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# Judging Girls: Decision Making in Parental Consent to Abortion Cases


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# JUDGING GIRLS: DECISION MAKING IN PARENTAL CONSENT TO ABORTION CASES<sup>†</sup>

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I am mature enough to know that I am too immature to have a baby.

Minor's statement to her attorney prior to her judicial bypass hearing in Michigan.  
(Winter 1992)

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Judges make determinations on a daily basis that profoundly affect people's lives. On March 28, 1991, the Michigan legislature enacted a statute entitled The Parental Rights Restoration Act (hereinafter "the Michigan Act" or "the Act").<sup>1</sup> This statute delegated to probate court judges the extraordinary task of deciding whether a minor girl may have an abortion without the consent of a parent. Nothing in law school and little in an average judge's experience provide a meaningful framework for making such a decision. Although many commentators, including the authors, argue that decisions about abortion should be left to the woman regardless of her age,<sup>2</sup> or to the judgment of her doctor,<sup>3</sup> or to counselors,<sup>4</sup> this decision now rests with probate judges.

As clinical law professors and, thus, practicing attorneys, we have represented several minor girls in their attempts to receive waivers of parental consent to abortion under the Michigan Act. We were also active in developing procedural rules to implement the statute and are involved in training attorneys to represent girls in judicial waiver hearings.<sup>5</sup> Therefore, we have personally witnessed the implementation of the Act thus far in Michigan.

We intend to provide a framework for judicial decision making under the Act by drawing on our personal experiences, reviewing treatment of parental consent cases by other courts, and considering what the discipline of psychology can tell us about adolescents. Ultimately, we offer certain presumptions that Michigan judges should apply, and we delineate those matters that are irrelevant to the inquiry into a minor girl's maturity and best interests.

Each decision to grant or to deny a girl's petition for waiver of parental consent is determinative of the teenager's future. Recent empir-

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1. MICH. COMP. LAWS ANN. § 722.901-.908 (West 1993 & Supp. 1995). See Appendix A for the full text of the statute.
  2. *Hodgson v. Minnesota*, 497 U.S. 417, 473 (1990) (Marshall, J., dissenting).
  3. See, e.g., Katherine M. Waters, Note, *Judicial Consent to Abort: Assessing a Minor's Maturity*, 54 GEO. WASH. L. REV. 90 (1985). See also MD. CODE ANN., HEALTH-GEN. § 20-103 (1990); W. VA. CODE § 16-2F-3 (1995).
  4. *H.L. v. Matheson*, 450 U.S. 398, 430 n.8 (1981) (Marshall, J., dissenting).
  5. We helped develop attorney training materials. In addition, we have arranged to have law students represent minor girls in parental consent to abortion hearings, under Michigan's student practice rule (MICH. CT. R. 8.120). A simulated parental consent hearing has been included in the Women and the Law Clinic curriculum at the University of Michigan Law School. Students from other clinical programs have requested the opportunity to handle these cases, and we have involved those students when possible.

ical research confirms that the two best indicators of whether a woman (and thus her children) will live in poverty are: (1) whether she had an out-of-wedlock birth as a teen; and (2) whether she failed to graduate from high school.<sup>6</sup> Consequently, interfering with a teenager's abortion decision may propel a teenage girl towards a life of poverty. Such profound decisions should not be made without deep respect for the minor's constitutional rights and for the unique way in which adolescent girls must prove themselves deserving of constitutional protection.

#### I. THE "MATURITY" AND "BEST INTERESTS" TEST: ORIGINS AND INTERPRETATION

*Roe v. Wade*<sup>7</sup> recognized a woman's right to privacy in making the decision whether to have an abortion. After this landmark decision, the Supreme Court reviewed, in eight different cases, statutes specifically restricting a minor's right to abortion.<sup>8</sup> In *Danforth*, the Court quickly rejected the possibility of a third party, spouse, or parent having absolute veto power over a woman's abortion decision.<sup>9</sup>

The Court in *Bellotti II*, reviewing a Massachusetts parental consent statute, listed requirements for an alternative procedure.<sup>10</sup> The Court ruled that the minor must have an opportunity to petition a court for a waiver of the parental consent requirement.<sup>11</sup> If she proves that she is mature and well informed, the court must grant the waiver.<sup>12</sup> In the alternative, the court must grant a waiver of parental consent if the waiver would be in the best interests of the minor.<sup>13</sup> The

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6. Greg J. Duncan & Saul D. Hoffman, Teenage Underclass Behavior and Subsequent Poverty: Have the Rules Changed? (Feb. 2, 1990) (on file with authors).

7. 410 U.S. 113 (1973).

8. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992); Hodgson v. Minnesota, 497 U.S. 417 (1990); Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983); City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983); H.L. v. Matheson, 450 U.S. 398 (1981); Bellotti v. Baird, 443 U.S. 622 (1979) (Bellotti II); Bellotti v. Baird, 428 U.S. 132 (1976) (Bellotti I); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976).

9. *Danforth*, 428 U.S. at 69, 74.

10. *Bellotti II*, 443 U.S. at 643-44.

11. *Bellotti II*, 443 U.S. at 643-44.

12. *Bellotti II*, 443 U.S. at 643-44.

13. *Bellotti II*, 443 U.S. at 643-44.

proceeding must also preserve the anonymity of the minor and must be timely.<sup>14</sup>

While the Court recognized that minors have constitutional rights, it acknowledged that states may restrict the rights of minors in ways that would be unconstitutional if applied to adults.<sup>15</sup> A pregnant minor who is mature enough to make the decision on her own is deserving of the same constitutional protection available to an adult woman. The Supreme Court allocated to trial judges the responsibility of differentiating between minors in need of parental intervention, those mature enough to bypass parental involvement, and those for whom parental involvement could be detrimental.<sup>16</sup> In the last case, the court could find the waiver of parental consent to be in the minor girl's best interests, notwithstanding her lack of maturity.<sup>17</sup>

Although the Supreme Court made clear that the judicial bypass procedure requires an opportunity to prove that the minor "is mature enough" or that a waiver is in her "best interests,"<sup>18</sup> the Court did not define "maturity" or "best interests." In fact, other Court opinions note the lack of guidance available to trial courts hearing petitions for waiver of parental consent.<sup>19</sup>

The most clearly stated criticism of the failure to define "maturity" and "best interests" appeared in Justice Marshall's separate opinion in *Hodgson v. Minnesota*:

The constitutional defects in any provision allowing someone to veto a woman's abortion decision are exacerbated by the vagueness of the standards contained in this statute. The statute gives no guidance on how a judge is to determine whether a minor is sufficiently "mature" and "capable" to make the decision on her own. . . . The statute similarly is silent as to how a judge is to determine whether an abortion without parental notification would serve an immature minor's "best interests." . . . Is the judge expected to know more about the woman's medical needs or psychological makeup than her doctor? Should he consider

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14. *Bellotti II*, 443 U.S. at 643-44.

15. *Bellotti II*, 443 U.S. at 635-39.

16. *Bellotti II*, 443 U.S. at 647-48.

17. *Bellotti II*, 443 U.S. at 647-48.

18. *Bellotti II*, 443 U.S. at 643-44.

19. *See, e.g., Hodgson v. Minnesota*, 497 U.S. 417, 474 (1990) (Marshall, J., concurring).

the woman's financial and emotional status to determine the quality of life the woman and her future child would enjoy in this world? Neither the record nor the Court answers such questions.<sup>20</sup>

Like the Minnesota Act, the Michigan Act provides no definition for its key terms: "sufficiently mature" and "well-enough informed" and "in the best interests of the minor."<sup>21</sup>

In his opinion in *Bellotti II*, Justice Powell noted the difficulties associated with defining maturity:

Not only is it difficult to define, let alone determine, maturity, but also the fact that a minor may be very much an adult in some respects does not mean that his or her need and opportunity for growth under parental guidance and discipline have ended. As discussed in the text, however, the peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors.<sup>22</sup>

Justice Powell is referring to the fact that a state may arbitrarily set an age that defines maturity for various rights and privileges, such as marriage, where the risk of requiring a mature minor to wait until she reaches the age of majority is relatively low. On the other hand, the urgency of the abortion decision requires an immediate determination of the minor's maturity: she cannot simply wait until she is eighteen and have the abortion at that time.<sup>23</sup> This urgency may justify the need to determine maturity, but the Court gives no guidance as to how the determination should be made.

In the first Supreme Court case reviewing a parental consent provision, a slightly more specific definition of maturity was given.<sup>24</sup> The Court quoted the dissenting district court judge, who stated that a minor should be able to make her own decision "provided she is sufficiently mature to understand the procedure and to make an intelligent

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20. *Hodgson*, 497 U.S. at 474 (Marshall, J., concurring).

21. MICH. COMP. LAWS ANN. § 722.901--908 (West 1993 & Supp. 1995).

22. *Bellotti v. Baird*, 443 U.S. 622, 643-44 n.23 (1979) (*Bellotti II*).

23. *Bellotti II*, 443 U.S. at 642.

24. See *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

assessment of her circumstances."<sup>25</sup> As we shall see below, this definition of maturity is consistent with our suggested judicial framework. This language was not, however, specifically adopted by the Supreme Court, leaving state judges with only the terms "maturity" and "best interests" to guide their decision making.

The Supreme Court, in fact, has explicitly rejected possible limitations on the definition of maturity. For example, in *H.L. v. Matheson*, the Court flatly rejected the concept that a minor mature enough to become pregnant was mature enough to decide to have an abortion, stating "[t]here is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion."<sup>26</sup> Thus, a teen must prove more than her biological maturity in order to meet the maturity standard.

In another parental consent case, the Court held that the City of Akron could "not make a blanket determination that *all* minors under the age of 15 are too immature to make this decision or that an abortion never may be in the minor's best interests without parental approval."<sup>27</sup> Thus, at least one attempt to narrow the "maturity" and "best interests" definition by requiring a minimum age limit for maturity failed.

In sum, the Supreme Court has left trial courts to define "maturity" and "best interests." Although some Justices have noted the difficulty of defining "maturity" and "best interests," the Court has failed to provide any rationale for leaving such a significant decision to the discretion of state trial judges. The ramifications of this broad discretion can have a profound effect on teenage girls.

25. *Danforth*, 428 U.S. at 74 (quoting *Planned Parenthood of Central Mo. v. Danforth*, 392 F. Supp. 1362, 1376 (E.D. Mo. 1975)).

26. *H.L. v. Matheson*, 450 U.S. 398, 408 (1981). The Court cites no authority for this conclusion. Indeed, a minor's physical and sexual development may indicate her maturity:

Psychoanalysis has emphasized *genitality* as one of the developmental conditions for full maturity. Genitality consists in the capacity to develop orgasmic potency which is more than the discharge of sex products in the sense of Kinsey's 'outlets.' It combines the ripening of intimate sexual mutuality with full genital sensitivity and with a capacity for discharge of tension from the whole body.

ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* 136-37 (W. W. Norton 1968).

27. *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 440 (1983) (emphasis in original).

## II. THE NATURE OF THE DECISION

In the absence of guidelines, the nature of the decision facing Michigan probate judges under the Act is clearly discretionary. There are no rules or definitions limiting a court's interpretation of "maturity" and "best interests," the central terms of the Act. In his article on the discretion allotted trial courts in child custody decisions, Carl E. Schneider defines discretionary decisions and rule-based decisions:

[T]he ideal type of a "rule" is an authoritative, mandatory, binding, specific, and precise direction to a judge that instructs him how to decide a case or resolve a legal issue. . . . [D]iscretion describes those "cases as to which a judge, who has consulted all relevant legal materials, is left free by the law to decide one way or another."<sup>28</sup>

The Michigan legislature could have provided rules by which the probate courts should determine a minor's "maturity" and "best interests" under the Act. For example, in Michigan, the legislature has set out twelve different factors that must be considered by trial courts in determining the best interests of children in custody decisions.<sup>29</sup> However, no similar rules or guidelines have been provided for parental consent cases.

