

Summer 1977

## Parental Consent Abortion Statutes: The Limits of State Power

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### Recommended Citation

Wand, Barbara Freedman (1977) "Parental Consent Abortion Statutes: The Limits of State Power," *Indiana Law Journal*: Vol. 52 : Iss. 4 , Article 8.

Available at: <https://www.repository.law.indiana.edu/ilj/vol52/iss4/8>

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## Parental Consent Abortion Statutes: The Limits of State Power

In 1976 the Supreme Court in *Planned Parenthood v. Danforth*<sup>1</sup> held unconstitutional a provision of a Missouri abortion statute<sup>2</sup> which required the consent of a parent or person in loco parentis before an abortion could be performed on an unmarried woman under the age of 18, unless the abortion was necessary to preserve the life of the mother. In reaching its decision the Court stated: "[T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the [minor] patient's pregnancy . . . ."<sup>3</sup> On the same day as the *Planned Parenthood* decision, however, the Court in *Bellotti v. Baird*<sup>4</sup> held that a somewhat different parental consent provision in a Massachusetts abortion statute<sup>5</sup> was susceptible of an interpretation which might be constitutional.<sup>6</sup> This statute also required parental consent before an abortion could be performed on a minor, but it further provided that a court order could be substituted for the parental consent if such consent were denied and if the court found the abortion to be in the

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<sup>1</sup>428 U.S. 52 (1976).

<sup>2</sup>MO. REV. STAT. § 188.020 (Supp. 1977). This statute provides in part:

No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment;

(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion;

(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother;

(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

<sup>3</sup>428 U.S. 52, 74 (1976).

<sup>4</sup>428 U.S. 132 (1976).

<sup>5</sup>MASS. ANN. LAWS. ch. 112, § 12P (Michie/Law. Co-op 1975). This statute provides in part:

(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

<sup>6</sup>In *Baird*, the Supreme Court vacated the district court's decision, which had held the consent provision unconstitutional, holding that the district court should have abstained. 428 U.S. at 134. The case was subsequently certified to the Supreme Judicial Court of Massachusetts for its construction of the statute. See note 18 *infra*. The United States Supreme Court found abstention to be appropriate because the statute was susceptible of an interpretation which would avoid or substantially modify the federal constitutional challenge to the statute. 428 U.S. at 147-48. Cf. *Harrison v. NAACP*, 360 U.S. 167, 177 (1959).

best interests of the minor. In remanding the case for certification to the Massachusetts Supreme Judicial Court for an interpretation of the statute, the Supreme Court stated that such a statute clearly was "susceptible to [an] interpretation . . . [which] would avoid or substantially modify the federal constitutional challenge to the statute. . . ."<sup>7</sup>

These cases have not resolved the issue of whether a state may require parental consent or consultation before an abortion can be performed on a minor. The Court has ruled that while a minor's decision to have an abortion is protected by her right of privacy,<sup>8</sup> a statute limiting the exercise of this decision may be upheld if it does not substantially infringe on that right of privacy or if the statute protects a compelling state interest. However, no firm guidelines in this area have come from the Court. The states are still in a position of uncertainty regarding the permissible limits of their regulation of a minor's decision to have an abortion. It is the purpose of this note to examine the justifications for upholding a parental consent statute<sup>9</sup> and to define the present constitutional limits on statutes requiring parental consultation or consent before an abortion can be performed on an unmarried minor.<sup>10</sup> An analysis of the possible interests a state may further in justification of such statutes will lead to the conclusion that no interest of sufficient

<sup>7</sup>428 U.S. at 148.

<sup>8</sup>Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976).

<sup>9</sup>The implications of this analysis may also be applied to the broader question of the desirability and constitutionality of parental consent requirements in a variety of contexts, e.g. with regard to other medical procedures, or to the dispensing of contraceptives to minors. Two recent cases regarding the dispensation of contraceptives to minors, for example, cited both *Planned Parenthood* and *Baird*. The Supreme Court, in *Carey v. Population Serv. Int'l*, 97 S. Ct. 2010 (1977), struck down a New York statute which prohibited the distribution of non-prescription contraceptives to persons under sixteen years of age except by a physician. But in *Doe v. Irwin*, 428 F. Supp. 1198 (W.D. Mich. 1977), a federal district court held that a state funded family planning center could not dispense birth control devices to unemancipated minors without first notifying the minor's parents.

<sup>10</sup>While this note deals with the infringement on the minor's right of privacy protected by the due process clause of the fourteenth amendment, statutes requiring parental consultation or consent before an abortion can be performed on an unmarried minor also involve several classifications which may be violative of the equal protection clause. Some of these classifications involve distinctions

- (1) between married and unmarried minors seeking abortions,
- (2) between unmarried adult women and unmarried minors seeking abortions, and
- (3) between unmarried minors seeking abortions and unmarried minors seeking other medical treatment.

Since "privacy" rights have been found to be fundamental and protected by the due process clause, it is plausible that these rights are also fundamental for purposes of equal protection clause analysis. See *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969), where the author notes: "Probably every interest found to be fundamental and therefore protected by the due process clause will also be fundamental under the equal protection clause, so that unequal treatment with respect to that interest would be upheld only on a very strong showing of justification." *Id.* at 1130. The showing required for equal protection analysis would be similar to that required under the due process clause, which is discussed in detail in this note. The classifications, to be valid, must be necessary to the achievement of a compelling state interest. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), and must be narrowly drawn to achieve that interest. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Dunn v. Blumstein*, 405 U.S. 330 (1972). For an analysis of whether such statutes can withstand an equal protection challenge, see *State v. Koome*, 84 Wash.2d 901, 530 P.2d 260, 66-68 (1975).

stature is served by requiring a minor to obtain either parental consultation or consent as a prerequisite to obtaining an abortion.

