

Minor Abortions in Illinois and the  
Judicial Bypass Procedure

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I. INTRODUCTION

While abortion rates in the United States are decreasing,<sup>1</sup> access to abortion is decreasing as well.<sup>2</sup> The passage of strict anti-abortion laws is closing clinics and making it difficult in many regions of the country to gain access to abortion services.<sup>3</sup> In particular, it is becoming more difficult for minors to obtain an abortion, a group that is already more limited than the general population to accessing abortion options.<sup>4</sup> One method for a minor to obtain an abortion is through a judicial bypass procedure, which allows a minor to get an abortion without having to get consent from, or notify her parents.<sup>5</sup> Generally, for a judge to approve an abortion in a judicial bypass

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1. Eric Eckholm, *Abortions Declining in U.S., Study Finds*, N.Y. TIMES (Feb. 3, 2014), [http://www.nytimes.com/2014/02/03/us/abortions-declining-in-us-study-finds.html?\\_r=0](http://www.nytimes.com/2014/02/03/us/abortions-declining-in-us-study-finds.html?_r=0) (discussing anti-abortion laws having only a minimal impact on the number of woman obtaining abortions because many were passed in 2011 or later, but they also stated that some of the new regulations “undoubtedly make it more difficult and costly for facilities to continue to provide services and for women to access them”).

2. Eric Eckholm, *Access to Abortions Falling as States Pass Restrictions*, N.Y. TIMES (Jan. 4, 2014), <http://www.nytimes.com/2014/01/04/us/women-losing-access-to-abortion-as-opponents-gain-ground-in-state-legislatures.html> (outlining the emerging political campaigns and potential court cases concerning anti-abortion measures across the country).

3. *Id.*

4. Anna C. Bonny, *Parental Consent and Notification Law in the Abortion Context: Rejecting the “Maturity” Standard in Judicial Bypass Proceedings*, 11 U.C. DAVIS J. JUV. L. & POL’Y, 311, 313 (2007) (arguing that judicial bypass proceedings should be objective, rather than subjective, to look to the best interest of the minor seeking an abortion).

5. Satsie Veith, *The Judicial Bypass Procedure and Adolescents’ Abortion Rights: The Fallacy of the “Maturity” Standard*, 23 HOFSTRA L. REV. 453, 455 (1994-1995) (stating that the purpose of the judicial bypass procedure is to replace the presumption that all minors are not able to make important decisions themselves with a judicial case-by-case determination

procedure a minor must either show that she is mature enough to have an abortion, or if the judge deems her immature, the judge must find that an abortion is in the minor's best interest.<sup>6</sup>

In Illinois, the issue of parental consent and notification had been hotly debated in the legal system for nearly two decades.<sup>7</sup> The Illinois Supreme Court ended the lengthy debate by ruling that a pregnant female under eighteen years old must now notify her parent or guardian at least forty-eight hours before she can undergo an abortion.<sup>8</sup> Prior to this ruling, a minor was not required to notify her parent or guardian to get access to an abortion.<sup>9</sup> As of August 15, 2013, if a minor in Illinois seeks access to an abortion without notifying an adult family member or guardian, she must go through a judicial bypass procedure to gain access to abortion services.<sup>10</sup>

The judicial bypass procedure in Illinois is bad policy. This procedure includes an incompatible maturity standard that leads to potential for bias and unclear standards, which is the basis for the long-standing opposition to the bypass option. The process itself does not serve the rights of minors, but rather is like a punishment. This article will address the weaknesses of the judicial bypass procedure and how it could be improved. First, Section II of this article will discuss the historical context of minor abortion. Next, Section III of this article will argue that the judicial bypass procedure is bad policy, exploring the opposition to the policy, the relevancy of the maturity

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of the maturity of the minor).

6. Bonny, *supra* note 4, at 316.

7. Kerry Lester, *Illinois Abortion Notification Law Upheld by State Supreme Court*, HUFFINGTON POST (July 11, 2013), [http://www.huffingtonpost.com/2013/07/11/illinois-abortion-notific\\_0\\_n\\_3581506.html](http://www.huffingtonpost.com/2013/07/11/illinois-abortion-notific_0_n_3581506.html) (stating that the Illinois Supreme Court unanimously upheld a 1995 state law requiring parental notification; for 18 years, the law debated on the legal challenges and what body should write the rules of enforcement of the law).