It is helpful to speculate briefly as to the reason for the discretion afforded judges in this context. Professor Schneider discusses several rationales for discretionary law.<sup>30</sup> The discretion permitted in parental consent cases can best, but not exactly, be described as "rule-failure" discretion:

[Rule failure discretion] is created where it is believed that cases will arise in circumstances so varied, so complex, and so hard to anticipate that no one could write rules that would accurately guide decisionmakers to correct results and only to correct results in a sufficiently large number of cases.<sup>31</sup>

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28. Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2226 (1991) (footnotes omitted).

29. MICH. COMP. LAWS ANN. § 722.23 (West 1993 & Supp. 1995).

30. Schneider, *supra* note 28, at 2242-47 (identifies the various sources of discretion).

31. Schneider, *supra* note 28, at 2243.



The judicial bypass procedure required by the Act, after all, was not the creation of the Michigan legislature, but of the Supreme Court in *Bellotti II*. There is no reason to expect Michigan legislators to define terms for which the Supreme Court provided no guidance. When terms are broad and could have several different meanings, it is unclear what would constitute a "correct result," making it nearly impossible to form rules that would lead to the "correct results."

On the other hand, the discretion permitted in parental consent cases does not fit the description of "rule-failure" discretion completely. While it is true that the Michigan legislature could not easily write rules to guide judges in applying ambiguous terms, it is not clear that the circumstances arising in these cases will be "so varied, so complex, and so hard to anticipate that no one could write rules."<sup>32</sup> Generally, it is not difficult to anticipate the fact patterns that will arise under the Act. In one scenario, the minor girl will most likely be sixteen or seventeen years old. She will not want to tell her parents about the abortion because she wishes to avoid their anticipated anger, disappointment, or humiliation.<sup>33</sup> The other likely scenario will be a very young girl, perhaps eleven or twelve years old, who will not be able to get parental consent due to the abuse or neglect of her parents.<sup>34</sup> In the former case, the court is likely to find "maturity"; in the latter case the court is likely to find the judicial waiver in the minor's "best interests." Cases will occasionally fall between these two: older teens who do not have many outward signs of "maturity" or young teens with nonabusive families. In sum, the problem with writing rules is not the complexity or unpredictability of the cases, but rather the inability to define what the Supreme Court meant by "maturity" and "best interests."

Perhaps "maturity" and "best interests" fall within the realm of terms that are hard to define but "we know it when we see it."<sup>35</sup> If a teen appears before a probate judge and tells the judge about her life,

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32. Schneider, *supra* note 28, at 2243.

33. See Patricia Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 FAM. PLAN. PERSP. 259, 262, 264 (1983).

34. Professor Scarnecchia represented an 11-year-old girl, pregnant as a result of rape, whose mother had left her in the care of a known rapist. Although the mother vacillated as to whether she would consent to the abortion, the child's grandmother supported the abortion decision. The father was unavailable to offer consent. The minor's treating physician said that the abortion was medically necessary due to her young age.

35. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (noting that although hard-core pornography is hard to define, "I know it when I see it.").

the judge presumably will be able to recognize her relative "maturity" and her "best interests." In fact, most adults might feel that they could make this judgment about teenagers without further guidelines. There is, however, an inherent risk in leaving the judicial waiver decision to the discretion of probate judges. Regarding a highly emotional, political, and moral decision like abortion, each judge is likely to have established personal beliefs. Broad discretion under the Act opens the door to the conscious or unconscious expression of those personal beliefs by the judge.

Indeed, Justices Stevens and Marshall warned of the broad discretion that would fall to trial courts under the best interests standard and the potential problems with that discretion. Justice Stevens wrote:

[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—particularly when contrary to her own informed and reasonable decision—is fundamentally at odds with privacy interests underlying the constitutional protection afforded to her decision.<sup>36</sup>

After citing the above quotation of Justice Stevens, Justice Marshall wrote in the *Hodgson* case: "It is difficult to conceive of any reason, aside from a judge's personal opposition to abortion, that would justify a finding that an immature woman's best interests would be served by forcing her to endure pregnancy and childbirth against her will."<sup>37</sup>

In New Hampshire, an attempt to pass a parental consent bill failed, at least in part, due to concerns about discretion expressed by state court judges who agreed that trial courts were not equipped to make such decisions with no guidelines from the legislature. Justice Souter, then a New Hampshire trial judge, wrote to the legislature on behalf of all New Hampshire Superior Court judges to criticize the proposed legislation that contained language similar to Michigan's Act:

The members of the court find . . . fundamental problems inherent in this provision. . . . [I]t would express a decision by society, speaking through the Legislature, to leave it to an

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36. *Bellotti v. Baird*, 443 U.S. 622, 655–56 (1979) (*Bellotti II*) (Stevens, J., concurring).

37. *Hodgson v. Minnesota*, 497 U.S. 417, 475 (1990) (Marshall, J., concurring in part and dissenting in part).

individual justice of this court to make fundamental moral decisions about the interests of other people without any standards to guide the individual judge. Judges are professionally qualified to apply rules and stated norms, but the provision in question would enact no rule to be applied and would express no norm. In the place of a rule or a norm there would be left only the individual judge's principles and predilections. As carefully considered as these might be, they would still be those of only one individual, not those of society.<sup>38</sup>

Justice Souter cited two specific reasons why this lack of guidance from the legislature was particularly troublesome. First, a constitutional right was at stake:

Much criticism of the role of the judiciary in this country has characterized judicial activity in the application of constitutional standards as no more than imposition of individual judges' views in the guise of applying constitutional terms of great generality. The provision that I have quoted from the present bill would force the Superior Court to engage in just such acts of unfettered personal choice.<sup>39</sup>

Although it may be appropriate to give courts broad discretion in deciding property divisions, child custody, or other family matters where fundamental constitutional rights are not at stake, decisions concerning the ability or inability to exercise constitutional rights should be carefully limited to avoid the dangers of "unfettered personal choice" cited by Justice Souter.<sup>40</sup>

The second danger noted by Justice Souter is the particularly moral nature of the decision that the minor girl must make. He recognized the risk that judges will simply substitute their own moral choice for that of the teenager:

The court's second concern is with the necessarily moral character of such choice and the resulting disparity of responses to

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38. John Milne, *Souter Note Helped Sink '81 N.H. Bill on Abortion; Letter Seen Offering No Clue to Personal Views*, BOSTON GLOBE, July 26, 1990, at 1.

39. Milne, *supra* note 38, at 1.

40. We argue below that this justifies a presumption in favor of granting parental consent waivers; see *infra* part V.D.

requests that judicial discretion be exercised. As you would expect, there are some judges who believe abortion under the circumstances contemplated by the bill is morally wrong, who could not in conscience issue an order requiring an abortion to be performed. There are others who believe what may be thought to be in the "best interests" of the pregnant minor is itself just as necessarily a moral as a social question, upon which a judge may not morally speak for another human being, whatever may be the judge's own personal opinion about the morality of abortion. Judges in each category would be obligated to indicate that they could not exercise their power in favor of authorizing abortions to be performed on immature pregnant minors.<sup>41</sup>

The moral nature of the abortion decision, therefore, further sets it apart from other discretionary decisions. Justice Souter wrote that the inability or unwillingness of some judges to grant or deny petitions on moral grounds would lead to judges disqualifying themselves from hearing cases and ultimately lead to forum shopping by the minor girls.<sup>42</sup> The Justice's theory, however, was never tested in New Hampshire, as the legislation failed.

Judges did choose to disqualify themselves from hearing parental consent cases in Minnesota and Massachusetts under similar legislation. In Minnesota, as of 1983, most of the judicial bypass petitions were filed in Minneapolis, St. Paul, or Duluth, because very few judges outside of these major cities would hear the cases.<sup>43</sup> Judge Allen Oleisky, who heard most petitions filed in Minneapolis, believed "that while some of the rural judges object on moral grounds to hearing these petitions, others simply consider it to be politically inexpedient for them to be involved."<sup>44</sup> In Massachusetts, in 1983, of the sixty-two judges who could hear judicial bypass petitions, eight refused to hear any petitions (citing moral problems), and two more refused to hear petitions filed by minors more than twelve weeks pregnant.<sup>45</sup> Other

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41. Milne, *supra* note 38, at 1.

42. Milne, *supra* note 38, at 1.

43. Donovan, *supra* note 33, at 259.

44. Donovan, *supra* note 33, at 264 ("He points out that Minnesota judges are elected to six-year terms, and that outside the Minneapolis area, Minnesota is a conservative state.").

45. Donovan, *supra* note 33, at 265.

judges were "so rude or difficult" that attorneys avoided bringing petitions before them, leaving approximately forty judges in the state to hear the petitions.<sup>46</sup> In Boston, only two judges out of fifteen were hearing petitions.<sup>47</sup> Similarly, although no judge in Providence, Rhode Island had officially disqualified him or herself, one judge hears most of the petitions because "her colleagues have reservations about minors' not consulting with their parents."<sup>48</sup>

Questioning why his colleagues in Minnesota refused to do their duty to implement the law, one judge asked why no one had petitioned the Supreme Court of Minnesota to enforce the judges' obligation to implement the statute.<sup>49</sup> This question brings us back to Justice Souter's mention of the particularly moral nature of the abortion issue. If we, as a society, are torn apart over the abortion issue, it is not surprising that judges may choose to opt out of making decisions that permit or deny an abortion. Ironically, we allow judges to make a choice about the morality of abortion, while restricting the teenage girl's ability to make a similar choice.

In Michigan, as well, some judges have resisted the granting of parental consent petitions.<sup>50</sup> Others have made their views so obvious that attorneys might not file such a petition before those judges.<sup>51</sup> The Michigan Act is so new that more judges may decline to participate in the process as time passes.

Appearing before judges who hear parental consent cases subjects minor girls to the individual beliefs of those judges. This level of judicial discretion poses threats to the petitioning minor even greater than might be expected. For example:

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46. Donovan, *supra* note 33, at 265.

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

48. Donovan, *supra* note 33, at 265.

49. Donovan, *supra* note 33, at 264.

50. Jaquelynn Boyle, *Judge Says He Resents Abortion Waiver Law*, DET. FREE PRESS, April 26, 1991, at 1A, 12A.

51. Boyle, *supra* note 50, at 1A. See also Mark Fritz, *Decision Due Friday Whether Girl, 11, Will Have Abortion*, KALAMAZOO GAZETTE, October 21, 1981, at A1; Nickie McWhirter, *Judge Waffled and Ducked as the Rights Were Wronged*, DET. FREE PRESS, October 26, 1981, at 1C (identifying a judge who refused to make a timely order to permit 11-year-old rape victim to obtain an abortion prior to the enactment of the Act).

1. Judges may oppose all abortions on moral or religious grounds, but fail to disqualify themselves from the process.<sup>52</sup>
2. Judges may be improperly influenced in their decisions by the race, ethnicity, or social class of the minor.<sup>53</sup>
3. Judges may be unable to understand the position of the teenage girl because of gender or age differences between the judge and teen.
4. Judges may view themselves in the role of substitute parents, as opposed to jurists.

None of this indicates how a judge would decide a particular teenage girl's case. It does indicate, however, that she may be telling her story to a judge who might have some very particular ideas about what a girl in her position ought to do.

In one study, attorneys and judges separately reviewed teen girls' maturity. Judges found that only nine out of the 477 girls were immature.<sup>54</sup> Attorneys evaluating the same pool of teens felt eleven were immature.<sup>55</sup> Remarkably, though, there was only one overlap; except in one instance, no two evaluators concluded that the same girl was immature.<sup>56</sup> This illustrates how subjective the evaluation of maturity can be.

Is this an unseemly discussion? After all, we want to believe that judges will rise above differences between themselves and the litigants

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52. For example, although not entirely predictive of a judge's position on abortion, the strong anti-abortion position adopted by the Catholic Church suggests that at least for Catholic judges a difficult moral conflict may exist when faced with a parental consent waiver petition.