#### THE RIGHT OF PRIVACY OF MINORS

In *Planned Parenthood* the Court determined that minors are protected by the right of privacy,<sup>11</sup> a right which previously had been held to encompass a woman's decision to terminate her pregnancy.<sup>12</sup> Thus it should be

<sup>11</sup>428 U.S. at 75. Although not mentioned specifically in the Constitution, an individual's right of privacy has been recognized in a long line of decisions of the United States Supreme Court. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). In *Griswold v. Connecticut*, the Court explained that the specific guarantees of the Bill of Rights (including the first, third, fourth, and fifth amendments) "have penumbras, formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484. These penumbras create zones of personal privacy with respect to various aspects of a person's life, including marriage, *Loving v. Virginia* 388 U.S. 1 (1967); contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); procreation, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

In response to the state's contentions that a child did not have the right or ability to consent to an abortion, the Court in *Planned Parenthood* stated:

We agree . . . that the State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy. . . . [T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

Constitutional rights do not mature and come into being magically only when one attains the state-defined age of maturity. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.

428 U.S. at 74.

Courts have made some distinctions in their application of constitutional rights to minors. They have dealt with the applicability of rights to minors on a case by case basis, where the issue is raised with respect to a particular constitutional guarantee. See, e.g., *Breed v. Jones*, 421 U.S. 519 (1975) (right to be free from double jeopardy); *Goss v. Lopez*, 419 U.S. 565 (1975) (students held to possess property and liberty interests protected by the fourteenth amendment). This approach leaves the Court free to find that rights secured to adults may not be applicable to minors, when such application would not serve the best interests of the minor or the state. See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), where the Court held that a trial by jury was not constitutionally required in the adjudicative phase of a juvenile court delinquency proceeding, since to do so would work to the detriment rather than the benefit of the minor by undercutting the purposes of the juvenile court system. The holding in *Planned Parenthood*, that the right to determine whether or not to terminate one's pregnancy is applicable to minors, evinces a *prima facie* determination that the exercise of the protected right will work to the benefit rather than the detriment of the minor. If that were not the case, the Court could have held that a minor is not protected by the right to determine whether or not to terminate her pregnancy.

<sup>12</sup>The right of a woman to decide whether or not to terminate her pregnancy is a fundamental right, included within the right of privacy, because of the far-reaching effects on a woman's life should the state deny her this choice:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In

settled that a minor possesses the right to determine whether or not to terminate her pregnancy.<sup>13</sup> In order for a minor to challenge the constitutionality of a statute which requires parental consultation or consent before she may obtain an abortion, she must initially demonstrate that the statute infringes upon that right.

Statutes prohibiting a woman from obtaining an abortion clearly infringe on the woman's exercise of her constitutionally protected right.<sup>14</sup> Absent a compelling state interest necessitating such a measure, such a statute could not stand.<sup>15</sup> A statute such as that of Missouri, which allows abortions on minors only where the minor obtains parental consent, in effect gives the parents a veto over the minor's decision to terminate her pregnancy.<sup>16</sup> Such a statute operates in much the same manner as a statute prohibiting abortion, by completely overriding the decision of the woman on whom the abortion is to be performed. This the Court held in *Planned Parenthood* is an unconstitutional infringement of the minor's right of privacy.<sup>17</sup>

A somewhat different situation is presented by a statute such as that of Massachusetts. While the statute requires a minor to attempt to obtain parental consent<sup>18</sup> before an abortion can be performed on her, it allows a minor who feels that consent has been withheld contrary to her own best interests to petition the court to authorize her abortion. The necessity of parental consent may thereby be obviated. This type of statute has been characterized by the

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other cases . . . the additional difficulties and continuing stigma of unwed motherhood may be involved.

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

<sup>13</sup>All of the same detriments cited by the Court in *Roe* apply to an equal or greater extent to the denial of this choice to minors, since the medical risks of pregnancy and childbirth are even greater with respect to minors than to adults. Pilpel and Wechsler, *Birth Control, Teenagers and the Law*, 1 FAMILY PLAN. PERSPECTIVES 29 (1969). In addition, most pregnant teenagers are unmarried, so that the stigma and difficulties of unwed motherhood may become involved. The disruption, by motherhood, of educational opportunities and other activities important to the development of the minor will be great in many cases.

<sup>14</sup>Roe v. Wade, 410 U.S. 113 (1973).

<sup>15</sup>The Court in *Roe* said that "[w]here certain fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'" *Id.* at 155. See also *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965).

<sup>16</sup>This was recognized by the Court in *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

<sup>17</sup>*Id.*

<sup>18</sup>The state in *Bellotti v. Baird*, 428 U.S. 132 (1976), argued that the Massachusetts statute would preserve the "mature minor rule" in Massachusetts, according to which a child determined by the court to be capable of giving informed consent would be allowed to do so. 428 U.S. at 144. Under this construction of the statute, a pregnant minor who considered herself to be within the mature minor rule could petition the court for authorization for an abortion "regardless of whether the parents had been consulted or had withheld their consent." *Id.* The Supreme Judicial Court of Massachusetts, however, in its construction of the statute, held that the mature minor rule would not apply, and therefore a showing of parental refusal to consent was necessary to initiate the court proceedings. *Baird v. Attorney Gen.*, 360 N.E.2d 288, 294 (Mass. 1977).

