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Which is greater: the right to parent or the rights of a parent? The legal and ethical quandaries when a minor child diagnosed with cancer wishes to utilize oocyte cryopreservation and advanced reproductive technology for future procreation.

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I. Introduction

Carly, a legal minor, was diagnosed with acute myelogenous leukemia and would require nine months of chemotherapy.² With her supportive parents by her side both day and night in the hospital, she went through the intense chemotherapy, finishing during her sophomore year of high school.³ Carly, now 15, has survived this life-altering disease with hopes of living a long and fulfilled life.⁴ Carly is now at the age where having children is a dream in the not too distant future, but typically one most children dream of at a very young age. Carly, as a minor, is legally incapable of making her own medical decisions.⁵ Should she have the ability to choose future procreation via some minor medical procedures and medicines through advanced cryopreservation technology without the consent of her parents?

There is an ethical conflict regarding the bodily rights of human genetic material and the rights of parents to make minor’s medical decisions. What happens when minor⁶ children are diagnosed with cancer, advanced technology allows them

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³ Id.
⁴ Id.
⁵ Id.
⁶ At common law, the minimum age of majority was 21. This has been lowered by state statute from 21 to 18 in most states. Eve Paul, Legal Rights of Minors to Sex-Related Care, 6 COLUM. HUM. RTS. L. REV. 357 (1974-75). Legal Ages, intra note 28.
the opportunity to procreate in the future, but their parent’s ultimately determine whether that medical decision is appropriate? Recently, an eight-year-old female was diagnosed with ovarian cancer. The consideration of her future fertility and potential motherhood seems frivolous at this age, but her maternal instinct of playing with babies and mimicking motherhood prevails. She will require cancer treatment, which includes surgery, chemotherapy and possibly radiation. The future is bleak with the knowledge that permanent damage to her ovaries and oocytes is likely, along with the high possibility of infertility. Let us assume she is a bit older at the time of diagnosis and has gone through puberty. Her body is capable of producing oocytes and there is technology that would allow her to freeze these eggs, preserving the possibility of caring for her very own biologic offspring in the future. Legally, she currently has no rights concerning this issue. The decision is entirely up to the parents. But what if the parents are not choosing parallel to the wishes of

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8 Id.
9 Id.
10 Oocytes are “a cell from which an egg or ovum develops by meiosis; a female gametocyte.” Mosby’s Medical Dictionary, 8th ed. (2009).
11 Radiation therapy is in itself painless. Treatment to higher doses causes varying side effects during treatment (acute side effects), in the months or years following treatment (long-term side effects), or after re-treatment (cumulative side effects). The nature, severity, and longevity of side effects depend on the organs that receive the radiation, the treatment itself (type of radiation, dose, fractionation, concurrent chemotherapy), and the patient. Most side effects are predictable and expected. ‘Infertility—The gonads (ovaries and testicles) are very sensitive to radiation. They may be unable to produce gametes following direct exposure to most normal treatment doses of radiation. Treatment planning for all body sites is designed to minimize, if not completely exclude dose to the gonads if they are not the primary area of treatment. Side Effects of Radiation Therapy, available at http://www.news-medical.net/health/Side-Effects-of-Radiation-Therapy.aspx (last visited on Mar. 12, 2013).
12 Steingraber, infra note 24.
13 Cryopreservation is “maintenance of the viability of excised tissue or organs by storing at very low temperatures.” Mosby’s Medical Dictionary, 8th ed. (2009).
the child? People are as good as the law allows them to act. Many would do what is best for their child, but what happens when parents use this parental power—knowingly or unknowingly—to hinder the child’s right to procreate in the future?

The rapidly growing and technologically advanced science of assisted reproductive medicine provides a host of means and alternatives for individuals and their families to fulfill their life dream of procreation.\textsuperscript{15} This medical technology is particularly relevant when individuals are faced with difficult or life threatening medical conditions that oftentimes renders them incapable of producing their genetic offspring.\textsuperscript{16} Justice Cardoza set forth the decision that “every human being of adult years and sound mind has a right to determine what shall be done with his own body.\textsuperscript{17} A surgeon who performs an operation without his patient’s consent commits an assault for which he is liable in damages” \textsuperscript{18} This decision sets forth an applicable standard for adult persons, but what holds when we are dealing with a minor child? The rights of minors are legally, in most cases, determined by their parent’s decision.\textsuperscript{19} There are some exceptions\textsuperscript{20} to this rule, but parents generally have the rights to determine medically what is suitable for their children, as we expect them to choose in the best interests of the child. What happens when a parent and a child

