

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 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, judicial bypass proceedings should be objective and look out for the best 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.

**PARENTAL CONSENT AND NOTIFICATION LAWS IN THE ABORTION CONTEXT:
REJECTING THE “MATURITY” STANDARD IN JUDICIAL BYPASS PROCEEDINGS**

Anna C. Bonny

INTRODUCTION	2
I. BACKGROUND	4
A. Parental Consent Statutes.....	4
B. Parental Notification Statutes	6
II. THE PROBLEM WITH USING “MATURITY” TO EVALUATE MINORS’ PETITIONS FOR ABORTIONS.	8
A. Current State Statutes Requiring Parental Involvement	8
B. The Subjectivity of “Maturity” and Judicial Bias.....	10
C. Recommended Guidelines to Avoid Judicial Bias.....	12
D. Poor Appellate Review of Judicial Bypass Proceedings	15
III. REJECTING THE “MATURITY” STANDARD IN JUDICIAL BYPASS PROCEEDINGS	16
A. Planned Parenthood v. Farmer	16
B. “Maturity” Has Been Rejected as a Requirement in Other Major Life Decisions For Minors	18
IV. CONCLUSION	21

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 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

¹ CAL. BUS. & PROF. CODE § 15658 (West 2005).

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

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

⁴ CAL. FAM. CODE § 302 (West 2005).

⁵ FAY A. ROZOVSKY, CONSENT TO TREATMENT: A PRACTICAL GUIDE 5.1 (3d ed. 1998). The common law stated that a minor was unable to consent to medical treatment by themselves and, with the exception of emergencies or other impractical situations, imposed a requirement on doctors to seek the consent of the minor's parent before performing any medical procedures.

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 possesses the requisite maturity to make an independent decision to have an abortion, or that even if she is not mature enough to make that decision herself, the desired abortion would be in her best interests. However, the "maturity" requirement of judicial by-pass procedures should be dismissed entirely; its application is biased and unworkable. The measuring of maturity is a subjective inquiry and no clear standard exists for judges to follow. Neither the Supreme Court nor state legislatures have provided judges with adequate guidance to measure maturity, and even developmental psychologists disagree on which factors correctly measure a minor's maturity. Since judges must rely on their own ideas of "maturity," judicial bypass evaluations are left primarily to their unfettered discretion. Moreover, appellate courts have been deferential to lower court rulings even when no reasoning is provided as to why certain factors constitute immaturity.

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).

In Part I this article will examine the history behind parental consent and notification statutes, as well as the current structure of related legal doctrines. Part II will detail the problems and significant dangers of judicial bias posed by using “maturity” to evaluate whether a pregnant minor should receive an abortion. Part III 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.

I. BACKGROUND

A. Parental Consent Statutes

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.¹⁰ The Supreme Court first examined an abortion parental consent statute in *Planned Parenthood of Central Missouri v. Danforth*.¹¹ 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.¹² Though noting that states have broader authority to regulate the activities of children than

¹⁰ 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 1*, 566 N.E.2d 1181, 60 U. CIN. L. REV. 907, 909 (1991).

¹¹ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 58 (1976).

¹² *Id.*

those of adults,¹³ Justice Blackman maintained that “[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.”¹⁴ 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.¹⁵ 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.”¹⁶

Three years later in *Bellotti v. Baird*, the Court evaluated whether a parental consent statute alternatively 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*.¹⁷ 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.¹⁸ The Court held that if a state requires a pregnant minor to obtain parental consent from a parent before obtaining an abortion, the state must also provide “an alternative procedure whereby authorization for the abortion can be obtained.”¹⁹ A minor could seek judicial permission to obtain an abortion, and the judge would determine whether the minor was

¹³ *Id.* at 75.

¹⁴ *Id.* at 74.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality decision).

¹⁸ *Id.* at 651.

¹⁹ *Id.* at 643.

