

MOTHER, MAY I?: RAMIFICATIONS FOR PARENTAL INVOLVEMENT LAWS FOR MINORS SEEKING ABORTION SERVICES

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INTRODUCTION

The imposition of parental involvement requirements on minors seeking abortion services encompasses a vast array of issues. Parental involvement laws can harm the health of minors through delays in care and breaches of confidentiality.¹ There are also serious

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1. See *generally* *Planned Parenthood v. Farmer*, 762 A.2d 620, 632-36 (N.J. 2000) (describing the failings of parental notification bypass procedures which often result in discouraging women from initiating the proceedings).

systematic problems with the integration of judicial bypass hearings into the traditional court system.² Minors are encouraged to, and many times do, involve parents in their decisions. When minors choose not to involve a parent in their decision-making process, they do so for compelling reasons. The balancing tests that judges are required to undertake during judicial bypass hearings are difficult to reconcile and are riddled with problems. The result is that parental involvement laws do not further a minor's best interests. This reflective essay will discuss all of the above points using illustrations from a role-play acted out by American University Washington College of Law students.³

I. PARENTAL INVOLVEMENT LAWS BURDEN MINORS' HEALTH

The enactment of a parental involvement law imposes many burdens on minors.⁴ Most significantly, parental involvement laws negatively impact the health of teenagers seeking abortion care.⁵ Teenagers as a group take longer to make decisions about abortion.⁶ Young women often have irregular menstrual cycles, causing them to take longer to recognize that they are pregnant.⁷ Also, teens are often unfamiliar with health care systems and lack financial resources.⁸ This causes delays in care.⁹ In the case of abortion, a woman's health risks are lowest if she seeks care during the early weeks of her pregnancy.¹⁰ Although the risk of complications arising

2. See generally Helena Silverstein, *Road Closed: Evaluating the Judicial Bypass Provision of the Pennsylvania Abortion Control Act*, 24 LAW & SOC. INQUIRY 73, 81 (1999) (concluding that the vast majority of Pennsylvania's sixty court districts fail to supply useful and accurate information to minors seeking abortion bypass proceedings).

3. See *Casey Skit*, 10 AM. U. J. GENDER SOC. POL'Y & L. 261 (2002).

4. See AMERICAN CIVIL LIBERTIES UNION, REPRODUCTIVE FREEDOM PROJECT: PARENTAL INVOLVEMENT LAWS, available at <http://www.aclu.org/issues/reproduct/parental.html> (last visited Mar. 20, 2002) [hereinafter ACLU] (reporting that twenty-eight states currently enforce laws that mandate parental involvement in a minor's abortion decision).

5. See *id.* (arguing that parental involvement laws delay the abortion procedure which, in turn, endanger the mother's health since health risks associated with abortion increase as pregnancy progresses).

6. See *Farmer*, 762 A.2d at 633 (discussing the physiological, cognitive, and financial factors that help explain why teenage women, as a group, generally take longer to decide whether to have an abortion).

7. *Id.*

8. See *id.* (arguing that these factors create time delays which affect the cost and availability of an abortion procedure for a minor). For example, the increase in cost for the procedure increases from \$500 for an abortion at twelve to fourteen weeks of pregnancy to \$1,000 at twenty weeks. *Id.* at 634.

9. See *id.* (declaring that the results of these factors are time delays that affect not only the cost, but also the availability of abortions).

10. See ALAN GUTTMACHER INSTITUTE, FACTS IN BRIEF: INDUCED ABORTIONS,

during an abortion is not as high as that of childbirth,¹¹ such risk increases with every week of pregnancy beyond eight weeks.¹² Therefore, it is imperative that young women who choose abortion be able to access those services without delay.

Parental involvement laws further delay the ability of minors to access abortion services. For a teenager like Maggie, who wishes to utilize a judicial bypass procedure, the parental involvement law can delay having an abortion for weeks.¹³ Judicial bypasses are not simple procedures; they require young women to navigate a complicated legal process which can be confusing, as well as time-consuming.¹⁴ First of all, Maggie must find the time to meet with an attorney. She accomplishes this by skipping school and admits that she might be caught. Since she does not have her own transportation to the attorney's office, Maggie relies on her sister to assist her. Maggie must also find the time to go to court for the bypass hearing, as well as find transportation to get to the courthouse. Many attorneys provide representation pro-bono; some states require that a teenager be given free legal counsel.¹⁵ If Maggie lived in a state where free legal representation were not available, she would have to raise the money to pay for an attorney, a considerable obstacle for a teenager. Although judges generally are required to make the determination whether or not to grant a bypass within a short period of time,¹⁶ the

available at http://www.gutmacher.org/pubs/fb_induced_abortion.html (Feb. 2000) (last visited Mar. 20, 2002) (finding that only one in every 530,000 abortions performed prior to the eighth week of pregnancy results in the death of the mother).

11. See *id.* (concluding that the risk of death associated with childbirth is approximately ten times higher than the risk associated with abortion).

12. See *id.* (indicating the risk of death from an abortion at eight weeks of pregnancy or fewer is one death for every seventeen thousand abortions, one death per six thousand abortions at sixteen to twenty weeks, and one death for every six thousand abortions performed after the twenty-first week); see also Herschel W. Lawson et al., *Abortion Mortality, United States, 1972-1987*, 171 AM. J. OF OBSTETRICS & GYNECOLOGY 1365, 1367 tbl.2 (1994) (indicating the number of deaths that occur for every 1,000 legal abortions increases from 0.4 prior to eight weeks of pregnancy to 12.0 after the twenty-first week).

