16 and Pregnant: Minors’ Consent in Abortion and Adoption

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Abstract

A minor girl’s decision about the resolution of an unplanned pregnancy is a highly contested issue. Especially contentious is the minor’s ability to consent to an abortion without the assistance of an adult such as her parents or a judge. That issue has received substantial attention from policy makers, scholars, judges and legislators. Almost no attention has been paid, however, to the decision of a minor parent to continue her pregnancy, relinquish her constitutionally-protected parental rights and place a child for adoption. In 37 states, a minor’s abortion decision is regulated differently from the decision of an adult’s, while in only 15 states is a minor’s decision to relinquish parental rights and consent to adoption treated any differently from an adult’s decision. Informed by new neuro-scientific advances in the understanding of minors’ decision-making, as well as law’s traditional treatment of minors’ decision-making in areas other than abortion, together with the legal treatment of minors’ abortion decisions, there seems little justification for leaving minors’ decisions about adoption unregulated. The justifications often advanced for the need for parental involvement in a minor’s abortion decision – the physical/medical risks, the psychological/emotional effects, and the importance of the decision – apply with equal force to the decision about adoption placement. The decision about adoption placement also differs from the abortion decision in at least one crucial respect – the legal complexity of the adoption decision, which implicates constitutionally-protected parental rights, adds another layer to the medical and moral decisions present in abortion. All states should require that minor mothers have independent legal counsel when making the decision about relinquishment of parental rights and consent to adoption placement.

¹ Professor of Law, Texas Wesleyan University School of Law. No one “builds” a law review article on her own. I would be remiss if I failed to acknowledge the contributions of many others to this project – I am grateful for the unflagging support of my faculty and helpful comments from faculty when I presented this topic, the lively engagement of my Adoption Law students, the helpful library staff, especially Laura McKinnon, who quickly and competently tracked down legal and non-legal sources alike, and the intellectually stimulating atmosphere of Texas Wesleyan University School of Law. And, as a single mother, I know it takes a village to raise a child; thanks to Mimi, Anne and Steve for their special assistance this summer, without which this article would not have been finished. This article is dedicated to my children’s birth mothers, who faced situations no mother should have to face and made decisions no mother should have to make.
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I was sixteen and pregnant. Frightened and so confused. I remember the pamphlet my school nurse handed me. Pregnant? Confused? We understand. We can help you decide which option is best for you and your baby. I needed that. An adult who would comfort me, help me and not judge. Blindly I walked into the adoption agency, seeking help, information, and my life was never the same. They used my age and my emotions for their own gain. Their offered comfort came with one agenda in mind - to make sure I chose adoption for my unborn baby. I walked in their doors as an unknowing, trusting child. I walked out as a battered mother who lost more than she could ever imagine.2

A minor girl’s decision about the resolution of an unplanned pregnancy is a highly contested issue. Especially contentious is the minor’s ability to consent to an abortion without the interference of a substitute decision-maker such as her parents or a judge. That issue has received substantial attention from policy makers, scholars, judges and legislators. Almost no attention has been paid, however, to the decision of a minor parent to continue her pregnancy, relinquish her parental rights and place a child for adoption. The assumption seems to be that such a decision is the only rational choice under the circumstances, so no protections are needed to protect that minor mother’s interests. Thus, in the vast majority of states, a pregnant minor can go through labor and delivery without her parents knowing. A pregnant minor can relinquish her parental rights in her child in order to place that child for adoption without her parents knowing. In fact, in all but 15 states, a minor can make the legally consequential decision of voluntarily terminating her parental rights without the advice of legal counsel, without a guardian ad litem representing her interests, without any adult in the room other than the representative of an adoption agency or adoptive parents. By contrast, in the vast majority of states, a pregnant minor cannot terminate her pregnancy without her parents knowing, unless a judge approves.

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

One frequent argument for parental notification in teen abortions is that parents ought to know about medical procedures performed on their children. What about childbirth by their minor children? Shouldn’t parents know about that? The risk of death and medical complications is greater with childbirth than with abortion, after all. The other popular argument rests on the significance of the decision – deciding whether to have an abortion is such an important thing that minors ought to have the advice of adults in making the decision. Parents can serve in that role, and if there is some reason why they should not be notified, then a judge can evaluate whether a minor is sufficiently mature to make the decision on her own. Why don’t we treat similarly another extremely important and significant decision, whether to terminate parental rights and place a child for adoption?

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

I. Unwed Pregnancy, Teen Pregnancy & Teen Parenting

You couldn’t be an unwed mother. Motherhood was synonymous with marriage. If you weren’t married, your child was a bastard and those terms were used. I think I’m like many other women who thought, “It may kill me to do this, but my baby is going to have what everybody keeps saying is best for him.” It’s not because the child wasn’t wanted. There would have been nothing more wonderful than to come home with my baby.³

We hear frequently about the “problem” of teen pregnancy. Most view teen pregnancy in a negative light, although there is, perhaps, less agreement on what is problematic about teen pregnancy. And what is considered problematic about teen pregnancy has differed over time, and oftentimes depends on the race of the minor mother. Thus, what we see as “teen pregnancy” is as much an issue of culture as biology.\(^4\) Race matters in how we define the problem and how we formulate the solution, as do attitudes toward sexuality, marriage and adoption.

**A. The Problem**

Is the problem of teen pregnancy one of early sexuality?\(^5\) Early child-bearing?\(^6\) At certain points in our history, rates of early childbearing, and consequently early sexuality, were substantially higher than today’s rates. In the 1950s, for example, the teen birth rate was 97 per thousand,\(^7\) while in 2010, the teen birth rate was only 31.4 per thousand.\(^8\) Of course, in the 1950s, almost all teenage mothers were married, at least by the time their babies were born.\(^9\) That is not the case today, given the decline in teen marriage.

So is the problem one of “unwed” pregnancy, representing the new immorality of premarital sex or the difficulty of single child-rearing? As to sex outside of marriage, there is


\(^6\) See discussion, *infra* at n. 237-242, of physical risks of early pregnancy and childbirth.


\(^9\) DUBIOUS CONCEPTIONS at 8. The trend of unmarried births increased from the 1950s – in 1970, about 30 percent of teen births were to unmarried couples, in 1980, about 50 percent of teen births were to unmarried couples, and by 1995, 70 percent of teen births were to unmarried couples. DUBIOUS CONCEPTIONS, *supra* n. 7, at 82. In 2010, 87% of teen births were to unmarried couples. Child Trends DataBank, *Teen Births*, [http://www.childtrendsdatabank.org/?q=node/52](http://www.childtrendsdatabank.org/?q=node/52) (visited by author July 17, 2012).
nothing “new” about that. Even during the time of the Puritans, whose very name conjures up visions of “prudish, ascetic, and antisexual,”
10 premarital sex existed. In 17th century America, one in three brides in the Chesapeake Bay colony was pregnant when married, as was one in ten in Massachusetts.  
11 Still, unwed births remained low during this time, at 1-3%.  
12 So during this era, the solution for an unwed pregnancy was typically marriage, thus avoiding single child-rearing for the most part.  
13 Legal marriage was not an option for African-American slaves, giving a different connotation to “pre-marital sex;” sexual norms for them differed from those for whites.  
15 While African-American slaves did not condone indiscriminate sex, they did not condemn pre-marital sexual relations and “the slave community accepted rather than stigmatized children born outside of marriage.”

Even today, the connection between unwed pregnancy and single child-rearing is less than many assume. Most single child-rearing occurs because of previously-married partners who are not sharing child-rearing responsibilities, not because of children born to unmarried parents.  
17 Even children born to unmarried parents today are likely to be raised by both parents, in a stable relationship.  
18 And, in the ‘90s, at the height of the teen pregnancy “epidemic,” one in three pregnant teens was actually married.  

11 DUBIOUS CONCEPTIONS, supra n. 7, at 17; Politics and Pregnancy, supra n. 4, at 101 (1992), citing INTIMATE MATTERS, supra n. 10, at 10, 33.  
12 Politics and Pregnancy, supra n. 4, at 101.  
13 “Bastardy” incurred punishment of the parents and attempts by civic and religious authorities to enforce marriage. INTIMATE MATTERS, supra n. 10, at 32.  
14 Marriages did occur, ritualized and celebrated, though not legal. Id. at 99  
15 Id. at 13, 97-98.  
16 Id. at 65.  
17 Divorce accounts for 60% of single-parent families, while failure to marry accounts for 30% of single-parent families. NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES xiii (1997).  
18 DUBIOUS CONCEPTIONS, supra n. 7, reporting that in 1980-81, 50% of teen pregnancies were to married couples, an additional 20% married within a year of the birth, and 40% married within three years. In addition, one survey found that 40% of unmarried teen fathers reported living with the child during the first year of the child’s life. Id. at 157, citing William Marsiglio, Adolescent Fathers in the United States: Their Initial Living Arrangements, Marital Experience, and Educational Outcomes, 19 FAMILY PLANNING PERSPECTIVES 240 (1987). Data from the National Survey of Families and Households showed that 22% of children of teen mothers had mothers who were living in a stable relationship. DUBIOUS CONCEPTIONS, supra n. 7 at 157, citing Larry Bumpass & James A. Sweet, Children’s Experience in Single-Parent Families: Implications of Cohabitation and Marital Transition, 21 FAMILY PLANNING PERSPECTIVES 256 (1989).  
19 DUBIOUS CONCEPTIONS, supra n. 7 at 144 (1996).
Through the period of increased urbanization and industrialization of the late eighteenth and early nineteenth century, the incidence of unwed pregnancy waxed and waned. At its highest point, an estimated 30% of brides were pregnant at the time of marriage. At its lowest point in the mid-nineteenth century, the rate of premarital pregnancy declined to 10%, fueled by religious revival and moral reform movements. Again, a hastily-arranged marriage was the solution for premarital sex that resulted in a pregnancy. The primary “problem” of unwed pregnancy at this time was one of morality – a woman was stigmatized by a non-marital pregnancy because of its proof of non-marital sex. Middle-class African-Americans also followed these stigmatizing norms, seeking to distance themselves from “the image of immorality that white culture projected onto the black lower class.” Poor urban and rural African-Americans, on the other hand, tended not to stigmatize pre-marital sexual experience and accepted unwed births.

The rates of teen and unwed pregnancy increased throughout the late eighteenth and early nineteenth century, peaked in 1957, and has been generally declining since then. This fact is surprising to many because of the rhetoric, starting in the 1970s, about an “epidemic” of teen pregnancy. One scholar argues persuasively that the “epidemic” of adolescent pregnancy in the 1970s was a myth, unmoored from any historical context that would have identified adolescent pregnancy as part of an ongoing historical trend rather than a modern-day crisis. Some demographic shifts at this time did, however, show marked changes in teen pregnancy. First, in terms of numbers, though teen pregnancy rates declined, the number of pregnant teens did not


21 Intimate Matters, supra n. 10, at 32 (1988).

22 “Epidemic” of Adolescent Pregnancy, supra n. 20, at 10; Politics and Pregnancy, supra n. 4, at 101.

23 Marriage was always an imperfect solution, of course. Indentured servants and slaves had no right to marry, and marriages between partners of different races were not legal. Naomi Cahn, Birthing Relationships, 17 Wis. Women’s L. J. 163, 174 (2002) [hereinafter Birthing Relationships].


25 Intimate Matters, supra n. 10, at 272.

26 “Epidemic” of Adolescent Pregnancy, supra n. 20, at 25: “The rate of teenage childbearing increased sharply after World War II and reached a peak of 97.3 births per 1,000 women ages 15 to 19 in 1957. After 1957 the rate of teenage fertility declined.”

27 Id. at 22-25; Dubious Conceptions, supra n. 7 at 81 (“In the early 1970s the phrase “teen pregnancy was just not part of the public lexicon. By 1978, however, a dozen articles per year were being published on the topic.”).

28 “Epidemic” of Adolescent Pregnancy, supra n. 20, at 24, 36-37.
decline because of the increased number of teenagers of the baby boom era becoming fertile. Second, in terms of age, teens were becoming pregnant at younger ages than in years past. The birth rate of women 18 to 19 years old declined by one-third from 1966 to 1977, while birth rate for girls 10 to 14 increased by one-third. And during this time period, because of delayed marriage, the rate of unmarried births among teenagers increased dramatically.

At this time, the “problem” of teen pregnancy tended to be seen as the increased burden of teen childbearing to society, especially when taken together with expansions of government programs for poor families. In 1975, for example, the federal government disbursed $4.65 billion in Aid to Families with Dependent Children to households of mothers who were teens at the time of their first births. Unlike earlier periods where marriage solved the economic problem of supporting the progeny of teens, marriage of this age group was in decline. In addition, there was a substantial decline in unmarried mothers placing children for adoption. While at least half of unmarried mothers placed their children for adoption in the 1950s, in the 1970s, 90% of unmarried mothers chose to parent their children. At this time, “The image of the young black mother on welfare relayed a message: sexual freedom extracted a high personal price.”

The 1980s and 1990s brought more talk of an epidemic of teen pregnancy. Birth rates among teens did increase during these decades, but made marked declines in the new century.

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29 Id. at 25.

30 Id. at 26. This increase in birth rates in younger girls still represents a small portion of teen births. In 1983, Vinovskis reports, girls 14 and younger were responsible for only 9,752 births, which represents only 2% of all teen births. Id. at 27.

