

A. The Constitutional Rights of Minors Regarding the Eighth Amendment and The Right to Privacy.

The state may deprive minors of rights guaranteed to adults, when such a deprivation addresses the unique vulnerability of juveniles, the inability of children to make critical decisions in an informed, mature manner, and the significance of the parental role.\textsuperscript{12} In *Planned Parenthood of\textsuperscript{12} 158, 170 (1944) (holding that the state has a heightened power of authority over children than over adults and therefore may regulate their activities more closely).\textsuperscript{12} See *Danforth*, 428 U.S. at 74 (acknowledging the state does have a somewhat broader right to regulate the activities of children than adults, thus the Court must determine whether there is a significant state interest in making parental consent a prerequisite for a minor seeking an abortion). \textit{But see} *Carey v. Population Services, Int’l*, 431 U.S. 678, 692 (1977) (listing minors’ constitutional rights affirmed in various Supreme Court decisions, including freedom of speech, equal protection against racial discrimination, due process in civil contexts and rights of defendants in criminal proceedings such as the prohibition of double jeopardy, the rights to notice, counsel, confrontation, cross-examination, the right not to incriminate oneself, and protection against coerced confessions).
Kansas City v. Danforth Justice Blackmun noted the tension between the inherent constitutional rights of minors, which do not “magically come into being” upon turning eighteen, and the state’s broader authority to regulate the activities of children than adults.\textsuperscript{13} The Court has addressed this tension in very different ways in its rulings on the juvenile death penalty and teenage abortions; invoking the Eighth Amendment rights of juveniles to protect them from the death penalty, and also allowing state legislatures to impose on the right to privacy of minors seeking abortions.\textsuperscript{14}

1. The Eighth Amendment and the Juvenile Death Penalty

Under the Eighth Amendment’s prohibition of cruel and unusual punishment and excessive sanctions most states have

\textsuperscript{13} See Danforth, 428 U.S. at 74 (doubting that a parent’s objection to a minor’s desire to obtain an abortion is more significant than the minor’s right to privacy).

\textsuperscript{14} See generally, Nicole A. Saharsky, Consistency as a Constitutional Value: A Comparative Look at Age in Abortion and Death Penalty Jurisprudence, 85 Minn. L. Rev. 1119, at 1119-20 (2001) (noting that both the death penalty and abortion implicate fundamental rights, while other rights denied to minors such as driving a car are not guaranteed by the Constitution).
modified, if not outlawed, capital punishment. Capital punishment is constitutional if it properly fulfills one of two social purposes: retribution and/or deterrence of capital crimes. If a death sentence inflicts unnecessary pain it is “cruel and unusual punishment,” and if the punishment is grossly disproportionate to the severity of the crime or the culpability of the offender it will constitute “excessive sanctions.” Recognizing that jury decisions could likely

15 See Gregg v. Georgia, 428 U.S. 153, 177 (1976) (explaining that the states initially narrowed the class of murders punishable by death and then adopted laws which expressly allowed juries to recommend mercy).

16 See id. at 183 (conceding that capital punishment might be offensive, but that it is essential to maintain a civil society in which citizens rely on the legal system rather than personally carry out vindication of wrongs).

17 See id. at 184 (affirming that capital punishment may be appropriate in extreme cases when the crime is so heinous that the only adequate response might be execution of the offender).

18 See id. at 173 (identifying a two part test to determine whether a punishment is excessive: (1) it cannot involve the unnecessary infliction of pain; and (2) it cannot be disproportionate to the severity of the crime); see also Roper
violate the Eighth Amendment by imposing the death penalty in an arbitrary or capricious manner, the Court advised judges to embrace the standards for aggravating and mitigating factors set forth by the drafters of the Model Penal Code.\textsuperscript{19}

In \textit{Thompson v. Oklahoma} and \textit{Roper v. Simmons} the Supreme Court held that the death penalty for minors constitutes cruel and unusual punishment, thus violating the Eighth Amendment.\textsuperscript{20}

\textsuperscript{19} \textit{See} ALI, Model Penal Code, 201.6 (Proposed Official Draft 1962) (proposing standards for jury instructions of aggravating and mitigating factors such as, (1) at the time of the murder, the defendant could not appreciate the wrongfulness of his conduct, and (2) the youth of the defendant at the time of the crime).

\textsuperscript{20} \textit{See Thompson v. Oklahoma}, 487 U.S. 815, 838 (1988) (holding that the death penalty for offenders under the age of sixteen does not fulfill the goals of capital punishment, and thus imposes excessive sanctions and violates the Eighth Amendment); \textit{Roper}, 543 U.S. at 578-79 (affirming the Missouri Supreme Court’s setting aside of the death sentence imposed upon the
The *Thompson* court reasoned that if the state could restrict the
rights of minors because they did not yet act as adults, then it
would be inconsistent not to consider this disparity in
determining whether or not the death sentence for minors would violate the Eighth Amendment.\textsuperscript{21}

2. The Privacy Rights of Minors Seeking Abortions

While it is not explicitly stated in the Constitution, several Supreme Court decisions have found that the right to privacy guarantees that the government cannot intrude upon rights of personal security, liberty, and private property.\textsuperscript{22}

\textsuperscript{21} See *Thompson*, 487 U.S. at 825 (defending the sentiment that children, “by definition,” are assumed incapable of taking care of themselves, and therefore are under the control of their parents, and if their parents fail, are the responsibility of the state).

\textsuperscript{22} See generally *Carey v. Population Services Int’l*, 431 U.S.
This is a fundamental right not restricted to the specific wording of the Bill of Rights, but rather “implicit in the concept of ordered liberty”. The right to privacy allows individuals to make decisions independent of government interference relating to marriage, procreation, contraception, family relationships, child rearing and education. At the center of these constitutionally protected choices and the

678, 685 (1977) (affirming that the right to privacy clearly protects the individual’s right to make certain decisions without government intrusion).

See Griswold v. Connecticut, 381 U.S. 469, 488 (1965) (Goldberg, J., concurring) (emphasizing that the Fourteenth Amendment makes the expressions of fundamental rights in the first eight amendments, including the right to privacy, applicable to the states); see also Roe v. Wade, 410 U.S. 113, 152 (1973) (locating the right to privacy in the First, Fourth, Fifth, Ninth, Fourteenth Amendments, and the Penumbras of the Bill of Rights).

See Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (declaring if the right to privacy means anything at all, it is the right of the individual to be free of government interference in a matter as personal as the decision of whether or not to have a child).
history of the right to privacy is the decision of whether or not to terminate a pregnancy.\textsuperscript{25}

In \textit{Roe v. Wade} the Supreme Court held that the Fourteenth Amendment’s “concepts of liberty and restrictions upon state action,” supports a right to personal privacy that extends to a woman’s right to choose, with the advice of a physician, whether or not to terminate her pregnancy.\textsuperscript{26} While \textit{Roe} did not address whether or not there is a distinction between the right to privacy of minors and adults, later cases have asserted that this right does extend to minors.\textsuperscript{27} However, compelling state

\textsuperscript{25} See \textit{Carey}, 431 U.S. at 685 (emphasizing that in the realm of the most intimate of human relationships, decisions whether or not to terminate a pregnancy are among the most intimate and sensitive).

\textsuperscript{26} See \textit{Roe}, 410 U.S. at 171 (Stewart, J., concurring) (1973) (holding that the inflexible Texas statute, which completely imposes upon a woman’s right to personal liberty as protected by the Fourteenth Amendment, fails to pass the careful scrutiny required by the Fourteenth Amendment).

\textsuperscript{27} See, \textit{e.g.}, \textit{Foe v. Vanderhoof}, 389 F. Supp. 947, 955 (D.C. Colo. 1975) (citing \textit{Coe v. Gernstein}, 389 F. Supp. 695, 697 (S.D. Fla. 1973)), (holding that if the state cannot interfere with a woman’s right to have an abortion until a compelling
interests, the protection of the minor and fostering parental control may limit the minor’s right more than an adult’s.28

Currently, forty-four states have some kind of parental notification or consent laws.29 These statutes require that a minor notify or obtain the consent of one of her parents or guardian before she can seek an abortion.30 State legislation

point of viability, neither can it interfere on behalf of parents to compel their daughters to terminate pregnancy before viability).

