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THE CHILD CUSTODY PROTECTION ACT

JULY 27, 1998.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 1645]

The Committee on the Judiciary, to which was referred the bill (S. 1645) to amend provisions of title 18, United States Code, to prohibit taking minors across State lines to avoid laws requiring the involvement of parents in abortion decisions, having considered the same, reports favorably thereon, with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Child Custody Protection Act".

59–010

SEC. 2. TRANSPORTATION OF MINORS TO AVOID CERTAIN LAWS RELATING TO ABORTION.

(a) IN GENERAL.—Title 18, United States Code, is amended by inserting after chapter 117 the following:

"CHAPTER 117A—TRANSPORTATION OF MINORS TO AVOID CERTAIN LAWS RELATING TO ABORTION

"Sec.
"2401. Transportation of minors to avoid certain laws relating to abortion.

"§ 2401. Transportation of minors to avoid certain laws relating to abortion

"(a) OFFENSE.—

"(1) GENERALLY.—Except as provided in subsection (b), whoever knowingly transports an individual who has not attained the age of 18 years across a State line, with the intent that such individual obtain an abortion, and thereby in fact abridges the right of a parent under a law, requiring parental involvement in a minor's abortion decision, of the State where the individual resides, shall be fined under this title or imprisoned not more than one year, or both.

"(2) DEFINITION.—For the purposes of this subsection, an abridgement of the right of a parent occurs if an abortion is performed on the individual, in a State other than the State where the individual resides, without the parental consent or notification, or the judicial authorization, that would have been required by that law had the abortion been performed in the State where the individual resides.

"(b) EXCEPTIONS.—

"(1) The prohibition of subsection (a) does not apply if the abortion was necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself.

"(2) An individual transported in violation of this section, and any parent of that individual, may not be prosecuted or sued for a violation of this section, a conspiracy to violate this section, or an offense under section 2 or 3 based on a violation of this section.

"(c) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution for an offense, or to a civil action, based on a violation of this section that the defendant reasonably believed, based on information the defendant obtained directly from a parent of the individual or other compelling facts, that before the individual obtained the abortion, the parental consent or notification, or judicial authorization took place that would have been required by the law requiring parental involvement in a minor's abortion decision, had the abortion been performed in the State where the individual resides.

"(d) CIVIL ACTION.—Any parent who suffers legal harm from a violation of subsection (a) may obtain appropriate relief in a civil action.

"(e) DEFINITIONS.—For the purposes of this section—

"(1) a law requiring parental involvement in a minor's abortion decision is a law—

"(A) requiring, before an abortion is performed on a minor, either—

"(i) the notification to, or consent of, a parent of that minor; or

"(ii) proceedings in a State court; and

"(B) that does not provide as an alternative to the requirements described in subparagraph (A) notification to or consent of any person or entity who is not described in that subparagraph;

"(2) the term 'parent' means—

"(A) a parent or guardian;

"(B) a legal custodian; or

"(C) a person standing in loco parentis who has care and control of the minor, and with whom the minor regularly resides;

who is designated by the law requiring parental involvement in the minor's abortion decision as a person to whom notification, or from whom consent, is required;

"(3) the term 'minor' means an individual who is not older than the maximum age requiring parental notification or consent, or proceedings in a State court, under the law requiring parental involvement in a minor's abortion decision; and

"(4) the term 'State' includes the District of Columbia and any commonwealth, possession, or other territory of the United States.".

(b) CLERICAL AMENDMENT.—The table of chapters for part I of title 18, United States Code, is amended by inserting after the item relating to chapter 117 the following new item:

"117A. Transportation of minors to avoid certain laws relating to abortion ..... 2401.".

I. PURPOSE

S. 1645, the Child Custody Protection Act, has one simple purpose: to help prevent circumvention of duly enacted State laws that seek to promote parental involvement in a minor daughter's decision with respect to abortion. These State laws are designed to accomplish two objectives. The first is to protect the rights of parents to be involved in the moral and medical decisions of their minor daughters. The second is to protect the health and safety of children. The Supreme Court has upheld these laws as legitimate efforts to protect familial relations. Unfortunately, too often they are being circumvented by third parties who are taking minors across State lines without their parents' knowledge so that the abortion may be performed in a State that does not require parental involvement.

S. 1645 addresses this problem by prohibiting the knowing transportation of a minor across a State line with the intent that she obtain an abortion, in circumvention of a State's parental consent or parental notification law. Violation of the act is a class A misdemeanor. The act also allows a parent who has been injured by a violation of the act to seek relief through a civil action.

S. 1645 will strengthen the effectiveness of State laws designed to protect familial relations and safeguard children from health and safety risks in this area. These laws recognize that a girl's parents will generally be the best source of guidance for her as she is deciding about abortion. Parents will also have the most knowledge about their daughter's prior psychological and medical history and can therefore provide critical information in determining the best medical course for their daughter. Finally, parents are usually the only people who can provide authorization for postabortion medical procedures or the release of pertinent data from family physicians. When a pregnant girl is taken to have an abortion without her parents' knowledge, she is denied their advice and assistance, and the risks to her health increase significantly.

S. 1645 does not supersede, override, or in any way alter existing State laws regarding minors' abortions. Nor does the act impose any Federal parental notice or consent requirement; rather, it merely provides assistance to States that have elected to adopt such requirements in securing their effectuation.

II. LEGISLATIVE HISTORY

This legislation was introduced on February 12, 1998, by Senator Abraham, with the cosponsorship of Senator Lott, Senator DeWine, Senator Inhofe, Senator Nickles, Senator Coverdell, Senator Helms, Senator Coats, Senator Sessions, Senator Enzi, Senator Craig, Senator Kyl, Senator Hatch, Senator Faircloth, Senator Brownback, Senator Santorum, Senator McConnell, Senator Hutchinson, Senator Bond, and Senator Grassley. Senator McCain, Senator Grams, Senator Hagel, Senator Burns, and Senator Smith of New Hampshire subsequently were added as cosponsors. The bill was referred

to the Committee on the Judiciary, where a hearing was held on May 20. The Committee marked up the bill on July 9 and July 16, whereupon it reported the bill out with a favorable recommendation by a 10-to-6 vote.

III. DISCUSSION

A. Need for the Legislation

S. 1645, the Child Custody Protection Act, is designed to address the problem of people transporting minor girls across State lines and thereby circumventing State parental consent and notification laws. Many States have laws that require the consent or notification of at least one parent, or court authorization, before a minor can obtain an abortion. Yet despite court approval of and overwhelming public support for these laws,[1] vulnerable children are taken from their families to out-of-State abortion clinics in flagrant disregard for the legal protections that many States have enacted. In 1995, Kathryn Kolbert, an attorney with the pro-abortion Center for Reproductive Law and Policy, stated, "There are thousands of minors who cross state lines for an abortion every year and who need the assistance of adults to do that."[2]

Many States have decided that involvement of parents in their daughter's decision to abort her child is crucial and have enacted laws designed to further this involvement. There are many good reasons why States enact such laws. First, parents are generally presumed to be the best source of guidance for their minor children on most important decisions. Second, a girl may have a medical condition that makes an abortion a particularly risky procedure for her or requires special precautions to be taken. For example, she may be allergic to certain kinds of anesthetics or have a weakened immune system that puts her at high risk of infection. Parental involvement will help assure that precautions appropriate to a girl's particular circumstances are taken. Third, postoperative complications, while not the rule, occur often enough that the recommended medical course involves some monitoring of certain aspects of the patient's health. Parental involvement increases the probability that, if a girl does suffer complications after an abortion, she will receive prompt and appropriate medical attention. For example, a perforated uterus has been considered a "normal risk" of the abortion procedure.[3] Untreated, a perforated uterus may result in an infection, complicated by fever, endometritis, and parametritis.[4] The New England Journal of Medicine describes the risk of such infection this way:

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[1] A June 6–8, 1998, telephone poll conducted by Baselice & Associates found that 85 percent of those surveyed did not believe that an individual should be able to take a minor girl across State lines to obtain an abortion without her parents' knowledge. A 1996 CNN/USA Today survey conducted by the Gallup Organization revealed that 74 percent of Americans support parental consent before an abortion is performed on a girl under the age of 18. Parental notification laws receive even greater support. A 1992 national poll by the Wirthlin Group found that 80 percent of Americans support requiring parental notification before an abortion is performed on a girl under the age of 18.

[2] See "Labor of Love is Deemed Criminal," The Nat'l L.J., Nov. 11, 1996.

[3] *Reynier* v. *Delta Women's Clinic,* 359 So.2d 733 (La. Ct. App. 1978).

[4] Phillip G. Stubblefield and David A. Grimes, "Current Concepts: Septic Abortions," New England J. Med. 310 (Aug. 4, 1994).

> The risk of death from postabortion sepsis [infection] is highest for young women, those who are unmarried, and those who undergo procedures that do not directly evacuate the contents of the uterus. * * * A delay in treatment allows the infection to progress to bacteremia, pelvic abscess, septic pelvic thrombophlebitis, disseminated intravascular coagulophy, septic shock, renal failure, and death. [5]

Without the knowledge that their daughter has had an abortion, parents may not be able fully to assist physicians called upon to treat any complications the girl might experience. This may delay proper diagnosis and further imperil the girl's health.

TESTIMONY FROM PARENTS

The Judiciary Committee heard testimony from two mothers whose daughters were secretly taken for abortions without their parents' knowledge, with potentially devastating consequences. In both cases, the minors on whom the abortions were performed suffered serious medical complications.

Joyce Farley, the mother of a minor girl, reported how her 12-year-old daughter was provided alcohol, raped, and then taken out of State by the rapist's mother for an abortion.[6] In the words of Joyce Farley, the abortion was arranged to destroy evidence—evidence that her 12-year-old daughter had been raped.[7] On August 31, 1995, her daughter, who had just turned 13, underwent a dangerous medical procedure without anyone present who knew her past medical history (as shown by the false medical history that was given to the abortionist).[8] Following the abortion, the mother of the rapist dropped off the child in another town 30 miles from the child's home.[9] The child returned to her home with severe pain and bleeding that revealed complications from an incomplete abortion.[10] When Joyce Farley contacted the original clinic that performed the abortion, the clinic told her that the bleeding was normal and to increase her daughter's Naprosyn, a medication given to her for pain, every hour if needed.[11] Fortunately, being a nurse, Ms. Farley knew this advice was wrong and could be harmful, but her daughter would not have known this.[12] Ms. Farley's daughter, because of her mother's intervention, ultimately received further medical care and a second procedure to complete the abortion.[13]

Eileen Roberts' 13-year-old daughter was encouraged, by a boyfriend and his adult friend, to obtain a secret abortion.[14] The adult friend drove Ms. Roberts' daughter to the abortion clinic 45 miles

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[5] Id.
[6] Hearing on S. 1645, the Child Custody Protection Act, before the Senate Committee on the Judiciary, 105th Cong., 2d sess. (May 20, 1998) (statement of Joyce Farley).
[7] Id.
[8] Id.
[9] Id.
[10] Id.
[11] Id.
[12] Id.
[13] Id.
[14] Hearing on S. 1645, the Child Custody Protection Act, before the Senate Committee on the Judiciary, 105th Cong., 2d sess. (May 20, 1998) (statement of Eileen Roberts).

away from her home and even paid for the abortion.[15] After 2 weeks of observing their daughter's depression, Ms. Roberts and her husband discovered that their child had an abortion from a questionnaire they found under her pillow, which their daughter had failed to return to the abortion clinic.[16] Their daughter's depression eventually led to her being hospitalized.[17] Upon a physical examination, doctors found that the abortion had been incompletely performed and required surgery to repair the damage done by the abortionist.[18] The hospital called Ms. Roberts and told her that they could not do reparative surgery without a signed consent form.[19] The following year, Ms. Roberts' daughter developed an infection and was diagnosed with pelvic inflammatory disease, which again required a 2-day hospitalization for IV antibiotic therapy and requiring a signed consent form.[20] Ms. Roberts and her family were responsible for over $27,000 in medical costs all of which resulted from this one secret abortion.[21]

WIDESPREAD CIRCUMVENTION OF STATE LAWS

States with parental involvement laws are becoming increasingly aware that these laws are being circumvented. Many abortion clinics encourage the evasion of State parental consent laws. Abortion clinics regularly advertise their "no parental consent" status in the "yellow pages" thereby encouraging and profiting from such interstate activities. The following is a survey of several states and their experience with evasion of parental involvement laws.

Pennsylvania

Pennsylvania passed a parental consent law in 1994. News reports have repeatedly maintained that Pennsylvania teenagers are going out of State to New Jersey and New York for abortions. In fact, in 1995 The New York Times reported, "Planned Parenthood in Philadelphia has a list of clinics, from New York to Baltimore, to which they will refer teenagers, according to the organization's executive director, Joann Coombs." Moreover, the Times gave accounts of clinics that had seen an increase in patients from Pennsylvania. One clinic, in Cherry Hill, NJ, reported seeing a threefold increase in Pennsylvania teenagers coming for abortions, to a rate of approximately six girls per week. Likewise, a clinic in Queens, NY, reported that it was not unusual to see Pennsylvania teenagers as patients in 1995, though earlier it had been rare.[22]

In the period just prior to the Pennsylvania laws taking effect, efforts were underway to make it easier for teenagers to go out of State for abortions. For instance, Newsday reported that "[c]ounselors and activists are meeting to plot strategy and printing

[15] Id. While Ms. Roberts' daughter was not taken to another State, her story is illustrative of the harms involved when a child is secretly taken away from her parents for an abortion. After this experience, Ms. Roberts formed an organization called Mothers Against Minor Abortions (MAMA). Ms. Roberts testified: "I speak today for those parents I know around the country, whose daughters have been taken out of state for their abortions." Id.
[16] Id.
[17] Id.
[18] Id.
[19] Id.
[20] Id.
[21] Id.
[22] "Teen-Agers Cross State Line in Abortion Exodus," The New York Times, Dec. 18, 1995.

maps with directions to clinics in New York, New Jersey, Delaware, and Washington, DC, where teenagers can still get abortions without parental consent * * *. "We will definitely be encouraging teenagers to go out of state," said Shawn Towey, director of the Greater Philadelphia Woman's Medical Fund, a nonprofit organization that gives money to women who can't afford to pay for their abortions."[23]

Moreover, some abortion clinics in nearby States, such as New Jersey and Maryland, use the lack of parental involvement requirements in their own States as a "selling point" in advertising directed at minors in Pennsylvania. One ad that appeared in the 1996 Yellow Pages for Scranton, PA, was purchased by Metropolitan Medical Associates, an abortion clinic in Englewood, NJ. Unlike Pennsylvania, which has a parental consent law, in New Jersey, as the ad proclaims, "No Parental Consent Required."[24] Another ad appeared in the 1997–98 Yellow Pages for Harrisburg, PA. The purchaser of the ad, Hillcrest Women's Medical Center, maintains a clinic in Harrisburg, but the ad also promotes the option of going to a sister clinic in Rockville, MD (about 100 miles away) where, the ad notes, there is "No Waiting Period" and "No Parental Consent" requirement.

Missouri

In 1997, a study in the American Journal of Public Health reported that a main abortion provider in Missouri refers minors out of State for abortions if the girl does not want to involve her parents. Reproductive Health Services, which performs over half of the abortions performed in Missouri, refers minors to the Hope Clinic for Women in Granite City, IL. Research has found that based on the available data, the frequency with which minors traveled out of State for an abortion increased by over 50 percent when Missouri's parental consent law went into effect. Furthermore, it was found that compared to older women, underage girls were significantly more likely to travel out of State to have their abortions.[25]

Massachusetts

Massachusetts has also seen an increase in out-of-State abortions performed on its teenage residents since the State's parental consent law went into effect in April 1981, according to a published study and anecdotal information. A 1986 study published in the American Journal of Public Health found that in the 4 months prior to implementation of the parental consent law, an average of 29 Massachusetts minors obtained out-of-State abortions each month (in Rhode Island, New Hampshire, Connecticut, and New York—data for Maine was not available). After the parental consent law was implemented, however, the average jumped to between 90 and 95 out-of-state abortions per month (using data from

[23] Charles V. Zehren, "As Pennsylvania Limits Access, Fight Rages On." Newsday, Feb. 22, 1994, at 13.