8. *Id.*

9. *Id.*

10. *Update: The Illinois Parental Notice Law is in effect as of August 15, 2013*, ILL. CAUCUS FOR ADOLESCENT HEALTH (July 22, 2013 2:23 PM), <http://www.ica.org/content/illinois-parental-notification-abortion-act> (providing a brief overview of what a minor in Illinois who is seeking an abortion must do to obtain an abortion with the Illinois Parental Notification Law going into effect in August 2013).

standard, the potential for bias, and the argument that the process itself is like a punishment. Finally, Section IV will suggest possible methods as to how Illinois should proceed with minor abortion in the future.

## II. HISTORICAL CONTEXT

The United States Supreme Court has a long line of precedent interpreting the Constitution as protecting a fundamental right of privacy, including freedom of choice in individualized, personal matters like family planning.<sup>11</sup> *Griswold v. Connecticut* discussed the issue of contraceptive rights, holding that a state law forbidding the use of contraceptives was unconstitutional because it violated the right of privacy.<sup>12</sup> In 1973, *Roe v. Wade* extended adults' privacy right from the right to prevent pregnancy as was stated in *Griswold*, to the right to terminate unplanned or unwanted pregnancies during part of the pregnancy.<sup>13</sup> Following *Roe*, minor abortions were discussed in the Supreme Court in *Planned Parenthood of Central Missouri v. Danforth*.<sup>14</sup> In this case, the Court held that the states could not impose blanket provisions that required parental consent, but it also asserted that not all minors are competent to consent to abortion.<sup>15</sup>

Finally, in *Bellotti v. Baird*, the Court held that if a state requires a pregnant minor to obtain parental consent before obtaining an abortion, then

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11. See Alexandra Rex, *Protecting the One Percent: Relevant Women, Undue Burdens, and Unworkable Judicial Bypasses*, 114 COLUM. L. REV. 85, 89 (2014) (analyzing generally parental involvement laws in abortion regulation, and specifically the effect of these regulations on the intended population, pregnant minors seeking abortions).

12. *Griswold v. Conn.*, 381 U.S. 479, 485-86 (1965) (discussing the right of privacy, holding that this right extends to married couples using contraceptives).

13. *Roe v. Wade*, 410 U.S. 113, 153-54 (1973) (holding that a state criminal abortion statute that prohibited abortions at any point in a pregnancy, except as a life-saving procedure, was unconstitutional because it violated the Due Process Clause of the Fourteenth Amendment).

14. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (discussing a state abortion statute, specifically holding that spousal consent and blanket parental consent for minors were unconstitutional because the State does not have authority to give a third party an absolute veto over the decision of a physician and his patient to terminate a pregnancy).

15. *Id.* at 74-75.

the state must also provide for the minor an alternative method to obtain authorization for the procedure.<sup>16</sup> Specifically, a minor can seek judicial permission for an abortion, and the judge will determine if the minor is mature enough to go through the abortion procedure, and if the procedure is in her best interest.<sup>17</sup> Currently, thirty-nine states require parental involvement in minor abortion decisions, with consent or notice requirements of one or both parents.<sup>18</sup> Seven states also allow a minor to obtain an abortion procedure if a grandparent or other adult relative is involved in the decision.<sup>19</sup> Thirty-eight states require an alternate process besides parental involvement for minors seeking abortion, namely, the judicial bypass procedure.<sup>20</sup>

In Illinois, there has been a long history of litigation concerning abortion, and recently the Illinois Supreme Court concluded in July 2013 that the Illinois Parental Notice of Abortion Act of 1995 (the Act) was constitutional.<sup>21</sup> The Act prohibits a doctor from performing an abortion on a minor unless forty-eight hours' notice is given to an adult family member.<sup>22</sup> Under the Act, there are only a handful of options for a pregnant minor to get an abortion in Illinois.<sup>23</sup> A pregnant minor can get access to an abortion by either: (1) consent of her parents, (2) notification at least forty-

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16. *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (holding that a state statute which required a pregnant minor seeking an abortion to acquire parental consent or judicial approval after parental notification was an unconstitutional burden on a pregnant minor).