13. JANE'S DUE PROCESS, INC., 2001 SEMI-ANNUAL REPORT 3 (Jan. 22–July 22, 2001) (reporting that minors seeking their services range from three to twenty weeks pregnant, with an average of eight weeks). Jane's Due Process, Inc. is a toll-free hotline created to assist in compliance with Texas parental notification laws, and links minors requiring bypass with pro bono lawyers. See *id.*

14. See NAT'L ABORTION FED'N, TEENAGE WOMEN, ABORTION AND LAW, available at <http://www.prochoice.org/facts/factsheets/pdf/f59.pdf> (last visited Mar. 20, 2002) (arguing that complicated bypass procedures increase the likelihood that poorer, younger, and less experienced teenagers will become either teenage mothers or resort to illegal abortion procedures).

15. See, e.g., 18 PA. CONS. STAT. § 3206 (1997 & Supp. 2001) (entitling a minor to court appointed counsel for judicial bypass hearings).

16. See, e.g., TEX. FAM. CODE ANN. § 33-003 (1999 & Supp. 2001) (requiring the

process of obtaining a judicial bypass can be lengthy. If the request for a bypass is denied, the minor may file an appeal, which usually involves a trip to the state court of appeals, which is typically located in the state's capitol.¹⁷ This can involve traveling a significant distance. If the request is denied by the appeals court, a minor can petition the state's highest court.¹⁸ This extensive process further delays care.

The delays caused by parental involvement laws increase the incidence of abortions later in pregnancy.¹⁹ For example, following the enactment of Missouri's parental involvement law, the proportion of second-trimester abortions among minors increased by seventeen percent.²⁰ To avoid complying with parental involvement laws, young women often travel across state lines to neighboring states where there is no parental involvement law.²¹ In Massachusetts, approximately one-third of minors seeking an abortion travel to another state for abortion procedures.²² The same appears to be true in Mississippi.²³ This means that a teenager who chooses to travel to another state must be resourceful enough to find reliable transportation to the clinic and set aside sufficient time to make the trip. This can cause additional delay in care. Of course, this is not

court to issue its decision by 5 p.m. on the second business day after the judicial bypass application is filed).

17. See, e.g., *Farmer*, 762 A.2d at 624 (describing the appeals process as codified by the New Jersey Parental Notification Act which provides that after a minor's initial petition is rejected, she can seek review in the Appellate Division within two business days after the court receives the petitioner's records).

18. See *id.* (recounting the procedures outlined by the New Jersey legislature that provides that a minor may have her petition reheard by the New Jersey Supreme Court if the appellate court rejects her bypass request).

19. See JANE'S DUE PROCESS, *supra* note 13, at 4 (finding that nineteen percent of teenagers using Texas' judicial bypass were near or already in their second trimester of pregnancy).

20. See ACLU, *supra* note 4 (arguing that although giving birth carries more risk than abortion, the medical risks of abortion increase significantly as pregnancy progresses).

21. See generally Virginia G. Cartoof & Lorraine V. Klerman, *Parental Consent to Abortion: Impact of the Massachusetts Law*, 76 AM. J. PUB. HEALTH 397 (1986) (analyzing the impact of Massachusetts parental consent law on minors seeking abortions in that state); Stanley K. Henshaw, *The Impact Requirements of Parental Consent for Minors' Abortions in Mississippi*, 27 FAM. PLAN. PERSP. 120, 121-22 (1995) (analyzing the impact of Mississippi's parental consent law by studying the number of abortions sought by both minors and adults in that state before and after the law went into effect).

22. See Cartoof & Klerman, *supra* note 21, at 399 (finding that after the passage of the Massachusetts parental consent law, roughly one out of every three minors seeking an abortion went to another state to have the procedure performed).

23. See Henshaw, *supra* note 21, at 122 (concluding that the impact of the Mississippi parental consent law on teens is similar to the impact of the Massachusetts law in finding that a large number of minors in Mississippi travel to neighboring states for abortion procedures).

always an option for a teenager, especially in areas where abortion providers are scarce.²⁴ In Maggie's situation, she would have to travel at least fifty miles each way. When Maggie's attorney mentions this to her as a possibility, she is very doubtful that she could find transportation to the clinic.

II. PARENTAL INVOLVEMENT LAWS COMPROMISE MINORS' RIGHTS TO CONFIDENTIAL MEDICAL CARE

The medical profession has long viewed confidential care for adolescents as essential to the delivery of timely health care services.²⁵ Adolescence is a critical period for minors to develop their independent sense of self. The American Medical Association, the American Public Health Association, and the Society for Adolescent Medicine have all concluded that minors should be encouraged, but not required, to involve their parents and partners in the decision-making process surrounding an unintended pregnancy.²⁶ The American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, and the American Academy of Family Physicians state that adolescent patients should receive the same degree of confidentiality received by adult patients.²⁷

The desire to maintain secrecy continues to be one of the leading reasons for deaths resulting from illegal abortions.²⁸ Because the need for privacy is compelling, pregnant minors facing parental involvement laws may resort to extreme measures to maintain their confidentiality, such as running away, having a back-alley abortion, or attempting a self-induced abortion.²⁹ In 1988, Indiana teenager

24. Eighty-six of all counties in the United States have no abortion provider; thirty-two percent of women of reproductive age live in those counties. See Stanley K. Henshaw, *Abortion Incidents and Services in the United States, 1995-1996*, 30 FAM. PLAN. PERSP. 263 (1998).