53. For example, poverty may affect how a teen displays her or his maturity. In a study investigating the moral reasoning of adolescents from low-income neighborhoods in Boston, researchers discovered that, at first glance, the statements of boys interviewed could be interpreted as representing low developmental levels of moral maturity. On closer analysis, their statements in fact "revealed a sense of morality that could be misrepresented or missed entirely" by traditional measures of moral development. Betty Bardige et al., *Moral Concerns and Considerations of Urban Youth*, in *MAPPING THE MORAL DOMAIN* 159, 165 (Carol Gilligan et al. eds., 1988).

Along with other findings of difference in how lower-income urban adolescents described moral issues, this study suggests that teenage girls from low-income backgrounds who are requesting a waiver of parental consent could display an inaccurately lower level of moral maturity to the court or other evaluator.

54. Susanne Yates & Anita J. Pliner, *Judging Maturity in the Courts: The Massachusetts Consent Statute*, 78 *AM. J. OF PUB. HEALTH* 646, 647 (1988) According to Yates and Pliner, eight of those nine minors had their petitions granted on a best interests analysis. The ninth went out of state to obtain an abortion.

55. Yates & Pliner, *supra* note 54, at 647.

56. Yates & Pliner, *supra* note 54, at 647.

before them in order to make fair and equitable decisions.<sup>57</sup> We have just carefully reviewed, however, the complete lack of direction given to judges making this decision. In discussing child custody decisions, Professor Schneider points to fears that judicial discretion will result in decisions that reflect the personal preferences of judges and notes: "These fears reflect a classic and real problem with discretion—that it permits the substitution of private for public rules, that it allows judges to consult their own preferences and even prejudices rather than applying those social preferences that have succeeded in acquiring the force of law."<sup>58</sup> These fears are especially well-founded when dealing with abortion decisions and thus justify concern over the nature of individual judges who will be hearing parental consent cases.

In the quotation above, Professor Schneider suggests that, rather than applying personal beliefs, judges should be "applying those social preferences that have succeeded in acquiring the force of law."<sup>59</sup> The legislative history and media coverage of the Act reveal that the social preference expressed in passage of the Act in large part reflected a desire to decrease the number of abortions performed in Michigan by reducing the number of teen pregnancies and thereby reducing the number of teens who choose abortion.<sup>60</sup> While some legislators may have truly desired to bring parents into the decision-making process, others were influenced by a desire to make abortions illegal. Thus, the "social preferences" reflected in the Act are, at best, mixed. Certainly, the need to determine "maturity" and "best interests" was not incorporated into the Act because of any social preference, but because the Supreme Court mandated such a procedure to protect the constitutional rights of the petitioning minors. There is no readily identifiable social preference

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57. The validity of this assumption has been challenged in Michigan, however, by the FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE COURTS (Dec. 1989) and the FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE COURTS (Dec. 1989), which demonstrated that judges as well as attorneys often take improper considerations such as race, gender, or ethnicity into account in their treatment of litigants, clients, and attorneys.

58. Schneider, *supra* note 28, at 2265.

59. Schneider, *supra* note 28, at 2265.

60. See JOURNAL OF THE SENATE OF THE STATE OF MICHIGAN at 2053–54 (Sept. 12, 1990) (statement of Sen. Welborn); JOURNAL OF THE HOUSE OF THE STATE OF MICHIGAN at 2132 (Sept. 12, 1990) (statement of Rep. Gire). See also Barbara Listing, *Do Minors Need Parental Consent to Get Abortions? Pro*, DET. NEWS, Dec. 3, 1989, at 23A.

to guide the court on the maturity or best interests issues, again leaving probate judges with little direction.

Relatively few state appellate decisions have grappled with these issues concerning parental consent or notice statutes. Those decisions begin to create limitations on trial courts' definitions of maturity and best interests but still fail to adequately define the terms.

### III. EXPERIENCE IN OTHER STATES

As of September 1, 1995, thirty-three states besides Michigan had parental consent or notification laws in effect.<sup>61</sup> Of those thirty-three, only two had no judicial bypass procedure.<sup>62</sup> Most of those state statutes, like Michigan's, follow the *Bellotti II* framework; they permit a teen to bypass her parent's consent if she is found to be mature and well-enough informed to make the abortion decision herself, or if not consulting her parents is found to be in her best interests.<sup>63</sup> None of those statutes, however, define maturity or give any more guidance to judges charged with determining maturity than did *Bellotti II*.

In deciding whether the court initially hearing the petition abused its discretion, state reviewing courts have struggled with how to determine whether the petitioner is mature.<sup>64</sup> One Florida Court of Appeals went so far as to say that the lack of any statutory definition of what it means for a petitioner to be "sufficiently mature" may render the statute unconstitutional.<sup>65</sup> The court said that the lack of definition

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61. See *infra* Appendix B.

62. UTAH CODE ANN. § 76-7-304 (1995); ALASKA STAT. § 18.16.010 (1994).

63. Two of those state statutes permit doctors, rather than judges, to determine maturity or best interests. MD. CODE ANN., HEALTH-GEN. § 20-103 (1990); W. VA. CODE § 16-2F-3 (1995).

64. To date, none of the reviewing courts have articulated or applied any review standard other than abuse of discretion. See, e.g., *In re Anonymous*, 515 So. 2d 1254 (Ala. Civ. App. 1987); *In re T.H.*, 484 N.E.2d 568 (Ind. 1985); *In re Jane Doe 1*, 566 N.E.2d 1181, 1184 (Ohio 1990) ("abuse of discretion [standard] . . . implies that the court's attitude is unreasonable, arbitrary or unconscionable" (quoting *State v. Adams*, 404 N.E.2d 144, 149 (Ohio 1980))).

65. *In re E.B.L.*, 544 So. 2d 333, 335 (Fla. Dist. Ct. App. 1989). See also *In re J.V.*, 548 So. 2d 749, 755 (Fla. Dist. Ct. App. 1989) (Walden, J., dissenting) ("the determination [of maturity] is not appropriately left to a court of law"). In *In re J.V.*, 541 So. 2d 769, 770 (Fla. Dist. Ct. App. 1989), the court looked to the *American Heritage Dictionary* to find a working definition of maturity. The court found the dictionary definition to be consistent with what the authors here are proposing: "worked out fully by the mind, considered." *In re J.V.*, 541 So. 2d at



allows the trial judge to "make arbitrary decisions based more upon personal, moral, religious or political beliefs than upon constitutionally permissible statutory guidelines."<sup>66</sup>

Despite the confusion, reviewing courts have not even attempted to define "maturity." At least one state court has explicitly refused to define "maturity," claiming that to do so would usurp the legislature's role.<sup>67</sup> What reviewing courts have relied on to prove maturity demonstrates just how much the decisions depend on the identity of the decision maker.<sup>68</sup> In *In re Mary Moe*, the Massachusetts Appeals Court suggested that there may have been sufficient evidence in the record for deciding the teen was mature but affirmed the lower court's finding of immaturity.<sup>69</sup>

One Alabama judge found that the minor was not "sufficiently mature" even though she was within a month of turning eighteen, lived by herself, supported herself with a full-time job, had completed the twelfth grade, had thought about the future and alternatives to abortion, and had an abusive stepfather who would retaliate against the minor's mother if she involved her mother in the decision.<sup>70</sup> The teen in this case was interviewed by *Ms.* magazine.<sup>71</sup> She described how the

770 (quoting AMERICAN HERITAGE DICTIONARY (2d ed. 1982)). Although the appellate court noted the definition, it affirmed the denial of waiver on another basis—the lack of a transcript from the hearing on the petition. *In re J.V.*, 541 So. 2d at 769. The Florida statute was later held unconstitutional under that state's constitution but not for lack of a definition of "sufficiently mature." *In re T.W.*, 551 So. 2d 1186 (Fla. 1989).

66. *In re T.W.*, No. 89-893 (Fla. Dist. Ct. App. May 12, 1989). Milne, *supra* note 38, at 1 (May 13, 1981, letter from Justice Souter opposing the New Hampshire Legislature's attempt to pass parental consent legislation).

67. *In re Jane Doe 1*, 566 N.E.2d 1181 (Ohio 1990).

68. *Hodgson v. Minnesota*, 497 U.S. 417, 474 (Marshall, J., concurring).

69. *In re Mary Moe*, 423 N.E.2d 1038, 1040, n.1 (Mass. App. Ct. 1981). The court said that petitioner's responses were "articulate and informed." The petitioner said she thought she was too young to raise a child; she did not want to place a baby for adoption, because the pregnancy would disrupt her education; and she described the medical procedures that would be used and the attendant risks. The appellate court reversed on best interests, finding that the trial court had erred by finding that the teen's "best interests" would be served only by her consulting at least one parent and then re-petitioning the court.

70. *In re Anonymous*, 515 So. 2d 1254, 1255 (Ala. Civ. App. 1987). The Court of Appeals reversed, stating "we can neither discern from the trial court's judgment nor from the record any ground upon which the trial court's conclusion could rest. We can safely say, having considered the record, that, should this minor not meet the criteria for 'maturity' under the statute, it is difficult to imagine one who would."

71. Angela Bonavoglia, *Kathy's Day in Court*, MS., Apr. 1988, at 46.

judge, Charles Nice, had pamphlets for adoption agencies and anti-choice Christian ministries in his office. Judge Nice refused to appoint the attorney the teen had brought to court with her and instead appointed another attorney whom she had never met. The judge then attempted to appoint the teen's original attorney as the attorney for the fetus. During forty-five minutes of testimony, Judge Nice repeatedly asked the teen whether she had considered adoption and instructed her attorney to ask her the same questions. When questioned in an interview about why he had refused the petition, the judge stated: "I based it on her looks . . . just something that comes across when you talk to her . . . her credibility."<sup>72</sup> Judge Nice also said that in determining best interests "he would consider not only what is in the minor's best interests, but what is in the fetus's best interests as well."<sup>73</sup>

Another judge found that a petitioner was not mature, nor was abortion in her best interests, even though she was twelve years old; the victim of statutory rape; coherent and consistent in saying she wanted the abortion; clear that she could not care for herself or a baby; clear in stating that she had discussed with her aunts all of her options and understood what they were; and was from a family with a history of mental illness (her mother had not been consulted because she was committed to the state mental hospital).<sup>74</sup>

Reviewing courts have stated that lower courts may consider the presence and non-verbal acts of the petitioner as part of the decision whether or not the teen should be found to be "mature."<sup>75</sup> At least one court has explicitly noted that the decision to seek a waiver of parental consent is evidence of "maturity" in and of itself that the court ought to consider.<sup>76</sup>

Rather than defining "sufficiently mature," some reviewing courts seem content to permit lower courts to consider facts that have nothing to do with *maturity*, but instead rate the *morality* of the petitioner. For example, where a teen previously had undergone an abortion, courts have found, based at least in part on that fact, that she is not "sufficiently mature" to make the abortion decision now without consulting

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72. Bonavoglia, *supra* note 71, at 50.

73. Bonavoglia, *supra* note 71, at 50.

74. *In re Anonymous*, 531 So. 2d 901, 905 (Ala. 1988) (corrected opinion on rehearing) (trial court reversed on best interests standard).

75. See *In re Mary Moe*, 423 N.E.2d 1038, 1040, n.1 (Mass. App. Ct. 1981).

76. *In re Anonymous*, 515 So. 2d 1254, 1255 (Ala. Civ. App. 1987).

her parents.<sup>77</sup> Whether the denial of the petition is based on the judge's unrealistic definition of maturity or on a moral determination, the result is to punish the teen for having sex.<sup>78</sup>

The teen who is found to be mature enough to make the decision on her own should have the same constitutional right to an abortion as an adult woman. Presumably agreeing with this premise, some reviewing courts have limited the discretion of lower courts by requiring them to follow the statutory framework. The Massachusetts Appeals Court, for instance, has stated that parents do not have a right to participate in the proceedings.<sup>79</sup> Other appellate courts have found that the trial court cannot unduly burden the decision by premising the waiver on having the abortion performed at a hospital rather than a clinic.<sup>80</sup> Still others have held that the petitioner has the right to counsel.<sup>81</sup>

The decisions described above represent the few cases where reviewing courts have considered denials of petitions and published their

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77. See *In re T.P.*, 475 N.E.2d 312 (Ind. 1985); *In re Jane Doe 1*, 566 N.E.2d 1181 (Ohio 1990).

