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NOTE

THE JUDICIAL BYPASS PROCEDURE AND ADOLESCENTS' ABORTION RIGHTS: THE FALLACY OF THE “MATUREITY” STANDARD

I. INTRODUCTION

In 1979, six years after Roe v. Wade1 laid down the guidelines for constitutional protection of a woman’s right to choose an abortion,2 the Supreme Court had still not settled on a formula which would express the extent to which the Constitution protected the abortion rights of pregnant teenagers. In the 1976 case of Planned Parenthood v. Danforth,3 the Court rejected a Missouri statute that required an unmarried minor to obtain the consent of a parent before having an abortion.4 Yet the decision was only five to four,5 and even the majority hinted that a less restrictive statute might be acceptable.6

In 1979, Bellotti v. Baird7 invalidated a Massachusetts parental consent statute, even though the statute provided that a teenager who

2. See infra note 118 (outlining the “trimester” framework through which Roe balances the rights of the woman, the state, and the fetus).
4. Id. at 74. The majority held that, after Roe, the state may not grant a third party the right to “an absolute, and possibly arbitrary, veto over the [minor’s] decision.” Id.
5. Id. at 54. The majority opinion was written by Justice Blackmun; Justice Stewart concurred joined by Justice Powell. Justice White, joined by Chief Justice Burger and Justice Rehnquist, concurred in part and dissented in part, as did Justice Stevens. See infra note 6 (discussing dissent theories).
6. Id. at 75 (stating that the “holding . . . does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy”). Justice White dissented on the ground that a requirement of “parental consultation and consent” for important decisions was the traditional method states have used to protect minors from their immaturity. Id. at 95 (White, J., concurring in part and dissenting in part). Justice Stevens found that Roe emphasized the importance of the abortion decision and thus the importance of assuring that a young woman will make a correct decision; it was “not irrational” for the legislature to determine that parental advice would make that more likely. Id. at 103 (Stevens, J., concurring in part and dissenting in part).
could not obtain the consent of her parents could attempt to obtain a court order authorizing the abortion "for good cause shown." 8 In a sense, however, the most significant aspect of Bellotti lay in dicta in the plurality opinion written by Justice Lewis Powell. 9 While finding the statute unacceptable, Powell assisted future legislatures desiring to require parental involvement in the abortion decisions of teenagers by describing the kind of alternative route to authorization, or "bypass option," that would make such a statute constitutional. 10 The Bellotti bypass procedure became the basis for current constitutional law on abortion rights of minors. The Court has since upheld several parental consent 11 and notification 12 statutes that include some version of the Bellotti bypass procedure.

Essentially, the Bellotti bypass procedure is a compromise between the traditional legal deference to parental authority over important decisions of minors 13 and the view that the right to choose abortion should accompany the condition of pregnancy, regardless of the age of the pregnant woman. 14 The procedure centers on the concept of "maturity": the state may not mandate parental or judicial approval

8. Id. at 625 (Powell, J., plurality opinion) (quoting MASS GEN LAWS ANN., ch. 112, § 125 (West 1983)). Four justices believed that this would violate the Danforth rule that prohibited a blanket third party veto over the abortion decisions of minors. Id. at 654 (Stevens, J., concurring in the judgment) (joined by Justices Brennan, Blackmun, and Marshall).

9. Justice Powell was joined by Chief Justice Burger and Justices Stewart and Rehnquist. However, Justice Rehnquist made it clear in a separate concurrence that he went along with the Powell opinion solely to provide guidance to lower courts. Id. at 651-52 (Rehnquist, J., concurring).

10. Id. at 643-44 (Powell, J., plurality opinion).


For a detailed discussion of Ohio v. Akron Center for Reprod. Health, Inc. and Hodgson v. Minnesota, see infra notes 99-113 and accompanying text.

13. See infra notes 54-62 and accompanying text (discussing deference to parental authority and the rationale behind it).

14. See infra notes 120-23 and accompanying text (citing the proponents of this view).
of the abortion decisions of all pregnant teenagers, because the "unique nature" of the abortion decision requires that "mature" teenagers be allowed to make that choice themselves. In other words, in the case of abortion, the presumption that all teenagers are unable to make important decisions for themselves must be replaced by a case-by-case determination of "maturity."16

In a skeletal outline, the procedure works like this:17 state legislatures may require an unmarried pregnant teenager to obtain parental consent or give parental notice before having an abortion, as long as they also provide the teenager an alternative route through the courts.18 This "judicial bypass procedure" must allow a minor to "bypass" her parents and go directly to court.19 There, a judge must determine whether or not the minor has sufficient "maturity" to decide for herself to have an abortion. No definition of "maturity" or guidelines for its determination have been supplied by the Court in Bellotti or any subsequent case.20 If the judge determines that a teenager is "mature," she receives judicial recognition of her maturity for the purposes of the abortion decision, not judicial consent. If the judge finds that a teenager lacks the "maturity" to make the abortion decision alone, she must still be allowed to get an abortion without

15. Bellotti, 443 U.S. at 642-43 (Powell, J., plurality opinion) (explaining that because of the need for a quick decision and the potential far-reaching consequences, abortion is different from other decisions a minor may face).
16. Id. at 643-44.
17. In subsequent cases, the Court has allowed legislatures to elaborate on this outlined procedure in various ways. See infra notes 99-113 and accompanying text for a discussion of two of these cases.
18. There is no legal requirement that the decision be made by a judge, however, relevant legislation has cast judges in this role. See infra note 20 for examples of these statutes.
19. This is one of the main ways in which the procedure differs from the one rejected in Bellotti. The proposed statute would have required a teenager to attempt to obtain her parents' consent first; only if they refused could she attempt to receive a judicial waiver for "good cause." Bellotti, 443 U.S. at 625 (Powell, J., plurality opinion) (quoting MASS. GEN. LAWS ANN., ch. 112, § 125 (West 1983)).
20. See Bellotti, 443 U.S. at 647-48. States are of course free to supply guidelines of their own. One of the most detailed of such guidelines is MO. ANN. STAT. § 188.028.2(2)-(3) (Vernon 1983) (outlining bypass procedure in parental consent provision), "the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor . . . ." Id. § 188.028.2(3); see also KY. REV. STAT. ANN. § 311.732(3)(e) (Michie 1994) (using similar language to describe the bypass procedure and parental consent provisions). As one commentator suggests, guidelines such as these "fail to provide much help to courts." Wendy Anton Fitzgerald, Maturity, Difference, and Mystery: Children's Perspectives and the Law, 36 Ariz. L. Rev. 11, § 6 n.499 (1994). For more examples of elaborations on the Bellotti requirement in the bypass procedures of parental consent and notice statutes, see infra note 89.
parental involvement if the judge determines that it is in her best interests.\(^{21}\)

The aim of this Note is to show the weakness of assumptions and associations that help to support the “maturity” standard which is at the center of the bypass procedure, in the face of the abundant evidence that the procedure itself does substantial harm to those it alleges to protect—pregnant teenagers. Part II focuses on this evidence by showing that the bypass procedure is based on questionable assumptions about the ability of teenagers to make important decisions, that the procedure is pointless on its own terms because it does not result in a change of outcome—minors are almost never denied the right to choose an abortion—and, further, that the procedure is in itself a burden which inconveniences, endangers, and humiliates pregnant teenagers with no apparent benefit to them.

Part III attempts to understand the “success” of the bypass procedure in becoming current constitutional law by exploring the roots of the “mature/immature” minor distinction in the ideology of the privacy right, theories of parental and state authority over children, and common attitudes about adults, children, and “maturity.” The bypass procedure gains legitimacy because it requires case-by-case determination of the “maturity” of pregnant minors who seek judicial approval for an abortion. This appears, at first, to be a welcome refinement of the presumption that “maturity” coincides with attainment of a certain chronological age. Though our legal system grants full legal autonomy to persons who arrive at adulthood, we are all aware that people of all ages beyond infancy vary widely in their ability and inclination to take care of themselves and others. The reliance on “maturity” and individual hearings seems humane and appeals to our instincts about adults and children and the need to protect the latter. But this very appeal makes it easier to ignore the actual consequences of the procedure in the lives of those it is supposedly devised to protect.

Part IV examines the true achievement of the bypass procedure. As shown by two recent Supreme Court decisions\(^{22}\) upholding oppressive regulation of abortion rights of minors, the bypass procedure allows legislators opposed to abortion to place burdens on the preg-

\(^{21}\) See Bellotti, 443 U.S. at 643-45 (Powell, J., plurality opinion) (outlining provisions of proposed bypass procedure).

