IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5423-MN/No. 86-5431-MN

JANE HODGSON, M.D., et al.,

Appellees and Cross-Appellants,

v.

THE STATE OF MINNESOTA, et al.,

Appellants and Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF FOR AMICUS CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF APPELLEES AND CROSS-APPELLANTS

DONALD N. BERSOFF
(Counsel of Record)
DAVID W. OGDEN
ENNIS FRIEDMAN & BERSOFF
1200 17th St., N.W., Suite 400
Washington, D.C. 20036
(202) 775-8100

Attorneys for Amicus Curiae
American Psychological Association

March 16, 1987

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... iii

INTEREST OF AMICUS CURIAE..... 1

ARGUMENT

I. THE ASSUMPTIONS USED BY THE STATE TO SUPPORT RESTRICTIVE PROVISIONS AFFECTING MINORS' ACCESS TO ABORTIONS FAIL TO ACKNOWLEDGE THE COMPLEXITY OF PRIOR DECISIONS OF THE SUPREME COURT AND THE CONCEPTS THEY EMBODY..... 1

II. OLDER ADOLESCENTS AND MANY YOUNGER ADOLESCENTS ARE AS ABLE AS ADULTS TO MAKE COMPETENT DECISIONS REGARDING ABORTION..... 4

A. Psychological Theory About Cognitive and Moral Development Strongly Supports the Conclusion That Most Adolescents Are Competent to Make Informed Decisions about Abortions..... 6

B. Research Confirms That Most Adolescents Have the Capacity to Make Sound Health Care Decisions, Including Decisions about Abortion..... 8

III. THERE IS NO SUPPORT FOR THE STATE'S PRESUMPTION THAT ADOLESCENTS ARE MORE PSYCHOLOGICALLY VULNERABLE THAN ADULTS..... 10

A. Adolescence is Not a Particularly Difficult Stage of Development..... 10

B. Much of the Stress Pregnant Adolescents Experience Is Due to Unwanted Pregnancy, Not to Abortion Itself..... 12

IV. THE STATE'S MANDATORY NOTICE AND WAITING PERIOD SERVE NO LEGITIMATE STATE INTERESTS AND MAY ACTUALLY BE HARMFUL TO THE OSTENSIBLE GOALS OF THE ACT..... 14

A. A Great Many Young Minors and Many Older Minors Voluntarily Inform Their Parents of the Desire to Have an Abortion..... 14

B. State Mandated Parental Consultation is Unlikely to Result in Positive Communication or Better Reasoned Decisionmaking and May Be Harmful to Adolescents Who Cannot or Will Not Use the Judicial Bypass Option..... 15

C. An "Arbitrary and Inflexible" 48-Hour Waiting Period Places Greater Burdens on Adolescents Than It Does on Adults..... 17

Page

V. THE PARENTAL NOTICE AND WAITING PERIOD PROVISIONS ARE UNCONSTITUTIONAL..... 19

CONCLUSION..... 20

TABLE OF AUTHORITIES

CASES: Page

Bellotti v. Baird, 443 U.S. 622 (1979)..... 1,2,3,4

Bender v. Williamsport, 475 U.S. ___, 106 S. Ct. 1326 (1986)..... 19

Carey v. Population Services International, 431 U.S. 678 (1977)..... 1,4,19

City of Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416 (1983)..... 1,2,4,17

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)..... 2

Fare v. Michael C., 442 U.S. 707 (1979)..... 2

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)..... 2

H.L. v. Matheson, 450 U.S. 398 (1981)..... 2,3,12

Indiana Planned Parenthood v. Pearson, 716 F.2d 1127 (7th Cir. 1983)..... 18

Parham v. J.R., 442 U.S. 584 (1979)..... 2

Planned Parenthood Ass'n. v. Ashcroft, 462 U.S. 476 (1983)..... 2

Planned Parenthood v. Cent. Mo. v. Danforth, 428 U.S. 52 (1976)..... 2,5

Roe v. Wade, 410 U.S. 113 (1973)..... 2,4,5,6

Women's Comm. Health Ctr., Inc. v. Cohen, 477 F. Supp. 542 (D. Maine 1979)..... 18

Women's Medical Ctr. of Providence, Inc. v. Roberts, 530 F. Supp. 1136 (D.R.I. 1982)..... 18

Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978)..... 18

STATUTORY AND REGULATORY PROVISIONS:

Minn. Stat. Ann. § 144.343 subd. 1..... 3

Minn. Stat. Ann. § 144.343 subds. 2-7 1

MISCELLANEOUS: Page

Adelman, Lusk, Alvarez & Acosta, Competence of Minors to Understand, Evaluate, and Communicate about their Psychoeducational Problems, 16 Prof. Psychology 426 (1985)..... 8

Adler & Dolcini, Psychological Issues in Abortion for Adolescents in Adolescent Abortion: Psychological & Legal Issues 74 (G. Melton ed. 1986)..... 12,13

Alan Guttmacher Institute, School Sex Education in Policy and Practice, 3 Issues in Brief 1 (1983)..... 5

Bastian & Adelman, Noncompulsory versus Legally Mandated Placement, Perceived Choice, and Response to Treatment among Adolescents, 52 J. Consulting & Clin. Psychology 171 (1984)..... 8

H. Bee, The Journey of Adulthood (1987)..... 11

Belter & Grisso, Children's Recognition of Rights Violations in Counseling, 15 Prof. Psychology 899 (1984)..... 8

Bracken, Hackamovitch & Grossman, The Decision to Abort and Psychological Sequelae, 158 J. Nerv. Ment. Disorders 154 (1974)..... 13

Campbell, Illness is a Point of View: The Development of Children's Concept of Illness, 46 Child Dev. 92 (1975)..... 9

Cates, Adolescent Abortions in the United States, 1 J. Adol. Health Care 18 (1980)..... 13

Centers for Disease Control, Abortion Surveillance, Annual Summary, 1979-1980 (1983)..... 5

C. Chilman (ed.), Adolescent Sexuality in a Changing American Society (NIH Pub. No. 79-1426) (1978)..... 13

Clary, Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area, 72 Am. J. Pub. Health, 283 (1982)..... 14,16

Cvetkovich & Grote, Adolescent Development and Teenage Fertility in Adolescents, Sex, and Contraception 109 (D. Byrne & W. Fisher eds. 1983)..... 11

