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Moral Authority in English and American Abortion Law

Joanna N. Erdman*

In *R. (on the application of Axon) v. Secretary of State for Health & Another*,¹ the English High Court affirmed that "the duty of confidentiality owed to a person under 16, in any setting, is the same as that owed to any other person."² Young women are entitled to seek and receive sexual health care, including abortion care, without parental notification.

The Court resolved the case primarily by reference to the "mature minor" rule, first developed in *Gillick v. West Norfolk and Wisbech AHA and another*.³ The rule states that a young person can give consent valid in law provided he or she has sufficient maturity and intelligence to understand the nature and implications of the proposed care.⁴ The Court reasoned that a logical relationship exists between the capacity to consent and the right to do so in privacy.⁵ Parental notification contradicted the mature minor rule and was inconsistent with *Gillick*. Evidence that without the guarantee of confidentiality young persons may be deterred from seeking care confirmed the rule as good public policy.⁶

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¹ *R. (on the application of Axon) v. Secretary of State for Health & Another*, [2006] E.W.H.C. 37 (Admin).

² The case was initiated shortly after the Department of Health issued a Best Practice Guidance advising medical professionals that "the duty of confidentiality owed to a person under 16, in any setting, is the same as that owed to any other person." Eng. Dep't of Health. Best practice guidance for doctors and other health professionals on the provision of advice and treatment to young people under 16 on contraception and sexual and reproductive health. (2004). Although the age of majority in England is 18 years, the *Family Law Reform Act 1968*, authorizes persons aged 16 and 17 years old to consent to medical care. See Axon, at para. 22.

³ *Gillick v. West Norfolk and Wisbech AHA and another*, [1985] 3 All ER 402.

⁴ Axon, at para. 9.

⁵ Axon, at paras. 56-59.

⁶ Axon, at para. 66-73.

Axon is also a constitutional case, reflecting a legal landscape that has changed drastically since *Gillick* was decided more than twenty years ago. Most significant is the introduction of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),⁷ which strengthened the language of competing rights and state interests in the English legal system.⁸ In *Axon*, the claim for parental notification was based on the parental right to family life, and the duty of confidentiality defended by reference to the privacy rights of young persons and health protection as a state interest.⁹

This rights-based framing is significant from a comparative constitutional perspective. By resolving the case through a set of competing rights and state interests, the Court adopted a conventional constitutional framing of abortion. *Axon* appeared by its nature similar to abortion cases in other constitutional systems and thus well-suited to comparative analysis. It is, therefore, unsurprising that one section of the judgment addressed overseas authorities on parental involvement.¹⁰ It is interesting, however, that the section is dedicated in near entirety to a rejection of American authorities. Under the U.S. Constitution, states may, but are not required, to enact laws that require parental consent and/or notification in abortion care.¹¹ These laws are collectively referred to as parental involvement laws.

The comparative constitutional section in *Axon* is *obiter dictum*, but not insignificant. The forceful rejection of American case law suggests more than irrelevance — it rises to aversion. *Aversive constitutionalism*, as termed by Kim Scheppelle, calls attention to negative models prominent in the minds of constitutional institutions.¹² Courts “may have only the vaguest sense of where they are going and how they should get there; more often, they have a clearer sense of what it is that they want to avoid.”¹³ The *Axon* Court clearly wished to avoid American-style abortion controversy in England.¹⁴ Many scholars note with relief that abortion in the United Kingdom generates less conflict and controversy than in the United States.¹⁵

⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221.

⁸ See Human Rights Act, 1998, c. 42 (Eng.).

⁹ *Axon*, at paras. 118–152.

¹⁰ *Axon*, at paras. 30–38.

¹¹ *Axon*, at para. 32, citing Planned Parenthood of South East Pennsylvania v. Casey, 505 U.S. 833 (1992).

¹² Kim Scheppelle, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models*, 1 Int'l J. Con.L. 296, 300 (2003).

¹³ *Id.*

¹⁴ *Axon*, at para. 37.

¹⁵ See e.g. J.K. Mason, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction* 14 (2007).

Aversive constitutionalism identifies more than a rejected approach. As Scheppelle suggests, the “rejected alternative might be . . . only the beginning of a more complicated process of defining a nation through that rejection.”¹⁶ Contrast and rejection can be an exercise in self-reflection, revealing how a court understands its own constitutional approach.

Sujit Choudhry isolates this value of comparative interpretation in his theory of dialogical interpretation, the goal of which is to “use comparative materials as an interpretive foil, to expose the factual and normative assumptions underlying the court’s own constitutional order.”¹⁷ He explains that by “articulating the assumptions underlying foreign jurisprudence, a court will inevitably uncover its own. By asking why foreign courts have reasoned a certain way, a court . . . asks itself why it reasons the way it does.”¹⁸ Aversive constitutionalism thus presents an opportunity to deconstruct claimed similarities and differences in constitutional approaches, to uncover and contest characteristics and assumptions otherwise unexamined.

The objective of this chapter is to use the aversive move in *Axon*, the contrast and rejection of American authorities on parental involvement, to expose a fundamental characteristic underlying the English constitutional approach to young women’s abortion care. This characteristic and its related assumptions are shared rather than contrasted in American and English law.

The shared characteristic is that of moral authority, defined as the legal authority to protect a state interest in prenatal life through moral abortion decision-making. Both American and English abortion law seek to protect a state interest in prenatal life by entrusting decision-making about young women’s abortion care to third parties: the family, the court, and the medical profession. Neither constitutional approach vests moral authority in young women themselves.

Third-party moral authority is supported by two related assumptions. The first assumption is that the involvement of third parties necessarily improves the moral quality of abortion decision-making. The second assumption is that such improvement is required. The capacity of young women to engage in moral decision-making is presumed to be underdeveloped, thereby creating the need for greater state regulation of their abortion care. This greater state regulation assumes the form of mandated third-party involvement.

Part I of this chapter deconstructs the aversive constitutional move in *Axon* in an effort to expose the shared characteristic of third-party moral authority and

¹⁶ Scheppelle, *supra* note 12 at 298.

¹⁷ Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, in *The Migration of Constitutional Ideas* 1, 22 (Sujit Choudhry, ed. 2007).

¹⁸ *Id.*

the supporting set of assumptions underlying American and English abortion law.

Part II turns to the assumptions themselves. It examines the widespread empirical evidence that refutes the assumptions of the need for and necessary benefit of mandated third-party involvement. The strength of the assumptions despite this empirical rebuttal suggests that some other factor is at work. This factor, it is argued, is the conventional gender hierarchy between the masculine and the feminine.

Third-party moral authority is demonstrated to rest on a set of gender-based assumptions. Young women are denied moral authority on a feminine-gendered and not simply age-based assumption of their underdeveloped capacity to engage in moral decision-making. The family, the court, and the medical profession are granted moral authority by virtue of their masculine-gendered identity. Given that third-party moral authority is constitutionally justified on these assumptions, their gendered nature renders this shared fundamental characteristic of American and English law problematic from a gender equality perspective, and, thus, in need of constitutional reform.

Part III seeks to develop a reformed vision of moral authority in abortion law from the perspective of gender equality. It offers a constitutional approach that protects the state interest in prenatal life by entrusting and supporting the decision-making of young women, privileging the unique moral insight of their individual experience.