31 Id. at 28-29 (the rate of out-of-wedlock births to girls 15 to 19 more than doubled between 1960 and 1983).

32 Id. at 30. These financial concerns were not novel – much of the bastardy laws of Colonial times arose from a concern that the populace should not be burdened with the cost of raising fatherless children. DUBIOUS CONCEPTIONS, supra n. 7 at 17.

33 “EPIDEMIC” OF ADOLESCENT PREGNANCY, supra n. 20, at 30. See also NATIONAL RESEARCH COUNCIL, RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREGNANCY, AND CHILDBEARING 132 (1987) (approximately 50-56% of AFDC funds in 1975 was directed to households in which the mother’s first child was born while she was a teen).

34 “EPIDEMIC” OF ADOLESCENT PREGNANCY, supra n. 20, at 29-30 & n. 14.

35 INTIMATE MATTERS, supra n. 10, at 300.

36 DUBIOUS CONCEPTIONS, supra n. 7, at 81.

37 Guttmacher Institute, U.S. Teenage Pregnancies, Births and Abortions: National and State Trends and Trends by Race and Ethnicity, Table 1.0 (2010)(highest rates of teen pregnancy in 1989, 114.9 per 1,000, and 1990, 116.3 per 1,000; steady decline until 2005, to 69.5 per 1,000). Brady E. Hamilton & Stephanie J. Ventura, Birth Rates for U.S. Teenagers Reach Historic Lows for All Age and Ethnic Groups, NCHS DATA BRIEF No. 89 (April 2012)(teen birth rate in 2010: 31.4 per 1,000).
As the number of teenagers raising children— as opposed to placing them for adoption— increased, the “problem” of teen pregnancy became identified as the consequences of teen pregnancy and childrearing on mothers and children. The litany is familiar: minor mothers complete on average fewer years of school, are less likely to graduate high school, and are less likely to go on to college. Minor mothers have more children in their lifetime than do mothers who delay first pregnancy to adulthood, and have those children at closer intervals. Fewer educational attainments and larger families mean that “adolescent mothers are less likely to find stable and remunerative employment than their peers who delay childbearing.”

Teen mothers are disproportionately poor and dependent on social welfare programs. Children raised by single teen mothers are likely to be raised in poverty, engage in drug use and other delinquent behavior, perform poorly in school, and repeat the cycle by becoming adolescent parents themselves.

It is less certain today that these problems are related to teenage childbearing, rather than the underlying poverty that is a risk factor for teenage pregnancy. More recent studies reveal a more nuanced picture of teen childbearing a causative of these problems. “A few pioneering studies have called into question the methodological error of assuming that teens who became mothers would have had the same life trajectories as teens who did not, had they delayed pregnancy.”

For example, when researchers compared similarly situated girls who parented to girls who experienced miscarriages, they found that many of the negative consequences of teen childbearing were less than expected and relatively short-lived:

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


39 Id. at 130.

40 Id. at 130.

41 Id. at 131-134, noting that in 1985 total welfare/food stamp/Medicare outlay attributable to teen childrearing amounted to $16.6 billion.

42 Id. at 134-138.

labor market earnings and appears to reduce the chances of living in poverty and participating in the associated social welfare programs.44

As further support for findings that teen pregnancy does not cause poverty or other social ills, but instead arises in situations where poverty already exists, one study found in following teen mothers into their 30s, that mothers with childhood advantages fared better over time than impoverished mothers.45 In other words, teens who were poor when they became pregnant remained poor – as did poor teens who miscarried – and less poor pregnant teens remained less poor. This research calls into question long-held assumptions about teen parenting creating a negative life trajectory for teens.

Other studies suggest some positive consequences of pregnancy and parenting for teen mothers. In a study focusing on inner city youth, pregnancy and childbearing led to a “heightened sense of purpose connected with increased health and safety-conscious behaviors.”46 Teen mothers report that motherhood “provided them with a priority in life, together with a determination to achieve things for both themselves and their children.”47 One study reveals that girls who parent their children have no different juvenile delinquency rates than never-pregnant girls, and that girls who have abortions or place their children for adoption have substantially higher rates of juvenile delinquency than those who parent.48 A number of legal and societal


changes have also ameliorated some of the negative effects of teen pregnancy. For example, since 1972, it is illegal for public schools to discriminate on the basis of pregnancy, which allows many pregnant girls to continue their education.\textsuperscript{49}

As society struggles with identifying what is problematic about the problem of teen pregnancy, shifting from concerns about immorality, impropriety of single parenthood, financial costs of supporting single mothers, and the negative societal consequences of teen pregnancy, unwed pregnancy, teen childbearing and teen childrearing, it also struggles with identifying solutions for the problem.

\textbf{B. The Solution}

Attitudes toward unwed pregnancies and teen pregnancies have changed over time, as have the perceived solutions for the problem. Social and public policy has always focused on prevention – either prevention of pregnancy through abstinence or through access to birth control, including sterilization of “unfit” parents, or prevention of childbirth through abortion. But once a pregnancy occurred, and was likely to be brought to term because of the unavailability of abortion, solutions varied over time. During the Puritan era, the solution for an unwed pregnancy was typically marriage, thus avoiding single child-rearing for the most part.\textsuperscript{50} Again, during the late 18\textsuperscript{th} century and early 19\textsuperscript{th} century, a hastily-arranged marriage was the solution for premarital sex that resulted in a pregnancy.\textsuperscript{51} With increased urbanization and industrialization and the increased mobility it brought, it became easier for fathers to avoid marriage, so new solutions needed to be found.

Adoption did not become a perceived solution to the problem of unwed or teen pregnancy until after World War II.\textsuperscript{52} Prior to that point, social and public policy called for keeping unwed mothers and their children together. “Family preservation was the creed of early twentieth-

\textsuperscript{49} 20 U.S.C. §1681(a) (2000) (“no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”); 34 C.F.R. §106.40(b)(1)(2005)(a school “shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy”). See \textsc{Wanda S. Pillow, Unfit Subjects: Educational Policy and the Teen Mother} (2004). Even before passage of that law, some pregnant minors sued and won the right to attend public schools. See, e.g., Ordway v. Hargraves, 323 F. Supp. 1155 (D.C. Mass. 1971).

\textsuperscript{50} \textsc{Intimate Matters, supra} n. 10, at 32.

\textsuperscript{51} Marriage was always an imperfect solution, of course. Indentured servants and slaves had no right to marry, and marriages between partners of different races were not legal. \textit{Birthing Relationships, supra} n. 23 at 174.

\textsuperscript{52} “The number of nonfamily adoptions per year went from approximately 8,000 in 1937 to over 70,000 in 1965.” \textsc{The Girls Who Went Away, supra} n. 3 at 183.
century child welfare reformers.”53 Separating mother and child was thought to be damaging to the child, harmful to the mother, and dangerous for the adoptive parents.54 Adoption would deny the child the “real mother love” it was entitled to, and would deny the birth mother an “incentive for right living.”55 Adoptive parents would be saddled with children genetically predisposed to bad behaviors “which cause family heartache.”56 There was little interest in adoption at this time because of strong beliefs in behavioral heredity—the children of women who had sex out of wedlock were thought to have “bad blood,” and consequently, “blood will tell.”57

Until the 1930s, unwed mothers were encouraged by social reformers, evangelical maternity homes, and social workers to keep their babies.58 Several states joined in, enacting legislation designed to discourage the separation of mother and infant.59 One form these laws took was mandatory breast-feeding and bonding laws that required unwed mothers in maternity homes to remain with their children for a number of months before the children could be relinquished for adoption.60 Even in states without such regulations, many maternity homes required expectant mothers to agree not to relinquish their children,61 and to remain in the maternity home for at least six months following birth even if they intended to relinquish the child for adoption.62 In Minnesota, adoption placement by unwed mothers was allowed only “if it


54 KINSHIP BY DESIGN, supra n. 55 at location 397. See also DUBIOUS CONCEPTIONS, supra n. 7 at 37, for a social reformer’s description of the biological progenitors of a child born outside marriage: “The typical illegitimate child, then, may be said to be the offspring of a young mother of inferior status mentally, morally and economically; and of a father who is probably a little superior to the mother in age, mentality, and economic status, if not in morals.”

55 KINSHIP BY DESIGN, supra n. 55 at location 397

56 Id.

57 Id. at location 408.

58 Birthing Relationships, supra, n. 23 at 174; RICKIE SOLINGER, WAKE UP LITTLE SUZI: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE 21 (2d ed. 2000)[hereinafter WAKE UP LITTLE SUZI].

59 Birthing Relationships, supra n. 23, at 174. For example, Maryland enacted a law in 1916 that established criminal penalties for the separation of mothers from their children under 6 months old. Id., citing U.S. Children’s Bureau, The Welfare of Infants of Illegitimate Birth in Baltimore as Affected by a Maryland Law of 1916 Governing the Separation from Their Mothers of Children Under Six Months Old 1, 12 (1925). See also FALLEN WOMEN, PROBLEM GIRLS, supra n. 24.

60 Birthing Relationships, supra n. 23, at 174-75; KINSHIP BY DESIGN, supra n. 55, at location 459.

61 Birthing Relationships, supra n. 23, at 176; FALLEN WOMEN, PROBLEM GIRLS, supra n. 24, at 33.

62 Id. at 88-90.
seems necessary under all the circumstances.” Thus, the expectation before World War II was that teen and unwed mothers would parent their children.

There had long been that expectation that teen and unwed mothers would parent their children in the African-American community. Some attributed this attitude to a “cultural acceptance” of illegitimacy that was either “rooted in preslavery African traditions,” or to patterns that were “born of the conditions of enslavement in the United States.” Others offer a more instrumental rationale for African-American mothers parenting their children – there was little interest among majority-white adoptive parents in adopting black babies.

There was a change in attitude toward adoption of white children by social workers as they “professionalized” in the 1930s and 40s. While social reformers saw the child of the unmarried mother as “a tool in the redemption of the mother,” social workers began to see their client as the child, separate from the interests of the mother. Increasingly, social workers saw the best interests of the child to be served by adoption. At least, adoption was considered in the best interests of white children.

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

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

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63 Birthing Relationships, supra n. 23, at 175.
64 FALLEN WOMEN, PROBLEM GIRLS, supra n. 24, at 157 (1993).
65 DUBIOUS CONCEPTIONS, supra n. 7 at 161; WAKE UP LITTLE SUZI, supra n. 60, at 57.
66 FALLEN WOMEN, PROBLEM GIRLS, supra n. 24, at 128.
67 Id.
68 Id. at 128-29.
69 WAKE UP LITTLE SUZI, supra n. 60, at 57 (in 1958, only 9 percent of all adoptions were of nonwhite babies).
70 FALLEN WOMEN, PROBLEM GIRLS, supra n. 24, at 128; WAKE UP LITTLE SUZI, supra n. 60, at 155.
One scholar describes this time in American adoption history as a time of “pressure, coercion, and inhumanity in procuring consents.”71 The underlying attitude of adoption professionals was that an unmarried woman and her child did not constitute a family, as evidenced by the following quote from an agency head:

An agency has a responsibility of pointing out to the unmarried mother the extreme difficulty, if not the impossibility, if she remains unmarried, of raising her child successfully in our culture without damage to the child and to herself . . . . The concept that the unmarried mother and her child constitute a family is to me unsupportable. There is no family in any real sense of the word.72

In denying parent/child dyads the status of family, social workers privileged the normative family, and viewed these dyads as “‘a blow at the solidarity of the family’ itself.” 73 Unmarried mothers were seen as unfit, and expected to relinquish. One agency head decried the lack of “skills and techniques” to obtain relinquishments among his social worker staff, and the “fearfulness in being aggressive in securing a release, as I feel, for the best interests of the child, they should be in many instances.”74 Thus, the expected outcome of an unmarried pregnancy of a white woman was placement for adoption, and social workers and agency professionals felt duty-bound to ensure that unmarried mothers relinquished their children for adoption.75

As social workers changed their attitudes about unmarried mothers placing children for adoption, there was a concomitant growth in interest in adoption after the war.76 The American eugenics movement tapered away and the importance of parenting – especially mothering – emerged with the post-war baby boom.77 Infertile couples wanted in on the baby boom, and with

71 David M. Smolin, Child Laundering as Exploitation: Applying Anti-trafficking Norms to Intercountry Adoption Under the Coming Hague Regime, 32 VT. L. REV. 17 (2007)[hereinafter Child Laundering as Exploitation], citing THE GIRLS WHO WENT AWAY, supra n. 3. See also WAKE UP LITTLE SUZI, supra n. 60, at 165-66 (“[W]hite unmarried mothers were defined by the state out of their motherhood.”).

72 Child Laundering as Exploitation, supra n. 73, at 7.

73 FALLEN WOMEN, PROBLEM GIRLS, supra n. 24, at 130.

74 WAKE UP LITTLE SUZI, supra n. 60, at 156. In response to the desire for “skills and techniques” in separating mothers from their babies, social workers were trained to take an active role to steer the young mother toward acceptance of adoption. Id. at 157. Social workers were trained to believe, “Realistically [the unwed mother] is in no position to make any kind of decision, to know what her feelings are, to evaluate any plan.” Id. at 158.

