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AN UNJUST ACT: THE SCHIZOPHRENIC STATE OF MATURITY AND CULPABILITY IN JUVENILE JUSTICE AND MINOR ABORTION RIGHTS LAW; RECENT TRENDS IN VIRGINIA AND NATIONALLY

JON-MICHAEL FOXWORTH

INTRODUCTION

> *Across America, prosecutors and legislators are pushing to try more juveniles as adults. Yet simultaneously, law-abiding adolescents are subject to ever-widening restrictions that treat them explicitly as non-adults—curfews, parental-consent requirements, an array of zero-tolerance policies at schools.*[1]

Between 1992 and 1997, forty-seven states altered their treatment of juvenile offenders.[2] Forty-five states made it easier to transfer juveniles to criminal court and to try a juvenile as an adult.[3] Thirty-one states enhanced the sentencing authority of their juvenile courts.[4] All forty-seven states making changes modified or removed the traditional confidentiality associated with the juvenile justice system.[5] Such changes indicate, at least where criminal responsibility is implicated, that the distinction between adolescence and adulthood is being conflated.[6]

In 1991, studies of juvenile abortion statutes indicated that fourteen states required a juvenile seeking an abortion to notify or acquire consent from at least one parent.[7] In 1998, the number of states with mandatory parental involvement laws had risen to

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1. David Cray, *U.S. Wrestles with Juveniles' Age of Responsibility; They can be Sent to Death Row Yet Not Buy Alcohol*, SOUTH BEND TRIBUNE, Dec. 10, 2000, at A8.

2. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS & VICTIMS: 1999 NATIONAL REPORT 89 (1999).

3. *Id.*

4. *Id.*

5. *Id.*

6. Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 547-48 (2000).

7. Allison Beth Hubbard, Recent Development, *The Erosion of Minors' Abortion Rights: An Analysis of* Hodson v. Minnesota *and* Ohio v. Akron Center for Reproductive Health, 1 UCLA WOMEN'S L.J. 227, 227 (1991). These states are Alabama, Arkansas, Indiana, Louisiana, Massachusetts, Minnesota, Missouri, North Dakota, Ohio, Rhode Island, South Carolina, Utah, West Virginia, and Wyoming. *Id.* at 227n3.

thirty-seven.[8] Currently the number of states with a parental involvement law is forty-two.[9] Although not all states with parental involvement laws actively enforce their provisions,[10] it is nevertheless clear that regulation of abortion on the basis of age has increased. Insofar as the predicate of the diminishment of a juvenile's right to abortion is maturity, recent legislation in this area indicates an equivocation of adolescence and childhood.[11]

The contrary equivocations of adolescence as adulthood in criminal law and adolescence as childhood in abortion legislation indicates a less than consistent view of the relationship of responsibility and age in the law.[12] Although there are legitimate reasons to differentiate responsibility as it relates to different rights and responsibilities,[13] the debate surrounding the issues of juvenile crime and abortion does not lend itself to such policy distinctions.

In this note, I will lay out the history and law surrounding the treatment of responsibility as it relates to juvenile crime and abortion. Recent legislation in Virginia and 4th circuit decisions will be used as an illustration of the current disparity in thought relating to responsibility. The simultaneous ebb of a juvenile's presumed responsibility to make reproductive decisions and flow of a juvenile's presumed responsibility for criminal act will be compared and criticized. Ultimately, although the law tells an inconsistent story where it relates to juvenile responsibility, it is doubtful that legislators intend such a mixed message. Rather, they likely intend no message at all. It is likely supervening

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8. Rachel Weissmann, *Constitutional Law What "Choice" do They Have?: Protecting Pregnant Minors' Reproductive Rights Using State Constitutions*, 1999 ANN. SURV. AM. L. 129, 130 (1999).

9. NARAL Pro-Choice America, *Restriction on Minor's Access to Abortion*, *available at* http://www.naral.org/mediaresources/fact/pdfs/restrictions.pdf. These states include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. *Id.*

10. *Id.* The states that do not enforce their parental involvement laws are: Alaska, Arizona, California, Colorado, Florida, Illinois, Montana, Nevada, New Jersey, and New Mexico. *Id.* Generally, the statutes are not enforced due to an order of the court or judgment of the Attorney General that the law is unenforceable. *Id.* New Jersey's statute is currently on appeal. NARAL, Pro-choice America, *New Jersey*, *available at* http://mail.naral.org/longdoc.nsf.

11. Scott, *supra* note 6 at 548-49.

12. *Id.* at 597-98.

13. *Id.* at 570.

political considerations lead the law to contradictory presumptions regarding juveniles.

II. HISTORY OF JUVENILE JUSTICE IN AMERICA

A. *Common Law Origins*

Originally, at common law, there was no separate system for juveniles.[14] Adults and juveniles were tried in the same courts, and if convicted, were punished similarly.[15] There developed, however, a defense for juveniles based on their youth.[16] "Common law criminal culpability was based on both an assumption of capacity to know wrongfulness and proof of specific *mens rea* required to commit a crime."[17] Juveniles, as less capable of distinguishing good and evil and less able to form the required intent, were presumed to lack the culpability to be punished.[18] This presumption formed the basis of the infancy defense.[19] The infancy defense is a sliding scale series of presumptions setting forth rebuttable and non-rebuttable levels of culpability based on the juvenile's age.[20]

> Children under the age of seven were conclusively presumed to be incapable of taking responsibility for their acts and thus were precluded from criminal adjudication. Children over the age of fourteen were regarded as adults and thus were presumed capable of committing crimes. Between these two ages the common law created a rebuttable presumption of incapacity. For a child between the ages of seven and fourteen to be subject to the criminal jurisdiction of the court, the state had to overcome a presumed incapacity on the part of the child by showing that the child knew the wrongfulness of his act.[21]

In the late nineteenth and early twentieth centuries social attitudes regarding children began to change.[22] Reformers of the era believed that since all juveniles lacked capacity, and this incapacity is based on immaturity, a separate judicial system

14. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 509 (1984).
15. *Id.*
16. *Id.* at 509-10.
17. *Id.* at 509.
18. *Id.* at 509-10.
19. *Id.* at 510.
20. Id at 510-11.
21. *Id.*
22. *Id.* at 512.

should be established to administer to the immature rather than punish the criminal.[23] The assumption was that the delinquent behavior of the juveniles was the result of immaturity rather than a criminal mind.[24] The proper response to this, it was supposed, was the edification and rehabilitation of the child in a justice system removed from adult (criminal) influence.[25]

The focus of the juvenile justice system was rehabilitation of the immature and misguided rather than punishment of the criminal.[26] As a non-criminal court that did not mete out punishment but acted to help the child and further the development of the child towards citizenship, the juvenile courts were designed without the procedural safeguards found in criminal courts.[27] Without a threat of punishment there was nothing for procedure to safeguard. Juveniles were nevertheless exposed to dispositions that, while benefiting and rehabilitating the juvenile, would act to limit their freedom and rights. Eventually, these well meaning impositions on juvenile rights lead to the imposition of some procedural safeguards by the Supreme Court.[28] Ironically, it was this attempt to protect the juvenile that ultimately lead to a more punitive understanding of juvenile justice.[29] Beginning in 1967, the Supreme Court decided a series of cases that shifted the focus of the juvenile court from determinations of delinquency to determinations more closely resembling criminal responsibility.[30]

B. Supreme Court Criminalizes Childhood

In 1966 the Supreme Court decided *Kent v. United States*.[31] In *Kent*, the District of Columbia Juvenile Court waived jurisdiction over Morris Kent and transferred the youth to district court to be tried on charges of robbery and rape.[32] To make such a transfer, the juvenile court was required to hold a hearing after a full

23. Lara A. Bazelon, Note, *Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 171 (2000).

24. Barry C. Feld, *Juvenile and Criminal Justice Systems' Response to Youth Violence*, 24 CRIME & JUST. 189, 192-93 (1998).

25. *Id.*

26. *Id.*

27. *Id.*

28. In re Gault, 387 U.S. 1, 28-31 (1967).

29. *See* Bazelon, *supra* note 23, at 173-179; Feld, *supra* note 24, at 193-205; Walkover, *supra* note 14, at 517-528.

30. Feld, *supra* note 24, at 193.

31. Kent v. United States, 383 U.S. 541 (1966).

32. *Id.* at 547-48.

investigation.[33] The investigation into Morris Kent's case was less than complete.[34] "Dismissing the procedure afforded Morris Kent as inadequate, the Supreme Court held that juvenile waiver orders must be grounded in a hearing, that counsel must have access to records and reports considered by the court, and that a statement of reasons must accompany the waiver order."[35] Despite the fact that the *Kent* decision only imposed procedural safeguards in juvenile court where criminal sanctions and transfer to criminal court were threatened, the effect of *Kent* was to initiate enforcement of procedural safeguards in juvenile court.[36]

One year after *Kent*, the Supreme Court decided *In re Gault*.[37] *Gault* expanded the procedural safeguards of *Kent*. In *Gault*, the Court held that the essentials of due process were required in the adjudicatory stage of juvenile justice proceedings.[38] Gerald Gault, charged with making lewd phone calls, argued that the procedures of his delinquency hearing denied his constitutional rights to notice, counsel, confrontation, cross-examination, the privilege against self-incrimination, and appellate review.[39] The Court concluded that all of the rights asserted in *Gault* — save appellate review — are guaranteed by the due process clause and are thus binding in juvenile court adjudication.[40]

Gault represents the expansion of the *Kent* procedural safeguards requirement when a juvenile is threatened with criminal adjudication to non-criminal juvenile adjudication. To the extent that these procedural safeguards find their ultimate foundation in the deprivation of rights threatened by criminal-type hearings, *Gault* identifies structural elements of criminal-type hearings within juvenile hearings and then begins the equivocation of criminal and juvenile justice. For example, the *Gault* court describes reform schools and related facilities associated with juvenile justice as similar to the penitentiaries associated with criminal justice.[41] They further identify the culpability associated with juvenile dispositions with criminal responsibility.[42]

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33. *Id.*
34. *Id.* at 546.
35. Walkover, *supra* note 14, at 519.
36. *Id.* at 519-20.
37. Gault, 387 U.S. at 1.
38. *Id.* at 30-31.
39. *Id.* at 9-10.
40. *Id.* at 10, 33-34, 41-42, 57-59.
41. *Id.* at 27.
42. *Id.* at 26-27.