\(^{22}\) Hodgson v. Minnesota, 497 U.S. 417 (1990) (upholding a requirement of notice to both parents where a minor could substitute a court order); Ohio v. Akron Center for Reprod. Health, Inc., 497 U.S. 502 (1990) (upholding a requirement of notice to both parents where a minor could substitute a court order).
nant teenagers seeking abortion that they are not allowed to place on pregnant adults. Finally, part V suggests that it would be more just, though not an ideal or complete solution to the problems of pregnant teenagers, to extend abortion rights to them on the same basis as to adults: the only prerequisite for the right to choose abortion should be the condition of pregnancy.

II. THE JUDICIAL BYPASS PROCEDURE: A SENSELESS BURDEN

The case-by-case determination of maturity called for by the judicial bypass procedure applies, of course, only to pregnant minors. Pregnant adults need not demonstrate their "maturity" before obtaining an abortion. This distinction is supposedly founded on the assumption that minors are less able than adults to make intelligent decisions.23

However, studies of adolescent and adult decision-making indicate that teenagers are as competent as adults in making decisions about medical treatment in general24 and abortion in particular.25 Differences in the way adolescents make decisions seem to derive not from lack of ability but from their social role as dependents,26 a role which is only reinforced by mandated interference of adults in their abortion decision. Evidence also indicates that though teenagers are

23. Belloti, 443 U.S. at 640 (Powell, J., plurality opinion) (explaining that parental notice or consent may typically be required by the state for a minor’s important decisions because “immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences”).

24. Interdivisional Committee on Adolescent Abortion, American Psychological Association, Adolescent Abortion: Psychological and Legal Issues, AM. PSYCHOLOGIST, Jan. 1987, at 73 [hereinafter Interdivisional Committee] (citing several studies and concluding that “available evidence . . . suggests that adolescents are as able to conceptualize and reason about treatment alternatives as adults are”).

25. Catherine C. Lewis, Minors’ Competence to Consent to Abortion, AM. PSYCHOLOGIST, Jan. 1987, at 84, 87 (summarizing results of several studies of adolescent decision-making and concluding that, though larger studies are needed, the current state of “psychological research gives no basis for restrictions on minors’ privacy in decision making on the ground of competence alone”).

26. Id. Lewis finds that the limited evidence available suggests that minors are as competent as adults in making pregnancy or birth control decisions and that differences in the performance of minors may result from the social and familial roles assigned to them. In other words, adolescents will make thoughtful decisions if they are allowed and encouraged to do so; see also Sigmund E. Dragastin, Research Themes and Priorities, in ADOLESCENCE IN THE LIFE CYCLE: PSYCHOLOGICAL CHANGE AND SOCIAL CONTEXT 291, 296 (Sigmund E. Dragastin & Glen H. Elder, Jr. eds., 1975) (quoting a researcher as suggesting that the “main difference in cognitive maturity in adolescents and adults may relate to levels of social participation: the picture one has for himself of what he is authorized to do and empowered to do and responsible for doing in particular situations”).
somewhat more likely than adults to suffer negative reactions follow-

ing abortions, these reactions are "generally mild."27

Nevertheless, it is difficult to imagine that a twelve- or thirteen-
year-old who becomes pregnant will always be as prepared to handle the decision of whether or not to have the child as an adult woman or even a seventeen-year-old. There is something disturbing in the image of a young child struggling with the realization that she is pregnant and seeking out an abortionist alone or with equally young friends; there is something appalling about a society that permits this to happen. However, the bypass procedure is not designed to offer such girls genuine comfort, advice, or support.28 Judges are not required or equipped to offer advice or counselling; the hearing is essentially a brief, forced appearance29 based on which a teenager is, in effect, either given or—very rarely—denied permission to have an abortion.30 Further, it is a procedure that, from the perspective of the child, appears as just another difficulty to be faced alone.31 Many pregnant teenagers, particularly younger ones, voluntarily consult at least one parent,32 and one survey reports that judges, lawyers and

27. Nancy E. Adler & Peggy Dolcini, Psychological Issues in Abortion for Adolescents, in ADOLESCENT ABORTION: PSYCHOLOGICAL AND LEGAL ISSUES 74, 84-87 (Gary B. Melton ed., 1986). The authors cite studies that show that negative reactions to an abortion are more likely when the teenager feels she has not made the decision freely but has been pressured by others. Id. at 88; see also Interdivisional Committee, supra note 24, at 74 (citing studies that show adolescents' negative feelings following abortion are "mild and transitory" and that the most common feeling of both adults and teenagers is relief).

28. See Hodgson v. Minnesota, 648 F. Supp. 756, 766 (Minn. 1986) (reporting that Minnesota judges who administer the bypass procedure find it has no positive effect on teenagers).

29. See Gary B. Melton, Legal Regulation of Adolescent Abortion—Unintended Effects, AM. PSYCHOLOGIST, Jan. 1987, at 79, 80 (hereinafter Melton, Unintended Effects) (citing report that shows hearings are typically less than fifteen minutes long and experts rarely testify).

30. See infra note 36 (citing results of three surveys of the outcomes of judicial bypass procedures).

31. See Hodgson, 648 F. Supp. at 763 (describing the guilt and shame experienced by many young women who undergo the bypass procedure).

32. Surveys of the behavior of teenagers indicate that many, especially younger ones, voluntarily consult at least one parent prior to obtaining an abortion. See Freddie Clary, Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area, AM. J. PUB. HEALTH, Mar. 1982, at 283, 284 (reporting, based on a study of 141 teenagers who attended a clinic that did not require notification, that a "substantial minority" had informed their parents beforehand—37% told their mothers, 26% their fathers—and that younger teenagers were more likely to have told a parent than older ones); Raye Hudson Rosen, Adolescent Pregnancy Decision-Making: Are Parents Important?, ADOLESCENCE, Spring 1980, at 43, 46 (finding that out of 432 unmarried Michigan teenagers surveyed, 57% had consulted at least one parent before making a final decision on how to handle the pregnancy and over
others who administer the procedure believe that forcing a teenager who feels she cannot consult with her parents to appear in court does nothing to improve parent-child communication.

Further, even if one believes that teenagers should be required to prove their "maturity" before carrying out a decision to have an abortion, the judicial bypass procedure still is not justified. The ultimate point of the procedure on its own terms is to deny the "immature" minor an abortion because it is somehow in her best interests to be forced to bear a child against her will. As Justice Thurgood Marshall commented, "It is difficult to conceive of any reason, aside from a judge's personal opposition to abortion, that would justify a finding that an immature woman's best interests would be served by forcing her to endure pregnancy and childbirth against her will." In fact,

half reported that their mother influenced their decision; Aida Torres et al., Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services, FAM. PLAN. PERSP., Nov.-Dec. 1980, at 284, 287-90 (reporting that out of 1,170 unmarried teenaged abortion patients, 55% discussed the abortion with parents prior to the procedure, 38% initiated it; 75% of those age 15 or younger consulted with parents, 46% initiated it).

33. See Clary, supra note 32, at 234. The most common reason teenagers chose not to inform their parents was fear of disappointing the parents or causing embarrassment. Id. Though from an adult perspective this may seem trivial or "childish," it can have tragic consequences. See Allison B. Hubbard, Recent Development, The Erosion of Minors' Abortion Rights: An Analysis of Hodgson v Minnesota and Ohio v. Akron Center for Reprod. Health, 1 UCLA J.L. 227 (1991) (describing a teenager who died from an illegal abortion rather than "disappoint" her parents). Approximately 30% feared hostile reactions, including violence and being prevented from having the abortion. Clary, supra note 32, at 284. As Clary and others have pointed out, it is not possible to assess how accurate teenagers' fear of negative parental reactions actually are. Id.; Gary B. Melton & Anita J. Pliner, Adolescent Abortion: A Psychological Analysis, in ADOLESCENT ABORTION: PSYCHOLOGICAL AND LEGAL ISSUES 1, 20-21 (Gary B. Melton ed., 1986). However, as has also been pointed out, the perception of parental hostility, if combined with legislation requiring parental involvement and other obstacles to abortion such as the judicial bypass, may cause teenagers to have unwanted children thus adding to social problems associated with teenage pregnancy, Clary, supra note 32, at 284-85, and can cause teenagers to delay obtaining an abortion, thus adding to medical and emotional risks of pregnancy. Melton & Pliner, supra at 21.