I. ENGLISH AND AMERICAN LAW IN CONTRAST AND COMPARISON

"Contrast" refers to setting in opposition to emphasize differences or likeness. "Comparison" refers to consideration of some shared characteristic. The aversive move in *Axon* is based on three contrasts in American and English constitutional law: abortion rights, state interests, and the autonomy rights of young persons.¹⁹

The first contrast concerns abortion rights. The American authorities, the English High Court asserted, are "intimately bound up with the question of the extent to which women may have any *prima facie* right to seek an abortion at all."²⁰ In England, "the right to an abortion is clearly established in certain prescribed circumstances."²¹

¹⁹ This chapter does not address the *Axon* Court's claimed structural differences between the U.S. Constitution and the ECHR, namely the difference between absolute and limited rights, see e.g. *Axon*, at para. 36.

²⁰ *Axon*, at para. 33.

²¹ *Id.*

The second contrast relates to state interests. The American authorities, the *Axon* Court explained, are "concerned with . . . the State's 'interest in the potentiality of human life,'" which arises under the American Constitution and reflects the cultural values of American society.²² This interest is without an equivalent in the United Kingdom. The constitutional conflict in *Axon*, the Court stated, concerns only "the rights of young people and the interests of their parents . . . [with] no third, potentially overriding, state interest in preserving unborn life."²³

The third contrast concerns the different autonomy rights of young persons in American and English law. The American authorities on parental involvement, the *Axon* Court reasoned, reflect that "the principle of autonomy is far less well-developed in the United States in the case of young people than it is under our domestic law or under the ECHR."²⁴

These contrasts cannot be sustained. The English High Court's rejection of the American authorities cannot be justified by the claimed differences in abortion rights, state interests, or the autonomy rights of young persons.

Although false, these contrasts are not without value. By distinguishing the American authorities, the *Axon* Court exposes a fundamental characteristic and supporting set of assumptions underlying its own constitutional approach. This characteristic is one of comparison rather than contrast between American and English law.

It is the shared characteristic of moral authority, defined as the legal authority to protect a state interest in prenatal life through *moral* abortion decision-making. Both American and English abortion law seek to protect a state interest in prenatal life by entrusting decision-making about young women's abortion care to third-party authorities: the family, the court, and the medical profession. Neither constitutional approach vests in young women the legal authority to protect this state interest.

A. Abortion Rights and State Interests in Contrast and Comparison

Inverse to the claimed contrasts in *Axon*, English and American law reflect a shared state interest in prenatal life, but protect distinct abortion rights.

First articulated in *Roe v. Wade*, the American right is founded in the concept of personal liberty under the U.S. Constitution.²⁵ The American abortion right is not, however, absolute. The right "must be considered against

²² *Axon*, at para. 34.

²³ *Id.*

²⁴ *Axon*, at para. 35.

²⁵ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

important state interests."²⁶ The protection of prenatal life is one such interest. As elaborated by the U.S. Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, although the abortion decision is central to a woman's personal dignity and autonomy, "[a]bortion is a unique act. It is an act fraught with consequences for others . . . [including] depending on one's beliefs, for the life or potential life that is aborted."²⁷

The Axon Court rightly identified prenatal life as a state interest, but wrongly asserted that the interest is unique to the United States, without equivalent in the United Kingdom. A state interest in prenatal life is reflected in abortion laws worldwide.²⁸ Its legal protection, however, assumes different forms. In the terminology of Ronald Dworkin, the law may protect prenatal life as a derivative or a detached interest.²⁹ As a derivative interest, prenatal life is protected under the right to life. Legal protection derives from the status of the unborn as a bearer of this right. As a detached interest, prenatal life is protected not as a right, but "as an objective or intrinsic good, a value in itself."³⁰

The Axon Court mistakenly characterized the American state interest as a derivative interest. The United Kingdom, the Court explained, has no equivalent state interest because "[u]nder the ECHR, the unborn are not covered by the right to life,"³¹ implying that the right to life under the U.S. Constitution extends to the unborn. This misunderstanding allowed the Court to characterize the American authorities in the traditional conflict terms of abortion discourse: abortion rights versus the right to life, and to distinguish Axon as concerned solely with the rights of young persons and their parents.³² Under the U.S. Constitution, however, prenatal life is not protected under the right to life. The guarantee against the deprivation of life without due process of law does not extend to the unborn.³³ English and American law are similar, not different, in this regard.

Under the U.S. Constitution, prenatal life is protected as a detached interest. The state may constitutionally protect prenatal life as an intrinsic good or value by ensuring that women who exercise their abortion rights and make the decision to terminate a pregnancy, do so in a manner respectful

of the consequences for the life or potential life that is aborted. The state may enact measures to ensure that women engage in serious, reflective, and thus morally responsible decision-making.³⁴ These measures, which cannot impose an undue burden on women seeking abortion care, may include mandated parental involvement. The American authorities, in other words, are premised on a state interest in fostering such third-party involvement "as will assist the minor in making her decision as wisely as possible."³⁵

An equivalent detached state interest in prenatal life is recognized under the ECHR.³⁶ Legal measures intended to protect prenatal life directly or respect for prenatal life as a moral value are permissible. State protection under English law is reflected in the unique criminal restrictions on abortion care.

The *Offences against the Person Act* renders it a criminal offence punishable by imprisonment to procure or perform an abortion in the United Kingdom.³⁷ The *Abortion Act 1967 (1967 Act)* authorizes lawful abortions under a set of prescribed indications, including health-related risks, the risk to life, and the risk of fetal abnormality.³⁸ An abortion is legal under the 1967 Act when two medical practitioners acting in good faith certify that the conditions of pregnancy satisfy one of the prescribed indications.³⁹ English abortion law is generically referred to as an indications-based law with third-party approval.

The protection of prenatal life is one objective of the 1967 Act.⁴⁰ Similar to American parental involvement laws, an indication-based abortion law seeks to ensure that women terminate their pregnancies in a manner respectful of the intrinsic value in prenatal life. American and English law are similar, not different, in this regard. The 1967 Act does so, however, primarily by restricting the scope of decision making to morally acceptable outcomes.⁴¹

This aspect of the 1967 Act allows for a contrast to be drawn between American and English abortion rights, but not the contrast claimed by the Axon Court. The claimed contrast concerns stability and scope: unlike the controversial status of the American right, the English right "is clearly established

³⁴ See *Casey*, at 872: "Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [women considering abortion] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy."

³⁵ *H.L. v. Matheson*, 450 U.S. 398, 420 (1981).

³⁶ *Vo v. France*, 40 Eur. Ct. H.R. 12, at para. 80 (2005).

³⁷ *Offences against the Person Act 1861*, (24 and 25 Vict. C. 100) (Eng.).

³⁸ *Abortion Act 1967*, c. 87 (Eng.).

³⁹ *Id.*

⁴⁰ UK Science and Technology Committee, House of Commons, *Scientific Developments Relating to the Abortion Act 1967* 32 (2007).

⁴¹ *Id.* See also Mason, *supra* note 15 at 18, 21.

²⁶ *Id.*

²⁷ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 853 (1992).

²⁸ *Albin Eser & Hans-Georg Koch, Abortion and the Law: From International Comparison to Legal Policy* 32 (2005).

