

Summer 2019

## An Illustration of the Intersection of Social Science and the Law: The Legal Rights Of Adolescents to Make Medical Decisions

Murray Levine

Leah Wallach

David I. Levine

Deborah Goldfarb

Follow this and additional works at: <https://repository.uchastings.edu/hwlj>

---

### Recommended Citation

Murray Levine, Leah Wallach, David I. Levine, and Deborah Goldfarb, *An Illustration of the Intersection of Social Science and the Law: The Legal Rights Of Adolescents to Make Medical Decisions*, 30 *Hastings Women's L.J.* 241 (2019).  
Available at: <https://repository.uchastings.edu/hwlj/vol30/iss2/6>

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in *Hastings Women's Law Journal* by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact [wangangela@uchastings.edu](mailto:wangangela@uchastings.edu).

---

---

■

## An Illustration of the Intersection of Social Science and the Law: The Legal Rights of Adolescents to Make Medical Decisions

*Murray Levine,\* Leah Wallach,\*\*  
David I. Levine,\*\*\* and Deborah Goldfarb\*\*\*\**

### ABSTRACT

*The following are excerpts of Chapter 1: Social Science and Psychological Influences in Law and Chapter 14: The Right of Adolescents to Make Significant Medical Decisions—The Abortion Example from the forthcoming textbook, Psychological Problems, Social Issues, and the Law.<sup>1</sup> The authors wrote the textbook, in part, to address the question: “When law and psychology intersect, can and how do we fully consider the potential ramifications of the social science beyond the confines of this one case?”<sup>2</sup> The editors of the Hastings Women’s Law Journal selected and adapted the ensuing passages of the authors’ work as an illustration of answering that question within a specific context. The passages from Chapter 1, in Section I of this Article, demonstrate that while social science and the law share characteristics and the law often relies on social science, the two fields are almost innately at odds. The passages from Chapter 14, in Sections II and III of this Article, exemplify how this dynamic plays out in a controversial area of both law and social science. The original content has not been changed but has been reformatted for law review publication by Zachary Sanderson.<sup>†</sup>*

---

\* Distinguished Service Professor Emeritus, Department of Psychology, State University of New York at Buffalo.

\*\* Clinical Psychologist, West London Mental Health, National Health Service Trust.

\*\*\* Raymond L. Sullivan Professor of Law, University of California, Hastings College of the Law.

\*\*\*\* Assistant Professor of Legal Psychology, Florida International University.

1. MURRAY LEVINE, LEAH WALLACH, DAVID I. LEVINE & DEBORAH GOLDFARB, *PSYCHOLOGICAL PROBLEMS, SOCIAL ISSUES, AND THE LAW* (3d ed. forthcoming 2019). Material published with the permission of West Academic Publishing.

2. MURRAY LEVINE ET AL., *supra* note 1.

† J.D. Candidate, 2019, University of California, Hastings College of the Law; Acquisitions Editor, *Hastings Women’s Law Journal*.

## TABLE OF CONTENTS

- I. SOCIAL SCIENCE AND PSYCHOLOGICAL INFLUENCES IN LAW
  - A. LAW AND SOCIAL SCIENCE: SIBLINGS OR DISTANTLY RELATED COUSINS?
  - B. LAW AND PSYCHOLOGY AFTER WORLD WAR II
- II. THE RIGHT OF ADOLESCENTS TO MAKE SIGNIFICANT MEDICAL DECISIONS: THE ABORTION EXAMPLE
  - A. ADOLESCENT PREGNANCY
  - B. THE ABORTION RIGHTS OF MINORS
- III. RESEARCH ISSUES RAISED BY THE COURT DECISIONS
  - A. MINORS' COMPETENCE TO MAKE A DECISION ABOUT ABORTION
  - B. EFFECTS OF PARENTAL NOTIFICATION AND CONSENT STATUTES
  - C. HOW ADOLESCENTS ADAPT TO THE LAW
- IV. SUMMARY

- I. SOCIAL SCIENCE AND PSYCHOLOGICAL INFLUENCES  
IN LAW

- A. LAW AND SOCIAL SCIENCE: SIBLINGS OR DISTANTLY RELATED  
COUSINS?

Understanding the extent to which law and social science can influence one another requires that we understand the ways they overlap and differ. Law and social science share some important characteristics. At a basic level, both are concerned with human behavior. Both law and social science change as society changes and as knowledge increases. However, they differ in how they understand and absorb change.

Social scientists' goal is new knowledge; they try to be skeptical, exploratory, and open to changing ideas based on new information. In psychology, conclusions and theories are subjected to criticism and challenge through peer review and published criticism by other scientists. Law's movement is necessarily gradual. One of law's functions is to ensure social stability. The legal system has a role in maintaining a sense of cultural identity and continuity while slowly incorporating cultural innovation and changing values.

The contrast between law's conservative nature and social science's willingness to experiment can be problematic when social science professionals interact with courts. For social scientists and mental health professionals, being wrong is part of the trial-and-error process of learning. To judges and lawyers, this learning process may seem like unreliability.

Trial courts seek to find out the truth about past events that are the subject of a specific dispute, then make a specific decision relatively quickly with whatever knowledge they have. When the legal process arrives at an erroneous conclusion, an injustice may be done. Justice Harry

Blackmun once characterized the difference in these terms:

The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final and binding legal judgment—often of great consequence—about a particular set of events in the past.<sup>3</sup>

Second, law and psychology evaluate behavior differently. Psychologists tend to see the behaviors, abilities, and responsibilities of different people as a continuum and as varying in the same person with different situations. They generally present conclusions in probabilistic terms, not as absolutes. The legal system often requires that people or behaviors be placed in distinct categories: insane or not, dangerous or not, negligent or not, guilty or not.