25. See John Loxterman, *Advocates for Youth, Adolescent Access to Confidential Health Services* (July 1997), available at <http://www.advocatesforyouth.org/publications/iag/confhlth.html> (last visited Oct. 27, 2001) (contending that making parental notification mandatory reduces the likelihood that teenagers will seek timely medical treatment).

26. See *Mandatory Parental Consent to Abortion*, 269 JAMA 82-86 (1993) [hereinafter *Mandatory Parental Consent*] (advocating that minors be encouraged to involve their parents when making the determination of whether to have an abortion, but not required to involve them in reaching their decision).

27. See *id.* at 84 (stating this argument was advanced in a joint statement that was released regarding confidentiality for adolescents).

28. See *id.* at 83 (alleging that the desire for secrecy is a leading reason for abortion related deaths since the Supreme Court determined that there was a constitutional right to an abortion in 1973).

29. *Id.*

Becky Bell, was confronted with an unplanned pregnancy.³⁰ She visited a clinic where the staff told her that under Indiana law, she would need to tell her parents that she planned to have an abortion.³¹ When clinic staff explained the judicial bypass procedure to her she said, "If I can't tell my mom and dad, how can I tell a judge who doesn't even know me?"³² A neighboring state that did not have a parental involvement law was too far away for her to travel to.³³ Instead, she had an illegal abortion under unsanitary conditions. Six days later, she died.³⁴ Her parents believe that the parental consent law in Indiana was responsible for her death.³⁵

Minors who utilize the judicial bypass procedure have their confidentiality compromised in several ways. Maggie must disclose her medical decisions to an attorney, a judge, and miscellaneous courthouse personnel who may handle her paperwork—all strangers to her. Although statutes require that bypass procedures be kept confidential, there are practical problems with integrating judicial bypass into the current judicial system to ensure that confidentiality. A teenager may be recognized at the courthouse by the judge, guardian ad litem, or a clerk.³⁶ She may encounter courthouse personnel unfamiliar with how judicial bypass works.³⁷ Teachers,

30. See NAT'L ABORTION FED'N PATIENT PROJECT: ABORTION EXPERIENCES [hereinafter NAF STORIES] (recounting the story of a high school junior living in Indiana, a state with a parental consent law, who dies after obtaining an illegal abortion because she did not want to tell her parents), available at <http://www.prochoice.org/Voices/Patients/pt000.htm> (last visited Jan. 28, 2002).

31. See IND. CODE ANN. § 16-18-2-267 (Michie 1998 & Supp. 2001) (requiring an unemancipated woman under eighteen years of age to provide written consent from her parents in order to have an abortion).

32. See *Child Custody Protection Act of 1998: Hearing on S. 1645 Before the Senate Comm. on the Judiciary*, 105th Cong. 24 (1998) (statement of Bill Bell and Karen Bell) [hereinafter *Hearing*] (recounting their daughter's response to an abortion counselor when weighing her options between traveling to Kentucky or obtaining a judicial waiver to get a legal abortion without parental consent).

33. See *id.* (revealing that the nearest out-of-state abortion clinic in Kentucky was 110 miles away).

34. See NAF STORIES, *supra* note 30 (recounting Becky Bell's refusal to go to the hospital because she feared her parents would discover that she had an abortion). Becky Bell died as a result of an illegal abortion performed under unsanitary conditions with dirty instruments. *Id.*

35. See *Hearing*, *supra* note 32, at 24-25 (arguing that parental consent laws force many young women to risk their lives in order to obtain abortions rather than involving their parents, and speculating that had they lived in a state without a parental consent statute, their daughter would still be alive).

36. See *Farmer*, 762 A.2d at 636 (discussing the experiences of a Minnesota judge who discovered after a waiver proceeding that the minor's parents received an anonymous letter informing them that their daughter was seen in the courthouse seeking the order).

37. See *generally* Silverstein, *supra* note 2, at 81 (finding only eight of Pennsylvania's sixty judicial districts were able to provide sufficient information

parents, or employers may question her as to why she is missing school or work so that she can visit with her attorney or attend a hearing. Each young woman who braves the judicial bypass process takes an enormous risk that she will be identified.³⁸ When Maggie expresses her concern about being recognized at the courthouse, her lawyer says he can try to get her in a back way and keep her out of public as much as possible. He also urges her to think of a cover story in the event that she is recognized. To protect her confidentiality in pursuing a legal remedy to have a legal medical procedure, Maggie must resort to clandestine maneuvering to access safe abortion care.

Confidentiality can also be an issue in jurisdictions where judges are elected. When the Texas Supreme Court established judicial bypass procedures for local courts, they took great pains to ensure that every aspect of the bypass process would remain confidential. One Texas legislator argued that the decisions rendered should be confidential so that judges could focus on doing the right thing, rather than worrying that their decision would be used against them in the next election.³⁹ Although some legislators and freedom of information proponents expressed discomfort with the confidentiality provisions, they are still in place.⁴⁰

III. THE JUDICIAL BYPASS SYSTEM IS FLAWED

Even when provisions for judicial bypass are included in a parental involvement statute, the practical reality is that in many instances it is impossible for minors to obtain a judicial bypass. It takes time for courts to make local rules to deal with the influx of cases, and the process often differs from county to county. In a 1997 study of Pennsylvania's parental involvement law published in the *Journal of the American Bar Foundation*, the author and an assistant contacted each county court in the state's sixty judicial districts.⁴¹ They tried to

about the state's judicial bypass procedure).

