S. HRG. 108–619

THE CHILD CUSTODY PROTECTION ACT: PROTECTING PARENTS' RIGHTS AND CHILDREN'S LIVES

HEARING

BEFORE THE

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THURSDAY, JUNE 3, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 3:15 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Jeff Sessions presiding.

Present: Senators Sessions and Ensign [ex officio.]

OPENING STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. We will come to order. I just have to extend an apology for the extended time that vote took. We have a little courtesy to give a few extra minutes, and they gave too much time as far as I am concerned in letting everybody make sure they got to cast their vote on a 95 to nothing vote.

And they have two more, so I cast my second vote, and it looks like we will have to go back for another vote. But I thought, with your indulgence, I would at least make an opening statement and maybe we can get started, and then maybe just one more short break before the interruption.

Today's hearing will take testimony on the Child Custody Protection Act, offered by our colleague and friend, Senator John Ensign. I am pleased to be a cosponsor of the bill. In fact, I was a cosponsor of the bill about 6 years ago when Senator Spence Abraham first offered it. We will hear both sides of the issue today from excellent panels.

The proposed legislation deals with what I think is a very real problem involving interstate transportation of minor children for the purposes of abortion, in violation of State-protected custody rights of parents, and the well-being of children. It is not about abortion. It is about the custody rights of parents.

This legislation will be a step toward defeating the legal loophole that now exists. It is a loophole that cheats parents out of their basic right to know about the health concerns of their minor children. This legislation does not expand or contract existing State laws or appear in any way to contradict Supreme Court precedent involving minor children and abortion. It would simply deal with how to give effect to constitutionally valid parental custody rights in our mobile society.

The Supreme Court has made it clear in *Planned Parenthood* v. *Casey*, a decision that expanded abortion rights, that it is proper for a State to declare that an abortion should not be performed on a minor child unless a parent is consulted. Many States require parental consent before a principal or a teacher can hand out an aspirin, and many States have concluded that to perform an abortion on a minor without parental consent or notice is a very dramatic interference on parents' protected interests.

It is the parents, after all, who will have to monitor their daughter's post-abortion medical condition. They love the child and they want her to have the best care. They have every right to not want some older man or some other person, for example, who has no real interest in their daughter's well-being making serious health decisions, or leading her into serious health decisions without their knowledge at all.

In my view, the right of parents to be involved in these major decisions is fundamental and ought not be lightly transgressed. State parental consent and notification statutes are a legitimate step to protect basic parental rights. However, we do not even need to discuss the merits of parental consent legislation because the issue before us today is not whether States should have such laws. The issue before us today is whether or not we should allow the circumvention of such constitutional State laws which are designed to protect children's health and parental rights.

There is direct evidence that third parties are interfering with protected parental rights by taking minor children for the purpose of an abortion from a State where parents have to be notified, to another State that does not have a notification law. This bill would preclude these third parties. It is not a radical or extreme proposal. Rather, it is just good public policy.

This is the type of legislation that even some pro-choice advocates agree with. Dr. Bruce Lucero, a former abortionist from Alabama, has performed 45,000 abortions. He supports this legislation. In a New York Times op ed he wrote that, "dangerous complications" are more likely to result when parents are not involved in these out-of-State abortions.

We will hear evidence today that demonstrates that this issue does not involve a few isolated cases. An attorney for the Center for Reproductive Law and Policy, Kathryn Kolbert, has stated, "There are thousands of minors who cross state lines for an abortion every year and who need assistance from adults to do that."

We have seen several examples of abortion clinics which openly place advertisements in the yellow pages of phone books, in nearby States that have parental consent statutes. These advertisements proudly proclaim "no parental consent."

Let me just show you a couple of these: "Abortion: No Waiting Period, No Parental Consent," and this was in the Pennsylvania phone book yellow pages encouraging people to go across the State line to Maryland. Pennsylvania has a parental notification statute.

Here is another one from the Pennsylvania phone book: "No Waiting Period, No Parental Consent Required."

"No Parental Consent or Waiting Period," and this was an ad for a Buffalo, New York abortion clinic in the Erie, Pennsylvania yellow pages.

This is an ad from a Phillipsburg, New Jersey, clinic, again no parental consent.

You have another one there. This ad is located on the website for an Englewood, New Jersey clinic. However, it is located on the page for Pennsylvania abortion clinics.

This is on the Pennsylvania website abortionclinic.com. These ads all target Pennsylvania teenagers and entice them to surrounding States. It doesn't just happen in Pennsylvania. On the State pages for 23 States with parental involvement laws, on the abortionclinic.com website, there are ads for abortion clinics in States without these laws. So we have an open policy of encouraging transportation in interstate commerce to evade State laws. It is the policy of these clinics to do so.

Some will argue the bill is unconstitutional and we will hear testimony on that today, but the Supreme Court has upheld parental notification and consent laws and this bill would simply help enforce those. It does nothing more than prohibit the evasion of the existing State constitutional statutes.

I was a Federal prosecutor for nearly 15 years and I remember the long-time Federal statute, the Mann Act, that prohibited the interstate transportation of women across State lines for the purposes of prostitution. That law has been upheld numerous times since the early 1900's.

Similarly, as a prosecutor I prosecuted in Federal court those who transported in interstate commerce stolen motor vehicles. It was not the theft of the vehicle that was the basis for the Federal crime. It was the transportation in interstate commerce of a vehicle that has been stolen. That was the gravamen of the offense.

So this bill is narrow in scope. It does not prohibit interstate abortions. It does not invalidate any State laws. It does not establish a right to parental involvement for residents of any other State that does not already have a parental involvement law. It doesn't even attempt to regulate the activities of the pregnant minor herself. It only reaches the conduct of outside parties who wrongfully usurp the rights of parents that are guaranteed by State law.

I have concluded that this bill is constitutional. We will have opposition to that today, and I think it deserves serious consideration and we will look at it carefully. I look forward to the testimony today as we continue to study this legislation. If any flaws exist, we would like to know what they are and seek to improve the statute. I know Senator Ensign would agree with that. I do, however, believe that minor children are being abused through the evasion of State law, and that Congress should act to place the responsibility for a child's care where that responsibility belongs, with the parents.

Senator Ensign, thank you for introducing this legislation and pursuing it. Thank you for your leadership, in general, in the Senate, and we would be glad to hear from you at this time.

STATEMENT OF HON. JOHN ENSIGN, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator ENSIGN. Well, thank you, Mr. Chairman, and thank you for holding this hearing on what I believe is very important legisla-

tion. If I may ask that my full statement be made part of the record and then I will just try to summarize.

Senator SESSIONS. It will.

Senator ENSIGN. Mr. Chairman, there are few issues in America that bring out as much emotion as abortion. There are good people on both sides of this issue and there are a lot of reasons that people approach it from different angles. When it comes to separating out what are reasonable restrictions, there are many issues that we should be able to come to agreement on and this legislation is a prime example.

USA Today and CNN, which are certainly not known as conservative organizations, conducted a poll that found that almost three-quarters of Americans support the idea of parental consent prior to a minor having an abortion. Judicial bypass laws have been written across the country for those cases where there is rape or incest involved within a family, because minors may be afraid to go to one of the parents because of abuse problems. There are ways to have the judicial system involved so that there are responsible people ensuring the safety of the minor. But these laws are set up in such a way that anyone, just because they say they care, can come and take somebody across State lines.

Make no mistake about it, abortion is a surgical procedure. It may be a simple surgical procedure, but it is a surgical procedure.

I have three children. My children cannot receive simple medication at school without my permission. A simple medication like aspirin given to the wrong person, even just a simple antibiotic, can cause some people to have a harmful reaction. That is one of the reasons that parental permission is so important because the parents are the most intimately involved people in that child's life. They know their medical history the best and are also the people that will do the follow-up care, for whatever the medical condition is.

If a child is taken across State lines for a surgical abortion and has complications that night or the next day, now this little girl is at home. She was afraid to tell her parents about the abortion in the first place and so a friend, or maybe it was the 20-something-year-old boyfriend, took the girl somewhere to have an abortion. Two-thirds of the pregnancies for under-age girls are fathered by guys over 20 years of age.

It is in that person's best interest, or at least they think it is in their best interest, to talk the little girl into having an abortion and to take them across state lines. But where is that person when the girl goes home and starts bleeding and has complications, or has an infection? This little girl is now afraid to tell her parents because not only, one, she was afraid of telling them about the pregnancy in the first place, but now they have compounded it by having an abortion. Victims may be terrified to tell their parents and they may wait too long, suffer in privacy, and end up having complications that could cost that little girl her life.

I have read through some of the testimony today. We are going to hear some people that will say that it is the compassionate thing to do to take somebody across State lines to get an abortion. However, we need to look at the whole person. That is the reason we

allowed the courts to be involved in these parental notification and parental consent laws.

We need to have the rule of law established and enforced. The purpose of the legislation before us today is to make sure that State parental notification and parental consent laws are uphold, so—that people cannot bypass those by having an adult take a minor across State lines. That is the bottom line for this.

I wish that all States would enact parental consent laws, not just parental notification, but actual parental consent laws. The people that care the most for the child should be involved in this kind of decision and, if there is aftercare needed, be fully informed in order to care for their young daughter.

I want everybody to try to put themselves in a position of a parent. You know, at that age teenagers go through a lot of emotions. They go through maybe a troubled time with their mom or their dad, but what parent wouldn't wrap their arms around this little girl? They are going to give them advice, and it may mean a decision other than abortion. In a lot of families, if they decide to have the abortion, then they will be there for not only the physical care afterwards, but also through the trauma associated with abortion psychologically and emotionally, as well.

So, Mr. Chairman, I appreciate your bringing this issue before this Committee and having a hearing on it. Nobody wants to talk about abortion these days. It is something that everybody wants to avoid. Nobody wants to talk about it. They are tired, they are sick of it. But there are lives that are being lost out there because these girls aren't being cared for post-abortion. I believe this legislation is necessary and I appreciate your willingness to have a hearing on it.

Thank you.

Senator SESSIONS. Thank you, Senator Ensign, for your leadership and your excellent statement. There is almost a suggestion sometimes that parents can't be trusted to love their children. These people that would take them across State lines, are they going to provide them a home? Are they going to help educate them? Are they going to raise this child with love and affection and for the rest of their lives be bonded together? No, they are not.

To say that a parent who raised a child from her youth up should not be engaged in some issue of this importance, I think, is a mistake. I am glad to see that a majority of States have passed laws that do provide for notification. We know that any State law that does not withstand constitutional muster won't stand and would not be predicate support for the bill you have offered. But we will talk about that more later.

Senator Ensign, I think there are a few minutes left on this second vote, if it goes according to time the way it is supposed to and not like—

Senator ENSIGN. Mr. Chairman, I already voted, so I am in good shape.

Senator SESSIONS. Okay, all right. I did, too, so we are into the third vote now. Did you vote on that?

Senator ENSIGN. Yes.

Senator SESSIONS. Well, come up. You can preside, and it won't take me but a minute to get this vote done.

Also, for the record I will offer Senator Leahy's statement, the ranking Democratic member of the Judiciary Committee who could not be here, but has provided a statement.

I think it might be appropriate if we do start with the second panel. Senator Ensign, you might call them up and introduce them.

Senator ENSIGN [PRESIDING.] Simply, this is just to make sure that Senator Sessions can be here. I am not a lawyer; he is, and so having all of the legal people here, I would like to have him here during their testimony. So if you all do not mind, we could just reverse the next two panels' order.

If we could call up panel number three: Ms. Joyce Farley, Ms. Crystal Lane, and Reverend Doctor Katherine Hancock Ragsdale, if you would all come up. If any of you have full statements, they will all be made part of the record and if you could try to summarize your remarks in around 5 minutes, we would certainly appreciate that. There is a little timer in front of you, and then we can engage in some questions and answers afterwards.

Why don't we just start with you, Ms. Farley, and we will work down the table? Thank you.

STATEMENT OF JOYCE FARLEY, DUSHORE, PENNSYLVANIA

Ms. FARLEY. Good afternoon, members of the U.S. Senate Judiciary Committee and all the public here. My name is Joyce Farley and I am a resident of the State of Pennsylvania. I have been asked by Senator Sessions to come before you today to explain why I support the Child Custody Protection Act.

Just about this time in 1995, my then-12-year-old daughter, Crystal, was intoxicated and raped by a 19-year-old male whom she had met after entering the local high school as a seventh-grade student. I was aware at this time that this male was trying to befriend my daughter and had requested him not to call the house or come to visit. This male had a reputation of seeking out the seventh-grade females to establish relationships for sex, and unfortunately Crystal had become one of his victims. This male is currently in prison for a similar rape conviction. Unfortunately, many perpetrators of this type have many more than one victim.

I was at the time, and still am, a mother working full-time away from home. Both parents working full-time or single-parent families are not unusual in our society, and why your support of the Child Custody Act is so important. The people of our Nation need to know that our children are a blessing and that we will protect them from harm.

On August 31, 1995, I discovered my 13-year-old daughter Crystal was missing from home. An investigation by the police, school officials and myself revealed the possibility that Crystal had been transported out of State for an abortion. I can't begin to tell you the fear that enveloped me, not knowing where my daughter was, who she was with, if she was in harm's way, and to learn in this manner that my young daughter was pregnant.

By early afternoon, Crystal was home safe with me, but so much had taken place in that 1 day. The mother of this 19-year-old male had taken Crystal for an abortion into the State of New York. Apparently, this woman decided this was the best solution for the situation caused by her son, with little regard for the welfare of my

daughter. Situations such as this is what the Child Custody Act was designed to help prevent.

I am a loving, responsible parent whose parenting was interfered with by an adult unknown to me. My child was taken for a medical procedure to a physician and facility that I had no knowledge of. When Crystal developed complications from this medical procedure, this physician was not available and refused to supply necessary medical records to a physician that was available to provide Crystal the medical care she needed.

I ask you please, in considering the Child Custody Protection Act, to put aside your personal opinions on abortion and please just consider the safety of the minor children of our Nation whose lives are put at risk when taken out of their home State to avoid abortion laws that are designed to protect them from harm.

Please don't allow harm to our children in order to protect abortion or any other medical procedure. Please allow loving, caring, responsible parents the freedom to provide the care their adolescent daughters need without interference from criminals or people who may think they are helping, but actually cause more harm than good.

In many ways, time is a great healer, but as imperfect human beings we don't always know the effect of our actions or how deep the physical and emotional scars actually dwell. I urge you again to help avoid the scarring of America's adolescent girls by voting in favor of the Child Custody Protection Act.

Thank you.

[The prepared statement of Ms. Farley appears as a submission for the record.]

Senator ENSIGN. Thank you, Ms. Farley.

Ms. Lane.

STATEMENT OF CRYSTAL LANE, DUSHORE, PENNSYLVANIA

Ms. LANE. My name is Crystal Lane and I am here today to tell you why I think the Child Custody Protection Act should be passed and made part of our National laws. I believe in this bill and I hope my message will make those present here today believers as well.

When I was 13 years old, I was taken across the Pennsylvania State line to New York for an abortion. The woman that took me was in her mid-40's. I was so young and immature in many ways. I trusted this woman because she was older and I was so scared, I didn't know what to do.

I really think I could have lost my life at the abortion clinic. I was awake through the entire time and asked them to stop, but no one listened to me. I think all the time about how things would have been different if my mom was with me or if I had told her I was pregnant. I would have been taken care with love rather than how I was treated.

After the abortion, things started to go wrong right away and just kept getting worse, until my mom took me to our family doctor and on to the hospital. Since the first abortion I had was incomplete, the procedure needed to be repeated. Going through all this was the most terrifying time of my life.

I am pleading to everyone here today to please take my story to heart and mind when considering the Child Custody Protection Act. I believe the passing of this bill will protect the children of our Nation from even more horrible things than what happened to me when I was only 13 years old. I was, and am, really nervous about coming here today, but I realize how important this bill is and the good it can bring to the people and the children this Nation.

Thank you all for taking the time to listen to me today. I hope you find it in your hearts to do the right thing.

[The prepared statement of Ms. Lane appears as a submission for the record.]

Senator ENSIGN. Thank you, Ms. Lane. I know what kind of pain and emotions this must bring up for you and I appreciate you being here.

Reverend Ragsdale.

STATEMENT OF REVEREND DOCTOR KATHERINE HANCOCK RAGSDALE, ST. DAVID'S EPISCOPAL CHURCH, PEPPERELL, MASSACHUSETTS, ON BEHALF OF NARAL PRO-CHOICE AMERICA AND THE RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE

Rev. RAGSDALE. Thank you. You do have the full version of my comments, which are a little long so I will give you an abbreviated version, within which I want to tell you one story and then make a couple of points.

I am the parish priest of a small country church in Massachusetts. Some years ago, I went to pick up a 15-year-old girl and drive her to Boston for an abortion. I didn't know that girl yet. I knew her school nurse. The nurse had called me a few days earlier to see if I knew where she might find bus and cab fare for the girl. I was stunned at the idea of a 15-year-old girl being asked to take multiple buses into the city all alone.

The nurse shared my concern, but explained that the girl had no one to turn to. She feared for her safety if her father found out and there were no other relatives close enough to help. So I went, and during our one-hour drive we talked. She told me about her dreams for the future, all the things she thought she might like to do and be. I talked to her about the kind of hard work and personal responsibility it would take to get there.

She told me about the guilt she felt for being pregnant, even though the pregnancy was a result of date rape. She didn't call it that. She just told me about the boy who pushed her down and forced himself on her. But he didn't pull a gun or break any bones or cause any serious injury, other than pregnancy and a wounded spirit. So she didn't know to call it rape. So I talked to her about how not everything that happens to us is our own fault or God's will, and about how very much God loves her.

I took her inside and then I went downstairs to get a couple of prescriptions filled for her, and I paid for them after I was informed that otherwise her father would be billed. Then I took her back to school and back to the nurse's office, and then I drove home wondering how many bright, funny, thoughtful girls, girls brimming with promise, were not lucky enough to know someone who knew someone who could help.

I despaired that any young woman should ever find herself in such a position, but frankly it never occurred to me that anyone would ever try to criminalize those who were able and willing to help. I did not, to my knowledge, break any laws that day, but I am here to tell you that if it had been necessary, I would have. And if helping young women like her should be made illegal, I will nonetheless continue to do it. I don't have a choice. I took vows, and if you tell me that it is a crime to exercise my ministry to care for all God's people—young and old, rich and poor, weak and strong alike—then I will have no choice but to do it anyway. And I am not alone; there will be a lot of jailed clergy.

I find it troubling that those of us in this room should find ourselves at odds over this issue. Presumably, we all want the same things. We want fewer unplanned pregnancies and we want young people who face problems, particularly problems that have to do with their health and their future, to receive love and support and counsel from responsible adults, preferably their parents.

If I thought this bill would achieve those goals, I would support it, too, but it won't. It doesn't resolve the problems with which we are faced. It doesn't even address those problems. This isn't a bill about solutions; it is a bill about punishment. We ought to be looking for new ways to solve our problems, not new ways to punish victims and those who care for them.

Yet, no matter how successful our efforts, there will be minors who faced unplanned pregnancies and we will always want them to be able to turn to their parents for love and support and guidance. That is, I have to assume, the noble motive behind this bill. We are appalled at the thought of any girl having to face and make such a decision without the help of her parents, as well we should be.

Nonetheless, many years ago the Episcopal Church passed a resolution opposing any parental consent or notification requirements that did not include a provision for non-judicial bypass. In our view, any morally-responsible requirement had to allow young women to turn for help to some responsible adult other than a parent or judge, to go instead to a grandparent or an aunt or a teacher or a neighbor or a counselor or a minister.

My church encourages the very things this bill would outlaw, and I would point out that this resolution was supported by many anti-choice bishops and deputies whose concern for the well-being of young women outweighed ideological positions.

Like you, we favor parental involvement. As you know, most women do indeed involve their parents. We wish that all could and would, but we know that no one can simply legislate healthy communication within families. We know that of those girls who do not involve their parents, many fear violence or being thrown out of their homes. And statistical and anecdotal evidence demonstrates that in far too many American homes, such fears are not unfounded.

There is no excuse, none, good enough to justify legislation that further imperils young people who are already in danger in their own homes. And if our compassion for those imperiled young people should fail us, there would still be a self-interested reason to fear

and oppose this legislation. It imperils all young women, even those in our own happy families.

Let's not kid ourselves. Even in the healthiest of families, teens sometimes cannot bring themselves to confide in their parents. Should they? Sure, but you know as well as I that teenagers will from time to time exercise poor judgment. It is a fact of nature and there is no law you can pass that will change that, and the penalty for poor judgment should not be death.

I ask you to oppose this bill, oppose it because no matter how good the intentions of its authors and its supporters, it is, in essence, punitive and mean-spirited. Oppose it out of compassion for those young people who cannot, for reasons of safety, tell a parent, but who need and deserve better than to be left alone in their distress. If all else fails, oppose it for purely selfish reasons. Oppose it because you don't want your daughter or granddaughter or niece to die just because she couldn't face her parents and you had outlawed all her other options.

Thank you.

[The prepared statement of Rev. Ragsdale appears as a submission for the record.]

Senator SESSIONS. [presiding] I hope we are not mean-spirited in this legislation. Parents love children, too. Sometimes, they come home to parents.

I would just ask you this. The child that you took to obtain an abortion—did you provide the upkeep for that child after she got back home?

Rev. RAGSDALE. No.

Senator SESSIONS. Did you in any way counsel or spend time with her?

Rev. RAGSDALE. Yes.

Senator SESSIONS. How much?

Rev. RAGSDALE. Not a lot.

Senator SESSIONS. Well, that is the only point I am making. Parents do that everyday. That is what they do.

Rev. RAGSDALE. Unfortunately, the judge was of the opinion that her parent didn't.

Senator SESSIONS. Well, under all of the Constitutional laws, am I not correct that if there is that type of circumstance, a court can bypass the parent's consent?

Rev. RAGSDALE. I believe you are correct, Senator, but you would be in a better position to know that than I. What I would point out is that the Episcopal Church, in opposing parental consent requirements that don't allow for non-judicial bypass, has a serious concern that asking young women who are already under distress to navigate the court system imposes a huge burden on them.

Frankly, I am an old woman who has been around for a—well, middle-aged, who has been around for a long time and I would feel a little intimidated trying to navigate the court system for any reason, but certainly for dealing with something as personal and intimate as that. We thought it was important that young women have support outside of that system.

I had a guy in my congregation ask me once, would you do this for my daughter? I said I wouldn't have to do this for your daughter. If your daughter came to me, I would be able to say to her,

you can talk to your father; let me go with you and help you do that. I know you. But if you were a different person than you are and she couldn't, in safety, talk to you, then, yes, absolutely I would help her. That is my responsibility.

Senator SESSIONS. What if the driver were a 35-year-old man who had a habit of having sexual relationships with teenage girls?

Rev. RAGSDALE. Well, again, Senator, you know the law better than I, but I am under the impression that that is already illegal and he should probably be prosecuted for that, and also that taking her away in an attempt to cover up the evidence of an illegal act is probably a separate crime in and of itself, for which he also should be prosecuted.

Senator SESSIONS. Well, that is not necessarily so. It depends on the age of consent and the State system. Some are 16, others may be lower than that.

Rev. RAGSDALE. Well, if you could fix that, I would really like to have that fixed.

Senator SESSIONS. Is that situation the kind of circumstance that you are dealing with? It seems to me that you have taken the harder cases which the court system has already considered and rendered an opinion on; that if a child has an abusive parent and has reason to be concerned about that, they have an option. But, otherwise, we would normally expect parents to do that.

I don't think the Episcopal Church takes the view that parental notification is bad. It simply said, as I read their position, that they believe that there should be a judicial exception.

Rev. RAGSDALE. No, sir. I actually wrote that position, so I am real clear on what it says.

Senator SESSIONS. What does it say?

Rev. RAGSDALE. It says it has to allow for non-judicial bypass.

Senator SESSIONS. A non-judicial bypass?

Rev. RAGSDALE. A non-judicial bypass, yes, sir. We were very clear when we crafted it. As I said, many anti-choice bishops and deputies supported me in pushing this through after I had written it. Apart from knowing how often the judicial bypass system fails young women—and I know you will hear about that in a moment and you already are aware of how thoroughly it fails young women in many States. Apart from that, we are of the opinion that it is an onerous burden and that young women need to be able to turn to trusted adults for help.

Senator SESSIONS. Ms. Farley, thank you for coming. Ms. Lane, thank you for coming. Do you have anything you would like to add to the comments?

Ms. FARLEY. Yes, I would. The woman that took Crystal across State lines, she wasn't, you know, the big bad guy. She was the mother of the male that raped Crystal and I think the motives were pretty obvious there. That woman dropped Crystal back off at some other person's house and left, and we haven't seen her again, except through court.

I work hard and I have insurance for my children. They are all grown now, but I did then. You know, this is a young lady who was a young girl. She wasn't a woman. You say "woman" a lot. She was a young girl and she was just scared. I am sure that woman was

scared that her son would go to jail, and he did. Unfortunately, he got out and did it again and again.

But as you say, she wasn't there, and you weren't there to see the pain Crystal went through all those years and the pain she still goes through. But I was there for her.

Senator SESSIONS. Ms. Farley, how do you feel about the idea that somehow parents can't be trusted to discuss these issues? I am sure a child would not want to disappoint their parents. They may make a decision not to tell them for that reason. But don't you think in the long run that child is better off if they do come forward and talk to their parents and the parents and the child can discuss all the ramifications of the behavior that may have caused the pregnancy and all the choices they may be facing?

Ms. FARLEY. Yes, I do, sir. I mean, family life is difficult; it is not perfect. Parents make mistakes, children make mistakes. You get together. I would think the church would want to encourage a family getting together and solving problems and working together. That is life, and when it is interfered with, that is when you have the dangerous situations.

I will tell you Crystal needed care and I had her at the gynecologist down in Williamsport. That abortion clinic would not give that physician Crystal's medical records. Crystal even requested the records, and that is very poor medical care. What would have happened? Crystal was very sick. Thankfully, I happened to be home from work that day and noticed she wasn't there, and thankfully found out. It is scary.

Senator SESSIONS. Well, I thank you both so much for coming. Reverend Ragsdale, thank you for sharing these issues. This is a very human thing. These are very real problems in the lives of young people today, and I think it is legitimate for a State to conclude that parents have a right to be involved in minor children's decisions of this kind. I think it is legitimate for this Congress to consider whether or not we ought to take legal action that would uphold and validate the decision of a State on this question, even though another State nearby may not agree.

Is there anything else that you all would like to share?

Thank you so much for all your personal stories.

Our next panel is Professor Harrison, Professor Rubin and Professor Collett. So we have gone from real people to scholars.

Professor Harrison is professor of law at the University of Virginia. He joined the faculty of UVA in 1993 as an associate professor of law. He graduated from the University of Virginia in 1977 and from Yale Law School in 1980. He was an associate with Patton, Boggs and Blow in Washington, D.C., and clerked for Hon. Robert Bork on the U.S. Court of Appeals for the District of Columbia Circuit. He worked at the Department of Justice from 1983 to 1993, serving in numerous capacities, including Deputy Assistant Attorney General in the Office of Legal Counsel from 1990 to 1993.

Mr. Harrison, I thank you for a short, succinct statement. I was able to read it all. I read most of Mr. Rubin's, but I didn't quite get to the end of it.

Professor Rubin is a professor at Georgetown University Law Center. He graduated from Harvard Law School, where he served as an editor of the Harvard Law Review. After graduating from law

school, Professor Rubin clerked for Judge Collins Seitz on the Third Circuit, and Justice David Souter on the U.S. Supreme Court. He has spent several years as a practicing lawyer specializing in constitutional litigation. Recently, Professor Rubin served as counsel to former Vice President Al Gore before the U.S. Supreme Court in the two Florida election cases, *Bush* v. *Palm Beach Canvasing Board* and *Bush* v. *Gore*.

Professor Teresa Stanton Collett is a professor at the University of St. Thomas School of Law. She graduated with honors from the University of Oklahoma School of Law and practiced as a member of the Trust and Estate Section of Crowe and Dunleavy in Oklahoma City. She also served on a joint legislative task force to reform Oklahoma's guardianship laws. The task force's efforts resulted in greater statutory protections for the elderly and people of limited mental capacity in the State.

She served as a visiting professor at Oklahoma College of Law and was then appointed to the faculty at South Texas College of Law, in Houston. She served as a visiting faculty member at several other law schools, has published over 40 articles, and is the co-author of a law case book on professional responsibility.

Thank you, all three of you, for being here. Without further ado, Professor Harrison, I would be glad to hear your comments on this legislation.

STATEMENT OF JOHN C. HARRISON, PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA, CHARLOTTESVILLE, VIRGINIA

Mr. HARRISON. Thank you, Senator Sessions. I will try to be as brief in person as I was in print.

Senator SESSIONS. You need not.

Mr. HARRISON. The Committee has asked me whether I think S. 851 is constitutional, and I believe it to be. The constitutional question that it presents is fundamentally one of federalism. Although the underlying issues involve abortion and the constitutional rights that the Supreme Court has found regarding abortion, the issue presented here has to do with federalism, and in particular with the overlapping and sometimes conflicting jurisdictions of the States as part of our Federal Union.

The first point that I would like to make and that my written testimony largely reflects is that it is common for Congress to use the commerce power not only for the purpose with which we may be mainly familiar—sort of direct regulation or ordinary activities—but in order to adjust conflicting jurisdictional claims within the Federal Union, and in particular to adjust conflicting jurisdictional claims among the States.

The old cases that I talk about in my written testimony having to do with the interstate transportation of liquor are examples of jurisdictional conflicts created by the coexistence of wet States and dry States in a Federal Union in which the dry States were not able fully to control access to their territory from liquor.

Congress' answer was a regulation of interstate commerce designed to reinforce the lawful jurisdiction of the dry States. And in doing that, Congress had to make a choice as to which States fundamentally had the better jurisdictional claim and in that case went with the dry States.

What I think is going on here in this legislation is a policy choice proposed to be made by Congress having to do with which State primarily has the jurisdiction and authority with respect to domestic relations, and choosing the State of residence.

Other questions that are raised by S. 851 have first to do with the issue of whether it is somehow impermissibly extra-territorial and somehow authorizes a State to exert its legislation jurisdiction outside of its territorial limits.

Very briefly, the point I would make is that specifically in the area of domestic relations—and it happens elsewhere in conflicts of law and choice of law, but specifically in the area of domestic relations—it is common for the rule regarding a domestic relationship to come not necessarily from the State in which the parties are physically present, but from some other State, routinely the State of residence; a classic example is the rule with which Congress has recently become more familiar, that (within limits, and there are limits to it) a marriage celebrated in one State, if valid in that State, is valid in another State even if it would not have been valid if celebrated in the second State.

The other question that S. 851 raises has to do with the right to travel, with the fact that the Supreme Court has found implicit in the Federal Union, an ability by adults largely to choose their State of residence and therefore in many ways to choose the legal regime that applies to them. I don't think that S. 851 poses a serious constitutional problem here.

First, with respect to domestic relations, it is far from clear—and this is a difficult and often debated matter—just how far the unilateral act of one party to a domestic relation—for example, the unilateral act of one spouse by changing location—can change the domestic relations that obtain between the spouses.

It is not necessary to address that question, which is a difficult and complex one, because here we are talking about minors who, by hypothesis, do not have even the constitutional right to make their own choice regarding abortion, and I think it therefore very likely do not have whatever the constitutional right is in the sphere of domestic relations to make a choice of place of residence so as to control the legal regime that applies to them. So for those reasons, I think that Senate bill 851 is constitutional.

Thank you, Senator.

[The prepared statement of Mr. Harrison appears as a submission for the record.]

Senator SESSIONS. Thank you, Professor Harrison.

Professor Rubin.

STATEMENT OF PETER J. RUBIN, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY, WASHINGTON, D.C.

Mr. RUBIN. Thank you, Senator Sessions. I have been asked by the Committee to assess whether S. 851, the Child Custody Protection Act now pending before the Senate, is consistent with the Constitution of the United States. I am honored to have the opportunity to convey my views to the Committee.

S. 851 would make it a Federal crime to assist a pregnant minor to obtain a lawful abortion in a State other than her State of residence and in accord with the less restrictive laws of that State un-

less she complies with the more severe restrictions her home State imposes for abortions sought by minors within its own territorial limits. The statute does not uniformly apply home State laws on pregnant minors who obtain out-of-state abortions. It applies only where the woman seeks to go from a State with a more restrictive regime into a State with a less restrictive one.

The proposed statute would, if enacted, violate the Constitution for three independent reasons. To begin with, it violates basic principles of federalism, principles fundamental to our constitutional order. States have the right to enact and enforce their own laws governing conduct within their territorial boundaries, and under the Privileges and Immunities Clause of Article IV, Section 2, residents of each of the United States have a right to travel to and from any State of the Union for purposes that are legal there.

Neither your home State nor Congress may lock you into the legal regime of your home State as you travel across the country. Indeed, in the landmark right-to-travel decision *Saenz* v. *Roe*, the Supreme Court recently reaffirmed this fundamental principle, holding that even with explicit Congressional approval, California could not carve an exception out from its legal regime to provide to those who had recently come into the State only the welfare benefits that they would have been entitled to receive under the laws of their former States of residence. And these were welfare laws that would operate far less directly and less powerfully than would a special criminal law restriction on primary conduct, like the proposal under discussion today.

Under Article IV, neither Virginia nor Congress could, for example, prohibit residents of Virginia, where casino gambling is illegal, from traveling interstate to gamble in a casino in Nevada. Senator Ensign, I am sure, knows that indeed the economy of Nevada essentially depends upon this aspect of federalism for its continued vitality. And people who like to hunt cannot be prohibited from traveling to States where hunting is legal in order to avail themselves of those States' hunting laws just because such hunting may be illegal in their home States.

The proposed law, though, amounts to a statutory attempt to force a most vulnerable class of young women to carry the restrictive laws of their home States strapped to their backs, bearing the great weight of those laws like the bars of a prison that follows them wherever they go.

And, of course, if home State legislation or Congressional legislation may saddle the home State citizens with that State's abortion regulation regime, then it may saddle them with their home State's adoption and marriage regimes, as well, and with piece after piece of the home State's legal fabric. There are no constitutional scissors that can cut this process short, no principled metric that can supply a stopping point.

You have heard a terrible, tragic story today that is claimed to justify the constitutional departures this bill represents. The States and the Congress have power within their respective spheres to prohibit and punish sexual predators, those who commit statutory rape, those who would coerce a pregnant young woman across State lines to obtain an abortion against her will. S. 851, though, does none of these things and it rests on a principle that violates

the basic premise upon which our Federal system is constructed. It therefore violates the Constitution of the United States.

Second, because of the cruel and dangerous method S. 851 employs to attempt to deter vulnerable pregnant young women, young women who may be too frightened to seek a judicial bypass or too terrified of physical abuse to notify a parent or legal guardian who may indeed be the cause of the pregnancy, from obtaining lawful abortions in States in which they do not reside, the proposed statute also violates the Due Process Clause of the Fifth Amendment.

Government may not attempt to deter a minor from engaging in a particular activity by making it more dangerous. That is the teaching of *Carey* v. *Population Services International*. The proposed statute does not actually prohibit pregnant adolescents from obtaining out-of-state abortions without complying with the parental notification or consent laws of their States of residence. It seeks, rather, to deter them from doing so by denying them the assistance of any compassionate or caring adult.

And it contains no exception where it is a pregnant young woman's close friend or her aunt or grandmother or a member of the clergy who accompanies her across a State line on this frightening journey. Indeed, it does not exempt health care providers, including doctors, from possible civil or criminal penalties.

Under the proposed statute, the pregnant young woman is left to make this perilous trip on her own and return alone from a medical procedure that may have after-effects, including bleeding or disorientation from anesthesia, or to seek an abortion illegally and less safely in her own State of residence. Under the Due Process Clause of the 14th Amendment, this is not a permissible means of achieving even an otherwise legitimate governmental end.

Finally, the proposed statute violates the undue burden test for abortion regulation adopted by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*. Under the analytical approach articulated by the Court in that case, the proposed statute has the unconstitutional purpose, and would have the unconstitutional effect, of placing a substantial obstacle in the path of the pregnant adolescents it affects seeking to exercise their right to choose to terminate a pregnancy.

In addition, the statute as now drafted lacks an exception required under *Casey* and the Court's most recent abortion decision.

Senator SESSIONS. Professor Rubin, if you will wrap up?

Mr. RUBIN. I am wrapping it up, Senator.

It lacks an exception for the health of the pregnant woman.

Thank you. I apologize for my lack of brevity in writing and in oral presentation. I look forward to your questions, Senator.

[The prepared statement of Mr. Rubin appears as a submission for the record.]

Senator SESSIONS. Very fine.

Professor Collett.

STATEMENT OF TERESA STANTON COLLETT, PROFESSOR OF LAW, UNIVERSITY OF ST. THOMAS SCHOOL OF LAW, MINNEAPOLIS, MINNESOTA

Ms. COLLETT. Mr. Chairman, Senator Ensign, I am delighted to have the opportunity to testify today. The testimony I am about to

present does not represent the interests of my institution or any other organization.

There are some fundamental facts that are being ignored by the testimony that has been presented by other members of this panel and Reverend Ragsdale, and those fundamental facts are these: In fact, those States that have enacted parental involvement laws number 44. Forty-four out of the 50 States have attempted legislatively to ensure that parents are involved to some degree in the minor's decision to obtain an abortion.

Of those 44 States, 8 have been ruled unconstitutional by either a State or Federal court because of some sort of infirmity. Of the remaining States, ten are ineffective in ensuring parental involvement because they allow some sort of abortion provider bypass or some other adult to provide the equivalent of parental consent or notification.

But notwithstanding that, 25 States in this Union have determined that parents should either be notified or give consent prior to their minor daughter being provided an abortion. Why is that? Because it represents the huge consensus in this country that a minor should have parental guidance in the decision on how to deal with an unplanned pregnancy.

And what is really telling is a survey by MTV, that great conservative media outlet. MTV, of their viewers ages 18 through 24, reflects that 68 percent agree that parental consent, not even notification—68 percent agree that parental consent should be in place.

When you do a more general survey, for the past 10 years it has held steady that 70 percent or more Americans believe that parental consent or notification should be in effect. This is a broad consensus on an issue that is so divisive as abortion; it is amazing. In fact, Senators, this is one of the few places where we have a win-win situation.