The Supreme Court continued the association of youthful misdeeds and hardened criminal behavior in *In re Winship*, decided three years after *Gault*.[43] In *Winship*, the Supreme Court required that the burden of proof used in juvenile court cases be identical to that involved in criminal cases, namely, proof beyond a reasonable doubt.[44] In so ruling, the Supreme Court removed most of the civil aspects of the juvenile justice system that was remaining after *Kent* and *Gault*.[45]

The shift undertaken by *Kent*, *Gault*, and *Winship* represents the transformation of the legal conception of juvenile justice from a rehabilitative system to a junior criminal system where criminal responsibility is the focus of the inquiry.[46] The Supreme Court successfully redefined the proper scope of juvenile justice from an inquiry into maturity, development, and rehabilitation to one of criminal responsibility and punishment with attendant threats to liberty. Given these Supreme Court decisions, whose effect is to criminalize the juvenile courts, the recent actions of state and federal law makers to lower ages at which juveniles can be tried as adults, increase punishments in juvenile court settings, and decrease the confidentiality associated with the juvenile court process should come as no surprise. The decisions of the Supreme Court removed much of the differentiation between immaturity and criminal responsibility upon which the juvenile court system was traditionally predicated.

C. *Lawmakers Criminalize Increasingly Younger Groups of Children*

> Since 1990, the US has executed more people for crimes committed when they were children than any other country in the world . . . . Now Jim Pitts, a Republican representative in the Texas legislature, wants to make it legal to execute children as young as 11. He is to introduce legislation recommending the death sentence for 11-year-old killers and adult sentences for offenders aged 10 and above. . . .
>
> Some blame television violence or parental neglect, others point to the availability of weapons in a country where one in 12 students carries a gun. . . .

43. *In re Winship*, 397 U.S. 358 (1970).
44. *Id.* at 361-68.
45. Walkover, *supra* note 14, at 520-21.
46. *Id.* at 522.

> Jim Pitts' proposed law has been dismissed by death penalty opponents and George Bush Jr, the Texas governor, has distanced himself from the idea.
>
> But Pitts has the backing of voters and politicians of both parties.[47]

The proposal of Representative Pitts in Texas is undoubtedly one of the most extreme examples of the movement to apply criminal responsibility to ever younger groups of juveniles. It is nevertheless indicative of the general trend.[48] The attempt to apply the death penalty to an eleven-year-old is particularly disturbing as it displays a blatant indifference to clearly established notions of criminal responsibility in the Supreme Court's death penalty jurisprudence.[49]

The Supreme Court's juvenile death penalty jurisprudence is important to the issue of juvenile justice generally, because it establishes that maturity and criminal responsibility is a necessary factor in criminal adjudication and sentencing. It is of limited use, however, because the preclusion effected on criminal law by immaturity is due in no small part to the severity of the criminal punishment in question. In *Thompson v. Oklahoma*, the court held that a fifteen-year-old juvenile, as a general rule, lacks the culpability proportional to a criminal sanction of death.[50] Despite initial recourse in *Thompson* to precedent based on "evolving standards of decency,"[51] standards based in state practice that appear to be evolving chronologically downwards,[52] the Court grounded it's Eighth Amendment decision in psychological studies indicating that juveniles tend to lack some degree of criminal capacity.[53] For the

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47. Emma Nugent & Allan Hall, *Too Young to Drink but Old Enough to Execute; The Teenagers on Death Row USA*, SCOTTISH DAILY RECORD & SUNDAY MAIL, Oct. 12, 1999, at 26-27.

48. *See supra* notes 1-6 and accompanying text.

49. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815 (1988) (arguing that punishment must be proportional to culpability); Stanford v. Kentucky, 492 U.S. 361 (1989) (showing that the plurality of Court supported proportionality jurisprudence).

50. Thompson, 487 U.S. at 821-25. Justice O'Connor declines to concur with the majority position that a sixteen-year-old is not sufficiently culpable to be put to death as a per se rule, but Justice O'Connor grants that absent a showing of maturity the sixteen-year-old may be presumed immature for death penalty purposes. *Id.* at 850-56.

51. *Id.* at 821-31 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). "Evolving standards of decency" essentially ground Eighth Amendment jurisprudence in the practices of the states. *Id.* at 822n4. If the states decided to execute eleven-year-olds, this interpretation of the Eighth Amendment would not appear to be a hindrance to such practices, as those practices define the acceptable limit of Eighth Amendment jurisprudence.

52. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *supra* note 2 at 5.

53. Thompson, 487 U.S. at 833-35.

Supreme Court, this justifies the presumption that certain juveniles are unlikely to possess the sort of bad intent required for a punishment of death.[54] *Thompson* is ultimately reliant on both evolving state practices and the developmental psychology underlying proportionality analysis. The split reasoning of the plurality opinion, fails to make clear a minimum age, or even if there is a minimum age, at which criminal responsibility may be found.

The proposal of Representative Pitts was neither accepted nor passed by the Texas legislature. It nevertheless portends an ever growing understanding of childrên as little adults subject to criminal sanctions. This understanding is especially dangerous as portions of the Court do not accept proportionality analysis,[55] and rely exclusively on state centered evolving standards of decency analysis. Such evolving standards of decency ultimately rely on state actors like Representative Pitts.

1. Transfer Provisions

Although the ages at which a juvenile can be transferred to criminal court are trending downwards, transfer is not a new phenomenon. As early as the 1920's, states had provisions to transfer juveniles to adult court under appropriate circumstances.[56] Currently all states have a transfer provision of some sort.[57] The purpose of the transfer provision is to move a defendant, who by age is within the original jurisdiction of the juvenile court, to a criminal court.[58]

A majority of the states set the maximum age of original jurisdiction in juvenile court at seventeen.[59] Three states have set the age of original jurisdiction at fifteen;[60] the remaining states place the age at sixteen.[61] Unlike the recent changes in transfer

54. *Id.*

55. *See Stanford*, 492 U.S. at 361. Justices Scalia, White, Kennedy, and Chief Justice Rehnquist rejected the notion that punishment should not be disproportionate to culpability. *Id. See generally infra* notes 221-41 and accompanying text (discussing *Stanford* and *Thompson*).

56. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *supra* note 1, at 13.

57. *Id.*

58. *Id.*

59. *Id.* at 9.

60. These States are Connecticut, New York, and North Carolina. *Id.*

61. *Id.* Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, South Carolina, Texas, and Wisconsin are the ten States allowing for a jurisdictional cut off at the age of sixteen.

provisions, there has been little change in the age at which the juvenile court loses original jurisdiction.[62]

Transfer provisions are generally of three major types: the judicial waiver, concurrent jurisdiction, and statutory exclusion.[63] The predominant method is judicial waiver.[64] Judicial waiver allows the juvenile court judge to waive the original jurisdiction of the juvenile court and transfer the juvenile to criminal court.[65] Judicial waiver itself comes in three forms: discretionary, mandatory, and presumptive waiver.[66] Discretionary waiver allows the court, generally once petitioned by the prosecutor, to transfer the case provided that such transfer is appropriate in light of statutorily proscribed factors for transfer.[67] Most important among such factors are age of the defendant and nature of the crime.[68] Additional factors include: use of firearms in the crime, amenability to treatment in the juvenile justice system, availability of appropriate disposition in the juvenile court, time available for sanctions, public safety, and best interest of the child.[69] Mandatory waiver statutes compel the juvenile court judge to transfer the case, provided the case meets certain absolute criterion similar to the discretionary waiver factors.[70] A presumptive waiver statute creates a rebuttable presumption that the juvenile should be transferred.[71]

A statutory exclusion statute functions similarly to mandatory waiver except the juvenile is never in the original jurisdiction of the juvenile court due to her age and the nature of her crime.[72] Concurrent jurisdiction, on the other hand, effectively allows the prosecutor to determine the jurisdiction wherein he wishes to try the case.[73] A concurrent jurisdiction statute provides that the juvenile court and the district court both have jurisdiction over the

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62. *Id.* at 9:

> Since 1975, four States have changed their age criteria: Alabama increased its upper age from 15 to 16 in 1976 and to 17 in 1977; Wyoming reduced its upper age from 18 to 17 in 1993; and New Hampshire and Wisconsin lowered their upper age from 17 to 16 in 1996.

Id.

63. *Id.* at 13.
64. *Id.* at 14.
65. *Id.* at 13.
66. *Id.* at 14.
67. *Id.* at 14.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 13.
73. *Id.*

juvenile; thus the prosecutor may bring the case wherever he chooses.[74]

Depending on the crime and the age of the juvenile, more than one of the above transfer provisions may be applicable.[75] For lesser offenses, discretionary judicial waiver is most likely to be applicable.[76] The older the juvenile and the more serious the crime, the more likely a lawmaking body has required the transfer of a juvenile by mandatory judicial waiver or statutory exclusion.[77]

The advantage of the discretionary judicial waiver is that the court may inquire into issues of capacity and criminal responsibility, along with the more popular factor of the severity of the crime.[78] The mandatory waiver and statutory exclusion creates a legislative presumption of capacity and criminal responsibility, at least if one goes so far as to assume that exposure to criminal liability ought to imply criminal responsibility. The same would be true to a lesser extent in the case of presumptive waivers.

During the 1990's an increasing number of states passed laws adding or expanding mandatory waiver and statutory exclusion provisions.[79] Currently fifteen states have presumptive waiver statutes, fourteen states have mandatory waiver statutes, and twenty-eight states have statutory exclusion provisions.[80]

Enhancing this movement to assign criminal responsibility to younger individuals for more crimes in more states are once an adult / always an adult statutes.[81] These statutes require that once a juvenile is convicted of a crime in criminal court, all subsequent offenses must be tried in criminal court.[82]

The general drift of the transfer provisions is a growing assumption that juveniles who commit certain crimes ought to be subject to criminal liability in a criminal court. The trend is away from allowing considerations of capacity to determine a juvenile's placement in criminal court. Even when considerations of capacity may be made, as in discretionary waiver, maturity is only one of many factors that may be considered and weighed. Thus, even in the best cases, a lack of capacity may not be determinative.

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74. *Id.*
75. *Id.* at 14.
76. *Id.*
77. *Id.*
78. *See, e.g.*, VA. CODE ANN. § 16.1-269.1 (2001).
79. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *supra* note 2, at 14.
80. *Id.* at 13.
81. *Id.*
82. *Id.* at 14.