Third, psychologists and judges may also approach issues differently at the legislative (policy) level. These differences may lead to misunderstandings between the two groups—and often disappointment for social scientists who sometimes feel that courts do not give their work the weight it deserves. One of the functions of social scientists is to empirically test conventional assumptions about human nature. Policy makers are not always interested in or willing to credit research questioning common sense or community beliefs.<sup>4</sup> They may feel it is a community's right to implement policies that reflect its deeply held beliefs.

Finally, judges have a complex job. Part of that job is to uphold or express the symbols of society's basic values.<sup>5</sup> Even when they are interested in empirical research bearing on a decision, data about the assumptions or outcomes of a policy will comprise only one of their considerations. Judges must consider legal rights and duties, the fairness of procedures, the appropriate assignment of power and authority, and legal precedent. Their reasoning determines the conclusions they draw from research facts or whether they consider research at all.

## B. LAW AND PSYCHOLOGY TODAY

Today, psychologists, social workers, psychiatrists, sociologists, anthropologists, and other social scientists participate both directly and indirectly in all three branches of government and influence policy at every

---

3. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

4. See Richard E. Redding, *Reconstructing Science through Law*, 23 S. ILL. U. L.J. 585 (1999).

5. See David L. Faigman, *Normative Constitutional Factfinding: Exploring the Empirical Component of Constitutional Interpretation*. 139 U. PA. L. REV. 541 (1991).

---

---

level.<sup>6</sup> Clinical forensic (“belonging to courts of justice”)<sup>7</sup> practice in general, and subspecialties in criminal and family law, have expanded greatly as well. Mental health professionals now contribute to the day-to-day administration of justice. They serve the courts as expert witnesses, and provide psychological services to the police and correctional systems. Family and juvenile courts work routinely with allied social service agencies. Clinical, cognitive, developmental, and social psychologists do the basic research on which expert opinion is grounded. Research by cognitive and social psychologists into issues such as the reliability of eyewitness testimony, false confession, juror biases, and juror decision making also influences the trial process, directly through expert testimony, and indirectly by suggesting ways judges and legislators may develop better procedures. Social scientists and legal scholars now quickly examine the legal implications of new developments in psychology and other social sciences.

## II. THE RIGHT OF ADOLESCENTS TO MAKE SIGNIFICANT MEDICAL DECISIONS: THE ABORTION EXAMPLE

The abortion controversy is among the most intense policy debates in contemporary society and presents an example of the interplay between law and psychology. On one end of the debate are those who believe that human life begins at the moment of conception. They say that a fetus of any gestational age is entitled to the same legal protections as a newborn child. To them, abortion is murder; for some, this is true even if the procedure is done to save the mother's life. On the other end of the debate are those who believe that life begins at birth, and that women should have the option of aborting a fetus as a matter of their autonomy. There are many views in between these poles, as well.

Many states have promulgated laws affecting adolescents, and courts have allowed greater limitations to be placed on adolescents than on adult rights to privacy and choice. Adolescent pregnancy touches on critically important and emotion-laden topics—adolescent sexuality, the meaning of motherhood to a woman's life, and the authority of families to make decisions for their children.

### A. ADOLESCENT PREGNANCY

The rates of pregnancies for teenagers in the United States vary greatly from state to state and by race and ethnicity but generally decreased between 2007 and 2015. In 2015, nationwide, about 229,715 females

---

6. See ANDREA SALTZMAN, DAVID M. FURMAN & KATHLEEN OHMAN, *LAW IN SOCIAL WORK PRACTICE* (3rd ed., 2016).

7. *Forensic*, BLACK'S LAW DICTIONARY (10th ed. 2014).

between the ages of 15 and 19 became pregnant.<sup>8</sup> In 2010, approximately 30 percent of pregnancies in girls age 15 to 19 ended in abortion.<sup>9</sup> This is part of a general trend in declining teenage abortion rates. The majority of the pregnancies ended in live births (around 60 percent). Since 2004, individuals have become more likely to obtain abortions via medication rather than surgical methods.<sup>10</sup>

#### B. THE ABORTION RIGHTS OF MINORS

**Parental consent.** The U.S. Supreme Court has always been ambivalent about granting full constitutional rights to minors, who are not considered competent to make their own decisions in many areas.<sup>11</sup> In a series of rulings between 1976 and 2006, the Court affirmed that minors do have a right to privacy in reproductive matters, but said their right is more limited than that of adults.

In *Planned Parenthood of Missouri v. Danforth*, the Court struck down a provision in Missouri law requiring that all unmarried women under 18 obtain **parental consent** for an abortion.<sup>12</sup> The Court said that the provision gave too much power to a third party (the parent) to veto the adolescent's privacy right to decide on an abortion.<sup>13</sup> However, in his opinion, Justice Blackmun (the author of *Roe*)<sup>14</sup> acknowledged that the state might have a different interest in regulating the right of an immature minor than in regulating the right of an adult woman.<sup>15</sup> The comment invited states to pass laws restricting the rights of minors. In subsequent cases, the Supreme Court modified its original position, ruling that states could require parental consent, provided the minor could obtain permission for the procedure from a state court judge (a **judicial bypass**) without first going to her parents.<sup>16</sup>

**Parental notification.** For a while, the Court distinguished between parental consent and parental notification statutes. Distinguishing between notification and consent implies that teens are essentially independent of their parent's influence when it comes to making a decision. Yet, can an

---

8. See Sherry L. Murphy et al., *Deaths: Final Data for 2015*, NAT'L VITAL STAT. REP., Nov. 2017, at 1.

9. OFF. OF ADOLESCENT HEALTH, OFF. OF THE ASSISTANT SECRETARY FOR HEALTH, U.S. DEP'T OF HEALTH AND HUMAN SERV., TRENDS IN TEEN PREGNANCY AND CHILDBEARING (2016).

