Abortions for Minors after Bellotti II: An Analysis of State Law and a Proposal.

Gerry D. Abel Lozano

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ABORTIONS FOR MINORS AFTER *BELLOTTI II*:
AN ANALYSIS OF STATE LAW AND A PROPOSAL

GERRY D. ABEL LOZANO

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
<td>947</td>
</tr>
<tr>
<td>II. History of Abortion Laws</td>
<td>950</td>
</tr>
<tr>
<td>A. Anti-Abortion</td>
<td>950</td>
</tr>
<tr>
<td>B. Abortion Legalized</td>
<td>951</td>
</tr>
<tr>
<td>D. Current Laws</td>
<td>952</td>
</tr>
<tr>
<td>III. State Legislation to Regulate Legal Abortion</td>
<td>953</td>
</tr>
<tr>
<td>A. Licensed Physician Requirement</td>
<td>953</td>
</tr>
<tr>
<td>B. Joint Commission on Accreditation of Hospitals Restriction</td>
<td>954</td>
</tr>
<tr>
<td>C. Licensed Facility Requirement</td>
<td>955</td>
</tr>
<tr>
<td>D. Recordkeeping and Reporting Requirements</td>
<td>957</td>
</tr>
<tr>
<td>E. Proposals</td>
<td>958</td>
</tr>
<tr>
<td>IV. Patient-Physician Roles</td>
<td>959</td>
</tr>
<tr>
<td>A. Minor’s Capacity to Consent</td>
<td>959</td>
</tr>
<tr>
<td>B. Physician-Patient Consultation Prior to Abortion</td>
<td>960</td>
</tr>
<tr>
<td>C. Specifying the Content of Informed Consent</td>
<td>962</td>
</tr>
<tr>
<td>D. Physician Immunity</td>
<td>964</td>
</tr>
<tr>
<td>E. Approval of Physician’s Decision Restriction</td>
<td>965</td>
</tr>
<tr>
<td>F. Viability: Medical v. Legislative Determination</td>
<td>966</td>
</tr>
<tr>
<td>G. Proposals</td>
<td>968</td>
</tr>
<tr>
<td>V. Parental Role in the Minor’s Abortion Decision</td>
<td>968</td>
</tr>
<tr>
<td>A. Parental Consent Laws</td>
<td>968</td>
</tr>
<tr>
<td>B. Parental Notice Statutes</td>
<td>971</td>
</tr>
<tr>
<td>C. Proposals</td>
<td>974</td>
</tr>
<tr>
<td>VI. Judicial Role in Minors’ Abortion Decisions</td>
<td>975</td>
</tr>
<tr>
<td>A. <em>Bellotti I</em>: Judicial-Parental Consent Statute</td>
<td>975</td>
</tr>
<tr>
<td>B. The Illinois Abortion Parental Control Act of 1977</td>
<td>976</td>
</tr>
<tr>
<td>C. <em>Bellotti II</em>: From the Known to the Unknown</td>
<td>978</td>
</tr>
<tr>
<td>1. <em>Bellotti II</em>’s Hypothetical Alternative Consent Law</td>
<td>978</td>
</tr>
<tr>
<td>2. Massachusetts’ Parental-Judicial Consent Law</td>
<td>979</td>
</tr>
</tbody>
</table>
1. In 1976 there were approximately 1,208 abortions per 1,000 live births for women under 15. See Pub. Health Serv., U.S. Dept. of Health, Educ. & Welfare, Center for Disease Control: Abortion Surveillance 1976, at 4, 23-24 (1978) (HEW Pub. No. (CDC) 78-8205). This is the only age group in which abortions outnumber live births. See id. at 23-24. In 1976 the total number of legal abortions, 988,267, represents 313 abortions to every 1000 live births. Id. at 16.


3. Data reported from twenty-six states indicates that of the 81,829 abortions performed on minors (13-17) the following distribution occurred:

<table>
<thead>
<tr>
<th>Age</th>
<th>Total Abortions</th>
<th>% of Total Teenage Abortions</th>
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</thead>
<tbody>
<tr>
<td>a.</td>
<td>13</td>
<td>1,307</td>
</tr>
<tr>
<td>b.</td>
<td>14</td>
<td>5,544</td>
</tr>
<tr>
<td>c.</td>
<td>15</td>
<td>14,475</td>
</tr>
<tr>
<td>d.</td>
<td>16</td>
<td>25,792</td>
</tr>
<tr>
<td>e.</td>
<td>17</td>
<td>34,711</td>
</tr>
</tbody>
</table>


4. Of the 21 million youth in the United States between 15 and 19 years of age, more than half have had sexual intercourse—7 million males and 4 million females. One-fifth of the 8 million 13-14 year olds are postulated to have had sexual intercourse. By age the following approximations of sexual intercourse are provided:
contraceptives ensure that abortion services will continue to be in demand. The total number of minors actually receiving abortions is unknown because only twenty-six states report data specifically delineating abortions provided to minors.

Providing abortion services to minors without obtaining parental consent was first sanctioned in 1976 by the United States Supreme Court in Planned Parenthood v. Danforth. The Court declared no state has the constitutional authority to permit any third party veto of the decision of a minor and her physician to terminate the minor’s pregnancy during the

a. 10% of all 13 year old unmarried women.
b. 17% of all 14 year old unmarried women.
c. 24% of all 15 year old unmarried women.
d. 31% of all 16 year old unmarried women.
e. 35% of all 17 year old unmarried women.

ALAN GUTTMACHER INSTITUTE, 11 MILLION TEENAGERS: WHAT CAN BE DONE ABOUT THE EPIDEMIC OF ADOLESCENT PREGNANCIES IN THE UNITED STATES


6. Of the approximately two million girls who turned 14 in 1978, about 15 percent will have obtained at least one legal abortion by age 20. Tietze, Teenage Pregnancies: Looking Ahead to 1984, 10 Fam. Plan. Perspectives 205, 206 (1978).


8. 428 U.S. 52, 74 (1976). The Danforth court reviewed a Missouri statute requiring parental consent for minors to receive an abortion unless necessary to preserve the mother’s life. See id. at 56, 72. Requiring parental consent for a minor before she may receive an abortion inhibits her ability to exercise abortion as an alternative. See Note, The Validity of Parental Consent Statutes After Planned Parenthood, 54 J. Urb. L. 127, 141-42, 143 (1976).
first trimester. More recently in *Bellotti v. Baird (Bellotti II)*, the Supreme Court reaffirmed the *Danforth* holding and continued the controversial inquiry into minors' abortion rights.