2. Criminalization of the Juvenile Court System

The most profound increase in the criminalization of juvenile justice has been in the increasing use of waiver and transfer provisions. Nevertheless, the dispositions used in the juvenile courts themselves also implicate the criminalization of juvenile justice. The most explicit example of this is the movement from traditional indeterminate sentences focused on rehabilitation to determinate sentences focused on restraint.

"Historically, the premise of sentencing in the juvenile court system was the 'best interests' of the child-offender implemented through indeterminate and non-proportional dispositions."[83] Dispositions in the juvenile justice system were not intended to punish, but were intended to save the delinquent from his delinquency through rehabilitation.[84] They acted to rehabilitate by 'sentencing' the juvenile to an indeterminate term of treatment focused on curing the juvenile of delinquency. Today, however, states are restraining the discretion of the juvenile court to rehabilitate the juvenile through the statutory imposition of determinate and proportional sentencing guidelines.[85]

Sentencing guidelines in the juvenile court context, remove the focus of the proceeding from the offender to the offense.[86] No longer is the juvenile court concerned with open-ended treatment of the actor; rather, a determinate punishment is proscribed in proportion to the act. As in criminal court, where certain acts carry proscribed punishments, juveniles are being incarcerated according to their acts. Recidivism is discouraged through threat of future punishment rather than through correcting the failings of the juvenile's character caused, in part, by immaturity.[87]

In light of *In re Gault*,[88] a movement from indeterminate to determinate sentencing procedures was inevitable. The Supreme Court, by equivocating criminal and juvenile court, required that the constitutional rights of the juvenile be protected as though he were in criminal court.[89] The imposition of determinate sentencing protects the juvenile from disparate treatment by enhancing

83. Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 848 (1988) [Hereinafter *Juvenile Court Meets the Principle of Offense*].

84. *Id.*

85. *Id.* at 849-50.

86. *Id.*

87. *See id.*

88. In re Gault, 387 U.S. at 1.

89. *Id.*

guarantees of uniformity, certainty, and proportionality in the sentencing.[90] Insofar as uniformity, certainty, and proportionality are values that implicate Eighth and Fourteenth Amendment equal protection issues, the movement in juvenile justice is towards a greater level of constitutionality.[91] This movement, however, is only necessary if juvenile justice is understood as punitive, as *In re Gault* insists it is.[92] The rehabilitative treatment of previous juvenile justice, while not without a constitutional dimension, does not implicate the alienation of rights in the same way that criminal incarceration does.

In re Gault supposes that juvenile justice is partly punitive. Constitutional principles of criminal justice require the imposition of determinate punishments to avoid Eighth Amendment disparate treatment concerns. Any determinate punishment must be proportional to the wrongful act under the Eighth Amendment. The imposition of determinate punishments thus makes juvenile justice more punitive by forcing a focus on the act rather than the actor. This in turn leads to an increase in punishment, a decrease in rehabilitation, and the criminalization of youth. *In re Gault* becomes a self-fulfilling prophecy by assuming minimal criminality, which implicates determinate sentencing, thereby leading to a focus on the criminality of the act, and therefrom the criminality of the actor. The irony of this prophecy is that the right to a jury trial is not granted under *In re Gault* or it's successors despite the introduction of criminal-type proceedings in juvenile court caused by *In re Gault*.[93]

III. ABORTION, JUVENILES, AND PARENTAL INVOLVEMENT STATUTES

In 1973, the Supreme Court upheld a woman's right of choice in reproductive matters by extending a woman's right of privacy under the Fourteenth Amendment to the right to choose an abortion.[94] In *Roe*, the court made clear, however, that this right is not absolute, and the right must be balanced with a state's interest in the health of the mother and the fetus.[95] After *Roe*, many states

90. *Juvenile Court Meets the Principle of Offense*, *supra* note 83, at 853-57.

91. *Id.*

92. In re Gault, 387 U.S. at 28-31.

93. *See Juvenile Court Meets the Principle of Offense*, *supra* note 83, at 858-59 (discussing constitutional challenges to Washington's juvenile law based on the absence of jury trials).

94. Roe v. Wade, 410 U.S. 113 (1973).

95. *Id.* at 162-64.

enacted mandatory parental involvement laws, thereby limiting the scope of the right to those mature under state law.[96] In so enacting, the question of a minor's right to an abortion was implicated.[97] In a series of cases from 1976 to 1992, the Supreme Court attempted to clarify the right of the juvenile to an abortion, the right of the state, and the rights of the parent.[98]

The first case decided by the Supreme Court on this topic was *Planned Parenthood v. Danforth*.[99] The case involved a Missouri law that required an unmarried minor to seek parental consent to have an abortion.[100] The Supreme Court struck down the law, reasoning that the consent statute created a veto over a minor's constitutional right to have an abortion.[101] The Court reasoned that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."[102] Thus, a juvenile does have a right to have an abortion which, like an adult's abortion right, is protected from state infringement. The court did not, however, allow access to abortion in the same way *Roe* does. Rather than allowing free and unfettered access to abortion where the state has a lessened interest (first trimester), as in *Roe*,[103] the court only precludes statutes that would create an absolute veto over the juveniles abortion decision.[104] As we will see, the right to an abortion that cannot be vetoed does not preclude the state from making the process exceptionally difficult.

Three years after *Danforth*, the Supreme Court in *Bellotti v. Baird*[105] was presented with an opportunity to clarify the ambiguities remaining from *Roe* and *Danforth*. The litigation in *Bellotti* concerned a Massachusetts parental consent requirement. Ultimately, the statute was found to be unconstitutional on two grounds.[106] First, the statute allowed a court to decline consent for a juvenile who is found to be mature for the purposes of the decision

96. Weissmann, *supra* note 8, at 133-34.
97. *Id.*
98. *Id.*
99. Planned Parenthood v. Danforth, 428 U.S. 52 (1976).
100. *Id.* at 58.
101. *Id.* at 74.
102. *Id.*
103. Roe, 410 U.S. at 163-64.
104. Danforth, 428 U.S. at 74-75.
105. *Bellotti v. Baird, 443 U.S. 622 (1979). This decision was the second opportunity the Supreme Court had to review the litigation between Bellotti and Baird. The first review resulted in remand with instructions to certify the case to the Massachusetts Supreme Judicial Court for interpretation of the statute. See Christopher M. Law, A House of Fools: The Child Custody Protection Act*, 8 AM. U. J. GENDER SOC. POL?Y & L. 717, 729-731 (2000).
106. Bellotti, 443 U.S. at 651.

to have an abortion.[107] Although the Massachusetts statute, unlike the parental involvement statute in *Danforth*, allowed the juvenile an opportunity to bypass the parental consent requirement by petition to the court, this bypass provision failed to alleviate the threat of veto, as it is within the discretion of the court to deny the constitutional rights of the juvenile without cause.[108] This indicates that the constitutional right possessed by a minor will fully vest only if she is, or is adjudged to be, mature.

The second portion of the statute the Supreme Court deemed unconstitutional required a juvenile seeking an abortion to notify and discuss with her parents her decision in all cases.[109] As is true in the context of parental consent, there must be a bypass provision wherein a juvenile can circumvent the impediment placed on her right by legislated parental involvement.[110] The court states:

> many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most.
>
> We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity — if she so desires — to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation.[111]

The court clearly states that any parental involvement statute must include a judicial bypass provision whereby a juvenile can prove her maturity, without first notifying or gaining consent of her

107. *Id.*
108. See *id.* at 650-51.
109. *Id.* at 651.
110. *Id.* at 647.
111. *Id.* at 647-48.

parents, and if she proves her maturity then she must be allowed to exercise her right without parental consent or notification.[112] Further, even if she cannot prove maturity the court must still grant the abortion if it is in her best interests.[113]

Two years later *H.L. v. Matheson* was decided.[114] Although this case is represented by some as an attack upon a minor's right to choose,[115] the case only reiterates the permissibility of a notification statute.[116] The critical issue developing from *Roe*, *Danforth*, and *Bellotti* is the possible role of a parental involvement statute as a veto on the right of a juvenile. As *Bellotti* makes clear, the presence of a judicial bypass provision is critical for the protection of a juvenile's constitutionally protected abortion right.[117] In language that seems to limit the juvenile's abortion right, the Court states that the fact "[t]hat the requirement of notice to parents may inhibit some minors from seeking abortions is not a valid basis to void the statute as applied to appellant and the class properly before us."[118] It is important to note, however, that the class in question is that of an "unemancipated minor who desires an abortion without parental notification but also desires not to explain to anyone her reasons either for wanting the abortion or for not wanting to notify her parents."[119] In effect, the class is that class who declines judicial bypass. Simply put, a veto of rights cannot exist where the juvenile declines to exercise her rights. Further, "[w]e cannot assume that the statute, when challenged in a proper case, will not be construed also to exempt demonstrably mature minors."[120]

In *Ohio v. Akron Center for Reproductive Health*,[121] a new standard was established that may have led or may lead to a weakening of the right to an abortion, particularly for minors.[122] In upholding an Ohio law that upheld a judicial bypass provision,[123]

112. *Id.*
113. *Id.*
114. H.L. v. Matheson, 450 U.S. 398 (1981).
115. Law, *supra* note 105, at 732-33.
116. Matheson, 450 U.S. at 398.
117. Bellotti, 443 U.S. at 647-48.
118. Matheson U.S. at 413.
119. *Id.* at 417-18 (Powell, J., concerring).
120. *Id.* at 406.
121. Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990).
122. Weissmann, *supra* note 8, at 136.
123. Akron, 497 U.S. at 508, 510. The judicial bypass provision required clear and convincing evidence to show the maturity or the juvenile or that the abortion was in the best interests of the juvenile. *Id.*

Akron introduces the undue burden standard[124] that currently defines the state of abortion law.[125]

Finally, in *Planned Parenthood v. Casey*, the undue burden standard was explicitly identified as the standard governing abortion law.[126] The danger of the undue burden standard is said to be that it relaxes the tight fit between the law's purpose and the means employed.[127] In effect, the state must now merely show that the means employed are not an excessive impediment to the right of the juvenile to get an abortion.[128] This relieves the state of part of its burden to show its interest in the legislation.[129] It is not immediately apparent what effect this change may have on parental involvement law, except that it removes the likelihood that parental involvement laws are per se unconstitutional. The reason for this is that the state requires less justification for its interest in parental involvement laws, and no longer needs to show a tight fit between the law and the means.