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

76 “The number of nonfamily adoptions per year went from approximately 8,000 in 1937 to over 70,000 in 1965.” ANN FESSLER, THE GIRLS WHO WENT AWAY, supra n. 3 at 183

less concern that behavior was biologically determined, adoption became an appealing option.\textsuperscript{78} While maternity homes prior to the war worked to prepare unwed mothers for single parenting, after the war the homes anticipated that the girls would place their children for adoption by infertile couples.\textsuperscript{79} This was different for African-American unwed mothers, who were largely excluded from maternity homes and expected to parent their children long after the expectations were that white unwed mothers would relinquish their children for adoption.\textsuperscript{80} Thus, from the period following World War II until \textit{Roe v. Wade} ushered in legalized abortion, the solution for white minors’ pregnancy was adoption.\textsuperscript{81} By placing a child for adoption, an unwed mother could redeem her transgression and contribute to her own rehabilitation.\textsuperscript{82}

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

For the most part, black families accepted the pregnancy and made a place for the new mother and child. As one Chicago mother of a single black teenager said at the time, “It would be immoral to place the baby [for adoption]. That would be like throwing away your own flesh and blood.”\textsuperscript{83}

While African-American teen mothers received considerable family support, they received very little welfare assistance. Even when legally eligible for such benefits, many states and localities sanctioned “informal welfare practices that denied or harassed black unwed mothers.”\textsuperscript{84} In some localities those informal practices became formal policy: in Illinois, for instance, the Public Aid Commission mandated that African-American mothers on welfare be warned that another illegitimate child could subject them to jail time.\textsuperscript{85}

With \textit{Roe v. Wade}, abortion became an additional solution for unmarried women’s unintended pregnancies.\textsuperscript{86} Adoption placement continued, but there was a significant decline

\begin{itemize}
  \item \textsuperscript{78} \textit{Wake Up Little Suzy}, \textit{supra} n. 60, at 127-28.
  \item \textsuperscript{79} Id. at 17, 24 (“white illegitimate babies could be a resource for childless couples who wanted to achieve a proper family”).
  \item \textsuperscript{80} Id. at 6. There were, however, a few integrated homes and some maternity homes exclusively for African-American mothers. Id. at 65-68
  \item \textsuperscript{81} “The number of nonfamily adoptions per year went from approximately 8,000 in 1937 to over 70,000 in 1965.” \textit{The Girls Who Went Away} \textit{supra} n. 3, at 183.
  \item \textsuperscript{82} \textit{Wake Up Little Suzy}, \textit{supra} n. 60, at 17. See also \textit{Child Laundering as Exploitation}, \textit{supra} n. 73, at 7.
  \item \textsuperscript{83} \textit{Wake Up Little Suzy}, \textit{supra} n. 60, at 6.
  \item \textsuperscript{84} Id. at 51.
  \item \textsuperscript{85} Id.
  \item \textsuperscript{86} 410 U.S. 113 (1973).
\end{itemize}
starting in the late 1970s. Whether the availability of legal abortion caused that decline is a highly contested matter, since the legalization of abortion did not occur in a vacuum. At the same time abortion became legal, stigma associated with unwed pregnancy and illegitimate birth started to decline as well:

Social scientists may eventually understand fully why attitudes toward sex and marriage changed so profoundly. Whatever the mechanisms, in less than a decade a shameful condition was transformed into a personal choice. The rise of the women’s movement, the sexual revolution, the greater availability of abortion (which made out-of-wedlock childbearing truly a choice), and the increasing fragility of marriage all no doubt contributed to the astonishing shift in the social meaning of illegitimacy.87

By the end of the Roe v. Wade decade, 90% of unmarried mothers were choosing to parent their children rather than place them for adoption.88 By the late 1980, 97-99% of unmarried mothers were choosing to parent their children.89 Given the availability of abortion, “choosing to continue a pregnancy means choosing to raise a child. Today, the decision to keep a child is one that tends to be made before the baby is born.”90

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

Sure I thought about it, but I never could do it. I know a lot of people could do a better job than me of being a mother and they can’t get pregnant, but that’s not my fault. I’m not going to go through nine months and then give someone else the benefit.91

With the decrease in stigma associated with out-of-wedlock birth, minor mothers feel less pressure to relinquish parental rights. Placing a child for adoption appears to them to be privileging material gain over the familial love that a poor and young mother might feel is the only thing she can supply.92 This reluctance to place a child for adoption can been seen in a positive light: “These young mothers express a commitment to moral values over material

87 Dubious Conceptions, supra n. 7 at 97.
88 Id. at 162.
89 Id. at 162.
90 Id. at 162.
91 Id. at 163.
92 Id. at 164.
advancement, a passionate attachment to children, and a willingness to try to sustain a family (albeit a nontraditional one) whatever the social and financial cost.”

While the increase in adoption placement after World War II coincided with the increase in adoption among parents, the opposite has occurred in recent time. With delayed childbearing and increased infertility, the demand for adoption has increased at the same time the supply has decreased. In this environment, some adoption professionals are returning to the potentially coercive “skills and techniques” of the past to encourage teen mothers to relinquish their infants. The National Council for Adoption, spearheaded legislation to create and fund the Infant Adoption Awareness Program, which offers free training to those who might come into contact with pregnant teens at health clinics, to encourage adoption. The NCFA also offers the training to school nurses and counselors, abstinence program personnel, crisis pregnancy center counselors to encourage girls to consider adoption placement. Although the law requires counseling to be nondirective, there is considerable evidence in the training materials that the counselor is expected to direct the girl toward adoption.

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

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

* * *

93 Id.
95 In 2002, 560,000 women had taken some steps to adopt. Centers for Disease Control and Prevention, Adoption Experiences of Women and Men and Demand for Children to Adopt by Women 18-44 Years of Age in the United States, 2002, Vital and Health Statistics, Series 23, Number 27, Figure 2 (2008). In that same year, “the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted had become virtually nonexistent.” Id. at 16.
96 See discussion, supra, at nn. 70-75.
97 See P.L. 106-310, Title XII §1201(October 17, 2000).
98 http://www.infantadopt.org/
So before answering these kinds of questions, we must also be living in the principles and assumptions that guide our adoption philosophy. For example, this curriculum invites adoption counselors, unmarried young women who are pregnant or have borne a child out of wedlock, biological fathers not married to the woman, parents of the young woman, and potential adoptive parents to consider the best interests of the infant as paramount. This principle stands in contrast to granting every person connected to the infant equal claim on the child. We are pursuing adoption as a process that provides parents for a child who needs them. It is meeting that need in the best possible way for the child that invites us to take the adoption option seriously.  

So the nondirective adoption counseling should start from the proposition that the birth mother must “change her heart,” and recognize that she has no better claim to the child than any other person – any other attitude is self-deceptive and self-centered. This is a shocking statement, given the way we ordinarily frame parenthood and parental rights. Indeed, if the decision of who was the rightful parent of the child rested solely on “best interests of the child,” any number of biological parents would lose their children to wealthier, more stable parents. 

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

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

The training materials suggest that the counselor respond as follows:

This statement can be declared from a self-centered or other-centered perspective. A variety of starting points are possible here, and must fit the counselor’s own sense of how to discuss realistic possibilities.

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

If the young woman acknowledges her meaning is that she would have become attached to the child, you could ask, “When you first made the decision to carry the child, do you

100 http://ncfaeducation.org/BirthparentCounseling/pdf/AdoptionPracticesInTheHumaneWorld.pdf

101 Annette Ruth Appell, Virtual Mothers and the Meaning of Motherhood, 34 U. Mich. J.L. Reform 683(2001). Professor Appell argues that critiques of parental authority that questions biology as the basis of the legal construction of parenthood challenges “the integrity of those families who do not easily fit dominant norms of family.” Id at 686. The position of the NCFA training materials harks back to the 1940s and 1950s when adoption professionals refused to recognize mother-child dyads as family. See discussion, at nn. 72-75, supra.

102 DUBIOUS CONCEPTIONS, supra n. 7 at 163.
sense you did it for the child or for you?” [This is, of course a question that can be answered in four ways: I did it for the child; I did it for me; I did it for both; I don’t know (or none of the above).]

A humane decision will always include being for the other, and being for the other in a humane way will always reveal that you are simultaneously “for” yourself.103

And in a section entitled, “What do I say if my client says...,” counselors are told to answer the statement, “I could never give my baby away,” by encouraging adoption: “Adoption can be a courageous and unselfish decision because you are putting the child above yourself.”104 A video of a birth mother discussing her decision to relinquish illustrates that the technique is employed. She describes that she told her counselor emphatically that she was not at all interested in adoption placement. But it seems her “nondirective” counselor pressed the idea, because she found herself working through an “adoption workbook.”105 It is hard to square this with “nondirective” counseling touted by the training materials.

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

II. Minors’ Decision-making

Lisa, 17, fell pregnant at 15 and kept her pregnancy so secret that her mother didn’t even know when she went into hospital to have her daughter, Summer Leigh. . . . “I thought I’d just go to hospital and give the baby up for adoption. It was only when I got to the hospital that I found out you can’t until you’re 18. . . . I didn’t want to give her away. I just didn’t want my mum to find out. It was a good job she found out. I would have regretted it.”106

105 http://ncfaeducation.org/BirthparentCounseling/Amain02.jsp?sfg=e35k442509

106 SUZIE HAYMAN & HELEN ELLIOTT, IT HAPPENED TO ME: TEENAGE PREGNANCY 18-19 (2002). Lisa’s story is set in England, which differs substantially from the U.S. in minors’ ability to relinquish a child for adoption.
A. Adolescent Development and Decision-making

Studies of adolescent development and decision-making abilities almost always start with Jean Piaget’s 1958 book, *The Growth of Logical Thinking From Childhood to Adolescence.* 107 Piaget posited four stages of development for children: the sensorimotor stage (birth to age 2); the preoperational stage (2-7); the concrete operational stage (7-11); and the formal operational stage (age 12 to adult). 108 It is only in this final stage, Piaget concluded, that adolescents acquire logical reasoning and abstract thinking. 109 In addition, the adolescent in the formal operational stage “becomes capable of introspection and is able to think about his or her own thoughts and feelings as if they were objects.” 110 By age 15, according to Piaget, children were now capable of reasoning like adults. 111 “Both adults and adolescents with formal operations reason using the same logical processes.” 112

More recent studies question Piaget’s stages of development, and note significant differences in the way adults and adolescents think that are not recognized in the age-based stages-of-development approach of Piaget. 113 Advances in brain imaging have allowed scientists to identify physical differences in the brains of adults and adolescents, revealing that a person’s brain is not fully grown until adulthood. “The human brain does not settle into its mature, adult form until after the adolescent years have passed and a person has entered young adulthood.” 114 The biological immaturity of the adolescent brain is especially acute in the prefrontal cortex, which plays a critical role in the higher functions of the brain, what are called the executive or “CEO” functions. 115


110 Id. at 112.

111 Id. at 111.

112 Id. This is not to say that Piaget did not recognize differences in adolescent thought; he attributed the difference to adolescents’ “disquieting megalomania and conscious egocentricity.” Id. at 130.

113 See ROBERT S. SIEGELER, EMERGING MINDS: THE PROCESS OF CHINAGE IN CHILDREN’S THINKING 11(1996) (“Unfortunately, [age-based stages of development models] have proved to be inconsistent with a great deal of data.”).


When it comes to "response inhibition, emotional regulation, planning and organization," the so-called executive functions, the most important components of the brain are the frontal lobes. In particular, "the neocortex at the top of the brain[] mediate[s] 'more complex' information-processing functions such as perception, thinking, and reasoning," and the prefrontal cortex is associated with a variety of cognitive abilities, including decision making, risk assessment, ability to judge future consequences, evaluating reward and punishment, behavioral inhibition, impulse control, deception, responses to positive and negative feedback, and making moral judgments.116

These executive functions include impulse control, risk assessment, and moral reasoning.117 The prefrontal cortex is one of the last areas of the brain to mature.118 “Because they are at a more primitive developmental stage, adolescents lack judgment . . . and cannot understand the consequences of their actions.”119

Other areas of the adolescent brain are also less developed than in the adult brain. The cerebellum continues to change through adolescence, and plays a significant role in “[a]nything we can think of as higher thought, mathematics, music, philosophy, decision-making, social

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117 Brief of AMA at 11.


119 Katherine Hunt Federle & Paul Skendelas, Thinking Like a Child: Legal Implications of Recent Developments in Brain Research for Juvenile Offenders, in Law, Mind and Brain 199, 199(eds. Michael Freeman & Oliver Goodenough 2009).
skill.” The immaturity of the adolescent brain produces judgments, thought patterns and emotions that are different from adults. Adolescents are more likely to focus on short-term consequences rather than future consequences, are more likely to discount the perspectives of others, and less likely to consider all available alternatives.

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

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

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

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

One of the implications of this work is that the brain is responding differently to the outside world in teenagers compared to adults. And in particular, with emotional information, the teenager's brain may be responding with more of a gut reaction than an executive or more thinking kind of response. And if that's the case, then one of the things


123 Brief of APA at 7, citing Elizabeth Cauffman & Laurance Steinberg, Immaturity and Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults, 18 BEHAV. SCI. & L. 741, 756 (2000).