34. Patricia Donovan, Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions, FAM. PLAN. PERSP., Nov.-Dec. 1983, at 259, 260, 266-67. Donovan quotes from several judges and other officials who administer the procedure; a typical comment, from a public defender, is as follows:

We’ve gone from ‘gee, wouldn’t it be a better world if girls were able to take to their parents about being pregnant’ and taken a quantum leap and ordered them to talk to their parents or go through a dozen hoops . . . and suffer embarrassment and inconvenience. I don’t think that’s brought many families closer together.

Id. at 266.

surveys indicate that judges almost never deny permission for an abortion to a minor judged to be "immature."36 Often, those judged to be "immature" obtain abortions in another state.37 If the goal of the bypass procedure is to prevent "immature" teenagers from having an abortion when it is not in their best interests, it would seem that the procedure is a pointless rubber-stamp.38

However, the procedure is worse than pointless; it is an added difficulty in the lives of pregnant teenagers. It sometimes presents very real problems of access: in Minnesota, for example,39 teenagers must often face a round trip of five hundred miles or more to find an available judge.40 The procedure is bound to add to delay in obtaining the abortion, even if the teenager has access to a court and does not procrastinate out of anxiety, and delay adds to the medical and psychological risks of abortion.41 Finally, the discomfort of the court appearance itself should not be forgotten. A pregnant teenage girl can be terrified of an appearance before a judge who has the power to deny her the right to an abortion.42 No matter how gentle and under-

impossible as a legal proposition to justify a finding that a pregnant minor was too immature, to decide whether to have an abortion for herself, but that it was in her best interests to bear the child").

36. See, e.g., Suzanne Yates & Anita J. Pliner, Judging Maturity in the Courts: The Massachusetts Consent Statute, AM. J. PUB. HEALTH, June 1988, at 646, 647, for an assessment of the Massachusetts parental consent law which replaced the one struck down in Bellotti v. Baird, 443 U.S. 622 (1979). According to questionnaires filled out by their attorneys, of 477 minors who went through judicial bypass hearings (approximately 23% of the total who did so between Dec. 1981 and June 1985), only nine were found to be immature. Only one of these was denied an abortion on the ground that it was not in her best interests, and she obtained an out-of-state abortion. Id.; see also MNOOKIN, supra note 35, at 239 (reporting that of 1300 pregnant minors who sought judicial bypass under the Massachusetts statute from Apr. 1981 to Feb. 1983, 90% were found to be mature; five were denied abortions on best interests grounds; four of these later obtained judicial consent and one went out of state); Hodgson v. Minnesota, 648 F. Supp. 756, 765 (D. Minn. 1986) (citing a fact finding that of 3,573 bypass petitions filed in Minnesota courts, nine were denied).

37. See supra note 36.

38. MNOOKIN, supra note 35, at 240; Melton, Unintended Effects, supra note 29, at 80; see also Hodgson, 648 F. Supp at 766 (citing testimony by judges who heard over 90% of the bypass cases under a Minnesota parental notice statute; one referred to the procedure as a "rubber-stamp"; none believed it had any positive effect on the minors).

39. Minnesota has a statute requiring notification of both parents prior to abortion obtained by unmarried minor which was upheld in Hodgson v. Minnesota, 497 U.S. 417 (1990) (upholding MINN. STAT. ANN. § 144.343(2) (West 1989)). For a discussion of the statute and case, see infra notes 98-106 and accompanying text.

40. Donovan, supra note 34, at 259. Many judges in Minnesota, which has a two-parent notice requirement, refuse to hear abortion petitions for political or moral reasons. Id.

41. Melton & Pliner, supra note 33, at 21.

42. See, e.g., Hodgson, 648 F. Supp at 763. The district court, hearing evidence on the
standing a judge may be, the message of the entire experience must be that the teenager is at least suspected of doing something wrong, or of being a bad, untrustworthy, person. The Court’s theory of the judicial bypass procedure completely ignores the fact that for a pregnant teenager who is already worried, frightened, and possibly ashamed, an appearance before a judge is not a pro forma exercise. The sad truth is that a pregnant teenager who is unable to face her parents or a judge may end up having a child she does not want or seeking an illegal abortion at the risk of her life.44

In sum, the judicial bypass procedure at best inconveniences and at worst endangers pregnant teenagers in the name of protecting them. Nevertheless, it is perhaps not surprising that the Court has not extended the abortion right to children on the same basis as to adults. Neglect of children’s perspectives by the law, and by society at large, is more the rule than the exception.45

In addition, it has not been difficult for members of the Court to fashion a surface rationale that seems to justify the bypass procedure: the notion of “maturity” as a legitimate legal standard on which to grant or withhold the right—of adolescents—to choose an abortion. The assumptions and associations underlying the “maturity” standard are explored in the following section.

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44. See Hubbard, supra note 33 (telling the story of a 17-year-old who died from complications of an illegal abortion in Massachusetts in 1988; she was afraid to “disappoint” her parents and was certain a judge would deny her a waiver).

45. See Fitzgerald, supra note 20, at 14-15 (“Our political choices reveal societal hostility to children.” For example, the number of children living in poverty increases while the condition of the elderly has improved; children are denied standing in child custody disputes.;) Martha Minow, Rights for the Next Generation: A Feminist Approach to Children’s Rights, 9 Harv. Women’s L.J. 1, 6-7 (1986) (arguing that “the inconsistent legal treatment of children stems in some measure from societal neglect of children” and pointing out that over 20% of American children live in poverty, over a million children are reported to authorities as victims of serious abuse, etc.).
III. "MATURITY" AS A LEGAL STANDARD FOR DISTRIBUTION OF RIGHTS

A. Roots of the "Maturity" Standard in the Privacy Right and Theories of Children's Rights

Privacy right cases and ideology, on which the abortion right is based, do not logically suggest broader legal rights for children; in fact, the reverse is true. And, as this section will show, the "maturity" standard relied on by the Bellotti bypass procedure derives from both privacy right ideology and theories of parental and state authority over children.

The constitutional right of privacy, insofar as it has a definable content, is arguably based on the concept of the autonomous, self-reliant person and the desire to protect autonomy from unwarranted government regulation of certain life-shaping decisions. It has been renamed the right of personhood, and, as Catharine MacKinnon has pointed out, "[p]ersonhood is a legal and social status, not a biological fact." One fully attains the status of personhood when one attains the status of autonomy.

The privacy right is essentially about protection of autonomy, but children, even teenagers, are not fully autonomous in the eyes of the

47. See, e.g., Robert G. Dixon, Jr., The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon, 1976 B.Y.U. L. REV. 43, 83-87 (arguing that the privacy right has no intrinsic meaning but is simply a collection of Supreme Court cases protecting individuals from government regulation of certain actions or decisions).
48. See, e.g., Laurence H. Tribe, American Constitutional Law 1308 (2d ed. 1988) (finding that precise definition of the privacy right is impossible, but that the courts must apply strict scrutiny to "any government action or deliberate omission that appears to transgress what it means to be human at a given time and place"); Louis Henkin, Privacy and Autonomy, 74 COLUM. L. REV. 1410, 1411 (1974) (describing the right of privacy as "an additional zone of autonomy, of presumptive immunity to governmental regulation"); Jed Rubenfeld, The Right of Privacy, 102 HARV. L. REV. 737, 784 (1989) (arguing that "[t]he principle of the right to privacy is . . . the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state").
49. See Tribe, supra note 48. For Professor Tribe's attempt to define the privacy right, see supra note 48.
50. Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 YALE L.J. 1281, 1316 (1991). MacKinnon discusses the legal and social status of the fetus and finds that in contemporary society "completed live birth mark[s] the personhood line." Id. I would suggest that not even live birth ushers a human being into full legal and social personhood. Children are not yet full persons legally or socially and some people never are: the severely retarded, for example.
law or society in general.\textsuperscript{51} Also, many privacy right cases have involved the rights of adults to procreate, to refrain from procreation, and to raise their children as they see fit. This has led some commentators to place at the “core” of the privacy right the “fundamental decisions that shape family life,”\textsuperscript{52} that is, such decisions when made by adults.\textsuperscript{53}

Given the background of the privacy right in the notions of individual autonomy and family (parental) autonomy, it is clear that a privacy right for children is almost an oxymoron. If adults express their autonomy in part by creating and raising children, it follows that those children can have little or no autonomy of their own and thus no claim to a constitutional right of privacy. Seen in this light, the right of privacy would seem to reinforce what Barbara Bennett Woodhouse has called the “property model” of the relation between children and parents.\textsuperscript{54} Woodhouse’s property model is not meant to

\textsuperscript{51} See infra notes 54-62 and accompanying text.


