

Parental Consent and Notification Laws in the Abortion Context: Rejecting the “Maturity” Standard in Judicial Bypass Proceedings

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Abstract

The choice to become a parent, to give a baby up for adoption, or to terminate a pregnancy presents a life-altering decision for a minor. The majority of states require minors to engage their parents or legal guardians in their choice to obtain an abortion, but not in decisions to give their babies up for adoption or to become parents. Though the United States Supreme Court has held that parental consent and notification laws do not infringe on a minor's constitutional rights if judicial bypass options are available, the reality of these judicial proceedings demonstrates a biased and unworkable legal avenue. The Supreme Court itself acknowledges the difficulty in measuring "maturity," but has continued to affirm "maturity" as the standard judges should use when evaluating minors' petitions.

Consequently, judges' decisions are left largely to their own discretion, resulting in inconsistent determinations of "maturity." Due to the significant risk of poverty and child abuse associated with teenage parenting, judicial bypass proceedings should be objective and look to the best interest of the minor. Rather than receiving such objectivity under the law, minors must not only navigate the cumbersome process of appearing before a judge to obtain a judicial waiver, but may also encounter a judge whose personal beliefs may have sealed their fate before they have even had their day in court. The danger of judicial bias, permitted through the unworkable definition of "maturity," must be eliminated from judicial bypass proceedings to protect the reproductive choices of pregnant minors.

I. Introduction

By law, minors are generally restricted in their autonomy. A state may restrict a minor's ability to purchase alcohol,¹ obtain a driver's license,² enter non-avoidable

¹ CAL. BUS. & PROF. CODE § 25658 (West 2005).

² CAL. VEH. CODE § 12814.6 (West 2005).

contracts,³ or marry.⁴ Generally, children under eighteen are not permitted to consent to or refuse medical treatment without their parents' consent.⁵ In at least one state, school administrators must have a parent's note before they are allowed to apply sunscreen on a student.⁶ Similarly, in the context of abortion, pregnant minors face restrictions on their decision-making. *Roe v. Wade* may have granted women the legal choice to terminate a pregnancy in 1973,⁷ but pregnant minors have yet to gain complete autonomy over their abortion decisions.

Currently, the majority of states require minors to engage their parents or legal guardians in their choice to obtain an abortion.⁸ The Supreme Court has held that parental consent and notification laws do not infringe on a minor's rights if the minor may bypass her parents by obtaining judicial consent.⁹ Typically, to gain a judicial bypass, a pregnant minor must demonstrate either that she is mature enough to decide to have an abortion, or that the desired abortion would be in her best interest, even if she is not mature enough to make that decision herself.¹⁰

The "maturity" requirement of judicial bypass procedures should be dismissed entirely; its application is biased and unworkable. Measuring maturity is a subjective inquiry, evidenced by the fact that even developmental psychologists disagree on which factors correctly measure a

³ CAL. FAM. CODE §§ 6700, 6701, 6710 (West 2005).

⁴ CAL. FAM. CODE § 302 (West 2005).

⁵ Jennifer L. Rosato, *The End of Adolescence: Let's Get Real: Quilting a Principled Approach to Adolescent Empowerment in Health Care Decision-Making*, 51 DEPAUL L. REV. 769, 771 (2002).

⁶ Daniel de Vise, *Bill Would Legislate Maryland Students' Use of Sunscreen*, WASH. POST, Mar. 29, 2005, at B1.

⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

⁸ THE ALAN GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS (2006), http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf.

⁹ *Bellotti v. Baird*, 443 U.S. 622 (1979).

¹⁰ *Id.* at 643-44.

minor's maturity.¹¹ Further, no clear standard exists for judges to follow. Neither the Supreme Court nor state legislatures have provided judges with adequate guidance to measure maturity. Since judges must rely on their own ideas of "maturity," judicial bypass evaluations are left primarily to their unfettered discretion. Adding to the problem, appellate courts have been deferential to lower court rulings even when no reasoning is provided as to why certain factors constitute immaturity.

In Part II, this article will examine the history behind parental consent and notification statutes, as well as the current structure of related legal doctrines. Part III will detail the problems and significant dangers of judicial bias that the "maturity" requirement poses. Part IV will examine other laws granting minors the ability to make other major life decisions without parental involvement, such as having a baby, obtaining medical treating during a pregnancy, receiving medical treatment for sexually transmitted diseases, or giving a baby up for adoption. Ultimately, this paper will conclude that the maturity requirement should not be used in judicial bypass proceedings to determine whether a minor may obtain an abortion.

II. Background

In response to the *Roe v. Wade* decision, many states began to legislate against a minor's right to an abortion by enacting parental consent or notification laws.¹² Parental consent laws require a minor to acquire permission from a parent before she may obtain an abortion.¹³ Parental notification laws require a minor to tell a parent that she is

¹¹ See Jason Allen MacBride, *Parental Consent Legislation Benefits Minors Seeking Abortions*, 10 BUFF. WOMEN'S L.J. 1, 9-10 (2001).

