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NOTES

PRO-LIFE JUDGES AND JUDICIAL BYPASS CASES

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This Note examines a "moral/formal" dilemma in judging.[1] It addresses the legal and moral situation of a judge who believes abortion is morally wrong,[2] when the law requires that judge to order permission for a minor to have an abortion without her parents' notice or consent.[3]

How can the judge assess the morality of so cooperating with abortion? How should the judge respond to any conflict between the judicial role and the demands of conscience and morality? We enter "the ethical debate over the proper response of judges to a conflict between law and morality."[4] Legal scholars studying

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1. Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & RELIGION 33, 38 (1989).

2. I will call this judge the "pro-life judge," recognizing the term's limitations but finding none to serve better.

3. *See* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 507–09 (1990) (describing typical judicial bypass procedure); Bellotti v. Baird (*Bellotti II*), 443 U.S. 622, 647–48 (1979) (plurality opinion) (setting forth constitutionally-mandated standards for judicial waiver of parental consent requirement). *See generally* Teresa S. Collett, *Seeking Solomon's Wisdom: Judicial Bypass of Parental Involvement in a Minor's Abortion Decision*, 52 BAYLOR L. REV. 513 (2000); Stephen P. Rosenberg, Note, *Splitting the Baby: When Can a Pregnant Minor Obtain an Abortion Without Parental Consent? The* Ex Parte Anonymous *Cases (Alabama 2001)*, 34 CONN. L. REV. 1109 (2002).

4. Paulsen, *supra* note 1, at 46. For articles addressing such conflicts, see John J. Coughlin, *Divorce and the Catholic Lawyer*, 61 JURIST 290 (2001); John H. Garvey & Amy V. Coney, *Catholic Judges and Capital Cases*, 81 MARQ. L. REV. 303 (1998); ORI LEV, *Personal Morality and Judicial Decisionmaking in the Death Penalty Context*, 11 J.L. & RELIGION 637 (1994–1995); William H. Pryor, Jr., *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 YALE L. & POL'Y REV. 347 (2006); Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 2002, at 17.

such conflicts recently have turned to this "judicial bypass" scenario as a test case.[5]

While this Note is as concerned with providing a reasoned analysis as with formulating conclusions, it agrees with other treatments finding that judicial bypass cases pose a serious issue of wrongful judicial cooperation in evil.[6] It also agrees with those commentators who have concluded that morally conflicted judges probably can and should recuse themselves from bypass cases.[7] Part I analyzes the constitutional and statutory law governing judicial bypass, showing how it requires the judge to issue permission for an abortion if the minor is sufficiently mature and well informed to make the decision on her own. Part II turns to case law and explains ways in which pro-life judges hearing bypass cases could make the procedure marginally more responsive to the state interest in encouraging childbirth over abortion and expressing respect for fetal life. Part III begins a moral analysis based on the Catholic moral tradition, considering whether a judge who issues a bypass cooperates immorally in abortion. Part IV examines recusal from bypass cases as one way that a judge can avoid complicity in abortion while remaining true to his or her legal duties. Part V examines resignation from the bench as another option in jurisdictions where recusal is unavailable or imprudent.

I. THE LEGAL RIGHT TO JUDICIAL BYPASS

Although, as a constitutional matter, states are free to require parental notice or consent for minors' abortions,[8] paren-

5. *See* Edward A. Hartnett, *Catholic Judges and Cooperation in Sin*, 4 U. ST. THOMAS L.J. 221, 249–51, 255–57 (2007) (addressing judicial bypass); Gregory A. Kalscheur, *Catholics in Public Life: Judges, Legislators, and Voters*, 46 J. CATH. LEGAL STUD. 211, 245–50 (2007) (addressing judicial bypass, again in the context of judges' moral duties).

6. *See* Hartnett, *supra* note 5, at 257 (concluding that, for moral reasons, "Catholic judges should not decide judicial bypass proceedings"); Kalscheur, *supra* note 5, at 248 (finding that bypass proceedings likely involve "culpable material cooperation in evil").

7. *See, e.g.*, Rebekah L. Osborn, Note, *Beliefs on the Bench: Recusal for Religious Reasons and the Model Code of Judicial Conduct*, 19 GEO. J. LEGAL ETHICS 895, 903 (2006); Lauren Treadwell, Note, *Informal Closing of the Bypass: Minors' Petitions to Bypass Parental Consent for Abortion in an Age of Increasing Judicial Recusals*, 58 HASTINGS L.J. 869, 877 (2007); *cf.* Paul Danielson, *Judicial Recusal and a Minor's Right to an Abortion*, 2 NW. J.L. & SOC. POL'Y 125 (2007) (finding recusal from bypass cases to be likely permitted under existing law, although problematic as a policy matter).

8. *See* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 327 (2006) (collecting cases and statutes); William H. Danne, Jr., Annotation, *Valid-*

tal involvement laws cannot interpose any "substantial obstacle"[9] to abortion when the minor is mature and well informed, or when abortion is in her best interest. Specifically, the Supreme Court has held that minors have a constitutional right to abortion, though more subject to regulation than in the case of adults.[10] The Court also has held that a minor who is both mature and well informed about abortion, or who can show that abortion is in her best interests, has a right to abortion without the consent of her parents or anyone acting *in loco parentis*.[11] In *Bellotti v. Baird* (*Bellotti II*), a plurality of the Court concluded that:

> [U]nder state regulation such as that undertaken by Massachusetts, every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she *satisfies the court that she is mature and well enough informed* to make intelligently the abortion decision on her own, the *court must authorize her to act without parental consultation* or consent. If she fails to satisfy the court that she is competent to make this decision independently, *she must be permitted to show that an abortion nevertheless would be in her best interests.* If the court is persuaded that it is, the *court must authorize the abortion.*[12]

Although the State may condition minors' access to abortion on notice to one parent,[13] perhaps without judicial bypass as an

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ity, Construction, and Application of Statutes Requiring Parental Notification of or Consent to Minor's Abortion, 77 A.L.R. 1 (2005).

9. *See* Stenberg v. Carhart, 530 U.S. 914, 921 (2000) (declaring it an "established principle[ ]" that an abortion regulation is unconstitutional if it "'has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992))); *accord* Gonzales v. Carhart, 127 S. Ct. 1610, 1626–27 (2007).

10. *See, e.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74–75 (1976) (positing that the strictures of *Roe* and *Doe* apply to regulations of minors' access to abortion).

11. *See* City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 439–40 (1983) (invalidating a parental consent ordinance because it did not contain the bypass procedure outlined in *Bellotti II*), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Bellotti v. Baird (*Bellotti II*), 443 U.S. 622, 647–48 (1979) (plurality opinion) (concluding that any parental consent requirement must contain an exception for a minor who can show a court she is "mature and well enough informed" to make an abortion decision independently); *Danforth*, 428 U.S. at 74 (holding that "the State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis*" as a condition for minor's abortion).

12. *Bellotti II*, 443 U.S. at 647–48 (emphasis added).

13. *See* Hodgson v. Minnesota, 497 U.S. 417, 450 (1990) (invalidating two-parent notice requirement because it "does not reasonably further any legiti-

option,[14] any parental involvement requirement would have to satisfy the Court's undue-burden test or a variant thereof.[15]

Even though the Supreme Court perhaps will not require judicial bypass of parental notice requirements (as opposed to bypass of parental consent requirements), the states have chosen to provide judicial bypass of both types of requirements. Twenty-four states require parental consent, and eleven other states require parental notice.[16] All thirty-five states provide for judicial bypass of these requirements.[17] The bypass provisions incorporate some version of the standard held to be constitutionally required in *Bellotti II*. For example, Texas's bypass provision reads:

> If the court finds that the minor is mature and sufficiently well informed, that [parental] notification would not be in the minor's best interest, or that notification may lead to physical, sexual, or emotional abuse of the minor, the court *shall* enter an order authorizing the minor to consent to the performance of the abortion without notification to either of her parents . . . .[18]

Note that the Texas law says "shall": granting the bypass is mandatory, not optional, for the court if the minor makes the requisite showing. In every state with a parental notice or consent

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mate state interest," state interest in parental involvement being fully satisfied by notice to one parent); H.L. v. Matheson, 450 U.S. 398, 407–10 (1981) (upholding parental notice requirement as less burdensome than parental consent requirement).

14. Federal courts have divided on whether a parental notice requirement must contain a provision for judicial bypass, and the Supreme Court has declined to rule on the issue. *Compare* Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1459 (8th Cir. 1995) (answering affirmatively), *cert. denied*, 517 U.S. 1174 (1996), *with* Planned Parenthood of the Blue Ridge v. Camblos, 155 F.3d 352, 372 (4th Cir. 1998) (answering negatively), *cert. denied*, 525 U.S. 1140 (1999). *See also* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 510 (1990) (declining to decide the issue).

15. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (setting forth undue burden standard).

16. Guttenmacher Inst., State Policies in Brief: Parental Involvement in Minors' Abortions (Jan. 1, 2008), http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf; *see also* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 326 n.1 (2006).

17. Guttenmacher Inst., *supra* note 16. In addition, seven other states have parental involvement laws not currently enforced. *Id.*

18. TEX. FAM. CODE ANN. § 33.003(i) (Vernon 2002) (emphasis added); *see also, e.g.*, TENN. CODE ANN. § 37-10-304(e) (2005) ("The consent requirement shall be waived if the court finds either that: (1) The minor is mature and well-informed enough to make the abortion decision on the minor's own; or (2) The performance of the abortion would be in the minor's best interests.").

law, judges will be required to determine whether a minor is sufficiently mature and well informed or whether abortion is in her best interest. If the judge makes either determination in the affirmative, the judge must order permission for the minor's abortion.

These constitutional and statutory standards preclude a judge from denying bypass based on an all-things-considered analysis of the minor's best interests. If the minor shows she is mature and sufficiently well informed, the judge cannot deny bypass on the ground that abortion is not in her best interests. If the minor shows that abortion is in her best interest, the judge cannot deny bypass on the ground that parental involvement is also in her best interest.[19] If the minor satisfies either the "mature and sufficiently well informed" test or the "best interests" test, the judge *must* grant permission for an abortion.

The judge also has no authority to deny permission for abortion by invoking respect for unborn human life. The "mature and sufficiently well informed" standard, which focuses only on the minor's capacity to choose, excludes consideration of whether abortion is a morally desirable outcome. The "best interests" standard is more flexible, but does not provide a ready mechanism for the judge to second-guess the minor's assertion that abortion is best for her. Neither does it explicitly or implicitly allow the judge to balance the minor's interests against those of the unborn fetus.