10. HENRY J KAISER FAMILY FOUNDATION, FACT SHEET, MEDICATION ABORTION (June 2018), <https://www.kff.org/womens-health-policy/fact-sheet/medication-abortion/> [<https://perma.cc/TQ3V-BVPK>].

11. See MURRAY LEVINE ET AL., *supra* note 1, ch. 4.

12. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, (1976).

13. *Id.*

14. *Roe v. Wade*, 410 U.S. 179 (1973).

15. *Danforth*, 428 U.S. at 74.

16. See *Bellotti v. Baird*, 443 U.S. 622 (1979).

adolescent act independently when her parents are aware of the decision she wants to make?

In *H.L. v. Matheson* (1981), Chief Justice Warren Burger wrote the opinion upholding a statute requiring a physician to notify "if possible" the parents of girls under 15, living at home, and not emancipated.<sup>17</sup> He reasoned that the state had a compelling interest in protecting immature and dependent minors and in preserving family integrity.<sup>18</sup> Chief Justice Burger wrote that parental notification protected the child because the parents could supply medical information and history to the physician that the minor did not know.<sup>19</sup> It did not matter if notice to the parent led to pressure on the girl to forgo the abortion because the state could elect policies to support childbirth rather than abortions, and notification was not the same as the veto involved in a statute requiring consent.<sup>20</sup>

The chief justice saw no contradiction in the fact that, under most state laws, a pregnant minor can consent to medical procedures related to carrying a pregnancy and to childbirth. Citing some literature, he said abortion was different because:

If the pregnant girl elects to carry her child to term, the medical decisions to be made entail few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort.<sup>21</sup>

Melton and Pliner (1986) disputed whether the literature in fact supported that contention.<sup>22</sup>

The *H.L. v. Matheson* (1981) opinion discussed the immature minor. How is maturity to be determined? The courts and legislatures accept simple chronological age as an adequate basis for determining competence to drive, to purchase alcohol, and to consent to sexual relations. In the abortion area, however, the Supreme Court refused to set a bright line of age, calling for a case-by-case determination of maturity.<sup>23</sup> The Court again addressed the issue of determining maturity to obtain an abortion in *Planned Parenthood v. Ashcroft* (1983).<sup>24</sup> In his opinion, Justice Lewis Powell listed the requirements for a valid parental notification or consent statute including the availability of a judicial bypass procedure:

---

17. *H. L. v. Matheson*, 450 U.S. 398 (1981).

18. *Matheson*, 450 U.S. at 398.

19. *Id.*

20. *Id.*

21. *Id.* at 412-413.

22. See GARY B. MELTON & A. J. PLINER, *Adolescent Abortion: A Psycholegal Analysis*, in *ADOLESCENT ABORTION: PSYCHOLOGICAL AND LEGAL ISSUES* (Gary B. Melton ed. 1986).

23. See *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983).

24. *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983).

---

---

To protect her privacy right, the minor who does not wish to obtain parental consent or does not want her parents to know must be allowed to go to court directly.<sup>25</sup>

Once in court, the minor must demonstrate to the judge that she is sufficiently mature to make the decision.<sup>26</sup> If the minor demonstrates maturity, the judge will waive the provisions for parental notification or consent.<sup>27</sup> Even if the judge finds the minor too immature to make the decision, the judge may authorize an abortion without parental notification or consent on the basis that this would be in the child's best interests.<sup>28</sup>

Justice Powell set out some factors for the court hearing the minor's petition to consider: her emotional development, her maturity, her intellect and understanding, her understanding of the consequences of an abortion and of alternatives, and anything else the judge found pertinent to consider.<sup>29</sup> These were vague, but they offered at least some minimum guidelines to judges and researchers.

**Two-parent versus one-parent notification.** In *Hodgson v. Minnesota*, the U.S. Supreme Court reviewed a Minnesota law requiring that a minor notify both parents of her intent to have an abortion.<sup>30</sup> The statute is another example of a state law designed to test the limits of restrictions on abortions. The legislature passed two versions of the bill, one version without a judicial bypass provision and another version with one.

The American Psychological Association submitted an amicus curiae brief to the Supreme Court arguing that the two-parent notification statute had harmful effects on minors.<sup>31</sup> The brief reviewed research showing that the two-parent notice requirement did not reestablish relationships with an estranged parent, and could result in threats to renew custody disputes. It could provoke violence or harassment in dysfunctional or abusive families. Some adolescents who might have notified one parent went to court only to avoid notifying the other one. The evidence at the trial opposing the implementation of the law supported the conclusion that the statute did not enhance communication with parents, and might well have impeded that goal. In addition, Minnesota state court judges who administered the law testified that they saw no good in it. The judges and other professionals

---

25. *Ashcroft*, 462 U.S. 476 at 490.

26. *Id.* at 491.

27. *Id.*

28. *Id.*

29. *Id.* at 493.

30. *See Hodgson v. Minnesota*, 497 U.S. 417 (1990).

31. Brief for Amici Curiae Am. Psychol. Ass'n, Nat'l Ass'n of Soc. Workers, Inc., & The Am. Jewish Comm. in Support of Petitioners/Cross-Respondents, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (No. 88-1125).

who worked with adolescents told the initial trial court that the procedure was nerve-racking for youth, and stimulated feelings of anger, shame, guilt, and embarrassment.