[These cases] clearly delineate a sphere of interests—which the Court now groups and denominates “privacy”—implicit in the “liberty” protected by the fourteenth amendment. At the core of this sphere is the right of the individual to make for himself—except where a very good reason exists for placing the decision in society’s hands—the fundamental decisions that shape family life: whom to marry; whether and when to have children; and with what values to rear those children.

\textsuperscript{53} The privacy right line of cases is commonly said to begin in the 1920s with two cases that did not specifically cite a “right of privacy,” but which protected parental authority over education of children from government regulation. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (striking down state requirement that all children attend public school); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down state laws that forbade foreign language instruction in public schools). Later cases are Zablocki v. Redhail, 434 U.S. 374 (1978) (striking down a statute that required court approval for the marriage of any person legally obligated to pay child support for children not in his or her custody); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (invalidating a local zoning ordinance that restricted those family members who could live together); Roe v. Wade, 410 U.S. 113 (1973) (extending right of privacy to a woman’s decision to abort a pregnancy); Eisenstadt v. Baird, 405 U.S. 438 (1972) (striking down a law prohibiting use of contraceptives by unmarried couples); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (holding that laws prohibiting the use of contraceptives violated a constitutional “right of privacy” protecting the marriage relationship); Skinner v. Oklahoma, 316 U.S. 535 (1942) (striking down state law prescribing sterilization for a certain class of criminals); see also Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (rejecting a privacy right challenge to a Georgia anti-sodomy statute on the ground that there was “[n]o connection between family, marriage, or procreation and homosexual activity”).

\textsuperscript{54} Barbara Bennett Woodhouse, “Who Owns the Child?”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. Rev. 995, 1042 (1992). Woodhouse’s “revisionist history” of Meyer and Pierce argues that these two cases, cited now as the origins of the privacy right line of cases and as “expressions of the liberal and libertarian spirit,” actually
claim that children are literally considered to be parental property but to assert "that our culture makes assumptions about children deeply analogous to those it adopts in thinking about property." To the extent this is true, it obviously conflicts with any claim of a child to a right of privacy: one cannot "belong to oneself" if one belongs to another.

An alternate model of parental authority, which Katharine T. Bartlett has called "the exchange view of parenthood," relies not on rights of ownership but on fulfillment of responsibilities. According to this model, parental authority over children derives from society's need to delegate the task of child-rearing to those best-situated and best-motivated to do it well—almost always the parents.

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55. Of course, in ancient Rome children were literally the property of their father and a strong presumption of paternal rights in children existed in 19th century American law. In more recent times, this has been replaced by a gender-neutral presumption of parental rights. Id. at 1043-46.

56. Id. at 1042. Woodhouse further explains that she:

do[es] not claim that [the property model of parenthood] represents the whole of a parent's relationship to his or her child but rather that it is useful in clarifying the historic responses of parents and judges to legislative and court interventions in the family. . . . This property rhetoric sheds important light not only on Meyer and Pierce, but on many ways in which courts and authorities act inconsistently with a trusteeship or best interest theory of adult power over children. If we look at history and listen to legislators, judges, and parents speaking about parental rights, clearly children were, and are, often conceptualized as closely akin to property. Id. at 1042-43; see also Janet Farrell Smith, Parenting and Property, in MOTHERING 199-212 (Joyce Trebilcot ed., 1983) (describing the "implicit model of property relations [that] underlies certain views about parenting").

57. See Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring) (quoting Charles Fried, Correspondence, 6 PHIL. & PUB. AFF. 288-89 (1977): the privacy right "embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole'").

58. Katharine T. Bartlett, Re-Expressing Parenthood, 98 YALE L.J. 293, 297-98 (1988) (explaining that the concept of parenthood as an exchange of rights and duties emerged with the development of the "modern liberal state").

59. See, e.g., Parham v. J.R., 442 U.S. 584, 604 (1979) (citing "the traditional presumption that the parents act in the best interests of their child" to reject a due process challenge to a state procedure allowing parents to commit their child to a mental institution without an adversary hearing). Other examples are the many cases and statutes that give preference to a biological parent in child custody disputes with third parties, often without even theoretical attention to the best interests of the child. See IRA M. ELLMAN ET AL., FAMILY LAW 600 (1991) (stating the "traditional rule . . . that a parent prevails against a non-parent" in the absence of special circumstances and listing representative cases); see also infra note 103, (discussing Justice Anthony Kennedy's view that children have rights only "through and with" their parents, expressed in Hodgson v. Minnesota, 497 U.S. 417, 481 (1990) (Kennedy, J.).
The parents are the most likely to be able to raise their child into a productive, well-behaved adult citizen. According to this view, parental authority stems not from ownership of the child, but from the child’s immaturity and, therefore, her need for such adult guidance until she reaches adulthood, and society’s need to delegate the task of child-raising to those most likely to perform it well.

The “exchange” model of parental authority is invoked by the courts when they wish to limit parental authority—since such authority originates in the state, the state can limit it if the parents fail to use it wisely. However, a corollary of this view would seem to be that if a particular child is in fact “mature” enough to make her own decisions, then both parental and state authority over her should cease. In other words, the common rationale for withholding full legal rights from children is that they must be protected from their innate “immaturity.” Yet it is widely recognized that the assumption that

60. Bruce C. Hafen has pointed out that due to the strength of the presumption that minors are immature and need to be protected,

61. See, e.g., Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (The Prince court upheld the application of a child labor statute to an aunt/guardian who allowed her niece to sell religious pamphlets on a public street; the Court pointed out the source and limitations of parental authority: “It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . . (It is in recognition of this that these decisions have respected the private realm of family life.”) (citation omitted) (emphasis added); see also infra notes 63-76 (discussing Bellotti v. Baird, 443 U.S. 622 (1979) (Powell, J., plurality opinion)).

62. Children, even older adolescents, are routinely not given full legal rights, generally with the rationale that people under a certain age must be protected from the consequences of their emotional, physical and intellectual immaturity. See supra note 60; see also Planned Parenthood v. Danforth, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part).

The State’s interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent . . . . The State’s interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible.
children are “immature” while adults are “mature” is a generalization, and that one can find some minors who are more “mature” in some respects than some adults. Therefore, if it is true that children’s rights are limited because of a personal quality—“immaturity”—rather than merely physical age and thus their legal status as children—then it follows that children who can show they are not “immature” arguably have a claim to be free of both parental and state authority. This claim would be particularly strong for certain important life-shaping decisions, such as those protected by the privacy right cases. As explained in the next section, this is the rationale of the judicial bypass procedure, at least as originally set out by Justice Lewis Powell.

B. The Bellotti Bypass Procedure

As stated in the introduction, Justice Powell’s plurality opinion in Bellotti v. Baird, in addition to rejecting a Massachusetts parental consent statute as unconstitutional, proposed guidelines for a bypass procedure that would make a parental consent statute acceptable to the Court.

Powell carefully laid a foundation for the constitutionality of this procedure. He first justified parental authority on the basis of the vulnerability and dependence of children; he then tempered that authority by invoking a version of the “exchange” view of parental

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63. See Fitzgerald, supra note 20, at 13. Fitzgerald points out the nonsensical situations often created by the presumption that children are “immature” while adults are not. The “millionaire’s child” may void a fair contract while an adult is stuck with a “barely conscionable deal”; teenagers cannot work in the “safest of manufacturing jobs” while many adult workers are faced with dangerous working conditions, etc.

64. Bellotti, 443 U.S. at 644-51 (Powell, J., plurality opinion) (explaining how the rejected statute fell short of the guidelines set out for a bypass procedure).

65. A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.

66. According to Powell, children's rights are limited in comparison to adults' rights for three reasons: children are vulnerable; they lack the knowledge and maturity needed to make critical decisions; the parental role in raising and guiding children is very important. Id. at 633-34.

67. See supra notes 58-60 and accompanying text (defining the “exchange view” of parental authority).
rights. He listed two justifications for the dominant role the state allows parents in raising children: first, state-mandated parental involvement in the important decisions of children protects children from the state itself and from their own immaturity; second, and more important, parents have the role of preparing children for citizenship. Parental authority over children is not only consistent with the ideal of individual liberty, it is necessary to it. "Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." Finally, Powell insisted that in this case the "need to preserve the constitutional right and the unique nature of the abortion decision . . . require a State to act with particular sensitivity when it legislates to foster parental involvement" in a minor's abortion decision. The state cannot require that all teenagers receive parental consent before obtaining an abortion; it must allow "mature" teenagers to obtain an abortion without parental consent or knowledge, and it must allow "immature" teenagers to do so if it is in their "best interests."