IV. VIRGINIA AND THE FOURTH CIRCUIT

In the 1990's changes were made to the statutory system effecting the way in which juvenile court transfers,[130]

124. *Id.* at 519-20.
125. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
126. *Id.*
127. Weissmann, *supra* note 8, at 140.
128. *Id.*
129. *Id.*
130. VA. CODE ANN. § 16.1-269.1 (2001). The statute provides in part:

> A. Except as provided in subsections B and C, if a juvenile fourteen years of age or older at the time of an alleged offense is charged with an offense which would be a felony if committed by an adult, the court shall, on motion of the attorney for the Commonwealth and prior to a hearing on the merits, hold a transfer hearing and may retain jurisdiction or transfer such juvenile for proper criminal proceedings to the appropriate circuit court having criminal jurisdiction of such offenses if committed by an adult. Any transfer to the appropriate circuit court shall be subject to the following conditions:
>
> 1. Notice as prescribed in §§ 16.1-263 and 16.1-264 shall be given to the juvenile and his parent, guardian, legal custodian or other person standing in loco parentis; or attorney;
>
> 2. The juvenile court finds that probable cause exists to believe that the juvenile committed the delinquent act as alleged or a lesser included delinquent act which would be a felony if committed by an adult;
>
> 3. The juvenile is competent to stand trial. The juvenile is presumed to be competent and the burden is on the party alleging the juvenile is not competent to rebut the presumption by a preponderance of the evidence; and
>
> 4. The court finds by a preponderance of the evidence that the juvenile is not a proper person to remain within the jurisdiction of the juvenile court. In determining whether a juvenile is a proper person to remain within the

jurisdiction of the juvenile court, the court shall consider, but not be limited to, the following factors:

a. The juvenile's age;

b. The seriousness and number of alleged offenses, including (i) whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; (ii) whether the alleged offense was against persons or property, with greater weight being given to offenses against persons, especially if death or bodily injury resulted; (iii) whether the maximum punishment for such an offense is greater than twenty years confinement if committed by an adult; (iv) whether the alleged offense involved the use of a firearm or other dangerous weapon by brandishing, threatening, displaying or otherwise employing such weapon; and (v) the nature of the juvenile's participation in the alleged offense;

c. Whether the juvenile can be retained in the juvenile justice system long enough for effective treatment and rehabilitation;

d. The appropriateness and availability of the services and dispositional alternatives in both the criminal justice and juvenile justice systems for dealing with the juvenile's problems;

e. The record and previous history of the juvenile in this or other jurisdictions, including (i) the number and nature of previous contacts with juvenile or circuit courts, (ii) the number and nature of prior periods of probation, (iii) the number and nature of prior commitments to juvenile correctional centers, (iv) the number and nature of previous residential and community-based treatments, (v) whether previous adjudications and commitments were for delinquent acts that involved the infliction of serious bodily injury, and (vi) whether the alleged offense is part of a repetitive pattern of similar adjudicated offenses;

f. Whether the juvenile has previously absconded from the legal custody of a juvenile correctional entity in this or any other jurisdiction;

g. The extent, if any, of the juvenile's degree of mental retardation or mental illness;

h. The juvenile's school record and education;

i. The juvenile's mental and emotional maturity; and

j. The juvenile's physical condition and physical maturity.

No transfer decision shall be precluded or reversed on the grounds that the court failed to consider any of the factors specified in subdivision A 4 of this section.

B. The juvenile court shall conduct a preliminary hearing whenever a juvenile fourteen years of age or older is charged with murder in violation of §§ 18.2-31, 18.2-32 or § 18.240, or aggravated malicious wounding in violation of§ 18.2-51.2.

C. The juvenile court shall conduct a preliminary hearing whenever a juvenile fourteen years of age or older is charged with murder in violation of § 18.2-33, felonious injury by mob in violation of § 18.2-4 1, abduction in violation of § 18.2-48, malicious wounding in violation of § 18.2-51, malicious wounding of a law-enforcement officer in violation of § 18.2-51.1, felonious poisoning in violation of § 18.2-54.1, adulteration of products in violation of § 18.2-54.1, robbery in violation of § 18.2-58 or carjacking in violation of § 18.2-58.1, rape in violation of § 18.2-61, forcible sodomy in violation of § 18.2-67.1 or object sexual penetration in violation of § 18.2-67.2, provided the attorney for the Commonwealth gives written notice of his intent to proceed pursuant to this subsection. The notice shall be filed with the court and mailed or delivered to counsel for the juvenile or, if the juvenile is not then represented by counsel, to the juvenile and a parent, guardian or other person standing in loco parentis with respect to the juvenile at least seven days prior to the preliminary hearing.

dispositional discretion of juvenile court judges,[131] and judicial bypass for mature minors seeking an abortion,[132] are handled in Virginia. Additionally, the Fourth Circuit, in *Blue Ridge v. Camblos*, interpreted the Virginia judicial bypass statute to require a mature juvenile to notify a parent of her decision to have an abortion.[133] The interpretation provided by the Fourth Circuit in *Camblos*, causes Virginia to have one of the most restrictive statutes regarding parental involvement in the nation. These changes marks Virginia's deep involvement in the national trend of declaring juveniles responsible for their criminal acts and yet insufficiently responsible to exercise their constitutional abortion rights without impediment and interference.

A. Juvenile Justice and Criminal Responsibility in Virginia

In 1994, Virginia passed several reform proposals propagated by the Virginia Commission of Youth's study of serious juvenile offenders.[134] The first reform implemented a revised transfer statute.[135] The revision, while simplifying the structure of the statute, also lowered the minimum age of transfer from fifteen to fourteen.[136] Professor Shepherd summarizes the procedures established by the revised transfer statute as follows:

> Upon the filing of the Commonwealth's motion, the court must hold a transfer hearing. Furthermore, the court must hold the

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> If the attorney for the Commonwealth elects not to give such notice, or if he elects to withdraw the notice prior to certification of the charge to the grand jury, he may proceed as provided in subsection A.

Id.

131. VA. CODE ANN. § 16.1-285.1(C) (2001).

132. VA. CODE ANN. § 16. 1-241(V) (2001). The Statute provides in pertinent part as follows:

> Petitions filed by a juvenile seeking judicial authorization for a physician to perform an abortion if a minor elects not to allow notice to an authorized person. After a hearing, a judge may authorize a physician to perform an abortion upon finding that the minor is mature and capable of giving informed consent to the proposed abortion. If the judge determines that the minor is not mature, the judge shall, after a hearing, determine whether the performance of an abortion upon the minor without notice to an authorized person would be in the minor's best interest, and if the court finds that the abortion would be in the minor's best interest, it shall so authorize a physician.

Id.

133. Blue Ridge v. Camblos, 116 F.3d 707 (4th Cir. 1997).

134. Robert E. Shepherd, Jr., *Annual Survey of Virginia Law: Legal Issues Involving Children*, 28 U. RICH. L. REV. 1075, 1076-77 (1994).

135. *Id.* at 1077.

136. *Id.*

hearing in a bifurcated fashion, with the determination of probable cause that the juvenile committed an act that would be a felony if committed by an adult as the initial decision. In addition, the court must also decide if the youth is competent to stand trial, with a presumption of competency which must be rebutted by a preponderance of the evidence by the party alleging incompetency. If the juvenile is fourteen years of age or older and is charged with a Class One or Two felony under Chapter 4 of Title 18.2 or with an unclassified felony pursuant to the same chapter with a maximum penalty of life imprisonment or imprisonment for a term of forty years if committed by an adult, the court may transfer the case to circuit court if it finds the child was (1) at least fourteen at the time of the commission of the offense, (2) that the child is competent to stand trial, and (3) that there is probable cause that the juvenile committed the offense. If the juvenile is sixteen years old or older, a finding of probable cause for commission of a Class Three felony violation of Chapter 4 of Title 18.2 for murder under Article 1, a mob-related felony under Article 2, kidnapping or abduction under Article 3, or assault or bodily wounding under Article 4, coupled with the jurisdictional and competency findings will warrant transfer.

If a juvenile who is fourteen years of age or older is charged with any other felony, then the court must enter into the second stage of the bifurcated hearing, which is a determination by a preponderance of the evidence of whether the "juvenile is not a proper person to remain within the jurisdiction of the juvenile court." The factors enumerated include: (a) age; (b) the seriousness and number of offenses, with a particular focus on the violence of the offense and the degree of the juvenile's culpability; (c) the length of time the juvenile could be kept in the juvenile justice system for treatment and rehabilitation; (d) the services and dispositional alternatives available in both the juvenile and adult systems; (e) the court record and previous offense history of the juvenile; (f) the history of escapes from juvenile correctional facilities; (g) the extent of any mental retardation or mental illness; (h) the youth's school record and education; (i) the juvenile's mental and emotional maturity; and (j) the physical maturity of the child. There is a curious anomaly in the section in that it directs the court to consider the factors, while stating "[n]o transfer decision shall be precluded or reversed on the grounds that the court failed to consider any of . . . [them] . . . ."[137]

137. *Id.* at 1077-79 (citations omitted).

The second reform proposal resulted in a change to the length of time a juvenile serious offender could be committed.[138] The revised statute lengthens the maximum term of determinate commitment from twelve months to seven years or until the offender reaches his twenty-first birthday.[139] To be considered a serious offender under the statute, and thus eligible for greatly lengthened commitment to a juvenile facility, the offender must be:

> fourteen years of age or older who has been found guilty of an offense which would be a felony if committed by an adult, and either (i) the juvenile is on parole for an offense which would be a felony if committed by an adult, (ii) the juvenile was committed to the state for an offense which would be a felony if committed by an adult within the immediately preceding twelve months, (iii) the felony offense is punishable by a term of confinement of greater than twenty years if the felony was committed by an adult, or (iv) the juvenile has been previously adjudicated delinquent for an offense which if committed by an adult would be a felony punishable by a term of confinement of twenty years or more, and the circuit court, or the juvenile or family court, as the case may be, finds that commitment under this section is necessary to meet the rehabilitative needs of the juvenile and would serve the best interests of the community.[140]

The extension of the punishment of the serious offender may nevertheless be meliorated by the discretion of the judge.[141] Factors similar to those considered in the transfer of the juvenile are used by the juvenile court judge to determine if the juvenile should be exposed to a longer term of commitment. These factors include: 1) the juvenile's age; 2) the seriousness, nature, and number of present offenses; 3) record and previous offense of the juvenile; and 4) Department of Youth and Family Service's recommended length of stay.[142]

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138. *Id.* at 1082. See, VA. CODE ANN. § 16.1-285.1(C) (2001). The statute reads, in pertinent part:

> In ordering commitment pursuant to this section, the court shall specify a period of commitment not to exceed seven years or the juvenile's twenty-first birthday, whichever shall occur first. The court may also order a period of determinate or indeterminate parole supervision to follow the commitment but the total period of commitment and parole supervision shall not exceed seven years or the juvenile's twenty-first birthday, whichever occurs first.