The Supreme Court was deeply divided. Justice John Paul Stevens wrote for a five-justice majority finding the two-parent notice without judicial bypass unconstitutional.<sup>32</sup> A different five-justice majority agreed that the statute including a judicial bypass provision was constitutional.<sup>33</sup> (Justice O'Connor provided the fifth vote each time.)<sup>34</sup>

Justice Anthony Kennedy wrote the opinion upholding the two-parent notification and 48-hour delay provisions with judicial bypass.<sup>35</sup> Justice Kennedy was unimpressed with the empirical evidence. In his view, the values embodied in the statute were more important than assessing empirically whether the statute was achieving its goal. He saw the Minnesota law as a permissible, reasoned attempt to further the state's legitimate interest in protecting minors and protecting the parental role without placing an absolute obstacle to abortion in an adolescent's way. Imperfections in the application of statutes are inevitable, he said. The Court should defer to the state legislature's wisdom in supporting a "tradition of a parental role in the care and upbringing of children that is as old as civilization itself."<sup>36</sup> Justice Kennedy reflected the opinion of a strong majority of Americans who, in public opinion polls, support laws requiring teenagers to obtain parental consent or notification before obtaining an abortion.<sup>37</sup>

Justice Thurgood Marshall, who was in the first five-justice majority, entered a vigorous dissent to any two-parent notification provision, with or without bypass.<sup>38</sup> In support of his position, Justice Marshall cited research findings extensively, including the APA brief and articles by Gary Melton and by Catherine Lewis published in the *American Psychologist*.<sup>39</sup>

In 2006, the Supreme Court reviewed a law requiring that 48 hours pass after parental notification before an abortion could take place.<sup>40</sup> The Court overturned the law as it lacked a medical emergency exception for the woman's health.<sup>41</sup> In ruling, however, the Court quietly raised a potential tension. Elsewhere in the textbook, we discuss research cited by

---

32. *Hodgson*, 497 U.S. at 417.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 501.

37. Margaret Carlson, *Abortion's Hardest Cases*, TIME, July 9, 1990 at 22.

38. *Hodgson*, 497 U.S. at 417.

39. See Gary Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 AM. PSYCHOLOGIST 79 (1987); see also Catherine Lewis, *Minors' Competence to Consent to Abortion*, 42 AM. PSYCHOLOGIST 84 (1987).

40. *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006).

41. *Id.*

the APA in other amicus briefs (that the Supreme Court endorsed) finding that adolescents are impulsive and, as such, should not be subjected to the death penalty.<sup>42</sup> Citing that research, the *Ayotte* Court thus stated that parental notification laws are still important to help adolescents make informed decisions.<sup>43</sup> However, many people might argue that the research in the APA brief seemed to contradict the *Hodgson* APA research that minors can make competent decisions.<sup>44</sup> Without explicitly noting it, the Court raised an important question: How can the law and research reconcile when children and adolescents can make good decisions and when do they make bad decisions? And, can a coherent policy be formed around such research studies? In this next section, we attempt to review some of this research and at least pose the questions.

### III. RESEARCH ISSUES RAISED BY THE COURT DECISIONS

Laws regulating adolescent access to abortion have sometimes played out in unexpected ways. How adolescents make decisions; how family members, judges, and lawyers who may represent adolescents in hearings respond; and the availability of abortion services determine what the laws mean in action.

#### A. MINORS' COMPETENCE TO MAKE A DECISION ABOUT ABORTION

Consent to health care must be informed; that is, the patient must have "received adequate information about the risks associated with the particular treatment and the alternatives that might be selected in place of it."<sup>45</sup> The patient receiving the information must be able to use it intelligently, to understand the information, and to draw inferences about the probable implications of any proposed treatment for his or her future.

The law presumes that adults are competent to make decisions about medical care, but that minors are not. In theory, giving the parent the authority to consent for the minor helps make up for what the minor lacks in experience, emotional maturity, or the ability to make a complex judgment. The states recognize that many older minors do have the competence to give consent to treatment in some areas. Many states also recognize that minors may not seek treatment or may delay treatment for conditions that, if known to the parents, might result in family conflict.

---

42. LEVINE ET AL., *supra* note 1.

43. *Ayotte*, 546 U.S. at 320.

44. See Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM. PSYCHOLOGIST 583 (2009).

45. WALTER J. WADLINGTON, *Consent to Medical Care for Minors: The Legal Framework*, in CHILDREN'S COMPETENCY TO CONSENT 57, 64 (G. B. Melton, G. P. Koocher, & M. J. Saks eds., 1983).

Depending on state law, minors under age 18 may seek treatment without parental consent for substance abuse or addiction, family planning, pregnancy care, venereal disease, and, sometimes, psychotherapy or counseling. The question is when can adolescents competently make such decisions.

**Research on adolescent decision-making.** Research suggests that young people 15 and older are fairly competent cognitively to make general health care decisions. They respond to questions about health care dilemmas and use information in a manner not too different from adults.<sup>46</sup> Ambuel and Rappaport studied adolescents who came to a woman's medical clinic for a pregnancy test.<sup>47</sup> They found that minors under 15, compared to older minors, were on average less able to answer questions about the advantages and disadvantages of an abortion or of parenthood, and about how a pregnancy or abortion might affect others in their lives.<sup>48</sup> Minors over 15 had about the same knowledge and information as those over 18.<sup>49</sup> Ehrlich studied adolescents who had sought judicial bypasses.<sup>50</sup> She reported that adolescents as young as 14 had fairly well thought through, reasons for their choice and that most could state several cogent reasons for seeking an abortion.<sup>51</sup>

Indeed, in a 2009 analysis, Steinberg and colleagues reconciled the differences between decisions on adolescent criminal impulsivity and the ability to make rational and informed medical choices.<sup>52</sup> There they noted that adolescents' cognitive abilities generally reached an adult-level around the age of 15 but that their psychosocial skills continued to develop throughout adolescence and perhaps into early adulthood.<sup>53</sup> Thus, the scientists argued that medical decisions are different from the choice to commit crime as the former is (though highly emotional) often made with time allotted to think and frequently in conjunction with another adult (even if not a parent).<sup>54</sup> Under these circumstances, most adolescents are arguably able to make adult-like decisions.

