
NOTE

**DEFENDING PARENTAL
INVOLVEMENT AND THE
PRESUMPTION OF IMMATURITY IN
MINORS' DECISIONS TO ABORT**

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I. INTRODUCTION

In *Bellotti v. Baird*,¹ the Supreme Court held that statutes requiring parental involvement before allowing minors to obtain abortions are constitutional because minors are generally incapable of making fully reasoned decisions. The Court further concluded that laws requiring parental involvement in minors' abortion decisions must include a "judicial bypass provision."² Judicial bypass provisions allow minors to petition the court to rebut their presumed immaturity by demonstrating that they have the necessary capacity to make an informed abortion decision. A finding of sufficient maturity requires the judge to waive the statutorily required parental involvement. If the minor fails to demonstrate her maturity, the judge must nonetheless allow her to have the abortion without the parental involvement if the judge believes it would be in her best interest.

Recently the debate over minors' rights to abortion has become more intense and complex; a constant tug-of-war exists between minors' con-

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1. 443 U.S. 622 (1979).

2. *See id.* at 651.

stitutionally protected privacy rights and parents' fundamental right to direct the upbringing of their children. The focus of these debates revolves around the issue of what relevant differences between minors and adults justify limiting minors' free access to abortion—thereby denying them equal privacy rights.

Many legal scholars have attempted to use psychology to address this question, creating tension between the legal and psychological communities with respect to their views of the fundamental rights at issue in determining whether minors are competent to consent to abortion. On the one hand, minors do not have equal privacy rights in many decisionmaking contexts because of their lack of maturity, experience, and ability to provide informed consent. On the other hand, many psychologists have attempted to persuade the courts that the presumption of minors' "immaturity" is unsupported and, in fact, contradicted by empirical research. Yet, within the psychological community, scholars disagree as to whether minors and adults have the same cognitive capacities for decisionmaking. A modern trend among psychologists advocates the need to research beyond cognitive aspects of competency, focusing instead on psychosocial factors such as responsibility, perspective, and temperance.

The debate over minors' rights to abortion encompasses three distinct tensions: (1) the legal tension between minors' and parents' fundamental rights; (2) the tension between law and psychology in drawing the appropriate line for legal competence and its accompanying privacy rights; and (3) the psychological tension between scientific evidence which supports and scientific evidence which refutes the proposition that minors and adults share the same cognitive and psychosocial capacities for decisionmaking.

Addressing only the latter two tensions, this Note seeks to defend legislation requiring parental involvement in minors' abortion decisions, and to advocate maintaining the presumption that minors lack the maturity to consent to abortion. However, this Note does not purport to analyze the morality of adolescent abortion, nor will it address the fundamental right of parents to direct the upbringing of their children. Similarly, this Note does not present arguments as to which option—abortion, adoption, or motherhood—is best for a pregnant minor. These issues are clearly outside the scope of the present analysis. Rather, this Note focuses on whether pregnant minors can benefit from involving their parents in their decision. It is purely a discussion of the legally relevant differences between minors and adult women that justify refusing minors free access to

abortion, the role of psychology in this issue, and the need for a less arbitrary judicial bypass hearing.

Part II examines the lack of standards for assessing both the maturity and the best interests of a pregnant minor, the fundamental defect of the current judicial bypass hearing. Presently, the judicial bypass hearing appears to be a rubber stamp in which virtually all pregnant minors petitioning before the court are granted free access to abortion. This statistical trend raises serious concern as to whether the judicial bypass truly protects immature minors from making poorly reasoned abortion decisions. This trend is also problematic because it supports the contention that abortion without parental involvement is always in a minor's best interests, thereby creating an absolute legal answer to a moral question.

Part III looks to the proper role of psychology in assessing minors' competency to make well-reasoned abortion decisions. Beginning with an examination of the legitimacy and authority of the assertion that no differences exist between minors and adults with respect to competent abortion decisions, this Part concludes with a critique of the increasing effort to eliminate the presumption of immaturity in minors' abortion decisions.

The purpose of paternalistic policymaking is to protect minors from adverse effects of immature decisions. Minors' susceptibility to greater harm presents another crucial factor justifying increased protection. Building upon this notion, Part IV analyzes psychology's role in identifying the differences between minors and adults in their susceptibility to the negative effects of abortion. Evidence suggesting that minors are more vulnerable than adults to the adverse consequences of abortion weighs in favor of limiting minors' access to abortion through parental involvement legislation. Moreover, by identifying the particular factors that correlate with negative reactions to abortion, judges can effectively use this information to guide their best interests inquiry instead of resorting to personal value judgments.

Part V discusses general policy arguments in favor of legislation requiring minors to involve their parents in their abortion decisions. Two classes of policy arguments exist in favor of parental-involvement legislation: (1) those that are derived from empirically demonstrated differences between adolescents and adults, and (2) those that remain persuasive in light of the belief that relevant differences do not exist between adolescents and adults. This Part begins with a discussion of some of the developmental deficiencies that distinguish minors from adults and discuss how they weigh in favor of parental involvement legislation. This Part next posits that even if no differences exist in competency between minors and

adults in the abortion decisionmaking context, there are, nevertheless, meaningful reasons to include parents in their daughter's decision to abort.

This Note concludes by proposing a three-step, as opposed to the current two-step, inquiry at the judicial bypass hearing. Although the first step should remain an assessment of maturity, a more stringent and less arbitrary measure of maturity is needed. Courts should consider other psychosocial factors that collectively define mature judgment rather than merely examine a minor's cognitive capacity. For minors who fail to demonstrate their maturity, the second step should be a best interests inquiry that asks whether a waiver of parental involvement, and not just the abortion itself, is in the minor's best interests. Only if the immature minor can demonstrate that a waiver of parental involvement would be in her best interests (with evidence to overcome the presumption that her parents would act in her best interests, such as a history of abuse, neglect, or substantial disregard for her health or safety), should the inquiry progress to the third step. The third and final stage should be a determination of whether an abortion is in the immature minor's best interest. Under this three-step inquiry, judges would decide whether or not an abortion would be in an immature minor's best interests only if the minor has first successfully rebutted the presumption that her parents would act in her best interests.

II. THE JUDICIAL BYPASS: FAILING TO SERVE ITS PROPER PURPOSE

The judicial bypass provides pregnant minors an opportunity to rebut the presumption of incompetence to consent to abortion. It also protects incompetent minors from their own immature decisionmaking.³ It should not, however, serve as a rubber stamp granting free access to abortion to nearly every minor petitioning before the court.

Research illustrates that few minors seeking a judicial bypass are ever found to be immature. Of those who are found to be immature, almost all are permitted to obtain an abortion on the grounds that it is in their best interests. For example, in only 15 out of 3,573 judicial bypass petitions filed in Minnesota between 1981 and 1986, did the court find that the mi-

3. See Satsie Veith, *The Judicial Bypass Procedure and Adolescents' Abortion Rights: The Fallacy of the "Maturity" Standard*, 23 HOFSTRA L. REV. 453, 466 (1994):

Therefore, if it is true that children's rights are limited because of a personal quality—"immaturity"—rather than merely physical age and thus their legal status as children—then it follows that children who can show they are not "immature" arguably have a claim to be free of both parental and state authority.