Nor is it likely that the judge has authority to deny bypass based on pro-life reasons kept concealed. If the judge issues an order denying bypass that is silent as to the reasons, the judge could fail a requirement that a bypass ruling state appropriate findings of fact and conclusions of law[20] or otherwise furnish matter for appellate review.[21] An appellate court could vacate and remand, ordering the judge to make his/her reasoning sufficiently explicit to admit review,[22] or alternatively the appellate

19. *See In re* Anonymous, 905 So. 2d 845, 848 (Ala. Civ. App. 2005) (reversing when the trial court denied bypass on the ground that the minor did not show that bypass, as distinct from abortion with parental consent, was in her best interest).

20. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 3206(f) (West 2000) ("[T]he court shall make in writing specific factual findings and legal conclusions supporting its decision . . . ."); MINN. STAT. ANN. § 144.343(6)(c)(iii) (West 2005) (same).

21. *See* Bellotti v. Baird (*Bellotti II*), 443 U.S. 622, 644 (1979) (plurality opinion) ("The [bypass] proceeding . . . , and any appeals that may follow, [must] . . . provide an effective opportunity for an abortion to be obtained.").

22. *See, e.g.*, *Ex parte* Anonymous, 889 So. 2d 518, 519 (Ala. 2003) (remanding to trial court when bypass denial was too conclusory to admit

court could render a decision for the minor.[23] Also, if the judge denies bypass based on pro-life reasons kept concealed, the decision could appear arbitrary to the minor affected, running afoul of the Supreme Court's concern that bypass not be denied arbitrarily.[24]

II. PRO-LIFE JUDGES APPLYING BYPASS LAW

Whether states' parental involvement laws are good policy or not is beyond the scope of this Note,[25] and states differ in the rigor of their enforcement.[26] More relevant to pro-life judges is the fact that the state has a legitimate interest, as the Supreme Court has recognized, in protecting unborn life throughout the term of pregnancy.[27] Nothing in the Constitution prohibits the state from acting on a preference for childbirth, so long as it places no "substantial obstacle" to a woman's freedom of choice.[28] The Court emphasized this recently in *Gonzales v. Carhart*, explaining that state regulations that "do no more than create a structural mechanism by which the State, or the parent or

meaningful appellate review); *In re* E.B.L., 544 So. 2d 333, 333 (Fla. Dist. Ct. App. 1989) (same).

23. *See In re* Doe 10, 78 S.W.3d 338, 340–41 (Tex. 2002) (holding that statute required the Texas Supreme Court to grant petition where trial court failed plain statutory requirement to issue written findings of fact and conclusions of law).

24. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) ("[T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.").

25. For articles engaging in this debate, see Collett, *supra* note 3, at 545, 574–76 (arguing that parental notification will often be in a minor's best interest if, for example, it leads to mental and physical help for post-abortion recovery or discovering that the pregnancy resulted from sexual exploitation); Carol Sanger, *Regulating Teenage Abortion in the United States*, 18 INT'L J.L. POL'Y & FAM. 305, 306 (2004) (criticizing parental involvement laws as more concerned "with securing a set of political goals aimed at thwarting access to abortion, restoring parental authority, and punishing girls for having sex"); Case Comment, *Abortion Rights—Parental Consent Requirement*, 117 HARV. L. REV. 2785, 2789–90 (2004).

26. "A five-year study of Minnesota bypass hearings revealed that out of 3,573 petitions, nine were denied, six were withdrawn, and 3,558 were granted." Sanger, *supra* note 25, at 309 (citing data reported in Hodgson v. Minnesota, 497 U.S. 417 (1990)). Other states' courts have been less sanguine, notably Alabama, which has many reported appeals from bypass denials. *See generally* Helena Silverstein & Leanne Speitel, *"Honey, I Have No Idea": Court Readiness to Handle Petitions to Waive Parental Consent for Abortion*, 88 IOWA L. REV. 75 (2002).

27. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

28. *Id.* at 877–78.

guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."[29]

In bypass hearings, therefore, judges may exercise available discretion to conduct the hearings and apply the law in a way that recognizes an unborn life is at stake. To the extent statutory law permits, judges constitutionally may use the bypass hearing to implement "structural mechanism[s] . . . [that] express profound respect for the life of the unborn."[30] This Part explains three ways in which judges can do so: appointing fetal guardians, considering whether the minor seeking bypass is *morally* well informed, and criticizing permissive abortion laws.

A. *Appointing Fetal Guardians*

First, the judge may have discretion to appoint a guardian ad litem for the minor's fetus, as at least Alabama judges have had permission to do.[31] Some Alabama judges have appointed fetal guardians routinely.[32] The practice has been commended[33] and criticized,[34] but the most thorough analysis concludes that it is constitutional.[35] Insofar as the appointment of a guardian

29. Gonzales v. Carhart, 127 S. Ct. 1610, 1627 (2007) (quoting *Casey*, 505 U.S. at 877).

30. *See id.* For an argument that judges *should* do so, see Paulsen, *supra* note 1, at 74 ("[For the pro-life judge,] [t]he natural right to life serves, interstitially, to supply the governing rule of law wherever positive law is not *expressly* to the contrary and as a choice of law principle in conflict-of-laws situations.").

31. *See Ex parte* Anonymous, 810 So. 2d 786, 796 (Ala. 2001) (Lyons, J., concurring in the result) (noting the court did not reach the issue, presented on appeal of whether guardian for fetus was proper, but opining in the affirmative); *In re* Anonymous, 720 So. 2d 497, 501 (Ala. 1998) (Hooper, C.J., concurring) (arguing for propriety of fetal guardians in bypass cases, as consistent with appointment of fetal guardians in other contexts, and with legislature's intent in enacting parental consent statute). *But see In re* T.W., 551 So. 2d 1186, 1190 (Fla. 1989) (stating without elaboration that appointment of fetal guardian was "clearly improper").

32. *Ex parte* Anonymous, 810 So. 2d 786, 789 (Ala. 2001) (relating that trial judge told petitioner it was his "practice" to appoint guardian for fetus because abortion is "something that is extremely serious and fatal for your child"); Helena Silverstein, *In the Matter of Anonymous, A Minor: Fetal Representation in Hearings to Waive Parental Consent for Abortion*, 11 CORNELL J.L. & PUB. POL'Y 69, 87 (2001).

33. *See* M. Todd Parker, Note, *A Changing of the Guard: The Propriety of Appointing Guardians for Fetuses*, 48 ST. LOUIS U. L.J. 1419, 1461–62 (2004).

34. Silverstein, *supra* note 32, at 105–06 (concluding that appointment of a fetal guardian makes the bypass process more "challenging," that is, more time consuming and potentially intimidating, for the minor).

35. *Id.* at 102–06. Silverstein reasons that *Casey* allows the state to "'create a structural mechanism . . . to express profound respect for the life of the

manifests the court's respect for the fetus as at least potential human life, it serves as a constitutionally-licit "structural mechanism by which the State . . . may express profound respect for the life of the unborn."[36]

Appointing a fetal guardian may also serve the interest of truth-finding in the bypass proceeding.[37] Unless a guardian is appointed, the bypass proceeding is ex parte: there will be no one representing the state's interest in enforcing the parental consent requirement or presenting an argument that the minor is not sufficiently mature. When a fetal guardian is appointed, the guardian may cross-examine the minor,[38] ensuring a complete story and helping the court to determine the minor's credibility. The guardian may also call witnesses and present evidence,[39] affording the court a fuller view of facts than if only the minor and her attorney appeared. These features of adversary litigation could, however, be objected to on the grounds that they tend to humiliate or shame the minor out of abortion, hindering her freedom to choose.

B. *Considering Whether the Minor Is Morally Well Informed*

Second, a judge could consider, as relevant to whether a minor is well informed, her knowledge of fetal life and consideration of moral arguments against abortion. The Supreme Court in *Casey* said that the state has a legitimate interest in "encourag[ing] [a woman] to know that there are philosophic

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unborn'" and that this, not a desire to prevent abortions, is the primary purpose of Alabama judges appointing fetal guardians. *Id.* at 102 (quoting *Casey*, 505 U.S. at 877 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (citation omitted)). Silverstein concludes that appointment of a fetal guardian could not be deemed unduly burdensome under Supreme Court precedent upholding twenty-four-hour waiting periods. *Id.* at 106.

36. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

37. Parker, *supra* note 33, at 1462; *see also* Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873, 1891–92 (1996) (expressing concern that in an ex parte proceeding where no opposing party challenges the evidence presented, the court's finding as to the minor's maturity will lack objective basis).

38. *See Ex parte* Anonymous, 889 So. 2d 518, 518 (Ala. 2003); *Ex parte* Anonymous, 810 So. 2d 786, 788 (Ala. 2001) (noting that "[t]he lawyer appointed for the fetus . . . subjected [the minor] to a probing cross-examination" concerning her knowledge of the risks of abortion and of alternatives to abortion); Silverstein, *supra* note 32, at 87–88 (reporting that in all seventeen Alabama cases where a fetal guardian was appointed, the guardian extensively questioned the minor).

39. *See In re* Anonymous, 720 So. 2d 497, 498 (Ala. 1998); *In re* Anonymous, 733 So. 2d 429, 430 (Ala. Civ. App. 1999).

and social arguments of great weight . . . in favor of continuing the pregnancy to full term."[40] The Court has upheld requirements that a woman seeking abortion give informed consent and receive certain information about the abortion procedure, including the "'probable gestational age' of the fetus."[41] Indiana law, for example, requires that a woman seeking abortion be informed of "the probable gestational age of the fetus, including an offer to provide . . . a picture or drawing of a fetus," and that she be informed of the possibility of viewing a fetal ultrasound image and hearing the fetus's heartbeat.[42]

Legal definitions of what is a mature and well informed minor often are broad enough to encompass assessment of the minor's knowledge of fetal life and consideration of the morality of abortion.[43] Typical definitions use broad language and direct the court to afford considerable weight to the minor's understanding of abortion and its alternatives. Definitions may be either statutory[44] or judicially constructed. Judicial definitions may enumerate a comprehensive set of factors[45] or a merely illustrative one.[46] Some appellate courts have declined to define explicitly what is a mature and well-informed minor, leaving the

40. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.); *see also* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520 (1990) ("A free and enlightened society may decide that each of its members should attain a clearer, more tolerant understanding of the profound philosophic choices confronted by a woman who is considering whether to seek an abortion.").

41. *Casey*, 505 U.S. at 881–82 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (overruling City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983), and Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986)).