28 See, e.g., Foe, 389 F. Supp. at 955 (concluding the challenged statute does not meet what the Court requires to allow a parental notification statute, nor do these state interests in promoting parental authority or limiting minors’ access to abortion justify a blanket parental consent requirement).


30 See, e.g., Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 153 (1976) (holding that a state could not lawfully enforce an absolute parental veto over the decision of a minor to abort); see also Zbaraz v. Hartigan, 584 F. Supp. 1452, 1457
enacting parental consent and notification laws must demonstrate that parental involvement is in the best interests of the child.\textsuperscript{31} The state, however, cannot impose a blanket provision requiring parental consent as a condition for an abortion of a minor during the first twelve weeks of pregnancy.\textsuperscript{32} In addition, n.6 (D.C. Ill. 1984) (citing to H.L. v. Matheson, 450 U.S. 398, 453 (1981) (Marshall, J., dissenting) arguing that some minors have the capacity and need to make decisions regarding their own healthcare without consulting their parents).

\textsuperscript{31} See Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 505 (1990) (asserting that it is rational and fair for the state to conclude that in most instances the process in which a woman has to confront these psychological choices should begin within her family); see also Bellotti v. Baird, 443 U.S. 622, 638–9 (1979) (advising that placing legal restrictions on a minor’s right to an abortion, which is more supportive of the parents’ role, may allow the child to become a mature participant in society).

\textsuperscript{32} See Danforth, 428 U.S. at 74 (holding that regardless of the reason, the state does not have the constitutional authority to give a third party absolute, possibly arbitrary veto power over a patient and physician’s combined decision to terminate a pregnancy).
the Court has ruled that these statutes must include an alternative to parental involvement in a judiciary bypass system that meets the requirements the Court has established in \textit{Danforth, Ashcroft, Bellotti v. Baird}, and \textit{Ohio v. Akron Center for Reproductive Rights}.\textsuperscript{33} The judiciary bypass procedures must allow the minor to seek an abortion independently when in her best interests.\textsuperscript{34}

\textsuperscript{33} \textit{See} Bellotti v. Baird, 443 U.S. 622, 631 (1979) (holding that the state may not impose a blanket provision which requires a minor to obtain the consent of her parents or guardian in the first twelve weeks of pregnancy). \textit{See, e.g., Akron}, 497 U.S. 502, 507-08 (1989) (rendering a statute invalid because it prevented a physician from performing an abortion on a minor without parental consent or notification unless: (1) the physician provides twenty-four hours notice to one of the minor’s parents or guardians; (2) one of the parents has consented to the abortion in writing; (3) a juvenile court authorizes the minor to consent independently; or (4) the juvenile court by inaction provides constructive authorization for the minor to consent).

\textsuperscript{34} \textit{See} Akron, 497 U.S. at 508 (describing the steps of the bypass procedure: (1) the juvenile has to file a complaint in juvenile court stating she is pregnant, unmarried, under the age of
When the Court first established in Roe v. Wade that a woman’s right to privacy guaranteed her the right to choose whether or not to terminate her pregnancy, it also firmly established that this right is subject to compelling state interests. These state interests are subject to a less rigorous test than the “compelling state interest test” articulated in Roe v. Wade. When the Court established that a minor is entitled to an abortion if she (1) is at least 18 years old and emancipated; (2) she desires an abortion without notifying her parents; (3) she has sufficient maturity and information to make an intelligent decision about having the abortion without notice; (4) one of her parents has physically, sexually or emotionally abused her; or that notice is not in her best interests; and (5) whether she has or has not retained an attorney).

35 See Bellotti, 443 U.S at 635 (noting the Court has held that the states can limit the freedom of children to make choices because during the “formative years” of childhood and adolescence, minors often lack the experience, judgment and perspective to choose what would be beneficial and not harmful to them).

36 See Roe v. Wade, 410 U.S. 113, 154 (1973) (explaining that the state may regulate the right to privacy in the interest of public health, medical standards, and protecting potential
woman’s right to privacy guaranteed her the right to terminate her pregnancy in the first trimester, the Court declined to determine whether minors were entitled to this right without parental consent.\textsuperscript{37} Subsequently the Court has concluded that the state may regulate a minor’s right to choose more stringently than adults.\textsuperscript{38} In addition to the state interests that may take precedent over a woman’s right to privacy concerning her decision to have an abortion, the state may also act to protect parental rights.\textsuperscript{39}

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\textsuperscript{37} See Roe, 410 U.S. at 165 n.67 (declining to determine whether state statutes which require the written permission of a minor’s parents or of a married woman’s husband are constitutional).

\textsuperscript{38} See Carey, 431 U.S. at 692 (admitting that historically the Court has been reluctant to deal with the “vexing” question of the power of the state to regulate conduct of minors because there may not be a precise answer).

\textsuperscript{39} See generally Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy, Note, 88 HARV. L. REV.
B. **Roper v. Simmons: The Establishment of a Bright Line Rule Excluding all Juveniles from the Death Penalty Because they are Inherently Less Mature and Criminally Culpable then Adults.**

In *Roper*, the Court determined that adolescents are not fully formed adults with full moral responsibility, and consequently it cannot impose the same standard for punishment that pertains to adults. The Court acknowledged that juvenile offenders have committed many brutal crimes, but rejected a proposal that every juvenile should be evaluated on a case-by-case basis to determine each offender’s individual culpability and eligibility for the death penalty. Even an expert


1001, 1014 (1975) (articulating that while the state may not have a sufficiently compelling interest to deny a fundamental right to minors, parental involvement may justify increased state involvement).

40 See *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (explaining that the death penalty is an ineffective form of deterrence because it is unlikely that juveniles, who tend to be more impetuous and irresponsible than adults, would consider the possibility of execution before committing a crime).

41 See *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (rejecting petitioner’s argument that, based on the Court’s individualized assessment of the aggravating and mitigating factors for the case of every offender, barring the death penalty for anyone
psychologist may not be able to differentiate between the juvenile offender whose crime is the result of his immaturity and the rare juvenile offender who is beyond rehabilitation.\textsuperscript{42} The Court found it could not equate the failings of a minor with an adult because a minor’s character deficiencies are more likely to change, and as he matures his impetuousness and recklessness will subside.\textsuperscript{43} Moreover, the very characteristics that lessen the culpability of juveniles make them less susceptible to deterrence, and life imprisonment may be a sufficiently severe punishment.\textsuperscript{44}

under the age of eighteen is arbitrary and unnecessary because there is an “unacceptable” likelihood that the brutality of a crime would overpower the mitigating circumstances of an offender’s youth).

\textsuperscript{42} See id. at 569 (reasoning that because juveniles are still struggling to form their own identity, it is less certain that when a juvenile commits a heinous crime it reflects an irretrievably corrupted character).

\textsuperscript{43} See id. (predicting a relatively small percentage of adolescents will retain these risky behaviors into adulthood).

\textsuperscript{44} See id. at 537 (stating that the death penalty is meant to fulfill two social purposes, first, retribution for heinous crimes and second, deterrence of capital crimes by prospective
C. Parallel Holdings on the Constitutionality of the Death Penalty for Individuals with Mental Retardation and the Juvenile Death Penalty.

The Court’s rulings on the constitutionality of the death penalty for the mentally retarded has served as a model for subsequent holdings regarding the juvenile death penalty.\textsuperscript{45} After the Court upheld the constitutionality of the death penalty for the mentally retarded in \textit{Penry v. Lynbaugh}\textsuperscript{46}, it went on to affirm the validity of the juvenile death penalty in \textit{Stanford v. Kentucky}\textsuperscript{47}. Three terms later, in \textit{Atkins v. Virginia} (offenders).