Id.

nor was both immature and an abortion was not her best interest.⁴ Similarly, a Massachusetts study revealed that only 9 of 477 judicial bypass cases between 1981 and 1985 were determined to be immature. Even more disturbing is the fact that this study demonstrated lawyers find their clients immature more often than the corresponding judges. In only one case did both the representing lawyer and the presiding judge identify the same minor as being immature.⁵ This calls into question the validity of these judgments. The contention that these judgments may not be accurate is bolstered by the fact that the average judicial bypass hearing is twelve minutes in duration, while ninety-two percent of the hearings are fewer than twenty minutes.⁶ Indeed, some judges need only five minutes to assess and determine that a minor is competent to consent to abortion.⁷

Based on these statistics, it is doubtful that virtually all minors petitioning the court to bypass parental involvement statutes are in fact sufficiently mature to make the abortion decision. The haste in the determination as well as the virtually guaranteed finding of maturity call into question whether the judicial bypass provision legitimately protects immature minors or whether it serves merely as a useless rubber stamp.⁸

A. DETERMINING MATURITY: A LACK OF STANDARDS LEADS TO VALUE JUDGMENTS

Critics of parental consent statutes point to the statistics mentioned above to assert that all minors who petition the court for judicial bypass are, in fact, legally mature. However, because there is no standard procedure by which judges determine pregnant minors' maturity, there is no way to test the accuracy of such arguments. According to one expert:

[N]o clear, empirically validated standards have yet been established to define when children develop "competence" (or even what, precisely, competence means). Indeed, many terms such as "competence," "intelligence," and "maturity" have been used interchangeably in legal settings. As a result, different and often conflicting standards have been advanced in different legal situations.⁹

4. See Anita J. Pliner & Suzanne Yates, *Psychological and Legal Issues in Minors' Rights to Abortion*, 48 J. SOC. ISSUES 203, 207 (1992).

5. See *id.* at 209.

6. See *id.*

7. See *id.*

8. See Veith, *supra* note 3, at 460.

9. Pliner & Yates, *supra* note 4, at 204 (citation omitted).

This lack of standards can result in too much judicial discretion which can lead to maturity determinations based on value judgments reflecting personal beliefs about the morality of abortion.

B. CONFUSING THE "BEST INTERESTS" STANDARD

A second criticism of the judicial bypass hearing arises from the potential blurring of two distinct "best interests" inquiries. The best interests inquiry may be defined in two ways: One approach defines it as the determination of whether or not *an abortion* would be in the immature minor's best interest. The other approach defines the best interests inquiry as a question of whether or not *a waiver of the requisite parental involvement* supports the minor's best interests. Although these two definitions are fundamentally different, it is unclear which of the two definitions judges use. It is clear, however, that the two should not be used interchangeably.

The former best interests inquiry is primarily concerned with whether or not a particular minor should or should not have an abortion in that minors' situation. This type of inquiry opens the door for value judgments that may necessarily incorporate moral beliefs about abortion. It is difficult to believe that judges can set aside their personal viewpoints on the morality of abortion to decide whether an immature minor should have an abortion. This type of judicial decisionmaking should be limited to circumstances in which the minor demonstrates that her parents are not likely to act in her best interests.

On the other hand, the latter best interests inquiry shifts the focus to whether involving the adolescent's parents would increase or decrease the quality of the adolescent's decision. This inquiry applies relatively more objective standards than the first inquiry, and is consistent with the legal presumption that parents act in the best interests of their children. Thus, a best interests inquiry that focuses on whether a waiver of parental involvement is in the immature minor's best interests is preferable to one that focuses on whether an abortion would be in her best interests.

III. THE ROLE OF PSYCHOLOGY IN DETERMINING MINORS' LEGAL COMPETENCE TO CONSENT TO ABORTION

A debate exists over what role psychological research should play in determining minors' legal competency to consent to abortion.¹⁰ On the

10. Compare GARY B. MELTON, ADOLESCENT ABORTION: PSYCHOLOGICAL AND LEGAL ISSUES 1-2 (1986) ("Psychologists can assist courts and legislatures in evaluating the validity of psychological assumptions to determine whether any compelling basis exists for age-based regulation of

one hand, psychological research can be used either to support or to undermine presumptions regarding minors' competency in abortion decisionmaking. This type of research addresses the issue of *whether* to draw a line between minors and adults. On the other hand, psychological research may be used to assist the law in determining *which factors* (cognitive, psychosocial, or other developmental factors) differentiate minors from adults in their decision making capabilities. In addressing the issue of *where* to draw the line between minors and adults, this Note attempts to define the standard for minors to overcome the presumption of immaturity. Part III.A. discusses the use of psychological research to determine whether a line between minors and adults needs to be drawn. It concludes that insufficient support currently exists for eliminating a presumption that minors are incompetent to consent to abortion. Part III.B. examines the second type of psychological research, arguing that although cognitive capacity is relevant to legal competence, psychological research must broaden its scope to investigate other psychosocial factors which may distinguish between the ability of minors and adults to make well reasoned abortion decisions.

A. MAINTAINING A LEGAL PRESUMPTION OF MINORS' IMMATURETY TO
CONSENT TO ABORTION

1. *Why Psychology Bears a High Burden of Proof With Respect to
Minors' Competency*

Historically, minors have enjoyed only limited rights in various legal contexts. Based in part on their inability to enter into binding agreements,¹¹ these restrictions "are premised on a fundamental social tenet that children require protection against their own immaturity and vulnerability in making decisions that may have serious consequences for their health and well-being."¹² As Justice Powell wrote in *Bellotti*, "[v]iewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults,

women's access to abortion."), with *American Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 854 n.8 (Cal. 1997) (Mosk, J., dissenting):

In this case, the parties presented evidence and the trial court made extensive factual findings concerning the cognitive abilities of adolescents to make critical decisions and about the importance of the parental role in a child's exercise of her privacy interest concerning the decision to have an abortion. Those findings prove to be of *limited application* to an assessment of the constitutional interests involved in this case.

Id. (emphasis added).

11. See *Lungren*, 940 P.2d at 855 (Mosk, J., dissenting).

12. *Id.*

the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'"¹³ Based upon the strength of legal tradition courts typically, *presume* that minors do not have the same level of maturity and responsibility as adults.¹⁴

The fundamental presumption of immaturity underlies parental consent and other paternalistic statutes. California statutes provide a good example of how the presumption has manifested itself in the law. The California Legislature has limited the unemancipated minor's ability to make privacy decisions in numerous contexts. For example, an unemancipated minor cannot obtain most medical and dental treatment, surgical procedures, or even the most routine X-rays without notifying and/or obtaining consent from one or both parents.¹⁵ Furthermore, minors are unable to consent to or consummate marriage without both parental consent and an order from the court. Similarly, an unmarried minor may not legally consent to sexual intercourse.¹⁶ Minors need parental consent to donate body parts following death.¹⁷ Minors are not allowed to undergo voluntary sterilization prior to age eighteen without parental consent.¹⁸ Minors cannot even receive a permanent tattoo,¹⁹ obtain a driver's license,²⁰ or use a tanning facility without parental consent.²¹

Because the presumption of minors' immaturity is firmly rooted in the law, psychology consequently bears a high burden of proof to convince legal policy makers that this presumption is not necessary in the abortion decisionmaking context. If psychology seeks to eliminate this legal presumption, it must produce stronger empirical evidence than currently exists to prove that there are no relevant differences between minors and adults.²²

13. *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (quoting plurality opinion).

14. *See, e.g., Lungren*, 940 P.2d at 855 (Mosk, J., dissenting) ("[There is a] simple truth derived from communal experience that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life.").

15. *See* CAL. FAM. CODE §§ 6910, 6911, 6922 (West 1994); CAL. PENAL CODE § 11171 (West 1993).

16. *See* CAL. FAM. CODE § 302 (West 1994).

17. *See* CAL. HEALTH & SAFETY CODE § 7150.5 (West Supp. 1994).