38. See *Farmer*, 762 A.2d at 636 (holding that the judicial bypass proceeding itself poses a risk for the minor that her anonymity may be breached because she can be seen by friends or family that are working in or visiting the courthouse).

39. See Rick Casey, *Will Texas Get its First Secret Courts?*, SAN ANTONIO EXPRESS-NEWS, Nov. 14, 1999, at 3A (referring to a statement made by Texas Representative Jim Dunnam, D-Waco, that judges would most likely do what they think is right, if they do not believe their decision will be used against them in the next election).

40. See Christy Hoppe, *Debate Continues over some Details of new Parental-Notice Abortion Law: Procedure for Judicial Bypass Criticized: Legislation to Take Effect Sunday*, DALLAS MORN. NEWS, Dec. 27, 1999, at 1A (noting that open-government advocates are troubled by the secrecy of judicial bypass hearings, but constitutional challenges are not planned).

41. See Silverstein, *supra* note 2, at 79-80 (stating that the county courts in

replicate what they believed a teenager looking into judicial bypass might do.⁴² They began by calling the main courthouse numbers.⁴³ If no one at the courthouse could help them, they called the court administrator's office or the judge's chambers.⁴⁴

The researchers discovered that only eight of Pennsylvania's sixty judicial districts were able to provide complete information about the parental involvement law, and even that information was not easy to obtain.⁴⁵ In one county, a woman in the court administrator's office said, referring to abortion, "I know this is business, but I can tell you that it's a very stupid thing to do and you'd have to live with it for the rest of your life."⁴⁶ The caller was then transferred to someone who could provide the correct information.⁴⁷ The study found that at least forty courts were completely unprepared to respond to inquiries concerning a bypass.⁴⁸ The most common response the researchers received was that the caller would have to get an attorney, even though Pennsylvania's parental involvement law requires the court to advise the minor that she has a right to court appointed counsel.⁴⁹ Some recommended contacting a legal services agency, but federally funded legal services are prohibited from assisting with abortion cases.⁵⁰ Many simply said to make some phone calls or to look in the yellow pages.⁵¹ Other courts gave referrals to family planning agencies or clinics out of a general lack of knowledge of how to proceed with a judicial bypass request.⁵² Several courts

Pennsylvania's judicial districts were contacted to determine their readiness to handle the state's bypass provision).

42. *See id.* at 80 (commenting that the author tried to replicate what a minor or layperson would do to gather information about the state's judicial bypass procedure).

43. *See id.* (stating that the main courthouse number was usually called first, instead of the Orphans Court, which usually handles bypass proceedings in Pennsylvania).

44. *See id.* at 80-81 (stating that they would follow up their initial telephone call by contacting the administrator's office or chambers, and then take the actions told to them by the court personnel).

45. *See id.* at 81 (finding that only eight counties were able to provide essentially complete information regarding the parent consent requirement of the Pennsylvania law).

46. *See id.* at 82.

47. Silverstein, *supra* note 2, at 82.

48. *Id.* at 88.

49. *Id.* at 82.

50. *Id.* (reporting that acceptance of federal funds precludes a legal services agency from providing a lawyer to assist a client requiring a judicial bypass).

51. *Id.*

52. *See id.* at 85 (noting that one inquiry led to guidance on how to file a petition). The caller was told that local rules would state the requirements for such a

recommended only general steps such as looking in the yellow pages under abortion.⁵³ Five courts also offered references to specific “crisis pregnancy organizations.”⁵⁴ These centers do not give referrals for abortion services and are for the most part ministry-based organizations that counsel women against abortion.

Courts would sometimes mention that papers could be filed, but were unable to tell the callers more specifically what was required.⁵⁵ At one point the researchers even spoke to a judge who, although unfamiliar with the law and unable to tell the caller about it, adamantly refused to hear her case.⁵⁶ In the face of these obstacles, minors might abandon their attempts to secure judicial bypasses. Even if a minor eventually finds the right answer, time has passed and the procedure has been delayed. It comes as no surprise that so many minors will travel to states where there are no parental involvement laws to navigate.

Fortunately, successful models for judicial bypass have been established in several states.⁵⁷ These can involve statewide referral systems with trained lawyers, clinic referral to advocacy organizations, clinic referrals to networks of contacts, clinic referral to one or two lawyers, clinic staff accompanying minors to court, or minors going to court with papers from the clinic documenting that a patient understands her decision to have an abortion.⁵⁸ However, these mechanisms have been spearheaded by clinics and activists, not the courts. For example, following the enactment of a parental involvement law in Texas, concerned attorneys founded Jane’s Due Process, a statewide attorney referral network for minors seeking a judicial bypass.⁵⁹

petition, and that the caller could find the rules in the law library of the court. *See id.*

53. Silverstein, *supra* note 2, at 83.

54. *Id.* at 83-84.

55. *Id.* at 85-86.

56. *Id.* at 87-88 (refusing to hear the case because he did not have specific knowledge of the law).

57. *See* AMERICAN CIVIL LIBERTIES UNION, JUDICIAL BYPASS FOR MINORS: MODELS THAT CAN MAKE THE BYPASS PROCESS WORK (2001) 1-4 (noting that states such as Massachusetts, Texas, Idaho and Iowa have adopted judicial bypass procedures).

