PREGNANT IN FOSTER CARE: PRENATAL CARE, ABORTION, AND THE CONSEQUENCES FOR FOSTER FAMILIES

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INTRODUCTION

Girls in foster care get pregnant. A lot.[1] For example, in 2005 the New York City Office of the Public Advocate estimated that as many as "[o]ne in six young women in foster care in New York City are pregnant or are already mothers . . . ."[2] When a teenage girl gets pregnant, there is always a complex set of issues and challenges that she will face: whether or not she will continue the pregnancy, what medical services are available to her if she decides to have the child, what abortion services are available to her if she does not, who will retain custody of the baby, whether she will give the baby up for adoption. For a pregnant teen in foster care, these issues are amplified by the child welfare system, where there are many more actors in play than just the pregnant girl, her parents, and the father of her child. The foster parents, the biological parents, and the state each play a substantial role in determining how the pregnant foster girl manages her pregnancy and the resources available to her, yet at the same time, the existing legislation and policies guiding these actors are inadequate for addressing her needs and often hinder her ability to exercise her

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1 *See* Amy Sullivan, *Teen Pregnancy: An Epidemic in Foster Care*, TIME, July 22, 2009, *available at* http://www.time.com/time/nation/article/0,8599,1911854,00.html (reporting that "[a] study at the University of Chicago found that nearly half of girls who had spent time in the foster-care system had been pregnant at least once by the time they were 19 years old"); *Pregnant and Parenting Teens in Foster Care*, CHILDREN'S LAW CENTER OF LOS ANGELES, http://www.clcla.org/facts_teens.htm (last visited Oct. 9, 2011) (noting that "[i]n a study of foster youth in 3 Midwestern states, 1/3 reported having been pregnant, and 2/3 of those reported that the pregnancy was unwanted"); THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, WHY IT MATTERS: TEEN PREGNANCY AND CHILD WELFARE (2010), www.thenationalcampaign.org/why-it-matters/pdf/child_welfare.pdf (noting numerous studies showing increased rates of pregnancy among children in care).

2 BETSY GOTBAUM, THE PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, CHILDREN RAISING CHILDREN: CITY FAILS TO ADEQUATELY ASSIST PREGNANT AND PARENTING YOUTH IN FOSTER CARE 7 (2005), http://publicadvocategotbaum.com/policy/documents/FosterCareSurveyReportFinal.pdf; *see also* Leslie Kaufman, *More Help Urged for Pregnant Foster Children*, N.Y. TIMES, May 16, 2005, *available at* http://www.nytimes.com/2005/05/16/nyregion/16foster.html.

rights.

While the populations of girls who become pregnant and girls in foster care overlap in great numbers, legislative and judicial actions in both state and federal forums have addressed the topics of teen pregnancy and foster care as separate and discrete, ignoring the challenges that pregnant girls in foster care face. For example, basic teen pregnancy prevention legislation that focuses on contraception, health, and sex education fails to account for the common experience of foster girls, who may lack access to a comprehensive health education due to gaps from frequent school changes and who may be particularly uncertain of whom to ask for access to birth control. There is a two-way informational gap that needs to be closed: legislators, policy makers, judges, agency officials, and others involved in the welfare of teenagers should make sure that when creating foster care policy, they also consider the impact of pregnancy, and that when considering measures to combat or mitigate teen pregnancy, they also consider the segment of teenagers in foster care.

This Article argues that the existing state and federal statutes, agency regulations, and sparse case law leave pregnant foster girls without appropriate resources and assistance. Child protection laws should provide for assistance with prenatal care and planning and access to abortion in order to truly serve their purpose. Part I of this Article provides background material concerning foster care and entitlements for foster children, including the medical care that foster children receive through Medicaid, and the various barriers to abortion access for women in general and for minors in particular. Part II of this Article discusses current agency regulations specifically related to pregnant foster girls as well as judicial responses to the intersection of pregnancy and foster care. Part III discusses statutory and regulatory recommendations to improve the situation of these young women.

I. Foster Care, Entitlements, and Abortion Access

Foster care has traditionally included a range of options including, officially and unofficially, kinship care. The availability of kinship care (care by relatives of the foster child) can create more complexity in the relationships that foster children have with their foster parents. The legal framework for entitlements for foster children includes medical care and specific Medicaid provisions, which allow foster children to access certain services, but which also place limits on their access to choice within the healthcare system. Some of those limits include Medicaid barriers to funding for abortion, as well as parental consent and notification laws in many states.

A. Foster Care

1. Overview of Foster Care

The number of children in foster care is large.[3] In the United States, there were nearly 500,000 children in foster care at the end of fiscal year 2009.[4] Federal legislation such as the Adoption and Safe Families Act[5] has been promulgated in order to promote adoption in general and to incentivize quicker adoption, thereby reducing the number of foster children.[6] State agencies also often promote preventive services to reduce the number of children removed in the first place, and agencies provide services to parents with the goal of returning children to their homes.[7]

2. The Process

A minor child is typically placed in foster care when the State finds that remaining in the care of her parents places her health or life in danger.[8] Provisions regarding removal

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3 In this article, the term "care" will be used interchangeably with foster care. This is in accordance with the practice of many child protective agencies. *See, e.g.*, U.S. DEP'T OF HEALTH & HUMAN SERVS. ADMIN. FOR CHILDREN & FAMILIES, FOSTER CARE STATISTICS 2009 3 (2011), *available at* http://www.childwelfare.gov/pubs/factsheets/foster.pdf (referring to "children in care").

4 *Id.* at 3, Exhibit 1.

5 Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

6 There are also state programs designed to promote efficient permanency proceedings. *See, e.g.*, N.Y. FAM. CT. ACT § 1086 (McKinney 2011). Permanency proceedings are Family Court hearings designed to review the foster agency's permanency planning for the child, where there will usually be a goal of either adoption (by a foster family) or a goal of return to parent. The intention is to avoid the situation of children who linger in foster care for years on a temporary basis, often moving from home to home, with little stability. *See* N.Y.C. Family Court, *Child Protective / Permanency Planning*, http://www.nycourts.gov/courts/nyc/family/childprotective.shtml (last visited Oct. 9, 2011).

7 *See, e.g.*, N.Y. SOC. SERV. LAW § 409-a (McKinney 2011); N.Y.C. Admin. for Children's Servs., *Preventive Services*, http://www.nyc.gov/html/acs/html/support_families/preventive_services.shtml (last visited Oct. 9, 2011); N.Y.C. Admin. for Children's Servs., *Family Assessment Program*, http://www.nyc.gov/html/acs/html/support_families/family_assessment_program.shtml (last visited Oct. 9, 2011).

8 N.Y. SOC. SERV. LAW § 417 (McKinney 2010).

of children from their homes often refer to "abused" or "maltreated" children.[9] Beginning with the first child protective agency in the world, the New York Society for the Prevention of Cruelty to Children,[10] the United States government has sought to provide housing and care for children who are removed from their parents by the State. Individual state statutes vary in their exact terms, but generally, children who are physically or otherwise abused, as well as children who are neglected, may be removed from their homes, typically by a state child protective agency.[11] Foster parents are paid a fee for provision of items such as food and clothing to their foster children,[12] and some state agencies pay foster parents an additional fee for their parenting services.[13] In some states, foster parents who are related to the child (kinship foster parents) are paid as well[14] when they act as official, rather than *ad hoc*, foster parents. *Ad hoc* fostering situations arise in families when a child is placed with a family member, often a grandparent or other relative, on a temporary or permanent basis without the involvement of the State and child protective services. Such arrangements are often used as temporary relief for parents who cannot care for their children but who do not wish to relinquish or endanger their legal custody. Both formal and informal kinship foster care arrangements will be discussed in more detail below.

3. Overarching Legal Issues and Responsibilities

The responsibility for the management and care of these children is split between many parties and cuts across state and personal spheres. Biological parents, former legal guardians, foster parents, government agencies, and, sometimes, private foster care contractors each have different rights over and responsibilities to the child. Generally speaking, the government agency has the primary legal authority over the child, the foster parents have custodial rights, and the biological parents retain "residual parental rights."[15] State statutes usually define these residual rights. For example, biological parents may

9 NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, 125TH ANNIVERSARY 1875–2000 (2000), *available at* http://www.nyspcc.org/nyspcc/history/attachment; *see also* N.Y. SOC. SERV. LAW § 412 (McKinney 2010).

10 NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, 125TH ANNIVERSARY 1875–2000 1 (2000), *available at* http://www.nyspcc.org/nyspcc/history/attachment.

11 N.Y. FAM. CT. ACT § 1012 (McKinney 2010).

12 N.Y. SOC. SERV. LAW § 398-a (McKinney 2010).

13 HARVEY SCHWEITZER & JUDITH LARSEN, FOSTER CARE LAW: A PRIMER 30 (2005).

14 N.Y. COMP. CODES R. & REGS. tit. 18, § 436.5 (2011).

15 SCHWEITZER & LARSEN, *supra* note 13, at 4.

retain some rights to direct the religious needs of their children, but the state can satisfy this by making reasonable efforts towards accommodation.[16]

4. Kinship Care

In the history of the foster care system, kinship care has remained available as an official and unofficial option. When a child is removed from her home by the state, the state agency faces an administrative choice as well as a policy decision regarding whether to place the child in kinship care or stranger (nonkinship) care. Relatives often take children on an *ad hoc*, voluntary basis for brief or extended periods of time, without direct involvement from the State or with the State's tacit approval. Grandparents, siblings of parents, and other extended family members have provided care for children when their parents could not do so on their own or at all, regardless of whether the state has been involved in officially removing the children from their parental home. The U.S. Supreme Court described the tradition of extended family involvement in childcare in 1977:

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it.[17]

Alternatively, relatives may also become official custodial guardians and may act as other foster parents do, including becoming licensed, passing background checks, and fulfilling other state-mandated requirements.[18]

The debate over whether children are better off being placed with extended family members or with non-family members has a long history, and different states have taken

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16 *See* Wilder v. Bernstein, 848 F.2d 1338 (2d Cir. 1988) (holding that when the state is acting for the parent, state must make reasonable efforts to assure religious needs of the children are met).