18. *See* CAL. FAM. CODE § 6925(b)(1) (West 1996).

19. *See* CAL. PENAL CODE § 653 (West 1998).

20. *See* CAL. VEH. CODE §§ 17700, 17701 (West Supp. 1999).

21. *See* CAL. BUS. & PROF. CODE § 22706(b)(3), (4) (West 1993).

22. *See infra* Part III.A.2.

2. *Overstating the Research Concluding No Differences in Decisionmaking Capabilities Exist Between Minors and Adults*

Many psychologists believe the basis for the legal presumption of minors' immaturity is not supported by empirical evidence. Indeed, some experts have concluded that no relevant differences exist between adolescents and adults with respect to decisionmaking capacities²³—although others have legitimately criticized this bold assertion.²⁴ Importantly, psychologists themselves have advocated the need for a high level of empirical certainty before asserting science as fact in legal contexts.²⁵ This section critiques studies which suggest that no differences exist between minors' and adults' decisionmaking capacities.

One major problem emanates from the fact that few studies actually compare adult and adolescent decisionmaking, hence there is little data supporting the claim of equivalent decisionmaking competence. In order to conclude from empirical research that no differences exist between adolescents and adults in their capacity to make reasoned abortion decisions, the research must necessarily compare adolescents to adults in decisionmaking.

Significantly, advocates of the notion that no significant differences exist between adolescents and adults, base their arguments upon research which failed to make precisely these crucial comparisons. For example, in cases dealing with adolescent abortion rights, the American Psychological Association (APA) submitted various amicus briefs asserting that research

23. See, e.g., Bruce Ambuel & Julian Rappaport, *Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion*, 16 LAW & HUM. BEHAV. 129, 151 (1992); Catherine C. Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 AM. J. ORTHOPSYCHIATRY 446, 451-52 (1980); Catherine C. Lewis, *Minors' Competence to Consent to Abortion*, 42 AM. PSYCHOLOGIST 84, 87 (1987); MELTON, *supra* note 10, at 18.

24. See, e.g., William Gardner, David Scherer & Maya Tester, *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, 44 AM. PSYCHOLOGIST 895, 897-98 (1989) ("The [APA] briefs [have] overstated what is known about the development of decisionmaking skills."); David Scherer & William Gardner, *Reasserting the Authority of Science*, 40 AM. PSYCHOLOGIST 1173, 1174 (1990) ("Presenting an assertion of scientific fact that is broadly generalizable across many contexts (as done in the APA briefs) requires a much higher standard of empirical certainty than the simple refutation of an unfounded bias in a specific context."); Anne C. Speckhard & Vincent M. Rue, *Postabortion Syndrome: An Emerging Public Health Concern*, 48 J. SOC. ISSUES 95, 97 (1992) ("[T]he APA has been correctly criticized for overly extending the weight of scientific authority with respect to its statements and generalizations regarding adolescents and abortion.") (citation omitted); Elizabeth S. Scott, N. Dickon Reppucci & Jennifer L. Woolard, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 222 (1995) ("[W]e believe that advocates' claims exaggerate the scientific evidence that no differences distinguish the decision making of adults and minors under informed consent tests.").

25. See Scherer & Gardner, *supra* note 24, at 1174.

reveals no differences between adolescent and adult decisionmaking abilities. However, the research upon which the APA relied is problematic because it either does not compare adolescent abilities to adult abilities, or fails to specifically examine decisionmaking.²⁶

A second criticism of the APA's positive assertion that no differences exist maintains that it is based on research involving self-reporting of cognitive processes.²⁷ This is problematic because retrospective verbal reporting of the relevant influences on one's own thinking, and hence subsequent decisionmaking, may not be a reliable measure of the individual's true cognition.²⁸ Therefore, studies using self-reports of cognitive processes lose credibility if people in general (adolescents and adults alike) lack the ability to adequately verbalize ex post the internal thought processes that led to an ultimate choice. Consequently, these studies may underestimate the true complexity of the internal process. In other words, studies relying on this type of methodology that conclude there are no cognitive differences between adolescents' and adults' decisionmaking capacities do so with a potentially inaccurate measure of both adolescent and adult cognitive processes. Objectively speaking, one should also be cautious of research studies which use verbalization of cognitive thought processes and conclude that relevant differences do exist. Since accurate self-reporting of thought processes may increase with age, cognitive differences between adolescents and adults may be exaggerated.

Some psychologists assert that no cognitive differences in decisionmaking exist between adults and children. However, information known about adult decisionmaking may point to some relevant differences. For instance, adults tend to simplify their decisions by keying in on only the most important factors when overloaded with information on a complex decision.²⁹ Also, decisionmaking is affected by the decisionmaker's emotional state.³⁰ These factors in adult decisionmaking leave the door open for possible relevant differences between adolescent and adult decision-

26. See Gardner et al., *supra* note 24, at 897-98.

27. See *id.* at 898.

28. See generally J. Kihlstrom, *The Cognitive Unconscious*, 237 *SCIENCE* 1145 (1987); Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 *PSYCHOL. REV.* 231 (1977).

29. See Gardner et al., *supra* note 24, at 898 (citing DANIEL KAHNEMAN, PAUL SLOVIC, & AMOS TVERSKY, *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (1982); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263-91 (1979); Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 *AM. PSYCHOLOGIST* 341 (1984); HERBERT SIMON, *RATIONALITY IN HUMAN AFFAIRS* (1985); Herbert Simon, *Rationality as Product and Process of Thought*, *AM. ECON. REV.* 1-16 (1978)).

30. See Gardner et al., *supra* note 24, at 898.

making. There is a need for research which addresses whether minors are similarly able to simplify complex decisions by focusing on the most relevant information, and also whether emotional arousal effects adolescent decisionmaking differently than adult decisionmaking.

An additional criticism suggests that adolescent cognitive development cannot be described by a distinct, "global ensemble of skills" generalizable across decisionmaking contexts.³¹ There is no ultimate competence required for all medical decisions, but rather there are minimum information processing skills required for particular decisions and their respective consequences. Therefore, although insightful, studies that examine the cognitive differences between adolescents and adults in medical treatment decisions other than abortion are insufficient to support the bold claim that no cognitive differences exist between adolescent and adult abortion decisions.

There are other methodological criticisms of research concluding that no relevant differences exist between adults' and minors' competencies. For instance, some commentators have criticized the fact that many of the studies were conducted in laboratories and used hypothetical situations to measure responses.³² This methodology is particularly problematic when studying adolescent abortion decisions. As realistically as hypothetical questions may be phrased, the answers to such questions cannot measure an adolescent's true ability to make a well-reasoned decision under the more intense stress of real-life consequences. Adults have greater decisionmaking skills than adolescents because their experience enables them to make reasoned decisions amidst high levels of stress. Studies that use hypothetical questions or laboratory settings may underestimate differences between adult and adolescent decisionmaking that would otherwise appear in the presence of high emotional stress. Accordingly, those conclusions based on responses to hypothetical dilemmas that suggest there are no differences in decisionmaking capacities may very well be exaggerated. Scholarly arguments to dissolve the legal presumption that minors are incompetent to make the abortion decision, based on the type of methodologically flawed psychological evidence discussed above, lack sufficient persuasion to eliminate the presumption.³³

31. *Id.*

32. See Scott et al., *supra* note 24, at 226.

33. For examples of scholarly arguments to eliminate the presumption of minors' immaturity based in part on psychology's inconclusive research see Maggie O'Shaughnessy, *The Worst of Both Worlds?: Parental Involvement Requirements and the Privacy Rights of Mature Minors*, 57 OHIO ST. L.J. 1731, 1741 (1996), and MELTON, *supra* note 10, at 18.