“mature” enough and whether the abortion would be in her best interest.²⁰ Though not defining the precise attributes of “maturity” that a minor must possess in order to bypass parental consent for an abortion,²¹ 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.²²

Thus, the Court established the judicial bypass and maturity requirements, which have been affirmed in several cases after *Bellotti*.²³

B. Parental Notification Statutes

In *Hodgson v. Minnesota*, the Court held that a two-parent *notification* requirement was unconstitutional.²⁴ In examining a statute which instituted a 48-hour waiting period after notification of both parents,²⁵ 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.²⁶ 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.”²⁷ The judicial

²⁰ *Id.*

²¹ *Id.* at 643-44 (recognizing maturity is “difficult to define, let alone determine”).

²² *Lambert v. Wicklund*, 520 U.S. 292, 295 (1997) (citing *Bellotti*, 443 U.S. at 643-44).

²³ *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 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).

²⁴ *Hodgson v. Minnesota*, 497 U.S. 417, 422-23 (1990).

²⁵ *Id.* at 422.

²⁶ *Id.* at 422-23.

²⁷ *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 511 (1990).

bypass provision allowed judicial consent if parental notice was not in the minor's best interest.²⁸ Though declining to answer whether a parental notification statute *must* include a bypass provision to be constitutional, the Court held that the bypass provision satisfied the four *Bellotti* criteria required for bypass provisions in parental consent statutes.²⁹ 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.

In *Lambert v. Wicklund*, the Court examined a parental notification statute which provided a judicial bypass where *notification* was not in the minor's best interest, but did not contain a judicial bypass where an abortion would be in the minor's best interests.³⁰ The Court held that a judicial bypass procedure which required a minor to show that parental notification was not in her best interests was equivalent to a judicial bypass procedure requiring a minor to show that abortion without notification was in her best interests.³¹

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.³² Lower courts had struck down the law, declaring it unconstitutional because there was no exception for medical emergencies.³³ Rather than taking the "bluntest remedy," such as striking down

²⁸ *Id.*

²⁹ *Lambert*, 520 U.S. 292, 295 (1997).

³⁰ *Id.*

³¹ *Id.* at 297-298.

³² *Ayotte v. Planned Parenthood of Northern New England*, No. 04-1144, 2006 U.S. LEXIS 912, at *6 (126 S. Ct. 961 (U.S. 2006)).

³³ *Id.* at *7.

an entire parental notification law, the Court held that other “modest” options are available to lower courts.³⁴ 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.³⁵

Thus, while a majority agreed that there was a problem with the law, the Court remanded the case without creating a remedy.³⁶

II. 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 abortion.³⁷ All thirty-four states require that the parental involvement have a judicial bypass process for minors seeking an abortion.³⁸ Of the remaining states, nine have parental consent or notification laws which have been found unconstitutional,³⁹ and seven have no laws on the books to prevent minors from obtaining abortions on their

³⁴ *Id.* at *19.

³⁵ *Id.* at *4

³⁶ *Id.* at *20.

³⁷ Guttmacher, *supra* note 8. Twenty-one states require one or both parents to consent to the procedure, while 12 require that a parent be notified and 1 state requires both parental consent and notification.

³⁸ THE ALAN GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: PARENTAL INVOLVEMENT IN MINORS’ ABORTIONS (2006), http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf.

³⁹ NARAL, PRO-CHOICE AMERICA, http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/nationwide-trends/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.

own.⁴⁰ Since approximately 400,000 minors become pregnant in the United States each year,⁴¹ courts have often been called upon to evaluate the maturity of minors seeking abortions. Unfortunately, there are no comprehensive national statistics for abortion applications from minors since most states do not collect them.⁴² 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.⁴³ 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.⁴⁴ In Florida, of the nearly 50,000 teenage abortions in Florida in 2004, only 201 underage girls sought out the courts to obtain an abortion without parental involvement, and only 184 were approved.⁴⁵