\textsuperscript{16} Id.
\textsuperscript{17} Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 127 (1914).
\textsuperscript{18} Id.
\textsuperscript{19} Bittinger, infra note 22.
\textsuperscript{20} Exceptions include emancipation, STD treatment without parental consent, pregnancy and various state statutes that give minors under the age of 18 the right to determine medical decisions. Legal Age, infra note 29; Guttmacher, infra note 90.
have different views on medical decisions that could hinder a life fulfillment in the future? The courts sometimes intervene in the instance of abuse or a perceived lack for the best interest of a child, but would the harvesting of a minor’s oocytes for potential future reproductive decisions fall into this category?21

The mature minor doctrine addresses children who are at least fifteen years of age, who might have the maturity to make decisions that differ from their parents in regards to healthcare.22 This doctrine recognizes the ability of teenage children and their cognizant to analyze the consequences of their medical decisions.23 A nebulous area in today’s society is the gray-zone between the ages of puberty24 and fifteen, in which children are physically capable of reproduction and sexual intercourse but their reproductive rights are governed by inconsistent laws that are confusing and vague in scope and purpose. Puberty is occurring in children much earlier than in years past.25 Female children grow up learning how to care for baby dolls and act like mothers, which develops the parental desire in most females at a very young age. One of the more common diseases affecting children is cancer, and if stricken with disease between the ages of puberty and the teen-aged years, their chemotherapy can (and often does) lead to infertility or severely impaired fertility.

After treatment, these children may lose their ability to have their biologic children

21 Macina, supra note 14.  
22 Ann Bittinger. Legal Hurdles to Leap to Get Medical Treatment for Children. 80 FLA. B.J. 24 (Jan. 2006).  
23 Id.  
24 Puberty is starting much younger in the United States. The average age of girls hitting puberty is 12.1 years old in African Americans and 12.6 in Caucasian females. This is an average age therefore the range can vary. Sandra Steingraber, The Falling Age of Puberty in U.S. Girls, available at 2013 at http://www.breastcancerfund.org/assets/pdfs/publications/falling-age-of-puberty.pdf (last visited March 9, 2013).  
25 Id.
without much say in their medical treatment.26 Whose decision should it be to determine a future right to procreate? The law says it is the decision of the parents, but what if the pediatric or teenage patient desires a biologic child in the future? Or, at the very least, the child’s potential for future biologic offspring by way of oocyte retrieval and cryopreservation.

Throughout legal history, the mental capabilities of minors have been heavily debated. Criminal law for instance is one area where the minor’s mental capability to understand the consequences of actions has been controversial. Minor’s heinous criminal acts have been put before the courts to decide the ability to understand the outcome of their actions, and children as young as ten years old have been charged as adults and held to the adult punishment, including life in prison.27 This contradicts the standard legal principle that minors are “disabled by age” and therefore incapable of making decisions without the parental approval.28

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26 National Cancer Institute, infra note 36.
27 Griffin, infra note 120.
28 Legal Ages Laws, available at http://law.jrank.org/pages/11848/Legal-Ages.html (last visited on March 9, 2013). Age of majority varies by state statute. Most states have the age of majority for medical consent as eighteen years old (Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. Some states have specific statutes lowering that age: Ala. § 22-8-4 gives anyone over 14 the ability the make their own medical decisions; Ark § 20-9-602 gives any minor with sufficient intellectual capability the right to make medical decisions; Cal § 6922 gives anyone over the age of 15 the right to consent to medical treatment; Kan § 38-123b gives anyone over the age of 16 the right to consent to medical treatment; Oreg § 109-610 gives anyone over the age of 15 the right to consent to medical treatment; RI § 23-4.6-1 gives anyone over the age of 16 the right to consent to medical treatment; SC § 20-7-280 gives anyone over the age of 16 the right to consent to medical treatment. Other states have laws making the age of majority greater than 18 years old, such as Mississippi, Nebraska.
Additionally, medical treatment in certain areas has been extended to minors without the approval and sometimes even the knowledge of parents. Contraceptives and sexually transmitted diseases constitute an area of autonomous patient medical decision-making in which states vary on the age requirement and parental knowledge prior to treatment, but overall most states allow minors to get contraceptive and STD treatment without the approval of their parents. By allowing minors to gain medical treatment regarding an area in which sex and the possibility of pregnancy is a risk; legal experts are implicitly agreeing that minors are therefore mature enough to make medical decisions associated with sex. There are actually some states that allow minors to have an abortion without parental knowledge. Conversely, why would minors not be able to protect their parental rights to have future offspring through advance reproductive technology?