²⁹ Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U Chi. L. Rev. 381, 396 (1992).

³⁰ *Id.*

³¹ Axon, at para. 34, citing *Vo v. France*, 40 Eur. Ct. H.R. 12 (2005).

³² *Id.*

³³ *Roe v. Wade*, at 159.

in certain prescribed circumstances."⁴² The Axon Court failed to understand that the differences in stability and scope are a consequence of the American and English abortion rights being fundamentally different rights.

The American abortion right is a constitutional right of personal liberty, which renders the right a greater threat to the state interest in prenatal life and, thus, more controversial. The legality and morality of abortion are not coterminous in American law. The English indication-based law, in contrast, constrains women's abortion decision-making to a set of prescribed and morally acceptable indications. English law confers no equivalent right of personal liberty. "The notion of a right attaches to abortion only in the sense of a more general right to health care as judged by medical authority."⁴³ The English abortion right, for this reason, is a weaker threat to the state interest, and thus, less controversial.

English law does not thereby strip abortion decision-making of its moral character. The law situates the moral aspects of abortion care within a medical context.⁴⁴ The Axon Court, for example, distinguished abortion from other sexual health care as representing a stronger claim for a limited duty of confidentiality.⁴⁵ In language similar to the American authorities, the Court explained that "a decision on whether to have an abortion raises potentially difficult non-medical issues such as moral, ethical, religious and cultural issues."⁴⁶ These issues are to be addressed in the clinical context under medical authority.

Mandated third-party involvement to ensure moral abortion decision-making plays a significant role in protecting the state interest under English law. Third-party authority is thus a shared characteristic of American and English law. It is a characteristic, moreover, based on a common assumption, namely that the involvement of third parties necessarily improves the moral quality of young women's abortion decision-making. The third parties legally designated to fulfill this role differ under American and English law. Under American law, the family and the court are granted moral authority. Under English law, it is the medical profession.

The American authorities privilege parental involvement on the assumption that parents "act in the minor's best interest and thereby assure[] that the minor's decision to terminate her pregnancy is knowing, intelligent, and

⁴² *Id.*

⁴³ Sheila Shaver, *Body rights, social rights, and the liberal welfare state*, 13 *Crit. Soc. Pol.* 66, 72 (1994).

⁴⁴ See Sally Sheldon, *Beyond Control: Medical Power and Abortion Law* (1997).

⁴⁵ Axon, at paras. 28, 83.

⁴⁶ *Id.* at para. 83.

deliberate."⁴⁷ In *Bellotti v. Baird*, the U.S. Supreme Court reasoned that the state "may determine, as a general proposition, that... [parental] consultation is particularly desirable with respect to the abortion decision — one that for some people raises profound moral and religious concerns..."⁴⁸

A similar claim was advanced in Axon, namely that "a parent, rather than any third party, is responsible for the welfare of the young person... and so... it follows that a parent is the best person for guiding and advising a young person."⁴⁹ The Axon Court accepted that "in the overwhelming majority of cases, the best judges of a young person's welfare are his or her parents,"⁵⁰ but also recognized as an increasingly important and accepted feature of family life, "[t]he right of young people to make decisions about their own lives by themselves at the expense of the views of their parents."⁵¹

The American authorities do not ignore this feature of family life, but resolve parent and child discord through courts of law under the judicial bypass. In *Bellotti*, the U.S. Supreme Court recognized that "young pregnant minors... are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court."⁵² States are, therefore, constitutionally required to provide a young woman with "the opportunity — if she so desires — to go directly to a court without first consulting her parents."⁵³ The Court is entrusted as the alternative moral authority.

The American authorities reject the medical profession as institutionally reliable to protect the state interest.⁵⁴ This contrasts with an earlier position in *Roe v. Wade*, wherein the U.S. Supreme Court assured that the moral issues of abortion care "are factors the woman and her responsible physician necessarily will consider in consultation."⁵⁵ More recent American authorities express a distrust of the medical profession. In *H.L. v. Matheson*, for example, the U.S. Supreme Court reasoned that "[w]hile the medical judgment of a physician of course is to be respected, there is no reason to believe as a general proposition that even the most conscientious physician's interest in the overall welfare of a minor can be equated with that of most parents."⁵⁶ In *Planned Parenthood of*

⁴⁷ *Hodgson v. Minnesota*, 497 U.S. 417, 450 (1990).

⁴⁸ *Bellotti v. Baird*, 443 U.S. 622, 642 (1979).

⁴⁹ Axon, at para. 44.

⁵⁰ *Id.* at para. 2; see also para. 153, citing *Gillick*.

⁵¹ *Id.* at para. 79.

⁵² *Bellotti*, at 647.

⁵³ *Id.* at 630.

⁵⁴ Nan D. Hunter, *Justice Blackmun, Abortion, and the Myth of Medical Independence*, 72 *Brook. L. Rev.* 147, 193 (2006).

⁵⁵ *Roe v. Wade*, at 154.

⁵⁶ *H.L. v. Matheson*, at 421, n. 8.

Central Missouri v. Danforth, the Court found it unlikely that a young woman "will obtain adequate counsel and support from the attending physician at an abortion clinic."⁵⁷

The claim for parental notification in *Axon* is similarly premised on the questionable capacity and trustworthiness of the medical professional, who does not owe the same duties to a young woman as a parent and "might perhaps be unqualified or not be in a position to advise about . . . particular non-medical matters."⁵⁸ The *Axon* Court, however, rejected this claim.

Under English law, the medical profession is entrusted to ensure moral decision-making through the application of the mature minor rule. Under the rule, as established in *Gillick*, a medical professional may lawfully provide abortion care to a young woman, if satisfied that she has sufficient maturity and intelligence to understand the nature and implications of the care.⁵⁹ The *Axon* Court characterized the rule as setting "judicially accepted conditions and safeguards" for the provision of abortion care without parental involvement.⁶⁰ The rule requires that young women understand properly all aspects of abortion care, including its complex and difficult moral aspects. The *Axon* Court repeated the emphasis in the following passage from *Gillick*:

... it has to be borne in mind that there is much to be understood by a girl under the age of 16 if she is to have legal capacity to consent to such treatment. It is not enough that she should understand the nature of the advice which is being given; she must also have a sufficient maturity to **understand what is involved**. There are moral and family questions. . . . It follows that a doctor will have to satisfy himself that she is able to appraise these factors before he can safely proceed upon the basis that she has at law capacity to consent to [care].⁶¹

The Court emphasized that a young woman must appreciate all aspects of the care. To understand properly "what is involved" in abortion care, the *Axon* Court concluded, "constitute[s] a high threshold" that many young women will be unable to satisfy.⁶² This standard reflects the claim that it is in the realm of moral decision-making that important differences in the capacities of young and adult women are likely to be found.

Moral decision-making under English law is thus ensured through the medical profession's strict enforcement of the mature minor rule. The *Axon*

⁵⁷ Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 92 (1976).

⁵⁸ *Axon*, at para. 83.

⁵⁹ *Id.* at para. 9.

⁶⁰ *Id.* at para. 105.

⁶¹ *Id.* at para. 89.

⁶² *Id.* at para. 90.