124 Id. at 7.

125 Brief of AMA at 8.
that you expect is that you'll have more of an impulsive behavioral response, instead of a necessarily thoughtful or measured kind of response.126

Thus, it would be “unfair to expect [teens] to have adult levels of organizational skills or decision making before their brain is finished being built.”127

Even before this scientific evidence was available to judges, the law developed in recognition of the impaired decision-making abilities of minors. Of course, the law is not completely consistent on this point128 – preventing capital punishment for minors, while allowing minors to be tried criminally as adults; insisting on parental involvement in minors’ decisions about abortion, while allowing pregnant minors to voluntarily relinquish parental rights. There are even inconsistencies that cross these dyads, like those who applaud lesser culpability for young offenders while decrying restrictions on minor girls’ ability to consent to abortion.129 The basic proposition of law, however, is that underage persons cannot consent to a wide range of activities.

B. The Law

“Children are constitutionally different from adults.”130 The law has long recognized that legal rights and liabilities of minors are different from adults. For example, minors are not able to enter into binding contracts;131 vote in elections;132 buy tobacco133 or alcohol134 or get a


127 ABA CRIMINAL JUSTICE SECTION, ADOLESCENCE, BRAIN DEVELOPMENT AND LEGAL CULPABILITY (2004).


129 J. Shoshanna Ehrlich tries to resolve this conundrum, arguing that minor girls should be allowed to consent to abortion without parental involvement, but that young offenders are deserving of different treatment from adults because of their minority. J. Shoshanna Ehrlich, Shifting Boundaries: Abortion, Criminal Culpability and the Indeterminate Legal Status of Adolescents, 18 WIS. WOMEN'S L.J. 77 (2003). Ehrlich argues that adolescents have sufficient cognition to make the abortion decision, since it is quintessentially a medical decision, while issues of criminal culpability include psychosocial considerations irrelevant in the abortion decision.


131 RESTATEMENT OF THE LAW, SECOND, CONTRACTS §14.


tattoo; marry without parental consent; consent to sex; or consent to or refuse medical procedures, including abortion. A minor in California cannot even use a tanning salon. The Supreme Court has recognized that minors who commit crimes lack the level of culpability of adults, making it unconstitutional to punish them with death or with life sentences without the possibility of parole. As the Court has noted, the law’s differential treatment of children is justified by three reasons: “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”

1. Vulnerability of Minors

In any number of areas, the law treats minors differently because of their vulnerability when interacting with adults. The well-known limitation on enforceability of minors’ contracts is often justified on the basis of the vulnerability of minors in interacting with adults in matters involving money and property. Over-reaching and fraud by adults might go undetected by

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134 No minors can purchase alcohol, and some adults cannot purchase alcohol, either, since the legal age for alcohol purchase is 21. See 23 U.S.C. 158 (2000), the National Minimum Drinking Age Act.

135 Cal. Penal Code §653 (2012)(making it a misdemeanor to tattoo or offer a tattoo to a person under 18).

136 Pamela E. Beatse, Marital Rights for Teens: Judicial Intervention that Properly Balances Privacy and Protection, 11 J. L. Fam. Stud. 577 at n.18 (2009), collecting state statutes requiring parental consent to at least some minors’ marriages.

137 Frances Olsen, Statutory Rape: A Feminist Critique of Rights Analysis, 63 Tex. L. Rev. 387, 403-04 (1984)(noting that the statutory age of consent in some states extended as high as age 21).

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

139 Id. See also Martin T. Harvey, Adolescent Competency and the Refusal of Medical Treatment, 13 Health Matrix 297, 298-300 (2003)(describing the traditional approach).


minors, thus they are protected from the consequences of their decisions by being able to void their contracts. In addition, minors are thought to be more suggestible than adults, and thus less capable of resisting high-pressure sales tactics. This problem of suggestibility informs other differential treatment of minors; the Supreme Court argued that one reason minors should not be put to death for even serious crimes is their malleability, their susceptibility to peer pressure. The vulnerability of young girls in the face of seduction efforts of older men informs statutory rape laws. Limitations on police interrogation of minors are justified on the basis of the increased suggestibility of minors.

2. Immature Decision-making

“The State commonly protects its youth from adverse governmental action and from their own immaturity,” because “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.” One scholar argues that the law views minors as “impaired adults, unable to perceive and understand until transformation to adulthood.” Restrictions on possession of alcohol and tobacco are obviously justified on the basis of minors lacking the


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

150 See, e.g., Haley v. Ohio, 332 U.S. 596, 598 (1948); In re Gault, 387 U.S. 1 (1967); Commonwealth v. A Juvenile, 449 N.E.2d 654, 657 (Mass. 1983)(parent or interested adult must be present before juvenile confession valid); State v. Fincher, 305 S.E.2d 685, 692 (N.C. 1983) (juvenile defendant must be informed he had a right for a parent or guardian to be present during interrogation); In re E.T.C., 449 A.2d 937, 940 (Vt. 1982) (juvenile cannot waive rights against self-incrimination without presence of interested adult). See also Patrick M. McMullen, Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles, 99 Nw. U.L. Rev. 971 (2005).

151 Belloti v. Baird at 637.

152 Id. at 635.

experience or perspective to avoid deleterious choices.\textsuperscript{154} Restrictions on voting and jury service for minors rests on the presumption that minors lack the necessary life experience to participate in these decision-making activities in a meaningful way.\textsuperscript{155}

3. Parental Authority

“[T]he guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors.”\textsuperscript{156} Parental authority over children is a concept of such great age as to have existed long before the creation of the Republic.\textsuperscript{157} Parents have the constitutional right “to direct the upbringing and education of children under their control.”\textsuperscript{158} The law allows and expects parents to teach, guide and inspire their children as they “grow into mature, socially responsible citizens.”\textsuperscript{159} That parental authority is not simply a matter of rights, it is instrumental – it is good for children:

Parents' strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their children's best interests in most circumstances. In contrast, the state's knowledge of and commitment to any particular child is relatively thin. A scheme of strong constitutional rights shields the parent expert from the intrusive second-guessing of the less expert state.\textsuperscript{160}


\textsuperscript{157} I W. BLACKSTONE, COMMENTARIES 452; J. LOCKE, TWO TREATIES OF GOVERNMENT 348-49 (3d ed. 1698); S. PUFFENDORF, OF THE LAW OF NATURE AND NATIONS 112 (1703).


\textsuperscript{159} Bellotti v. Baird, 443 U.S. 622, 638 (1979)(raising children is “beyond the competence of impersonal political institutions.”).

While parental authority is not absolute, it serves as an important limitation on laws that grant autonomy to minors.\textsuperscript{161} The origin of statutory rape laws, for example, was in the father’s ownership of his daughter, as were laws relating to parental consent for early marriage.\textsuperscript{162} The justification for laws limiting a minor’s right to consent or refuse medical treatment rests on this concept of parental authority.\textsuperscript{163}

Of course, these three justifications for limitations on minors – their vulnerability, their immaturity in decision-making, their parents’ authority – are interrelated. We grant parents authority over children because of children’s vulnerability, and their immature decision-making often creates that vulnerability. These justifications are easily seen in the regulation of minors’ abortion decision-making, and are entirely absent in the way most states regulate minors’ decision-making in the context of relinquishment of parental rights and consent to adoption placement.

\section*{III. Regulation of Minors’ Abortion and Adoption Decision-making}

Well, first, I was happy. I was like, “Oh my god, I have a little baby growing inside of me.” I was happy, and then . . . I was thinking how my family would react . . . and that’s when I was like, “Nope, I can’t have the baby.”\textsuperscript{164}

\subsection*{A. Abortion and Minors}

In 1975, the Supreme Court extended the privacy protection to make decisions about abortion, acknowledged two years earlier in \textit{Roe v. Wade},\textsuperscript{165} to at least some minors.\textsuperscript{166} The

\begin{footnotesize}
\textsuperscript{161} “Especially because the best interests of a child and the best interests of even a loving parent can clash, parental authority over children--even where the parent is not generally ‘unfit’--is not without limits in this country.” Gonzalez v. Reno, 212 F.3d 1338, 1352 (11th Cir. Fla. 2000)(Elian Gonzalez case).


\textsuperscript{163} Alicia Ouellette, \textit{Shaping Parental Authority over Children's Bodies}, 85 IND. L.J. 955, 956-57 (2010), noting that parental authority has allowed parents to “westernize the eyes of their adoptive Asian children, to modify the facial features of children with Down Syndrome, to inject human growth hormone (HGH) into healthy children, to enlarge the breasts of or suck the fat from teenagers, to attenuate the growth and remove the reproductive organs of a child with disabilities, and to remove bone marrow from a nine-year-old girl for use by a brother who sexually abused her.”


\textsuperscript{165} 410 U.S. 113 (1973).
\end{footnotesize}
Court held that a statutory scheme that gave parents an absolute veto over a minor’s decision to terminate her pregnancy was unconstitutional, while “signaling that the Court might uphold a less intrusive law.”\textsuperscript{167} The court revisit the issue four years later in \textit{Belloti v. Baird},\textsuperscript{168} holding that a minor’s ability to obtain an abortion could be limited in certain respects. In particular, a state could, consistent with the Constitution, prevent a minor from having an abortion absent parental consent, so long as the state provided a judicial bypass exception.\textsuperscript{169} In so doing, the Court “simultaneously recognizes and curtails the liberty and interest of young women in their own bodies.”\textsuperscript{170} Since that ruling, 43 states have passed statutes requiring parental notification or consent prior to a minors’ abortion, though in six of those states the parental involvement laws are temporarily or permanently enjoined.\textsuperscript{171} Twenty-two states require that at least one parent consent to a minor’s abortion,\textsuperscript{172} while 11 states require prior notification of at least one parent.\textsuperscript{173} Four states require both notification of and consent from a parent prior to a minor’s abortion.\textsuperscript{174}

In all states with parent involvement laws, statutes also provide for judicial bypass as required by the Constitution.\textsuperscript{175} The judicial bypass provision is designed to preserve decisional privacy for minors and to prevent parental consent requirements from amounting to an absolute veto.\textsuperscript{176} Some statutes provide specific direction to the court on factors to consider in allowing a minor to have an abortion without parental notification or consent. For example, Arizona law

\textsuperscript{167} Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1975). The Court noted, however, “[O]ur holding . . . does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy.” Id. at 75.

\textsuperscript{168} \textit{443 U.S. 622 (1979)}.

\textsuperscript{169} Id. See also HELENA SILVERSTEIN, GIIRLS ON THE STAND: HOW COURTS FAIL PREGNANT MINORS 15 (2007).


\textsuperscript{171} GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: AN OVERVIEW OF MINORS’ CONSENT LAW 2 (2012)(enjoined in California, Illinois, Montana, Nevada, New Jersey and New Mexico).

\textsuperscript{172} Id. at 1. The 22 states are Alabama, Arizona, Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia and Wisconsin.

\textsuperscript{173} Id. (Alaska, Colorado, Delaware, Florida, Georgia, Iowa, Maryland, Minnesota, New Hampshire, South Dakota and West Virginia).

\textsuperscript{174} Id. (Oklahoma, Texas, Utah and Wyoming).

\textsuperscript{175} Belloti v. Baird, \textit{443 U.S. 622 (1979)}. See, for example, ALABAMA CODE ANN. §26-21-3(c) (Michie 2011); ALASKA STAT. §18.16.020(a)(2), (3) (2011); ARIZONA REV. STAT. §36-2152(B) (2011); FLA. ANN. STAT. §390.011144(4) (2010); CODE GA. ANN. §15-11-114 (2010); INDIANA STAT. ANN. §16-34-2-4(b) (Burns 2011); IOWA CODE ANN. §135L.3(3) (2010); KENTUCKY REV. STAT. ANN. §311.732(3) (2010); LA. STAT. ANN. §40:1299.35.5(B) (2011).

\textsuperscript{176} Id. See also J. SHOSHANNA EHRLICH, WHO DECIDES? THE ABORTION RIGHTS OF TEENS 46-47 (2006).
requires the court to allow the abortion if it determines that the pregnant minor is mature and capable of giving informed consent, or that the abortion without parental notice or consent would be in her best interests. In Louisiana, a minor seeking judicial bypass may be required to attend an evaluation and counseling session with a mental health professional, designed to produce “trustworthy and reliable expert opinion concerning the minor’s sufficiency of knowledge, insight, judgment, and maturity,” so that the court can consider her maturity and best interests.

B. Adoption and Minors

In all U.S. jurisdictions, a minor’s status as a minor does not impair her consent to relinquish her parental rights, so long as statutory requirements are met. In some jurisdictions, adoption statutes will say explicitly that a minor parent can relinquish parental rights and consent to adoption. Even where the statutes are silent, however, courts generally hold that the minor mother can consent. In Nelson v. Gibson, the Minnesota Supreme Court held that the 17-year-old mother, who had since married the father of the child and sought to prevent the adoption, could consent under a silent statute:

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

177 ARIZONA REV. STAT. §36-2152(B)(2011). See also IDAHO PENAL CODE ANN. §18-609A(2) (2010)(maturity or best interests); INDIANA STAT. ANN. §16-34-2-4(b) (Burns 2011)(maturity or best interests); KENTUCKY REV. STAT. ANN. §311.732(3) (2010)(court shall hear evidence relating to “emotional development, maturity, intellect, and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful”); LA. STAT. ANN. §40:1299.35.5(B) (2011).