58. *See generally* Silverstein, *supra* note 2, at 95 (observing that while most abortion clinics adequately assist minors with their bypass hearings it may not be sufficient to negate the effects of ill-prepared county courts).

59. Terri Langford, *Group to help girls in path to abortion: Lawyers offer aid with parental-notice law*, DALLAS MORN. NEWS, Jan. 23, 2001, at 22A.

A. *Minors Consent to Other Medical Treatments, But Cannot Consent to Abortion Without Parental Involvement in Most States*

Informed consent involves a patient understanding the condition, nature, purpose, risks, alternative treatments (including no treatment), and benefits of any proposed medical treatment.⁶⁰ Under common law, parents are generally authorized to give informed consent for the medical care of their minor children based on a presumption that young people lack the judgment to make fully informed decisions.⁶¹ Exceptions to this rule include medical emergencies or when a minor has been emancipated, such as by marriage.⁶² In the last thirty years, states have passed laws explicitly authorizing minors to consent to health care related to sexual activity, substance abuse, and mental health care.⁶³ This reflects the recognition by lawmakers that while parental involvement is desirable, many minors will not seek services if they are obligated to tell their parents.⁶⁴ For example, twenty-five states and the District of Columbia allow minors to consent to contraceptive services; twenty-seven states and the District of Columbia allow pregnant minors to obtain prenatal care and delivery services without parental involvement; all fifty and the District of Columbia allow minors to consent to testing for sexually transmitted diseases, including HIV;⁶⁵ forty-four states and the District of Columbia allow confidential counseling and medical care for minors suffering from drug or alcohol abuse; and twenty and the District of Columbia allow minors to consent to outpatient mental health services.⁶⁶

The difference in public policy toward minors terminating a

60. See Donna Lieberman & Jessica Feirman, *Legal Issues in the Reproductive Health Care of Adolescents*, 54 J. AM. MED. WOMEN'S ASS'N 109, 110 (Summer 1999) (noting that obtaining an adolescent's informed consent is not necessarily sufficient).

61. *Id.*; see also ALAN GUTTMACHER INST., MINORS AND THE RIGHT TO CONSENT TO HEALTH CARE 1-2 (2000) [hereinafter MINORS AND THE RIGHT] (arguing that minors have the capacity and right to make important decisions about health care).

62. See MINORS AND THE RIGHT, *supra* note 61, at 2 (noting the controversy of providing minors' access to the Title X family planning program). Title X provides government funds to clinics that provide confidential contraceptive services and reproductive services to women, regardless of age, marital status, income or health insurance status.

63. See *id.* (warning of the effect of the trend to return parental control over minor's reproductive health care decisions).

64. See *id.* (recognizing the U.S. Supreme Court rulings "extending the constitutional right to privacy to a minor's decision to obtain contraceptives or to terminate an unwanted pregnancy").

65. See *id.* With respect to HIV, three states limit this authorization to HIV testing only. *Id.*

66. See *id.* (observing that no state mandates parental consent for any of these procedures).

pregnancy is striking. Thirty-one states have laws in effect requiring parental involvement in a young woman's decision to have an abortion.⁶⁷ In contrast, more than half of the states requiring parental involvement for abortion allow minors to consent to prenatal care and delivery services without consulting a parent.⁶⁸ Thirty-four states and the District of Columbia permit a minor mother to place her child for adoption without her parents' permission or knowledge.⁶⁹ Although policy makers recognize that required parental involvement for certain health care decisions jeopardizes teens' health, they do not see the harm that results from parental involvement laws for abortion services.

B. Most Minors Voluntarily Inform Their Parents of Their Decision to Have An Abortion; Those Who Do Not, Have Compelling Reasons Not To Inform Their Parents

It is important to emphasize that health care providers recognizes that parents are ordinarily the people who are closest to the minor and most concerned for their welfare.⁷⁰ Many minors generally do benefit from the advice and support of their parents.⁷¹ The American Medical Association recommends that physicians strongly encourage minors to discuss their pregnancies and reproductive options with their parents.⁷² Physicians can also explain how parental involvement can be helpful as parents are generally very understanding and supportive.⁷³ However, health care providers ultimately recognize that it is the minors themselves who are in the best position to

67. *See id.* at 2 (noting that only two states and the District of Columbia support a minor's decision to secure an abortion on her own).

68. *See* MINORS AND THE RIGHT, *supra* note 61, at 5 (realizing the contradiction in states that recognize a minor's competence to make major decisions for his or her child, but require a minor to have parental consent to have an abortion).

69. *See id.* (noting that eleven states do not differentiate between minor parents and adult parents).

70. *See id.* at 4 (reporting that advocates of parental involvement laws like groups such as "Focus on the Family" and "The Family Research Counsel" maintain that minor's consent laws reflect "an increasing nonchalance about the sanctity of the family unit on the part of the government").

71. *See id.* (quoting "Focus on the Family" as stating that "the current prescription for preventing pregnancy and STDs among adolescents has failed miserably in solving the problem and that parental involvement and the transmitting of the parent's values are the most effective deterrents in preventing early sexual activity").

72. *See Mandatory Parental Consent, supra* note 26, at 83 (asserting that a physician should explain that a parent can provide valuable assistance to the pregnant teenage in assessing her pregnancy and her future).