Disputes concerning abortion rights for minors will undoubtedly con-


10. --- U.S. ---, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979). The decision will hereinafter be referred to as *Bellotti II* since this is the second time the Supreme Court has heard the case. See id. at ---, 99 S. Ct. at 3052 n.32, 61 L. Ed. 2d at 818 n.32. The case began when a class action suit was filed to enjoin enforcement of a 1974 Massachusetts statute which made it a criminal offense to perform an abortion on a minor without parental consent or a judicial order. The court denied defendants' motion to abstain pending authoritative interpretive statement of the Massachusetts Supreme Judicial Court; the statute was held unconstitutional, and its enforcement enjoined. See *Baird v. Bellotti*, 393 F. Supp. 847, 849, 857 (D. Mass. 1975) (*Baird I*). This decision was then appealed to the United States Supreme Court. The Court agreed with appellants that the federal district court had no basis to determine the constitutionality of the statute in issue. The Supreme Court, therefore, vacated the lower court's decision and remanded the case with direction that the federal district court certify questions concerning interpretation of the statute to the Massachusetts Supreme Judicial Court. See *Bellotti v. Baird*, 428 U.S. 132, 151-52 (1976) (*Bellotti I*). Upon remand, the district court sent a list of certified questions to the Massachusetts Supreme Judicial Court who interpreted the language of the statute in issue by responding to the certified questions. The court stated the stay of enforcement of the statute would expire 20 days after receipt of this opinion by the federal district court. See *Baird v. Attorney General*, 360 N.E.2d 288, 303 (Mass. 1977). Upon receipt of these certified answers, the federal district court entered a judgment staying the operation of the statute pending their decision on the constitutionality of the statute. See *Baird v. Bellotti*, 428 F. Supp. 854, 855, 857 (D. Mass. 1977) (*Baird II*). Upon review of the state's interpretation of its statute, the district court once again, as in *Baird I*, held the statute unconstitutional and permanently enjoined its enforcement. See *Baird v. Bellotti*, 450 F. Supp. 997, 1006 (D. Mass. 1978) (*Baird III*). On direct appeal, the United States Supreme Court in July 1979 affirmed the district court's finding the Massachusetts statute unconstitutional. See *Bellotti v. Baird*, --- U.S. ---, 99 S. Ct. 3035, 3052, 61 L. Ed. 2d 797, 818 (1979) (*Bellotti II*).

continue for years because of fundamental and, perhaps, irreconcilable disagreement over the degree to which the law should reflect religious and social values. The purpose of this comment is twofold. Initially, it will analyze how abortion laws in the United States affect the abortion rights of minors. Such analysis will reveal there is virtually no regulation of abortion procedures performed on minors because the majority of the existing laws are unconstitutional. A statute will then be proposed to demonstrate constitutional requirements for regulation of the abortion rights of minors. This comment does not challenge laws granting minors the right to abortions in consultation with their physician unhampered by any third party veto. Rather, the goal is to acknowledge and clarify the existing right as established by the United States Supreme Court in Danforth and Bellotti II and to propose legislation that will regulate the right and withstand constitutional challenge.

II. HISTORY OF ABORTION LAWS

A. Anti-Abortion

When criminal anti-abortion laws were first enacted, abortion was a medically dangerous and sometimes fatal procedure. States legislated anti-abortion laws to prevent women from exposure to medical risks unless the abortion was necessary to preserve the woman's life. Modern medical techniques now make early abortions safer than childbirth. Although abortion was a crime at common law, abortions performed before "quickening"—first movement of the fetus in the uterust—were not a


13. For a summary of the laws in the United States and their impact on minors' abortion rights, see Appendix I, Abortion Laws in the United States: Summary, Classification, and Status.


crime. Early abortion laws in the United States adopted this distinction. Connecticut, the first state to enact anti-abortion legislation, declared in 1821 that intentional destruction of a quickened fetus was a crime. By the time the fourteenth amendment was adopted in 1868, thirty-six states and territories had passed laws limiting abortion. By August 1970, twenty-one of these anti-abortion laws were still in effect and enforceable. During the late 19th century, however, the distinction between quick and nonquick fetuses disappeared, and by the late 1950's most states prohibited all abortions unless necessary to save the life of the mother.

B. Abortion Legalized

In 1973 the United States Supreme Court's landmark decision, Roe v. Wade, held anti-abortion laws unconstitutional. Roe announced that an individual's right of privacy encompassed a woman's right to decide "whether or not to terminate her pregnancy." During the first trimester of pregnancy a woman, in consultation with her physician, may elect to have an abortion, and the state has no right to interfere with, regulate, or limit this decision. After the first trimester and before viability of the

21. See id. at 176 n.2 (Rehnquist, J., dissenting).
26. Id. at 153, 163. Although the state cannot unduly burden the abortion decision or process, requirements to protect the state's interest may be imposed. See, e.g., Maher v.
fetus, the state may regulate the abortion procedure in reasonable ways to protect the mother's health. After viability a state may prohibit abortion entirely to protect the fetal life except when the abortion is necessary to preserve the mother's life or health.

C. Current Laws

Approximately nine states have anti-abortion statutes that have been challenged and held unconstitutional. Rhode Island has both an unconstitutional anti-abortion statute and a statute prohibiting abortion of a

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27. See Roe v. Wade, 410 U.S. 113, 164 (1973). Reasonable state regulations may be imposed even during the first trimester if they do not "legally . . . impact or consequence the abortion decision or . . . the physician-patient relationship." Planned Parenthood v. Danforth, 428 U.S. 52, 80-81 (1976) (recordkeeping and reporting requirements); Connecticut v. Menillo, 423 U.S. 9, 11 (1975) (per curiam) (even first trimester abortion may be restricted to performance by a licensed physician only).

28. Roe v. Wade, 410 U.S. 113, 164-65 (1973). Actually, Roe is reenacting the common law practice of prohibiting abortions only when the fetus is quick. Compare id. at 160 (viability occurs when fetus is potentially able to live outside womb with medical assistance) with R.I. GEN. LAWS § 11-23-5 (1970) (quickened fetus is one capable of surviving birth with available medical aid).


30. See R.I. GEN. LAWS §§ 11-3-1 to 11-3-5 (1969 & Supp. 1979). The statute as originally written was held unconstitutional. Doe v. Israel, 358 F. Supp. 1193, 1199, 1202 (D. R.I.)
quickened fetus which, when challenged, was upheld as constitutional.31 New Hampshire is the only other state with a statute prohibiting abortion of a quickened fetus.32 Five states have unchallenged anti-abortion statutes33 that are contrary to the Roe holding. Since Roe the Supreme Court has only upheld an anti-abortion statute as constitutional when it was enforced against a non-physician.34

III. STATE LEGISLATION TO REGULATE LEGAL ABORTIONS

A pregnant woman’s right to an abortion during the first trimester is not absolute.35 A state has the right to protect the health of its citizens so long as such protection does not constitute a “legally significant impact or consequence on the abortion decision or on the physician-patient relationship.”36 Decisions since Roe have upheld reasonable state regulations during the first trimester.37

A. LICENSED PHYSICIAN REQUIREMENT

In declaring anti-abortion statutes unconstitutional, the Roe decision

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31. See R. I. GEN LAWS § 11-23-5 (1970). Statute upheld as constitutional because state prohibition of abortion after fetus is quickened is not contrary to Roe’s guidance that a state may prohibit abortions after viability. See Rodos v. Michaelson, 527 F.2d 582, 585 (1st Cir. 1975).