And the United States Supreme Court agrees. They have consistently stated that there are, in fact, reasons that parents should be involved in a minor's decision to obtain an abortion. The restriction they have placed on that is that in those few cases where parents might not respond reasonably, there must be the opportunity for a parental bypass, where it is a parental consent statute.

Now, how often does judicial bypass occur? Reverend Ragsdale and Professor Rubin have suggested that this is an onerous and burdensome circumstance, and yet the empirical evidence that we have regarding these judicial bypass proceedings suggests quite the opposite.

In fact, a survey done of the Massachusetts proceedings in these cases show that those hearings average 12.12 minutes, and, in fact, that in those cases almost every bypass petition that was presented was granted. In my home State of Minnesota, a similar survey indicated that almost every bypass petition that was presented to the courts was granted.

In the State of Texas, we saw an increase in the number of parents that were notified. At least according to Planned Parenthood's own statistics, prior to the passage of our Parental Notification Act, 67 percent of all parents were notified. But after our Parental Notification Act, well over 90 percent of all parents now are involved in their minor daughter's attempt to obtain an abortion.

Is this a good and necessary thing? Well, according to a case that was just settled down in Texas, a minor who went through a judicial bypass with the assistance of one of these interested bystanders, with the assistance of an attorney that was trained through Planned Parenthood, told her lawyer that she was receiving psychiatric assistance and, in fact, was taking psychotropic drugs.

The lawyer suggested that she not tell the judge, so she didn't. The consequence of the abortion was tremendous psychological disturbance. That is how the parents found out that she had had the abortion. So the Department of Health in Texas was sued for failure to check up on whether or not the abortion clinics were adequately complying with the informed consent requirements under the State of Texas law. That matter has now been settled and we hope to see the State of Texas Department of Health ensuring greater compliance with informed consent.

Parents, according to the United States Supreme Court, are in the best position to ensure the medical well-being of their minor daughters. And according to Planned Parenthood's own research, well over 80 percent of those parents will agree with their daughter's decision to obtain an abortion.

I see I am out of time, Mr. Chairman, so I will stop there.

[The prepared statement of Ms. Collett appears as a submission for the record.]

Senator SESSIONS. Thank you. Well, three good presentations.

Professor Rubin, you mentioned traveling in interstate commerce to gamble or whatever other example you gave there. I was thinking about how Senator Ensign and his other veterinarian brother, Wayne Allard, have a bill to prohibit transportation in interstate commerce of fighting cocks for the purpose of cock-fighting in a State that allows it from States that don't allow it.

How would you opine on that one?

Mr. RUBIN. I think that is in the same category as what Professor Harrison described about transportation of liquor in interstate commerce. I completely agree that Congress' primary authority derives from the right to regulate interstate commerce and to regulate the movement of goods in interstate commerce.

Human beings are not goods being transported in interstate commerce. They are not liquor, they are not fighting cocks. They are individuals with the right in our Federal system to travel from State to State that has been recognized by the Supreme Court and to take advantage of the laws in the States into which they travel.

So Article IV, Section 2, of the Constitution reads, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." This has been held to mean that they are entitled to obtain—in *Doe* v. *Bolton*, in 1973, the Court held they are entitled to obtain medical services, including abortion services, on the same terms as people in the State of destination. So that law is, I think, completely constitutional.

Senator SESSIONS. What about the Mann Act, the interstate transportation for the purpose of prostitution?

Mr. RUBIN. The Mann Act is different from this statute. I believe that this proposed statute, Senator, is actually unique in that it attempts to project the rule of the person's home State into another State. This doesn't create a Federal uniform rule that says no one

moving in interstate commerce may have an abortion unless they comply with some Federal parental consent law. That would be a different statute from this. That is a Federal statute which says moving in interstate commerce for purposes of prostitution is unlawful.

Senator ENSIGN. Professor Rubin, would you just let me follow that up?

Mr. RUBIN. Senator, yes, please.

Senator ENSIGN. In the State of Nevada, in several counties, prostitution is legal. Would a law be constitutional that says that you cannot, under the Mann Act, have an adult bring a 12-year-old girl to the State of Nevada if it was legal in the State of Nevada.

Mr. RUBIN. Is it legal for a 12-year-old girl to be a prostitute in the—

Senator ENSIGN. No. I am saying if it was, you could say that in any State. That is absolutely allowed.

Mr. RUBIN. I am not sure—

Senator ENSIGN. Sure, it is.

Mr. RUBIN. I think there might be some constitutional difficulty with a law that purported to legalize prostitution by a 12-year-old.

Senator ENSIGN. In a 15-year-old. Whatever it is, I am saying if it was legal for a teenager, would the Mann Act be constitutional in that case?

Mr. RUBIN. The Mann Act sets a uniform national standard and that is a different case from this case, which purports to have the law that applied depend upon the State of residence of the person engaged in the act.

If the Mann Act were rewritten so that it only applied to people whose home States didn't permit the act that they were going to do, so that the question would be what is your home State's law, then that would be this. But the Mann Act creates a uniform national rule and could create a uniform national rule such as you are describing.

Senator SESSIONS. Professor Harrison, do you agree that commerce does not include people, and how would you analyze the argument that Professor Rubin has made? And then I will ask Professor Collett to respond, also.

Mr. HARRISON. For one person to transport another person across State lines is, per the Mann Act, interstate commerce. And as you said in your opening statement, that has routinely been upheld. Many of Congress' regulation of interstate commerce are specifically tied to interstate movement, including interstate movement by the person committing the crime, although that is not how S. 851 operates.

So although sometimes the interstate movement of persons is different from the interstate movement of goods for constitutional purposes, of course, there is no bright line principle that Congress can't regulate the interstate movement of persons, and in particular can't regulate one person's decision to transport somebody else interstate. Again, that is the Mann Act.

As to the question whether the Mann Act is different because it adopts a uniform national policy, a uniform national rule, rather than tying the rule to the rule of a particular State, to get back

to the interstate liquor cases from the early part of the 20th century, there was, in fact, a controversy on the Court and among commentators—and indeed President Taft had a strong view on this, but it was not ultimately the view that prevailed—whether Congress, in order to legislate in that area, had to do so uniformly.

And the Court's answer was that it did not, and that the Wilson Act, which tied the legality of the interstate transportation of liquor to the substantive law of the State into which it was being transported, was constitutional; that was not an impermissible delegation of Congressional power to the State, which was said to be the difficulty.

So using the law of the State as the trigger for the substantive Federal rule, which is what S. 851 does, is also what the Wilson Act did, and the Court upheld the Wilson Act. One of the arguments was, no, you can't do that, you can't tie it to the State rule; it has to be uniform. A majority of the Court rejected that.

Indeed, the principle of the Wilson Act is now in Section 2 of the 21st Amendment, the amendment that repealed the 18th Amendment that established nationwide prohibition. Section 2 of the 21st Amendment forbids—and it is almost the only section of the Constitution that actually forbids private conduct—the importation into a State of liquor in violation of the laws of the State; that is to say, it ties the Federal rule to the choice that the State has made.

So not only does the Constitution permit that, in the one area in which it actually has its own rule about this, the Constitution does that. So that phenomenon is now a familiar one in the law. I think the harder question, primarily the harder policy question, is whether the State with the primary claim to regulate is the State in which the minor is physically located at the time of the abortion or the State of residence, although as I indicated, it is routine for the law of domestic relations to tie domestic rights and obligations, including parental rights and obligations, to the State of residence rather than the State in which someone is temporarily located.

Senator SESSIONS. Professor Collett.

Ms. COLLETT. In fact, Congress has had to intervene where, for example, in a divorce situation parents have tried to flee the State of residence to avoid child support obligations, tried to flee the State of residence to try to avoid custodial orders, and they have created uniform Federal laws. So that is not an unusual or unprecedented move and there is no question about the enforceability of that.

Senator SESSIONS. This bill does not prohibit travel. It prohibits travel for the purpose, in essence, of evading a parental notification law of the State, and it prohibits a third party from causing this to occur. It does not even prohibit the minor from voluntarily, on their own, going out of State.

How does that impact it, Mr. Harrison?

Mr. HARRISON. Again, that makes it much like the Mann Act.

Senator SESSIONS. Professor Rubin.

Mr. RUBIN. Well, I guess there are two points. As to the latter point that the young woman can still go alone, as I have described, I think that this is an independent reason why it is unconstitu-

tional. To require a young woman in extremis to find cab fare or take multiple buses, as Reverend Ragsdale described in her testimony—I think you were out of the room during that part of her description—

Senator SESSIONS. I remember reading that.

Mr. RUBIN. —independently violates the Due Process Clause.

Senator SESSIONS. I am not a court, but I am not too into that argument. I am not a judge. It is okay for the record, but what about this interstate travel and the argument you made originally?

Mr. RUBIN. If you look at a case like *Saenz* v. *Roe*, the court is only applying a law to people who have already traveled interstate. The fact that they are unable to take advantage of the benefits of the law of the destination State is held as a matter of law to have a deterrent effect on the right of travel and therefore to infringe it. And the same is true here. Whether it is an assistance of a person or the person is still allowed to travel, the avowed purpose of this law is to keep young women from doing this.

And I would also just say you used the word "evasion." It isn't an evasion of their home State's laws. It is an avoidance of the legal regime of one State by going into another State. That is in my written testimony as well.

Senator SESSIONS. Professor Collett.

Ms. COLLETT. But the anecdotal story of Reverend Ragsdale is not borne out by, in fact, the study that was done by the Alan Gutmacher Institute, which is, of course, Planned Parenthood's research arm. A survey of 1,500 unmarried minors having abortions revealed that when neither parent knows of the abortion, it is the boyfriend who accompanies them. Eighty-nine percent said it was the boyfriend who was involved in making the decision to have the abortion, and 93 percent if the minor was 15 or younger.

Senator SESSIONS. Those are pretty dramatic statistics. You said that was Planned Parenthood's statistics?

Ms. COLLETT. Yes. It is a study done by Stanley Henshaw, who is their demographer, and it is published at 24 Family Planning Perspectives 196, in 1992.

Senator SESSIONS. Well, I think that adds a lot of credibility to the concern most people have about parental consent. Intuitively, that is the issue that has driven legislatures, at least 40-some-odd, to pass some sort of law dealing with this.

Professor Harrison, if the underlying State law for some reason over-reaches and places too great a burden on the right to choose provided for in Roe and Casey and other cases, is that a defense that a good lawyer can make to this matter?

Mr. HARRISON. Absolutely. Congress can reinforce only State laws that are themselves valid, absolutely.

Senator SESSIONS. Would you agree with that, Professor Rubin? In other words, if there is some State out there that has a law that has gone too far and is not valid under Supreme Court interpretation of the Constitution, could they raise that in defense to a charge like this?

Mr. RUBIN. I don't know the answer to that question under the text of your statute. My federalism objection, which I gather is the one that interests you most, assumes the validity of the State laws.

They simply can't be projected into the other State, carried on the back of the State resident.

Senator SESSIONS. Professor Collett, do you think that would be a matter that could be asserted? I mean, we would not want to draft the statute in such a way that it would prohibit a person raising this defense, assuming they could be able to raise it.

Ms. COLLETT. I agree with Professor Harrison. The eight State statutes that have been declared constitutionally infirm are not resurrected by this statute.

Senator SESSIONS. I don't claim to be a constitutional scholar, but I have prosecuted lots of cases and I have seen lots of statutes pass here.

Professor Rubin, you remember the big case of the gun on the schoolyard that the Supreme Court struck down for lack of interstate commerce nexus. What was your view on that? Have you expressed it? You don't have to if you haven't expressed it.

Mr. RUBIN. I haven't expressed a view on the Lopez case. I say in my testimony that I don't think that an objection to this on Lopez grounds is well taken; that is, I think that if there weren't this federalism problem, the nexus to interstate commerce that you have built into the bill is adequate under the Court's commerce power as it has been construed under Lopez and following cases.

Senator SESSIONS. In recent years, Congress has passed laws that do not have a nexus, and Lopez, in my view, was one of them. All of the old statutes—the Mann Act, interstate transportation of stolen property, motor vehicles, kidnapping—are directly tied to interstate commerce. This bill is directly tied to interstate commerce.

Mr. RUBIN. But it does have, Senator—excuse me.

Senator SESSIONS. So am I curious about your view on that.

Mr. RUBIN. It does, though, have this, I think, unique structure of saying that the law that is applicable to an individual in a State is the law of his or her home State, her State of residence; that you can't shake that however far you go. And that is different from, I believe, all other Federal statutes.

It was the structure of—and I mean no comparison in terms of gravity—it was the structure of the fugitive slave laws under the specific authorization of the fugitive slave clause which said that—and, in fact, it is interesting because these are all in Article IV. Full faith and credit has to be given to judgments of different States. That is Professor Collett's example of a divorce or whatever. That is a judgment of a State.

Section 2: the citizens of each State are entitled to privileges and immunities of citizens in the several States. But then down below, two exceptions; I guess they are exceptions. If you commit a crime in one State, the other State has to extradite you. And no person held to service or labor in one State under the laws thereof, escaping into another, in consequence of any law or regulation therein, shall be discharged from such service or labor.

This is the only example I know of in American history where the law of a destination State was held invalid and where someone was bound by the law of the State that they had departed from. It is a highly unusual structure of law and it doesn't support federalism. Federalism is different States with different laws. It really

cuts against the State's right, the destination State's right to have its own laws.

Senator SESSIONS. Well, I am not sure I agree with that because the State's lawful exercise of support of parental rights is undermined.

Mr. RUBIN. Well, the destination State has made a determination.

Senator SESSIONS. I know, but that has little or no nexus to the child.

Let me ask this of the three of you. It seems to me the act of transporting this minor child across State lines is what is prohibited. That essentially commences at least in the State where the prohibition exists. Would that not give it constitutional support?

Mr. HARRISON. That is true. I don't think it needs that, Senator, and I want to say something about the point of the conflicting jurisdictions of the States because that, I think, is the trickiest question here.

Senator Ensign isn't here anymore, but I want to talk about something else involving Nevada, which is the Nevada quickie divorce, another problem from the conflict of laws and the constitutional law of the conflict of laws from earlier in the 20th century.

The point I want to make is that Nevada made possible the so-called quickie divorce by having a short period of residence; that is to say by permitting one party to a marriage to obtain residence in Nevada quickly and thereby give Nevada the jurisdiction to decree a divorce, although as it turned out not necessarily the jurisdiction to control the property, the other part of the domestic relationship, in other States.

The point I want to make is that even to get the jurisdiction to do that, to operate, as they said in those days, on the marital thing, Nevada had to become the State of residence. The rule of conflict of laws at the time—and I think it is still the same, it certainly was then—was that just passing through a State, just being physically present in a State, did not give that State, the State you were physically in, if you were a member of a domestic relationship, the right to control the rights and responsibilities of that domestic relationship, and in particular to grant the divorce.

In order to obtain the divorce, it was necessary to become resident in the State, even if only for a relatively short period of time. So specifically in the context of domestic relations, something that might look extra-territorial, where the law of the State of residence continues to control the domestic relationship—here, the parent-child relationship—actually is not unusual, and the law of divorce is an example.

Senator SESSIONS. All right, maybe we have covered that. I think that is really interesting. Well, I thank all of you for your very insightful comments. This deals with an issue that I think is important. I have no doubt of the public policy validity of it. I feel very strongly about that.

I do not feel like there has been any oppression of a minor child to take care that they consult their parent before they undertake such a serious action as an abortion. So I feel good about that. I do want to make sure that if we have any errors in drafting that could impact the Constitution, I would be prepared to consider

those. Frankly, I remain pretty convinced as a former prosecutor that if somebody takes somebody out of a State, across a State line, they have acted in violation of the State authority and that this could be a Federal offense.

I want to ask you one thing I didn't quite get, Professor Harrison. On the liquor laws, I don't quite understand. What did it exactly prohibit?

Mr. HARRISON. The Wilson Act operates like Section 2 of the 21st Amendment now operates to forbid the importation into a State of liquor in violation of the laws of the State. So it tied the Federal rule to the State rule. It didn't say no interstate transportation of liquor. It said no interstate transportation of liquor to a dry State, basically, which is the rule now constitutionalized in Section 2 of the 21st Amendment. It was a matter of some controversy then, but the court sustained a Federal statute that didn't impose a uniform national rule, didn't say no interstate transportation of liquor, but rather said whether the liquor can be transported into a State depends on the law of the State. The court approved that in the Wilson Act cases.

Senator SESSIONS. Well, very good.

Senator Ensign's entire statement will be made a part of the record, as will Senator Hatch's, and the record will be open for 7 days. I note that my colleagues from the other side of the aisle had submitted some names for witnesses, but I am sorry that they didn't come to participate in this. I think it is an important social issue in America and I think the Congress of the United States has every right to act constitutionally, if it is able, to respond to the public interest.

I thank all of you for your testimony. It has been a worthwhile hearing. If there is nothing else, we are adjourned.

[Whereupon, at 4:36 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

"THE CHILD CUSTODY PROTECTION ACT: PROTECTING PARENTS' RIGHTS AND CHILDREN'S LIVES"
SENATE JUDICIARY COMMITTEE
June 3, 2004
Follow-up Questions for Witnesses
Senator Jeff Sessions

Questions for Professor Teresa Collett

A. In your testimony you cite a study regarding who generally assists young women in obtaining abortions absent parental involvement. What is the source of that study?

Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSP. 196-213 (1992). FAMILY PLANNING PERSPECTIVES is published by the Alan Guttmacher Institute, a special affiliate of Planned Parenthood Federation of America (*The History of the Alan Guttmacher Institute* at http://www.agi-usa.org/about/history.html).

B. Has Congress involved itself in family law in any other way that you aware of?

Congress has routinely evidenced its concern for the ability of states to protect children and the familial relationship as illustrated by the following federal statutes:

- 25 U.S.C., Chapter 21 - Indian Child Welfare Act
- 28 U.S.C. § 1738A - Full Faith and Credit Given to Child Custody Determinations
- 42 U.S.C. § 651 - Child Support Enforcement Act
- 42 U.S.C. § 11601 - International Child Abduction Remedies Act
- 42 U.S.C., Chapter 132 - Victims of Child Abuse
- 42 U.S.C., Chapter 6 - The Children's Bureau
- 42 U.S.C., Chapter 67 - Child Abuse Prevention and Treatment and Adoption Reform Act
- 42 U.S.C., Chapter 7 - Social Security Act
- 42 U.S.C. § 620 - Adoption Assistance and Child Welfare Act of 1980

C. Do you agree with Professor Rubin's analysis that this law must contain a health exception?

No, I do not agree with Professor Rubin's claim that this law must contain a health exception. Congress is free to incorporate the laws of the states "on a wholesale basis. Its reason for adopting local laws in not so much because

Congress has examined them individually as it is because the laws are already in force . . . ." *United States v. Sharpnack*, 355 U.S. 286, 293 (1958).

D. Have you done any studies on the frequency of emergency abortions for adolescents?

Yes, in preparation for publication of my article, Teresa S. Collett, *Protecting Our Daughters: The Need for the Vermont Parental Notification Law*, 26 Vt. L.Rev. 101 (2001). I discovered that during 2000, the first year the Texas Parental Notification Act was implemented, 3,830 minors obtained abortions in Texas. During the same time period, the Texas Department of Health received no certificates of abortions performed upon minors under emergency circumstances. Tex. Fam. Code 33.002(a)(4)(B) requires such certificates by a physician if an emergency abortion is performed. *Id.* at 126, n.126. Idaho public records reflect a similar lack of emergency abortions. During the first year of reporting, fifty-eight minors obtained abortions with no emergency abortions reported. *Id.* at 124-25.

More recently in response to requests of various state health officials I have received documents showing that during 2002, of the 876 abortions performed on minors in Alabama none where due to medical emergency; in Idaho of the seventy performed on minors, none were due to medical emergency, in Texas of the 3,654 performed on minors, none were due to medical emergency, and in Wisconsin of the 727 performed on minors, none were performed due to medical emergency.

E. Have you done any studies on the frequency of judicial bypass and parental involvement in various states?

Yes. The results are published in *Seeking Solomon's Wisdom: Judicial Bypass of Parental Involvement in a Minor's Abortion Decision*, 52 BAYLOR L. REV. 513 (2000), and *Protecting Our Daughters: The Need for the Vermont Parental Notification Law*, 26 Vt. L.Rev. 101 (2001).

I am in the process of completing a study of the frequency of parental involvement and the use of judicial bypass for the year 2002. While many states do not maintain publicly available records regarding this information, a few do. Alabama continues to report that well over 95% of the minors obtaining abortions in that state do so with parental consent (852/12). Idaho similarly reports less than five percent using judicial bypass to avoid that state's parental consent law (64/3). South Dakota reports fourteen of seventy-six minors obtained judicial bypasses, rather than parental consent. In Texas where 3,654 minors obtained abortions, the Texas Department of Health paid for assistance in 284 judicial bypass proceedings. In Wisconsin, less than ten percent of the minors obtaining abortions did so with the use of an order obtained through judicial bypass (727/63).

F. After reading and hearing Professor Rubin's testimony, do you have any additional responses that you would like to make to it?

Professor Rubin raises the specter of minors seeking illegal abortions, rather than complying with the parental involvement laws of their home states in his written testimony. While abortion activists often make this argument, it has no basis in fact. The same argument was made against passage of the Hyde Amendment. In 1977 the U.S. federal government paid for 295,000 welfare abortions. In 1978 it paid for only 2,000 because the Hyde Amendment had cut off the funding. A survey of ten states revealed, "No increase in abortion related complications was observed . . . . No abortion deaths related to either legal or illegal abortions were detected, [and there was] no difference between institutions in funded and non-funded states." (Morbidity and Mortality Weekly Report, CDC, U.S. Dept. HEW, vol. 28, no. 4, Feb. 2, 1979.)

He suggests that minors seek to avoid parental involvement due to "a history of abuse" or incest. Yet a 1989 memo prepared by the Minnesota Attorney General states:

> [A]fter some five years of the statute's operation, the evidence does not disclose a single instance of abuse or forceful obstruction of abortion of any Minnesota minor. The plaintiffs [in *Hodgson v. Minn.*, 497 U.S. 417 (1990)] also conceded that there was no evidence of any increase in medical complications which could be attributed to the law.

State of Minnesota Office of the Attorney General, *Background Briefing Concerning the Minnesota Parent Notification Law*, at 3.

States that have chosen to treat abortion like every other elective medical procedure performed on a minor by requiring parental involvement will benefit from the passage of the "Child Custody Protection Act."

SUBMISSIONS FOR THE RECORD

June 1, 2004

U.S. Senate
Washington, DC 20510

Dear Senator:

We, the undersigned organizations dedicated to protecting reproductive rights and enhancing women's health, write to express our opposition to S.851, the so-called "Child Custody Protection Act."

The "Child Custody Protection Act" would make it a federal crime for any person, other than a parent, to accompany a young woman across a state line for the purpose of obtaining abortion care, if the home state's parental-involvement law has not been met.

This bill poses a serious threat to young women's health. Most young women who are faced with the decision to have an abortion already involve their parents in their decision. Even in states in which mandatory parental involvement is not required, over 60 percent of parents knew of their daughter's pregnancy. And among young women who did not tell their family, 30 percent had experienced or feared violence in their family or feared being forced to leave home.

Those young women who decide they cannot involve a parent often seek help and guidance from other trusted adults. Unfortunately, this bill would deter young women from seeking assistance from a trusted adult. Under this legislation, grandparents, aunts, uncles, adult siblings or clergy could be prosecuted and jailed simply for supporting a young woman in crisis who seeks reproductive health services – even if that person does not intend, or even know, that the parental-involvement law of the state of residence has not been followed.

Moreover, this legislation is unconstitutional and tramples on some of the most basic principles of federalism. In the words of legal scholars Laurence Tribe of Harvard University and Peter J. Rubin of Georgetown University, the legislation "violates the rights of states to enact and enforce their own laws governing conduct within their territorial boundaries, and the rights of the residents of each of the United States and of the District of Columbia to travel to and from any state of the Union for lawful purposes, a right strongly affirmed by the Supreme Court . . ."

While we share the belief that young women should involve parents when facing difficult reproductive-health choices, in situations where such communication is not possible, we believe young women should be encouraged to involve other trusted adults. Unfortunately, this bill does not accomplish that goal. In fact, it does the exact

opposite by forcing women to face important decisions alone, without any help. We urge you to stand against this dangerous legislation.

Sincerely,

Advocates for Youth
American Association of University Women
American Civil Liberties Union
American Humanist Association
American Medical Women's Association
Center for Reproductive Rights
Central Conference of American Rabbis
Disciples for Choice
Disciples Justice Action Network
Law Students for Choice
Legal Momentum (the new NOW Legal Defense and Education Fund)
NARAL Pro-Choice America
National Abortion Federation
National Council of Jewish Women
National Family Planning and Reproductive Health Association
National Organization for Women
National Partnership for Women & Families
National Women's Law Center
People For the American Way
Physicians for Reproductive Choice and Health®
Planned Parenthood Federation of America
Population Connection
Religious Coalition for Reproductive Choice
Reproductive Health Technologies Project
Sexuality Information and Education Council of the United States
The Alan Guttmacher Institute
Union for Reform Judaism
Unitarian Universalist Association of Congregations

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The Honorable Patrick Leahy
Ranking Member, Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Leahy,

Thank you for the opportunity to respond to assertions about certain research findings of The Alan Guttmacher Institute (AGI), and about AGI, made during the Judiciary Committee's June 3, 2004, hearing on the proposed Child Custody Protection Act.

In an exchange with Senator Jeff Sessions, Professor Teresa Stanton Collett stated that, according to a 1991 AGI survey of minor women having an abortion, 89% of those who did not inform either parent involved their boyfriend in their decision-making. In citing this one finding in isolation, Professor Collett distorted the picture of minors' decision-making and whom they, in fact, involve.

In the AGI survey*, 60% of all minors having an abortion reported that one or both parents knew that they were doing so; the younger the minor, the more likely it was that she had informed at least one parent. Among those who did not tell their parents, 30% had experienced violence in their family, feared that violence would occur or were afraid of being forced to leave home. The young women who did not consult a parent generally reported that they consulted with others: at least one other adult (52%) *and/or* their boyfriend (89%) *and/or* a member of the clergy, a school counselor or another professional not associated with the abortion clinic (22%).

In fact, when a boyfriend was consulted, the large majority—65%—did *not* try to persuade the young woman to have an abortion, and 16% tried to persuade her to continue her pregnancy. Among those young women having an abortion without their parents' knowledge—almost all of whom were either 16 or 17 years old and many of whom were already employed—58% reported that their boyfriend accompanied them to the clinic.

In citing AGI data, Professor Collett also mischaracterized the Institute as "Planned Parenthood's research arm." In fact, while AGI was founded (as the Center for Family Planning Program Development) within Planned Parenthood Federation of America (PPFA) in 1968, it was established as an independent, not-for-profit corporation for research, policy analysis and public education in 1977. To foster continued communication between the two organizations, AGI remains a "Special Affiliate" of PPFA. All aspects of AGI's program, however, are

independently determined by AGI. PPFA supports that program with an annual financial contribution; in 2003, that contribution represented 6% of AGI's total revenues.

Please do not hesitate to contact me or AGI's Washington office with any questions or for further information.

Sincerely yours,
Susheela Singh
Vice President for Research

* Henshaw S and Kost K, Parental involvement in minors' abortion decisions, *Family Planning Perspectives*, 1992, 24(5):196–207 & 213.

American Academy of Pediatrics

SAM SOCIETY FOR ADOLESCENT MEDICINE
...a Multidisciplinary Organization of Health Professionals

STATEMENT FOR THE RECORD

ON BEHALF OF

THE AMERICAN ACADEMY OF PEDIATRICS

AND

SOCIETY FOR ADOLESCENT MEDICINE

FOR THE

SENATE JUDICIARY COMMITTEE

REGARDING

S.851

THE CHILD CUSTODY PROTECTION ACT

JUNE 10, 2004

This statement is submitted on behalf of the American Academy of Pediatrics (AAP), an organization of 57,000 primary care pediatricians, pediatric medical subspecialists, and surgical specialists who are dedicated to the health, safety, and well being of infants, children, adolescents, and young adults, and the Society for Adolescent Medicine (SAM), a multidisciplinary organization of professionals including physicians, nurses, psychologists, social workers, and others committed to improving the physical and psychosocial health and well-being of all adolescents. AAP and SAM appreciate the opportunity to submit to the Senate Judiciary Committee a statement for the record on S. 851, the Child Custody Protection Act.

OVERVIEW:

The AAP and SAM firmly believe that parents should be involved in and responsible for assuring medical care for their children. Moreover, our organizations agree that parents ordinarily act in the best interests of their children and that minors benefit from the advice and the emotional support provided by parents. Both AAP and SAM strongly encourage adolescents to involve their parents or other trusted adults in important health care decisions. This includes those regarding pregnancy and pregnancy termination. Research confirms that most adolescents do so voluntarily. This is predicated not by laws but on the quality of their relationships. By its very nature family communication is a family responsibility. Adolescents who live in warm, loving, caring environments, who feel supported by their parents, will in most instances communicate with their parents in a crisis, including the disclosure of a pregnancy.

The role of pediatricians and other adolescent health professionals is to support, encourage, strengthen and enhance parental communication and involvement in adolescent decisions without compromising the ethics and integrity of the relationship with adolescent patients.

The stated intent of those who support mandatory parental consent and notification laws is that such laws enhance family communication as well as parental involvement and responsibility. However, the evidence does not support that these laws have that desired effect. To the contrary, there is evidence that these laws may have an adverse impact on some families and that it increases the risk of medical and psychological harm to adolescents. The American Academy of Pediatrics reports, "[i]nvoluntary parental notification can precipitate a family crisis characterized by severe parental anger and rejection of the minor and her partner. One third of minors who do not inform parents already have experienced family violence and fear it will recur. Research on abusive and dysfunctional families shows that violence is at its worse during a family member's pregnancy and during the adolescence of the family's children."

CONFIDENTIALITY OF CARE:

Confidentiality of health care services is an important element in assuring adolescents' access to care -- and it is compromised when adolescents are required to seek parental consent. The AAP and SAM, strongly believe that young people must have access to

confidential health care services -- including reproductive health care and abortion services. Every state has laws that provide for confidential access to some services for young people, including sexual assault, STDs, substance abuse, mental health counseling, or reproductive health care. Concern about confidentiality is one of the primary reasons young people delay seeking health services for sensitive issues, whether for an unintended pregnancy or for other reasons. While parental involvement is very desirable, and should be encouraged, it may not always be feasible and it should not be legislated. Young people must be able to receive essential health care expeditiously and confidentially.

Most adolescents will seek medical care with their parent or parents' knowledge. However, making services contingent on **mandatory** parental involvement (either parental consent or notification) may negatively affect adolescent decision-making. Mandatory parental consent or notification reduces the likelihood that young people will seek timely treatment for sensitive health issues. In a regional survey of suburban adolescents, only 45 percent said they would seek medical care for sexually transmitted diseases, drug abuse or birth control if they were required to notify their parents.

A teen struggling with concerns over his or her sexual health may be reluctant to share these concerns with a parent for fear of embarrassment, disapproval, or possible violence. A parent or relative may even be the cause or focus of the teen's emotional or physical problems. The guarantee of confidentiality and the adolescent' s awareness of this guarantee are equally essential in helping adolescents to seek health care.

For these reasons, physicians and other adolescent health professionals strongly support adolescents' ability to access confidential health care. A national survey conducted by the American Medical Association (AMA) found that physicians favor confidentiality for adolescents. A regional survey of pediatricians showed strong backing of confidential health services for adolescents, with 75 percent favoring confidential treatment. Pediatricians and other adolescent health professionals describe confidentiality as "essential" in ensuring that patients share necessary and factual information with their health care provider. This is especially important if we are to reduce the incidence of adolescent suicide, substance abuse, sexually transmitted diseases and unintended pregnancies.

Many influential health care organizations support the provision of confidential health services for adolescents. Here is what they say:

The American Academy of Pediatrics. "A general policy guaranteeing confidentiality for the teenager, except in life-threatening situations, should be clearly stated to the parent and the adolescent at the initiation of the professional relationship, either verbally or in writing."

The Society for Adolescent Medicine. "The most practical reason for clinicians to grant confidentiality to adolescent patients is to facilitate accurate diagnosis and appropriate treatment.... If an assurance of confidentiality is not extended, this may create an obstacle

to care since that adolescent may withhold information, delay entry into care, or refuse care."

The American Medical Association. "The AMA reaffirms that confidential care for adolescents is critical to improving their health. The AMA encourages physicians to involve parents in the medical care of the adolescent patient, when it would be in the best interest of the adolescent. When in the opinion of the physician, parental involvement would not be beneficial, parental consent or notification should not be a barrier to care."

The AMA also notes that, "because the need for privacy may be compelling, minors may be driven to desperate measures to maintain the confidentiality of their pregnancies. They may run away from home, obtain a "back alley" abortion, or resort to a self-induced abortion. The desire to maintain secrecy has been one of the leading reasons for illegal abortion since...1973."

American College of Physicians. "Physicians should be knowledgeable about state laws governing the rights of adolescent patients to confidentiality and the adolescent's legal right to consent to treatment. The physician must not release information without the patient's consent unless required by the law or if there is a duty to warn another.

The American Public Health Association. APHA "urges that...confidential health services (be) tailored to the needs of adolescents, including sexually active adolescents, adolescents considering sexual intercourse, and those seeking information, counseling, or services related to preventing, continuing or terminating a pregnancy."

Of course, it is important for young people who are facing a health-related crisis to be able to turn to someone dependable, someone they trust, to help them decide what is best. Many times that person is a parent. Teenagers facing a crisis pregnancy should be encouraged to involve a parent, and most do so. In fact, over 75 percent of pregnant teens under age 16 involve at least one parent in their decision, even in states that do not mandate them to do so. In some populations as many as 91% of teenagers younger than 18 years voluntarily consulted a parent or "parent surrogate" about a pregnancy decision.

All too often, however, young women know that their parents would be overwhelmed, angry, distraught or disappointed if they knew about the pregnancy. Fear of emotional or physical abuse, including being thrown out of the house, are among the major reasons teenagers say they are afraid to tell their parents about a pregnancy. Young women who are afraid to involve their parents very often turn to another adult in times of difficulty. One study shows that, of young women who did not involve a parent in their abortion decision, over half turned to another adult; 15 percent of these young women involved a stepparent or other adult relative.

THE IMPLICATIONS OF S. 851 FOR YOUNG WOMEN, FAMILIES, STATES, AND HEALTH CARE PROFESSIONALS:

S. 851 would harm young women who are most afraid to involve their parents in an abortion decision and who most need the support of other adults in their lives. Instead of encouraging young people to involve adults whom they trust, the law would discourage such communication. The bill would have the unintentional outcome of placing a chilling effect on teenagers' ability to talk openly with adults -- including family members and medical providers -- because it sends a message that adults who help young people grapple with difficult decisions are criminals. This disincentive is extremely dangerous for those young people most in need of support and guidance in a difficult time, particularly when they cannot involve their parents.

This legislation is not only troublesome with regard to its effect on confidential medical care for teens; it is also a harmful and potentially dangerous bill from the perspective of its intent and its potential effect on states' and individuals' rights.

As currently written, S. 851, in effect would apply one state's laws to another state. Young women would be required to abide by the law of the "original" state (the state where the young woman resides) regardless of where they seek medical care. There are many reasons why women travel to obtain an abortion, including concerns about confidentiality and consent. An adult who accompanies a young woman to a **legal**, accessible, and affordable abortion provider would be placed in the position of risking criminal sanctions.

Applying the laws from one state to young women who seek medical care in another state, as S. 851 would do, raises important questions about the rights of states and of health care professionals. Physicians and other health professionals, have the responsibility to refer patients to the best care possible. With any other medical procedure physicians and other health professionals are not subject to guidelines that prohibit proceeding with medical care in one state based on guidelines from the referring state. In addition, in certain metropolitan areas physicians have a license to practice in more than one jurisdiction, such as Washington, D.C., Maryland, and Virginia. In other metropolitan areas that cross state lines most of the health services are in one state, and not the other. Imposition of the requirements contained in S. 851 not only would burden families but also would result in significant disruption of the relationships between health care professionals and their patients, too. It could also threaten other adults who help teenagers. As an example, consider the Greater Metropolitan Washington community -- what would happen if a teen took the Metro subway or bus from Falls Church, Virginia to Washington, D.C.? Would an adult who loaned the teenager Metro fare be liable?

Furthermore, this law would be extraordinarily difficult to enforce. For example, does the law apply only to women who travel to another state in order to exercise their constitutional right to seek reproductive health care? The AAP and SAM are concerned that there could also be implications for young women who are temporarily living outside their home state because of travel, education or employment. The legal ramifications

could be severe for an adult traveling with a young woman even if the adult believes that the home state parental consent or notification laws have been followed.

Moreover, AAP and SAM are troubled by the legislation's potential effect on the responsibilities of the health care providers involved. Health care providers have a "fiduciary duty" (the highest degree of a legal obligation or duty) to protect the confidentiality of their patients, and a number of federal and state laws mandate protection of the confidentiality of medical records and information. One of the most common requirements is found in state licensing statues for physicians. Often, a physician who violates a patient's confidentiality is subject to disciplinary action, including revocation of his/her license. Many states mandate that health records must be kept confidential and cannot be released without the patient's consent. AAP and SAM are concerned that Congress may put health care providers in the position where they must violate their legal or ethical confidentiality obligations in order to meet the requirements imposed by a neighboring state.

CONCLUSION

In conclusion, AAP and SAM reiterate a statement previously made by a former president of the Society for Adolescent Medicine: "[C]learly the proposed bill is designed to eliminate this [abortion] option for many adolescents. Adolescents who cannot rely on one or both parents to help them through the trauma of a pregnancy and who, for legal or geographical reasons, may need to go to an adjoining state for termination, are effectively precluded from receiving help from those (such as other relatives, health professionals, or even the clergy) who would be there to help them. In essence, this law would put adolescents in the position of having to take care of themselves (possibly traveling long distances in the process), without supportive care during a traumatic time in their lives."