Court's trust in the medical profession as moral authority can be expected in a legal system in which all abortion care is subject to medical authorization. "Medicalization" is arguably the defining characteristic of the English criminal abortion law, constraining all abortion decision-making within a set of prescribed indications and subjecting all decisions to the approval of the medical profession.

B. Minors, Autonomy Rights, and Abortion in Contrast and Comparison

The third contrast in *Axon* concerns the different autonomy rights of young persons. The American authorities, the Court explained, reflect that "the principle of autonomy is far less well-developed in the United States in the case of young people than it is under our domestic law or under the ECHR."⁶³ This contrast is again difficult to sustain.

Contrary to the claims of the *Axon* Court, many U.S. state courts have adopted the mature minor rule as expressed in *Gillick*, and many U.S. states have statutory equivalents to the English *Family Law Reform Act 1968*, which confers upon young persons below the age of majority a general right to consent to medical care.⁶⁴ Many U.S. state laws expressly authorize young persons to consent to sexual health care and protect the confidential delivery of those health care services.⁶⁵ These statutes are grounded in the same public health concerns cited in *Axon*.⁶⁶ In this respect, parental involvement in abortion care reflects not a trend, but an anomaly in American law.

The American authorities, moreover, do not deny, but emphasize, the constitutional rights of young persons. In *Danforth*, the U.S. Supreme Court affirmed that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."⁶⁷ The American abortion right extends to both young and adult women. The "state does not have the constitutional authority to give a third-party an absolute, and possibly arbitrary, veto over the decision" of a young woman to terminate her pregnancy.⁶⁸ Under both American and English law, therefore, autonomy rights are recognized to inhere in persons of all ages. In *Axon*, the Court

⁶³ *Id.* at para. 35.

⁶⁴ Cynthia Dailard & Chinue Turner Richardson, *Teenagers' Access to Confidential Reproductive Health Services*, 8 *Guttmacher Rep. Pub. Pol.* 6 (2005).

⁶⁵ *Id.*

⁶⁶ See text at footnote 6.

⁶⁷ *Danforth*, at 76.

⁶⁸ *Id.*

reasoned that the mere status of being a child "is not a distinction of decisive or any great importance" in the enjoyment of human rights.⁶⁹

The American authorities on parental involvement also reflect the mature minor rule, recognizing the evolving decision-making capacities of young women. As affirmed by the U.S. Supreme Court in *Bellotti*, the state cannot "disregard . . . the abortion decision of a minor who has been determined to be mature and fully competent to assess the implications of the choice she has made."⁷⁰ This is reflected in the constitutional requirement that parental consent laws include a judicial bypass, allowing courts to authorize an abortion without parental involvement if the young woman possesses the maturity for informed consent or the abortion is deemed in her best interests.⁷¹

Both American and English constitutional law deny the state authority to impose a third-party veto over the decision-making of young persons based on age alone. Each embraces a form of the mature minor rule. In *Axon*, the rule is reflected in the Court's reference to the evolving capacities principle of the *United Nations Convention on the Rights of the Child*, a human rights treaty ratified by the United Kingdom. This principle requires the state to "respect the responsibilities, rights and duties of parents . . . in a manner consistent with the evolving capacities of the child."⁷²

American and English law share a further characteristic: despite constitutional recognition as rights-holders, young persons remain distinguishable from adults. Young and adult women may be treated differently in the abortion context despite each enjoying an autonomy right. Justification for this different treatment derives from the shared conception of abortion decision-making as uniquely implicating the state interest in prenatal life.

Underlying both American and English law is a common assumption that a young woman's capacity to engage with the moral issues of abortion care can be distinguished from her capacity to understand the nature and implications of abortion as medical care. The standard informed consent model, focused on cognition and comprehension, is deemed too narrow a standard against which to assess decision-making capacity in the abortion context.⁷³ Young women with sufficient maturity to understand the medical aspects of abortion care are

⁶⁹ *Axon*, at para. 65.

⁷⁰ *Bellotti*, at 651.

⁷¹ *Id.* at 643 and 644. The U.S. Supreme Court has never explicitly ruled on whether parental notification laws also require a judicial bypass.

⁷² *Axon*, at para. 76, citing *Convention on the Rights of the Child*, 20 Nov. 1989, 1577 U.N.T.S. 3, Art. 5.

⁷³ Elizabeth S. Scott, Dickon Reppucci & Jennifer L. Woolard, *Evaluating adolescent decision making in legal contexts*, 19 L. & Hum. Behav. 221, 223 (1995).

assumed incapable of moral judgment subject to evidence of the contrary.⁷⁴ In *Bellotti*, for example, the U.S. Supreme Court justified parental involvement laws based on young women's lack of "experience, perspective and judgment" leading to their "inability to make critical decisions in an informed, mature manner."⁷⁵ In *Axon*, the Court concluded that for a young woman to understand properly "what is involved" in abortion care sufficient to provide legal consent without parental involvement constitutes a high threshold that many young women will be unable to satisfy.⁷⁶

Given that responsible decision-making is one means to protect prenatal life, the assumption of young women's underdeveloped capacity to engage in moral decision-making creates the need for greater state regulation of their abortion care. This state regulation is mandated third-party involvement.

C. Third-Party Moral Authority in English and American Abortion Law

American and English constitutional approaches to young women's abortion care, in summary, share a fundamental characteristic supported by a common set of assumptions.

The shared characteristic is moral authority, defined as the legal authority to protect a state interest in prenatal life through moral abortion decision-making. Contrary to the claimed contrast in *Axon*, both American and English abortion law reflect prenatal life as a state interest. Both, moreover, seek to protect this state interest by ensuring that abortion decision-making is serious and reflective, respectful of prenatal life as an intrinsic good or value. In young women's abortion care, moral decision-making is secured through the mandated involvement of third parties.

Third-party moral authority is constitutionally justified by two related assumptions. The first assumption is that the involvement of third parties necessarily improves the moral quality of young women's abortion decision-making. American and English law differ, however, in the third party considered best suited to and thus entrusted with this task. Under American law, the family and the court are granted moral authority. Under English law, it is the medical profession. The second assumption is that improvement in the moral quality of young women's abortion decision-making is required. Contrary to the claimed contrast in *Axon*, American and English law both recognize the constitutional autonomy rights of young persons. The different treatment of young and adult women is nevertheless justified on the assumption that young women's

⁷⁴ *Id.*

⁷⁵ *Bellotti*, at 633-635.

⁷⁶ *Axon*, para. 90.

capacity to engage with the moral issues of abortion care is underdeveloped, creating the need for third-party involvement.

II. INVESTIGATING THE EVIDENCE AND GENDERED BASIS OF THIRD-PARTY MORAL AUTHORITY

This part of the chapter investigates the assumptions underlying third-party moral authority. It reveals that the assumptions of the need for and necessary benefit of mandated third-party involvement are strongly refuted by widespread empirical evidence. The strength of the assumptions despite this empirical rebuttal suggests that some other factor is at work. This factor, it is argued, is the masculine-feminine gender hierarchy.