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 of poverty,

⁴⁰ THE ALAN GUTTMACHER INSTITUTE, <http://www.guttmacher.org/pubs/sfaa/connecticut.html> (last visited Aug. 29, 2006); THE ALAN GUTTMACHER INSTITUTE, <http://www.guttmacher.org/pubs/sfaa/hawaii.html> (last visited Aug. 29, 2006); THE ALAN GUTTMACHER INSTITUTE, http://www.guttmacher.org/pubs/sfaa/new_york.html (last visited Aug. 29, 2006); THE ALAN GUTTMACHER INSTITUTE, <http://www.guttmacher.org/pubs/sfaa/oregon.html> (last visited Aug. 29, 2006); THE ALAN GUTTMACHER INSTITUTE, <http://www.guttmacher.org/pubs/sfaa/vermont.html> (last visited Aug. 29, 2006); THE ALAN GUTTMACHER INSTITUTE, <http://www.guttmacher.org/pubs/sfaa/washington.html> (last visited Aug. 29, 2006). These states include Connecticut, Hawaii, Maine, New York, Oregon, Vermont, and Washington.

⁴¹ Emily Buss, Article, *The Parental Rights of Minors*, 48 BUFF. L. REV. 785, 787 (2000).

⁴² 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/04/recuse.html?ex=1146110400&en=ee4519b0fd36675e&ei=5070>.

⁴³ MARAL, PRO-CHOICE MICHIGAN, <http://www.prochoicemichigan.org/s01takeaction/200307281.shtml> (last visited May 4, 2006).

⁴⁴ *Id.*

⁴⁵ Mary Ellen Klas, *Abortion Rules Challenged*, MIAMI HERALD, Mar. 23, 2006, at 4B.

or a cause of poverty.⁴⁶ Raising a child may interfere with the ability to pursue education⁴⁷ and develop job skills,⁴⁸ 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.⁴⁹ Due to these significant risks of teenage parenting, judicial bypass proceedings should evaluate a minor's maturity and 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.⁵⁰ In evaluating a pregnant minor's maturity, courts have examined factors such as the minor's age,⁵¹ academic performance,⁵² intellectual capacity,⁵³ participation in extracurricular activities at school,⁵⁴ plans for the future,⁵⁵ and the ability to handle her own finances.⁵⁶ In

⁴⁶ See Kristen Luker, Note, *Dubious Conceptions: The Politics of Teenage Pregnancy*, 51 DEPAUL L. REV. 963, 963 (2002).

⁴⁷ 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).

⁴⁸ Buss, *supra* note 41 at 787.

⁴⁹ See Luker, *supra* note 46 at 51.

⁵⁰ 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).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1118.

⁵⁵ *Id.*

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.”⁵⁷ Of the states using the judicial bypass process, none have provided judges with any practical guidance in evaluating “maturity.”⁵⁸ In fact, when petitioned by a minor to obtain a judicial bypass, one Tennessee judge had “no clue” that minors could seek a judicial waiver to obtain an abortion.⁵⁹

Requiring judges to evaluate the maturity of pregnant minors without specific evaluation criteria poses a significant danger of judicial bias.⁶⁰ 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;⁶¹ the judge is “improperly influenced” by the minor’s race, ethnicity, or social class;⁶² the judge cannot understand the minor’s reasoning due to a generational gap or differences in gender;⁶³ or the judge might inappropriately slip into the role of “substitute parent” as opposed to remaining objective.⁶⁴

⁵⁶ *Id.*

⁵⁷ *Bellotti*, 443 U.S. at 644.

⁵⁸ Suellen Scarnecchia & Julie Kunce Field, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 MICH. J. GENDER & L. 75, 113 (1995).

⁵⁹ ABOUT.COM, <http://atheism.about.com/b/a/179626.htm> (last visited May 2, 2006).

⁶⁰ Scarnecchia, *supra* note 58 at 113.