178 LA. STAT. ANN. §40:1299.35.5(B) (2011).

179 See, for example, FLA. ANN. STAT. § 63.082 (2010)(minor parent has power to consent to adoption, and may not revoke that consent upon reaching the age of majority); TEX. FAM. CODE ANN. §161.103(a)(1)(2010)(affidavit of voluntary relinquishment of parental rights may be signed “by the parent, whether or not a minor, whose parental rights are to be relinquished”); HAWAII REV. STAT. ANN. §578-2(e) (Michie 2010)(“The minority of a child’s parent shall not be a bar to the right of such parent to execute a valid and binding consent to the adoption of such child.”); MISS. CODE ANN. §93-15-103(2)(Supp. 2002)(“The rights of a parent . . . may be relinquished [by signed affidavit] . . . regardless of the age of the parent”); In re Adoption of D.N.T., 843 So.2d 690, 706-07 (Miss. 2003)(minor mother can consent to adoption pursuant to statute, despite rule of procedure requiring service of process in civil case to be served on parent of minor).

180 50 N.W.2d 278 (Minn. 1951).
purposes at an earlier age than for others. It follows that the mother, though a minor – as the law then existed – had the capacity to consent to the adoption of her child.\textsuperscript{181}

In a majority of U.S. jurisdictions, a minor’s decision to relinquish a child for adoption is not only valid, but is regulated exactly the same as an adult’s decision. In only 15 states are there different or additional requirements for a minor’s decision to place a child for adoption. In four states, a minor must be provided independent legal counsel.\textsuperscript{182} In six states, a court must appoint a guardian ad litem for the minor parent.\textsuperscript{183} In five states, a minor’s parent must consent to the relinquishment.\textsuperscript{184}

1. Independent Legal Counsel

Independent legal counsel for a prospective birth mother is not universally required in the United States. In four states, however, when the prospective birth mother is a minor she is required to have independent legal counsel. By independent, we mean that the attorney cannot also represent the adoptive parents or the adoption agency facilitating the placement.

Prior to 1990, Kansas statutes addressed the minority of the placing parent by simply stating that minority shall not invalidate a parent’s consent.\textsuperscript{185} After a study of the Family Law Advisory Committee of the Kansas Judicial Council, several changes were proposed to protect minor parents.\textsuperscript{186} The committee stated:

Minors are afforded legal protection in regard to other decisions and it appears to the committee that the decision to give up a child merits attempts at protection as well. The proposed subsection would require independent legal counsel for a minor and the presence of the minor's attorney at the time the instrument is executed.\textsuperscript{187}

Kansas statutes now provide that the minor parent must first have the advice of independent legal counsel as to the consequences of the consent prior to the execution of the consent affidavit.\textsuperscript{188} Counsel must also be present when the affidavit is executed.\textsuperscript{189} In Kansas,

\textsuperscript{181} 50 N.W.2d at 283 (internal citations omitted).
\textsuperscript{182} Kansas, Maryland, Montana and Vermont.
\textsuperscript{183} Alabama, Arkansas, Connecticut, Kentucky, Michigan and Rhode Island.
\textsuperscript{184} Louisiana, Michigan, Minnesota, New Hampshire and Rhode Island.
\textsuperscript{185} In re Adoption of N.A.P., 23 Kan. App.2d 257, 263, 930 P.2d 609, 614 (1997), citing Comment # 5 to S.B. 431 [1990].
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} KAN. STAT. ANN. §59-2115 (2010).
the prospective adoptive parents or the child-placing agency are solely responsible for the expense of providing independent counsel.\textsuperscript{190}

The statutory requirement of independent counsel does not mean that a minor parent must be provided with counsel to represent her throughout the adoption proceeding, however. In a case where a minor parent was afforded counsel at the time of consent, and then sought out the same attorney to represent her in challenging her consent in court, and was refused, the court held that it is sufficient that counsel represent the minor parent “immediately prior to and at the time consent is executed.”\textsuperscript{191}

In Montana, in a direct placement adoption, a relinquishment executed by a minor parent “is not valid unless the minor parent has been advised by an attorney who does not represent the prospective adoptive parent.”\textsuperscript{192} In 2006, the Montana Supreme Court addressed whether this provision applied in a case where the birth mother misstated her age and all parties believed that the mother was over 18 at the time of the adoption.\textsuperscript{193} The court concluded that the statute “exists to protect minor parents from making legally binding direct parental placement adoptions without counsel’s advice and representation.”\textsuperscript{194} Noting that the minor mother had difficulty understanding the paperwork related to the adoption, that the prospective adoptive mother called her once a day to encourage her to sign and promised that she could see her child anytime she wanted, and that the minor mother did not know this promise was not enforceable, the court concluded that this was precisely why the statute existed – to protect minor mothers like this one.\textsuperscript{195}

In adoption proceedings where a parent relinquishes parental rights or consents to adoption, Maryland law requires the court to appoint an attorney to represent a parent who is a minor.\textsuperscript{196} Furthermore, consent of a minor parent is not valid unless accompanied by an affidavit.

\textsuperscript{190} KAN. STAT. ANN. §59-2115 (2010). The Family Law Advisory Committee of the Kansas Judicial Council, in proposing this requirement, spoke to the necessity of counsel’s presence at the time the affidavit was executed: “The proposal requires the minor’s attorney to be present at the time of execution in light of the fact that advice provided at an earlier time may diminish in value due to the intervening passage of time and birth of the child.” In re Adoption of N.A.P., 23 Kan. App.2d 257, 263, 930 P.2d 609, 614 (1997), citing Comment # 5 to S.B. 431 [1990].

\textsuperscript{191} In re Adoption of N.A.P., 23 Kan. App.2d 257, 930 P.2d 609, 614 (1997). The court further stated, “It was not intended that the minor be provided legal representation for the adoption proceeding to follow. If the legislature would have intended full-blown legal representation for a minor, it would have said so.”

\textsuperscript{192} MON. CODE ANN. §42-2-405(2)(2010).

\textsuperscript{193} In re Adoption of A.L.O., 331 Mont. 334, 132 P.3d 543 (2006).

\textsuperscript{194} Id. at 546.

\textsuperscript{195} Id.

\textsuperscript{196} MD ANN. CODE §5-307 (2010).
of appointed counsel stating that the minor consents knowingly and voluntarily.\textsuperscript{197} The statute does not explicitly require that counsel for minor birth parents be independent of the prospective adoptive parents or child-placing agency. The statutes provide that an attorney may represent more than one party to the adoption if the Maryland Lawyers’ Rules of Professional Conduct would allow that dual representation.\textsuperscript{198}

Vermont notes that a parent who is a minor is competent to execute a consent or relinquishment if the parent has had the advice of an attorney who does not represent the adoptive parents or the agency to which the parent is relinquishing the child.\textsuperscript{199} The attorney must be present when the consent is executed.\textsuperscript{200} The person before whom the consent or relinquishment is taken must certify that a minor parent was advised by an independent attorney.\textsuperscript{201}

\textbf{2. Guardian Ad Litem}

Four states – Alabama, Arkansas, Connecticut and Kentucky – require a court to appoint a guardian ad litem to represent a minor parent in an adoption proceeding. A minor mother in Alabama can relinquish her parental rights, and the fact of minority does not provide grounds for revocation of that consent.\textsuperscript{202} However, the court must appoint a guardian ad litem to represent the interests of the minor parent.\textsuperscript{203} A minor over the age of 13 can nominate the guardian ad litem she wishes to represent her.\textsuperscript{204} A minor father must also have a guardian ad litem appointed, unless the court finds that he has impliedly consented to the adoption by his actions.\textsuperscript{205}

Though the statute requires the appointment of a guardian ad litem to represent the interests of the minor mother, it does not, apparently, require that appointment to occur prior to
the mother’s consent. In *Anderson v. Hetherington*, the court discovered during the course of the adoption hearing that the mother was a minor at the time of giving birth, at the time of signing the consent, and at the time of the hearing. At that point, the court appointed a guardian ad litem to protect the mother’s interests and continued the hearing. The mother was not personally present at the hearing, appears not to have ever met with the guardian ad litem, and thus was only represented by the belatedly-appointed ad litem at the hearing. The court found the mother’s consent to be valid. The mother filed a motion to reconsider, and after hearing additional testimony, the court reaffirmed its prior decision and granted the petition for adoption. On appeal, there seemed to be no difficulty with the way the guardian ad litem was appointed, suggesting that the role of the guardian ad litem is quite limited in this context.

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

3. Parental Consent

In five states – Louisiana, Michigan, Minnesota, New Hampshire and Rhode Island – parental consent or notification is a necessary prerequisite to a minor’s relinquishment of parental rights. Louisiana requires parental consent of the minor parent in private adoptions, but

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206 560 So.2d 1078 (Alabama 1990).
207 560 So.2d at 1079.
208 560 So.2d at 1079.
209 ARKANSAS CODE ANN. §9-9-208(c)(2010).
210 Id.
211 CONN. GEN. STAT. ANN. §45a-708(a)(2011).
212 Id.
213 Id. at §45a-708(b) & (c).
214 KENTUCKY REV. STAT. ANN. §199.500(2)(2010).
In private adoption, a minor parent surrendering a child for adoption must have a parent or guardian join in the surrender unless the minor has been emancipated. The statute further provides that if the minor’s parent refuses consent, the court may authorize the surrender by the minor if it finds that 1) the minor is sufficiently mature and well-informed to surrender, and 2) the surrender is in the child’s best interest.

Michigan recognizes that an unemancipated minor parent’s consent to adoption is not valid unless her parent, guardian or guardian ad litem consents. Though Minnesota has recognized since 1951 that a minor mother can consent to adoption, its statutes require that the minor mother’s parents or guardian must also consent. New Hampshire statutes provide that a birth mother’s surrender of parental rights is required in adoption, but if she is under 18, the court may require the assent of her parents or legal guardian as well. In Rhode Island, “no minor parent may give a binding consent to any adoption petition or to any termination of rights . . . except with the consent of one of the parents, guardian, or guardian ad litem of the minor parent.”

IV. Are the Decisions About Abortion and Adoption Similar?

I have given a baby up for adoption, and I have had an abortion, and while anecdotes are not evidence, I can assert that abortions may or may not cause depression - it certainly did not in me, apart from briefly mourning the path not taken - but adoption? That is an entirely different matter. I don’t doubt that there are women who were fine after adoption, and there is emphatically nothing wrong with that or with them; but I want to point out that if we’re going to have a seemingly neverending discussion about the sorrow and remorse caused by abortion, then it is about goddamn time that we hear from birth mothers too.


218 MICH. COMPILERED LAWS ANN. §710.43(4) (2011).

219 Nelson v. Gibson, 50 N.W.2d 278 (Minn. 1951).

220 MINN. STAT. ANN. §259.24(2) (2011). The statute requires that a minor also be offered the opportunity to consult with an attorney, clergy member or doctor, but does not render consent invalid if the minor declines the offer.


222 GEN. LAWS R.I. ANN. §15-7-10(b)(2010).
Believe me when I say that of the two choices, it was adoption that nearly destroyed me - and it never ends.\textsuperscript{223}

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

A. Physical Health & Safety

1. Abortion

One frequent argument for parental notification in teen abortions is that parents ought to know about medical procedures performed on their children, given that all medical procedures involve some health risks. A parent informed of a minor’s abortion can help the minor evaluate the medical risks and can provide after-care with an awareness to watch for adverse consequences.\textsuperscript{224} One can make the same argument about childbirth by minor children. The risk of death and medical complications is greater with childbirth than with abortion, and because childbirth is riskier for teens than for adults, abortion for teens is significantly safer.\textsuperscript{225} Indeed, in Roe v. Wade,\textsuperscript{226} the Court noted the following about the risk of abortion versus the risk of childbirth:

[A]bortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared.\textsuperscript{227}


\textsuperscript{224} See HELENA SILVERSTEIN, GIRLS ON THE STAND: HOW COURTS FAIL PREGNANT MINORS 5-6 (2007).

\textsuperscript{225} W. Cates, Jr., Abortion for Teenagers in ABORTION AND STERILIZATION: MEDICAL AND SOCIAL ASPECTS 139 (J.E. Hodgson, ed. 1981) (The mortality rate for teen pregnancy is five times higher than the mortality rate for teen abortion).

\textsuperscript{226} 410 U.S. 113 (1973).

\textsuperscript{227} Id. at 149.
More recent statistics support the Court’s assessment of the low medical risks associated with abortion, especially when compared to the risks associated with continued pregnancy and childbirth. Not only are mortality risks lower for teen abortion, the risk of serious complications is also lower for teens. Abortion for teens does not pose long-term health risks, either, not for breast cancer or future infertility or low-weight babies in the future, or increased risk of miscarriage in subsequent pregnancies after abortion.


230 Willard Cates, Jr. et al., *The Risks Associated with Teenage Abortion*, 309 N. ENG. J. MED. 621(1983)(lower morbidity associated with abortion of teens); NATIONAL RESEARCH COUNCIL, RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREGNANCY, AND CHILDBEARING 125 (1987)(complications following abortion lower for teens than adult women, regardless of gestational stage at which abortion is performed and regardless of the method used).