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8. American Medical Association. Council on Ethical and Judicial Affairs. "Mandatory Parental Consent to Abortion." JAMA. Vol. 269. No.1, January 6, 1993 p. 83

WASHINGTON NATIONAL OFFICE
Laura W. Murphy
Director

1333 H Street, 10th Floor, NW, Washington, D.C. 20005 (202) 544-1681 Fax (202) 546-0738

MEMORANDUM

TO: Interested Persons

FROM: ACLU Washington National Office

RE: The Teen Endangerment Act (S. 851/H.R. 1755)

DATE: June 2, 2004

The American Civil Liberties Union opposes the Teen Endangerment Act (S. 851/H.R. 1755) called the "Child Custody Protection Act" by its sponsors. The bill would make it a federal crime for a person, other than a parent, to transport a minor across state lines for an abortion unless the minor had already fulfilled the requirements of her home state's parental involvement law. It would deny teenagers facing unintended pregnancies the assistance of trusted adults, endanger their health, and violate their constitutional rights.

- **This legislation will not increase parental involvement in the abortion decisions of young women.**

Even in the absence of any legal requirement, most young women who are pregnant and seeking an abortion voluntarily involve a parent in their decision.[1] The younger the teenager, the more likely her parents are to know about her decision: ninety percent of adolescents fourteen or younger report that at least one of their parents knew of their decision.[2] For those young women who choose not to involve their parents, many valid reasons compel them not to do so.[3] For instance, one third of teenagers who do not tell their parents about a pregnancy have already

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[1] Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 Family Planning Perspectives 196, 196 (Sept./Oct. 1992).

[2] *Id.* at 200.

[3] *Id.* at 202-03.

been the victims of family violence -- physical, emotional, and sexual abuse -- and fear it will recur.[4] Long-term studies of abusive and dysfunctional families reveal that the incidence of violence escalates when a wife or teenage daughter becomes pregnant.[5] Forcing a young woman to notify her abusive parent of a pregnancy can have dangerous, and even fatal, consequences for her and for other family members. In Idaho, a thirteen-year-old sixth-grade student named Spring Adams was shot to death by her father after he learned she planned to end a pregnancy he himself had caused.[6]

When a young woman determines that she cannot tell a parent she is pregnant, a bill like this will not make her change her mind. The same percentage of minors inform their parents about their intent to have an abortion in states with and without parental involvement laws.[7] This legislation will not create healthy family communication where it does not already exist.

- **For many young women, the judicial bypass is not a real alternative.**

For many teenagers living under parental involvement laws, the prospect of going to court for a "judicial bypass" of the parental involvement requirement is daunting or futile. Some teenagers live in regions where the local judges simply never grant bypass petitions. For example, the director of an Indianapolis women's clinic told the *New York Times* in 1992 that she was not aware of any teenager who had been granted a judicial bypass in that city in the prior six years.[8] Other young women have reason to fear being recognized in local courthouses. Still others simply cannot face revealing intimate details of their lives to a series of strangers in a formal, legal process. As the Supreme Court has noted, "The court experience produce[s] fear, tension, anxiety, and shame among minors."[9]

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[4] American Academy of Pediatrics, *The Adolescent's Right to Confidential Care When Considering Abortion*, 97 Pediatrics 746, 748 (1996).

[5] Council on Ethical and Judicial Affairs, American Medical Association, *Mandatory Parental Consent to Abortion*, 269 JAMA 82, 82-86 (1993).

[6] Ensunsa, *Adams Charged With Murder*, Idaho Statesman, Aug. 23, 1989.

[7] Robert W. Blum, Michael D. Resnick & Trisha Stark, *Factors Associated with the Use of Court Bypass by Minors to Obtain Abortions*, 22 Family Planning Perspectives 158, 160 (July/Aug. 1990).

[8] Tamar Lewin, *Parental Consent to Abortion: How Enforcement Can Vary*, N.Y. Times, May 28, 1992, at A1; *see also* Hodgson v. Minnesota, 497 U.S. 417, 440 (1990) (noting that, in Minnesota, "a number of counties are served by judges who are unwilling to hear bypass petitions").

[9] Hodgson, 497 U.S. at 441.

- **This legislation will endanger the health of young women by forcing them to travel alone.**

Many teenagers are unable to satisfy a state parental involvement law, either because they cannot tell one parent (or, in some states, both parents) about a pregnancy or because they cannot face or have no fair chance of obtaining a judicial bypass. In addition, some teenagers must travel out of state to obtain an abortion, either because the closest abortion facility is located in a neighboring state or because there is no in-state provider available at their stage of pregnancy.

The overwhelming majority of young women who obtain abortions involve an *adult* (a parent, other family member, counselor, clergy member, teacher, or adult friend) in their decision[10] and are accompanied by someone to the health-care facility.[11] S. 851/H.R. 1755, however, would discourage young women who are already isolated and frightened from turning to someone they trust. Knowing that anyone who helps them obtain an out-of-state abortion would risk arrest and imprisonment, many young women would be forced by this legislation to travel alone across state lines. Clearly, it is in the best interests of young women for caring, responsible adults to accompany them to an abortion provider and to escort them home after the surgery. By forcing young women instead to travel alone, this bill would threaten their physical and mental health.

- **By closing outlets for teenagers facing the crisis of an unwanted pregnancy, this bill would lead some to dangerous and desperate acts.**

This legislation will push those minors desperate to avoid parental involvement to drastic acts that risk their health and well-being. A teenager facing an unwanted pregnancy is already in crisis. If she is unable or unwilling to consult her parents, her desperation is deepened by her isolation. Teenagers in these circumstances sometimes resort to self-induced abortion or illegal abortion as a way out. These efforts all too often have tragic results. For example, Becky Bell, an Indiana teenager, died from an illegal abortion because she couldn't bear to tell her parents about her pregnancy and thus could not comply with Indiana's parental notice law.[12]

Out-of-state travel, in the company of a trusted companion, for a *legal* abortion, has provided many such teenagers a difficult but necessary outlet in a crisis. This bill would close that outlet, leading increasing numbers of young women to resort to the kinds of alternatives that all too often end with serious physical harm or death.

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[10] Henshaw & Kost, *supra* note 1, at 207.

[11] *Id.* (ninety-three percent of minors who did not involve a parent in their abortion decision were nonetheless accompanied by someone to the abortion facility).

[12] Rochelle Sharpe, *Abortion Law: Fatal Effect?*, Gannett News Service, Nov. 27, 1989; CBS, *60 Minutes*, Feb. 24, 1991.

- **This legislation would lead to the unjustifiable prosecution of people who, for appropriate reasons, are helping young women to travel to another state to obtain an abortion.**

This bill would impose federal criminal penalties on *anyone* (except a parent) who "transports" a young woman across state lines to obtain an abortion if she has not first complied with her home state's parental involvement law. The bill provides no exception for cases in which a young woman's health would be harmed if medical care were delayed in order for her to comply with her home state's parental involvement statute. The following are some examples of potential prosecutions under the bill:

- Emergency medical personnel -- both driver and technician -- could be prosecuted for transporting a minor across state lines to the nearest abortion provider, even if an emergency abortion were necessary to save the young woman from serious physical harm;

- A grandmother who takes care of her granddaughter every day could be prosecuted for taking her granddaughter to another state for an abortion, even if she did not know about this federal law or was unaware that her home state required parental involvement for an abortion;

- An adult older sister could not help her teenage sister to obtain an out-of-state abortion even if both sisters were regularly subject to physical abuse by their parents and even if no local court would ever grant or even hear a bypass petition.

As these examples illustrate, this legislation would criminalize caring, responsible behavior on the part of adults concerned with a young woman's well-being. It would deter trustworthy adults and professionals from helping a young woman to obtain an out-of-state abortion no matter what the circumstances. It thus would create a barrier to safe, timely medical care and would endanger young women's well-being.

- **This legislation raises serious constitutional concerns.**

In addition to its damaging effects on young women's health and welfare, this bill violates both the letter and spirit of the Constitution in at least three respects.

  - **It violates constitutional principles of federalism.**

First, this legislation conflicts with core constitutional principles of federalism -- principles recently reaffirmed by the Supreme Court in its landmark ruling Saenz v. Roe.[13] The Constitution protects the right of every individual to travel freely from state to state and, when visiting another state, not to be treated as a foreigner. As the Supreme Court held in Saenz, "[A] citizen of one state who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he

[13] 526 U.S. 489 (1999).

visits."[14] The Supreme Court has previously applied this principle in the context of restrictive abortion laws. In Doe v. Bolton, the Court held that, because the Privileges and Immunities Clause "protect[s] persons who enter [other states] seeking the medical services that are available there," a state must make abortions available to visitors on the same legal terms under which it makes them available to residents.[15] In violation of these essential principles of federalism, this bill saddles a young woman with the laws of her home state no matter where she travels in the nation.

The Constitution also protects the right of each state to enforce its own laws within its territorial boundaries. Yet, this legislation supplants the laws of the majority of states because they have either no law in effect mandating parental involvement for minors seeking abortions, or have parental involvement laws that do not conform to the definition set forth in S. 851/H.R. 1755. In these states, this bill would impose criminal penalties on visitors that residents do not face under their own state's laws. The federal bill thus would discriminate against teenagers within the same state on the basis of their state of origin and deprive teens, and those assisting them, of their right to travel to engage in conduct legal in another state.[16]

That this bill conflicts with the fundamental nature of our federal scheme should concern anyone who respects the integrity of the American constitutional system.

- **It subjects teens to government-mandated harm.**

Second, this legislation violates teenagers' due process rights by subjecting them to government-mandated harm. The Constitution prohibits the government from attempting to deter a constitutionally protected activity by increasing the danger of engaging in that activity. Thus, in Carey v. Population Services International, the Supreme Court held that a state may not restrict minors' access to contraceptives in order to deter minors' sexual activity "by increasing the hazards attendant on it."[17] By depriving young women of the assistance of others when they cross state lines to obtain an abortion, this legislation exposes them to just such heightened peril.

Young women who must leave their home state to obtain an abortion face far greater dangers if they travel alone than if they make the trip in the company of someone they trust. Some abortions involve surgical procedures that may not permit a young woman to drive home, often over long distances, by herself. This legislation bans virtually all assistance, including that of the young woman's grandparents, aunts, uncles, sisters, brothers, cousins, and religious

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[14] 526 U.S. at 501.

[15] 410 U.S. 179, 200 (1973); see also Saenz, 526 U.S. at 502 (Privileges and Immunities Clause "provides important protections for non-residents who enter a State ... to procure medical services ....").

[16] Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

[17] 431 U.S. 678, 694 (1977) (plurality opinion).

counselors. It undermines the government's asserted interest in protecting minors' well-being to criminalize this crucial assistance. The Supreme Court has held that a statute that undermines the government's asserted justification for it is constitutionally deficient. Thus, in Hodgson, the Court held that a two-parent notice requirement without a judicial bypass was unconstitutional where it "disserv[ed] the state interest in protecting . . . the minor" because it "proved positively harmful to the minor and her family."[18] Because this bill subjects teenagers to increased danger by banning assisted travel while leaving them free to travel on their own, it is irrational and unconstitutional.

- **It lacks a health exception and contains an inadequate life exception.**

Third, this bill lacks a constitutionally required health exception and contains an inadequate life exception. The Supreme Court has held that any restriction on abortion, including laws mandating parental involvement, must contain an exception to protect both the health and life of the woman. In Planned Parenthood v. Casey, the Supreme Court held that all abortion regulations must contain a valid medical emergency exception, "for the essential holding of Roe forbids a state from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health."[19] The Supreme Court recently reaffirmed this holding in Stenberg v. Carhart, in which it held that "at a minimum" an abortion restriction must contain an exception to protect a woman's health.[20] Because this legislation contains no health exception whatsoever and an impermissibly narrow life exception, it is unconstitutional.

* * * *

Because The Teen Endangerment Act (S. 851/H.R. 1755) would both endanger young women's safety and violate their constitutional rights, the ACLU vigorously opposes its passage.

For more information, please contact ACLU Associate Director Gregory T. Nojeim at 202/675-2326 or Legislative Assistant Heather Sheridan at 202/715-0822.

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[18] 497 U.S. at 450.

[19] 505 U.S. 833, 880 (1992).

[20] 120 S. Ct. 2597, 2609 (2000).

MEMORANDUM

TO: Senate Judiciary Committee Staff

FROM: ACLU Washington National Office

RE: S. 851 -- Teen Endangerment Act (or "Child Custody Protection Act")
Inadequacy of Judicial Bypass Procedures -- Statements from Across the Country

DATE: June 2, 2004

This memorandum provides background materials on judicial bypass procedures to assist you in preparing for the upcoming hearing on S. 851, the Teen Endangerment Act (called the "Child Custody Protection Act" by its proponents. S. 851 would subject to criminal and civil liability anyone other than a parent who knowingly transports a minor across state lines for the purpose of obtaining an abortion without first satisfying the minor's home state's parental involvement law.

Supporters of S. 851 have argued, and undoubtedly will argue again, that a judicial bypass of the state's parental involvement requirement is a real alternative for those young women who cannot tell a parent about a pregnancy. In a judicial bypass procedure, a teen seeks permission from a local judge in lieu of her parents to obtain an abortion. The process involves formal court proceedings -- usually both through a written petition and an oral presentation -- followed by a decision and, in some cases, an appeals process. Unfortunately, for many teenagers living under parental involvement laws, judicial bypasses are available only in theory and not in practice.

This memorandum collects accounts from adults who have assisted minors in a variety of states in attempting to obtain judicial bypasses. These accounts provide sobering evidence that a judicial bypass *is not a real option* in many parts of this country.

I. Inadequacy of Judicial Bypass Procedures

While some young women facing crisis pregnancies can successfully maneuver through a judicial bypass procedure, for countless other young women in communities across the country, the procedure is effectively unavailable. Getting a bypass means having to make telephone calls to courts and lawyers, travel one, two, and sometimes three times to the courthouse, and explain multiple absences from home, school, or work. While this may sound easy, for a teen who needs to keep their abortion (and therefore the calls, trips, and absences) private, it is a formidable challenge that can, and often does, lead to discovery.

Even those minors who are able to make the necessary phone calls to the court are likely to get incorrect information about their rights. Others will be actively discouraged from exercising them. In 1997, a team of researchers called all sixty of the county courts in Pennsylvania, a state that has had a parental consent law in effect since 1994. Helena Silverstein, *Road Closed: Evaluating the Judicial Bypass Provision of the Pennsylvania Abortion Control Act*, 24 Law & Social Inquiry 73 (Winter 1999). The researchers found that only 10 of the courts were ready to handle a bypass petition or even refer the caller to someone trained to help guide the minor through the process. Two-thirds of the courts were completely unable or unwilling to do so. Some courts referred the caller to anti-abortion pregnancy crisis centers or tried to talk the minor out of having an abortion. Twenty courts told the caller that the minor would have to find an attorney on her own, even though the law specifically entitles the minor to court-appointed counsel. Other courts told the caller that the proceeding could not be kept confidential and implied that the parents would be notified.

Still others cannot bear the prospect of revealing the intimate details of their lives to a series of strangers in a formal, legal process. This was the case for Amy (a pseudonym), a thirteen-year-old from Massachusetts who became pregnant as a result of being raped by her mother's boyfriend. At first, Amy didn't turn to her mother because she thought her mother would choose the boyfriend over her. But when she learned that she could not get an abortion without obtaining her mother's consent or going to court, she was simply too scared to go before a judge to discuss what had happened to her. Reluctantly, she confided in her mother. Unfortunately, Amy's prediction of her mother's reaction was accurate: she called Amy a "slut" and threw her out of the house.

In addition, some young women have been denied a judicial bypass in patently biased and unjust ways. Some teenagers live in regions where the local judges simply never grant bypass petitions, despite rulings by the United States Supreme Court that a minor must be granted a bypass if she is mature enough to make her own decisions or if the court otherwise concludes that an abortion is in her best interest. *See Bellotti v. Baird*, 443 U.S. 622 (1979). For example, the director of an Indianapolis women's clinic told the *New York Times* in 1992 that she was not aware of any teenager who had been granted a judicial bypass in that city in the prior six years. *See* Tamar Lewin, *Parental Consent to Abortion: How Enforcement Can Vary*, N.Y. Times, May 28, 1992, at A1; *see also Hodgson v. Minnesota*, 497 U.S. 417, 440 (1990) (noting that, in Minnesota, "a number of counties are served by judges who are unwilling to hear bypass petitions"). In 2001, a Justice of the Alabama Supreme Court objected to a lower court's denial of a seventeen-year-old's bypass petition on the ground that "[r]eligious opposition to abortion in [Alabama] is so pervasive and intransigent" that it has led to unconstitutional denials of bypasses. *See In re Anonymous*, --- So.2d --, 2001 WL 92466, at *6 (Johnstone, J., dissenting).

II. Statements

The American Civil Liberties Union has gathered statements from attorneys and professionals across the country familiar the judicial bypass procedures in their states. Attached are copies of these statements for your use in preparation for the upcoming hearing on S. 851. As you will see, the statements demonstrate the obstacles that young women face in their efforts

to obtain judicial bypasses. Consider, for example, the words of Beverly Howard, an attorney and court-advocate from Alabama:

> Approximately a year ago, I was appointed to represent a minor who lived in a county adjacent to Montgomery [County]. When we appeared before the judge in Montgomery County, he asked the young women[sic] why she had not filed her petition in her home county. She informed the judge that the juvenile intake office in her home county had told her that they did not "do those things in this county." The judge nevertheless instructed me to go to the minor's home county to complete the paperwork there. After the intake office, circuit clerk's office, and juvenile office refused to help me, I contacted the presiding judge, who made the necessary arrangements for the hearing to take place. Even though the Constitution guarantees a confidential bypass process, a number of extraneous courthouse employees were permitted to observe the hearing. Just before we finished presenting our case, one of the observers shouted that the judge should grant the waiver request because 'we don't need anymore niggers around here.' . . . It was a particularly stinging insult, added to the many other indignities she had suffered in her attempt to obtain a judicial bypass . . .
>
> There are two . . . judges in Montgomery County who are now ordering minors to attend counseling at a Save-A-Life Center as a condition of granting a waiver. The counselors at Save-A-Life . . . will not permit minors to remain anonymous by providing only their initials and not their names. Minors are afraid that if they are forced to give their names, the center will notify their parents. And indeed, unlike the court, the counselors at Save-A-Life are under no legal obligation *not* to inform a minor's parents. When they arrive at the center, the teenagers are forced to participate in a question and answer session in which they are asked for their responses to biblically based questions . . . They are then given baby booties to take home. This experience is not only traumatic for these minors; it is unconstitutional for the state to require teens to attend religious counseling as a condition of a favorable court ruling." Statement of Beverly J. Howard, Esq. (June 10, 1998).

* * *

S. 851 would deny young women facing unintended pregnancies the assistance of trusted adults, endanger their health, and violate their constitutional rights. As Ms. Howard's account and the other attached statements indicate, the notion that the "availability" of judicial bypass procedures somehow ameliorates the harmful consequences of this legislation is false.

For more information, please contact ACLU Associate Director Gregory T. Nojeim at 202/675-2326 or Legislative Assistant Heather Sheridan at 202/715-0822.

Statement of Dr. Michele Wilson, Associate Professor
University of Alabama, Birmingham

My name is Dr. Michele Wilson and I am a professor in the Department of Sociology at the University of Alabama, Birmingham. I am also Chair of the Women's Studies Program at the University. For the past sixteen years I have conducted abortion-related research specializing on the reproductive rights of young women. My focus is on the social and behavioral aspects of abortion. Because of my research in this area, I closely follow how laws regulating abortion impact minors.

In conducting my research on abortion, I have interviewed thousands of young women ages eleven to seventeen who have obtained or attempted to obtain an abortion. Over ninety percent of these young women communicated with their parents about their abortion. My research has shown that the very small percentage of minors who sought an abortion without parental consent had good reasons for not involving their parents. Many of these young women were victims of incest or abuse within the home. In these cases, revealing the abortion, or even the pregnancy, could put the minor in even more danger. Other minors I have interviewed came from families that were experiencing significant financial or health problems. These minors chose not to tell their parents to avoid placing an additional burden on their parents at a time when they were already under significant stress. This may seem trivial, but to a young woman who sees her family falling apart, these concerns loom extremely large.

My work in this area reveals that for many young women the judicial bypass is not a realistic alternative. Some face enormous, often insurmountable obstacles, in obtaining a judicial bypass. For example, one young woman I interviewed tried to apply for a judicial bypass but was told by a court employee that abortions were illegal in that county. Another young woman was called a "slut" by a court official and was told that she should "pay the price for her sin."

In Alabama, the judicial bypass process has recently broken down entirely. In June, the state supreme court announced that it would no longer give meaningful review to denials of bypass petitions, but rather will defer to the trial judges in almost all cases. In a state like Alabama, where anti-abortion sentiment runs high, including among many of the judges, this has given anti-choice courts carte blanche to deny young women's petitions.

A case handed down by the state supreme court last month is illustrative. Jane* is a seventeen-year-old young woman, only a few months away from her eighteenth birthday. Although just entering her senior year of high school, she has already obtained a scholarship for college. In addition, she has worked part-time for over a year and saves her money to help finance her education.

When Jane discovered she was pregnant, she could not turn to her parents. Her mother had left her as an infant and, although they had some contact now, her mother was not involved in raising her. Turning to her father wasn't an option -- she hadn't heard from him in years. Jane had been raised by her grandmother, but she knew from experience that she couldn't turn to her either. Her grandmother threw her own teenage daughter out of the house when she got pregnant and had told Jane she would do the same to her if she got pregnant.

Unable to go to her parents or her grandmother, she instead turned to other trusted adults. She confided in her adult sister and her godmother, both of whom supported her decision. In addition, she went to a health facility that provides abortions and met both with the doctor and a counselor. She also went to a community health center to talk to a counselor about her decision.

Despite Jane's obvious maturity and the fact that she would be on the streets if her grandmother learned of her pregnancy, the judge denied the petition, callously declaring that "if this child is kicked out of her home, the godmother could file the appropriate Petition for Custody and give the minor permission, if she wishes, for the abortion." This decision was upheld by the Alabama Supreme Court, and, given the state supreme court's new deference to trial court opinions, I expect to see more and more decisions like this one.

In another recent case, the young woman's petition was initially denied by the trial court. Although in this rare instance the Alabama Supreme Court eventually reversed the decision, finding that it blatantly conflicted with governing U.S. Supreme Court precedent, the process took more than a month. The delay caused by the bypass process forced the young woman to have a later abortion that was both riskier to her health and several hundred dollars more expensive. I have no doubt that the additional expense would make an abortion unobtainable for many teens.

In certain areas of the state, young women are also sent by the courts to Sav-A-Life before the judge will hear or grant their petition. Sav-A-Life is a "Christ-centered ministry" that is "under-girded by a commitment to evangelism and Biblical truth" and is devoted to ending abortion. The women I have interviewed who were forced by the state to go to Sav-A-Life were required to watch a video that details religious arguments against abortion and presents false information about abortion and its aftermath. These young women walk into abortion clinics fearing for their lives because of the lies they have been told and believing that they will be unable to have children in the future and that they will go to hell for their choice. It is a testament to how strong their desire to end the pregnancy is that they nonetheless proceed with the abortion.

Because the judicial bypass system does not work for many minors, in many cases the only way for them to obtain a safe and legal abortion is to cross state lines. I can hardly bear to think of what will happen to these young women if the "Child Custody Protection Act" cuts off this life-saving alternative.

Date: 9/1/01

Dr. Michele Wilson

*This young woman's name has been changed to protect her confidentiality.

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Statement of Beverly J. Howard, attorney and court-appointed advocate, Montgomery, Alabama

I am a practicing attorney in Alabama. For the past eight years, I have been appointed to represent minors who petition the Montgomery County court for a waiver of Alabama's parental consent requirement for abortion. It has been my experience that the judicial bypass process that the girls must go through can be very traumatic and emotionally distressing, depending on which judge is assigned to hear their petition.

Approximately a year ago, I was appointed to represent a minor who lived in a county adjacent to Montgomery. When we appeared before the judge in Montgomery County, he asked the young women why she had not filed her petition in her home county. She informed the judge that the juvenile intake office in her home county had told her that they did not "do those things in this county." The judge nevertheless instructed me to go to the minor's home county to complete the paperwork there. After the intake office, circuit clerk's office, and juvenile office refused to help me, I contacted the presiding judge, who made the necessary arrangements for the hearing to take place. Even though the Constitution guarantees a confidential bypass process, a number of extraneous courthouse employees were permitted to observe the hearing. Just before we finished presenting our case, one of the observers shouted that the judge should grant the waiver request because "we don't need anymore niggers around here". My client was shocked and hurt by this outburst. It was a particularly stinging insult, added to the many other indignities she had suffered in her attempt to obtain a judicial bypass.

Minors seeking judicial waivers face outrageous conduct all too often in the Alabama courts. I had another client who sought a waiver in Montgomery County within the past two months. We provided evidence to the court that she was mature enough to make the decision to end her pregnancy on her own. This evidence evidently persuaded the judge. While he was signing his order granting the waiver, however, the judge asked my client, "what day do you want to kill your baby?"

There are two other judges in Montgomery County who are now ordering minors to attend counseling at a Save-A-Life Center as a condition of granting a waiver. The counselors at Save-A-Life are not licensed or trained in social work; they are merely religious opponents of legal abortion. Moreover, they will not permit minors to remain anonymous by providing only their initials and not their names. Minors are afraid that if they are forced to give their names, the center will notify their parents. And indeed, unlike the court, the counselors at Save-A-Life are under no legal obligation *not* to inform a minor's parents. When they arrive at the center, the teenagers are forced to participate

in a question-and-answer session in which they are asked for their responses to biblically based questions. They must also watch a video about abortion procedures that is misleading and outdated by several years. They are then given baby booties to take home. This experience is not only traumatic for these minors; it is unconstitutional for the state to require teens to attend religious counseling as a condition of a favorable court ruling.

The judicial bypass process here in Alabama reflects our state's general hostility toward abortion and, consequently, to minors who seek abortions. For those Alabama minors who cannot tell their parents, the waiver process can de daunting, traumatic, and, as these examples illustrate, humiliating. The proposed "Child Custody Protection Act" would close off what for many teens may be the only bearable alternative to parental involvement.

6-10-98
Dated

BEVERLY J. HOWARD, ESQ.

Statement of Linda Johnson*, Attorney

My name is Linda Johnson* and I am an attorney in a rural northern Alabama county. I have been a Guardian ad litem (GAL) for 10 years in this county, which is a guardian appointed by the court to represent minors in place of their parents. One of my responsibilities regarding GAL work involves representing young women who want abortions without obtaining their parents consent. Alabama law requires that a minor seeking an abortion must obtain consent from one of her parents or her legal guardian. If this route is not chosen, the minor may obtain a waiver of the parental consent requirement from a juvenile court judge in her home county or in the county in which the abortion is to be performed.

For any minor in this county, a waiver is unattainable. Some years ago I was warned by the Chief Intake Officer of Juvenile Probation that the new Juvenile Judge would not hear any cases regarding waivers. The Intake Officer reiterated the Judge's disapproval and made it clear that any attorney bringing forth these cases "would pay dearly" and the Judge would be "exceedingly unhappy" with that attorney. Further, and even more devastatingly, the waiver would be denied with the minor in the courtroom. The Judge specifically said if the young women wanted the waiver they should go to the city where they planned to have the procedure, and apply for the waiver.

This ordeal weighs heavily on the young woman seeking the waiver. Cities that provide abortion services are several hours away. For a minor attending school and without her own transportation, getting to another city to apply for a waiver is a tremendous obstacle to overcome. This process may take up to four trips, first to apply for the waiver, second to meet with the attorney, third for the court date, and finally to have the procedure. Ultimately this process--combining distance, transportation, and the need to fabricate excuses to her parents, teachers, and peers for missing school-- is detrimental to the minor.

Another option is to cross state lines to obtain an abortion. Because the process is so overwhelming in Alabama this is the only real--and often the safest--option, for many young women. Minors from north Alabama can easily cross into Tennessee, where no parental consent law is in effect. This would allow them timely medical care while protecting their confidentiality. These minors usually do not travel alone. They go in the company of a trusted relative or friend, often an older sister. If it were to become law, the "Child Custody Protection Act" would force these minors to travel alone, or would prevent them from traveling altogether, thereby, barring them from access to timely medical care.

These minors are already suffering because our county's bypass process does not work for them. This proposed new legislation, if enacted, would cut off a crucial outlet for teens in a desperate situation.

Date: Mar 14 1995 Linda Johnson*

*Name has been changed

Robert L. Mueller, M.D.
Corinne Rovetti, RNC/MSN

STATEMENT OF BERNIE MCNABB

I am the Executive Director at the Knoxville Center for Reproductive Health. I have worked at the Center for twenty-four years. Throughout the years, we have had parental consent laws and parental notification laws in this state. Sometimes these laws have been the subject of an injunction, however. It has been my experience that whether or not a parental involvement law was in force, the vast majority of teens involve at least one parent in their decision to terminate their pregnancy. My concern is for the teen who feels that, regardless of the law she simply cannot or will not involve a parent. The Child Protection Act will not help these teens. It will simply compound the obstacles they face, undermining the very well being the Act purports to protect.

There are many stories to tell of young women desperately seeking to avoid telling a parent about a pregnancy. There are many stories to tell of young women who, unable to turn to their parents, try to turn to the courts, but to no avail. For these teens, among others, there may be no real option but to travel out of state, if they are to have the opportunity to have the confidential and expeditious alternative to a parental involvement law that the Constitution requires.

One story that sticks in my mind is illustrative. Some time ago, we saw a sixteen year old who wanted an abortion who, for purpose of this statement, I'll call Cindy. Cindy did not want a baby. She had plans to go to college and didn't see how she could do that with a child. At that time, the state had in effect a parental consent requirement. We advised Cindy that, to get the procedure, she would have to obtain either the consent of one parent or a court order. She said that she could not approach her parents. She said they were very religious, and she feared that, if they knew, they would not let her have the abortion.

Knoxville Center for Reproductive Health, Inc.
1547 West Clinch Avenue, Knoxville, Tennessee 37916 (423) 637-3861

For some time, Cindy persevered in the effort to get a judicial bypass. She called the state's toll free hotline to get an advocate to help her navigate the court process. She called the advocate. When she couldn't reach the advocate safely during the day, she got the advocate's home phone number, so she would have more flexibility to reach the advocate without her parents' detection. She couldn't have the advocate call her because her parents had caller id and noticed unusual numbers. She went to court a week later for her scheduled court appointment. She was nervous because her neighbor worked in the courthouse. She waited, all the while anxious about being detected. No one else showed up. Cindy left, disappointed and discouraged. As it turned out, the hearing had been cancelled. The advocate hadn't been able to let Cindy know, because she couldn't call her at home.

Another hearing was scheduled. Cindy went to the courthouse again. Again, she worried about being seen by her neighbor. This time, after she had waited a few minutes, she left, assuming the hearing was cancelled again. Later she talked to the advocate. The advocate had been slightly delayed getting to court. The advocate told Cindy that a judge could see her the next day. But when the advocate told Cindy the name of the judge, it turned out he was a member of Cindy's church and taught Sunday school there. That's when she knew she couldn't be assured a confidential bypass in court.

Only then did Cindy turn to what seemed to be her last real option. She made an appointment to go to Virginia for the abortion, a state that at that time had no parental involvement law. Ultimately, Cindy was unable to keep that appointment because she couldn't arrange transportation. She got the abortion she wanted only because Tennessee's parental consent law was very soon thereafter enjoined.

The Child Custody Protection Act, if passed, would leave minors like Cindy with even fewer options. Faced with the possibility of detection at their local courthouse, such minors will inevitably seek alternatives. Were such a law in place, however, minors such as Cindy who might need to travel out of state will have little choice but to go alone.

Bernadette McNabb

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STATEMENT ON "CHILD CUSTODY PROTECTION ACT"

This statement is being submitted by Jamie Ann Sabino, Co-Chair of the Judicial Consent for Minors Lawyer Referral Panel. The Panel consists of Massachusetts attorneys who represent minors seeking judicial consent for an abortion under Massachusetts General Law Ch. 112, sec. 12S. This law, which has been in effect since 1981, requires a minor to obtain the consent of a parent or the court before obtaining an abortion. I am intimately familiar with the by-pass procedures in Massachusetts: I keep in regular touch with Panel attorneys, review summaries of hearings, prepare legal updates, and meet with clerks and judges concerning problems in implementing this law. I have also represented over fifty young women in hearings.

Parental involvement laws place significant burdens on young women who seek abortions, burdens that are not balanced by any benefit. In theory, parental involvement laws are intended to promote intra-family communication. However, it has been the Massachusetts experience that family communications cannot be legislated. The young women who elect to go to court or out-of-state know they cannot communicate with their parents on the subject of abortion. In many cases, the young women have real and confirmed fears of being forced to leave their homes if their parents were to learn of their pregnancy, of being physically abused by their parents or of being forced into a premature and unwanted marriage. We have also had several cases where the pregnancy was the result of incest. In many other cases, the young women are trying to protect a family unit already fragile from death, hospitalization or serious illness, from a burden they know will strain it beyond its limit. These cases have included situations where the family has recently suffered death, mental breakdown and hospitalization, serious illness such as a heart attack or a brain tumor and chronic alcoholism.

The choice of petitioning the courts is difficult in most cases and impossible in some. For many young women it is logistically difficult to find transportation both to court (which may be many miles away) and then, on another day, to the clinic or hospital for the abortion. To make matters worse for these teens, court hearings are held during day when school is typically in session. Schools in the state regularly contact the families of students who are absent. For many teens then, going to court will result in the loss of their constitutional right not to involve their parents.

In addition, the court hearing is extremely stressful. Most adults are wary and even afraid of court proceedings. For minors who are going to court about a matter as intimate and fundamental as whether to have a child, the process is even more daunting. Their fears

have been exacerbated by the wholly inappropriate conduct some suffer. Judges berate and belittle both the minors and their attorneys. Minors have been chastised for engaging in premarital sexual relations and admonished to keep their legs crossed or to have their boyfriend keep his pants on. Judges have asked minors if they know they are taking the life of an unborn child, despite court promulgated guidelines indicating that this type of inquiry is inappropriate. These types of questions, coupled with overt judicial hostility, often create a climate of terror for these young women. Even if a judge is not hostile and limits his or her inquiry to a determination of the maturity or best interests of the minor, a young woman is still forced to reveal intimate details in an inherently intimidating environment.

There is also inherent delay in any judicial bypass system. Even under optimum conditions the bypass system causes delays ranging from an average of four or five days to over a month in obtaining medical procedures. Yates and Pliner, Judging Maturity in the Courts: The Massachusetts Consent Statute, 78 Am. J. Pub. Health 646 (1987). Delays intrinsic to the process are caused by the lack of judges (ten percent of the superior court judges in Massachusetts have recused themselves from these cases), transportation problems and trouble locating attorneys. Delays increase the risk of the abortion procedure and may push the minor from the first to the second trimester, making the procedure more expensive and less available.

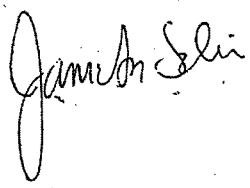
Given the difficulties in the by-pass process, many minors choose to travel out-of-state for an abortion. Often they travel with a family member - - often an aunt, grandparent or older sibling who is raising the teen. In Massachusetts, some travelled with their mothers. Prior to 1997, the Massachusetts statute required the consent of both parents. There were many cases of one parent, determining that the involvement of the other parent was a risk, taking their daughter out of state for an abortion. One mother discussed with me the difficult logistics of trying to bring her daughter to court - she would have had to miss an additional day of work which placed her job at risk and her daughter would have had to miss an additional day of school. The logistics of being away from job and home for two days (court and the abortion) increased the risk of loss of confidentiality. Another mother choose to accompany her daughter out of state as she felt it inappropriate and highly insulting for her and her daughter to have to place themselves before a strange judge for his permission to do what was a joint family decision.

Faced with a parental consent law or a possible Child Custody Protection Act (CCPA), minors will continue to travel out of state. But with the proposed CCPA, the minors may have to travel without the support of the adult family members or friends on whom they now rely. Many will fear involving an aunt or older sister if that might result in criminal charges - leaving that teenager without the care and assistance of that adult. Many an adult will reconsider giving a young friend a ride - and will leave that teenager to hitchhike to another state. Instead of encouraging young women to go to adults and encouraging adults to be involved with young women, this law will isolate young women. Parental involvement laws already penalize young women who come from dysfunctional families or families in crisis. To now force young women in such situations to go out-of-state alone or through the trauma of a court hearing is cruel.

Finally, it is extremely important to note that parental involvement laws and court

hearings do not promote or encourage family involvement or protect immature minors. The majority of minors already choose to involve their parents. However, a number of studies have shown the same number of minors involve their parents in their abortion decision in states without parental involvement laws as do in states with parental involvement laws. Nor is the system capable of reaching out and aiding immature minors. A random sample of 400 petitions in Massachusetts showed that 97% of the minors who go to court are mature and capable of giving their own consent. Therefore, all of the time, expense and trauma results in the simple affirmation that the overwhelming majority of these young women are mature and capable of giving informed consent.

The Massachusetts experience has shown that there is little to gain from a parental involvement law and much to lose both financially and in human terms. To take away the adult support from young women who might choose to go out-of-state, by enacting the CCPA, would be a drastic mistake with serious consequences.



6/15/98

Statement of June Ayers, Administrative Director/Part Owner
Reproductive Health Services in Montgomery, Alabama

For the past fifteen years, I have been the part owner and Director of Reproductive Health Services in Montgomery, Alabama. Our clinic provides an array of reproductive health services including pregnancy tests, birth control counseling, gynecological exams, and abortions. It is located in Montgomery County in central Alabama and meets the needs of women throughout the state.

Because of my work, I am familiar with Alabama's abortion laws, including those applicable to minors. Before a minor may obtain an abortion, Alabama law requires that she obtain the consent of one of her parents or her legal guardian, or that she obtain a waiver of the parental consent requirement from a juvenile court judge in her home county or in the county in which the abortion is to be performed. I have come to view the statute's alternative to parental consent as flawed because the waiver procedure is not being administered correctly.

I have heard numerous stories in recent years that lead me to my belief that the waiver procedure is not working for young women in rural counties. Minors have called me after hours at the courthouse, pleading for help. They have been shuffled from one office to another, from Juvenile Court to Family Court, asking for waivers. They are forced to tell their stories numerous times. Court personnel have no answers for these young women. Most do not know how to process a waiver, and even more shocking, some don't even know this waiver process exists. At the end of a day spent like this, not only have these minors compromised their confidentiality, they justifiably doubt that they will ever obtain a judicial bypass. My concern is that these teens may take desperate measures which may well jeopardize their health and well being.