17. *Id.* at 647.

18. See GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: PARENTAL INVOLVEMENT IN MINORS' ABORTIONS (2014) (explaining the level of parental involvement in minors' abortions in all fifty states).

19. *Id.*

20. *Id.*

21. See *Hope Clinic for Women, Ltd. v. Flores*, 991 N.E.2d 745, 761 (Ill. 2013) (holding that the statutory requirement that minors who seek an abortion must give notice to an adult family member or acquire a judicial waiver of such notice in a judicial bypass procedure did not violate the state constitutional right to privacy because it was not unduly burdensome).

22. *Id.*; 750 ILL. COMP. STAT. 70/10 (2013) (stating that an adult family member is defined as "a person over twenty-one years of age who is the parent, grandparent, step-parent living in the household, or legal guardian.").

23. See GUTTMACHER, *supra* note 18.

eight hours before the procedure of one adult family member who lives with the minor, (3) or a judicial bypass waiver procedure in front of a judge which waives the notice requirement.<sup>24</sup> There are also several exceptions which do not require notice: (4) the minor is married, divorced or widowed, (5) the minor is legally emancipated, (6) there is a medical emergency or (7) where there has been abuse, assault, incest or neglect by a family member.<sup>25</sup>

The litigation concerning parental notification for abortion in Illinois began in 1983 when a group of doctors who provided abortions filed suit in the United States District Court against the Attorney General of Illinois and the State's Attorney of Illinois, to challenge the constitutionality of the Parental Notice of Abortion Act of 1983.<sup>26</sup> The District Court held the 1983 Act was unconstitutional, and the Seventh Circuit Court of Appeals as well as the United States Supreme Court affirmed.<sup>27</sup> The District Court placed a permanent injunction on the defendants, the Attorney General of Illinois and the State's Attorney of Illinois, from enforcing the provisions of the 1983 Act.<sup>28</sup>

In 1995, the Illinois General Assembly repealed the Parental Notice of Abortion Act of 1983, replacing it with the 1995 Act.<sup>29</sup> The plaintiff doctors amended their complaint regarding the 1983 Act, and they subsequently challenged the constitutionality of the 1995 Act.<sup>30</sup> In February 1996, in response to the amended complaint and because the Illinois Supreme Court

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24. *Id.*; See Allie Carter, *Understanding the Illinois Parental Notice of Abortion Act*, ACLU-IL BLOG (Nov. 13, 2013, 5:20 PM), <http://www.aclu-il.org/understanding-the-illinois-parental-notice-of-abortion-act/> (discussing the requirements of the Illinois' Parental Notice of Abortion Act, and the implications of those requirements on the parties involved).

25. See GUTTMACHER, *supra* note 18; Carter, *supra* note 24.

26. See *Hope Clinic for Women*, 991 N.E.2d at 749-50.

27. *Id.* at 750.

28. *Id.*

29. *Id.*; Julia Thiel, *Will the Parental Notice of Abortion Act help or hurt young women?*, CHI. READER (April 28, 2014), <http://www.chicagoreader.com/chicago/illinois-parental-notification-abortion-act-minors-judicial-bypass-aclu/Content?oid=13246305> (stating that the 1983 Act required notification of both parents, while the 1995 Act only required notification to one parent).

30. See *Hope Clinic for Women*, 991 N.E.2d at 751.

had declined to enact judicial bypass rules as requested by the Illinois legislature, the Federal District Court entered a permanent injunction on the Act, barring enforcement.<sup>31</sup> In September 2006, the Supreme Court of Illinois adopted Illinois Supreme Court Rule 303A, which provided for updates to the judicial bypass procedure.<sup>32</sup> The rule stated that the court would issue findings of fact in these bypass procedures within forty-eight hours, the bypass procedures would be confidential, there would be a right to an expeditious appeal, and, at the request of the minor, counsel would be appointed.<sup>33</sup> Yet, even with several more motions and appeals by the defendant to lift the injunction, the courts still enjoined the defendants from enforcing the Act.<sup>34</sup> The Illinois Supreme Court finally heard the case in 2013 and held that the Act was constitutional, therefore allowing for judicial bypass procedures.<sup>35</sup> Thus, the Illinois judicial bypass procedure has been in effect for less than a year.<sup>36</sup>