Our society is founded on the liberties provided to us by the United States Constitution, which include the right to procreate. Which legal standard is greater: the right for parents to make medical decisions for their minor children, or the rights of those minors to procreate?

II. Overview of Childhood Cancer

A future aspiring pediatric neurosurgeon, Shanna was diagnosed with a brain tumor at fourteen-years-old. Shanna considers herself as “one of the lucky ones”
who fought and survived this disease, and has a bright future full of life.34 Through this experience she has learned to not take life for granted, and has aspirations to save lives in the medical profession in the future.35 Her ability to have children in the future is somewhat of a gamble through normal reproductive means.36 Shouldn’t Shanna have the ability to make future parental choices through the use of advanced cryopreservation therapy?

Cryopreservation is a process that entails powerful hormonal medications and some minor surgical procedures, and must be decided upon and dealt with in a timely fashion, prior to any reproductive altering surgery, chemotherapy, radiation, or any combination of these.37

Cancer is still the number one cause of disease-related death for children.38 Each year, 13,400 children between the ages of birth and nineteen are diagnosed with some form of cancer.39 Additionally a staggering 12,060 children in the United States will be diagnosed with some form of cancer before the age of fifteen.40 Amongst these children, the overall survival rate has increased dramatically since 1970.41 Advances in medical technology and medicine have enabled children to

34 Id.
35 Id.
40 American Cancer Society, supra note 36.
41 American Childhood Cancer Society, supra note 39.
overcome severe disease and live fulfilling lives. Almost 80% of children will survive beyond the five-year period from diagnosis and go on to live fulfilling lives, with some long term effects and risks. One estimate states that 1 in every 900 adults is a survivor of childhood cancer, which shows the vast technological improvements allowing for survival and life after cancer.

Cancer treatment looks not only at the current side effects of treatment, but also those effects of treatment to be seen later in life. Two-thirds of all cancer survivors face a late-effect from treatment, such as infertility. Infertility, simply put, is defined as “the inability to conceive or maintain a pregnancy after twelve months of trying. This definition assumes one is dealing with healthy, reproductive age individuals without a history of fertility-damaging disease, chemotherapy treatments, or surgery to treat their malignancy. In regards to cancer, treatment is specific to the type and stage of malignancy, but frequently entails a rigorous combination of surgical intervention, chemotherapy and/or radiation therapy. Childhood cancer usually responds best to aggressive and toxic chemotherapy, as childhood cancers grow rapidly, and chemotherapy is the quickest option of treatment.

42 Id.
43 Id.
46 American Cancer Society, *supra* note 36.
48 Id.
49 American Cancer Society, *supra* note 36.
50 American Cancer Society, *supra* note 36.
Chemotherapy\textsuperscript{51} kills and can eliminate cancer cells, however the adverse effect can also damage normal cells, including those involved in reproduction.\textsuperscript{52} Specifically the risk of damage to the ovaries, and uterus can be heightened when radiation is directly targeted at those areas for treatment.\textsuperscript{53}

Another form of treatment is surgery. For some rare childhood or adolescent cancers, complete surgical removal of the reproductive organs (uterus, fallopian tube, ovaries) is necessary.\textsuperscript{54} Other malignancies require pelvic radiation therapy that typically renders the reproductive organs ineffective.\textsuperscript{55} Depending on the disease site, the treatments and side effects may vary, but any of these treatment modalities can prove particularly damaging to an individual's future fertility potential.

**III. Overview of Reproductive Technology**

With the growing medical technology and advances in reproduction, women have an array of choices before they start treatment.\textsuperscript{56} The American Society of Clinical Oncology recommends fertility preservation in cancer patients, which has become a standard method of treatment in the course of adult cancer treatments.\textsuperscript{57} Treatment of cancer may necessitate the administration of chemotherapy or