2. Pregnancy and Childbirth

Pregnancy poses health risks for adolescents at a rate higher than for adults. Teenage girls who are pregnant are less likely to get adequate prenatal care, which could screen for medical problems for both mother and baby, and are more likely to have poor eating habits during pregnancy. Pregnant teens have a higher risk of having pregnancy-induced hypertension than pregnant adult women. They also have a higher risk of preeclampsia, which can cause organ damage in the mother. These health conditions also predispose pregnant adolescents to premature birth and low birth-weight babies, and higher rates of miscarriages and stillbirths. Postpartum depression is also higher for adolescents than for adults.

B. Emotional Health & Wellbeing

1. Abortion

In *H. L. v. Matheson*, the Court justified parental notification by arguing that "[t]he . . . emotional and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature." Some studies do, indeed, support the

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236 Id. at 124; D. Bluestein & M.E. Starling, *Helping pregnant teenagers*, 161 WESTERN J. MED. 140, 142 (1994)(half of teenagers start prenatal care in the second trimester, 10% in the third trimester, and 2.4% receive no prenatal care).


proposition that minors’ reactions after abortion differ from adults’ reactions. For example, younger women are more likely to feel guilt instead of relief after an abortion, and increased feelings of guilt and depression for younger women persisted 24 hours, 6 weeks, and 6 months post-abortion. Two to three months after abortion, younger women were more likely to experience shame, guilt, fear of disapproval, regret, anxiety, depression, doubt, and anger than older women. Some of those reactions from women under age 20 included more nightmares and sleep disruptions, and more suicide attempts post-abortion than women over 20 at the time of abortion. Another study, of women selected from a post-abortion support group for those experiencing difficulties, reported that adolescents were more likely to "feel forced by circumstances to have the abortion," and reported greater severity of psychological stress.


246 N.E. Adler, Emotional Responses of Women Following Therapeutic Abortion. 45 AM. J. ORTHOPSYCH. 446 (1975).


248 See Wanda Franz & David Reardon, Differential Impact of Abortion on Adolescents and Adults, 27 ADOLESCENCE 161, 163 (1992). The selection of study subjects from a group already seeking help makes the sample biased, which may make it difficult to assess how many adolescents suffer negative psychological effects from abortion and how many do not, the study does offer important information about differences between the reactions of adolescents and adults. And for comparison purposes, it is important to note that the empirical data about women who have emotional difficulties following adoption suffer from the same sampling bias. See supra, n. 179.
In a study specifically designed to test the Supreme Court’s premise that minors are particularly susceptible to psychological distress following abortion, researchers found differences between the reactions of minors and adults one month following abortion, but no differences two years after abortion.\(^\text{249}\) The study tested for depression,\(^\text{250}\) decision satisfaction,\(^\text{251}\) benefit-harm appraisals,\(^\text{252}\) and specific emotions related to the abortion.\(^\text{253}\) Additionally, the study asked respondents two years after abortion (but not one month following the abortion), if they had the decision to do over again under the same circumstances that existed two years ago, whether they would make the same decision to have the abortion.\(^\text{254}\)

The results of the study showed no difference between adolescents and adults on measurements of depression or specific emotions related to the abortion one month following abortion.\(^\text{255}\) However, the study revealed statistically significant differences between minors and adults on decision satisfaction and benefit-harm appraisal one month following abortion.\(^\text{256}\) At the two-month follow-up, those differences had disappeared, with no significant difference between adults and minors on any factor.\(^\text{257}\)


\(^\text{250}\) Id. at 498, asking how much six depressive symptoms bothered study participants since having the abortion.

\(^\text{251}\) Id., asking “All in all, how do you feel about your decision to have an abortion?” Respondents answered on a scale of 1 (“it was definitely the wrong decision”) to 5 (“it was definitely the right decision”).

\(^\text{252}\) Id. at 498-99, asking, harm-based questions one-month following the abortion, respondents to answer on a 5-point strongly-agree to strongly-disagree scale to “I feel stressed about having had this abortion;” “I think this abortion has had a negative effect on me;” and “I feel this abortion has had harmful (or bad) consequences for me.” At the two-year appraisal, the first question was replaced with: “I feel my life is worse today because I had the abortion.” Benefit questions were asked, using the same strongly-agree/strongly-disagree scale: “I think the abortion has had a positive (good) effect on me;” “I have become a stronger person because of having had the abortion;” and “I have grown as a person from the experience.”

\(^\text{253}\) Id. at 499, respondents were asked about emotions specific to the abortion experience: happy, satisfied, good, pleased, contented, sorry, sad, guilty, grief, regret, feelings of loss, blue, low, angry at myself, angry at someone else, disappointed with myself, and relieved. Respondents were asked to answer on a 5-point scale from 1 (not at all) to 5 (a great deal).

\(^\text{254}\) Id. at 499. Again, respondents were asked to answer on a 5-point scale from 1 (definitely no) to 5 (definitely yes.).

\(^\text{255}\) Id. at 501.

\(^\text{256}\) Id.

\(^\text{257}\) Id.
2. Adoption

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

In the period immediately following relinquishment, birth mothers report that relinquishment brings “a powerful sense of loss and isolation.” Birth mothers reported traumatic dreams, sleep disruption, and “a sense that the experience is surreal.” One study reported that of birth mothers found signing the adoption papers to be “one of the most difficult parts of the adoption process,” and of birth mothers six months after birth reported feeling grief. In comparing adolescents who chose to parent and those who chose to relinquish for adoption, those who relinquished were less comfortable with their decision than those who parented. In one study of birth mothers who returned to school after relinquishment, researchers found that the negative emotions felt by birth mothers adversely affected school


259 Id. at 16.

260 Id. See also Linda Theron & Nadine Dunn, Coping Strategies for Adolescent Birth-Mothers Who Return to School Following Adoption, 26 SOUTH AFRICA J. ED. 491 (2006)[hereinafter Coping Strategies].

261 Defined in the psychological literature as the first two years following relinquishment. Birth Parents in Adoption, supra n. 258, at 26.


263 Birth Parents in Adoption, supra n. 258, at 26.


The birth mothers who experienced the most deterioration in school performance were preoccupied with grief and regret concerning the adoption decision and thought recurrently about their personal loss. The majority of birth mothers expressed negative future expectations, expecting the future to be a continuation of the bleakness they currently experienced. The feelings interfered with motivation, and thus, negatively affected school performance. “The greatest deterioration in school performance was noted when birth-mothers felt there was nothing to live for.”

Birth mothers also experience long-term effects of adoption relinquishment on emotions and well-being. While some researchers report feelings of satisfaction by birth mothers four years after birth, and positive outcomes on some socio-demographic and social psychological outcomes, most also experience continuing grief and loss. Long-term effects include ongoing depression, shame and negative self-image. Birth mothers report feeling unloveable. These feelings can cause birth mothers future difficulties in attaching to romantic partners and subsequent children. Issues with future parenting include “intense attachment to

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266 Coping Strategies, supra n. 259, at 495.

267 Id. at 496. See also Birth Parents in Adoption, supra n. 258, at 26, noting that birth mothers consistently report that their hope to be able to “get on with their life” doesn’t reach fruition,” citing A. Brodzinsky, Surrendering an Infant for Adoption: The Birthmother Experience in THE PSYCHOLOGY OF ADOPTION (A. Brodzinsky & M. Schechter, eds. 1990) & A.D. Sorosky, A. Baran, & R. Pannor, The Effects of Sealed Record in Adoption, 133 AM. J. PSYCH. 900 (1976).

268 Coping Strategies, supra n. 259, at 497.

269 From two years post-placement.

270 Wiley & Baden, Birth Parents in Adoption, supra n. 258, note that research on the long-term effects of adoption relinquishment tend to be based on self-selecting samples or samples from birth mothers seeking treatment. Id. at 30. Because of this sampling bias, “No data were found in either the clinical or empirical literature on birth parents that suggest that birth parents cope well with their decision to relinquish.” Id. While this sampling bias may make it difficult to assess how many birth parents suffer long-term effects and how many do not, the studies do offer important information about negative effects that birth mothers may experience long-term. And for comparison purposes, it is important to note that the empirical data about women who have emotional difficulties following abortion suffer from the same sampling bias.


274 Birth Parents in Adoption, supra n. 258, at 29.

275 Id. at 29-30.
and overprotection of children born to and raised by birthmothers after the placement of a child for adoption.”

Birth mothers who kept the adoption relinquishment a secret feared that others would reject them if the secret were discovered. Birth mothers experienced what one researcher calls the “psychological presence” of the relinquished child, discrediting the frequently-asserted notion that birth mothers would forget about the relinquishment experience and continue on their pre-pregnancy life trajectory.

Birth mothers also experience a higher rate of secondary infertility than the population at large, and many have no other children. In one study, the majority of birth mothers reported “no decrease in feelings of sadness, anger, and guilt since their relinquishment up to 30 years [before].”

C. Importance of the Decision

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

What marks the decision as important can be unraveled into three strands: 1) the immediacy of the decision, 2) the permanence of the decision, and 3) the effect of the decision beyond the interests of the minor birth mother. Decisions about relinquishment of parental rights and adoption placement share these aspects of decisions about abortion.


1. Immediacy

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

The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it. A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.282

The Court further noted that if those short weeks were to pass, then the minor mother might have to face the enormous consequences of teen parenting.283

The decision about adoption placement shares a similar, if not identical, sense of immediacy. Professor James Dwyer writes of “the urgency to act immediately after birth to get babies into permanent families,” because of the importance of the infant attaching to the adoptive parents.284 Professor Elizabeth Samuels has noted, in an article titled, *Time to Decide*, that an expectant mother’s decision about adoption placement is time-sensitive.285 In looking at cases where a birth mother seeks to regain her child, Professor Samuels writes:

Perhaps most starkly, they highlight the very short periods of time that are provided under a majority of state laws after which a mother's consent may effectively be given and become irrevocable. In a number of other countries – including a majority of European countries and Australian states – consent may not be given or does not become final for a period of approximately six weeks. In approximately half the U.S. states, however, irrevocable consent can be established in as short a period as less than four days after birth.286

And the time within which a placing mother has to decide or to change her mind is growing shorter with each legal reform of adoption laws. Professor Samuels notes that a number of

282 Id.

283 Id.


285 Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509 (2005)[hereinafter *Time to Decide*].

286 Id. at 513-14.
states have sharply limited consent or revocation periods in recent years. For example, at one
time Louisiana allowed a birth mother to revoke her consent at any time before a final decree of
adoption was entered. Then in 1960, the time was cut shorter, allowing for revocation only until
an interlocutory decree of adoption was entered. Then in 1979, the time period for revocation
was reduced to 30 days, and the revocation did not automatically provide for return of the child
to the birth mother, but return only if in the best interests of the child. That 30 day period is
generous, compared to other states, according to Professor Samuels: in Colorado, a birth
mother’s consent is irrevocable after 4 days. Thus, the law creates a sense of immediacy for
the decision about relinquishment of parental rights and consent to adoption.

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

2. Permanence

The Supreme Court has also noted that the decision about abortion is important because
of its permanence. It is a decision that cannot be undone. Once the abortion is obtained, there is
no other option. And once the decision to forgo the abortion is made, and the time to obtain an
abortion has passed, the decision to give birth is equally permanent. The Court said, in Belloti v. Baird:

287 Id. at 546.
288 Id. at 545.
290 Marianne Berry, The practice of open adoption: Findings from a study of 1396 adoptive families, 13 CHILDREN & YOUTH SERVICES REV. 379 (2002)(30% of the adoptive parents were present at the birth of the adopted child (half of those in the delivery room and half nearby in the hospital)); Jeffrey J. Haugaard, Natalie M. West & Alison M. Moed, Open Adoption: Attitudes and Experiences, 4 ADOPTION QUARTERLY 89 (2000) (reporting similar figures for presence of adoptive parents at birth of child).
291 Time to Decide, supra n. 287, at 525.
292 2 MADELYN FREUNDLICH, ADOPTION AND ETHICS 27 (2000).
Moreover, the potentially severe detriment facing a pregnant woman, is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. . . . In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.293

Because of the adoption option not mentioned by the Court, the decision to forgo abortion does not make teen parenting inevitable. However, as noted in the discussion of the medical, emotional and psychological effects of adoption placement for the birth mother, the status as birth mother has indelible consequences.294 Also as noted above, given the difficulty of revoking a decision to relinquish parental rights and consent to adoption, that decision is permanent.295

To the same extent that the birth parent’s relinquishment of parental rights marks a permanent change in the parent’s rights, the relinquishment works that same permanent change on the adoptee’s relationship to that parent. The adoptee can no longer rely on the parental obligations that law creates, including the parent’s obligation of financial support.296 Termination of parental rights is, therefore, permanent.

3. Effects Beyond the Mother

With regard to the decision about abortion, one must acknowledge that many people believe that the fetus represents life, and has the same status as a person who is born.297 Thus, they are concerned about the effect of the minor’s abortion decision on that life. However, the law does not recognize the fetus as a person.298 Nonetheless, the Supreme Court has


294 See discussion accompanying nn. 244-266, supra.

295 See discussion accompanying nn. 270-273 supra.

296 Am. Jur. 2d, Adoption § 170. In some stepparent adoptions, termination of the parental rights of a parent so that the spouse of the other parent can adopt the child does not extinguish child support obligations.