\textsuperscript{45} See \textit{id}. at 564 (comparing the evidence in Atkins v. Virginia, that thirty states had prohibited the death penalty for the mentally retarded, with the evidence of the thirty states which prohibited the juvenile death penalty in 2005).

\textsuperscript{46} 492 U.S. 302 (1989)

\textsuperscript{47} See \textit{Stanford v. Kentucky}, 492 U.S. 361, 378 (1989) (rejecting petitioner’s argument that the Court should apply its own informed judgment for a national consensus which supported the juvenile death penalty); \textit{see also Roper}, 543 U.S. at 562-63 (explaining that the \textit{Stanford} Court would not deem the death penalty for the mentally retarded cruel and unusual punishment without a national consensus to indicate contemporary standards of decency).
the Court held that according to evolving standards of decency the execution of the mentally retarded was cruel and unusual punishment. The reasoning of the Roper court relied heavily on the Atkins opinion, particularly in its findings that the current national consensus objects to the execution of the mentally retarded as cruel and unusual punishment.

**III. ANALYSIS**

In Roper, the Court relied on the Eighth Amendment rights of juveniles to apply a bright line rule distinguishing all

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48 See 536 U.S. 304, 319 (2002) (finding that unless the imposition of the death penalty on a mentally retarded individual significantly impacts one or both of the punishment’s goals of retribution or deterrence it is a useless imposition of pain and suffering and thus unconstitutional).

49 See Roper v. Simmons, 543 U.S. 551, 562-3 (2005). (supporting the notion that there was a national consensus against the death penalty for the mentally retarded because at the time of the Atkins decision, thirty states had already prohibited the execution of the mentally retarded, including twelve that had prohibited the death penalty altogether, and the execution of the mentally retarded in states that did not formally prohibit the practice was still extremely rare).
juvenile offenders from adults.\textsuperscript{50} If the Court applied a similar bright line rule to female minors seeking abortions, it would prevent female minors from invoking their right to privacy.\textsuperscript{51} Until now, the Court has recognized that some minors may be mature enough to make an independent decision, or that parental involvement is simply not in the best interests of all minors.\textsuperscript{52} If the Court followed the precedent it set in \textit{Roper} and categorized all adolescents as inherently immature, it could give the states license to enact blanket parental involvement.

\textsuperscript{50} See \textit{Roper}, 543 U.S. at 561-63 (reviewing the history of the juvenile death penalty, from the Court’s affirmation that it does not violate the Eighth Amendment until the recent \textit{Atkins v. Virginia} decision which held that capital punishment for the mentally retarded does violate the Eighth Amendment).

\textsuperscript{51} \textit{See, e.g.}, Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476, 504 (1983) (affirming that the state’s interest in protecting immature minors will justify a parental consent statute, but the statute must still provide for an alternative).

\textsuperscript{52} \textit{See Ayotte v. Planned Parenthood of Northern New England}, 126 S.Ct. 961, 966 n.2 (2006) (acknowledging that some young women do not have a parent who can provide rational, loving guidance and advice).
provisions without an alternative. \(^{53}\) To protect the best interests of minors in all situations, the Court should maintain its prohibition of the juvenile death penalty for minors while continuing to invalidate parental involvement statutes that do not provide an alternative to a female minor seeking an abortion. \(^{54}\)

A. The Court Should not Apply a Bright Line Rule to Minors Seeking Abortions because it Would Completely Diminish their Right to Privacy.

The Court has not protected the right to privacy of minors

\(^{53}\) See Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 525 (1990) (Scalia, J. concurring) (reminding the state to act with particular sensitivity when it enacts parental involvement statutes because of the unique nature of the abortion decision as compared to other decisions a minor must make); see also Saharsky, supra note 14, at 1157-58 (noting that the effects of the decisions to execute a juvenile or deny a young woman an abortion are more serious and irreversible than other constitutional deprivations).

\(^{54}\) See Ayotte, 126 S.Ct at 966 n.2 (noting the most common reason adolescent females do not notify a second parent when they must notify at least one parent according to the consent statute is because the second parent was abusive and notification would have provoked further abuse).
as staunchly as it has protected minors’ Eighth Amendment rights.\textsuperscript{55} The Eighth Amendment is explicitly written in the Constitution, and clearly prohibits cruel and unusual punishment and excessive sanctions.\textsuperscript{56} A woman’s right to privacy, gleaned from several amendments and the Bill of Rights, is susceptible to competing state interests such as health concerns, medical standards and prenatal life.\textsuperscript{57} By definition the juvenile death penalty is unconstitutional.\textsuperscript{58}

\textsuperscript{55} See Roper v. Simmons, 543 U.S. 551, 568 (2005) (noting that a majority of the states have already prohibited capital punishment for minors, and that the Court now holds that the Eighth Amendment requires the legislature to outlaw the juvenile death penalty).

\textsuperscript{56} See Gregg v. Georgia, 428 U.S. 153, 169 (1976) (reviewing the history of the phrase “cruel and unusual punishment” from its origination in the English Bill of Rights in 1689 to the American drafting of the Eighth Amendment, as the emphasis shifted from punishment outside of the sentencing court’s jurisdiction to proscribing outright torture).

\textsuperscript{57} See Roe v. Wade, 410 U.S. 113, 153 (1973) (describing such harm as a threat to the physical health of the mother, as well as the potential psychological harm, and the distress for all concerned with an unwanted child in a family that is not equipped to raise it, and the stigma of unwed motherhood).
penalty violates the Eighth Amendment because the Roper decision determined that it constitutes cruel and unusual punishment and excessive sanctions.\textsuperscript{58}

If the Court established a similar bright line rule for minors seeking an abortion, it would nullify the female minor’s right to privacy in any situation.\textsuperscript{59} In Roper the Court admitted that choosing eighteen as a cutoff age was somewhat arbitrary, and failed to account for a wide range of levels of maturity amongst juveniles, but such a bright line rule was necessary to prevent a violation of the Eighth Amendment.\textsuperscript{60}

\textsuperscript{58} See Roper, 543 U.S. at 556 (noting that the imposition of the death penalty on juveniles is less likely to fulfill the two main goals of capital punishment, deterrence and retribution, and thus cause unnecessary pain and violate the Eighth Amendment).

\textsuperscript{59} See Roe, 410 U.S. at 153 (applying the Fourteenth and Ninth Amendments to the protection of a woman’s right to choose whether or not to terminate her pregnancy).

\textsuperscript{60} See Roper, 543 U.S. at 574 (holding that even though a categorical rule of eighteen years is problematic because adolescents mature at different rates, it had to set a boundary between adulthood and childhood); see also Scott, supra note 4, at 561 (arguing that a categorical age of majority is a “crude”
made a similar determination regarding female adolescents seeking abortions, it would deny all minors their right to privacy. Yet minors are entitled to the right to privacy guaranteed to women in Roe v. Wade, when the Court held that a woman has the right to decide (with her physician) in the first trimester whether or not to terminate her pregnancy. While state interests can override the adolescent female’s right to privacy, a bright line rule classifying all female minors as judgment on maturity and age, but it is usually an effective mechanism for making a legal distinction between juveniles and adults).

61 See generally Carol Sanger, Between Autonomy and Dependency: Pregnancy and Parenthood in Adolescence Sexual and Reproductive Autonomy in U.S. Law, 18, INT’L J.L. & POL’Y & FAM. 305, 309 (2004) (explaining that the bypass system is guided by two constitutionally imposed requirements: (1) to protect the minor’s anonymity to avoid alerting her parents; and (2) the process must be expeditious to ensure that an abortion could take place before legal viability of the fetus).

62 See Roe, 410 U.S. at 153 (noting the detriments the state would impose upon a woman by denying her the right to terminate her pregnancy include: medical harm, psychological distress, and the stigma of unwanted motherhood).
incapable of making a decision without the advice of their parents would eradicate it altogether.  