That being said, teens have unrealistic expectations about how their

---

46. See Catherine C Lewis, *How Adolescents Approach Decisions: Changes Over Grades Seven to Twelve and Policy Implications*, 52 CHILD DEV. 538 (1981); see also Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589 (1982).

47. See B. Ambuel & J. Rappaport, *Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion*, 16 L. & HUMAN BEHAV. 129 (1992).

48. *Id.*

49. *Id.*

50. J. Shoshanna Ehrlich, *Choosing Abortion: Teens Who Make the Decision Without Parental Involvement*, GENDER ISSUES, Mar. 2003, at 3, 3.

51. *Id.*

52. Steinberg et al., *supra* note 44.

53. *Id.*

54. See Laurence Steinberg & Dustin Albert, *Judgment and Decision Making in Adolescence*, 21 J. OF RES. ON ADOLESCENCE 211 (2011).

lives would be affected by carrying a child to term. Ninety-four percent believe they could stay in school if they became pregnant, but only 70 percent of pregnant teens actually do stay.<sup>55</sup> Fifty-one percent believe they would marry the father of the child, but 81 percent of teen mothers are unmarried.<sup>56</sup>

**Examining the Research: Adolescent Decision-Making.** Throughout this book, we have looked at the research on adolescents' abilities to make careful decisions. In 2016, Cohen and an impressive group of colleagues considered decisions made by 110 participants varying in age from 13 to 25.<sup>57</sup> These decisions were made under either positive, negative, or neutral emotional contexts.<sup>58</sup>

Younger adults revealed differences in their cognitive control from older adults but only when they were negatively aroused.<sup>59</sup> No such differences were found in the positive or neutral conditions.<sup>60</sup> This argues for interventions that provide adolescents with support to ensure that they are able to make choices without increased current stress or arousal.

**Controversy about the use of research.** Many psychologists have debated the correct use of the research regarding adolescent competence and decision-making. Is the research settled or clear enough to usefully inform the courts and legislatures? Or, instead, are the scientists using their research to motivate their desired policy outcomes? There are large risks in the ways that science is perceived. Indeed, as noted by Steinberg and his colleagues:

If APA's statements about the state of scientific knowledge are seen as advocacy masquerading as research, the integrity of the Association's scientific mission is threatened.<sup>61</sup>

The debate regarding whether the science is ready has been ongoing for some time. In the early 1980s, some psychologists argued that, based on intellectual competence alone as demonstrated in developmental studies, there was little basis for limiting the right of older adolescents to participate in medical decisions.<sup>62</sup> They maintain that the research, though imperfect, was

---

55. SIECUS REP., Feb.-Mar. 2002, at 1, 1.

56. *Id.*

57. Alexandra O. Cohen et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 PSYCHOL. SCI. 549, 550 (2016).

58. *Id.* at 551.

59. *Id.* at 557.

60. *Id.*

61. Steinberg et al., *supra* note 45, at 583.

62. See Gary B. Melton, *Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy*, 38 AM. PSYCHOLOGIST 99 (1983); Gary B. Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. OF FAM. L. 445 (1984); Gary B. Melton & Nancy F. Russo, *Adolescent Abortion: Psychological Perspectives on Public Policy*, 42 AM. PSYCHOLOGIST 69 (1987).

well enough developed to provide useful information to judges who need to make immediate decisions in the cases before them.<sup>63</sup> The APA agreed with this position and presented the work in amicus curiae briefs to the Supreme Court in *Hartigan v. Zbaraz and Charles*, *Thornburgh v. American College of Obstetricians and Gynecologists*, and *Hodgson v. Minnesota*.<sup>64</sup>

Gardner, Scherer, and Tester, however, believed that the APA's use of the studies on adolescent competence in a legal forum was inappropriate.<sup>65</sup> They argued that the research was too sparse, the methods oversimplified, and the conclusions not well enough accepted in the scientific community to warrant confident assertions in a brief to the U.S. Supreme Court.<sup>66</sup> The debate thus still continues about when the database is sufficient to warrant an amicus brief and when it is sufficient to support a policy preference. When and how do we decide the science is ready for judges and legislators to rely upon it with confidence?

#### B. EFFECTS OF PARENTAL NOTIFICATION AND CONSENT STATUTES

Parental notification or consent statutes are intended to protect the minor from unwise decisions, and to promote the integrity of the family and the authority of the parent. No law prohibits adolescents from informing their parents. The laws permit adolescents to avoid notifying parents if the adolescent so chooses by going to court. The statutes present an important opportunity to see how a law shapes human behavior, and how people adapt to a law when vital interests are at stake.

**Did adolescents notify parents before they had to?** Clary studied 141 adolescents who had requested abortion services at a clinic in the Minneapolis-St. Paul area in 1979, before Minnesota implemented its law requiring parental notification.<sup>67</sup> Most studies found that around half of minors voluntarily involved one or both of their parents, even if the hospital or abortion clinic had no policy requiring parental consent or notification.<sup>68</sup> Younger minors, perhaps because of greater financial and emotional dependence, were more likely to inform their parents than older

---

63. *Id.*

64. See *Hartigan v. Zbaraz*, 484 U.S. 171 (1987); *Thornburgh v. American Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

65. See William Gardner, David Scherer, & Maya Tester, *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, 44 AM. PSYCHOLOGIST 885 (1989).