¹² Steven F. Stuhlberg, Note, *When is a Pregnant Minor Mature? When is an Abortion in Her Best Interests? The Ohio Supreme Court Applies Ohio's Abortion Parental Notification Law: In Re Jane Doe I*, 566 N.E.2d 1181, 60 U. CIN. L. REV. 907, 909 (1991).

¹³ Coalition for Positive Sexuality, <http://www.positive.org/Resources/consent.html> (last visited Feb. 12, 2007).

having an abortion, but she does not need the parent's permission to obtain the procedure.¹⁴

A. Parental Consent Statutes

The Supreme Court first examined an abortion parental consent statute in *Planned Parenthood of Central Missouri v. Danforth*.¹⁵ In *Danforth*, the statute at issue required an unmarried minor to obtain written consent from one parent or legal guardian before she could obtain an abortion, unless the abortion was necessary to preserve her life.¹⁶ Though noting that states have broader authority to regulate the activities of children than those of adults,¹⁷ Justice Blackmun maintained that “[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.”¹⁸ The Court held that conditioning minors’ access to abortions on parental consent did not achieve state interests such as safeguarding the family unit and parental authority. Thus, the Court maintained that any parental interest in the decision of a minor child to have or not have an abortion did not outweigh a pregnant minor’s right of privacy in the abortion context.¹⁹ A state “does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient’s pregnancy, regardless of the reason for withholding the consent.”²⁰ The Court did not determine whether a restriction that fell short of an absolute veto on an immature minor’s abortion decision could be constitutional.²¹

Three years later in *Bellotti v. Baird*, the Court evaluated whether a parental consent statute alternatively

¹⁴ *Id.*

¹⁵ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 58 (1976).

¹⁶ *Id.*

¹⁷ *Id.* at 75.

¹⁸ *Id.* at 74.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976).

allowing pregnant minors to obtain a judicial waiver of parental consent for “good cause shown” avoided the “absolute, and possibly arbitrary, veto” forbidden by *Danforth*.²² Despite the existence of the waiver in *Bellotti*, the Court found the statute unconstitutional because it permitted judicial authorization for an abortion to be withheld from a sufficiently mature minor, and it required parental consultation or notification in all instances without allowing the minor to receive an independent judicial determination.²³ The Court held that if a state requires a pregnant minor to obtain parental consent before obtaining an abortion, the state must also provide “an alternative procedure whereby authorization for the abortion can be obtained.”²⁴ The Court determined that a minor in such a state is entitled to seek judicial permission to obtain an abortion, and that the judge is to determine whether the minor is “mature” enough or whether the abortion would be in her best interest.²⁵ Though not defining the precise attributes of “maturity” that a minor must possess in order to bypass parental consent for an abortion,²⁶ the Court’s principal decision offered four criteria for a constitutional bypass provision:

- (i) allow the minor to bypass the consent requirement if she establishes that she is mature enough and well enough informed to make the abortion decision independently;
- (ii) allow the minor to bypass the consent requirement if she establishes that the abortion would be in her best interests;
- (iii) ensure the minor’s anonymity;
- and (iv) provide for expeditious bypass procedures.²⁷

²² *Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality decision).

²³ *Id.* at 651.

²⁴ *Id.* at 643.

²⁵ *Id.*

²⁶ *Id.* at 643-44 (recognizing maturity is “difficult to define, let alone determine”).

²⁷ *Lambert v. Wicklund*, 520 U.S. 292, 295 (1997) (citing *Bellotti*, 443 U.S. at 643-44).

Thus, the Court established the judicial bypass and maturity requirements, which have been affirmed in several cases after *Bellotti*.²⁸

B. Parental Notification Statutes

Parental notification statutes have also received a great deal of judicial scrutiny. In many instances, mandatory notification laws pose as much of a danger as mandatory consent laws: a parent opposed to a daughter's abortion may prevent her from obtaining the medical care she needs even if consent is not required.²⁹ Perhaps for this reason, the Supreme Court has examined numerous notification statutes to evaluate their constitutionality.

In *Hodgson v. Minnesota*, the Court held that a two-parent notification requirement was unconstitutional.³⁰ In examining a statute which instituted a 48-hour waiting period after notification of both parents,³¹ the Court held that this defect could be saved by the existence of a judicial bypass procedure similar to the alternatives required of parental consent statutes.³² In *Ohio v. Akron Center for Reproductive Health* (Akron II), decided on the same day as *Hodgson*, the Court held that "a bypass procedure that will suffice for a consent statute will also suffice for a notice statute."³³ The judicial bypass provision allowed judicial consent if parental notice was not in the minor's best interest.³⁴ Though declining

²⁸ See generally *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (statute prohibiting doctors from performing abortions on minors without parental consent found unconstitutional because it did not provide for judicial consent alternative); *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476 (1983) (statute requiring evidence of minor's emotional development, intellect, and maturity to be given to juvenile court for minor to obtain judicial consent found constitutional).