The appellants' construction of the statute remains relevant, however, since it was this interpretation of the statute which the United States Supreme Court felt made abstention appropriate.

Supreme Court as one which "prefers parental consultation and consent," but is "fundamentally different from a statute that creates a 'parental veto.'"<sup>19</sup>

Such a statute however is very similar to an outright parental veto statute. The Supreme Judicial Court of Massachusetts has itself characterized the statute as a form of veto. While agreeing that there was no absolute veto inherent in the Massachusetts statute, it commented that the word "veto" might be used in describing the statute "by analogy to the legislative process, a veto which may be overridden."<sup>20</sup> This latter characterization is more accurate, since a minor must consult her parents and attempt to obtain their consent as a prerequisite to initiating the judicial review procedure.<sup>21</sup> Thus, the parents' refusal to consent does act as a veto, unless the minor initiates the judicial review to "override" the veto.<sup>22</sup>

Even if such a statute is not found to infringe on a minor's right of privacy on the basis that it permits a parental veto, several other forms of infringement result from this statute. It is acknowledged that minors are reluctant to discuss their sexual activity with their parents.<sup>23</sup> Furthermore, a minor woman may fear the result of informing her parents of her pregnancy. Requiring a minor to inform her parents of her pregnancy and of her desire to have an abortion may have a profound effect on both the nature of the minor's deliberations as to whether to have an abortion and on how that decision is to be carried out.<sup>24</sup> Although abortion is safest when performed in the early stages of pregnancy, a minor who has decided to have an abortion may be deterred from seeking that abortion as early as is desirable, while she contemplates whether or not to consult her parents and obtain a legal abortion or to resort to an illegal one for which she need not obtain parental consent.<sup>25</sup> Even if she eventually decides to consult her parents, precious time has been lost. If, on the other hand, the minor decides not to consult her parents, she may be forced into a course of action she would not have followed

<sup>19</sup>*Bellotti v. Baird*, 428 U.S. 132, 145 (1976).

<sup>20</sup>*Baird v. Attorney Gen.*, 360 N.E.2d 288, 294 (Mass. 1976).

<sup>21</sup>The Massachusetts statute provides that judicial consent may be obtained "[i]f one or both of the mother's parents refuse such consent. . . ." MASS. ANN. LAWS. ch. 112, § 12P (Michie/Law. Co-op 1975).

<sup>22</sup>Statutes that prohibit abortion or give a third party an absolute veto over the woman's decision whether to terminate her pregnancy most clearly infringe on the woman's right of privacy. Statutes which, rather than proscribing abortion, impose strict procedural requirements which must be complied with before a woman can obtain an abortion may also infringe on a woman's right to privacy. *Doe v. Bolton*, 410 U.S. 179, 195-200 (1973). There are two features of the procedure which a minor must follow under a statute such as that of Massachusetts which substantially infringe on her right to decide whether to terminate her pregnancy: the requirement of parental consultation, and the nature of the judicial proceeding in cases where a minor seeks court consent to her decision to abort.

<sup>23</sup>Stein, *Furnishing Information and Medical Treatment to Minors for Prevention, Termination and Treatment of Pregnancy*, 5 CLEARINGHOUSE REV., 131, 154 (1971).

<sup>24</sup>"For example, the minor may have become pregnant through an act of incest and be unwilling to have this known to her mother. Or the minor may have reasonable grounds for believing that knowledge of her pregnancy would result in severe punitive sanctions by her family." Pilpel and Zuckerman, *Abortion and the Rights of Minors*, in *ABORTION, SOCIETY AND THE LAW* 275, 296 (D. Walbert & J. Butler eds. 1973).

<sup>25</sup>See Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L. Q. 343; 359 (1972); Pilpel, *Minors' Rights to Medical Care*, 36 ALB. L. REV. 462 (1972).

had she not been required to obtain parental consent.<sup>26</sup> She may decide to bear the unwanted child, run away, try to self-abort, or seek an illegal and possibly unsafe abortion, as a result of the obstacles that a statute requiring parental consultation puts upon her right to decide whether or not to terminate her pregnancy.<sup>27</sup>

A statute such as that of Massachusetts does not provide the minor's parents with an absolute veto over their daughter's decision to have an abortion. The method by which the veto of the parents may be overridden, however, is of such a nature as to infringe upon the minor's exercise of her right to decide whether or not to have an abortion. If the minor is unwilling to have her parents learn of the pregnancy, then the right to an abortion is made no more accessible by the possibility of obtaining a court order, since the court's consent order may be entered only "if one or both of the mother's parents refuse such consent."<sup>28</sup>

Even if the minor consults her parents, is refused consent, and desires to obtain the consent of the court, the obstacles she will encounter in initiating and pursuing litigation may "comprise an unworkable burden."<sup>29</sup> Recognizing this "unworkable burden," the Washington Supreme Court noted: "Minor women unwilling to add litigation against their parents to their already acute personal difficulties would gain little from the possibility of court intervention."<sup>30</sup> A decision to obtain a court order presupposes sufficient legal sophistication to be aware of the existence of the remedy, a sophistication not possessed by most children.<sup>31</sup> Once the decision to obtain a court order is made, the minor would be faced with the task of obtaining counsel.<sup>32</sup> In most

<sup>26</sup>Poe v. Gerstein, 517 F.2d 787, 793 n.11 (5th Cir. 1975).