42. IND. CODE ANN. § 16-34-2-1.1(a) (West 2007).

43. On state definitions of what is a mature and well-informed minor, see generally Steven F. Stuhlbarg, Note, *When Is a Pregnant Minor Mature? When Is an Abortion in Her Best Interests?*, 60 U. CIN. L. REV. 907 (1992).

44. *See, e.g.*, N.C. GEN. STAT. § 90-21.8(d) (2005) (directing court at bypass hearing to hear evidence relating to, inter alia, "the emotional development, maturity, intellect, and understanding of the minor"); 18 PA. CONS. STAT. ANN. § 3206(f) (West 2000) (similar).

45. *See In re* Doe, 19 S.W.3d 249, 256 (Tex. 2000) (requiring a minor to establish that she is mature and sufficiently well informed, to show that she has obtained information about and understands the health risks of abortion, to establish that she understands alternatives to abortion, and to establish that she is "aware of the emotional and psychological aspects of undergoing abortion," including how the abortion decision "might affect her family relations"); *see also* Collett, *supra* note 3, at 564–65 (discussing the Texas standard).

46. *See In re* B.S., 74 P.3d 285, 290 (Ariz. Ct. App. 2003) (citing *Bellotti II* for the proposition that "maturity *may* be measured by examining the minor's experience, perspective, and judgment") (emphasis added); *In re* Petition of Anonymous 1, 558 N.W.2d 784, 787 (Neb. 1997) (same).

determination's parameters to trial court discretion.[47] The relevant inquiry seems of its nature to be open ended.[48]

Under any sound definition, the minor's awareness of fetal life and her consideration of the morality of abortion are relevant to whether she is mature and well informed. Bypass decisions commonly recite a minor's awareness and consideration of alternatives to abortion in finding that she is indeed mature and well informed.[49] Whether the minor has considered the morality of abortion pertains to this common and important inquiry of whether she has considered alternatives, such as adoption or raising the child. To *consider* the alternatives intelligently vis-à-vis one another, the minor has to consider their arguable morality. The minor's knowledge of fetal life likewise pertains to her knowledge of the abortion procedure—as one court put it, whether she has "'knowledge necessary to substantially understand the situation at hand and the consequences of the choices that can be made.'"[50]

The higher the standard of proof the minor must meet, the more relevant will be the minor's knowledge of fetal life and consideration of the morality of abortion. *Bellotti II* assumes that the burden of proof will rest on the minor,[51] and the Supreme Court has held that a state may require the minor to show maturity or best interests by clear and convincing evidence.[52] The standard of proof, therefore, varies among states. The Texas and Kansas statutes both adopt a preponderance standard.[53] Some appellate

47. *In re* R.B., 790 So. 2d 830, 834 (Miss. 2001) (declining to impose a concrete standard for determining maturity, and suggesting the trial judge must exercise discretion); *In re* Doe 1, 566 N.E.2d 1181, 1184–85 (Ohio 1990) (plurality opinion) (stating that Ohio's bypass statute invests the juvenile court with "a certain amount of discretion in determining whether" the minor is sufficiently mature and declining to adopt a six-factor test urged by the appellant).

48. *See* Bellotti v. Baird (*Bellotti II*), 443 U.S. 622, 644 n.23 (1979) (plurality opinion) ("[T]he peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors."); Suellyn Scarnecchia & Julie Kunce Field, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 MICH. J. GENDER & L. 75, 100–10 (1995) (noting a variety of factors proposed under Michigan law for determining maturity).

49. *See, e.g.*, *In re* Doe, 485 S.E.2d 354, 358 (N.C. Ct. App. 1997); *In re* Doe, 615 N.E.2d 1142, 1143 (Ohio Ct. App. 1992) (per curiam).

50. *In re* Petition of Doe, 866 P.2d 1069, 1074 (Kan. 1994).

51. *See Bellotti II*, 443 U.S. at 647–48 (concluding that under legitimate bypass procedure, a court must authorize the minor's abortion decision "[i]f she satisfies the court that she is mature and well enough informed" but that "if the court is not persuaded" it may decline to sanction the abortion).

52. Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 515–16 (1990).

53. TEX. FAM. CODE ANN. § 33.003(i) (Vernon 2002); KAN. STAT. ANN. § 65-6704 (2003).

courts have implicitly adopted a preponderance standard, requiring the court to grant bypass if there is some evidence the minor is mature and well informed, and no evidence to the contrary.[54] Other states have required a clear and convincing showing, either by statute[55] or judicial decision.[56] When the standard of proof is clear and convincing evidence, the minor will not necessarily establish her maturity by presenting only some evidence of maturity, such as that she is a good student, that she is employed, or that she has plans for the future.[57] Her knowledge of fetal life and consideration of the morality of abortion can thus affect whether she has established her maturity.

Courts have come close to recognizing that a minor's consideration of the morality of abortion affects whether she is mature and well informed. Some justices of the Texas Supreme Court would have required all minors seeking bypass to be informed of moral arguments against abortion.[58] The Nebraska Supreme Court also has suggested that consideration of the morality of abortion could evidence the minor's maturity or understanding of her options. The Nebraska court upheld a finding that a minor was not mature and well informed because, although she

54. *See, e.g.*, *Ex parte* Anonymous, 595 So. 2d 497, 498 (Ala. 1992) ("[T]he petition for wavier of parental consent may be *denied* only if the court specifically finds *both* that (1) the minor is immature and not well enough informed to make the abortion decision on her own, *and* (2) that performance of the abortion would not be in her best interests.").

55. OHIO REV. CODE ANN. § 2151.85(C)(1) (LexisNexis 2007); LA. REV. STAT. ANN. § 40:1299.35.5(B)(4) (2001); FLA. STAT. § 390.01114 (2007).

56. *In re* Petition of Anonymous, 558 N.W.2d 784, 787 (Neb. 1997) ("Considering the magnitude of the decision at issue, the fact that the proceedings are ex parte in nature, and recognizing that any evidence will usually satisfy the preponderance of the evidence standard, we think it necessary that the pregnant minor establish, by *clear and convincing evidence*, her maturity or that the performance of an abortion upon her without parental notification is in her best interests.") (emphasis added); *In re* B.S., 74 P.3d 285, 289 (Ariz. Ct. App. 2003).

57. *See, e.g.*, *In re* Doe 1, 566 N.E.2d 1181, 1184 (Ohio 1991) (affirming trial court's ruling that a seventeen-year-old, with a "B" average in high school, who held part-time jobs and planned to attend college, was not mature and well enough informed); H.B. v. Wilkinson, 639 F. Supp. 952, 957–58 (D. Utah 1986) (concluding that seventeen-year-old, a good student who planned to attend college and was allowed use of family car, was not mature because she "demonstrated unrealistic judgment and perspective in such things as her reliance on the advice of teenagers, her expectation of keeping the [pregnancy] secret from her parents . . . , her dismissal without consideration of the possibility of experiencing post-abortion depression, her purposeful failure to use contraceptives and her cavalier attitude about the ease of abortion").

58. *In re* Doe, 19 S.W.3d. 249, 263–65 (Tex. 2000) (Owens, J., concurring).

had somewhat considered abortion alternatives including adoption,[59] her testimony "did not indicate that [she] understood and appreciated the gravity and impact of each option before her," and it was not evident that "she understood and appreciated the short- and long-term consequences of her desire to seek an abortion."[60] Similarly, Alabama courts have denied bypass to minors who appeared unreflective as to the moral gravity of abortion[61] or its long-term psychological consequences.[62]

A judge may not, however, afford more weight to the minor's consideration of the morality of abortion than the governing law permits. Although one Alabama judge apparently has required most minors seeking bypass to have first consulted a pro-life counseling organization,[63] requiring such consultation stretches the limits of the judge's authority. An Alabama appellate court reversed a finding of immaturity that was based in part on the minor's "failure to seek counseling from a facility that opposes abortion, from her parents, or from a mature relative or friend."[64] The court said that although a minor who does seek such counseling thereby demonstrates maturity, a minor who does not seek such counseling does not thereby demonstrate immaturity.[65] A judge who requires every bypass petitioner to show appreciation of pro-life arguments perhaps adds illegitimately to the exclusive set of requirements for bypass set forth by statute.[66]

A judge who evaluates the minor's consideration of the morality of abortion must also frame the legal inquiry in nonreligious terms distinct from the judge's personal views or convic-

59. *In re* Petition of Anonymous, 558 N.W.2d 784, 786 (Neb. 1997).

60. *Id.* at 788.

61. *See Ex parte* Anonymous, 812 So. 2d 1234, 1238 (Ala. 2001) ("'[T]he testimony of the minor and the godmother appeared to be rehearsed and . . . neither of the two individuals showed any emotion concerning the very serious request they were making in this proceeding.'").

62. *See Ex parte* Anonymous, 808 So. 2d 1030, 1033 (Ala. 2001) (citing trial court's findings).

63. *See In re* Anonymous, 905 So. 2d 845, 848 (Ala. Civ. App. 2005) (quoting trial judge's order, stating that he routinely required a minor seeking bypass to consult with "Sav-A-Life, or a similar pro-life organization").

64. *In re* Anonymous, 733 So. 2d 429, 431 (Ala. Civ. App. 1999).

65. *Id.*

66. *See In re* Doe, No. 02CA0067, 2002 WL 31492302, at *3 (Ohio Ct. App. Sept. 16, 2002). The appeals court reversed a trial court ruling that a minor was insufficiently mature. The trial court judge based his ruling on the fact that the minor had not spoken with any medical provider or person who had had an abortion. The appeals court found instead that the minor possessed the requisite knowledge plainly contemplated by the Ohio bypass statute and was thus sufficiently mature and well informed.

tions. An Alabama judge who based a denial of bypass, in part, on the minor's failure to consider what the judge termed "the spiritual aspects of her decision"[67] was reversed and sharply criticized for making a religiously grounded decision that "superimpose[d] [the court's] judgment or its moral convictions on the minor."[68] In another Alabama case where the judge referred to the "spiritual consequences" of the minor's abortion decision, the appellate court explicitly "question[ed] [the judge's] objectivity in a judicial-bypass case."[69]

As for the minor's understanding of fetal life, appellate courts have not recognized its importance for a well-informed decision. While appellate decisions have found a minor's awareness of abortion's effects on her own physical health to be important,[70] even essential,[71] if she is to be deemed well informed, they have seldom inquired about the minor's awareness that abortion destroys an actual or potential human life. The Nebraska Supreme Court, for example, stated that a minor's inability to articulate the medical risks of abortion indicated lack of perspective or judgment, yet at the same time expressed no concern over the minor's inability to articulate that what an abortion would, in her words, "scrape out" of her womb was a life or potential life.[72] In a Texas bypass hearing, however, the minor's attorney adduced the minor's willingness to go forward with abortion despite knowing that her fetus is a human life.[73] And an Alabama

67. *In re* Anonymous, 733 So. 2d 429, 431 (Ala. Civ. App. 1999).