A. *The Moral Authorities: An Evidenced-Based Approach*

The striking aspect of third-party moral authority in both American and English law is its basis in assumption rather than evidence. The American authorities, for example, acknowledge that parental involvement laws are based on the "quite reasonable assumption that minors will benefit from consultation with their parents."⁷⁷ It is assumed that *mandated* third-party involvement *necessarily* improves the moral quality of abortion decision-making. Empirical evidence suggests otherwise. This evidence not only fails to support the assumptions underlying third-party moral authority, but also reveals its broader dysfunction.

Empirical evidence strongly refutes any meaningful difference between mature young women and their adult counterparts in capacity for moral decision-making.⁷⁸ Research on pregnancy-related decision-making suggests that by middle adolescence (ages 14 and 15 years), most young women have developed adult-like capacities respecting experience, perspective, and judgment.⁷⁹ No meaningful age-related differences are evident in the thoroughness of considered consequences, the number of reasons considered, and the content of the reasoning.⁸⁰

The assumed benefit of mandated third-party involvement further derives from an artificial conceptualization of young women as otherwise isolated in

⁷⁷ Casey, at 896.

⁷⁸ See Nancy Adler, Emily Ozer, and Jeanne Tschann, *Abortion among adolescents*, 58 *Am. Psych.* 217 (2003).

⁷⁹ Bruce Ambuel, *Adolescents, Unintended Pregnancy, and Abortion: The Struggle for a Comprehensive Social Policy*, 4 *Curr. Dir. Psych. Sci.* 1, 3 (1995).

⁸⁰ See e.g. Bruce Ambuel and Julian Rappaport, *Developmental trends in adolescents' psychological and legal competence to consent to abortion*, 16 *L. & Hum. Behav.* 129 (1992).

their decision-making.⁸¹ Empirical evidence reveals that the vast majority of young women in both the United States and England voluntarily consults with and seeks the advice of third parties, including at least one parent.⁸² Studies also confirm that most young women who do not involve a parent voluntarily consult and seek advice from a trusted adult, their sexual partners, and friends.⁸³ Assuming then that third-party involvement improves the decision-making process, there is no need for a legal mandate because young women voluntarily seek third-party involvement.

There is also little empirical support for the assumption that third-party involvement necessarily yields such benefits; that the addition of more voices always improves the process or outcome of decision-making.⁸⁴ This assumption derives ironically from observed behavior, namely that most young women voluntarily involve third parties. This behavior, however, may be explained by benefits other than the improved quality of decision-making, such as compassion and support.

With respect to parental involvement, for example, there is little research on how pregnancy and its termination are discussed in family contexts.⁸⁵ It is assumed that parents possess what their children lack in maturity, experience, and judgment. It is assumed that parents will engage with their children on serious and reflective terms. Parental involvement laws in general demand "neither conversation nor informed counseling.... The legal requirement... is a signature."⁸⁶

The nature of parent-child interactions also varies greatly among families. For some young women, the parental paradigm of the American approach is a legal fiction. In extreme but documented cases, parental involvement laws force young women to negotiate with parents at considerable risk to their safety and well-being.⁸⁷ For these young women, mandated involvement is not redundant, but carries equally no benefit, only a risk of harm.

⁸¹ Laura Finken, *The Role of Consultants in Adolescents' Decision-Making: A Focus on Abortion Decisions*, in *The Development of Judgment and Decision Making in Children and Adolescents* 255, 272 (Janis E. Jacobs & Paul A. Klaczynski, eds. 2005).

⁸² *Id.* at 265. See also *Elie Lee et al., A Matter of Choice? Explaining National Variation in Teenage Abortion and Motherhood* 41-42 (2004). The Axon Court also notes that two-thirds of abortions involving young women under the age of 16 years are carried out with parental knowledge. Axon, at para. 83.

⁸³ See Finken, *supra* note 81 at 257, 267 and Lee, *supra* note 82 at 39, 45.

⁸⁴ Finken, *supra* note 81 at 257.

⁸⁵ Lee, *supra* note 82 at 5.

⁸⁶ Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 *Int'l J. L. Pol. & Fam.* 305, 314 (2004).

⁸⁷ Michelle Fine & Sara McClelland, *The Politics of Teen Women's Sexuality: Public Policy and the Adolescent Female Body*, 56 *Emory L.J.* 993, 1020 (2007).

Empirical evidence similarly refutes any constructive benefit of court involvement under the judicial bypass requirement. Research indicates that evidentiary hearings to confirm the maturity of young women are often cursory in nature, with courts almost uniformly granting bypasses to all young women.⁸⁸ Judges have described how "ill-equipped they feel themselves to be in assessing a pregnant minor's maturity or her best interests with regard to the question of abortion."⁸⁹ Young women's experience confirms the mere formality of judicial involvement and its limited role in enhancing the quality of abortion decision-making. Most young women report having made the decision to terminate a pregnancy prior to seeking court approval,⁹⁰ and experienced the hearing as a "hurdle" or "high stakes test" to be passed.⁹¹ In the hearing, the young women focused not on their decision-making, but "on avoiding mistakes or not giving the wrong impression to the judge."⁹² The law thus arguably obstructs serious decision-making, promoting strategic behavior intended to secure judicial approval.

Legally mandated parental and judicial involvement may not achieve its intended benefits, but it is not without effect. Widespread evidence demonstrates its deterring effect on young women's access to abortion care.⁹³ The American authorities, however, are little concerned with this dysfunction. As claimed by the U.S. Supreme Court in *H.L. v. Matheson*, "The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions."⁹⁴ These adverse effects function differently in Axon. Evidence that young persons may be deterred from seeking abortion care confirmed the legal duty of confidentiality as good public policy.⁹⁵

Without mandated parental or judicial involvement, English law offers the benefit of confidential decision-making, and, in this respect, facilitates young women's access to abortion care. There is little evidence, however, that the mandated involvement of a medical professional in abortion decision-making, either through the authorization requirement of the criminal law or strict enforcement of the mature minor rule, serves the state interest.

⁸⁸ *Id.* at 1024.

⁸⁹ Sanger, *supra* note 86 at 309.

⁹⁰ J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decisions without Involving Their Parents*, 18 *Berkeley Women's L. J.* 61, 144 (2003).

⁹¹ *Id.* at 145.

⁹² *Id.*

⁹³ Diane Reddy et al., *Effect of mandatory parental notification on adolescent girls' use of sexual health care services*, 288 *JAMA* 710, 712 (2002).

⁹⁴ *H.L. v. Matheson*, at 450.

⁹⁵ Axon, at para. 66-73.

The criminal abortion law is widely regarded as "virtually meaningless as a measure of control."⁹⁶ The law is intended to protect prenatal life by constraining women's abortion decision-making to a set of state-authorized indications under medical authorization. A parliamentary committee recently reported that the law plays no meaningful role in abortion care because one indication is satisfied in all normal first trimester pregnancies.⁹⁷ Most abortions in the United Kingdom are certified under the indication that permits legal abortion prior to 24 weeks where "the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman."⁹⁸ Given the safety of abortion care, the potential risks of full-term pregnancy are always greater than early termination.⁹⁹ It is thus arguably impossible for a medical professional to perform an early abortion outside the prescribed indications.¹⁰⁰ Akin to authorizations under the judicial bypass requirement, "requests for abortions are being 'rubber stamped'."¹⁰¹ Medical professionals are now allowed to authorize an abortion "without seeing the patient, so long as they believe, in good faith, that the woman meets the legal grounds for abortion on the basis of the clinical notes."¹⁰²

Strict enforcement of the mature minor rule also proves of little value in improving the quality of abortion decision-making. Most young women report having made their decision prior to visiting a medical professional.¹⁰³ Decision-making was undertaken in non-clinical settings, and the medical professional was positioned as relatively distant to this process.¹⁰⁴ The purpose of professional consultation, as experienced by the young women, is not to discuss decision-making, but to obtain a referral for abortion care.¹⁰⁵

Mandated third-party involvement under English law is not, however, without benefit. Many young women view medical authorization as "important for the reassurance and confidence it can provide and in allowing abortion to be perceived as a legitimate choice."¹⁰⁶ Mandated professional involvement benefits young women, but not in the intended way. An indications-based law

⁹⁶ Mason, *supra* note 15 at 27.