I have had several disturbing conversations with attorneys who have contacted me with concern for the minors they are representing in the bypass process. These attorneys, like the minors who have contacted me, have told me that courthouse personnel often lack knowledge of the waiver procedure. For example, an attorney in a city two hours away was representing a minor who the attorney stated had no chance of getting a waiver due to the political ramifications the judge would have to face if he granted it. I suggested that the attorney refer the minor to Montgomery for the court hearing, but I never heard from the minor nor her attorney again.

The "Child Custody Protection Act" would increase the burdens of minors by removing a crucial outlet for Alabama teens disserved by our state's flawed bypass process.

Date: 6/19/98

June Ayers

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Statement from Amy Lucid, LICSW

10 June, 1998

I am the Counseling Coordinator at Planned Parenthood/Preterm Health Services of Greater Boston. We have had a parental consent law in Massachusetts since the early 1980s. Every year, hundreds of young women go through the judicial bypass process, many with the help of Planned Parenthood. Our Counseling and Referral Hotline assists young women to get through the consent process, no matter where in the state they are having their abortions.

We are fortunate to have a state to our north which has no parental consent laws. Although most minors who request it are given court consent, many choose instead to go to New Hampshire, avoiding the court consent process. Minors who are undocumented, criminally involved, or in abusive situations often fear going to court. Those who don't speak English well can also find the process very intimidating. Because the court hearings are all during the day on weekdays, they create absences from school or home that can be difficult to explain for minors. Even if the abortion itself can be scheduled for Saturday, the court hearing cannot. For these reasons and many others, minors need the option to go out of state.

We recently assisted a 16 year old high school student to go through the court consent process. This young woman came from a very devout Catholic family, and she was very concerned about what would happen if her parents found out about the pregnancy. She had also been having difficulty in school, and although she was doing better, she faced suspension if she had any unexcused absences. Going to court for consent required her to leave school on a weekday. In an attempt to avoid any trouble at school, the minor asked her attorney to write her an excuse note. When the school saw an unfamiliar name on the note, they immediately called the minor's parents to ask who had taken her out of school and why. The minor thought quickly and told her parents that she had been helping a friend. Fortunately, her quick thinking allowed her to maintain her privacy without causing further trouble in her family.

This is just one example of why minors need the option to go out of state for abortion procedures. Preserving this option helps protect the right to safe, legal abortion for all American women.

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CENTER FOR REPRODUCTIVE RIGHTS

STATEMENT OF CENTER FOR REPRODUCTIVE RIGHTS
IN OPPOSITION TO THE "CHILD CUSTODY PROTECTION ACT" (S. 851)
JUNE 2, 2004

The Center for Reproductive Rights urges the Senate Judiciary Committee to reject the so-called "Child Custody Protection Act," S. 851 (CCPA). The Center opposes CCPA because its passage would harm minors, punish their caring relatives and friends, and violate the federal constitution.

The Center, the only public interest law firm in the United States dedicated exclusively to the protection of reproductive rights both at home and abroad, has placed an emphasis upon defending the reproductive rights of the disenfranchised, including minors. Most recently, the Center has worked to block enforcement under state constitutions or federal law of onerous and discriminatory parental involvement statutes in Alaska, Florida, and Oklahoma.

Center attorneys are the preeminent abortion rights litigators in the United States and have represented women and health care providers in challenges to numerous restrictive laws at every level of the state and federal court systems. Center lawyers are counsel of record in one of the challenges to the federal abortion ban and were the attorneys of record in the most recent abortion case decided by the United States Supreme Court -- *Stenberg v. Carhart*, 530 U.S. 914 (2000).

OVERVIEW

The Child Custody Protection Act would make it a crime for any person, other than a parent, knowingly to transport a minor across a state line for the purpose of obtaining an abortion, if the minor does not comply with the requirements of the forced parental involvement law of her state of residency. CCPA does not "protect" minors. Rather, CCPA will harm young women and will punish caring relatives and friends who seek to provide guidance and support to young women seeking abortions. CCPA will force many young women to travel alone for an abortion, seek risky alternatives, or carry unwanted pregnancies to term.

Most parents know when their daughters undergo an abortion, even in the absence of any legal requirement that they provide consent or be notified before a minor obtains an abortion. Under current law, whether or not a parent *must* be notified or provide consent depends upon the law of the state in which the abortion will be performed. Fewer than half of the states enforce a requirement for notification or consent of a parent. Of the other states, some have never enacted a law requiring parental involvement, some have

passed laws that allow another adult (such as a grandparent or other adult family member) to be notified or provide consent, and the remainder have enacted laws that are not enforced due to court rulings or Attorney General opinions. States that do mandate parental involvement before

a young woman may terminate her pregnancy must provide an alternative procedure by which she may obtain authorization for an abortion without parental knowledge; typically, the

procedure is a "judicial bypass procedure" through which a young woman may seek a court order waiving the state's forced parental involvement requirement.

Some young women cannot involve a parent in the very personal decision to terminate a pregnancy. Many of those young women seek guidance from another adult, such as a grandparent, aunt, or adult sibling. Fear of abuse, pressure to carry the pregnancy to term, threats of being thrown out of the house or other negative repercussions top the list of reasons that keep some minors from involving a parent in their decision. For battered teenagers and incest survivors in particular, laws that require that one or both parents consent to or be informed of a planned abortion increase the risks in an already dangerous situation.

Young women who travel out of their home state to obtain an abortion do so for a variety of reasons. Some wish to avoid the harms they may suffer if forced to involve a parent. Others go out of state due to difficulties in going to court in their home state to seek a waiver of the parental involvement requirement, lack of a nearby abortion provider in their home state, or the presence of supportive loved ones in the other state. Whatever their reason, CCPA will force those young women to travel alone out of state, rather than with a trusted relative or friend.

The deceptively titled "Child Custody Protection Act" would:

- **Harm Young Women** by endangering young women who are afraid or unable to discuss their unwanted pregnancies with their parents, potentially forcing them to travel alone to another state or even to attempt a risky self-induced abortion or obtain an unsafe illegal abortion
- **Punish Caring Relatives and Others Who Help Young Women** by criminalizing assistance they provide to young women who travel to another state to exercise their right to obtain an abortion
- **Violate Established Constitutional Principles** of federalism, reproductive rights, the right to travel, and equal protection

HOW CCPA CHANGES EXISTING LAW

All minors must comply with the forced parental involvement law, if any, of the state in which they obtain an abortion -- CCPA does not change that fact. What CCPA does do is criminalize currently lawful situations in which a minor goes out of state for an abortion with someone other than her parent. CCPA would criminalize the "knowing transport" of a minor across a state line with the intent that the minor obtain an abortion if so doing "abridges the right of a parent" under the forced parental involvement law of the minor's resident state.[1] "Abridgement of the right of a parent" occurs if the minor obtains an abortion outside her home state without "the parental consent or notification, or the judicial authorization" that would have been required if she obtained an abortion in the state where she resides. CCPA discriminates amongst state laws: not every state's parental involvement law will follow a minor from her state of residency to the state where she obtains an abortion. CCPA gives extra-territorial effect to only those laws that meet

CCPA's definition of a "parental involvement law," which is limited to "strict" parental involvement laws that do not allow someone other than a parent or legal guardian (such as a grandparent or aunt) to receive notice or provide consent. Therefore, under CCPA, a minor traveling from a state with a "strict" parental involvement law (one that matches the CCPA definition) must comply with her home state's law if she travels with a companion. However, a minor traveling from a state whose requirements are "broader" than the CCPA definition (such as a law that allows a grandparent to consent to the minor's abortion) need not comply with her home state's law even if she travels with a companion. If the young woman travels alone, CCPA does not apply in any case.

An individual who assists a young woman in violation of CCPA faces both civil and criminal liability, including imprisonment for up to one year, fines of up to $100,000, or both.[2] The bill would also allow parents to bring civil suits against persons who assist the young woman in violation of CCPA. Prosecution may be avoided only if the abortion is necessary to save the life of the minor because of a physical disorder, physical injury, or physical illness.

CCPA violates the general legal principles that the laws of one state are not enforceable in another state and that people are required to comply with the laws of the state in which they are located but not simultaneously the laws of any other state. CCPA would make a young woman seeking an out of state abortion who is accompanied by a non-parent (such as a trusted relative or friend) subject to the laws of the state in which she seeks the abortion *and* the law of her state of residency. Although the young woman herself is exempt from prosecution under CCPA, she must comply with both states' laws or risk federal criminal prosecutions of her companion and possibly the abortion provider and others as well. Young women's fears of prosecution of those who help them may lead the minors to travel out of state alone, in order to avoid risk of prosecution. In the alternative, young women may seek illegal abortions in their own state, attempt to self-abort or carry unwanted pregnancies to term. CCPA is an extreme and intrusive attempt to deter young women from obtaining safe and legal abortions.

HARMING YOUNG WOMEN

The deceptively titled "Child Custody Protection Act" would not "protect" young women. By making it more difficult for them to safely access constitutionally protected abortion services, CCPA would harm the very minors that it purports to protect. CCPA would harm those young women who decide to seek an abortion in another state by requiring them to comply with laws of two states or to travel alone if they cannot involve their parents. In addition, by mandating communication only with parents, CCPA would harm minors by criminalizing assistance received from close family members, friends, and counselors.

Ignoring Geographic and Economic Realities

Minors may decide to obtain an abortion outside of their state of residency for a variety of reasons. These young women's decisions may not be related to the particular laws of a state but may be based on important factors in obtaining any health care services, such as location, recommendations of others, and the proximity of loved ones.

The location of the closest abortion provider may be a factor in deciding where a minor chooses to obtain an abortion. As of 2000, 87% of all counties in the United States did not have an

abortion provider.[3] Therefore, for some young women, the closest provider may be in a neighboring state.

Young women may also travel to neighboring states based on clinic recommendations or for financial reasons. A young woman may receive a recommendation from a trusted individual for a doctor or a clinic that happens to be in a neighboring state. Or varying medical costs may mean that a clinic in a neighboring state provides a more economical option for a minor. If young women are deterred from going out of state for abortions in such situations, they may obtain unsafe, illegal abortions, attempt to self-abort, or carry an unwanted pregnancy to term.

Legislating Family Dynamics

Regardless of state mandates requiring disclosure, young women's parents often are aware of the minor's decision to have an abortion.[4] The younger the minor is, the more likely it is that her parents will know about her abortion decision; one study found that ninety percent of minors under the age of fifteen reported that at least one of their parents knew about their decision.[5] In addition, whether or not they are required to do so by law, health care providers routinely suggest that a young woman involve her parents if possible.

When young women avoid parental involvement in their abortion decision, the choice is usually well justified.[6] In families where abusive relationships or other problems prevent good communication between parents and their teenage daughters, state-mandated discussions can exacerbate existing problems. For battered teenagers and incest survivors in particular, forced parental involvement laws increase the risks in an already dangerous situation.[7] Even in the best of circumstances, candid communication about sexuality and reproductive issues may not take place in families. Generally, mandatory notification and consent requirements are not an effective means of encouraging more open discussion and can actually damage relations among family members. Attempts to legislate family dynamics without considering the differing relationships that exist within families is dangerous and unrealistic.

CCPA is not designed to enhance communication between minors and their parents, as is apparent from its selective application only to some minors: those who travel from certain states with a companion. Rather, CCPA seeks to deter young women from obtaining a safe and legal abortion and thus will cause some of them to act alone, seek risky alternatives to an out of state abortion, or to carry unwanted pregnancies to term.

Discouraging Young Women From Obtaining Help From Relatives and Other Trusted Adults

CCPA also harms young women by its failure to recognize the importance of other family members and trusted adults in a young woman's life. The law ignores the fact that many young women who do not voluntarily involve a parent in their decision to seek an abortion do involve another adult, whom they trust and to whom they are close, in that decision.[8] One study found that more than half of all young women who did not involve a parent involved some other adult in their decision, including 15 % who involved a stepparent or other adult relative.[9] These adults include: grandparents, siblings, or other extended family members; clergy, teachers, social workers, or other counselors; and supportive friends. CCPA would force young women to choose between not receiving assistance from these supportive adults in traveling across state lines for an abortion or risk exposing those adults to criminal liabilities, including jail time and

fines. CCPA could lead to the arrest of grandmothers and aunts who are looking out for the best interests of the young women they care about.

Imposing Extra Burdens on Young Women From Some States
CCPA would trap the unwary minor in a confusing maze of conflicting state laws. Currently, a young woman seeking an abortion can expect the health care providers from whom she seeks an abortion to be familiar with the provider's own state's applicable legal requirements and the young woman can rely on those persons for assistance in understanding how to comply with the law of that state. However, under CCPA, the young woman could no longer rely solely on the assistance of the provider in making sure that she and those accompanying her are meeting all applicable legal requirements. A young woman who plans to travel out of state with a companion would need to determine the law in both her home state and the state to which she is traveling in order to protect those assisting her. This may require contacting clinics in multiple states or researching the applicable forced parental involvement laws, using the definition specified under CCPA, to determine whether her home state's law will travel with her and what it requires.

If a young woman exercises her constitutional choice to seek a judicial waiver of a state's parental involvement law, she may have to obtain waivers from two states: her home state, if it meets the "strict" CCPA definition, and the state where the abortion will be performed. Having to obtain just one judicial waiver can delay a young woman in obtaining an abortion and cause other harms.[10] While going to court can be a daunting experience even for adults, minors face additional difficulties in judicial bypass proceedings. It is frightening for many young women to disclose intimate details of their lives to strangers in a formal, legal process. Some young women live in regions where the local judges never grant bypass petitions, or the closest court that hears the petitions is located hundreds of miles away, or where their confidentiality may be jeopardized because people who know them or their family work in the courthouse. Moreover, many young women find it difficult to take time off from school or work in order to appear at a hearing.

Abused minors are likely to find it particularly difficult to use the judicial bypass process for a number of reasons. A common defense and coping mechanism of an abused minor is avoidance. Therefore abused minors are likely to avoid the judicial bypass process, which may be perceived as extremely stressful. In addition, abused minors may be particularly fearful of turning to the courts because the abuse they have experienced makes them distrustful of authority. Moreover, these minors may have difficulty getting to the hearing because abusers generally place severe restrictions on the minor's activities.

PUNISHING CARING RELATIVES AND OTHERS WHO HELP YOUNG WOMEN
CCPA will punish caring relatives and others who help young women obtain abortions. Most young women voluntarily involved a parent, relative or other adult in their decision to obtain an abortion.[11] CCPA would discourage those non-parents from assisting minors in obtaining desired medical care by the threat of criminal penalties. For example, if a young woman who lives in a state with a "strict" parental involvement law travels with her grandmother to a state (such as South Carolina or Wisconsin) that allows a grandparent to provide consent for an abortion, the grandmother would face prosecution under CCPA if the young woman did not also involve a parent or get a court waiver in order to satisfy her home state's law.

Health care providers who know that a minor has been transported across state lines by a non-parent could also be at risk from a number of complex provisions regarding conspiracy and accessory liability.[12] To avoid the risk of liability, the health care provider would have to determine whether the minor seeking an abortion is from another state; whether she was accompanied across state lines by a non-parent; whether, under CCPA, she is required to comply with the forced parental involvement law of her home state and, if so, whether she did. Of course, the provider will have to determine whether the minor also complied with the parental involvement requirements, if any, of the state in which she is seeking the abortion. If the provider determines that the young woman was required to, but did not, comply with the law of her home state, the provider may risk liability himself unless he denies her the health service she seeks. Thus, to avoid the risk of criminal liability, health care providers in every state would need to be familiar with numerous state laws or deny services to any minor who cannot prove she resides in the state where the provider is located.

VIOLATING THE CONSTITUTION
CCPA's radical attempt to limit young women's access to abortion would come at the expense of the right to reproductive choice established in *Roe v. Wade*[13] and numerous other established constitutional principles.

The Child Custody Protection Act would unconstitutionally:

- violate principles of federalism
- burden young women's access to abortion
- endanger the health of young women by making it more dangerous for them to engage in constitutionally protected conduct
- endanger young women due to its failure to include an adequate medical emergency exception
- hinder the right to travel recognized under the Privileges and Immunities Clause
- infringe upon the Equal Protection prong of the Fifth Amendment

Violating Principles of Federalism
CCPA would violate fundamental principles of federalism and state sovereignty. A core principle of American federalism is that laws of a state apply only within the state's boundaries. CCPA would require some people to carry their own state's laws with them when traveling out of state. Under CCPA, a minor crossing state lines with a trusted relative or friend would not only be subject to the parental involvement law of the state she has entered, but would also need to comply with the parental involvement law of her home state, if her home state's law meets the CCPA definition.

Allowing a state's laws to extend beyond its borders runs completely contrary to the state sovereignty principles on which this country is founded. For example, gambling using slot machines is legal under the laws of Nevada, but not under those of California. Residents of Nevada are prohibited from gambling while in California, while California residents are

permitted to gamble while in Nevada. Forcing citizens of California to carry their home state's law into Nevada, thereby prohibiting them from using slot machines while in Nevada, would be inconsistent with federalism principles. Requiring compliance within the borders of one state with the different and possibly conflicting law of another state would be even more ludicrous in the case of abortion -- a constitutionally protected right -- than it would be in the case of casino gambling, which is not a constitutionally protected activity.

Twenty-six states and the District of Columbia either have parental involvement laws that do not meet the "strict" definition in CCPA, have parental involvement laws which are not enforced in their state, or have not enacted a parental involvement law. These states' legal requirements for the provision of abortion to minors are treated as second-class laws by CCPA. Within those twenty-six states and the District, CCPA would impose the requirements of other states, whose laws come within CCPA's definition of a parental involvement law, on non-resident minors accompanied by a non-parent. Thus, within those states and the District, representing approximately 57% of the United States population, CCPA would impose the laws of the other twenty-four states, representing just 43% of the population. Health care providers would be faced with the task of comparing the law of their minor patients' home states to CCPA's definition of a "parental involvement law" and then, if necessary, making sure that those patients had met the requirements that would have applied if they sought an abortion in their home state -- requirements that the providers' own state has not adopted, does not enforce, or even has explicitly rejected.

In effect, CCPA would make those state laws that Congress prefers (those requiring "strict" parental involvement) controlling in states with laws that it does not like (those with broader or no parental involvement requirements). This is an unprecedented Congressional intrusion into what has traditionally been an arena in which each state regulates its own citizens.

Burdening Young Women's Access to Abortion

CCPA would unduly burden access to abortion for young women who travel across state lines to obtain services and who choose not to involve their parents. In 1973, the United States Supreme Court recognized a constitutional right to choose whether or not to have an abortion in the landmark decision *Roe v. Wade*.[14] The Court reaffirmed the right to choose in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, holding that restrictions on this right are unconstitutional if they impose an "undue burden" on a woman's access to abortion.[15] The right extends to both minors and adults, but the Supreme Court has permitted individual states to impose some restrictions on the ability of young women to obtain abortions within the state's borders.[16]

The United States Supreme Court has ruled that states may require parental consent or notification before a minor obtains an abortion in the state, if the law also provides an "alternative" to parental involvement, such as a judicial bypass procedure, by which a young woman can obtain an abortion without involving a parent.[17] To obtain a judicial bypass, a young woman must appear before a judge and prove either that she is mature enough to decide whether to have an abortion or that an abortion would be in her best interests.

Thirty-four states enforce parental involvement laws. These laws vary in their requirements, but, absent CCPA, they apply only to minors receiving an abortion within those individual states. Twenty-four of these states have "strict" laws that fit CCPA's restrictive definition of a "parental involvement law." Ten states have parental involvement laws that are "broader" than the definition in CCPA, in that they do not limit the notification or consent requirement to a parent exclusively, but allow involvement of some other adult, such as a grandparent or other adult family member. Of the remaining sixteen states, ten have enacted parental involvement laws which are not enforced within the state due to court rulings or Attorney General opinions;[18] six states and the District of Columbia have not enacted forced parental involvement laws.

Under current law, a minor must always meet the requirements of the state in which she is receiving an abortion. Under CCPA, a minor from one of the twenty-four states that has a forced parental involvement law that matches the CCPA definition would carry her home state's law with her when she travels across state lines with a trusted relative or friend to receive an abortion. She would therefore have to meet the requirements of both her home state and the state in which she receives the abortion, thus being forced to comply with extra burdens beyond those imposed on any other minors seeking abortions. If the young woman does not comply with her home state's requirements in the state to which she traveled, the person who assists her would face liability. Every minor from a state with a "strict" parental involvement law will be faced with a choice: overcome the extra obstacles created by CCPA or travel alone out of state.

In order to protect a supportive non-parent who is accompanying her from criminal liability, a minor would need to determine both her own state's law and that of the state in which she is seeking an abortion. CCPA would create an undue burden for these young women by requiring them to comply with multiple state laws. For example, Pennsylvania has a "strict" parental involvement law under CCPA, whereas Delaware's law is "broader" than the CCPA definition. Pennsylvania requires that a minor obtain the written consent of one parent. Delaware provides that written notification must be provided to a parent, grandparent or licensed mental health professional at least twenty-four hours prior to an abortion.[19] A minor from Pennsylvania may choose to travel to Delaware with her grandmother to receive an abortion from the closest provider. Notification of her grandmother would satisfy Delaware's law, but the young woman would also need to obtain the written consent of one of her parents so that her grandmother would not risk liability under CCPA.

If a young woman chooses to obtain a judicial bypass of the parental involvement requirements, she will also face an undue burden under CCPA, as she may need to go to court in two states -- her home state and the state in which she seeks the abortion. For example, a Massachusetts resident traveling to Rhode Island with a non-parent to obtain an abortion would have to obtain a judicial waiver of the parental involvement requirements of both states because the minor carries Massachusetts's "strict" parental involvement law with her wherever she goes.[20] Going through the judicial process just one time is a burden on minors; doing it two times in two different states would place an unconstitutional undue burden on a young woman's access to abortion.

CCPA would also create an undue burden on minors' access to abortion by deterring trusted relatives and friends from helping a young woman due to fear of criminal and civil liability. Even if some people were willing to take this risk, young women seeking abortions may refrain

from seeking advice and assistance for fear of exposing family members, counselors, or other supportive friends to liability. As a result, young woman may choose instead to travel alone across state lines.

In addition to putting persons who travel with the minor at risk of liability, CCPA places health care providers at risk, thus further unduly burdening minors' access to abortion services. Fear of prosecution may lead some abortion providers to refuse to provide services to young women.

Endangering the Health of Young Women By Making it More Dangerous for Them to Engage in Constitutionally Protected Conduct

The Supreme Court has ruled that the State cannot deter someone from engaging in constitutionally protected conduct by making it more dangerous to engage in that conduct,[21] yet that is exactly what CCPA does. CCPA tries to dissuade young women from exercising their constitutional right to obtain an abortion by making it more dangerous for them to exercise that right. It deters young women from traveling with a trusted relative or friend, who would be at risk of criminal prosecution, and thus encourages young women to travel alone out of state to obtain an abortion. Yet, depending on the abortion procedure, it may be unsafe for the young woman to drive herself home after the abortion, especially over long distances. Thus, the young woman is exposed to more danger than if she traveled with a trusted adult.

Failing to Provide an Adequate Medical Emergency Exception

The United States Supreme Court has repeatedly ruled that any restriction on abortion must contain exceptions to allow for abortions that are necessary to protect the health and life of the pregnant woman.[22] To be constitutionally adequate, the exception must cover situations in which a woman faces the risk of psychological or emotional harm, not just physical harm.[23] CCPA, however, does not include *any* exception for situations in which the young woman's health is threatened if she does not obtain an abortion. Nor does CCPA include an exception for situations in which the young woman has an emergency need for an abortion to save her life where it is endangered by mental illness or disorder. The failure to include these provisions shows an utter lack of regard for established constitutional law and the health of young women.

Hindering the Right to Travel

CCPA would unconstitutionally regulate interstate travel between *certain* states, for *certain* people and under *certain* conditions. It would make the legality of interstate travel dependent upon the traveler's *state of residency*, the *purpose* of the travel, and the *people with whom* she is traveling.

The right to travel freely between the states is a fundamental right of state citizenship, which is protected by the Privileges and Immunities Clause of Article IV of the Constitution. This includes "the right to be treated as a welcome visitor rather than an unfriendly alien" when traveling between the states.[24] The Supreme Court has held that the Privileges and Immunities Clause "protect[s] persons who enter [a state] seeking the medical services that are available there."[25] Thus, Article IV gives constitutional protection to a minor who travels from her home state to another state to "procure medical services," including, specifically, abortion services -- the subject of the Court's 1973 decision in *Doe v. Bolton*).[26] Therefore, a minor transported from, for example, Massachusetts to Maine by a friend or relative for an abortion -- as well as the

person who accompanies her -- has the right to be treated as a "welcome visitor rather than an unfriendly alien."[27]

Under CCPA, minors who come into a state to seek medical services would be subjected to different treatment than minors who already live in that state and seek medical services there. Also, minors crossing state lines to seek medical services would be treated differently depending on their state of origin: minors from states with "strict" parental involvement laws would face special burdens not imposed on minors from states with "broad" or no parental involvement laws. Moreover, a minor who traveled alone into a state from a state with a "strict" parental involvement law would be treated more favorably than a minor from the same state who traveled with a non-parent: the lone minor would only need to comply with the law of the state she entered, but the accompanied minor would have to comply with the requirements of both her home state and of the state she entered. Thus, CCPA creates a hodgepodge of restrictions on interstate travel and results in the disparate treatment of people based on their state of residency, thereby violating the rights of citizenship recognized by the Privileges and Immunities Clause of Article IV.

Infringing Upon the Equal Protection Prong of the Fifth Amendment
The Fifth Amendment prohibits Congress from depriving individuals of equal protection of the law.[28] Equal protection case law prohibits Congress from creating a classification that penalizes the exercise of a constitutional right, except in furtherance of a compelling governmental interest.[29] When such a classification is formed, it is subject to strict scrutiny, the highest level of judicial scrutiny. Under strict scrutiny analysis, the government has the burden of establishing that the classification is narrowly tailored and based on the furtherance of a compelling governmental interest. CCPA would impermissibly classify persons based on the exercise of two fundamental rights -- the constitutional right to choose abortion and the right to interstate travel -- because it is not narrowly tailored nor does it further a compelling governmental interest.

As to the right to reproductive choice, CCPA impermissibly classifies among minors being transported across state lines and among those persons transporting them: it penalizes only those persons who are assisting minors in exercising their right to abortion. However, persons transporting minors across state lines are not penalized by CCPA if the minors are being transported for other purposes, including, for example, to seek pregnancy-related care associated with carrying a pregnancy to term, to seek a medical procedure far riskier than abortion, or to exercise the right to marry.

With respect to the right to interstate travel, CCPA also impermissibly classifies among both minors and the persons transporting them. The minor's state of residency determines whether the person transporting her is committing a crime. No other federal statute classifies among interstate travelers based upon their state residency. Indeed, the Supreme Court's decision in *Saenz v. Roe*[30] confirms the illegitimacy of classifying based on state of residency. In that case, the Court held that it is not permissible to classify based upon state residency for the purpose of determining eligibility for welfare benefits. Surely, if it is unconstitutional for the government to limit access to welfare benefits for persons from another state, it is similarly unconstitutional to limit access to constitutionally protected abortion services based on a person's state of residency.

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CONCLUSION

The deceptively titled "Child Custody Protection Act" would harm – not "protect" – young women. It would endanger their health, deny them the assistance of trusted relatives and other adults, and encourage them to travel alone for abortion services. The bill would turn caring relatives and friends who assist young women in obtaining an abortion -- including grandmothers and aunts -- into criminals. CCPA would violate the federal constitution, in particular by contravening principles of federalism, making it more dangerous for young women to engage in constitutionally protected conduct, and infringing upon the rights to reproductive choice and interstate travel.

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ENDNOTES

1. Child Custody Protection Act, S. 851, 108th Cong. (2003).
2. Any individual, minor or adult, except the young woman seeking an abortion and her parents, could be liable under CCPA. See S. 851. Violation of CCPA would be a Class A misdemeanor. See id.; 18 U.S.C. §§ 3559, 3571.
3. See Lawrence B. Finer & Stanley K. Henshaw, Abortion Incidence and Services in the United States in 2000, 35 Perspectives on Sexual and Reproductive Health 6 (2003).
4. See Mary S. Griffin-Carlson & Paul J. Schwanenflugel, Adolescent Abortion and Parental Notification: Evidence for the Importance of Family Functioning on the Perceived Quality of Parental Involvement in U.S. Families, 39 J. Child Psychol. Psychiat. 543 (1998); Mary S. Griffin-Carlson & Kathleen J. Mackin, Parental Consent: Factors Influencing Adolescent Disclosure Regarding Abortion, 28 Adolescence 1 (1993); Stanley K. Henshaw & Kathryn Kost, Parental Involvement in Minors' Abortion Decisions, 24 Fam. Plan. Persp. 196 (1992); Laurie S. Zabin, et al., To Whom Do Inner-City Minors Talk About Their Pregnancies? Adolescents' Communication With Parents and Parent Surrogates, 24 Fam. Plan. Persp. 148 (1992); Raye Hudson Rosen, Adolescent Pregnancy Decision-Making: Are Parents Important? , 25 Adolescence 43 (1980).
5. Henshaw & Kost, supra note 4, at 200.
6. See, e.g., Council on Ethical and Judicial Affairs, American Medical Association, Mandatory Parental Consent to Abortion, 269 JAMA 82, 82-84 (1993); Henshaw & Kost, supra note 4, at 207; Patricia Donovan, Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions, 15 Fam. Plan. Persp. 259 (1983).
7. See Am. Acad. of Pediatrics, The Adolescent's Right to Confidential Care When Considering Abortion, 97 Pediatrics 746, 748 (1996); Council on Ethical and Judicial Affairs, supra note 6, at 82-86.
8. See Griffin-Carlson & Mackin, supra note 4, at 9; Henshaw & Kost, supra note 4, at 205-06; Zabin, et al., supra note 4.
9. Henshaw & Kost, supra note 4, at 207.
10. See Charlotte Ellertson, Ph.D., MPA, Mandatory Parental Involvement in Minors' Abortions: Effects of the Laws in Minnesota, Missouri, and Indiana, 87 Am. J. of Pub. Health 1367 (1997); Stanley K. Henshaw, The Impact of Requirements for Parental Consent on Minors' Abortions in Mississippi, 27 Fam. Plan. Persp. 120 (1995).
11. Henshaw & Kost, supra note 4, at 207.
12. As a proposed addition to the federal Criminal Code, CCPA would be read with other provisions of the Code, including conspiracy and accessory liability. Attempts to amend CCPA to limit the scope of liability to the principal who commits the offense were repeatedly rejected by the bill's sponsors during the 105th and 106th Congresses.
13. 410 U.S. 113 (1973).
14. 410 U.S. 113.
15. 505 U.S. 833 (1992).
16. See, e.g., Hodgson v. Minnesota, 497 U.S. 417 (1990); Bellotti v. Baird, 443 U.S. 622, 644-45 (1979) ("Bellotti II").
17. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990); Bellotti II, 443 U.S. 622.
18. Enforcement of the forced parental involvement laws of these ten states has been permanently or preliminarily blocked by a federal or state court order or Attorney General opinion, based on challenges to the law under the federal or a state constitution.
19. 18 Pa. Cons. Ann. § 3206 (West 2000); Del. Code Ann. tit. 24 § 1780, et seq. (2000).
20. R.I. Gen. Laws § 23-4.7-6 (2000); Mass. Gen. Laws ch. 112, § 12S (2000).
21. See Carey v. Population Servs. Int'l, 431 U.S. 678, 694 (1977) (plurality opinion).
22. Roe v. Wade, 410 U.S. 113, 164-165 (1973); Casey, 505 U.S. at 879; Stenberg v. Carhart, 530 U.S. 914, 938 (2000).

23. Doe v. Bolton, 410 U.S. 179, 193 (1973).
24. Saenz v. Roe, 526 U.S. 489, 500 (1999).
25. Doe v. Bolton, 410 U.S. at 200.
26. 410 U.S. at 200; see also Saenz, 526 U.S. at 502 (noting that the Privileges and Immunities clause "provides important protections for non-residents who enter a State . . . to procure medical services . . . .").
27. Saenz, 526 U.S. at 500.
28. This prohibition on Congress acts in the same manner in which the Fourteenth Amendment prohibits the State from violating equal protection of the law. See Bolling v. Sharpe, 347 U.S. 497 (1954).
29. Romer v. Evans, 517 U.S. 620, 631 (1996).
30. 526 U.S. 489.

UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

Senator Jeff Sessions, Presiding

June 3, 2004

Prepared Testimony of
Professor Teresa Stanton Collett*

Good afternoon Mr. Chairman, Members of the Committee, and other distinguished guests. My name is Teresa Stanton Collett and I am a professor of law at the University of St. Thomas School of Law in Minneapolis, Minnesota.

I am honored to have been invited to testify on Senate Bill 851, the "Child Custody Protection Act" (the "Act"). My testimony represents my professional knowledge and opinion as a law professor who writes on the topic of family law, and specifically on the topic of parental involvement laws. It also represents my experience in assisting legislators across the country in evaluating parental involvement laws during the legislative process and defending parental involvement laws in the courts. I have served as a member of the Texas Supreme Court Subadvisory Committee charged with proposing court rules implementing the judicial bypass of parental notification in that state. I appeared before the House Judiciary Committees in 1998 and 2001 to testify in support of predecessors to S. 851, and I continue to support the passage of the Child Custody Protection Act. My testimony today is not intended to represent the views of my employer, the University of St. Thomas, or any other organization or person.

It is my opinion that the Child Custody Protection Act will significantly advance the legitimate health and safety interests of young girls experiencing an unplanned pregnancy. It will also safeguard the ability of states to protect their minor citizens through the adoption of effective parental involvement statutes.[1]

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[1] Cases evidencing the general rule that parents are legally entitled to make medical decisions on behalf of their children include Newmark v. Williams, 588 A.2d 1108 (Del. Super. Ct. 1991) (upholding parents' rejection of chemotherapy in favor of prayer treatment where survival was not assured even with medical intervention.); *In re* Eric B., 235 Cal Rptr. 22 (Cal. Ct. App. 1987) (requiring medical monitoring of child following court-ordered chemotherapy treatments over renewed parental objections); *In re* Green, 292 A.2d 387 (Pa. 1972) (dismissing court ordered medical intervention for seventeen-year-old poliomyelitis patient suffering from 94% curvature of the spine on basis that condition is not considered life-threatening); and *In re* Baby K, 832 F.Supp. 1022 (E.D. Va. 1993), *aff'd*, 16 F.3d. 590 (4th Cir.), *cert. denied*, 115 S.Ct. 91(1994) (court rejected petition by hospital and natural father to remove anacephalic child from life support over mother's objection). *See also* Gina Kolata, *Battle over a Baby's Future Raises Hard Ethical Issues,* NY TIMES, Dec. 27, 1994, at A1, and Michelle O. Ray, *Defying Death Sentence, Baby Ryan Heads Home*, NEWS TRIB., Mar. 6, 1995, at A1 (news reports of successful effort by parents of premature handicapped infant to enjoin hospital from discontinuing dialysis without their consent).

While the primary focus of my testimony will be on the reasons for and effect of parental involvement laws, it is important at the outset of my testimony to emphasize that this proposed legislation does not establish a national requirement of parental consent or notification prior to the performance of an abortion on young girls who lack sufficient maturity to determine whether abortions are in their best interest. It does not attempt to preempt, interfere with or regulate any purely intrastate activities related to the procurement of abortion services.[2] Rather the modest aim of this Act is to protect the right of each state to determine the level of parental involvement required prior to the performance of an abortion on any of state's minor citizens.

Parental Rights to Control Medical Care of Minors

The United States Supreme Court has described parents' right to control the care of their children as "perhaps the oldest of the fundamental liberty interests recognized by this Court."[3] In addressing the right of parents to direct the medical care of their children, the Court has stated:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." Surely, this includes a "high duty" to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.[4]

It is this need to insure the availability of parental guidance and support that underlies the laws requiring a parent is notified or gives consent prior to the performance of an abortion on his or her minor daughter. The national consensus in favor of this position is illustrated by the fact that there are parental involvement laws on the books in forty-four

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[2] While such legislation may be a highly desirable means to promote the health and well-being of young girls confronting an unplanned pregnancy, the jurisdictional basis for federal action of this type may be limited. Cf. *United States v. Lopez*, 514 U.S. 549 (1995)(striking down the Gun-Free School Zones Act on the basis that it exceeded Congressional authority under the Commerce Clause).

[3] Troxel v. Granville, 530 U.S. 57, 120 U.S. Sup. Ct. 2054 at 2060 (2000)(overturning Washington visitation statute which unduly interfered with parental rights).