²⁹ Center for Reproductive Rights, http://www.crlp.org/pub_fac_mandconsent.html (last visited Feb. 12, 2007).

³⁰ *Hodgson v. Minnesota*, 497 U.S. 417, 422-23 (1990).

³¹ *Id.* at 422.

³² *Id.* at 422-23.

³³ *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 511 (1990).

³⁴ *Id.*

to answer whether a parental notification statute *must* include a bypass provision to be constitutional, the Court held that the bypass provision in question satisfied the four *Bellotti* criteria required for bypass provisions in parental consent statutes.³⁵ The Court held that the parental notification statute *a fortiori* satisfied any criteria that might be required for judicial bypasses of parental notification statutes, and was therefore constitutional.³⁶

In the recent *Ayotte v. Planned Parenthood of Northern New England*, the Supreme Court examined a New Hampshire law requiring minors to obtain the consent of at least one parent and wait forty-eight hours before having an abortion.³⁷ Lower courts had struck down the law, declaring it unconstitutional because there was no exception for medical emergencies.³⁸ Rather than taking the “bluntest remedy,” such as striking down the entire parental notification law, the Court held that other “modest” options are available to lower courts.³⁹ According to Justice O’Connor:

[i]n the case that is before us . . . the lower courts need not have invalidated the law wholesale . . . Only a few applications of New Hampshire’s parental notification statute would present a constitutional problem. So long as they are faithful to legislative intent, then, in this case the lower courts can issue a declaratory judgment and an injunction prohibiting the statute’s unconstitutional application.⁴⁰

Thus, while a majority agreed that there was a problem with the law, the Court remanded the case without creating a

³⁵ *Lambert v. Wicklund*, 520 U.S. 292, 295 (1997).

³⁶ *Id.*

³⁷ *Ayotte v. Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006).

³⁸ *Id.* at 969.

³⁹ *Id.*

⁴⁰ *Id.*

remedy.⁴¹ Instead of reevaluating or clarifying the standard to be used in determining whether minors should obtain abortions, the Supreme Court seemed to back away from the issue and pass the decision over to states to solve.⁴²

C. Conclusion About Parental Consent and Notification Laws

Although notification and consent laws impose different requirements on minors, both laws have essentially the same impact.⁴³ For a minor who is afraid to discuss her pregnancy and abortion choice with a parent, there is no difference between having to “tell” her parents or being required to obtain their consent for the procedure.⁴⁴ A minor who notifies a parent may be prevented from obtaining the procedure because her parent does not want her to have an abortion.⁴⁵ More importantly, for both parental consent and notification statutes, the Supreme Court has provided no guidance on how to measure “maturity.” Despite examining numerous parental involvement statutes, the Court has created an unworkable standard for judges to use in deciding whether a minor should obtain an abortion. As will be seen, the judicial bypass alternative to parental consent and notification laws is fraught with bias whether the minor seeks to avoid gaining consent or to avoid just notifying her parents.

III. The Problem with Using “Maturity” to Evaluate Minors’ Petitions for Abortions

A. Current State Statutes Requiring Parental Involvement

Operating under the doctrines set forth in *Bellotti v. Baird* and its progeny, thirty-four states currently require some form of parental involvement in a minor’s decision to have an

⁴¹ *Id.*

⁴² *Id.*

⁴³ Center for Reproductive Rights, *supra* note 29.

⁴⁴ *Id.*

⁴⁵ *Id.*

abortion.⁴⁶ All thirty-four states require that the parental involvement have a judicial bypass process for minors seeking an abortion.⁴⁷ Of the remaining states, nine have parental consent or notification laws which have been found unconstitutional,⁴⁸ and seven have no laws on the books to prevent minors from obtaining abortions on their own.⁴⁹ Since approximately 400,000 minors become pregnant in the United States each year,⁵⁰ courts have often been called upon to evaluate the maturity of minors seeking abortions. Unfortunately, there are no comprehensive national statistics

⁴⁶ THE ALAN GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS, *supra* note 8. Twenty-one states require one or both parents to consent to the procedure, while twelve require that a parent be notified, and one state requires both parental consent and notification.

⁴⁷ THE ALAN GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: PARENTAL INVOLVEMENT IN MINORS' ABORTIONS (2006), http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf.

⁴⁸ NARAL, PRO-CHOICE AMERICA, http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/key-issues/young-women.html (last visited Aug. 29, 2006). Parental consent or notification laws in Alaska, California, Idaho, Illinois, Montana, Nevada, New Hampshire, New Jersey, and New Mexico have been held unconstitutional.