Finally, those psychologists advocating that no differences exist appear to overlook studies that, in fact, have found some significant differences between minors' and adults' capacities for making well-reasoned abortion decisions.³⁴ For example, one study found significant differences in the reasoning of young adolescents (twelve to fourteen) versus older adolescents (seventeen to nineteen) and young adults (twenty-three to twenty-five) in their decisions to have an abortion based on measures of ego development and moral judgment.³⁵ The young adolescents in this study were found to reason at a level characterized by self-protectiveness, wariness, fear of being caught, externalization of blame, and the processing of emotions at a superficial level.³⁶ On the other hand, the older subjects possessed a level of reasoning that entails the ability to differentiate norms and goals, to become more aware of self in relation to others, to demonstrate more individuation, and to have a deeper emotional life.³⁷ These researchers concluded that, "major difference[s] did appear between the youngest group [ages twelve to fourteen] and the other ages [seventeen to twenty-five] on the general assessments of cognitive-developmental stage. In terms of parental consent, the rationale for requiring notification, presumably on the basis of immaturity, could be supported by these findings."³⁸

However, based on the Moral Maturity Score for Abortion (MMSA) measurement, this same study found no differences between age groups with regards to reasoning specifically about abortion.³⁹ MMSA scores correlate directly with the Kohlberg stages of moral reasoning. Both the older adolescents and the young adults in this particular study reasoned at a level significantly lower than that of Kohlberg's normative sample.⁴⁰ The fact that the older subjects appeared to reason about abortion similarly to the younger subjects based on the MMSA scores may have been due to the fact that the older subjects reasoned significantly below normal levels for their age groups. Moreover, this study may be limited due to the small sample size (thirty), especially in the young adolescent group (with only

34. See, e.g., Victoria Foster & Norman A. Sprinthall, *Developmental Profiles of Adolescents and Young Adults Choosing Abortion: Stage Sequence, Décalage, and Implications for Policy*, 27 *ADOLESCENCE* 655 (1992).

35. See *id.* at 667.

36. See *id.* at 665.

37. See *id.*

38. *Id.* at 668. Although it is true that this study supports the argument that the legal competency line should be lowered to a younger age, it is presented here solely to refute the proposition that no relevant differences exist between minors and adults.

39. See *id.* at 664.

40. See *id.* at 665.

four participants). Again, however, it is presented to highlight the existence of research which finds differences between adolescents and adults. More importantly, these studies must be addressed by psychologists asserting no differences exist.

Along a similar vein, a psychoanalytic study found that adolescents' responses to abortion decisions varied depending on their stage of development.⁴¹ Early adolescents (ages twelve to fifteen) lacked knowledge of the nature of the situation, used the pregnancy to enhance their relationship with their mother, and denied responsibility for their actions. This group of adolescents did not attribute any reality to the baby and made the abortion decision based on the perception that they had no other choice.⁴² Middle adolescents (ages fifteen to eighteen) demonstrated limited understanding of their responsibility for the situation, used the pregnancy as a means to obtain autonomy from the family and as a source of power, and showed ambivalence toward the abortion.⁴³ In contrast, late adolescents (ages eighteen to twenty-one) took greater responsibility, were more in tune with their emotions and desires, and found the abortion decision to be most difficult.⁴⁴ This study in particular, albeit in the context of responses to abortion as opposed to decisionmaking per se, demonstrates relevant differences between minors and adults.⁴⁵ Before psychologists can persuasively assert that no relevant differences exist between minors and adults, they must address and respond to studies concluding to the contrary.

3. *The Slippery Slope*

Even if the field of psychology was able to demonstrate with scientific certainty that no differences exist between adolescents and adults to justify limiting adolescents' access to abortion, how can the law justify restricting any privacy rights of minors in decisionmaking? In other words, if a thirteen-year-old is competent enough on her own to decide to terminate her pregnancy, how does the law defend refusing her the absolute right to make all medical decisions (for example, donate her organs), marry, have consensual sex, drink alcohol, drive a car, or even simply get a permanent tattoo? True, many psychologists acknowledge that compe-

41. See Wanda Franz & David Reardon, *Differential Impact of Abortion on Adolescents and Adults*, 27 *ADOLESCENCE* 161, 163 (1992) (citing Sherry L. Hatcher, *Understanding Adolescent Pregnancy and Abortion*, 3 *PRIMARY CARE* 407, 410 (1976)).

42. See *id.*

43. See *id.*

44. See *id.*

45. See *infra* Part IV.

tency can vary from context to context.⁴⁶ Yet, it is hard to imagine that an adolescent could achieve the requisite competency for abortion decision-making and yet not have competency in other situations involving privacy rights with less dramatic, severe, and permanent consequences. Advocates for eliminating the legal presumption of minors' immaturity in abortion decisionmaking must be prepared to address the consequences that such a radical legal shift would have on all other laws that distinguish between adolescents and adults.

B. IDENTIFYING THE RELEVANT DIFFERENCES BETWEEN MINORS AND ADULTS IN THEIR DECISIONMAKING CAPABILITIES

Although current psychological research lacks sufficient persuasion to eliminate the presumption of minors' incompetence to consent to abortion, this is not to say that psychological research deserves no role in defining the legal standards of competency to consent to abortion. Psychological research can still assist the law by identifying potential relevant differences between minors and adults.

1. *Identifying Differentiating Factors to Establish the Standard for Overcoming the Presumption of Immaturity*

It is important to remember that legal presumptions are based on generalizations about adolescent minors. Similarly, psychology is only able to infer descriptive generalizations from specific research studies. In other words, no matter what conclusions the law or psychology makes, they will not be applicable to all adolescents. It is this principle that underlies the judicial bypass, allowing minors to rebut the presumption of their immaturity to a judge.

Identifying the specific factors differentiating the level of mature judgement in minors from adults is crucial because it establishes the standard for overcoming the presumption of incompetency. In essence, these factors constitute the elements of competent decisionmaking that the law requires a pregnant minor to possess in order to overcome the presumption

46. See, e.g., Bruce Ambuel, *Adolescents, Unintended Pregnancy, and Abortion: The Struggle for a Compassionate Social Policy*, 4 CURRENT DIRECTIONS IN PSYCHOL. SCI. 1, 3 (1995) ("nor do individuals apply their abilities uniformly across settings"); Scott et al., *supra* note 24, at 225 ("Thus, a finding of competence to make one kind of decision may not be generalizable to other decisions in other contexts."); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 268 (1996) ("It may be . . . that adolescents exhibit a great deal of perspective when choosing their courses in school, but not when determining whether to abort a pregnancy or whether to waive their *Miranda* rights.").

of immaturity and make the abortion decision without parental involvement.

Future research is needed to identify which factors of mature judgment in fact differentiate minors from adults. Once specific differentiating factors are identified, they can be used to establish concrete standards of competency for judges to abide by when determining whether a pregnant minor is competent to make the abortion decision.

2. *Broadening Research on Informed Consent: Beyond Cognitive Capacity*

One reason why some psychologists have been so quick to conclude that no differences exist between minors and adults is because of the narrow scope of their research studies.⁴⁷ Some experts have argued that psychological research using an informed consent model based solely on measures of cognitive ability is of limited use to legal policymakers:

Informed consent standards of legal competence, and the model based on these standards, focus on two aspects of cognitive functioning—capacity for reasoning and understanding. Protective legal policies directed toward minors, however, are based not only on the presumption that adolescents differ from adults in these capacities, but also that their choices and behavior are affected, in ways that distinguish them developmentally from adults, by other decision-making factors that are not included under an informed consent model.⁴⁸

Psychological research needs to be expanded beyond the study of adolescent cognitive capacities to examine psychosocial factors in development. These factors may distinguish adults and adolescents in a legally relevant manner, and would thereby be more informative to paternalistic policymakers than research focusing solely on cognitive functioning.