David, Rasmussen & Holst, Postpartum and Postabortion Psychotic Reactions, 13 Fam. Plan. Persp. 88 (1981)..... 13

Page

Dollinger, Thelen & Walsh, Children's Conception of Psychological Problems, 9 J. Clin. Child Psychology 191 (1980)..... 9

Donovan, Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions, 15 Fam. Plan. Persp. 259 (1983)..... 15,17

E. Douvan & J. Adelson, The Adolescent Experience (1966)..... 11

Elkind, Conceptual Orientation Shifts in Children and Adolescents, 37 Child Dev. 493 (1966)..... 7

Ferguson, The Competence and Freedom of Children to Make Choices Regarding Participation in Research: A Statement, 34 J. Soc. Issues 114 (1978)..... 8

D. Finkelhor & Assoc., A Sourcebook on Child Sexual Abuse (1986)..... 16

J. Flavell, The Developmental Psychology of Jean Piaget (1963)..... 6

Flavell, An Analysis of Cognitive-Developmental Sequences, 86 Genetic Psychology Monographs 279 (1972)..... 7

Fox & Inazu, Mother-Daughter Communication About Sex, 29 Fam. Rel. 347 (1980)..... 15

F. Furstenberg, Unplanned Parenthood: The Social Consequences of Teenage Childbearing 54 (1976)..... 16

Gelles & Straus, Violence in the American Family, 35(2) J. Soc. Issues 15 (1979)..... 16

T. Grisso, Juveniles Waiver of Rights (1981)..... 8

Grisso & Vierling, Minors' Consent to Treatment: A Developmental Perspective, 9 Prof. Psychology 412 (1978)..... 8

Grisso, Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis, 68 Calif. L. Rev. 1134 (1980)..... 8

Grodin & Alpert, Informed Consent and Pediatric Care in Children's Competence to Consent 93 (G. Melton, G. Koocher, M. Saks eds. 1983)..... 7

B. Inhelder & J. Piaget, The Growth of Logical Thinking from Childhood to Adolescence (1958)..... 6

Page

Kaser-Boyd, Adelman & Taylor, Minors' Ability to Identify Risks and Benefits of Therapy, 16 Prof. Psychology 411 (1985)..... 8

Keating, Thinking Processes in Adolescence in Handbook of Adolescent Psychology 211 (J. Adelson ed. 1980)..... 7

Kohlberg, The Development of Children's Orientations Toward Moral Order, 6 Vita Humana 11 (1963)..... 7

Koocher, Competence to Consent: Psychotherapy in Children's Competence to Consent 111 (G. Melton, G. Koocher & M. Saks eds. 1983)..... 8

Laufer & Wolfe, Privacy as a Concept and a Social Issue, 33 (3) J. Soc. Issues 22 (1977)..... 15

Lewis, A Comparison of Minors and Adults' Pregnancy Decisions, 50 Am. J. Orthopsychiatry 446 (1980)..... 9

Lewis, Decision Making Related to Health: When Could/Should Children Act Responsibly? in Children's Competence to Consent 75 (G. Melton, G. Koocher & M. Saks eds. 1983)..... 8

Lewis, How Adolescents Approach Decisions: Changes over Grades Seven to Twelve and Policy Implications, 52 Child Dev. 538 (1981)..... 9

Lewis, Minors' Competence to Consent to Abortion, 42 Am. Psychologist 84 (1987)..... 10

Maracek, Consequences of Adolescent Childbearing and Abortion in Adolescent Abortion: Psychological & Legal Issues 95 (G. Melton ed. 1986)..... 12,14

Marecek, Counseling Adolescents with Problem Pregnancies, 42 Am. Psychologist 89 (1987)..... 11

Melton, Children's Participation in Treatment Planning: Psychological and Legal Issues, 12 Prof. Psychology 246 (1981)..... 9

Melton, Decision Making by Children: Psychological Risks and Benefits in Children's Competence to Consent 21 (G. Melton, G. Koocher & M. Saks eds. 1983)..... 15

Melton, Developmental Psychology and the Law: The State of the Art, 22 J. Fam. L. 445 (1984)..... 7

Page

Melton, Effects of a State Law Permitting Minors to Consent to Psychotherapy, 12 Prof. Psychology 647 (1981)..... 9

Melton, Legal Regulation of Adolescent Abortion: Unintended Effects, 42 Am. Psychologist 79 (1987)..... 17

Melton, Minors and Privacy: Are Legal and Psychological Concepts Compatible? 62 Neb. L. Rev. 455 (1983)..... 15

Melton & Pliner, Adolescent Abortion: A Psychological Analysis in Adolescent Abortion: Psychological & Legal Issues 1 (G. Melton ed. 1986)..... 7,17

Mnookin, Bellotti v. Baird: A Hard Case in In the Interest of Children: Advocacy, Law Reform, and Public Policy 149 (R. Mnookin ed. 1985)..... 14,17

National Academy of Sciences, Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing 1 (1987)..... 5,12,13,14,17,18,19

Neimark & Lewis, Development of Logical Problem Solving, 29 Child Dev. 527 (1968)..... 7

Neuhauser, Amsterdam, Hines & Steward, Children's Concepts of Healing; Cognitive Development and Locus of Control Factors, 48 Am. J. Orthopsychiatry 335 (1978)..... 9

Olson, Social and Psychological Correlates of Pregnancy Resolution Among Adolescent Women, 50 Am. J. Orthopsychiatry 432 (1980)..... 11,12

Osofsky & Osofsky, Teenage Pregnancy: Psychosocial Considerations, 21 Clin. Obstretics & Gynecology 1161 (1978)..... 16

Parke & Swain, Children's Privacy in the Home: Developmental, Ecological, and Child-Rearing Determinants, 11 Env't. & Behav. 87 (1979)..... 15

Peres-Reyes & Falk, Follow-up After Therapeutic Abortion in Early Adolescence, 28 Archives of Gen. Psychiatry 120 (1973)..... 13

Roberts, Beidelman & Wurtele, Children's Perception of Medical and Psychological Disorders in their Peers, 10 J. Clin. Child Psychology 76 (1981)..... 9

Rosen, Adolescent Pregnancy Decision-making: Are Parents Important? 15 Adolescence 44 (1980)..... 14,15

Page

Russo, Adolescent Abortion: The Epidemiological Context in Adolescent Abortion: Psychological & Legal Issues 40 (G. Melton ed. 1986)..... 5,11,18