297 Resolving this highly contested issue is beyond the scope of this article. As the Court noted in Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992), “Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage.” For the attempts of others to resolve the question, see JOHN T. NOONAN, JR., THE MORALITY OF ABORTION (1970); LAWRENCE H. TRIBE, THE CLASH OF ABSOLUTES (1990); Ruth Colker, Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom, 77 CALIF. L. REV. 1011 (1989); Mark T. Brown, The Morality of Abortion and the Deprivation of Futures, 26 J. MED. ETHICS 103 (2000); Don Marquis, Why Abortion is Immoral, 86 J. PHIL. 183 (1989); Mary Anne Warren, Do Potential People Have Moral Rights, 7 CAN. J. PHIL. 275 (1977); Judith Jarvis Thomson, A Defense of Abortion, 1 PHIL. & PUB. AFF. 47 (1971). Note that adoption also presents moral issues. See TIMOTHY PATRICK JACKSON, THE MORALITY OF ADOPTION: SOCIAL-PSYCHOLOGICAL, THEOLOGICAL, AND LEGAL PERSPECTIVES (2005).

298 See Roe v. Wade, 410 U.S. 113, 158 (1973)(“the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”).
acknowledged that a state has an interest, beyond the health of the mother, in the potential for life that the fetus represents.\textsuperscript{299} Because of that interest, a state can enact laws informed by a preference that the pregnancy be continued rather than terminated.\textsuperscript{300} In this way, the law recognizes the effect of the abortion decision beyond the minor mother herself, and concerns itself with the effect of the abortion in ending the potential for life.

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

Adopted children are thought to face some unique developmental challenges. "[U]nlike children growing up with their birth parents," Triseliotis observes, "those adopted have to accomplish or be aided to accomplish a number of additional psychological tasks, which most of them do successfully." Those tasks include attaching to new parents, understanding the meaning of adoption, acknowledging the differences involved in having two sets of parents, and "dealing with the sense of loss of the original parents and the element of rejection that it conveys."\textsuperscript{301}

While adoption often has a positive effect on adoptees, especially when compared to those who are raised in institutions or in foster care and never adopted,\textsuperscript{302} there are also lifetime issues, some quite negative, that face many adoptees.\textsuperscript{303} Many adoptees’ struggles with adoption identity, while not reaching the level of psychopathology, may explain high levels of behavior

\textsuperscript{299} Id. at 150 (Court rejects the notion that it must decide that life begins at conception, accepting “the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.”). See also Planned Parenthood v. Casey, 505 U.S. 833, 869 (1992)(the state’s “concern for the life of the unborn” has “at a later point in fetal development . . . sufficient force so that the right of the woman to terminate the pregnancy can be restricted”).

\textsuperscript{300} Planned Parenthood v. Casey, 505 U.S. 833, 872 (1992)(state may enact laws designed to encourage mother “to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term.”); Poelker v. Doe, 432 U.S. 519, 521(1977)("The Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth.”).

\textsuperscript{301} Time to Decide, supra n. 287, at 530-31, quoting JOHN TRISIELIOTIS, ADOPTION: THEORY, POLICY AND PRACTICE 35 (1997).

\textsuperscript{302} David M. Brodzinsky, Long-Term Outcomes in Adoption, 3 FUTURE OF CHILDREN 153, 153 (2003); Evan B. Donaldson Adoption Institute, Beyond Culture Camp: Promoting Healthy Identity Formation in Adoption 14 (2009).

\textsuperscript{303} Evan B. Donaldson Adoption Institute, Beyond Culture Camp: Promoting Healthy Identity Formation in Adoption 29-30 (2009). This study found that, against expectations that adoption issues would taper off for adults, that for both same-race and transracial adoptees adoptee identity continued into adulthood. “[R]esult suggests the lifelong nature of identity work and the reality that adulthood is a crucial period in which adoptive and racial/ethnic identities continue to be salient for adopted persons.” Id. at 30. Almost one-fourth of same-race adoptees reported, as adults, that they felt extremely or somewhat uncomfortable with their identity as an adopted person. Id. at 32.
problems observed in adopted children and adolescents. In addition, while adoptees represent less than two percent of the childhood population in the United States, they represent 10-15% of those in mental health care facilities.

Adoptees may experience adoption not as the happy event adoptive parents and society ascribe to it, but as a more ambivalent experience. Adoptees may experience adoption as a profound loss, despite the “replacement” of the lost birth family by adoptive family. Adoptees can have problems with fears of abandonment and rejection, and with trust and attachment that affects future relationships. Because of cultural biases that favor biological families, adoptees may face stigma associated with being adopted.

The many similarities between minors’ decision-making about abortion and about adoption placement – physical and emotional risks to the mother and effects beyond the mother –

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309 Consider this description of the stigma of being adopted:

Adopted children are seen as coming from a defective biological line; their birth parents either did not want them or were immoral and dysfunctional. Adopted children are seen as damaged goods, presumed to have suffered maltreatment after birth before being rescued and processed by the child protective system, and therefore, likely to have lifelong struggles. . . . Adopted children also appear atomistic, because they are disconnected from their extended biological family and because we suspect their extended adoptive family keeps them at arms length, never treating them as full or equal members of the family. They are persons with no real family. Because of this perception, adopted children are often uncomfortable revealing that they were adopted. This perception is a major reason why many adoptees undertake a search for their birth parents: we communicate to them that they are deficient, lacking something of great importance, and as a result, they go to great lengths to try to become complete.

suggest that similar treatment of those decisions is called for. To the extent that minors have impaired decision-making capacity in one arena, they lack it in similar arenas. Similar treatment, however, does not mean identical treatment. There is at least one significant difference between the abortion and adoption decision – the legal complexity of the adoption decision – that suggests that parental notification may not be an adequate protection of a minor’s interests in the course of decision-making about adoption.\(^{310}\) This is reflected in the few states that treat a minor’s decision to terminate parental rights and consent to adoption differently from an adult’s decision. In lieu of parental notification, those states provide for appointment of guardian ad litem or an independent attorney for the minor parent.\(^{311}\) The following section discusses the appropriate remedy among remedies and proposes statutory reform.

V. Proposed Statutory Reform

Stephanie Bennett was a 17-year-old mother and high school student, living at home in Ohio with her supportive mom and step-dad. When she revealed concerns about motherhood to her guidance counselor, Thomas Saltsman, he immediately arranged for her to meet with an adoption agency on school grounds, during school hours. Days after that first meeting, Stephanie took baby Evelyn and ran away from home. Hours later, she signed the paperwork relinquishing her parental rights. Stephanie’s parents were devastated.\(^{312}\)

A. Choosing a Remedy Among Remedies

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

While there can be disagreement over parental involvement in minors’ abortion decisions, it seems that at least parental involvement is tailored to the identified issues with

\(^{310}\) See discussion, infra, accompanying nn. 318-354.

\(^{311}\) See discussion, supra, accompanying nn. 181-224.

regard to the decision. A parent may be able to help weigh the medical and psychological effects of abortion and adoption placement, but a parent is not as capable at helping a teen navigate the multitude of complex legal issues related to adoption.\(^{313}\) There are also practical and constitutional considerations in parental consent in a minor’s adoption decision that do not exist with a minor’s abortion decision. What, for example, would happen if a minor parent wanted to relinquish parental rights and the minor’s parent refused to consent? A minor cannot be compelled to parent any more than she can be compelled not to parent. Ordinarily, when the minor’s parent refuses to consent it is because that minor’s parent (the child’s grandparent) is interested in parenting the grandchild. But if that is not the case, a judge will be called upon the resolve the dispute, and would need to appoint counsel and/or guardian ad litem for all involved.

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

An attorney and a guardian ad litem, however, are bound by very different professional standards defining each one's obligations towards their clients. The representative serving in the role of an attorney is generally bound by guidelines of professional responsibility, while a representative serving as a guardian ad litem is not necessarily bound by the same client obligations. In general, a guardian ad litem is not bound by the client's expressed wishes and is able to advocate for a result that he or she believes to be in the minor's best interests. By contrast, an individual serving as an attorney is obligated under professional and ethical rules to advocate for a minor's expressed preferences, irrespective of what the attorney believes to be in the minor's best interests. Furthermore, an attorney is obligated to maintain client confidentiality under ethical guidelines, while a guardian ad litem generally does not have any confidentiality obligations towards his or her minor client.\(^{314}\)

The distinctive role of guardian ad litem is not adequate protection of a minor parent’s decision about the complex legal matters involved in the adoption placement decision.\(^{315}\)

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\(^{313}\) This is not to suggest that parents are unimportant in the decision. Most studies show that successful teen parents are those who have a support system, including parents. See Sarah E. Oberlander, Maureen M. Black & Raymond H. Starr, Jr., *African American Adolescent Mothers and Grandmothers: A Multigenerational Approach to Parenting*, 39 AM. J. COMMUNITY PSYCH. 37 (2007).


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

The early adoption statutes provided a mechanism for the transfer of full parental control from one person to another. The statutes carefully specified that the adoptive parents stood in the shoes of the biological parents with respect to custody, obedience, and care. They explicitly transferred "all" parental rights from the biological parents to the adopting parents, with a corresponding transfer of the child's legal obligations of obedience, support, and maintenance. Thus, although the parent-child relationship was transformed with respect to the parent's identity, the nature of parental rights and authority remained unchallenged. Adoption thus confirmed the indivisibility of parental rights by allowing new parents to replace legally the birth parents.316

For that replacement to be effectuated, a court must first terminate the parental rights of the birth parents before granting parental rights to the adoptive family.317

The Supreme Court has long recognized parental rights as fundamental rights recognized by the Constitution.318 Because of the fundamental nature of parental rights, the Supreme Court has said that a state cannot lightly revoke those rights. When a state seeks to terminate parental rights involuntarily (without the parent's consent), the Constitution requires a heightened standard of clear and convincing evidence.319 Despite the fundamental nature of parental rights, a parent can voluntarily relinquish these rights.

Voluntary relinquishment of parental rights cuts off all parental rights, including “the parent's right to the custody of the child and his right to visit the child, his right to control the child's training and education, the necessity for the parent to consent to the adoption of the child and the parent's right to the earnings of the child, and the parent's right to inherit from or through the child.”320 A minor birth parent may not know or understand what rights parents have, so that she does not fully understand the rights she is relinquishing. Consider the case of 17-year-old LaTonya Chienta Anderson.321 She signed a relinquishment and consent that read as follows:

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

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

This case seems to illustrate perfectly why a minor needs additional protections in signing an adoption consent. It is easy to imagine that she saw the adoption as a way to make the custody “legal,” without understanding the implications for her own parental rights. All that is encompassed in her request that the judge “make all such orders and decrees as may be necessary or proper to legally effectuate said adoption,” was likely just so much mumbo-jumbo to the minor mother.

Relinquishment of parental rights and consent to adoption must be knowingly and voluntarily given. Because of the complexity of the legal decisions involved in adoption, it is difficult to see how a minor’s actions in this regard could be knowingly, intelligently and voluntarily given – at least without support from a legal professional. Consider a student in my

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322 Id. at 1080.
323 Id.
324 Id.
325 Id.
326 Id.
327 Id.
328 See In re J.M.P., 528 So.2d 1002, 1007 (1988);
Adoption Law class. Now an adult, she had relinquished a child for adoption when she was 16 years old. She shared that information with the class, and said key to her decision to place her child for adoption was that she had been given a choice of adoptive parents and the promise of continuing contact. During the course of the class, she was dismayed to learn that the promise of continuing contact – an “open adoption” agreement – was not legally enforceable in the state in which she entered into it. When she looked with adult eyes at her relinquishment affidavit, she realized that she had relinquished the child to the adoption agency, not to her chosen adoptive parents, and that the agency could have placed her child with other adoptive parents. She learned during the course of the class that her child’s right to inherit from her had been terminated. She discovered that she could not have access to her child’s original birth certificate, even though her name was on it as mother. This birth mother was obviously intelligent, proven by her graduation from high school and college, and her admission to law school. But at age 16, she was not aware of the legal intricacies of the adoption placement decision.

The issue of open adoption, or post-adoption contact, is a particularly thorny legal issue in adoption placement. Since adoption requires termination of parental rights of the biological

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329 That state, Texas, did not allow for legally enforceable post-adoption contact agreements until 2003, years after the student’s adoption placement decision. For more about the complexity of the enforcement of post-adoption contact agreements, see discussion at text accompanying nn. 290-305.

330 See TEX. FAM. CODE ANN. 161.103(b)(12)(2010), which provides that the affidavit of relinquishment of parental rights may name the prospective adoptive parent, but need not do so. Instead, a child placing agency can be named as the managing conservator of the child. Then, under TEX. FAM. CODE ANN. 162.010 (2010), the managing conservator can consent to the adoption with no further consent of the biological parent needed.

331 The law student had been pleased to learn in her course on wills and intestate succession that under TEX. PROBATE CODE ANN. §40 (2010), her child could inherit from her. She did not realize, however, that the trial court in her adoption placement had cut off the right of inheritance in the decree terminating her parental rights, as permitted by TEX. FAM. CODE ANN. §161.206 (2010). She did not attend the hearing, and as a 16-year-old, it is unlikely she would have understood what was happening since she was not represented by counsel.