Currently, the courts do often find that if a statute does not meet the established requirements, it is unconstitutional for enforcing a blanket parental consent provision.  

For example, in Foe v. Vanderhoof the court recognized that while a minor’s right to privacy is not absolute and is subject to particular limitations by the state, a statute which provided no alternative to parental consent did not further the state interests recognized in Roe because it did not account for the

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63 See Bellotti v. Baird, 443 U.S. 622, 639 (1979) (noting that Massachusetts has attempted to reconcile a woman’s right to privacy with the state’s special interest in encouraging the minor to seek the advice of her parents). See generally Sanger, supra note 60, at 309 (interpreting Bellotti as a compromise between the constitutional right to privacy of minors and parental rights, because it held that minors have the right in some situations to make an independent decision).

64 See Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 90 (1976) (Stewart, J., concurring) (finding the “primary constitutional deficiency” of the Missouri parental consent statute was an absolute limitation placed on the minor’s right to choose to terminate her pregnancy).
length of the pregnancy or special reasons to excuse the consent requirement.\textsuperscript{65} While the Roper decision does not leave the courts with the option of considering the individual circumstances of the defendant, in Foe the court made its ruling based on the specific circumstances of this particular young woman: she was mature, she was not living at home and she was able to give informed consent.\textsuperscript{66}

B. When to Make an Exception: The Court Should Require Exceptions to Parental Consent and Notification

\textsuperscript{65} See Foe v. Vanderhoof, 389 F. Supp. 947 (D.C. Ill. 1975) (noting in the instant case that the plaintiff was in her second trimester, and in this trimester the state may only assert a compelling interest for regulating the procedure if the health of the mother is at stake).

\textsuperscript{66} See id. at 950 (explaining that the minor, despite her maturity, was unable to obtain an abortion according to the laws of the jurisdiction because her mother refused to give consent).

See, \textit{e.g.}, J. Shoshanna Ehrlich, \textit{Minors as Medical Decision Makers: The Pretextual Reasoning of The Court in the Abortion Cases}, 65 MICH. J. GENDER & L. 82, 89 (2000) (implying that the true purpose of the Missouri statute in \textit{Planned Parenthood v. Danforth} was not the welfare of adolescents and family integrity but rather to limit the rights of adolescents to seek an abortion).
Statutes.

Unlike the bright line rule in Roper holding that the state may never execute juveniles under the age of eighteen, in cases concerning the rights of minors seeking an abortion, parental notification and consent statutes must make exceptions granting minors the same autonomy as adults under certain circumstances.\(^67\) By acknowledging that there is diversity within the class of minors seeking abortions, particularly in the range of levels of maturity, the Court can require states to provide exceptions to parental notification statutes.\(^68\)

\(^67\) See Bellotti, 443 U.S. at 643-44 (listing the four standard requirements to allow a female adolescent to obtain an abortion without parental consent: (1) she establishes she is mature enough and well enough informed to independently make the decision to have an abortion; or 2) she establishes the abortion was in her best interests, and the process much (3) protect the minor’s anonymity and (4) be expeditious.

\(^68\) See, e.g., Bellotti, 443 U.S. at 643 (holding that if the state decides to require parental consent, it must also provide an alternative procedure); see also Ohio v. Akron, 497 U.S. 502, 504 (1990) (holding the state has to provide an adequate process through which parental notification can be avoided if the minor is mature or notice would not be in her best interests).
In Roper the Court eliminated any institutional flexibility by declaring the imposition of the death penalty on juveniles a violation of the Eighth Amendment; this is an effective means of protecting juveniles from the death penalty, but one that would cause harm to minors seeking abortions.\footnote{69} While the judiciary bypass system may ensure that in many or even most cases the pregnant minor must consult with her parents, it does provide an institutional mechanism for allowing some minors to come to an independent decision.\footnote{70} Even with its flaws, the concept of the

\footnote{69} Compare Roper v. Simmons, 543 U.S. 551, 573 (2005) (finding a bright line rule is the only acceptable approach because it is too difficult to distinguish which juvenile are and are not amenable to rehabilitation), with Bellotti v. Baird, 443 U.S. 622, 632 (1979) (declaring that a parental notification statute was too broad because it allowed parental interests to supercede what would be in the best interests of the minor).

\footnote{70} See, e.g., Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 90 (1976) (Stewart, J., concurring) (clarifying that a statute, which required parental consent in most cases, would be constitutional if it provided for judicial resolution of a conflict between a parent and child and judicial determination that the minor was mature enough to give informed consent without her parents’ approval or if the abortion was in
judiciary bypass system prevents a bright line rule because it acknowledges a diversity of growth and capability among this particular group of minors. While states cannot enact statutes allowing the death penalty for juveniles, a state legislature may modify its parental involvement statute to pass constitutional scrutiny. For example, after the Court held Missouri’s parental consent statute invalid because it imposed a special consent provision as a prerequisite for termination without sufficient justification, the Missouri legislature modified the statute to provide that a judge could (1) grant the petition for majority rights for the purpose of obtaining an abortion, (2) find the abortion in the best interest of the minor and give judicial

her best interest).

71 See Foe v. Vanderhoof, 389 F. Supp. 947, 955 (D.C. Ill. 1975) (determining that the minor’s right to privacy was stronger if she did not live with her parents and made a voluntary and informed decision regarding abortion).

72 See Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 51, 75 (1976) (emphasizing the Court’s finding in this case that the parental consent statute is invalid does not mean that the Court will find every similar statute invalid, as long as it provides certain exceptions).
consent, or (3) deny the petition. The Court accepted the statute’s new language because it allowed a judge to deny the minor’s petition for an abortion only after it reviewed evidence of the emotional wellbeing and maturity of the minor. Unlike the juvenile death penalty, states may enact statutes that give more control to parents and the state as long as they provide for an alternative.

C. The Court has Appropriately not Classified Adolescents Seeking Abortions as Collectively Immature because it Recognizes that the Particular Situation of the Pregnant Minor May Warrant her Expedited Maturity.

In both decisions concerning the juvenile death penalty and

73 See Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476, 493 (1982) (rejecting plaintiff’s argument that the Court of Appeals’ conclusion that the denial of the petition would require the court to find the minor was not mature enough to make her own decision and the abortion was not in her own interests was unreasonable).

74 See Foe, 389 F. Supp. at 955 (distinguishing any “good cause” from the specific requirements for “good cause” in this statute such as the emotional or physical health of the minor).

75 See Sanger, supra note 60, at 318 n.14 (explaining that the bypass hearing saves parental consent statutes, and the Court has affirmed several times that it satisfies any constitutional doubt regarding a notification statute).
minors seeking abortions, the courts recognize that adolescence is a unique period of development in between childhood and adulthood. While both the Roper decision and Supreme Court cases involving the rights of minors seeking an abortion have referred to minors as inherently less mature than adults, only the Roper decision has categorized all minors as inherently less mature than adults. Rather than categorize all minors seeking abortions as too immature to make an independent decision, the

76 See Bellotti v. Baird, 443 U.S 622, 635 (1979) (noting that the Court has held that the states can limit the freedom of children to make choices because the Court realizes that during the “formative years” of childhood and adolescence, minors often lack the experience, judgment and perspective to choose what would be beneficial and not harmful to them).