Schowalter, The Minor's Role in Consent for Mental Health Treatment, 17 J. Am. Acad. Child Psychiatry 505 (1978)..... 8

Shusterman, The Psychosocial Factors of the Abortion Experience: A Critical Review, 1 Psychology of Women Q. 79 (1976)..... 12,13

Taylor, Adelman & Kaser-Boyd, Exploring Minors' Reluctance and Dissatisfaction with Psychotherapy, 16 Prof. Psychology 418 (1985)..... 8

Torres, Forrest & Eisman, Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services, 12 Fam. Plan. Persp. 284 (1980)..... 14

Wadlington, Minors and Health Care: The Age of Consent, 11 Osgoode Hall L.J. 115 (1973)..... 3

Wald, Children's Rights: A Framework for Analysis, 12 U.C.D.L. Rev. 255 (1979)..... 8

Weithorn & Campbell, The Competency of Children and Adolescents to Make Informed Treatment Decisions, 53 Child Dev. 1589 (1982)..... 9

Weithorn, Children's Capacities in Legal Contexts in Children, Mental Health, and the Law 25 (N. Reppucci & Assoc. eds. 1984)..... 7

Weithorn, Developmental Factors and Competence to Make Informed Treatment Decisions in Legal Reforms Affecting Child and Youth Services 85 (G. Melton ed. 1982)..... 8

Wolfe, Childhood and Privacy in Children and the Environment 175 (I. Altman & J. Wohlwill eds. 1978)..... 15

INTEREST OF AMICUS CURIAE

The statement of interest of amicus American Psychological Association (APA) is fully set forth in its Motion for Leave to File Brief Amicus Curiae.

ARGUMENT

I. THE ASSUMPTIONS USED BY THE STATE TO SUPPORT RESTRICTIVE PROVISIONS AFFECTING MINORS' ACCESS TO ABORTIONS FAIL TO ACKNOWLEDGE THE COMPLEXITY OF PRIOR DECISIONS OF THE SUPREME COURT AND THE CONCEPTS THEY EMBODY.

In City of Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416 (1983), the Supreme Court held unconstitutional an ordinance prohibiting a physician from performing an abortion on a woman until 24 hours after she signed a consent form. The Court concluded that there was no legitimate justification for imposing this "arbitrary and inflexible waiting period." Id. at 450. It is not clear from the decision whether it applies to minors as well as adults. In many cases, "the question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer." Carey v. Population Services International, 431 U.S. 678, 692 (1977). Amicus respectfully submits, however, that in this case the State has plainly failed to provide constitutionally sufficient bases for treating most pregnant adolescents in a manner that would be unconstitutional for adults.

The State attempts to support the constitutionality of Minn. Stat. Ann. § 144.343 subds. 2-7 [the "Act"] by placing principal reliance on arguments flowing from Bellotti v. Baird, 443 U.S. 622, 637 (Bellotti II) (1979), i.e., that unemancipated minors are "peculiarly vulnerable" and suffer significant psychological risks when they choose to abort, are unable "to make critical decisions in an informed, mature manner," and need parental

consultation to help them through an often psychologically and medically difficult period. See Brief for Appellants and Cross-Appellees [hereinafter Brief for Appellants] at 3, 12-14, 26, 34-35. As amicus will show in Points II-IV, however, those arguments are directly contradicted by empirical findings developed over the past decade. "As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point." Parham v. J.R., 442 U.S. 584, 602 (1979).

Moreover, the Supreme Court has recognized the constitutional requirement of a more individualistic and realistic treatment of adolescents than does the State. In assessing the competency and maturity of minors to make important decisions, the Court has rejected the indefensible per se presumption that all adolescents are incompetent and immature.[1/] Indeed, the Court has held that "a blanket determination that all minors under the age of 15 are too immature" to make a decision related to procreation is unconstitutional. City of Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416, 440 (1983).[2/]

1/ The Supreme Court's decisions respecting minors' rights to decide whether to have an abortion do not suppose that all adolescents are incompetent to make this "fundamental" decision, see Roe v. Wade, 410 U.S. 113 (1973), but have, instead, recognized that the legal status of "minority" encompasses wide ranges of age and maturity levels. See Planned Parenthood v. Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976). It is only "immature minors" whom the Court perceives as often, though not always, lacking "the ability to make fully informed choices." Bellotti II, 443 U.S. at 640; accord Planned Parenthood Ass'n. v. Ashcroft, 462 U.S. 476, 490-491 (1983) (the State's interest is limited to "protecting immature minors"). For the adoption of these principles in non-abortion cases see, e.g., Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Fare v. Michael C., 442 U.S. 707 (1979); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

2/ Whether a parental notice requirement can constitutionally apply to "mature minors" is an open question. H.L. v. Matheson, 450 U.S. 398, 406 (1981); id. at 414 (Powell, J., concurring).

Thus, the Court has recognized a constitutional difference between immature and "mature minors," see Bellotti II, 443 U.S. at 643-644 and n.23, a difference relevant in determining whether a particular adolescent is competent to make procreative decisions without parental or judicial involvement. As amicus will show, there is substantial empirical support for the "undoubted social reality" that "some minors, in some circumstances, have the capacity and need to determine their health care needs without involving their parents." H.L. v. Matheson, 450 U.S. 398, 453 (1981) (Marshall, J., dissenting). See Wadlington, Minors and Health Care: The Age of Consent, 11 Osgoode Hall L.J. 115, 117-120 (1973).

Minnesota itself recognizes that not all unemancipated minors are incapable of making competent decisions, including those affecting their own health care. Under Minnesota law, any minor "may give effective consent for medical, mental, or other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse." Minn. Stat. Ann. § 144.343 subd. 1. No parental involvement of any kind is required. This provision confers on pregnant minors a legal capacity flatly inconsistent with the presumptions of the Act, and alone provides a sufficient basis for holding the Act unconstitutional: A State that formally recognize the competence of minors in this area cannot base a provision abridging fundamental rights on presumed incompetence.[3/]

3/ Insofar as pregnant minors may consent to all other medical treatment without parental involvement, the Act irrationally discriminates against pregnant minors who seek abortions, and irrationally singles out the abortion decision as one which pregnant minors are incompetent to make. There is no basis to believe that pregnant minors are any less competent to make the abortion decision with the assistance of a health professional than they are to make such decisions regarding other medical and surgical procedures having far greater risk to the minor's own health and significant potential risk to the fetus.