⁴⁹ THE ALAN GUTTMACHER INSTITUTE, STATE FACTS ABOUT ABORTION: CONNECTICUT (2006), <http://www.guttmacher.org/pubs/sfaa/connecticut.html> (last visited Aug. 29, 2006); THE ALAN GUTTMACHER INSTITUTE, STATE FACTS ABOUT ABORTION: HAWAII, <http://www.guttmacher.org/pubs/sfaa/hawaii.html> (last visited Aug. 29, 2006); THE ALAN GUTTMACHER INSTITUTE, STATE FACTS ABOUT ABORTION: NEW YORK, http://www.guttmacher.org/pubs/sfaa/new_york.html (last visited Aug. 29, 2006); THE ALAN GUTTMACHER INSTITUTE, STATE FACTS ABOUT ABORTION: OREGON, <http://www.guttmacher.org/pubs/sfaa/oregon.html> (last visited Aug. 29, 2006); THE ALAN GUTTMACHER INSTITUTE, STATE FACTS ABOUT ABORTION: VERMONT, <http://www.guttmacher.org/pubs/sfaa/vermont.html> (last visited Aug. 29, 2006); THE ALAN GUTTMACHER INSTITUTE, STATE FACTS ABOUT ABORTION: WASHINGTON, <http://www.guttmacher.org/pubs/sfaa/washington.html> (last visited Aug. 29, 2006); THE ALAN GUTTMACHER INSTITUTE, STATE FACTS ABOUT ABORTION: MAINE, <http://www.guttmacher.org/pubs/sfaa/maine.html> (last visited Feb. 28, 2007). These states include Connecticut, Hawaii, Maine, New York, Oregon, Vermont, and Washington.

⁵⁰ Emily Buss, *The Parental Rights of Minors*, 48 BUFF. L. REV. 785, 787 (2000).

for abortion applications from minors since most states do not collect them.⁵¹ Available information in Michigan reported in 2001 that only 6.69% of all abortions in Michigan were performed on minors, and less than 1% of all pregnancies in Michigan ended as a result of an abortion obtained by a minor.⁵² Of that less than 1%, almost 70% of all Michigan minors wishing to gain access to abortions did so by discussing it with their parents and obtaining approval.⁵³ In Florida, of the nearly 50,000 teenage abortions in 2004, only 201 underage girls sought out the courts to obtain an abortion without parental involvement, and only 184 were approved.⁵⁴

Though the Michigan and Florida statistics suggest only small numbers of minors seek judicial bypasses, these court determinations have a profound impact on the lives of pregnant minors. Poverty is associated with teen parenting, either as a marker or cause of poverty.⁵⁵ Raising a child may interfere with the ability to pursue education⁵⁶ and develop job skills,⁵⁷ preventing minor parents from improving their lives and the lives of their children. Moreover, studies have shown that minor parents are more likely to receive welfare, have less family income, and abuse their children.⁵⁸ Due to these significant risks of teenage parenting, judicial bypass proceedings should evaluate a minor's maturity and

⁵¹ Adam Liptak, *On Moral Grounds, Some Judges Are Opting Out of Abortion Cases*, N.Y. TIMES, Sept. 4, 2005, available at <http://www.nytimes.com/2005/09/04/national/04recuse.html?ex=1146110400&en=ee4519b0fd36675e&ei=5070>.

⁵² MARAL, PRO-CHOICE MICHIGAN, <http://www.prochoicemichigan.org/s01takeaction/200307281.shtml> (last visited May 4, 2006).

⁵³ *Id.*

⁵⁴ Mary Ellen Klas, *Abortion Rules Challenged*, MIAMI HERALD, Mar. 23, 2006, at 4B.

⁵⁵ See Kristen Luker, Note, *Dubious Conceptions: The Politics of Teenage Pregnancy*, 51 DEPAUL L. REV. 963 (2002).

⁵⁶ Jennifer Soper, *Straddling the Line: Adolescent Pregnancy and Questions of Capacity*, 23 LAW & PSYCHOL. REV. 195, 212-13 (1999) (noting the likelihood of pregnant teens to drop out of high school).

⁵⁷ Buss, *supra* note 50, at 787.

⁵⁸ Jami L. Crews, *When Mommy's a Minor: Balancing the Rights of Grandparents Raising Grandchildren Against Minors' Parental Rights*, 28 LAW & PSYCHOL. REV. 133, 135 (2004).

circumstances without bias from the court. As will be seen, however, because “maturity” is a subjective determination and no clear standard exists to evaluate maturity, judges are able to impose their personal beliefs on minors seeking abortions. The danger of judicial bias, permitted through the unworkable definition of “maturity,” must be eliminated from judicial bypass proceedings to protect the reproductive choices of pregnant minors.