[24] It is noteworthy that in September 1996, a reporter for The Record newspaper published in nearby Hackensack, NJ, was told by two staff abortionists at the Metropolitan Medical clinic that at least 1,500 partial-birth abortions are performed in the clinic annually. "Most are teenagers," one doctor told the newspaper. See Ruth Padawer, "The Facts on Partial-Birth Abortion," The Record, Sept. 15, 1996, at R04.

[25] Charlotte Ellertson, "Mandatory Parental Involvement in Minors' Abortions: Effects of the Laws in Minnesota, Missouri, and Indiana," Am. J. Pub. Health, Aug. 1997.

the five States of Rhode Island, New Hampshire, Connecticut, New York, and Maine)—representing one-third of the abortions obtained by Massachusetts" minors.[26]

The study noted that due to what the authors described as "astute marketing," one abortion clinic in New Hampshire almost doubled the monthly average of abortions performed on Massachusetts minors (from 14 in 1981 to 27 in 1982). The abortionist "began advertising in the 1982 Yellow Pages of metropolitan areas along the northern Massachusetts border, stating 'consent for minors not required.'"[27]

In April 1991, the Planned Parenthood League of Massachusetts estimated that approximately 1,200 Massachusetts minor girls travel out of State for abortions each year, the majority of them to New Hampshire. Planned Parenthood said that surveys of New Hampshire clinics revealed an average of 100 appointments per month by Massachusetts minors.[28]

Mississippi

A 1995 study of the effect of Mississippi's parental consent law revealed that Mississippi has also experienced an increase in the number of minors traveling out of State for abortion. The study, published in Family Planning Perspectives, compared data for the 5 months before the parental consent law took effect in June 1993 with data for the 6 months after it took effect, and found that "[a]mong Mississippi residents having an abortion in the state, the ratio of minors to older women decreased by 13 percent * * * [h]owever, this decline was largely offset by a 32-percent increase in the ratio of minors to older women among Mississippi residents traveling to other States for abortion services."[29]

Based on the available data, the study suggests that the Mississippi parental consent law appeared to have "little or no effect on the abortion rate among minors but a large increase in the proportion of minors who travel to other states to have abortions, along with a decrease in minors coming from other states to Mississippi."[30]

Virginia

Grace S. Sparks, executive director of the Virginia League of Planned Parenthood, predicted in February 1997 that if Virginia were to pass a parental notification law, teenagers would travel out of State for abortions. "In every state where they've passed parental notification, * * * there's been an increase in out-of-state abortions," she said, adding, "I suspect that that's what will happen in Virginia, that teen-agers who cannot tell their parents * * * will go out of state and have abortions * * *."[31]

Virginia's parental notification law took effect on July 1, 1997. According to a recent article in The Washington Post, initial re-

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[26] Virginia G. Cartoof and Lorraine V. Klerman, "Parental Consent for Abortion: Impact of the Massachusetts Law," Am. J. Pub. Health, Apr. 1986, at 398.

[27] Id.

[28] "Mass. Abortion Laws Push Teens Over Border," Boston Herald, Apr. 7, 1991.

[29] Stanley K. Henshaw, "The Impact of Requirements for Parental Consent on Minors' Abortions in Mississippi," Fam. Planning Perspectives, June 1995.

[30] Id.

[31] Lisa A. Singh, "Those Are the People Who Are Being Hurt," Style Weekly, Feb. 11, 1997.

ports indicate that abortions performed on Virginia minors have dropped 20 percent during the first 5 months that the law has been in effect (from 903 abortions during the same time period in 1996 to approximately 700 abortions in 1997). The article suggests, however, that Virginia teenagers are traveling to the District of Columbia in order to obtain an abortion without involving their parent. In fact, the National Abortion Federation (NAF), which runs a toll-free national abortion hotline, said that calls from Virginia teenagers seeking information on how to obtain an abortion out-of-State were the largest source of teenage callers seeking out-of-State abortions, at 7 to 10 calls per day. NAF hotline operator Amy Schriefer has gone so far as to talk a Richmond area teenage girl through the route (involving a Greyhound bus and the Metro's Red Line) to obtain an abortion in the District of Columbia.[32]

ADULT MALE PREDATORS AND EVASION OF PARENTAL INVOLVEMENT LAWS

One significant reason behind evasion of a State's parental involvement law can be an effort to cover up statutory rape law violations.

There are several indications that a majority of teenage girls who become pregnant are impregnated by adult men.

In a study of over 46,000 pregnancies by school-age girls in California, researchers found that "71 percent, or over 33,000, were fathered by adult post-high-school men whose mean age was 22.6 years, an average of 5 years older than the mothers. * * * Even among junior high school mothers aged 15 or younger, most births are fathered by adult men 6 to 7 years their senior. *Men aged 25 or older father more births among California school-age girls than do boys under age 18*."[33] Another study reports that 58 percent of the time it is the girl's boyfriend who accompanies a girl for an abortion when her parents have not been told about the pregnancy.[34] [35] Obviously, many of these men are vulnerable to statutory rape charges, which vulnerability provides a strong incentive to pressure the much younger girl to agree to an abortion without revealing the pregnancy to the parents. Currently, a man seeking to do so can evade parental consent requirements by driving his victim across State lines.

B. The Child Custody Protection Act

S. 1645 builds upon two of the few points of agreement in the national debate over abortion: the desirability of parental involvement in a minor's abortion decision and the need to protect a pregnant minor's physical health.

The act does not establish a national requirement of parental consent or notification prior to the performance of an abortion on a minor under 18. Nor does it attempt to regulate any purely intra-

[32] "Fewer Teens Receiving Abortions in Virginia," The Washington Post, Mar. 3, 1998.

[33] Mike A. Males, "Adult Involvement in Teenage Childbearing and STD," Lancet, vol. 64, (July 8, 1995) (emphasis added). See also, Mike A. Males and Kenneth S.Y. Chew, "The Ages of Fathers in California Adolescent Births, 1993," Am. J. Pub. Health (Apr. 1996).

[34] See Stanley Henshaw and Kathryn Post, "Parental Involvement in Minors' Abortion Decisions," Fam. Planning Perspectives, vol. 24, no. 5 (Sept./Oct. 1992).

[35] Footnote has been omitted.

state activities related to the procurement of abortion services. S. 1645 simply helps effectuate the policies of States that have decided to provide a layer of protection for their own residents against these dangers to children's health and safety by requiring parental involvement in the abortion decision.

CONSTITUTIONAL ISSUES

1. Constitutional Authority for the Enactment of S. 1645

S. 1645 is plainly within Congress' power to regulate commerce among the several States.[36] Commerce, as that term is used in the Constitution, includes travel whether or not that travel is for reasons of business.[37] To transport another person across State lines is to engage in commerce among the States. Thus, as Professor Harrison explained in testimony before the Committee on this bill,[38] this legislation does not require consideration of the more difficult questions in this area, which concern the scope of Congress' power to regulate activity that is not, but that affects, commerce among the States.[39] Whatever the case may be with respect to legislation of the former type, it has long been held to be a proper use of the interstate commerce for Congress, in the pursuit of noncommercial objectives, to forbid the use of the instrumentalities of interstate commerce.[40]

In fact, S. 1645 presents, if anything, an easier case than *Caminetti,* the leading case for this proposition, because the bill does not rest primarily on a congressional policy independent of that of the State that has primary jurisdiction to regulate the subject matter involved. Rather, as Professor Harrison testified, "in S. 1645 Congress is seeking to ensure that the laws of the State primarily concerned, the State in which the minor resides, are complied with. In doing so Congress is dealing with a problem that arises from the federal union, not making its own decisions concerning local matters such as domestic relations or abortion."[41] This makes it a quintessential example of legislation to address a circumstance where Federal power is needed "to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing."[42]

2. Federalism/Right to Travel

It has been suggested that because this legislation limits the ability of the State to which a minor is transported to obtain an abortion to apply its own policies to conduct that occurs within its own borders S. 1645 is problematic under principles of federalism. But when two States have different policies, even in the absence of Federal legislation, choice of law principles will frequently dic-

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[36] See art. I. sec. 8, cl. 3.

[37] See e.g., *Caminetti* v. *United States,* 242 U.S. 470 (1917).

[38] Hearing on S. 1645, the Child Custody Protection Act, before the Senate Committee on the Judiciary, 105th Cong., sess. (May 20, 1998) (statement of John Harrison).

[39] See *A.L.A. Schechier Poultry Corp.* v. *United States,* 295 U.S. 495 (1935); *Wickard* v. *Filburn,* 317 U.S. 111 (1942); *Katzenbach* v. *McClung,* 379 U.S. 294 (1964); *United States* v. *Lopez,* 514 U.S. 549 (1995).

[40] See e.g., *Caminetti* v. *United States,* 242 U.S. 470 (1917).

[41] Hearing on S. 1645, the Child Custody Protection Act, before the Senate Committee on the Judiciary, 105th Cong., 2d sess. (May 20, 1998) (statement of John Harrison).

[42] See *United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944).

tate the application of the law of a State different from the one where the conduct occurred.[43] That is especially the case under modern "interest analysis" conflict principles.[44] All S. 1645 does is give preference to the minor's home State's policy concerning the degree of parental involvement required before an abortion may be performed on a minor. A person's residence is a well-established basis for a State to have a sufficient interest to warrant considering applying that State's law even where there are States with competing claims.[45] Indeed, "the law of a person's domicile typically governs family law matters."[46] Consistent with this rule, the Uniform Child Custody Jurisdiction and Enforcement Act, recently approved by the National Conference of Commissioners on Uniform State laws, gives exclusive jurisdiction to make custody determinations to the court in the jurisdiction where the child has lived for the 6 months preceding the commencement of a child custody proceeding.[47] Thus, even in the absence of any Federal legislation, the home State of the minor would have a strong argument for extraterritorial application of its parental involvement statutes.

Especially in the absence of Federal legislation, however, extraterritorial assertions of jurisdiction would undoubtedly be questioned under various lines of cases limiting the States' powers to regulate interstate conduct.[48] Indeed, even Pennsylvania's efforts to punish the intrastate portion of conduct of the man and his mother who took Joyce Farley out of her parents' custody was challenged on this ground.[49] In addition, there are serious practical problems for States trying to pursue anyone for interstate conduct: limits on their agents' investigatory powers, possible extradition issues, and the like. All of these issues in combination present serious obstacles to a State relying exclusively on its own powers to prevent circumvention of its parental involvement laws by third parties taking minors out of State.

Thus, this conduct presents a fairly classic case in prudential as well as constitutional terms for the Federal Government to intervene to assist States in preventing this from happening. As noted in the prior section of this report, whatever arguments there may be against a State's efforts to limit this kind of behavior, there are no similar lines of cases limiting Congress' power to prohibit the use of the channels of interstate commerce for a particular kind of conduct. Enactment of legislation of this type will also help a State

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[43] See Restatement of Law Second, Conflict of Laws 2d, sec. 6 (1971);

[44] See B. Currie "Selected Essays on the Conflict of Laws" (1963).

[45] See Brilmayer, "Interstate Preemption: the Right to Travel, the Right to Life, and the Right to Die," 91 Mich. L. Rev. 873, 877–78 (1993).

[46] Id. at 887 citing R. Weintraub," Commentary on the Conflict of Laws" 228–30, 240–45, 256 (traditional rule was that only State of child's domicile could determine custody) (2d ed. 1980).

[47] Internet site, www.law.upenn.edu/library/ulc/uccjea/chldcus2.htm; see also *Trindle* v. *State,* 602 A.2d 1232 (Md. 1992) (upholding Maryland conviction for child kidnapping by father and stepmother where mother from whose custody child was taken resided in Maryland and child formerly resided there, even though the kidnapping took place entirely in Delaware and abroad); *Rios* v. *State,* 733 P.2d 242 (Wyo. 1987) (sustaining Wyoming conviction for child kidnapping because custodial mother had moved there while father had temporary custody because mother now resided there and child was expected to reside there as well); see generally, Bradford, "What Happens if *Roe* is Overruled? Extraterritorial Regulation of Abortion by the States," 35 Ariz. L. Rev. 87, 100–103 (1993), discussing these and other cases.

[48] See Letter of Acting Assistant Attorney General Sutin to Senator Leahy, July 8, 1998, n. 3 and materials cited therein.

[49] See *Commonwealth* v. *Hartford,* No. 0008PHL97, Brief for Defendant-Appellant (Penn. Superior Ct., filed _____). That this challenge did not succeed in Pennsylvania does not guarantee that it would not succeed elsewhere.

defend against legal challenges to its own authority to seek to enforce its parental involvement statute extraterritorially should it choose to do so.[50] Finally, the Federal Government's agents also will not encounter the same kinds of potential practical challenges to their authority to operate outside the home State that the home State's agents might experience.

A very recent exercise of Congress' power to regulate interstate commerce in order to prevent the avoidance of a duty imposed by a person's home State law was Congress' enactment of the Deadbeat Parents Punishment Act of 1998.[51] That law made it a felony for anyone to travel in interstate or foreign commerce with the intent to evade a support obligation, if the obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000.[52]

Other longstanding Federal laws have gone significantly further. 18 U.S.C. 922(a)(5) forbids anybody who is not a licensed importer, manufacturer, dealer, or collector to transfer any firearm to any person other than a licensed importer, manufacturer, dealer, or collector, who the transferor knows or has reasonable cause to believe does not reside in the State where the transferor resides. The counterpart provision on the buyer's side, 18 U.S.C. 922(a)(9), forbids any person who is not a licensed importer, manufacturer, dealer, or collector to receive any firearm in a State where he does not reside unless the receipt is for lawful sporting purposes. It is plain that the purpose behind both of these provisions is the same as the purpose behind the Child Custody Protection Act: to protect the policies of the State of residence of the person seeking to buy the firearm, even though the sale/purchase is legal under the laws of the State where the firearm is being sold.[53] But the firearms provisions go further than S. 1645 in at least three respects. First, they do not simply forbid interstate travel to obtain a firearm, they forbid the sale to or purchase by the nonresident. Second, they impose this prohibition even if the sale or purchase would in fact be perfectly legal in the resident's home State. This prophylactic step thus potentially interferes with the policies of the State where the gun would otherwise be sold and the one where the purchaser resides in order to make sure that the policies of States with more restrictive gun laws than either are not circumvented. If this were all that the firearms provisions did, the analogous law would be a Federal law forbidding the performance of an abortion on a minor

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[50] See, e.g., *In re Rahrer,* 140 U.S. 545 (1891), where the Supreme Court upheld a conviction under State law prohibiting the sale of liquor shipped from out-of-State after Congress had passed the Wilson Act subjecting liquor from out-of-State to such laws, even though the previous years, the Court had held in *Leisy* v. *Hardin,* 135 U.S. 100 (1890), before enactment of the Wilson Act, that such laws violated the dormant commerce clause and could not be enforced; see also *Clark Distilling Co.* v. *Western Maryland Railway,* 242 U.S. 311 (1917), where the Court similarly sustained the Webb-Kenyon Act of 1913, which imposed a federal prohibition on the shipment of alcoholic beverages into a State where their possession or use was unlawful; see generally P. Brest and S. Levinson, "Processes of Constitutional Decisionmaking," 2d ed. (Little Brown & Co, 1983), at 40–48, discussing these and other cases.

[51] Public Law 105–187.

[52] Id.

[53] In the Congressional findings and declarations portion of the act June 19, 1968, Public Law 90–351, Congress indicated that this was one of its central purposes:

> "(a) The Congress hereby finds and declares—
>
> "(1) that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police powers."

who resides out-of-State. Third, however, the firearms provisions also burden the ability of the State where the provisions prevent guns from being sold to carry out a policy in favor of greater access to guns by people in that State, for example by allowing the carrying of a concealed weapon (which a State may believe helps prevent crime). Thus, these firearms provisions go much further in imposing Federal restrictions that effectively prevent a State from carrying out its own policy within its own borders in order to protect the authority of other States to enact firearms restrictions than S. 1645 goes in order to protect the authority of States to require parental involvement in the decision whether an abortion shall be performed on a minor.[54]

Finally, S. 1645 is not unlike the Mann Act,[55] which prohibits the knowing transportation of women in interstate commerce for purposes of prostitution. The Mann Act does not exempt transportation into States in which prostitution might be legal, and in *U.S.* v. *Pelton,*[56] the Eighth Circuit upheld the Mann Act against a challenge of unconstitutionality in its application to transporting a person into Nevada where prostitution was legal.