⁹⁷ UK Science and Technology Committee, *supra* note 40 at 34-35.

⁹⁸ *Abortion Act 1967*, c. 87 (Eng.).

⁹⁹ Mason, *supra* note 15 at 28.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 33.

¹⁰² UK Science and Technology Committee, *supra* note 40 at 32.

¹⁰³ Lee et al., *supra* note 82 at 48.

¹⁰⁴ Ellie Lee, *Young Women, Pregnancy, and Abortion in Britain: A Discussion of Law 'In Practice'*, 18 *Int'l. J. L. Pol. & Fam.* 283, 289 (2004).

¹⁰⁵ Lee et al., *supra* note 82 at 30.

¹⁰⁶ *Id.*

signals to women acceptable outcomes in abortion decision-making. Women can then formulate their requests for abortion care in the language of the law, allowing their decision-making to be perceived as morally responsible. Rather than engaging in reflective decision-making, young women simply parrot state-sanctioned reasons for terminating a pregnancy. Emphasis is placed on the health risks of pregnancy for the woman or future child, perpetuating the view that abortion is acceptable only when there is an *actual reason*, apart from the decision of the woman herself.¹⁰⁷ In the United States, public support for abortion is similarly strongest in cases where abortion is perceived as not resulting from the exercise of choice, but as beyond the woman's control.¹⁰⁸ The law again functions to obstruct reflective decision-making, and to promote strategic behavior.

B. *The Moral Authorities: A Gendered Approach*

The strength of the assumptions underlying third-party moral authority, despite their widespread empirical rebuttal, suggests that some other factor is at work. This factor, it is argued, is the masculine-feminine gender hierarchy.

Moral decision-making has long been situated within a gendered framework, two hierarchically arranged standards of moral reasoning invariably associated with gender: the masculine glorified, the feminine denigrated.¹⁰⁹ Masculine moral reasoning is associated with the impartial analytical resolution of abstract principles, feminine moral reasoning with individualized and contextual decision-making. The assumption that the moral capacity of young women is underdeveloped may reflect not a deficiency of assessment, but a deficiency in the standard by which moral capacity is assessed. Empirical studies reveal that most women do not make or justify their abortion decisions through the impartial analytical resolution of abstract principles. Both young and adult women tend to describe their abortion decision-making in individualized and context-specific terms.

In a U.K. study, young women described ambivalence in their abortion decision-making, often reflecting a tension between abstract moral principles

and the context-specific demands of real life.¹¹⁰ "In the abstract, abortion might be viewed as 'wrong' but, when a pregnancy occurred abortion emerged as a practical solution."¹¹¹ In a U.S. study, young women described their decision-making as intuitive rather than analytical.¹¹² The young women experienced difficulty articulating the reasons to support their decisions, which were simply described as having "come to mind," "feeling" intuitively right, "being the best option," or the "right thing to do."¹¹³ When young women did articulate reasons, they tended to be highly individualized and context specific. The U.S. study characterized the reasons provided by young women as "articulated from their own perspective" or "from a 'self-oriented perspective.'"¹¹⁴ Concern for the life or potential life aborted, for example, was incorporated into decision-making, but from the perspective of the young woman's incapacity to care for the child if born.¹¹⁵ Young women explained that they were not mature enough, not emotionally ready, too irresponsible or too young to care for a child.¹¹⁶ The young women also articulated an acute awareness of the situational nature of their decision ("not right for me at this time"), citing the impact a child would have on their current circumstances and future plans.¹¹⁷ As the title of the U.S. study suggests, abortion decision-making was "grounded in the reality of their lives."

The individualized and context-specific nature of the decision-making, and the fact that all young persons engaged in abortion decision-making are women, strengthens the identification of these young women with the denigrated *feminine* standard of moral reasoning. This identification is further strengthened by their departure from the glorified *masculine* standard. Their ambivalence, for example, may be interpreted as a failure to adequately engage with or analytically resolve abstract moral principles. It is the practice of most courts under the judicial bypass to approve petitions unless the young woman is *ambivalent* about her decision.¹¹⁸ A young woman's difficulty in articulating reasons may be interpreted as evidence that she lacks a valid reason to support her decision, suggestive of its superficial rather than intuitive nature. Expressly self-oriented reasons cannot be rationally assessed as objectively valid, and may thus be deemed irrelevant to moral reasoning. The

¹¹⁰ Lee et al., *supra* note 82.

¹¹¹ *Id.* at 17.

¹¹² Ehrlich, *supra* note 90.

¹¹³ *Id.* at 97, 107, 108.

¹¹⁴ *Id.* at 109, 118.

¹¹⁵ *Id.* at 159.

¹¹⁶ *Id.* at 97 and 109.

¹¹⁷ *Id.*

¹¹⁸ Sanger, *supra* note 86 at 310.

¹⁰⁷ *Id.* at 16.

¹⁰⁸ Melody Rose, *Safe, Legal and Unavailable: Abortion Politics in the United States* 42 (2007).

¹⁰⁹ See e.g., Kohlberg-Gilligan Debate: Carol Gilligan criticized Lawrence Kohlberg's scale of moral development, which privileged the universal, abstract, and impersonal as androcentric, neglecting, and thus devaluing an alternative moral approach of contextual reasoning and care for others empirically associated with women. Lawrence Kohlberg, *The Philosophy of Moral Development* (1981); Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982).

masculine standard demands a detached universal perspective, the abstraction from rather than attention to individuality and context. The reasons offered by young women – that they are too immature, irresponsible, and too young to care for a child – may further be interpreted to support the assumption of broader incapacity, and thus the need for third-party involvement.

The identification of young women with the denigrated feminine rather than glorified masculine standard of moral reasoning strengthens the assumption of their underdeveloped moral capacity. The assumption, in other words, is sustained through gender congruence, the fact that young women engage in feminine moral reasoning. Their underdeveloped moral capacity derives not from age, but from gender.