73. *See id.* (noting that minors often review their pregnancy options with at least one parent).

evaluate who to inform of their intimate medical decisions.⁷⁴

The majority of teens seeking abortion services involve at least one parent, usually their mother, in their decisions.⁷⁵ In 1991, researchers studying minors in states without a parental involvement law found that 61% told one or both of their parents about their decision to have an abortion.⁷⁶ Of the 39% that did not involve a parent, 54% were seventeen and only 2% were younger than fifteen.⁷⁷ Many showed signs of autonomy such as holding a job (43%), living apart from their parents (15%), or already having a child (9%).⁷⁸ Among minors whose parents found out about the pregnancy without being told by their daughter, 58% reported one or more adverse results, with at least 6% appearing to have suffered harmful consequences such as experiencing violence in the home, being beaten, being forced to leave home, or having the health of their parents affected.⁷⁹ Ten percent stated that knowledge of the pregnancy caused problems between a parent and stepparent.⁸⁰ Adverse consequences were two to four times more common than when minors voluntarily told their parents.⁸¹

Victims of domestic violence are usually secretive, and minors are

74. *See id.* (remarking that several health care provider organizations recognize the importance of allowing adolescent patients the discretion of who to involve in their decision-making process).

75. *See* Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSP. 196, 196 (Sept./Oct. 1992) (noting that in a 1991 study, among minors whose parents found out about the abortion without being told by the minor, six percent reported physical violence, being forced to leave home, or damage to their parents' health).

76. *Id.* *See generally* JANE'S DUE PROCESS, *supra* note 13, at 3 (noting that a significant number of teenagers did involve a parent in the decision-making process).

77. *See* Henshaw & Kost, *supra* note 75, at 206 (finding similar reports in Texas which has a parental involvement law); *see also* JANE'S DUE PROCESS, *supra* note 13, at 4 (noting the state-wide network of attorneys assisting minors with judicial bypass, fifty-five percent of minors seeking bypass in the first six months of 2001 were seventeen years old). Seventeen-percent of those were within two months of their eighteenth birthdays. *Id.* Thirty percent were 16 years old. *Id.*

78. *See* Henshaw & Kost, *supra* note 75, at 206 (remarking that it was not their first abortion for 13% of minors who did not involve a parent in their decision); *see also* JANE'S DUE PROCESS, *supra* note 13, at 4 (reporting that for the first six months of 2001, 10% of minors seeking judicial bypasses in Texas were high school graduates; 48% were employed; 35% were working and attending school; and 10% were already mothers).

79. *See* Henshaw & Kost, *supra* note 75, at 207. Twenty-seven percent of minors seeking judicial bypasses in Texas report having experienced physical or emotional abuse by a parent or legal guardian. JANE'S DUE PROCESS, *supra* note 13, at 4. Twenty-one percent report having been expelled from the home or threatened with expulsion from the home. *Id.*

80. Henshaw & Kost, *supra* note 75, at 207.

81. *Id.*

especially reluctant to divulge the existence of abuse.⁸² “Additionally, in many instances the minor’s pregnancy precipitates the first episode of physical abuse she suffers.”⁸³ “Finally, minors may be psychologically abused to an extent that it is serious without the abuse being reportable under child abuse statutes.”⁸⁴ Furthermore, a parent’s adverse response to an abortion can also affect a minor’s recovery after an abortion.⁸⁵ In a study of post-abortion adjustment in teenagers, of the girls who had difficulty adjusting, 65% reported that the relationship with their parents prior to the abortion was poor.⁸⁶

While the majority of minors do inform a parent of their decisions, and health care providers encourage minors to involve a parent, the minors themselves are in the best position to understand the risks of involving a parent.⁸⁷ When minors do not wish to involve a parent, they often have compelling reasons.⁸⁸ For this reason it is especially important for states with parental involvement laws to have workable judicial bypass procedures.⁸⁹

While legislators may have the stated goal of improving family communication, the reality is that these laws cannot compel a better relationship between a minor and her parents.⁹⁰ Becky Bell’s family today testifies against parental involvement laws. They point out that although Becky did not fear physical abuse and only wanted to avoid disappointing them, the law did not improve family communication.

82. See *Mandatory Parental Consent*, *supra* note 26, at 84 (noting that minors are especially reluctant to report the existence of abuse in their home).

83. *Id.*; see also Henshaw & Kost, *supra* note 75, at 196 (revealing results from a 1991 study that showed that 61% of pregnant teenagers reported physical abuse and being forced to leave their homes after their parents discovered the pregnancy from a source other than themselves).

84. Henshaw & Kost, *supra* note 75, at 196.

85. See Mary S. Griffin-Carlson & Kathleen J. Mackin, *Parental Consent: Factors Influencing Adolescent Disclosure Regarding Abortion*, 28 *ADOLESCENCE* 1, 4 (Spring 1993) (concluding that financial and emotional dependence were correlated to a minor’s decision to confide in her parent’s about her pregnancy).

86. *Id.*

87. See Henshaw & Kost, *supra* note 75, at 196 (collecting data from a 1991 study that reported that minors’ most common reasons for not telling their parents about being pregnant were wanting to preserve their relationship with their parents and wanting to protect their parents from stress and conflict).

88. See *id.* at 196 (listing fear of physical abuse, being forced to leave the home, and damaging their parents’ health as reasons minors reported for not telling their parents about their pregnancy).