17 Moore v. City of East Cleveland, 431 U.S. 494, 504–05 (1977) (footnote omitted).

18 *See* SCHWEITZER & LARSEN, *supra* note 13, at 27 (describing different foster care arrangements); JUNE MELVIN MICKENS & DEBRA RATTERMAN BAKER, MAKING GOOD DECISIONS ABOUT KINSHIP CARE 31 (1997) (describing the different legal options available to relatives who want to care for children).

different policy stances on the issue.[19] Most states promote kinship care as a policy.[20] Children in kinship care are more likely to be placed with their siblings,[21] and children may experience less stress when placed with family members.[22] Studies have shown that children in kinship care have fewer moves than their counterparts in nonkinship or stranger foster care, and are "less likely to experience subsequent maltreatment while in care."[23] Providing money and specialized services to kinship foster families would help to promote kinship arrangements. However, many state agencies do not provide these services or financial support to kinship foster parents, or they provide a lower level of support than is provided to nonkinship foster parents.[24]

Despite some states' emphasis on kinship foster care, there are impediments to this type of support for children. Different states have different licensing and other requirements for kinship placements relative to stranger care. There are some benefits to official licensing of family members, most notably the payment that licensed foster parents receive for taking in foster children.[25] However, official licensing requirements can also cause delays and can even prevent placement with a relative. For example, licensing requirements can sometimes be so strict that family members cannot meet them.[26] When licensing requirements are imposed upon kinship foster parents already caring for children, as happened in Michigan

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19 URBAN INSTITUTE, STATE POLICIES FOR ASSESSING AND SUPPORTING KINSHIP FOSTER PARENTS 6 (1999), *available at* www.urban.org/PDF/discussion00-05.pdf (describing state policies and procedures regarding kinship placement).

20 *Id.* at 9.

21 Richard Barth et al., *Kinship Care and Nonkinship Foster Care: Informing the New Debate*, *in* CHILD PROTECTION: USING RESEARCH TO IMPROVE POLICY AND PRACTICE 187, 187 (Haskins et al. eds., 2007); *see also* Aron Shlonsky et al., *The Other Kin: Setting the Course for Research, Policy, and Practice with Siblings in Foster Care*, 27 CHILD. YOUTH SERVICES REV. 697 (2005).

22 Barth, *supra* note 21, at 187; *see also* Mimi V. Chapman et al., *Children's Voices: The Perceptions of Children in Foster Care*, 74 AM. J. ORTHOPSYCHIATRY 293, 298–99 (2004).

23 Barth, *supra* note 21, at 188.

24 URBAN INSTITUTE, *supra* note 19, at 31.

25 *Id.* at 18.

26 *See, e.g.*, PUBLIC CATALYST, PROGRESS OF THE MICHIGAN DEPARTMENT OF HUMAN RESOURCES: PERIOD THREE MONITORING REPORT FOR DWAYNE B. V. GRANHOLM 95–97 (2009–2010), *available at* http://www.pcg4change.com/Public_Catalsyt/index_files/Period3Report.pdf (discussing the removal of children from the homes of grandparents and other relatives after the Michigan Department of Human Services signed a consent decree with the organization Children's Rights that added licensing requirements for kinship placements).

following the consent decree in *Dwayne B. v. Granholm*,[27] children are forced to move again after their initial family disruptions.[28] States vary greatly in their placement rates of children in kinship care, relative to stranger care. For example, Hawaii and Florida place over forty percent of foster children with relatives, while Kentucky, Tennessee, South Carolina, and Virginia each place less than ten percent of children with relatives.[29] The low numbers in states that place very few children with relatives are at least in part due to strict state licensing procedures. In Connecticut, where only 13.7% of children are placed with relatives,[30] a report by Governor Dannel P. Malloy's transition team attributed the low numbers to "DCF regulations and practice are barriers to kinship care."[31] Clearly, some states could do more to promote this type of placement.

Child protection agencies generally have a stated goal of family preservation or support.[32] Kinship care is one obvious way to work towards that goal. Living with a relative provides a greater chance that the foster parent will be amenable to staying in contact with the biological parent, and it provides psychological benefits to the child.[33] This is especially important for young women, who may be less likely to become pregnant if they have strong familial relationships. Research has shown that "strong relationships between parents,

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27 Dwayne B. v. Granholm, No. 06-13548, 2007 WL 1140920 (E.D. Mich. Apr. 17, 2007). The Consent Decree was entered on October 24, 2008. *See* Children's Rights, *Michigan (Dwayne B. v. Granholm): Overview*, http://www.childrensrights.org/reform-campaigns/legal-cases/michigan/ (last visited Oct 9, 2011).

28 *See supra* note 26.

29 Nat'l Coal. for Child Protection Reform, *How well does your state do at easing the trauma of foster care?*, WHERE ARE AMERICA'S FOSTER CHILDREN? (Feb. 14, 2011, 8:54 AM), http://www.nccprgraphics.blogspot.com/ (last visited Oct. 9, 2011) (ranking states by their use of relative/kinship foster care).

30 *Id.*

31 CHILDREN'S SERVICES WORKING GROUP POLICY PROPOSALS, SUBMITTED TO GOVERNOR-ELECT MALLOY'S TRANSITION TEAM 35 (2010), *available at* http://www.ct.gov/malloy/lib/malloy/2-Children%27s_Services.pdf; *see also* Jacqueline Rabe, *New DCF Commissioner: Agency Must Place More Children with Relatives*, THE CONN. MIRROR, Mar. 4, 2011, *available at* http://www.ctmirror.org/story/11612/dcf-commissioner-connecticut-lowest-country-placing-children-relatives?destination=node/11612.

32 *See, e.g.*, Washington State Dep't of Soc. & Health Servs. Children's Admin., *Case Services Policy Manual*, *available at* http://www.dshs.wa.gov/ca/pubs/mnl_case/chapter1.asp (last updated Jan. 10, 2008) ("We believe that in most instances the family is the best place for a child to grow. This includes the child's extended family or an adoptive family.").

33 JOSEPH CRUMBLEY & ROBERT L. LITTLE, RELATIVES RAISING CHILDREN: AN OVERVIEW OF KINSHIP CARE 1 (1997) (stating that kinship care reduced "separation anxiety, adjustment reactions, attachment disorders, [and] conduct disorders").

other adults, and teens" influence the incidence of teen pregnancy.[34] Kinship foster care is more likely to maintain these relationships and to increase feelings of familial permanency.

While kinship foster care may not be ideal, it can, as discussed above, mitigate some of the most harmful effects of family disruption and impermanence. Furthermore, when a pregnancy does occur, family support is a strong predictor of the health of the mother and baby and of the future success of the mother in both education and employment. Research shows that pregnant and parenting teens who receive social support in the form of emotional support, guidance, and other forms of assistance from their families have better outcomes for themselves and their children.[35] Such positive outcomes for pregnant and parenting teens include maternal competency, improved feelings of love towards the child, and higher levels of life satisfaction.[36] Parenting adolescents "who live with their parents *or relatives* are more likely to return to school, to graduate from high school, to be employed, and to be free from welfare payments."[37] Kinship care in this context will tend to increase permanency and family support, in contrast to nonkinship care.

B. Entitlements

Foster children are entitled to certain basic services from the government, including medical care. Medical care, as discussed below, is almost always provided via Medicaid. Foster children with special needs may also be entitled to particular medical treatments.[38]

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34 THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, FOSTERING HOPE: PREVENTING TEEN PREGNANCY AMONG YOUTH IN FOSTER CARE 11 (2005), *available at* http://www.thenationalcampaign.org/resources/pdf/pubs/FosteringHope_FINAL.pdf.

35 FLORIDA STATE UNIVERSITY CENTER FOR PREVENTION AND EARLY INTERVENTION POLICY, SOCIAL SUPPORT: IMPROVING OUTCOMES FOR ADOLESCENT PARENTS AND THEIR CHILDREN, Fact Sheet 1 (2005), *available at* http://www.cpeip.fsu.edu/resourceFiles/resourceFile_77.pdf.

36 *Id.* at 1–2.

37 *Id.* at 2 (emphasis added).

38 *See, e.g.*, Janet D. v. Carros, 362 A.2d 1060, 1073–75 (Pa. Super. Ct. 1976) (discussing treatment and services that must be provided to children in care).

1. Medical Care and Medicaid[39]

Federal laws, particularly the Social Security Act,[40] establish health services to which foster children are entitled.[41] Titles XIX[42] and XX[43] of the Social Security Act provide that foster children are eligible for Medicaid, and these titles designate goals for state provision of services. The federal Early and Periodic Screening, Diagnostic and Treatment Services (EPSDT) program,[44] a part of Medicaid, is a "gateway" to health care for foster children. States interpret this law and attempt to enforce its mandates with varying success.[45] The vast majority of children in foster care—up to ninety-nine percent—are eligible for Medicaid.[46] In addition, the Foster Care Independence Act establishes that Medicaid may continue to be available to former foster children between the ages of 18 and 21, who have "aged out" of the system in many states.[47]

Since states direct the specifics of the medical care available to foster children beyond the federal requirements,[48] there is some variety in the provision of that care. When risky medical situations arise, the biological parents' (or previous legal guardians') right to make medical decisions for their children might sometimes be privileged.[49]

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39 While this may call for a longer discussion elsewhere, it is suggested that the healthcare reform bill is not expected to substantially change the present situation for foster children, the vast majority of whom are on Medicaid, as discussed in this section.

40 42 U.S.C.A. § 672(h) (West 2010).

41 SCHWEITZER & LARSEN, *supra* note 13, at 10.

42 42 U.S.C.A. §§ 1396 et seq. (West 2010).

43 42 U.S.C.A. §§ 1397 et seq. (West 2010).

44 42 U.S.C. § 1396d(r) (2006).