78. When a judge's determination of maturity is based on repeated pregnancies and/or abortions, it is unrealistic because it does not take into account the level of ignorance, misinformation, and pressure on teens regarding sex. Teens of both sexes fail to discuss contraceptive methods, are ignorant of birth control methods and how to obtain or use them, and are afraid to discuss using contraceptives with their partner for fear of alienating him or her. See Ellen Eliason Kisker, *Teenagers Talk about Sex, Pregnancy and Contraception*, 17 FAM. PLAN. PERSP. 83 (1985). When the judge's determination is based on a concern that the teen is sexually active, it is unrealistic because it ignores the level of sexual activity by teens in general. See SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, U.S. HOUSE OF REPRESENTATIVES, A DECADE OF DENIAL: TEENS AND AIDS IN AMERICA (102d Cong., 2d Sess.) (finding 68% of adolescent girls and 86% of adolescent boys are sexually active by age 20).

79. *In re Mary Moe* (No. 1), 498 N.E.2d 1358 (Mass. App. Ct. 1986). For other cases addressing this, see *In re Mary Moe*, 423 N.E.2d 1038 (Mass. App. Ct. 1981) (holding that where trial judge has found that an abortion is in a minor's best interests, it is reversible error to require parental consent); *Orr v. Knowles*, 337 N.W.2d 699 (Neb. 1983) (stating that if minor held mature enough, parental notice must be waived). See also Donovan, *supra* note 33. At least one Michigan probate judge has publicly stated that he intends to consult a teen's parents before determining that she is mature: "Maybe I'm old-fashioned . . . but I can't think of a better source of information on the minor's maturity than her parents. . . . It is to be remembered that the name of the law is the Parental Rights Restoration Act. It is not named the Minor's Secret Abortion Act. . . . I believe [the parents] have a right to be heard regarding their own daughter." Frank D. Willis, Van Buren County Probate Judge, *Letter to the Editor*, COURIER-LEADER (Paw Paw, Mich.), Feb. 7, 1992.

80. *E.g.*, *In re Mary Moe*, 517 N.E.2d 170 (Mass. App. Ct. 1987); *In re Mary Moe*, 469 N.E.2d 1312 (Mass. App. Ct. 1984).

81. *E.g.*, *In re Mary Moe*, 523 N.E.2d 794 (Mass. App. Ct. 1988).

decisions. These few published cases, however, do not reflect how the vast majority of courts initially hearing these petitions decide whether a minor is sufficiently mature or how the minor is treated during the process. "Laws are generally implemented through appeals. The judges know that as long as they grant a minor's petition, there is nothing to appeal, and therefore no one will look at how they conducted the hearing."<sup>82</sup>

In Michigan, there have not been any appellate decisions yet, and few, if any, appeals of denied petitions. Consequently, there has been no public review of what is occurring in different counties or in individual cases.<sup>83</sup> What limits Michigan reviewing courts will put on probate judges remains to be seen. The Association of Michigan Probate Judges has attempted to give the courts hearing the petitions some guidance on how to make the "maturity" or "best interests" decision by prescribing suggested questions that purport to get at the issue of maturity.<sup>84</sup> As will be shown below, those questions are largely irrelevant in determining whether a teen is mature enough to make the abortion decision without consulting her parents.

#### IV. THE MATURITY OF ADOLESCENT GIRLS: A PSYCHOLOGICAL PERSPECTIVE

Turning to the field of psychology for insight into adolescent maturity, we find an interesting historical convergence. At the same time that the Supreme Court asked state courts to determine "How mature is this teenage girl?," psychologists were recognizing that all prior research into adolescent development and maturity had been based on the behavior of boys. Girls were simply compared to boys and found to be lacking in comparison. More specifically, they were found to be slower to develop and to separate themselves from their parents.

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82. Donovan, *supra* note 33, at 266 (quoting Jaime Sabino, Chair of Massachusetts Lawyers' Referral Panel Steering Committee).

83. Not only has there been no review by appellate courts, some counties and individual Michigan judges have issued orders banning any reference to the decision or the proceedings for any reason. *See, e.g.*, Oakland County Form Order Granting/Denying Waiver of Parental Consent for Abortion (on file with authors). How the procedures used by the courts in these cases affects the decision-making process is discussed in more detail below.

84. Memorandum from Don Owens, President, Michigan Probate Court Judges' Association to All Michigan Probate Judges (Apr. 11, 1991) (on file with authors) (suggested questions attached, *infra* Appendix C).

Campbell and Benedick summarize this history:

[U]ntil the early 1980's, adolescent girls were compared to the standard of male development theory. Young women were found to be wanting and thus determined to be less developed and mature than their male counterparts. Theorists and researchers reflected a particular cultural and sociopolitical stance. . . . Broverman et al.'s study of behavioral norms for males, females and adults illuminated a pervasive thrust in the practising clinicians that defined women as less than fully adult. When young women claimed power and instrumentality, they were defined (as by Douvan and Abelson's study) as ambiguously female or not quite right. Because of this historic stance, young women have suffered from a severe lack of validation of themselves and the growth of the field of human development has been distorted and stunted.<sup>85</sup>

During the 1980s, research on women and girls revealed a separate track of development from that of men and boys. Because earlier researchers found differences between women and men, these researchers concluded that, by definition, women were inferior to men. The history of studying adolescent development solely through the experience of

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85. Patricia Campbell & Elissa Benedick, *Adolescent Development Research* (unpublished manuscript, on file with authors). See generally Carol Gilligan, *Adolescent Development Reconsidered*, in *MAPPING THE MORAL DOMAIN* vii (Carol Gilligan et al. eds., 1988).

While it is informative to read criticism of the biased approach taken by early researchers, it is even more striking to read the primary sources themselves, which treat girls and women as though they were an aberrant minority of the human race. For example, in the course of discussing the personality development of all adolescents, Jean Piaget suddenly begins to describe how girls are different:

Undoubtedly, the life plan of young girls is more closely linked to personal relationships [than are boys'], and their hypothetico-deductive systems take on the form more of a hierarchy of affective values than of a theoretical system. Nevertheless, they are also concerned [as boys are] with a life plan that goes far beyond reality. If their life plan is more concerned [than boys'] with people, this is because the life for which they are preparing is more concerned with specific interpersonal feelings than with general emotions.

JEAN PIAGET, *SIX PSYCHOLOGICAL STUDIES* 68 (David Elkind ed. & Anita Tenzer trans., Random House, 1967). It becomes clear that the "adolescent" he had previously been describing had been the male adolescent, the "norm."

boys suggests that psychological evaluations of the maturity of girls could be quite faulty if based on the biased research of the past.

The new research began to define adolescent girls' development as both different and normal. The work of Carol Gilligan epitomized the new direction in the study of teenage girls.<sup>86</sup> Professor Gilligan, listening to women and men as they described themselves and their moral conflicts, noticed a distinctive female voice. The female voice placed special emphasis on relationships and described an emphasis on the needs of individuals when discussing moral dilemmas (also referred to as an emphasis on care). Men, on the other hand, tended to speak less of relationships and to emphasize the application of rules or justice to moral conflict.<sup>87</sup> Discovering a "different" moral voice in women laid the foundation for Professor Gilligan's criticism of prior psychological research for its exclusion of this "voice."<sup>88</sup>

86. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982); *MAPPING THE MORAL DOMAIN* (Carol Gilligan et al. eds., 1988).

87. Gilligan states:

Two moral voices signalled different ways of thinking about what constitutes a moral problem and how such problems can be addressed or solved. In addition, two voices draw attention to the fact that a story can be told from different angles and a situation seen in different lights. Like ambiguous figure perception where the same picture can be seen as a vase or as two faces, the basic elements of moral judgment—self, others, and the relationship between them—can be organized in different ways, depending on how "relationship" is imagined or construed. From the perspective of someone seeking or loving justice, relationships are organized in terms of equality, symbolized by the balancing of scales. Moral concerns focus on problems of oppression, problems stemming from inequality, and the moral ideal is one of reciprocity or equal respect. From the perspective of someone seeking or valuing care, relationship connotes responsiveness or engagement, a resiliency of connection that is symbolized by a network or web. Moral concerns focus on problems of detachment, on disconnection or abandonment or indifference, and the moral ideal is one of attention and response. Since all relationships can be characterized both in terms of equality and in terms of attachment or connection, all relationships—public and private—can be seen in two ways and spoken of in two sets of terms. By adopting one or another moral voice or standpoint, people can highlight problems that are associated with different kinds of vulnerability—to oppression or to abandonment—and focus attention on different types of concern.

Gilligan, *Adolescent Development Reconsidered*, in *MAPPING THE MORAL DOMAIN*, *supra* note 85, at xvii–xviii.

88. GILLIGAN, *IN A DIFFERENT VOICE*, *supra* note 86, at 1–4. See GILLIGAN, *IN A DIFFERENT VOICE*, *supra* note 86, at 71–77 (results of a study by Gilligan of women in the throes of the decision whether or not to have an abortion).

In the past, psychological theory emphasized the “individuation” process as normal development in teenagers. Adolescent maturity was measured by the extent to which teens had separated from and become independent of their parents. Professor Gilligan criticizes this view of adolescent development as contrary to the human experience: “Psychologists in characterizing adolescence as a time of ‘second individuation’ and in celebrating an identity that is ‘self-wrought’ have encouraged a way of thinking in which the interdependence of human life and the reliance of people on one another becomes either problematic or tacit.”<sup>89</sup>

Adolescent girls regularly reported concerns about maintaining not only parental relationships, but other relationships as well. During adolescence, they did not appear to be separating from their parents and, thus, seemed developmentally behind their male counterparts. Gilligan, in listening to teenagers, discovered that both boys and girls could look at moral dilemmas in terms of relationships or in terms of justice.<sup>90</sup> She concluded that the previous emphasis on separation from parents and on individuation denied the normal development of teenage girls as well as an important aspect of the development of teenage boys.<sup>91</sup>

In representing adolescent girls in parental consent hearings, we ask our clients why they do not want to request parental consent for the abortion. The girls regularly report a desire not to hurt their parents by

89. Gilligan, *Adolescent Development Reconsidered*, in *MAPPING THE MORAL DOMAIN*, *supra* note 85, at xii (citations omitted).

To see self-sufficiency as the hallmark of maturity conveys a view of adult life that is at odds with the human condition, a view that cannot sustain the kinds of longterm commitments and involvements with other people that are necessary for raising and educating a child or for citizenship in a democratic society (see Arendt, 1958). The equation of development with separation and of maturity with independence presumes a radical discontinuity of generations and encourages a view of human experience that is essentially divorced from history or time.

Gilligan, *Adolescent Development Reconsidered*, in *MAPPING THE MORAL DOMAIN*, *supra* note 85, at xii.

90. “The ability to sustain two perspectives that offer divergent views of a scene or to tell a story from two different angles can be taken as a marker of cognitive and moral growth in adolescence . . .” Gilligan, *Adolescent Development Reconsidered*, in *MAPPING THE MORAL DOMAIN*, *supra* note 85, at xxvi.

91. “Moral maturity then presumably entails an ability to see in at least two ways and to speak at least two languages, and the relationship between justice and care perspectives or voices becomes a key question for investigation.” Gilligan, *Adolescent Development Reconsidered*, in *MAPPING THE MORAL DOMAIN*, *supra* note 85, at xx.

telling them about the pregnancy. This reason for requesting a waiver of parental consent might seem irrational to some. After all, if a girl loves her parents and does not want to hurt them, their relationship is probably healthy enough to survive the news of the pregnancy. As adult onlookers, we might be tempted to deny a petition for waiver of parental rights, sympathizing with loving parents who, we believe, could help their daughter in crisis. This is contrary to the teen's view. Her interest in maintaining a stable and loving relationship with her parents may be paramount in her eyes. The thought of confessing a pregnancy to the parents she loves is possibly the worst fate imaginable. Does this desire to shield her parents from her painful situation evidence maturity? Professor Gilligan's work at least suggests that her desire to maintain her relationship with her parents does not evidence a lack of maturity.