66. *Id.*

67. See Freddie Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 AM. J. OF PUB. HEALTH 283 (1982).

68. See Clary, *supra* note 67; see V. G. Cartoof & L. V. Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 AM. J. OF PUB. HEALTH 397 (1986); see also Catherine Lewis, *Minors' Competence to Consent to Abortion*, 42 AM. PSYCHOLOGIST 84 (1987).

minors.<sup>69</sup>

Smith found that most adolescents who confided in their parents felt the experience increased communication and brought them closer together.<sup>70</sup> However, those who expected their parents would have a negative reaction were less likely to inform them of the pregnancy in the first place.<sup>71</sup> About a third of those who did not tell their parents believed that, if they had, their parents would have punished them or prevented them from having the abortion. Some young women said they feared upsetting their parents or making them feel bad.<sup>72</sup>

**After parental notification: Advise, consent, or coerce.** Ehrlich found that adolescents under 18 who sought judicial waivers under the law in Massachusetts expressed many of the same concerns as adolescents prior to notification laws being enacted (that parents would try to convince them not to obtain the procedure).<sup>73</sup> In addition to concerns about physical abuse, many feared their parents would lose respect for them or lose trust.<sup>74</sup> Many who sought the waivers said that they had had little communication with their parents about sex and that communication now would be very difficult.<sup>75</sup>

Adolescents who want an abortion and fear their parents will oppose their wishes can try to obtain the abortion by getting court permission or by seeking the abortion in another state without parental notification or consent laws. If the state's consent or notification law is to be upheld as constitutional, adolescents must have the option of seeking a court waiver without notifying their parents. Adolescents who want to have the baby do not need their parents' permission under the U.S. Supreme Court's rulings.

**With whom do adolescents consult?** Almost half of adolescents who wish to obtain an abortion notify an adult who is neither their parent nor a medical professional.<sup>76</sup> Adolescents are also likely to share problems with friends than with parents or professionals.<sup>77</sup> Seventy-one percent of adolescents seeking an abortion in Cartoof and Klerman's sample told their best friend, and about 90 percent told their boyfriends.<sup>78</sup> Ehrlich reported similar findings based on a large sample of adolescents who sought a

---

69. *Id.*

70. Elizabeth M. Smith, *A Follow-up Study of Women Who Request Abortion*, 43 AM. J. OF ORTHOPSYCHIATRY 574, 581 (1973).

71. *Id.* at 583.

72. *Id.*

73. Ehrlich, *supra* note 51.

74. *Id.*

75. *Id.*

76. Kathryn Kost & Stanley Henshaw, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSP. 196 (1992).

77. *Id.*

78. V. G. Cartoof & L. V. Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 AMER. J. OF PUB. HEALTH 397 (1986).

judicial bypass waiver in Massachusetts.<sup>79</sup>

We do not know exactly what teenage friends have to offer by way of sage counsel or practical advice to a pregnant adolescent.<sup>80</sup> Research has shown that the presence of peers can induce adolescents to make more risky decisions.<sup>81</sup> However, most of this research has focused on emotional or impulsive decisions, which, as we discussed earlier, have been argued to be different for adolescents than situations where cognition is the driving factor.

### C. HOW ADOLESCENTS ADAPT TO THE LAW

Researchers have investigated the effects of parental notification laws in Massachusetts and Minnesota, and there are some data from other states as well.

**The judicial bypass option.** Before parental notification or consent laws took effect, 33 percent to 50 percent of minors seeking an abortion informed their parents.<sup>82</sup> Mnookin estimated that, after Massachusetts instituted a parental consent requirement with judicial bypass in 1981, about 75 percent of minors seeking abortions in the state obtained parental consent, and about 25 percent sought judicial bypass.<sup>83</sup> However, a significant number of young women obtained abortions in neighboring states without those restrictions to avoid both the consent provision and a court hearing.<sup>84</sup> If we take into account adolescents who went out of state, after the law went into effect, only about 42 percent of Massachusetts minors getting abortions were notifying their parents.

Blum, Resnick, and Stark studied the impact of the Minnesota law that required minors to notify both parents or seek a judicial bypass.<sup>85</sup> They concluded that the law probably resulted in more adolescents telling their parents about their pregnancy.<sup>86</sup> However, about 43 percent of minors seeking abortions used the court bypass.<sup>87</sup> About a quarter of these minors had notified one parent, but did not want to notify the other.<sup>88</sup> Most of the

---

79. Ehrlich, *supra* note 50.

80. Lewis, *supra* note 39.

81. See Laurence Steinberg et al., *The Teenage Brain: Peer Influences on Adolescent Decision Making*, 22(2) CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 114 (2013).

82. See ROBERT HARRIS MNOOKIN, *Bellotti v. Baird: A Hard Case*, in THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM AND PUBLIC POLICY 15 (Robert Harris Mnookin ed., 1985).

83. *Id.*

84. Cartoof & Klerman, *supra* note 79.

85. R. W. Blum, M. D. Resnick, & T. Stark, *Factors Associated with the Use of Court Bypass by Minors to Obtain Abortion*, 22 FAM. PLAN. PERSP. 158 (1990).