Furthermore, psychology could better educate the law with regard to minors' competence by studying both the psychosocial factors that affect judgment directly and the development of these factors throughout adolescence and adulthood.⁴⁹ For example, legally relevant psychosocial factors may include perspective, education, socialization, experience, and emo-

47. See *infra* Part III.A.2.

48. Scott et al., *supra* note 24, at 222. See generally Steinberg & Cauffman, *supra* note 46, at 249-50.

49. See *id.*

tion.⁵⁰ Specifically, psychologists have hypothesized that future-time perspective, peer influence, and attitude toward risk are factors of decision-making beyond cognition that may illustrate legally relevant differences between adults and adolescents.⁵¹

For instance, adolescents appear to weigh the short-term consequences of a decision and discount the future more heavily than do adults.⁵² Consequently, adolescents may not properly weigh, or may even ignore, the negative health or psychological harms that could result from having an abortion beyond the immediate future. Also, some evidence suggests that adolescents are more susceptible to peer influence than adults, both in direct peer pressure to make certain choices and subjective desire for peer approval without any explicit coercion.⁵³ If this is the case, parental involvement legislation could help curtail adolescent abortion decisions based on fear of social ostracism or disapproval from friends.

As for attitude toward risk, "adolescents seem to differ from adults in their perception of and attitude toward risk," in that they engage in risky behaviors more often than adults, or are considered less risk averse.⁵⁴ However, it is unclear in which direction this difference would cut, since the identification of risks associated with abortion and pregnancy decisions necessarily entails personal value judgments as well as an assessment of the medical health risks.

The bottom line is that more research needs to be conducted before psychology can be practically applied in the context of minors' legal competency to consent to abortion. Research which identifies psychosocial factors affecting mature judgment, and which analyzes whether adolescents and adults can be distinguished on the basis of those factors, would be useful to legal policymakers. One group of psychologists has proposed that "responsibility," "temperance" and "perspective" "compromise the attributes most often associated with mature decision making . . ." ⁵⁵ Therefore, these factors must be considered and analyzed in addition to

50. See, e.g., A.L. Greene, *Future-Time Perspective in Adolescence: The Present of Things Future Revisited*, 15 J. YOUTH & ADOLESCENCE 99, 110 (1986) ("What these differing patterns suggest is that adolescents may expand and construct their perspective of the future not so much in consequence of cognitive factors, but as a result of the social and educational experiences that they have accumulated.").

51. See Scott et al., *supra* note 24, at 230-31.

52. See *id.* at 222, 231 (citing William Gardner & Janna Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, in ADOLESCENTS IN THE AIDS EPIDEMIC 17-34 (William Gardner, Susan G. Millstein & Brian L. Wilcox eds., 1991)).

53. See Scott et al., *supra* note 24, at 230.

54. See *id.*

55. Steinberg & Cauffman, *supra* note 46, at 252.

cognitive competence to reason abstractly.⁵⁶ Responsibility is comprised of “healthy autonomy, self-reliance, and clarity of identity.”⁵⁷ Temperance includes “the ability to limit impulsivity, avoid extremes in decision making, and to evaluate a situation thoroughly before acting, including seeking the advice of others when appropriate.”⁵⁸ Finally, perspective incorporates the “ab[ility] to acknowledge the complexity of a situation and to frame a specific decision within a larger complex.”⁵⁹

After reviewing existing research, these psychologists have tentatively concluded that there are significant differences between adolescents and adults in psychosocial domains that most likely have implications for mature judgment.⁶⁰ Furthermore, there appears “to be a scientific basis within the psychological literature on adolescent development for distinguishing under the law between individuals who have, versus have not, reached the age of 17.”⁶¹

In sum, a current, albeit tentative, analysis under a broadened informed consent model that takes into consideration psychosocial factors of mature judgment reveals that relevant differences exist between minors’ and adults’ decisionmaking abilities. More importantly, future research using this expanded approach will provide further insight to, as well as create a deeper understanding of, the practical consequences of these differences.

IV. THE ROLE OF PSYCHOLOGY IN EXPOSING THE DIFFERENTIAL IMPACT OF ABORTION ON ADOLESCENTS AND ADULTS

Aside from lack of competency and mature judgment, the legal presumption that minors are incompetent to make the abortion decision is also based on minors’ greater susceptibility to negative consequences following abortion. One major theme among legislative “findings” extracted from United States Supreme Court opinions is that the “medical, emotional, and psychological consequences of an abortion are serious and can be lasting, particularly when the patient is an immature minor.”⁶²

56. *See id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *See id.*

61. *Id.*

62. *American Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 859 n.11 (Cal. 1997) (citing *Stats.* 1987, ch. 1237, § 1, at 4396).

A. GREATER HARM CALLS FOR GREATER PROTECTION:
PERSUASIVE EVIDENCE IN FAVOR OF LIMITING
MINORS' ACCESS TO ABORTION

Psychological evidence supports the proposition that adolescents are more likely to suffer adverse effects from the abortion procedure and experience.⁶³ Adolescents have been found to experience such negative reactions as guilt, psychological problems, emotional stress, and suicide attempts.⁶⁴ However, the central issue is whether, and how, adolescents differ from adults in their susceptibility to greater negative reactions to abortion.

Research demonstrates that adolescents have a greater predisposition to Postabortion Syndrome.⁶⁵ Postabortion Syndrome, suggested by some to be a type of Post-Traumatic Stress Disorder, is comprised of the following symptoms:

- (1) exposure to or participation in an abortion experience . . . which is perceived as traumatic and beyond the range of usual human experience;
- (2) uncontrolled negative reexperiencing of the abortion death event, . . .
- (3) unsuccessful attempts to avoid or deny abortion recollections and emotional pain, which result in reduced responsiveness to others and one's environment; and
- (4) experiencing associated symptoms not present before the abortion, including guilt about surviving.⁶⁶

Clinical evidence suggests that individuals possessing certain characteristics or undergoing particular circumstances tend to be predisposed to Postabortion Syndrome. Some of these factors include "low self-esteem," "lack of relationship support," "immature interpersonal relationships," "lack of support from one's family," "biased preabortion counseling," and "being an adolescent rather than an adult."⁶⁷

Another study comparing adult and adolescent negative reactions to abortion found that women under age twenty experienced more nightmares and made more suicide attempts following the abortion than women over

63. See Speckhard & Rue, *supra* note 24. See also Brenda Major & Catherine Cozzarelli, *Psychosocial Predictors of Adjustment to Abortion*, 48 LAW. & HUM. BEHAV. 121, 137-38 (1992) (suggesting that ability to effectively cope with abortion is linked with self-efficacy which may be undermined "by younger age and correspondingly fewer resources"); Sharon D. White & Richard R. DeBlassie, *Adolescent Sexual Behavior*, 27 ADOLESCENCE 183 (1992) (explaining that abortion can result in medical and psychological problems, especially for the immature teenager).

64. See Franz & Reardon, *supra* note 41, at 161-62.

65. See Speckhard & Rue, *supra* note 24, at 114.

66. *Id.* at 105.