The Bellotti bypass procedure is based on the principle that when a minor arrives at "full growth and maturity," the state will no longer enforce parental authority over him or her, nor will it exercise state authority in place of an inadequate parent. Powell acknowledges that the point of "full growth and maturity" is generally set at the age of majority. However, in this case, the "unique nature" of the abortion decision requires that common presumptions about maturity of children and the authority of parents be set aside and replaced with

68. *Bellotti*, 443 U.S. at 637 (Powell, J., plurality opinion).
69. *Id.* at 637-38
70. *Id.* at 638-39.
71. *Id.* at 642. Two factors make this a decision for which blanket parental consent cannot be required: the need to make the decision as quickly as possible and the "grave and indelible" consequences of denying the minor the right to an abortion. *Id.* at 642-43.
72. *Id.* at 643-44. The "best interests" standard in effect replaces the "good cause" standard included in the rejected statute. See *supra* note 8 and accompanying text. These terms may well amount to the same thing in this context, but "best interests," familiar of course from child custody law, is probably meant to emphasize that the proceeding is premised on the welfare of the teenager.
73. *Bellotti*, 443 U.S. at 643 n.23 (Powell, J., plurality opinion) (explaining that the state may generally use the age of majority as a prerequisite for full legal rights, even though it is "inevitably arbitrary," because of the state's interest in supporting parental authority and because definition and determination of "maturity" raises problems).
74. See *supra* note 71.
case-by-case determinations of “maturity” and best interests.

Thus, Powell’s rationale places the bypass procedure firmly in the tradition of state deference to parental authority, but acknowledges the importance of the abortion decision by limiting that authority in terms that are suggested by the “exchange theory” of parental rights.\(^{75}\) The “mature” child is therefore to be exempt from both state and parental interference in her abortion decision. However, as shown in part II, the “mature” child is not exempt from state authority because the state may still require her to go through the bypass procedure itself.\(^{76}\) Yet the Court ignores the actual effects of the bypass procedure on pregnant teenagers, while state legislators and the voters they represent continue to find it acceptable law.

The next section explores the assumptions and connotations of the “maturity” concept in an attempt to understand how it can succeed as a legal standard in spite of its failure to achieve its stated goals of liberating and protecting pregnant minors.

C. The Fallacy of “Maturity/Immaturity” as a Legal Standard

The *Bellotti* bypass procedure has a superficial legitimacy because it appears to challenge the presumption that “maturity”—in this context, the ability to make an important decision wisely—comes with, and only with, the age of majority. After all, no one really believes that all persons are “immature” in some definable way until the day they reach eighteen, at which time they magically become “mature.” It is a social and legal convention to describe people in this way.

However, even while we know on some level that this is a simplistic generalization, it does have the power to shape the way we think about people and behave toward them. We place people in predefined categories and perceive them in a certain way based on the category in which they are placed.\(^{77}\) We expect adults to be ma-

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\(^{75}\) For a discussion of the exchange theory see *supra* notes 38-60 and accompanying text.

\(^{76}\) *See supra* notes 23-45 and accompanying text.

\(^{77}\) Joseph Goldstein has defined the categories “child,” “adult,” and “parent” as follows:

To be a *child* is to be at risk, dependent, and without capacity or authority to decide what is “best” for oneself.

To be an *adult* is to be a risktaker, independent, and with capacity and authority to decide and to do what is “best” for oneself.

To be an *adult who is a parent* is to be presumed in law to have the capacity, authority, and responsibility to determine and to do what is good for
ture and adolescents to be immature and our expectations influence the behavior of the adults and adolescents we meet. 78

The power of the convention that people become capable of taking care of and being responsible for themselves at a designated age derives in part from another convention of great power: the cultural ideal of the autonomous, self-reliant individual, discussed earlier in connection with the right of privacy. 79 Our culture's investment in the concept of individual autonomy is not a literal belief that all adults are equally capable of making wise decisions and carrying them out in the world. This too is a convention, a presumption on which we base our legal rules. 80 Yet, precisely because we know that complete autonomy is not attainable in the real world, the concept of the autonomous person calls into being and relies on the opposite concept: the dependent, subordinate person. If some identifiable group of persons is presumed to be autonomous, then another identifiable group must be presumed to be dependent, because it is only in opposition to the concept "dependence" that the concept "autonomy" has meaning.

The judicial bypass procedure, while it rejects the assumption that all pregnant adults can be trusted to make a "good" decision to have an abortion and all pregnant minors cannot, relies on the "maturity" concept to divide all minors into two categories: those who can be trusted to make a "good" abortion decision because they are "mature" and those who cannot because they are "immature." This new classification actually perpetuates the idea that people can be divided into two groups, one autonomous and one dependent, based not on age alone, but on age, or, if it comes first, the attainment of "maturity." In short, the bypass procedure sets aside one simplistic categorization of society 81 into autonomous and nonautonomous individuals.

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78. As mentioned above, some experts believe that much of the difference between the decision-making performance observed between adults and adolescents results from different social roles and expectations. See supra note 26 and accompanying text.

79. See supra notes 46-53 and accompanying text.

80. It is a presumption that perhaps reflects a commitment to the idea that in a moral sense all autonomous persons are equal and therefore the law should treat them as equals.

81. Martha Minow has pointed out that classification, the creation of boundaries, is an essential element of legal analysis. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 7-11 (1990). Law has treated as marginal, inferior, and different any person who does not fit the normal model of the autonomous, competent individual. Law has tended to
only to replace it with another.  

The flaw in the reliance of the bypass procedure on “maturity” is not that “maturity” is an illusion or an inherently simplistic concept. Clearly “maturity” does mean something that most people could agree upon, at least in general terms. Most people do “mature” throughout their lives; they learn about themselves, they learn to consider long- 
term consequences of their actions, they learn to consider others, they gain useful knowledge and experience. The problem is that the bypass procedure operates as if this rather amorphous concept were a uniform quality that one either has or does not have and that its presence in a given (minor) person can be easily identified by an objective (adult) observer.

To put it another way, the Court’s call for a case-by-case deter-
mination of “maturity” evokes a humane, reasoned consideration of the capacity of young people to handle a difficult situation on their own. There is something appealing and reassuring in the thought that at least some adult will talk to a young person before she commits the irrevocable act of abortion. But it is as if the reality of the bypass procedure—the way it actually affects young people’s lives—is disguised by this evocation of benevolent adult authority. This disguising effect is helped along by the Court’s assumption that “maturity” is a uniform, easily recognizable quality, an assumption which is in turn supported by the close association of “maturity” with the age of majority—the very association that the bypass procedure is supposedly

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deny the mutual dependence of all people while accepting and accentuating the de-
pendency of people who are “different.” And law has relied on abstract concepts, presented as if they have clear and known boundaries, even though the concepts await redefinition with each use.

Id. at 10.

82. Of course by allowing an inquiry into the “maturity” only of minor women, the bypass procedure continues to distribute rights based on the attainment of the age of majority. In other words, once one is over eighteen one has the right to decide to get an abortion without undergoing an inquiry into one’s “maturity.”

83. See, e.g., the rather circular definitions of “mature” in RANDOM HOUSE UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1983):

1. complete in natural growth or development, as plant and animal forms, . . . 2.
ripe, as fruit, or fully aged, as cheese or wine. 3. fully developed in body or mind, as a person, a mature woman.

Id. at 1187.

84. In other words, we are used to thinking of people as independent or dependent, capable of caring for themselves or incapable of it, based on physical age. Social expecta-
tions and legal rules rely on this assumption, so that attaining the age of majority has tremen-
dous significance in a person’s life. It would be natural to assume, even if on an uncon-
scious level, that if society grants a person a new, adult status at a certain age, there must
designed to challenge. In other words, it is easier for “maturity,” though undefined, to become accepted as a legal standard in this context, because it appeals to our instinctive desire to believe in the benevolent exercise of adult authority, even while it claims to reject the arbitrary exercise of that authority. Because “maturity” appeals to our belief that there is some quantifiable difference between the capacity of adults and of children, it is easier to get away with offering “maturity” as an *undefined* standard. In fact, despite Justice Powell’s insistence on the “unique nature” of the abortion decision,⁵⁵ the bypass procedure’s reliance on an undefined “maturity” implies that the decision to abort a pregnancy is in a class with other decisions like renting an apartment or selecting a college—decisions in which a certain kind of experience or judgment is clearly desirable. Yet the decision to end one’s pregnancy—or to have a child for that matter, though no “maturity” test is required for this—is arguably unlike many other decisions. It is an extraordinarily intimate, personal decision, essentially because the pregnancy and the abortion take place within the pregnant woman’s own body. It is not unreasonable to ask what kind of “maturity” one needs to decide whether or not to carry a pregnancy to term or have an abortion.