B. The Subjectivity of “Maturity” and Judicial Bias

State courts have measured “maturity” in a variety of ways.⁵⁹ In evaluating a pregnant minor’s maturity, courts have examined factors such as the minor’s age,⁶⁰ academic performance,⁶¹ intellectual capacity,⁶² participation in extracurricular activities at school,⁶³ plans for the future,⁶⁴ and the ability to handle her own finances.⁶⁵ In essence, judges have been forced to develop their own criteria for evaluating maturity since the Supreme Court has never provided a specific standard. On the contrary, in *Bellotti* the Court recognized that maturity is “difficult to define, let alone determine . . . The peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors.”⁶⁶ Of the states using the judicial bypass process, none have provided judges with any practical guidance in evaluating “maturity.”⁶⁷

Requiring judges to evaluate the maturity of pregnant minors without specific evaluation criteria poses a significant

⁵⁹ Stephen P. Rosenberg, Note, *Splitting the Baby: When Can a Pregnant Minor Obtain an Abortion Without Parental Consent? The Ex Parte Anonymous Cases (Alabama 2001)*, 34 CONN. L. REV. 1109, 1117 (2002).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1118.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Bellotti v. Baird*, 443 U.S. 622, 644 (1979).

⁶⁷ Suellyn Scarnecchia & Julie Kunce Field, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 MICH J. GENDER & L. 75, 113 (1995).

danger of judicial bias.⁶⁸ Since the evaluation is left to the “unfettered discretion” of each judge, a trial judge may deny a petition for the following erroneous reasons: personal religious beliefs;⁶⁹ the judge is “improperly influenced” by the minor’s race, ethnicity, or social class;⁷⁰ the judge cannot understand the minor’s reasoning due to a generational gap or difference in gender;⁷¹ or the judge might inappropriately slip into the role of “substitute parent” as opposed to remaining objective.⁷²

Some judges in Tennessee, Alabama, and Pennsylvania have realized their personal biases, and have refused on religious and moral grounds to hear minors’ petitions seeking judicial waivers.⁷³ At least one judge has also cited political pressure as another factor in deciding to grant minors’ judicial bypass petitions.⁷⁴ Although biased judges may impose their beliefs on minors seeking abortions, the other danger is that allowing judges to recuse themselves in all such cases means that *no* judge may be available in a minor’s county to hear her petition. For example, in Tennessee’s Shelby Circuit Court, only four of the nine judges on the court currently hear abortion applications.⁷⁵ In Boston in 1992, only two judges out of fifteen were hearing judicial bypass petitions.⁷⁶

C. Recommended Guidelines to Avoid Judicial Bias

Due to the serious risks of bias or abuse by trial courts, Professors Suellen Scarnecchia and Julie Kunce Field have proposed specific guidelines for judges to use in determining whether a minor is sufficiently mature to make the decision to obtain an abortion without parental notification or consent.⁷⁷

⁶⁸ *Id.*

⁶⁹ *Id.* at 87.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Liptak, *supra* note 51.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Tamar Lewin, *The Anguish of Asking a Court for an Abortion*, N.Y. TIMES, May 28, 1992, at B8.

⁷⁷ Scarnecchia, *supra* note 67, at 98-112.

Some of their suggestions include presuming minors aged sixteen and above to be sufficiently mature to obtain judicial waiver,⁷⁸ or presuming that an abortion is always in the best interest of a minor who is under the age of thirteen due to serious health risks associated with childbirth at that age.⁷⁹ For minors aged thirteen through fifteen, Scarnecchia and Field have recommended using maturity factors that are probative of the minor's ability to give informed consent to the abortion procedure.⁸⁰ For example, the judge may ask minors about their plans to pay for the procedure and receipt of medical information from a licensed doctor or clinic, but not ask about their academic performance or general plans for the future.⁸¹ Scarnecchia and Field also maintain that on the issue of best interest, a judge should determine whether the minor might suffer physical or emotional harm if the judicial bypass is denied.⁸²

At least one legal commentator has embraced the recommendations set forth by Scarnecchia and Field.⁸³ However, despite their detailed approach, the fact remains that it may be nearly impossible for judges to evaluate a minor's maturity without using some form of subjectivity. Even developmental psychologists—specialists in the area of child development and child behavior—disagree as to whether minors are capable of “adult decision-making.” Regarding medical treatment, some studies have suggested that adolescents have an “inability to anticipate future outcomes, to recognize possible risks of treatment.”⁸⁴ Other studies have concluded that adolescents aged fourteen and above possess the requisite understanding and reasoning to make health care decisions, and that their decision-making processes resemble those of young adults.⁸⁵ Much of the disagreement has

⁷⁸ *Id.* at 111-112.

⁷⁹ *Id.* at 112.

⁸⁰ *Id.*

⁸¹ *Id.* at 119-122.

⁸² *Id.* at 112.

⁸³ Rosenberg, *supra* note 59, at 1138-1139.