86. *Id.*

87. *Id.*

88. *Id.*

group that went to court was over 16 (85 percent), and the majority came from economically better-off families.<sup>89</sup>

The judicial waiver provisions of state laws on parental notification or consent, a constitutional requirement, provide good examples of the difference between the law on the books and the law in action.<sup>90</sup> In Massachusetts, the judicial waiver worked reasonably smoothly, although the adolescents who went through the procedure found it stressful and embarrassing.<sup>91</sup> Other states also have such laws, but the mechanics were such that there were obstacles to using the court, especially if the judge reviewing the petition personally opposed abortion.<sup>92</sup>

Silverstein et al. studied how well the Tennessee parental consent law operated. In theory, the law had several provisions that should make it easier for adolescents to access the judicial bypass option (e.g., a state-supported advocate, court-appointed counsel to assist the adolescent, and courts with jurisdiction conveniently located in each county). The research team called each county's court, saying, "I am calling to find out how a girl who is not eighteen who wants an abortion can get a judge's permission to avoid telling her parents."<sup>93</sup>

If the respondent in the court referred the caller to someone else, the research team pursued that call to see where it led. The research team measured "preparedness" by noting whether or not the court personnel acknowledged their obligation to conduct waiver hearings and mentioned the availability of legal counsel or an advocate. Based on the telephone inquiry, they classified 45 of Tennessee's 95 county courts (47 percent) as being unprepared to handle inquiries. Many of the courts simply recommended contacting an attorney, a social service agency, or an abortion clinic. Eight informants in the 45 unprepared courts expressed doubts that a judge could waive parental consent, although state law explicitly gives judges that authority.<sup>94</sup>

Most of the court advocates designated by the Department of Social Services to work with minors on the petitions were prepared to do so. However, it took repeated telephone calls to contact many of the advocates. Adolescents would not or could not leave home numbers to receive callbacks from advocates. They feared their parents would learn what they wanted to do. For many adolescents, these administrative flaws made the waiver procedure accessible only with difficulty. Similar problems were

---

89. Blum et al., *supra* note 85.

90. Ehrlich, *supra* note 50.

91. *Id.* at 30.

92. *Id.* at 31.

93. See Helena Silverstein et al., *Easier Said than Done: Tennessee's Efforts to Implement Mandated Parental Consent for Abortion and the Judicial Waiver Process*, 27 L. & POL'Y 399, 405-407 (2005).

94. *Id.* at 407-412.

reported in Alabama and Pennsylvania.<sup>95</sup>

**What happens when adolescents go to court?** In those states for which we have data, judges almost never reject the petitions of minors seeking abortions. From 1981 to 1983, about 1,300 Massachusetts minors sought judicial authorization for an abortion. The hearings were short. The judges found the minor was "mature" in about 90 percent of the cases. When the minor was not mature, the judge was required to consider her "best interests." The Massachusetts judges found that an abortion was in the minor's best interests in all but five cases. All five managed to obtain abortions, one by going to another judge, three through an appeal, and one by going out of state.<sup>96</sup> Ehrlich, working with Massachusetts adolescents in subsequent years, reported similar rates of judges allowing minors to obtain abortions. Though judges in Massachusetts almost always granted the petition, the young women who went to court experienced it as aversive and punitive.<sup>97</sup> Many were embarrassed and angered by the experience. Going to court in and of itself invaded adolescent privacy.<sup>98</sup> Judges asked the young women intimate questions about their sex lives, their menstrual cycles (to determine how advanced the pregnancy was), about abortions, about how they made their decision, and sometimes about their relationship with their parents.<sup>99</sup> Young petitioners were also afraid they might see someone they knew in the courthouse building.<sup>100</sup>

In Minnesota, petitions were usually granted after a hearing lasting an average of 15 minutes (see Justice Marshall's dissent in *Hodgson v. Minnesota*). However, the judicial bypass procedure was burdensome.<sup>101</sup> In addition to delays arising from court schedules, judges who had conscientious objections to abortion refused to hear the petitions.<sup>102</sup> Minors sometimes had to travel as much as 500 miles to get a hearing.<sup>103</sup> Undertaking a journey of that distance in itself sometimes compromised a teenager's privacy.<sup>104</sup> None of the groups involved in judicial bypass thought the procedure was satisfactory.<sup>105</sup> The young women who went to court were angry and resentful at having to report intimate details of their lives to strangers, and many reported feeling anxious and guilty in court as

---

95. *Id.* at 412-415.

96. MNOOKIN, *supra* note 82.

97. Ehrlich, *supra* note 50, at 12-19.

98. Ehrlich, *supra* note 50, at 30-31; see also Gary Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 AM. PSYCHOLOGIST 79 (1987).

99. Ehrlich, *supra* note 50, at 30-31.

100. *Id.*

101. See Patricia Donovan, *Judging Teenagers: How Minors Fare When They Seek Court Authorized Abortions*, 15 FAM. PLAN. PERSP. 259, 260-261 (1983).

102. *Id.* at 264.

103. *Id.*

104. *Id.*

105. *Id.* at 266-267.

well.<sup>106</sup> Judges did not see the point of the proceeding; if the young woman was mature, she could have an abortion as she wished.<sup>107</sup> If they found that she was not mature enough to make her own decision, how could they decide she was mature enough to bear a child? Lawyers assigned to aid the petitioning minors also disliked the task.<sup>108</sup> They received no fee or were paid low fees by the state and not very promptly.<sup>109</sup>

While judges in Massachusetts, Minnesota, and Michigan tend to rubber-stamp petitions by minors, this may not be the case in other states. There are very little systematic data for other states. When judicial approval of petitions is more difficult to obtain, one can hypothesize that more pregnant minors will inform their parents or go out of the state if they can to avoid the requirement. Virginia's bypass statute gives the judge discretion to inform the adolescent's parent or parents. There are no data on the effect of this Virginia law. The District of Columbia, which borders Virginia, has no parental consent or notification law. However, the District of Columbia has the highest number of teenage abortions in the country. Some of the adolescents who had abortions in the District of Columbia came from neighboring Virginia. In Texas, adolescents advised by lawyers or counselors may go "judge shopping."<sup>110</sup> For example, two counties with judges with anti-abortion reputations had 19 and 13 cases respectively.<sup>111</sup> Two adjacent counties handled 191 and 110 cases respectively.<sup>112</sup>