To clarify this point, suppose that the bypass procedure had relied on “competence” rather than “maturity.” Competence is after all a familiar legal standard; courts are required to determine the competence of individuals in various situations, such as standing trial, refusing medical treatment, signing a will, etc., though of course the rule is that *adults* are presumed competent barring evidence to the contrary.⁵⁶ However, legal standards for competency in these situations are different, because it is realized that competence means something different in each context.⁵⁷ Thus, in the abortion context, the Court might have required that state legislatures that do not want to presume that all teenagers are competent to decide to have an abortion must develop a standard of competency which is related to the abor-

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⁵⁵ *See supra* note 71.
⁵⁷ *Id.*
tion decision itself. If the teenager could not pass this competency test, she could still receive court or parental authorization to have an abortion. This Note does not argue that such a rule is desirable, but rather that it would have greater legitimacy than the “maturity” standard because it would at least require state legislatures to give some consideration of what capacity a teenager must have to be allowed to decide to obtain an abortion.

It is notable that surveys of decisions made by judges who administer the bypass procedure indicate that, in the vast majority of cases, pregnant teenagers are deemed to be “mature” enough to make an abortion decision themselves. There is of course no way of knowing what standards of “maturity” these judges are applying, but the overwhelming numbers of “mature” minors suggests that, whatever those standards are, judges have concluded in their own minds that as a rule those teenagers that appear before them have whatever it takes to make that decision. As argued above in part II, this result, combined with the fact that those few teenagers who are found “immature” are almost invariably granted permission to receive an abortion because it is found to be in their best interests, points to the futility of the bypass procedure itself. In addition, the “maturity”

88. For example, tests to determine capacity to refuse life-saving medical treatment include the ability to “evidence a choice,” the “reasonable outcome” test, the “rational reasons” test, the “ability to understand” test, and the “actual understanding” test; the names of these tests are all fairly self explanatory. Id. at 744-49.

89. Of course, states are now free to set up guidelines defining what is meant by “maturity.” The parental consent statutes of both Missouri and Kentucky, for example, provide for bypass procedures which require the court to “hear evidence relating to the emotional development, maturity, intellect and understanding of the minor.” KY. REV. STAT. ANN. § 311.732(3)(e) (Michie. Supp. 1994); MO. ANN. STAT. § 188.028.2(2)(3) (Vermont 1983). This is so broad as to arguably not be of much use; see also N.D. CENT. CODE § 14-02.1-03.1(2)(a) (1991) (requiring the court to determine whether the teenager is “sufficiently mature and well informed with regard to the nature, effects, and possible consequences of both having an abortion and bearing her child to be able to choose intelligently among the alternatives”); MASS. GEN. LAWS ANN. ch. 112 § 12S (West 1983) (requiring judge to determine whether the minor “is mature and capable of giving informed consent to the proposed abortion”). Parental notice statutes tend to provide less detailed guidance to courts faced with administering bypass procedures: typical are the requirements that the judge determine “that the pregnant woman is mature and capable of giving informed consent,” MINN. STAT. ANN. § 144.343.Subd.6(c)(i) (West 1989), or that the teenager show she is “sufficiently mature and well enough informed to decide intelligently whether to have an abortion,” OHIO REV. CODE ANN. § 2151.85(C)(1) (Anderson 1994); see also ARK. CODE ANN. § 20-16-804 (Michie 1991).

90. See supra note 36 (giving results of three surveys that show that the overwhelming majority of pregnant teenagers are judged to be “mature”).

91. See supra notes 36-38 and accompanying text.
standard does leave the door open for inconsistent and idiosyncratic decisions by judges.\textsuperscript{92} Therefore, though the bypass procedure unfairly gains legitimacy from the connotations of the “maturity” standard, the real damage done by the bypass procedure is not caused by judicial misuse of this concept. The real damage is caused simply by the existence of the requirement of the court appearance itself. As cited above in part II, the necessity of appearing in court sometimes presents logistical difficulties which increase delay.\textsuperscript{93} In addition, apprehension of the appearance can increase delay, and the appearance itself can produce anxiety, shame, and guilt.\textsuperscript{94} Yet the procedure itself is believed by those who administer it to bring nothing of value to minors or their families.\textsuperscript{95}

In supporting the bypass procedure, the Court ignores these results. It further ignores the fact that the process of identifying “maturity” must itself constitute government intrusion into an individual’s privacy.\textsuperscript{96} This intrusion is of course inevitable once the burden of proving “maturity” and hence “autonomy” has been shifted to the individual on a case-by-case basis, rather than being a presumption based on some physical or social characteristic such as age, race, sex, or class. By separating “maturity” from the presumption that it occurs at a pre-defined age, the Court removes the protection that this presumption affords—protection from government intrusion into personal decisions and our capacity to make them.

It is significant that this intrusion is permitted only when its subject is a minor. If the Court’s concern were truly whether or not a

\textsuperscript{92} See, e.g., Steven F. Stuhlbarg, Casenote, When is a Pregnant Minor Mature? When is an Abortion in her Best Interests? The Ohio Supreme Court Applies Ohio’s Abortion Parental Notification Law: In re Jane Doe 1, 566 N.E.2d 1181 (Ohio 1991), 60 CINCINNATI L. REV. 907 (1992). Stuhlbarg tells the story of “Jane Doe,” a young Ohio woman who was denied judicial bypass of a parental notice requirement because she had not proved her maturity or that an abortion would be in her best interests; Ohio’s statute requires clear and convincing evidence of both of these claims. See infra note 112. Jane was seventeen, held part-time jobs and helped support herself, and had had one abortion in the past. She consulted with her mother but was afraid to tell her father who had beaten her in the past. Id. at 907-08. For a detailed discussion of the Ohio statute in question and the Supreme Court case upholding it, see infra notes 107-12.

\textsuperscript{93} See supra notes 39-41 and accompanying text.

\textsuperscript{94} See supra note 42 and accompanying text.

\textsuperscript{95} See supra note 34 and accompanying text.

\textsuperscript{96} Though Justice Powell acknowledged the difficulty of defining and determining “maturity,” Bellotti v. Baird, 443 U.S. 622, 643 n.23 (1979) (Powell, J. plurality opinion), no attempt was made in this decision or any later decision to suggest how states might deal with this difficulty.
pregnant woman had the “maturity” to decide to have an abortion, it would have to permit states to require others—fathers, husbands, doctors, judges—to review the decision of adult women as well. To the extent that “maturity” is a definable concept, there is of course no guarantee that the age of majority brings “maturity” with it, just as there is no guarantee that a person under the age of majority is “immature.” However, one can imagine the outrage that would result from a serious suggestion that this should be the law. The power of adult women in contemporary politics and society, and common perceptions of their “maturity” and autonomy, would probably not permit such a rule. Children lack this power and hence are vulnerable to manipulation by adults: this is really what the bypass procedure is all about.

IV. THE TRUE FUNCTION OF THE JUDICIAL BYPASS PROCEDURE

The judicial bypass procedure has succeeded in becoming the current state of the law. It has failed, however, in its stated objectives to liberate “mature” and protect “immature” pregnant teenagers. The irony is that children are vulnerable and in need of protection, quite often because of adults. The judicial bypass procedure not only fails to give them protection, it is itself an example of the victimization of children.

The real point of the bypass procedure is the exercise of adult control of children, and particularly adult manipulation of children—made possible by children’s political and legal vulnerability—to make political points: in this case, to take the brunt of political efforts to block abortion rights. Thus, since the Bellotti bypass procedure was presented in 1979, versions of it have been used by later legislatures and later Court decisions to validate oppressive statutes that fail even to live up to the “particular sensitivity” for which the Bellotti plurality opinion called.97

In the two most recent major cases dealing with minors’ abortion rights,98 the Court upheld state laws restricting the abortion right of minors. Ohio v. Akron Center for Reproductive Health, Inc.99 and Hodgson v. Minnesota100 both approved oppressive legislation essen-

97. See supra note 71 and accompanying text.
98. For a list of the most significant minor’s abortion rights cases, see supra notes 11-12.
tially because it contained versions of the Bellotti bypass option.\textsuperscript{101}

In Hodgson, the Court considered the constitutionality of alternate provisions of a parental notice statute: it rejected one that required notice to both parents with no provision for judicial bypass, but it upheld the same requirement with a judicial bypass option.\textsuperscript{102} The swing voter was Justice O’Connor, the only justice to find that the bypass option made constitutional an—in her opinion—otherwise unconstitutional statute.\textsuperscript{103}

\textsuperscript{101} The Court first upheld a parental consent measure with judicial bypass in Planned Parenthood v. Ashcroft, 462 U.S. 476, 492-93 (1983). Mo. Rev. Stat. § 188.028 closely resembled the Bellotti model statute: it required that a physician obtain written informed consent from the minor and one parent or guardian unless the minor had a court order granting the right of "self-consent"; the court was to hear evidence of the "emotional development, maturity, intellect, and understanding of the minor; the nature, possible consequences, and alternatives to the abortion," id. § 188.028.2(3); or evidence that the abortion was in the minor's best interests. Ashcroft, 462 U.S. at 493. Nevertheless, Justices Blackmun, Marshall, Brennan, and Stevens dissented on the ground that it violated the Danforth rule against a third-party veto of a pregnant teenager's decision. Id. at 503-04 (Blackmun, J., concurring in part and dissenting in part).