77 Compare Roper v. Simmons, 543 U.S. 551, 573 (2005) (explaining that the Court had to establish a bright line rule rather than allow courts to evaluate juvenile offenders on a case-by-case basis because the jury might allow the details of a particularly cold blooded claim to overcome the mitigating factor of the defendant’s youth), with Bellotti, 443 U.S. at 644 n.23 (indicating that the sensitive nature and serious consequences of the abortion decision requires a case-by-case evaluation of the maturity of the minor).
Court has held that parental consent or notification laws must provide for exceptions if the adolescent proves she is mature enough to make an independent decision or that parental involvement would not be in her best interest.\textsuperscript{78}

To support its bright line rule, the Roper Court pointed to a professional rule that forbids psychiatrists from diagnosing any juvenile under the age of eighteen as having an antisocial personality disorder, because it is so difficult for psychiatrists to distinguish between the immature juvenile offender and the “rare” juvenile offender that is beyond rehabilitation.\textsuperscript{79} In contrast in \textit{Bellotti v. Baird}, the Court accounted for variation in growth and maturation among young woman, and held that the state could not enforce a blanket provision requiring parental consent.\textsuperscript{80} The \textit{Bellotti} court found

\textit{See, e.g., Bellotti}, 443 U.S. at 642 (adding that bearing a child is one of the traditional criteria for termination of the legal disabilities of minority).

\textit{See, Roper}, 543 U.S. at 573 (reasoning if trained psychiatrists will not diagnose any juveniles as having an antisocial personality disorder, then the states should refrain from asking jurors to make an even more serious diagnosis that the offender is eligible for the death penalty).

\textit{See Bellotti}, 443 U.S. at 642 (listing other factors such as
that a parental notice statute was unreasonable because it required parental notice in every case that the parent was available, but many, and perhaps even a large majority of minors are capable of giving informed consent.\textsuperscript{81}

While the classification of juveniles as less mature than adults protects them from the death penalty, allowing female minors to decide whether or not to terminate their pregnancy necessitates almost the opposite assumption.\textsuperscript{82} The classification of all juvenile offenders as immature demonstrates that adolescents’ characteristic impetuous and risky behavior is a probable cause of their current education, employment skills, financial resources and emotional maturity that would make unwanted motherhood particularly burdensome for a minor).\textsuperscript{81}

\textsuperscript{81} See id. (explaining that the Massachusetts statute in question stated an unmarried mother under the age of eighteen needs the consent of both her parents in order to obtain an abortion).\textsuperscript{81}

\textsuperscript{82} See Saharsky, supra note 14, at 1148 (arguing that many state statutes providing for parental involvement in a minor’s decision to have an abortion do not actually define what makes a minor mature, but rather leave this determination to a judge or parents).
incarceration. Furthermore, such an assumption allows for the possibility of rehabilitation, but if the offender is beyond rehabilitation he or she will remain incarcerated, and not pose a threat to the public. It would be inconsistent to punish a child in furtherance of the same goals of harsh retribution and deterrence that apply to adults, when the court assumes that children cannot take care of themselves. It would also be

83 See Thompson v. Oklahoma, 487 U.S. 818, 825 n.23 (1988) (stating that the statutes from Oklahoma and other states reflect society’s vision of children as a class because they do not yet act as adults who can fully consider the costs and consequences of their actions, so society must act in their best interest by restricting certain choices).

84 See Roper v. Simmons, 543 U.S. 551, 574 (2005) (rejecting petitioner’s argument that, based on the Court’ individualized assessment of the aggravating and mitigating factors for the case of every offender, barring the death penalty for anyone under the age of eighteen is arbitrary and unnecessary because there is an “unacceptable” likelihood that the brutality of a crime would overpower the mitigating circumstances of an offender’s youth).

85 See Thompson, 487 U.S. at 825 (quoting Schall v. Martin 467 U.S. 253 (1984) (noting that by definition children are assumed
inconsistent to classify all minors seeking an abortion as inherently less mature than adults, when if the court or her parents deny a minor the right to obtain an abortion because she is immature, it effectively compels her to become a mother.\textsuperscript{86}

The Court was able to proscribe the death penalty for juveniles because it categorized them as a separate class in need of government intervention.\textsuperscript{87} In \textit{Roper} the court pointed to research on the development of adolescents to characterize them as generally impetuous, poor decision makers and risk takers, but the courts addressing the reproductive rights of minors have relied on scientific research that indicates that a minor incapable of taking care of themselves and subject to the control of their parents, or if parental control fails, the state must act as a guardian).

\textsuperscript{86} See, \textit{e.g.}, \textit{Bellotti v. Baird}, 443 U.S. 622, 642 (1979) (noting that the abortion decision differs in important ways from other decisions minors have to make, such as deciding whether or not to marry, because the minor who wants to marry can postpone her decision whereas an abortion is permanent).

\textsuperscript{87} See generally \textit{Saharsky}, supra note 14, at 1123 (noting that social reformers based the juvenile justice system on the principle that children are immature and need a separate system from adults).
seeking an abortion may be sufficiently mature to make an independent decision.\textsuperscript{88} In \textit{Thompson v. Oklahoma}, the decision preceding \textit{Roper} which outlawed the death penalty for all juveniles under the age of sixteen,\textsuperscript{89} the Court found that (1) adolescents tend to be less mature and have a less developed sense of responsibility than adults and these qualities often lead to impetuous actions and decisions;\textsuperscript{90} (2) juveniles are more

\textsuperscript{88} See \textit{id.}, supra note 14, at 1137 (citing Planned Parenthood of Kansas City V. Danforth, 428 U.S. 52, 91 (1976)(Stewart, J., concurring) arguing when state laws do not include the notion of maturity in abortion laws, the Supreme Court makes it central, for example, Judge Stewart’s concern that a young woman may not be able to decide whether or not she wants an abortion without “mature advice and emotional support.”).

\textsuperscript{89} See \textit{Roper}, 543 U.S. at 573 (justifying its decision in favor of a bright line rule because the severity of a heinous crime would overpower mitigating arguments based on youth even in consideration of the juvenile’s “objective immature, vulnerability and lack of true depravity”).

\textsuperscript{90} See \textit{id.} at 569 (quoting Arnett, \textit{Reckless Behavior in Adolescence: A Developmental Perspective}, 12 \textit{Developmental Review} 339 (1992) which states that virtually all states prohibit juveniles under the age of eighteen from voting, serving on
susceptible to peer pressure and negative influences;\textsuperscript{91} (3) a juvenile’s character is not as well formed as an adult’s character; as juveniles still struggle to define their identity, it is less likely that even a heinous crime proves the offender is irretrievably depraved.\textsuperscript{92} Acknowledging the research on adolescent development has allowed the legislatures to define age-based classes that account for the qualitative distinction in maturity between minors and adults.\textsuperscript{93}

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\textsuperscript{91} See Roper, 543 U.S. at 569 (citing Steinberg and Scott, \textit{Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty}, 59 \textit{AM. PSYCHOLOGIST} 1009, 1014 (2003) and explaining that juvenile’s heightened susceptibility to peer pressure is partially due to the lack of control juveniles have over their own environment compared to adults).

\textsuperscript{92} See Roper, 543 U.S. at 570 (adding that juveniles’ vulnerability and comparative lack of control over their immediate surroundings compel the court to be more lenient in forgiving them for succumbing to negative influences than adults).

\textsuperscript{93} See Thompson v. Oklahoma, 487 U.S. 815, 853 (1988) (O’Connor, J., concurring) (cautioning the Court not to substitute its
The court must be careful in its language to avoid the categorization of all minors seeking abortions as inherently immature even when a statute allows for an alternative.⁹⁴ In the Akron decision, the Court characterized young women seeking abortions as lonely, even terrified, and immature or incapable of making an independent decision, stating that it would “deny all dignity to the family” to prevent the state from ensuring that in most cases the minor would have parental guidance, and mature advice.⁹⁵ If the Court expresses this kind of sentiment “inevitably subjective judgment” pertaining to a minimum age for the death penalty for the judgment of state legislatures, because these special characteristics which distinguish juveniles from adults vary widely among individuals of the same age).

⁹⁴ See Planned Parenthood of Kansas City v. Danforth, 428 U.S. 52, 75 (1976) (concluding that providing a parent with absolute power to decide whether a child may terminate a pregnancy will not strengthen the family unit, or parental authority, when the issue of the pregnancy has already been so coercive to the family structure).