Id.

139. Shepherd, *supra* note 134, at 1082.

140. VA. CODE ANN. § 16.1-285.1(A) (2001).

141. VA. CODE ANN. § 16.1-285.1(B) (2001).

142. *Id.*

Both reforms promulgated by the Virginia Commission of Youth's study of serious juvenile offenders, lead to a reduction in the age at which a juvenile can be found criminally responsible. This is most clearly the case in the juvenile transfer provision, which expands the class of juveniles treated as adults.[143] The extension of juvenile commitment,[144] while not shifting the juvenile to the criminal system, expands punishment well beyond what was previously supposed to be appropriate for a juvenile.[145] Troublesomely, it is not altogether clear that the transfer provision is substantively different from the expanded commitment of serious juvenile offenders. The basic requirements exposing a juvenile to transfer or extended commitment are virtually identical.[146] Both statutes contain similar discretionary considerations for the determination of transfer or punishment.[147] Furthermore, in light of the equivocation of juvenile justice and criminal responsibility propounded by the Supreme Court,[148] it is somewhat disingenuous to describe a seven-year commitment as non-punitive and rehabilitative in nature.

The Commonwealth of Virginia has also instituted a "once an adult/always an adult" statute.[149] According to this statute, once a

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143. VA. CODE ANN. § 16.1-269.1 (2001).

144. VA. CODE ANN. § 16.1-285.1(C) (2001).

145. As embodied in the previous limit of twelve months.

146. *Compare* VA. CODE ANN. § 16.1-269.1(A) *with* VA. CODE ANN § 16.1-285.1(C) (including requirements that offender is fourteen or older and commits an act that would be a felony if committed by an adult).

147. *Compare* VA. CODE ANN. § 16.1-269.1(A) *with* VA. CODE ANN. § 16.1-285.1(C) (including discretionary considerations like: age, seriousness of offense, suggested juvenile court punishment and previous record of the juvenile offender).

148. See supra notes 26-45 and accompanying text.

149. VA. CODE ANN. § 16.1-271 (2001). The statute reads:

> The trial or treatment of a juvenile as an adult pursuant to the provisions of this chapter shall preclude the juvenile court from taking jurisdiction of such juvenile for subsequent offenses committed by that juvenile.
>
> Any juvenile who is tried and convicted in a circuit court as an adult under the provisions of this article shall be considered and treated as an adult in any criminal proceeding resulting from any alleged future criminal acts and any pending allegations of delinquency which have not been disposed of by the juvenile court at the time of the criminal conviction.
>
> All procedures and dispositions applicable to adults charged with such a criminal offense shall apply in such cases, including, but not limited to, arrest; probable cause determination by a magistrate or grand jury; the use of a warrant, summons, or capias instead of a petition to initiate the case; adult bail; preliminary hearing and right to counsel provisions; trial in a court having jurisdiction over adults; and trial and sentencing as an adult. The provisions of this article regarding a transfer hearing shall not be applicable to such juveniles.

Id.

juvenile is transferred to criminal court and convicted of the charge, the criminal court will have original jurisdiction over any subsequent charge.[150] The effect of such a statute is to concretize the suppositions of criminal responsibility produced by the juvenile transfer provision.

As a final example of the declining age of responsibility in Virginia, in *Jackson v. Virginia*, the Virginia Supreme Court upheld the death penalty for 16-year-old Chauncey Jacob Jackson.[151] Jackson was charged and convicted of capital murder, attempted robbery, two firearms charges, conspiracy to commit robbery, and receipt of stolen property.[152] For this he received a death sentence.[153] While it is suggestive of Virginia's attitude to youth and responsibility that it is trying to execute a sixteen year-old, the penalty phase of the trial is even more suggestive. In an effort to make it's case for the death penalty, the Commonwealth introduced evidence of prior misdeeds.[154] These misdeeds were adjudications arising from the juvenile court system.[155] The Commonwealth, by allowing acts committed when the Defendant was thirteen[156] for purposes of the death penalty sentencing of a sixteen year-old, is taking the position, intentional or not, that a sixteen year old is so completely developed in terms of maturity and responsibility that he can be put to death and that acts committed when thirteen demonstrate criminal responsibility at that early age.

B. *The Parental Notice Act and Planned Parenthood v. Camblos: The Fourth Circuit, Abortion, and Parental Notice.*

In 1999, the Parental Notice Act[157] was signed into law.[158] This act "requires that a minor who decides to have an abortion inform one of her parents twenty-four hours prior to performance of the procedure."[159] Hours before the law became effective the federal district court for the Western District of Virginia enjoined the enforcement of the Act.[160]

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150. *Id.*
151. Jackson v. Commonwealth of Virginia, 499 S.E.2d 538 (1988).
152. *Id.* at 542.
153. *Id.*
154. *Id.* at 543.
155. *Id.*
156. *Id.*
157. Parental Notice Act, VA. CODE ANN. § 16.1-241(V) (2001).
158. Planned Parenthood v. Camblos, 155 F.3d 352, 355 (4th Cir. 1998).
159. *Id.*
160. *Id.*

The district court reasoned that under the standard set forth under *Bellotti v. Baird*,[161] the Parental Notice Act lacked a sufficient judicial bypass provision.[162] The district court read *Bellotti* to require the mandatory waiver of any notification provision provided that the juvenile can demonstrate her maturity during a judicial bypass hearing.[163]

The Court of Appeals for the Fourth Circuit stayed the district court's order[164] and eventually ruled that the Parental Notice Act was not unconstitutional.[165] The Fourth Circuit argued that the district court misread *Bellotti* as creating a requirement and standard for judicial bypass for parental notice statutes.[166] The Fourth Circuit reads the Supreme Court precedent as devoid of any explication of a standard for a judicial bypass provision in the case of parental notice requirements.[167] Although the Supreme Court has upheld parental notice statutes with *Bellotti*-type[168] bypass procedures, the Supreme Court has never explicitly required bypass procedures for a notice statute.[169]

The district court, in support of enjoining the statute, cites the opinion of Justice Powell from *Bellotti* addressing this very issue.[170] The Fourth Circuit cites the citation of the district court.[171] The citation reads as follows: "[i]f [a pregnant minor] satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court *must* authorize her to act without parental consultation or consent."[172] It is hard to understand the foregoing passage from *Bellotti* as establishing at least the necessity that a judicial bypass provision be included in a parental notice statute. The Court's opinion in *Bellotti* clearly states that a mature juvenile capable of making an informed judgment cannot be required to act so as to give notice to her

161. Bellotti, 443 U.S. at 622.
162. Planned Parenthood v. Camblos, 155 F.3d at 356.
163. *Id.*
164. Camblos, 116 F.3d 707.
165. Planned Parenthood v. Camblos, 155 F.3d at 355.
166. *Id.* at 356-57.
167. *Id.*
168. Parental consent.
169. Planned Parenthood v. Camblos, 155 F.3d at 356-57.
170. *Id.* at 356.
171. *Id.*
172. *Id.* (quoting Memorandum Op. at 10, quoting *Bellotti*, 443 U.S. at 647 (op. of Powell, J.)).

parent.[173] According to *Bellotti*, the court must authorize her independent actions.[174]

The Fourth Circuit states that the Supreme Court "has always carefully distinguished [parental notice] statutes from parental consent statutes, explicitly reserving the question of what, if any, bypass procedures are required for parental notice statutes."[175] The Fourth Circuit is correct in observing that decisions subsequent to *Bellotti* state that the Supreme Court has never explicitly required a judicial bypass provision.[176] This, however, would seem to surprise the dissent in *Bellotti*.[177] Justice White, like the district court for the Western District of Virginia, reads the *Bellotti* opinion as clearly stating that a minor found mature by a court must be excused from any parental consent or notice statute.[178] Justice White, in his dissent, summarizes the opinion of the court as follows:

> Going beyond *Danforth*, the Court now holds it unconstitutional for a State to require that in all cases parents receive notice that their daughter seeks an abortion and, if they object to the abortion, an opportunity to participate in a hearing that will determine whether it is in the "best interests" of the child to undergo the surgery. Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.[179]

It seems quite clear, to even the dissent, that *Bellotti* speaks to parental notice as well as parental consent laws.

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173. Bellotti, 443 at 647. The Court states:

> We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity - if she so desires - to go directly to a court *without first consulting or notifying her parents*. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, *the court must authorize her to act without parental consultation* or consent.

Id. (emphasis added).

174. *Id.*

175. *Id.* Planned Parenthood v. Camblos, 155 F.3d at 357 (citing Lambert v. Wicklund, 520 U.S. 292, 295-88 (1997) and Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 510-11 (1990)).

176. Akron, 497 U.S. at 510-11; Lambert v. Wicklund, 520 U.S. 292 (1997).

177. Bellotti, 443 U.S. at 657 (White, J., dissenting).

178. *Id.*

179. *Id.*

To be fair, *Bellotti* is a 4/4/1 split decision.[180] The lead opinion, while providing the acknowledged constitutional framework of much of the debate regarding parental involvement laws, is not an opinion that expresses the opinion of a true majority of the court. This fact, however, fails to diminish the effect of the opinion in the parental consent cases.

Furthermore, *Bellotti* is a parental consent case.[181] Seemingly any opinion it has to give on the issue of parental notice acts is dicta. Perhaps this is so despite the reading given the case by Justice White in his dissent.