332 Only the court that granted the adoption may grant access to the original birth certificate. TEX. HEALTH & SAFETY CODE ANN. §192.008 (2010). Any other information about the adoption, including current information about the identity and location of the adopted child would only come about from the mutual consent registry in Texas, TEX. FAM. CODE ANN. §162.407 (2010), and only if both birth mother and adopted child registered and were matched. Absent a match, the student would only be able to get the information by going to court and showing good cause. TEX. FAM. CODE ANN. §162.022 (2010)(showing of “good cause”); Dan Tilly, Confidentiality of Adoption Records in Texas: A Good Case for Defining Good Cause, 57 BAYLOR L. REV. 531 (2005)(simply desiring a reunion between birth mother and adopted child is not good cause).

parents, they possess no residual rights to insist on post-adoption contact. Only in the minority of states where there is legislation on point does a birth parent have an enforceable right to post-adoption contact. It is still common practice in states without enforceable open-adoption agreements, however, for agencies and adoptive parents to enter into such unenforceable “agreements.” For example, Amazing Grace Adoption Agency, based in Raleigh, North Carolina, offers the following services to birth parents: “Choosing and meeting with an adoptive family; Receiving information and pictures of your baby following an adoptive placement; Different levels of openness with the adoptive family.” If you visit the website of Missouri Adoption Agency, a page will describe open adoptions, and includes a testament by a birth mother describing her contact with her relinquished child: “It was my desire to have an open adoption and this has worked beautifully for all of us.” At Spirit of Faith Adoption Agency in Ohio, the agency describes open adoption as an option: “Most importantly, because of openness, there can be contact in the future and an ongoing story to share of your child’s life; a story that is based on love. When there is openness, or on-going communication between adults, your child will know that the decision you made was not an easy one, and made out of love for

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334 McCabe v. McCabe, 78 P.3d. 956, 958 (Okla. 2003)(termination of parental rights cuts off all parental rights, including “the parent’s right . . . to visit the child”); Tammy M. Somogye, Opening Minds to Open Adoption, 45 KAN. L. REV. 619, 623 (1997)(adoption severs all rights of the biological parents, without an exception for establishing visitation rights).

335 According to Child Welfare Information Gateway, Postadoption Contact Agreements Between Birth and Adoptive Families, U.S. Department of Health and Human Services, Children’s Bureau (2011), the following states have some form of enforceable continuing post-adoption contact: Alaska, Arizona, California, Connecticut, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin. Six states have statutes that explicitly provide that while open adoption agreements may be entered into, they are not enforceable by the court: Missouri, North Carolina, Ohio, South Carolina, South Dakota and Tennessee. In all other states, statutes are silent about the enforceability of open adoption agreements.

336 Six states have statutes that explicitly provide that while open adoption agreements may be entered into, they are not enforceable by the court: Missouri, North Carolina, Ohio, South Carolina, South Dakota and Tennessee. Yet, in those states, adoption agencies still offer “open adoption agreements.”


338 [http://www.allblessings.org/birthparent/typesofadoption.shtml](http://www.allblessings.org/birthparent/typesofadoption.shtml) (last visited by author July 21, 2012). The website does not mention that open adoption agreements are unenforceable in Missouri. See MISSOURI ANN. STAT. §453.080(4) (2010)(upon completion of an adoption, further contact is solely at the discretion of the adoptive parents).
him/her.” The birth parents may not be aware that the openness promised by these agencies will not be legally binding.

In those states with enforceable open adoption agreements, there are complex legal requirements to limit the parties who can enter into such agreements and to limit the types of adoptions in which such agreements are enforceable. For example, in Connecticut, post-adoption contact agreements are not enforceable in private adoptions, only in adoptions from foster care. In Nebraska, court-approved contact agreements are only renewable two-year terms. In Wisconsin and Vermont, open adoption agreements are only enforceable in stepparent adoptions. In Indiana, the agreement is enforceable only if the child is over age 2 at the time of the adoption, while in Oregon, if the child is under age 1, the child must have spent at least half his or her life with the birth relative seeking an open adoption agreement. Similarly, in Oklahoma, the agreement is enforceable only if the child resided with the birth parent prior to the adoption. In Montana, a court can refuse enforcement of an open adoption agreement if enforcement would be detrimental to the child or undermine the adoptive parent’s parental authority, or if due to changed circumstances, compliance with the agreement would be unduly burdensome. Even without these limitations, most states with enforceable agreements require careful attention to intricacies of the statutes. In most states that enforce open adoption agreements, those agreements are enforceable only when approved by a court and/or included in an adoption decree. In Texas, a post-adoption contact agreement is enforceable only if a judge incorporates it in the termination of parental rights order; it is not enforceable if it is only included in the affidavit for voluntary relinquishment of parental rights, or if it is only included in the adoption decree. These are not requirements that a minor birth mother is likely to know.


340 CONN. GEN. STAT. §45a-715(h)(2010).


342 WISC. ANN. STAT. §48.925(1)(2010); VERMONT ANN. STAT. Tit. 15A, § 4-112 (2010).


345 OKLAHOMA ANN. STAT. Tit. 10, §7505-1.5 (2010).

346 MONTANA ANN. CODE § 42-5-301(2010).

347 See, e.g., ALASKA STAT. §§25.23.180(j); 47.10.089(e) (2011); MINN. ANN. STAT. §259.58 (2010); ORE. REV. STAT. §109.305 (2011).

Minor birth parents may not be aware of legal rights associated with revocation of consent, with inheritance rights, or with any of the other multitude of rights and obligations affected by the legal relinquishment of parental rights and consent to an adoption. If the only adults with whom the relinquishing minor interacts are the adoptive parents or the lawyer or

349 For example, all consents in Massachusetts are irrevocable. Mass. Ann. Laws Ch. 210, §2 (2010) In Hawaii, consent is irrevocable unless a court finds it would be in the child’s best interest to allow the revocation. Hawaii Rev. Stat. §578-2(f)(2010). In other states, there are revocation periods of various lengths. In Arkansas, for example, a birth mother has 10 days in which to revoke consent. Ark. Code Ann. §9-9-209 (2010). Oklahoma gives a birth mother 15 days to revoke her consent, but only for an extrajudicial consent; all other consents are irrevocable. Okla. Ann. Stat. Tit. 10, §§7503-2.7; 7503-2.6 (2010). Birth mothers in Kentucky have 20 days to revoke consent. Kentucky Rev. Stat. §199.500 (2010). Birth mothers in California have 30 days in a direct placement adoption, unless the child is an American Indian child, in which the time limit is 2 years. Cal. Fam. Code §§8814.5; 8700, 8606.5 (2010). In Colorado, a birth mother may withdraw her consent within 90 days, but only if she establishes by clear and convincing evidence that her consent was obtained by fraud or duress. Co. Rev. Stat. §19-5-104(7)(a)(2010). And in all states, if the child is an American Indian child, “the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption.” Indian Child Welfare Act, 25 U.S.C.S. §1913(c)(2012). See also Time to Decide, supra n. 287, at 509. Furthermore, a right to revoke consent may not mean that a relinquishing parent automatically regains custody of the child and a return of parental rights. In a number of jurisdictions, revocation of consent only triggers a hearing to determine whether it would be in the best interests of the child for the birth mother’s consent to be vitirated. See, e.g., In re J.M.P., 528 So.2d 1002 (1988), where the birth mother “timely exercised her right to revoke her consent,” but rather than return of the child, she faced a best interest of the child hearing where a trial court would compare the 18-year-old single mother who was a cashier at a grocery store and who was still living at home with her parents because of her inability to support herself, with a two-parent established household with a stay-at-home parent.

350 In Alaska, for example, all inheritance rights of the adopted child from the birth parents or relatives of the birth parents are terminated, unless the adoption decree specifically continues them. Alaska Stat. §§25.23.130; 13.12.114 (2010). In Kansas, an adoption decree terminates the right of the birth parent to inherit from the adopted child, but the adopted child may still inherit from the birth parent. Kan. Ann. Stat. §59-2118 (2010). Upon the death of an adoptee in Illinois, the birth parents cannot inherit from the adoptee “property that the adopted person has taken from or through the birth parent or birth relatives by gift, will, or under intestate laws.” Ill. Cons. Stat. Tit. 755, § 5/2-4(b), (d) (2010). In Texas, one statute giveth what another taketh away: the Probate Code provides that an adopted child can inherit from birth parents, Tex. Probate Code Ann. §40 (2010), while the Family Code provides that a birth child inherits from birth parents only if the court does not terminate those inheritance rights in the decree terminating parental rights. Tex. Fam. Code Ann. §161.206 (2010).

351 Alaska Code §18.50.500 (2009)(if adult adoptee consents, birth parent can receive current name and address); Cal. Fam. Code §9201 (2009) if adoptee is age 21 or older and consents, birth parent can receive identifying information). Many states provide a mechanism for a birth parent, without being identified, to supply updated medical information to an adoptee who requests it. Thus, a birth parent who develops a disease that may be inherited by her birth child can supply that information even after the adoption is finalized. See, e.g., Colorado Rev. Stat. §19-5-305 (2009). However, most do not provide a mechanism for an adoptee to provide medical information to the birth parent. Thus, an adoptee who develops a disease likely inherited from a birth parent cannot inform the birth parent, thus preventing early diagnosis and treatment of that birth parent or other children of that birth parent. In those jurisdictions, a birth parent would only be able to access such information by applying to the court. See, e.g., Arizona Rev. Stat. §8-121 (2009)(disclosure only on showing of “compelling need”); Tex. Fam. Code Ann. §162.022 (Vernon 2010)(showing of “good cause”); Dan Tilly, Confidentiality of Adoption Records in Texas: A Good Case for Defining Good Cause, 57 Baylor L. Rev. 531 (2005)(collecting “good cause” cases from multiple jurisdictions). And without knowing that the adopted child has developed any such condition, the birth parent would be hard pressed to establish good cause.
agency representing the adoptive parents, a minor will have little access to information crucial to a voluntary and knowing consent. The judge overseeing the adoption is not usually in the position to serve this function. Though adoption is a legal process, it is not uncommon for a birth mother never to set foot in the courtroom. Statutes allow a birth parent to waive notice of any and all hearings at the same time the affidavit of voluntary relinquishment is signed.\textsuperscript{352} Thus, there is no opportunity for a birth parent to ask questions in court, for a judge to assess the maturity of the minor birth parent or what the birth parent understands about the legal parental rights she is waiving.

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

\textbf{B. Proposed Statute}

In order to adequately protect a minor parent’s constitutionally-protected right to parent, a state’s adoption statutes must require the appointment of legal counsel for minor parents. That counsel must be independent of the adoptive parents and/or the adoption agency so as to avoid any conflict of interest.\textsuperscript{353} The statute must also consider the financial status of the minor parent, and provide for independent legal counsel at no cost to the minor parent, either through government appointment and payment or through attribution of the cost to the adoption agency or adoptive parent. An appropriate statute should also ensure that a minor parent be provided adequate information about resources available to aid her in parenting, similar to that given before making a decision about abortion in many states, before she makes a decision to terminate her parental rights and consent to an adoption.

A statute should read as follows:

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

\textsuperscript{352} See, e.g., TEX. FAM. CODE ANN. §161.103 (2010)( affidavit of voluntary relinquishment of parental right may contain waiver of process in suit to terminate the parent-child relationship and adoption); Md. Code 5-339(a)(1)(i) (2011)(consent may include waiver of right to notice of further proceedings).

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

3. An attorney advising a minor parent shall certify for the court in writing that the minor parent has been advised by the attorney of the:

   a) legal rights and responsibility of parents;
   b) consequences of termination of parental rights on the legal rights and responsibility of parents, including rights of inheritance, confidentiality of adoption records, legal requirements for future contact between parent and child;
   c) circumstances in which the relinquishment of parental rights can be revoked and consent to adoption can be withdrawn;
   d) availability or unavailability of post-adoption contact agreements in the jurisdiction and the legal enforceability of such agreements;
   e) legal obligation of both parents to provide financial support for their child and the availability of services from the State to determine paternity and enforce child support orders;
   f) eligibility of birth parent and child for state and federal welfare assistance;
   g) right of the parent to be present in court for termination of parental rights and/or finalization of adoption and the right to waive such right;
   h) limitation on any representation of the parent, including a statement that the attorney will not be representing the parent in any contested adoption.

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

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

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

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

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

It rang though my ears like a harsh tolling bell of death. The words cut me like razors, I just wanted them to shut up and be done with it. Yes, yes, whatever...just be quiet, stop saying that, where is the pen? I signed. . . . I disassociated from it all, and just went on automatic. I would be strong and do what I ought, what would make them all happy and cleanse me, make them proud. No tears, no wavering, determination. 354

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

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

The failure to recognize the mother-child dyad as a family suggests we need not protect that dyad as we would the normative family. We can then unmoor the rights of the mother from

biology, and insist instead that we focus only on the best interest of the child, and do so from the proposition that a teen mother can never be in the best interest of a child. This is how we have come to the current state of the law where minor mothers are relinquishing constitutionally-protected parental rights with little consideration for the decision-making deficits of teens.

If states with parental involvement laws are truly basing those laws on a minor’s inability to make reasoned decisions, especially in important matters, then those states should seek to remove the inconsistency in their laws that allow a minor to relinquish her parental rights and place a child for adoption without any independent adult oversight. Given the legal complexity of the adoption decision, and its lifelong effect on birth parents and adoptees, all birth parents, regardless of age, should be provided legal counsel in the process. But at a minimum, minor birth parents, whose immaturity and inexperience may impair decision-making, should have the assistance of independent legal counsel when making the adoption placement decision.