45 SCHWEITZER & LARSEN, *supra* note 13, at 10.

46 RAMESH RAGHAVAN & ARLEEN LEIBOWITZ, *Medicaid and Mental Health Care for Children in the Child Welfare System*, *in* CHILD PROTECTION: USING RESEARCH TO IMPROVE POLICY AND PRACTICE 120, 122 (Haskins et al. eds., 2007); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-26, FOSTER CARE: STATE PRACTICES FOR ASSESSING HEALTH NEEDS, FACILITATING SERVICE DELIVERY, AND MONITORING CHILDREN'S CARE 1 (2009) (noting that "[t]reatment for the health care needs of children in foster care is generally financed through states' Medicaid programs").

47 The Foster Care Independence Act of 1999, Pub. L. No. 106-169, §121, 112 Stat. 1822.

48 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 46, at 1.

49 SCHWEITZER & LARSEN, *supra* note 13, at 49.

Despite these provisions, many children in foster care are not receiving the care that they need.[50] The United States Department of Health and Human Services (HHS) regularly assesses state child welfare performance and, according to the Urban Institute, has "found that only one state met federal standards for provision of health and mental health services to children involved with the child welfare system . . . ."[51] The reasons given by HHS for the gap in health care included an "insufficient number of doctors and dentists willing to accept Medicaid, a lack of consistency in conducting adequate and timely health and mental health assessments, and a lack of consistency in providing children with preventive health and dental services."[52]

2. Prenatal Care and Pregnancy Services

Many states have laws regarding minors' ability to consent to prenatal care. Thirty-seven states have such laws; of those, thirteen allow doctors to inform parents when the child is seeking prenatal care, if the doctor determines that doing so is in the best interests of the child.[53] Foster agencies may contract with providers to provide certain standard services. However, many services might fall outside of those that are typically provided, including OBGYN services.[54]

Medicaid is generally available for prenatal care services.[55] In addition, the federal Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) may provide "[s]upplemental nutritious foods, [n]utrition education and counseling at WIC clinics, [and] [s]creening and referrals to other health, welfare and social services."[56] An application is required in order to receive WIC services.

States may have their own programs. New York, for example, offers pregnant foster girls a number of specific services. First, one Medicaid provision available to pregnant foster

50 URBAN INSTITUTE, MEDICAID SPENDING ON FOSTER CARE 1 (2005), *available at* http://www.urban.org/UploadedPDF/311221_medicaid_spending.pdf.

51 *Id.*

52 *Id.*

53 GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: MINORS' ACCESS TO PRENATAL CARE 1 (2010), *available at* http://www.guttmacher.org/statecenter/spibs/spib_MAPC.pdf.

54 SCHWEITZER & LARSEN, *supra* note 13, at 14.

55 *Id.* at 15.

56 U.S. Dep't of Agric. Food and Nutrition Serv., *WIC at a Glance*, http://www.fns.usda.gov/wic/aboutwic/wicataglance.htm (last modified Jul. 19, 2011).

girls is the Prenatal Care Assistance Program (PCAP), through which "pregnant women can obtain prenatal health services, such as lab tests, HIV tests, nutrition screenings, and other services related to their pregnancy."[57] In addition, the Teenage Services Act (TASA) provides services to pregnant and parenting teens who receive Medicaid.[58]

However, the fact that these services are available does not necessarily mean that they are utilized, nor does it mean that every population has access to them. For example, the American Bar Association, in partnership with the Health Teen Network, reported that "[a] recent [2009] study by Chapin Hall of over 4500 pregnant and parenting teens in foster care in Illinois found that: Although most females received some prenatal care, more than one in five pregnancies involved either no prenatal care, or care that began during the third trimester."[59] Some of the challenges that the Chapin Hall study identified that there were significant "difficulties associated with engaging pregnant and parenting foster youth in services."[60] There is also a history of denial of access to prenatal care through Medicaid for particularly vulnerable populations, such as undocumented immigrants.[61]

At least one federal court, the Sixth Circuit Court of Appeals, has held that refusal to establish paternity can result in loss of prenatal Medicaid benefits for an otherwise eligible (i.e., low-income) pregnant woman. In *Douglas v. Babcock*,[62] the court found that:

> [A] Medicaid applicant is required to assist the state by assigning any support and medical payment rights to the state, cooperating with the state

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57 Health Info. Tool for Empowerment, *Medicaid for Pregnant Women (PCAP/MOMS) and Family Planning Programs*, http://www.hitesite.org/Members/ViewCategory.aspx?id=20 (last visited Oct. 9, 2011); *see also* N.Y. State Dep't of Health, *Prenatal Care in New York State*, http://www.health.ny.gov/community/pregnancy/health_care/prenatal/ (last modified Dec. 2010).

58 *See* N.Y.C. Admin. for Children's Servs., *Preventive Services TASA* (2011), http://www.nyc.gov/html/acs/html/support_families/preventive_services_tasa.shtml.

59 THE HEALTHY TEEN NETWORK & ABA CENTER ON CHILDREN & THE LAW, ADVOCACY FOR PREGNANT AND PARENTING TEENS IN FOSTER CARE 1, http://www.healthyteennetwork.org/vertical/Sites/%7BB4D0CC76-CF78-4784-BA7C-5D0436F6040C%7D/uploads/%7BA1D4E6CF-9E51-4AF9-B2E0-B0BF06DEF04B%7D.pdf (last visited Oct. 9, 2011).

60 AMY DWORSKY & JAN DECOURSEY, PREGNANT AND PARENTING FOSTER YOUTH: THEIR NEEDS, THEIR EXPERIENCES 36 (2009), *available at* http://www.chapinhall.org/sites/default/files/Pregnant_Foster_Youth_final_081109.pdf.

61 *See, e.g.*, Lewis v. Grinker, 111 F. Supp. 2d 142, 144 (E.D.N.Y. 2000) (discussing routine denial of prenatal care to "otherwise eligible pregnant aliens").

62 Douglas v. Babcock, 990 F.2d 875 (6th Cir. 1993).

> in establishing the paternity of any minor child born out of wedlock for whom the applicant is legally responsible, and cooperating with the state in identifying and pursuing any third parties who may be liable to pay for medical care.[63]

The applicant in that case could only get out of the requirement to establish paternity by showing "good cause"; in the absence of such, she was denied Medicaid prenatal care.[64] These barriers and problems with access to Medicaid services make clear that the ostensible availability of the services is not the same as meaningful access to them.

C. Access To and Funding For Abortion

Many women in the United States face significant impediments to accessing abortion, such as a lack of local or even regional abortion facilities, resulting in the need to travel to faraway urban centers or out of state;[65] waiting periods,[66] which may necessitate continued absence from work when traveling for an abortion; new state laws mandating that doctors show any woman seeking an abortion a picture of her ultrasound;[67] and crisis pregnancy centers that masquerade as facilities offering information on choice, but that

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63 *Id.* at 878.

64 *Id.*

65 Rachel K. Jones & Kathryn Kooistra, *Abortion Incidence and Access to Services in the United States, 2008*, GUTTMACHER INSTITUTE (2008), *available at* http://www.guttmacher.org/pubs/journals/4304111.pdf (reporting that in 2008, ninety-nine percent of Mississippi counties and ninety-eight percent of North Dakota and South Dakota counties had no abortion provider, and that ninety-six percent of Wyoming women and ninety-one percent of Mississippi women lived in a county with no abortion provider); *see also* Evelyn Nieves, *S.D. Makes Abortion Rare Through Laws and Stigma*, WASH. POST, Dec. 27, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/12/26/AR2005122600747.html (describing three states, Mississippi, North Dakota, and South Dakota, that each only had one abortion provider in 2005).

66 GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: COUNSELING AND WAITING PERIODS FOR ABORTION 1 (2011), *available at* http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf (noting that twenty-five states require a specified waiting period before an abortion may be performed).

67 Kevin Sack, *In Ultrasound, Abortion Fight Has New Front*, N.Y. TIMES, May 27, 2010, at A1, *available at* http://www.nytimes.com/2010/05/28/health/policy/28ultrasound.html ("[Twenty] states have enacted laws that encourage or require the use of ultrasound.").

instead provide only anti-choice information to women seeking assistance.[68] These structural impediments are compounded by poverty and Medicaid provisions. When a low-income woman on Medicaid attempts to obtain an abortion, she is either on her own completely for funding or dependent on state Medicaid funds if they are available,[69] because federal Medicaid funds cannot, by law, be used for abortion. This issue will be discussed in more detail in Part II.C.3, below.

When a minor attempts to obtain an abortion, these impediments are exacerbated by new challenges. Pregnant teenagers will have more difficulty finding transportation and funding for their abortion, and may be less savvy about avoiding crisis pregnancy centers. Some states require parental notification or consent, which can be troubling or in some cases dangerous for a pregnant minor living at home. As discussed below in Part I.C.1, pregnant teenagers may face abuse or be thrown out of their homes if they are forced to inform their parents of their pregnancy. Minors also may not be aware of judicial bypass procedures that are available to them, or how to access the court system in enough time to obtain a bypass for a legal abortion. Even if judicial bypass is available and the minor takes advantage of it, the process of obtaining one may cause harm in itself, such as humiliation, also discussed below in Part I.C.1. Adding foster care to the mix compounds these problems, particularly with respect to parental notification and funding, each of which is discussed in the sections below.

1. The State of Foster Care and Pregnancy

Most foster girls have their babies, whether they wish to or not. One study in Illinois, published in 2009, found that among foster girls included in the study, at least eighty percent of pregnancies resulted in a live birth.[70] That study also found that of the pregnancies in

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68 *Crisis Pregnancy Centers Offer Misleading Information on Abortion Risks*, GUTTMACHER INSTITUTE, July 18, 2006, *available at* http://www.guttmacher.org/media/inthenews/2006/07/18/index.html ("Federally funded 'crisis pregnancy centers' (CPCs) frequently mislead and misinform pregnant teens about the health risks of induced abortion") (citing HOUSE OF REPRESENTATIVES COMMITTEE ON GOVERNMENT REFORM —MINORITY STAFF SPECIAL INVESTIGATIONS DIVISION, FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS (Jul. 2006). The New York City Council has recently taken action on this issue. On March 2, 2011, the City Council passed a "truth in advertising" bill that will require such centers to clearly state the services they offer and do not offer, such as abortion and birth control. Elizabeth A. Harris, *City Council Favors Pregnancy Center Disclosures*, N.Y. TIMES, Mar. 2, 2011, at A22, *available at* http://www.nytimes.com/2011/03/03/nyregion/03pregnancy.html.