Supposing then, that those portions of *Bellotti* relevant to the issue in *Camblos* are not binding on the Fourth Circuit, the Fourth Circuit's assertion that no judicial bypass provision is constitutionally required for a parental notification statute seems to be based on two grounds.[182] First, the Supreme Court has, of late, declared that they have never spoken to the issue of judicial bypass requirements in parental notification laws. Assuming that statements concerning parental notification, like those in *Belotti*, are dicta produced in the context of parental consent cases, the Fourth Circuit is certainly not bound to case law that does not exist. The problem is that the Fourth Circuit takes the initiative and denies that the right to judicial bypass of parental notification provisions for juveniles exists.[183] The Fourth Circuit further claims, contrary to their earlier supposition of Supreme Court silence, that precedent exists undermining the right to judicial bypass of parental notice laws.[184]

The Fourth Circuit relies, in part, on *H.L. v. Matheson*.[185] As mentioned earlier, *Matheson* is often misread.[186] The Fourth Circuit reads the case for the following proposition: "a state can, without providing any bypass procedure at all, constitutionally require notice to the parents of an unemancipated minor who has 'made no claim or showing as to her maturity or as to her relations with her parents'".[187] This reading is not uncommon.[188] *Matheson*, however, only stands for the proposition that a parental notification

180. *Id.* at 647.
181. *Id.*
182. Planned Parenthood v. Camblos, 155 F.3d at 363.
183. *Id.*
184. *Id.* at 363.
185. Matheson, 450 U.S. at 398.
186. *See supra* notes 114-20 and accompanying text.
187. Camblos, 155 F.3d at 363.
188. Law, *supra* note 105, at 732-33.

statute is permissible under the Constitution.[189] This holding is not surprising in that the run of cases from *Roe* to *Casey* all uphold the state's right to impose an even stricter constriction of the juvenile's right in the form of parental consent statutes. As *Bellotti* makes clear, the presence of a judicial bypass provision is critical for the protection of a juvenile's constitutionally protected abortion rights.[190] The *Matheson* court does state that "the requirement of notice to parents may inhibit some minors from seeking abortions is not a valid basis to void the statute as applied to appellant and the class properly before us."[191] The critical portion of this statement is the reference to the appellant and her class. The appellant challenged the statute on the ground that it inhibited a mature minor's exercise of her right to an abortion.[192] The appellant, however, refused to express the basis of her maturity in a bypass hearing, and thus declined the bypass provision.[193]

The appellant's challenge in *Matheson* is that it is unconstitutional to require a pregnant juvenile to serve notice to her parents of her desire to have an abortion.[194] The class that the appellant represents is that of an "unemancipated minor who desires an abortion without parental notification but also desires not to explain to anyone her reasons either for wanting the abortion or for not wanting to notify her parents."[195] The class is that class who declines judicial bypass. In *Camblos*, on the other hand, the class is those juveniles who seek to be or are adjudged mature in a bypass hearing.[196]

The Fourth Circuit's confusion over *Matheson* is further compounded by the representation in *Matheson* that the holding should not be extended to cases like *Camblos*, involving juvenile's who have submitted themselves to a bypass hearing. The *Matheson* court states, "[w]e cannot assume that the statute, when challenged in a proper case, will not be construed also to exempt demonstrably mature minors."[197] Thus, in upholding the statute, the court is not addressing the issue in *Cambrol*, nor are they departing from their position in *Bellotti*.

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189. Matheson, 450 U.S. 409.
190. Bellotti, 443 U.S. at 647-48.
191. Matheson, 450 U.S at 413.
192. *Id.*
193. *Id.* at 417-18
194. Id. at 405.
195. *Id.*
196. Planned Parenthood v. Camblos, 155 F.3d at 352.
197. *Id.* at 406.

This position is reflected in the *Camblos* concurrences.[198] The opinion of Judge Widener describes the interpretation of the word "may" in the statute[199] as allowing a judge to decline to obviate the notice requirement of a juvenile judged to be mature is an abuse of discretion.[200] Under the precedent, a juvenile who is found to be mature must be authorized to have an abortion.[201]

The concurrence in the judgment of Judge Michael is much less charitable to the majority. This opinion argues, with Judge Widener, that precedent requires the reading of "may" in a compulsory sense.[202] Judge Michael moves on to argue that, Virginia precedent aside, the court must read "may" as "must" to meet the requirements of constitutionality.[203]

Judge Michael makes the "maturity argument" that is at the heart of this Note.[204] Judge Michael argues that the predicate of a

198. Planned Parenthood v. Camblos, 115 F.3d at 385-92 (Widener, J., concurring; Michael, J., joined by Murnaghan, J., Ervin, J., and Motz, J., concurring in judgment).

199. VA. CODE ANN. § 16.1-241(V) (2001).

200. Planned Parenthood v. Camblos, 115 F.3dat 385.

201. *Id.*

202. *Id.* at 386.

203. *Id.*

204. The conclusion of Judge Michael's maturity argument is as follows:

> The Court's statements in these cases make clear that once a minor is found to be mature and capable of making an informed choice, she must be given the same consideration as an adult woman when it comes to her constitutional rights. See *Bellotti* II, 443 U.S. at 647 (plurality opinion); *Akron I*, 462 U.S. at 428 n.10; *Hodgson*, 497 U.S. at 453-54. Thus, the state cannot impose any restrictions on a mature minor's right to choose an abortion that cannot be imposed on an adult woman. See *Planned Parenthood v. Miller*, 63 F.3d 1452, 1460 (8th Cir. 1995) (Arnold, C.J.), *cert. denied sub nom. Janklow v. Planned Parenthood*, 517 U.S. 1174, 134 L. Ed. 2d679, 116 5. Ct. 1582 (1996); *see also Causeway Medical Suite v. Ieyoub*, 123 F.3d 849, 851 n.3 (5th Cir. 1997) (Jones, J., dissenting from denial of reh'g en banc) (Under *Bellotti* II "[i]f the court finds [a young woman] sufficiently mature to make the abortion decision, that is the end of the matter. Neither the court nor the parents can tell her what to do"). Until today, this principle has led *every* circuit considering the issue to conclude that any statute which forbids mature minors from obtaining abortions without parental notice is unconstitutional unless it provides a *mandatory* judicial bypass. *See, e.g., Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096, 1104-06 (5th Cir. 1997), *reh'g en banc denied* 123 F.3d 849 (5th Cir.), *cert. denied*, 118 S. Ct. 357 (1997); *Miller*, 63 F.3d at 1459-61; *Zbaraz v. Hartigan*, 763 F.2d 1532, 1536 (7th Cir. 1985), *aff'd by an equally divided court*, 484 U.S. 171 (1987); *Indiana Planned Parenthood Affiliate Assoc. v. Pearson*, 716 F.2d 1127, 1134 (7th Cir. 1983) (A parental notice statute "constitutionally cannot . . . give the juvenile court the authority to refuse to waive notification despite a finding that the minor is mature"). Against this background, I cannot agree with the majority's conclusion that the Constitution allows a state to forbid mature minors from exercising their right to an abortion unless they first notify their parents.

Id. at 388.

State or parent infringing on the constitutional right to an abortion is maturity.[205] Without sufficient maturity the juvenile's rights can be constrained for the better judgment of the state, court, or parent.[206] Once the juvenile is found to be mature there is no justification for the state to infringe on the constitutional right to an abortion.[207] To rephrase, once a juvenile is found to be mature she is fully vested with her right to have an abortion. "Parents have a traditional and substantial interest in, as well as a responsibility for, the rearing and welfare of their children, especially during immature years."[208]

V. THE SCHIZOPHRENIA OF MATURITY AND THE LAW

> For the most part, [presuming that an adolescent is an adult for some purposes and a child for other] works well. A bright line rule that designates a particular age as the boundary between childhood and adulthood for multiple purposes (the "age of majority"), regardless of actual maturity, has the advantage of providing a clear signal of the attainment of adult legal status. It is also administratively efficient and promotes parental responsibility. Moreover, by shifting the boundary and extending adult rights and duties at different ages for different purposes, lawmakers accomplish the transition from childhood to adulthood gradually . . . . In some contexts, however, categorical assumptions that ignore the transitional stage of adolescence can lead to harmful outcomes.[209]

Some level of schizophrenia, as it relates to maturity, must inhere in the law for a variety of reasons. First, different rights and responsibilities within a society may have legitimately different consequences and requirements. For example, one who is mature enough to drive a car may not possess the requisite capacity to serve in the armed forces. Due to developmental differences, pornographic or graphically violent literary material may have an effect on a minor that would not be experienced by an adult. Second, some rights and responsibilities may implicate the Constitution in ways other rights do not. An example of this is a woman's right to an abortion, and a woman's right to drive. [210]

205. *See id.*
206. *See id.*
207. *See id.*
208. Matheson, 450 U.S. at 419.
209. Scott, *supra* note 6, at 548-49.
210. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. at 824-47 (discussing and comparing ages of maturity for activities like: right to gamble, drive, purchase pornography, right to vote,

Whatever interest a state may have in limiting some right, must be balanced against the individual's Constitutional entitlement to such a right.[211] It is the contention of this Note, as far as juvenile justice and juvenile abortion rights are concerned, no such balance is struck. The will of the majority, as embodied in the state's interest in crime prevention and unborn children, has acted to the detriment of minors by establishing conflicting capacity standards.

A. *The Occasional Concern for the Dangerous Immaturity of Pregnant Minors in Virginia*

It is evident that under the Supreme Court's abortion jurisprudence a State does have an interest in an unborn fetus.[212] This interest must be weighed against the interest of the pregnant woman.[213] Under the reasoning of *Danforth* and its successors, this interest is also weighed against the rights of the pregnant juvenile. Due to the age of the juvenile, and her lack of maturity, the rights of the juvenile are not fully vested as a matter of statutory presumption.[214] The rights of the juvenile must be weighed against those of the state, and those possessed by her parent.[215] Generally considered, parents possess rights as trustees of the portion of the juvenile's rights that have yet to vest in the juvenile[216], as well as those rights attributable to the parents qua parents.[217] The state may thus exercise its interest in the welfare of the fetus by requiring the consent or notice of the juvenile's parents, provided that there is a judicial bypass provision.[218]

The peculiar position of judicial bypass in the state of Virginia, as demonstrated by the Fourth Circuit's interpretation of the Parental Notice Act[219] in *Camblos*,[220] is further exacerbated by Virginia law concerning medical care for minors.[221] Section E of this act establishes the presumed maturity of a juvenile to consent

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right to drive, and right to serve on a jury).

211. Bellotti, 443 U.S. at 633-34.

212. Roe, 410 U.S. at 149-50.

213. *Id.* at 154-56.