37. See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52, 80 (1976) (recordkeeping and reporting requirements); Connecticut v. Menillo, 423 U.S. 9, 11 (1975) (per curiam) (abortion may be performed only by licensed physician); Doe v. Bolton, 410 U.S. 179, 191-92 (1973) (abortions limited to only those necessary in physician’s best clinical judgment).
applied only to competent licensed physicians who performed abortions under safe, clinical conditions. The *Roe* decision did not hold anti-abortion statutes void and unenforceable against a non-physician abortionist. In *Connecticut v. Menillo* the Supreme Court clarified *Roe's* holding by affirming a state's conviction of a non-physician for violation of the state anti-abortion statute. It is reasonable, therefore, to correlate this principle with laws governing minors' abortions and conclude that a state may criminally prosecute a non-physician for performing an abortion on a consenting minor.

**B. Joint Commission on Accreditation of Hospitals Restriction**

In *Doe v. Bolton,* the companion case to *Roe,* the Supreme Court ruled unconstitutional a state's requirement that abortions be performed only in hospitals accredited by the Joint Commission on Accreditation of Hospitals (JCAH). Such a requirement was found indefensible since there was no evidence showing non-JCAH hospitals were inadequate to perform medically safe abortions. The Court further stated performance of first trimester abortions could not be limited to hospitals. There was no proof the full resources and expense of a hospital rather than the resources of some appropriately licensed medical facility were necessary to

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39. See *Connecticut v. Menillo,* 423 U.S. 9, 10 (1975) (per curiam). According to *Menillo,* the *Roe* court's restriction of first trimester abortions was predicated upon the premise that first trimester abortion was as safe for the woman as normal childbirth; this premise is valid only if the abortion is performed by a physician under conditions ensuring maximum safety for the woman. *Id.* at 11.
42. 410 U.S. 179 (1973).
43. See *id.* at 195.
44. See *id.* at 194-95, 201. The *Doe* court held a Georgia statute unconstitutional that required all abortions be performed in a JCAH hospital. *Id.* at 201. This statute remains in the Georgia code. See *Ga. Code Ann.* § 26-1202(b) (1978 & Supp. 1979).
Eleven states have unchallenged laws in conflict with the holdings of *Doe.* California and Maryland require all abortions be performed in a JCAH hospital. Somewhat less restrictive, but nevertheless unconstitutional, Hawaii and Oklahoma statutes direct all abortions be performed in a hospital. Seven other states require a hospital be used for abortions done either after twelve weeks or during the second trimester.

C. Licensed Facility Requirement

The *Roe* opinion stated that *after the end* of the first trimester a state could regulate the abortion procedure to preserve and protect maternal health. As examples of permissible state regulations, *Roe* listed licensing of both the person performing the abortion and the facility housing the abortion procedure. Since the Supreme Court subsequently allowed states to impose licensing requirements upon persons performing abortion

46. See *Doe v. Bolton,* 410 U.S. 179, 195 (1973). The *Doe* opinion reasoned that facilities other than hospitals may be adequate to perform abortions if they possess the staff necessary to perform abortions safely. *Id.* at 195. The Court advised that doing away with the JCAH requirement did not mean a state could not enact licensing standards for facilities performing abortions "from and after the end of the first trimester." *Id.* at 195. The *Doe* Court did not address whether facilities performing first trimester abortions could be compelled to meet state health standards and licensing laws. *Cf.* Friendship Medical Center, Ltd. v. Chicago Bd. of Health, 505 F.2d 1141, 1144-45, 1150-51 (7th Cir. 1974) (application of board of health regulations to facility constitutes unconstitutional inference with first trimester abortion right based on *Roe* and *Doe*), cert. denied, 420 U.S. 997 (1975). See generally *Doe v. Bolton,* 410 U.S. 179 (1973); Uddo, A Wink From the Bench: The Federal Courts and Abortion, 53 Tul. L. Rev. 398, 415-18 (1979).

47. See CAL. HEALTH & SAFETY CODE § 25951(a) (Deering 1975); MD. ANN. CODE art. 43, § 137(a) (1957 & Supp. 1978).


50. See IND. CODE ANN. § 35-1-58.5-2(b)(2) (Burns 1979); LA. REV. STAT. ANN. § 40:1299.35.3 (West Supp. 1980); MINN. STAT. ANN § 145.412(1), (2) (West Supp. 1979); TENN. CODE ANN. § 39-301(e)(2) (1975); UTAH CODE ANN. § 76-7-302(2) (1978); VA. CODE § 18.2-74(a), (b) (1975).

51. See *Roe v. Wade,* 410 U.S. 113, 163 (1973); *Baird v. Department of Pub. Health,* 599 F.2d 1098, 1101 (1st Cir. 1979). *Roe* also held states could not regulate or prohibit abortions during the first trimester. See *Roe v. Wade,* 410 U.S. 113, 142 (1973). This holding, however, was subsequently interpreted as applicable only to those state restrictions that "significantly impact or consequence" the abortion decision or the physician-patient relationship during the first trimester. See *Planned Parenthood v. Danforth,* 428 U.S. 52, 81 (1976); *Baird v. Department of Pub. Health,* 599 F.2d 1098, 1101 (1st Cir. 1979); Westchester Women's Health Organization, Inc. v. Whalen, 475 F. Supp. 734, 740 (S.D. N.Y. 1979).

before the end of the first trimester, the First Circuit Court of Appeals in Baird v. Department of Public Health reasoned it was, therefore, permissible for states to enforce licensing of facilities performing first trimester abortions. Unless these restrictions are unduly burdensome or significantly impact the availability of abortion services, such laws do not violate Roe.

States may promulgate laws necessary to maintain medical standards. "The state has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." State restrictions may not, however, cause significant impact or consequence to the abortion decision or upon the physician-patient relationship during the first trimester. Lower courts since Roe have only upheld state licensing requirements that do not impose greater restrictions on abortion clinics than are required of facilities performing medically analogous procedures. Following this gui-