69 *See* discussion on funding *infra*.

70 DWORSKY & DECOURSEY, *supra* note 60, at 11.

the study whose outcome could be tracked, only 4.7% had been terminated.[71] This can be compared to the thirty-two percent of nationwide teenage (aged fifteen to nineteen) pregnancies ending in abortion in 2006.[72] This comparison suggests that there may be many pregnant foster girls who would have utilized abortion services if they were not in care.

This higher incidence of live births and, thus, lower incidence of abortion has costs. Health care, welfare, prison costs, and lost revenue are some of the collateral costs of teenaged childbearing.[73] The children of foster children are more likely to wind up in care themselves, and teenage parents are more likely to be charged with abuse or neglect.[74] Both teen mothers and their children tend to experience negative educational consequences as a result of the mother's teen pregnancy.[75] If these young women want to continue their pregnancies, they should be supported with all appropriate services, and more should be done to help them be successful parents. But structural impediments, such as those discussed below, should not force these girls to continue an unwanted pregnancy that will result in high costs to themselves, their child, and the State.

2. Parental Notification and Consent

The bellwether cases of *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) and *Bellotti v. Baird*, 443 U.S. 622 (1979), held that minors cannot be denied abortions as a class, and that parental notification or consent requirements, without more, are unconstitutional. The solution that the court came up with in *Bellotti* was the judicial bypass method:

> 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

71 *Id.*

72 GUTTMACHER INSTITUTE, U.S. TEENAGE PREGNANCIES, BIRTHS AND ABORTIONS: NATIONAL AND STATE TRENDS BY RACE AND ETHNICITY 2 (2010), *available at* http://www.guttmacher.org/pubs/USTPtrends.pdf.

73 THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, BY THE NUMBERS: THE PUBLIC COSTS OF TEEN CHILDBEARING 2 (2006), *available at* http://www.thenationalcampaign.org/costs/pdf/report/BTN_National_Report.pdf.

74 Rebecca Bonagura, *Redefining the Baseline: Reasonable Efforts, Family Preservation, and Parenting Foster Children in New York*, 18 COLUM. J. GENDER & L. 175, 176 (2008).

75 THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, TEEN PREGNANCY AND EDUCATION 1 (2010), *available at* http://www.thenationalcampaign.org/why-it-matters/pdf/education.pdf.

independently, the desired abortion would be in her best interests.[76]

Thirty-six states have parental consent or notification laws.[77] These laws typically require that in order for a minor to obtain an abortion, she must either notify one or both parents, or obtain consent from one or both parents. Per *Bellotti*, each of these states must provide a judicial bypass procedure, whereby the minor may seek the court's, rather than her parents', consent to the procedure. In addition, six states allow minors to satisfy the requirement by notifying or obtaining the consent of an alternate family member.[78] Consent and notification laws usually allow an exception for minors with medical emergencies, although a few do not.[79] Finally, some of these states allow exceptions for cases of abuse, assault, incest, or neglect; twenty states, however, do not allow for such exceptions.[80]

3. Parental Involvement for Foster Girls

Many states with parental notification or consent laws simply fail to consider who is supposed to be notified of, or who is authorized to consent to, the abortion when the girl is in foster care. For example, the law in Mississippi provides as follows:

> (1) Except as otherwise provided in subsections (2) and (3) of this section, no person shall perform an abortion upon an unemancipated minor

76 Bellotti v. Baird, 443 U.S. 622, 643–44 (1979).

77 The following states require parental notification: Alaska, Colorado, Delaware, Florida, Georgia, Iowa, Kansas, Maryland, Minnesota, Nebraska, South Dakota, and West Virginia. The following states require parental consent: Alabama, Arizona, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, and Wisconsin. Of these, two states, Mississippi and North Dakota, require the consent of both parents. The following states require both parental notification and consent: Oklahoma, Texas, Utah, and Wyoming. The following states have consent policies currently enjoined by court order: California and New Mexico. The following states have notification policies currently enjoined by court order: Illinois, Montana, Nevada, and New Jersey. Guttmacher Institute, *supra* note 53, at 2.

78 The following states allow an alternative family member to authorize the procedure: Delaware, Iowa, North Carolina, South Carolina, Virginia, and Wisconsin. *Id.*

79 The following states do NOT provide an exception to parental notification or consent laws due to medical emergency: Maryland (allows waiver in limited circumstances by a health professional), Missouri, Ohio, Rhode Island. *Id.*

80 The following states do NOT provide an exception to parental notification or consent laws due to abuse, assault, incest, or neglect: Alabama, Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Texas, West Virginia, Wyoming. *Id.*

> unless he or his agent first obtains the written consent of both parents or the legal guardian of the minor.
>
> (2)(a) If the minor's parents are divorced or otherwise unmarried and living separate and apart, then the written consent of the parent with primary custody, care and control of such minor shall be sufficient.
>
> (b) If the minor's parents are married and one (1) parent is not available to the person performing the abortion in a reasonable time and manner, then the written consent of the parent who is available shall be sufficient.
>
> (c) If the minor's pregnancy was caused by sexual intercourse with the minor's natural father, adoptive father or stepfather, then the written consent of the minor's mother shall be sufficient.
>
> (3) A minor who elects not to seek or does not obtain consent from her parents or legal guardian under this section may petition, on her own behalf or by next friend, the chancery court in the county in which the minor resides or in the county in which the abortion is to be performed for a waiver of the consent requirement of this section pursuant to the procedures of Section 41-41-55.[81]

The statute refers only to "parents" or a "legal guardian." Typically, as discussed above in Part I.A, legal guardianship rests with the state when a child is taken in to foster care, not the biological parent, former legal guardian, or foster parent.[82] The statute is silent regarding foster girls' right to abortion services.

Since the statute quoted above is silent on this issue, as are other parental consent and notification statutes,[83] it is hard for a girl to know who, if anyone, can consent to

81 MISS. CODE ANN. § 41-41-53 (West 2010).

82 SCHWEITZER & LARSEN, *supra* note 13, at 4.

83 Almost all of these statutes are written with the same language, mentioning only "parents" or "guardians." *See, e.g.*, MASS. GEN. LAWS ANN. ch. 12, § 225 (West 2011) (requiring that the physician performing the abortion obtain the consent of "her parents" or a "guardian"); MICH. COMP. LAWS ANN. § 722.903 (West 2011) (referring to the "parents or legal guardian of the minor"); 18 PA. CONS. STAT. ANN. § 3206 (West 2011) (requiring that the physician conducting an abortion for a girl under eighteen years of age must obtain the consent of "one of her parents" or, if a parent is not available, her "guardian"); TENN. CODE ANN. § 37-10-303 (West 2011) (requiring consent of one "parent or legal guardian," with judicial bypass as a remedy "[i]f neither a parent nor a legal guardian is available"). Tennessee also makes it a misdemeanor to impersonate the parent or guardian of a minor seeking an abortion. TENN. CODE ANN. § 37-10-303 (West 2011).

her abortion on her behalf. This usually leads girls to seek out judicial bypass (discussed *infra*), even if they could legally obtain consent from someone, such as their biological parent, a foster parent, or a caseworker. The need for timeliness in obtaining the procedure, accompanied by the legal confusion, often results in pursuit of judicial bypass rather than a girl attempting to confront the legal question of who could consent for her.[84] It may even be the case that the complex nature of the legal question of who could consent results in the state avoiding the question altogether. For example, in Florida, girls in foster care were apparently "consenting to their own abortions" until the parental consent statute was struck down by the Florida courts.[85] The state child protection agency was barred from consenting to abortions, but girls could simply consent on their own behalf.[86]

Most parental consent and notification statutes are written without reference to the unique issues faced by girls in a variety of situations which may pose logistical, psychological, and safety concerns. There can be significant problems for minors who desire to obtain an abortion in states that require parental consent or notification. Girls may face verbal or physical abuse if they tell a parent about their pregnancy or their desire for an abortion, and many girls risk being kicked out of their homes if they come home pregnant.[87] There is also the risk of delay, as abortion cannot be performed legally for the entire duration of the pregnancy. The Supreme Court acknowledged at least some of these concerns in *Bellotti*, when it stated that "the unique nature and consequences of the abortion decision make it inappropriate 'to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.'"[88]

84 For example, the Pennsylvania parental consent statute also states that if a guardian is not available, someone standing "in loco parentis" might consent for her, but the statute fails to define who that might be. 18 PA. CONS. STAT. ANN. § 3206 (West 2011). If, as the statute says, "any adult person standing in loco parentis shall be sufficient," does that mean that her foster parent could consent? Her caseworker? An older relative, such as an aunt? The statute is silent.

85 Abby Goodnough, *Florida Halts Fight to Bar Girl's Abortion*, N.Y. TIMES, May 4, 2005, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C0DEED91630F937A35756C0A9639C8B63.

86 *Id.*

87 *See, e.g.*, HELENA SILVERSTEIN, GIRLS ON THE STAND: HOW COURTS FAIL PREGNANT MINORS 13 (2007) (reporting that "the AMA has concluded that some minors would experience serious physical and emotional injury under a blanket parental involvement provision"); Miriam Gerace, *Should doctors have to notify parents before a minor receives an abortion?*, L.A. TIMES, October 22, 2008, *available at* http://www.latimes.com/news/opinion/la-oew-gerace-short22-2008oct22,0,7048163.story (noting that studies show "there is a significant risk of violence, abuse and rejection in families when parents are informed of a pregnancy").