68. *Id.* at 432 (quoting *Ex parte* Anonymous, 618 So. 2d 722, 725 (Ala. 1993)).

69. *In re* Anonymous, 905 So. 2d 845, 850 (Ala. Civ. App. 2005).

70. *See, e.g., In re* Doe, No. 02CA0067, 2002 WL 31492302, at *3 (Ohio Ct. App. Sept. 16, 2002) (stating that minor's knowledge of abortion procedure and its risks, with consideration of alternatives to abortion, and favorable testimony about her personal responsibility, were clear and convincing evidence that she was mature and well enough informed).

71. *See In re* Doe, 19 S.W.3d 249, 256 (Tex. 2000) (requiring the mature and well-informed minor to show that she has obtained information about and understands the health risks of abortion).

72. *In re* Petition of Anonymous 2, 570 N.W.2d 836, 838, 839 (Neb. 1997). Of course, the American legal system does not generally treat the fetus as "a life" for the purpose of defining abortion rights. However, for the purpose of enacting abortion regulations such as waiting periods and informed consent requirements, the state has a legally-recognized interest in protecting the fetus as at least potential life. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871 (1992) (plurality opinion) (specifying the state interest in protecting potential life).

73. *In re* Doe 4, 19 S.W.3d 322, 329 (Tex. 2000) (Hecht, J., dissenting) (indicating minor answered affirmatively to questions, "And we have talked about that life is very sacred, have we not?" and "And you know that if the Court

judge found that a minor was well informed in part because she "ha[d] seen the ultrasound of her child."[74]

The Alabama judge sensibly applied the "well informed" standard, as an abortion decision can hardly be well informed if the minor is oblivious of what abortion really does to unborn life. However, judges would push the limits of their authority if they required the minor to understand the effects on the fetus in every case. Some appellate courts have reversed denials of bypass where the judge appeared to require an adult level of knowledge and maturity.[75] If many adult women would be unable to articulate to a court the facts of fetal development and what abortion does to the fetus, judges could easily exceed their authority in requiring such understanding from a minor.

Further, it could be objected that if a court denies bypass because the minor has not adequately considered the morality of abortion or educated herself as to its consequences for her fetus, the court has imposed an undue burden on the minor's constitutional right to abortion. Yet minors' abortion rights are not exactly equivalent to adults',[76] and the law contemplates burdening them with parental involvement or the time and expense of a bypass proceeding. Therefore, a legal requirement that would be an undue burden for an adult may not be one for a minor. If judicial bypass proceedings are supposed to be meaningful and not pro forma, then it does not seem unduly burdensome that the judge ask searching questions going to whether the minor appreciates the gravity of abortion.

C. *Criticizing Permissive Abortion Law*

Finally, even if a judge is legally constrained to order permission for an abortion, nothing prevents the judge from stating, on the record, appropriate reservations about this result or the law that compels it. One judge, for example, accompanied a bypass order with a statement that the judge "'[did] not condone abor-

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grants this, in essence what you are going to do is end a—a life that is already starting now?").

74. *In re* Anonymous, 905 So. 2d 845, 848 (Ala. Civ. App. 2005).

75. *See, e.g.*, *Ex parte* Anonymous, 618 So. 2d 722, 725 (Ala. 1993); *In re* Doe, 924 So. 2d 935, 938–39 (Fla. Dist. Ct. App. 2006) (holding that trial court applied an incorrect definition of "sufficiently mature" when it "improperly held Doe to the standard of a fully-grown adult").

76. *See* Bellotti v. Baird (*Bellotti II*), 443 U.S. 622, 634 (1979) (plurality opinion) ("[T]he constitutional rights of children cannot be equated with those of adults . . . .").

tion.'"[77] Four justices of the Alabama Supreme Court stated in a concurring opinion that their decision to uphold a judicial bypass "should not be construed or understood as expressing our personal views on whether abortion is right or wrong, whether the decisions of the United States Supreme Court that govern us in this area are sound, or whether these decisions will be modified or overruled in the future."[78] Other judges have more openly criticized the permissive law they have felt constrained to apply. Justice Easley of the Mississippi Supreme Court, separately concurring in a bypass case, opined that the state has a duty "to protect all life including prenatal life."[79] Justice Easley explained that with the help of "numerous private, faith-based, and public agencies," alternatives to abortion are almost always practicable.[80]

Of course, the judge whose written opinion criticizes permissive abortion law could face public criticism for improperly bringing religion into the public square, even if the judge's arguments are ethically rather than religiously based. The criticism has some force because a judge's official actions should reflect publicly accessible and acceptable reasons,[81] and commonly it is thought that "[t]he question about the moral worth of the fetus is not one that anyone can answer on the basis of [generally] shared premises and publicly accessible reasons."[82] Yet in spite of pervasive moral disagreement in our society, moral arguments against legalized abortion are accessible to all even if religion is not. A public official who argues that "abortion takes innocent life which society should protect" and that "our concept of rights cannot embrace actions so intrinsically evil" may have come "to believe these things by a specifically [religious] route, but other people have reached the same conclusions by other roads . . . and there is nothing sectarian about saving lives."[83] Perhaps the problem is that such arguments appeal, at least implicitly, to a

77. *In re* Anonymous, 720 So. 2d 497, 504 (Ala. 1998) (Hooper, C.J., concurring in part and dissenting in part) (quoting trial judge's order).

78. *Id.*

79. *In re* R.B., 790 So. 2d 830, 835 (Miss. 2001) (Easely, J., concurring).

80. *Id.*

81. Judges generally "rely on arguments they believe should have force for all judges." Kent Greenawalt, *Religion and American Political Judgments*, 36 WAKE FOREST L. REV. 401, 410 (2001). Judges arguably are those public officials most directly subject to a requirement that their stated justifications for action sound in "public reason." *See* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 768 (1997).

82. John H. Garvey, *The Pope's Submarine*, 30 SAN DIEGO L. REV. 849, 872 (1993).

83. *Id.* at 874.

metaphysics—a comprehensive doctrine of reality—that not all citizens share.[84] Natural law theorists, however, argue that "people can reason to sound moral judgments *without* understanding or accepting any overall theory that explains how these judgments fit with physical reality or God's purposes," suggesting why "the moral arguments the [natural law] theorist presents might qualify as public reasons, even though his complete theory definitely does not."[85]

There is another argument, to the effect that judicial conduct knowingly influenced or motivated by the judge's religious beliefs violates the Constitution. If a public official "takes official action for the sole purpose of promoting the religious aims of his Church" he would act inconsistently with the "*Lemon* rule against religious purposes."[86] Yet when the judge criticizes pro-abortion law on ethical premises that, as has been suggested, are fundamentally nonsectarian, the *Lemon* rule may not apply. The *Lemon* rule also may be unsound because "[t]he Establishment Clause . . . is mainly about what laws do, not why they are enacted."[87] Further, if certain moral intuitions function as necessary presuppositions of our nation's laws, as surely is the case, then judicial recourse to religious beliefs that make these moral intuitions accessible should not be constitutionally out-of-bounds.[88]

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84. Perhaps any argument that abortion gravely violates human dignity would offend Rawls's principle that arguments applying to "basic political and social institutions" be such that they "can be presented independently from comprehensive doctrines of any kind." Rawls, *supra* note 81, at 776.

85. Kent Greenawalt, *Natural Law and Public Reasons*, 47 VILL. L. REV. 531, 543 (2002).

86. Garvey, *supra* note 82, at 875 (citing Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)). Arguably the Establishment Clause then "limits the ability of judges, like any governmental actors, to excessively involve or advance religion through their official functions or purposes." Scott C. Idleman, *The Concealment of Religious Values in Judicial Decisionmaking*, 91 VA. L. REV. 515, 526 (2005). *See generally* Scott C. Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, 81 MARQ. L. REV. 537 (1998).

87. *See* Greenawalt, *supra* note 81, at 412.

88. *See* Francis J. Beckwith, *Taking Theology Seriously: The Status of the Religious Beliefs of Judicial Nominees for the Federal Bench*, 20 NOTRE DAME J. L. ETHICS & PUB. POL'Y 455 (2005) (arguing that religious traditions are knowledge traditions that may as properly inform legal reasoning as other non-legal sources of information); Stephen D. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989) (arguing that our nation's constitutional law is based in part on moral reasoning and that there is no prima facie reason to exclude religious traditions from informing such moral reasoning).

III. MORAL ANALYSIS: JUDICIAL BYPASS AND COOPERATION IN EVIL

So far this Note has considered how bypass law requires the judge to issue permission for a minor's abortion if the minor is mature and well informed. Without entirely leaving the legal frame of reference, this Part considers the moral implications of a judge so acting. How, if at all, is the judge morally responsible for the abortion that he or she legally authorizes or gives permission for?[89] This inquiry divides into two questions: Does the judge who issues a bypass violate the moral norm that forbids intentional killing? If not, is the judge's action still wrongful because abortion is its forseen side effect? To put it in traditional moral-theological vocabulary: (1) Does the judge who issues a bypass order cooperate formally in the act of abortion? (2) If not, does the judge's act constitute impermissible material cooperation?[90] Finding a clear answer may be difficult because assessment of material cooperation is always ad hoc and fact specific.

A. *Formal Cooperation?*

The pro-life judge recognizes that the moral law proscribes, without exceptions, any act which is "intended, whether as end or means, to kill an innocent human being."[91] What one chooses for purposes of moral evaluation is one's proposal for action,

89. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2152(B) (2003) ("A judge of the superior court shall . . . authorize a physician to perform the abortion if the judge determines that the pregnant minor is mature and capable of giving informed consent to the proposed abortion."). Other statutes describe the judicial action as authorizing the minor to consent to abortion. *E.g.*, FLA. STAT. § 390.01114(4)(c) (2007) ("If the court finds . . . that the minor is sufficiently mature to decide whether to terminate her pregnancy, the court shall issue an order *authorizing the minor to consent* to . . . a termination of pregnancy.") (emphasis added). Still other statutes characterize the judicial action as waiving the parental involvement requirement. *E.g.*, ALA. CODE. § 26-21-4(f) (1992); KAN. STAT. ANN. § 65-6704 (2003).