89. See *MINORS AND THE RIGHT*, *supra* note 61, at 6 (concluding that “in the best of all worlds, teens and parents would work in a partnership on decisions that could have a lifelong impact,” but that parents are not always their children’s best advocates and that access to confidential health care is a matter of life and death for many teens).

90. *Id.*

Instead, it destroyed their daughter.⁹¹

C. *The Balancing Tests Used in Judicial Bypass Hearings Are Not Good Measures of a Minor's Best Interests*

The role-play⁹² does an excellent job of showing the perversities of the mature minor and best interest tests. Under Columbia law, the judge has the discretion to grant Maggie's bypass request if she demonstrates that she is sufficiently mature or if it is in her best interest to have an abortion. In this fact pattern, if the judge were to find that Maggie is not mature enough to make the decision to have an abortion, and that it was not in her best interests to have an abortion, then how would she be mature enough to have a child and how would it be in her best interest to become a parent? Teenage mothers are more likely to drop out of school, rely on public assistance and develop health problems.⁹³ Children of teenage mothers are also more likely to experience low birth weight and other health problems.⁹⁴ It is interesting to note that in some states, such as Texas, teenage mothers are not emancipated minors and would still need the involvement of a parent to have an abortion, even though her parents may not be involved in the care for her child.⁹⁵ How can a teenage mother not be mature enough to decide whether or not it is in her best interests to terminate her pregnancy, but be allowed to make critical decisions regarding the health of a child?

The incorporation of guardian *ad litem*s into the judicial bypass process can further complicate matters for the minor. Minors are often afforded guardian *ad litem*s in legal proceedings, such as divorce.⁹⁶ Although minors seeking a judicial bypass may have their

91. *Hearing*, *supra* note 32, at 24.

92. *See Casey Skit*, *supra* note 2.

93. *See* MARCH OF DIMES, *Teenage Pregnancy Fact Sheet* (Oct. 29, 2001) (citing a study that revealed that sixty-four percent of teen mothers received their high school diploma compared to ninety-four percent of female teens who did not give birth), available at http://www.modimes.org/healthlibrary2/factsheets/Teenage_Pregnancy_Fact_Sheet.htm (last visited Mar. 20, 2002); AMERICAN COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, *ADOLESCENT PREGNANCY FACTS* 8, 10 (1998).

94. *See* AMERICAN COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, *supra* note 92, at 10 (noting effects such as undeveloped organs, lung problems, bleeding in the brain, and vision loss).

95. *See* Sylvia Moreno, *Abortion Notification Bill Spurs Debate on Teens Rights*, DALLAS MORN. NEWS, Mar. 17, 1997, at 5A (noting that Texas is the thirty-ninth state in the country to require young women to notify or obtain consent of one or both parents before an abortion).

96. *See id.* (defining guardian *ad litem* as an agent of the court appointed to represent the interest of a child).

own attorney, sometimes judges will appoint a guardian *ad litem* who is not the attorney as well. Maggie's attorney mentions the possibility of having a guardian *ad litem*, but one is not appointed. Guardian *ad litem*s are used frequently in judicial bypass procedures throughout the country.⁹⁷ In Alabama, one judge appointed a fetus a guardian *ad litem* to ensure that the fetus had "an opportunity to have a voice, even a vicarious one, in the decision making."⁹⁸ In this instance, the fetus' guardian *ad litem* gave the "client" a name — Baby Ashley.⁹⁹ Over numerous objections by the young woman's counsel, the guardian *ad litem* made statements such as "You say that you are aware that God instructed you not to kill your own baby, but you want to do it anyway?"¹⁰⁰ "And are you saying here today that notwithstanding everything that you want to interfere with God's plan for your baby?"¹⁰¹ The judge made a "regretful" finding that the minor was well informed and granted the bypass.¹⁰² The guardian *ad litem* appealed on the fetus' behalf, but was denied.¹⁰³ Antiabortion activists were so pleased with the appointment of a guardian *ad litem* for the fetus that they proposed a bill to require a guardian *ad litem* for every fetus of a minor seeking an abortion, but it has not passed.¹⁰⁴ Reports of ideologically-motivated guardian *ad litem*s have also surfaced in Texas.¹⁰⁵ In the Alabama case, the minor stated that the bypass experience was a horrible ordeal.¹⁰⁶ Appointment of guardian *ad litem*s with an antiabortion agenda is overwhelmingly unfair to the minors' whose best interests are supposedly at stake.¹⁰⁷

97. See Moreno, *supra* note 95, at 5A (noting that in Texas a minor could request a judicial bypass, which would allow a court to determine whether she was mature and sufficiently well informed to proceed on her own or whether notifying her parent was not in her best interests).

98. Amy Bach, *No Choice for Teens*, 269 THE NATION 7, 7 (Oct. 11, 1999) (asserting that "antiabortion judges have been highly creative when faced with pregnant minors who want their consent for abortions: using harassing interrogation, tactics, appointing anti-choice attorneys to represent the young women").

99. See *id.* (exemplifying an instance in which the fetus is given a voice through the assumption of a name).

100. *Id.*

101. *Id.*

102. See *id.* (noting that the young woman was a high school honors student who had a scholarship to college, was opposed to abortion and that she had sought counseling from a pro-life organization).

103. See *id.* (explaining that only the young women could appeal).

104. See Bach, *supra* note 97, at 7 (stating that the purpose of the guardian for the fetus is so that the court may make an informed decision and do substantial justice).