<sup>27</sup>See Pilpel & Zuckerman, *Abortion and the Rights of Minors*, in *ABORTION, SOCIETY AND THE LAW* 275, 283 (D. Walbert & J. Butler eds. 1973); Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305, 324 (1974).

Another effect of a statute requiring parental consultation or consent is that it is likely to inhibit communication between the minor and her family physician. Where a statute requires a minor to consult her parents and to attempt to receive their consent before a legal abortion can be performed, a minor may be unwilling to confide in her family physician for fear he will notify her parents in an attempt to obtain consent. Under such circumstances, the minor may resort instead to a "no questions asked" illegal abortionist. This deprives the minor of a valuable source of advice and guidance from a skilled professional who by knowing her would be in an excellent position to counsel her about her decision. *Id.* at 328.

<sup>28</sup>MASS. ANN. LAWS. ch. 112, § 12P (Michie/Law. Co-op 1975).

<sup>29</sup>State v. Koome, 84 Wash. 2d 901, 906, 530 P.2d 260, 264 (1975).

<sup>30</sup>*Id.*

<sup>31</sup>See Note, *Counseling the Counselors: Legal Implications of Counseling Minors without Parental Consent*, 31 MD. L. REV. 332, 337 (1971).

<sup>32</sup>Since the court order will be given for "good cause shown," the minor will most probably need legal assistance in presenting her case. The Supreme Judicial Court of Massachusetts, when questioned about the judicial procedure to be used to obtain the court order, gave its opinion that the hearing would be an adversary one with the parents as the defendants. *Baird v. Attorney Gen.*, 360 N.E.2d 288, 297. While no final opinion has been rendered as to whether counsel would be necessary for the minor during the hearing, the court states its doubt "that the Legislature intended in all cases that an indigent minor should proceed without counsel in seeking authorization of an abortion. . . ." *Id.* at 301. This statement suggests that counsel will be needed in at least some cases. Even if counsel is not necessary to show "good cause," an attorney would most probably be the vehicle used for getting into the court system. An attorney would

situations, minors "generally have not enjoyed representation by lawyers as frequently as adults."<sup>33</sup> If the minor personally knows an attorney, he would most likely be a friend of the family, so that it may be even harder for the minor to convince the attorney to represent her in an action to obtain an abortion against the will of her parents. Even if a minor finds a lawyer willing to take the case, the problem of compensation may stand in the way of the minor's representation.<sup>34</sup>

The delays inherent in a legal proceeding of this sort further infringe on the minor's right to decide whether or not to terminate her pregnancy.<sup>35</sup> Since abortion is safest when performed early in pregnancy,<sup>36</sup> the delay of a court hearing may postpone the implementation of the minor's decision until a time when the abortion is much more dangerous to her. Not only is there the delay of the court hearing itself, but there is also the possibility of appellate review.<sup>37</sup> When the delays of litigation are considered in conjunction with the facts that minors often refuse to believe they are pregnant until well into the first trimester of pregnancy, and that litigation could well be preceded by a lengthy session of parental consultation and family crisis, the burden of a court hearing to override parental refusal to consent may be a substantial infringement on the minor's decision to terminate her pregnancy.

Even if the minor chooses to seek a court order, its procurement depends upon the court's determination that the abortion is in the minor's best interests. Thus if a minor has made a personal decision to have an abortion, after consultation with her parents, and that decision may be viewed by the minor's attending physician as in her best interests, her decision may still be blocked if the court decides that the abortion is not in her best interests.<sup>38</sup> This raises serious constitutional questions. When the court has the power to override a good faith decision of a minor woman and her doctor, the woman's right of privacy in relation to her doctor and the intimacy that relationship requires is destroyed. This infringement on the relationship of a woman and her doctor violates her fundamental right of privacy as severely as does a parental veto.<sup>39</sup>

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also probably be needed for the appeals process foreseen by the Supreme Judicial Court of Massachusetts. *Id.* at 298.

<sup>33</sup>Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State*, 4 FAM. L.Q. 319, 340 (1970).

<sup>34</sup>"Where money generally has not been available, either because of poverty of the child's family or because his parents were proceeding against him and he had no money of his own . . . representation has been thoroughly inadequate." *Id.* at 341.

<sup>35</sup>*State v. Koome*, 84 Wash. 2d 901, 917, 530 P.2d 260, 269 (1975) (Finley, J., concurring).

<sup>36</sup>See note 51 *infra*.

<sup>37</sup>The Supreme Judicial Court of Massachusetts had "no question concerning the speedy disposition of any appeal." *Baird v. Attorney Gen.*, 360 N.E.2d 288, 298 (Mass. 1977). They cite one case which was reported to the court and decided two days later, but admit "this prompt disposition may have been facilitated by the fact that the case was entered in the Supreme Judicial Court . . . and promptly reserved and reported for decision by a single justice of this court." *Id.* In actuality, speedy appellate review is the exception rather than the rule, and no special procedure to assure speedy review is provided for by the statute or foreseen by the Supreme Judicial Court of Massachusetts.