88 Bellotti v. Baird, 443 U.S. 622, 643 (1979) (*quoting* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 73 (1973)).

Judicial bypass, the current solution to these problems, does not always provide a remedy, and in fact can create a new set of problems for pregnant minors.[89] The judicial bypass procedure allows a pregnant minor to access the court system and request that she be allowed to access an abortion without the notification or consent of her parent.[90] Courts administering judicial bypasses will typically look to factors such as the girl's maturity, what is in her best interest, and whether she has been fully informed about the abortion process.[91] Judicial bypass itself carries risks to a minor's "health, [to] her well-being, and to her dignity."[92] Some of the problems with the bypass procedure include humiliation,[93] dignitary harms,[94] and the risk that the petition for judicial bypass will be denied.[95]

The problems just discussed are only intensified when the minor is in foster care. The delays in access to abortion for girls in foster care can be significant. For example,

> "[a] Pennsylvania minor in foster care delayed petitioning because of 'confusion among staff in the Department of Human Services' (her custodian) as to whether it would pay for an abortion. Once advised the Department would pay, the minor immediately filed, but her petition was denied on the grounds that, medical evidence notwithstanding, her pregnancy was too developed."[96]

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89 Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409 (2009).

90 All thirty-six states that have parental notification or consent statutes also have a judicial bypass procedure. *See* GUTTMACHER INSTITUTE, *supra* note 53, at 1.

91 Anna C. Bonny, *Parental Consent and Notification Laws in the Abortion Context: Rejecting the "Maturity" Standard in Judicial Bypass Proceedings*, 11 U.C. DAVIS J. JUV. L. & POL'Y 311 (2007) (discussing the imprecise nature of the "maturity" standard used in judicial bypass proceedings).

92 Sanger, *supra* note 89, at 437.

93 *Id.* at 444–45.

94 *Id.* at 450.

95 Most petitions that are initially denied are granted on appeal. The appeals process itself adds another level of delay and enhances the problems encountered in the initial hearing. Some petitions are entirely denied, in which case the girl may be essentially forced to bear her child if her parents do not consent or cannot be notified. In most cases, however, an abortion can eventually be obtained if the pregnant teen pursues the appellate process. *See id.* at 436.

96 Sanger, *supra* note 89, at 438 (*quoting* In re L.D.F., 820 A.2d 714, 715 (Pa. 2003) (reversing lower court's denial of petition)).

Furthermore, foster girls can face added risks to their home security. If a girl is in kinship care, she faces the same risks as girls who live with their parents. If in stranger foster care, the risks are elevated because she is already in a non-permanent living situation. She may risk being turned away from her foster home as a result of her pregnancy or abortion. If she is close to aging out of the system, at age seventeen for example, the foster agency may not expend the resources to find her another home for such a short period of time.[97] Furthermore, even if she desires and is able to obtain an abortion without the knowledge of her foster parent, she may fear breaches of her confidentiality if she must inform her foster agency of her pregnancy and planned abortion in compliance with parental consent and notification laws. She may fear that if she shares information with her caseworker, it will be shared with her foster parent, deterring her from seeking out services for her pregnancy or abortion. One of the risks of judicial bypass is "public exposure,"[98] which is critical to a foster child hoping to remain in care.

Emancipated minors are one category of abortion-seekers who have had success in challenging parental consent and notification laws.[99] In some cases the emancipation need not be formalized in order to be recognized by the court; it may be enough that the "evidence is clear and convincing that petitioner is in no manner dependent on a parent or guardian."[100] This category of excepted minors makes it clear that it is possible for the courts to work around parental notification and consent laws for particular categories of girls when they wish to do so.

Finally, as discussed below, state agencies are often silent or near silent on the issue of pregnancy in foster care. It may be unlikely, therefore, that a foster girl would be able to obtain resources from her agency or caseworker such as information about how to obtain a judicial bypass or help obtaining funding.

4. Funding and Medicaid

Even if an abortion can be legally obtained, funding is often a problem. Women in general, and poor women in particular, face impediments to funding. Abortion can cost in

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97 In most states, foster care may be provided until age eighteen; in New York State, "youth may remain in foster care until the age of 21." Children's Aid Soc'y, *Aging out of Foster Care* (Feb. 8, 2005), http://www.childrensaidsociety.org/issues/aging-out-foster-care.

98 Sanger, *supra* note 89, at 440.

99 In re Anonymous 3, 782 N.W.2d 591 (Neb. 2010).

100 *Id.* at 595.

the range of $350 to $850 nationally for abortions in the first trimester.[101] If a woman does not have insurance, she must come up with the money on her own, or with the help of an abortion fund.[102] Because women in low-paying jobs who lack the characteristics necessary to qualify for Medicaid are the most likely to be without insurance, poor women are the most in need of funding for abortions.[103]

Even women who do have private health insurance, either through their employers or independently, often do not have abortion coverage. Several states have passed laws restricting abortion coverage in private insurance,[104] and several more have added restrictions in the wake of the federal Patient Protection and Affordable Care Act, which provides for state-level health care exchanges.[105] Louisiana and Tennessee plan on restricting all private insurance funding for abortion once the health exchanges take effect in 2014, and other states intend to follow suit.[106] Most of these state-level restrictions on insurance limit the potential coverage to cases where the woman's life is in danger, or where she is a victim of rape or incest.[107] These restrictions can place a large financial burden even on women with higher incomes who have private health insurance.

101 Planned Parenthood, *In-Clinic Abortion Procedures*, http://www.plannedparenthood.org/health-topics/abortion/in-clinic-abortion-procedures-4359.asp (last visited Oct. 9, 2011). Note that mifepristone (the abortion pill) may cost slightly less. Planned Parenthood, *The Abortion Pill (Medication Abortion)*, http://www.plannedparenthood.org/health-topics/abortion/abortion-pill-medication-abortion-4354.asp (last visited Oct. 9, 2011).

102 *See, e.g.*, Nat'l Network of Abortion Funds, *Why Do We Need Abortion Funds?*, http://www.fundabortionnow.org/learn/why-abortion-funds (last visited Oct. 9, 2011).

103 For example, in 2007, 24.5% of people with household incomes of less than $25,000 had no health insurance, while only 7.8% of people with household incomes of more than $75,000 had no insurance. U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007 23, *available at* http://www.census.gov/prod/2008pubs/p60-235.pdf.

104 The following states already restrict private insurance funding for abortion: Idaho, Kentucky, Missouri, North Dakota, Oklahoma, and Rhode Island. Rhode Island's policy is currently enjoined by court order and not in effect. The following states plan on restricting coverage once the health exchanges take effect in 2014: Arizona, Louisiana, Mississippi, Missouri, and Tennessee. The following states restrict insurance policies for public employees seeking abortions: Arizona, Colorado, Illinois, Kentucky, Massachusetts, Mississippi, Nebraska, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, and Virginia. GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: RESTRICTING INSURANCE COVERAGE OF ABORTION 1–2 (2011), *available at* http://www.guttmacher.org/statecenter/spibs/spib_RICA.pdf.

105 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified as amended in scattered sections of 21, 25, 26, 29, and 42 U.S.C.).

106 GUTTMACHER INSTITUTE, *supra* note 104, at 2.

107 *Id.* at 1.

Teenage girls in particular often have trouble finding the money to pay for an abortion, because of their lack of, or minimal access to, income. For women and teenagers on Medicaid, the funding problem becomes more pronounced. Because federal Medicaid funds cannot be used to cover abortion, only state funds can be used to pay for abortions.[108] Medicaid recipients are entitled to funding for abortion under the Hyde Amendment in cases of rape, incest, or life endangerment,[109] but, barring such situations, may not receive federal funds. Many states do provide funding for abortions to Medicaid recipients under certain circumstances, particularly for health reasons, but many more do not.[110] If a Medicaid recipient lives in a state with stringent restrictions on funding for abortions, she must rely on her own resources or on an Abortion Fund[111] to finance the procedure.

Since the vast majority of foster children receive Medicaid, as discussed in Part I.B.1 above, the role of Medicaid in funding abortions is significant. Foster children may, in some cases, be entitled to receive small amounts of funds from the state for personal use. In New York for example, foster children "receive a regular allowance appropriate to age, which shall not be used to meet basic needs."[112] This small amount, even when available,

108 Departments of Labor, Health & Human Services, Education and Related Agencies Appropriations Act, Pub. L. No. 105-78, 111 Stat. 1467, §§ 509, 510 (1997).

109 Nat'l Abortion Fed'n, *Public Funding for Abortion: Medicaid and the Hyde Amendment*, http://www.prochoice.org/about_abortion/facts/public_funding.html (last visited Oct. 9, 2011); *see also* Harris v. McRae, 448 U.S. 297 (1980) (upholding the constitutionality of the Hyde Amendment).

110 *See* National Abortion Federation, *supra* note 109 (describing each U.S. state's provision of funding for abortion, noting the following:

> "Funding under Hyde Amendment Only: Alabama, Arkansas, Colorado, Delaware, District of Columbia, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maine, Michigan, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Wyoming. Hyde Amendment and Additional Health Circumstances: Indiana (physical health), Iowa (fetal abnormality), Mississippi (fetal abnormality), Utah (physical health and fetal abnormality), Virginia (fetal abnormality), and Wisconsin (physical health). All or Most Health Circumstances: Alaska, Arizona, California, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, New York, Oregon, Vermont, Washington, and West Virginia. Noncompliant with the Hyde Amendment: South Dakota (life endangerment only.)".

111 Abortion Funds are private not-for-profit organizations that rely on donations to assist low-income women in funding their abortions. *See* THE NATIONAL NETWORK OF ABORTION FUNDS, http://members.nnaf.org/xina/xioutput.cgi?config=public_members&output=list&sort=member_id&select=&no_template= (last visited Oct. 9, 2011) (listing private non-profit organizations that have been picking up this slack).

112 N.Y. COMP. CODES R. & REGS. tit. 18, § 441.12 (2011).

will likely not cover the cost of an abortion.