54. 599 F.2d 1098 (1st Cir. 1979).
55. Id. at 1102-03; accord, Hodgson v. Lawson, 542 F.2d 1350, 1358 (8th Cir. 1976) (general medical facility licensing standards enforceable against abortion facilities); Florida Women's Medical Clinic, Inc. v. Smith, 478 F. Supp. 233, 236 (S.D. Fla. 1979) (statutory licensing requirements applicable to facilities terminating first trimester pregnancies).
58. Id. at 149-50.
60. See Baird v. Department of Pub. Health, 599 F.2d 1098, 1102 (1st Cir. 1979) (upheld Massachusetts general clinic licensing law which did not apply solely to abortion clinics); Hodgson v. Lawson, 542 F.2d 1350, 1357-58 (8th Cir. 1976) (abortion clinic restrictions only valid if consistent with those restrictions that regulate clinics with similar surgical procedures); Westchester Women's Health Organization, Inc. v. Whalen, 475 F. Supp. 734, 741 (S.D. N.Y. 1979) (requirement that abortion clinics conform to minimum health standards upheld); cf. Friendship Medical Center, Ltd. v. Chicago Bd. of Health, 505 F.2d 1141, 1153-54 (7th Cir. 1974) (required facilities, equipment, and supplies must be maintained in working order and sanitary condition), cert. denied, 420 U.S. 997 (1975); Abortion Coalition v.
dance, licensing of abortion clinics is essential if a state is to ensure that minors are receiving medically approved abortion procedures performed under general health, sanitary, and safety standards.61

Roe was initially interpreted as severely limiting the regulation of abortion clinics.62 Only a few states currently have licensing provisions in their abortion statutes.63 Other states have enforced their general health facilities licensing laws against abortion facilities.64 Recent case law suggests the constitutionality of each law will depend upon a case-by-case evaluation of the law's impact upon abortion services.65

D. Recordkeeping and Reporting Requirements

In Danforth the Supreme Court ruled states may impose recordkeeping and reporting requirements on physicians performing first trimester abortions.66 The requirements, however, must be reasonably related to protection of maternal health and must ensure a patient's confidentiality and privacy are preserved.67 Danforth further cautioned such requirements


65. See Baird v. Department of Pub. Health, 599 F.2d 1098, 1102 (1st Cir. 1979).


may not significantly interfere with "the abortion decision or the physician-patient relationship." 68 In approving the challenged Missouri statute, the Danforth Court expressly assumed enforcement of these general statutes would not impose unduly tedious or burdensome details upon abortion providers. 69 If implemented in a reasonable manner, requirements for abortion reports and records can increase medical knowledge and ultimately ensure abortions are performed in accordance with the law. 70 Specific statistics on abortions are an essential prerequisite for objective analysis of whether abortions conform with Supreme Court guidance and community medical standards. 71 The Supreme Court's primary goal has been to prevent a state's interference with either the abortion decision or the physician-patient relationship during the first trimester rather than to deny state regulatory authority. 72

E. Proposals

State law regulating abortions for minors should affirm that women have a constitutional right to request medical termination of their first trimester pregnancies without interference by the state. 73 To protect a minor against receiving non-standard or fraudulent medical care, the


69. See Planned Parenthood v. Danforth, 428 U.S. 52, 81 (1976). The court will presume abortion regulations which are seemingly neutral on their face are permissible; however, evidence or expert testimony on the effect of the regulation on either the abortion decision or upon the physician-patient relationship will overcome this presumption. See Baird v. Department of Pub. Health, 599 F.2d 1098, 1102 (1st Cir. 1979). There is no standard by which to determine what constitutes burdensome requirements. See Wood & Durham, Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship, 1978 B.Y.U. L. Rev. 783, 810-11, 816-17. Oklahoma's reporting and recording statute was analyzed to be constitutional in light of Danforth's rule that such requirements be reasonable and not unduly tedious. See OKLA. STAT. ANN. tit. 63, §§ 1-738, 1-739 (West Supp. 1979); Note, Constitutional Law: A Constitutional Analysis of the New Oklahoma Abortion Statute, 32 Okla. L. Rev. 138, 138 nn.11 & 13 (1979).

70. See Planned Parenthood v. Danforth, 428 U.S. 52, 79, 81 (1976). It has been estimated that twenty to thirty percent of criminal abortions performed prior to Roe and Doe were performed on non-pregnant women. Marcin & Marcin, The Physician's Decision-Making Role in Abortion Cases, 36 The Jurist 66, 68 (1975).


73. See Appendix II, § III.
statute should expressly provide that abortions may be performed only by licensed physicians, specifically trained for such procedures.\textsuperscript{74} States should further stipulate that all abortions on minors be performed in a licensed facility or hospital. Performance of abortions after the first trimester should not be limited to hospitals unless the physician decides such a measure is necessary for the health and safety of the patient.\textsuperscript{75} To ensure monitoring of these services, states should impose reporting and recordkeeping requirements on physicians and facilities providing abortions to minors.\textsuperscript{76}

IV. PATIENT-PHYSICIAN ROLES

A. Minor's Capacity to Consent

*Danforth* emancipated a pregnant minor for the limited purpose of deciding, in consultation with her physician, whether to terminate her pregnancy before the fetus becomes viable.\textsuperscript{77} The abortion decision is primarily a medical one\textsuperscript{78} wherein the physician's medical judgment should be exercised in light of all factors affecting the patient: physical, emotional, psychological, and familial.\textsuperscript{79} Compelled parental interference with this physician-patient decision is unconstitutional\textsuperscript{80} because it negates a minor's constitutional right to make her decision privately and independently.\textsuperscript{81} Realistically, parents cannot prevent their daughter from becoming pregnant once she has reached the age of fertility. The age of fertility, therefore, is the minimum standard a state should use to establish when a minor is emancipated for the purpose of consenting to abortion.\textsuperscript{82} One author has observed that the justification for emancipation

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\textsuperscript{74} See Appendix II, § IV.
\textsuperscript{75} See Appendix II, § IX.
\textsuperscript{76} See Appendix II, § V.
\textsuperscript{80} Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976); see Bellotti v. Baird, — U.S. —, 99 S. Ct. 3035, 3046, 3048, 61 L. Ed. 2d 797, 811, 813 (1979); Wynn v. Carey, 582 F.2d 1375, 1394 (7th Cir. 1978).
\textsuperscript{81} See Bellotti v. Baird, — U.S. —, 99 S. Ct. 3035, 3054, 61 L. Ed. 2d 797, 820-21 (1979) (Stevens, J., concurring).
stems ultimately from a judicial recognition that those who insist upon parental consent are concerned less with the child's well being than they are with opposing abortion.83

B. Physician-Patient Consultation Prior to Abortion

Especially when minors are involved,84 a physician-patient consultation should precede any abortion.85 Signed consent forms alone do not mean a minor has given valid informed consent unless such consent was given after a pretreatment physician-patient consultation.86 The Roe opinion
has been interpreted as impliedly assuming a physician-patient consultation would occur. This assumption was supported by Doe's description of the physician's special skill as a counselor. In contrast to the implication in Roe and Doe that physicians would necessarily counsel their patients, abortion clinics have been stereotyped as business enterprises where the physician never sees the patient before the abortion. Acknowledging the prevalence of the stereotype clinic, the Danforth Court expressed special concern that minors were routinely not counseled by their physicians before the abortion, a procedure completed normally in five to seven minutes. It has been suggested that a state could accomplish its goal of ensuring informed consent by statutorily making the physician responsible for deciding if the minor's consent is valid, informed, and voluntary. Even if doctor-patient consultation were required, the physician's medical judgment may be distorted by the financial gains inherent in performing abortions. The physician-patient consultation will usually be beneficial; as in the words of Chief Justice Burger, "the vast majority of physicians observe the standards of their profession, and act

tutional. See Wolfe v. Schroering, 541 F.2d 523, 526 (6th Cir. 1976).