<sup>38</sup>See note 5 *supra*.

<sup>39</sup>See *Doe v. Bolton*, 410 U.S. 179 (1973), which held unconstitutional a statute which re-

Any statute which removes complete control over the decision to abort from a woman, minor or not, and her physician thus seriously infringes on the woman's constitutional right of privacy.<sup>40</sup> This infringement cannot be upheld without a showing by the state of a compelling interest which is achieved by the narrowest means available.<sup>41</sup>

#### POSSIBLE COMPELLING STATE INTERESTS

The fact that a minor does possess the right of privacy does not mean that the state may never infringe upon its exercise. Where a state statute infringes upon fundamental personal rights, however, the state must show that the statute was enacted to further a "compelling state interest"<sup>42</sup> and that the interest is not "pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."<sup>43</sup> When a statute purports to regulate the activities of minors, it has been recognized that the state's authority is broader than its authority to regulate the activities of adults.<sup>44</sup> But where a minor's fundamental rights are infringed by a statute, the "broader authority" of the state does not substantially affect the strength of the showing a state must make in support of its statute.<sup>45</sup> While the

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quired the approval of a hospital committee before an abortion could be performed, even though the woman's own physician had approved the abortion. The Court stated that "[t]he woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview." *Id.* at 197.

In a concurring opinion, Justice Douglas stated:

Crucial here, however, is state-imposed control over the medical decision whether pregnancy should be interrupted. The good-faith decision of the patients' chosen physician is overridden and the final decision passed on to others in whose selection the patient has no part. This is a total destruction of the right of privacy between physician and patient and the intimacy of relation which that entails. . . .

*Id.* at 219.

If the approval of other physicians was held to infringe to too great a degree on the right of privacy between physician and patient, the court's review of a doctor's professional opinion would similarly intrude on this right.

<sup>40</sup>The minor woman's right of equal protection under the laws may also be infringed. See note 10 *supra*.

<sup>41</sup>The Supreme Court recently recognized that the same strict scrutiny that is applied to statutes prohibiting abortion must be applied to "state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision. . . . [S]uch access is essential to exercise of the constitutionally protected right of decision in matters of childbearing. . . ." *Carey v. Population Serv. Int'l*, 97 S. Ct. 2010, 2018 (1977).

<sup>42</sup>*Shapiro v. Thompson*, 394 U.S. 618 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Bates v. Little Rock*, 361 U.S. 516 (1960).

<sup>43</sup>*NAACP v. Alabama*, 377 U.S. 288, 307 (1964). Although the NAACP case involved freedom of association, the analysis used therein is cited in *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), a case which dealt with the right of privacy.

<sup>44</sup>*Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

<sup>45</sup>See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), in which the Court recognized the right of children to exercise their religion. The case, however, was actually decided on the right of free speech, and the Court used the same "clear and present danger" test applicable when the state restricts the rights of adults. See also *Ginsberg v. New York*, 390 U.S. 629 (1968), in which the requisite showing by the state in support of legislation prohibiting the sale of certain obscene materials to minors was one of a rational relationship to a legitimate state

Supreme Court in *Planned Parenthood* referred to the showing the state must make in support of a statute infringing on the minor's right of privacy as a "significant" rather than a compelling state interest,<sup>46</sup> the Court itself seems unclear as to what extent this showing differs from the compelling state interest test.<sup>47</sup> The rigor with which the Court applied the significant state interest test in *Planned Parenthood* and in *Carey v. Population Services International*,<sup>48</sup> demonstrates that the standard "for all practical purposes approaches the 'compelling state interest' standard."<sup>49</sup>

In *Roe v. Wade*<sup>50</sup> the Supreme Court considered the compelling interests of the state in regulating abortions in adult women. The two interests the Court considered in that case were protection of maternal health and safeguarding potential life. These, the Court held, were not compelling enough interests during the first trimester of pregnancy to justify infringing on an adult woman's right to have an abortion.<sup>51</sup>

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interest, only because "obscenity is not protected expression and may be suppressed without a showing of the circumstances which lie behind the phrase 'clear and present danger' in its application to protected speech." 390 U.S. at 641. Thus the applicable constitutional analysis was dictated by the nature of the right infringed, not the characteristics of the person protected by the right. See also *Carey v. Population Serv. Int'l*, 97 S. Ct. 2010 (1977).

<sup>46</sup>428 U.S. at 75.

<sup>47</sup>In *Carey v. Population Services International*, the plurality states in a footnote that this test "is apparently less rigorous than the 'compelling state interest' test." 97 S. Ct. at 2021 n.15 (emphasis added). It should be noted that in *Roe v. Wade*, the Court used the word "significant" as a synonym for "compelling" when it stated that it is "appropriate for a State to decide that at some point in time another interest [other than the woman's right of privacy] becomes significantly involved." 410 U.S. 113, 159 (1973).

In *Population Services International*, the Court states that this lesser scrutiny is justified because of the state's broader authority in regulating the activities of children, yet this justification only recognizes that the state may have a compelling interest in regulating the activities of minors where such an interest would not exist to justify the regulation of the same activities as applied to adults. For example, in *Prince v. Massachusetts*, the Court stated that "It is true children have rights, in common with older people, in the primary use of highways. But even in such use, streets afford dangers for them not affecting adults." 321 U.S. 158, 169 (1944). The Court in *Population Services International* also justifies the lesser standard of scrutiny on the basis that the right of privacy at issue is "the interest in independence in making certain kinds of important decisions," and "the law has generally regarded minors as having a lesser capability for making important decisions." 97 S. Ct. at 2021 n.15. However, skepticism as to the ability of minors to exercise the right of privacy would justify holding it inapplicable to minors, but not in reducing the level of interest a state must assert in infringing on the right once it has been held to apply to minors.