67. *Id.* at 114.

twenty.⁶⁸ This same study also found that drug abuse, psychotic delusions, and paranoid and antisocial personality disorders were more prevalent among the adolescent group.⁶⁹

Finally, a unique yet highly relevant study attempted to answer the following question: Which variables differentiate adolescent responses to abortion from those of mature women?⁷⁰ Since the goal of the study was to examine the characteristics of women who claim to experience long-term negative effects of abortion, and not *whether* or not women experience these postabortion effects, the subjects were obtained through support groups for women who were self-identified as needing assistance with problems following abortion. Results from surveys given to these women illustrated that the younger the woman was at the time she had the abortion, the longer it took her to join a support group and the less satisfied she was with her choice to abort.⁷¹ Even more so, as compared to adults, adolescent subjects were "less satisfied with services at the time of the abortion," "more likely to feel forced by circumstances to have the abortion," "reported significantly greater severity of psychological stress," "more often reported wanting to give birth," and "tended to prefer to keep the baby."⁷²

It should be noted that the differences reported in this study may have been due to selection bias. In other words, if adolescents are generally less inclined to seek help following abortion, those that do may illustrate more severe symptoms, thereby exaggerating the differences. However, there may be many reasons that induce adolescents suffering less severe post-abortion distress to seek help, such as parental support or knowledge of the symptoms.⁷³ Furthermore, if lack of parental support is a primary reason why adolescents suffering postabortion distress are less likely to seek help, *and* lack of parental support is a strong predictor of adverse reactions to

68. See Nancy B. Campbell, Kathleen Franco & Stephen Jurs, *Abortion in Adolescence*, 23 ADOLESCENCE 813, 819 (1988).

69. See *id.*

70. See Franz & Reardon, *supra* note 41, at 164.

71. See *id.* at 166.

72. *Id.*

73. Even if a parent does not support his or her daughter's decision to abort, knowledge of the fact can put that parent on notice of the possibility of distressing reactions. Parents that did not support their daughter's decision to abort may still encourage her to seek help upon noticing any adverse reactions. Also, other reasons adolescents with less severe postabortion symptoms may nonetheless seek help may include the maturity or independence of the adolescent, encouragement from peers or her partner, or simply the ease with which adolescents can access the support programs (e.g., are they nearby or well-advertised?).

abortion,⁷⁴ this study may underrepresent adolescents suffering postabortion distress.⁷⁵ Also, if it is the case that adolescents without parental support suffer *more severe* postabortion distress in addition to the illustrated *greater likelihood* of distress, this may help to offset the possibility of exaggerated differences due to selection bias.

A common argument made in response to the assertion that adolescents are at greater risk for negative reactions to abortion than adults is that adolescent pregnancy is more harmful than adolescent abortion. However, this is an argument concerning which is the better option for a pregnant adolescent: giving birth, or aborting the child. True, information regarding the risks of pregnancy are necessary for mature judgment. Yet, this is not an argument why parents should be excluded from their daughter's decision to abort. It is not contested that pregnancy can be exceptionally risky for young adolescents. Due to the nature of pregnancy, however, parents are more likely to be notified and thereby given the option to be involved in their daughter's decision to have the baby and provide her with the necessary care. Such is not the case when an adolescent chooses to abort without informing her parents. In short, the argument that adolescent pregnancy may be more harmful than adolescent abortion does not address the more legally relevant issue of parental involvement.

To summarize, empirical research reveals significant differences between adolescent and adult reactions to abortion. Adolescents have been shown to be much more susceptible to negative psychological reactions to the abortion experience. Additionally, this enhanced vulnerability to negative consequences may be the result of immature decisionmaking abilities.

B. IDENTIFYING THE VULNERABLE GROUP OF MINORS

Identifying the necessary cognitive and psychosocial factors for mature judgment can help define the standard for minors to overcome the legal presumption of immaturity. By the same token, identifying the factors that make adolescents more susceptible to negative reactions to abortion than adults can help define an appropriate best interests inquiry.

If a minor fails to overcome the presumption of her immaturity, the current judicial bypass requires the judge to determine whether an abortion would be in the immature minor's best interest. Based on the information

74. See O'Shaughnessy, *supra* note 33, at 1741; MELTON, *supra* note 10, at 87; Speckhard & Rue, *supra* note 24, at 114.

75. Of course, without these subjects we do not know the severity of the postabortion distress.

above, it would be beneficial to ask the immature minor questions that focus on her perception of responsibility for her decision. It is also important to focus on whether or not she perceives lack of support or external pressure to have an abortion, and whether, in the absence of these pressures, she would prefer to give birth to the baby.⁷⁶ It may also be helpful to know on what basis the minor perceives lack of parental support. Answers to these questions may help determine the immature minors' level of susceptibility to adverse reactions following the abortion. Answers that correlate with factors which put minors at risk for negative reactions should weigh in favor of refusing a waiver of parental involvement. Of course, the few factors discussed in this section by no means comprise a sufficiently comprehensive best interests inquiry. Rather, they are an example of how the currently standardless best interests inquiry could be improved by the use of guidelines based on real differences between adolescent and adult risks of psychological harm following abortion.

V. THE POSITIVE EFFECTS OF PARENTAL INVOLVEMENT IN THE ABORTION DECISION

A. IN LIGHT OF ILLUSTRATED DIFFERENCES BETWEEN ADOLESCENTS AND ADULTS

A common argument against parental involvement statutes is that, even assuming there are significant differences between adult and adolescent capacity for mature judgment, and adult and adolescent risk of post-abortion psychological harm, parental involvement will not help curtail them. Instead, it subjects the pregnant adolescent and her family to further harm. This section responds to this argument by demonstrating the ways in which parental involvement in minors' abortion decisions serve the minors' best interests.

76. For instance, a study by Catherine Lewis concluded that one difference between adolescent and adult abortion decisions is that adolescents are more likely to feel their decision to abort was externally compelled. In this study one 16 year old subject gave the following reason for choosing to have an abortion: "It's a way of not letting people find out. A way to cover up my mistake, I guess you could say . . . If there were no parents or anything, I'd have it. Since there are, I lean toward abortion." Lewis, *supra* note 23, at 449. It would have been helpful to know what led this young adolescent to feel her parents would disapprove of her desire to keep the baby to the point of feeling forced to have an abortion, and if these fears were in fact warranted. It is this type of situation, where an adolescent chooses to have an abortion solely to avoid misperceived, or exaggerated parental disapproval of her true desire to keep the baby, that parental involvement legislation can help prevent. See *infra* notes 80-86 and accompanying text.

First and foremost, we presume that parents will act in their child's best interest due to the natural emotional bonds of love and attachment that form between the majority of parents and children. Second, the majority of states have rejected the assertion that a requirement of parental involvement or judicial authorization is detrimental to the health of pregnant minors and their family relationships.⁷⁷

State legislatures have found that "parents ordinarily possess information essential to a physician's exercise of his or her best medical judgment concerning a minor child," and that "parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention subsequent to her abortion."⁷⁸ Recall that adolescents are more likely than adults to be dissatisfied with the services they received during the abortion, to feel uninformed by the counseling provided, and to take longer to seek outside help if they experience negative consequences.⁷⁹ Thus, involving parents may increase the likelihood that the adolescent receives adequate and immediate psychological and medical services and information.

Parents can also correct their daughters' misapprehensions and challenge their erroneous beliefs.⁸⁰ More importantly, legislation that requires minors to involve their parents in the decision to abort can reveal minors' erroneous perceptions of lack of parental support in their decision. In general, perception of the mother-adolescent relationship is essential to adolescent functioning.⁸¹ In particular, perceived lack of parental support has been reported as the single most important determinant of psychological reactions to abortion.⁸² However, over half of pregnant adolescents seeking an abortion prefer not to consult their parents, many times out of fear that their parents will try to prevent the abortion.⁸³ Although this is cer-

77. The following states currently have parental consent or notification requirements for minors seeking an abortion: Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, West Virginia, Wisconsin, and Wyoming. See *American Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 852 n.5 (Cal. 1997) (Mosk, J., dissenting).