Structural impediments continue to be placed in front of women seeking abortion in the United States, and the problem only seems to get worse the poorer and the younger the woman seeking the abortion is. Despite abortion being a legal medical procedure, state and federal policies expressly limit access to it. Furthermore, it is not access to abortion alone but access to health care and services in general for young women that is lacking. For example, though access to prenatal care is just as important for girls who intend to give up their child for adoption as it is for girls who intend to keep their child, teenagers who wish to choose to give their baby up for adoption also face impediments. While adoption is ostensibly an option for the children of foster girls, it is not one that is often chosen. Of teenagers whose pregnancies are full-term, only three percent choose adoption.[113] There may be similar structural impediments to this choice as there are to abortion.[114] These issues are all the more reason for agencies to promote comprehensive informational and educational resources about pregnancy, contraception, and the range of options that should be available to pregnant girls in foster care.

II. Agency and Judicial Response to Pregnant Foster Children

The significant problems of access to medical care and abortion presented in Part I pose challenges to agencies and the courts. This Part will examine the responses of state and federal agencies, and of state and federal courts, to these issues. Rather than tackle these problems head-on, most agencies have generally—and irresponsibly—ignored them. Courts have been more willing to address the abortion issue, and are often forced to do so in the context of judicial bypass; nevertheless, courts often prefer to uphold the status quo.

A. Agency Response

1. Federal Agency Response

The United States Department for Health and Human Services (HHS) oversees the provision of child welfare in the United States. HHS's Administration for Children & Families provides information about child welfare and conducts research on state practices, and compiles statistics regarding foster care and child welfare. The Family

113 Kyle Wier, *Promoting Adoption as a Solution to Teen Pregnancy: A Study and Model*, 5 J.L. & FAM. STUD. 319, 319 (2003).

114 Pregnant teenagers may be dissuaded from choosing adoption over child rearing. *See, e.g., id.* at 323–36.

and Youth Services Bureau funds Maternity Group Homes for Pregnant and Parenting Youth,[115] and one of HHS Secretary Kathleen Sebelius' stated priorities is to reduce teen and unintended pregnancy, focusing on "demographic groups who have the highest teen pregnancy rates," including youth in foster care.[116] HHS has conducted numerous research initiatives regarding child welfare, but it has yet to conduct specific research into the unique challenges of pregnant youth in foster care.

2. State Agencies

When foster girls become pregnant, they are often removed from their foster homes, formally or informally. In a 2009 article in TIME, a girl from California describes being pressured to leave foster care at age seventeen when she became pregnant because the system would not be able to accommodate both her and her child.[117] When there are services available, they "lack continuity, universality, and entitlement. Many programs fail to include mothers as full participants and beneficiaries."[118]

A 1995 report from the Youth Advocacy Center[119] found similar problems. The Center found that pregnant girls were separated from their newborns because there were no families or homes to accommodate them, because the process was confusing, because the foster girls felt they had no control over the process and their own care, and because they felt alienated from child care workers, their schools, and current or former foster families.[120] Ten years later, in 2005, the Public Advocate for the City of New York followed up on the Youth Advocacy Center report and found that not much had changed.[121] The New York City Administration for Children's Services (ACS) was still failing to report the number of foster children who have children, services were still lacking, and foster child parents were

115 U.S. Dep't of Health & Human Servs. Admin. for Children & Families, *Maternity Group Homes for Pregnant and Parenting Youth (MGH)*, http://www.acf.hhs.gov/programs/fysb/content/programs/mgh.htm (last updated Nov. 3, 2010).

116 U.S. Dep't of Health & Human Servs., *Reduce Teen and Unintended Pregnancy,* http://www.hhs.gov/secretary/about/reduce.html (last visited Oct. 9, 2011).

117 Sullivan, *supra* note 1.

118 CHILDREN'S LAW CENTER OF LOS ANGELES, *supra* note 1.

119 YOUTH ADVOCACY CENTER, CARING FOR OUR CHILDREN: IMPROVING THE FOSTER CARE SYSTEM FOR TEEN MOTHERS AND THEIR CHILDREN (1995), *available at* http://www.youthadvocacycenter.org/pdf/CaringforOurChildren.pdf.

120 *Id.* at 8–9.

121 GOTBAUM, *supra* note 2, at 3.

still being overlooked and under-served by the city.[122]

When services are provided, they are often on an *ad hoc*, non-centralized basis. One mother described her experiences as pregnant in foster care, saying "her agency never referred her to parenting classes. Her foster mother wasn't around much and did not offer any advice on how to care for a newborn."[123] When she was able to get services, it was on her own initiative, and she was lucky to eventually find a placement foster home that could accommodate her and her child.

State agencies usually do not have specific policies regarding these issues. In 2008, the Gotham Gazette reported that ACS in New York "does not provide the privately run foster care agencies it oversees with guidelines on services for pregnant and parenting teens. Nor does it keep track of how many teens in the system are pregnant or parenting."[124] The New York State manual for foster families, an eighty-six-page document, mentions nothing about what to do if your foster child becomes pregnant and contains only a brief comment that "[i]n New York State, a minor can consent to his or her own reproductive health care including: family planning, abortion, prenatal care, care during labor and delivery, and care for sexually transmitted diseases."[125] When up to one in six girls in the New York City foster system may become pregnant,[126] it is surprising that the state manual is entirely silent on this issue. And in Washington State, the Practices and Procedures guide for the Children's Administration contains one sentence directing the agency what services to provide to pregnant foster girls: "Provide life skill development training on parenting to pregnant or parenting teens."[127] There is a lack of well-thought-out, comprehensive planning on the part of agencies to address this issue.[128]

There are, however, some positive signs that agencies are aware of the unique

122 *Id.* at 3–4.

123 Laura Longhine, *When Foster Children Become Pregnant*, GOTHAM GAZETTE, Aug. 7, 2008, *available at* http://www.gothamgazette.com/article/iotw/20080807/200/2599.

124 *Id.*

125 OFFICE OF CHILDREN AND FAMILY SERVICES, NEW YORK STATE FOSTER PARENT MANUAL 29 (2010), *available at* http://www.ocfs.state.ny.us/main/publications/Pub5011.pdf.

126 GOTBAUM, *supra* note 2, at 7.

127 Wash. State Dep't of Soc. & Health Servs. Children's Admin., *Practices and Procedures Guide*, *available at* http://www.dshs.wa.gov/CA/pubs/mnl_pnpg/chapter4_4310.asp (last updated Aug. 26, 2011).

128 *See* Eve Stotland & Cynthia Godsoe, *The Legal Status of Pregnant and Parenting Youth in Foster Care*, 17 U. FLA. J.L. & PUB. POL'Y 1, 1 (2006).

challenges faced when a girl becomes pregnant in foster care or enters foster care as a result of pregnancy. These agencies have started to respond, at least by acknowledging that pregnant foster children exist. In New York, ACS recommends that its private agencies refer pregnant foster children to the Nurse Family Partnership,[129] which can provide assistance to low-income new mothers. However, there is no requirement that the agencies do so. Since foster care is privatized in New York,[130] the individual foster agencies can choose to provide as much or as little help as they see fit, with only advisory oversight by ACS on this issue.

In Rhode Island, the Department of Children Youth and Families (DCYF) has made an attempt to directly address the issue of pregnancy in foster care by putting information for pregnant teens involved with DCYF on its website. Unfortunately, the resources seem to be provided entirely on an *ad hoc* basis, without a clear or specified plan in place. In the "Youth Questions" section of its website, DCYF provides the following:

> What happens if I get pregnant while involved with DCYF?
>
> It is important to make sure that you find services to support you. If you are a female and pregnant and not sure what to do and you are involved with DCYF you should contact your case or social worker. Your worker will explore the situation, options, and services with you. If you are a partner of a female who is pregnant and you are involved with DCYF you should contact your case or social worker as well so they can help you explore your options.
>
> While your worker cannot make the decisions for you, they can be supportive of you and point you in the direction of agencies and services to assist you in making your decisions. Your worker can help to identify services like the ones offered by Planned Parenthood of RI, where you can discuss options such as: continuing with the pregnancy and locating appropriate prenatal health care, making adoption plans; or terminating the pregnancy. The decision is yours to make, but it is a good idea to discuss it with people who are objective, can assist you in exploring all of

129 Press Release, NYC Admin. for Children's Servs., ACS Commissioner John B. Mattingly Reminds Families of Resources Available During the Holiday Season (Dec. 12, 2007), *available at* http://www.nyc.gov/html/acs/html/pr_archives/pr07_12_12.shtml. *See generally* THE NURSE FAMILY PARTNERSHIP, http://www.nursefamilypartnership.org (last visited Oct. 9, 2011).

130 ACS in New York City contracts with private foster care agencies to place children in foster homes and to monitor their care. ADMIN. FOR CHILDREN'S SERVS., BOOKLET: INTRODUCTION TO ACS 22 (2006), *available at* http://www.nyc.gov/html/acs/downloads/pdf/pub_intro_acs_06.pdf.

> your options and can direct you to the services you will need. Your worker can help you identify agencies and services that meet your needs and can support you in your decision.[131]

While Rhode Island DCYF has attempted to provide an answer to this difficult question, the agency places the onus entirely on the pregnant girl to make sure that she gets services for herself. There is no indication that there is any regular counseling or planning around these issues. Furthermore, Rhode Island has a judicial bypass procedure for its parental consent law, but makes no reference to this in its materials. If a girl is pregnant, it is up to her to figure out how to get services and how to talk to her caseworker about her plans; presumably, it is also up to her to figure out how to go to court on her own to obtain a judicial bypass. There is also no indication of the potential consequences for her if she does go to her agency: Will she be removed from care? Will she be able to have her baby and find a place to live?

One additional potential response to foster child pregnancy is referral to a maternity residence.[132] A maternity residence is typically a group home for pregnant and sometimes parenting teens, offering housing and often education and job training.[133] These residences can work for some girls, but there are also the common problems that seem systemic to the agency response across all options: there are delays, and the girls often feel that they lack agency and control over themselves, their bodies, and their children.[134] Maternity residences have fallen out of favor in many states but continue to exist as alternative options.