\textsuperscript{102} MINN. STAT. ANN. § 144.343(2)-(5) (West 1989). The provision with bypass was meant to go into effect if the other was blocked by the courts, which is in fact what happened. Hodgson v. Minnesota, 648 F. Supp. 756, 781 (D. Minn. 1986).

\textsuperscript{103} Hodgson, 497 U.S. at 461 (O'Connor, J., concurring in part and concurring in the judgment). Justices Stevens, Marshall, Brennan, and Blackmun believed the notice requirement to be unconstitutional with or without judicial bypass. Id. at 455, 461 (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justices Kennedy, Scalia, Rehnquist, and White believed it to be constitutional with or without bypass. Id. at 481 (Kennedy, J., concurring in the judgment in part and dissenting in part). Justice Kennedy's opinion, joined by the other three, demonstrates how distant his position is from Justice Powell's Bellotti opinion. As Justice Kennedy put it, the rights of children are clearly subordinated to those of parents: children are denied many rights, and they can "exercise the rights they do have only through and with parental consent." Id. at 482. Thus Justice Kennedy's view is clearly closer to the "property model" of children's rights than the "exchange view" of Justice Powell's opinion. Justice Powell stated two justifications for state support of parental authority and by implication, for a constitutional limit to state support of parental authority: the parents' duty to socialize the child and the need to protect the child from the authority of the state. Bellotti v. Baird, 443 U.S. 622, 637 (1979) (Powell, J., plurality opinion). Justice Kennedy, however, acknowledged no constitutional protection for the child but only for the parent's "liberty interest" in the child, Hodgson, 497 U.S. at 484 (Kennedy, J., concurring in the judgment in part and dissenting in part), and thus would allow the state to pass legislation to "foster parental participation" in the child's life. Id. at 484-85. The result of this reasoning is to leave the child without protection from either parental or state authority. The state may intrude into the child's life if it does so in the name of fostering parental authority, or the parent's right to a relationship with the child. See Homer H. Clark, Jr., Children and the Constitution, 1992 U. ILL. L. REV. 1, 36 (commenting that if Justice Kennedy's Hodgson opinion that a child's claim must be asserted by her parents becomes the "position of a majority of the Justices, America's children are indeed in trouble").
The federal district court had held, on the basis of lengthy testimony on the effects of the two-parent notice requirement with bypass, that such a requirement placed an unacceptable burden on pregnant minors and their families. Nevertheless, Justice O'Connor, though she believed that two-parent notice without bypass was unconstitutional, decided that the bypass option saved the statute.

The majority in Akron Center held a parental consent statute constitutional on the ground that its judicial bypass procedure complied with the guidelines set out in Powell's Bellotti opinion. The bypass procedure included such apparently pointless difficulties as making the minor select one of three complaint forms prior to her court appearance; one states that she is mature enough to choose an abortion, another that a parent has regularly abused her, another that an abortion is in her best interests.

Justice Blackmun's dissent correctly pointed out that Ohio's statute may be in conformance with a technical interpretation of the Bellotti guidelines, but it is not in conformance with the reasoning of Bellotti which formed the basis for the guidelines. Ohio's legislature,

105. Id. at 777-79. The court found that the effect had been to involve possibly disruptive, violent, or indifferent parents in the minor's decision, even if the minor had already confided in one parent and neither she nor that parent wanted the other parent to know. Id. at 777-78. The court found that the bypass procedure, was a "traumatic distraction" that interfered with the existing parent-child bond. Id. at 778. The court also found that the difficulty of scheduling a hearing typically caused delays of two or three days and up to a week, thus adding to the health risks to the minor. Id. at 779; see supra note 42 (citing the district court's finding of emotional stress experienced by minors faced with the bypass procedure).
106. Hodgson, 497 U.S. at 461 (O'Connor, J., concurring in part and concurring in the judgment) (holding that interference with the family "simply does not exist" where there is a bypass option).
107. Ohio v. Akron Center for Reprod. Health, Inc., 497 U.S. 502, 518-20 (1990); see also Ohio Rev. Code Ann. §§ 2919.12, 2151.85, 2505.073 (Anderson 1994). These statutes make it a crime for a physician to perform an abortion on an unmarried, unemancipated minor unless 1) the physician provides twenty-four hour notice to one parent or guardian, or to an adult relative of the minor if the minor and the adult sign an affidavit stating that the minor fears physical, sexual, or severe emotional abuse from one of her parents, or 2) the physician has written consent from one parent or guardian, or 3) a juvenile court issues an order permitting the abortion (the bypass option), or 4) the court gives constructive authorization for the abortion by failing to act expeditiously.
108. Ohio Rev. Code Ann. §§ 2919.12, 2151.85, 2505.073. The court must appoint a lawyer and guardian ad litem (after the minor has selected the pleading form), and the minor must prove all allegations by clear and convincing evidence. Akron Center, 497 U.S. at 518-20.
109. Joined by Justices Marshall and Brennan. Id. at 516.
rather than acting with the "particular sensitivity" called for by Bellotti, had acted with "particular insensitivity" and had created "a tortuous maze" through which the pregnant teenager must find her way. Justice Kennedy's Akron Center decision centered on the Bellotti bypass procedure, ignoring the reasoning that accompanied and explained it. Each provision of the procedure was considered separately and found not to be expressly ruled out by Bellotti.

Based on Akron and Hodgson, the bypass option is not only a rubber stamp procedure in itself, but it has become a rubber stamp by which states "constitutionalize" statutes which function only as burdens on pregnant teenagers who seek an abortion. The actual function, then, of the judicial bypass procedure is to allow state legislators to use pregnant teenagers in the political struggle against abortion rights.

110. Id. at 525 (Blackmun, J., dissenting). Further, the state had not shown any "significant state interest in deliberately placing its pattern of obstacles in the path of the pregnant minor . . . . The challenged provisions . . . are merely "poorly disguised elements of discouragement for the abortion decision." Id. at 525-26 (quoting Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 763 (1986)). The Court, Justice Blackmun wrote, "considers each provision in a piecemeal fashion, never acknowledging or assessing" the burden that the procedure as a whole places on the minor. Id. at 527.


112. Akron Center, 497 U.S. at 514-17. The Court upheld the constructive authorization provision, rejecting a claim that the lack of an affirmative order from the court giving permission for the abortion after it had failed to act within the set time limit would deter physicians from performing the operation. Id. at 515. The Court upheld the clear and convincing evidence standard of proof as applied to the minor attempting to prove her maturity, a pattern of parental abuse, or best interests, since Bellotti had allowed a state to place the burden of proof on the minor to show her maturity or best interests, and a higher standard of proof is appropriate in an ex parte proceeding. Id. at 515-16. The Court held that forcing the minor to choose one of three pleading forms when petitioning the court would not interfere with her Bellotti right to show maturity or best interests. Bearing in mind that at this point no lawyer or guardian ad litem would have been appointed, the Court reasoned that it was "unlikely that the Ohio courts will treat a minor's choice of complaint form without due care and understanding for her unrepresented status." Id. at 517.