⁹⁵ See Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 520 (1990) (arguing that the state may assume that the young woman’s debate over her choices whether or not terminate
in its opinions, it may influence the judges in the judiciary bypass system responsible for the evaluation these young women.$^{96}$ The Foe court’s affirmation of the an individual young woman’s maturity and competence to make an independent decision is a better model, because it does not make generalizations about “most” young women.$^{97}$

The major Supreme Court decisions on an adolescent’s access to an abortion reflect a more nuanced approach to determining when to treat a minor as an adult in the legal system, and the Court is careful not to label all adolescents as “less mature” or “less responsible” than adults.$^{98}$ In Zbaraz v. Hartigan the

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$^{96}$ See Ehrlich, supra note 65, at 101 (arguing that parental involvement laws are not intended to promote competent decision making, but rather to stop young women from choosing abortion).

$^{97}$ See Foe v. Vanderhoof, 389 F. Supp. 947, 954-55 (D.C. Colo. 1975) (objecting to a Colorado parental consent statute because it has an unconditional requirement for adult consent without any exception for the health of the mother or viability of the fetus).

$^{98}$ See Bellotti v. Baird, 443 U.S. 622, 644 n.23 (1979) (explaining that it is difficult to determine, much less define maturity, and in some ways the minor may be an adult, but this
court concluded that a minor’s pregnancy could necessitate her expedited maturity, suggesting that a sexually active adolescent who is responsible to seek professional help for a problem, rather than fantasizing that the pregnancy will disappear, is mature enough to make a decision regarding her own health care.\textsuperscript{99} Unlike the \textit{Roper decision}, the District Court acknowledged that pregnancy may necessitate an expedited maturation in an adolescent.\textsuperscript{100} Even adolescents who lack the requisite maturity to make an informed consent may be grouped in the same class as

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\textsuperscript{99} See Zbaraz v. Hartigan, 584 F. Supp. 1452, 1457 n.6 (D.C. Ill. 1984) citing to Melton, \textit{Minors and Privacy: Are Legal and Psychological Concepts Compatible?}, 62 Neb. L. Rev. 455, 467 n.63 (1983) contradicting the Supreme Court’s conclusion that pregnant adolescents will make poorly reasoned decisions by citing research that children are no less competent than adults to make a competent decision regarding their health).
\end{quote}

\begin{quote}
\textsuperscript{100} See, \textit{e.g.}, Bellotti, 443 U.S. at 642 (proposing a pregnant minor’s youth imposes a particular burden as she assumes the legal responsibility of motherhood).
\end{quote}
their “mature” counterparts.\textsuperscript{101} Moreover, even if the minor is not mature enough to make an independent decision, it might still be in her best interests not to inform her parents of her intent to terminate her pregnancy.\textsuperscript{102}

D. The Roper Court’s reliance on Atkins Reinforces the Court’s Categorization of all Juveniles as Inherently Ineligible for the Death Penalty.

In reaching its decision on the juvenile death penalty, the Roper court relied on much of the reasoning and precedent set in the earlier Atkins decision that held the capital punishment of individuals with mental retardation unconstitutional.\textsuperscript{103} The

\textsuperscript{101} See id. at 627 n.5 (rejecting the appellants’ argument that relief should only be for the class of “mature” minors, and holding that the rights of minors who lack “adequate capacity” to give consent could be adjudicated in the suit).

\textsuperscript{102} See generally Sanger, supra note 60, at 306 (arguing that parental involvement statues are overly broad, applying not only to thirteen and fourteen year olds, but also to sixteen and seventeen year olds who may not live at home or are already mothers).

\textsuperscript{103} See Roper v. Simmons, 543 U.S. 551, 564 (2005) (relying on the rule that the Constitution allows the Court to determine evolving standards of decency independently of past precedent, as it did in Atkins to proscribe the death penalty for the
Court’s comparison focused on the shift in national consensus against the death penalty for the mentally retarded and minors.\textsuperscript{104} The Roper Court established eighteen years of age as the boundary between minors and adults, the same cutoff age upon which the Atkins court relied; specifying that the clinical definition of mental retardation requires the lack of adaptive skills that manifest in an individual functioning at a “normal” IQ by the age of eighteen.\textsuperscript{105} Perhaps most revealing in the

\textsuperscript{104} See Brief of New York et al as Amici Curiae on Behalf of Respondent at 15 (U.S. 2004) (noting that the legislative prohibitions against capital punishment for juveniles have been in effect even longer than those against the execution of the mentally retarded; five out of eighteen statutes prohibiting the execution of the mentally retarded were enacted in the year before the Court’s decision, half were enacted in the previous eight years, and all had been enacted within the previous fourteen years, but all eleven states had already passed statutes prohibiting juvenile executions).

\textsuperscript{105} See Atkins v. Virginia, 536 U.S. 304, 309 n.3 (2002) (referring to the American Association on Mental Retardation and the American Psychiatric Association’s definition of mental retardation, which states that the onset of mental retardation
Court’s interpretation of the criminal culpability of juveniles is the very similar language and reasoning that it used to describe both the diminished culpability of individuals with mental retardation and juveniles. Both courts describe the likelihood of individuals with mental retardation and juveniles to act impetuously and to follow leaders or succumb to peer pressure.

Yet there is a fundamental difference between juveniles and individuals with mental retardation that the Roper Court does not address: juveniles will eventually achieve adult status while the condition of mental retardation is permanent. Such a comparison between juveniles and another class of a permanent must occur before the age of eighteen).

106 See Roper, 536 U.S. at 571 (applying the same conclusions the Court came to in Atkins regarding the diminished culpability of mentally retarded offenders to juvenile offenders).

107 See Atkins, 536 U.S. at 317 (clarifying that there is no evidence that individuals with mental retardation are more likely to engage in criminal conduct, but there is ample evidence as to their inclination to act impetuously and follow leaders); Roper, 543 U.S. at 559 (recounting testimony regarding the defendant’s severe immaturity, impulsivity, and proclivity for outside manipulation and influence).
status emphasizes the absolute categorization of juveniles until they turn eighteen. While both individuals with mental retardation and juveniles exhibit a broad range of abilities, levels of maturity and self-control, the Court has chosen to characterize each group as a distinct class for which the death penalty is never applicable.¹⁰⁸

E. The Court has not Formulated a Bright Line Rule Regarding the Reproductive Rights of Women with Mental Retardation and it should Continue to Use This Model of Evaluating Individuals on a Case-by-Case Basis for Minors Seeking Abortions.

In contrast to the Supreme Court’s categorization of all individuals with mental retardation as insufficiently criminally culpable to be eligible for the death penalty,¹⁰⁹ neither the

¹⁰⁸ See Penry v. Lynaugh, 492 U.S. 302, 338 (1989) (reasoning that individuals with mental retardation are eligible for the death penalty because they are not a homogenous group but actually differ in levels of intelligence and capability); See also David L. Rumley, A License to Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty, Comment, 24 St. Mary’s L.J. 1299, 1320-21 (1993) (explaining that individuals with mental retardation are not a homogenous, but rather vary widely in temperament, capabilities, talent, aptitude, achievement, personality, and I.Q. scores).

¹⁰⁹ See Roper, 543 U.S. at 571 (applying the same conclusions the
Supreme Court nor the lower courts have developed a similar bright line rule concerning the reproductive rights of women with mental retardation. There are only two major state supreme court decisions on the rights of mentally retarded women to seek an abortion, and they have two very different outcomes. Rather than establish a bright line rule as in Roper and Atkins, the courts are more inclined to evaluate each case on an individual basis according to several different factors. The courts’ insistence on evaluating each case

Court found in Atkins, that the death penalty has a diminished retributive and deterrent effect on the mentally retarded, to juvenile offenders).

110 See In the Matter of Grady, 85 N.J. 235, 265 (1981) (holding that a person who is legally incompetent may be capable of making a decision about sterilization).