Whatever the outer prudential or constitutional limits on legislation of this type may be in our Federal system, the Child Custody Protection Act does not come close to them. Our Federal system does not leave Congress powerless to take action to prevent third parties from taking children out of their home State in order to interfere with that State's efforts to protect children by assuring that parents are involved in the serious decision whether their daughter will have an abortion performed on her.

3. Roe v. *Wade, Planned Parenthood* v. *Casey, and the Child Custody Protection Act*

A. THE SUPREME COURT'S GENERAL TEST FOR THE CONSTITUTIONALITY OF STATE LAWS REGULATING ABORTION

In *Roe* v. *Wade,*[57] a majority of the Supreme Court found that the 14th amendment's "due process" clause, which provides that no State shall deprive any person of "life, liberty, or property" without due process of law, includes within it a "substantive" component, which should be understood to bar a State from prohibiting abortions under some circumstances. This "substantive" component of the 14th amendment's "due process" clause, also described in that case as including a "right to privacy," has been held to forbid virtually all State prohibitions on abortion during the first trimester of pregnancy.[58] Although *Roe* v. *Wade's* holding that the Constitu-

[54] These firearm restrictions are accompanied by slightly relaxed, but still quite stringent restrictions on the ability of licensed importers, manufacturers, dealers, or collectors to sell to anyone who the licensee knows or has reasonable cause to believe does not reside in the State where the licensee's business is located, see 18 U.S.C. 922(b)(3) (which generally forbids such transactions but allows them in the case of the loan or rental of a firearm for temporary lawful sporting use, and in the case of rifles or shotguns provided that the legal requirements for their transfer in both the licensee's and purchaser's home State have been complied with, while presuming that the licensee has actual knowledge of the State laws of both States); and by similar restrictions on the ability of anyone to have a firearm delivered from out-of-State unless the acquisition is by bequest and lawful in the State where it was acquired, see 18 U.S.C. 922(c)(3).

[55] 18 U.S.C. 2421.

[56] 578 F.2d 701 (1978) (cert. denied).

[57] 410 U.S. 113 (1973).

[58] *Planned Parenthood* v. *Casey,* 505 U.S. 833, 985 (Scalia, J., dissenting).

tion provides some special protection for the right to have an abortion remains a part of the Court's jurisprudence, the "trimester" method of regulation it devised and its holding that the right to an abortion was a "fundamental freedom" which a State could override only for a compelling purpose have been all but repudiated. In *Planned Parenthood* v. *Casey,*[59] the Court changed its approach to analyzing the scope of permissible State regulation of abortion and the standards to be applied in evaluating the constitutionality of the regulation. Instead of declaring that the right to seek an abortion was a "fundamental right" calling for a "compelling State interest" to regulate, the new holding was that State regulation of abortion was permissible so long as such regulation did not place an "undue burden" on a woman's exercise of her constitutional rights with regard to abortion.[60]

B. STATE PARENTAL INVOLVEMENT LAWS UNDER ROE AND CASEY

Following the Court's decision in *Roe* v. *Wade,*[61] many States enacted parental consent or notification statutes for abortions performed on minors. A parental consent law is generally a law that requires one or both parents to give actual consent before their minor daughter undergoes an abortion. A parental notification law requires that one or both of the parents of the minor be notified at some time prior to the abortion.

The Court first considered a law requiring parental involvement in a minor daughter's abortion in *Planned Parenthood of Central Missouri* v. *Danforth*.[62] The Missouri statute gave a minor girl's parent an absolute veto over her decision to have an abortion. While noting that States have greater authority to regulate abortion procedures for minors than those for adults, the majority, led by Justice Blackmun, found that a complete parental veto was unconstitutional.[63]

In *Bellotti* v. *Baird*,[64] the Court remanded a parental consent statute that was unclear as to whether the parents had authority to veto the abortion and as to the availability of a judicial bypass procedure. The statute returned to the Supreme Court in *Bellotti* v. *Baird (Bellotti II)*.[65] The statute in *Bellotti II* required a minor to receive the consent of her parents or a judicial bypass proceeding, but the bypass proceeding did not allow the court to authorize the abortion on the grounds that the minor was sufficiently mature to make an informed decision regarding the abortion. The Supreme Court invalidated the statute without a majority opinion.

Justice Powell's plurality opinion held that a State could limit the ability of a minor girl to obtain an abortion by requiring notifi-

[59] 505 U.S. 833 (1992).

[60] For the articulation of the "undue burden" standard in *Casey,* see id. at 874–880. While the "undue burden" standard as expressed in *Casey* appeared only to be the views of the three-person plurality, Justice Scalia predicted that "undue burden" would henceforward be the relevant standard, Id., at 984–995 (Scalia, J. dissenting), and it now appears that the lower Federal courts understand that the "undue burden" standard is the correct one to be applied in abortion cases, See, e.g., *Manning* v. *Hunt,* 119 F.3d 254, 260 (4th Cir. 1997) ("The trend does appear to be a move away from the strict scrutiny standard toward the so-called 'undue burden' standard of review").

[61] 410 U.S. 113 (1973).

[62] 428 U.S. 52 (1976).

[63] Id.

[64] 428 U.S. 132 (1976).

[65] 443 U.S. 622 (1979).

cation or consent of a parent if, but only if, the State established a procedure where the minor girl could bypass the consent or notification requirement.[66] This has become the de facto constitutional standard for parental consent and notification laws. In upholding the principle of parental involvement laws, the plurality found three reasons why the constitutional rights of minors were not equal to the constitutional rights of adults: "The peculiar vulnerability of children; their inability to make decisions in an informed, mature manner; and the importance of the parental role in child rearing."[67] Thus, the plurality tried to design guidelines for a judicial bypass proceeding that allowed States to address these interests.

In *H.L.* v. *Matheson*,[68] a minor girl challenged the constitutional validity of a State statute that required a physician to give notice to the parents of a minor girl whenever possible before performing an abortion on her. By a vote of 6 to 3, the statute was found to be constitutional. Chief Justice Burger's majority opinion found that a State could require notification to the parents of a minor girl because the notification "furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child."[69]

In *Planned Parenthood Association of Kansas City, Missouri, Inc.* v. *Ashcroft*,[70] the Court found a State law to be constitutional that required a minor to receive the consent of one of her parents for an abortion or, in the alternative, to obtain the consent of a juvenile court judge. While there was no majority opinion, this case marked the first time the Court directly upheld a parental *consent* requirement.

In *Ohio* v. *Akron Center for Reproductive Health*,[71] the Supreme Court upheld a statute that required a physician to give notice to one of the minor's parents or, under some circumstances, another relative, before performing an abortion on the minor. The statute permitted the physician and the minor to avoid the requirement by a judicial bypass. Justice Kennedy, writing for the majority, held that the bypass proceeding did not unconstitutionally impair a minor's rights by the creation of unnecessary delay.[72] The Court established in this case that it will not invalidate State procedures so long as they seem to be reasonably designed to provide the minor with an expedited process.

In *Hodgson* v. *Minnesota*,[73] the Court invalidated a State statute that required notification of both parents prior to a minor girl's abortion without the option of a judicial bypass. The Court, however, made clear that the requirement that both parents be notified of the abortion and the 48-hour waiting period the law required between notification and the performance of the abortion would be

[66] Id. at 651.
[67] Id. at 634.
[68] 450 U.S. 398 (1981).
[69] Id. at 409.
[70] 462 U.S. 476 (1983).
[71] 497 U.S. 502 (1990).
[72] Id. at 514–515.
[73] 497 U.S. 417 (1990).

constitutional if these requirements were accompanied by a judicial bypass procedure that met constitutional standards.

Finally, in *Planned Parenthood* v. *Casey,*[74] the three Justice plurality opinion reaffirmed the continuing validity of this line of cases and pursuant to it, upheld Pennsylvania's requirement for informed one-parent consent coupled with a judicial bypass.

C. JUDICIAL BYPASS UNDER THE SUPREME COURT'S PARENTAL INVOLVEMENT CASES

Before leaving this discussion of the case law on abortion and State parental involvement statutes, it seems useful to summarize the Supreme Court's views on the kinds of judicial bypass proceedings that, if included in a State parental involvement law, will make the law constitutional in the Court's eyes.

In a State with a parental involvement law, a judicial bypass provides a mechanism for a minor to get an order from an adjudicatory tribunal[75] that she may have an abortion without the parental involvement that would otherwise be required. The standard for judicial bypass proceedings follows the general test set forth in *Bellotti* v. *Baird (Bellotti II)*.[76] Under *Bellotti II,* the bypass procedure must provide for an abortion to be approved:

> (1) if the minor shows that she is mature and well-informed enough to make her own decision, in consultation with her physician, without regard to her parents" wishes; or
>
> (2) that even if she is not mature enough to make the decision by herself, performance of the abortion without parental notice would be in her best interests.

The procedure must also be confidential (such that her identity is not divulged to her parents or others) and be conducted with expedition to allow the minor an effective opportunity to obtain the abortion.[77]

Evidence concerning maturity may include work and personal experience, appreciation of the gravity of the procedure, and displays of personal judgment.[78] Evidence that the abortion is in the minor's best interests may include medical risks which depend on the time, place or type of procedure to be performed.[79] Concerns about the minor's general health risks are also encompassed in the "best interests" prong. For example, one court found that it was in the best interests of a minor it deemed immature to obtain an abortion due to a heart condition.[80] Because she was unable to discontinue heart medication that caused fetal birth defects without risk of grave physical harm to herself, the judge concluded it was in her best interests to obtain an abortion. Judges may also consider evidence or

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[74] 505 U.S. 833 (1992).

[75] The tribunal can consist of a judge of a general jurisdiction trial court, a juvenile court judge, or an administrative panel delegated authority by State law to make decisions concerning abortions for minor girls. See Constitutional Law, Hornbook Series, 5th edition, (John R. Nowak and Ronald D. Rotunda, eds., 1995.)

[76] 443 U.S. 622 (1979) (*Bellotti II.*)

[77] See *Ohio* v. *Akron Center for Reproductive Health,* 497 U.S. 502 (1990) (mature and best interests); *Planned Parenthood* v. *Casey,* 112 S.Ct. 2791 (1992) (sufficiently mature and in the minor's bet interest); and *Hodgson* v. *Minnesota*, 497 U.S. 417 (1990) (mature and capable of giving informed consent or that abortion without notice to both parents would be in her best interest).

[78] See *Hodgson,* 497 U.S. 417 (1990).

[79] See generally 1 Am. Jur. 2d "Abortion and Birth Control" 66.

[80] See *In Re Moe,* 26 Mass App. 915 (1988).

history of physical, sexual, or emotional abuse by parents or guardians under the "best interest" umbrella.[81]

E. RECAPITULATION

Thus, a few clear principles emerge under the Supreme Court's cases regarding abortion and State parental involvement laws. As a general matter, a State may require the consent of, or notification to, one or both of a minor's parents before an abortion may be performed on their daughter, so long as the State also provides for a constitutionally adequate judicial bypass procedure, a mature minor or a minor with regard to whom a court has found that parental involvement is not in her best interests pursuant to which can bypass parental involvement requirements and obtain the abortion on the strength of a court order.

F. THE CHILD CUSTODY PROTECTION ACT AND THE SUPREME COURT'S ABORTION/PARENTAL INVOLVEMENT CASES

The core operative provision of the Child Custody Protection Act, set out in proposed subsection 2401(a)(1) of title 18 in the Committee-reported substitute, outlaws the abridgment of parental rights by anyone who knowingly transports a minor across State lines with the intent that the minor obtain an abortion. Proposed subsection 2401(a)(2) defines an abridgment of parental rights as the out-of-State performance of an abortion on the minor without the parental consent or notification, or judicial authorization, "that would have been required by [the home State's parental involvement] law had the abortion been performed" in the minor's home State. Thus, the kind of parental involvement the act requires is defined entirely by the requirements of the home State's law. If a State parental involvement law unconstitutionally burdens a minor's right to an abortion, then that State law imposes no parental involvement requirements, because any requirements it might seek to impose are superseded by the Constitution.[82] In this circumstance S. 1645 will not impose any parental involvement requirement either. Thus, in the main, as Professor Harrison explained in his testimony before the Committee, "S. 1645 does not raise any questions concerning the permissible regulation of abortion that are independent of the state laws that it is designed to effectuate."[83] Rather, "to the extent that a state rule is inconsistent with the Court's doctrine, that rule is ineffective and this bill would not make it effective."[84]

Accordingly, some constitutional criticisms of S. 1645 made by opponents of this legislation of necessity miss their mark. For example, the contention that a State law parental notice or consent requirement is unduly burdensome because some minors will find it too difficult to tell their parents about their pregnancy, and that judicial bypass does not sufficiently mitigate this burden because

[81] 1 Am. Jur. 2d "Abortion and Birth Control" 66. Also, the court may consider alternatives to abortion, and whether assuming the responsibilities of motherhood would be best in such situations.

[82] Cf. *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 176–80 (1803) (unconstitutional Federal law cannot bind courts or other departments of the Federal Government).

[83] Hearing on S. 1645, the Child Custody Protection Act, before the Senate Committee on the Judiciary, 105th Cong., 2d sess. (May 20, 1998) (statement of Prof. John Harrison).

[84] Id.

court processes are inherently too difficult and too intimidating for minors to be able to use, finds its answer in the Supreme Court cases upholding State laws structured in exactly this fashion.[85]

For similar reasons, the suggestion in Professor Tribe's letter to the members of the Judiciary Committee that subsection (b)(1) of proposed section 2401 of title 18 preempts any State-law-based health exceptions and is constitutionally inadequate[86] is similarly wrong on two scores. First, a careful reading of the Committee-adopted substitute's language (which may not have been available to Professor Tribe when he wrote his letter) makes clear that his view that subsection (b)(1) preempts the home State's health exceptions is mistaken. Rather, subsection (b)(1)'s exception is intended to supplement any health exceptions recognized by the home State. This is because subsection (a)(2) defines an abridgment of parental rights as the performance of an out-of-State abortion without the parental involvement *that would have been required under the home State's laws.* Any exceptions contained in that State's laws must therefore be incorporated by reference. This is because if a home State law has an applicable exception, the home State would *not* have required parental involvement in the circumstances covered by the exception, and hence performance of the abortion without parental involvement would not be an abridgment of parental rights under subsection (a)(1). Second, as explained above, in circumstances where the home State's health exception is not constitutionally adequate, the home State will impose no requirements because any requirements it sought to impose will be trumped by the U.S. Constitution. Thus, no matter what the scope of subsection (b)(1)'s exception, it cannot create constitutional difficulties for S. 1645. Rather, as Professor Harrison explained in his testimony before the Committee, "[b]ecause constitutional limits on the States' regulatory authority are in effect incorporated into subsection (a) of proposed Section 2401, subsection (b) is in addition to any exceptions required by the Court's doctrine."[87]

The remaining question is whether the barrier S. 1645 erects against evasion of parental involvement laws that themselves satisfy the Constitution might nevertheless be found unconstitutional under the Supreme Court's abortion and parental involvement cases. In the Committee's view, such a result would be quite peculiar.

Nothing in the Court's opinions on any of the State parental involvement laws on whose constitutionality it has passed suggests that the laws' constitutionality turns in any way on the option that a minor could have of avoiding application of these laws by seeking an abortion out of State. To the contrary, as the Court has analyzed these laws, it has consistently assumed that the minor's options are to involve the parent as the law requires, or, if the law permits, to seek a judicial bypass. It has consistently held that giving a minor these options, and only these options, is constitutionally permissible. Thus it would be quite surprising if the Court

[85] See, e.g., *Planned Parenthood* v. *Casey,* 505 U.S. 833, 899–900.

[86] Hearing on S. 1645, the Child Custody Protection Act, before the Senate Committee on the Judiciary, 105th Cong., 2d sess. (May 20, 1998) (letter of Prof. Larry Tribe).