We can, therefore, draw caution from the discipline of psychology. Asked to determine a teenage girl's maturity, a court enters into an inquiry that is difficult and wrought with dangerous assumptions. The work of modern psychological researchers, looking particularly at the maturity of adolescent girls, suggests that both psychological experts and judges asked to evaluate girls may be heavily influenced by definitions of maturity based on the experiences of boys in our society. Our lack of inquiry into the normal development of girls leaves us less able to confidently assess their maturity.

Finally, the work of Professor Gilligan and others links maturity to moral development and suggests that girls and boys, or women and men, approach moral questions differently. Instead of believing that there are clearly "right" and clearly "wrong" decisions (the traditional male model of morality), women have more of a tendency to emphasize responsibilities to the various persons in their lives. "After careful consideration" of all choices, she makes the decision that she "believes will result in the most good, or cause the least harm to all concerned."<sup>92</sup> If, in fact, men and women have a different way of approaching moral questions, then the distance in reasoning between the young girl and an older male judge is potentially very great. How is the judge equipped to review the girl's ability to make a decision about abortion?

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92. Kelly Flood, *Decision for Abortion Is Moral: Women's Choices Often Based on Responsibilities*, LEXINGTON-HERALD LEADER, Mar. 15, 1992, Special Section at 9. Professor Scarnecchia thanks her friend, the Reverend Kelly Flood, for this insight into the morality of abortion.



## V. A FRAMEWORK FOR JUDICIAL DECISION MAKING

Within our proposed framework, we will suggest definitions for “maturity” and “best interests,” and then describe three ways in which a court can limit its own discretion both to implement the statute and to protect the minor’s constitutional right to privacy. First, we suggest that by limiting the scope of inquiry to factors that bear directly on “maturity” and “best interests,” the judge can appropriately narrow the issue and better justify his or her decision. Second, we discuss procedural rules that may aid in reaching “better” decisions. Finally, we propose presumptions that, if adopted by the court, will simplify the decision, make it more predictable, and still protect both the interests of parents and the constitutional rights of the affected minor girls.

### *A. Working Definitions of “Maturity” and “Best Interests”*

The probate court must determine under the statute whether the minor has the maturity “to make the decision regarding abortion independently of her parents or legal guardian.”<sup>93</sup> Therefore, the only issue for the court is whether the teen is mature enough to make, on her own, an informed decision about whether to undergo a particular medical procedure. The court is not charged with finding that the teen is the equivalent of an adult in all of her conduct or that she is mature for all purposes.<sup>94</sup> In fact, the court has no business determining whether the teen is of good moral character or is mature for any purpose other than for making the decision at hand. Certainly, the court should not find that the teen who has made the decision to have an abortion does not understand the consequences of her choice just because the judge disagrees with that choice for religious, political, or moral reasons. We conclude that, under the framework set out by *Bellotti II* and the Michigan statute, all the court must find is whether

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93. MICH. COMP. LAWS ANN. § 722.904 (West 1993).

94. In fact, as will be shown below, because the questions suggested by the Michigan Probate Court Judges’ Association really try to determine whether the teens are mature for all purposes, and favor “good girls” who conform to societal rules, the questions are more appropriately designed to determine who would make a better mother rather than who has enough information to decide for herself whether to bear a child.

the teen has considered and understands the consequences (medical, physical, and emotional) of her choice.<sup>95</sup>

Part of the determination that she is mature enough to make the decision at hand is asking whether the minor is "well-enough informed" to give consent to the medical procedure.<sup>96</sup> This part of the inquiry should focus on the information she has received about the medical procedure and the medical consequences of undergoing—as well as not undergoing—the abortion. Again, the baseline inquiry is whether she has given the decision careful consideration.

If the teen is not found to be mature and well-informed enough to make the decision on her own, the probate judge is to determine whether the waiver would be in her "best interests." This inquiry is not based on the minor's ability to make her own decision, but is based on what is best for the teen. In defining "best interests," we believe the judge should consider whether it is best for the teen to be able to make the abortion decision independently, given all of the possible physical, social, medical, and emotional consequences of being required to seek parental consent. Although this determination is akin to a substituted judgment for an incompetent, the inquiry must take into account the minor's preference.<sup>97</sup> In no way should the best interests determination take into account the best interests of the fetus or of the teen's parents, or the judge's own bias or morals.<sup>98</sup> The court cannot simply order that it would be in the teen's best interests to ask her parents for consent and that she, therefore, must do so.<sup>99</sup> "Best interests" concerns more than whether the teen will face physical abuse if she tells her parents about the pregnancy. In our experience, however, the threat of physical

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95. It is useful to keep in mind throughout this analysis that the statute does not require the probate judges to give their "consent" to the teen's abortion; it merely is a judicial determination that the teen can proceed with whatever choice she makes about the pregnancy. *See* MICH. COMP. LAWS ANN. § 722.904 (West 1993).

96. MICH. COMP. LAWS ANN. § 722.904 (West 1993).

97. *Cf.* *Cruzan v. Missouri*, 497 U.S. 261 (1990) (clear statement of preference considered in determining what a now-incompetent woman would have wanted). *See also* Suggested Guidelines for Standing Order 5-81 for the Massachusetts Superior Court, Guideline 8 (on file with authors).

98. Indeed, some of the parental consent statutes explicitly charge that the parents who are asked for consent must consider the teen's "best interests" in giving consent, implying that the parents' own interests are irrelevant. MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1991); 18 PA. CONS. STAT. § 3206 (1983 & Supp. 1995).

99. *See, e.g., In re Mary Moe*, 423 N.E.2d 1038, 1042 (Mass. App. Ct. 1981).

abuse is the factor most commonly considered in evaluating "best interests."

In April 1991, the Michigan Probate Judge's Association developed a list of recommended questions for determining whether the petitioning minor was mature and well informed, or whether it is in her best interests to obtain the requested waiver.<sup>100</sup> The questions, though recommended and not required, appear to be an attempt to narrow the judges' "unfettered personal choice."<sup>101</sup> Many of the "maturity" questions focus on helping the judge determine whether a teen is mature in other areas of her life, or whether the teen's parents are abusive, and thus whether not consulting her parents is in her "best interests." Despite this admirable effort, most of the questions are irrelevant to the issue of "maturity," and focus only on one aspect of "best interests." Therefore, the use of the questions may allow a court to deny a petition for the wrong reasons under the guise of following stated norms.

In light of the definitions of "maturity" and "best interests" we propose above, we will review the proposed questions to show whether they can in fact assist the court in making the statutory assessment.

### *B. Relevant and Irrelevant Areas of Inquiry*

The Michigan Probate Judges' Association suggested twenty-nine questions directed toward the issue of "maturity."<sup>102</sup> Of these questions, fewer than half seek information that is relevant to determining whether the teen has carefully considered her choice. Many of the questions seek to determine whether the teen is mature for all purposes, an inquiry better suited to finding out whether she would make a good parent than to whether she has made a considered, informed choice to have an abortion. A teen need not be mature for all purposes to make this informed choice.<sup>103</sup> Other questions impose implicit judgments that favor wealthier teens over their poorer counterparts. Our review of these

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100. See Appendix C.

101. Milne, *supra* note 38, at 1.

102. Memorandum from Don Owens, President, Michigan probate Court Judges' Association to All Michigan Probate Judges (Apr. 11, 1991) (on file with authors) (suggested questions attached, *infra* Appendix C) [hereinafter *Questions*].

103. If maturity for all purposes were the standard, then anyone who was not mature enough under that standard would certainly not be mature enough to be forced to carry a pregnancy to term and become a parent. See *Hodgson v. Minnesota*, 497 U.S. 417, 475 (1990) (Marshall, J., dissenting).

questions will refer to these different areas of inquiry and what they show about the teen's maturity in light of our definition. In addition, we will set out in Appendix D the relevant questions that a court should ask.

*What is the minor's birthdate? What grade in school has the minor achieved?* The minor's age is relevant for the same reason that the law concludes that the ages eighteen or twenty-one carry with them the presumption of maturity for certain life decisions.<sup>104</sup> Presumably, the closer to age eighteen a teen is, the more apparent it is she should be considered mature.<sup>105</sup> In Michigan, a teen over the age of sixteen is beyond the age of consent in sexual matters.<sup>106</sup> In fact, as we will indicate below, we believe that a sixteen or seventeen year old should be considered to be presumptively mature for purposes of this decision.<sup>107</sup>

*What are her academic grades? What is her school attendance record?* The test of maturity is not, nor should it be, a test of intelligence or conformity to rules. Academic grades are generally accepted as a test of relative intelligence. Although comprehension of the ramifications of the decision is part of our working definition of "maturity," and a more intelligent teen may more quickly or more easily understand the ramifications of her decision, academic grades do not necessarily test that understanding. Indeed, all that high academic grades and school attendance may in fact test are conformity to rules, which may or may not

104. See, e.g., MICH. COMP. LAWS ANN. § 722.4 (West 1993 & Supp. 1995) (emancipation occurs when a person reaches the age of 18); MICH. CONST. art. II, § 1 (voting at age 21); MICH. COMP. LAWS ANN. § 436.33b (West 1978 & Supp. 1995) (minimum age to drink alcohol is 21); MICH. COMP. LAWS ANN. § 333.6121 (West 1992) (certain medical consents); MICH. COMP. LAWS ANN. § 551.51 (West 1988) (minimum age of marriage is 16).

105. Despite this analysis, the Supreme Court of Ohio rejected a six-factor test proposed by petitioner that would have presumed that minors aged 15 and older were mature enough to make the decision without consulting a parent. *In re Jane Doe 1*, 566 N.E.2d 1181 (Ohio 1990). Cf. *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 439 (1983) (addressing prohibitions on abortion for girls under age 15 without consent of parent or guardian).

106. See MICH. COMP. LAWS ANN. § 750.520b-d (West 1991).

107. When it comes to abortion, some state legislatures are determined to treat all women, no matter what their age, as presumptively too "immature" to give informed consent. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791 (1992); MICH. COMP. LAWS ANN. § 333.17015(3) (West Supp. 1995) (requiring a 24-hour waiting period before a physician can perform an abortion on a woman of any age).

be indicative of whether a teen understands the consequences of her choice to undergo an abortion without consulting her parents. The question is not whether she is smart and able to do schoolwork, but whether she has thought about and understands her choice. Other questions are relevant to and probe that understanding more directly.

*Does she participate in any extracurricular activities? If so, what are they? What is her employment history? What are her responsibilities in her own home and residence? What is her driving record?* All of these questions seem to be trying to determine whether the teen is mature for all purposes, rather than trying to determine whether she is able to make the decision on her own. Whether she sweeps her room every week or has never gotten a speeding ticket has nothing to do with whether she understands the consequences of her choice.

Nor does whether a teen participates in any extracurricular activities have anything to do with whether she is informed enough to understand the ramifications of her decision. This question unfairly favors teens who are able to participate in after-school activities. This question may also lead to inaccurate information, in that several of our clients had been forced to drop their extracurricular activities due to their pregnancies, so when first asked to describe their activities they responded "none." Although the question may elicit what the teen recognizes as at least one of the personal consequences of her choice (i.e., if she goes on with the pregnancy she may have to give up college or her job or cheerleading or basketball), the question itself is irrelevant to determining maturity for this issue.

*What are her general plans for her future?* Many of the teens that we have represented have expressed an understanding and thoughtful consideration of the consequences of having a baby as a teenager, saying things like "I'm too young to take care of a baby"; "I would have to give up college"; "I would lose my job"; "My parents would kick me out of the house and I would have no place to go."<sup>108</sup> Such considered judgment of the consequences of her choice is evidence that a teen has thought through her choice, but plans or lack of them is not determinative of maturity. Instead, the court can simply ask her in a straight-

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108. The consequences to the teen of not having the abortion and becoming a single parent are grave. The Michigan study shows that if she has the child, she and the child will likely fall into poverty and may never get out of it. *See generally* Duncan & Hoffman, *supra* note 6.

forward manner whether she has thought about the personal consequences of her decision to have an abortion.