113. See Hubbard, supra note 33, at 243 (finding that Hodgson means the Court will approve a law that severely abridges the minor's rights if it contains a bypass option, and that under the Ohio statute minors are "completely at the mercy" of the judge's personal view of abortion); Melody G. Embree & Tracy A. Dobson, Parental Involvement in Adolescent Abortion Decisions: A Legal and Psychological Critique, 10 LAW & INEQ. J. 53, 78 (1991) (arguing that "parental involvement legislation can be viewed as part of an ongoing effort to ban all abortions"); Clyde Moore, Note, Hodgson v. Minnesota: The Fog Clears from Parental Notice Laws, 16 T. MARSHALL L. REV. 399, 416-18 (1991) (arguing that the Court's approval of two-parent notice with bypass ignores the fact that many teenagers live in one-parent homes and that the choice of going to court or giving parental notice may lead young women to seek illegal abortions).
V. A MORE JUST ALTERNATIVE

It would seem to be a matter of simple justice to extend to pregnant teenagers a privacy right to choose abortion on the same basis as adults. As this Note has tried to show, the judicial bypass procedure is based on questionable assumptions about the capacity of young women to make an abortion decision;\(^{114}\) it is pointless because the overwhelming majority of teenagers who appear in court end up receiving authorization to obtain an abortion;\(^{115}\) and the procedure itself represents an inconvenient and potentially dangerous burden.\(^{116}\) As long as Roe v. Wade\(^ {117}\) remains the law of the land,\(^ {118}\) its protection should apply to all women who are pregnant and who therefore face the dangers and burdens of pregnancy.\(^ {119}\)

This approach would condition the abortion right on the state of pregnancy itself rather than age or "maturity." Joseph Goldstein has suggested that "[p]regnancy alone, without regard to a child's age, would be a sufficiently objective standard for emancipation to deter-

\(^{114}\) See supra notes 23-27 and accompanying text. Admittedly, the evidence on the decision-making competence of adolescents is inconclusive. See supra note 25. However, it could be argued that the paucity of such information despite the routine denial of rights to adolescents based supposedly on their inability to make important decisions is in itself an indication of the unwillingness of society to be genuinely concerned with the rights and needs of young people. Further, the fact that the Court has ignored what little evidence exists on the subject is arguably evidence of the same thing.

\(^{115}\) See supra notes 36-37 and accompanying text.

\(^{116}\) See supra notes 39-44 and accompanying text.

\(^{117}\) 410 U.S. 113 (1973).

\(^{118}\) Roe held that a woman's right to choose abortion would be protected from government interference within certain constraints. The Court found two state interests sufficiently compelling to limit the pregnant woman's right: the health of the mother and the life of the fetus. Id. at 162. The Court then went on to construct a trimester framework which allotted various strengths to competing interests based on the progression of the fetus to viability. The state's interest in protecting the mother's health becomes compelling only after the first trimester; the state's interest in protecting the potential life of the fetus becomes compelling only after viability, which is roughly after the second trimester. Thus, no regulation is permitted during the first trimester; regulation only to protect the mother's health is permitted during the second trimester; and abortion may be prohibited during the third trimester. Id. at 162-64.

\(^{119}\) The Court's decision in Roe was of course based explicitly on the privacy right protection of the right to procreate or refrain from procreation, but the Court went on to emphasize the "detriment" the state would impose on a woman by denying her an abortion: the physical and mental burdens of pregnancy and child care, the pain of an unwanted child, the strain on a family unable to care for the child, and the "stigma of unwed motherhood." Id. at 153. All of these burdens of course fall at least as hard on a teenage mother as on an adult mother.
mine whether or not to obtain an abortion.”\textsuperscript{120} Laura Purdy, in a book which questions the approach of “child liberationists,”\textsuperscript{121} states that “[a]ccess to abortion without parental consent . . . is fully appropriate.”\textsuperscript{122} Pointing out that abortion rights laws have been in part motivated by “the general recognition that parenthood is a serious responsibility” and the “concern of women, in particular, to have more control over their own bodies and lives,” Purdy argues that the “burden of proof should be on opponents of such access to show why the same arguments don’t justify these similar rights for girls.”\textsuperscript{123}

The even-handed application of the privacy right in the context of the abortion choice would be a genuine improvement in the law. It would not, however, be the ideal solution, for reasons that have to do with the nature of the privacy right itself. The privacy right is based on the stated cultural ideal that all persons who are really persons, and who therefore have full legal rights, are autonomous, self-reliant, self-contained individuals.\textsuperscript{124} This ideology encourages the legal system to ignore the obvious and real power imbalances between people that prevent many from having real control over their lives.\textsuperscript{125} Thus, the power imbalance between men and women that results in unwanted pregnancy is frozen in place by laws that allot to women a “right” to an abortion without changing the circumstances of their lives.\textsuperscript{126} Meanwhile, the debate over abortion rights centers on the right to “choose,” in an abstract sense, what one may not be able to get any-

\textsuperscript{120} Goldstein, supra note 77, at 663:

The right to . . . emancipation [for purposes of a given health-care choice] should not rest on satisfying, on a case-by-case basis, some body of wise persons that the particular child is “mature enough” to choose or that the particular child’s choice is “right.” To introduce such a subjective process for decision would be not to emancipate the child but rather to transfer to the state the parental control and responsibility for determining when to consult and abide by the child’s choice.

\textit{Id.} at 662-63.

\textsuperscript{121} LAURA M. PURDY, IN THEIR BEST INTERESTS? 12 (1992) (arguing that a reevaluation of children’s rights should not depend solely on children’s “intrinsic characteristics” because what children “need and want depends in part on social conditions and social ideals”).

\textsuperscript{122} \textit{Id.} at 225.

\textsuperscript{123} \textit{Id.} at 225-26.

\textsuperscript{124} For a brief discussion of privacy right ideology, see supra notes 46-53 and accompanying text.

\textsuperscript{125} See Catharine A. MacKinnon, Privacy v. Equality: Beyond Roe v. Wade, in FEMINISM UNMODIFIED 93, 96 (1987). MacKinnon contends that the abortion rights cases have actually “translate[d] the ideology of the private sphere into the individual woman’s legal right to privacy as a means of subordinating women’s collective needs to the imperatives of male supremacy.” \textit{Id.} at 97.

\textsuperscript{126} See \textit{id.} at 94-97.
way (because of lack of money or unavailability of a doctor who will perform an abortion) and what one should be able to avoid needing (through birth control or abstinence).

Likewise, a rule that simply extends the right to choose an abortion to pregnant teenagers would not address the reasons that many teenage girls become pregnant when they do not want to have children, or the problems of teenage mothers, or the difficulty in obtaining an abortion if one is alone, without funds, and without access to a doctor who will perform one. It would simply extend to pregnant teenagers the legal presumption that they are autonomous actors, making decisions and shaping their lives on a more or less equal basis with other autonomous actors.

Of course nothing now prevents state legislatures from passing laws genuinely meant to aid young girls in making a decision or to help their families cope with the situation. Such laws, if devised and administered with genuine attention and concern, might be a good thing. For example, a state that wanted to ensure that an unmarried pregnant minor would not feel pressured into aborting her pregnancy out of financial need or fear of parental hostility might provide financial aid for her and her family or noncoercive family counselling services. That mandated parental involvement statutes without exception deal only with abortion and not with childbirth betrays the true agenda. Considering the far greater financial and physical commitment involved in giving birth as opposed to aborting a pregnancy, and thus the greater risks involved, it would make more sense to require parental involvement in an unmarried teenager’s decision to give birth than in her decision to terminate a pregnancy.127 The legislatures that pass parental involvement laws are clearly interested not in protecting teenagers or their families but in hindering abortion.

This is exactly why the Supreme Court should extend to pregnant minors the full effects of the holding in Roe v. Wade. The ideology of the privacy right may not help young people face life’s difficulties, but at least it would prevent government from making them worse for no good reason.

127. Purdy, supra note 121, at 226 (arguing that “the case for required consultation with an informed adult is far stronger if a girl wants to stay pregnant and put the baby up for adoption or keep it”).
VI. CONCLUSION

Under current law, state or local government may mandate parental consent or notification prior to a minor's abortion as long as the minor has access to an alternative form of official authorization. The reliance of this bypass procedure on the separation of minors into two groups—"mature" and "immature"—is in a way a logical extension of the ideology of the privacy right, as seen through a philosophy of children's rights that ties parental and state authority to the child's need for guidance and protection. However, in practice the bypass option is unnecessary, unworkable, and a pretext for burdens on pregnant teenagers who seek abortion that would be unconstitutional if placed on adult women. The persistence of the bypass option despite these flaws is perhaps partly explained by its apparent congruity with the assumptions underlying the privacy right and the nature of children, and by its apparent function as a compromise between the tradition of legal deference to parental authority on the one hand and the personal and highly consequential nature of the abortion/childbirth decision on the other. In the end, though, continued reliance on it by the courts and legislatures is unjustifiable. As long as the privacy right is recognized as the basis for a woman's right to choose abortion, that right should be extended equally to pregnant women regardless of age.

Satsie Veith