By rigidly equating lack of emancipation with immaturity for all minors, the State fails to act with the particularity the Constitution mandates.[4/] Imposing the requirements of the Act on all minors is unnecessarily wasteful of both adolescents' and the judiciary's resources. By sweeping within its ambit a large number of mature adolescents as capable of choosing competently and responsibly as adults, as demonstrated by overwhelming and consistent empirical research, see Points II-IV, infra, the Act is unconstitutional.

II. OLDER ADOLESCENTS AND MANY YOUNGER ADOLESCENTS ARE AS ABLE AS ADULTS TO MAKE COMPETENT DECISIONS REGARDING ABORTION.

The Supreme Court has asserted, as a guiding principle, that:

> [W]hen a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.

Carey v. Population Services International, 431 U.S. 678, 696 (1977).

There is no question that the right to secure an abortion is fundamental. Roe v. Wade, 410 U.S. 113 (1973). There is no question that the Act creates a burden for all unemancipated minors that is unconstitutional, at least as applied to adults. City of Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416 (1983). There is also no question that the State provides no empirical support for its assumption that no unemancipated minor is capable of making informed and mature choices.

The Supreme Court has yet to define precisely what the capacity to

---

4/ "The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this manner." Bellotti II, 443 U.S. at 642.

make informed choices means. In the main, the Court has eschewed a definition of capacity to consent that focuses on the choice made.[5/] Instead, it has focused on the individual's cognitive capacity to make the decision to abort, i.e., the ability to understand the nature of the procedure, its risks, benefits, consequences, and possible alternatives:

> The Court assumes that parental consent is an appropriate requirement if the minor is not capable of understanding the procedure and of appreciating its consequences and those of available alternatives. This assumption is, of course, correct and consistent with the predicate which underlies all state legislation seeking to protect minors from the consequences of decisions they are not yet prepared to make.

Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 104 (1976) (Stevens, J., concurring in part and dissenting in part).

Whether adolescents possess the requisite capacity to consent under this formulation is an empirical question, and significant and substantial empirical evidence and scientific literature developed by social scientists bears directly on that question. As amicus will describe, that literature shows that there is no empirical justification for the special and anomalous burden the State has imposed on all unemancipated minors seeking abortion.

5/ In the abortion context, it would certainly be unconstitutional to define capacity to choose in terms of the choice made, i.e., by finding incapable of consent any minor who chooses to have an abortion. Within the contours of Roe v. Wade, 410 U.S. 113 (1973), abortions are lawful. There are about 1.5 million abortions performed each year. See Russo, Adolescent Abortion: The Epidemiological Context in Adolescent Abortion: Psychological & Legal Issues 40-50 (G. Melton ed. 1986) [hereinafter Adolescent Abortion]; Alan Guttmacher Institute, School Sex Education in Policy and Practice, 3 Issues in Brief 1 (1983) [hereinafter AGI]; Centers for Disease Control, Abortion Surveillance, Annual Summary, 1979-1980 (1983). Of approximately 1.1 million teenage pregnancies, about 40% are terminated by abortion. National Academy of Sciences, Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing 1, 15, 261 (1987) [hereinafter NAS Report]; AGI, supra. By any objective standard, therefore, the decision to abort is one that a reasonable person, including a reasonable adolescent, could make.

Thus, the Act fails to select means that are "narrowly drawn," Roe v. Wade, 410 U.S. 113, 155 (1973), in support of whatever legitimate interests Minnesota may have in protecting those few minors who are not competent, in consultation with their physicians, to decide whether to abort.

A. Psychological Theory About Cognitive and Moral Development Strongly Supports the Conclusion That Most Adolescents Are Competent to Make Informed Decisions About Abortions.

Psychologists have generated well-established and generally accepted theories concerning adolescents' capacities for understanding and reasoning as part of the process of decisionmaking, especially in comparison to the same capacities in adults. Cognitive capacity develops in a predictable sequence of stages, from simple reflexive reactions in infancy to the comprehension of abstractions and future consequences in early adolescence.[6/]

The ability to comprehend future consequences, called "formal operations," is most relevant to the decisions affected by the Act as it is closely akin to the "capacity to consent." In the period of formal operations individuals acquire the ability to generate many possible solutions to a problem, to think about each possible solution hypothetically, to imagine its consequences before they occur, to consider both immediate and longer-range consequences, and to weigh and balance these various potential outcomes to reach a conclusion about the decision to be made. Once the period of formal operations is complete, an individual has the decisionmaking abilities of an adult.

In early adolescence (10-13) children move toward the period of formal operations. By the age of 14 or 15, almost all minors with at least

---

6/ See B. Inhelder & J. Piaget, The Growth of Logical Thinking from Childhood to Adolescence (1958); see generally J. Flavell, The Developmental Psychology of Jean Piaget (1963).

average intellectual ability possess the capacity for formal operations that characterize the problem-solving process of adults. A large body of empirical research supports these principles.[7/]

To the extent that many decisions require the weighing of the moral consequences of options, moral development is another important factor in competent decisionmaking. Psychological theory and empirical research on adolescents' moral development reaches virtually the same conclusions as found in cognitive development. Early adolescence is marked by emergence of the adult's capacity to form moral principles against which to judge one's behavior and decisions, and this capacity is fully developed by ages 14-15. See generally Kohlberg, The Development of Children's Orientations Toward Moral Order, 6 Vita Humana 11 (1963).

Based on these established principles of cognitive and moral development, it is now generally accepted that by mid-adolescence (14-15) the great majority of adolescents of average intelligence do not differ from adults in their capacities to understand and reason about medical and psychological treatment alternatives, or in their abilities to comprehend and consider risks and benefits regarding treatment alternatives.[8/]

7/ See, e.g., See Keating, Thinking Processes in Adolescence in Handbook of Adolescent Psychology 211 (J. Adelson ed. 1980); Flavell, An Analysis of Cognitive-Developmental Sequences, 86 Genetic Psychology Monographs 279 (1972); Neimark & Lewis, Development of Logical Problem Solving, 29 Child Dev. 527 (1968); Elkind, Conceptual Orientation Shifts in Children and Adolescents, 37 Child Dev. 493 (1966).