\begin{footnotes}\textsuperscript{51} Chemotherapy is “the treatment of cancer with one or more cytotoxic antineoplastic drugs ("chemotherapeutic agents") as part of a standardized regimen. Chemotherapy may be given with a curative intent or it may aim to prolong life or to palliate symptoms. It is often used in conjunction with other cancer treatments, such as radiation therapy or surgery. Traditional chemotherapeutic agents act by killing cells that divide rapidly, one of the main properties of most cancer cells. This means that chemotherapy also harms cells that divide rapidly under normal circumstances: cells in the bone marrow, digestive tract, and hair follicles.” Armstrong, supra note 44.  
\textsuperscript{52} Journey Forward, supra note 45.  
\textsuperscript{53} Id.  
\textsuperscript{54} Radiation Therapy, supra note 11.  
\textsuperscript{55} Id.  
\textsuperscript{56} SJ Lee, American Society of Clinical Oncology recommendation on fertility preservation in cancer treatment. J CLIN ONCOL. 2006;24(18): 2917.  
\textsuperscript{57} Id. \end{footnotes}
radiation therapy, which often times can lead to the late effects of infertility.\textsuperscript{58} Advancements in technology allow for multiple options of reproduction, such as cryopreservation\textsuperscript{59} of oocytes and/or embryos.\textsuperscript{60} Cryopreservation is a process that entails powerful hormonal medications and some minor surgical procedures, and must be decided upon and dealt with in a timely fashion, prior to any reproductive altering surgery, chemotherapy, radiation, or any combination of these.\textsuperscript{61} Cyropreservation is an ethical quandary among children with cancer, as the procedure requires ovarian stimulation\textsuperscript{62} in order to produce a viable amount of oocytes for withdrawal.\textsuperscript{63}

Oocyte cryopreservation\textsuperscript{64} includes one to multiple weeks of hormone injections that stimulate the ovaries to produce multiple viable oocytes.\textsuperscript{65} Through medication and an ultrasound-guided needle through the vagina, the eggs are removed and immediately frozen.\textsuperscript{66} Oocyte cryopreservation is an accepted form of assisted reproduction, widely used in cancer patients across the United States prior


\textsuperscript{59} “Cyropreservation of embryos is a proven effective technique for preserving reproductive capacity...oocytes can be frozen for many years and remain viable.” \textit{Id}.

\textsuperscript{60} \textit{Id}.

\textsuperscript{61} Seymour, \textit{supra} note 37.

\textsuperscript{62} “Although oocytes can be retrieved during a natural cycle, the yield is extremely low so controlled ovarian stimulation is routinely performed.” Sonmexer, \textit{supra} note 58.

\textsuperscript{63} \textit{Id}.

\textsuperscript{64} Human oocyte cryopreservation (egg freezing) is a “novel technology in which a woman’s eggs (oocytes) are extracted, frozen and stored. Later, when she is ready to become pregnant, the eggs can be thawed, fertilized, and transferred to the uterus as embryos.” Oocyte cryopreservation, available at http://en.wikipedia.org/wiki/Oocyte_cryopreservation (last visited Mar. 9, 2013).


\textsuperscript{66} \textit{Id}.
The American Cancer Society still lists oocyte cryopreservation as an experimental but accepted form of treatment, but in recent months acceptance and success rates have prevailed.

IV. Legality of Minor’s Medical Decisions

In the United States, all medical procedures require informed consent prior to being performed. The main driving force behind medical decisions is the patient’s ability to make the ultimate and final decision regarding their health and treatment. The patient ultimately must have the legal capacity to provide this informed consent, which the law accepts from a competent adult or the parent/guardian on a minor. The United States Supreme Court has recognized that parents possess and have the knowledge to make decisions for their minor children. Minors are deemed incapable of making a medical decision when under

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67 Seymour, supra note 37.
69 Blacks Law Dictionary defines informed consent as “a person’s agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives” Blacks Law Dictionary, 8th Ed. (2011).
70 Bonner v. Moran, 126 F.2d 121,122 (D.C. Cir. 1941) (“There can be no doubt that a surgical operation is a technical battery, regardless of its results, and is only excusable when there is express or implied consent by the patient.”).
71 Cobbs v. Grant, 502 P.2d 1, 10 (Cal 1972).
72 Scholendorff v. Society of New York Hospital, 211 N.Y. 125, 129 (1914).
73 Parham v. J.R., 442 U.S. 584, 585 (1979); Wisconsin v. Yoder, 406 U.S. 205, 232-34 (1972) (upholding the right of Amish parents to remove their children from public school to alternatively provide them with religiously-based, community-sponsored vocational training); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (according parents the right to educate their children in parochial schools); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (protecting the right of parents against state interference to have their children taught German in parochial school); see also Custody of a Minor, 379 N.E.2d 1053, 1062 (Mass. 1978) (explaining that case law has recognized that these "natural rights" of parents encompass an entire "private realm of family life" and must be protected from unwarranted state interference).
the age of majority. The age of majority varies by state through judicial or statutory law, but on average is the age of eighteen. Only three states have the age of majority greater than eighteen: Alabama, Nebraska and Mississippi. Ultimately, our legal system has decided that the courts will determine which interest prevails: (1) the natural rights of parents, (2) the responsibilities of the state, and (3) the personal needs of the child. Regarding the medical treatment of minors with cancer, time is of the essence, but the right to procreate has not yet been determined as an emergent medical right in the jurisdiction of the courts.