[4] Parham v. J.R., 442 U.S. 584 at 602 (1979)(emphasis added)(rejecting claim that minors had right to adversarial proceeding prior to commitment by parents for treatment related to mental health).

of the fifty states.[5] Only six states in the nation have not attempted to legislatively insure some level of parental involvement in a minor's decision to obtain an abortion.[6]

Of the forty-four states that have enacted laws, eight statutes have been determined to have state or federal constitutional infirmities. Therefore the laws of

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[5] See Ala. Code § § 26-21-1 to-8 (Westlaw 2003 through organizational and 1st session); Alaska Stat. §§ 18.16.010(a)(3), .020, .030, .090(2) (Bender, WESTLAW through 2002 Replacement Set).; Ariz. Rev. Stat. Ann. § 36-2152 (West, WESTLAW through May 2004); Ark. Code Ann. § § 20-16-801 to-808 (WESTLAW through end of 2003 Reg. Sess.); Cal. Health & Safety Code § 123450 (West 1996 & Supp. 1999); COLO. REV. STAT. ANN. §§ 12-37.5-101 to -108 (WESTLAW through ch. 18 of 2003 1st Reg. Sess.); H.B. 1376, 64th General Assembly, Gen. Sess. (Co. 2003); Conn. Gen. Stat. Ann. § 19(a)-601 (WESTLAW current with amendments received through 2003 Jan. Reg. Sess., June 30 Sp. Sess. and Sept. 8 Sp. Sess.); Del. Code Ann. tit. 24, § § 1780-1789B (WESTLAW current through 2003 Regular Session of the 142nd General Assembly); Fla. Stat. Ann. § 390.01115 (WESTLAW current through May 12, 2004); Ga. Code Ann. § § 15-11-110 to-118 (WESTLAW current through end of 2003 Reg. Sess.); Idaho Code § 18-609(6) (WESTLAW current through end of 2003 session); 750 Ill. Comp. Stat. 70/1-70/99 (WESTLAW current through P.A. 93-673 of the 2004 Reg. Sess.); Ind. Code Ann. § § 16-18-2-267, 16-34-2-4 (WESTLAW current through P.L. 1 of 2004 2nd Regular Sess.); Iowa Code Ann. § § 135L.1-8 (WESTLAW current through end of 2003 1st Ex. Sess.); Kan. Stat. Ann. § 65-6705 (WESTLAW current through 2003 Reg. Sess.); Ky. Rev. Stat. Ann. § 311.732 (WESTLAW current through end of 2003 Reg. Sess.); La. Rev. Stat. Ann. § 40:1299.35.5 (WESTLAW current through all 2004 First Extraordinary Session Acts); Me. Rev. Stat. Ann. tit. 22, § 1597-A (WESTLAW current through 2003 First Special Session of the 121st Legislature); Md. Code Ann., Health-Gen. § 20-103 (WESTLAW current with laws from the 2004 Regular Session effective through May 11, 2004); Mass. Ann. Laws ch. 112, § 12s (WESTLAW current through Ch. 115 of the 2004 2nd Annual Sess.); Mich. Stat. Ann. § § 722.901 et seq. (WESTLAW current through P.A.2004, No. 102); Minn. Stat. Ann. § § 144.343 , 645.452 (WESTLAW current with 2004 Regular Session laws through Chapters 140, 144, 147, 150 to 152 and 158); Miss. Code Ann. § § 41-41-51 to-63 (WESTLAW current through end of 2003 Reg. Sess.); Mo. Ann. Stat. § § 188.015, 188.028 (WESTLAW current through the End of the First Regular and Second Extraordinary Sessions of the 92nd General Assembly (2003); Mont. Code Ann. § § 50-20-201 to-215 (WESTLAW current through the 2003 Regular Session of the 58th Legislature); Neb. Rev. Stat. § § 71-6901 to- 6909 (WESTLAW current through First Regular Session of the 98th Legislature (2003)); Nev. Rev. Stat. § § 442.255-.257 (WESTLAW current through the 2003 Reg. Sess. Of the 72nd Legislature and the 19th and 20th Spec. Sess. (2003)); N.H. Stat. Ann. §§132.25 et seq. (WESTLAW current through end of 2003 Reg. Sess.); N.J. Stat. Ann. § § 9:17A-1 to-1.12 (WESTLAW current through L.2004); N.M. Stat. Ann. § § 30-5-1(C) (WESTLAW current through the Spec. Sess. Of the 46th Legislature (2004)); N.C. Gen. Stat. § § 90-21.6 et seq. (WESTLAW current through the 2003 Second Ex. Sess.); N.D. Cent. Code § § 14-02.1 to 03.1 (WESTLAW current through 2003 General and Spec. Sess.); OHIO REV. CODE ANN. §§ 2151.85, 2505.073, 2919.12, 2919.122 (WESTLAW current through 2004 File 76 of the 125th GA (2003-2004), apv. by 5/6/04); 18 Pa. Cons. Stat. Ann. § 3206 (WESTLAW current through Act 2004-21); R.I. Gen. Laws § 23-4.7-6 (WESTLAW current through Jan. 2003 Sess.); S.C. Code Ann. § § 44-41-10, 30 to-37 (WESTLAW current through end of 2003 Reg. Sess.); S.D. Codified Laws § § 26-1-1, 34-23A-7 (WESTLAW current through the end of the 2004 Reg. Sess.); Tenn. Code Ann. § 37-10-301 et seq. (WESTLAW current with laws from 2004 Second Reg. Sess. eff. April 30, 2004); Tex. Fam. Code Ann. § 33.001-.004 (WESTLAW current through the end of the 2004 Fourth Called Session); Utah Code Ann. § 76-7-304 (WESTLAW current through 2003 2nd Spec. Sess.); Va. Code Ann. § 16.1-241(V) as amended by Senate Bill 335 (WESTLAW current through 2003 Reg. Sess.); W. Va. Code § § 16-2F-1 et seq. (WESTLAW current with Laws of the 2004 Regular Session effective before April 15, 2004); Wis. Stat. Ann. § 48.375 (WESTLAW current through 2003 Act 137, published 3/4/04); Wyo. Stat. Ann. § 35-6-118 (WESTLAW current through 2003 Reg. Sess.).

[6] These are Hawaii, New York, Oklahoma, Oregon, Vermont, and Washington.

thirty-six states are in effect today.[7] Ten of these states have laws that empower abortion providers to decide whether to involve parents or allow notice to or consent from people other than parents or legal guardians.[8] These laws are substantially ineffectual in assuring parental involvement in a minor's decision to obtain an abortion. However, parents in the remaining twenty-six states are effectively guaranteed the right to parental notification or consent in most cases.[9]

Widespread Public Support

There is widespread agreement that as a general rule, parents should be involved in their minor daughter's decision to terminate an unplanned pregnancy. This agreement even extends to young people, ages 18 to 24.[10] To my knowledge, no organizations or

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[7] Courts in the face of claims of state or federal constitutional infirmity have enjoined the implementation of eight state statutes. See *Planned Parenthood v. State*, 3AN-97-6014 Cl (Alaska Super. Ct. Oct. 13, 2003) (Decision on Remand). The state has announced it will appeal the lower court decision. State to Appeal Abortion Decision, JUNEAU EMPIRE, Oct. 22, 2003;, *Glick v. McKay*, 616 F. Supp. 322, 327 (D. Nev. 1985), aff'd, 937 F.2d 434 (9th Cir. 1991); *American Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 800 (Cal. 1997) (parental consent statute violated state constitutional right to privacy); *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So.2d 612 (Fla. 2003) (parental notification requirement violated state constitutional right to privacy); *Planned Parenthood of Central New Jersey v. Farmer*, 762 A.2d 620 (N.J. 2000) (parental notification law with judicial waiver violates state constitution); *Zbaraz v. Ryan*, No. 84 C 771 (N.D. Ill. 1996) (Ill. Supreme Ct. refused to issue rules implementing Ill. Stat.); *Wicklund v. State*, No. ADV-97-671 (Mont. Dist. Ct. Feb. 25, 1999) (parental notification law violated state constitution) available at http://www.mtbizlaw.com/1stjd99/WICKLUND_2_11.*htm Planned Parenthood of Northern New England v. Heed*, 296 F.Supp.2d 59 (D.N.H. 2003) (striking down statute due to absence of health exception) appeal filed, No. 04-1161 (1st Cir). *Cf. Planned Parenthood of Idaho, Inc. v. Lance*, No. CIV 00-0353-S-MHW (D. Idaho Mar. 8, 2002), *appeal filed*, No. 02-35700 (9th Cir. July 24, 2002)(invalidated post-emergency abortion notification requirement only).

[8] See Conn. Gen. Stat. Ann. § 19(a)-601 (stating that the abortion provider need only discuss the possibility of parental involvement); Del. Code Ann. tit. 24, § 1783(a) (allowing notice to a licensed mental health professional not associated with an abortion provider); Kan. Stat. Ann. § 65-6705(j) (allowing a physician to bypass parental notice in cases where the physician determines that an emergency exists that threatens the "well-being" of the minor); Me. Rev. Stat. Ann. tit. 22, § 1597- A(2) (allowing a minor to give informed consent after counseling by the abortion provider); Md. Code Ann., Health-Gen. § 20-103(c) (allowing a physician to determine that parental notice is not in the minor's best interest); Ohio Rev. Code Ann. § 2919.12 (stating that notice may be given to a brother, sister, step-parent, or grandparent if certain qualifications are met); Utah Code Ann. § 76-7-304 (stating that a physician need notify only if possible); W. Va. Code § 16-2F-1 (stating physician not affiliated with an abortion provider may waive the notice requirement); Wis. Stat. Ann. § 48-375 (stating that the notice may be given to any adult family member).

[9] The guarantee is qualified by the fact that every state with an effective parental involvement law has judicial bypass of parental involvement for mature and well informed minors and minors for whom the court determines that abortion is in their best interest.

[10] A Kaiser Family Foundation/MTV Survey of 603 people ages 18-24 found that 68% favored laws requiring parental consent prior to performance of an abortion on girls under 18. *Sex Laws: Youth Opinion on Sexual Health Issues in the 2000 Election* (conducted July 5-17, 2000) available at <http://www.kcts.org/productions/youthpolitics/issues/index.asp l> (visited June 1, 2004). Similar results are found in polls taken from September 1981 to January 2004, which consistently reflect over 70% of the American public support parental consent or notification laws. See, e.g., Gallup/CNN/USA Today Poll

individuals, whether abortion rights activists or pro-life advocates, dispute this point.[11] On an issue as contentious and divisive as abortion, it is both remarkable and instructive that there is such firm and long-standing support for laws requiring parental involvement.

Various reasons underlie this broad and consistent support. As Justices O'Connor, Kennedy, and Souter observed in *Planned Parenthood v. Casey*,[12] parental consent and notification laws related to abortions "are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart."[13] This reasoning led the Court to conclude that the Pennsylvania parental consent law was constitutional.

Out of respect for the time constraints of this committee, I will limit my remarks to examining two of the benefits that are achieved by parental involvement statutes: improved medical care for young girls seeking abortions and increased protection against sexual exploitation by adult men.

Improved Medical Care of Minor Girls

(released Jan. 15, 2004) (73% favor requiring parental consent for abortion "for women under 18"); CBS News/ NY Times Poll (released Jan. 15, 1998) (78% of those polled favor requiring parental consent before a girl under 18 years of age could have an abortion); Americans United for Life, Abortion and Moral Beliefs, A Survey of American Opinion (1991); Wirthlin Group Survey, Public Opinion, May-June 1989; Life/Contemporary American Family (released December, 1981) (78% of those polled believed that "a girl who is under 18 years of age [should] have to notify her parents before she can have an abortion"). Other polling results are available in Westlaw, Dialog library, poll file.

[11] "Responsible parents should be involved when their young daughters face crisis pregnancies." National Abortion and Reproductive Rights Action League Publications -- *Factsheet: Mandatory Parental Consent and Notice Laws and the Freedom to Choose* (1999). "Physicians should strongly encourage minors to discuss their pregnancy with their parents. Physicians should explain how parental involvement can be helpful and that parents are generally very understanding and supportive. If a minor expresses concerns about parental involvement, the physician should ensure that the minor's reluctance is not based on any misperceptions about the likely consequences of parental involvement." Council on Ethical and Judicial Affairs, American Medical Association, *Mandatory Parental Consent to Abortion*, JAMA 82 (January 6 1993) (opposing laws that mandate parental involvement on the basis that such laws may expose minors to physical harm, or compromise "the minor's need for privacy on matters of sexual intimacy.")

[12] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

[13] 505 U.S. at 895. In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), the first of a series of United States Supreme Court cases dealing with parental consent or notification laws, Justice Stewart wrote, "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision of whether to have a child." *Id.* at 91. Three years later the Court acknowledged that parental consultation is critical for minors considering abortion because "minors often lack the experience, perspective and judgment to avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. 622, 640, (1979) (*Bellotti II*) (plurality opinion). The *Bellotti* Court also observed that parental consultation is particularly desirable regarding the abortion decision since, for some, the situation raises profound moral and religious concerns. *Bellotti II*, 443 U.S. at 635.

Medical care for minors seeking abortions is improved by parental involvement in three ways. First, parental involvement laws allow parents to assist their daughter in the selection of the abortion provider.

As with all medical procedures, one of the most important guarantees of patient safety is the professional competence of those who perform the medical procedure. In *Bellotti v. Baird*, the United States Supreme Court acknowledged the superior ability of parents to evaluate and select appropriate healthcare providers.[14]

> In this case, however, we are concerned only with minors who according to the record range in age from children of twelve years to 17-year-old teenagers. Even the latter are less likely than adults to know or be able to recognize ethical, qualified physicians, or to have the means to engage such professionals. Many minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent or unethical.[15]

Historically, the National Abortion Federation has recommended that patients seeking an abortion confirm that the abortion will be performed by a licensed physician in good standing with the state Board of Medical Examiners and that the doctor have admitting privileges at a local hospital not more than twenty minutes away from the location where the abortion is to occur in order to insure adequate care should complications arise.[16] These recommendations were deleted after they were introduced into evidence in malpractice cases against abortion providers. Notwithstanding this change in the NAF recommendations, a well-informed parent seeking to guide her child is more likely to inquire regarding these matters than a panicky teen who just wants to no longer be pregnant.

Second, parental involvement laws insure that parents have the opportunity to provide additional medical history and information to abortion providers prior to performance of the abortion.[17]

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[14] 443 U.S. 622 at 641 (1979) (*Bellotti II*).

[15] *Bellotti v. Baird*, 443 U.S. 622 at 641 (1979) (*Bellotti II*).

[16] National Abortion Federation, *Having an Abortion? Your Guide to Good Care* (2000) which was available at <http://www.prochoice.org/pregnant/goodcare.htm>, (visited Jan. 1, 2000).

[17] In *Edison v. Reproductive Health Services*, 863 S.W.2d 621 (Mo. App. E.D. 1993), the court confronted the question of whether an abortion provider could be held liable for the suicide of Sandra, a fourteen-year-old girl, due to depression following an abortion. Learning of the abortion only after her daughter's death, the girl's mother sued the abortion provider, alleging that her daughter's death was due to the failure to obtain a psychiatric history or monitor Sandra's mental health. *Id.* at 624. An eyewitness to Sandra's death "testified that he saw Sandra holding on to a fence on a bridge over Arsenal Street and then jumped in front of a car traveling below on Arsenal. She appeared to have been rocking back and forth while holding onto the fence, then deliberately let go and jumped far out to the driver's side of the car that struck her. A second car hit her while she was on the ground. Sandra was taken to a hospital and died the next day of multiple injuries." *Id.* at 622.

> The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.[18]

Abortion providers, in turn, have the opportunity to disclose the medical risks of the procedure to the adult who can advise the girl in giving her informed consent to the surgical procedure. Parental notification insures that the abortion providers inform a mature adult of the risks and benefits of the proposed treatment, after having received a more complete and thus more accurate medical history of the patient.

The third way in which parental notification will improve medical treatment of pregnant minors is by insuring that parents have adequate knowledge to recognize and respond to any post-abortion complication that may develop.[19] While it is often claimed that abortion is one of the safest surgical procedures performed today, the actual rate of many complications is simply unknown because there is no coordinated national effort to collect and maintain this information.[20]

The court ultimately determined that Sandra was not insane at the time she committed suicide. Therefore her actions broke the chain of causation required for recovery. Yet evidence was presented that the daughter had a history of psychological illness, and that her behavior was noticeably different after the abortion. *Id.* at 628. If Sandra's mother had known that her daughter had obtained an abortion, it is possible that this tragedy would have been avoided.

See also Anna Glasier, *Counseling for Abortion, in* MODERN METHODS OF INDUCING ABORTION 112, 117 (David T. Baird et al. eds., 1995)("20% of women suffer from severe feelings of loss, grief and regret"); Jo Ann Rosenfeld, *Emotional Responses to Therapeutic Abortion*, 45 AM. FAM. PHYSICIAN 137, 138 (1992) ("Teenagers who do not tell their parents about their abortion have an increased incidence of emotional problems and feelings of guilt."); Mika Gissler, *Suicides After Pregnancy in Finland 1987-1994: Register to Linkage Study,* 313 BRIT. MED. J. 1431, 1433 (1996); H. David et al., *Postpartum and Postabortion Psychotic Reactions*, 13 FAMILY PLANNING PERSPECTIVES 889 (1981) and David C. Reardon, 95 So. Med. J. 834 (Aug. 2002) available at www.sma.org/smj/index.cfm. Additional sources are collected and discussed in Thomas R. Eller, *Informed Consent Civil Actions for Post-Abortion Psychological Trauma*, 71 NOTRE DAME L. REV. 639 (1996).

[18] *H.L. v. Matheson*, 450 U.S. 398 at 411 (1981). Accord *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 518-19 (1990).

[19] See *Ohio v. Akron Ctr. For Reproductive Health*, 497 U.S. 502, 519 (1990).

[20] "The abortion reporting systems of some countries and states in the United States include entries about complications, but these systems are generally considered to underreport infections and other problems that appear some time after procedure was performed." Stanley K. Henshaw, *Unintended Pregnancy and Abortion: A Public Health Perspective* in *A Clinician's Guide to Medical and Surgical Abortions* at 20 (Maureen Paul et al., eds. 1999).

Notwithstanding this failure by public health authorities, abortion providers have identified infection is one of the most common post-abortion complications.[21] The warning signs of infection typically begin within the first forty-eight to ninety-six hours after the abortion and can include fever, pain, pelvic tenderness, and elevated white blood count.[22] Caught early, most infections can be treated successfully with oral antibiotics.[23] Left untreated, it can result in death.

Similarly post-operative bleeding after an abortion is common, and even where excessive[24] can be easily controlled if medical treatment is sought promptly. However, hemorrhage is a one of the most serious post-abortion complications and should be evaluated by a medical professional immediately. [25] Untreated it can result in the death of the minor.[26]

Experts often characterize a perforated uterus is a "normal risk" associated with abortion.[27] This complication also can be easily dealt with if detected early, but lead to serious consequences if medical help is not sought promptly.

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[21] David A. Grimes, *Sequelae of Abortion*, *in* MODERN METHODS OF INDUCING ABORTION 95, 99-100 (David T. Baird et al. eds., 1995).

[22] *See* E. Steve Lichtenberg et al., *Abortion Complications: Prevention and Management, in* A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTIONS 197, 206 (Maureen Paul et al. eds., 1999).

[23] *See id.* at 206-07.

[24] The National Abortion Federation defines excessive bleeding as "saturation of more than one pad per hour for more than three hours." NATIONAL ABORTION FEDERATION, CLINICAL POLICY GUIDELINES, *Delayed Bleeding*, Standard 3 (2002) available at http://www.guideline.gov and enter National Abortion Federation as search.

[25] NATIONAL ABORTION FEDERATION, CLINICAL POLICY GUIDELINES, *Complications: Bleeding*, Policy Statement (2002) available at http://www.guideline.gov and enter National Abortion Federation as search.

[26] See *Evans v. Mutual Assur., Inc.*, 727 So. 2d 66 (Ala. 1999) (discussing a dispute between a physician and the malpractice carrier regarding coverage for the death of an 18-year-old girl from hemorrhaging induced by abortion).

[27] *Reynier v Delta Women's Clinic*, 359 So.2d 733 (La. Ct. App. 1978). "All the medical testimony was to the effect that a perforated uterus was a normal risk, but the statistics given by the experts indicated that it was an infrequent occurrence and it was rare for a major blood vessel to be damaged." *Id.* at 738. Frequent injuries from incomplete abortions in Texas are discussed in *Swate v. Schiffers*, 975 S.W.2d 70, 26 Media L. Rep. 2258 (Tex.App.-San Antonio, 1998) (abortionist unsuccessful claim of libel against journalist for reports based in part upon one disciplinary order that doctor had failed to complete abortions performed on several patients, and that he had failed to repair lacerations which occurred during abortion procedures) *Compare Sherman v. District of Columbia Bd. of Medicine*, 557 A.2d 943 (D.C. 1989) "Dr. Sherman placed his patients' lives at risk by using unsterile instruments in surgical procedures and by intentionally doing incomplete abortions (using septic instruments) to increase his fees by making later surgical procedures necessary. His practices made very serious infections (and perhaps death) virtually certain to occur. Dr. Sherman does not challenge our findings that his misconduct was willful nor that he risked serious infections in his patients for money." *Id.* at 944.

Many minors may ignore or deny the seriousness of post-abortion symptoms or may lack the financial resources to respond to those symptoms.[28] This is because some of the most serious complications are delayed and only detected during the follow-up visit; yet, only about one-third of all abortion patients actually keep their appointments for post-operative checkups.[29] Absent parental notification, hemorrhaging may be mistaken for a heavy period and severe depression as typical teenage angst.

Increased Protection from Sexual Assault

In addition to improving the medical care received by young girls dealing with an unplanned pregnancy, parental notification will provide increased protection against sexual exploitation of minors by adult men. National studies reveal "[a]lmost two thirds of adolescent mothers have partners older than 20 years of age."[30] In a study of over 46,000 pregnancies by school-age girls in California, researchers found that "71%, or over 33,000, were fathered by adult post-high-school men whose mean age was 22.6 years, an average of 5 years older than the mothers. . . . Even among junior high school mothers aged 15 or younger, most births are fathered by adult men 6-7 years their senior. *Men aged 25 or older father more births among California school-age girls than do boys under age 18.*"[31] Other studies have found that most teenage pregnancies are the result of predatory practices by men who are substantially older.[32]

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[28] *Parental Notification of Abortion: Hearings on H. 218 Before the House Comm. on Health and Welfare*, 2001-2002 Legis. Sess. (Vt. 2001) 33 (testimony of "Sue" an anonymous Vermont mother, on March 20, 2001).

[29] *See id.*

[30] American Academy of Pediatrics Committee on Adolescence, *Adolescent Pregnancy – Current Trends and Issues: 1998*, 103 PEDIATRICS 516, 519 (1999), also available on the worldwide web at <http://www.aap.org/policy/re9828.html>. See also Nat'l Ctr. for Health Statistics, *Report to Congress on Out-of-Wedlock Childbearing*, DHHS Pub. No. (PHS) 95-1257 (1995) available at http://www.cdc.gov/nchs/data/misc/wedlock.pdf.

> In fact, data indicate that, among girls 14 or younger when they first had sex, a majority of these first intercourse experiences were nonvoluntary. Evidence also indicates that among unmarried teenage mothers, two-thirds of the fathers are age 20 or older, suggesting that differences in power and status exist between many sexual partners.

Id. at 12.

[31] Mike A. Males, *Adult Involvement in Teenage Childbearing and STD*, LANCET 64 (July 8,1995) (emphasis added).

[32] *Id.* citing HP Boyer and D. Fine, *Sexual Abuse as a Factor in Adolescent Pregnancy and Child Maltreatment*, FAM. PLAN. PERSPECTIVES at 4 (1992); and HP Gershenson, et al. *The Prevalence of Coercive Experience Among Teenage Mothers*, J. INTERPERS. VIOL. 204 (1989). "Younger teenagers are especially vulnerable to coercive and nonconsensual sex. Involuntary sexual activity has been reported in 74% of sexually active girls younger than 14 years and 60% of those younger than 15 years." American Academy of Pediatrics Committee on Adolescence, *Adolescent Pregnancy – Current Trends and Issues: 1998*, 103 PEDIATRICS 516 (1999), also available on the worldwide web at <http://www.aap.org/policy/re9828.html>.

A survey of 1500 unmarried minors having abortions revealed that among minors who reported that neither parent knew of the abortion, 89% said that a boyfriend was involved in deciding or arranging the abortion (and 93% of those 15 and under said that a boyfriend was involved).[33] Further, 76% indicated that a boyfriend helped pay the expenses of the abortion. Clearly, a number of young girls who obtained abortions without their parents' knowledge were encouraged to do so by a sexual partner who could be charged with statutory rape. Secret abortions do nothing to expose these men's wrongful conduct.[34] In fact, by aborting the pregnancy abusive partners avoid the public evidence of their misconduct and are licensed to continue the abuse. Parental notification laws insure that parents have the opportunity to protect their daughters from those who would victimize their daughters further.

Abortion providers are reluctant to report information indicating a minor is the victim of statutory rape.[35] Failure to report may result in the minor returning to an abusive relationship. For example, a Planned Parenthood affiliate in Arizona was found civilly liable for failing to report the fact that the clinic had performed an abortion on a twelve-year-old girl who had been impregnated by her foster brother. The abortion provider did not report the crime as required by law and the girl returned to the foster home where she was raped and impregnated a second time.[36] Or consider the case of the Connecticut ten-year old girl impregnated by a seventy-five year old man. The child was examined by two physicians who failed to report the sexual abuse to public authorities, as required by Connecticut law.[37] Furthermore, by failing to preserve fetal tissue the

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[33] Henshaw & Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 Fam. Plan. Persp.196-213 (1992).

[34] See *Manning v. Hunt*, 119 F.3d 254 (4th Cir. 1997). In disposing of a constitutional challenge to a reporting duty imposed in the North Carolina parental consent statute, the court stated:

> Appellants would have a judge, who is sworn to uphold the law, withhold vital information regarding rape or incest, which would allow state authorities to end the abuse, protect the victim, and punish the abuser. Not only would Appellants' position prevent the judge from helping the victim seeking the abortion, but it would prevent the judge from helping other juveniles in the same household under the same threat of incest. This Court does not believe that the Constitution requires judges be placed in such an untenable position. . . . Appellants' position would instead afford protection to rapists and perpetrators of incest. This can only serve the interests of the criminal, not the child.

Id. at 273-74.

[35] Patricia Donovan, *Caught Between Teens and the Law: Family Planning Programs and Statutory Rape Reporting*, 3 Family Planning Perspectives 5 (1998).

[36] See *Glendale Teen Files Lawsuit Against Planned Parenthood*, THE ARIZONA REPUBLIC, Sept. 2, 2001 and *Judge Rules Against Planned Parenthood* at www.12news.com/headline/PlannedParenthood122602.html

[37] Christine Walsh, *Conn. Doc Set to be Cleared in Abuse Case,* India New England (Jan. 15, 2003) available at http://www.indianewengland.com/news/2003/01/15/Connecticut/Conn-Doc.Set.To.Be.Cleared.In.Abuse.Case-345711.shtml

abortion providers may make effective prosecution of the rape impossible since the defendant's paternity cannot be established through the use of DNA testing.

States adopting parental involvement laws have come to the reasonable conclusion that secret abortions do not advance the best interests of most minor girls.[38] This is particularly reasonable in light of the fact that most teen pregnancies are the result of sexual relations with adult men, and many of these relationships involve criminal conduct. Parental involvement laws insure that parents have the opportunity to protect their daughters from those who would victimize their daughters again and again and again. The Child Custody Protection Act would insure that men cannot deprive these minors of this protection by merely taking the girls across state lines for abortions.

Effectiveness of Judicial Bypass

In those few cases where it is not in the girl's best interest to disclose her pregnancy to her parents, state laws generally provide the pregnant minor the option of seeking a court determination that either involvement of the girl's parent is not in her best interest, or that she is sufficiently mature to make decisions regarding the continuation of her pregnancy. This is a requirement for parental consent laws under existing United States Supreme Court cases, and courts have been quick to overturn laws omitting adequate bypass.[39]

In the past opponents of the Child Custody Protection Act have argued that its passage would endanger teens since parents may be abusive and many teens would seek illegal abortions.[40] This is a phantom fear. Parental involvement laws are on the books in over two-thirds of the states, some for over twenty years, and there is no case where it has been established that these laws led to parental abuse or to self-inflicted injury.[41]

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[38] See *Manning v. Hunt*, 119 F.3d 254 (4th Cir. 1997). In disposing of a constitutional challenge to a reporting duty imposed in the North Carolina parental consent statute, the court stated:

> Appellants would have a judge, who is sworn to uphold the law, withhold vital information regarding rape or incest which would allow state authorities to end the abuse, protect the victim, and punish the abuser. Not only would Appellants' position prevent the judge from helping the victim seeking the abortion, but it would prevent the judge from helping other juveniles in the same household under the same threat of incest. This Court does not believe that the Constitution requires judges be placed in such an untenable position. . . . Appellants' position would instead afford protection to rapists and perpetrators of incest. This can only serve the interests of the criminal, not the child.

Id. at 273-74.

[39] See n. 7 *supra*.

[40] See Donna Leusner, *Parental Notification of Abortion Approved*, The Star-Ledger (June 25, 1999) available online at www.nj.com/page1/ledger/c21e74.html. "They would go to New York. They would go to a back alley. They would do what they have to do to avoid telling their parents. . . . Don't force them to do that," said Sen. Richard C. Codey (D-Essex) who voted no [to passage of the Parental Notification of Abortion Act]. *Id.*

[41] A 1989 memo prepared by the Minnesota Attorney General regarding Minnesota's experience with its parental involvement law states that "after some five years of the statute's operation, the evidence does not

Similarly, there is no evidence that these laws have led to an increase in illegal abortions.[42]

It often asserted that parental involvement laws do not increase the number of parents notified of their daughters' intentions to obtain abortions, since minors will commonly seek judicial bypass of the parental involvement requirement.[43] Assessing the accuracy of this claim is difficult since parental notification or consent laws rarely impose reporting requirements regarding the use of judicial bypass. The Idaho parental consent law enacted in 2000 is one of the few exceptions to this general rule.[44] Based

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disclose a single instance of abuse or forceful obstruction of abortion for any Minnesota minor." Testimony before the Texas House of Representatives on the Massachusetts' experience with its parental consent law revealed a similar absence of unintended, but harmful, consequences. Ms. Jamie Sabino, chair of the Massachusetts Judicial Consent for Minors Lawyer Referral Panel, could identify no case of a Massachusetts' minor being abused or abandoned as a result of the law. *See Hearing on Tex. H.B. 1073 Before the House State Affairs Comm.*, 76th Leg., R.S. 21 (Apr. 19, 1999) (statement by Jamie Sabino, JD).

[42] *See Hearing on Tex. H.B. 1073 Before the House State Affairs Comm.*, 76th Leg., R.S. 21 (Apr. 19, 1999) (statement by Jamie Sabino, J.D. testifying that there had been no increase in the number of illegal abortions in Massachusetts since the enactment of the statute in 1981).

[43] *Statement of Bear Atwood, Public Information director in Opposition to A-CR2*, Public Hearing before N.J. Assembly Judiciary Committee, Oct. 16, 2000, at p. 113x. "Studies show that about the same number of teens involve their parents in their abortion instates that have parental involvement laws and those that don't." *Id.* See also Testimony of Jamie Sabino before the Vermont House of Representatives' Committee on Health & Welfare, February 20, 2001 (reporting no change in the percentage of teens notifying their parents in Massachusetts after enforcement of parental consent law).

[44] 18 Idaho §609A(4). provides:

> (a) The vital statistics unit of the department of health and welfare shall, in addition to other information required pursuant to section 39-261, Idaho Code, require the complete and accurate reporting of information relevant to each abortion performed upon a minor which shall include, at a minimum, the following:
>
> (i) Whether the abortion was performed following the physician's receipt of:
>
> 1. The written informed consent of a parent and the minor; or
> 2. The written informed consent of an emancipated minor for herself; or
> 3. The written informed consent of a minor for herself pursuant to a court order granting the minor the right to self-consent; or
> 4. The written informed consent of a court pursuant to an order which includes a finding that the performance of the abortion, despite the absence of the consent of a parent, is in the best interests of the minor; or
> 5. The professional judgment of the attending physician that the performance of the abortion was immediately necessary due to a medical emergency and there was insufficient time to obtain consent from a parent or a court order.
>
> (ii) If the abortion was performed due to a medical emergency and without consent from a parent or court order, the diagnosis upon which the attending physician determined that the abortion was immediately necessary due to a medical emergency.
>
> (b) The knowing failure of the attending physician to perform any one (1) or more of the acts required under this subsection is grounds for discipline pursuant to section 54-1814(6), Idaho Code, and shall subject the physician to assessment of a civil penalty of one hundred dollars ($100) for each month or portion thereof that each such failure continues, payable to the center for vital statistics and health policy, but such failure shall not constitute a criminal act.

upon the reporting required under that law, less than five percent of the abortions obtained by minors were pursuant to a judicial bypass in 2002. According to the Idaho Department of Health, sixty-four minors were reported as obtaining abortions. Sixty-one of these abortions were performed after obtaining parental consent and three abortions were pursuant to judicial bypass of parental involvement.[45]

Obtaining comparable information in states having parental involvement laws with no mandatory reporting requirement is difficult. State agencies often will not accumulate such information absent a legislative mandate. Nonetheless, it is safe to say that the use of judicial bypass to avoid parental involvement varies significantly among the states. [46]

Conclusion

By passage of the Child Custody Protection Act, Congress will protect the ability of the citizens in each state to determine the proper level of parental involvement in the lives of young girls facing an unplanned pregnancy.

Experience in states having parental involvement laws has shown that, when notified, parents and their daughters unite in a desire to resolve issues surrounding an unplanned pregnancy. If the minor chooses to terminate the pregnancy, parents can assist their daughters in selecting competent abortion providers, and abortion providers may receive more comprehensive medical histories of their patients. In these cases, the minors will more likely be encouraged to obtain post-operative check-ups, and parents will be prepared to respond to any complications that arise.[47]

If the minor chooses to continue her pregnancy, involvement of her parents serves many of the same goals. Parents can provide or help obtain the necessary resources for early and comprehensive prenatal care. They can assist their daughters in evaluating he options of single parenthood, adoption, or early marriage. Perhaps most importantly,

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[45] Idaho Department of Health.

[46] In 2002, 852 girls got abortions in Alabama with a parent's approval and 12 with a judge's approval, according to state health department records. In South Dakota 59 minors obtained abortions with parental consent and 14 with judicial orders bypassing parental involvement. Indiana has few bypass proceedings according to an informal study published as part of a law review article. In Pennsylvania, approximately 13,700 minors obtained abortions from 1994 through 1999. Of these only about seven percent or 1,000 girls bypassed parental involvement via court order.

Texas implemented its Parental Notification Act in 2000. During the state legislative hearings, the Texas Family Planning Council submitted a study indicating that a parent accompanied 69% of minors seeking abortions in Texas. After passage of the Texas Parental Notification Act, well over 90% of all minors seeking an abortion in Texas involve a parent.

[47] Compare the experience recounted in *Testimony of Marie P. Carter*, Public Hearing before N.J. Assembly Judiciary Committee, Oct. 16, 2000, at p. 90x (secret abortion by teen resulting in emotional harm).

they can provide the love and support that is found in the many healthy families of the United States.[48]

Regardless of whether the girl chooses to continue or terminate her pregnancy, parental involvement laws have proven desirable because they afford greater protection for the many girls who are pregnant due to sexual assault. By insuring that parents know of the pregnancy, it becomes much more likely that they will intervene to insure the protection of their daughters from future assaults.

In balancing the minor's right to privacy and her need for parental involvement, the majority of states have determined that parents should know before abortions are preformed on minors. This is a reasonable conclusion and well within the states' police powers. However, the political authority of each state stops at its geographic boundaries. States need the assistance of the federal government to insure that the protection they wish to afford their children is not easily circumvented by strangers taking minors across state lines.

The Child Custody Protection Act has the unique virtue of building upon two of the few points of agreement in the national debate over abortion: the desirability of parental involvement in a minor's decisions about an unplanned pregnancy, and the need to protect the physical health and safety of the pregnant girl. I urge members of this committee to vote for its passage.

Thank you, Mister Chairman, for allowing me the time to appear before the committee and to extend my remarks in the form of this written testimony.

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[48] See *Statement of Marie Sica, Constitutional Amendment ACR-2/SCR86*, Public Hearing before N.J. Assembly Judiciary Committee, Oct. 16, 2000, at p. 16x.

SENATOR JOHN ENSIGN
CHILD CUSTODY PROTECTION ACT
JUNE 3, 2004

Mr. Chairman, I want to thank you for holding this hearing on the Child Custody Protection Act and your leadership on this issue.

I have three young children in school, including a daughter, so I know something about parental consent. My wife and I, like most parents, have to give our written consent for school activities all the time.

In most schools, an underage child can't go on a school field trip without a signed permission slip. An underage child also can't receive mild medication at school, such as aspirin, for the alleviation of pain or discomfort unless a parent signs a release form permitting the school nurse to administer it. In some schools, a child may not take sex education class without parental consent. As we will hear today, nothing, however, prevents this same child from being taken across state lines, in direct disobedience of state laws, for the purpose of undergoing a life-altering abortion.

This bill before us, the Child Custody Protection Act, makes it a federal offense to knowingly transport minor across a state line, with the intent that she obtain an abortion, in circumvention of a state's parental consent or parental notification law. It specifies that neither the minor transported nor her parent may be prosecuted or sued for a violation of this Act.

This legislation does not supercede, override, or in any way alter existing state parental involvement laws. It does not impose any parental notice or consent requirement on any state. The Child Custody Protection Act addresses the interstate transportation of minors in order to circumvent valid, existing state laws and uses the authority of Congress to regulate interstate activity to protect those laws from evasion.

In other words, this bill simply attempts to strengthen the effectiveness of state laws designed to protect children from the health and safety risks associated with abortion. In many cases, only a girl's parents know of her prior psychological and medical history, including allergies to medication and anesthesia. Also, parents are usually the only people who can provide authorization for post-abortion medical procedures or the release of pertinent data from family physicians. When a pregnant girl is taken to have an abortion without her parents' knowledge, none of these precautions can be taken. The harsh reality is that leaving parents uninformed about their underage daughter's abortion may not only be detrimental to the physical and mental health of the child but may, in some instances, be fatal.

Leaving parents uninformed also, as Dr. Collett will discuss in her testimony, deprives young girls of added protection against sexual exploitation by adult men. I did not realize that according to the American Academy of Pediatrics, "[a]lmost two thirds of adolescent mothers have partners older than 20 years of age." Parental notification laws are an important tool to enable parents –

particularly in cases of statutory rape – to protect their daughters from further abuse.

Mr. Chairman, this legislation is a common-sense solution to a dire problem. A minor who is forbidden to drink alcohol, to stay out past a certain hour, or to drive a car in some states is certainly not prepared to make a life-altering, hazardous decision, such as an abortion, without the consultation or consent of at least one parent.

In fact, a poll 2003 CNN/ USA Today Gallup poll found that 73% of those polled favor a law requiring women under 18 to get parental consent for any abortion.

Mr. Chairman, I look forward to working with you, and other members of the Senate, to ensure that underage girls are protected from unscrupulous individuals who want them to make a life-altering decision without parental involvement.

Testimony in Support of the "Child Custody Protection Act"

By Joyce Farley

Good afternoon members of the U.S. Senate Judiciary Subcommittee. My name is Joyce Farley and I am a resident of the state of Pennsylvania. I have been asked by Senator Sessions to come before you today to explain why I support the "Child Custody Protection Act".