⁸⁴ Crews, *supra* note 58, at 138.

⁸⁵ Rosato, *supra* note 5, at 785-86.

focused on how to define competence: narrowly, through the components of understanding and reason; or more broadly, through the psychosocial factors that distinguish adolescents from adults,⁸⁶ such as conformity and compliance in relation to peers and parents, their attitude toward and perception of risk, and temporal perspective.⁸⁷ Regardless of how developmental psychologists choose to define “maturity,” the fact that specialists in this area disagree leaves little hope for judges.

In the twenty-seven years since *Bellotti* first introduced the “maturity” prong of granting judicial waivers, judges still differ in their evaluations of petitions for judicial bypass. According to one study, a judge presiding over a bypass proceeding may be “improperly influenced” by the minor’s race, ethnicity, or socio-economic background.⁸⁸ Moreover, some judges themselves realize that judicial bypass proceedings cause fear, tension, anxiety, and shame among minors, causing some who are mature, and some whose best interest would be served by an abortion, to “forego the bypass option and either notify their parents or carry to term.”⁸⁹ One study has also suggested that teenage girls from low-income backgrounds who seek judicial waivers of parental consent may display an inaccurately low level of moral maturity to the court or other evaluator.⁹⁰ Thus, studies have shown not only that “maturity” may be incorrectly determined by a court, but that this false determination may disproportionately affect minors based on their socio-economic class.

⁸⁶ See Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 724-30 (1997).

⁸⁷ J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision without Involving Their Parents*, 18 BERKELEY WOMEN'S L.J. 61, 152 (2003).

⁸⁸ Scarnecchia, *supra* note 67, at 87.

⁸⁹ *Hodgson v. Minnesota*, 497 U.S. 417, 441 (1990).

⁹⁰ Scarnecchia, *supra* note 67, at 87 n.53.

D. Poor Appellate Review of Judicial Bypass Proceedings

As the following case demonstrates, in evaluating maturity some judges may lend great weight to certain factors such as age and academic performance, and other courts may disregard those factors entirely in their maturity evaluations. *In re Jane Doe 1* illustrates the judicial bias involved in bypass proceedings, as well as the hesitancy of appellate courts to find error in trial court decisions despite their questionable reasoning.⁹¹ Recognizing that lower court judges are vested with discretion in evaluating maturity,⁹² a plurality of the Ohio Supreme Court held that the trial court was not unreasonable to base its finding of immaturity upon (1) the minor's having had a prior abortion within the last year, and (2) the minor's having had her two pregnancies result from sex with different men.⁹³ One legal commentator has summed up the problem with this decision with the following question: "[h]ow could [the minor's] having had a prior abortion indicate that she was not well enough informed to make her own abortion decision, or that she lacked competence to assess the implications of this decision?"⁹⁴ Rather than showing immaturity, a prior abortion would indicate that the minor was well informed of the abortion process from past personal experience, and that she was competent to assess its implications.⁹⁵ To err is human and maturity does not necessarily protect against the repeating of mistakes.⁹⁶ Seventy-eight percent of teen pregnancies in the U.S. are unplanned.⁹⁷ Thus, if accidentally becoming pregnant were to connote immaturity, most judicial bypass petitions could be denied on that basis alone.

Moreover, this author does not believe that a minor's number of current or past sexual partners speaks to her

⁹¹ *In re Jane Doe 1*, 566 N.E.2d 1181 (Ohio 1991).

⁹² *Id.* at 1184.

⁹³ *Id.*

⁹⁴ Stuhlberg, *supra* note 12, at 952.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Stanley K. Henshaw, *Unintended Pregnancy in the United States*, 30 FAMILY PLANNING PERSPECTIVES 24 (1998), available at <http://www.guttmacher.org/pubs/journal/3002498.pdf>.

maturity; rather, it speaks to her lifestyle choice. With whom and when a minor chooses to have sex does not relate to her understanding of the abortion procedure, nor does it have anything to do with her medical assessment of the option to have an abortion. In the case above, the state court clearly allowed a subjective belief about sexual morality to outweigh other factors in the minor's situation. The minor was a senior in high school, maintained a 3.0 grade point average, was involved in school sports, planned to attend college, and had held various part time jobs. Although these factors have been used by other courts to find maturity,⁹⁸ the lower court in *Jane Doe* did not take these into consideration. Most striking, the lower court gave no explanation as to why the factors it did choose demonstrated immaturity—and the Ohio Supreme Court found no reason to reverse the lower court's decision even though it lacked any semblance of judicial reasoning.⁹⁹ This case and its holding underline the fundamental problem of the maturity test.