*What is her financial situation? Does the minor have a physician? Has her physician made a recommendation to the minor regarding the minor's abortion? Would there be any foreseeable medical complications in this case according to the physician?*<sup>109</sup> These questions unfairly favor well-to-do teens over poorer teens who may not have any income or a regular physician.<sup>110</sup> To the extent that these questions are a way for the judge to determine whether the teen has enough information to give knowing and considered consent, they are vague and made redundant by other questions suggested by the Probate Judges' Association.

If the unstated question here is whether the teen has made arrangements to pay for the abortion and aftercare procedures, thus determining whether she understands the ramifications of her decision, then this is the question that should be asked. The teen's financial situation and whether she can afford regular medical care is irrelevant.

*What is her prior court involvement, if any?* This question is hopelessly vague. Does it include being a testifying witness? Having filed for divorce? To the extent that this question is attempting to determine whether the teen has a criminal or juvenile record, it is irrelevant. The teen's record has nothing to do with her ability to understand the ramifications of her decision. To the extent that the question is seeking information about any other court involvement, such as being a witness, it is still irrelevant. Even if the minor is testifying at trial as a victim of the rape that resulted in the pregnancy for which she is seeking the abortion, that testimony has nothing to do with whether the teen is able to make an informed decision.

*What is her mental health record, if any? What is the minor's health history, including use of medications, controlled substances and alcohol?* The

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109. The questions regarding the doctor's recommendations and concerns about complications seem to be more of a test of whether the abortion is in the teen's "best interests," rather than whether *she* (not her doctor) understands the consequences of her choice.

110. See Donovan, *supra* note 33, at 262 (indicating that poorer teens do not use the bypass process as much as more well-to-do teens). Perhaps one reason poorer teens do not use the process as often is an inherent class bias in the system. See also Robert W. Blum et al., *Factors Associated with the Use of Court Bypass by Minors to Obtain Abortions*, 22 FAM. PLAN. PERSP. 158 (1990).

only relevant inquiry regarding mental health is whether there is any mental condition that would render the minor unable to understand the consequences of her choice. The question regarding her mental health record is too broad and overly intrusive. It is thus irrelevant.

The minor's physical health history is irrelevant to determining maturity, and like the employment and extracurricular activities questions, is in part really directed to the possible consequences that might befall the teen as a result of her decision. It is up to the medical staff involved, not the court, to make the determination that an abortion should not be performed due to physical health concerns.<sup>111</sup>

The second part of the question, whether the teen has used or abused controlled substances or alcohol, is only relevant to whether she understands the consequences of her choice.<sup>112</sup> An analogous situation is a criminal defendant's waiver of his Fifth and Sixth Amendment rights when entering a guilty plea.<sup>113</sup> There, the court makes careful inquiry into the basis for the plea, and informs the defendant that he is waiving his right to confront witnesses, to hold the state to its burden of proof, and to not incriminate himself, among other things. If a defendant were intoxicated at the time he made his plea, this fact could negate the plea, because he may not have understood the consequences of his choice to waive his constitutional rights. Here, the only relevance a teen's use or abuse of alcohol may have is if it either affects her ability to understand the consequences of her choice at the time she signs the doctor's consent form, or affects her ability to testify at the bypass hearing.

*What are the minor's sources of information regarding abortion?* This question is relevant to the extent that it relates to the issue of informed

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111. Both her physical and mental health histories are potentially relevant to the "best interests" inquiry. See *Questions*, *supra* note 102; *infra* Appendix C.

112. If the teen abuses alcohol or drugs, it certainly seems incongruous to deny the petition, effectively forcing a drug-addicted woman to have a baby.

113. Although only the most ardent anti-abortion advocates would embrace the analogy of a pregnant teen seeking an abortion to a guilty criminal defendant, the parental consent law puts both in a similar situation. Both have to come to the court and admit guilt for something society does not sanction (out-of-wedlock sex or criminal conduct), and both have to rely on the judge for the ruling that will determine much of the course of the rest of their lives. The difference, however, is that the judge's discretion in the criminal case is limited in Michigan by strict sentencing guidelines. MICH. COMP. LAWS ANN. § 769.34 (West Supp. 1995). As has been described above, there is no limit whatsoever on the judges' discretion in parental consent cases.

consent. The *sources* of information, though, are not as important as the information that the teen has and her understanding of that information.<sup>114</sup> The court's inquiry here could be narrowed to the question of whether the teen feels that she has enough information concerning the medical, physical, and emotional ramifications of abortion to make her own choice.

*Is the information accurate and thorough?* Although this inquiry goes directly to the issue of informed consent, it raises the issue of whether the teen has to prove that the information is accurate and thorough. No other medical informed consent requires the patient to prove that the information relied on in giving consent meets this criteria; this burden is on the medical professional who will perform the procedure. Here, the presumption should be that if the minor has obtained the information from a licensed doctor or clinic, the information is accurate and thorough.<sup>115</sup> To determine whether the teen who has been to a licensed clinic or physician has all the information she needs, the better question would be to ask whether she feels she has enough information to make the decision.

*Has the minor received counseling from anyone regarding abortion, and if so, with whom? Does she feel she needs more counseling regarding her pregnancy and request for an abortion?* If the judge is concerned about whether the teen has enough information, the judge should ask whether she feels she is able to make an informed choice. One thing that the

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114. One of the examples of a source of information that is irrelevant in and of itself is the fact that the teen may have already had an abortion. The court may use the fact that the teen has had an abortion to determine whether she understands the procedure and thus the consequences of her choice, but it would be wrong for the court to turn the inquiry into an evaluation of the teen's morality. Asking whether the teen previously had an abortion permits a judge to say the teen is immature when what he means is that she is, in his view, immoral.

For example, in a case Professor Field handled, the 17-year-old teen was seeking a bypass for her second abortion within six months. The court found her mature enough to make the decision on her own, noting that she was familiar with the abortion procedure. As a precautionary, educational measure, the court expressed concerns for the teen's health and wanted to know whether the teen was going to use protection against unwanted pregnancies in the future. Whether the teen did so or not was not determinative of the court's finding of "maturity." Thus the court did not turn the inquiry into a moral evaluation, but rather an informational one.

115. For example, in the cases we have handled under Michigan's law, the courts have presumed that if the teen got information from a licensed clinic, then she had been appropriately advised of the medical procedures and consequences.



judge should not do is require the teen to be counseled by a particular person or counselor. The decision whether to have an abortion is the teen's choice, not a choice that should be imposed on her by Bethany Christian Services<sup>116</sup> or any other agency or person. There is no provision in the statute that permits the court to order counseling, particularly religious counseling, or any other services for the minor.<sup>117</sup>

*How would the minor go about obtaining an abortion? What arrangements would the minor make to have the abortion performed?<sup>118</sup> Does the minor understand the various options or alternatives to abortion? Has she considered them? Have both abortion procedures and child birth procedures together with the medical risks been explained to her? Have the aftercare procedures been explained and understood? Has the minor been informed and does she understand what to do if medical complications occur? Has the minor been counseled as to possible emotional and psychological problems she may experience after the abortion or child birth? How would she deal with such problems if any? Has the minor been promised anything from anyone if she would have the abortion? Has the minor been threatened with any action or inaction if she does not have the abortion?*

These are the most relevant questions for determining maturity. Each one goes directly to the issue of whether the teen is well informed and understands the medical, emotional, and physical ramifications of her decision. These questions also address the issue of whether the teen is making her own decision.

In asking these questions, the judge should not require the teen to provide a detailed explanation of the counseling she has undergone and the information she has been given. In criminal pleas, judges do not require a thorough explanation from the defendant of the Fifth or Sixth

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116. *But cf.* Willis, *supra* note 79 ("Bethany Christian Services is the only full service agency in Van Buren County that counsels and works with unwed pregnant minors . . . . I really feel that before the minor child makes such a crucial decision that she should counsel with a professional agency regarding all her possible options.").

117. This omission of services for the minor highlights the true intent of the statute: not to help pregnant minors but to deter abortions. The Michigan Legislature, considering an earlier form of the Act, affirmatively rejected a substitute bill that would have provided direct assistance to pregnant teens. *Supra* note 60.

118. These questions are redundant because they elicit information gathered through other questions. Simply by being in court the minor has already taken the first step and therefore demonstrated that she knows how to "go about obtaining an abortion" by asking for a waiver of parental consent. *Cf.* Bellotti v. Baird, 443 U.S. 622 (1979) (Bellotti II).

Amendment; they merely ask whether the defendant understands the rights he is waiving by pleading guilty. With the criminal defendant, the judge assumes that the defendant's attorney adequately explained the law. Similarly, in parental consent cases, the judge should assume that a health-care provider will adequately explain the medical consequences.

In addition to the issues suggested by the questions discussed above, in our experience, the court has been interested in why the teen has not told her parents; whether she was using birth control at the time she got pregnant; and whether she intends to use birth control to avoid this problem in the future. Like the questions regarding jobs, extracurricular activities, and general plans for the future, these areas of inquiry are relevant only to the extent that they can help the court determine whether the teen has thought about the consequences of her decision. Although whether a teen is using birth control might be determinative of maturity for other purposes, it is not determinative of maturity for purposes of this statute.<sup>119</sup>

The Probate Judges' Association also proposed questions directed to the "best interests" inquiry.<sup>120</sup> The majority of those questions are directed to whether there has been abuse, or whether there is the

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119. It is questionable whether use of birth control is determinative in any way of "maturity" for all purposes when teens are compared with one another. The reality of teens' ignorance about sex and birth control is that few teens understand birth control or how to use it and are reluctant to introduce its use in a relationship for fear of being thought "easy." See Kisker, *supra* note 78, at 84. Relying on whether a teen uses birth control as a basis for determining "maturity" has the potential of punishing the majority of teens who are merely the victims of American society's avoidance of realistic discussions about sex. While we agree that it may be useful for the court to use the hearing as an opportunity to remind the teen that birth control is necessary to prevent an unwanted pregnancy, whether the teen has been pregnant previously or was using birth control at the time she got pregnant should not be a determining factor under either the "maturity" or "best interests" standard.

120. Those questions are: What is the minor's relationship with her mother, father, or her guardian? With whom does the minor reside? Who has legal custody of the minor? Has the minor considered a petition for emancipation? Who does the minor usually turn to for advice? What is the person's advice on this issue of abortion, if any? Does the minor feel she should not inform a parent or guardian about her pregnancy and request for this waiver and, if so, why? How do each of her parents or guardians generally respond when confronted with actions of the minor that displease them? What does the minor believe would occur if she discussed her pregnancy and desire for an abortion with either parent or guardian? What evidence regarding past behavior of the parents or guardians is there that would show harm would come to the minor if parental or guardians' consent were requested? *Questions, supra* note 102; *infra* Appendix C.

potential for abuse if the minor was to consult her parents.<sup>121</sup> The "best interests" determination, however, is more than a finding of whether the teen will be subjected to physical abuse if she consults her parents. In determining "best interests," the court should look not only at her reasons for not consulting with her parents, but also at what the medical, emotional, physical, and social consequences of requiring her to seek parental consent would be.<sup>122</sup>

Of course, there is overlap between some of the questions designated as "best interests" questions and some designated as "maturity" questions. One area where there seems to be overlap is the proposed "best interests" question, "Has the minor considered a petition for emancipation?"<sup>123</sup> In Michigan, an emancipated teen is not required to obtain parental consent,<sup>124</sup> presumably because where an emancipation petition has been granted, the court has determined that the teen has demonstrated an ability, and thus earned the right, to make her own life decisions.<sup>125</sup>

Professor Field has handled two cases with similar facts that illustrate the potential overlap between "best interests" and "maturity" inquiries. Both teens were already parents of infants and were pregnant by the men who had fathered their first child. Both were receiving public assistance and had thought about the consequences of having a second child and decided against it. Both had received thorough counseling from Planned Parenthood about the abortion procedure and understood the procedure. Both had distant and poor relationships with their own mothers and no relationships at all with their own fathers.

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121. *Questions, supra* note 102; *infra* Appendix C.