8/ See Melton & Pliner, Adolescent Abortion: A Psycholegal Analysis in Adolescent Abortion, supra note 5, at 1; Weithorn, Children's Capacities in Legal Contexts in Children, Mental Health, and the Law 25 (N. Reppucci & Assoc. eds. 1984). See also, e.g., Melton, Developmental Psychology and the Law: The State of the Art, 22 J. Fam. L. 445 (1984); Grodin & Alpert, Informed Consent and Pediatric Care in Children's Competence to Consent 93 (G.

(footnote continued on next page)

B. Research Confirms that Most Adolescents Have the Capacity to Make Sound Health Care Decisions, Including Decisions About Abortion.

Extensive empirical literature demonstrates that adolescents' actual decisionmaking performance when faced with various types of real-life practical problems involving treatment and non-treatment decisions accords with the principles and theories discussed in Point II(A). Many of these studies compare the performance of adolescents to that of adults in making such decisions.9/

For example, 14-year old minors and adults were presented with four hypothetical vignettes about individuals suffering from particular medical or psychological disorders. They were presented with detailed information about the nature, purpose, risks, and benefits of the alternative treatments, and

---

8/ (continued)
Melton, G. Koocher & M. Saks eds. 1983) [hereinafter Children's Competence]; Weithorn, Developmental Factors and Competence to Make Informed Treatment Decisions in Legal Reforms Affecting Child and Youth Services 85 (G. Melton ed. 1982); Wald, Children's Rights: A Framework for Analysis, 12 U.C.D. L. Rev. 255 (1979); Ferguson, The Competence and Freedom of Children to Make Choices Regarding Participation in Research: A Statement, 34 J. Soc. Issues 114 (1978); Grisso & Vierling, Minors' Consent to Treatment: A Developmental Perspective, 9 Prof. Psychology 412 (1978); Schowalter, The Minor's Role in Consent for Mental Health Treatment, 17 J. Am. Acad. Child Psychiatry 505 (1978).

9/ In addition to the studies cited or discussed in supra, note 8, see, e.g., Adelman, Lusk, Alvarez & Acosta, Competence of Minors to Understand, Evaluate, and Communicate about their Psychoeducational Problems, 16 Prof. Psychology 426 (1985); Taylor, Adelman & Kaser-Boyd, Exploring Minors' Reluctance and Dissatisfaction with Psychotherapy, 16 Prof. Psychology 418 (1985); Kaser-Boyd, Adelman & Taylor, Minors' Ability to Identify Risks and Benefits of Therapy, 16 Prof. Psychology 411 (1985); Bastian & Adelman, Noncompulsory versus Legally Mandated Placement, Perceived Choice, and Response to Treatment among Adolescents, 52 J. Consulting & Clin. Psychology 171 (1984); Belter & Grisso, Children's Recognition of Rights Violations in Counseling, 15 Prof. Psychology 899 (1984); T. Grisso, Juveniles Waiver of Rights (1981); Grisso, Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis, 68 Calif. L. Rev. 1134 (1980); Koocher, Competence to Consent: Psychotherapy in Children's Competence, supra note 8, at 11; Lewis,
(footnote continued on next page)

were asked to choose among them. The participants were then asked a series of standardized questions about their decisions. In most instances, the responses showed no difference between the adults and the 14-year-olds on any of the scales of competency used in the study--factual understanding, inferential understanding (appreciation), reasoning, choice of reasonable option, and evidence of choice. Weithorn & Campbell, The Competency of Children and Adolescents to Make Informed Treatment Decisions, 53 Child Dev. 1589 (1982).

The most directly relevant study examined pregnant minors' and adults' decisionmaking in an actual treatment setting. Lewis, A Comparison of Minors' and Adults' Pregnancy Decisions, 50 Am. J. Orthopsychiatry 446 (1980). The results confirm those gleaned from hypothetical and laboratory situations, as well as from other studies conducted in real-life settings. In this study, unmarried adolescents, ages 13-17, and unmarried adult women, ages 18-25, were asked to consider their options for responding to their own pregnancies at the time of their pregnancy tests. Standardized questions were used to determine their knowledge of pregnancy-related laws, sources of advice they had received or expected to seek, the range of factors one could consider in making choices about one's pregnancy, and the reasons for their own choices.

9/ (continued)
Decision Making Related to Health in Children's Competence, supra note 8, at 75; Lewis, How Adolescents Approach Decisions: Changes over Grades Seven to Twelve and Policy Implications, 52 Child Dev. 538 (1981); Melton, Effects of a State Law Permitting Minors to Consent to Psychotherapy, 12 Prof. Psychology 647 (1981); Melton, Children's Participation in Treatment Planning: Psychological and Legal Issues, 12 Prof. Psychology 246 (1981); Roberts, Beidelman & Wurtele, Children's Perception of Medical and Psychological Disorders in their Peers, 10 J. Clin. Child Psychology 76 (1981); Dollinger, Thelen & Walsh, Children's Conception of Psychological Problems, 9 J. Clin. Child Psychology 191 (1980); Neuhauser, Amsterdam, Hines & Steward, Children's Concepts of Healing; Cognitive Development and Locus of Control Factors, 48 Am. J. Orthopsychiatry 335 (1978); Campbell, Illness is a Point of View: The Development of Children's Concept of Illness, 46 Child Dev. 92 (1975).

The study revealed no statistically significant differences between the unmarried minors and adults in knowledge of pregnancy-related laws or in their choices. Nineteen percent of minors and 23% of adults planned to carry to term. When asked to describe factors that could affect one's choice of abortion or motherhood, minors differed very little from adults in the frequency with which they mentioned various considerations and consequences. There were no significant differences on such factors as the positive emotions associated with mothering, financial concerns, effect of given choices on ones' life-goals or present life-style, or social stigma. In general, "minors equaled adults in their 'competence' to imagine the various ramifications of the pregnancy decision." Id. at 449. See also Lewis, Minors' Competence to Consent to Abortion, 42 Am. Psychologist 84 (1987).

In sum, the unvarying and highly significant findings of numerous scientific studies indicate that with respect to the capacity to understand and reason logically, there is no qualitative or quantitative difference between minors in mid-adolescence, i.e., about 14-15 years of age, and adults.[10/]

III. THERE IS NO SUPPORT FOR THE STATE'S PRESUMPTION THAT ADOLESCENTS ARE MORE PSYCHOLOGICALLY VULNERABLE THAN ADULTS.

A. Adolescence is Not a Particularly Difficult Stage of Development.

Early views of adolescence as a time of tumult and rebellion have been challenged by contemporary developmental psychology. Though there are developmental challenges adolescents must meet, these are not different in

---

10/ Moreover, progressively increasing numbers of younger adolescents demonstrate such capacities as they proceed through the developmental transition typical of ages 11-14.

number or severity than the challenges confronting individuals at other times in the life course. H. Bee, The Journey of Adulthood (1987); É. Douvan & J. Adelson, The Adolescent Experience (1966).