IV. Rejecting the “Maturity” Standard in Judicial Bypass Proceedings

A. Planned Parenthood v. Farmer

Though many courts have relied on the “maturity” requirement to determine whether or not to grant a minor's judicial bypass petition, at least one state supreme court has struck down a parental notification statute as violative of the state's equal protection clause. In *Planned Parenthood v. Farmer*, the New Jersey Supreme Court declared the state's parental notification law unconstitutional because it permitted minors to make health care decisions during pregnancy—including whether she would have a caesarean section—but did not permit the same minor to terminate her pregnancy.¹⁰⁰

⁹⁸ *In re Doe*, 2002 Ohio 3926 (Ohio Ct. App. 2002); *In re Doe*, 2005 Ohio 1559 (Ohio Ct. App. 2005).

⁹⁹ *In re Jane Doe 1*, 566 N.E.2d 1181, 1184 (Ohio 1991).

¹⁰⁰ *Planned Parenthood of Cent. New Jersey v. Farmer*, 762 A.2d 620, 638 (N.J. 2000).

Instead of focusing on a pregnant minor's maturity, the court examined the harsh reality of burdens placed on minors who seek judicial waivers.¹⁰¹ The *Farmer* court found that even notifying parents placed financial and emotional burdens on minors which could prevent them from obtaining abortions.¹⁰² The court specifically noted that parental displeasure, the threat of withdrawal of financial support, or actual blocking of the abortion decision were all such burdens.¹⁰³ The court also noted that minors encounter more time delays than older women because they often learn of their pregnancy later and need to have an abortion soon after this discovery; minors must overcome inexperience with the health care system; and minors lack the financial resources to easily acquire an abortion.¹⁰⁴ According to the *Farmer* court, these delays harm minors due to the increase in medical complications in later abortions, and because the cost of an abortion increases the longer a minor waits and could become too expensive.¹⁰⁵ In addition, the court held that judicial bypass procedures exacerbate these delays because a minor must seek legal representation and miss school to appear in court without her parents' knowledge.¹⁰⁶ Thus, competing state interests to restrict minors' access to abortions were not justified.¹⁰⁷

In looking beyond the "maturity" requirement, the *Farmer* court examined the life circumstances of minors in their totality. This author believes that in doing so, the New Jersey Supreme Court did what some courts have failed to do: operate in the best interest of the minor instead of trying to meet some vague notion of "maturity."

¹⁰¹ *Id.* at 635.

¹⁰² *Id.* at 634-637.

¹⁰³ *Id.* at 635.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Planned Parenthood of Cent. New Jersey v. Farmer*, 762 A.2d 620, 636 (N.J. 2000).

¹⁰⁷ *Id.*

B. "Maturity" Has Been Rejected as a Requirement in Other Major Life Decisions for Minors

Unfortunately, most courts do not appear to take the reality-based approach reflected in the *Farmer* decision.¹⁰⁸ Instead, most courts continue to hold onto the outmoded presumptions of juvenile immaturity. Proponents of parental consent and notification statutes justify such laws on the ground that the decision to terminate a pregnancy is less a medical choice than a major life decision, and minors are too immature to make such choices.¹⁰⁹ Since an abortion may have long-term impacts on a woman's psychological and emotional well-being, advocates of parental involvement maintain that parental guidance becomes especially important for minors.¹¹⁰ Many states, however, allow minors to make other decisions which may have a similar effect on their lives. Many states allow pregnant minors to consent to medical treatment for their pregnancy.¹¹¹ The Supreme Court has rendered unconstitutional statutes which prohibit the distribution of non-medical contraceptives to minors.¹¹² Many states have enacted statutes that allow minors to obtain treatment for sexually transmitted diseases without parental consent or knowledge.¹¹³ Moreover, these barriers for minors

¹⁰⁸ Rosato, *supra* note 5, at 776.

¹⁰⁹ THE ALAN GUTTMACHER INSTITUTE, MINORS AND THE RIGHT TO CONSENT TO HEALTH CARE (2000), <http://www.guttmacher.org/pubs/tgr/03/4/gr030404.pdf>.

¹¹⁰ *Id.*

¹¹¹ THE ALAN GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: MINORS' ACCESS TO PRENATAL CARE, http://www.guttmacher.org/statecenter/spibs/spib_MAPC.pdf (last visited Apr. 8, 2006). These states include Alabama, Alaska, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and Washington.

¹¹² *Carey v. Population Services International*, 431 U.S. 678 (1977).

¹¹³ THE ALAN GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: MINORS' ACCESS TO STD SERVICES, http://www.guttmacher.org/statecenter/spibs/spib_MASS.pdf. These states include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District

seeking abortions indicate that state legislatures believe a minor is mature enough to have a baby.