90. *See* GERMAIN GRISEZ, 1 WAY OF THE LORD JESUS: CHRISTIAN MORAL PRINCIPLES 301 (1983) ("The idea of the distinction [between formal and material cooperation] is that one who formally cooperates participates in the immoral act in such a way that it becomes his or her own, whereas one who materially cooperates does something which facilitates the immoral act but does not make it his or her own.").

91. *See* JOHN FINNIS, AQUINAS 141 (1998) [hereinafter FINNIS, AQUINAS]; *see also* CATECHISM OF THE CATHOLIC CHURCH paras. 2268, 2269 (2d ed. 1997) [hereinafter CATECHISM] (explaining that the Fifth Commandment forbids both "direct and intentional killing" and "doing anything with the intention of *indirectly* bringing about a person's death"). For an explanation of the concept of exceptionless moral norms, see JOHN FINNIS, MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH 1–6 (1991) [hereinafter FINNIS, MORAL ABSOLUTES].

comprising both the end one seeks and the means one selects to obtain it.[92] These elements comprising one's choice are distinguished from results that are their foreseen side-effects; for side-effects one bears a real, but different and generally lesser, responsibility.[93]

The judge cooperates formally if and only if, in choosing to authorize the minor's abortion pursuant to bypass law, the judge chooses abortion as an end or a means.[94] Compare our judge with a legislator who enacts a law expanding abortion access: clearly that legislator chooses, as an end or a means, to make abortion available. Catholic authorities, therefore, have emphatically instructed Catholic elected officials not to vote for such laws, explaining that doing so would constitute impermissible cooperation in evil.[95] A judge would engage in similar cooperation if, in choosing between two interpretations of a law, neither of which the existing body of law compelled, he chose the interpretation that permitted more abortions. That is, a judge chooses a pro-abortion outcome if it derives from judicial discretion[96] mirroring legislative policy-making.

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92. FINNIS, MORAL ABSOLUTES, *supra* note 91, at 40; *see also* GRISEZ, *supra* note 90, at 233 ("The action of an individual is defined by the proposal adopted by a choice, just as the action of a group is defined by the motion adopted by a vote. . . . Since one's action is defined by the proposal one adopts, one not only does what one chooses to do as good in itself . . . but also does what one chooses to do as a means.").

93. GRISEZ, *supra* note 90, at 239–40 ("In choosing one establishes one's existential identity by settling one's personal priorities among the goods on which the choice bears. One does not determine oneself in the same way with respect to forseen [sic] side effects, which are neither sought for their own sake nor included in the proposal one adopts.").

94. Traditionally, "[f]ormal cooperation is defined as cooperating in a morally wrongful act while sharing in the immoral intention of the person committing the act." Kalscheur, *supra* note 5, at 232 (quotation and citation omitted). Formal cooperation is always morally wrongful.

95. *See* CONGREGATION FOR THE DOCTRINE OF THE FAITH, DOCTRINAL NOTE ON SOME QUESTIONS REGARDING THE PARTICIPATION OF CATHOLICS IN POLITICAL LIFE para. 4 (2002) [hereinafter DOCTRINAL NOTE] ("John Paul II, continuing the constant teaching of the Church, has reiterated many times that those who are directly involved in lawmaking bodies have a 'grave and clear obligation to oppose' any law that attacks human life. For them, as for every Catholic, it is impossible to promote such laws or to vote for them.") (citation omitted); Bishop John Myers, *Obligations of Catholics and Rights of Unborn Children*, 20 ORIGINS 65 (1990) (pastoral statement setting forth duty to refrain from enacting permissive abortion laws).

96. On the concept of judicial discretion, see J. ERIC SMITHBURN, JUDICIAL DISCRETION 7 (2006) ("'Discretion signifies choice. First, the decision-maker exercising discretion has the ability to choose from a range of permissible conclusions. . . . Although the act of choosing will be guided by various legal and other considerations, the decision-maker, and not the law, decides. . . . The trial

Suppose, however, that the judge's reading of the bypass statute and applicable case law leads the judge to conclude that if he follows the law he *must* grant an abortion bypass to this minor. The judge's only options are: (1) to follow the law and grant the bypass; or (2) to avoid granting the bypass by somehow not applying the law. If the judge, then, grants the bypass, she still is not choosing abortion as an end or a means, at least not in the same way as the pro-abortion legislator or the judge exercising discretion. And under the bypass law examined in Parts I and II, the judge has minimal discretion when deciding under the mature and well informed test (the best interests test would allow more discretion). Under the mature and well informed test, the judge who uses all the discretion she has to consider the minor's knowledge of fetal life and consideration of the morality of abortion may still be forced to conclude that this minor is mature and well informed under any legally-defensible reading of that standard. In that case, the judge who issues the bypass does not opt for abortion in a discretionary way and probably does not choose abortion as an end or a means.

To state the same point positively, the pro-life judge enforcing bypass law has an object and a motivation to her action that remain distinct from that of the minor seeking an abortion. The judge who rules that the minor is mature and sufficiently informed to decide for herself may fervently hope that, upon further reflection, the minor decides against abortion. The judge's "legitimate acts and reasons" for making this ruling may be identified as, inter alia, "service to the legal system and the provision of justice in general," "continued employment and the financial care of self and other dependents," and "opportunities to bring the Catholic [or other religious] tradition into [bypass] law."[97]

Most likely then, a judge who issues a judicial bypass when she reasonably believes that applying the law compels this result does not cooperate formally in the evil of abortion. Perhaps this conclusion is incorrect because, it could be thought, a judge issuing a bypass order acts as an agent of a permissive abortion law (or legal order), and agents usually function as formal cooperators with their principals. However, a judge compelled by clearly established law to order a bypass is an agent with limited discre-

court nevertheless must choose wisely . . . with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.'" (quoting Johnson v. United States, 398 A.2d 354, 361 (D.C. 1979))).

97. Coughlin, *supra* note 4, at 306 (explaining these acts and reasons in the context of judicial involvement in divorce cases).

tion.[98] As long as a judge does not necessarily share in the intention or proposal of every law he enforces, the judge who enforces a permissive abortion law does not necessarily choose abortion by doing so.[99]

B. *Material Cooperation?*

Suppose the judge knows that if he issues the bypass order, it will result in the minor obtaining an abortion. The judge will then, in issuing the bypass, accept two things as foreseen side effects: the abortion itself, and the fact that the judge's official action makes it easier for *this minor to choose* abortion. Under traditional Catholic moral analysis, "[m]aterial cooperation in another's evil act is permissible when: (1) the cooperator's act is good or indifferent in itself; (2) the cooperator has a reason for acting that is just; and (3) the cooperator's reason [for acting] is proportionate to the gravity of the wrongdoing and the closeness of the assistance."[100]

Judicial bypass plainly involves material cooperation; the main issue in determining whether it is permissible is under (3), the question of proportionality. As suggested earlier, (1) and (2) likely are satisfied because the judge's act of applying bypass law to the facts of a particular case is good or indifferent in itself, and the judge's official duty to enforce the law supplies just reasons for acting. Whether these reasons are proportionate to the gravity of abortion and the closeness of the judge's assistance to a particular minor is a difficult and fact-intensive question, as "questions of proportionality do not easily admit clear answers."[101] Several discrete factors, however, can guide the analysis. When considering proportionality in relation to the gravity of the wrongdoing, we can examine: (1) the gravity of the wrongdoing in itself—for example, taking a person's life is graver than harming his reputation or pecuniary interests; (2) the risk of

98. For the proposition that an agent who acts with discretion is likely to share in the intentions of the principal, see GRISEZ, *supra* note 90, at 302–03 ("Individuals who act as agents for others . . . usually have responsibility as formal cooperators. . . . An agent given wide discretion is unlikely to be able to serve without adopting as his or her own the proposals which the principal wishes to execute, for the agent with discretion will be unable to do anything except by proceeding with the principal's own end in view.").

99. *Cf.* Scalia, *supra* note 4, at 18 (arguing that a judge who enforces pro-abortion law is ordinarily not responsible for the death of a human being because, even if society and its legislators have a moral duty to enact laws prohibiting abortion, a judge is not a legislator and "a judge . . . bears no moral guilt for the laws society has failed to enact").

100. Coughlin, *supra* note 4, at 306.

101. *Id.* at 307.

scandal created by the cooperation; and (3) "the bad effects of the cooperation in proportion to the good that is to be accomplished."[102] When considering proportionality in relation to the closeness of the assistance, we can ask: (1) Does the assistance directly facilitate the wrongdoing, that is, can it be characterized as proximate rather than remote?; (2) Will foregoing the assistance likely prevent the wrongdoing?; and (3) How interpersonal is the assistance?[103]

1. Gravity of the Wrongdoing

In the Catholic moral tradition, human life is of utmost value, and therefore material cooperation in abortion seems to "require a countervailing reason of a rather significant gravity."[104] In the bypass context, moreover, judicial cooperation likely creates a serious risk of scandal to the minor. The Biblical precept to love one's neighbor implies that one should not "do anything that causes [one's] brother to stumble."[105] As the Catechism of the Catholic Church explains, "[s]candal can be provoked by laws or institutions" and "[a]nyone who uses the power at his disposal in such a way that it leads others to do wrong becomes guilty of scandal . . . ."[106] Judge William H. Pryor, Jr. acknowledges that "[f]or judges and lawyers there is a special danger of scandal, because '[s]candal is grave when given by those who by nature or office are obliged to teach and educate others.'"[107]

In granting a bypass there is a grave risk of scandal, first, because any bypass ruling makes the judge function in some sense like the minor's guardian. The bypass hearing is not for finding out what the law is, rather it is to determine whether *this particular minor* is mature and well enough informed to choose abortion, or whether abortion is in her best interests. The judge hears evidence about the minor's life history and experiences, about her knowledge of the abortion procedure, and about her understanding of alternatives to abortion. The judge—whose

102. *See id.* at 307–08; *see also* GRISEZ, *supra* note 90, at 241 (explaining risk of scandal as one factor in the analysis of material cooperation).

103. *See* Coughlin, *supra* note 4, at 308–09.

104. *Id.* at 307 (using this language of "significant gravity" in the context of unjust divorce cases and Catholic lawyers' involvement such cases).

105. *Romans* 14:21. As the Catechism of the Catholic Church explains, "[r]espect for the souls of others" requires that one avoid scandal, which is a "grave offense if by deed or omission another is deliberately led into a grave offense." CATECHISM, *supra* note 91, at para. 2284.