111 See Susan Stefan, Whose Egg is it Anyway? Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women, 13 Nova. L. Rev. 405, 436 (1989) (proposing that the Rhode Island Supreme Court’s ruling is legally preferable to New York’s because it requires procedural due process when the request for an abortion is brought by someone other than the pregnant woman).

112 See In the Matter of Mary Moe, 385 Mass. 555, 567–68, n.19,
individually and in the best interests of the woman in question should serve as a model for decisions regarding adolescents seeking abortions.\textsuperscript{113}

Just as there are many legal parallels between juvenile and mentally retarded offenders, particularly in relation to their Eighth Amendment rights, female adolescents and mentally retarded women share a similar legal status, in which they are wards of their parents or guardian.\textsuperscript{114} In \textit{The Matter of Mary Moe}, the Supreme Judicial Court of Massachusetts even compared

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\item[(1)] whether the ward is competent to make a decision concerning sterilization;
\item[(2)] the ward’s physical ability to procreate;
\item[(3)] the possibility of a less drastic means of birth control;
\item[(4)] the medical necessity for the procedure;
\item[(5)] the level of the individual’s disability).
\end{itemize}

\textsuperscript{113} See \textit{id.} at 571 n. 12 (insisting that neither the good intentions of the parent or guardian nor the convenience of the state should influence the court’s decision which must be in the best interests of the ward).

\textsuperscript{114} See, \textit{e.g.}, \textit{In re Jane Doe}, 533 A.2d 523, 525 (R.I. 1987) (acknowledging that the incompetent woman in question, if competent, would absolutely have the constitutional right to terminate her pregnancy).
the role of the judge determining whether to grant a minor’s petition to have an abortion absent parental consent to the role of the judge in determining whether or not the parents or guardian of a mentally retarded woman could have her sterilized without her consent.\textsuperscript{115} The Moe court declared that the state must recognize the dignity and worth of the individual and afford her the same rights and choices that it affords to a competent person, such as the right to privacy.\textsuperscript{116} Moreover, the Court recognized that a woman with mental retardation, who is legally adjudicated incompetent, might be capable of making certain decisions.\textsuperscript{117} In its commitment to evaluate each case

\textsuperscript{115} See \textit{In the Matter of Moe}, 385 Mass. at 570 n. 8 (explaining that just as a judge may determine that an adolescent is competent of consenting to an abortion, so too can the judge determine that an incompetent individual may give informed consent to a sterilization procedure).

\textsuperscript{116} See \textit{In re Jane Doe}, 533 A.2d at 564-65 (affirming that the state cannot deny incompetent individuals the same procreative rights as competent individuals enjoy).

\textsuperscript{117} See \textit{id.} at 567-68 (cautioning an individual who is legally incompetent to make some decisions regarding his or her health, finances and general welfare may be able to make other decisions regarding sterilization).
individually to best protect the privacy rights and best interests of women with mental retardation, the Moe decision provides a strong model for jurisprudence concerning the reproductive rights of teenagers.\textsuperscript{118}

\textbf{F. The Prohibition of the Death Penalty for Juveniles and Parental Notification Laws Can Co-Exist, Because Both Fulfill the Court’s Duty to Protect Juveniles.}

In \textit{Thompson v. Oklahoma}, the Court characterized the role of the law with regard to minors as the “beneficent face” of paternalism, a “caring, nurturing” parent who must make decisions for a child not yet prepared to determine the direction of his or her life.\textsuperscript{119} The Court’s heightened duty to protect minors is the sole justification for deprivations of rights that would be unconstitutional for adults.\textsuperscript{120} The state

\textsuperscript{118} See \textit{id.} at 564 (holding the government unlawfully deprives a woman of her right to privacy if it denies her the opportunity to choose sterilization).

\textsuperscript{119} See \textit{Thompson v. Oklahoma}, 487 U.S. 815, 825 n.23 (1988) (explaining that rights are only meaningful is they are exercised by agents acting with the knowledge and understanding of the principles of those rights).

\textsuperscript{120} See \textit{id.} (listing the right to marry and the right to vote as examples of rights the state may deprive of children but not of adults).
has a duty to enact laws, such as those affecting the juvenile
death penalty and parental notification and consent statutes,
which will serve the best interests of minors.\footnote{121}{See id. (noting the law is flexible in the manner which it
accords rights to those who cannot make independent decisions,
including children).}

Following the Roper decision, juveniles under the age of
eighteen are actually entitled to a heightened Eighth Amendment
protection, because the execution of juveniles is cruel and
unusual punishment.\footnote{122}{See id. at 825 (noting that children are inherently incapable
of caring for themselves, and therefore are the responsibility
of their parents and the state).} This decision is obviously in the best
interest of juveniles – protecting their Eighth Amendment rights
by determining that they are entitled to different standards of
the Eighth Amendment test than adults.\footnote{123}{See Roper v. Simmons, 543 U.S. 551, 553 (2005) (ruling that
the Eighth Amendment requires the prohibition of the death
penalty because capital punishment has to be limited to
offenders who are so culpable that they are the most deserving
of an execution).} The Court, however, has compromised the constitutional rights of female minors in
finding that competing state and parental interests may override
their right to privacy when parental involvement is in the minor’s best interest. It is only when the female minor can demonstrate what the *Roper* decision has categorically denied, that she is sufficiently mature to make her own decision and invoke her constitutional right, that she can gain an equal right to privacy as an adult. While there are several competing interests to determine whether or not a minor may obtain an abortion, ultimately all parties are competing for who will determine what is in the best interests of the minor.

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124 See Planned Parenthood of Kansas City v. Danforth, 428 U.S. 52, 94-95 (1976) (Stewart, J. and Powell, J., concurring) (clarifying that the purpose of the parental consent requirement is not merely to fulfill the parent’s or state interest, but rather to enforce a woman’s right to choose as determined in *Roe v. Wade*).

125 See Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 503 (1990) (finding that a statute satisfies constitutional requirements because it allows a minor to demonstrate she is sufficiently mature to make a decision without parental influence).

126 See *Danforth*, 428 U.S. at 94-95 (Stevens, J., concurring) (reasoning that the state’s interest in protecting children necessitates protective measures, thus the minor cannot make an
IV. Recommendations

Not only should the Court evaluate each individual case of a young woman seeking an abortion, but the Court must also ensure that the system responsible for this evaluation is actually effective in providing an alternative to parental consent and notification laws.\textsuperscript{127} This system demonstrates the Court’s confidence that some minors are capable of making an independent decision, and grants permission to almost all minors who enter the system.\textsuperscript{128} If the system is too complicated or enforceable bargain because he or she may not foresee the consequences of his or her actions); see also Bellotti v. Baird, 443 U.S. 622, 638 (1979) (conceding the “guiding role” of parents in raising their children justifies limitation on the freedoms of adolescents).

\textsuperscript{127} See generally Sanger, supra, note 60 at 309 (describing judges who regularly grant bypass petitions have testified that they often feel ill equipped to assess a minor’s maturity or her best interests).

\textsuperscript{128} See Stephanie A. Zavala, Defending Parental Involvement and the Presumption of Maturity in Minors’ Decisions to Abort, 72 S. Cal. L. Rev. 1725, 1778–29 (1999) (noting the court only denied the right to obtain an abortion to fifteen out of 3,573 judicial bypass petitions filed in Minnesota between 1981 and 1986,
difficult for a young woman to negotiate, it effectively creates a bright line rule because there is no real alternative. The Court must be vigilant in denying the validity of statutes that seriously diminish the minor’s opportunity to seek a judiciary bypass. Otherwise, the judiciary bypass system is merely, as Justice Blackmun described in his dissent in Akron, a horribly

because the minor was not mature enough and the abortion was not in her best interests, and only nine out of 477 petitions in Massachusetts were denied between 1981 and 1985).