B. Judicial Response

The cases discussed in this section fall into two categories: how the courts address the rights of pregnant teens in foster care, and how certain categories of girls challenge parental consent and notification laws.

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131 R.I. Dep't of Children, Youth & Families, *Questions for Youth in DCYF Care*, http://www.dcyf.ri.gov/questions/youth_questions.php#pregnant (last updated May 11, 2011).

132 YOUTH ADVOCACY CENTER, *supra* note 119, at 11; *see, e.g.*, INWOOD HOUSE, http://www.inwoodhouse.com/programs.html (last visited Oct. 9, 2011) (providing "a haven for pregnant teens in foster care who have nowhere else to turn" in New York City).

133 *See, e.g.*, INWOOD HOUSE, *supra* note 132; *see also* HIDDEN CHOICES, http://www.hiddenchoices.com/ (last visited Oct. 9, 2011) (national maternity residence locator).

134 YOUTH ADVOCACY CENTER, *supra* note 119, at 15–16.

1. The Rights and Responsibilities of Teen Mothers in Foster Care

Pregnant and parenting foster girls occupy a strange legal position. On the one hand, they are wards of the state, which is responsible for their care and management. On the other hand, they may be solely responsible for their own children and retain the same parental rights as any other parent.[135]

The responsibilities of the state to foster girls may involve complicated issues of responsibility for the pregnancy. There is a notion that foster parents and agencies should not "let" a foster girl become pregnant. In *Riley v. Camp*,[136] a fifteen-year-old girl, Rena, became pregnant by her eighteen-year-old boyfriend (and later husband), Billy Westbrook, while in foster care. Her mother sued two social workers, and a jury trial in the district court found for the mother, finding "that the social workers deprived the mother of her rights under the substantive component of the Due Process Clause by failing to allow the mother to visit her child and by failing to prevent the child from becoming pregnant."[137] The Eleventh Circuit panel on appeal affirmed.[138]

When the Eleventh Circuit denied rehearing en banc, Judge Tjoflat, dissenting from the denial of rehearing, wrote to object to the "creation of these new rights . . . ."[139] Judge Tjoflat wrote that the panel "found that the defendants infringed a second substantive due process right of the plaintiff's when they failed, by gross negligence, deliberate indifference, or specific intent, to prevent Billy Westbrook from impregnating and marrying Rena, the acts that resulted in the termination of the plaintiff's residual parental rights."[140] If there is a substantive due process right of this nature, the responsibilities of child welfare agencies are changed dramatically. Although this particular case hinged in part on Rena's marriage, which resulted in her emancipation, it is not hard to see that such responsibilities might be extended. If a state child welfare agency can be found liable for failing "by gross negligence, deliberate indifference, or specific intent" to prevent the pregnancy of its minor wards, it must then have an affirmative duty to make reasonable efforts to prevent such an occurrence.

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135 *See* Troxel v. Granville, 530 U.S. 57 (2000).

136 Riley v. Camp, 84 F.3d 437 (11th Cir. 1996).

137 *Id.* at 959.

138 Riley v. Camp, 990 F.2d 1268 (11th Cir. 1993) (unpublished table decision).

139 *Riley*, 130 F.3d at 959.

140 *Id.* at 966.

This has the potential to have some major impact on the way that foster girls are treated before and after they become pregnant. Prior to pregnancy, there may be an affirmative duty for the state to provide special programs for teenagers in foster care or training for caseworkers. During pregnancy, there may also be affirmative duties to provide services for the foster girl and any resulting children.

On the other hand, the status of foster girls as wards of the state can also sometimes lead to loss of their parental rights. In *In Interest of C.N.G.*,[141] a mother's parental rights to her child were permanently terminated. In dissent, Judge Cowart explained the facts that led the Florida Department of Health and Rehabilitative Services (H.R.S.) to petition for termination of the girl's parental rights.

> While she was sixteen years of age and still in foster care, she became pregnant and gave birth to C.N.G. on August 26, 1984. Because of the mother's own legal dependency, H.R.S. took custody of the child at birth and placed it in foster care where it remained until these proceedings.[142]

The girl in question had a permanent intellectual disability and never had custody of her child. It seems that the combination of her disability and status as a ward of the state led to her being denied the opportunity to care for her child.

Finally, court cases sometimes provide a forum for exposing the complicated set of problems faced by pregnant girls in foster care. In *In re Kirsten R.*,[143] a pregnant fifteen-year-old girl was on probation and living with her grandparents. As the court described her situation,

> [m]inor's grandparents told minor's probation officer that they no longer wanted to care for minor because she was unwilling to have an abortion . . . . Minor's grandmother testified that she thought minor should be placed in a foster care facility because minor does not follow her grandparents' instructions to do her school work or clean her room. [144]

At the time of the hearing, the girl was in juvenile hall, awaiting placement in a foster

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141 In Interest of C.N.G., 531 So.2d 345 (Fla. Dist. Ct. App. 1998).

142 *Id.* at 345.

143 In re Kirsten R., No. E043153, 2008 WL 308406 (Cal. Ct. App. Feb. 5, 2008).

144 *Id.* at *1–2.

care facility.[145]

2. Abortion: Parental Consent and Notification Laws, Judicial Bypass

Courts vary in how rigidly they choose to apply parental consent and notification laws. Some counties essentially rubber-stamp judicial bypass proceedings, while in others, the statutes are much more difficult to overcome. While girls almost always obtain a judicial bypass if they persist in the appellate process, it is burdensome for girls to have to go to the courts when the statutes have been written without them in mind, as discussed above in Part I. There are many categories of girls for whom parental notification or consent laws simply do not fit. Foster girls, as discussed in this article, are one such group. Other groups of girls include, but are by no means limited to, those who have never met one of their parents, girls whose parent(s) are incarcerated in prison or held in a mental health facility or rehabilitation center, girls who do not wish to be in contact with a parent because of sexual or physical abuse, and girls who do not know where one or both parents live. It is not uncommon for girls in such situations to still live under the legal guardianship of such parents, even when they are unavailable, cannot be found, or pose a physical or psychological risk to their daughter. Such girls are stuck when courts refuse to be flexible in interpreting parental notification and consent statutes.

Many courts are unwilling to bend the parental notification and consent statutes to fit the particular problems faced by some girls who wish to obtain an abortion. The Mississippi statute quoted above in Part I[146] has been notoriously rigidly applied. *In re A.W.*[147] is an example of the Mississippi legislature and court's failure to consider the impossible position in which some girls may find themselves when they reside in parental notification or consent states. In that case, a seventeen-year-old girl petitioned the court for a waiver of the state's parental consent statute. Her mother had died five years prior to the action, and she did not have a relationship with her father. She lived with her aunt, though not in a formal custody arrangement, which highlights the variety of living arrangements that are not taken into account by such statutes. Furthermore, the girl explored her options, and contemplated the impact of her decision: "She met with a counselor at the abortion clinic and ha[d] read pamphlets to familiarize herself with the abortion procedure. She also spoke with someone at the medical center about the option of adoption."[148] She had planned to attend college,

145 *Id.* at *2.

146 MISS. CODE ANN. § 41-41-53 (West 2010).

147 In re A.W., 826 So.2d 1280 (Miss. 2002).

148 *Id.* at 1281.

and had suicidal thoughts as a result of the pregnancy.[149] Despite all of these factors, the Mississippi Supreme Court denied her petition, holding that "[t]he chancellor ultimately found that the [sic] A.W. was simply afraid of the responsibility of motherhood. This Court will not second guess the chancellor where the record supports the chancellor's findings and the chancellor was in the best position to evaluate the maturity level of A.W."[150] Even though she was not formally in foster care, the girl in this case was in a position outside of the typical family and therefore not addressed by the state legislature. The Mississippi statute and others like it typically contemplate a traditional family, in which the pregnant minor resides with both parents and is not in physical or psychological danger if she tells her parents of her pregnancy or planned abortion. Many pregnant minors find themselves outside of this framework, living with alternate family members, without contact from one or both parents, or in other situations that make it difficult or impossible to notify or obtain consent for their abortion. Foster care, again, adds layers of complication to these issues.

There are other cases of courts denying bypass procedures that betray an anti-choice bias. In *In re R.B.*,[151] the Mississippi Supreme Court cited the following factors in determining that the seventeen-year-old petitioner, whose parents were dead and who lived with her grandmother, was not mature enough to make her own abortion decision:

> According to R.B., no medical personnel told her about the risks associated with an abortion, nor has she specifically asked. R.B. has no knowledge of the risks of infection, hemorrhage, or breast cancer. She is not aware that an abortion could cause danger to subsequent pregnancies and infertility. Further, she does not know the name of the physician who would perform the procedure, and she has made no investigation into the background or qualifications of the physician. She is concerned primarily with the cost of the abortion and indicates that she picked the Memphis clinic over the Jackson clinic because the Memphis clinic is cheaper. She has no knowledge of what the word "viability" means.[152]

The court did not explain why this lack of knowledge meant that she was not aware of the meaning of her desired abortion, or why such testimony revealed her lack of maturity. Choosing a cheaper clinic in particular does not seem to weigh against her maturity but

149 *Id.* at 1281–82.

150 *Id.* at 1282.

151 In re R.B., 790 So.2d 830 (Miss. 2001).

152 *Id.* at 831.

rather in favor of her planning.

Courts have sometimes not even granted waivers of the statute where a minor has a real, justifiable fear of losing her home if her guardian discovers her pregnancy. In *In re Anonymous*,[153] the petitioner was again seventeen years old. She lived with her grandmother, whom she believed would not consent to an abortion and would kick her out of the house if she discovered her pregnancy. This fear seems to have been well-founded, rather than exaggerated, since the court noted that "the grandmother had made the minor's aunt move out of the home when the aunt became pregnant at the age of 18."[154] Nevertheless, after remanding the case for further fact-finding, the Alabama Court of Civil Appeals upheld the trial court's denial of her petition.