106. *Id.* at para. 2286, 2287.

107. Pryor, *supra* note 4, at 360 (quoting CATECHISM, *supra* note 91, at para. 2285).

permission for abortion the minor seeks instead of her parents' permission—stands to the minor as a figure of authority. If the judge does not object to the minor's choice of abortion, the judge's stance will look a lot like approval, or at least indifference.

Second, the very hermeneutic of a bypass proceeding condones the minor's choice of abortion in a wide range of circumstances. Bypass law makes the judge determine whether the minor is mature and well enough informed to choose abortion, yet that very inquiry makes no sense if abortion is morally wrong. It would make no sense, for instance, to ask whether a person is mature and well enough informed to choose to drive drunk. The law may also ask the judge to determine whether abortion is in the minor's best interests; yet again, the form of inquiry makes no sense if abortion is morally wrong. If abortion is a moral evil, then it cannot be in anyone's real best interests. Therefore the judge who, in all seriousness, inquires whether a particular minor is mature and well enough informed to choose abortion, or whether abortion is in her best interests, belies any pro-life convictions or sympathies that judge may have at heart. Conducting the bypass hearing under the legally-prescribed terms inevitably, and inextricably, tells the minor that abortion is a morally permissible choice.

2. Closeness of the Assistance

Consideration of the closeness of assistance involved in judicial bypass likewise suggests that cooperation can be justified only by reasons of significant gravity. The judge's bypass ruling almost always directly facilitates the abortion. Assuming that the minor comes to the judge because she is unable or unwilling to go through her parents, the judge's permission is a legally essential step for the abortion to be obtained. Although the judge's assistance is proximate, foregoing the assistance will in all likelihood not prevent the abortion. If the pro-life judge recuses herself, "there are probably at least several other judges in the jurisdiction who will be willing to hear the case."[108]

What tips the scales and makes judicial bypass a close form of assistance is its interpersonal aspect, insofar as the judge interacts with a particular minor about one particular abortion decision. Bypass cases therefore differ in kind from cases where

108. *See* Coughlin, *supra* note 4, at 308 (observing this in the context of unjust divorce cases). *But see* Treadwell, *supra* note 7, at 880 (asserting that in socially conservative regions of the country, recusals are increasingly common and likely to prevent expeditious resolution of bypass petitions).

judges must strike down, under *Roe v. Wade*,[109] laws that restrict abortion access unduly. In those constitutionally-based challenges to general laws, the judge can foresee that applying *Roe* likely will result in more abortions. Yet those cases lack the interpersonal dimension of the bypass case, where the judge must decide whether *this particular minor* can have an abortion, and specifically whether she is mature and well informed enough to do so.

3. Other Factors

Other moral principles can also factor in the proportionality analysis, among them, fairness and the Christian calling to bear witness to the dignity of the human person. According to Grisez, "Material cooperation is often ruled out by other moral considerations, especially fairness."[110] Bypass law, like any permissive abortion law, is fundamentally unfair because it sanctions the killing of society's weakest members, often in the interest of the more powerful. "This consideration about fairness—not the sanctity of life as such—points to what is basically objectionable about the legalization of abortion, though not about abortion itself."[111]

If the pro-life judge is Christian, she has further reasons to refuse cooperation in unfair, permissive abortion laws. As Grisez has noted, Christian moral standards require a special solicitude for the weak, the powerless, and the victimized, a group which includes the unborn:

> Christian standards leave less room to act in ways which in fact facilitate evil, especially when that evil involves serious harm to others. The demands of mercy and self-oblation require Christians to avoid cooperation when the immoral act which is facilitated harms another and the only consideration which might justify cooperation is the good of the Christian himself or herself.[112]

Christians also have an apostolic responsibility, over and above the responsibilities the moral law imposes directly, to witness to the truth about the human person. "[R]efusing to cooperate in evildoing is often an important way of bearing witness to the truth."[113] In this vein, Grisez suggests that "a nurse who prepares

109. Roe v. Wade, 410 U.S. 113 (1973).

110. GRISEZ, *supra* note 90, at 302.

111. *Id.* at 280; *see also* Myers, *supra* note 95, at 70 ("Most material cooperation in abortion is grossly unfair. Only in very limited circumstances will material cooperation be consistent with Christ's command that we do unto others as we would have others do unto us.").

112. GRISEZ, *supra* note 90, at 303.

113. *Id.* at 302.

patients for abortion," although abortion is no part of her proposal for action, "perhaps ought to look for a different job or refuse to do these preparations by way of testimony to the truth."[114]

4. Conclusion

Whether the pro-life judge's reasons for involvement in a bypass case are proportionate to the gravity of abortion and the closeness of assistance depends on what precisely those reasons are, making the question difficult to answer in the abstract. If the judge's continued employment and ability to care financially for self and family depends on hearing and deciding bypass cases, then the reason is a serious and grave one.[115] Whether it is serious and grave enough to correspond to the gravity of facilitating a minor's abortion is another question.

Perhaps the best resolution is as follows: If the judge can recuse herself from bypass cases and remain on the bench, she should do so, but if recusal is not an option, she should consider resignation.[116] If the judge can recuse herself from bypass cases, then deciding them is not a condition of continued employment or livelihood, and one of the graver reasons for cooperation no longer applies. The other just reason for cooperation, the judge's obligation to enforce the positive law, by itself appears to lack proportionate gravity in a bypass case. For if the "central case" of law is morally upstanding law,[117] then unjust law, including bypass law, is not what the judge's office exists to enforce.[118]

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114. *Id.*

115. *See* Coughlin, *supra* note 4, at 305–06.

116. *Cf. id.* at 306 (stating, in the context of unjust divorce cases, that "[w]hen an exemption is possible, legal professionals should refuse to cooperate as a sign of 'conscientious objection' to an unjust legal arrangement" (citation omitted)).

117. As the natural law tradition claims, according to John Gardner, *Nearly Natural Law*, 52 AM. J. JURIS. (forthcoming 2007–2008).

118. According to the natural law tradition as incorporated in Catholic teaching, a law that contravenes the moral order is, for all its empirical reality, not fully a law as regards the moral sphere. *See* FINNIS, AQUINAS, *supra* note 91, at 272 ("Obviously, if the law purports to require its subjects to do things of the sort that no one should ever do, it cannot rightly be complied with; one's moral obligation is not to obey but to disobey. And if it purports to authorize such acts (e.g., rape, theft, infanticide), its authorization is morally void and of no effect." (citations omitted)); Martin Luther King, Jr., *Letter From Birmingham Jail*, *in* PHILOSOPHY OF LAW 219, 221 (Joel Feinberg & Jules Coleman eds., 2000) (arguing that there is no moral obligation to obey an unjust law, that is, "a human law that is not rooted in eternal and natural law"). Unjust laws "can have no binding force in conscience." JOHN PAUL II, EVANGELIUM VITAE: THE GOSPEL OF LIFE para. 72 (1995) [hereinafter EVANGELIUM VITAE]. John Paul II notes, "Abortion and euthanasia are thus crimes which no human law can claim to legitimize.

Although each pro-life judge considering whether to decide bypass cases will have to weigh the matter in his or her own conscience, the conclusion that issuing a judicial bypass involves wrongful material cooperation is not unprecedented. Antonin Scalia has said that a judge who believes capital punishment is immoral cannot, in good conscience, materially cooperate with a death sentence by affirming it on appeal.[119] Catholic scholars John Garvey and Amy Coney Barrett suggest the same in their nuanced analysis of the issue.[120] For Garvey and Barrett, a judge's cooperation in capital punishment is problematic for two reasons: it causes the death of a human being and may give rise to scandal when the judge appears to approve of that death.[121] Judicial cooperation in a minor's decision to abort is no less grave.

IV. RESOLVING THE MORAL DILEMMA: RECUSAL

If the pro-life judge believes in conscience that issuing a bypass would be immoral, the judge must follow his or her conscience and find a way to avoid issuing the order.[122] Morality also requires that the judge act in fairness to the legal system.[123] If the legal system requires judges to hear and decide all manner of cases regardless of moral scruples, the judge's only fair option for resolving the moral dilemma may be resignation from the bench. If, however, the system permits judges to recuse themselves from morally repugnant cases, and if systematic recusal from bypass cases would not be unfair, then the pro-life judge can resolve the conflict between conscience and duty through recusal instead.

There is no obligation in conscience to obey such laws; instead there is a grave and clear obligation to oppose them by conscientious objection." *Id.* at para. 73.

119. Scalia posits that "[w]here . . . the appellate judge merely determines that the [death] sentence pronounced by the trial court is in accordance with law, perhaps the principle of material cooperation could be applied. But . . . that principle demands that the good deriving from the cooperation exceed the evil which is assisted. I find it hard to see how any appellate judge could find this condition to be met . . . ." Scalia, *supra* note 4, at 18.

120. *See* Garvey & Coney, *supra* note 4, at 342.

121. *See id.* ("Unless [the appellate judge] intervenes, the defendant will die. And his act of affirming, whatever its legal significance might be, looks a lot like approval of the sentence.").

122. Indeed, "[a] human being must always obey the certain judgment of his conscience. If he were to deliberately act against it, he would condemn himself." CATECHISM, *supra* note 91, at para. 1790. Grisez emphasizes that "[w]hen duties would require one to do something inconsistent with an absolute [moral] norm, the latter prevails." GRISEZ, *supra* note 90, at 296.

123. *See* GRISEZ, *supra* note 90, at 296 ("[W]hen a duty requires a choice contrary to what a nonabsolute norm would indicate if the requirement of duty did not exist, one must resolve the conflict by formulating a more specified norm in accord with fairness.").

Many commentators consider recusal an option for judges in cases involving moral conflict. Garvey and Barrett, for example, have argued that Catholic judges who follow their Church's teaching against capital punishment should recuse themselves from direct participation in capital sentencing.[124] At least one author has argued that a judge's pro-life beliefs could amount to bias requiring recusal from abortion bypass cases.[125] Others have suggested, more generally, that recusal is legally and morally appropriate for a judge convinced that enforcing a certain law would be immoral.[126] Some Tennessee trial judges have in fact opted for recusal in bypass cases.[127] However, a fellow judge in their circuit criticized their choice, arguing that a judge obliged by oath of office to uphold all the laws of a jurisdiction cannot fairly recuse himself simply because the law to be applied is repugnant.[128]

Is a judge legally permitted to recuse herself from a case, or a category of cases, when moral conscience conflicts with the law she would be bound to apply? Is a judge legally required to do so? These questions reduce to a single inquiry because recusal is not supposed to be discretionary with the judge. The American Bar Association's Model Code of Judicial Conduct provides: "A judge shall hear and decide matters assigned to the judge, except when disqualification is *required* . . . ."[129]

The Model Code, however, allows the judge flexibility to determine when disqualification is required. Rule 2.11 provides that a judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to" enumerated circumstances.[130] The

124. Garvey & Coney, *supra* note 4, at 305–06; *see also* Robert W. Tuttle, *Death's Casuistry*, 81 MARQ. L. REV. 371, 371–72 (1998) (explaining and largely agreeing with Garvey and Coney's argument).