<sup>48</sup>97 S. Ct. 2010 (1977).

<sup>49</sup>*Id.* at 2027-28 (Powell, J., concurring).

<sup>50</sup>410 U.S. 113 (1973).

<sup>51</sup>During the first trimester of pregnancy, when the fetus is not yet viable and abortion as a medical procedure carries with it fewer risks to a pregnant woman than does childbirth, *id.* at 149, neither state interests in protecting maternal health nor state interests in safeguarding potential life are at that point compelling, and therefore the abortion decision "in all its aspects is inherently, and primarily, a medical decision," and it must be left to the medical judgment of the pregnant woman's physician. *Id.* at 166. After the first trimester, when the risks of abortion to a pregnant woman increase, the state has a compelling interest in safeguarding the pregnant woman's health and can regulate the abortion procedure by legislation reasonably related to the accomplishment of that interest. *Id.* at 163. The Court gives examples of permissible state regulation in furtherance of this interest: establishment of qualifications and licensing requirements for physicians performing abortions and establishment of licensing requirements for the type of facility where abortions may be performed. For the stage of pregnancy subsequent to

Since the *Roe* decision dealt with compelling interests of the state vis-a-vis adult women, it is arguable that the Supreme Court might find a compelling interest with respect to minors even during the first three months of pregnancy.<sup>52</sup> No additional interest of the state with respect to minors can be asserted, however, in the area of protecting potential life, for no matter what the age of the mother, viability is still the point where the state's interest in protecting potential life becomes compelling.<sup>53</sup> With regard to the asserted interest of maternal health, "the teenage mother is 'high risk' medically in almost every respect, during pregnancy and childbirth."<sup>54</sup> This fact taken together with the fact that, at least during the first trimester, abortion is safer than pregnancy and childbirth,<sup>55</sup> thus removes any interest the state might advance in restricting the availability of abortions to minors on the grounds of protecting maternal health.<sup>56</sup> Sustaining an infringement on the minor's right must thus be based on a compelling interest not considered in *Roe*.

The interests of the state in protecting the integrity of the family unit and parental authority were asserted by the State of Missouri in *Planned Parenthood*. The Supreme Court found these interests not to be compelling. It stated:

It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor [who is] mature enough to have become pregnant.<sup>57</sup>

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the viability of the fetus, the state's interest in the protection of potential life becomes compelling, since at that point the fetus has the capability of meaningful life outside the mother's womb, and the state may then regulate abortion to that end. *Id.*

<sup>52</sup>To some courts, the *Roe* holding was limited to consideration of only the two interests asserted by the state of Texas in support of its statute, the protection of maternal health and the safeguarding of potential life. *See, e.g., State v. Koome*, 84 Wash. 2d 901, 906-07, P.2d 260, 264 (1975). Thus, a statute regulating abortion might be sustained upon a showing by the state of some additional compelling interest not considered by the Court in *Roe*.

To others, the Court's statement in *Roe* that during the first trimester of pregnancy the abortion decision must be left to the medical judgment of the pregnant woman's attending physician dictates the result that the state has no compelling interest in regulating abortion during the first trimester or pregnancy. *See, e.g., Wolfe v. Schroering*, 388 F. Supp. 631 (W.D. Ky. 1974).

<sup>53</sup>The Court in *Roe* states that setting the stage of viability as the point when the state's interest in protecting potential life becomes compelling has "both logical and biological justification," since that is the stage when the fetus is capable of meaningful life outside the womb. 410 U.S. 113, 163 (1972). The same logical and biological justifications would exist regardless of the age of the mother, for what is of concern with regard to the state's interest in protecting potential life is the maturity of the fetus, not the maturity of the mother.

<sup>54</sup>Pilpel and Wechsler, *Birth Control, Teenagers and the Law*, 1 FAMILY PLAN. PERSPECTIVES 29 (1969).

<sup>55</sup>*See* note 51 *supra*.

<sup>56</sup>Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305, 327 (1974).

<sup>57</sup>428 U.S. at 75.

Another interest often asserted in support of parental consent provisions is the state's interest in ensuring that a minor's decision to complete or terminate her pregnancy is an informed one,<sup>58</sup> thus protecting the minor from her own improvidence.<sup>59</sup> In *Planned Parenthood*, the Supreme Court acknowledged that the State of Missouri had asserted this interest.<sup>60</sup> Yet the Court never directly discussed this interest, and thus left open the question of whether such an interest could be compelling.<sup>61</sup> An examination of this interest, however, demonstrates that it, too, should be found to be noncompelling.