⁶¹ *Id.* at 87.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

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.⁶⁵ At least one judge has also cited political pressure as another factor in deciding to grant minors' judicial bypass petitions.⁶⁶ 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.⁶⁷ In Boston in 1992, only two judges out of fifteen were hearing judicial bypass petitions.⁶⁸

C. Recommended Guidelines to Avoid Judicial Bias

Due to the serious risks of bias or abuse by trial courts, Professors Suellyn 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 herself to obtain an abortion.⁶⁹ Some of their suggestions include presuming minors aged sixteen and above to be sufficiently mature to obtain judicial waiver,⁷⁰ or presuming that an abortion is always in the best interests of a minor who is under the age of thirteen due to serious health risks associated with childbirth at that age.⁷¹ For minors aged thirteen through fifteen, Scarnecchia and

⁶⁵ Liptak, *supra* note 42.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Tamar Lewin, *The Anguish of Asking a Court for an Abortion*, N.Y. TIMES, May 28, 1992, at B8.

⁶⁹ Scarnecchia, *supra* note 58 at 98-112.

⁷⁰ *Id.* at 111-112.

⁷¹ *Id.* at 112.

Field have recommended using maturity factors that are probative of the minor's ability to give informed consent to the abortion procedure.⁷² 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.⁷³ Scarnecchia and Field also maintain that on the issue of best interests, a judge should determine whether the minor might suffer physical or emotional harm if the judicial bypass is denied.⁷⁴

At least one legal commentator has embraced the recommendations set forth by Scarnecchia and Field.⁷⁵ However, despite their detailed approach, the fact is 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.”⁷⁶ 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.⁷⁷ Much of the disagreement has focused on how to define competence: narrowly through the

⁷² *Id.*

⁷³ *Id.* at 122.

⁷⁴ *Id.* at 112.

⁷⁵ Rosenberg, *supra* note 50 at 1138-1139.

⁷⁶ See Wanda Franz & David Reardon, *Differential Impact of Abortion on Adolescents and Adults*, 27 *Adolescence* 161, 162-63 (1992).

⁷⁷ *Id.*

components of understanding and reason, or though the psychosocial factors that distinguish adolescents from adults,⁷⁸ such as conformity and compliance in relation to peers and parents, their attitude toward and perception of risk, and temporal perspective.⁷⁹

Regardless of how development 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.⁸⁰ 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 interests would be served by an abortion, to “forego the bypass option and either notify their parents or carry to term.”⁸¹ One study has also suggested that teenage girls from low-income backgrounds who seek judicial waivers of parental consent may display an inaccurately lower level of moral maturity to the court or other evaluator.⁸² 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.

⁷⁸ 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).

⁷⁹ Franz, *supra* note 76 at 162.

⁸⁰ Betty Bardige et al., *Moral Concerns and Considerations of Urban Youth*, in MAPPING THE MORAL DOMAIN 159, 165 (Carol Gilligan et al. eds., 1988).

⁸¹ Hodgson, 497 U.S. at 441.

⁸² Bardige, *supra* note 80 at 165.

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* 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.⁸³ Recognizing that lower court judges are vested with discretion in evaluating maturity,⁸⁴ 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) having her two pregnancies result from sex with different men.⁸⁵ As one legal commentator has noted, "[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?"⁸⁶ Rather, this would indicate that she was well informed of the abortion process from past personal experience, and that she was competent to assess its implications.⁸⁷ To err is human and maturity does not necessarily protect against the repeating of mistakes.⁸⁸ Seventy-eight percent of teen pregnancies in the U.S. are unplanned.⁸⁹ Thus, if accidentally becoming pregnant were to connote immaturity, most judicial bypass petitions could be denied on that basis alone.

⁸³ *In re Jane Doe 1*, 566 N.E.2d 1181 (Ohio 1991).

⁸⁴ *Id.* at 1184.

⁸⁵ *Id.*

⁸⁶ Stuhlberg, *supra* note 10 at 952.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ HENSHAW SK, UNINTENDED PREGNANCY IN THE UNITED STATES, FAMILY PLANNING Perspectives (1998).

Moreover, this author does not believe that someone’s number of sexual partners speaks to maturity or immaturity. Rather, it is a lifestyle choice. The number of sexual partners does not relate to a minor’s understanding of the abortion procedure, nor does it have anything to do with one’s medical assessment of having an abortion. Here, the state court 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,⁹⁰ 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.⁹¹

III. 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

⁹⁰ In re Doe, 2002 Ohio 3926 (Ohio Ct. App. 2002); In re Doe, 2005 Ohio 1559 (Ohio Ct. App. 2005).