Just about this time in 1995 my then 12 year old daughter Crystal was intoxicated and raped by a 19 year old male who she had met after entering the local high school as a 7th grade student. I was aware this male was trying to befriend my daughter and had requested that he not call or come to the house to visit. This male had a reputation of seeking out the 7th grade females to establish relationships for sex and unfortunately Crystal had become one of his victims. This male is currently in prison for a similar rape conviction. Unfortunately many perpetrators have more than one victim. I was at the time and still am a mother working full time away from home. Both parents working full time or single parent families are not unusual in our society and why your support of the "Child Custody Act" is so important. People of our nation need to know that our children are a blessing and that we will protect them from harm. On August 31 1995 I discovered my 13 year old daughter Crystal was missing from home. An investigation by the police, school officials, and myself revealed the possibility that Crystal had been transported out of state for an abortion. I can't begin to tell you the fear that enveloped me not knowing where my daughter was, who she was with, if she was in harms way, and to learn in this manner that my young daughter was pregnant. By early afternoon Crystal was home safe with me but so

much had taken place in that one day. The mother of this 19 year old male had taken Crystal for an abortion in the state of New York. Apparently this woman decided this was the best solution for the situation caused by her son with little regard for the welfare of my daughter. Situations such as this is what the "Child Custody Act" was designed to help prevent. I am a loving responsible parent in whose parenting was interfered with by an adult unknown to me. My child was taken for a medical procedure to a physician and facility that I had no knowledge. When Crystal developed complications from this medical procedure this physician was not available and refused to supply necessary medical records to a physician that was available to provide Crystal the medical care she needed. I ask you to please in considering the "Child Custody Protection Act" to put aside your personal opinions on abortion and to please just consider the safety of the minor children of our nation who's lives are put at risk when taken out of their home state to avoid abortion laws that are designed to protect them from harm. Please don't allow harm to our children in order to protect abortion or any other medical procedure. Please allow loving, caring, responsible parents the freedom to provide the care their adolescent daughters need without interference from criminals or people who may think they are helping but actually cause more harm than good. In many ways time is a great healer but as imperfect human beings we don't always know the effect of our actions or how deep the physical and emotions scars actually dwell. I urge you again to help avoid the scarring of America's adolescent girls by voting in favor of the "Child Custody Protection Act".

Thank you

Statement of
John C. Harrison
Professor of Law
University of Virginia

Committee on the Judiciary
United States Senate

Commerce Clause Issues Associated With S. 851

June 3, 2004

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The Committee has asked that I testify concerning Congress' power to enact S. 851, the Child Custody Protection Act.[1]

The proposed legislation would make it a federal crime knowingly to transport across a state line "an individual who has not attained the age of 18 years . . . with the intent that such individual obtain an abortion, and thereby in fact [to abridge] the right of a parent under a law requiring parental involvement in a minor's abortion decision, in force in the State where the individual resides."

S. 851 is a regulation of commerce among the several States. Commerce, as that term is used in the Constitution, includes travel whether or not that travel is for reasons of business. *E.g.*, *Caminetti* v. *United States*, 242 U.S. 470 (1917). To transport another person across state lines is to engage in commerce among the States. There is thus no need to address the scope of Congress' power to regulate activity that is not, but that affects, commerce among the States, *see, e.g.*, *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Wickard* v. *Filburn*, 317 U.S. 111 (1942); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *United States* v. *Lopez*, 514 U.S. 549 (1995).

Under the Supreme Court's current doctrine, Congress can adopt rules concerning interstate commerce, such as this one, for reasons related primarily to local activity rather than commerce itself. *United States* v. *Darby*, 312 U.S. 100 (1941).[2] Hence even if S. 851 reflected a substantive congressional policy concerning abortion and domestic relations it would be a valid exercise of the commerce power because it is a regulation of interstate commerce.

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[1] This statement is substantially identical to the testimony I provided the Committee on May 20, 1998 with respect to S. 1645 in the 105th Congress.

[2] *Darby* overruled Hammer v. Dagenhart, 247 U.S. 251 (1918), which held unconstitutional a ban on interstate shipment of goods made with child labor. The Court in *Hammer* found that the statute was in excess of the commerce power, even though it regulated only interstate transportation, because its purpose was related to production, which is a local activity.

Even under the more limited view of the commerce power that has prevailed in the past, S. 851 would be within Congress' power. This legislation, unlike the child labor statute at issue in *Hammer* v. *Dagenhart*, does not rest primarily on a congressional policy independent of that of the State that has primary jurisdiction to regulate the subject matter involved. Rather, in legislation like this Congress would be seeking to ensure that the laws of the State primarily concerned, the State in which the minor resides, are complied with. In doing so Congress would be dealing with a problem that arises from the federal union, not making its own decisions concerning local matters such as domestic relations or abortion.

S. 851 in this regard resembles the Webb-Kenyon Act, Act of March 1, 1913, 37 Stat. 699, which dealt with a problem posed by then-current dormant commerce clause doctrine for States with strong prohibition laws. Such States, under *Leisy* v. *Hardin*, 135 U.S. 100 (1890), were limited in their power to regulate liquor that was shipped from out of state. Under the Webb-Kenyon Act, liquor was "deprived of its interstate character" (to use the old terminology) and its introduction into a dry State prohibited. The Court upheld the Webb-Kenyon Act in *Clark Distilling Company* v. *Western Maryland Railway Company and State of West Virginia*, 242 U.S. 311 (1917).[3]

My testimony is concerned with the Commerce Clause, not with the limitations on the regulation of abortion that the Court has found in the Due Process Clauses of the Fifth and Fourteenth Amendments. That focus is appropriate, I think, because S. 851 does not raise any questions concerning the permissible regulation of abortion that are independent of the state laws that it is designed to effectuate. To the extent that a state rule is inconsistent with the Court's doctrine, that rule is ineffective and this bill would not make it effective. Hence it is unnecessary to ask, for example, whether subsection (b)(1) of proposed section 2431 of title 18 would constitute an adequate exception to a rule regulating abortion. Because constitutional limits on

[3] The rule of the Webb-Kenyon Act currently appears in Section 2 of the Twenty-First Amendment.

the States' regulatory authority are in effect incorporated into proposed Section 2431, subsection (b)(1) is in addition to any exceptions required by the Court's doctrine.

This testimony on legal issues associated with S. 851 is provided to the Committee as a public service. It represents my own views and is not presented on behalf of any client or my employer, the University of Virginia.

Statement by Chairman Orrin. G. Hatch
before the Senate Judiciary Committee
Hearing on "The Child Custody Protection Act: Protecting Parents Rights and Children's Lives"
June 3, 2004

I want to thank Senator Sessions for holding this hearing today. I also want to thank Senator Ensign for introducing S. 851, the Child Custody Protection Act, and for appearing today to testify. I am proud to be an original cosponsor of S. 851 and want to express my strong support for this important piece of legislation. Similar legislation was previously introduced in past sessions of Congress but, and I am sad to say, never was signed into law. However, I hope that this Congress we are able to pass this bill which will help protect the health and safety of children while safeguarding the rights and responsibilities of parents.

I want to first thank Crystal Lane for her courage to appear here today, to testify, and to participate in the legislative process. As you hear her traumatic story, remember when this happened, Crystal was a young 13 year old girl—barely a teenager— who was underwent a serious medical procedure, an abortion, without anesthesia, without the comfort of her mother or any other family, and which resulted in serious medical complications that caused her and her family much pain afterwards.

The Child Custody Protection Act is a reasonable and rational approach to fixing a serious problem, like Crystal was exposed to. In most places, a school nurse cannot provide an aspirin to a student for a headache without permission from the parent. Students cannot go on field trips without parental approval. Some report cards need a parent's signature to verify the parent knows how their child is performing academically.

This bill is not addressing something relatively trivial; it is drawing attention to a very serious medical procedure and protecting the health and safety of young girls. States that choose to implement parental notification laws because of their concerns with the well-being and safety of children should have every tool necessary to enforce their own laws.

An abortion is a risky medical procedure, especially for young teenagers. This bill is designed to protect children from the health and safety risks associated with abortion. In many cases, only a young girl's parents know of her prior psychological and medical history, including allergies to medication and anesthesia. Many other medical procedures in this country require the consent of parents before they are performed on a minor. Also, parents are usually the only people who can provide authorization for post-abortion medical procedures or even release important information from family physicians. Given all of these other important medical situations that require parental consent, it is only reasonable and logical to recognize and enforce a States law asking for parental consent or notification for certain abortions.

This bill is a reasonable effort to build upon two basic points with which many agree--despite other longstanding differences. The first is the desirability of parental involvement in a minor's abortion decision, and the other is the need to protect a pregnant minor's physical health.

This bill does not supersede, override, or in any way alter existing State parental consent or notification laws. Nor does this bill require States to implement their own parental involvement laws. The Child Custody Protection Act simply makes it a Federal offense to knowingly transport a female minor across a state line, with the intent that she obtain an abortion, in circumvention of State laws requiring parental consent or notification.

This legislation, I would emphasize, is not a Federal parental involvement law; it merely ensures that State laws are not evaded through interstate activity. The Federal Government is not trying to tell the States how they must act and when, and this bill is not forcing parents to be good parents. This legislation strengthens the effectiveness of State laws, which is where the issue is best addressed and enforced. If we fail to pass this bill, we would be choosing to ignore the legitimacy and constitutionality of States to create and pass laws that specifically address the needs and desires of its citizens, especially when it comes to the health and safety of children.

We all know how contentious the issue of abortion can get around here, and across the country. But this matter is not even about abortion. This bill is simply about protecting the health and safety of minor children and the rights that their own States have concluded their parents should have.

I welcome and thank all of our witnesses for their appearance here today.

The Child Custody Protection Act

Crystal Lane's Testimony

Hi, my name is Crystal Lane and I'm here today to tell you why I think the "Child Custody Protection Act" should be passed and made part of our national laws. I believe in this Bill and hope my message will make those present here today believers as well.

When I was 13 years old I was taken across the Pennsylvania state line to New York for an abortion. The woman that took me was in her mid forties. I was so young and immature in many ways. I trusted this woman because she was older and I was so scared I didn't know what to do. I really think I could've lost my life at the abortion clinic. I was awake through the entire time and asked them to stop but no one listened to me. I think all the time about how things would have been different if my Mom was with me or if I had told her I was pregnant. I would have been taken care of with love rather than how I was treated. After the abortion things started to go wrong right away and just kept getting worse until my Mom took me to our family doctor and on to the hospital. Since the first abortion I had was incomplete, the procedure needed to be repeated. Going through all this was the most terrifying time of my life.

I am pleading to everyone here today to please take my story to heart and mind when considering the "Child Custody Protection Act". I believe the passing of this Bill will protect the children of our nation from even more horrible things then what happened to me when I was only 13 years old. I am really nervous about coming here today but I realize how important this Bill is and the good that it can bring to the people of this nation. Thank you all for taking the time to listen to me today. I hope you find it in your hearts to do the right thing!

Statement of Senator Edward M. Kennedy
on the Child Custody Protection Act
Senate Judiciary Committee
June 3, 2004

The bill considered today raises serious questions about the principles of federalism and a woman's right to choose. It also raises the very real possibility of increasing the health risks of abortion for young women.

This bill would create a broad new criminal and civil liability for anyone other than a parent – including a grandparent, aunt, adult sibling or religious counselor – who accompanies a young woman across state lines to receive abortion services if the home state's parental-involvement law has not been met.

In the past, supporters of such legislation claimed that one of its primary goals was to support the enforcement of state law. But the law is likely to have the opposite effect by extending restrictive state laws into states that have refused to adopt such laws themselves. As a result, a state law requiring parental involvement would have to be applied by states that allow notification to family members other than a parent and to states that do not require any notice.

The bill also imposes an undue burden on a woman's constitutionally protected right to choose. Young women who are reluctant to tell their parents about an unwanted pregnancy – whether because they are victims of familial abuse or incest, because they lack a relationship of trust with their parents, or even because they fear they have let their parents down – will be forced to "go it alone" in seeking an abortion in a nearby state. Some young women may turn to "back alley" abortions, rather than seek professional assistance in a neighboring state. In other cases, the bill would force young women who seek to comply with the law to abide by parental notification proceedings in two states – her home state and the state where she seeks an abortion – without the help of an adult.

The bill is so broad that it could also impose significant unwarranted burdens on health providers. A provider in a state without a parental involvement statute could be required to enforce another state's parental involvement law before providing abortion services for a minor from out of state, even though the procedure is fully legal in the provider's state and protected by the Constitution.

Denying a young woman a legal abortion does not mean she will decide not to end her pregnancy. She may choose to do it illegally, facing serious health risks, or even losing her life as a result of regulations put in place by a law supposedly created to "protect" her.

These major problems are not outweighed by any pressing need for this legislation. To the extent that supporters of the bill fear young women may be taken across state lines to obtain an abortion against their will, laws already protect against such a problem. Kidnapping is illegal in every state, and patients must give informed consent before undergoing medical procedures. The bill we are considering today is both unnecessary and unwise.

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
Hearing on the Child Custody Protection Act
June 3, 2004

The hearing today on the Child Custody Protection Act raises very challenging issues for us as lawmakers. The matters involved are deeply personal and strike at the heart of any parent. I unequivocally support the goal of fostering closer familial relationships and the value of encouraging parental involvement in a child's decision about how to respond to an unplanned pregnancy. I believe, however, that States should continue to maintain their historically dominant role in developing and implementing policies that affect family matters, such as marriage, divorce, child custody and policies on parental involvement in minors' abortion decisions. That is the nature of our federal system, in which the States may, within the common bounds of our Constitution, resolve issues consistent with the particular mores or practices of the individual State. We must honor and protect this system. Federal laws cannot and should not attempt to dictate the nature of family relationships.

In my view, this bill significantly undermines important federalism principles that we have respected, at least since the Civil War. In addition, while I know as a father that most parents hope their children would turn to them in times of crisis, no law will make that happen. No law will force a young pregnant woman to talk to her parents when she is too frightened or too embarrassed to do so. This bill will not encourage a young woman to involve her parents in a decision to have an abortion. It does not increase the perception of choices for such young women. Rather it is likely to drive young women who are afraid to seek help from their families away from their families and greatly increase the dangers they face from an unwanted pregnancy. For these reasons, I oppose this bill.

Only 25 States have adopted parental consent or notification laws that are currently enforced and meet the bill's definition of a "law requiring parental involvement in a minor's abortion decision." Thus, the remaining States either have opted for no such law, or are enforcing a law that allows for the involvement of adults other than a parent or guardian in the minor's abortion decision. The direct consequence of this bill would be to federalize the reach of the most strict parental involvement laws, overriding the policies in the remaining States in this country.

That the bill does not expressly establish a federal parental consent requirement is a mere fig leaf which cannot hide its anti-federalism effect. The bill would use the power and resources of the Federal Government to force select States' parental involvement laws

into effect in all other States. Furthermore, it would create a federal crime as a mechanism for such federal intervention.

I can think of only one other instance in which the Federal Government applied its resources to enforce one State's policy, absent a State judgment or charge, against the residents of that State even when the resident found refuge in another State. I refer to the fugitive slave laws before the Civil War. None of us — and certainly not the sponsors of this legislation — would ever condone slavery. Yet unfortunately, that is the only legislative precedent we have for a bill that would use federal law to enforce a particular State's laws against people wherever those people may travel.

The Thirteenth Amendment to the Constitution outlawed slavery and repealed article IV, section 2, paragraph 3 of the Constitution, which authorized return of runaway slaves to their owners. That authority and the implementing laws enacted by Congress, such as the Fugitive Slave Act of 1793, enabled slave owners to reclaim slaves who managed to escape to free States or territories.

In fact, the notorious Dred Scott decision relied on this since-repealed constitutional provision to decide that slaves were not citizens of the United States entitled to the privileges and immunities granted to the white citizens of each State. This is why Dred Scott, born a slave, was deemed by the Supreme Court to continue to be a slave, even when he traveled to a "free" territory that prohibited slavery.

In 1858, Abraham Lincoln, who was at the time running for the U.S. Senate, criticized the Dred Scott decision, "because it tends to nationalize slavery." Indeed, the dissenting opinion in Dred Scott, made plain that "the principle laid down [in the opinion] will enable the people of a slave state to introduce slavery into a free State ... and by returning the slave to the State whence he was brought, by force or otherwise, the status of slavery attaches, and protects the rights of the master, and defies the sovereignty of the free State."

And so too with S. 851, which tends to nationalize select State laws, even in those States that have declined to adopt such strict policies. Fugitive slave laws are no model to emulate with respect to our daughters and granddaughters.

Make no mistake: Despite the sponsors' contention that this bill does not attempt to regulate any purely intrastate activities related to the procurement of abortion services, the effect of this bill would be to impose the policies of certain States on the residents of the remaining ones.

Just because some in Congress may prefer the policies of certain States over those in the others does not mean we should give those policies federal enforcement authority across the nation. Doing so sets a dangerous precedent.

What about State laws governing the sale of fireworks? Vermont bars the sale of all kinds of consumer fireworks, including Roman candles and sky rockets. These fireworks

are perfectly legal in other States, including next-door New Hampshire. What would we think about making it a federal crime for a Vermonter to go to New Hampshire to buy consumer fireworks because they are illegal in Vermont? I believe we would view such a law -- even if it were constitutional and even if it would promote the "safer" State fireworks law — as overreaching in the exercise of our federal power.

Should residents of States that prohibit gambling not be able to travel to Las Vegas or Atlantic City or the many other places that now allow it?

It is the nature of our Federal system that when residents of a State travel to neighboring States or across the nation, they must conform their behavior to the laws of the States they visit. When residents of each State are forced to carry with them only the laws of their own State, they may be advantaged or disadvantaged but one thing is clear: We will have turned our federal system on its ear.

In this way, the bill imposes significant new burdens on a woman's right to choose and impinges on the right to travel and the privileges and immunities due under the Constitution to every citizen. Peter J. Rubin of Georgetown University Law Center, whose testimony I welcome today, and Laurence H. Tribe of Harvard Law School, have argued that the bill violates both "the rights of states to enact and enforce their own laws governing conduct within their territorial boundaries, and the rights of the residents of each of the United States ... to travel to and from any state of the Union for lawful purposes, a right strongly reaffirmed by the Supreme Court." These leading constitutional scholars contend that the bill as drafted is unconstitutional.

Given Tuesday's ruling by a Federal judge that the partial birth abortion ban is an unconstitutional burden on a woman's right to seek an abortion do we really want the Congress to pass another bill of suspect constitutional validity? And, given the highly intrusive practices of the Department of Justice in seeking to obtain women's private medical records in litigating the challenges to the partial birth law, do we want to encourage the Federal prosecutors to investigate decisions made by young women with the counsel of friends, relatives, and clergy?

This bill would sweep into its criminal and civil liability reach extended family members, including grandparents or aunts and uncles, who respond to a cry for help from a young relative by helping her travel across State lines to obtain an abortion, without telling her parents as required by the laws of her home State. In addition to close family members, any other person to whom a young pregnant woman may turn for help, including health care providers and religious counselors, could be dragged into court on criminal charges or in a civil suit. Rev. Doctor Katherine Hancock Ragsdale, who is with us today, once helped a stranger, a 15-year-old girl seeking an abortion in Massachusetts. The girl feared for her safety if her father learned of her pregnancy and had no relative to turn to for help. She was alone and desperate. Should such conduct have subjected Rev. Ragsdale to federal prosecution?

The purported goal of this bill, to foster closer familial relationships, will not be served by threatening to throw into jail any grandmother or aunt or sibling who helps a young relative travel out of State to obtain an abortion without telling her parents, as required by her home State law. The result of this bill will be to discourage young women from turning to a trusted adult for advice and assistance. Instead, these young women may be forced then into the hands of strangers or into isolation.

Keep in mind what this bill does not do. It does not prohibit pregnant minors from traveling across State lines to have an abortion, even if their purpose is to avoid telling their parents as required by their home State law. Thus, this bill will urge more young women to travel alone to obtain abortions or to seek illegal "back alley" abortions locally. How can anyone view these outcomes as desirable? Young pregnant women who seek the counsel and involvement of close family members when they cannot confide in their parents — for example, where a parent has committed incest or there is a history of child abuse — would subject those same close relatives to the risk of criminal prosecution and civil suit, if the young woman subsequently travels across State lines for an abortion.

No law will force a young pregnant woman to involve her parents in her abortion decision if she is determined to keep that fact secret from her parents. Indeed, according to the American Academy of Pediatrics, the percentages of minors who inform parents about their intent to have abortions are essentially the same in States with and without notification laws. Yet while doing nothing to achieve the goal of protecting parental rights to be involved in the actions of their minor children, S.851 would isolate young pregnant women, forcing them to run away from home or pushing them to seek protection from strangers at a time of crisis. And while doing nothing to foster familial relationships, this bill would do serious damage to important federalism and constitutional principles.

I thank the witnesses for appearing today, and ask unanimous consent to insert into the hearing record a letter from a number of groups that are opposed to S.851, and written submissions from the Center for Reproductive Rights and the American Civil Liberties Union.

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Written Testimony of

Diana Philip

June 3, 2004

For consideration by members of the Senate Judiciary Committee
S.851, the "Child Custody Protection Act"

My name is Diana Philip and I have served as a legal advocate in non-profit organizations for the last 15 years covering issues of domestic violence, sexual assault, civil liberties and reproductive rights. I have worked on behalf of those who have been wary to access legal services in search of safety, freedom and autonomy. I have witnessed how well a legal system can respond to victims of crime or to the disenfranchised. I have also witnessed how the system can fail and the negative aftermath for those denied the legal relief they so desperately sought.

In the last few years, I have become immersed in the realities regarding the legal rights of pregnant minors by creating a statewide response to the Texas state parental notification law enacted January 2000. I am the co-founder of a non-profit organization called Jane's DUE PROCESS and currently serve as its executive director. The agency offers accurate information on how to comply with the state parental notification law for abortion services and free legal representation to engage in the judicial bypass option. This organization is dedicated to offering legal relief to minors seeking to comply with the law and not circumvent it. It is for this reason that I submit this testimony as an individual, and not on behalf of Jane's Due Process. As an agency, Jane's DUE PROCESS (JDP) does not assist minors in circumventing state law; however, as an individual, I am aware of reasons why a pregnant minor may choose to not engage in judicial bypass or to seek abortion services outside of her home state.

Before the passage of the state parental notification law, Texas abortion providers reported that 80-95% of minors had a parent involved in the decision to terminate a pregnancy. The ones that did not have a parent involved had compelling reasons. Parents had abandoned or disowned their children or created a dysfunctional home environment from which teenagers fled in search of safety or stability. The same percentages apply today. If at least one parent cannot be notified by the clinic, minors are able to receive judicial bypass waivers by demonstrating those same compelling reasons but only in those areas of the state that allow confidentiality, fair hearings and due process. Now each of these abortion procedures is delayed when a minor participates in the legal process, increasing the costs, and at times, the risks of complication in terminating a pregnancy at a more progressed stage.

Since January 1, 2000, Texas law requires that when a minor chooses to obtain an abortion, the physician shall notify a parent or legal guardian at least 48 hours before the procedure. For abused or orphaned teenagers, parental involvement regarding such a decision is not a safe or feasible option. The Texas Legislature included a judicial bypass option for a minor, known as "Jane Doe," to petition for the parental notification by the physician to be waived. A judge has the authority to grant a waiver when a minor demonstrates:

- that she is mature and well-informed to make such a decision,
- that notification of a parent or legal guardian would not be in her best interest and/or
- that notification could lead to physical, sexual or emotional abuse of her.

However, when the law went into effect, questions were raised regarding access to the judicial bypass process and fair application of the law. Advocates grew concerned that most

Texas teenagers did not know they had the right to legally bypass notification. Family planning clinics knew little about referring minor patients to attorneys able to provide effective counsel in this issue, particularly in local legal systems where court personnel had little interest in following the law or maintaining confidentiality. Attorneys wanting to assist these minors had no training or support system to aid their work, especially through the appellate process.

In response to these concerns, the JDP 24-hour toll-free hotline,' website, and statewide lawyer referral programs were launched in January 2001. During its first year, over 1,000 hotline calls were received from pregnant minors and their partners, friends, relatives, counselors, and teachers, as well as from legal and medical professionals about how to comply with the new law. In JDP's second year, patient advocacy services were added to better assist minors in participating in medical and legal appointments by providing transportation, childcare, over-night accommodation and financial assistance for pre-court sonograms and pregnancy options counseling. In response to an increase of inquiries from minors who did not wish to end their unexpected pregnancies, research was conducted during its third year on how to assist minors seeking legal relief in order to continue their pregnancies while facing potential abuse and/or abandonment. Now in its fourth year, JDP has expanded its services to include information and referrals for pregnant minors seeking protective orders, emancipation actions and Title IX public school discrimination claims in order to become a true pro-choice organization.

I want you to become familiar with the population of pregnant minors that have contacted Jane's DUE PROCESS through its hotline seeking abortion services. At this writing, approximately 5,400 hotline calls have been received in the last three and half years and over 1,450 minors have been screened for legal services. These "Jane Does" have much in common with one another, although they span the socio-economic scale and vary racially and geographically. The vast majority are adamant that they want to be parents one day. All want to be in a better or more mature position in their lives to be good parents and productive adults. They fear the consequences of allowing a parent or legal guardian the power to decide that an unintended pregnancy of a minor daughter should continue against the minor's better judgment. Advocates for pregnant minors in Texas still marvel at the irony that those behind the parental notification law believe that minors are always too immature to make the decision to terminate a pregnancy without a parent being involved, yet are mature enough to become adolescent parents, whether or not the parents will be supportive of daughter's baby.

The majority of pregnant minors contacting JDP report that they are 17 years old, approximately 56%, with one-fourth within two months of their 18th birthdays. In Texas, 17 year-olds may legally consent to sexual contact, stand trial as adults and no longer be reported as runaways, yet they cannot consent to an abortion without parental notification. The majority of Jane Does are often the most insightful and mature members of their families. They understand that a family that is unable to communicate on a daily basis due to a significant degree of dysfunction, separation and/or abuse is less likely to act appropriately while in crisis. A little less than one third of the pregnant minors who contact the hotline are 16 years old, while only 10% are 15 years of age.

When Jane Does are not the most mature among their peers, they are most often the victims of an abusive family and have more to fear when faced with the possibility of a judicial bypass waiver being denied. One out of four minors contacting the JDP hotline report having experienced physical abuse by a parent or legal guardian. Some report fear that the domestic violence will extend to other family members due to a parent's rage over the news of an unexpected pregnancy of the minor daughter. Thirty-seven percent of these pregnant minors report having been threatened by a parent or legal guardian with bring kicked out of the home for being pregnant through actual warnings or witnessing it happen to other household members. Twenty-seven percent report the high probability that family members will pressure or force them to continue an unintended pregnancy if notification occurs. Those that have been victims of sexual assault discuss how they fear their parents will not ever believe they were raped and will force them to continue the pregnancy as a punishment for "youthful indiscretion" or due to certain religious beliefs.

Forty-four percent are of Anglo descent, 32% of Hispanic ethnicity, while 16% are from African or Caribbean heritage. The majority of those minors who are not of Anglo descent are first-generation American or immigrants themselves. They speak of the disgrace and sometimes ostracism of other relatives who experience unintended pregnancies, the cultural differences that can lead to physical abuse by parents in responding to average adolescent behavior and the economic struggles in adequately supporting their immigrant families let alone another unexpected child.

Depending on which study one reads, it appears that Texas is ranked among the top three states with the highest ratios in teen pregnancies, teen births and subsequent teen births. One-fourth of minors contacting the JDP hotline have experienced a prior pregnancy. These Jane Does are among the most confused when trying to comprehend legal rights regarding teen pregnancy. Texas law requires no parental involvement of a minor who seeks medical services regarding her pregnancy, be it a pregnancy test, sonogram, amniocenteses, fetal surgery, or C-section delivery, but mandates a parent or legal guardian to be notified at least 48 hours before an abortion is performed.

Fourteen percent of the pregnant minors contacting JDP are active teen parents. Since parenting minors are not considered emancipated under Texas law, they too are required to have a parent or legal guardian notified or have that notification waived by a judge. They are among the most frightened in having a parent forced to be involved in a subsequent pregnancy due to threats of abuse, homelessness and abandonment with a repeat pregnancy. Some talk about how their parents stopped them from ending their first pregnancies and how they fear their parents having that type of power over them again. Other minors who had parents that forced them to give up babies up for adoption are still devastated by their parents' actions and are very reluctant in seeking future parental involvement in pregnancy decisions.

It is also important to note that over one-third of the Jane Does report no longer living with a parent or legal guardian. Fourteen percent are living with relatives who were never established as legal guardians, primarily due to lack of financial resources to secure a lawyer for representation. The majority of the others live alone, with friends or their boyfriends. Some reside in emergency shelters or juvenile detention centers. If there is enough information to contact at least one parent, they will comply with the law by providing that

information to the clinic to make the contact. Thirty-five percent have no feasible way to contact at least one parent due to that parent being missing, incarcerated or deceased. Twelve percent are orphans or defacto orphans as both parents are missing, incarcerated or deceased. Minors unable to contact either parent are not exempt from the parental notification law in Texas and must seek judicial bypass. Although the majority of those not residing with a parent or legal guardian are being cared for by other family members or relatives, there is no alternative consent provision in the statute to address this population of minors.

The founding mission of JDP was to serve pregnant minors who sought assistance in complying with the Texas parental notification law to receive abortion services. The issue of concern was, and still is, the ability for a minor to receive a fair hearing should she choose to ask a judge to grant a waiver to bypass the physician's legal obligation to notify a parent or legal guardian. To aid minors in successfully seeking this legal relief, JDP has trained lawyers statewide to be on-call and represent these teens pro bono in order to ensure due process in each case presented in court. To help minors learn more about their pregnancy options and receive sonograms to verify the stage of pregnancy, JDP has identified allies among family planning clinics willing to effectively assist minors in considering all their choices before making a solid decision regarding an unintended pregnancy. To inform as many minors as possible about the judicial bypass option, JDP actively seeks outreach opportunities with social service and crisis intervention agencies. Unfortunately, pregnant minors still experience barriers placed by adults in learning more about their legal rights and being encouraged to exercise them.

Although it has been over four years since the law was enacted, minors seeking judicial bypass still experience bias from local court personnel, and attorneys struggle with due process issues while encouraging fair application of the law. Some teenagers have been turned away from the district and county clerks, told to seek hearings elsewhere or just simply were refused to the right to submit applications for judicial bypass hearings. Some judges have decided not to honor the open venue measure allowed in the statute, blocking minors from other counties from applying for legal relief. Confidentiality measures have been questionable, especially in smaller counties, and the ability to apply for a waiver outside one's home county may be necessary when the minor knows those who work in the local courthouse. In at least one instance, a judge demanded to know the name of the Jane Doe. In another case, court personnel were allowed to remain present in what is supposed to be a confidential setting. Through body language and facial expressions they intimidated the minor during her testimony. Confidentiality is such an issue in these cases, that a judge once bought a laminating machine to seal the records shut after each judicial bypass hearing before sending it down for the clerk to file.

Some judges have been known to have personal practices to make the "Jane Does" cry during testimony before granting waivers. Rulings have been delayed by judges who require the minor to continue a hearing so she may visit a psychologist, clergyman or a different kind of family planning clinic before ruling in her case. Judges have been known to appoint anti-choice guardian ad litems to harshly confront minors with inappropriate inquires and comments. If minors fail to respond or have a "wrong" answer, they are deemed "immature" or "poorly informed about pregnancy options". Some guardians ad litem have been reported as saying that instead of representing the "best interests of the minor", they

represent "the fetus" or "the absent parents" from the judicial bypass process. Teens seeking waivers while in their second trimester or who admit to prior pregnancies have been known to face more bias and have their waivers denied even after strongly proving their grounds.

Along with the barriers in seeking fair access and due process, minors also find inaccurate information about the existence of judicial bypass. Social service agencies, crisis intervention hotlines and family planning clinics do not always give complete information to minors about the state parental notification law and the judicial bypass option. This may be due to bias against abortion as a pregnancy option or discomfort with the idea of a minor having an abortion without parental knowledge.

Since there are few abortion providers in Texas (only 15 out of 254 counties have abortion clinics), there is a concern that some minors feel they have no choice due simply to the lack of actual access to abortion services. To make matters more difficult, some family planning clinics are wary of serving minor patients without parental permission. This means that there are fewer clinics accessible to teenagers that will work with minors who wish to notify a parent or obtain a judicial bypass waiver. Denial of safe and legal health care services may force a minor to make unhealthy choices. Minor patients have been known to delay seeking abortion services until in their second trimester after receiving false information earlier in their pregnancies about the state parental notification law.

Another barrier for minors trying to access health care and legal assistance involves the trouble brought about by missing school. Students continually face the consequences of skipping classes to make clinic appointments, meet with attorneys and guardians ad litem or attend court hearings. School policies and practices vary and students themselves are unsure of how closely administrators enforce rules, such as contacting a parent about a student's absence, excused or not. JDP attorneys frequently air their concerns about how the judicial bypass process undermines student's academic success and about the types of strategies a minor has to employ to not tip off teachers, nurses and counselors who would not agree with the decision to terminate a pregnancy. Eighty-five percent of these minors are attending high school, being home schooled or obtaining their GEDs. Eight percent are high school graduates (most of which are in college), while 6% are drop-outs. Those minors who work have the added burden of not getting in trouble with their employers or risk losing the income they need to pay for the medical services they seek. Over one third of pregnant minors contacting the hotline report both working and attending school.

What happens after pregnant minors contact the JDP hotline? These are the best estimates:

- 43% seek judicial bypass with the assistance of a JDP lawyer or through an established court appointed system referred by JDP that is known to be appropriate in its expediency and confidentiality.
- 27% of pregnant teens who contact the hotline indicate that they intend to have a parent notified upon completion of our screening process. The majority of these teens had been given misinformation that the law was parental consent or had not been told how notification by an abortion clinic is actually handled.
- The remaining 5% of callers are able to obtain emergency contraception, experience miscarriages or choose to continue their pregnancies after speaking to hotline staff.

- It is unknown the actions of 25% of the pregnant teens advised to seek pregnancy options counseling

I have heard of many scenarios that lead me to believe that a minor would seriously consider seeking abortion services out of state rather than comply with a state's parental involvement law. For example, I remember in the summer of 2001 receiving hotline calls from pregnant minors in Oklahoma, looking for information about receiving abortions in Texas. Oklahoma had just passed a vague law concerning the liability issues a physician would face performing an abortion on a minor without parental knowledge or consent (this statute since has been successfully challenged on constitutional grounds). The few number of abortion clinics resorted to parental consent polices. Since there was no legal remedy to allow minors to bypass the new state law, Oklahoma teens were seeking services in surrounding states. The stories ranged from minors whose parents refused to walk into an abortion clinic to give consent, to those whose parents would harm them for seeking to end an unintended pregnancy if forced to have knowledge of the pregnancy decision.

One situation in Oklahoma involved a Native American minor who was thrown out of her home by her adopted parents when she told them she was pregnant. A family friend found that the teenager was being forced to sleep in the backyard and that her parents intended to disown her completely. When the minor decided to seek abortion services, her parents refused to go to the clinic to give their consent. Although they were not interested in stopping her from getting the abortion, they certainly had no intention to help her either. The family friend call the JDP hotline and requested information about how the minor could seek services in Texas, since notification of a parent was an option since both parents were already aware of her intention. If the minor could get transportation to Texas, she could have a parent notified by phone or by letter, since it could not be done in person. I have no idea if that minor was able to access abortion services in Texas or another state.

Another situation from Oklahoma came from a minor in foster care. Her foster mother became excited by the news that the minor was pregnant and made the decision for the teen that she would continue the pregnancy and give any baby over to her son and his wife who were having difficulty conceiving. Obviously the foster mother had no interest in giving consent to the minor's abortion. The minor's older sister contacted the JDP hotline wanting to know how her younger sister could possibly still have an abortion without the foster mother's involvement and was willing to transport the minor to any clinic in any state that would be willing to help her.

Lack of access to abortion clinics is another reason why a minor may seek services out of state. Due to the limited number of clinics in such a large state, some must travel many hours to receive these medical services. If a border state has facilities that are closer to the residence of the minor, she may choose to seek services there and abide by that state's parental involvement law. A relative or friend may try to assist her with transportation. For instance, a minor who lived with her disabled mother 45 minutes from the Louisiana state line thought it was best for her aunt to drive her to one of the clinics there. The decision to end the pregnancy was made with the support of her family. The closest clinic to her in Texas had a parental consent policy and was located 3 hours away. Her mother could not physically go to the clinic and give consent. There was no need for the minor to go through

a judicial bypass hearing, since the same clinic does not honor judicial bypass waivers. She would have had to travel 5 hours to the closest clinic that would do notification by telephone to her mother, but the aunt was her only means of transportation and could not take significant time off from work nor afford the travel involved in such a lengthy trip.

Confidentiality is a prime reason for minors who fear that no matter what guarantees are being made in the court house, if a parent works in the local legal system or is well known in the political community, she may find that the decision can only remain private if she leaves the state to seek services. One minor who contacted us decided to seek services out of state as her step-father was a prominent figure in law enforcement and she knew that no matter where she traveled in Texas, he would have ways of finding out where she went missing for a day to participate in a court hearing during school hours. She chose to travel out of state on a Saturday with friends because not only did she fear that he would become abusive with her mother for the minor's pregnancy if her mother was to be notified of her decision (heavy domestic violence issues), but that she did not wish to embarrass her family if the news came out to the community in any way. Although the statute clearly defines that judicial bypass cases are to be kept confidential as set out in the U.S. Supreme Court ruling *Bellotti v. Baird (*1979), folks in Texas know that next to junior high schools, courthouses are the worse gossip mills you are going to find and that not a lot escapes a law enforcement man in search of a trouble making step-daughter.

Another reason why minors would seek services out of state is when access to the judicial bypass process is denied. Despite the efforts of an organization like JDP, actors in the legal system who are uncomfortable with the parental notification statute find creative ways for non-compliance. One court appointed lawyer told his client two weeks after he filed her application for judicial bypass that he wasn't really interested in representing her so she just need to call the judge and see what she was supposed to do next. (A hearing and decision is to be made no later than 5:00 p.m. of the second business day after an application is filed or the waiver is deemed granted.) Thinking that it was this way everywhere in Texas, the minor called the hotline to see where she could go out of state to get the medical services for which she could not seem to get an order. It would not surprise me to learn that others have sought services out of state for the same reason.