A minor is presumed to acquire the capacity to weigh and understand the risks and benefits of their decision once they reach the age of majority. Many states have recently accepted a concept known as the Mature Minor Doctrine, which states that some minors have the maturity to make their own medical decisions if “sufficiently mature to understand, discern and appreciate the risks and

74 Nicole Herbert, Creating Life to Save a Life: An issue inadequately addressed by the current legal framework under which minors are permitted to donate tissue and organs. 17 S. CAL. INTERDIS. L.J. 337 (2008).
76 Id.
78 Id. See also Michelle Oberman, Turning Girls into Women: Re-evaluating Modern Statutory Rape Law, 85 J. CRIM. L. & CRIMINOLOGY 15, 47 (1994); Tania E. Wright, A Minor's Right To Consent to Medical Care, 25 HOW. L.J. 525, 525-26 (1982).
79 The mature minor doctrine is a statutory, regulatory, or common law policy accepting that an unemancipated minor patient may possess the maturity to choose or reject a particular health care treatment, sometimes without the knowledge or agreement of parents, and should be permitted to do so. It is now generally considered a form of patient’s rights; formerly, the Mature Minor Rule was largely seen as protecting health care providers from criminal and civil claims by parents of minors at least 15 years of age. Melinda T. Derish and Kathleen Vanden Heuvel, Mature Minors Should Have the Right to Refuse Life- Sustaining Medical Treatment, 28 J.L. MED. & ETHICS 109, 115 (2000).
benefits.”80 The Mature Minor’s Doctrine has not set forth a concrete age standard.81 Each state sets forth their individual guidelines for minor medical consent: for example, Georgia does not recognize the mature minor doctrine. 82 This doctrine is a step in the direction to allow minors the power to participate and ultimately make a final decision for their medical health. Without a concrete age, the Mature Minor’s Doctrine is a very subjective premise when left in the hands of the court. With the earlier onset of puberty and the growing incidence of cancer among children, the medical decisions for fertility treatments are happening at a much younger age than in the past.83

The legal world accepts the emancipation84 of a child when they become a parent, regardless of the age at the time of birth.85 Furthermore, some states allow minors (not those emancipated) to get an abortion, contraceptives86, prenatal care87, and medical treatment for sexually transmitted diseases without parental consent.88 Only six states put an age requirement on the minors ability to consent to sexually

80 Id.
82 Id.
83 Steingraber, supra note 24.
84 The act by which one who was unfree or under the power and control of another is set at liberty and made his own master. Fremont v. Sandowu, 50 N. H. 303; Varney v. Young, 11 Vt. 258.
85 Available at www.depts.washington.edu on January 12, 2013.
88 Id.
transmitted disease treatment, therefore forty-four states allow a minor at any age to consent to medical treatments for their STD. According to recent studies by the Guttmacher Institute, twenty-three states and the District of Columbia allow any aged minor to consent to all contraceptive services without parental consent, twenty-four states allow only certain minors contraceptive services, and only four states have no relevant policy. Furthermore, thirty-two states and the District of Columbia explicitly allow all minors to consent to prenatal care. Twenty-seven states and the District of Columbia allow all minor parents to choose to place their child up for adoption without the consent of their parents. Connecticut, Maine, and the District of Columbia all minors to consent to abortion services, and twelve states only require parental notice of the abortion. Some states have age restrictions on

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89 Only Hawaii, Idaho, New Hampshire, North Dakota, South Carolina, and Washington have a age requirement of at least 14 years of age to consent to STD treatment. Id.

90 The Guttmacher Institute is a non-profit organization, which works to advance reproductive health including abortion rights. The institute operates in the United States and globally “through an interrelated program of social science research, policy analysis and public education.” The Guttmacher Institute in 1968 was founded as the Center for Family Planning Program Development, a semi-autonomous division of the Planned Parenthood Federation of America. Guttmacher Institute, An Overview of Minor’s Consent Law, STATE POLICIES IN BRIEF, January 1, 2013, available at http://www.guttmacher.org (last visited Mar. 9, 2013).


92 States that allow some minors to receive contraception, typically a 14/15 ages threshold—Alabama, Connecticut, Florida, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, West Virginia. Id.

93 North Dakota, Ohio, Rhode Island and Wisconsin have no relevant policy for contraceptive services. Id.

94 Id.

95 Alabama, Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Maryland, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming allow all aged minor parents to choose adoption. Id.