125. Osborn, *supra* note 7, at 903–04.

126. James L. Buckley, *The Catholic Public Servant*, FIRST THINGS, Feb. 1992, at 18, 19 ("Should I ever be asked to hear a case in which the application of the law might result in my material complicity in an immoral act, I would have to examine my conscience and, if it so dictated, recuse myself."); LEV, *supra* note 4, at 640 (reporting similar comments by judicial nominee Stephen Breyer).

127. Adam Liptak, *Some Judges Are Opting Out of Abortion Cases*, CHI. DAILY L. BULL., Sept. 7, 2005, at 2; *see also* D'Army Bailey, *The Religious Commitments of Judicial Nominees—Address by Judge Bailey*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 443, 443–44 (2006).

128. Liptak, *supra* note 127 (quoting Judge D'Army Bailey as stating that a Tennessee judge is "sw[orn] to uphold all of the laws of Tennessee" even if he disagrees with certain of them); Bailey, *supra* note 127, at 444 ("The price of a judge's conscience would be to step down from the bench.").

129. MODEL CODE OF JUDICIAL CONDUCT R. 2.6 (2007) (emphasis added).

130. *Id.* 2.11.

standard is not whether the judge can in fact apply the law impartially, but whether he or third parties could reasonably doubt that he will apply the law impartially.[131] If the judge believes that it would be immoral to apply the law in favor of one party to the case, she may doubt whether, when it comes time for legal decisionmaking, she will in fact apply the law objectively, her moral judgment notwithstanding.

The judge, therefore, who believes it would be immoral to give one party the benefit of law arguably has actual prejudice against that party, or the possibility of prejudice sufficient to compel disqualification.[132] Garvey and Barrett argue that the phrase "personal bias or prejudice" in the federal recusal statute broadly encompasses "some illegitimate reason for wanting to rule against this particular party" even if the judge does not "have it in for *this* defendant" in the sense of personal animosity.[133] The same authors think that a judge with scruples of conscience against the death penalty may lack impartiality in a capital case like a juror with such scruples.[134] If a juror set against the death penalty deprives the state of a fair opportunity to apply death-penalty law, a judge set against abortion may just as well deprive a minor seeking bypass of a fair opportunity to gain the benefit of bypass law. In order to avoid the possibility of that procedural unfairness—a possibility where the judge's impartiality "might reasonably be questioned"—the pro-life judge could recuse herself.[135]

131. A federal judge must disqualify himself not only "in any proceeding in which his impartiality might reasonably be questioned" but also for actual bias or prejudice, "where he has a personal bias or prejudice concerning a party." 28 U.S.C. § 455 (2000).

132. *See* Garvey & Coney, *supra* note 4, at 343 n.161 ("There are several reported cases where litigants have claimed that the judge's religious belief has caused actual bias sufficient to disqualify him under [federal law]. All such claims have failed for lack of proof.").

133. *Id.* at 332–33; *see also* Richard B. Saphire, *Religion and Recusal*, 81 MARQ. L. REV. 351, 353–54 (1998) ("Garvey and Coney suggest . . . that recusal is required where the judge's ability to determine the facts or apply the law is, in some fundamental way, skewed or distorted by the judge's moral or conscientious scruples.").

134. Garvey & Coney, *supra* note 4, at 333. The Supreme Court has held that the state may exclude from capital cases jurors who are "irrevocably committed" to vote against the death penalty. Witherspoon v. Illinois, 391 U.S. 510, 522 (1968); *cf.* Logan v. United States, 144 U.S. 263, 298 (1892) (holding that a juror is not impartial for this purpose if his scruples "prevent him from standing indifferent between the government and the accused").

135. *See* T.L.J. v. Webster, 792 F.2d 734, 739 n.4 (8th Cir. 1986) ("Regardless of personal discomfort with the law, it is the duty of judges to apply it. If they cannot do so with a clear conscience, then they should remove themselves from this category of cases.").

Perhaps a conflict between the judge's moral conscience and his duty to apply the law operates like a conflict between that duty and any personal interest of the judge in the outcome of the proceeding. Either conflict prevents the judge from standing neutral as to the outcome. For this reason, Judge Pryor concludes that recusal is a "simple remedy" available for a conflict between legal and moral duty: the Model Code requires recusal in any proceeding in which the judge might lack partiality, and "[a] judge cannot be impartial to his moral duty."[136] In particular, a judge who believes or suspects that it would be a mortal sin to grant the bypass has the strongest personal interest in avoiding that result. That interest seems comparable in the force of its influence, if wholly distinct in its nature, to the interest of a judge whose pecuniary affairs are mingled with those of a party. If the underlying principle of recusal law is that a judge should disqualify himself in any proceeding in which the judge's passions or interests could stand in the way of impartially applying the law, then a pro-life judge could conclude that the law requires recusal from bypass cases.

If the law does not appear settled, policy considerations suggest any doubt be resolved in favor of allowing recusal for such moral reasons. Arguably, American society, and its judicial system, should afford judges the right to recusal in cases of moral conflict rather than force judges who follow their conscience to resign. Pope John Paul II has argued that refusal to cooperate in evil is not only a moral duty, it is also a human right; therefore, medical or other professionals who refuse to cooperate in abortion should be immune from legal or financial penalties.[137] Of course, service as an American judge is a privilege and not a right; perhaps exclusion from judicial office is not an unfair price to pay for following one's conscience.[138] Yet if a rule against recusal for moral reasons had the effect of excluding a substantial number of religious believers from office, because of their religion, it arguably would violate the spirit of the Constitution's "no religious test" clause.[139] Normatively, it has been argued that

136. Pryor, *supra* note 4, at 361.

137. EVANGELIUM VITAE, *supra* note 118, at para. 74; *cf.* 43 PA. CONS. STAT. ANN. § 955.2 (West 1991) (granting immunity from liability to hospital or hospital employee who refuses, for moral or ethical reasons, to perform or cooperate in abortion or sterilization).

138. *Cf.* Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that the individual has no constitutional right to exemption from generally applicable laws that incidentally burden a religious practice).

139. U.S. CONST. art. VI. ("[N]o religious test shall ever be required as a qualification to any office or public trust under the United States."); Feminist Women's Health Ctr. v. Codispoti, 69 F.3d 399, 400 (9th Cir. 1995) (holding

"[t]he community should not command judges with moral qualms to order abortions or sign death sentences" in part because if "[these judges] resign, the wider community has lost the service and talent of some of its best judges."[140]

Recusal, however, has costs which judges should consider in deciding whether it is prudent or fair. First, if some judges recuse themselves from bypass cases, other judges will be compelled to hear and decide a larger number of them. These are cases that no judge, even the pro-choice judge, relishes.[141] Accordingly, when several Tennessee judges in one circuit recused themselves from bypass cases, Judge Bailey, as a fellow judge in their circuit, doubted whether that recusal was fair.[142] Second, might recusal from bypass cases possibly compromise the judge's ability to function as a judge in other matters, particularly that of upholding the public confidence in judicial impartiality?[143] Would a judge known for recusing himself from bypass cases for moral reasons earn public approval for his transparency, or would he be criticized for mingling his judicial functions too much with "personal" pro-life convictions?[144]

V. RESOLVING THE MORAL DILEMMA: RESIGNATION

Resignation is the other option, and a judge may feel compelled to it who believes that retaining judicial office is incompatible or inconsistent with refusing to hear a certain kind of case or apply a certain law.[145] Resignation may also reveal the judge's pro-life stance with greater transparency, especially if accompa-

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that if party could disqualify the judge from abortion-related case, because of judge's "fervently-held" beliefs and nothing more, that result would violate the "no religious test" clause); Garvey & Coney, *supra* note 4, at 348–50 (arguing that mandatory disqualification of judges because of their religious affiliations would not be consistent with the clause).

140. Bruce Ledewitz, *An Essay Concerning Judicial Resignation and Non-Cooperation in the Presence of Evil*, 27 DUQ. L. REV. 1, 3 (1988).

141. I am indebted to Amy Coney Barrett for this common-sense point.

142. Bailey, *supra* note 127, at 444.

143. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007) ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary . . . .").

144. *See* Michael Stokes Paulsen & Steffen N. Johnson, *Scalia's Sermonette*, 72 NOTRE DAME L. REV. 863 (1997) (noting public criticism of Justice Scalia for extrajudicial, religious remarks made at prayer breakfast).

145. *See* Joseph W. Moylan, *No Law Can Give Me the Right to Do What Is Wrong*, *in* LIFE AND LEARNING V: PROCEEDINGS OF THE FIFTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 234, 237 (Joseph W. Koterski ed., 1996) (suggesting that Nebraska Code of Judicial Ethics did not permit him to remain a judge and refuse to hear bypass cases); Scalia, *supra* note 4, at 18 (stating that a judge who believes the death penalty is immoral should resign "rather than simply ignor-

nied by a statement of reasons. Resignation, then, may afford a more powerful witness than recusal because it evidences the judge's willingness to give up professional position and reputation in order to respect unborn life.[146] When Judge Moylan, striving to live as a faithful Catholic, resigned from the bench rather than authorize a minor's abortion, he invited a local newspaper to run a story, which it did. Although Moylan's resignation received little attention from the general press, several national Christian magazines published about it.[147] People across the country wrote to Moylan praising his courage and attesting that his example inspired them to live pro-life convictions more generously.[148]

Judicial resignations accompanied by judges' criticism of legalized abortion and of the Supreme Court decisions constitutionalizing it could also educate the public.[149] The judge's criticism should contain "a truthful description of 'what is going on'"[150] when a judge authorizes a minor's abortion, bringing to light the moral situation faced by the judge and by the minor. The judge should explain that abortion is neither a medical procedure[151] nor a mere "termination of pregnancy"[152] but the tak-

ing duly enacted, constitutional laws and sabotaging death penalty cases," but not explicitly addressing recusal).