[87] Hearing on S. 1645, the Child Custody Protection Act, before the Senate Committee on the Judiciary, 105th Cong., 2d sess. (May 20, 1998) (statement of Prof. John Harrison).

were suddenly to hold that even the complete withdrawal of an option whose availability the Court did not even consider—the obtaining of an out-of-State abortion—was nevertheless an unconstitutional abridgment of a minor's right to an abortion.

S. 1645, however, stops very far short of withdrawing that option. First, it places no limit on the minor herself crossing State lines to obtain the abortion,[88] nor does it place any limit on the out-of-State abortion provider's performance of the abortion. Second, it places no penalties on anyone for the minor's obtaining the abortion out-of-State, provided that she does so with parental involvement or judicial authorization sufficient to satisfy her home State's law. Finally, it places no penalties on any person who reasonably believed, based on information obtained from the minor's parents or other compelling facts, that parental involvement or judicial authorization sufficient to satisfy the minor's home State law had occurred.

In its letter to Senator Leahy, the Department of Justice identified two instances where the effect of S. 1645 may be to make an out-of-State abortion sufficiently difficult for a minor to obtain that, if going out of State were the only way for her to obtain an abortion, the burden S. 1645 imposes on the out-of-State option might be subject to constitutional question under the Court's case law. First, DOJ argues that there may be instances where, because the State's parental consent or notice requirement applies only to doctors licensed to practice in-State, and because the State's judicial bypass proceeding requires application for a waiver of the requirement (which would not apply in the first place to an out-of-State abortion provider), a judicial bypass might not be available for an out-of-State abortion.[89]

The particular example DOJ cites of a statute that presents these kinds of difficulties is Montana's parental notice requirement, which, at least at present, would not be the basis for any action under the Child Custody Protection Act, because it is under preliminary injunction and hence imposes no parental involvement requirements of any kind.[90] Assuming that there are other parental involvement laws that are not under injunction, are constitutional, and therefore would be the basis for action under the Child Custody Protection Act and that present the same difficulty, however, it is still impossible to see how they would raise questions about S. 1645's constitutionality. Since the State law must itself be constitutional in order for S. 1645 to attach any consequences to it, by hypothesis the minor would be able to obtain the abortion in her home State without unconstitutional restrictions on her right to do so—which is all the Supreme Court has ever said is required.

Second, DOJ argues that S. 1645 may be constitutionally problematic where the home State's requirements run only against physicians performing abortions within the State who are charged with giving the requisite notice or securing the requisite consent. In

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[88] See S. 1645, sec, 2(a), proposed 18 U.S.C. 2401(b)(2).

[89] Letter of Acting Assistant Attorney General Sutin to Senator Leahy, July 8, 1998, pp. 6–7 and n. 7.

[90] *Wicklund* v. *State*, No. ADV 97–671 (Mont. 1st Jud. Dist. Feb. 13, 1998). The preliminary injunction rests on State constitutional grounds, the U.S. Supreme Court having previously upheld the statute against Federal Constitutional challenge *See Lambert* v. *Wicklund*, 520 U.S. 242 (1997).

such an instance, DOJ argues, "it would not be at all clear how a minor seeking an out-of-State abortion could satisfy the consent portion of such a home-State law."[91] The example DOJ gives is South Carolina's parental involvement law, which requires the patient to provide proof of consent to one of these physicians. This argument, however, does not take sufficient account of the language of the substitute, which was changed to address precisely these kinds of problems.[92] Unlike the bill as originally introduced, the Committee-approved substitute does not require the State law requirements themselves to have been met before the abortion may be performed. Rather, it requires only "parental consent or notification, or judicial authorization * * * that would have been required" by the home State law.[93] Hence, no violation of S. 1645 would occur if the minor provides the same proof of consent that she would have been required to give a South Carolina physician to an out-of-State abortion provider.[94] The Committee-approved substitute also includes an affirmative defense excusing a defendant who can show that he or she "reasonably believed, based on information obtained directly from a parent of [the minor] or other compelling facts," the requisite consent, notification, or judicial authorization was given, which provides an additional margin of safety protecting the defendant from liability in the case of any purely technical defects in the form of the consent or notice given.

Finally, DOJ hypothesizes that if a minor went out-of-State for an abortion and the State she went to also had a parental involvement law, S. 1645 might create strong pressures to satisfy two such laws, which, it argues, would be an undue burden. This result, however, could obtain even without S. 1645, depending on what view the home State had of the extraterritorial application of its statute. Moreover, once again, so long as the option of having the abortion in her home State was constitutionally adequate, as it would have to be in order for S. 1645 to make failure to comply

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[91] Letter of Acting Assistant Attorney General Sutin to Senator Leahy, July 8, 1998, pp. 6–7 and n.7.

[92] DOJ does obliquely acknowledge that the language in the substitute may have cured this problem. DOJ's letter to Chairman Hyde concerning the House bill as it had been reported by the Subcommittee on the Constitution, which did not contain the language changes made by the substitute, noted that "It therefore would not be at all clear how a minor seeking an out-of-state abortion could satisfy even the consent portion of such a home-state law in a manner that would permit a 'transporter' of that minor to avoid criminal liability under proposed § 2401(a)." Letter of Acting Assistant Attorney General Sutin to The Honorable Henry Hyde (June 24, 1998). DOJ's letter to Senator Leahy qualifies this statement, including the same sentence, but leading off with the clause "Thus, to the extent that proposed § 2401(a) is intended to require literal compliance with the home state's law, it would not be at all clear etc." Letter of Acting Assistant Attorney General Sutin to The Honorable Patrick Leahy (July 8, 1998). (Emphasis added.)

[93] S. 1645, sec. 2, proposed 18 U.S.C. 2401(a)(2).

[94] In fact, because South Carolina allows consent to be given by persons other than those defined as parents under S. 1645, in its current form its law would not be a "law requiring parental involvement" as that term is used in S. 1645, see proposed 18 U.S.C. 2401(e) (e) and (2), and hence could not form the basis for action under S. 1645. Nevertheless, there may be other State laws that do meet S. 1645's definition of a "law requiring parental involvement" that present similar issues, so the point seems worth addressing.

Even if a State law could be found that was picked up by S. 1645 and where, because of some peculiarity in its operation, the consent or notice it would have required if the abortion were performed in-State could not be given if the abortion were performed out-of-State, and for some reason no form of consent, notice, or judicial authorization could be given sufficient to satisfy the affirmative defense, the same counterargument as the one made in the preceding paragraph would apply in this instance as well: The minor would still have the constitutionally sufficient option of having the abortion performed in-State.

with that home State's requirements the basis for Federal action, no constitutional problem would appear to be presented.

4. S. 1645's Intent Requirement

Finally, a few brief words are in order about S. 1645's intent requirement. In order to violate S. 1645, a person must *knowingly* transport the minor across State lines *with the intent* that she obtain an abortion. The Department of Justice and others have suggested that more should be required, because people cannot reasonably be expected to know the fine points of State parental involvement laws, and therefore may violate S. 1645 by inadvertence. In fact, however, somebody who is not a child's parent and takes her across State lines in order for her to get an abortion without her parents' knowledge is not doing something so plainly consistent with ordinary standards of morality that he or she should expect the law to have nothing to say about it. To the contrary, he or she is doing something that most people would think is wrong. Therefore, outlawing this, like outlawing other conduct inconsistent with ordinary moral standards, does not warrant inclusion of a special mens rea requirement of the type that Congress uses where it is dealing with a highly technical regulatory scheme that an ordinary citizen cannot be expected to know.[95] Rather, this is the ordinary case in which Congress may legitimately rely on "the background presumption that every citizen knows the law."[96]

The Committee-adopted substitute version of S. 1645 does account for the possibility of reasonable good faith violations of State laws by providing for an affirmative defense if the person taking the minor across State lines reasonably believed, based on information he or she obtained directly from the minor's parent or other compelling facts, that consent, notice, or judicial authorization sufficient that it would have satisfied the State law, had been given. This provision strikes a reasonable balance by preventing anyone from being in jeopardy for technical defects in the consent, notice, or judicial authorization, without allowing the person to avoid liability simply by claiming that he or she was relying on the minor's assurance that the parental involvement requirement had been satisfied.[97]

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[95] Cf. *Bryan* v. *United States,* 118 S.Ct. 1139, 1998 U.S. Lexis 4011, 20 n.18, quoting *Cheek* v. *United States,* 498 U.S. 192, 199–200 (1991):

> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain Federal criminal tax offenses. Thus, The Court almost 60 years ago interpreted the statutory term "willfully" as used in the Federal criminal tax statutes as carving out an exception to the traditional rule [that every person is presumed to know the law]. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws.

[96] See *Bryan* v. *United States,* 1998 U.S. Lexis 4011, 17.

[97] The rationale for rejecting reliance on the minor's assertion is similar to the longstanding general rejection, albeit with exceptions in some jurisdictions, of the defense to statutory rape based on a reasonable mistake as to the age of the complainant. See. e.g., *State* v. *Ruhl,* 8 Iowa 447 (1859); *Beckham* v. *Nacke,* 56 Mo. 546 (1874); *State* v. *Newton,* 44 Iowa 45 (1876); *Lawrence* v. *Commonwealth,* 30 Gratt. 845 (1878); *State* v. *Griffith,* 67 mo. 287 (1878); *Heath* v. *State,* 173 Ind. 296, 90 N.E. 310 (1910), *State* v. *Wade*, 224 N.C. 760, 32 S.E.2d 314 (1944); *Commonwealth* v. *Sarricks,* 161 Pa. Super 577, 56 A.2d 323 (1948); *State* v. *Superior Court of Pima County,* 104 Arz. 440, 454 P.2d 982 (1969); *Nelson* v. *Moriarty,* 484 F.2d 1034 (1st cir. 1973); *People* v.

Continued

POLICY ISSUES

Apart from the constitutional concerns they raise, critics of S. 1645 make two interrelated policy objections. First, this legislation places close family members trying to help minors who can't tell their parents at risk of prosecution. Second, critics argue, the effect will be to further isolate these minors, who, rather than turning to these other family members, will either seek an illegal abortion or pursue one across State lines, but entirely on their own.

These arguments, however, ignore three realities. First, as explained in the opening portion of this report, the vast majority of nonparents who accompany minors to get abortions are not relatives. Rather, they tend to be the person who impregnated the minor and people associated with that person. Second, many minors who resist telling their parents about their pregnancy do so not because they face serious risks of abuse as a consequence of telling or because the pregnancy was a result of incest or for other reasons of this sort. Rather, as Dr. Bruce Lucero, a pro-choice physician who performed 45,000 abortions in Alabama explained in a column in the New York Times, "In almost all cases, the only reason that a teen-age girl doesn't want to tell her parents about her pregnancy is that she feels ashamed and doesn't want to let her parents down."[98] In these kinds of cases, the best help adults close to the teen-age girl, be they relatives or others, can give is not to go along with the teenager's desire for concealment by bringing her across State lines, but rather to encourage her to talk to her parents. As Dr. Lucero continued,

> [P]arents are usually the ones who can best help their teen-ager consider her options. And whatever the girl's decision, parents can provide the necessary emotional support and financial assistance. Even in a conservative state like Alabama, I found that parents were almost always supportive.
>
> If a teen-ager seeks an abortion out of state, however, things become infinitely more complicated. Instead of telling her parents, she may delay her abortion and try to scrape together enough money—usually $150 to $300—herself. As a result, she often waits too long and then has to turn to her parents for help to pay for a more expensive and riskier second-trimester abortion.
>
> Also, patients who receive abortions at out-of-state clinics frequently do not return for follow-up care, which can lead to dangerous complications. And a teen-ager who has an abortion across state lines without her parents' knowledge is even more unlikely to tell them that she is having complications.[99]

Finally, where there is a real problem with parental involvement, as Dr. Lucero also pointed out "[i]n cases where teen-agers can't tell their parents—because of abuse, for instance—parental notifi-

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Cash, 419 Mich. 230, 351 N.W.2d 822 (1984); *State* v. *Stiffler,* 117 Idaho 405, 788 P.2d 220 (1988), contra, see, e.g., *People* v. *Hernandez,* 61 Cal. 2d 519, 393 P.2d 673, 39 Cal. Rptr. 361 (1964).

[98] Dr. Bruce Lucero, "Parental Guidance, Needed," N.Y. Times, sec. 4, p. 17 (July 12, 1998).

[99] Id.

cation laws allow teen-agers to petition a judge for a waiver."[100] The best help a loving adult relative can give a minor in such a case is to assist her in obtaining such a waiver.

Critics of parental involvement statutes argue that judicial bypasses are too complex and subject to the whim of individual judges' views on abortion. "Some young women who manage to arrange a hearing face judges who are vehemently anti-choice and who routinely deny petitions, despite rulings by the U.S. Supreme Court that a minor must be granted a bypass if she is mature or if an abortion is in her best interest. As a result, minors in states with parental involvement laws frequently go to a neighboring state to obtain an abortion instead of trying to obtain a judicial bypass."[101] The reality, however, is that these proceedings are simple,[102] and that the only empirical studies that have been done suggest that applications for bypass are overwhelmingly granted.

A survey of Massachusetts cases filed between 1981 and 1983 found that every minor who sought judicial authorization to bypass parental consent received it.[103] A subsequent study found that orders were refused to only 1 of 477 girls seeking judicial authorization from Massachusetts courts between December 1981 and June 1985.[104] The average hearing lasted only 12.12 minutes, and "more than 92 percent of the hearings [were] less than or equal to 20 minutes."[105] Similar results obtained in Minnesota, where, based upon a review of bypass petitions filed from August 1, 1981, to March 1, 1986, a Federal trial court determined that of the 3,573 bypass petitions filed, 6 were withdrawn, 9 were denied, and 3,558 were granted.[106] Likewise, early returns suggest similar ease in obtaining judicial approval in Virginia, according to a recent report on the newly enacted Virginia parental notification statute.[107] Out of 18 requests for judicial bypass, "all but one of the requests were granted eventually."[108]

Finally, it is worth noting that the only instances where close relatives will be in any serious danger of being pursued by Federal authorities under S. 1645 will be those in which at least the parents are encouraging the Federal authorities to act. No prosecutor would expect a jury to convict a relative in the face of testimony by parents seeking to exonerate the relative, and therefore no prosecution would be brought under these circumstances.

IV. VOTE OF THE COMMITTEE

The Senate Judiciary Committee, with a quorum present, met on Thursday, July 9, at 9 a.m. and on Thursday, July 16, 1998, at 9:30 a.m. to mark up S. 1645. The following votes occurred on the bill and amendments proposed thereto:

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[100] Id.

[101] NARAL Publications—"Factsheet: S. 1645 is a Threat to Young Women's Health," (1998).

[102] See *Orr* v. *Knowles,* 337 N.W.2d 699 at 706 (Neb. 1983).

[103] Robert H. Mnookin, *Bellotti* v. *Baird,* "A Hard Case" in "In the Interest of Children: Advocacy, Law Reform, and Public Policy," 149 at 239 (Robert H. Mnookin ed., 1985).

[104] Susanne Yates and Anita J. Pliner, "Judging Maturity in the Courts: The Massachusetts Consent Statute," 78 Am. J. Pub. Health 646, 647 (1998).

[105] Id. at 648.

[106] *Hodgson* v. *Minnesota,* 648 F. Supp. 756 at 765 (D. Minn. 1986).

[107] Ellen Nakashima, "Fewer Teens Receiving Abortion in Virginia: Notification Law to Get Court Test," Washington Post (Mar. 3, 1998).

[108] Id.

(1) Senator Abraham offered a substitute amendment, which was agreed to by a unanimous voice vote.