It might be supposed that adolescents who engage in early sexual activity and who become pregnant are "acting out" their emotional difficulties or "rebelling" against their parents. There is, however, no support for this argument. First, most people become sexually active during adolescence. Marecek, Counseling Adolescents with Problem Pregnancies, 42 Am. Psychologist 89 (1987). Second, early sexual experience is not a form of rebellion. Sexually active minors perceive their behavior as consonant with their parents' values and attitudes, not antagonistic to them.[11/] Third, 40% of today's 20-year-old women have had at least one pregnancy during their teen years. Russo, Adolescent Abortion: The Epidemiological Context in Adolescent Abortion, supra note 5 at 63.

Nor are adolescents seeking abortions drawn from an especially psychologically or emotionally vulnerable subpopulation. In fact, unmarried adolescents who seek abortions are similar in psychological makeup to other adolescents. Olson, Social and Psychological Correlates of Pregnancy Resolution Among Adolescent Women, 50 Am. J. Orthopsychiatry 432, 436 (1980). Moreover, compared to unmarried adolescents who choose to carry to term, those seeking abortions are likely to be somewhat advantaged in terms of social class status, family background, and academic achievement. Id. Adolescents

---

11/ Both sexually acting and nonactive adolescents have similar perceptions of their parents' level of discipline and similar positive feelings toward their parents. Cvetkovich & Grote, Adolescent Development and Teenage Fertility in Adolescents, Sex, and Contraception 109 (D. Byrne & W. Fisher eds. 1983).

who seek abortions, compared to those who choose motherhood, are characterized by a number of traits associated with positive mental health and superior psychological maturity--greater independence, higher academic motivation and aspiration, and more feelings of competence and optimism. Id. Thus, not only is it untrue that as a group adolescents who choose abortions are at special psychological risk, but the opposite is actually correct.

B. Much of the Stress Pregnant Adolescents Experience is Due to Unwanted Pregnancy, Not to Abortion Itself.

The evidence does not support the assertion that there are "potentially grave emotional and psychological consequences of the decision to abort." H.L. v. Matheson, 450 U.S. 398, 412 (1981). Three major reviews of the psychological and psychiatric research literature all confirm that for most women who undergo abortion, there are no long-term negative emotional effects.[12/]

When women experience regret, sadness, or guilt, such feelings are mild and diminish rapidly. Adler & Dolcini, Psychological Issues in Abortions for Adolescents in Adolescent Abortion, supra note 5, at 84. Serious difficulties such as clinical depression, psychotic reactions, or suicide are extremely rare. When they do occur, they are most likely to occur among women with prior histories of psychiatric problems. Id.[13/] With respect to adolescents, abortion "is neither psychologically harmful nor in other ways damaging to the patient." Olson, Social and Psychological Correlates of

---

12/ Marecek, Consequences of Adolescent Childbearing and Abortion in Adolescent Abortion, supra note 5, at 96; Adler & Dolcini, Psychological Issues in Abortions for Adolescents in Adolescent Abortion, supra note 5, at 74; Shusterman, The Psychosocial Factors of the Abortion Experience: A Critical Review, 1 Psychology of Women Q. 79 (1976) [hereinafter Shusterman].

13/ See NAS Report, supra note 5, at 195.

Pregnancy Resolution Among Adolescent Women, 50 Am. J. Orthopsychiatry 432, 440 (1980). "Very few teenagers have severe psychiatric complications after induced abortion; most are relieved to have terminated an unplanned pregnancy." Cates, Adolescent Abortions in the United States, 1 J. Adol. Health Care 18, 22 (1980).14/

Abortion not only carries a low risk of negative psychological consequences for adolescents, but the psychological sequelae of abortion are usually positive, with significant dimunition of anxiety and increased feelings of well-being. "The predominant response following abortion is generally relief."15/

The abortion removes serious potential constraints on the minor's life and future. After an abortion, the adolescent can resume her normal life and activities in school, at home, and with peers. In contrast, "adolescent mothers are significantly more likely to curtail their education, to be relegated to low-paying jobs, to be single parents, and to be on welfare . . . . " NAS Report, supra note 5, at 18, as well as to experience repeat pregnancies and, for those who marry to legitimate the birth, greater marital

---

14/ See C. Chilman (ed.), Adolescent Sexuality in a Changing American Society (NIH Pub. No. 79-1426 1978); Bracken, Hackamovitch & Grossman, The Decision to Abort and Psychological Sequelae, 158 J. Nerv. Ment. Disorders 154 (1974); Peres-Reyes & Falk, Follow-up After Therapeutic Abortion in Early Adolescence, 28 Archives of Gen. Psychiatry 120 (1973); see also David, Rasmussen & Holst, Postpartum and Postabortion Psychotic Reactions, 13 Fam. Plan. Persp. 88 (1981) (only 11.4 psychiatric admissions per 10,000 abortions). See generally NAS Report, supra note 5, at 195-196 (one of factors contributing, however, to negative response is "delay in obtaining abortion," id. at 196).

15/ Adler & Dolcini, Psychological Issues in Abortions for Adolescents in Adolescent Abortion, supra note 5, at 84. Generally, studies of the mental health status of pregnant women before and after abortion show significant reductions in the symptoms of stress, as measured by standardized psychological tests. Shusterman, supra note 12.

instability. Marecek, Consequences of Adolescent Childbearing and Abortion in Adolescent Abortion, supra note 5, at 96.[16/]

IV. THE STATE'S MANDATORY NOTICE AND WAITING PERIOD SERVE NO LEGITIMATE STATE INTERESTS AND MAY ACTUALLY BE HARMFUL TO THE OSTENSIBLE GOALS OF THE ACT.

The State reasons that the Act will encourage parental participation and reduce the risks of the abortion decision, as it perceives them. Brief for Appellants at 14, 34-35. Research completely contradicts this claim.