146. Compare this with the story of Michigan judge Randall Hekman, who, when called upon to order an abortion for a minor ward of the court, refused to do so "on the alternative grounds (i) that it was not in the best interests of the girl; and (ii) that he would in any event feel compelled to reject the authority of *Roe* as a lawless and immoral decision." After suffering public recrimination, Hekman eventually was cleared of judicial misconduct charges. Paulsen, *supra* note 1, at 81 (citing RANDALL HEKMAN, JUSTICE FOR THE UNBORN (1984)).

147. Moylan, *supra* note 145, at 240.

148. *Id.* at 241.

149. *See* Ledewitz, *supra* note 140, at 11 ("The act of [judicial] resignation . . . also serves as a symbolic protest designed to persuade the majority to change its view."); Paulsen, *supra* note 1, at 77 ("Criticism of *Roe*'s result by the men and women of the judiciary is an important and necessary contribution to both moral reasoning and law; it undermines the moral legitimacy of an immoral holding.").

150. Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 543 (2003). Garnett suggests that religious believers should contribute to the public debate over the death penalty an account of what an execution is, morally and anthropologically. *Id.* at 542–43, 549.

151. *Contra* MINN. STAT. § 144.343 (2005) (codifying parental notification for abortion law as an exception to the general rules regarding minors' consent to "medical, mental and other health services" related to pregnancy); Planned Parenthood League of Mass., Inc. v. Attorney Gen., 677 N.E.2d 101, 102 (Mass. 1997) (characterizing judicial authorization for a minor's abortion as authorization for a "medical procedure").

ing of human life at its earliest and most vulnerable stage.[153] Although the judge should avoid any demeaning, insulting, or otherwise offensive tone,[154] he should not shrink from calling the evil of abortion by its real name.[155] Federal judge Richard Casey performed this task heroically in deciding a case involving abortion regulations.[156] Although applying Supreme Court precedent that rendered a partial-birth abortion ban unconstitutional, Judge Casey's findings of fact left no doubt about the violence that abortion inflicts on a living fetus.[157] The judge who resigns should also criticize the legal reasoning of *Roe v. Wade* and its progeny,[158] explaining that these cases are simply bad constitutional law.[159] If enough judges resign rather than enforce permissive abortion laws, they may influence public opinion and thereby facilitate a shift in the legal climate.

A pro-life judge who resigns could also make a moral argument for why the American people should protect unborn persons' right to life.[160] Such an argument would challenge the moral-anthropological claims on which the Supreme Court has posited the right to abortion as an exercise of autonomy. The

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152. *Contra* FLA. STAT. § 390.01114 (2005) (bypass statute terming abortion an "induce[ment] of termination of pregnancy").

153. *See* GERMAIN GRISEZ, ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS 273–87 (1970); Stephen D. Schwarz, *Personhood Begins at Conception*, *in* THE ABORTION CONTROVERSY: 25 YEARS AFTER *ROE V. WADE* (Louis P. Pojman & Francis J. Beckwith eds., 1994) (both arguing that a fetus is an unborn human person).

154. *See In re* Anonymous, 905 So. 2d 845, 850 (Ala. Civ. App. 2005) (criticizing trial judge for highlighting the moral issue by means of a "demeaning" and "sarcastic" tone that called into question the judge's objectivity in a bypass case).

155. In one dissenting opinion, Justice Scalia characterized partial-birth abortion as "killing a human child" and a "visibly brutal means of eliminating our half-born posterity." Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

156. *See* Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436 (S.D.N.Y. 2004).

157. *Id.* at 466 (describing "D & X" procedure and reporting expert testimony that a fetus "likely feels severe pain" as it is killed). Judge Casey wrote that "the testimony at trial and before Congress establishes that D & X is a gruesome, brutal, barbaric, and uncivilized medical procedure." *Id.* at 479.

158. *See* Paulsen, *supra* note 1, at 78.

159. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting in part) (arguing that abortion is not constitutionally protected because "(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed").

160. *See* Paulsen, *supra* note 1, at 78 (suggesting that a pro-life judge recuse himself from an abortion case after issuing an opinion explaining "the natural right to life").

judge should not hesitate to argue that the "mystery passage" in *Planned Parenthood v. Casey*[161] is an appealing but ultimately false account of what it means to be human. The judge should argue, in contrast to the *Casey* dictum, that the foundation of human and civil rights derives from human dignity that runs far deeper than merely humans' capacity to make autonomous choices.[162] Such a peaceful appeal to the public conscience for the alteration of unjust laws has formed an important part of the American political tradition, notably in the 1960s civil rights movement.[163]

Resignation, too, has its costs. If pro-life judges resign, they can no longer advance the pro-life cause in the judicial arena, through, for example, enforcing common-law doctrines that protect the human person and upholding legitimate legislative restrictions on abortion, euthanasia, and the like. Many legal commentators would lament if pro-life judges chose to resign their offices.[164] For the Catholic Church, too, this could be a bad result, inconsistent with the Church's exhortation for lay Catholics to participate in public life through elected and appointed public office.[165] Perhaps pro-life judges who resign could consider other forms of public service in the executive or legislative arenas.

VI. CONCLUSION

As this Note has shown, the pro-life judge who rules on abortion bypass cases faces a potentially irreconcilable conflict between the law and his or her moral conscience. Legally, the judge must authorize an abortion for a minor who establishes that she is mature and well enough informed to make the deci-

161. *Casey*, 505 U.S. at 851 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

162. *See* Garnett, *supra* note 150, at 556–58 (arguing that religious believers should propose to the public a more truthful anthropology than that contained in the *Casey* "mystery passage").

163. *See* Martin Luther King, Jr., *supra* note 118, at 222 ("[A]n individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.").

164. *Cf.* Scalia, *supra* note 4, at 21 (doubting that it would "be a good thing" if "American Catholics were ineligible to go on the bench in all jurisdictions imposing the death penalty").

165. The Congregation of the Doctrine of the Faith has stated that "'the lay faithful are never to relinquish their participation in 'public life', that is, in the many different economic, social, legislative, administrative and cultural areas, which are intended to promote organically and institutionally the common good.'" DOCTRINAL NOTE, *supra* note 95, at para. 1 (quoting JOHN PAUL II, CHRISTIFIDELES LAICI para. 42 (1988)).

sion on her own. Although the judge may, in some jurisdictions, appoint a guardian for the fetus and scrutinize the minor's understanding of the gravity of abortion, the judge has no discretion to deny permission for an abortion that would be immoral or unwise. Even if the judge grants bypass solely because the law compels that result, and therefore does not choose abortion as an end or a means, the bypass still facilitates the death of an innocent human being and tends to condone the minor's morally wrongful choice. This raises the issue of whether such material cooperation is permissible. If possible, the judge should recuse herself from these cases as a sign of conscientious objection to an unjust legal arrangement. If recusal is not possible, the judge should ask whether the reasons for cooperation and remaining on the bench are proportionate to the gravity of abortion and the closeness of the judge's assistance. The judge should consider, generally and in particular cases, whether this balance of reasons requires resignation from the bench.

As fitting in a journal devoted to Judeo-Christian perspectives on the law, this Note closes with observations on the dialectic between the Christian judge's duties as a judge and his or her responsibilities as a Christian. The judicial duty to enforce positive law fundamentally involves seeking justice within the status quo, not changing law or legal institutions to conform more fully to the moral order.[166] The judicial duty therefore stands in tension with the Christian citizen's responsibility to permeate the life of society with moral values, whether or not the status quo recognizes or affirms those values.[167] Although civil society and

166. As Kalscheur explains, "[w]hile the role of the legislator is to strive to embody in positive law those policies that will . . . best promote the common good, the role of the judge with respect to the common good is significantly different." Kalscheur, *supra* note 5, at 226–27. "Instead, the primary role of the judge [in the American constitutional system] is to use the tools of legal analysis to interpret the constitution and laws, and to apply those laws as they exist in the context of deciding individual cases." *Id.* And even when constitutional construction is at issue, various sides acknowledge that justices are not simply free to enact their own views of what is just or good or expedient, but owe fidelity to the American people's history and sense of moral values. *Compare* Pryor, *supra* note 4, at 357 ("The business of using moral judgment to change the law is reserved to the political branches . . . ."), *with* William J. Brennan, Jr., *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2, 4 (1985). Justice Brennan rejects forced adherence to the Constitution's original meaning, but acknowledges that justices "speak for their community, not for themselves alone" when they interpret the Constitution. "The act of interpretation must be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is sought." Brennan, *supra*.

167. Christian lay faithful, "guided by a Christian conscience in conformity with its values . . . exercise their proper task of infusing the temporal order

its law enjoy a rightful autonomy from the Church and from the specifically religious sphere, they are not autonomous from the moral order.[168] Rather, Christians and all citizens have the right and duty to "seek the truth with sincerity and to promote and defend . . . moral truths concerning society, justice, freedom, respect for human life and the other rights of the person."[169] When the positive law already reflects the truth about human persons and their rights, the Christian judge's duty to uphold the law and his obligation to serve moral values reinforce one another. When, as is the case with our abortion laws, the positive law stands morally wanting, the Christian judge faces her toughest dilemma. Ultimately, the judge, as a morally responsible human being, must resolve any conflict between the exercise of office and the demands of morality in favor of morality. That is, she must yield judicial power to the transcendent demands of goodness and justice.

Although this Note has tended toward negative conclusions, its moral analysis is rooted in a positive value, the transcendent dignity and worth of every human person. The pro-life judge who recuses himself from a case or resigns to avoid complicity in abortion is refusing to choose ahead of the fundamental good of human life goods that are lesser and properly subordinate. The pro-life judge who is Christian will recognize in this demand of conscience a call to gospel self-denial. Such self-denial is not ultimately negative, but serves the positive values of human life, dignity, and true freedom.[170] The Christian judge who undertakes such self-denial will do so mindful of "the fascinating but also demanding truth which Christ reveals to us . . . : 'Whoever receives one such child in my name receives me' (Mt. 18:5); 'Truly, I say to you, as you did it to one of the least of these my brethren, you did it to me' (Mt. 25:40)."[171]

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with Christian values, all the while respecting the nature and rightful autonomy of that order, and cooperating with other citizens according to their particular competence and responsibility." DOCTRINAL NOTE, *supra* note 95, at para. 1 (footnotes and emphasis omitted).

168. *See id.*

169. *Id.* at para. 6.

170. *See* EVANGELIUM VITAE, *supra* note 118, at para. 2 (describing the Church's proclamation of the right to life as motivated by the "incomparable value of every human person" revealed in the mystery of Redemption).

171. *Id.* at para. 104.