### III. JUDICIAL BYPASS PROCEDURE IS BAD POLICY

The judicial bypass procedure is bad policy because there has been long standing opposition to it,<sup>37</sup> and there has been difficulty in accommodating the new law.<sup>38</sup> Additionally, judges may be biased<sup>39</sup> because of the

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31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 751-52.

35. *Id.* at 772.

36. See ILL. CAUCUS FOR ADOLESCENT HEALTH, *supra* note 10.

37. See *Hope Clinic for Women*, 991 N.E.2d at 749-53.

38. See Paul Benjamin Linton, *Long Road to Justice: The Illinois Supreme Court, The Illinois Attorney General, and the Parental Notice Abortion Act of 1995*, 41 LOY. U. CHI. L.J. 753, 777 (2010) (outlining the judicial and legislative history of Illinois parental consent or notice laws until July 2009, when the U.S. Court of Appeals for the Seventh Circuit upheld the constitutionality of the Illinois Parental Notice of Abortion Act of 1995).

39. See Bonny, *supra* note 4, at 323, 325; see also Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 419-20, 461-62 (2009) (discussing that while most pregnant minors get their petition for an abortion approved in a bypass procedure, minors often have to prove more than just maturity to the judge conducting the procedures, which could be affected by the bias of the judge evaluating the minor).

subjectivity and incompatibility of the maturity standard.<sup>40</sup> Lastly, the process itself does not serve the rights of minors, but rather is like a punishment that humiliates, embarrasses, and unfairly stresses the minor.<sup>41</sup>

*A. Difficulty Accommodating the New Act*

In Illinois there has been strong opposition to limitations on minor abortions and the judicial bypass procedure in general, as is evidenced by the nearly two decades long legal battle opposed to the enforcement of the Act.<sup>42</sup> While pro-life leaning supporters argue that the Act provides parents some assurance that their daughter will not proceed with a morally complex and medically serious procedure without their knowledge or before parents have a chance to counsel their daughter,<sup>43</sup> opponents to the Act argue that the Illinois courts are not equipped for the burden of providing and implementing minors with constitutionally-sound judicial bypass procedures.<sup>44</sup> In particular, the Clerk of the Circuit Court of Cook County, Dorothy Brown, stated in 2007 that Cook County, the most populous county in Illinois where most of the abortions in the state occur, would be unduly burdened by the judicial bypass procedures, and that the procedures would require much effort to allocate the resources to allow them to properly function.<sup>45</sup> Since the passage of the Act in late 2013, it is doubtful that Illinois and specifically Cook County are able to completely accommodate these procedures.

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40. See Bonny, *supra* note 4, at 332.

41. See Sanger, *supra* note 39, at 418; Rex, *supra* note 11, at 118.

42. See Hope Clinic for Women, 991 N.E.2d at 750-53.

43. See *Editorial, Common Sense on Minors and Abortion*, CHI. TRIB. July 23, 2013, [http://articles.chicagotribune.com/2013-07-22/opinion/ct-edit-abortion-20130722\\_1\\_parental-notification-law-abortion-rights-illegal-abortion](http://articles.chicagotribune.com/2013-07-22/opinion/ct-edit-abortion-20130722_1_parental-notification-law-abortion-rights-illegal-abortion) (arguing that the Illinois parental notification law is good public policy because it balances the rights of minors and their parents).