88. See Doe v. Bolton, 410 U.S. 179, 197 (1973). "The good physician—despite the presence of rascals in the medical profession as in all others [professions], we trust that most physicians are 'good'—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.

89. The Supreme Court's vision of an effective doctor-patient relationship necessarily preceding the abortion decision is contrary to the reality of contemporary abortion in practice. Wood & Durham, Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship, 1978 B.Y.U. L. Rev. 783, 784.


92. States should assist and regulate the physician since he plays perhaps the most critical role in the minor's abortion decision. See Note, Baird v. Bellotti: Abortion—The Minor's Right To Decide, 33 U. MIAMI L. Rev. 705, 719-20 (1979).

only on the basis of carefully deliberated medical judgments relating to life and health.  

Kentucky has a consultation statute requiring the physician to counsel patients prior to a second trimester abortion. In *Wolfe v. Schroering* the Sixth Circuit Court of Appeals upheld the constitutionality of this statute. The court defended the statute by explaining that “informing the expectant mother of the reasonably possible physical and mental consequences of the performance of the abortion or the non-performance” ensures the abortion decision is an informed decision.

Maine’s newly enacted statute directs the attending physician to counsel a woman to ensure her consent is truly informed. Challenging the statute in *Women’s Community Health Center, Inc. v. Cohen*, plaintiffs argued that requiring physicians to give the informed consent information to the patient was medically unnecessary, burdensome, and an intentional obstacle “designed to discourage women from having abortions.” The *Cohen* court, in upholding the statute, countered that although the statute increased the physician’s involvement, plaintiffs had neither proven such involvement would significantly increase the cost of abortions nor had the plaintiffs shown that such a law unduly burdened a woman’s constitutional right to an abortion.

C. Specifying the Content of Informed Consent

Restricting abortion services by requiring a physician to obtain prior, written informed consent from the patient was approved by *Danforth*.

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94. Roe v. Wade, 410 U.S. 113, 208 (1973) (Burger, C.J., concurring). One article has postulated that state control over the physician’s involvement in the abortion decision may be limited by the integrity of physicians, but it is the only avenue remaining for significant state involvement in abortions. See Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U. L. Rev. 783, 785-86.


96. 541 F.2d 523 (6th Cir. 1976).

97. *See id.* at 526.

98. *See id.* at 526.


101. *Id.* at 549.

102. *Id.* at 549.


The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally by the State to the extent of requiring her prior written consent.

*Id.* at 67; accord, Freiman v. Ashcroft, 584 F.2d 247, 251 (8th Cir. 1978) (Missouri informed consent statute); *Women’s Community Health Center, Inc. v. Cohen*, 477 F. Supp. 542, 549.
One writer has predicted the physician’s failure to acquire informed consent will establish the basis for a malpractice suit. The patient’s consent should be informed, freely given, and not the result of any third party influence. Informed consent was defined by Danforth as telling the patient about the procedure and its correlative consequences.

The constitutionality of some informed consent statutes has been challenged because of their specifications as to what a physician must tell a patient to accomplish informed consent. The Eighth Circuit Court of Appeals addressed this issue in Freiman v. Ashcroft and held the Missouri informed consent statute invalid in part because it directed the physician to tell the patient about another statute concerning disposition of infants born alive during abortion. This information was considered.

(D. Me. 1979) (Maine informed consent statute).


106. See id. at 67 n.8 (“to ascribe more meaning . . . might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession”); Freiman v. Ashcroft, 584 F.2d 247, 251 (8th Cir. 1978); Wynn v. Carey, 582 F.2d 1375, 1385 (7th Cir. 1978); Women’s Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 549 (D. Me. 1979).


108. 584 F.2d 247 (8th Cir. 1978).


110. See Mo. Ann. Stat. § 188.040 (Vernon Supp. 1980) (infant born alive during abortion is abandoned ward of state). A similar provision was struck down because it terminated parental rights without due process of law. See Doe v. Rampton, 366 F. Supp. 189, 193 (C.D. Utah), vacated, 410 U.S. 950 (1973) (after Roe v. Wade). In Hodgson v. Lawson, 542 F.2d 1350, 1355 (8th Cir. 1976), the court found a similar Minnesota statute questionable; the statute’s constitutionality, however, was not ruled on since the statute was not properly before the court. See Minn. Stat. Ann. § 145.415(3),(2) (West Supp. 1979) (live born infant from abortion is abandoned ward of state).

111. See Freiman v. Ashcroft, 584 F.2d 247, 251-52 (8th Cir. 1978).
ST. MARY'S LAW JOURNAL

112. Id. at 251.
117. See Planned Parenthood v. Danforth, 428 U.S. 52, 67 n.8 (1976); Freiman v. Ashcroft, 584 F.2d 247, 251 (8th Cir. 1978); cf. Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 549-50 (D. Me. 1979) (informed consent statute valid). Maine informed consent statute “requiring physician to inform the woman that she is pregnant, of the probable number of weeks since conception, and of the risks associated with her pregnancy and the method of abortion to be used” and the alternatives to abortion is valid because it furthers the state’s interest in ensuring women make fully informed abortion decisions. Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 549-50 (D. Me. 1979).
Neither Danforth nor Bellotti II addressed whether a minor, during her majority, could disaffirm her prior consent to abortion. State law, therefore, should expressly protect the physician against such liability through disaffirmance by stating that a minor's consent to abortion is final and not subject to subsequent disaffirmance. State law should also assist the physician by including the Danforth guidance that a minor may not be compelled by her parents to submit to an abortion unless she also gives her voluntary, informed consent.

E. Approval of Physician's Decision Restriction

Predicating a licensed physician's decision to perform an abortion on advanced approval by a staff of hospital physicians or upon the concurrence of additional physicians was held unconstitutional by Doe. The Doe Court further stated the imposition of approval by a hospital abortion committee was unduly restrictive of the patient's right to an abortion. In addition, subjecting the physician's decision to a review by his copractitioners unnecessarily infringes on the doctor's licensed right to practice medicine. According to Doe this approach is one founded upon suspicion and discloses a lack of confidence in the integrity of physicians.


121. Some state statutes expressly protect physicians against liability by disaffirmance. See, e.g., CAL. CIV. CODE § 34.5 (Deering Supp. 1979); FLA. STAT. ANN. § 458.215 (West Supp. 1978); MD. ANN. CODE art. 43, §§ 135, 135A (Supp. 1978).