96 Id.

97 Connecticut, Maine and the District of Columbia allow minors to consent to abortions without any parental notice; while Alaska, Colorado, Delaware, Florida, Georgia, Illinois, Iowa, Maryland, Minnesota,
the applicability of these laws, but there is no consistency throughout the nation regarding the optimal or legal age at which a minor has the ability to consent to certain medical treatments.

This legal agreement that minors have the ability to choose sexual intercourse, and the consequences of that action, including the medical treatment potentially needed without parental consent, implicitly states that minors reaching the age of puberty are mentally capable of making life changing medical decisions, such as to parent or not to parent (abortion). Twenty-three states and the District of Columbia allow any aged minor to obtain contraception without parental consent or knowledge, accepting that children possess the ability to know the consequences of sexual intercourse and choose the option to not procreate. This change and agreement is contradictory to the traditional legal standard of minors lacking mental maturity to make medical decisions under the age of majority due to the disability of age and inability to weight the consequences of decisions.

In order for a minor to donate blood, the American Red Cross requires that people be at least seventeen years old and weigh more than 110 pounds. (In some states, the age is sixteen with a parent's permission.) This age of seventeen is not at the age of maturity, according to the legal world. The age of majority is the threshold of adulthood as it is conceptualized (and recognized or declared) in law. It is the chronological moment when minors cease to legally be considered children and assume control over their persons, actions, and decisions, thereby terminating the legal control and legal responsibilities of their parents or guardian over and for them.

Montana, New Jersey, South Dakota, and West Virginia require only parental notice, not consent. Guttmacher, supra note 90.

98 Id.

99 Id.


101 The age of majority is the threshold of adulthood as it is conceptualized (and recognized or declared) in law. It is the chronological moment when minors cease to legally be considered children and assume control over their persons, actions, and decisions, thereby terminating the legal control and legal responsibilities of their parents or guardian over and for them.
when minors can medically make their own sound decisions is inconsistent and varies by medical treatment. The ability to make sound, discerning decisions seems to be the threshold states are utilizing to determine a minor’s ability to make their own medical decisions. Where is the threshold to determine when minors can medically make their own sound decisions?

B. The Standard for Treating Minors as Adults in Criminal Circumstances

On June 16, 1944, the United States made history when they executed George Stinney (14 years old), the youngest person to be legally executed in the United States during the twentieth century. George was convicted of the murder of two girls named Betty June Binnicker (11) and Mary Emma Thames (8) who were both found in a muddy hole. He was tried and sentenced to death in the electric chair; the case was not appealed. The age of fourteen has not reached the age of maturity, is below the threshold of medical maturity according to most states, and the United States determined that Stinney at fourteen years old recognized the consequences of murder and legally executed him as punishment. This once again shows that minors under the age of fifteen are fully capable of mental recognition of consequences, and therefore should be able to make conscious decisions in regards to future procreation rights.

In February 2009, state police found 26-year-old Kenzie Houk, eight months

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103 Id.
104 Id.
pregnant, in her bed with a bullet though her head. The search for her killer ended with the most surprising murder suspect residents of Wampum, Pennsylvania, had ever seen: eleven-year-old Jordan Brown, the son of the victim's fiancé. He is one of the youngest suspects in the country to be charged with homicide. He was charged as an adult, therefore held to the consequences of life in prison or execution. At eleven years old, Brown was deemed to have the mental capability of knowing and understanding the consequences of his action.

James Bulger’s mother left her two-year-old son at the butcher shop’s door thinking that it would not take her long to return. Jon and Robert, both ten years old, took two-year-old James on a walk. During their two-mile walk, the ten-year-old boys had punched, kicked, picked up and dropped James on his head. Jon and Robert brought James onto the local railway, where they flung paint in his left eye, threw stones at him, beat him with bricks, sexually assaulted him, and covered his dead body with bricks. It was reported that James died sometime before the train hit him. The ten year olds were convicted of murder and held to adult standards for their heinous, premeditated, and brutal actions. These are just some example of when children have full knowledge and comprehension of the consequences of their actions, therefore being held to an adult standard. In this case, a standard of

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106 Id.
107 Id.
108 Id.
109 Calin, supra note 102.
110 Id.
111 Id.
112 Id.
113 Id.
punishment.