This claim is supported by the fact that the feminine identifying traits are not age specific. Both young and adult women describe their abortion decision-making in individualized and context-specific terms. All persons seeking abortion care are women. The factor of age, however, is constitutionally exploited to permit an assessment of moral capacity in young women that would be impermissible for adult women. It is only young women who bear the burden of third-party involvement for failing to satisfy a moral standard that most adult women would themselves fail.¹¹⁹ Regardless, therefore, of the fact that adult women are not directly subject to the moral standard, its denigration of feminine moral reasoning in effect devalues the moral quality of abortion decision-making as engaged in by many women, both young and adult. Borrowing from the insights of Carol Gilligan, the moral standard defines individualized and contextual decision-making in the abortion context as underdeveloped or otherwise inadequate rather than seeing it as a valid alternative moral perspective.¹²⁰

The second assumption underlying third-party moral authority, namely that third-party involvement necessarily improves the quality of abortion decision-making, is also supported by the gendered framework of moral reasoning. For both American and English law not only mandate third-party involvement, but also specify the third party involved. The three designated third parties – the parent or head of family, the court of law, and the medical profession – are all traditional institutions of male authority. If gender operates as a cue to moral capacity, traditional institutions of male authority may be accepted as morally trustworthy and capable of protecting the state interest simply by virtue of their masculinity, their identification with masculine moral reasoning. Their authority, in the true sense of the term, is a power that needs neither to be

¹¹⁹ Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 *Hofstra L. Rev.* 547, 575 (2000).

¹²⁰ Gilligan, *supra* note 109 at 1–2.

explained nor defended.¹²¹ It is accepted based on the gender congruence between institution and the glorified standard of moral reasoning.

The medical profession, for example, has long been entrusted as a profession to make sound decisions, whether of a medical or moral nature, with its legal authority extending “well beyond what would accrue purely on the basis of technical competence, training, and knowledge.”¹²² Under American law, the family is accepted as a moral authority based on its traditional value as the “institution through which ‘we inculcate and pass down many of our most cherished values, moral and cultural.’”¹²³ Parental involvement laws are, on occasion, constitutionally justified by reference to a state interest in protecting the traditional family as a valued state institution, rather than as means to ensure moral decision-making. In *Hodgson v. Minnesota*, for example, the U.S. Supreme Court upheld a law requiring notification of both biological parents, with no exception for divorced parents or unmarried couples.¹²⁴ Parental involvement is conditioned not on the existence of real family ties supportive of constructive engagement between parent and child, but on biological markers of kinship.¹²⁵ Where the family is demonstrated to depart from the idealized norm, moral authority is vested in courts of law, the cultural bastion of masculine reasoning.

To qualify as moral, abortion decision-making requires nothing more than the involvement of a third party identified with the masculine standard of moral reasoning. The trustworthiness of these parties to protect the state interest derives not from any demonstrated effect on abortion decision-making, but merely from their masculine identity. Mandated third-party involvement thus serves as a kind of “contemporary laying on of hands . . . the ritual may do no more than . . . a vague and comforting feeling that something useful has been done.”¹²⁶

Third-party moral authority, the characteristic shared in American and English law, is premised on gendered assumptions. Young women are denied moral authority on a feminine-gendered assumption of their underdeveloped

¹²¹ Laurie Rudman and Stephen Kilianski, *Implicit and Explicit Attitudes Toward Female Authority*, 26(11) *Person & Soc. Psych. Bull.* 1315 (2000).

¹²² *Sheldon*, *supra* note 44 at 72.

¹²³ *H.L. v. Matheson*, at 420.

¹²⁴ See e.g. *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

¹²⁵ This strongly contrasts with the approach of the Aton Court, which cautions that whether “there is family life and hence a right to family life in a particular family is a question of fact . . . [It depends] upon the real existence in practice of close family ties.” Aton, at para. 131, citing *K. v. United Kingdom*, 50 DR 199, 207 (1986).

¹²⁶ Ellie Lee, *Tensions in the Regulation of Abortion in Britain*, 30 *J. Law. Soc.* 532, 550 (2003), citing C. Brewer, *Who Should Counsel in Meeting on Abortion Counseling* at 29 (Birth Control Trust ed. 1978).

capacity to engage in moral decision-making. The family, the court, and the medical profession are granted moral authority by virtue of their masculinized gendered identity. Given that third-party moral authority is constitutionally justified by these assumptions, their hierarchical gendered nature renders this shared fundamental characteristic of American and English law problematic from a gender equality perspective. The denigration of the feminine and privileging of the masculine – and the subjection of young women to this gendered system – renders both the American and English laws on abortion in need of constitutional reform.

III. A NEW MORAL AUTHORITY IN ABORTION LAW

This part of the chapter seeks to develop a reformed vision of moral authority in abortion law from a perspective of gender equality. It offers a constitutional approach that protects the state interest in prenatal life by entrusting and supporting the decision-making of young women, privileging the unique moral insight of their individual experiences.

Following in the tradition of Carol Gilligan and scholars of feminist moral theory, the reform of moral authority requires a disassociation of gender, both the denigrated feminine and the glorified masculine, from the standard of moral decision-making. This disassociation creates an opportunity to revalue the moral capacity of women who make and articulate their decisions to terminate a pregnancy in terms traditionally identified as feminine. By divesting masculine moral reasoning of its privileged status, women need not make or justify their abortion decisions in detached abstract analytical terms to be recognized as capable and trustworthy to engage in moral decision-making. Individualized and contextual decision-making, the traditional feminine standard, is positioned as an alternative rather than deficient mode of moral reasoning.

A. *The Moral Authority of Experience*

With the elimination of gender as a cue for moral authority, some other credential is required. What marks women as capable and trustworthy to engage in moral abortion decision-making?

Feminist theory has long sought to displace the privileged *detached perspective* of masculine moral reasoning with the *involved perspective* of those who experience pregnancy and its termination, recognized as central to the individualized and contextual decision-making of traditional feminine moral reasoning. By virtue of her experience, it may be argued, a woman has a unique and critical perspective on the moral issues of abortion care. Precisely because it cannot be universalized, her experience is more, rather than less,

relevant to moral decision-making. It is valued as a source of moral insight that improves the quality of decision-making. Experience, in other words, can be a credential for moral authority.

Under this conception of moral authority, the experience of the millions of women worldwide who decide each year to terminate their pregnancies comes to matter from a moral point of view. The experience itself, the fact of their decision-making, carries moral weight. It is problematic, however, to derive moral authority from the simple fact that a woman decides to terminate her pregnancy. Women's abortion decision-making is the subject to be legitimated by moral authority. It cannot, therefore, also function as the standard.

Attention to the content rather than fact of women's abortion decision-making serves moreover an important function. It is crucial to bringing about the true reform of abortion laws that subject women not only to the involvement of third parties, but to the masculine moral standard those parties represent. If women are simply substituted for third parties under a new moral authority, continuing to adhere to and act on a masculine moral standard, women may become enlisted in their own subordination, upholding the standard as their own. Even when engaged in individualized and contextual reasoning, for which they are currently discredited, young women reflect in their decision-making traits of masculine moral reasoning. Their ambivalence, for example, has been explained as reflecting a tension between abstract principles and the demands of real life, the former an integrated part of their decision-making. Regardless, therefore, of legal mandate, women may continue to articulate their decision-making in ways that would allow others to perceive their decisions as moral according to the masculine standard.¹²⁷

Women may also articulate their decisions in terms traditionally identified as feminine, citing to individual and contextual reasons, but without revaluing its degrading tone. The tendency of young women, for example, to focus on their being too immature, or too irresponsible to care for a child may reflect an internalization of the gendered assumption of their underdeveloped capacities more generally. It is difficult to forge a positive moral identity from such narratives.