44. See Linton, *supra* note 38.

45. *Id.*

*B. Subjectivity of Maturity Standard Leads to Potential for Bias*

The maturity standard can lead to potential bias because the standard is subjective and incompatible.<sup>46</sup> In other states, minors generally tend to get a waiver approved by a judge who solely determines what is in their best interest, avoiding the maturity standard.<sup>47</sup> However, courts in other states do not grant waivers in every case. A minor could possibly be considered not mature enough to abort the pregnancy, but mature enough to keep the child, leading to conflicting standards of what maturity means.<sup>48</sup> In either situation, a minor is not protected by the standard, making the standard incompatible for its purpose.<sup>49</sup>

There is also a strong potential for bias by judges in judicial bypass waiver procedures.<sup>50</sup> Judges could be biased against a minor because the judge does not find the minor to be mature or dislikes the fact that the minor is seeking an abortion.<sup>51</sup> Specifically, the United States Supreme Court has not provided a definition for how a judge should determine what maturity means.<sup>52</sup> In fact, in *Bellotti*, the Court stated that maturity is difficult to define or determine, and that the nature of the abortion decision requires individual evaluations of the maturity of each pregnant minor seeking a judicial bypass.<sup>53</sup>

While some states provide judges with guidance for what maturity means,<sup>54</sup> Illinois law is silent on this issue.<sup>55</sup> Because there is no clear standard, the decision for Illinois judges is arbitrary and subject to potential

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46. See Bonny, *supra* note 4, at 332.

47. See Sanger, *supra* note 39, at 419; Veith, *supra* note 5, at 459-60.

48. See Rex, *supra* note 11, at 119.

49. *Id.*; see Bonny, *supra* note 4, at 332.

50. See Bonny, *supra* note 4, at 322-23.

51. *Id.*

52. See Veith, *supra* note 5, at 455.

53. *Bellotti*, *supra* note 16, at 643 n.23.

54. See Sanger, *supra* note 39, at 430.

55. 750 ILL. COMP. STAT. 70/75(d)(1) (2013) (declaring the procedure for judicial waiver of notice to determine whether a minor can obtain an abortion).

biases of the individual judge presiding over the judicial bypass procedure.<sup>56</sup> While the judges are supposed to be a neutral third party representing the state, maturity is a subjective standard, which opens the door to potential bias.<sup>57</sup> Some judges in other states believe their view of maturity is not the same as someone else's view of maturity.<sup>58</sup> The lack of a legal standard on what maturity means gives judges absolute discretion when deciding if a minor should receive an abortion.<sup>59</sup>

Further, judges can be biased from political or religious beliefs, generational or gender differences, or from a desire to act as a substitute parent for the minor.<sup>60</sup> The judge may even make his or her decision before they hear from the minor because the judge may believe that the minor is immature for not telling her parents about wanting to obtain an abortion.<sup>61</sup> Judges are not supposed to be parents in a judicial bypass waiver procedure; rather, they must act as representatives of the State.<sup>62</sup>

*C. The Process Humiliates, Embarrasses, and Unfairly Stresses the Minor*

Because the maturity standard is flawed,<sup>63</sup> the procedure lacks actual importance, making it a potentially humiliating inconvenience and burden for minors.<sup>64</sup> The judicial bypass waiver procedures humiliate, embarrass, and unfairly stress a minor for making a decision about accessing an abortion, rather than evaluating the quality of the minor's decision to go through with an abortion without notifying her parents or guardians, leading

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56. See Bonny, *supra* note 4, at 322-23.

57. See generally *id.* at 323 (stating that the evaluation process mandated by the Supreme Court of the United States for determining whether a minor is mature is not specifically defined, leaving judges to develop their own criteria, which can lead to a strong danger of bias).

58. See Sanger, *supra* note 39, at 431.

59. *Id.* at 491.

60. See Bonny, *supra* note 4, at 323.

61. See Sanger, *supra* note 39, at 434, 451-52.

62. *Id.* at 451.

63. *Id.* at 419; Veith, *supra* note 5, at 459-60.