I am also hearing more stories about judicial activism. One particular judge on at least one occasion threatened to rescind a waiver to be granted until the minor met with an anti-choice counselor, who in the meeting arranged by the judge demanded to know the minor's name and her parent's contact information. The minor indicated to me that she had not chosen to provide that information, and felt she had no choice but to leave the state. If a minor is intent on not becoming a parent, it is reasonable for her to consider seeking abortion services out of state when she feels that she is being denied such services in her home state with failed attempts to comply with her home state's law.

Another instance in which a minor would seek services outside her home state is when the waiver is denied. In our first year of services, we had a case in which a 14 year-old being raised by her grandmother was seeking a judicial bypass. Her mother had been murdered the year before and her father was missing. The grandmother was doing the best she could in raising the young teen, but the youth was acting out and had been taken advantage of by a 20 year-old man. The minor was too afraid to tell her grandmother that had she had gotten

pregnant and delayed telling her until she was in her second trimester. During the hearing, the judge stayed fixated on the issue that the minor was in a more progressed stage of pregnancy and made inappropriate statements regarding how the minor was "taking a life" and "stopping a beating heart". The waiver was denied. When the attorney tried to discuss with the grandmother the notion of appealing, the grandmother cut him off and said that she would "just handle it somehow". I have no idea what she did to help her granddaughter. Grandmother and granddaughter disappeared and were not heard from again.

Texas also has a new obstacle for minors seeking abortion services in their home state: HB15. This law was enacted January 2004 and stipulates that abortion procedures performed post 15.9 weeks can only be done in ambulatory surgical centers. At the time of the bill's passage, not one of the 36 licensed abortion clinics was assessed as an ambulatory surgical center and at this writing not one clinic has been able to renovate its existing structure to be deemed such. Clinics are now forced to refer adult and minor patients out of state, delaying the second trimester procedure further and creating an additional financial burden by adding significant costs in transportation.

Of the 25% in which we have no indication of how the pregnant minor chose to deal with her unintended pregnancy after contacting JDP, I have no idea the number that choose to seek services out of state. I know that those minors considering such an option had supportive friends and relatives that were willing to transport them to any clinic they needed to follow through with their pregnancy choice. I can understand why minors are so reluctant to trust other adults to help them comply with the state law. They must hear stories from other teens who have had a parent notified about an abortion and met with harmful consequences or attempted to access the judicial bypass process and were treated with disrespect or insensitivity.

It is my opinion, any measure that mandates that a minor seek to comply with her home state parental involvement law before seeking services out of state will add significant delay in receiving these medical services. It is also my opinion that no adult should be punished for transporting a minor across state lines to seek this particular type of safe and legal medical procedure. I have spoken with minors who are too frightened to comply with the state parental notification law. They inquire about methods to self-abort such as drinking bottles of bleach or vinegar, buying illegal drugs off the street or seeking illegal abortions in Mexico. Even when we offer extensive support, some are still too afraid and decline to use our services. This generation of young women, 30 years after abortion has been recognized as a constitutional right, need not be placed in harm's way by creating further obstacles. They have enough to contend with as it is.

Statistics regarding Jane Does screened for JDP services (1/22/01- 5/31/04 representing 1462 minors)

- 56% are 17 years old, 26% of which report being within two months of their 18th birthdays
- 30% are 16 years old
- 10% are 15 years old
- 44% are of Anglo descent
- 32% are of Hispanic descent
- 16% are of African or Caribbean descent
- 85% are attending high school, being home schooled or getting their GEDS
- 8% are high school graduates, while 6% are high school drop outs
- 40% are employed
- 35% are working and attending school
- 14% are already mothers supporting at least one child
- 24% have had at least one prior pregnancy
- 7 weeks is the average stage of pregnancy reported at the time of the first call
- 65% have yet to confirm the stage of pregnancy by a clinic
- 25% are fast approaching or already in their second trimester at first contact
- 3 days to 4 weeks is the range of time a minor prepares and participates in the judicial bypass process depending on the number of barriers to navigate
- 25% report having experienced physical abuse by a parent or legal guardian
- 37% report having been threatened by a parent or legal guardian to be kicked out of the home for being pregnant or already have been kicked out
- 27% report the high probability that family members will force or pressure them to continue an unintended pregnancy
- 35% of the minors do not live with a parent or legal guardian
- 35% report not knowing how to contact at least one parent because she or he is missing, deceased or incarcerated.
- 12% report being unable to contact either parent

- 28% of minors contacting the hotline indicate the intention to notify a parent or legal guardian of an abortion decision at the end of the screening process
- 16% report birth control failure, 48% report condom failure
- 25% report knowing about parental notification law prior to pregnancy
- 17% report knowing about parental notification law due to experience with prior pregnancy

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Testimony Presented by

The Rev. Doctor Katherine Hancock Ragsdale
Episcopal Priest

On behalf of NARAL Pro-Choice America and
the Religious Coalition for Reproductive Choice

Before the Committee on the Judiciary,
U.S. Senate
June 3, 2004

S.851, the Child Custody Protection Act

Ladies and gentlemen of the Committee, thank you for the invitation to speak with you this afternoon. My name is Katherine Hancock Ragsdale. I am an Episcopal priest and former chair of the board of the Religious Coalition for Reproductive Choice, the 31-year-old coalition of 39 national religious and religiously affiliated organizations from 15 denominations and faith traditions. I also serve on the board of NARAL Pro-Choice America. I am the vicar, or priest in charge, of a congregation in a very small town in Massachusetts. It is primarily as a parish priest that I am here today. As a parish priest it is my privilege to be intimately involved in the lives of a variety of people who struggle every day with what it means be ethical, morally responsible people of God in an always complex, frequently confusing, sometimes difficult, and occasionally tragic modern world. It is my job, and my joy, to try to help, and that's why I'm here today.

I recall vividly a day when I left my home near Cambridge, Massachusetts, and drove to one of the economically challenged cities to the north of me to pick up a fifteen-year-old girl and drive her to Boston for an 8 a.m. appointment for an abortion. I didn't know the girl – I knew her school nurse. The nurse had called me a few days earlier to see if I knew where she might find money to give the girl for bus fare to and cab fare home from the hospital. I was stunned – a fifteen-year-old girl was going to have to get up at the crack of dawn and take multiple buses to the hospital alone? The nurse shared my concern but explained that the girl had no one to turn to. She feared for her safety if her father found out and there was no other relative close enough to help. There was no one to be with her. So I went. And during our hour-long drive to Boston we talked.

She told me about her dreams for the future – all the things she thought she might like to do and be. I talked to her about the kind of hard work and personal responsibility it would take to get there.

She told me about the guilt she felt for being pregnant – even though the pregnancy was the result of a date rape. She didn't call it that. She just told me about the really cute guy from school who seemed so nice and about how pleased she was when he asked her out. And then, she told me, he asked her to have sex with him and she refused. And he asked her again...and again. And then he pushed her down and forced himself on her. But he didn't pull a gun, or break any bones, or cause any serious injury – other than a pregnancy and a wounded spirit – so she didn't know to call it rape. She figured the fault was hers for not somehow having known that he wasn't really the "nice boy" he had seemed. And I talked to her about the limits of personal responsibility; about how not everything that happens to us is our own fault, or God's will; and about how much God loves her.

Then I took her inside and turned her over to some very kind nurses. I went downstairs to get a couple of prescriptions filled for her. I paid for the prescriptions after

I was informed that they'd either need the girl's father's signature in order to charge them to his insurance, or the completion of a pile of forms that looked far too complex for any fifteen-year-old to have to deal with. I drove her back to her school and walked her to the nurse's office and turned her over to someone who would look out for her for the rest of the day. And then I drove home wondering how many bright, funny, thoughtful girls, girls brimming with promise, were not lucky enough to know someone who knew someone who could help. I despaired that in a society as rich and, purportedly, reasonable and compassionate as ours, any young woman should ever find herself in such a position. It never occurred to me that anyone would ever try to criminalize those who were able and willing to help.

Although New Hampshire was closer to that girl's home than Boston, as it happened, I did not take her across state lines. Nor did I, to my knowledge, break any laws. But if either of those things had been necessary in order to help her, I would have done them. And if helping young women like her should be made illegal I will, nonetheless, continue to do it. I have no choice because some years ago I stood before an altar and a Bishop and the people of God and vowed "to proclaim by word and deed the Gospel of Jesus Christ and to fashion (my) life in accordance with its precepts...to love and serve the people among whom (I) work, caring alike for young and old, strong and weak, rich and poor." I have no choice. Even if you tell me that it is a crime to exercise my ministry, I will have no choice. And, I assure you, I am not alone.

I find it troubling, to say the least, that those of us in this room should find ourselves at odds over this issue. Presumably we all want the same things. We want fewer unplanned pregnancies and we want young people who face problems, particularly problems that have to do with their health and their futures, to receive loving support and counsel from responsible adults. This bill, however, doesn't help to achieve those goals. It doesn't resolve the problems with which we are faced. It doesn't even address those problems. This is not a bill about solutions; it's a bill about punishments. And, while it is the rare saint who is not sometimes subject to punitive impulses, such impulses are, nonetheless, venal and beneath the dignity of Americans or of any member of the human family.

We should be talking, instead, about reality-based, age-appropriate sex education for all young people, and about safe, affordable, and available contraception. We should be figuring out how we impress upon boys that "no" really does mean "no," and about how to teach girls to defend themselves. We should be talking about education and economics; about childcare and welfare; about violence at home and on the streets; not about new ways to punish victims and those who care for them.

Yet, no matter how intense and successful our efforts, there will still be minors who face unplanned pregnancies. And some of them will still decide that abortion is the best

– sometimes the most responsible – option for them. And then, as now, we will want them to be able to turn to their parents for love and support and guidance.

That is, I have to assume, the noble motive behind this bill. We are appalled at the thought of any girl having to face and make such a decision without the help of her parents, as well we should be. Still, several years ago the Episcopal Church passed a resolution opposing any parental consent or notification requirements that did not include provision for non-judicial bypass. In our view, any morally responsible notification or consent requirement had to allow young women to turn for help to a responsible adult other than a parent or a judge – to go instead to a grandparent or an aunt, a teacher or neighbor, a counselor, minister or rabbi. Our resolution encourages the very things this bill would outlaw. Sure, we want young people to be able to turn to their parents. But when they can't or won't we want to make it easier, not harder, for them to turn to other responsible adults.

We adopted this resolution (by a large majority) not because we don't care about parental involvement. The Episcopal Church wants young women to be able to turn to their parents for help when faced with serious decisions. I want that. I'm sure you, and everyone in this room, wants that. And, in fact, most girls – more than 60 percent – do turn to their parents. We'd like it to be 100 percent. But we know that no one can simply legislate healthy communication within families. And we know that, of those girls who do not involve their parents, many feared violence or being thrown out of their home. Statistical and anecdotal evidence demonstrates that, in far too many American homes, such fears are not unfounded. There is no excuse good enough to justify legislation or regulation that further imperils young people who are already living in danger in their own homes.

Even if we were to find ourselves drained of the last vestiges of our compassion there would still be a self-interested reason to fear and oppose this legislation. It imperils all young women, even those in our own families. One hopes that none of the young women we know and love has anything to fear from their parents. We may even be quite confident that this is true. But let's not kid ourselves. Even in the happiest and healthiest of families teens sometimes cannot bring themselves to confide in their parents. Even in families like Rebecca Bell's. Perhaps you remember her story. Becky's parents report that they had a very good and loving relationship with their daughter. They believed that there was nothing that she couldn't or wouldn't tell them. But when Becky became pregnant she apparently couldn't stand the thought of disappointing and hurting the parents she loved. And she lived in a state that required parental notification. So she had an illegal abortion – and she died.

Should Becky Bell have talked to her parents? I think so. Did she exercise poor judgment? Absolutely. But, sisters and brothers, I'm here to tell you, teenagers will, from

time to time, exercise poor judgment. It's a fact of nature and there is no law you can pass that will change that. The penalty should not be death.

Oppose this bill. Oppose it because no matter how good the intentions of its authors and supporters, it is, in essence, punitive and mean-spirited. Oppose it out of compassion for those young people who cannot, for reasons of their safety, comply with its provisions. If all else fails, oppose it for purely selfish reasons. Oppose it because you don't want your daughter, or granddaughter, or niece to die just because she couldn't face her parents and you had outlawed all her other options.

Thank you for the opportunity to testify before you today.

MOTHERS AND ADVOCATES FOR MOTHERS ALONE, (MAMA) INC.
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STATEMENT OF EILEEN ROBERTS
Senate Judiciary Committee

June 3, 2004

I am a mother of a daughter, who at the age of 14 underwent an abortion without my knowledge. At age 13 a close relationship I had with my daughter was interrupted by a period of her rebelling, which included a relationship with a boy I knew was not in her best interest. My daughter refused my request not to see this boy, but I continued to unconditionally love her and care for her to the best of my ability, during this difficulty time.

During my daughter's rebellion towards parental authority, my daughter was encouraged by her boyfriend, with the assistance of an adult friend, to obtain a secret abortion without my knowledge. This adult friend drove my daughter to the abortion clinic 45 miles away from our home and even paid for my daughter's abortion.

As a result of her depression, my daughter was hospitalized at which time it was discovered that the abortion had been incompletely performed, requiring surgery to repair the damage done by the abortionist. I was called and was told that my daughter could not have that surgery without a signed consent by myself or my husband.

The following year my daughter developed an infection and was diagnosed as having pelvic inflammatory disease as a direct result of that abortion. This diagnosis required a two day hospitalization for IV antibiotic therapy and required a signed consent form. To add insult to injury, my husband and I were responsible for the medical costs, which amounted to over $27,000.

Today in this country teenage girls who are truly from abusive homes are being taken across state lines, given a secret abortion, and then are being sent back home to the abuser. This is one of my greatest concerns, as this activity is contrary to the laws of this country and abortion clinics performing legal abortions are allowed to do so.

The Child Custody Protection Act does not prohibit any women to have an abortion, but gives back parents their constitutional right to be responsible for their children. No one besides the parent or a legal guardian has the right to take any minor aged child across state lines for any reason and abortion should not be the exception.

The Child Custody Protection Act will protect our young adolescent daughters, restore parental rights and uphold family dignity.

On behalf of 78% of Americans who believe parents have a right to know, I thank you Senator Ensign and Senator Sessions for allowing testimony on this important bill.

Respectfully submitted,

Eileen Roberts

THE CONSTITUTIONALITY OF S. 851, THE PROPOSED "CHILD CUSTODY PROTECTION ACT"

WRITTEN TESTIMONY OF PETER J. RUBIN
PROFESSOR OF LAW
GEORGETOWN UNIVERSITY

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

June 2, 2004

Introduction

I have been asked by the Committee to assess whether S. 851, now pending before the Senate, is consistent with the Constitution of the United States. I am honored to have the opportunity to convey my views to the Committee.*

It is my considered conclusion that the proposed statute would, if enacted, violate the Constitution for three independent reasons. To begin with, it violates constitutional principles of federalism, principles that are fundamental to our constitutional order. The statute violates the rights of states to enact and enforce their own laws governing conduct within their territorial boundaries, and the rights of the residents of each of the United States and of the District of Columbia to travel to and from any state of the Union for lawful purposes, a right strongly reaffirmed by the Supreme Court in its recent landmark decision in *Saenz v. Roe*, 526 U.S. 489 (1999).

Second, because of the cruel and dangerous method it employs to attempt to deter pregnant young women from obtaining lawful abortions in states in which they do not reside, the proposed statute also violates the Due Process Clause of the Fifth Amendment. Government may not attempt to deter a minor from engaging in a particular activity by making it more dangerous. See *Carey* v. *Population Services International*, 431 U.S. 678 (1977). Here the proposed statute does not actually prohibit pregnant adolescents from obtaining out of state abortions without complying with the parental notification or consent laws of their states of residence. It seeks, rather, to deter them from doing so by denying them the assistance of any compassionate or caring adult, including family members such as grandparents, aunts and uncles,

*My testimony is provided in the public interest; I do not speak on behalf of any client or organization.

etc. This bill leaves the scared, pregnant minor on her own. Under the Due Process Clause of the Fourteenth Amendment this is not a permissible means of achieving even an otherwise legitimate governmental end.

Finally, the proposed statute violates the undue burden test for abortion regulation adopted by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 877 (1992). Under the analytical approach articulated by the Court in that case, the proposed statute has the unconstitutional purpose and would have the unconstitutional effect of placing a "substantial obstacle" in the path of the pregnant adolescents it affects seeking to exercise their right to choose to terminate a pregnancy. In addition, the statute as now drafted lacks an exception, required under *Casey* and the Court's most recent abortion decision, *Stenberg v. Carhart*, 530 U.S. 914, 930-938 (2000), for the health of the pregnant woman. [1]

Analysis

S. 851 would provide criminal and civil penalties, including imprisonment for up to one year, for any person who

> knowingly transports a minor across a State line, with the intent that such minor obtain an abortion. . . [if] an abortion is performed on the minor, in a State other than the State where the minor resides, without the parental consent or notification, or the judicial authorization, that would have been required by [a law in force in the state where the minor resides] had the abortion been performed in the State where the minor resides.

S. 851, §2 (a) (proposed 18 U.S.C. §2431(a)(1) and (2)).

In other words, this law makes it a *federal crime* to assist a pregnant minor to obtain a *lawful* abortion. The criminal penalties kick in if the abortion the young woman seeks would be performed in a state other than her state of residence, and in accord with the less restrictive laws of that state, unless she complies with the more severe restrictions her home state imposes upon abortions performed upon minors within its territorial limits.

The law contains no exceptions for situations where the young woman's home state purports to disclaim any such extraterritorial effect for its parental consultation rules, or where it

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[1]This written testimony draws upon written submissions I have previously made addressing essentially identical bills considered by previous Congresses. See "S. 851 and Constitutional Principles of Federalism," Written Testimony of Laurence H. Tribe and Peter J. Rubin before the United State House of Representatives Committee on the Judiciary, Subcommittee on the Constitution, September 5, 2001 (co-authored with Professor Laurence H. Tribe) (addressing the federalism question); "The Constitution and the Proposed Child Custody Protection Act," Written Testimony of Peter J. Rubin before the Senate Committee on the Judiciary, May 20, 1998 (addressing the Due Process and undue burden questions).

is a pregnant young woman's close friend, or her aunt or grandmother, or a member of the clergy, who accompanies her "across a State line" on this frightening journey, even where she would have obtained the abortion anyway, whether lawfully in another state after a more perilous trip alone, or illegally (and less safely) in her home state because she is too frightened to seek a judicial bypass or too terrified of physical abuse to notify a parent or legal guardian who may, indeed, be the cause of her pregnancy.

It does not exempt health care providers, including doctors, from possible criminal or civil penalties. Nor does it uniformly apply home-state laws on pregnant minors who obtain out-of-state abortions. The law applies only where the young woman seeks to go from a state with a more restrictive regime into a state with a less restrictive one.

1. Constitutional Principles of Federalism

The proposed law amounts to a statutory attempt to force a most vulnerable class of young women to carry the restrictive laws of their home states strapped to their backs, bearing the great weight of those laws like the bars of a prison that follows them wherever they go (unless they are willing to go alone). Such a law violates the basic premises upon which our federal system is constructed, and therefore violates the Constitution of the United States.

The essence of federalism is that the several states have not only different physical territories and different topographies but also different political and legal regimes. Crossing the border into another state, which every citizen has a right to do, may perhaps not permit the traveler to escape *all* tax or other fiscal or recordkeeping duties owed to the state as a condition of remaining a resident and thus a citizen of that state,[2] but necessarily permits the traveler temporarily to shed her home state's regime of laws regulating primary conduct in favor of the legal regime of the state she has chosen to visit. Whether cast in terms of the destination state's authority to enact laws effective throughout its domain without having to make exceptions for travelers from other states, or cast in terms of the individual's right to travel – which would almost certainly be deterred and would in any event be rendered virtually meaningless if the traveler could not shake the conduct-constraining laws of her home state – the proposition that a state may not project its laws into other states by following its citizens there is bedrock in our federal system.

One need reflect only briefly on what rejecting that proposition would mean in order to understand how axiomatic it is to the structure of federalism. Suppose that your home state or Congress could lock you into the legal regime of your home state as you travel across the

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[2]There are significant constitutional limits, of course, even upon a state's authority to tax its residents on transactions undertaken, or income earned, in other states, but so long as there is no taxation without representation (as there is not if the resident's eligibility to vote remains intact notwithstanding temporary absence from the state) and so long as the subject of the tax is not such as to incur a danger of multiple taxation, the absent resident's continuing eligibility for whatever benefits and services the state constitutionally extends to *all* its residents and *only* to its residents imposes a potential burden on state resources for which at least a minimal tax may in some circumstances be warranted.

country. This would mean that the speed limits, marriage regulations, restrictions on adoption, rules about assisted suicide, firearms regulations, and all other controls over behavior enacted by the state you sought to leave behind, either temporarily or permanently, would in fact follow you into all 49 of the other states as you traveled the length and breadth of the nation in search of more hospitable "rules of the road." If your search was for a more favorable legal environment in which to make your home, you might as well just look up the laws of distant states on the internet rather than roaming about in a futile effort at sampling them, since you will not actually experience those laws by traveling there. And if your search was for a less hostile legal environment in which to attend college or spend a summer vacation or obtain a medical procedure, you might as well skip even the internet, since the theoretically less hostile laws of other jurisdictions will mean nothing to you so long as your state of residence remains unchanged.

Unless the right to travel interstate means nothing more than the right to change the scenery, opting for the open fields of Kansas or the mountains of Colorado or the beaches of Florida but all the while living under the legal regime of whichever state you call home, telling you that the laws governing your behavior will remain constant as you cross from one state into another and then another is tantamount to telling you that you may in truth be compelled to remain at home — although you may, of course, engage in a simulacrum of interstate travel, with an experience much like that of the visitor to a virtual reality arcade who is strapped into special equipment that provides the look and feel of alternative physical environments — from sea to shining sea — but that does not alter the political and legal environment one iota. And, of course, if home-state legislation, or congressional legislation, may saddle the home state's citizens with that state's abortion regulation regime, then it may saddle them with their home state's adoption and marriage regimes as well, and with piece after piece of the home state's legal fabric until the home state's citizens are all safely and tightly wrapped in the straitjacket of the home state's entire legal regime. There are no constitutional scissors that can cut this process short, no principled metric that can supply a stopping point. The principle underlying S. 851 is nothing less, therefore, than the principle that individuals may indeed be tightly bound by the legal regimes of their home states even as they traverse the nation by traveling to other states with very different regimes of law. It follows, therefore, that — unless the right to engage in interstate travel that is so central to our federal system is indeed only a right to change the surrounding scenery — S. 851 rests on a principle that obliterates that right completely.

It is irrelevant to the federalism analysis that the proposed federal statute does not literally prohibit the minor herself from obtaining an out-of-state abortion without complying with the parental consent or notification laws of her home state, criminalizing instead only the conduct of *assisting* such a young woman by transporting her across state lines. The manifest and indeed avowed purpose of the statute is to prevent the pregnant minor from crossing state lines to obtain an abortion that is lawful in her state of destination whenever it would have violated her home state's law to obtain an abortion there because the pregnant woman has not fully complied with her home state's requirements for parental consent or notification. The means used to achieve this end do not alter the constitutional calculus. Prohibiting assistance in crossing state lines in the manner of this proposed statute suffers the same infirmity with respect

to our federal structure as would a direct ban on traveling across state lines to obtain an abortion that complies with all the laws of the state where it is performed without first complying also with the laws that would apply to obtaining an abortion in one's home state.

The federalism principle I have described operates routinely in our national life. Indeed, it is so commonplace it is taken for granted. Thus, for example, neither Virginia nor Congress could prohibit residents of Virginia, where casino gambling is illegal, from traveling interstate to gamble in a casino in Nevada. (Indeed, the economy of Nevada essentially depends upon this aspect of federalism for its continued vitality.) People who like to hunt cannot be prohibited from traveling to states where hunting is legal in order to avail themselves of those pro-hunting laws just because such hunting may be illegal in their home state. And citizens of every state must be free, for example, to read and watch material, even constitutionally unprotected material, in New York City the distribution of which might be unlawful in their own states, but which New York has chosen not to forbid. To call interstate travel for such purposes an "evasion" or "circumvention" of one's home-state laws – as S. 851 purports to do, see S. 851, §2(a) (heading of the proposed 18 U.S.C. § 2431) ("Transportation of minors in circumvention of certain laws relating to abortion") – is to misunderstand the basic premise of federalism: one is *entitled* to avoid those laws by traveling interstate. Doing so amounts to neither evasion nor circumvention.

Put simply, you may not be compelled to abandon your citizenship in your home state as a condition of voting with your feet for the legal and political regime of whatever other state you wish to visit. The fact that you intend to return home cannot undercut your right, while in another state, to be governed by *its* rules of primary conduct rather than by the rules of primary conduct of the state from which you came and to which you will return. When in Rome, perhaps you will not do as the Romans do, but you are entitled — if this figurative Rome is within the United States — to be governed as the Romans are. If something is lawful for one of them to do, it must be lawful for you as well. The fact that each state is free, notwithstanding Article IV,[3] to make certain *benefits* available on a preferential basis to its own citizens does not mean that a state's *criminal laws* may be replaced with stricter ones for the visiting citizen from another state, whether by that state's own choice or by virtue of the law of the visitor's state or by virtue of a congressional enactment. To be sure, a state need not treat the travels of its citizens to other states as suddenly lifting otherwise applicable restrictions when they return home. Thus, a state that bans the possession of gambling equipment, of specific kinds of weapons, of liquor, or of obscene material may certainly enforce such bans against anyone who would bring the contraband items into the jurisdiction, including its own residents returning from a gambling state, a hunting state, a drinking state, or a state that chooses not to outlaw obscenity. But that is a far cry from projecting one state's restrictive gambling, firearms, alcohol, or obscenity laws into another state whenever citizens of the first state venture there.

Thus states cannot prohibit the lawful out-of-state conduct of their citizens, nor may they impose criminal-law-backed burdens – as S. 851 would do – upon those lawfully engaged in

[3] U.S. Const. Art. IV, §2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states").

business or other activity within their sister states. Indeed, this principle is so fundamental that it runs through the Supreme Court's jurisprudence in cases that are nominally about provisions and rights as diverse as the Commerce Clause, the Due Process Clause, and the right to travel, which is itself derived from several distinct constitutional sources.[4] See, e.g., *Healy v. Beer Institute*, 491 U.S. 324, 336 n. 13 (1989) (Commerce Clause decision quoting *Edgar v. Mite Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion), which in turn quoted the Court's Due Process decision in *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)) ("The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limit of the State's power.'").

The Supreme Court recently reaffirmed this fundamental principle in its landmark right to travel decision, *Saenz v. Roe,* 526 U.S. 489 (1999). There the Court held that, even with congressional approval, the State of California was powerless to carve out an exception to its otherwise-applicable legal regime by providing recently-arrived residents with only the welfare benefits that they would have been entitled to receive under the laws of their former states of residence. This attempt to saddle these interstate travelers with the laws of their former home states – even if only the welfare laws, laws that would operate far less directly and less powerfully than would a special criminal-law restriction on primary conduct – was held to impose an unconstitutional penalty upon their right to interstate travel, which, the Court held, is guaranteed them by the Privileges or Immunities Clause of the Fourteenth Amendment. See *Saenz*, 526 U.S. at 503-504.

Although *Saenz* concerned new residents of a state, the decision also reaffirmed that the constitutional right to travel under the Privileges and Immunities Clause of Article IV, Section 2, provides a similar type of protection to a non-resident who enters a state not to settle, but with an intent eventually to return to her home state:[5]

> [B]y virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the "Privileges and Immunities of Citizens in the several States" that he visits. This provision removes "from the citizens of each State the disabilities of alienage in the other States." *Paul v. Virginia*, 8 Wall. 168, 180 (1869). It provides important protections for nonresidents who enter a State whether to obtain employment, *Hicklin v.Orbeck*, 437 U.S. 518 (1978), to procure medical services, *Doe v. Bolton*, 410 U.S. 179, 200 (1973), or even to engage in commercial shrimp fishing, *Toomer v. Witsell*, 334 U.S. 385 (1948).

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[4]See *Saenz v. Roe*, 526 U.S. 489, 500-504 (1999) (describing the various components of the right to travel and their constitutional derivation).

[5] That Clause, fundamental to the structure of our federal system, "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of state B enjoy." *Toomer* v. *Witsell*, 334 U.S. 385, 395 (1948).

Saenz, 526 U.S. at 501-502 (footnotes and parenthetical omitted).

Indeed, *Doe v. Bolton*, 410 U.S. 179 (1973), which was decided over thirty years ago, and to which the *Saenz* court referred, specifically held that, under Article IV of the Constitution, a state may not restrict the ability of visiting non-residents to obtain abortions on the same terms and conditions under which they are made available by law to state residents. "[T]he Privileges and Immunities Clause, Const. Art. IV, §2, protects persons . . . who enter [a state] seeking the medical services that are available there." Id. at 200.

Thus, in terms of protection from being hobbled by the laws of one's home state wherever one travels, nothing turns on whether the interstate traveler intends to remain permanently in her destination state, or to return to her state of origin. Combined with the Court's holding that, like the states, Congress may not contravene the principles of federalism that are sometimes described under the "right to travel" label, *Saenz* reinforces the conclusion, if it were not clear before, that even if enacted by Congress, a law like S. 851 that attempts by reference to a state's own laws to control that state's resident's out-of-state conduct on pains of criminal punishment, whether of that resident or of whoever might assist her to travel interstate, would violate the federal Constitution. See also *Shapiro* v. *Thompson*, 394 U.S. 618, 629-630 (1969) (invalidating an Act of Congress mandating a durational residency requirement for recently-arrived District of Columbia residents seeking to obtain welfare assistance).

In 1999, Professor Lino Graglia of the University of Texas School of Law testified before Congress in favor of a bill essentially identical to this one. An opponent of constitutional abortion rights, he candidly conceded that the proposed law would "make it . . . more dangerous for young women to exercise their constitutional right to obtain a safe and legal abortion." Testimony of Lino A. Graglia on H.R. 1218 before the Constitution Subcommittee of the Committee on the Judiciary, U.S. House of Representatives, May 27, 1999 at 1. He also concluded, however, that "the Act furthers the principle of federalism to the extent that it reinforces or makes effective the very small amount of policymaking authority on the abortion issue that the Supreme Court, an arm of the national government, has permitted to remain with the States." Id. at 2. He testified that he supported the bill because he would support "anything Congress can do to move control of the issue back into the hands of the States." Id. at 1.

Of course, as the description of S. 851 given above demonstrates, that proposed statute would do nothing to move "back" into the hands of the states any of the control over abortion that was precluded by *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny. The several states already have their own distinctive regimes for regulating the provision of abortion services to pregnant minors, regimes that are permitted under the Supreme Court's abortion rulings. That, indeed, is the very premise of this proposed law. But, rather than respecting federalism by permitting each state's law to operate within its own sphere, the proposed federal statute would contravene that essential principle of federalism by saddling the abortion-seeking young woman with the restrictive law of her home state wherever she may travel within the United States unless she travels unaided. Indeed, it would add insult to this federalism injury by imposing its

regime *regardless of the wishes of her home state*, whose legislature might recoil from the prospect of transforming its parental notification laws, enacted ostensibly to encourage the provision of loving support and advice to distraught young women, into an obstacle to the most desperate of these young women, compelling them in the moment of their greatest despair to choose between, on the one hand, telling someone close to them of their situation and perhaps exposing this loved one to criminal punishment, and, on the other, going to the back alleys or on an unaccompanied trip to another, possibly distant state. This federal statute would therefore violate rather than reinforce basic constitutional principles of federalism.[6]

The fact that the proposed law applies only to those assisting the interstate travel of *minors* seeking abortions may make the federalism-based constitutional infirmity somewhat less obvious – while at the same time rendering the law more vulnerable to constitutional challenge under the Due Process Clause because of the danger in which it will place the class of frightened, perhaps desperate young women least able to travel safely on their own. See infra at 12-14. The importance of protecting the relationship between parents and their minor children cannot be gainsaid. But in the end, the fact that the proposed statute involves the interstate travel only of minors does not alter the conclusion that it violates constitutional principles of federalism.

No less than the right to end a pregnancy, the constitutional right to travel interstate and to take advantage of the laws of other states exists even for those citizens who are not yet eighteen. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976). Nonetheless, the Court has held that, in furtherance of the minors' best interests, government may in some circumstances have more leeway to regulate where minors are concerned. Thus, whereas a law that sought, for example, to burden *adult* women with their home state's constitutionally acceptable waiting periods for abortion (or with their home state's constitutionally permissible medical regulations that may make abortion more costly) even when they traveled out of state to avoid those waiting periods (or other regulations) would *obviously* be unconstitutional, it might be argued that a law like the proposed one, which seeks to force a young woman to comply with her home state's parental consent laws regardless of her circumstances, is, because of its focus on minors, somehow saved from constitutional invalidity.

It is not, for at least two reasons. First, the importance of the constitutional right in

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[6]Although the failure of S. 851 to exempt states that would not opt to give their parental involvement laws extraterritorial effect certainly aggravates its violation of federalism, this proposed statute would, as I have shown, violate federalism principles even if it permitted states to opt out. Just as Congress may not license the state of destination of an interstate traveler to hobble the new resident, even temporarily, with the laws of her former state of residence (even with respect to mere benefits that the state of destination is free to limit to its own residents), see *Saenz v. Roe*, 526 U.S. at 507-508, so Congress may not license an interstate traveler's home state, during the time of that traveler's sojourn in other states, to hobble her with its laws.

question for the pregnant minor too desperate even to seek judicial approval for abortion in her home state – either because of its futility there,[7] or because of her terror at a judicial proceeding held to discuss her pregnancy and personal circumstances[8] – means that government's power to burden that choice is severely restricted. As Justice Powell wrote over two decades ago:

> The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. . . . A pregnant adolescent . . . cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.
>
> Moreover, the potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.

Bellotti v. *Baird* (*Bellotti II*), 443 U.S. 622, 642 (1979) (plurality opinion) (citations omitted).

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[7]In this regard, Congress has previously heard the testimony of Billie Lominick, a 63-year old grandmother who helped a pregnant minor from a physically and sexually abusive household cross state lines to obtain an abortion after she was unable to find any judge in her home state of South Carolina who would hear her judicial bypass petition. See http://www.house.gov/judiciary/lomi0527.htm (testimony of Billie Lominick). There is also evidence that the rate at which some state judges grant these petitions is disproportionately low, something that appears to reflect their own personal views about abortion rather than the legal standards they are supposed to apply: For example, in 1992 the director of a woman's clinic in Indianapolis reported that in six years she had never known of any minor successfully obtaining a judicial bypass in that city. See Lewin, Parental Consent to Abortion: How Enforcement Can Vary, *The New York Times*, May 28, 1992 at A1. In Ohio, one 17 ½ year old had a petition denied by a judge who concluded that she had "not had enough hard knocks in her life." *Id.*

[8]For a description of the emotional trauma that may be involved in judicial bypass proceedings, see *Hodgson v. Minnesota*, 497 U.S. 417, 441-442 and n. 29 (1990). Although bypass procedures are required by the Constitution in order to *prevent* imposition by parental consent or notification laws of a substantial obstacle in the path of a pregnant minor who wishes to have an abortion, in at least some states "[t]he court [bypass] experience [itself] produced fear, tension, anxiety, and shame among minors, causing some who were mature, and some whose best interests would have been served by an abortion, to 'forego the bypass option and either notify their parents or carry to term.' " *Hodgson*, 497 U.S. at 441-442 (quoting the unchallenged finding of the district court). Indeed, rather than undergo the judicial bypass process, some girls have apparently been driven to obtain unlawful abortions, which has led to the death of at least one 17 year old, Becky Bell. See Lewin, supra note 5.

Second, the fact that the penalties on travel out of state by minors who do not first seek parental consent or judicial bypass are triggered *only* by intent to obtain a lawful abortion and *only* if the minor's home state has more stringent "minor protection" provisions in the form of parental involvement rules than the state of destination, renders any protection-of-minors exception to the basic rule of federalism unavailable.

To begin with, the proposed law, unlike one that evenhandedly defers to each state's determination of what will best protect the emotional health and physical safety of its pregnant minors who seek to terminate their pregnancies, simply defers to states with *strict* parental control laws and subordinates the interests of states that have decided that legally-mandated consent or notification is not a sound means of protecting pregnant minors. The law does *not* purport to impose a uniform nationwide requirement that all pregnant young women should be subject to the abortion laws of their home states and only those abortion laws wherever they may travel. Thus, under S. 851, a pregnant minor whose parents believe that it would be both destructive and profoundly disrespectful to their mature, sexually active daughter to require her by law to obtain their consent before having an abortion, and who live in a state whose laws reflect that view, would, despite the judgment expressed in the laws of her home state, *still* be required to obtain parental consent should she seek an abortion in a neighboring state with a stricter parental involvement law – something she might do, for example, because that is where the nearest abortion provider is located. This substantively slanted way in which S. 851 would operate fatally undermines any argument that might otherwise be available that principles of federalism must give way because this law seeks to ensure that the health and safety of pregnant minors are protected in the way their home states have decided would be best.[9]

In addition, the proposed law, again unlike one protecting parental involvement generally, selectively targets one form of control: control with respect to the constitutionally protected procedure of terminating a pregnancy before viability. The proposed law does not do a thing for parental control if the minor is being assisted into another state (or, where the relevant regulation is local, into another city or county) for the purpose of obtaining a tattoo, or endoscopic surgery to correct a foot problem, or laser surgery for an eye defect. The law is activated only when the medical procedure being obtained in another state is the termination of a pregnancy. It is as though Congress proposed to assist parents in controlling their children when, and only when, those children wish to buy constitutionally protected but sexually explicit books about methods of birth control and abortion in states where the sale of such books to these minors is entirely lawful.