In a separate but parallel legal matter, many juveniles in the criminal system are charged as adults upon committing a crime.\textsuperscript{114} The Legislature in nearly every state has given rights for juveniles to be prosecuted as adults for crimes committed far before the age of majority.\textsuperscript{115} Similar to the age of consent for certain medical treatment, each state has the discretion to set the age at which a juvenile is able to be tried as an adult. Kansas carries the lowest threshold, as a ten year old can be charged as an adult.\textsuperscript{116} This implicitly shows that legally the juvenile at ten years old is capable of knowing the consequences of his actions, therefore capable of being held to an adult standard.\textsuperscript{117} The ages in which juveniles are tried as an adult varies, but on average most states have a juvenile capable of being charged in at least certain offenses as an adult.\textsuperscript{118}

Some states exclude certain serious juvenile crimes for juvenile jurisdiction, therefore if the age threshold is met; the crime is an adult crime. In the state of Wisconsin, if you are convicted of murder at the age of ten, you are excluded from juvenile jurisdiction and held to the adult standard.\textsuperscript{119} Twenty-two states in the country uphold an age standard for the crime of murder, with ten years old being the

\textsuperscript{114} Griffin, infra note 120.

\textsuperscript{115} Id.


\textsuperscript{117} Id.

\textsuperscript{118} Griffin, infra note 120.

minimum. Florida has the highest annual transfer rate reported, averaging 165 for every 100,000 juveniles (ages ten and above) transferred to adult court; 94% of those transfers being for felonies.

Juveniles are those defined as under the age of majority. When juveniles commit a crime, jurisdiction lies in the juvenile courts. Changing ideology, maturity of minors, and heinous crimes are factors frequently influencing a juvenile case to be transferred to adult courts. Nearly all states give the courts discretion to waive jurisdiction and transfer cases to adult court. As of 2009, forty-five states have complete discretion when it comes to judicial waiver for transfer. Thirty-four states have implemented a policy that once a juvenile has been convicted of an adult crime, regardless of age, they will always be tried as an adult. Most states allow juvenile courts to transfer certain crimes to adult jurisdiction, but many have minimum age requirements.

The minimum age expressly stated that juveniles can be transferred to adult

\[121\] Id.
\[122\] Id.
\[123\] Id.
\[124\] Id.
\[125\] Griffin, supra note 120.
\[128\] Id.
criminal jurisdiction at ten-years-old.\textsuperscript{129} Kansas is the most liberal in allowing ten-year-olds to be transferred for any criminal offense, while Vermont and Indiana uphold that age standard for murder cases.\textsuperscript{130} Many states statistics or age standards are not published and the discretion of the courts is the final say.\textsuperscript{131} The most alarming statistic is that in forty-eight states all minors awaiting adult criminal court can be held in adult jails pending trial, with only eighteen requiring youth-adult separation.\textsuperscript{132} This ultimately puts the minor in the same situation he/she would have been in if committing the same crime above the age of majority. This criminal age standard supports the argument that minors are capable of fully comprehending the consequences of their actions or decisions. If they are not mentally capable of this, courts would never allow minors to be prosecuted as an adult with the punishments as severe as the death penalty or life in prison.

Children are legally accepted as being able to fully comprehend and discern their actions in dealing with pregnancy, sexually transmitted diseases, and multiple criminal charges. The youngest criminal age standard is ten years old, and there is no legal age minimum in many instances of juvenile transfers to adult court. Our legal system allow minors to have the ability to choose an abortion, choose adoption for their child regardless of age, and also to seek and obtain medical attention regarding contraception and sexual diseases. This implicit standard shows that minors are fully able to discern the consequences of pregnancy and sexual

\begin{flushleft}
\textsuperscript{129} \textit{Id.} \\
\textsuperscript{130} Griffin, supra note 120. \\
\textsuperscript{131} \textit{Id.} \\
\textsuperscript{132} \textit{Id.}
\end{flushleft}
diseases, choosing what is right for them without the consent of their parents. If our legal system allows minors the medical choice of pregnancy, allows them to be charged as adult criminals, and in some states allows them to discontinue a pregnancy; why would the standard be any different when we are discussing oocyte cryopreservation for minors with cancer?

V. Legality of Right to Procreate

The rights to procreate and to parent one’s child are fundamental rights under both the Florida Constitution and the United States Constitution. In American Constitutional Law, fundamental rights have special significance under the U.S. Constitution. The U.S. Supreme Court recognizes those rights enumerated in the U.S. Constitution as “fundamental”. The Court further describes fundamental rights to be those rights that pre-exist the Foundation of the United States. These fundamental rights are frequently also termed ”God-given rights”, ”human rights” or ”natural rights”. All such terms refer to the fundamental nature of certain rights under the U.S. Constitution. There are two types of fundamental rights: textual, which are enumerated in the Constitution, and non-textual, which are not expressly enumerated but are deemed fundamental because “they are deeply rooted in our nation’s history and tradition…a fundamental liberty interest.” The right to procreate is a non-textual fundamental right and is discussed in Skinner v. Oklahoma.