Most striking, thirty-four states and the District of Columbia explicitly permit a minor mother to place her child up for adoption without her own parents' permission or knowledge.¹¹⁴ Twenty-nine states and the District of Columbia currently have laws that authorize a minor parent to consent to medical care for his or her child.¹¹⁵ The Supreme Court has on multiple occasions upheld the fundamental right to parent,¹¹⁶ and that parents possess an implicit constitutional right to freedom from state intervention in family matters.¹¹⁷ Perhaps due to this tradition of "right to parent," states rarely restrict the parental rights of minors over their children. At least one state will only intervene in cases where it is not in

of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

¹¹⁴ THE ALAN GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: MINORS' RIGHTS AS PARENTS, http://www.guttmacher.org/statecenter/spibs/spib_MRP.pdf. These states include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

¹¹⁵ THE ALAN GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: MINORS' ACCESS TO PRENATAL CARE, *supra* note 111.

¹¹⁶ *Troxel v. Granville*, 530 U.S. 57, 75 (2000); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that a state law mandating parents to send their children to public schools interfered with parents' liberty to control their children's education); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (recognizing that religious freedom and parental autonomy are important, but not without limitation and thus, holding that the state, as *parens patriae*, could restrict parental control by prohibiting child labor).

¹¹⁷ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (invalidating a Nebraska law, enacted during World War I when anti-German feelings were strong, which banned the teaching of foreign languages in public schools).

the best interest of the minor's child for the minor parent to retain custody and control of the child.¹¹⁸

Arguably, placing a child up for adoption or seeking medical care for one's child requires a parent to possess "maturity." Some commentators have held that since minors have a near absolute right to parent, it is illogical to prevent minors from obtaining abortions due to lack of maturity.¹¹⁹ As one commentator has noted, "[t]he law operates under the mistaken notion that even though a minor may be too immature to have an abortion, she is mature enough to make major medical decisions related to her pregnancy and subsequently to make decisions regarding the upbringing of her child."¹²⁰ At least one commentator has suggested the opposite, that minors' parental rights should be limited because their autonomy is restricted in other areas due to their status as a minor.¹²¹ However, this author believes strongly that if courts are not willing to grant minors access to abortions in all cases, the minors should at least be able to assert their full rights as parents. If held otherwise, courts would essentially force minors to have children under current abortion statutes and then deny minors any say in how to raise their children. If states are concerned about the ability of minors to parent, then they should allow minors the choice to seek abortions without parental involvement.

Regardless of the position one takes on minors being able to obtain abortions, using "maturity" as a determining factor in a judicial bypass proceeding creates a legal environment where judges do not have to justify their reasoning for rejecting a minor's judicial bypass petition. Thus, judges may interject their personal biases in their decisions. The state of Florida is considering legislation which would require pregnant minors to petition courts closer to home to prevent minors from "forum shopping" for more lenient judges within the state.¹²² Under current Florida law,

¹¹⁸ CAL. FAM. CODE § 3011 (West 2004).

¹¹⁹ See Scarnecchia, *supra* note 67.

¹²⁰ Rosato, *supra* note 5, at 775.

¹²¹ Buss, *supra* note 50, at 812-821.

¹²² Klas, *supra* note 54.

minors may go to any judge within one of the five district courts of appeal in the state.¹²³ Though proponents of this idea desire to make it more difficult for minors to obtain abortions, they are acknowledging the disparity of court outcomes in evaluating minor's petitions: some judges are known for being more lenient. Ultimately, judges have too much discretion to evaluate "maturity," and the inconsistency of outcomes promotes a very subjective sense of justice.

In the view of this author, the "maturity" requirement has proven to be unworkable because it is a subjective inquiry that allows judicial bias to permeate courtroom proceedings. Minors should have access to judicial bypass proceedings to protect their reproductive rights, but "maturity" should not be the test used by judges to decide whether a minor may have an abortion. Until the Supreme Court or state legislators provide specific criteria against which judges may evaluate a minor's maturity, another analysis should be used.

V. Conclusion

The choice to become a parent, to give a baby up for adoption, or to terminate a pregnancy presents a life-altering decision for a minor. The majority of states require minors to engage their parents or legal guardians in their choice to obtain an abortion, but not in decisions to give their babies up for adoption or to become parents. Though the Supreme Court has held that parental consent and notification laws do not infringe on a minor's constitutional rights if judicial bypass options are available, the reality of these judicial proceedings demonstrates a biased and unworkable legal avenue. Even the Supreme Court acknowledges the difficulty in measuring "maturity," but has continued to affirm "maturity" as the standard judges should use when evaluating minor's petitions.

Consequently, judges' decisions are left largely to their own discretion and have resulted in inconsistent determinations of "maturity." Due to the significant risk of poverty and child abuse associated with teenage parenting,

¹²³ *Id.*

judicial bypass proceedings should be objective and look out for the best interests of the minor. Not only must minors navigate the cumbersome process of appearing before a judge to obtain a judicial waiver, they may encounter a judge whose personal beliefs have sealed their fate before they have even had their day in court. Thus, the danger of judicial bias, permitted through the unworkable definition of "maturity," must be eliminated from judicial bypass proceedings to protect the reproductive choices of pregnant minors.