⁹¹ In re Jane Doe 1, 566 N.E.2d at 1184.

section – but not permit the same minor to terminate her pregnancy.⁹² Instead of focusing on a pregnant minor’s maturity, the court examined the harsh reality of burdens placed on minors who seek judicial waivers.⁹³ The *Farmer* court found that even *notifying* parents placed financial and emotional burdens on minors which could prevent them from obtaining abortions:⁹⁴ parental displeasure, withdrawal of financial support, or actual blocking of the abortion decision.⁹⁵ 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.⁹⁶ According to the *Farmer* court, these delays harm minors due to the increase of medical complications in later abortions, as well as because the cost of an abortion increases the longer a minor waits and could become too expensive.⁹⁷ Moreover, the court held that judicial bypass procedures exacerbate these delays because minors must seek legal representation and miss school to appear in court without her parents’ knowledge.⁹⁸ Thus, competing state interests to restrict minors’ access to abortions were not justified.⁹⁹

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

⁹² *Planned Parenthood v. Farmer*, 762 A.2d 620, 638 (N.J. 2000).

⁹³ *Id.* at 635.

⁹⁴ *Id.* at 634-637.

⁹⁵ *Id.* at 634.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 635.

⁹⁹ *Id.*

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.”

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.¹⁰⁰ Instead, most courts continue to hold on to 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.¹⁰¹ 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.¹⁰² However, many states 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.¹⁰³ The Supreme Court has rendered unconstitutional statutes which prohibit the distribution of non-medical contraceptives to minors.¹⁰⁴ Many states have enacted statutes that allow minors to obtain treatment for sexually transmitted diseases without

¹⁰⁰ Luker, *supra* note 46 at 776.

¹⁰¹ THE ALAN GUTTMACHER INSTITUTE, MINORS AND THE RIGHT TO CONSENT TO HEALTH CARE (2000), <http://www.guttmacher.org/pubs/tgr/03/4/gr030404.pdf>.

¹⁰² *Id.*

¹⁰³ 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.

¹⁰⁴ *Carey v. Population Services International*, 431 U.S. 678 (1977).

parental consent or knowledge.¹⁰⁵ And these barriers for minors 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.¹⁰⁶ 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.¹⁰⁷ The Supreme Court has on multiple occasions upheld the fundamental right to parent,¹⁰⁸ and that parents possess an implicit constitutional right to freedom from state intervention in family matters.¹⁰⁹ Perhaps due to this tradition of "right to parent," no state restricts the parental rights of minors over their children. A state will only intervene in cases where it

¹⁰⁵ 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 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.

¹⁰⁶ 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.

¹⁰⁷ Guttmacher, *supra* note 100.

¹⁰⁸ *Troxel v. Granville*, 530 U.S. 57 at 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 the 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).

¹⁰⁹ *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).

is not in the best interest of the minor's child for the minor parent to retain custody and control of the child.¹¹⁰

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.¹¹¹ 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."¹¹² 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.¹¹³ 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. Otherwise courts would in essence be forcing minors to have children and then dictating the way in which those minors raised 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 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

¹¹⁰ CAL. FAM. CODE § 3011 (West 2004).

¹¹¹ See Scarnecchia, *supra* note 58.

¹¹² Luker, *supra* note 46 at 775.

¹¹³ Buss, *supra* note 41 at 812-821.

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.¹¹⁴ Under current Florida law, minors may go to any judge within one of the five district courts of appeal in the state.¹¹⁵ Though backers of this idea desire to make it more difficult for minors to obtain abortions, these proponents 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.

IV. 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

¹¹⁴ Klas, *supra* note 45.

¹¹⁵ *Id.*

poverty and child abuse associated with teenage parenting, judicial bypass proceedings should be objective and look out for the best 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.