(2) Senator Kennedy offered an amendment to require the Attorney General to certify as a precondition of Federal prosecution that (A) the appropriate State court did not have jurisdiction or refused to assume jurisdiction with respect to the conduct sought to be prosecuted and (B) Federal prosecution was necessary and in the public interest. The amendment was not agreed to by a rollcall vote of 7 yeas and 9 nays:

YEAS	NAYS
Leahy	Thurmond (by proxy)
Kennedy	Grassley
Kohl (by proxy)	Thompson
Feinstein	Kyl
Feingold (by proxy)	DeWine
Durbin	Ashcroft
Torricelli (by proxy)	Abraham
	Sessions
	Hatch

(3) Senator Feinstein offered an amendment to exempt any adult family member of the minor from the prohibitions of the act. The amendment was not agreed to by a rollcall vote of 7 yeas and 9 nays:

YEAS	NAYS
Leahy	Thurmond (by proxy)
Kennedy (by proxy)	Grassley (by proxy)
Kohl (by proxy)	Thompson
Feinstein	Kyl
Feingold	DeWine
Durbin	Ashcroft (by proxy)
Torricelli (by proxy)	Abraham
	Sessions
	Hatch

(4) The Committee then voted on final passage to report the bill, as amended, favorably by a rollcall vote of 10 yeas to 6 nays:

YEAS	NAYS
Thurmond (by proxy)	Leahy
Grassley (by proxy)	Kennedy (by proxy)
Thompson	Feinstein
Kyl	Feingold
DeWine	Durbin
Ashcroft (by proxy)	Torricelli
Abraham	
Sessions	
Kohl (by proxy)	
Hatch	

V. SECTION-BY-SECTION ANALYSIS

Section 1. Short Title

This section states that the short title of this bill is the "Child Custody Protection Act".

Section 2. Transportation of minors to avoid certain laws relating to abortion

Section 2(a) amends title 18 of the United States Code by inserting after chapter 117 a proposed new chapter 117A entitled—"Transportation of minors to avoid certain laws relating to abortion," within which would be included a new section 2401 on this subject.

Subsection (a) of proposed section 2401 outlaws the knowing transportation across a State line of a person under 18 years of age with the intent that she obtain an abortion, in abridgment of a parent's right of involvement according to State law. This subsection requires only knowledge by the defendant that he or she was transporting the person across State lines with the intent that she obtain an abortion. It does not require that the transporter know the requirements of the home State law, know that they have not been complied with, or indeed know anything about the existence of the State law. By the same token, it does not require that the defendant know that his or her actions violate Federal law, or indeed know anything about the Federal law. A reasonable belief that parental notice or consent, or judicial authorization, has been given, is an affirmative defense whose terms are set out in subsection (c).

Subsection (a), paragraph (1), imposes a maximum of 1 year imprisonment or a fine, or both.

Subsection (a), paragraph (2) specifies the criteria for a violation of the parental right under this statute as follows: an abortion must be performed on a minor in a State other than the minor's residence and without the parental consent or notification, or the judicial authorization, that would have been required had the abortion been performed in the minor's State of residence.

Subsection (b), paragraph (1) specifies that subsection (a) does not apply if the abortion is necessary to save the life of the minor. This subsection is not intended to preempt any other exceptions that a State parental involvement law that meets the definitions set out in subsection (e)(1) and (e)(2) may recognize.

Subsection (b), paragraph (2) clarifies that neither the minor being transported nor her parents may be prosecuted or sued for a violation of this bill.

Subsection (c) provides an affirmative defense to prosecution or civil action based on violation of the act where the defendant reasonably believed, based on information obtained directly from the girl's parent or other compelling facts, that the requirements of the girl's State of residence regarding parental involvement or judicial authorization in abortions had been satisfied. A minor's own assertion to a defendant that her parents knew or had consented would not, by itself, constitute sufficient basis to make out this affirmative defense.

Subsection (d) establishes a civil cause of action for a parent who suffers legal harm from a violation of subsection (a).

Subsection (e) sets forth definitions of certain terms in this bill.

Subsection (e)(1)(A) defines "a law requiring parental involvement in a minor's abortion decision" to be a law requiring either "the notification to, or consent of, a parent of that minor or proceedings in a State court."

Subsection (e)(1)(B) stipulates that a law conforming to the definition in (e)(1)(A) cannot provide notification to or consent of any person or entity other than a "parent" as defined in the subsequent section.

Subsection (e)(2) defines "parent" to mean a parent or guardian, or a legal custodian, or a person standing in loco parentis (if that person has "care and control" of the minor and is a person with whom the minor "regularly resides") and who is designated by the applicable State parental involvement law as the person to whom notification, or from whom consent, is required. In this context, a person in loco parentis has the meaning it has at common law: a person who effectively functions as a child's guardian, but without the legal formalities of guardianship having been met. It would not include individuals who are not truly exercising the responsibilities of parents, such as an adult boyfriend with whom the minor may be living.

Subsection (e)(3) defines "minor" to mean a person not older than the maximum age requiring parental notification or consent, or proceedings in a State court, under the parental involvement law of the State, where the minor resides.

Subsection (e)(4) defines "State" to include the District of Columbia "and any commonwealth, possession, or other territory of the United States."

Section 2(b) is a clerical amendment to insert the new chapter in the table of chapters for part I of title 18.

VI. COST ESTIMATE

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 1645—Child Custody Protection Act

CBO estimates that implementing S. 1645 would not result in any significant cost to the federal government. Because enactment of S. 1645 could affect direct spending and receipts, pay-as-you-go procedures would apply to the bill. However, CBO estimates that any impact on direct spending and receipts would not be significant. S. 1645 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

S. 1645 would make it a federal crime to transport a minor across state lines, under certain circumstances, to obtain an abortion without parental notification. Violators would be subject to imprisonment and fines. As a result, the federal government would be able to pursue cases that it otherwise would not be able to prosecute. CBO expects that any increase in federal costs for law enforcement, court proceedings, or prison operations would not be significant, however, because of the small number of cases likely to be involved. Any such additional costs would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under S. 1645 could be subject to criminal fines, the federal government might collect additional fines if the bill is enacted. Collections of such fines are recorded in the budget as governmental receipts (revenues), which are deposited in the Crime Victims Fund and spent in the following

year. CBO expects that any additional receipts and direct spending would be negligible.

The CBO staff contact for this estimate is Mark Grabowicz. This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

VII. REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b)(1), rule XXVI of the Standing Rules of the Senate, it is hereby stated that the Committee finds that the bill will have no additional direct regulatory impact.

VIII. MINORITY VIEWS

I. INTRODUCTION

Proponents of the so-called Child Custody Protection Act argue that this bill would help "protect familial relations and safeguard children from health and safety risks." They are wrong.

Far from promoting healthy family relationships, this bill would drive young women away from their families and greatly increase the dangers they face from an unwanted pregnancy. Moreover, this bill would undermine important federalism principles and violate the Constitution on multiple grounds. Finally, the bill poses significant enforcement problems that the sponsors fail to acknowledge, let alone address in any substantive fashion.

This bill would add a new provision to the Federal criminal code making it a misdemeanor offense for any person to transport a minor across State lines with the intent to obtain an abortion and thereby, in fact, "abridges the right of a parent" under a parental notification or consent law of the State in which the minor resides. The bill contains no prohibition whatsoever against pregnant minors traveling across State lines to have an abortion, even if their purpose is to avoid telling their parents, as required by their home State law.

While proponents indicate in the majority report that the bill's "simple purpose" is to provide "assistance to States that have elected to adopt such requirements," only the most restrictive State parental consent or notification laws would garner such assistance. The bill carefully restricts the parental involvement laws that would enjoy the new Federal "assistance" offered by the bill to those that require the consent of or notification to only parents or guardians of a pregnant minor. States that have chosen not to enact any parental involvement law or with such a law that allows for the involvement of any other family member, such as a grandparent, aunt or adult sibling, in the decision of a minor to obtain an abortion, are not entitled to any Federal "assistance."

As discussed more fully below, the effect of this Federal preference for the parental involvement laws of a minority of States would be to extend their reach into the majority of the States, even though many have rejected such restrictive parental involvement laws. In short, this bill rejects sound federalism principles in favor of the parental involvement laws adopted and enforced in only 20 States.

The proponents antipathy to involvement by anyone other than a parent in a minor's abortion decision is further demonstrated by the overbroad scope of the criminal and civil liability provisions. While the young woman herself and her parents are exempt from any liability, any grandmother, aunt, uncle, sibling, or other family member, family friend or counselor who helps a pregnant minor

travel across State lines, or accompanies her, to get an abortion would be subject to Federal criminal prosecution and civil suit, if the minor has not complied with her home State parental involvement law.

The consequence of such a law should be obvious: instead of increasing parental involvement in a minor's decision to terminate a pregnancy, S. 1645 would dramatically increase the isolation of young pregnant women and the dangers they face in obtaining an abortion. This bill would merely lead to more young women traveling alone to obtain abortions or seeking illegal "back alley" abortions locally, hardly a desirable policy result. Young pregnant women who seek the counsel and involvement of close family members when they cannot confide in their parents—for example where a parent has committed incest or there is a history of child abuse—would subject those same close relatives to the risk of criminal prosecution and civil suit, if the young woman subsequently travels across State lines for an abortion.

In addition to close family members, any other person to whom a young pregnant woman may turn for help, including her minor friends, health care providers, and counselors, could be dragged into court on criminal charges or in a civil suit. The criminal law's broad definitions of conspiracy, aiding and abetting, and accomplice liability, in conjunction with the bill's strict liability, could have the result of indiscriminately sweeping within the bill's criminal prohibition a number of unsuspecting persons having only peripheral involvement in a minor's abortion—even if they were unaware of the fact that a minor was crossing State lines to seek an abortion without complying with her home State's parental involvement law. As a result, the law could apply to clinic employees, bus drivers, and emergency medical personnel.

Finally, because the bill imposes significant new burdens on a woman's right to choose and impinges on the right to travel and the privileges and immunities due under the Constitution to every citizen, it has been declared unconstitutional by constitutional scholars.

No law—and certainly not this bill—will force a young pregnant woman to involve her parents in her abortion decision if she is determined to keep that fact secret from her parents. Indeed, according to the American Academy of Pediatrics, the percentages of minors who inform parents about their intent to have abortions are essentially the same in States with and without notification laws.[1] Yet, while doing nothing to achieve the goal of protecting parental rights to be involved in the actions of their minor children, the bill would do damage to important federalism and constitutional principles, and isolate young pregnant women, force them to run away from home or drive them into the hands of strangers at a time of crisis.

II. THE BILL VIOLATES FEDERALISM PRINCIPLES

States have historically maintained the dominant role in developing and implementing policies that affect family matters, such as

[1] American Academy of Pediatrics, "The Adolescent's Right to Confidential Care When Considering Abortion," 97 Pediatrics, 746, p. 748 (May 1998).

marriage, divorce, child custody and policies on parental involvement in minors' abortion decisions. That is the nature of our Federal system, in which the States may, within the common bounds of our Constitution, resolve issues consistent with the particular mores or practices of the individual State.

Only 20 States have adopted parental consent or notification laws that are currently enforced and meet the bill's definition of a "law requiring parental involvement in a minor's abortion decision."[2] Thus, the majority of the States either have opted for no such law or are enforcing a law that allows for the involvement of adults other than a parent or guardian in the minor's abortion decision.[3]

Proponents are just plain wrong when they say in the majority report that this bill "does not supersede, override, or in any way alter existing State laws regarding minors' abortions." On the contrary, the direct consequence of this bill would be to federalize the reach of parental involvement laws in place in the minority of States in ways that override policies in place in the majority of the States in this country.

The fact that the bill establishes no new parental consent or notification requirements is a mere figleaf which cannot hide its antifederalism effect. The bill would use Federal agency resources to enforce the minority of States' parental involvement laws wherever minors from those States travel and in connection with actions taken in other States. Furthermore, it would create a Federal crime as a mechanism for such Federal intervention.

The 20-State parental involvement statutes "assisted" by S. 1645 were not drafted with this extraterritorial application in mind. These statutes do not say that the parental involvement provisions hinge on residency but provide restrictions on abortions to be performed on minors within the State where the law applies. Nevertheless, even if these States have not contemplated and neither need nor want Federal intervention to enforce their parental involvement laws, this bill would federalize the reach of these laws wherever the pregnant minors of those States travel within the country.

Moreover, even if a State does not enforce its own parental involvement law, due to a court injunction or determination of a State Attorney General, this bill may still make it a Federal crime to help a minor cross State lines for an abortion without complying with that unenforced or unenforceable State law. Despite the clear

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[2] The 20 States with parental consent laws that are enforced and meet the definition in S. 1645 are: Alabama, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Pennsylvania, Rhode Island, South Dakota, Utah and Wyoming. National Abortion Rights Action League, "Who Decides? A State-by-State Review of Abortion and Reproductive Rights," pp. 154–55 (1998) (hereafter "NARAL Chart").

[3] Ten States (Florida, Hawaii, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Texas, Vermont and Washington) and the District of Columbia do not require any form of parental consent or notification in connection with a minor's abortion decision. NARAL Chart, supra. While a total of 40 States have adopted some form of parental consent or notification law, these laws in nine States (Alaska, Arizona, California, Colorado, Illinois, Montana, Nevada, New Mexico and Tennessee) have been declared unenforceable by a court or attorney general. Id. Of the remaining 31 States with enforced parental involvement laws, the following 11 States allow persons other than parents to be involved in a minor's abortion decision: Delaware, Illinois, Iowa, Maine, Maryland, North Carolina, Ohio, South Carolina, Virginia, West Virginia, and Wisconsin. Id.

intention of the sponsors that S. 1645 not apply in those circumstances, the language of the bill is not clear on that issue.

Make no mistake, despite the proponents' contention that this bill does not "attempt to regulate any purely intrastate activities related to the procurement of abortion services," the effect of this bill would be to impose the parental consent policies in the minority of States on the residents of the majority of States. For example, Vermont has no parental consent or notification law, though a neighboring State—Massachusetts—does. In the early 1980's, press reports indicated that a 2-percent increase in abortions in Vermont were attributable to minors from Massachusetts coming across the border to avoid telling their parents under that State's parental consent law.

If this bill becomes law, Vermont health care providers could be put in the position of enforcing Massachusetts' parental involvement laws before any abortion procedures are performed on minors from Massachusetts; otherwise these health care providers run the risk of criminal or civil liability. In other words, when confronted with a nonresident pregnant minor, who may be from Massachusetts, a Vermont health care provider would not be able to perform procedures that are legal in Vermont and protected by the U.S. Constitution. Instead, that Vermont health care provider would be forced to import and enforce another State's law.

Indeed, health care professionals share this concern. As Renee Jenkins, M.D., testified:

> I am concerned about the effect on and responsibilities to the health care providers involved: the doctor's responsibility when providing abortion services to women of any age from out-of-state. * * * I am very concerned that Congress may put health care providers in the position where they must violate their state's confidentiality statutes in order to meet the obligations of a neighboring state.[4]

Since it is not always easy to tell where a minor's "home" State is, health care providers would end up bearing the burden, in terms of time, cost, and resources, of checking on the residency of *every* minor who comes to them for abortion services. This would be the only way to ensure that there are no nonresident minors among them who have not complied with their "home state" parental involvement laws. This is not the policy that the majority of States have chosen for the minors within their borders, yet the bill would force the laws and policies of the minority of States on them.

Moreover, the Federal Government would be in the unfortunate position of prosecuting people differently, depending on the State in which that person has established residence. This disparate treatment would result from the non-uniformity of State parental involvement laws. State statutes on parental involvement in a minor's abortion decision vary widely and, as noted, a number of States have no such requirement at all. Thus, under the bill, whether a person is subject to Federal prosecution would depend upon the vagaries of State law.

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[4] See Hearing on S. 1645, "The Child Custody Protection Act," before the Senate Committee on the Judiciary, 105th Cong., 2d sess., (May 20, 1998) (testimony of Renee Jenkins, M.D.) (hereafter "S. 1645 hearing").

Just because some in Congress may prefer the policies of one State over those in the majority of the States does not mean we should give those policies Federal enforcement authority across the Nation. Doing so sets a dangerous precedent.

We should think about how this policy might impact additional settings. For example, some States, such as Vermont, allow the carrying of concealed weapons without a permit, while other States bar that practice. Should Congress authorize Federal intervention that would allow residents of those States to enjoy the privilege of carrying their concealed weapons into States with more restrictive concealed weapons laws? It is the nature of our Federal system that when residents of a State travel to neighboring States and across the Nation, they must conform their behavior to the laws of the States they visit. When residents of each State are forced to carry with them only the laws of their own State, they may be advantaged or disadvantaged but one thing is clear: We will have turned our Federal system on its ear.