A. A Great Many Young Minors and Many Older Minors Voluntarily Inform Their Parents of the Desire to Have an Abortion.

Those minors most likely in need of adult counsel generally consult their parents about their pregnancies, regardless of legal mandates. Young adolescents (ages 11-14) typically involve their parents in reproductive decisions, even in those States without a parental notification requirement.

Approximately three-fourths of minors aged 15 or younger inform their parents before they obtain an abortion,[17/] and 25% of this group report that their parents suggested the abortion.[18/] In States requiring that minors

---

16/ Although amicus takes no moral position concerning abortion, it is clear that abortion is safer than carrying to term for almost all adolescents.

17/ Torres, Forrest & Eisman, Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services, 12 Fam. Plan. Persp. 284, 287-290 (1980) [hereinafter Telling Parents]. See also Mnookin, Bellotti v. Baird: A Hard Case in In the Interest of Children: Advocacy, Law Reform, and Public Policy, 149, 240-241 (R. Mnookin ed. 1985) [hereinafter Mnookin]; Clary, Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area, 72 Am. J. Pub. Health, 283, 284 (1982) [hereinafter Clary]; Rosen, Adolescent Pregnancy Decision-making: Are Parents Important? 15 Adolescence 44 (1980) (57% of 432 pregnant adolescents under age 18 in State without parental notification or consent statute consulted their parents about abortion decision) [hereinafter Rosen].

18/ Telling Parents, supra note 17, at 290. "Among very young teenagers, it appears that parents have a major influence on the decision to terminate a pregnancy." NAS Report, supra note 5, at 113. But only 8% of 17 year olds who obtain abortions report that they did so at their parents suggestion. Telling Parents, supra note 17, at 290.

either inform parents or obtain their consent prior to obtaining an abortion, young adolescents rarely use judicial bypass procedures.[19/]

Minors who are unusually ambivalent about the decision or who perceive themselves as relatively incompetent decisionmakers also are likely to involve their parents in an abortion decision. Rosen, supra note 17, at 48. Even older minors often consult their parents about the abortion decision though this does not occur as frequently as among early adolescents. Indeed, it is a long-established fact that adolescents often seek the advice of their parents about non-trivial decisions.

B. State Mandated Parental Consultation is Unlikely to Result in Positive Communication or Better Reasoned Decisionmaking and May Be Harmful to Adolescents Who Cannot or Will Not Use the Judicial Bypass Option.

In general, parents are only minimally involved in adolescents' development of sexual knowledge. This indicates that attempts by the State to compel parental consultation in minors' abortion decisions is unlikely to result in more reasoned decisions. Melton, Minors and Privacy: Are Legal and Psychological Concepts Compatible? 62 Neb. L. Rev. 455, 470-471 (1983).[20/]

19/ Nearly 90% of minors who use judicial bypass procedures are aged 16-17. Donovan, Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions, 15 Fam. Plan. Persp. 259, 261 (1983) [hereinafter Judging Teenagers].

20/ Adolescents' substantial discomfort in initiating or participating in such discussions, see Fox & Inazu, Mother-Daughter Communication About Sex, 29 Fam. Rel. 347 (1980), reflects, in part, an appropriate regard for privacy. The protection of privacy and the maintenance of control over personal information in sexual matters is a special concern of adolescent females. See Melton, Decision Making by Children: Psychological Risks and Benefits in Children's Competence, supra note 8, at 21; Parke & Swain, Children's Privacy in the Home: Developmental, Ecological, and Child-Rearing Determinants, 11 Env't. & Behav. 87 (1979); Wolfe, Childhood and Privacy in Children and the Environment 175 (I. Altman & J. Wohlwill eds. 1978); Laufer & Wolfe, Privacy as a Concept and a Social Issue, 33(3) J. Soc. Issues 22 (1977). Assertion of privacy is a mark of maturity and psychological adaptation among adolescents. Hodgson v. Minnesota, 648 F. Supp. 756, 763-764, 767 (D. Minn. 1986).

Failures in family communication about sexuality are likely to be exacerbated when a teenager announces her pregnancy. Such an announcement typically evokes an initial response of anger and disappointment and triggers a crisis in the family.[21]

Even though many parents seem to be supportive of their pregnant daughters after some period of time,[22] parental consultation puts some minors at substantial risk. In about one-third of cases in which adolescents do not inform their parents about their pregnancy and planned abortion, they fail to do so because they fear physical punishment or some other severe reaction.[23] This fear should not be minimized.[24] In addition to physical danger, substantial family disharmony can result from state mandated parental consultation, without any compensating assistance to the minor. There is no reason to doubt that, in general, those adolescents who choose not

---

21/ See, e.g., Osofsky & Osofsky, Teenage Pregnancy: Psychosocial Considerations, 21 Clin. Obstetrics & Gynecology 1161 (1978).

22/ F. Furstenberg, Unplanned Parenthood: The Social Consequences of Teenage Childbearing 54-57 (1976) (although over 67% of parents initially disturbed, eventually 70% become significantly less negative).

23/ See Clary, supra note 17, at 284. Even if some adolescents misjudge their parents' response, the perception may be more important than the reality. Fear of parental reaction under enforced consultation may cause adolescents to delay seeking medical assistance or making a decision whether to abort, thereby putting themselves at greater medical and psychological risk.

24/ Based on parental reports in a national sample, 1.4 to 1.9 million children are kicked, bitten, punched, severely beaten, or actually victimized with a gun or knife by their parents. Gelles & Straus, Violence in the American Family, 35(2) J. Soc. Issues 15, 24 (1979). Because these data are based on parents' self-report in interviews, these estimates are likely to be less than the actual frequency of physical maltreatment of children. Furthermore, parental sexual abuse is disturbingly common, see generally D. Finkelhor & Assoc., A Sourcebook on Child Sexual Abuse (1986), and, in a number of cases, the adolescent is seeking to abort a pregnancy resulting from parental incest.

to consult with their parents have the least to gain and most to lose from consultation.