105. See *id.* (stating that the fetuses' state appointed guardian engaged the young women in religious based questioning).

106. See *id.* (noting the efforts to reintroduce the Bill in the next session).

107. See *id.* (stating that judicial higher ups stopped assigning parental consent

Many bypass requests are denied. Recently, an Alabama judge decided that a pregnant teenager answered questions too perfunctorily and with so little emotion that he denied her request for a judicial bypass.¹⁰⁸ The seventeen-year-old minor testified that she had spoken to a doctor and a counselor, and that she was not ready for a child.¹⁰⁹ The judge stated that in his opinion, the minor's testimony was rehearsed and that she did not show enough emotion concerning the request she was making, even though the judge did not even try to question the minor herself.¹¹⁰ That case was appealed to the Alabama Supreme Court and the lower court judge's decision stood.¹¹¹ Such an outcome is a gross miscarriage of justice.

D. Maggie Demonstrates that She Has Met Columbia's Statutory Requirements in her Bypass Hearing

Throughout the role-play, Maggie demonstrates that she is mature enough to make the decision to have an abortion and that she has very good reasons for not involving her mother.¹¹² Maggie has a part-time job to support her family and a mother who is chronically ill.¹¹³ Maggie fears involving her mother because she does not want to complicate her heart condition.¹¹⁴ Asking her father to give consent is not an option; he is not in contact with Maggie, and, in any event, lives in another state.¹¹⁵ Maggie has visited a clinic and has received counseling about the abortion procedure, its risks and alternatives.¹¹⁶ Her only experience with children is through babysitting.¹¹⁷ Maggie is sixteen years old and has been savvy enough

cases to Judge Anderson because of his anti-abortion sentiment).

108. Bill Poovey, *Divided Court Upholds Denial of Abortion for Unemotional Teen*, ASSOC. PRESS, Aug. 17, 2001, LEXIS (Academic Universe, State and Regional).

109. *See id.* (noting that she said the father, who is preparing to attend college, agreed that they were not ready for a child, financially or otherwise).

110. *See id.* (stating that attorneys for the teen said the judge's findings lacked support in the record and lacked any connection to the maturity level of knowledge or best interest of the minor).

111. *See id.* (noting that the conclusions of the lower court were based on personally viewed witnesses and cannot be questioned on appeal on a printed record).

112. *See Casey Skit*, *supra* note 2, at 270.

113. JANE'S DUE PROCESS, *supra* note 13, at 3.

114. *See Casey Skit*, *supra* note 2, at 270, 274.

115. *Id.* at 270. In Texas, 31% of minors seeking judicial bypass do not live with a parent or legal guardian and 30% percent report being unable to contact a parent (missing, deceased or incarcerated). JANE'S DUE PROCESS, *supra* note 13, at 3. Moreover, 13% percent report being able to contact either parent. *Id.*

116. *See Casey Skit*, *supra* note 2, at 272-73.

117. *See id.* at 274.

to obtain an attorney and make time to visit the court to meet with a judge.¹¹⁸ The purpose of Maggie's hearing is to determine whether she is mature enough to make the decision to terminate her pregnancy on her own, and if she is not mature enough, whether having an abortion would be in her best interest.¹¹⁹

From the start of the hearing, it is clear that the judge is against Maggie's decision to have an abortion and is trying to dissuade her.¹²⁰ He gives her misleading information about the risks of having an abortion without mentioning the risks of carrying a pregnancy to term.¹²¹ For example, he mentions the risks of sterility and infertility, internal bleeding, stroke, and even death without giving any statistics. While complications from both legal abortion and childbirth are rare, women are more likely to suffer complications from childbirth rather than abortion.¹²² The judge also brings up adoption as a potential solution, and urges Maggie to consider her decision from the fetus' perspective.

The role-play does not reveal what the judge ultimately decides, but Maggie does meet Columbia's statutory requirements. She demonstrates that she is quite mature and understands the decision she is making and that it is not in her or her family's best interests that she has a child. If the judge were to find against her, it appears that Maggie and her lawyer would appeal.

CONCLUSION

The judicial bypass procedure cannot cure the problems parental involvement laws cause for a minor who feels she cannot involve a parent in her decision to terminate her pregnancy.¹²³ Throughout the United States, access to abortion services is in peril. The number of abortion providers has declined steadily, causing many women to travel significant distances in order to find a provider. Many states impose waiting periods for abortion. Many insurance plans and public assistance programs pay for abortion services only in limited circumstances. All of these obstacles to safe abortion care disproportionately affect young women, who are often without

118. See *id.* at 269.

119. JANE'S DUE PROCESS, *supra* note 13, at 3.

120. See *Casey Skit*, *supra* note 2, at 269-80.

121. See *id.* at 272-73.

122. See ALAN GUTTMACHER INSTITUTE, *supra* note 10.

123. See *Mandatory Parental Consent*, *supra* note 75, at 84 (asserting that beneficial counsel for a minor results from her ability to search out guidance from individuals she feels most comfortable discussing her pregnancy options).

resources of their own. Parental involvement laws only exacerbate an already difficult situation. These laws harm minors' health, and the judicial bypass remedy mandated by the United States Supreme Court is not accessible in many parts of the country. Maggie's situation in the role-play created by American University's Washington College of Law students illustrates this in a compelling way. Innovative attorneys have helped make this process easier for young women, but justice requires that minors have the right to access confidential and safe medical care, including abortion care, free from government obstacles.