214. Danforth, 428 U.S. at 74.

215. *Id.*

216. Scott, *supra* note 6, at 551.

217. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972); Ginsberg v. New York, 390 U.S. 629, 639 (1968); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925);.

218. *See supra* note 217.

219. Parental Notice Act, VA. CODE ANN. § 16.1-241(V) (2001).

220. Planned Parenthood v. Camblos, 155 F.3d at 352.

221. VA. CODE ANN. §54.1-2969 (2001).

to certain medical procedures.[222] Among these procedures is "birth control, pregnancy [and] family planning . . . ."[223] On some level, the contraposition of presumed immaturity for abortion procedures and presumed maturity for pregnancy related medical treatment is absurd. If the justification for abortion restrictions are the state's interest in the health of the unborn fetus, and a minor is presumed incompetent in this regard, it seems contradictory that Virginia should trust juveniles with pre-natal care of their unborn children without any requirement of state or parental assistance.

Admittedly there is a difference between terminating and maintaining a pregnancy. A state will have greater interests in the former. Nevertheless, if the Virginia House of Delegates is sincere in its concern for the rights of the fetus and those of the parent, and is sincere in its belief that minor females are per se immature when it comes to child-bearing rights, it is difficult to understand why the Virginia House of Delegates abandons unborn children to the feckless hands of immature and incompetent women.

Is it really female immaturity with which Virginia and the Fourth Circuit is concerned?

B. *Finishing Second to Last in the Race to Justify Transfer to Criminal Court? Maturity.*

In the list of enumerated factors for transfer of a juvenile to criminal court, maturity is listed eighth out of nine factors.[224] Certainly, severity of the crime, mental retardation, recidivism, amenability to rehabilitation, physical maturity, school record, and previous escape from custody are important factors.[225] It is nevertheless peculiar to suppose that the Virginia House of Delegates is not averse to the transfer of a juvenile to criminal court based on factors other than sufficient maturity for criminal culpability. Maturity, after all is only one of nine factors to be weighed together. Not surprisingly, the statute provides assurances that when an immature minor slips through the cracks in the transfer statute, and finds her way into the criminal court system, that "[n]o transfer decision shall be precluded or reversed on the grounds that the court failed to consider any of the factors specified. . . ."[226]

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222. *Id.* §2969(E).
223. *Id.* §2969(E)(2).
224. VA. CODE ANN. § 16.1-269.1 (2001).
225. *Id.*
226. *Id.*

"It is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant.'"[227] "There is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults."[228] While maturity is a mitigating factor in criminal court dispositions, it is not a factor in criminal court adjudication. Thus, the Virginia General Assembly may ultimately be begging off the issue of criminal responsibility entirely. If maturity is only one of many factors, without any statutory language requiring sufficient maturity to establish even a minimal notion of criminal culpability, and if the failure to consider criminal culpability qua maturity is not grounds for reversal of the transfer decision, then culpability is irrelevant but for judicial discretion.

C. The Body Politic Cuts Off its Head to Spite its Progeny

In both, the juvenile transfer statute[229] and the Parental Notice Act[230] concerns for maturity are legislated.[231] In practice, however, maturity is downplayed and is subverted to state's interest in fetuses and crime prevention. The effort of the Virginia House of Delegates, and legislatures nationally, to abrogate a minor's right to an abortion through parental involvement statutes, and to minimize the relationship between culpability and punishment through juvenile transfer statutes, is indicative of a will to sacrifice constitutional rights and traditional notions of justice to the appetites of the body politic. What is most telling is that the consistent subversion of rights expresses itself in the appearance of inconsistency. Juvenile transfer statutes generally lower the age of responsibility while parental involvement statutes tend to raise the age of responsibility. In either case, it is the *image* of the acts of criminality and abortion that is driving this schizophrenic approach to responsibility.

In a multitude of states, the simple act of committing a serious crime will result in transfer to criminal court. Such transfers are made without regard to maturity, sometimes without a hearing,

227. Thompson, 487 U.S. at 834 (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

228. Thompson, 487 U.S. at 834.

229. VA. CODE ANN. § 16.1-269.1.

230. VA. CODE ANN. § 16.1-241.

231. In both statutes maturity is listed as a factor for consideration. Unfortunately, in the transfer provision maturity is only one of nine facts and in the Parental Notice Act an adjudication of maturity does not necessitate the vesting of the minor's abortion rights. *See* VA. CODE ANN. § 16.1-269.1; Parental Notice Act, VA. CODE ANN. § 16.1-241.

and occasionally without regard to age.[232] The movement of the law, away from treatment of the juvenile offender to punishment of the offensive act, is seemingly complete as to certain offenses.[233] It is the act which provides the face and focus for the court system, allowing the appearance of severe malfeasance to replace notions of culpability.

In *Stanford v. Kentucky*, Justice Scalia delivers the opinion of the court, denying a challenge to death penalty convictions by a sixteen and seventeen-year-old on Eighth Amendment grounds.[234] One of the arguments used by the juveniles is that the differentiation of ages of responsibility as it relates to different activities implicates the Eighth Amendment in the inconsistent application of the law.[235] While Justice Scalia's dismissal of this argument as absurd is accurate, his phrasing is telling.

> It is, to begin with, absurd to think that one must be mature enough to drive carefully, to drink responsibly, or vote intelligently, in order to be old enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards.[236]

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232. Nicole A. Saharsky, Note, *Consistency as a Constitutional Value: A Comparative Look at Age in Abortion and Death Penalty Jurisprudence*, 85 MINN. L. REV. 1119, 1160 n.221 (2001).

> *See, e.g.*, Ariz. Rev. Stat. 13-501 (Supp. 2000) (automatic waiver if age fifteen or over and commits a violent crime); Ark. Code Ann. 9-27-318 (Michie Supp. 1999) (waiver based seriousness of the offense with minimum transfer age of fourteen); Colo. Rev. Stat. 19-2-518 (1)(a)(I)(A) (2000) (allowing transfer at age twelve upon commission of certain felonies and violent crimes); Idaho Code 20-508, 20-509 (Michie Supp. 1997) (no minimum age required for transfer, based on list of crimes); Miss. Code Ann. 43-21-157 (1) (2000) (allowing transfer at age thirteen based on seriousness of the offense); Mo. Ann. Stat. 211.071 (1) (West 1996) (allowing transfer at age twelve, based on type of offense); Mont. Code Ann. 41-5-206 (1)(a) (1999) (allowing transfer at age twelve, based on offense); N.C. Gen. Stat. 7B-2200 (1999) (allowing transfer at age thirteen if criminal act was a felony); Or. Rev. Stat. 419C.340 (1997), 419C.352 (Supp. 1998) (transfer allowed, with no minimum age specified, if certain crimes charged); R.I. Gen. Laws 14-1-7, 14-1-7.2 (1994), 14-1-7.1 (Supp. 1999) (no minimum age requirement for transfer, based on type of offense); S.D. Codified Laws 26-11-1, 26-11-4 (Michie 1999) (no minimum age requirement for transfer, based on type of crime); . . . [Okla. Stat. tit. 10 7001.3 (2001)] (Oklahoma statute that authorizes adult treatment based only on the seriousness of the offense).

Id.

233. *Id.* at 1160.

234. Stanford, 492 U.S. 361.

235. *Id.* at 374.

236. *Id.*

Justice Scalia's mistake is that he allows the appearance of the act to cloud his reasoning on responsibility.

It does not follow that simply because one is "old enough to understand that murdering another human being is profoundly wrong,"[237] one is necessarily criminally culpable for one's act. "Even the toddler can discharge a firearm and kill an intended victim . . .," and understand that this act is wrong.[238] The nature of such understanding, however, is questionable.

Justice Scalia's view presumes, as many states presume,[239] that commission of an act associated with malice aforethought implies the presence of malice aforethought. The simple answer to this contention is that, even in the case of adults, the law allows for mitigating circumstances, like an uncontrollable emotional reaction, to meliorate the agent's culpability. It seems strange then, that Justice Scalia declines to extend the same consideration to adolescents, whose behavior is marked by antisocial behavior, poor decision making, and questionable impulse control.[240] Studies indicate that adolescence is marked by psychosocial factors affecting the judgment of beings otherwise capable of understanding right and wrong.[241] Despite the presence of understanding in juvenile decision making, the notion that the juvenile can simply "conform one's conduct to that most minimal of all civilized standards,"[242] is simply misplaced.

The error of behavior conformance aside, Justice Scalia commits a non-sequitur in his comparing other modes of responsibility to criminal responsibility. He equates 'carefulness', 'responsibility', and 'intelligence' with 'understanding'. Surely Justice Scalia can apprehend that a four-year-old possesses an understanding that killing is wrong. It is doubtful, however, that the traits of carefulness, responsibility, and intelligence could be applied to a four-year-old, even though an understanding of drinking, driving, and voting could be supposed. This error betrays a more fundamental equating of responsibility and understanding. Understanding provides no real criteria for determining responsibility. If it did trends criminalizing juvenile justice would not only be justified but would be required. Why shouldn't the

237. *Id.*

238. Saharsky, *supra* note 232, at 1161 n.222 (citing VICTOR L. STREIB, DEATH PENALTY FOR JUVENILES 184 (1987)).

239. *See supra* note 216-223 and accompanying text.

240. Scott, *supra* note 6, at 155-60.

241. *Id.* at 162-72. Professor Scott lists peer influence, distorted attitude towards risk, and variant temporal perspectives as factors adversely affecting juvenile decision-making. *Id.*

242. Stanford, 492 U.S. at 374.

teenage vandal be punished similarly to the middle-aged vandal if they were equally culpable? To do otherwise would raise issues of disparate treatment under the Eighth Amendment, similar, in fact to supposing the juvenile offender responsible but the pregnant minor irresponsible when both possess equal levels of 'understanding'.