**Delay in seeking abortion.** Abortions are riskier and more costly as a pregnancy progresses. Because the period between the first suspicions that they are pregnant and the decision about what to do is the most stressful for women, delay also increases stress and anxiety. Most abortions take place within the first 12 weeks of gestation. However, adolescents, especially younger ones, more than older women, delay seeking an abortion. Concern about their parents' reactions and reluctance to go to court may be among the reasons adolescents delay seeking an abortion, to their detriment. In Texas, following a parental notification law, fewer minors became pregnant, but minors who were pregnant and were within six months of reaching their eighteenth birthday showed an increased likelihood of obtaining a delayed (and more complicated) second trimester abortion.<sup>113</sup>

---

106. Donovan, *supra* note 101, at 267.

107. *Id.*

108. MNOOKIN, *supra* note 82 at 516; Donovan, *supra* note 101 at 265.

109. MNOOKIN, *supra* note 82, at 54; Donovan, *supra* note 101, at 268.

110. Janet Elliott, *Abortion Detour: Girls Looking to Bypass Parental Notice Avoid Harris County Courts*, HOUS. CHRON., (Mar. 24, 2002), <https://www.chron.com/news/houston-texas/article/Girls-turning-to-liberal-courts-to-avoid-parental-2068391.php> [<https://perma.cc/U4G-68T2>].

111. *Id.*

112. *Id.*

113. See Theodore Joyce et al., *Changes in Abortions and Births and the Texas Parental Notification Law*, 354 N. ENG. J. OF MED. 1011 (2006).

There seems to be a general trend to delay seeking an abortion among women in those states with laws that require a waiting period or a return for a second consultation, as approved in *Casey*.<sup>114</sup> In Mississippi, the proportion of second-trimester abortions increased from 7.5 percent of abortions to 11.5 percent among women who relied on providers within the state.<sup>115</sup> The rate increased somewhat less among those able to seek abortions in nearby states that did not have a law requiring delay.<sup>116</sup>

**Does parental notification reduce the number of abortions?** Pro-life advocates hoped that parental notification and consent statutes would reduce the number of abortions, but the law did not appear to have that effect in Massachusetts.<sup>117</sup> Cartoof and Klerman (1986) used the Massachusetts Department of Health database to examine changes month by month in the number of adolescents who obtained abortions within the state, and also obtained data on the number of minors who obtained abortions in five neighboring states that at that time did not have parental consent or notification requirements.<sup>118</sup> The number of women under 17 having abortions in Massachusetts went down about 43 percent the year the notification requirement was implemented.<sup>119</sup> However, the number of Massachusetts minors seeking abortions in neighboring states went from an average of 29 a month to an average of 95 a month.<sup>120</sup> The researchers concluded that the law had done very little, if anything, to reduce the number of abortions among Massachusetts adolescents.<sup>121</sup> In Texas, the number of abortions obtained by teenagers did decline following passage of a parental notification law, but it is difficult to attribute the decline to the operation of the law alone.<sup>122</sup> The number of abortions has been declining nationally for several years now; some believe that it is due to increased access to healthcare and/or increased education rather than restrictions on access to abortion.

#### IV. SUMMARY

Adolescents' ability to make informed medical decisions for themselves is an area of both empirical and legal debate. Perhaps no other medical decision has been more litigated than the right of adolescents to decide to have an abortion. For most of our nation's history, abortion was

---

114. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

115. See Theodore Joyce & Robert Kaestner, *The Impact of Mississippi's Mandatory Delay Law on the Timing of Abortion*, 32 FAM. PLAN. PERSP. 4 (2000).

116. *Id.*

117. Cartoof & Klerman, *supra* note 78, at 400; MNOOKIN, *supra* note 83, at 149.

118. Cartoof & Klerman, *supra* note 78, at 397.

119. *Id.* at 398.

120. *Id.*

121. *Id.* at 400.

122. Joyce et al., *supra* note 113, at 1036-1038.

---

---

the province of state governments. In the twentieth century, the Supreme Court developed a constitutional right to privacy that it extended first to the use of contraception and then, in *Roe v. Wade*, to abortion.<sup>123</sup> By making the right to get an abortion part of a constitutionally protected right to privacy in reproductive matters, the decision limited the power of the states to prohibit abortion. After *Roe v. Wade*, a growing right-to-life movement worked toward the passage of state laws regulating abortion in ways that would be likely to discourage women from terminating their pregnancies. Some of the restrictions survived challenges brought to the Supreme Court, but the Court refused to overturn the basic ruling that abortion could not be banned.<sup>124</sup>

The abortion story is far from over, and social science and psychological studies will continue to play a part in the debate. The social science community will be divided about when the research base is sufficiently strong to be a basis for policy recommendations. For example, more work is needed to reconcile the research showing that adolescents are more likely to make risky choices than adults with research showing that adolescents can make rational and capable decisions. The one thing of which we can be confident is that activists of all points of view will use social science and psychological studies to try to persuade the public to support their causes. As a result, research may well have both direct and indirect effects on legislative debates and judicial decision making.

---

123. *Roe*, 410 U.S. at 113.

124. *Danforth*, 428 U.S. at 52; *Matheson*, 450 U.S. at 398; *Akron Ctr. for Reprod. Health*, 462 U.S. at 416; *Ashcroft*, 462 U.S. at 476; *Hodgson*, 497 U.S. at 417; *Ayotte*, 546 U.S. at 320; *Hartigan*, 484 U.S. at 171; *Thornburgh*, 476 U.S. at 747; *Casey*, 505 U.S. at 833.

\*\*\*