64. See Veith, *supra* note 5, at 456.

to a process like punishment.<sup>65</sup> Even some attorneys, guardians ad litem, and physicians that are involved in the process of the bypass procedures label the procedures as stressful and embarrassing events that do not accomplish much good for minors.<sup>66</sup>

The nature of the judicial bypass procedure itself does not seem to enhance the quality of minors' decisions.<sup>67</sup> Minors have described feeling intimidated, nervous, and humiliated when they went to court for a judicial bypass procedure.<sup>68</sup> The outlook of going to court makes some minors panicky, anxious, and some girls even develop a deep shame from the procedure.<sup>69</sup> In these procedures, minors are forced to explain the most private matters of their lives to complete strangers and forced to be compelling enough in their story to get approval for the procedure.<sup>70</sup> It is even argued that the actual function of these procedures is for legislatures to use these pregnant teenage girls as a tool in the politically charged fight against abortion rights.<sup>71</sup> The procedures should be altered to serve a more clear, informative, unbiased and protective function for minors.

#### IV. HOW ILLINOIS SHOULD PROCEED WITH MINORS AND ABORTION

The judicial bypass procedure is still new in Illinois, but the procedure should be improved to better serve and protect pregnant minors who seek access to abortions. First, the maturity standard should be eliminated from the judge's evaluation process because while most minors are found to be mature,<sup>72</sup> when they are not, an absolute veto is placed on the minor's

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65. See Sanger, *supra* note 39, at 418.

66. See Rex, *supra* note 11, at 122.

67. See J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision without Involving Their Parents*, 18 BERKELEY WOMEN'S L.J. 61, 145, 173-74 (2003) (arguing that it is absurd and inconsistent to apply mature decisional capacity with the decision to have an abortion).

68. *Id.*

69. *Id.*

70. See Sanger, *supra* note 39, at 445.

71. See Veith, *supra* note 5, at 477.

72. See Rex, *supra* note 11, at 121.

decision about her personal health.<sup>73</sup> Secondly, there should be a mental health professional alternative before the judicial bypass procedure. Other states give decision-making authority to doctors who will not be performing the abortion procedure and to mental health professionals, as opposed to judges in judicial bypass procedures.<sup>74</sup> This step is a good option to be used before a bypass procedure because of the skilled experience of mental health professionals to act as counselors and get a holistic idea of whether the minor is prepared for the decision of an abortion.<sup>75</sup> This additional step would leave the judicial bypass as only a last resort option, improved with the elimination of the maturity standard.

Allowing minors to speak with mental health professionals would be a more ethical approach to the judicial bypass procedures in Illinois because it would help prevent potential biases and alleviate part of the shaming aspect of the procedures.<sup>76</sup> It would more closely address the needs of the population these procedures in Illinois are meant to protect: young girls who feel that they cannot turn to their family but rather are looking to the State for help in making a very important life decision.<sup>77</sup>

## V. CONCLUSION

In conclusion, judicial bypass waiver procedures are insufficient and do not meet the needs of minors seeking abortion. In Illinois, there has been long-standing opposition to limitations on minor abortions and the enforcement of these procedures as a substitute for notice.<sup>78</sup> The procedures have a strong potential for judicial bias that could prevent a minor from

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73. See Sanger, *supra* note 39, at 491.

74. See Ehrlich, *supra* note 67, at 177.

75. *Id.*

76. *Id.*

77. See *Roe*, *supra* note 13, at 164 (holding that the Constitution protects a woman's right to choose to terminate a pregnancy before viability); Rex, *supra* note 11, at 98-99; Thiel, *supra* note 29.

78. See Hope Clinic for Women, 991 N.E.2d at 750-53.

getting a waiver of notice.<sup>79</sup> Even though most minors do end up getting a waiver from the bypass procedure,<sup>80</sup> the procedure should be used as only a last resort option for minors. The procedures are not conducive to minors in helping them reach a decision; rather minors view them more as a punishment.<sup>81</sup> Illinois should implement counseling with mental health professionals to determine holistically whether a minor can obtain a waiver to get an abortion.<sup>82</sup> This improvement to Illinois law will help the state better serve the population it is aiming to protect.<sup>83</sup>

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79. See Bonny, *supra* note 4, at 322-23.

80. See Rex, *supra* note 11, at 121.

81. See Sanger, *supra* note 39, at 418; Rex, *supra* note 11, at 118.

82. See Ehrlich, *supra* note 67, at 177.

83. See Roe, *supra* note 13, at 164; Rex, *supra* note 11, at 98-99; Thiel, *supra* note 29.