Justice Scalia, however, need not be pushed to this extreme. He can always take refuge in the "evolving standards of decency" jurisprudence of the Eighth Amendment[243] to argue that it is contrary to standards of decency to allow violent youthful offenders to evade criminal charges and to allow a juvenile minor to consent to an abortion. This, "evolving standards of decency" jurisprudence, however, places into doubt whether culpability in any real sense is required under Justice Scalia's vision of the Eighth Amendment.[244]

In *Stanford*, Justice Scalia rejects the notion that the Court must determine whether "there is a disproportion 'between the punishment imposed and the defendant's blameworthiness.'"[245] He argues that the "evolving standards of decency" analysis subsumes "proportionality" analysis as the "'proportionality' analysis itself can only be conducted on the basis of standards set by our own society; the only alternative, once again, would be our personal preferences."[246] Presumably then, if enough states choose to lower the age of criminal responsibility to seven and the age of maturity to twenty-one for purposes of abortion, there could be no challenge under the Constitution.[247]

Justice Scalia's understanding of proportionality analysis, however, is flawed. In the year prior to the Court's deciding *Stanford*, the Supreme Court decided *Thompson v. Oklahoma*.[248] In *Thompson*, the Court used the "proportionality" analysis in deciding that a sixteen-year-old is presumptively immature for purposes of criminal culpability and the death penalty.[249] The court in *Thompson* anticipated and resolved Scalia's dichotomy between personal opinion and community standards of decency by reference to extensive psychological research into juvenile responsibility.[250] The court read the psychological research to establish that

243. *Id.* at 369 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).
244. *Id.*
245. *Id.* at 379-80.
246. *Id.*
247. *Stanford* was a 4/4/1 decision. Only three other justices, Justice Rehnquist, Justice White, and Justice Kennedy assented to Scalia's denial of the "Proportionality" analysis. *Id.*
248. Thompson v. Oklahoma, 487 U.S. 815 (1988).
249. *Id.*
250. *Id.* at 835.

"[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is more apt to be motivated by mere emotion or peer pressure than is an adult."[251] This view directly contradicts Justice Scalia's easy notion that "to understand that murdering another human being is profoundly wrong [is to be able to] conform one's conduct to that most minimal of all civilized standards."[252]

In equating criminal culpability with understanding,[253] Scalia would leave the states to determine criminal responsibility by reference to whatever they choose. Judging by the inconsistent application of the age of responsibility, particularly where constitutional rights are implicated, i.e., recent trends to lower the age of criminal responsibility and raise the age at which a woman's constitutional right to an abortion vests, state legislatures are already invoking "evolving standards of decency."[254] Youth is 'indecent,' because the legislators focus, as did Justice Scalia, on the act. "[S]ome courts consider unwed pregnancy itself to be a sign of immaturity,"[255] some consider juvenile offenders to be "Super-Predators"[256], and some even consider abortion as "profoundly wrong and abhorrent to that most minimal of all civilized standards."[257] It is the consideration, or imagery, of the act that creates the slackening of notions of responsibility in juvenile justice and the more stringent notions under parental involvement statutes, including those in Virginia.

D. The Supreme Court's Circular Precedent on Juvenile Abortion and Juvenile Justice

The groundwork of the Supreme Court's jurisprudence in juvenile justice and minor abortion rights is self-referential. The parental involvement cases are cited by the juvenile justice cases, which are cited by the juvenile death penalty cases. Given the

251. *Id.*

252. *Stanford*, 492 U.S. at 374

253. This would seem to imply that M'Naughten-type rules could be adopted for all areas of criminal responsibility.

254. Stanford, 492 U.S. at 361-62.

255. Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873, 1890 (1996).

256. James Herbie DiFonzo, *Parental Responsibility for Juvenile Crime*, 80 OR. L. REV. 1 (2001). The Super-Predator is a mythical construction of modern delinquency describing youthful offenders as irreversibly violent and unsalvageable, and is used to justify the increasingly punitive nature of juvenile justice. *Id.* at 15.

257. Stanford, 492 U.S. at 374.

nature of precedent this is an unspectacular proposition. Given, however, the contradictory direction that the ages of responsibility are moving in these areas, it is surprising to imagine such common origins.

In re Gault,[258] which started juvenile justice down the road to criminal court,[259] provided valuable theoretical underpinnings to the Court's juvenile abortion jurisprudence.[260] In *Bellotti*, the Court indicates that "[a] child, merely on account of his minority, is not beyond the protection of the Constitution. As the Court said in *In re Gault*, 387 U.S. 1, 13 (1967), 'whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.'"[261] Thus, that the abortion rights of the juvenile were even partially vested was the result of precedent like *Gault* that allowed for incomplete constitutional rights for juveniles. These incomplete rights in *Gault*, however, lead to the criminalization of juvenile justice.

Thompson, for its part, relies on *Bellotti* for the notion that culpability is affected by the psychosocial factors to which an adolescent is exposed.[262] As a death penalty case, *Thompson* is not one of the primary focuses of this note, but it provides an additional counterweight to the criminalizing effects of *Gault*. *Thompson* stands for the proposition that punishment should be directly related to the culpability of the convicted.[263] In its way, *Gault* has undermined this principle, despite its attempt to protect juvenile rights. The ultimate effect of the procedural protections of *Gault* is the movement away from rehabilitation for serious offenders.[264] This movement to punitive dispositions for juveniles undermines the relationship of culpability and punishment. Of course, a second effect of *Gault* is the protection of minor abortion rights.

VI. MATURITY: A REFLECTION OF THE FACE OF THE ACT, CONCEALMENT OF THE ACTOR

The reason that *Belotti*, with the juvenile abortion decisions, and *Gault*, with the juvenile justice decisions, lead to disparate results in the area of culpability is due to the idea of the state's

258. Gault, 387 U.S. 1 (1967).
259. *See supra* notes 36-44, 83-86 and accompanying text.
260. Bellotti, 443 U.S. at 633.
261. *Id.*
262. Thompson, 487 U.S. at 834.
263. *Id.*
264. *See supra* notes 83-87 and accompanying text.

interest. Both lines of cases are concerned with the protection of the minor's rights. In the abortion cases the Supreme Court resists the state's interest in lowering ages of responsibility. In the juvenile justice cases, however, the Supreme Court argues for a lowering of the relevant age. The relevant age for the Supreme Court in juvenile justice cases concerns the age at which procedural protections are implicated.[265] The Court is essential indifferent to the issue of the age of responsibility in juvenile justice, provided procedural rights are protected.[266]

An initial answer to the disparate treatment question raised by this Note is based in the treatment of procedural and substantive rights. In the case of abortion, a substantive right, the Supreme Court consistently argues that maturity and culpability matter to the vesting of the right. In the case of juvenile justice, however, the court focuses on proper procedure once the actor is submitted to adjudication. The question of what age the juvenile ought to be for such adjudication does not fall within the scope of proper procedure once within the adjudication process. The difficulty in the area of juvenile justice arises in that expanding adult criminal-type procedural protections have justified the treatment of the protected in criminal terms, even if the protected are juveniles.

On the other hand, the substantive/procedural distinction does not go far in resolving the deeper dilemma of this Note, i.e., why do the states treat these rights disparately by alternately assigning adolescents the maturity or culpability of adults and then of children. The answer to this dilemma lies in the state's interest in legislating in the areas of crime prevention and protection of human life. These expressed interests, however, do not explain the extremity of the pressure to lower the age of criminal responsibility in the face of contrary psychological literature and to willful restriction of the abortion right to its absolute extent regardless of maturity. The ultimate answer to this dilemma, sadly, is political.

The state, as a democratic institution, expresses its interest as the political will of the body politic. Perhaps the interest of the state can be best expressed as an interest in punishing *acts* of violence and the *act* of abortion. These interests exist for the state, and in the body politic, irrespective of the rights threatened by the state's protection of its interest. After all, the popular image of the violent juvenile as a mythical super-predator, lacking any

265. Kent v. United States, 383 U.S. 541 (1966).

266. The death penalty decisions are an exception to the general course of the juvenile justice cases. *Thompson* argues that age does matter. The death penalty, however, implicates notions of culpability more strongly than would other areas of juvenile justice.

semblance of conscience,[267] and the murder of unborn children[268] are powerfully visceral images for portions of the public. These images exist, despite Constitutional protections, in much the same way disturbing visceral images of violent or pornographic speech exist for some, despite obvious First amendment protections. Such imagery is inevitable in the mind of the public and is a proper focus of legislative action. In the case of juvenile justice and minor abortion rights, however, this imagery, as embodied in the legislative focus on the act, has superceded concern for the actor whose rights are being curtailed through incarceration or abortion prohibition. Problematically, the states indifference to the actor leads to an indifference to issues of maturity and culpability in the law.

As was discussed above,[269] the movement of state legislatures is clearly to treat juvenile crime in terms of bad acts rather than misguided juveniles. The understanding of juvenile justice in terms of acts easily extends to abortion in light of particular political views. If the state is acting to prevent a bad act it will not hesitate to expand the class to whom a proscription may be created, by raising ages of responsibility. In the case of abortion the state tries to prevent the act, and therefore raises the age at which the act may be committed, while in the case of juvenile justice the state seeks to punish the act, and therefore lowers the age at which a person may be held responsible for the act.

In either case, the state seeks protection from the act; the actor just gets swept along.

CONCLUSION

Although short-term protection of society and fetuses may tempt one to abrogate notions of criminal responsibility in the name of democracy; this is unprincipled and contrary to the Eighth Amendment jurisprudence in *Thompson* and *Bellotti*. The first and last question is: does the protection of the right allow imposition of a burden where the predicate for such burden is lacking? In the case of parental involvement laws, the predicate is an immaturity

267. DiFonzo, *supra* note 245, at 15.

268. *See, e.g.*, Madsen v. Women's Health Ctr., 512 U.S. 753 (1994). Madsen demonstrates the visceral reaction some have to abortion. In *Madsen* the Supreme Court upheld restriction on anti-abortion protesting propagated in response to the frequent and disruptive protests that abortion clinics endure. *Id.* Aspects of these protests included derogatory epithets like, "baby killer." *Id.* at 759.

269. *See supra* notes 80-86 and accompanying notes.

limiting the constitutional right. In the case of crime and transfer, the predicate is capacity to form the requisite intent. Intent is more than mere knowledge, but is, as *Thompson* points out, capacity. In both cases the issue is capacity. For political reasons, Virginia is abrogating these notions by lowering ages of criminal responsibility and refusing to respect a vested constitutional right where it is judicially vested through a hearing on maturity. Differing treatment of juveniles for purposes of the criminal law and the constitutional right to an abortion betrays an inconsistent at best, duplicitous at worst, line of thought regarding responsibility. The criminalization of youth offenders, coupled with the paternalistic impediments of a juvenile's abortion rights, begs for coherent treatment. A healthy legal system ought not to support the hypothetical that: if being an unwed mother were a crime, a juvenile would be mature enough to be incarcerated, but not mature enough to exercise her right to an abortion without the help of her parents.