126. See id. at 199.

127. See id. at 196. "The restrictions are necessarily degrading to the conscientious physician, particularly the obstetrician, whose professional activity is concerned with the physical and mental welfare . . . [and] emotions . . . of his female patients." Id. at 196-97.
Only a few states have laws that impose restrictions on the attending physician's decision. California and Maryland subject the recommending physician's decision to final approval by a hospital medical committee.\textsuperscript{128} In Kansas and Virginia a physician must secure the written approval of additional physicians.\textsuperscript{129} Excepting the California statute which has been held unconstitutional, these unchallenged laws are probably unconstitutional since they are contrary to \textit{Doe}.\textsuperscript{130}

F. Viability: Medical v. Legislative Determination

\textit{Roe} recognized the state's right to protect fetal life.\textsuperscript{131} This right becomes dominant or "compelling" at viability.\textsuperscript{132} The legal definition of viability, established by the \textit{Roe} Court, is the time when the fetus is potentially able to live outside the mother's womb.\textsuperscript{133} In order to protect fetal life, therefore, the state may proscribe abortions at and after viability except when the abortion is necessary to preserve the life or health of the mother.\textsuperscript{134}

When viability occurs is a medical determination left to the judgment

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  \item 129. See \textit{KAN. STAT. ANN.} § 65-444 (1972) (three additional physicians) (unchallenged); \textit{VA. CODE} § 18.2-74(b) (1975) (abortion after second trimester requires two additional physicians) (unchallenged).
  \item 132. See \textit{id.} at 155.
    
    When the Supreme Court selected viability of the fetus as a point of special significance in the abortion decision, it not only made a biological mistake but a practical one. Trying to ordain by judicial fiat an essentially meaningless point in the life continuum, the Court was confronted with the hopeless task of suggesting some degree of precision where there is none.


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of the attending physician.\textsuperscript{135} The time when viability is reached varies with each pregnancy, as well as with advancement in medical technology.\textsuperscript{136} As enunciated recently by the Supreme Court in Colautti v. Franklin,\textsuperscript{137}

a physician determines whether or not a fetus is viable after considering a number of variables; the gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman’s general health and nutrition; the quality of the available medical facilities; and other factors.\textsuperscript{138}

Even medical experts may disagree whether a particular second trimester fetus has become viable because the precise determination of viability is difficult.\textsuperscript{139} Danforth rejected the argument that the legislature may specify a set number of weeks as the point of viability.\textsuperscript{140} Colautti extended this rule by holding

neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability be it weeks of gestation or fetal weight or any other single factor as the determinant of when the state has a compelling interest in the life or health of the fetus.\textsuperscript{141}

As Roe established, “at or after viability” is the only criteria states may use to prohibit abortions.\textsuperscript{142} Several states, however, have violated this rule by proscribing abortions at other times.\textsuperscript{143} Contrary to the Colautti rule that legislatures may not place viability at a fixed point,\textsuperscript{144} Idaho and Oklahoma have unchallenged statutes defining legal presumptions of via-

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\item \textit{Id. at 686, 58 L. Ed. 2d at 609.}
\item \textit{See id. at 686, 58 L. Ed. 2d at 609.}
\item See Planned Parenthood v. Danforth, \textit{428 U.S. 52, 65 (1976)}.
\item Roe v. Wade, \textit{410 U.S. 113, 164-65 (1973)}.
\item See Colautti v. Franklin, \textit{U.S.} \textit{99 S. Ct. 675, 682, 58 L. Ed. 2d 596, 605 (1979)}.
\end{enumerate}
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bility.\textsuperscript{148} Except Minnesota law, which prohibits abortion during the second half of gestation,\textsuperscript{148} the other identified laws will probably not impair most minors’ ability to obtain legal abortions since abortions are normally not performed after the twentieth week of pregnancy.\textsuperscript{147}

G. Proposals

Abortion laws should emancipate a minor for the purpose of consenting to an abortion from the time she attains the age of fertility.\textsuperscript{149} Prior to performing the abortion, the physician should be required to consult with the patient\textsuperscript{148} and obtain her written informed consent for the abortion.\textsuperscript{150} To protect the physician who has received a minor’s informed consent and performed the abortion, an abortion statute should affirmatively establish that a minor’s consent is final and not subject to subsequent disaffirmance when the minor achieves majority.\textsuperscript{151} The attending physician’s medical decision to perform the abortion should be sufficient without concurrence by other physicians.\textsuperscript{152} Furthermore, physicians should be prohibited from performing an abortion on a minor when the physician has determined her fetus is viable.\textsuperscript{153}

V. Parental Role in the Minor’s Abortion Decision

A. Parental Consent Laws

\textit{Roe} expressly left undecided whether an unmarried minor has the same constitutional right to abortion during the first trimester of pregnancy as an unmarried adult.\textsuperscript{154} In \textit{Danforth} two Missouri physicians challenged a

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\item \textsuperscript{145} See \textit{Idaho Code} § 18-604(5) (1979) (legal presumption viability occurs at 25th week);
\item \textsuperscript{147} In Texas and most other states physicians usually do not perform abortions on minors after 20 weeks; post 20 week abortions are referred to Atlanta, Georgia. Interview with Dr. Paul C. Weinberg, M.D., Professor of Obstetrics and Gynecology at the University of Texas at San Antonio Medical School, in San Antonio, Texas (Sept. 1979).
\item \textsuperscript{148} See Appendix II, § VI.
\item \textsuperscript{149} See Appendix II, § XI.
\item \textsuperscript{150} See Appendix II, § X.
\item \textsuperscript{151} See Appendix II, § VI.
\item \textsuperscript{152} See Appendix II, § XI.
\item \textsuperscript{153} See Appendix II, § XII.
\item \textsuperscript{154} \textit{Roe v. Wade}, 410 U.S. 113, 165 n.67 (1973); \textit{see Planned Parenthood v. Danforth}, 428 U.S. 52, 55 (1976); Poe v. Gerstein, 517 F.2d 787, 789 (5th Cir. 1975), \textit{aff’d}, 428 U.S. 901
\end{itemize}
newly enacted Missouri abortion statute requiring the written consent of at least one parent when the patient was unmarried and under eighteen years old. Danforth followed several lower court decisions that had concluded parental consent statutes were unconstitutional. A state does not have constitutional power to authorize any third party veto of the decision of the minor and her physician to terminate her pregnancy during the first trimester.

The Danforth Court reasoned minors' constitutional rights do not commence "magically only when one attains the state-defined age of majority." Minors possess constitutional rights although the Court has historically permitted broader state regulation of children than adults. The Court then questioned whether there was any significant state interest in conditioning a minor's abortion decision on the consent of a parent. The majority, after careful deliberation, decided that providing parents with absolute power over their daughter's abortion decision would neither strengthen the family unit nor protect parental authority already directly challenged by the pregnancy itself.


156. See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (Missouri statute); Wolfe v. Schroeing, 541 F.2d 523, 525, 528 (6th Cir. 1976) (Kentucky statute); Poe v. Gerstein, 517 F.2d 787, 792 (5th Cir. 1975) (Florida statute).