129 See Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 526 (1990) (Blackmun, J., dissenting) (arguing that the statute in question does not create a judicial bypass system that would be sensitive to the needs of minors, but rather has created a “tortuous maze” and excludes the mature minor who might not have the intellectual ability to understand the convoluted paperwork, and it “spurns” the immature minor who is abused or for some reason argues that an abortion without informed consent would be in her best interest).

130 See, e.g., Ehrlich, supra note 65, at 82 (implying that the true purpose of the Missouri statute in Planned Parenthood of Kansas City v. Danforth was not the welfare of adolescents and family integrity but rather to limit the rights of adolescents to seek an abortion).
traumatic experience for a young woman, considering the strong possibility that the minor is pregnant as a result of sexual abuse and the minor would probably not be able to seek “compassionate” advice from her parents. Justice Blackmun criticized the overly complex system as a covert attempt to prevent young women from obtaining consent to make an independent decision.

The Court should not allow waiting period and informed consent statutes that are essentially institutionalized barriers to the judiciary bypass system. In Planned Parenthood of

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131 See Akron, 497 U.S at 537 n.5 (noting that in 1986 more than one million children and adolescents were abused by their parents, and this figure is minimal due to the high rates of undetected abuse, pregnancy does not prevent, and may even encourage physical attacks).

132 See generally Zavala, supra note 127, at 1729 (noting that the average judicial bypass hearing is twelve minutes long, and ninety-two percent of all hearings are less than twenty minutes, and in some cases the judge has only five minutes to assess the minor’s competency to make an independent decision).

133 See e.g., 18 PA.CONST.STAT.(1990) § 3205. (providing the general rules regarding informed consent, and holding that except for a medical emergency all consents to an abortion must
Southeastern Pennsylvania v. Casey, the Court affirmed the validity of Pennsylvania’s informed consent provision in its parental consent statute, requiring a twenty-four hour waiting period, prior to which the physician has orally informed the pregnant woman and her parents of the nature of the medical procedure, gestational age of the fetus and medical risks associated with pregnancy.¹³⁴ Not only will a waiting period lengthen the young woman and her parents’ already very difficult decision-making process, but it also gives the state ample

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¹³⁴ See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 899 (1992) (considering Pennsylvania’s parental consent provision which provides that except for a medical emergency, a minor under the age of eighteen may not obtain an abortion unless she and one of her parents provides informed consent, or if a parent will not provide informed consent, the court may approve the abortion if it determines that the young woman is mature and capable of informed consent or that an abortion would be in her best interests).
opportunity to influence the young woman’s parents. An informed consent statute such as the one in Casey presents an extra step in which the state may influence the young woman before she goes through the judiciary bypass system. Moreover, it is illogical that the state can impose upon the parent’s decision-making process when the purpose of the parental consent provision is to allow the family to make the decision according to its own value system.

135 See Ehrlich, supra note 126, at 105 (arguing that the Court’s support of the consent requirement allows the state a double opportunity to convince female minors to keep their unborn children, now not only minors but parents are compelled to submit to the arguments of the state in favor of an abortion).

136 See 18 PA. CONST. STAT. (1990) § 3205. (listing the requirements for informed consent: the physician or another health care professional or social worker must inform the pregnant woman that (1) there is free available literature describing the unborn child and a list of agencies that provide alternatives to abortion, (2) medical assistance benefits may be available, and (3) the father is liable for support of the child).

137 See Casey, 505 U.S. at 899-900 (justifying the waiting period provision because it allows the pregnant minor to consult with her parents in private and discuss the outcome of her decision.
To ensure that parental involvement laws do not effect a categorization of all minors as inherently immature and thus never capable of making an independent decision, the Court must ensure that the judiciary bypass system provide a reasonable, accessible alternative to minors seeking an abortion.\textsuperscript{138} Otherwise, even if the Court does not declare a bright line rule, it will essentially create one, by allowing for a system which provides the state unnecessary opportunities to influence young women who are capable of making an independent decision, or to even prevent them from the opportunity to make such a decision altogether.\textsuperscript{139}

\textsuperscript{138} See, \textit{e.g.}, Ehrlich, \textit{supra} note 65, at 84 (criticizing the Court in Planned Parenthood of Kansas City v. Danforth for failing to consider whether the Missouri statute, which subjected the abortion decision to a parental consent requirement, was actually protecting the welfare of female adolescents and the integrity of the family, or if it was actually seeking to limit the abortion rights of minors).

\textsuperscript{139} See \textit{id.}, \textit{supra} note 65, at 105 (arguing that while parents are not required to participate in their daughters’ decision to become a mother, parental consent requirements can compel a
V. Conclusion

This Casenote agrees with the Court’s decision in Roper v. Simmons to classify all minors as inherently immature to protect them from the imposition of the death penalty.\textsuperscript{140} The Roper decision, however, should not set a precedent for the Court to allow states more control over the abortion rights of female minors.\textsuperscript{141} While the Court may interfere with a minor’s constitutional rights if it is in his or her best interest, the Court must be careful not to allow the state, parents or guardians to interfere unless the minor is truly incapable of making an independent decision.\textsuperscript{142}

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\textsuperscript{140} See discussion supra Part III.E (explaining that the Court’s first and foremost duty is to protect juveniles, as it does in the Roper decision).

\textsuperscript{141} See discussion supra Part II.B (noting the Court’s rejection of the proposal that the criminal system evaluate juveniles on a case-by-case basis to determine whether or not a juvenile offender is sufficiently criminally culpable to be eligible for the death penalty).

\textsuperscript{142} See discussion supra Part III.C (agreeing with the Court for allowing pregnant minors to prove that they are sufficiently
In the context of the juvenile death penalty, the Court should act as the definitive paternal force and establish a bright line rule that will preserve the minor’s constitutional right.\textsuperscript{143} This precedent, however, should not be applied to one of the other most controversial and fundamental rights of minors, the right to terminate a pregnancy.\textsuperscript{144} A bright line

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\textsuperscript{143} See Thompson v. Oklahoma, 487 U.S. 815, 825 n.23 (1988) (defining children as incapable of taking care of themselves, subject to the control of their parents, and if their parents fail, the state must fulfill its role of parens patriae).

\textsuperscript{144} See discussion supra Part III.D (arguing that the Court should follow the model it set in its decisions dealing with the autonomy of individuals with mental retardation over their own reproductive rights when deciding cases concerning adolescents seeking abortions, and decide these cases on a case-by-case basis).
distinction between minors and adults would fail to account for female minors who are capable of making their own decisions, or for whom parental consent would not be in their best interests.\(^{145}\)

Ultimately, the Court must decide what is in the best interest of the juvenile, and protect or infringe upon his or her constitutional rights accordingly.\(^{146}\) While the Court can strengthen the minor’s Eighth Amendment right because it overrules any state interest in the juvenile death penalty, the Court should not apply a bright line rule to minors seeking abortions, because such a rule would nullify the minor’s right to privacy.\(^{147}\) By advising a case-by-case approach rather than a

\(^{145}\) See Ehrlich, supra note 65, at 84 (arguing that the Planned Parenthood v. Danforth decision failed to consider that the Missouri statute effectively assumed young women could embrace but not avoid motherhood).

\(^{146}\) See discussion supra Part III.E (concluding that the Roper precedent of a bright line rule distinguishing between minors and adolescents and a case-by-case evaluation of minors seeking abortions can coexist because both are in the best interests of juveniles).

\(^{147}\) See discussion supra part II.A (comparing the explicit, more established Eighth Amendment right to the more tenuous right to
bright line rule, the Court protects the right to privacy of young women because they may still have the option to seek an abortion independently.\textsuperscript{148}

\textsuperscript{148} See Carey v. Population Services, Int’l, 431 U.S. 678 (1977) (holding that the right to reproduce and whether or not to bear a child is at the heart of the constitutionally protected right to privacy. See generally Eisenstadt v. Baird, 405 U.S. 438 (1972), if the right of privacy means anything, it is the right to be from government intrusion regarding the decision of whether or not to bear a child.