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133 T.M.H, supra note 32.
134 Id.
135 Id.
137 Id.
In *Skinner v. Oklahoma*, these evolutionary principles appear to guide constitutional law. At issue in the *Skinner* case was an Oklahoma statute, which authorized sterilization for any habitual criminal convicted of two or more felonies involving “moral turpitude.” After a first conviction for stealing chickens, and a second for armed robbery, Oklahoma instituted sterilization proceedings against Mr. Skinner. Not wanting to give up the right to have children, he challenged the constitutionality of the statute, claiming the right to procreate as a fundamental civil right. The court agreed with him, describing procreation as “a right, which is basic to the perpetuation of a race.”

The right to privacy is a fundamental right in our U.S. Constitution. This right of personal privacy includes “the interest in independence in making certain kinds of important decisions.” The decision whether or not to beget or bear a child is at the heart of the Constitution protected choices, which applies to all United States citizens, regardless of age.

The right to procreate includes the freedom to not procreate. Contraceptive freedom has been adopted in United States law based on constitutionally guarded privacy interests for adults and minors equally. States have passed minor laws on

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140 Id.
141 Id.
142 Id.
143 Id.
144 Seal v. Morgan, 229 F.3d 567, 574-575 (6th Cir. 2000).
147 Id.
148 Id. ("While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are..."
the rights of minors to receive contraception and have an abortion without parental consent, therefore embracing this concept through minor medical rights. States have not passed any legislature that allows for minors to choose to procreate in the future with the assistance of advanced cryopreservation technology.

The Supreme Court has further recognized that a minor has the same right to privacy under *Roe v. Wade* that an adult woman has regardless of age of maturity. According to the Court, "constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority." Minors, as well as adults, are protected by the Constitution, and possess the constitutional rights of privacy and procreation. Procreation through assisted reproduction technology has been long accepted by society, but there are still the moral quandaries that play a role in the acceptance. Oocyte donation is a form of accepted assisted reproduction.

**VI. Conclusion**

A minor’s decision-making capacity regarding their own medical treatment has raised profound moral and legal issues over many years. The courts have been serving as the legal and moral arbitrator for children, all the while struggling to fairly determine resolutions for the ever-changing medical field. Cancer is the number one personal decisions "relating to marriage, procreation, contraception, family relationships, and child rearing and education." *")

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150 *Id.*
151 *Id.*
disease related cause of death for children under nineteen\textsuperscript{154}, fortunately with advancements in medical technology and treatment, the survival rate continues to improve. The success of survival also brings forth the struggle and potential to think beyond the present when dealing with childhood cancer. Fertility options are typically addressed in the course of cancer treatment for adults, but have yet been a standard treatment for children. Children with cancer still have the opportunity to have children, and with current advanced reproductive technologies, that opportunity is highly plausible.

Juveniles for over 90 years have been held to adult standards in certain criminal actions. Adult standards include juveniles as young as fourteen being executed for murder, twelve year olds being sentenced to life in prison, and multiple adult sentencing given to children as young as ten years old.\textsuperscript{155} The courts have ultimately decided that some crimes are so heinous that juveniles would have to possess the mental capability to discern the consequences, therefore held to an adult standard of punishment. If this were to be true, why would our courts not feel minors have the ability to discern their own medical treatment?

Legal assertions made throughout history support the right to procreate for all human beings, the rights of minors to gain court orders without parental consent for medical treatment, the rights of minors to receive abortions and contraceptives without parental consent, and the ability of minors to be held accountable for heinous criminal acts regardless of age. All humans have the fundamental right to

\textsuperscript{154} American Cancer Society, \textit{supra} note 36.
\textsuperscript{155} Griffin, \textit{supra} note 120.
procreate, without any definition of how that procreation should be done. Children in certain states have the authority to choose to abort a child without parental consent or simply with parental notice. Most courts agree with the Constitutional right to privacy, and allow minors the right of privacy in sexually based decisions, including the right not to parent through abortion. This implicitly states that minors have the requisite mental ability to make those sexual based medical choices, therefore why they have the mental ability to choose future procreation.

With burgeoning assisted reproductive technologies allowing for the harvest and cryopreservation of an individual’s reproductive capacity coupled with continued improvements in survival rates for childhood cancers, the issue of children’s reproductive rights becomes pertinent. As these medical technologies continue to improve and become more widely recognized and accepted as options for pediatric cancer patients, it will become paramount for courts to establish concrete legislation to define the appropriate ages and/or parental influence for decisions regarding children’s right to future procreation.