159. See id. at 74. The fourteenth amendment and the Bill of Rights are for minors as well as adults. See, e.g., Ingraham v. Wright, 430 U.S. 651, 674 (1977) (corporal punishment of school children may violate their liberty); Goss v. Lopez, 419 U.S. 565, 579 (1975) (children may not be compelled to relinquish property rights without due process); In re Gault, 387 U.S. 1, 13 (1967) (guarantees against deprivation of liberty without due process applies to minors in juvenile hearings).


162. See id. at 75; Poe v. Gerstein, 517 F.2d 787, 793-94 (5th Cir. 1975) (statutorily
The Supreme Court, most recently in *Bellotti II*, again addressed the constitutionality of parental consent legislation. Under scrutiny was a 1974 Massachusetts statute that made it a criminal offense to perform an abortion on a minor without parental consent or a judicial order. The Court acknowledged this legislation represented the state’s attempt to reconcile the woman’s constitutional right to choose abortion created by *Roe* with the state’s “special interest” in having parental involvement in the abortion decision of a minor. Different than the parental consent statute invalidated by *Danforth*, the Massachusetts law provided that a minor refused parental consent could obtain consent from a judge. The Court, nevertheless, reiterated states must preserve the minor’s constitutional right to abortion, a decision that must not be conditioned upon parental consent or refusal of parental consent.

In justifying their consistent negation of parental consent laws, the Court pointed out that the abortion decision is unique. One prevented from abortion is posed with special problems not encountered by a minor who is, for example, merely prevented from marrying without parental consent. A minor and her fiancé may postpone their marriage plans for an indefinite period; abortion, however, ceases to be an alternative both legally and medically approximately halfway through pregnancy. Though parental consent may be appropriate to other choices facing a minor, it is unconstitutional to subject a minor’s abortion decision to parental control regardless of a parent’s reason for withholding imposed parental consent unlikely to restore parental control.

169. See id. at ___, 99 S. Ct. at 3047-48, 61 L. Ed. 2d at 812-13.
170. See id. at ___, 99 S. Ct. at 3047-48, 61 L. Ed. 2d at 812-13. Laws may delay exercise of the minor’s right and destroy the minor’s chance for a relatively safe first trimester abortion. The minor may be faced with either a more dangerous and expensive second trimester abortion or an unwanted pregnancy if the fetus has become viable. See Wynn v. Carey, 582 F.2d 1375, 1389 (7th Cir. 1978); Women’s Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 550-51 (D. Me. 1979).
permission.171 Although parental consent was held unconstitutional by Danforth in 1976, there are currently twelve states with parental consent statutes. Seven jurisdictions have unchallenged parental consent statutes;172 South Carolina, however, requires parental consent only for those minors less than sixteen years of age.173 Five other states have parental consent laws on the books, but these statutes have been challenged and found unconstitutional.174 Twelve states, therefore, still have not responded to Danforth by revising their abortion laws to protect the rights of minors.175

B. Parental Notice Statutes

The Bellotti II Court did not address whether a state may require parental notice of a minor's abortion decision when such notice is not a prerequisite for judicial consent.176 The concurring Bellotti II opinion interpreted parental notice as potentially constitutional because the plurality opinion did not specifically invalidate all parental notice, only parental

175. Those states that did respond to Danforth by modifying their statutes were identified in a recent analysis. See Note, The Illinois Abortion Parental Consent Act of 1977: A Far Cry From Permissible Consultation, 12 J. MAR. J. PRAC. & PROC. 135, 138-39 n.22 (1978).
176. See generally Bellotti v. Baird, ___ U.S. ___, 99 S. Ct. 3035, 3048, 61 L. Ed. 2d 797 (1979). “Much of the debate over the constitutionality of a statute mandating parental notification has been foreclosed by the recent Supreme Court decision in . . . [Bellotti II].” Women’s Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 546 (D. Me. 1979). Bellotti II is “persuasive authority for . . . holding . . . Maine’s parental notification statute has a substantial probability of being found unconstitutional at a trial on the merits.” Id. at 547. The Utah Supreme Court cited the Bellotti II plurality opinion as authority for holding the Utah parental notice statute constitutional. See H—L— v. Matheson, 604 P.2d 907, 912 (Utah 1979); Utah Code Ann. § 76-7-304(2) (1978).
notice that either burdens a minor’s acquisition of judicial consent or results in a third party veto.\textsuperscript{177} The dissent, however, analyzed the plurality opinion as holding all parental notice unconstitutional.\textsuperscript{178} Since there is disagreement among the Justices on what the \textit{Bellotti II} plurality opinion held regarding parental notice, it is uncertain whether parental notice laws will constitute unconstitutional regulation of a minor’s abortion rights.\textsuperscript{179}

Validity of parental notice statutes was squarely addressed by the Seventh Circuit Court of Appeals in \textit{Wypn v. Carey}\textsuperscript{180} wherein the court concluded that in some cases even simple parental notice may be contrary to a minor’s best interests.\textsuperscript{181} The minor may, as a result of parental notice of her abortion decision, be physically abused, harmed, compelled into an undesired marriage, or be required to continue her pregnancy as punishment for her immoral conduct.\textsuperscript{182} These possible detrimental conse-

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\item[178.] See id. at \textit{99 S. Ct. 3055}, 61 L. Ed. 2d at 822 (White, J., dissenting); Pilpel \textit{& Law, Bellotti v. Baird: A Victory for Minors’ Rights of Reproductive Choice}, 8 FAM. PLAN. POPULATION REP. 39, 39 (1979) (\textit{Bellotti II} held all parental notice requirements unconstitutional).
\item[179.] A federal district court in Maine has issued a preliminary injunction against the enforcement of a new Maine statute which requires physicians to notify parents of all unemancipated minors under age 17 prior to performing abortions. \textit{See Women’s Community Health Center, Inc. v. Cohen}, 477 F. Supp. 542, 548 (D. Me. 1979). The \textit{Cohen} court concluded the parental notification statute had a “substantial probability” of being found unconstitutional at a trial on the merits because it fell short of \textit{Bellotti II’s} standards. The standards, as analyzed by the \textit{Cohen} court, suggest that a statute should not mandate parental notice for all cases; a statute that permits parental notice for some must also include an alternative for other minors to obtain an abortion without parental notification. \textit{See id.} at 547-48. The Utah parental notice statute, requiring the consulting physician to notify the minor’s parents if the physician can ascertain their identity and location, was held constitutional because the statute neither unduly burdens minors’ abortion decision nor permits parents an absolute veto. \textit{See H—L— v. Matheson}, 604 P.2d 907, 912 (Utah 1979).
\item[180.] 582 F.2d 1375 (7th Cir. 1978).
\item[181.] \textit{See id.} at 1388. Statutes on parental notice should not apply to all minors, but rather should apply for a case by case evaluation of the appropriateness of parental notice. \textit{See id.} at 1388. “[I]n some instances the involvement of parents in a minor’s abortion decision will be harmful to both the minor and the family relationship.” \textit{Women’s Community Health Center, Inc. v. Cohen}, 477 F: Supp. 542, 548 (D. Me. 1979).
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quences demonstrate that parents’ albeit valid interest in knowing about the minor’s abortion decision could directly conflict with the minor’s right of privacy. 183