122. For example, teens who are faced with the prospect of telling their parents that they are pregnant in order to obtain consent for abortion and cannot do so may opt for unsafe, illegal abortions or suicide. Cf. Laille Gabinet, *Attempted Suicide in Response to Refusal of Elective Abortion*, 1984 OHIO ST. MED. J. 801-803. See, e.g., Bella English, *Mindless Law, Needless Death*, BOSTON GLOBE, August 22, 1990, at 29 (describing death of Indiana teen Becky Bell from illegal abortion).

123. A petition for emancipation is not a viable alternative for a bypass hearing given the amount of time necessary for obtaining an order of emancipation. In addition, under Michigan law, parents must be notified of the emancipation petition, thus defeating the purpose of the judicial bypass process. MICH. COMP. LAWS ANN. § 722.4a(3) (West 1993).

124. MICH. COMP. LAWS ANN. § 722.902(c) (West 1993 & Supp. 1995).

125. Interestingly, the Michigan statute does not exempt married teens from the parental consent requirement, but Michigan law provides for the emancipation of married minors, thus freeing them from the Act's parental consent requirement. MICH. COMP. LAWS ANN. § 722.4(2)(a) (West 1993 & Supp. 1995).

One of the teens was seventeen, almost eighteen; the other was fifteen, almost sixteen. The only really distinguishing factor besides age was that the older teen was living on her own, while the younger teen lived with her grandmother. The court granted both petitions but, despite the similarities, based each decision on different grounds. The seventeen year old was found to be mature under the statute, but the fifteen year old's petition was granted because it was found to be in her "best interests."

In Appendix D, we suggest questions that may more closely bear on the issues of "maturity" and "best interests" of a minor girl. The "best interests" inquiry, which tends to be more intrusive, is unnecessary if the court finds the girl mature. Therefore, the court should limit its initial inquiry to "maturity."

Much of the court's inquiry in some of the cases we have handled has been accomplished through court caseworkers, who interview the teen and make recommendations to the court concerning whether the waiver should be granted. We will now discuss how different court procedures in these cases impact the court's decisions.

### *C. Procedural Limitations on Discretion*

One limit on the court's discretion in these cases is appellate review. As noted above, very few cases are reviewed because of the time constraints inherent in the process. The Michigan Court Rules set strict time limits, recognizing that a time delay can effectively moot the decision. If petitions are granted, no matter how inappropriate the court's inquiry may have been, there will be no appellate review. In addition, court-issued "gag" orders effectively shield what could be court abuses. Such orders also undermine public review of courts by prohibiting anyone from reporting anything that occurs in the court, even if the minor's confidentiality is not threatened by revealing statistical or demographic information. Although we are concerned with protecting the minor's confidentiality, such protection does not require total nondisclosure of the occurrence of hearings or the court's conduct during hearings. The Michigan Supreme Court should investigate and forbid any attempts to hide information about the experience of litigants under this statute except when required to protect the confidentiality of individual girls.

Some Michigan courts have involved experienced social workers in the process, using these individuals as almost substitute guardians *ad*

*litem* who make a recommendation to the judge about whether the teen is mature or whether the waiver is in the teen's "best interests." However, this additional person does not necessarily serve as a limit on the judge's discretion; the social worker's recommendation can be as easily influenced by his or her own bias and morals as can the judge's decision. Also, where the social worker is employed by the court, his or her recommendation may easily be influenced by what he or she believes are the judge's own biases and moral beliefs.

The use of a social worker can be analogized to statutes that permit a medical doctor (other than the one performing the abortion) to determine "best interests" or "maturity."<sup>126</sup> Although that system eliminates the *judicial* discretion concerns, it does not eliminate the danger inherent in letting someone other than the teen make a decision that profoundly affects her life. By requiring a second interview, the use of a doctor or a social worker in this process allows a teen's life to be scrutinized by yet another person. We are not convinced that the social worker's recommendation is necessary, provided that the minor is represented by counsel.<sup>127</sup>

Although procedures can serve to rein in unfettered discretion, they are not a complete solution. Below, we recommend presumptions that will consider proper factors and decrease the likelihood that the decision will be influenced by a judge's own bias or moral beliefs.

#### *D. Proposed Presumptions of "Maturity" and "Best Interests"*

We propose that the only real way to limit a court's discretion in a manner consistent with a minor's constitutional rights is to apply presumptions that are consistent with the purpose of the law and that flow out of the psychological literature discussed above. We propose presumptions based on the nature of the decision, age, source of information, and social factors involved in each case.

A judge should presume maturity and be required to rebut that presumption in any decision denying a waiver. In determining whether to grant a minor girl's petition for waiver of parental consent, a trial

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126. *E.g.*, W. VA. CODE § 16-2F-3(c) (1995).

127. *Cf.* MICH. COMP. LAWS ANN. § 722.904(2)(a)(ii) (West 1993) (requiring the probate court to notify minor of right to a court-appointed attorney or guardian *ad litem*).

judge decides whether the girl will or will not have the same constitutional protection as an adult woman.<sup>128</sup> Depending on the court's decision, the minor girl will either exercise her constitutional right to decide whether to have a child, or she must completely relinquish to her parents her constitutional right to decide. It is an either/or situation; the teen sits on a fence between full constitutional protection and none. When a person's right to protected freedoms is so clearly in question and when the question is to be decided at the court's discretion, the court should generally presume in favor of granting the constitutional right.

Most teens who are not independent enough to make a decision on their own do consult their parents.<sup>129</sup> Therefore, those who come to court to seek a bypass should be presumed mature. Indeed, finding out about the need for a bypass and preparing for and coming to court are tasks that require thought, perseverance, organizational skills, and the ability to handle the consequences of one's conduct. That alone may be evidence of maturity. Therefore, if a judge finds what he or she believes to be equal evidence of maturity and of immaturity, then the court should grant the petition waiving parental consent.

Presumptions should also be based on age. For instance, teens sixteen and over should be presumed mature. These teens are at an advanced level of cognitive development and are at the age of consent for sex. A teen that age also has limited power to consent to other life decisions such as marriage.<sup>130</sup> If a teen sixteen or over marries without parental consent, the marriage is not automatically void.<sup>131</sup> Thus, contrary to current law, a teen who is married should be presumed to be mature enough to make the abortion decision on her own. Certainly, a teen who has a child and can make the entire range of medical decisions for her child without a specific finding of "maturity" should be presumed mature enough to make the abortion decision for herself.

As far as the "best interests" inquiry is concerned,<sup>132</sup> a waiver

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128. See generally *Bellotti v. Baird*, 443 U.S. 622, 647 (1979) (*Bellotti II*).

129. Raye Hudson Rosen, *Adolescent Pregnancy Decision-Making: Are Parents Important?*, 15 *ADOLESCENCE* 23, 52 (Spring 1980).

130. *Hodgson v. Minnesota*, 497 U.S. 417, 445 (1990).

131. Cf. MICH. COMP. LAWS ANN. § 551.51 (West 1988) (voiding marriages of persons under 16).

132. Although the "best interests" inquiry under the statute is apparently limited to whether it is in the teen's "best interests" not to consult her parents about the decision, some of the social realities demonstrate that it is generally not in a teen's

should be presumed to be in a teen's "best interests" if she is under thirteen. It should be presumed to be in a younger teen's "best interests" because of the higher risks of carrying a pregnancy to term. In Michigan, a pregnant teen who is under age thirteen is per se the victim of rape.<sup>133</sup> If the pregnancy is the result of rape or incest, the waiver should be deemed in the teen's "best interests," regardless of age.<sup>134</sup>

With the middle group of teens, the thirteen through fifteen year olds, it is much more difficult to apply presumptions based on age. For this age group, it would be appropriate to use the relevant questions set out in Appendix D. During that inquiry, however, the judge should keep in mind that coming to court evidences "maturity" and, with respect to the best interests inquiry, the facts set out in footnote 132 favor granting the petition.

In addition, it should be presumed that, if the teen has obtained information from a licensed medical professional or clinic, the information was accurate and thorough. A medical professional is not likely to undertake a medical procedure such as an abortion without being sure to obtain informed consent.

### CONCLUSION

The Supreme Court permits states to restrict a minor's right to make her own determination as to whether she should have an abortion and directs that a judicial bypass process is necessarily part of such a restriction. The Supreme Court did nothing, however, to help state courts make the determination either that a minor is "mature" enough to make the abortion decision on her own or that making the abortion decision without consulting her parents would be in her "best interests."

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"best interests" to carry a pregnancy to term. For example, teenage mothers and their children plunge into poverty and often do not get out. *See* Duncan & Hoffman, *supra* note 6, at 9. And carrying a pregnancy to term by an "immature" mother against her will is inconsistent with her "best interests." *Hodgson*, 497 U.S. at 475 (Marshall, J., dissenting).

133. MICH. COMP. LAWS ANN. § 750.520b-c (West 1991).

134. The Michigan legislature defeated several attempts to amend the Act to allow an exception in cases of rape or incest. JOURNAL OF THE SENATE OF THE STATE OF MICHIGAN at 219 (Feb. 14, 1990); JOURNAL OF THE HOUSE OF THE STATE OF MICHIGAN at 2882 (Dec. 6, 1989); JOURNAL OF THE HOUSE OF THE STATE OF MICHIGAN at 2884 (Dec. 6, 1989); JOURNAL OF THE SENATE OF THE STATE OF MICHIGAN at 2135-56 (Oct. 25, 1989).

None of the states that use the judicial bypass process have given their judges any practical guidance much beyond the few statements by the Supreme Court. Essentially, whether a minor's petition for a waiver of parental consent should be granted is a determination left to the unfettered discretion of each judge.

Our proposal sets out guidelines for courts faced with making the determination of whether a teen is mature based on the nature of the teen's decision and the psychology and sociology of the decision-making process itself. Yet even with these guidelines, the "maturity" decision is one that is difficult, if not impossible, for judges to make. Even applying our proposed guidelines, it is doubtful that the Michigan statute's stated goal, restoration of parental rights, is furthered by the parental consent/judicial bypass process. The potential resultant harm to teenagers forced to go through this process, however, is enormous. ❀



## APPENDIX A

PARENTAL RIGHTS RESTORATION ACT  
MICH. COMP. LAWS ANN. § 722.901–.908

## 722.901 Short title

Section 1. This act shall be known and may be cited as “the parental rights restoration act”.

## 722.902 Definitions

Section 2. As used in this act

(a) “Abortion” means the intentional use of an instrument, drug, or other substance or device to terminate a woman’s pregnancy for a purpose other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus. Abortion does not include the use or prescription of a drug or device intended as a contraceptive.

(b) “Emergency” means a situation in which continuation of the pregnancy of the minor would create an immediate threat and grave risk to the life of the minor, as certified in writing by a physician.

(c) “Minor” means a person under the age of 18 years who is not emancipated pursuant to section 4 of Act No. 293 of the Public Acts of 1968, being section 722.4 of the Michigan Compiled Laws.

(d) “Next friend” means a person who is not 1 of the following:

(i) A physician who performs abortions.

(ii) A person who is employed by, or received financial consideration from, a physician who performs abortions or an organization that provides abortions or abortion counseling and referral services.

(iii) A person who serves as a board member or volunteer to an organization that provides abortions or abortion counseling and referral services.

## 722.903 Abortion for minor; written consent; petition to court for waiver of parental consent

Section 3. (1) Except as otherwise provided in this act, a person shall not perform an abortion on a minor without first obtaining the written consent of the minor and 1 of the parents or the legal guardian of the minor.

(2) If the parent or legal guardian is not available or refuses to give his or her consent, or if the minor elects not to seek consent of a parent or the legal guardian, the minor may petition the probate court

pursuant to section 4 for a waiver of the parental consent requirements of this section.

722.904 Probate court jurisdiction of petition for waiver of parental consent; proceedings; appeal; confidentiality; reports of suspected abuse

Section 4. (1) The probate court has jurisdiction of proceedings related to a minor's petition for a waiver of parental consent.

(2) Proceedings held pursuant to this act shall be completed with confidential and sufficient expedition to provide self-consent to an abortion, in accordance with all the following:

(a) The probate court shall, upon its first contact with a minor seeking a waiver of parental consent under this act, provide the minor with notice of the minor's right to all of the following:

(i) Confidentiality of the proceedings, including the right to use initials in the petition.