The state interest in ensuring informed consent rests on the assumption that a minor is not capable of making the decision whether or not to terminate her pregnancy in her own best interest. Therefore, the intervention of the state in requiring parental consultation or consent is necessary to protect the minor's best interest: "Informed consent by the patient . . . has long been necessary before a physician could render any services, and minors . . . were considered incapable of effective consent. Thus parental consent was required at common law as a substitute for the child's consent."<sup>62</sup>

It will be difficult for a state to assert an interest based on the inability of the minor to give effective consent if, as is the case with both the Missouri and Massachusetts statutes, the written consent of the minor as well as that of her parents is necessary before the abortion can be performed on the minor.<sup>63</sup> If the parents' consent is needed in lieu of the minor's consent, why is the minor's consent needed, too? If the minor is incapable of giving informed consent because she cannot make the decision in her own best interest, then whether the minor consents or not should be irrelevant, if the interest of the state is to protect the best interests of the minor.<sup>64</sup>

<sup>58</sup>*Id.* at 72-73; *State v. Koome*, 84 Wash. 2d 901, P.2d 260 (1975).

<sup>59</sup>*Poe v. Gerstein*, 517 F.2d 787, 792 (5th Cir. 1975).

<sup>60</sup>The State argued that Missouri law "is replete with provisions reflecting the interest of the state in assuring the welfare of minors. . . ." and that "[c]ertain decisions are considered by the State to be outside the scope of a minor's ability to act in his own best interest. . . ." 428 U.S. at 72. "Thus, a State's permitting a child to obtain an abortion without the counsel of an adult 'who has responsibility or concern for the child would constitute an irresponsible abdication of the State's duty to protect the welfare of minors.'" *Id.* at 72-73.

<sup>61</sup>Although the Court never discusses the state's interest in protecting a minor's informed consent by requiring parental consent, the Court's inclination to deny such interest is supported in its statement that "[t]he fault with § 3(4) [of the Missouri statute requiring parental consent] is that it imposes a special consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so *without a sufficient justification for the restriction.*" 428 U.S. at 75 (emphasis added).

<sup>62</sup>Note, *Parental Consent Requirements and Privacy Rights of Minors: the Contraceptive Controversy*, 88 HARV L. REV. 1001 (1975).

<sup>63</sup>MASS. ANN. LAWS. ch. 112, § 12P (Michie/Law. Co-op 1975).

<sup>64</sup>It might be argued that the minor's consent is necessary, not because of her ability to contribute to a determination of what is in her best interests, but only as a precaution to protect the physician from possible charges of assault and battery which may follow unauthorized invasions of the minor's body. However, the consent which must be given to protect a doctor from possible assault charges is not a lesser consent than that which is involved in the minor's decision to have an abortion: "To be valid, any consent must be an 'informed' one. . . ." Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115 (1973).

The state may also argue that requiring parental consultation or consent is a means of ensuring that the minor will have guidance in making her decision whether or not to have an abortion. If so, then in order to show a compelling state interest the state must demonstrate that the child is without sufficient guidance absent state intervention. In *Roe*, the Court found that the pregnant woman's attending physician provides significant guidance. According to *Roe*, the decision whether or not to terminate one's pregnancy is not the woman's alone, even during the first trimester of pregnancy: "For the stage prior to approximately the end of the first trimester, the abortion decision . . . must be left to the *medical judgment of the pregnant woman's attending physician*."<sup>65</sup> Thus the minor will not be making the decision alone. Even if she is convinced that an abortion would be in her own best interest, the decision must also be concurred in by her doctor.

Nor can it be maintained that either the scope or quality of guidance which a minor would receive from her physician would differ significantly from that which would be provided by the parents. Statutes requiring parental consent before an abortion can be performed on a minor have been interpreted to limit the permissible deliberations of the parents to an assessment of what would be in their daughter's best interests.<sup>66</sup> While the role of the doctor in the abortion decision is referred to in *Roe* as the exercise of "medical judgment," the variety of factors which a doctor may consider in arriving at his decision has been recognized by the Court to be quite broad: "[M]edical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well being of the patient."<sup>67</sup> While the parents may have a more personal knowledge of the minor than the physician, it has been shown that because of their personal attachment to their child, parents' reactions to their minor daughter's pregnancy may result in a decision not in the minor's best interests.<sup>68</sup> Thus

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<sup>65</sup>*Roe v. Wade*, 410 U.S. 113, 164 (1973)(emphasis added). See notes 66-69 *infra* & text accompanying for a discussion as to the scope and quality of the doctor's role in the abortion decision.

<sup>66</sup>*Baird v. Attorney Gen.*, 360 N.E.2d 288, 292 (Mass. 1977).

<sup>67</sup>*Doe v. Bolton*, 410 U.S. 179, 192 (1972). As to the quality of the physician's counseling expertise, Mr. Justice Blackmun states that "[t]he good physician . . . will have sympathy and understanding for the pregnant patient that probably are not exceeded by those who participate in other areas of professional counseling." *Id.* at 197.

In *Roe v. Wade*, 410 U.S. 113 (1973), Mr. Justice Blackmun lists some of the "factors the woman and her responsible physician will consider in consultation":

Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.

In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

*Id.* at 153.