One constitutional scholar explained:

> The statute appears to be unique, both in prohibiting interstate travel for a lawful purpose, in working a discrimination among citizens in the applicability of local law based only on their state of residence, and in requiring citizens to carry with them the legal restrictions imposed by their State of residence regardless of where they may travel within the nation.[5]

Contrary to the proponents' bald assertion in the majority report that the bill "presents a fairly classic case * * * for the federal government to intervene to assist States," the approach of this legislation is extraordinary. The examples cited by proponents as models for this legislation are wholly inapposite.

First, proponents look to the Deadbeat Parents Punishment Act of 1998 as an example of analogous legislation. This new law punishes the travel in interstate or foreign commerce with the intent to evade a "support obligation" that has been set "under a court order or an order of an administrative process." This law authorizes Federal enforcement of a State's judicial orders and is fully consistent with the operation of the full faith and credit clause of the Constitution. By contrast, S. 1645 would authorize Federal intervention not to enforce a State judgment or State criminal charge, but to apply one State's law to conduct occurring legally within the borders of another State.

The Deadbeat Parents Punishment Act reflects the unremarkable proposition that in circumstances where a person commits a crime in one State and flees to another, full faith and credit will be given to the laws of the original State so that the perpetrator may be returned there to face charges or punishment. This does not implicate the right of a citizen to travel. See *Jones* v. *Helms,* 452 U.S. 412, 419 (1981). By contrast, persons who would be subject to criminal liability under S. 1645 would have committed no crime or offense under any State law. The State parental involve-

[5] S. 1645 hearing, supra note 4, (submitted written testimony of Peter J. Rubin, visiting associate professor of law, Georgetown University Law Center, academic year 1998–99).

ment law being federally enforced would not have any applicability to an abortion lawfully performed on a minor in another State.

Second, proponents cite choice of law principles that "frequently dictate the application of the law of a State different from the one where the conduct occurred." This is pure subterfuge since choice of law principles simply tell courts engaged in civil litigation what law to apply and, unlike S. 1645, do not purport to impose criminal sanctions on conduct that occurs outside a State's territory.[6] Generally, a State's criminal law does not apply extraterritorially, unless there are specific extraterritorial principles set out in the law, which accord with Federal constitutional principles.[7]

In a last gasp effort to show that S. 1645 is not unique, proponents cite Federal restrictions limiting transfers, purchases and sales of firearms by nonresidents to licensed importers, manufacturers, dealers or collectors and barring such transactions with unlicensed individuals. 18 U.S.C. 922(a) (5) and (9). These restrictions apply whether or not the transaction would be perfectly legal in the resident or nonresident's home State. Thus, even though the Federal firearms law discriminates between residents and nonresidents, unlike S. 1645, the home State law of a nonresident does not follow him or her into another State. In other words, regardless of what the home State law is, for purposes of the Federal firearms laws, the only salient matter is whether a person is a resident or nonresident. Indeed, the proponents admit as much, stating that an analogous law to the firearms restrictions "would be a Federal law forbidding the performance of an abortion on a minor who resides out-of-state."

In any event, whatever the scope of Federal power to discriminate between residents and nonresidents regarding the sale of guns within the context of a comprehensive licensing scheme designed to give States control over who may receive guns in a particular State, the Supreme Court has made clear that Congress and the States may not exercise such discrimination in the provision of medical services, including abortion services. *Doe* v. *Bolton,* 410 U.S. 179, 200 (1973) (Supreme Court invalidated provisions of Georgia law that required, inter alia, that a woman be a resident of the State to obtain an abortion).

Finally, proponents look to the Mann Act, 18 U.S.C. 2421, as the paradigm for S. 1645, but this statute is very different. The Mann Act punishes the transportation of an individual across State lines "with the intent that such individual engage in prostitution." The residency of the transported individual is irrelevant under the Mann Act. In addition, the Mann Act applies regardless of the particular policy on prostitution in that individual's home State or destination State. By contrast, S. 1645 is only triggered by the restrictive parental involvement law adopted and effective in a minority of only 20 States.

Unfortunately, there is only one historical precedent in which the Federal Government applied its resources to enforce one State's

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[6] Model Penal Code Sec. 1.03 note on jurisdiction and application of forum law (Official Draft and Explanatory Notes, 1962).

[7] See Restatement (Second) Conflict of Laws Sec. 2 (1962). See also, Steven Bradford, "What Happens if *Roe* is Overruled? Extraterritorial Regulation of Abortion by the States." 35 Ariz. L. Rev. 87, 102 (1993).

policy, absent a State judgment or charge, against the residents of that State even when the resident found refuge in another State: fugitive slave laws dating to before the Civil War. No one in Congress would countenance such laws and all of us abhor slavery. Thankfully, the 13th amendment to the Constitution outlawed slavery and repealed article IV, section 2, paragraph 3 of the Constitution, which authorized return of runaway slaves to their owners. That authority, and congressional implementing laws, such as the Fugitive Slave Act of 1793, enabled slave owners to reclaim slaves who managed to escape to "free" States or territories.

In fact, the notorious *Dred Scott* [8] decision relied on this since-repealed constitutional provision to decide that slaves were not citizens of the United States entitled to the privileges and immunities granted to the white citizens of each State. This is why Dred Scott, born a slave, was deemed by the Supreme Court to continue to be a slave, even when he traveled to a "free" territory that prohibited slavery.

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

S. 1645 "tends to nationalize" parental involvement laws, even in those States that have declined to adopt such policies. Fugitive slave laws are no model to emulate with respect to our daughters and granddaughters. None of us, neither opponents or the proponents of this bill, would repeat the mistake of slavery. But beyond the question of slavery is the question of the role the Federal Government played before the Civil War in enforcing the laws of certain States. We should also not repeat that mistake.

Finally, Harvard University Law School Prof. Laurence H. Tribe, after examining this bill in its entirety, has concluded unequivocally that "it violates fundamental constitutional principles of federalism by seeking to force individuals who cross state lines to carry with them the legal regimes of their states of residence, no matter where they travel within the United States." [9] Specifically, this bill is impermissible under both the constitutional right to travel and the privileges and immunities clause of article IV, section 2 of the Constitution. Professor Tribe explains that, "the Constitution protects the right of each citizen of the United States to travel freely from state to state for the very purpose of taking advantage of the laws in those states that he or she prefers." [10]

As a recent editorial critical of this bill stated: "One of the central ideas of this country's structure is that the States will try different approaches to problems and people will vote with their feet

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[8] *Dred Scott* v. *Sandford,* 60 U.S. 393, pp. 558–59 (1856).

[9] Letter of Harvard Law School Prof. Laurence H. Tribe to members of the Senate Committee on the Judiciary, on the "Constitutionality of S. 1645," p. 1. (June 23, 1998). (Hereafter "Tribe Letter").

[10] Id., p. 3.

in deciding which laws they like. That purpose is eviscerated if Congress criminalizes the transportation."[11]

For this reason, Congress may not forbid people from shopping out of State on Sunday, if their resident jurisdiction has blue laws mandating Sunday store closures; or from buying liquor for personal use out of State, if their resident jurisdiction is "dry"; or from gambling at an out-of-State casino, if their resident State disallows gambling.

Significantly, in support of their proposition that S. 1645 does not violate federalism principles, proponents cite approvingly an article that instead raises "at least five possible constitutional problems" with the extraterritorial application of a State's law.[12] Noting the "aggressive way in which some States are testing the boundaries of constitutionality in the abortion area," the author predicts that, "an extraterritorial abortion statute may soon be presented to the Court."[13] In light of the fact that women and minors are "seeking to travel out of states with restrictive abortion laws to states where abortions are more freely available," he concludes that:

> *It is only a matter of time before a zealous legislature tries to prevent state law from being circumvented in this manner.* If so the question of extraterritoriality will add yet one more issue to the abortion debate that has consumed this country for the last twenty years.[14] (Emphasis supplied.)

Unfortunately, the 105th Congress appears to be the "zealous legislature" that this author predicted.

III. THE BILL IS DANGEROUS FOR YOUNG WOMEN AND UNDERMINES FAMILY VALUES

A. The bill would isolate young pregnant women from their families

S. 1645 is hostile to the well being of families and pregnant young women. Despite proponents' claims that S. 1645 would help enforce a parent's right to counsel their daughters, the reality is that legislating complex family relationships is an impossible task.

Under the legislation, pregnant young women who are unable to satisfy a State parental involvement law—either because they cannot tell one parent (or in some states, both parents) about their pregnancy or because they have no fair chance of obtaining a judicial bypass—would put at risk of criminal and civil liability those to whom they turn for help, including their grandmothers, aunts, siblings or close friends. It should be obvious that threatening to throw into jail any grandmother or aunt or sibling who helps a young relative travel out-of-State to obtain an abortion without telling her parents, as required by her home State law, does not foster closer familial relationships.

Yet, Senator Feinstein's amendment to exempt adult family members, including a grandparent, stepparent, an aunt, or a sibling, was voted down.

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[11] The Washington Post, A–16, July 20, 1998.
[12] Bradford, supra note 7, p. 90.
[13] Id., p. 170.
[14] Id.

Even nonparent adults who are in fact raising a child would be subject to liability under the bill. This is because the legislation includes an excessively narrow definition of "parent," referring only to a parent or guardian; a legal custodian; or a person standing in loco parentis who has care and control of the minor, and with whom the minor regularly resides and who is designated by a State's parental involvement law as a person to whom notification, or from whom consent, is required.[15]

There is no provision to afford protection to grandparents, aunts or uncles who are in fact raising a minor but have not been formally designated as the child's guardian. This is the case even where the child's parents cannot be located.[16]

Studies have revealed that more than half of all young women who do not involve a parent in a decision to terminate a pregnancy choose to involve another trusted adult, very often a relative.[17] A 1996 report by the American Academy of Pediatrics, cites surveys showing that pregnant minors who do not involve a parent in their decision to have an abortion, often involve other responsible adults, including other relatives.[18] In one survey, 91 percent of the young pregnant women interviewed consulted either a parent or "parent surrogate" who was often a grandmother, aunt or other relative with whom they lived, even if that adult was not the legal guardian.[19]

Thus, the real result of this bill would be to discourage young pregnant women from turning to a trusted adult for advice and assistance. Threatening an investigation by the Federal Bureau of Investigation and Federal criminal prosecution of any loving family member who helps a young pregnant relative in distress to go out of State to obtain an abortion, would be a short-sighted and drastic mistake.

In fact, the direct effect of the bill may be to force young pregnant women to travel alone across State lines to obtain an abortion. It is far preferable to permit a trusted friend or family member to accompany a woman and drive her home from this surgical procedure.[20]

In addition, the bill may have the unintended consequence of encouraging young women in trouble to abandon their family, friends and homes, and force them into the hands of strangers or into isolation. If they are willing to travel across State lines to obtain an abortion, will this bill effectively force them to move their domicile across State lines to avoid engendering criminal and civil liability? If becoming a resident of another State will eviscerate the hold of

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[15] S. 1645 (to be codified as 18 U.S.C. 2401(e)(2)).

[16] Of the 31 States with enforced parental involvement laws, only a few expressly allow consent or notice to a grandparent. For example, Ohio allows notice to a grandparent, step-parent or adult sibling under certain circumstances. NARAL Chart, supra note 2.

[17] Stanley K. Henshaw and Kathryn Kost, "Parental Involvement in Minors' Abortion Decisions," 24 Family Planning Perspectives 196, p. 207 (Sept./Oct. 1992). (Hereafter "Henshaw and Kost").

[18] American Academy of Pediatrics, supra note 1, pp. 747–48 n. 19 citing supra note 16, p.213.

[19] Id., n. 20, citing Zabin, et al., "To Whom Do Inner-City Minors Talk to About Their Pregnancies?" 24 Family Planning Perspectives 148, p. 173 (1992).

[20] The likelihood and length of the travel should not be understated. Many teenagers seeking an abortion must travel out of State to obtain the procedure, either because the closest facility is located in a neighboring State or because there is no in-State provider available. In fact, currently 84 percent of counties lack an abortion provider. Others seek to ensure confidentiality by going out of State. See Stanley K. Henshaw and Jennifer Van Vort, "Abortion Services in the United States," 26 1991 and 1992, 26 Family Planning Perspectives 103 (May/June 1994).

a home States restrictive parental consent law, moving may be the only choice that passage of this bill may leave them. And, what of those young women who intend to move or those who tell others that they intend to move, does that defeat the claims the bill is intended to create to deter abortions?

As much as we would prefer the active and supportive involvement of parents in their minor children's major decisions, it is not always realistic to expect children to seek parental involvement in the sensitive area of abortion. That is why the American Medical Association, the Society for Adolescent Medicine, the American Public Health Association, the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, and other health professional organizations have concluded that young pregnant minors should not be compelled or required to involve their parents in their decisions to obtain abortions, although they should be encouraged to discuss their pregnancies with their parents and other responsible adults.[21]

When a child is unwilling or unable to seek parental consent, the results can be tragic. The testimony of Bill and Mary Bell is telling in this regard.[22]

The Bells were the parents of a daughter who died following an illegal abortion that she obtained because she did not want her parents to know about her pregnancy. A Planned Parenthood counselor in Indiana informed Becky that she would have to either notify her parents or petition a judge in order to get an abortion. Becky responded that she did not want to tell her parents because she did not want to hurt them. She also replied that if she could not tell her parents with whom she was very close, she would not feel comfortable asking a judge that she did not even know. Instead of traveling 110 miles to Kentucky, Becky opted to undergo an illegal abortion close to her home. Unfortunately, Becky developed serious complications from her illegal abortion that resulted in her death.

Moreover, many young women justifiably fear that they would be physically or emotionally abused if forced to disclose their pregnancy to their parents. Nearly one-third of minors who choose not to consult with their parents have experienced violence in their family or feared violence or being forced to leave home.[23] Indeed, the American Academy of Pediatrics, Committee on Adolescence, recently reported that

> Adolescents who are strongly opposed to informing parents tend to predict family reactions accurately. Involuntary parental notification can precipitate a family crisis

[21] American Academy of Pediatrics, supra note 1, p. 748.

[22] Hearing on S. 1645, supra note 4, (Statement of Bill and Mary Bell). See also Position Paper from The National Abortion Federation, "The True Victims of S. 1645/S. 1645 The Teen Endangerment Act" (June 1998) (describing the case of Keishawn, an eleven-year-old from Maryland, who was impregnated by her step-father, and sought an abortion with the assistance of her aunt, Vicky Simpson, who was awaiting an order granting her custody of Keishawn. Upon learning of the pregnancy, Keishawn's doctors in Maryland recommended that Keishawn have anesthesia during the abortion procedure, but, none of the hospitals in Maryland would allow the abortion to be provided at their facility. As a result, Keishawn's aunt sought the attention of a specialist practicing in a neighboring State, who agreed to provide the abortion. Under S. 1645, Vicki could have been federally prosecuted for helping her young niece cope with this pregnancy resulting from incest).

[23] Henshaw and Kost, supra note 17, p. 196.

> characterized by severe parental anger and rejection of the minor and her partner. One third of minors who do not inform parents already have experienced family violence and fear it will recur. Research on abusive and dysfunctional families shows that violence is at its worst during a family member's pregnancy and during the adolescence of the family's children. Although parental involvement in minors abortion decisions may be helpful in many cases, in others it may be punitive, coercive, or abusive.[24]

Furthermore, studies show that family violence is at its worst during a family member's pregnancy.[25] This is the lesson of Spring Adams, an Idaho teenager who was shot to death by her father after he learned she was planning to terminate a pregnancy caused by his acts of incest.[26]

The dangers to young pregnant women created by parental involvement laws would only be compounded by passage of S. 1645. The net result of this bill would be to isolate these young women from the grandparents, aunts and close family members who could provide them with the guidance and care they need, if they refuse to turn to their parents. Contrary to the proponents' stated intent, this bill would end up weakening family communications and creating suspicion and mistrust among close family members. Most tragic of all is that this bill would hurt most the very children its sponsors purport to want to help.

B. Judicial bypass procedures are no panacea

The proponents' response to the real safety risks posed by S. 1645 is to point to the State judicial bypass procedure. While this bypass procedure may have some theoretical value, in practice, a judicial bypass is often difficult, if not impossible, for troubled young women to obtain.