(ii) Court appointment of an attorney or guardian ad litem.

(iii) Assistance with preparing and filing the petition.

(b) A minor may file a petition for waiver of parental consent in the probate court of the county in which the minor resides. For purposes of this act, the county in which the minor resides means the county in which the minor's residence is located or the county in which the minor is found.

(c) Upon request of the minor, the probate court shall provide the minor with assistance in preparing and filing the petition for waiver of parental consent.

(d) A minor may file a petition for waiver of parental consent under this act on her own behalf or through a next friend. The minor may use initials or some other means of assuring confidentiality in this petition.

(e) Upon request of the minor, the probate court shall appoint an attorney or guardian ad litem within 24 hours to represent the minor in proceedings under this section.

(f) A minor is not required to pay a fee for proceedings under this section.

(g) A hearing on a petition for waiver of parental consent under this act shall be held within 72 hours, excluding Sundays and holidays, after the petition is filed and shall be closed to the public. All records of proceedings related to the petition for waiver of parental consent under this act are confidential.

(h) The probate court that hears the petition for waiver of parental consent shall issue and make part of the confidential record its specific

findings of fact and conclusions of law in support of its ruling either on record or in a written opinion.

(i) A written order granting or denying a petition for waiver of parental consent filed pursuant to this act shall be issued within 48 hours, excluding Sundays and holidays, after the hearing on the petition is held.

(3) The probate court shall grant a waiver of parental consent if it finds either of the following:

(a) The minor is sufficiently mature and well-enough informed to make the decision regarding abortion independently of her parents or legal guardian.

(b) The waiver would be in the best interests of the minor.

(4) A minor who is denied a waiver under this section may appeal the probate court's decision to the court of appeals. Appeal proceedings shall be expedited and confidential. The notice of appeal shall be filed within 24 hours of the issuance of the order denying the petition. The appeal shall be perfected within 72 hours, excluding Sundays and holidays, from the filing of the notice of appeal.

(5) The confidentiality requirements of this section do not prevent the probate court from reporting suspected child abuse under section 4 of the child protection law, Act No. 238 of the Public Acts of 1975, being section 722.624 of the Michigan Compiled Laws.

(6) If the minor who is seeking a waiver of parental consent reveals to the probate court that she is a victim of sexual abuse, and that her pregnancy is, or may be, the result of sexual abuse, the probate court shall immediately do all of the following:

(a) Report the suspected sexual abuse to the department of social services or a law enforcement agency pursuant to the child protection law, Act No. 238 of the Public Acts of 1975, being sections 722.621 to 722.636 of the Michigan Compiled Laws.

(b) Inform the minor that there are laws designed to protect her, including all of the following provisions of chapter XIIA of the probate code, Act No. 288 of the Public Acts of 1939, being sections 712A.1 to 712A.28 of the Michigan Compiled Laws:

(i) That a law enforcement officer may without court order take the minor into temporary protective custody if, after investigation, the officer has reasonable grounds to conclude that the minor's health, safety, or welfare would be endangered by leaving her in the custody of her parent or legal guardian.

(ii) That the juvenile division of the probate court may, upon

learning of the suspected sexual abuse, immediately hold a preliminary inquiry to determine whether a petition for court jurisdiction should be filed or whether other action should be taken.

(iii) That the juvenile court shall appoint an attorney to represent the minor in protective proceedings.

(iv) That after a petition has been filed, the juvenile court may order that the minor be placed with someone other than her parent or legal guardian pending trial or further court order if such placement is necessary to avoid substantial risk to the minor's life, physical health, or mental well-being.

(7) As used in this section, "child abuse" and "sexual abuse" mean those terms as defined in section 2 of the child protection law, Act No. 238 of the Public Acts of 1975, being section 722.622 of the Michigan Compiled Laws.

#### 722.905 Emergency abortion

Section 5. The requirements of Section 3 do not apply to an abortion performed pursuant to an emergency.

#### 722.906 Applicability to nonresidents

Section 6. The requirements of this act apply regardless of whether the minor is a resident of this state.

#### 722.907 Violation of act, misdemeanor; civil action, damages

Section 7. (1) A person who intentionally performs an abortion in violation of this act is guilty of a misdemeanor.

(2) A person's failure to obtain either parental consent pursuant to this act or a copy of a waiver granted under section 4 before performing an abortion on a minor is prima facie evidence in appropriate civil actions of his or her failure to obtain informed consent to perform the abortion or of his or her interference with family relations. A court shall not construe the law of this state to preclude exemplary damages in a civil action related to violations of this act.

#### 722.908 Right to abortion not created

Section 8. (1) This act does not create a right to an abortion.

(2) Notwithstanding any other provision of this act, a person shall not perform an abortion that is prohibited by law.

## APPENDIX B

## STATES WITH PARENTAL CONSENT OR NOTIFICATION LAWS

*Alabama:* ALA. CODE § 26-21-3 (1992) (consent); *Alaska:* ALASKA STAT. § 18.16.010 (1994) (one parent consent; no bypass procedure); *Arizona:* ARIZ. REV. STAT. ANN. § 36-2152 (1993) (consent); *Arkansas:* ARK. CODE ANN. § 20-16-801 et seq. (Michie 1991) (two parent notice); *California:* CAL. HEALTH & SAFETY CODE § 25958 (West Supp. 1995) (consent); *Colorado:* COLO. REV. STAT. § 18-6-101 et seq. (1986 & Supp. 1994) (consent); *Delaware:* DEL. CODE ANN. tit. 24, § 1790 (1987 & Supp. 1994) (two parent consent); *Georgia:* GA. CODE ANN. § 15-11-112 (1994) (notice); *Idaho:* IDAHO CODE § 18-609 (1987) (notice); *Illinois:* ILL. REV. STAT. ch. 720, para. 520-4 (1994) (two parent notice); *Kentucky:* KY. REV. STAT. ANN. § 311.732 (Michie/Bobbs-Merrill 1990 & Supp. 1994) (consent); *Louisiana:* LA. REV. STAT. ANN. § 40:1299.35.5 (West 1992) (consent); *Maine:* ME. REV. STAT. ANN. tit. 22 § 1597-A (West 1992 & Supp. 1994) (consent); *Maryland:* MD. CODE ANN., HEALTH-GEN. § 20-103 (1990) (one parent notice); *Massachusetts:* MASS. ANN. LAWS ch. 112, § 12S (Law Co-op. 1991) (consent); *Minnesota:* MINN. STAT. ANN. § 144.343 (West 1989) (notice); *Mississippi:* MISS. CODE ANN. § 41-41-53 (1993) (consent); *Missouri:* MO. ANN. STAT. § 188.028 (Vernon 1983 & Supp. 1995) (consent); *Montana:* MONT. CODE ANN. § 50-20-107 (1993) (notice); *Nevada:* NEV. REV. STAT. § 442.255 (1991) (one parent notice); *North Dakota:* N.D. CENT. CODE § 14-02.1-03.1 (1991) (consent); *Ohio:* OHIO REV. CODE ANN. § 2919.12 (Anderson 1993) (notice; permits notice to a sibling over 21 in lieu of parent); *Pennsylvania:* PA. STAT. ANN., tit. 18, § 3206 (1983 & Supp. 1995) (consent); *Rhode Island:* R.I. GEN. LAWS § 23-4.7-6 (1989) (consent); *South Carolina:* S.C. CODE ANN. § 44-41-31 (Law. Co-op. Supp. 1994) (consent); *South Dakota:* S.D. CODIFIED LAWS ANN. § 34-23A-7 (1994) (consent); *Tennessee:* TENN. CODE ANN. § 37-10-303 (1991) (consent); *Utah:* UTAH CODE ANN. § 76-7-304 (1995) (notice; no bypass procedure); *Virginia:* VA. CODE ANN. § 18.2-76 (Michie 1988) (consent); *Washington:* WASH. REV. CODE ANN. § 9.02.070 (West 1988) (consent); *West Virginia:* W. VA. CODE § 16-2F-3 (1995) (one parent notice); *Wisconsin:* WIS. STAT. § 48.375 (1992) (parental notification encouraged but not required); *Wyoming:* WYO. STAT. § 35-6-118 (1994) (one parent notice).

## APPENDIX C

MICHIGAN PROBATE JUDGES ASSOCIATION,  
QUESTIONNAIRE TO ASSIST THE COURT  
REGARDING WAIVER OF PARENTAL CONSENT

*Issue I:* Is the minor sufficiently mature and well-enough informed to make the decision regarding abortion independently of parent(s) or legal guardian?

What is the minor's birthdate?

What grade in school has the minor achieved?

What are her academic grades?

What is her school attendance record?

Does she participate in any school activities? If so what are they?

Does she participate in any extracurricular activities? If so what are they?

What is her employment history?

What is her financial situation?

What are her responsibilities in her home and residence?

What is her driving record?

What is her prior court involvement, if any?

What is her mental health record, if any?

What are her general plans for her future?

What are the minor's sources of information regarding abortion?

Is the information accurate and thorough?

Has the minor received counseling from anyone regarding abortion and if so, with whom?

Does she feel that she needs more counseling regarding her pregnancy and request for an abortion?

Does the minor understand the options or alternatives to abortion? Has she considered them?

How would the minor go about obtaining an abortion?

What is the minor's health history, including use of medications, controlled substances and alcohol?

Does the minor have a physician?

Has the physician made a recommendation to the minor regarding the minor's abortion?

Would there be any foreseeable medical complications in this case according to the physician?

Have both abortion procedures and child birth procedures together with the medical risks been explained to her?

Have the aftercare procedures been explained and understood?

Has the minor been informed and does she understand what to do if medical complications occur?

Has the minor been counseled as to the possible emotional and psychological problems she may experience after the abortion or child birth? How would she deal with such problems if any?

What arrangements would the minor make to have the abortion performed?

Has the minor been promised anything from anyone if she would have the abortion?

Has the minor been threatened with any action or inaction if she does not have the abortion?

*Issue II:* Is it in the best interests of the minor to grant the waiver of parental consent?

What is the minor's relationship with her mother, father, or her guardian?

With whom does the minor reside?

Who has legal custody of the minor?

Has the minor considered a petition for emancipation?

Who does the minor usually turn to for advice?

What is the person's advice on this issue of abortion, if any?

Does the minor feel she should not inform a parent or guardian about her pregnancy and request for this waiver and if so, why?

How do each of her parents or guardians generally respond when confronted with actions of the minor which displease them?

What does the minor believe would occur if she discussed her pregnancy and desire for an abortion with either parent or guardian?

What evidence regarding past behavior of the parents or guardians is there which would show harm would come to the minor if parental or guardians' consent were requested?



## APPENDIX D

SUGGESTED QUESTIONS FOR DETERMINING  
“MATURITY” AND “BEST INTERESTS”

Note: The inquiry should be limited to “maturity” at first, and should only proceed to “best interests,” which is a more intrusive inquiry, once the court has determined that “maturity” is not sufficient for granting the petition.

Also, the fact that the teen has come to court at all should itself be evidence of the teen’s “maturity.” Teens aged sixteen and seventeen should be presumptively deemed mature. For teens under age thirteen, it should be presumed to be in their “best interests” to obtain an abortion.

Questions related to “maturity”:

1. How old are you?
2. Have you thought about the personal consequences of the decision whether to have an abortion?
3. Have you made arrangements to pay for the medical procedure and any aftercare needs?
4. Do you have any mental condition that would render you unable to understand the consequences of your choice?
5. Do you feel that you have enough information regarding the medical, physical, and emotional ramifications of abortion so that you can make your own choice?
6. Did you get your information from a licensed doctor or clinic? (If so, it should be presumed to be adequate to provide informed consent from the teen).

Questions related to “best interests”:

1. How old are you?
2. Why do you feel that you should not inform your parent about your pregnancy and desire for an abortion?

3. How does your parent generally respond to things that you do that displease him or her?
4. What would be the medical, physical, social, and emotional consequences to you if you were to consult your parent?