78. *Id.* at 859 n. 11 (citing Stats. 1987, ch. 1237, § 1, p. 4396).

79. See Franz & Reardon, *supra* note 41, at 161.

80. See Everett L. Worthington, Jr., David B. Larson, Malvin B. Brubaker, Cheryl Colecchi, James T. Berry, & David Morrow, *The Benefits of Legislation Requiring Parental Involvement Prior to Adolescent Abortion*, 44 AM. PSYCHOLOGIST 1542, 1543 (1989).

81. See Michelle Wierson & Rex Forehand, *Family Stressors and Adolescent Functioning: A Consideration of Models for Early and Middle Adolescents*, 23 BEHAV. THERAPY 671, 685 (1992).

82. See O'Shaughnessy, *supra* note 33, at 1756.

83. See ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN: ADVOCACY LAW REFORM AND PUBLIC POLICY 159 (1985).

tainly a possibility, these fears are generally highly exaggerated.⁸⁴ There is little evidence that parents, even those with strong religious convictions, would force their daughter to bear a child against her best interests.⁸⁵ To the contrary, research has shown that while anticipated parental anger towards a daughter's pregnancy may take place initially, most parents become supportive upon adjusting to the news.⁸⁶ Two-thirds to four-fifths of parents have been found to be supportive of their daughter,⁸⁷ even in those studies conducted prior to *Roe v. Wade*⁸⁸ when attitudes towards teenage pregnancy were much more judgmental than today. True, these studies generally deal with parental support of their daughter's pregnancy, and not necessarily the daughter's decision to have an abortion. However, they are presented to accentuate the fact that many teens overestimate parental anger and lack of support. Furthermore, attitudes towards adolescent abortion were likely to be more judgmental prior to *Roe* since the illegality of abortion was more likely to induce a sense of "immorality." Now that abortion is a legally acceptable pregnancy alternative and the negative effects of teenage pregnancy have been accentuated, parents may be more inclined to support their daughters' decision to abort.

Of course, the real fear from opponents of parental involvement legislation is that parents will forbid their daughter to have an abortion altogether. Again, there is simply "little evidence in the limited decision-making literature . . . to suggest that parental notification legislation does harm to a teenager or her family;" instead, such legislation may "support family communication and facilitate decision-making."⁸⁹ Although some (how many we do not know) parents may refuse to consent to the abortion, there would still be a net benefit to parental involvement legislation. The benefit accrues primarily from the fact that many adolescents who have mistakenly perceived a lack of support from their parents would now in fact have their parents' emotional care, support, and guidance as they face

84. *See id.*

85. *See id.*

86. *See* M.E. Swigar, R. Breslin, M.G. Pouzzner et al., *Interview Follow-Up of Abortion Drop-outs*, 11 SOC. PSYCHIATRY 135 (1976)

87. *See* Worthington et al., *supra* note 80, at 1542. *See generally* FRANK G. BOLTON, JR., *THE PREGNANT ADOLESCENT: PROBLEMS OF PREMATURE PARENTHOOD* (1980); CHARLES E. BOWERMAN, DONALD P. IRISH, HALLOWELL POPE, *UNWED MOTHERHOOD: PERSONAL AND SOCIAL CONSEQUENCES* (1966); David A. Baptiste, Jr., *Counseling the Pregnant Adolescent Within a Family Context: Therapeutic Issues and Strategies*, 13 FAM. THER. 163 (1986); Lucy Olson, *Social and Psychological Correlates of Pregnancy Resolution Among Women: A Review*, 50 AM. J. ORTHOPSYCHIATRY 432 (1980).

88. 410 U.S. 113 (1973).

89. Everett L. Worthington, Jr., David B. Larson, John S. Lyons, Malvin W. Brubabker, Cheryl A. Colecchi, James T. Berry, & David Morrow, *Mandatory Parental Involvement Prior to Adolescent Abortion*, 12 J. ADOLESCENT HEALTH 138 (1991) [hereinafter *Mandatory Parental Involvement*].

this difficult and potentially harmful experience, thereby improving the quality of their decisionmaking. In other words, parental involvement requirements can “weed out” those adolescents with exaggerated beliefs of parental anger, without substantially harming those adolescents who correctly anticipate lack of parental support. This is mainly because “adolescents who *truly* lack parental support will experience distress whether or not parents are informed of an impending abortion.”⁹⁰ Thus, the potential benefits of parental involvement legislation outweigh the potential harms.

Furthermore, the argument that parental ignorance is better for pregnant minors than parental involvement is unfounded.⁹¹ There is no persuasive evidence to support this contention, which is at the basis of many arguments opposing parental involvement in adolescent abortion decisions.⁹²

Another advantage to parental involvement legislation is that it has the potential to protect against impulsive adolescent decisionmaking. This impulsiveness may be due to adolescents’ tendency to disproportionately weigh short term consequences and discount the long-term future.⁹³ Pregnant adolescents have been found to be highly vulnerable to immediate situational cues in making pregnancy resolution decisions.⁹⁴ Parental involvement legislation requiring either that the pregnant minor consult her parents or go through the judicial bypass process “mitigates [against] the demand-laden situation in which an adolescent finds she is pregnant while at a clinic where there is the potential to have an abortion.”⁹⁵

B. EVEN ASSUMING NO DIFFERENCES EXIST BETWEEN ADOLESCENTS AND ADULTS

Even if it could be proven that there are no significant differences between adolescent and adult capacities for mature judgment or vulnerability to negative reactions following abortion, there are still legitimate reasons to favor parental involvement legislation. One of these reasons is that parents need to be informed of their daughter’s pregnancy decision in order to pay closer attention and provide enhanced supervision of her social life, educate and advise her on sex and contraception, and take other necessary measures to avoid repeat pregnancies and subsequent abor-

90. Worthington et al., *supra* note 80, at 1543 (citations omitted) (emphasis added).

91. *See Mandatory Parental Involvement*, *supra* note 89, at 140.

92. *See id.*

93. *See supra* note 50.

94. *See* W. Godfrey Cobliner, *Pregnancy in the Single Adolescent Girl: The Role of Cognitive Functions*, 3 J. YOUTH & ADOLESCENCE 17 (1974).

95. Worthington et al., *supra* note 80, at 1543.

tions.⁹⁶ This argument is based upon parents' affirmative responsibility to protect the health and welfare of their children. Not only do parents deserve the right to be informed of their daughter's abortion decision, they essentially must have this right in order to effectuate their legal and moral duties of care for their adolescent daughter.

The importance of this argument cannot be stressed enough. Adolescent abortion is obviously the result of adolescent sex. Professionals are deeply concerned with the negative psychological effects of sexual activity on the sexually active adolescent, especially the younger adolescent.⁹⁷ Parents have been found to be the earliest and most influential factor, especially through communication, in adolescent sexuality.⁹⁸ One study showed that parents who carefully monitored their adolescents were aware of whom they dated and where they went, and those who enforced an appropriate curfew were least likely to have their adolescents engaging in irresponsible sexual behaviors.⁹⁹ Therefore, without parental involvement legislation, parents are robbed of the ability to educate and influence their daughter's sexuality. In the end, this may impose the greatest cost on the adolescent herself.