In many cases, teenagers live in regions where the local judges consistently refuse to grant bypasses, regardless of the facts involved. For example, a 1983 study found that a number of judges in Massachusetts refuse to handle abortion petitions or focus inappropriately on the morality of abortion and are insulting and rude to minors and their attorneys.[27]

Likewise, the Supreme Court found that in Minnesota, many judges refuse even to hear bypass proceedings.[28]

Other teenagers may live in small communities where the judge may be a friend of the young woman's parents, a family member, or even the parent of a friend. Still others may live in regions where the relevant courts are not open in the evenings or on week-

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[24] American Academy of Pediatrics, supra note 1, p. 75.

[25] Ching-Tung Wang and Deborah Daro, "Current Trends in Child Abuse Reporting and Fatalities: The Results of the 1996 Annual Fifty State Survey," National Committee for Prevention of Child Abuse, Chicago (1997); H. Amaro, et al., "Violence During Pregnancy and Substance Abuse," 80 American Journal of Public Health 575, 575-579 (1990).

[26] Margie Boule, "An American Tragedy," Sunday Oregonian, Aug. 27, 1989.

[27] Patricia Donovan, "Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions," 15 Family Planning Perspectives 259 (Nov./Dec. 1983).

[28] *Hodgson* v. *Minnesota,* 497 U.S. 417, 475 (1990). In Florida, after denying a bypass petition to a teenage Florida girl who was in high school, participated in extracurricular activities, worked 20 hours a week, and baby-sat regularly for her mother, the judge suggested that he, himself, as a representative of the court, had standing to represent the State's interest when the minor appealed the denial. *In re T.W.*, 551 So. 2d 1186, 1190 (Fla. 1989).

ends, when minors could seek a bypass without missing school or arousing suspicion.[29]

Finally, many minors fear that the judicial bypass procedure lacks the necessary confidentiality. Indeed, pregnant minors seeking a judicial bypass are required "to divulge intimate details of her private life to dozens of strangers (clerks, bailiffs, court reporters, witnesses, and others) to obtain a brief (10 minute) hearing before a judge who has no firsthand knowledge of her case and typically no training in counseling adolescents or developmental issues."[30] The American Medical Association has noted that:

> because the need for privacy may be compelling, minors may be driven to desperate measures to maintain the confidentiality of their pregnancies * * *. The desire to maintain secrecy has been one of the leading reasons for illegal abortion deaths since * * * 1973.[31]

Many young women, faced with the prospect of embarrassment and social stigma, would rather resort to drastic measures rather than undergo the humiliation of revealing intimate details of their lives to a series of strangers in a formal legal process.

In short, the American Academy of Pediatrics has concluded that the judicial bypass procedure "itself poses risks of medical and pschological harm. It is detrimental to medical well-being, because it causes further delays in access to medical treatment (from 4 days to several weeks), which increase the risk of complications from delayed or second-trimester procedures. It is detrimental to emotional well-being because adolescents perceive the court proceedings as extremely burdensome, humiliating and stressful."[32] In short, the judicial bypass procedure is no panacea.

C. This legislation is unnecessary and unneeded

Given the dangers to young women from passage of this bill, the proponents have a heavy burden to justify the need for such legislation. They have utterly failed to meet that burden.

The majority cites as a "significant reason" for the "evasion of a state's parental involvement law", the "effort to cover up statutory rape law violations." None among us condones either statutory rape or efforts by any adult to "cover up" illegal sexual relations with a child. In fact, States can and should pursue such statutory rape charges aggressively as an important tool in protecting young children.

To the extent that this bill would provide an additional misdemeanor charge against a man who faces—at a minimum—felony charges of statutory rape, it is difficult to view this bill as much of an additional deterrent.

Indeed, the majority cites the testimony of Joyce Farley, whose 13-year-old daughter was transported across State lines for an abortion by the stepmother of an 18-year-old boy, whom the Penn-

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[29] The courts in Massachusetts, Minnesota and Rhode Island are not open in the evenings or on weekends. See Donovan, infra note 58, p. 259.

[30] American Academy of Pediatrics, supra note 1, p. 750.

[31] American Medical Association, Council on Ethical and Judicial Affairs, AMA, "Mandatory Parental Consent to Abortion," 269 Journal of the American Medical Association (JAMA) 83 (Jan. 6, 1993).

[32] American Academy of Pediatrics, supra note 1, p. 750.

sylvania attorney general described as the person whom Farley's daughter had dated during the summer of 1995.[33] The stepmother, Rosa Hartford, drove Farley's daughter from Pennsylvania (which has a parental consent law) to an abortion clinic 60 miles away in New York (which has no parental consent law).

The stepson was subsequently convicted of statutory rape, and Hartford was convicted of "interfering with the custody of a child" and sentenced to 1 year's probation. Hartford's conviction was set aside and she has been awarded a new trial. Nevertheless, in this instance, Pennsylvania authorities were clearly able to vindicate the rights of Joyce Farley and prosecute Hartford for "taking a 13 year old from her mother's custody and without her mother's knowledge or consent to undergo a serious medical procedure."[34] In fact, Hartford "was subject to a penalty at least twice as long as the penalty provided for in this bill * * *"[35]

While the proponents dedicate an entire section of the majority report to "adult male predators and evasion of parental involvement laws", they fail to state the obvious: namely, that State laws relating to statutory rape, sexual assault, kidnaping, interference with the custody of a child, and related offenses all carry ample felony penalties and are available to State and local law enforcement officers to investigate, charge and prosecute those persons who take advantage of young women sexually.

The misdemeanor penalty provided in S. 1645 is not a tool that State and local law enforcement officials need to focus on "adult male predators," particularly in light of the significant enforcement problems detailed by the Department of Justice and summarized below. This purported justification for the bill is merely a subterfuge for its real purpose: to federalize the reach of the restrictive parental involvement laws adopted in the minority of States.

IV. THE SCOPE OF LIABILITY IS OVERLY BROAD

Proponents of this bill often cite as examples of the need for this bill the actions of predatory individuals who force and coerce a minor into obtaining an abortion. However, the net cast by this bill is far broader and far more problematic.

In fact, as originally introduced, this bill could have subjected parents to criminal prosecution for traveling across State lines, perhaps to the nearest abortion provider, with their daughter to obtain an abortion. Renee Jenkins, M.D., explained:

> Six States (AR, ID, MS, MS, ND, UT) require both parents to consent or be notified about a minor's abortion decision. Some do not allow an exception where the parents do not live together anymore, because of divorce, abandonment or domestic violence. Under S. 1645, a parent in one of these states would be criminally liable for accompanying

[33] S. 1645 Hearing, supra note 4 (testimony of Mike Fisher, Attorney General, Commonwealth of Pennsylvania) (1998).

[34] Id.

[35] Answer by Mike Fisher, Attorney General, Commonwealth of Pennsylavania, to written question number 1(a) of Senator Patrick Leahy, Ranking Member, Committee on the Judiciary (June 5, 1998).

his/her daughter to an out-of-state abortion provider without obtaining the other parent's approval.[36]

After the hearing at which Dr. Jenkins testified, even the sponsors of the legislation acknowledged the over-broad reach of the criminal liability provisions in this bill, as originally crafted, and took steps with a substitute amendment, to exclude parents, but only parents, from the threat of criminal prosecution. Their effort does not go far enough, and the bill remains overbroad.

The legislation includes a criminal penalty against all persons who "knowingly transport an individual who has not attained the age of 18 years across a State line, with the intent that such individual obtain an abortion, and thereby abridges the right of a parent under a law, requiring parental involvement in a minor's abortion decision, of the State where the individual resides." [37]

There is no requirement that the individual be aware of this legal prohibition or have knowledge of the young woman's intent to evade her resident State's parental involvement laws.[38]

Anyone simply transporting a minor could be jailed for up to 1 year or fined or both. Any bus driver, taxi driver, family member or friend transporting a young woman to obtain an abortion, but unaware that the young woman has not engaged in a formal parental involvement process could conceivably be sent to jail under this prohibition.

Many young pregnant women may turn for help in dealing with the abortion decision to their best friends, who are also likely to be minors. In fact, Joyce Farley's daughter told, not only the man who impregnanted her, but also her teenage sister, Lisa Farley, and at least two of her friends that she was pregnant.[39] Mike Fisher, the Pennsylvania attorney general, made clear that if Lisa Farley or her teenage friends had been the persons to travel with the pregnant daughter across State lines to get an abortion, they would have been subject to criminal liability under this bill. Mr. Fisher said, "The law would make no distinction for minors who violate the act." [40]

The same applies to emergency medical personnel who may be aware they are taking a minor across state lines to obtain an abortion, but would have no choice if a medical emergency were occurring.

These concerns were highlighted in the Justice Department's views on S. 1645. The Department observed:

> Congress has [in the past] opted for willfulness where there is a high likelihood of defendants reasonably believing that they are acting lawfully. * * * Many of the people a minor will likely turn to for help—people such as her grandmother, her aunt, her sibling (who also may be a minor), her religious counselor, her teenaged best friend—will often be people with little or no experience with abor-

[36] S. 1645 Hearing, supra note 4.

[37] S. 1645 (to be codified at 18 U.S.C. 2401(a)).

[38] An amendment offered at full committee markup of S. 1645 by Rep. Melvin Watt (D–NC) to add an intent requirement was defeated on a party line vote.

[39] S. 1645 Hearing. Supra note 4.

[40] Answer by Attorney General Mike Fisher to written question number 1(c) of Senator Patrick Leahy, supra note 35.

> tion or knowledge of the relevant law, let alone its finer points. Seeking to aid her, they might well engage in conduct they reasonably believe to be lawful—a minor who is a granddaughter, a niece, a parishioner, or a friend across state lines to a place where she can legally have an abortion.

In such circumstances, they would completely unwittingly violate a Federal criminal law and expose themselves to criminal and civil sanction.[41]

The supporters of this bill inaccurately compare it to the Mann Act, which prohibits the transport of "any individual under the age of 18 years in interstate or foreign commerce, or in any Territory or Possession of the U.S., with intent that such individual engage in prostitution, or in a sexual activity for which any person can be charged with a criminal offense * * *."[42]

The Mann Act, like most other criminal laws, requires that individuals have specific knowledge of the facts which make their actions illegal.

Moreover, prostitution is illegal in 49 of the 50 states, whereas abortion is legal, and indeed, constitutionally protected. A person convicted of possessing stolen property, for example, must know or have reason to know that the property they possess is, in deed, stolen property. S. 1645 has no such intent requirement and, therefore, creates a strict criminal liability for anyone in violation. Such extreme measures in a bill that likely inflicts undue burdens on young women is indicative of the underlying purpose of the legislation: to make it much harder and much more dangerous for young women to exercise their constitutional right to obtain a safe and legal abortion.

The problems inherent in the enforcement of a strict liability crime are further exacerbated by existing criminal laws relating to accessories, accessories after the fact, and conspiracies.[43] A nurse at a clinic providing directions to a minor or her driver may be liable as an accessory under this legislation. A doctor who procures a ride home for a minor and the person accompanying her because of car troubles coupled with the minor's expressed fear of calling her parents for assistance may be liable as an accessory after the fact. The pregnant minors sibling, who merely agrees to transport the minor across State lines without any knowledge or intent to evade the resident State's parental consent or notification laws, could be liable for violating this statute.

The civil liability provisions of this bill create a blanket Federal cause of action for parents who suffer "legal harm" as a result of their child being transported across State lines. This provision risks chilling family and doctor-patient relations. Agency law principles would enable an "aggrieved" parent to sue medical facilities, doctors, nurses, taxi drivers, relatives, ministers, and anyone else

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[41] Letter from Acting Assitant Attorney General L. Anthony Sutin, to Senator Patrick Leahy, Ranking Member, Committee on the Judiciary (July 8, 1998), p.8 (citations omitted). (Hereafter "Department of Justice letter").

[42] 18 U.S.C. 2421.

[43] 18 U.S.C. 2 (accessories); 3 (accessories after the fact); and 371 (conspiracies). During full committee markup of S. 1645, Rep. Bobby Scott (D VA) offered an amendment which would prohibit prosecutions based on accessory or accessory after the fact culpability. The amendment was defeated by voice vote.

providing assistance to a minor transported across State lines to obtain an abortion.

This means that abortion providers could be subject to civil suit for performing an otherwise lawful abortion on an out-of-State minor, who failed to comply with her home State's parental involvement law. For example, a Vermont healthcare provider who performs an abortion lawful in Vermont on a minor from Massachusetts, Maine, or Rhode Island (which require some form of parental consent), could be sued by the minor's parent.

This is why in a letter to Senate Judiciary Committee Ranking Member Senator Leahy, White House Chief of Staff Erskine Bowles stated that the civil liability provisions of S. 1645 "would provide an unintended basis for vexatious litigation against individuals and organizations." [44]

Not only would the civil liability provision subject virtually everyone assisting a minor to lawsuits, it would subject any one with whom the minor comes in contact to the rules of discovery. Nothing would stop a lawyer from deposing other women who have visited the defendant clinic. Nothing would prevent parents and family members from being forced to give testimony concerning some of their most private conversations with the minor obtaining the abortion. Nothing would protect friends of the minor from being dragged into depositions to discuss what they know about a subject that should be private confidential.

In addition, the bill also allows for civil actions between family members by authorizing lawsuits to be brought by any parent or legal guardian suffering "legal harm" against any person assisting a minor in obtaining an abortion across State lines. The legislation is so broad that even a father who committed rape or incest with his own daughter is permitted to bring a lawsuit seeking compensation under S. 1645.

The legislation also raises troubling questions concerning the impact of civil liability provisions on Federal rule of civil procedure 26 protective orders when the entire scheme of this new Federal cause of action is based on material that is invasive. In addition, it is unclear what types of changes family planning clinics may be required to make in order to protect themselves against legal actions. They may be required to interrogate anyone looking under the age of 25, require birth certificates, and encourage persons to drive alone in order to protect themselves from liability. It is not too difficult to conceive of antichoice groups using this legislation to harass family planning clinics out of existence.

V. THE BILL UNCONSTITUTIONALLY BURDENS REPRODUCTIVE FREEDOM

A. The constitutional framework

On January 22, 1973, the Supreme Court issued its landmark ruling in *Roe* v. *Wade* [45] and ensured women the fundamental right to choose when to terminate a pregnancy. In succeeding years, the Supreme Court also issued rulings further defining the parameters

[44] Letter from Erskine B. Bowles, Chief of Staff to the President to Senator Patrick Leahy, Ranking Member, Committee on the Judiciary (July 8, 1998).

[45] 410 U.S. 113 (1973).

of *Roe*, including decisions regarding a minor's right to obtain an abortion.

The Court found a Missouri parental consent law requiring an unmarried woman under the age of 18 to obtain written consent from a parent, unconstitutional. In *Planned Parenthood of Missouri* v. *Danforth* [46], the Court said,

> We agree with appellants and with the courts whose decisions have just been cited that the State may not impose a blanket requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor * * * It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.[47]

In *Bellotti* v. *Baird*,[48] the plurality found that although minors, like adults, have a constitutionally protected right to choose, States may limit the freedom of minors to make important decisions when they lack the experience or maturity needed to avoid decisions that may be detrimental to them. Under the *Bellotti* standard, a State may require parental involvement only if, through a bypass procedure, a mature minor is given the opportunity to make the abortion decision for herself, and a minor not mature enough to decide for herself is provided an opportunity to show that an abortion would be in her best interests. In addition, the bypass alternative to mandatory parental consent or notice must be "completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.[49]

The bottom line for the *Bellotti* Court is "whether [a statute] provides for parental notice and consent in a manner that does not unduly burden the right to seek an abortion." [50] For, as the Court stated,

> The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy * * * There are few situations in which denying a minor the right to

[46] 428 U.S. 52 (1976).

[47] Id., p. 74.

[48] 443 U.S. 622 (1979).

[49] Id., p. 644.

[50] Id., p. 640.

> make an important decision will have consequences so grave and indelible.[51]

The Court's rulings in *Planned Parenthood* v. *Ashcroft*[52] and *Hodgson* v. *Minnesota*[53] affirm its earlier decisions.