Sometimes, however, courts are willing to find that the parental consent and notification laws are not appropriate, either on their face or as applied.[155] In *American Academy of Pediatrics v. Lungren*,[156] the California Supreme Court found that its parental notification statute violated the California state constitution by impermissibly infringing on minors' right to privacy.[157] Finally, as discussed above in Part I, emancipated minors are generally not required to comply with parental notification and consent statutes. There are many other groups of girls who would benefit from this flexible treatment, as discussed in Part III.B below.

III. Recommendations for Agencies, Courts and State Legislatures

It is clear that while states are mandated to provide medical care to foster children, and in theory are supposed to provide prenatal care or access to abortion, most are ill-equipped to deal with the challenges that pregnant foster girls face. Furthermore, while courts and legislatures value kinship care, kinship foster parents, who may be in the best position to provide stability and emotional support to pregnant teens, are not given any additional resources.

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153 In re Anonymous, 812 So.2d 1221 (Ala. Civ. App. 2001).

154 *Id.* at 1222.

155 *See, e.g.*, Ex parte Anonymous, 531 So.2d 901 (Ala. 1988).

156 American Acad. of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997).

157 *Id.* at 847.

A. Agency Recommendations

Girls are often removed from their foster homes when they become pregnant,[158] and the experience creates more instability and stress in their lives. As Crumbley notes, "Being removed from [their] parents predisposes children to feelings of abandonment and rejection."[159] Being again removed from their foster families can increase these feelings.

The Supreme Court has affirmed that the extended family network, as is found in kinship foster care arrangements, is a good thing.[160] Furthermore, the Second Circuit has held that kinship foster parents are entitled to more substantial due process rights than stranger foster parents.[161] This indicates the importance that the Second Circuit, at least, has placed on children remaining within a family network and on the preservation of kinship placements. Agencies should therefore promote such placements when feasible, and especially when preferred by the foster child.

It is clear, as discussed above, that family stability is important for the well-being of the foster girl and her child, if she chooses to bear it. Because a foster girl's pregnancy so often leads to the break-up of foster families, additional stress, and other complications, foster agencies must do more to provide planning and services around the issue of foster girl pregnancy. Retention of the family structure, whether in the context of kinship care or not, provides a more stable environment for the pregnant foster child and any resulting children.

When a foster girl gets pregnant, challenges arise for the foster girl, the foster family, and the foster agency. For example, foster parents may not want to care for a new baby[162] and may not have the space or resources to do so. They may not have training in how to take care of a baby and, importantly, in how to help the foster child care for her baby.[163] Agencies do

158 Discussed in Part II of this article.

159 CRUMBLEY & LITTLE, *supra* note 33, at 2.

160 *See* Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977) ("The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."); *see also* Smith v. Organization of Foster Families For Equality and Reform ("OFFER"), 431 U.S. 816 (1977) (establishing factors to consider when determining the nature of a foster parent's liberty interest).

161 *See* Rivera v. Marcus, 696 F.2d 1016, 1024–35 (2d Cir. 1982) (applying OFFER factors, finding a liberty interest that kinship foster parents have in their foster children).

162 GOTBAUM, *supra* note 2, at 6.

163 *Id.* at 8.

not help by refusing to acknowledge the issue. They should create planning programs and advocate for and fund services to assist girls and foster families when pregnancy occurs. When a foster child becomes pregnant, she and her foster family should be encouraged to stay together. The foster family should be provided with additional funding and resources to handle the pregnancy and resulting child care needs, if applicable. This would include additional money, parenting classes, childcare, and educational resources. Agencies should also consider their unique role in acting *in loco parentis* for pregnant foster girls, who do not have the same access to outside resources that other girls may have. It is especially important for these girls to be given every opportunity to have control over their bodies and their pregnancies.

B. Judicial Recommendations

The judiciary is in a unique position in parental consent and notification states to make a difference in the lives of foster children. Unfortunately, the reliance on state courts for judicial bypass procedures means that there can be wildly differing results.

The flexibility shown with respect to emancipated minors by some courts, discussed above in Part II, could be extended to other categories of minors. Although emancipated minors are in a unique position because they have had a judicial determination of their maturity, they also share important features with foster children with respect to abortion decisions.

The idea of a judicial bypass is to provide pregnant girls an alternative to obtaining parental consent. In the case of emancipated minors, parental consent is no longer necessary because the court has determined that they have the maturity to act on their own behalf. This is unlike the case of foster children, who have had no such judicial determination.

However, there is another factor justifying special consideration for emancipated minors that foster girls may share. Part of the idea behind judicial bypass is that it offers an option for girls whose parents will not consent, or that the girl believes will not consent, to the abortion. It is the chance for the girl to ask for a second look at the factors that go into the determination of whether the abortion is in her best interest: if she is mature enough to make the decision on her own, if she is fully aware and consenting to the procedure, and so on. In states with parental consent laws, judicial bypass ensures that parents do not have the exclusive power to make that decision. This is a good thing, not because most parents do not have the best interests of their children in mind, but because vesting an exclusive veto power over a woman's abortion decision is dangerous and has strong potential to remove the right to abortion altogether for certain groups of girls.

In many states, however, foster children, like emancipated minors, only have one practical option—the judicial bypass procedure—if they wish to access abortion in parental consent and notification states. In both cases, because of the potential that a second party, the parent, will have to review the decision and consent, each minor only has one person who could allow their abortion to proceed: the judge overseeing the judicial bypass proceeding.[164] This sole discretion exercised by the judge creates the same risks and potential for abuse that the judicial bypass process was designed to address in the first place.

Due to these potential problems when there is a sole decision-maker, judges should exhibit the most flexibility in situations where the girl has no access to a parent, as in the case of foster children. Until legislatures catch up to these issues, and while parental consent laws remain applicable to foster girls but fail to address their unique situation, courts should be flexible in interpreting parental consent and notification statutes, and should particularly note and take account of the impediments that pregnant foster girls face. The judicial bypass procedure is a wildly loose standard that can be interpreted narrowly or broadly as a particular court decides; courts should err on the side of broad interpretation to ensure that the right to abortion, a legal medical procedure, is not effectively barred for entire classes of young women.

C. Legislative Recommendations

Finally, state legislatures are in a position to incorporate considerations about foster care and other alternative family structures into parental consent and notification statutes. Barring the elimination of such statutes, which is not politically feasible in many states, states should broaden the language of these statutes to address the needs of a wider variety of girls in non-traditional family settings. It is not only middle class girls from two-parent households who need access to abortion. Girls without access to financial resources, whose parents are out of contact, whose parents are abusive, and who are in foster care are underserved and marginalized by their states when such laws effectively bar their access to abortion.

There are a number of ways that this could be accomplished. First, caseworkers could be designated "parents" who have the authority to consent to abortion procedures. As the legal guardian of the foster children, the State itself, through its agents, could serve as a proxy for biological parents in giving consent. However, the separation between the state and

164 Although judicial bypass denials are appealable, the appeals process can be lengthy, confusing, and stressful. Most denials are not appealed. The impracticality of an appeal distinguishes the judicial bypass procedure for abortion from other cases where a judge is the sole decision maker.

abortion providers imposed by the Hyde Amendment and other regulations may make this solution impracticable without additional legislation.[165] Furthermore, certain caseworkers may be disinclined to grant consent to abortion, posing a problem similar to that faced by non-foster girls with reluctant parents. An option might be a caseworker *notification* rather than consent requirement for foster children living in parental consent states. This option may be attractive to legislatures that want to encourage adult involvement in adolescents' lives. However, this option poses potential problems too, such as confidentiality. Many girls will not welcome this information being shared with a caseworker, and they may fear repercussions such as forced transfers if their caseworker does not agree with their decision.

Another alternative is to allow foster girls to obtain the consent of or to notify an alternate family member. If a girl is in foster care, she may have a complex relationship with her parents, who may have been accused of abuse or neglect. If she is living in kinship care, she may feel comfortable with and want to involve her relative, typically a grandmother or aunt, in her decision to continue with the pregnancy or to obtain an abortion. The goals of parental notification[166] would be equally served by having an alternate family member involved in her case.

Parental consent and notification laws seem to be here to stay, at least in some form. It would help serve the goal of child welfare and protection to advocate for reforming these laws to allow for more flexibility, rather than imposing a rigid structure into which many girls struggle to fit.

CONCLUSION

Federal and state agencies, as well as the courts, have thus far taken an *ad hoc* approach to the problem of access to medical care and abortion for foster girls. This does a disservice

165 Consider the situation in *Ex parte Anonymous*, 531 So.2d 901, 902 (Ala. 1988), discussed above in Part II.B.2, in which the child protective agency in Alabama "[took] the position that it [could] not give consent because of regulatory prohibitions against an agency receiving Federal funds if it participates in a decision for an abortion . . . ."

166 *See* Bellotti v. Baird, 443 U.S. 622, 640 (1979) (holding that "[a]s immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor" and that "[i]t may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns") (footnote omitted); American Acad. of Pediatrics v. Lungren, 940 P.2d 797, 847 (Cal. 1997) (noting that the purposes of parental consent laws is "to protect the physical and mental health of pregnant adolescents and to give these adolescents the benefit of consultation with a caring and supportive parent").

to a particularly vulnerable population of girls, who have already experienced family disruption and in many cases abuse, and who need early intervention to help them acquire appropriate care, whatever their decision about the pregnancy. Comprehensive schemes at the state level that provide early intervention programs and clear directives to foster care agencies regarding teen access to pregnancy services are necessary. At both the federal and state levels, impediments to abortion access such as parental notification and funding barriers should be cleared for foster girls, who do not fit neatly into the notification and judicial bypass scheme, and who may have no independent access to funds. Meanwhile, the courts should make every effort to ease these girls' access to medical care and abortion. This population of young women in foster care is under-served in so many areas, and faces so many additional challenges that their peers may not. They deserve better from the systems that purport to serve and care for them.