As recognized by Virginia Held, moral authority "cannot simply absorb the 'gender' that has been left behind, even if both genders would want it to. . . . There are very good reasons for women not to want simply to be accorded

¹²⁷ A study documenting abortion decision-making in Canada following the repeal of medical authorization requirements revealed that women experienced a kind of self-discipline "demonstrating how, at an ideological (and experiential) level, the construction of women needing permission for abortion effectively outlasted decriminalization in Canada." Eileen V. Fegan, *Recovering Women: Intimate Images and Legal Strategy*, 11 Soc. & Legal Stud. 155, 167 (2002).

entry as equals into the enterprise of morality as so far developed."¹²⁸ Moral authority must extend to the transformation of moral standards. True moral authority requires more than granting women the legal authority to protect prenatal life through existing moral standards. Women must be entrusted with the legal authority to transform the standard of moral decision-making and develop a modern interpersonal standard reflective of women's individual experiences in pregnancy and its termination.

This emphasis on individual experience recognizes that moral decision-making is necessarily related to if not dependent on the individual woman concerned. Her experience provides a relativistic assessment of what, with all moral values considered, she has *reason* to do in her particular circumstance. Empirical evidence supports the claim that experience matters. A U.K. study, for example, reported that young women's views about abortion frequently change once pregnancy is experienced.¹²⁹ Once pregnant, many of the young women interviewed viewed abortion as no longer "wrong" or "like murder," but the "right thing to do."¹³⁰ Others came to accept abortion as "wrong but the right thing to do." The fluidity and contradiction of these positions may be understood as reflecting the fact that experience, which cannot always be articulated in the language of abstract principles or neatly integrated into analytical reasoning, nevertheless provides some insight that shifts the moral perspective.

The priority of individual experience also suggests that moral decision-making may be without universal validity. One woman's abortion decision cannot be taken to either validate or refute the moral quality of any other woman's decision. Although contradicting the universalist tradition of masculine moral reasoning, this specificity is not a deficiency. To the contrary, acknowledging the relevance of individual experience reflects a new standard of moral decision-making.

This standard is not, however, one of strict moral relativism. The point rather, as articulated by Seyla Benhabib, "is to recognize the ideological limitations and biases that arise in the discourse of a universalist morality."¹³¹ The discarding of a universal standard of moral decision-making is not to deny the relevance of existing moral resources, including the abstract principles and

¹²⁸ Virginia Held, *Feminist Transformations of Moral Theory*, 50 *Phil. & Phen. Res.* 321, 327 (1990).

¹²⁹ Lee et al., *supra* note 82 at 17, 21.

¹³⁰ *Id.*

¹³¹ Seyla Benhabib, *The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Moral Theory, in Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* 148, 156 (Seyla Benhabib ed., 1992).

analytical reasoning of masculine moral reasoning. An individualistic interpersonal moral standard "does not deny us grounds, reasons, intelligibles or the like. Rather, it situates them."¹³² It recognizes the deficiency of decision-making premised on the detached analytical reasoning of third parties. It recognizes that the woman herself, by virtue of her experience, is uniquely qualified not only to engage with, and resolve, the moral issues of abortion care, but to identify and conceptualize the moral issues differently. An individualistic interpersonal standard thus reflects trust in women's moral judgment – a true conception of moral authority. That a woman knows "the right thing to do" in her circumstance becomes a reason itself to accept her decision-making as moral, in addition to any abstract reasons that she may provide. By virtue of being "hers," the decision acquires intrinsic moral weight.

Women's moral authority in abortion law thus carries the potential to transform the standard of moral decision-making in abortion care and create a new way of thinking about the morality of abortion by validating the perspective of those who experience pregnancy and its termination.

B. Young Women's Moral Authority

An individualistic, interpersonal, moral standard should not be understood as an aspiration to self-sufficiency, independence, or indifference to others. To recognize the moral authority of young women is not to deny the value of third-party involvement in abortion decision-making, but to assign it a new objective. Third-party involvement may legitimately serve to improve the quality of abortion decision-making, and thus protect the state interest in prenatal life, by *supporting* young women as moral decision-makers. This constitutional approach recognizes that young women and their experience matter from a moral point of view, that young women can contribute in important ways to the reform of moral standards in abortion decision-making. Mandated third-party involvement should thus be constitutionally assessed on its capacity to support young women in the exercise of moral decision-making as they mature. Supportive third-party involvement includes opportunities for young women to obtain information, to discuss their decision-making, to seek non-judgmental compassionate advice and care, and to feel validated in their decision-making.

The value of supportive third-party involvement is reflected in empirical evidence. In the U.K. study, the young women reported positive experiences of seeking and receiving abortion care in strikingly uniform terms. They valued

¹³² Steven Winter, *Human Values in a Postmodern World*, 6 *Yale J.L. & Hum.* 233, 246 (1994).

being "treated in a non-judgemental, caring or helpful way, where having an abortion was viewed as normal, and being given plenty of information about what was happening."¹³³ Third-party involvement was seen as positive when young women perceived the medical professional as "on [their] side."¹³⁴ What mattered most was not endorsement of their decision, but that the medical professional respected "their right to make a choice" and was "prepared to act on their behalf."¹³⁵ The main constructive role of professional involvement was allowing these young women to feel supported and confident in their decision-making, to feel that they were not being judged.¹³⁶ Third-party involvement was seen as negative when intrusive or demanding, when the young women were "asked to justify a decision they had already very clearly made."¹³⁷ The provision of information about obtaining and undergoing an abortion was also emphasized, and was deemed of "psychological significance, in that it legitimized and normalized requesting abortion."¹³⁸ Young women, most importantly, emphasized being treated as capable decision-makers. Although many had expected to be treated poorly because of their age, young women responded positively to being "treated like an adult" and "not looked down on for being young."¹³⁹

CONCLUSION

The purpose of this chapter is to examine the gendered nature of moral authority in abortion law. Both American and English constitutional approaches to young women's abortion care share the fundamental characteristic of third-party moral authority. Each seeks to protect a state interest in prenatal life by entrusting decision-making about young women's abortion care to third parties: the family, the court, and the medical profession. Neither constitutional approach vests moral authority in the young women themselves.

The chapter demonstrates that third-party moral authority is premised on gendered assumptions. Young women are denied moral authority on a feminine-gendered and not simply an age-based assumption of their underdeveloped capacity to engage in moral decision-making. The family, the court, and the medical profession are granted moral authority by virtue of their

¹³³ Lee, *supra* note 104 at 299.

¹³⁴ Lee *et al.*, *supra* note 82 at 28.

¹³⁵ *Id.* at 29.

¹³⁶ Lee, *supra* note 104 at 298.

¹³⁷ *Id.* at 298.

¹³⁸ *Id.* at 296.

¹³⁹ Lee *et al.*, *supra* note 82 at 34.

masculine-gendered identity. Given that third-party moral authority is constitutionally justified by these assumptions, their hierarchical gendered nature renders this shared characteristic of American and English abortion law problematic from a gender equality perspective, and in need of constitutional reform.

In an effort to guide this reform, the chapter offers a vision of moral authority in abortion law that is rooted in gender equality. This approach seeks to protect the state interest in prenatal life by entrusting and supporting young women in their abortion decision-making, privileging the unique moral insight of their individual experiences.