<sup>68</sup>See, e.g., *Baird v. Bellotti*, 393 F. Supp. 847 (D. Mass. 1975) (finding that some parents insist upon the continuation of their daughter's pregnancy as a punishment); *State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1975) (father of the minor opposed the abortion in the belief that requiring her to continue her pregnancy would deter her from becoming pregnant in the future and her guardian opposed the abortion on religious grounds).

the detachment of the physician may allow him to make a more objective determination of what would serve the best interests of the child.<sup>69</sup>

Given the scope and nature of the physician's role in the abortion decision, the state's interest in ensuring the welfare of the minor is well protected without the necessity of state intervention.<sup>70</sup> The state cannot thus successfully argue that a minor is without sufficient guidance in making the decision as to whether or not an abortion would be in her own best interests.<sup>71</sup>

In legislation regarding other categories of health care, many states, including Massachusetts and Missouri, have themselves recognized the limitations of parental consent requirements. These statutes, which allow minors to receive medical care without parental consultation or consent, most often apply to treatment of drug addiction or rehabilitation, pregnancy and childbirth, family planning or birth control, and venereal disease.<sup>72</sup> This legislation recognizes that a requirement of parental consultation or consent may be counterproductive in furthering the best interests of the minor by deterring the minor from seeking needed medical services as early as desirable.<sup>73</sup> States have recognized that minors may be unwilling to consult their parents, and have determined that the interest in ensuring an informed consent must be subordinated to the state's greater interest in ensuring that the minor receives medical treatment as soon as possible. A similar reluctance to consult one's parents exists when the minor is pregnant and considering abortion. Considering the high incidence of physical and psychological risks associated with pregnancy and childbirth during the teenage years,<sup>74</sup> and the possible problems which unwed motherhood may impose on a minor,<sup>75</sup> in

<sup>69</sup>For guidelines as to the physician's role in counseling patients considering abortion, see Marcin & Marcin, *The Physician's Decision-Making Role in Abortion Cases*, 35 THE JURIST 66 (1975); Proceedings of the AMA House of Delegates 220 (June 1970); Butler & Fujita, *Abortion Screening and Counseling: A Brief Guide for Physicians*, 50 POSTGRADUATE MEDICINE 208 (1971); Margolis, *Some Thoughts on Medical Evaluation and Counseling of Applicants for Abortion*, 14 CLINICAL OBSTETRICS AND GYNECOLOGY 1255 (1971).

<sup>70</sup>If the state felt that the ordinary counseling process between patient and physician was inadequate to meet the needs of the minor, a statute might provide for a period of counseling by the physician, with material specially geared to the needs of minors to be covered during that counseling. In order to insure that such counseling did take place, a certificate of consultation, signed by patient and physician might be required.

<sup>71</sup>If the state felt that counseling in addition to that between doctor and patient was necessary, it might require evidence of consultation with a professional counseling agency, although if expense or an extended period of counseling is involved the question of undue burden on the minor's right to privacy will arise. In any event, the requirement of consultation with a party other than the parents may be shown to be at least as effective as consultation with the parents in improving the quality of the decisionmaking process when a minor is considering terminating her pregnancy.

<sup>72</sup>E.g., COLO. REV. STAT. § 25-6-201 (1974) (birth control services); DEL. CODE ANN. tit. 13, § 707 (Michie 1975) (pregnancy treatment); IND. CODE § 16-8-5-1 (1976) (venereal disease); MASS. ANN. LAWS. ch. 112, § 12E (Michie/Law. Co-op 1975) (drug addiction); VA. CODE § 32-137 (1973) (venereal disease).

<sup>73</sup>Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115, 122 (1973).

<sup>74</sup>Schwartz, *Abortion on Request: The Psychiatric Implications*, in ABORTION, SOCIETY AND THE LAW 139, 152 (D. Walbert & J. Butler eds. 1973).

<sup>75</sup>See Menken, *The Health and Social Consequences of Teenage Childbearing*, 4 FAMILY PLAN. PERSPECTIVES 43 (1972).

many cases abortion may be in the best interests of the minor. If so, the state would have a compelling interest, as in the areas of venereal disease and pregnancy, in ensuring that the treatment be undertaken as soon as possible, since that is when the procedure is safest.<sup>76</sup> It will be very difficult for the state to assert that its interest in ensuring an informed decision in the case of abortion is compelling enough to overcome its interest in promoting timely medical treatment, especially since the interest of the state "in protecting minors from improvidently consenting to medical treatment is not consistently asserted and appears not to be present in a variety of health situations . . . ."<sup>77</sup> Such an interest does not fit the definition of a compelling state interest given by the Supreme Court in *Thomas v. Collins*: "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."<sup>78</sup>

#### CONCLUSION

The Supreme Court has held unconstitutional statutes requiring parental consent before an abortion can be performed on an unmarried minor. However, no ruling has yet been made with regard to statutes requiring parental consent, but which provide for the possibility of a court order in lieu of parental consent when a minor shows good cause for granting such an order. While such statutes do not give parents an absolute veto over their daughter's decision to have an abortion, the statutes do infringe on the minor's constitutionally protected right to determine whether or not to terminate her pregnancy.

Since the physician plays a mandatory role in any woman's decision to have an abortion, the state's asserted interest based on the premise that minors are without sufficient guidance in making the decision is not compelling. If the state's interest in guidance were recognized by the Court, such statutes would nevertheless fall, since there are other methods for ensuring an informed decision by a minor which would not infringe so greatly on the minor's rights, and which would be more effective in accomplishing any interest which the state might have in protecting the welfare of minors.

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<sup>76</sup>See note 51 *supra*.

<sup>77</sup>Pilpel & Zuckerman, *Abortion and the Rights of Minors*, in *ABORTION, SOCIETY AND THE LAW* 275, 289 (D. Walbert & J. Butler eds. 1973).

<sup>78</sup>323 U.S. 516, 530 (1945).