Furthermore, parental involvement legislation can support and enhance family communication. The process of individuation in adolescence is the result of the interplay between individuality *and connectedness in family relationships*. Both of these factors effect an adolescent's ability to "explore identity-related choices and co-ordinate multiple perspectives," which are two important aspects of adolescent psychosocial competence.¹⁰⁰ Individuation requires that the adolescent make an autonomous decision to have an abortion (individuality) *in light of* (interplay) the feelings, perspective, and reactions of her parents (connectedness of family relationships). Due to the risk of misperception, it is important that the parental responses are actual rather than perceived. An adolescent who assumes the decision to have an abortion on her own strips her parents of the opportunity to effectively communicate their feelings, perspective, and reactions to their daughter before she makes her ultimate decision.

96. See *id.* at 1544; MNOOKIN, *supra* note 83, at 158-59.

97. See White & DeBlassie, *supra* note 63, at 183.

98. See *id.* at 184.

99. See Brent C. Miller, J. Kelly McCoy, Terrance D. Olson & Christopher M. Wallace, *Parental Discipline and Control Attempts in Relation to Adolescent Sexual Attitudes and Behavior*, 48 J. MARRIAGE & FAM. 503 (1986).

100. Harold D. Grotevant & Catherine R. Cooper, *Individuation in Family Relationships: A Perspective on Individual Differences in the Development of Identity and Role-Taking Skill in Adolescence*, 29 HUM. DEV. 82, 96 (1986).

Finally, even some opponents of parental involvement in adolescents' abortion decisions have conceded that, "in general, adults are more competent in given decision-making tasks than adolescents"¹⁰¹ The fact that most "parents have more experience making decisions under emotional strain," and are more "likely [than minors] to consider carefully a variety of options" weighs heavily in favor of involving parents in minors' abortion decisions.¹⁰² Even the majority of professional contraceptive and pregnancy counselors feel that an adolescent should be supported by an adult when making the decision to abort, and that the participation of a parent is very important.¹⁰³

VI. CONCLUSION: PROPOSED REFORM OF THE JUDICIAL BYPASS HEARING

Although the judicial bypass currently appears to be functioning as a rubber stamp, "the need to amend is not the need to end."¹⁰⁴ The intended goal underlying the judicial bypass is a positive one—one that desperately needs to be preserved. Consequently, instead of eliminating the judicial bypass altogether, it must be amended to better protect immature minors from incompetent decisionmaking while simultaneously allowing mature minors to make the abortion decision autonomously. For example, judicial bypass inquiry does not have to be based on abstract, ambiguous notions of maturity. Although the law essentially has the power to write its own definition of competence,¹⁰⁵ it would be more credible for it to incorporate empirical evidence of factors differentiating minors and adults.

Under the current state of the law, unrestricted abortion rights follow from competent decisionmaking, yet adults and minors are presumed to differ in this capacity. Psychological research can help point out exactly what those cognitive and psychosocial differences are, such as differences in risk-taking behavior, future time perspective, or peer influence. The law should then consider these differences and determine which are legally

101. Enid Gruber & Martin M. Anderson, *Legislating Parental Involvement in Adolescent Abortion: Re-examining the Arguments of Worthington and His Colleagues*, 45 AM. PSYCHOLOGIST 1174 (1990).

102. Worthington et al., *supra* note 80, at 1543.

103. See MNOOKIN, *supra* note 83, at 159.

104. Erwin Chemerinsky, The Federalist Society Annual Symposium, University of Southern California Law School, Feb. 12, 1998 (debating the need to amend the federal statute concerning independent counsel rather than abolish it altogether).

105. For example, consider the syllogism: Mental Insanity is to Legal Insanity as Psychological Competence is to Legal Competence. In both instances, the former may be relevant to the latter, but by no means are they equals.

relevant and deserve incorporation into a legal standard of maturity. Moreover, legal policy makers must be prepared to justify and explain their acceptance or reliance on certain psychological differences over others when drawing lines of legal competency.

Finally, the best interests inquiry should be split into two prongs. This would change the judicial bypass from a two-step to a three-step inquiry. Following a finding of immaturity, the second step should be a determination of whether it is in the best interests of the incompetent minor to involve or not to involve her parent(s) in the decision to have an abortion.¹⁰⁶

The U.S. Supreme Court, while noting the distinction between the two inquiries, nonetheless held that this standard is acceptable under *Bellotti*.¹⁰⁷ Following a finding of immaturity should be a presumption that the minor is in need of adult supervision, or guidance in her decision. Furthermore, to avoid illegitimate contradiction within the law, the presumption that parents generally act in the best interests of their children must be preserved at the best interests stage of the hearing. Hence, the burden should be on the immature minor to demonstrate to the judge why involving her parents in this decision would cause her undue harm rather than improve the quality of her decision. Only if the minor is able to demonstrate that her parents are not likely to act in her best interests regarding her decision to abort should the judge move to the third inquiry: whether or not the abortion itself would be in the immature minor's best interests.

Determining why adolescents refuse to include their parents in their decision to abort is highly relevant to the best interests inquiry. If the adolescent can demonstrate that her home is not one in which the natural emotional bonds of love and attachment move her parents to act in her best interests, then she should be allowed a judicial determination of whether an abortion itself would be in her best interests. But, in reality why are immature minors refusing to involve their parents in their abortion decisions? Because their parents are abusive? Because they don't want their parents to find out about their sexual activity? Because they perceive, possibly mistakenly, non-abusive parental anger, disapproval, or lack of support? Or simply because they don't want to involve their parents?

106. The best interests standard, "provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor . . . is fundamentally at odds with the privacy interest underlying the constitutional protection afforded her decision." *Bellotti v. Baird*, 443 U.S. 622, 655-56 (1979) (Stevens, J., concurring).

107. See *Lambert v. Wicklund*, 520 U.S. 292 (1997).

It is proposed that only the first class of minors, those who can demonstrate parental abuse, neglect, or prior examples of parental disregard for the minor's best interests, should be allowed to waive requirements of parental involvement at the competency hearing. The reason for this limitation is that the law permits parents to override their immature minors' desires in certain decisionmaking contexts because of the presumption that parents generally act in their children's best interest.¹⁰⁸ Therefore, it does not follow that an immature minor should automatically be allowed to bypass the statutory requirements of parental involvement simply because her parents may "disagree" with her decision. A parent's disagreement with his or her daughter's decision to have an abortion must still be afforded the benefit of the presumption of acting in the daughter's best interest. To hold that refusing an adolescent the right to an abortion could never be in her best interests would essentially create a fixed legal answer to a moral question: If an immature minor is pregnant, only an abortion would be in her best interests.

Denying parents the right to be involved in their daughter's abortion decision on the basis that they may prevent the abortion does three things. First, it discriminates against parents with moral beliefs against abortion. Second, it deprives them of the benefit of the legal presumption that communicating those beliefs to their pregnant minor before having an abortion would be in her best interests. Finally, it presumes, without any evidentiary support, that parents with moral convictions against abortions will necessarily refuse to consent to their daughter's abortion.

There are legitimate reasons to maintain the presumption that minors are incompetent to make the abortion decision. Claims that there are no differences between minors and adults with respect to abortion decision-making capacities are exaggerated and lack sufficient scientific certainty. Furthermore, upon broadening the scope beyond cognitive capacities to psychosocial factors, there is evidence of relevant differences. In addition to minors' lack of maturity, there is also strong evidence that adolescents possess a greater vulnerability to psychological harms following abortion.

Involving parents in adolescent abortion decisions can help to avoid these harms, as well as ensure that pregnant minors make well-reasoned decisions. Parental involvement statutes should not be viewed as a scheme by pro-life advocates to block access to abortion, but rather as a means to ensure that immature pregnant minors make well-reasoned decisions and

108. See *supra* Part III.A.1.

receive the necessary care and guidance from parents who have their best interests at heart.