In 1992, the Court reaffirmed the essential holding in *Roe* and its view that the right to choose whether or not to terminate a pregnancy extends to minors. In *Planned Parenthood of Southeastern Pennsylvania* v. *Casey,*[54] the Court said that a pregnant minor has the right "to make the ultimate decision" about her pregnancy without an undue burden being imposed upon her decision by State regulation. "Regulations which do no more than create a structural mechanism by which * * * the parent or guardian of a minor may express profound respect for the life of the unborn are permitted," but only "if they are not a substantial obstacle to the woman's exercise of the right to choose."[55]

B. The Child Custody Protection Act is Inconsistent with the Standard of Review Articulated by the Supreme Court in Casey.

The undue burden standard provides the Committee with a clear test to assess the constitutionality of the Child Custody Protection Act. As Professor Laurence Tribe wrote to the Committee,

> The Court's decision in *Casey* articulates a very precise method for determining whether an abortion regulation places a "substantial obstacle" in the path of women who seek to exercise their right to terminate a pregnancy. Under *Casey,* the facial validity of an abortion regulation is to be measured by its impact upon "the group for whom the law is a restriction, not the group for whom the law is irrelevant." The Court thus set up an extremely practical test for determining whether a regulation is valid: If, "in a large fraction of the cases" of those pregnant women "who do not wish" to comply with the law, a regulation "will operate as a substantial obstacle to a woman's choice to undergo an abortion," then that regulation is unconstitutional.[56]

Using the *Casey* standard, the Child Custody Protection Act is unconstitutional. The standard requires that we determine whether or not the affect of the proposed legislation will act as a substantial obstacle to a significant proportion of the class of pregnant minors who do not want to comply with it. History and experience tell us that young women who—for a variety of reasons—do not wish to discuss their pregnancies with their parents, find the bypass option intimidating and seek the assistance of a caring relative or friend to obtain an abortion in another State, would find the Child Custody Protection Act to be a substantial obstacle.

It is documented that 75 percent of women under 16 who have abortions tell at least one parent about their pregnancy. The *Casey* standard, however, requires the Committee to assess the proposed

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[51] Id., p. 642.
[52] 462 U.S. 476 (1983).
[53] 497 U.S. 417 (1990).
[54] 505 U.S. 833 (1992).
[55] Id., p. 877.
[56] Tribe Letter, supra note 9, p. 7.

bill's impact on young women who feel that they cannot discuss their pregnancy or the option of abortion with their parents and wish to leave their State of residency to obtain an abortion. A young woman may make that decision for a variety of reasons.

First, more than 3 million children a year report abuse or neglect. Most of them are abused by a parent or a close family relation. Often when a teenager cannot tell a parent about her pregnancy, it's because the parent is ill, or because the parent abuses drugs or alcohol, or because the disclosure would provoke abuse or violence. The American Medical Association has stated that,

> [I]t is reasonable to believe that some minors justifiably fear that they would be treated violently by one or both parents if they had to disclose their pregnancy to their parents. Research on abusive and dysfunctional families has shown that family violence is at its worst during a family member's pregnancy * * * If parental involvement were universally required, some minors might suffer serious physical injury * * * Parental involvement often precipitates a family crisis, characterized by severe parental anger and rejection of the minor.[57]

Some young women may also decline to tell a parent because they fear disappointing them. Unfortunately, these decisions may become deadly. As noted above, Mary and Bill Bell described the unfortunate events that led their daughter Beckys' death from a "back alley" abortion. Becky had an illegal abortion rather than—her words—"hurt her parents."

Proponents of the Child Custody Protection Act argue that a young woman can turn to the constitutionally required by-pass process. But, this process is not always helpful or available to young women. Some young women cannot maneuver the legal procedures required or cannot attend hearings scheduled during school hours. Others do not initiate the process because they fear that the proceedings are not confidential or that they will be recognized by people at the courthouse. Some young women face judges who are vehemently antichoice and routinely deny petitions, although the Supreme Court has said that a minor must be given a bypass if she is mature or if an abortion is in her best interest. In some States, local judges refuse to hold hearings.

For example, a 1983 report entitled, "Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions," documents the problems young women encounter when they seek a judicial bypass in Massachusetts, Minnesota, or Rhode Island. The author interviewed two-dozen judges, public defenders, private attorneys, guardians ad litem, and abortion providers and counselors and determined that although judicial bypass laws and procedures "appear reasonable and workable on paper, in practice they constitute a serious, and in some cases insurmountable, barrier confronting minors who wish to obtain abortions."[58]

In Minnesota, for example, the judges in most counties refused—for moral or political reasons—to implement the law. As a result,

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[57] American Medical Association, supra note 31, p. 82.

[58] Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions,* 15 Family Planning Perspectives 6 (1983).

many young women had to make a round trip of 500 miles or more. For minors who could not make such a trip, the option of going to court was effectively lost. A number of judges in Massachusetts refused to handle abortion petitions. The report also stated that "some of the judges who do handle these cases focus—inappropriately—on the morality of abortion or are insulting or rude to the minor and her attorney."[59] The report also found that no courts in Massachusetts, Minnesota or Rhode Island were open in the evening or on weekends, times when minors could more easily be away from home.

Finally, many young women do not avail themselves of the bypass process because they do not want to reveal intimate details of their personal lives to strangers. Mary and Bill Bell told the Committee that Becky felt that she couldn't ask a judge for permission to have an abortion because, as Becky told a Planned Parenthood counselor, "If I can't tell my mom and dad, how can I tell a judge who doesn't even know me?"[60]

In these situations, young women often feel that they have two choices—cross State lines to obtain an abortion or, as the American Medical Association notes, "[r]un away from home, obtain a 'back alley' abortion, or resort to a self-induced abortion." The AMA goes on to note that "[t]he desire to maintain secrecy has been one of the leading reasons for illegal abortion deaths since 1973."[61]

Given the evidence that young women, who do not wish to tell their parent about their pregnancy or believe that they can not navigate the judicial bypass process, view travel to another State—with the assistance of a relative or friend—as the only means to obtain a legal abortion, the Child Custody Protection Act is unconstitutional.

Professor Tribe explains that the burden placed on this vulnerable group of young women by S. 1645, renders the bill unconstitutional. He states:

> S. 1645 operates only upon the narrower class of pregnant minors who, by definition, would rather undertake out-of-state travel to obtain an abortion than face the judicial bypass process. This may reflect some practical problems with the application of the state's own bypass procedures, or it may reflect the particular fears and sensitivities of this class of pregnant minors. But the result, for constitutional purposes, is the same either way: because a large fraction of these young women would be deterred by S. 1645 from exercising their right to choose, the law cannot stand."[62]

C. The Child Custody Protection Act fails to Meet the Hodgson Test.

Young women would encounter substantial difficulties in States that do not provide mechanisms for fulfilling the mandated notice or consent requirements when an abortion is to be performed in another State. For those young women, the proposed legislation could

[59] Id.
[60] Id.
[61] American Medical Association, supra note 31, p. 83.
[62] Tribe letter, supra note 9.

eviscerate the fundamental right established in *Roe*. This is inconsistent with the Supreme Court's decision in *Hodgson* which held that a two-parent notification requirement without a bypass mechanism would fail to serve "any state interest with respect to functioning families." The Justice Department has explained:

> [The proposed legislation] would appear to be unconstitutional as applied to a minor seeking an out-of-state abortion, where the law of the state in which the minor resides lacks a constitutionally sufficient mechanism for satisfying that state's notice or consent requirements when an abortion is to be performed out of state. In such cases the provision would have the effect of deterring or preventing minors (particularly those who cannot drive) from obtaining out-of-state abortions even when, for example, a minor's parents in the "parental consent" state would have provided consent, or the minor would have been able to obtain a judicial bypass, had mechanisms for manifesting such consent or obtaining such a bypass for an out-of-state abortion been available.[63]

In addition, the legislation would appear to operate unconstitutionally by requiring a double consent requirement if both the minor's State of residence and the State in which the minor seeks to have the abortion performed have parental notice laws.

The Department of Justice explains:

> [If the proposed legislation] were construed to require satisfaction of the parental involvement requirements of the minor's state of residence as well, then in many cases the federal statute would, in effect, require a minor who would need or want assistance in crossing state lines to satisfy parallel parental consent or notification laws in both the state of residence and the state in which she seeks the abortion. Such duplication would seem to serve little or no legitimate governmental interest, just as the requirement of the second parent's notification without an opportunity for bypass failed to do so in Hodgson.[64]

In sum, in the views of the constitutional scholars to have considered this issue, S. 1645 "has the unconstitutional purpose and would have the unconstitutional effect of placing a "substantial obstacle" in the path of the pregnant adolescents its affects seeking to exercise their right to choose to terminate a pregnancy."[65]

VI. THE BILL RAISES SIGNIFICANT ENFORCEMENT PROBLEMS

S. 1645 will present a number of complex, if not intractable, law enforcement problems. The Department of Justice has concluded that this bill would "present a myriad of serious enforcement problems" that would make violations of the bill "notably difficult to investigate and to prosecute, and would involve significant, and largely unnecessary, outlays of federal resources."

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[63] Department of Justice letter, supra note 31, p. 6.

[64] Id., p.7.

[65] S. 1645 Hearing, supra note 4 (submitted testimony of Professor Rubin); Tribe letter, supra note 9.

Specifically, because of the multijurisdictional nature of the violation at issue, and the fact that the violative conduct is not illegal in either the home State of the pregnant minor or the State to which she is being transported for the abortion, the full burden of investigating these violations will fall to the FBI. As the Department notes, "It would be difficult for local law enforcement to work in tandem with federal authorities because there is no local crime over which they would have jurisdiction."[66] Practically speaking, federal agents will be put in the position of "State Border Patrols."

Furthermore, given the studies that show that pregnant minors often turn to relatives and friends for help, the Department notes that the principal targets of the bill are likely to be defendants who would be "highly sympathetic."[67] Indeed, "a relatively high percentage of the putative defendants under this statute may be minors, which raises special concerns in the federal system."[68]

The witnesses to the conduct criminalized by the bill would also raise significant problems. They may be close relatives or friends of the pregnant minor, who may have no interest in and downright hostility to participating in or helping with a Federal investigation. Indeed, the Department anticipates that the minor "is likely to be a hostile and uncooperative witness."[69]

Witnesses or targets would likely include medical personnel, who will raise particular privileges, such as the physician-patient privilege, or medical privacy issues that may complicate litigation. As the Department explains, "state privacy laws concerning medical records and the existence of certain state privileges will slow the investigation of these crimes."[70]

Given the hostility of many of the potential witnesses to the conduct criminalized by the bill, Federal authorities will be forced to turn to documentary evidence, such as medical records, to help prove the case. Even enforcing subpoenas for documentary evidence would, according to the Department, "take tremendous time and effort and provoke tension between the state and federal systems."[71]

The significant enforcement concerns raised by the Department make clear that the investigation and prosecution of the new crime created by this bill would require enormous effort, time and resources. Given the often sympathetic defendants and hostile witnesses, there is certainly no firm prospect of success.

Despite these difficulties, the Department anticipates that "there is the distinct possibility that the FBI would be required to evaluate unusually high numbers of complaints."[72] Straining scarce Federal resources with this new responsibility may end up diverting attention and needed resources from other law enforcement priorities. This is cause for significant concern to which insufficient attention has been by the proponents of this legislation.

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[66] Department of Justice letter, supra note 31, p. 10.
[67] Id.
[68] Id.
[69] Id.
[70] Id.
[71] Id.
[72] Id.

VII. CONCLUSION

This legislation does nothing to make abortion less necessary, only more dangerous. S. 1645 would not accomplish its purported purposes of encouraging parental involvement and takes the wrong approach to the problem of teenage pregnancy. It does nothing to increase adolescent awareness of the dangers of premarital sex. The bill does nothing to resolve the problems of dysfunctional families where children cannot confide in their parents or fear physical harm should they do so. The bill does nothing to actually stop a teenager from obtaining an out-of-State abortion, other than making the trip more dangerous.

We are disappointed that the majority has held steadfast in its efforts to create an overbroad and confusing criminal and civil liability scheme that will lead to family members suing family members and throwing grandparents, stepparents and doctors in jail for the crime of providing responsible assistance to young women in need.

Because S. 1645 is a burdensome attack on the rights and well-being of young women, we cannot support this legislation.

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EDWARD M. KENNEDY.
DIANNE FEINSTEIN.
RUSSELL D. FEINGOLD.
RICHARD J. DURBIN.
ROBERT G. TORRICELLI.

IX. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1645, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

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TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I.—CRIMES

Chapter	*Sec.*
1. General provisions	1
* * * * * * *	
117. Transportation for illegal sexual activity and related crimes	2421
117A. Transportation of minors to avoid certain laws relating to abortion	*2401*
* * * * * * *	

CHAPTER 117—TRANSPORTATION FOR ILLEGAL SEXUAL ACTIVITY AND RELATED CRIMES

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§ 2424. Filing factual statement about alien individual

(a) Whoever * * *

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(b) In any prosecution brought under this section, if it appears that any such statement required is not on file in the office of the Commissioner of Immigration and Naturalization, the person whose duty it is to file such statement shall be presumed to have failed to file said statement, unless such person or persons shall prove otherwise. No person shall be excused from furnishing the statement, as required by this section, on the ground or for the reason that the statement so required by that person, or the information therein contained, might tend to criminate that person or subject that person to a penalty or forfeiture, but no information contained in the statement or any evidence which is directly or indirectly derived from such information may be used against any person making such statement in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with this section.

CHAPTER 117A—TRANSPORTATION OF MINORS TO AVOID CERTAIN LAWS RELATING TO ABORTION

Sec.
2401. Transportation of minors to avoid certain laws relating to abortion.

§ 2401. Transportation of minors to avoid certain laws relating to abortion

(a) OFFENSE.—

(1) GENERALLY.—Except as provided in subsection (b), whoever knowingly transports an individual who has not attained the age of 18 years across a State line, with the intent that such individual obtain an abortion, and thereby in fact abridges the right of a parent under a law, requiring parental involvement in a minor's abortion decision, of the State where the individual resides, shall be fined under this title or imprisoned not more than one year, or both.

(2) DEFINITION—For the purposes of this subsection, an abridgement of the right of a parent occurs if an abortion is performed on the individual, in a State other than the State where the individual resides, without a parental consent or notification, or the judicial authorization, that would have been required by that law had the abortion been performed in the State where the individual resides.

(b) EXCEPTIONS.—

(1) The prohibition of subsection (a) does not apply if the abortion was necessary to save the life of the minor because her life was endangered by a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself.

(2) An individual transported in violation of this section, and any parent of that individual, may not be prosecuted or sued for a violation of this section, a conspiracy to violate this section, or an offense under section 2 or 3 based on a violation of this section.

(c) AFFIRMATIVE DEFENSE.—It is an affirmative defense to prosecution for an offense, or to a civil action, based on a violation of this section that the defendant reasonably believed, based on information the defendant obtained directly from a parent of the individual or other compelling facts, that before the individual obtained the abortion, the parental consent or notification, or judicial authorization took place that would have been required by the law requiring parental involvement in a minor's abortion decision, had the abortion been performed in the State where the individual resides.

(d) CIVIL ACTION.—Any parent who suffers legal harm from a violation of subsection (a) may obtain appropriate relief in a civil action.

(e) DEFINITIONS.—For the purposes of this section—

(1) a law requiring parental involvement in a minor's abortion decision is a law—

(A) requiring, before an abortion is performed on a minor, either—

(i) the notification to, or consent of, a parent of that minor; or

(ii) proceeding in a State court; and

(B) that does not provide as an alternative to the requirements described in subparagraph (A) notification to or consent of any person or entity who is not described in that subparagraph;

(2) the term "parent" means—

(A) a parent or guardian;

(B) a legal custodian; or

(C) a person standing in loco parentis who has care and control of the minor, and with whom the minor regulatory resides;

who is designated by the law requiring parental involvement in the minor's abortion decision as a person to whom notification, or from whom consent, is required;

(3) the term "minor" means an individual who is not older than the maximum age requiring parental notification or consent, or proceedings in a State court, under the law requiring parental involvement in a minor's abortion decision; and

(4) the term "State" includes the District of Columbia and any commonwealth, possession, or other territory of the United States.

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