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[9]Nor does this law even purport to be justified as a reflection of Congress's *own* vision of what would best protect the pregnant minor. This law does not impose a federal parental involvement standard either nationwide or, assuming it would be constitutionally permissible, upon all pregnant minors engaged in interstate travel for purposes of having an abortion. For Congress to decide to apply its parental involvement regime only when minors travel from more restrictive to less restrictive states, and for it to do so without itself determining what level of parental involvement is appropriate – as is the case with S. 851 – is incompatible with either a protection-of-minors purpose or a federalism-promoting purpose.

The basic constitutional principle that such laws overlook is that the greater power does not necessarily include the lesser. Thus, for example, even though so-called "fighting words" may be banned altogether despite the First Amendment, it is unconstitutional, the Supreme Court held in 1992, for government selectively to ban those fighting words that are racist or anti-semitic in character. See *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 391-392 (1992). To take another example, Congress could not make it a crime to assist a minor who has had an abortion in the past to cross a state line in order to obtain a lawful form of cosmetic surgery elsewhere if that minor has not complied with her state's valid parental involvement law for such surgery. Even though Congress might enact a broader law that would cover all the minors in the class described, it could not enact a law aimed only at those who have had abortions. Such a law would impermissibly single out abortion for special burdens. The proposed law does so as well. Thus, even if a law that were properly drawn to protect minors could constitutionally displace one of the basic rules of federalism, the proposed statute can not.[10]

Lastly, in oral testimony given in 1999 Professor John Harrison of the University of Virginia, while conceding that ordinarily a law such as this, which purported to impose upon an individual her home state's laws in order to prevent her from engaging in lawful conduct in one of the other states, would be constitutionally "doubtful," argued that the constitutionality of *this* law is resolved by the fact that it relates to "domestic relations," a sphere in which, according to Professor Harrison, "the state with the primary jurisdiction over the rights and responsibilities of parties to the domestic relations is the state of residence. . . and not the state where the conduct" at issue occurs. See transcript of the Hearing of the Constitution Subcommittee of the House Judiciary Committee on the Child Custody Protection Act, May 27, 1999.

This "domestic relations exception" to principles of federalism described by Professor Harrison, however, does not exist, at least not in any context relevant to the constitutionality of S. 851. To be sure, acting pursuant to Article IV, § 1, Congress has prescribed special state obligations to accord full faith and credit to judgments in the domestic relations context — for example, to child custody determinations and child support orders. 28 U.S.C. §§ 1738A, 1738B. These provisions also establish choice of law principles governing modification of domestic relations orders. In addition, in a controversial provision whose constitutionality is open to question, Congress has said that states are *not* required to accord full faith and credit to same-sex marriages. *Id.* at § 1738C.

But the special measures adopted by Congress in the domestic relations context can provide no justification for S. 851. There is a world of difference between provisions like §§ 1738A and 1738B, which prescribe the full faith and credit to which state *judicial decrees and judgments* are entitled, and proposed S. 851, which in effect gives state *statutes* extraterritorial

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[10]I have not argued that S. 851 would exceed Congress's affirmative Commerce Clause authority under *Lopez v. United States*, 514 U.S. 549 (1995). I do not believe such an objection would be well-taken. Of course, to the extent an affirmatively authorized federal requirement of parental involvement in interstate surgical trips would unduly burden the abortion rights of minors, it would be unconstitutional.

operation — by purporting to impose criminal liability for interstate travel undertaken to engage in conduct lawful within the territorial jurisdiction of the state in which the conduct is to occur, based solely upon the laws in effect in the state of residence of the individual who seeks to travel to a state where she can engage in that conduct lawfully.

The Supreme Court has always differentiated "the credit owed to laws (legislative measures and common law) and to judgments." *Baker v. General Motors Corp.*, 522 U.S. 222, 232 (1998). For example, while a state may not decline on public policy grounds to give full faith and credit to a judicial judgment from another state, *see, e.g., Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908), a forum state has always been free to consider its own public policies in declining to follow the legislative enactments of other states. *See Nevada v. Hall*, 440 U.S. 410, 421-24 (1979). In short, under the Full Faith and Credit Clause, a state has never been compelled "to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939). In fact, the Full Faith and Credit Clause was meant to prevent "parochial entrenchment on the interests of other States." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality opinion). A state is under no obligation to enforce another state's statute with which it disagrees.

But S. 851 would run afoul of that principle. It imposes the restrictive laws of a woman's home state wherever she travels, in derogation of the usual rules regarding choice of law and full faith and credit.

2. The Statute Fails to Use Reasonable Means To Achieve Its Ends In Violation of the Due Process Clause

Even if it were permissible for the government to prevent the pregnant minors affected by this statute from crossing state lines in order to obtain out of state abortions without complying with the laws of their home state, the means used in this statute to achieve those ends violate the Due Process Clause. Under that provision government may use only "reasonable" means to achieve even legitimate ends. See *Hodgson* v. *Minnesota*, 497 U.S. at 450.

This law does *not* prohibit pregnant minors themselves from crossing state lines nor does it purport to criminalize their conduct in obtaining abortions in other states without complying with the laws of their state of residence. Indeed, it expressly states that the pregnant minor who obtains an out of state abortion is not herself subject to the law. See S. 851, §2 (a) (proposed 18 U.S.C. §2431(b) (2)). Rather it punishes any adult who provides her assistance by transporting them across state lines. And it covers *all* adults, including relatives to whom a desperate, frightened pregnant adolescent might turn. Even a grandmother would be subject to imprisonment under this federal law for assisting her terrified granddaughter who, for whatever reason, simply could not speak to her parents about her unintended pregnancy.

The law thus would deny pregnant minors fearful of telling their parents of their pregnancy – perhaps because of a history of abuse or even because their own father or another

relative may be responsible for the pregnancy – or of running the gantlet of their state's judicial bypass procedure the assistance of *any* compassionate or sympathetic adult, including any adult family member, at a time when they need it the most. These pregnant minors would still be permitted to attempt to obtain an out of state abortion, but the proposed law would require them to do so on their own. The law thus would operate by increasing the danger to and fear of these terrified young women. Those who chose to make the journey could rely on no adult to watch out for them, assist them or accompany them either on their trip, at the office of the abortion provider, or as they return home from the procedure – possibly suffering from aftereffects including disorientation from anesthesia or bleeding. Others will choose not to travel, but will seek unlawful abortions in their home states. As described above, at least one seventeen-year-old too scared to comply with her home state's law requiring parental consent or judicial bypass has already died from an unlawful abortion. See supra n. 6.

The Court's cases make clear that such a brutal and harmful mechanism for achieving even a legitimate governmental purpose would violate the Constitution. Government may not attempt to deter a minor from engaging in a particular activity – here, obtaining an out of state abortion without complying with her home state's parental consultation or bypass law – by making it more hazardous. See *Carey* v. *Population Services International*, 431 U.S. 678, 694-695 (1977) (plurality opinion) (state may not restrict minors' access to contraceptives as a means of "deter[ing]" "minors' sexual activity" by "increasing the hazards attendant on it"); *id.* at 714-716 (Stevens, J., concurring in the judgment) (same principle); *Eisenstadt* v. *Baird*, 405 U.S. 438, 448 (1973) (prohibiting distribution of contraceptives to the unmarried is an "unreasonable" way of achieving the goal of "discouraging premarital sexual intercourse").

Instructive in this regard is *Hodgson* v. *Minnesota*, 497 U.S. 417(1990), in which the Court held that a two-parent notification provision – constitutionally justifiable, like the proposed statute, only to the extent that it serves "to protect the minor's welfare," id. at 455 – did not "reasonably further any legitimate state interest." Id. at 450. The Court concluded that

> Not only does two-parent notification fail to serve any state interest with respect to functioning families, it disserves the state interest in protecting and assisting the minor with respect to dysfunctional families. The record reveals that in the thousands of dysfunctional families affected by this statute, the two-parent notice requirement proved positively harmful to the minor and her family. The testimony at trial established that this requirement, ostensibly designed for the benefit of the minor, resulted in major trauma to the child, and often to a parent as well. . . . In [some] circumstances, the statute was not merely ineffectual in achieving the State's goals but actually counterproductive.

497 U.S. at 450-451 (citations omitted). See also *id.* at 454 (the only permissible justification for "any rule requiring parental involvement in the abortion decision" is "the best interests of the child.").

The Court of course has recognized that it would be desirable for parents to be involved

in the important decisions their children may make, including the decision whether to carry a pregnancy to term. However, the Court has also recognized that "The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter." *Bellotti II*, 443 U.S. at 642. Because S. 851 attempts to achieve its ends only by depriving the scared, pregnant minor of the assistance of any sympathetic adult, it violates the Constitution. As in *Hodgson*, the Due Process Clause requires government to "adopt less burdensome means to protect the minor's welfare." *Hodgson*, 497 U.S. at 455.

3. The Proposed Law Unduly Burdens The Right of a Pregnant Minor to Obtain an Abortion

Finally, under the analytical approach articulated by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 883, 887 (1992), the proposed statute unconstitutionally imposes an "undue burden" upon the constitutional rights of those pregnant adolescents to whom it applies. See *Casey*, 505 U.S. 883, 887 (1992) (controlling plurality opinion of O'Connor, Kennedy, and Souter, JJ.) (reaffirming that the right of a pregnant minor "to make the ultimate decision" cannot be unduly burdened).

As the Supreme Court explained in *Casey*, an undue burden exists, and therefore a provision of law is invalid, if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 887. Because the proposed statute has both this purpose and this effect, it is unconstitutional.

a. First, the statute's *effect* will be to place a substantial obstacle in the path of the young women it targets who seek to exercise their constitutionally-protected right to choose. *Casey* explains that the proper procedure for determining the facial validity of an abortion restriction is to examine its operation upon the class of women "who do not wish" to comply with its requirements. *Casey*, 505 U.S. at 895. If "in a large fraction of" these cases the law would "operate as a substantial obstacle to a woman's choice to undergo an abortion," it is "an undue burden, and therefore invalid." *Id.* See also *Fargo Women's Health Center* v. *Schafer*, 507 U.S. 1013 (1993) (O'Connor, J., concurring in denial of stay and injunction) (reaffirming that this is the proper approach for determining the facial validity of a statute under *Casey*'s undue burden standard).

Undoubtedly many pregnant women cross state lines to obtain abortions because the nearest abortion provider is not in their home state. Among minors crossing state lines for this reason, many may have consulted their parents and involved them in their decision. Others would likely not object to the application of S. 851. Here, though, the constitutionality of the Act must be measured by its impact upon the class who would not wish to comply with it: the most vulnerable, scared and desperate pregnant young women and girls in our society, those who would rather seek the assistance of another adult, perhaps a close relative, in traveling out of state to obtain an abortion than notify their parents or undergo the judicial bypass regime of the state in which they reside.

The fact that they have chosen to go to such lengths to avoid the legal requirements imposed by their states of residence indicates that the proposed statute will "in a large fraction of the cases . . . operate as a substantial obstacle to [their] choice to undergo an abortion," *id.*, effectively resulting in their carrying their pregnancies to term despite their desire to obtain an abortion. It thus violates the Constitution.

Casey makes clear that "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." 505 U.S. at 877. Where, however, a regulation, even one with a benign purpose, will "dete[r]" a "significant number of women . . . from procuring an abortion as surely as if the [government] had outlawed abortion," it imposes an undue burden and it cannot stand. See *Casey*, 505 U.S. at 894 (invalidating as an undue burden Pennsylvania's spousal notification law). See also *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986) (statute is invalid if it would "intimidate women into continuing pregnancies").

Of course it could be argued that what leads to the creation of the "substantial obstacle" in this case is the flawed operation of certain states' judicial bypass regimes. It is simply not material to the constitutional analysis, however, that, for many pregnant minors, flaws in the implementation of their home states' judicial bypass regimes will be one of the but-for causes of the interference that the proposed statute will work with respect to the right to choose. So long as the proposed statute would in effect impose a substantial obstacle upon the pregnant minors it affects, it violates the constitution under *Casey*. That the federal statute might not be the only cause of the obstacle imposed upon the pregnant minor, or that some group of pregnant minors might also be able to obviate this effect by bringing an action challenging as an undue burden the operation of the notification and consent laws in their state of residence, is irrelevant. See *Casey*, 505 U.S. at 897 (striking down law that by its terms did nothing more than require women to notify their spouses of their intent to have an abortion because "[w]hether the prospect of the notification itself deters . . . women from seeking abortions, or whether the husband . . . prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to [a] veto . . .").[11]

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[11] Nor under *Casey* is it relevant to the constitutional analysis of the proposed law that the parental consent or notification regime in the minor's state of residence may itself have been held on its face not to be unduly burdensome. Such a holding would mean only that the state's judicial bypass procedure is adequate to prevent that notification or consent law from imposing a substantial obstacle in the path of a large fraction of the pregnant minors to whom it applies and who wish to exercise their right to choose. The proposed federal law, however, by definition operates upon a much narrower, more vulnerable, and more desperate class of pregnant minors within each affected state than does the universally-applicable parental consent or notification law. Thus, even were it to operate only in conjunction with state parental consent or notification laws that have themselves been held on their face not to impose an undue burden, as described above the proposed statute would still run afoul of *Casey* because of the substantial obstacle it will impose in a large fraction of the cases to which it applies.

b. The statutory text, too, demonstrates that the *purpose* of the law within the meaning of *Casey* is to create a substantial obstacle that will in practice prevent these minor women from obtaining abortions. As described above, it is clear that the purpose of the law is not to permit every state to apply its laws extraterritorially upon its minor residents if it so chooses. The law is substantively slanted: It does not enforce the policy preferences of parents who may believe that legally enforced parental consent or notification laws interfere wrongly with the independence of their mature minor daughters and who, indeed, live in states that have made that same policy choice through their legislatures' decision not to adopt such laws. Nor does the law apply to all forms of parental involvement in their children's decisionmaking: only the decision with respect to abortion is singled out.

The goal of the law thus is not to advance federalism or to respect the laws of each state with respect to parental involvement in their children's lives. Nor, since it does not purport to impose a national standard for parental notification or consent, is its purpose to ensure that some uniform standard applies that in Congress's judgment properly expresses the appropriate balance. It ensures only that the most stringent parental consent or notification law applies in case a woman crosses state lines to have an abortion. And the only purpose for such a substantively slanted rule is to deter pregnant young women from obtaining abortions.

That the statute is designed to achieve this result can also be inferred from an exception contained in its text. Under the statute, the restriction on transportation across state lines for purposes of obtaining an abortion does not apply "if the abortion was necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself." Proposed 18 U.S.C. §2431(b).

Tellingly, this is *not* an exception for the emergency performance of a life-saving abortion, the performance of an abortion where there is no time to obtain parental consent or go through a judicial bypass procedure. Such an exception would make sense if the law were truly intended merely to enforce compliance with laws in the pregnant minor's home state relating to parental consent or notification.

Rather, this exception is designed to permit the pregnant woman to obtain a desired abortion if it is necessary to save her life, even when there is no immediate threat so that she could obtain such an abortion after complying with her home state's law. That the statute's drafters thought such an exception was necessary reflects an understanding that the proposed statute would, in fact, impose an absolute obstacle to the pregnant young woman obtaining an abortion, not merely a delay. This explains the inclusion of an exception for the pregnant minor's life that applies whether the pregnant minor faces an emergency or not.

Although in some sense this exception is broader than what might be expected in a law truly designed to compel notification or bypass, it reveals that the statute is *intended* not to foster effective compliance with state laws that themselves pose no substantial obstacle to the exercise of the right to choose, but to effectively require those young women afraid to comply with their

home state's laws to carry their pregnancies to term. Even if the law would not be effective in achieving this goal, because this is its purpose, it violates the Fourteenth Amendment to the Constitution.

c. Lastly, even aside from these infirmities, the proposed statute would still violate the Constitution under *Casey* because it lacks the required exception for the health of the pregnant woman. The Court in *Casey* made clear that "the essential holding of *Roe*," which it reaffirmed, "forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Casey*, 505 U.S. at 880.

As currently written, the proposed statute contains no exception for the pregnant adolescent's health at all. The Supreme Court's decision in *Stenberg v. Carhart* confirms and reinforces that such an exception is constitutionally necessary. *See Stenberg v. Carhart*, 530 U.S. 914, 930-938 (2000). Indeed, the abortion restriction at issue there contained only an exception for the woman's life *essentially identical to the one included in S. 851. See id.* at 921-922. The law there was held invalid because, like S. 851, it failed to include a constitutionally-required "exception . . . for the preservation of the . . . health of the mother." *Id.* at 938 (quoting *Casey*, 505 U.S. at 879); *cf. id.* at 930, 945-946 (citations and internal quotation marks omitted) (independently invalidating that statute because it "impose[d] an undue burden on . . . the ability" of those among the approximately ten percent of women seeking abortions who do so during the second trimester of pregnancy "to choose a [particular method of obtaining an] abortion"). Here, as the proposed statute's authors recognized, a life exception is constitutionally required. A health exception is constitutionally required as well. Because the proposed statute does not contain any such exception, it is constitutionally infirm, for the same reason as the law struck down in *Stenberg*.

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June 3, 2004

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Statement of Senator Jeff Sessions
"The Child Custody Protection Act: Protecting Parents' Rights and Children's Lives"
Senate Judiciary Committee
June 3, 2004

Today's hearing will take testimony on "The Child Custody Protection Act", offered by our colleague and friend, John Ensign. I am pleased to be a co-sponsor of the bill.

We will hear both sides of the issue from excellent panels. The proposed legislation deals with a very real problem involving the interstate transportation of minor children for the purpose of abortion in violation of state protected custody rights of parents and the well being of children. It is not about abortion; it is about the custody rights of parents. This legislation will be a step towards defeating the legal loophole that now exists. It is a loophole that cheats parents of their basic right to know about the health concerns of their minor children. This legislation does not expand, or contract existing state laws or appear to contradict Supreme Court precedent involving minor children and abortion. It would simply deal with how to give effect to constitutionally valid parental custody rights in our mobile society.

The Supreme Court made it clear in Planned Parenthood v. Casey, a decision that expanded abortion rights, that it is proper for a state to declare that an abortion should not be performed on a minor child unless a parent is consulted. Many states require parental consent before a principal or teacher can hand out an aspirin. And, many states have concluded that to perform an abortion on a minor without parental consent or notice is a very dramatic interference with parents' protected interests. It is the parents, after all, who will have to monitor their daughter's medical condition afterwards. They love the child and want her to have the best care. They have every right to not want some older man, for example who has no real interest in their minor daughter's well-being, making serious health decisions for her without their knowledge.

In my view, the right of parents to be involved in these major decisions is

fundamental and ought not be lightly transgressed. State parental consent and notification statutes are a legitimate step to protect basic parental rights.

However, we do not even need to discuss the merits of parental consent legislation, because the issue before us today is not whether states should have such laws. The issue before us today is whether we should allow the circumvention of such constitutional state laws designed to protect parental rights and children's health.

There is direct evidence that third parties are interfering with protected parental rights by taking minor children for the purpose of an abortion from a state where parents have to be notified, to another state that doesn't have that law. This bill would preclude these third parties. This is not a radical or extreme proposal. Rather, it is good policy.

This is the type of legislation that even some pro-choice advocates agree with. Dr. Bruce A. Lucero, a former abortionist from Alabama, has performed 45,000 abortions. He supports this legislation. In a New York Times op-ed, he wrote that "dangerous complications" are more likely to result when parents are not involved in out-of-state abortions.

We will hear evidence today that demonstrates that this issue does not involve a few isolated cases. An attorney for the Center for Reproductive Law and Policy, Kathryn Kolbert, has stated: "There are thousands of minors who cross state lines for an abortion every year and who need assistance from adults to do that."[1] We have seen several examples of abortion clinics which openly place advertisements in the yellow pages in nearby states that have parental consent statutes. These advertisements proudly proclaim: "No parental consent."

Thus, these clinics are openly encouraging the transportation in interstate commerce to evade state laws. It is their policy to encourage this evasion.

Some will argue that this bill is unconstitutional and we will hear testimony on this issue today. But, the Supreme Court has upheld state parental notification and consent laws that this bill would help enforce. The bill does nothing more than prohibit the evasion of constitutional state statutes.

I was a federal prosecutor for nearly 15 years. A long-time federal statute is the Mann Act. Since 1910 the Mann Act has prohibited the interstate transportation of women or girls across state lines for prostitution or other immoral purposes. The constitutionality of the Mann Act has been upheld by the Supreme Court since the early 1900s. Similarly, as a federal prosecutor, I prosecuted in federal court those who transported in interstate commerce stolen motor vehicles. It was not the theft of the vehicle that was the basis for the crime. It was the transportation in interstate commerce of a vehicle that had been stolen. That was the significant part of the offense.

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[1] Labor of Love is Deemed Criminal, The National Law Journal, Nov. 11, 1996, at A8.

Also, this bill is very narrow in its scope. It does not prohibit interstate abortions. It does not invalidate any state laws. It does not establish a right to parental involvement for residents of any state that does not already have a parental involvement law. It doesn't even attempt to regulate the activities of the pregnant minor herself. It only reaches the conduct of outside parties who wrongfully usurp the rights of parents that are guaranteed by state law.

Some suggest that the bill should be narrowed further, to exempt the interference with parental rights if the interfering adult is a relative of the child. I would disagree with that. This bill would not prevent a minor from seeking counsel from an aunt or grandmother or anyone else. It would only prohibit that aunt and grandmother from violating the rights of parents by secretly driving their daughter to another state for an abortion without consent or notification.

It is the parent or legal guardian's responsibility for the primary care of a child. In the rare circumstances where that would not be appropriate, the bill provides a judicial by-pass.

I have concluded that this bill is constitutional. Still, I look forward to the testimony today, both for and against, as we continue to study this legislation, to identify any flaws that may exist and seek to make it better. I do, however, believe that minor children are being abused through the evasion of state law and that Congress should act to place the responsibility for children's care where that responsibility belongs — with the parents.

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June 10, 2004

WRITTEN TESTIMONY OF LAURIE SCHWAB ZABIN, Ph.D.
IN OPPOSITION TO THE "CHILD CUSTODY PROTECTION ACT" (S.851)

For consideration by members of the Senate Judiciary Committee

My name is Laurie Schwab Zabin. I am currently a professor at Johns Hopkins University with a joint appointment in the Department of Population and Family Health Sciences at the Johns Hopkins Bloomberg School of Public Health and in the Department of Gynecology and Obstetrics at the School of Medicine.

I am honored to have the opportunity to present my views on the proposed Child Custody Protection Act (S. 851) to the Senate Judiciary Committee. My testimony is provided in the public interest; I am not speaking on behalf of any organization with which I am affiliated.

I believe that the Child Custody Protection Act (CCPA) will be harmful to young women, by impairing their access to confidential health care and delaying their access to abortion services. Moreover, CCPA will not foster family unity and it will be particularly detrimental to young women in non-traditional family situations. This Act criminalizes those few individuals who assist young women achieve their legal rights and frequently their deeply needed health services. Who are the young women who need this non-parental help? They are specifically those from dysfunctional or stressed households -- often not even living with a parent because the

parent does not or cannot assume parental responsibility. Our research has proven that the vast majority of young people turn to their parents when in stressful situations; those few who can't should be helped, and those grandmothers, aunts, and older siblings who play the role of the parent deserve all our support -- not criminalization.

Professional Background:

I obtained my Ph.D. from the Johns Hopkins University School of Hygiene and Public Health in 1979. I attended graduate school after working for over twenty years in family planning services and establishing one of the first federally funded, community-based family planning centers in the 1960's. Since obtaining my Ph.D., I have taught at Johns Hopkins as a full professor since 1993 and as an assistant and then associate professor from 1979 to 1992. Specifically, I have taught numerous courses on adolescent pregnancy and reproductive health, mainly to physicians and other health professionals who are candidates for masters or doctorates in the School of Public Health. I also supervise the dissertation and post-doctoral work of several students each year who work in the field of adolescent pregnancy and reproductive health.

I am an active member of numerous professional organizations, including the American Public Health Association (APHA), the Society for Adolescent Medicine, the Alan Guttmacher Institute (AGI), and Planned Parenthood Federation of America (PPFA), and I have served on the governing bodies of APHA and PPFA and as chair of the AGI. I have also served on a variety of panels, including the White House Initiative on Adolescent Pregnancy Prevention and as an advisor to, among others, the Centers for Disease Control and Prevention (Division of Adolescent and School Health, Advisory Panel on Evaluation, 1992); the Surgeon General's Select Consultant Group (Adolescent Pregnancy, 1994-95); and the International Center for

Research on Women (Technical Advisory Group, Women and AIDS Program, 1991-1993).

Additionally, I have developed and advised numerous programs aimed at preventing adolescent pregnancy and sexually transmitted diseases, including the Johns Hopkins Teen Pregnancy Primary Prevention Program, the CDC Teen Pregnancy Prevention Center at the University of Minnesota, and the Adolescent Project Development of the American Academy of Arts and Sciences. I was the founding director of the Bill and Melinda Gates Institute for Population and Reproductive Health.

A substantial portion of my time is devoted to research. The focus of my research has been on the intersection of social science and medicine in the field of reproductive health, and much of my work has focused on adolescents. I have published several books and numerous articles in peer-reviewed journals on adolescent pregnancy, childbearing, and sexual behavior. I am also a peer reviewer for several journals, including the Journals of Adolescent Health, Adolescent and Pediatric Gynecology, the American Medical Association, and Research on Adolescence.

Because of my own research, my supervision of research conducted by graduate students and post-doctoral fellows, and my peer review of articles for approximately twenty journals, I am intimately familiar with research and findings regarding adolescent sexual behavior, pregnancy, childbirth, abortion, and adolescents' access to reproductive health care. Furthermore, my experience in establishing a family planning clinic in Baltimore and intervention programs directed at adolescents throughout the country and the world provide me with extensive practical experience with adolescents and in how, when, and under what circumstances teens access reproductive health care.

CCPA Will Harm Young Women by Impairing Their Access to Confidential Health Care Services:

As I know from over twenty years of involvement in providing reproductive health care to adolescents through family planning clinics, and as my research confirms, confidentiality of services is one of the most important factors considered by adolescents in their decision to access reproductive health care. While research findings do not imply that teenagers won't voluntarily communicate with their parents about reproductive health care issues at some future time, it does mean that confidentiality is absolutely essential in prompting adolescents initially to access health care.

In one study of 1,243 teenage patients in 31 family planning clinics in eight cities, one of the top responses to the inquiry why they had delayed seeking reproductive health services after they first had sexual intercourse was that they had just found out that they didn't have to tell their parents in order to get those services. The most important reason they gave for choosing the particular clinic they attended was that the clinic "doesn't tell parents." Across the board, adolescents answered several different questions regarding why and when they chose to visit a clinic by referencing the importance of confidential services.[1] The importance of confidential care to adolescents was confirmed in another study I performed in the context of school-linked health services.[2]

A very recent study has re-confirmed the importance of confidentiality for minors seeking reproductive health care. In that study, young women who were attending a family planning clinic were asked what they would do if the state required that parents be informed in writing that

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1 Laurie Schwab Zabin & Samuel D. Clark, Jr., *Institutional Factors Affecting Teenagers' Choice and Reasons for Delay in Attending a Family Planning Clinic*, 15 Fam. Plan. Persp. 25, 26 (1983); Laurie Schwab Zabin & Samuel D. Clark, *Why They Delay: A Study of Teenage Family Planning in Clinic Patients*, 13 Fam. Plan. Persp. 205, 213-214 (1981).

2 Laurie S. Zabin, Heather A. Stark & Mark R. Emerson, *Reasons for Delay in Contraceptive Clinic Utilization: Adolescent Clinic and Nonclinic Populations Compared*, 12 J. Adol. Health Care 225, 229 (1991).

they were seeking contraceptive services before they could obtain such services. Forty-seven percent reported that they would stop using all services provided at the clinic and another 12 percent said that they would make some differences in their use of services, including delaying testing or treatment for sexually transmitted diseases.[3]

It is clear that without the guarantee of confidentiality, adolescents delay or avoid accessing reproductive health care and contraception, even while they begin or continue to engage in sexual behavior that exposes them to health risks. For example, my research found that the mean interval from first intercourse to first contraceptive visit for all sexually active, teenage clinic patients was over 16 months.[4] Furthermore, those young women who put off their first clinic visit until the point that they actually suspected they were pregnant were almost twice as likely to be among the ones that said they feared parental discovery.[5] In short, while fear of parental discovery remains a dominant reason for teenagers to delay access to health care, it apparently does not cause minors to delay or cease engaging in sexual activity.

Moreover, a complex law that limits minors' access to health care does not just affect the minors directly affected by that law, but rather acts as a deterrent to other minors needing health care as well. By making the law surrounding minors' access to abortion more complex, CCPA will make abortion access more confusing to all young women. In addition, teenagers will conclude that because they cannot trust the health care system for confidential services in the abortion context, there is no reason to believe that they would receive confidential care in other areas, such as contraceptive care or treatment of sexually transmitted diseases, mental health, or drug use or abuse.

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3 Diane M. Reddy, Raymond Fleming & Carolyne Swain, *Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services*, 288 JAMA 710 (2002).
4 *Why They Delay* at 207.
5 *Why They Delay* at 215 (Table 12).

A fundamental tenet of adolescent health care is therefore to ensure absolute confidentiality. CCPA, however, increases the difficulties for young women in obtaining confidential health care, by forcing more young women to disclose their intent to terminate a pregnancy to their parents or to a court in order to obtain an abortion. CCPA thus increases the likelihood that pregnant adolescents will delay or avoid seeking proper care. Moreover, it may force young women to travel alone out of state or to attempt to self-induce an abortion, in order to avoid the loss of confidentiality.

CCPA Will Harm Young Women by Delaying Their Access to Abortion Services:

Making it more difficult for young women to access confidential abortion services and forcing them to comply with this confusing legislation in order to avoid putting trusted relatives and friends at risk undoubtedly will delay some young women's abortions. Young women who would not otherwise tell their parents will put off their abortions while deciding whether they should do that or instead travel alone out of state for an abortion and while working up the courage to go ahead with one of those options. Those minors who decide to use their home state's judicial bypass process will also be delayed as they attempt to figure out the system and arrange to get to court without arousing suspicion. Some of these minors will then have to go to court in a second state -- where they seek the abortion -- causing further delay.

Minors can ill afford such delays. Adolescents already tend to seek abortions later in pregnancy than older women. For example, 17 percent of teens seeking abortions obtain them after 12 weeks, as compared to 11 percent of women aged 20 and over.[6] Such delay is caused by a number of factors, including the delay minors experience in recognizing pregnancy (both because of irregular menstrual cycles and the denial that some minors go through even after a

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6 *See* Laurie D. Elam-Evans, *et al.*, *Abortion Surveillance -- United States, 2000*, 52 Morbidity and Mortality Weekly Report, CDC Surveillance Summaries, No. SS-12, Table 16 (Nov. 2003).

positive pregnancy test); the difficulties they face in negotiating a health care system with which they are unfamiliar; the problems they face in arranging for an abortion without arousing suspicion of family or friends; and the difficulty they have raising the funds for an abortion.[7]

Accordingly, because pregnant adolescents are particularly prone to delaying access to health care, requiring an adolescent to navigate the additional hurdles imposed by CCPA, on top of the existing maze of state parental involvement laws, will harm some minors by delaying their access to abortions -- potentially pushing them into their second trimester.

CCPA Will Not Foster Family Unity:

While confidentiality of health services is essential to a minor's decision to access such services, that is not to say that all adolescents avoid parental involvement. In fact, studies confirm that the majority of minors voluntarily involve a parent in their decision to terminate their pregnancy.[8]

My own research found that regardless of the final decision regarding a pregnancy outcome, the overwhelming majority of young women wanted to and did consult with a parent before deciding what to do about their pregnancy. Even many of the young women who did not live with a parent consulted with their mothers. In some cases, when the minor had no parent with whom she could consult, she turned to a "parent surrogate" -- some other adult, neither a parent nor a legal guardian, who played the role of parent in her life. Specifically, in a study of 334 African-American, urban teenagers who sought pregnancy tests in two Baltimore clinics, 91% of those whose test results were positive reported that they had consulted a parent or parent surrogate before deciding what to do about the pregnancy, and an additional 4% confided in

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7 *See* Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortions?*, 20 Fam. Plan. Persp. 169, 174-75 (1988).

8 *See, e.g.*, Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 Fam. Plan. Persp. 194 (1992).

another adult.[9] Age was an important factor in whether the minor consulted with a parent. Specifically, the few adolescents who did not consult with their mothers before deciding what to do about their pregnancies were significantly older than those who did.[10] This corresponds with other studies' findings that the younger the minor, the more likely she is to consult with a parent about her decision to terminate her pregnancy.[11]

Furthermore, the vast majority of our sample -- 88% -- reported satisfaction with the pregnancy outcome they chose; there was little difference between those who chose to terminate the pregnancy and those who chose to carry the pregnancy to term. Significantly, we found that whether the young woman was satisfied with her decision was not related to whether she consulted with a parent, but rather had to more with the support that she did or did not receive. The few young women who did not consult with their mothers were no less satisfied with the outcome than those who did.[12]

Another important factor in satisfaction with the decision was who made the final decision: whether the minor felt a sense of autonomy, that she had the right to make her own decision. Young women who made the decision themselves were significantly more satisfied than those who felt the decision was made for them. Indeed, the minors for whom the outcome was different from what, before they had the pregnancy test results, they had thought they would choose were less likely to be satisfied with the outcome.[13]

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9 Laurie Schwab Zabin, *et al., To Whom Do Inner-City Minors Talk About Their Pregnancies? Adolescents' Communication With Parents and Parent Surrogates*, 24 Fam. Plan. Persp. 148, 151 (1992). While other studies have found lower percentages of voluntary involvement (e.g., 61%), the higher percentages evidenced by our study may be partly explained by differences in attitudes regarding sexuality and communication about sexuality in African-American families.

10 *To Whom Do Inner-City Minors Talk About Their Pregnancies* at 152.

11 *See, e.g., Parental Involvement in Minors' Abortion Decisions* at 200, 205 (Tables 3 & 8).

12 *To Whom Do Inner-City Minors Talk About Their Pregnancies* at 153.

13 *To Whom Do Inner-City Minors Talk About Their Pregnancies* at 153.

My research findings are consistent with my observations at clinics and school-linked health care programs. Not only do most minors voluntarily involve their parents in the decision of what to do about their pregnancy, but many find it extremely important to do so at their own pace. While clinic counselors frequently are the best advocates for parental involvement, effective counseling to encourage parental involvement is most successful when adolescents are allowed the autonomy to decide for themselves when and whether they should talk to a parent about a pregnancy. One would wish that the law would do everything possible to encourage minors to consult with professional health counselors, rather than putting barriers in the way of such communication.

Effective, positive communication cannot happen suddenly or through coercion. Parent-child communication has a positive effect on young people's behavior when it is a longstanding part of their relationship, not when it comes only at a moment of crisis. Indeed, the results of my research confirm that prior parent-child relationships and patterns of communication are among the most important variables in determining whether and when a pregnant minor communicates with a parent. Specifically, adolescents who found it easy to talk about sex with the woman who had raised them, and those who had received most of their knowledge about having a baby from their parents, were significantly more likely to have confided in their parents before the pregnancy test than those who did not have such open communication with their parents.[14]

In fact, to my knowledge, there is no evidence that requiring parental consent or notification creates a new communication pattern between minors and their parents. If the communication exists, it will persist -- in the face or absence of a law mandating parental involvement. If the pattern of communication between parent and child has been broken or is

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14 *To Whom Do Inner City Minors Talk About Their Pregnancies* at 152.

nonexistent, it will not be mended or created through legislative mandate. In fact, a study comparing the rate of parental involvement in a state with a mandatory parental notice law with the rate of parental involvement in a state without such a requirement found that there was no meaningful difference in the percentage of minors whose parents knew of their decision.[15] Indeed, for some relationships, most often in dysfunctional families, forced communication will be worse than no communication at all, spurring incidents of abuse or coercion, or destroying a parent-child relationship rather than strengthening it. For these reasons as well, by forcing more minors to involve a parent CCPA will harm -- not improve -- certain family relationships.

CCPA Will Be Particularly Detrimental to Young Women in Non-traditional Family Situations:

CCPA will harm young women in non-traditional family situations most of all. CCPA seems to be premised on the idea that forced communication with a parent -- and only with a parent -- is beneficial to young women planning to terminate a pregnancy. As discussed above, forced family communication is not beneficial to young women or their families. Moreover, CCPA fails to recognize and value the important role that adults other than parents or legal guardians play in the lives of some young women.

For example, in the study of teenagers seeking pregnancy tests in Baltimore clinics, we asked the young people who was the person in their household to whom they were responsible. We found that for many of the teens that person was somebody who was not designated as either a parent or legal guardian; usually this person was a close relative such as a grandmother or aunt. Almost nine percent of the young women in the study consulted with a parent surrogate but not a parent before their pregnancy test and slightly more than 5% consulted only with their parent surrogate before making a decision on what to do in response to a positive pregnancy test. Of the

15 Robert W. Blum, Michael D. Resnick, & Trisha Stark, *The Impact of a Parental Notification Law on Adolescent Decision-Making*, 77 Am. J. of Public Health 619 (1987).

17% who did not live with their mother, 37% consulted with their parent surrogate before their pregnancy test and 26% consulted with that person before making their outcome decision.[16] Another study found that over half of the minors who did not involve a parent in their pregnancy decision involved some other adult, such as a grandmother or adult sister, teacher, school counselor, or pastor.[17]

CCPA fails to take this reality into account. Rather, it will make parent surrogates into criminals if they assist the minor they are responsible for by helping her obtain an abortion outside her state of residency. Thus, CCPA will undercut these very important family relationships.[18] And this will occur at a time when the young woman is pregnant and wants help from the person she trusts.

By criminalizing situations in which a parent surrogate helps a young woman obtain an out of state abortion, CCPA is particularly detrimental to young women in non-traditional family situations. When a parent is not present or, even if present, is not willing or able to assume the parental role, it is essential for the lasting good of the minor that the government not weaken the role of the parent surrogate. Certainly it should not criminalize that role.

16 *To Whom Do Inner-City Minors Talk About Their Pregnancies* at 150.
17 *Parental Involvement in Minors' Abortion Decisions* at 205.
18 CCPA also sends the message that these relationships are devalued by giving extra-territorial effect only to the state laws that require that a parent be notified or give consent and not to the state laws that allow some parent surrogates -- such as grandparents and other adult relatives – to be notified or give consent.