In sum, mandatory notice laws, ostensibly intended to increase parent-child communication and more rational decisionmaking by minors, fail to achieve their intended effect.[25/] Indeed, the National Academy of Sciences, in a major study, recently observed that almost all minors who employ judicial bypass procedures and avoid parental involvement are held to be mature, and their decision to have an abortion to be in their best interests.[26/]

C. An "Arbitrary and Inflexible" 48-Hour Waiting Period Places Greater Burdens on Adolescents Than It Does on Adults.

The 48-hour waiting period here at issue imposes even greater burdens on adolescents' right to obtain an abortion than similar provisions the Supreme Court has struck down as applied to all women. In concluding that the government "failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible [24-hour] waiting period," City of Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416, 450 (1983), the Supreme Court's primary concerns were that the waiting period increased the cost of obtaining an abortion by requiring a woman to make two separate trips to the abortion facility and increased the risk of obtaining an abortion

---

25/ It is not surprising that "[d]efendants offered the court no persuasive testimony upon which a finding that Minnesota's parental notification law [with a 48-hour waiting period] enhances parent-child communications, or improves family relations generally". Hodgson, 648 F. Supp. at 768. The court properly concluded that enforced parental consultation undermines family integrity and protection of minors. Id. at 775-777. See Melton, Legal Regulation of Adolescent Abortion: Unintended Effects, 42 Am. Psychologist 79 (1987).

26/ See NAS Report, supra note 5, at 194-195; Melton & Pliner, Adolescent Abortion: A Psycholegal Analysis in Adolescent Abortion, supra note 5, at 26; Mnookin, supra note 17 at 239-240; Judging Teenagers, supra note 19 at 259 (1983).

because scheduling difficulties effectively delayed the planned abortion for longer than 24 hours. Id.

Almost without exception, courts that have considered the issue have recognized the substantial and undue burdens imposed by a one to two day waiting period. As the lower court, ruling on a fully developed record, found, "The cost of an abortion increases with gestational age because the procedure become more difficult and requires more skill on the part of the doctor." Hodgson v. Minnesota, 648 F. Supp. 756, 761 (D. Minn. 1986). "A [two or three days] delay . . . creates an increased medical risk to an abortion patient." Id. at 762.[27/]

These burdens on the right to obtain an abortion are particularly onerous for adolescents[28/] Thus, the additional state-imposed delay needlessly compounds the health risks adolescents already experience.

27/ Accord Wynn v. Carey, 582 F.2d 1375, 1389 (7th Cir. 1978); Women's Medical Ctr. of Providence, Inc. v. Roberts, 530 F. Supp. 1136, 1146 (D. R.I. 1982); Women's Comm. Health Ctr., Inc. v. Cohen, 477 F. Supp. 542, 551 (D. Maine 1979) ("Any delay increases the risk to the woman's health: the risk of major complications increases 20 to 30 percent each week of delay, and the risk of death increases about 50 percent each week."); Hodgson, 648 F. Supp. at 765 ("Delay of any length in performing an abortion increases the statistical risk of mortality and morbidity. The increase in risk becomes statistically significant when the length of delay reaches one week.")

28/ Adolescents already obtain abortions later in pregnancy than older women. Women under age 19 account for 29% of all abortions but more than 40% of abortions performed at more than 16 weeks of gestation. Adolescents below 15 years of age are twice as likely to have abortions at 16 weeks or later than adolescents 15-19 years of age (14% vs. 7%). These data are especially salient given the fact that the risk of death at 16 weeks of gestation is 13 times greater than that at eight weeks or less. See Russo, Adolescent Abortion: The Epidemiological Context in Adolescent Abortion, supra note 5, at 567-57; NAS Report, supra note 5, at 114 and 277. See Indiana Planned Parenthood v. Pearson, 716 F.2d 1127, 1142 (7th Cir. 1983) ("the same objections to the waiting period for adults listed in City of Akron apply to waiting periods for minors); Hodgson, 648 F. Supp. at 765 ("[t]his statutorily imposed delay frequently is compounded by scheduling factors such as clinic hours, transportation requirements, weather, a minor's school and work commitments").

In sum, Minnesota's mandatory notice and waiting period provisions have no more than facial rationality and fail to withstand scientific scrutiny. These provisions increase the health risks for pregnant minors without any demonstrable enhancement of the parental role or the quality of decisionmaking.

V. THE PARENTAL NOTICE AND WAITING PERIOD PROVISIONS ARE UNCONSTITUTIONAL.

The psychological assumptions upon which the Act depends do not comport at all with empirical research. They are based solely upon folklore, sentiment, and the State's concept of how it would like the world to function. These are not sufficient bases upon which to abridge fundamental constitutional rights.

The Supreme Court has held that "when a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden . . . requires more than a bare assertion, based on a . . . complete absence of supporting evidence." Carey v. Population Services International, 431 U.S. 678, 696 (1977); see also, Bender v. Williamsport, 475 U.S. ___, 106 S. Ct. 1326, 1337 (1986) (Burger, C.J., dissenting) (eschewing "utterly unproven, subjective impressions"). The State's empirical assumptions are completely without support. "[O]n the basis of existing research . . . the contention that adolescents are unlikely or unable to make well-reasoned decisions or that they are especially vulnerable to serious psychological harm as a result of an abortion is not supported." NAS Report, supra note 5, at 277 (emphasis added). The Act is therefore unconstitutional.

For minors younger than age 15, the Act might be said to serve some interests asserted by the State because a higher percentage of such minors have decisionmaking capacities lower than those of adults. Even for these

younger minors, however, the same ethical and professional mandates that guide health care professionals in determining whether any of their patients is competent to give informed consent should be sufficient protection. For adolescents aged 15-17, the overwhelming majority of minors seeking abortions, the Act is plainly unjustifiable. The Act unnecessarily intrudes on the privacy of most adolescents seeking abortions and imposes an undue burden on their right to choose whether to obtain an abortion.

Amicus urges this Court to hold that States may not employ parental notice and waiting period requirements to interfere with the ability of minors to choose for themselves how and whether to involve their parents in their constitutionally protected decision. As is the case with adults, in circumstances in which the attending professionals have doubts as to the validity or reliability of the minor's consent, third-party determination of the issue would be appropriate. Such a structure would fully protect the competent minor's constitutional right to an unburdened abortion decision, would serve the State's interest in protecting immature minors from improvident decisions, and would serve the additional salutary purpose of freeing judicial resources from unnecessary inquiries that in virtually all cases simply ratify the minors' choice to abort.

CONCLUSION

For the foregoing reasons, the judgment of the District Court for the District of Minnesota should be affirmed.

Respectfully submitted,

DONALD N. BERSOFF
DAVID W. OGDEN
ENNIS FRIEDMAN & BERSOFF
1200 Seventeenth St. N.W. # 400
Washington, D.C. 20036
(202) 775-8100
Attorneys for Amicus Curiae
American Psychological Association