The Wynn court compared the abortion law to statutes that allow minors to receive medical care without parental notice for venereal disease and drug abuse. 184 The providing of medical care for abortion, venereal disease, and drug abuse, without involving parents, may not only be in the best interests of the minor, but also in the public interest to ensure that minors receive legalized medical services. 185 Wynn, therefore, concluded that a case by case assessment of whether parental notice is in the minor’s best interests should be made, and implied that this assessment be left to the discretion of the attending physician as in cases of venereal disease and drug abuse. 186

More recently in Women’s Community Health Center, Inc. v. Cohen, 187 the court reviewed the constitutionality of a statute providing parental notification of a minor’s abortion decision when the minor is unemancipated and less than seventeen years of age. 188 The Cohen court compared the challenged Maine statute with the Massachusetts statute struck down by the Supreme Court in Bellotti II. 189 The Maine statute was found inadequate to “meet the constitutional standard defined in . . . [Bellotti II] . . . because it provides no alternative permitting a minor to obtain an abortion without parental notification.” 190 The Cohen court’s implied goal was to protect minors against parents who would respond inappropriately to such information, and thereby expose the minor to negative consequences. 191


184. See Wynn v. Carey, 582 F.2d 1375, 1388 (7th Cir. 1978); ILL. ANN. STAT. ch. 91, §§ 18.3, 18.7 (Smith-Hurd 1977).

185. See Wynn v. Carey, 582 F.2d 1375, 1388 (7th Cir. 1978). See also Women’s Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 548 (D. Me. 1979) (parental notification may deter minors from seeking competent, professional, and legal abortion services).

186. See Wynn v. Carey, 582 F.2d 1375, 1388 n.25 (7th Cir. 1978); ILL. ANN. STAT. ch. 91, § 81.5 (Smith-Hurd 1977) (physician’s discretion whether to inform parents of treatment given or needed); cf. H—L— v. Matheson, 604 P.2d 907, 912 (Utah 1979) (Utah mandatory parental notice statute upheld as beneficial to physician and minor).


188. See id. at 546; ME. REV. STAT. ANN. tit. 22, § 1597 (West Supp. 1979).


191. See Women’s Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 548 (D.
In contrast to the *Cohen* decision, the Utah Supreme Court in *H-L v. Matheson* upheld the Utah parental notification statute. After reviewing *Bellotti II*, the *Matheson* court concluded that the limited parental involvement imposed by notification did not confer veto power upon the minor's parents. Parental notification, rather, both increased the physician's ability to exert his best judgment and furthered the state's interest in motivating the unmarried pregnant minor to seek parental guidance.

Two states have parental notice statutes that were challenged based upon *Bellotti II*—one statute was upheld and the other was enjoined. Five other jurisdictions possess varying notice statutes that remain unchallenged. In the wake of conflicting interpretations and applications of *Bellotti II*, other states will probably expend much legislative time enacting mandatory parental notice laws as the state's last hope of permitting parental involvement in the abortion decision of minors.

C. Proposals

State law should specify that a physician may not perform an abortion on a minor based solely on parental or judicial consent—the minor must also consent. Statutes recommending parental notice of a minor's abortion...
VI. JUDICIAL ROLE IN MINORS’ ABORTION DECISIONS

A. Bellotti I: Judicial-Parental Consent Statute

On the same day the Supreme Court in *Danforth* struck down parental consent statutes, the Court reviewed the validity of a statute allowing judicial consent in lieu of parental consent. In *Bellotti v. Baird* (*Bellotti I*), the Massachusetts statute at issue provided:

[i]f 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 . . . for good cause shown, after such hearing as he deems necessary.

Proponents of the statute contended it was fundamentally different from the *Danforth* parental veto statute. Upon request, a minor would be allowed to consent to abortion if the court determined she was capable of giving informed consent. If the minor was found incapable of informed consent, a judge could grant consent provided “good cause” was shown. Good cause means demonstrating the abortion is in the minor’s best interests.

The opponents, however, argued an entirely different interpretation of the statute. Because the statute created a right to a parental veto, it raised the presumption the minor was incapable of informed consent. Once refused parental consent, the minor has the burden of proving to a

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201. See Appendix II, § VII.
208. See id. at 145.
210. See id. at 145.
211. See id. at 146.
judge that good cause exists for her abortion. In a good cause proceeding the judge is necessarily compelled to choose between the minor's privacy rights and the parents' rights; furthermore, the hearing itself imposes an unconstitutional delay and burden upon the minor's abortion decision.

Since the statute was susceptible of two vastly different interpretations, the Court abstained from ruling pending state construction of the statute. Bellotti I implied a law that either created a parental veto or unduly burdened the right of a minor to choose an abortion would not be constitutional.

B. The Illinois Abortion Parental Control Act of 1977

The unanimous decision in Bellotti I to remand the case for state construction of the statute in issue left open the possibility a parental-judicial consent law could be constitutional. Subsequent to Bellotti I, the Illinois Legislature, "seizing on this possibility," enacted the Illinois Abortion Parental Control Act of 1977. The statute provided, in part, that the minor must secure the written consent of her parents and:

- if such consent is refused or cannot be obtained, consent may be obtained by order of a judge of the circuit court upon a finding, after such hearing as the judge deems necessary, that the pregnant minor fully understands the consequences of an abortion to her and her unborn child. Notice of such hearing shall be sent to the parents of the minor. The procedure shall be

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212. See id. at 146.
213. See id. at 146.
214. See id. at 146-47. Abstention should be observed when an untested statute could possibly be construed by the state judiciary in a way that would eliminate the need for federal challenge or "materially change the nature" of the challenge. See id. at 147.
handled expeditiously.219

Less than three weeks after this statute became effective, action was commenced for declaratory and injunctive relief against the parental-judicial consent provisions of the Illinois act.220 In Wynn v. Scott221 the district court concluded the Illinois act’s judicial alternative was void because it violated the Bellotti I standard that alternative remedies must not be unduly burdensome.222 Upon direct appeal this decision was affirmed in Wynn v. Carey.223

In Carey the Seventh Circuit Court of Appeals analyzed the deficiencies of the judicial consent alternative imposed by the Illinois act.224 When a minor is refused parental consent she cannot initiate judicial proceedings to override this veto unless she has knowledge such an alternative exists.225 Even if aware that such a procedure exists, the burden of going to court without counsel and often against her parents’ wishes, imposes a “formidable” burden on a minor.226 It is unduly burdensome to require a minor to initiate court proceedings when her parents may be present as her opponents.227 The delay likely to be caused by the added burden of a court proceeding could destroy entirely a minor’s opportunity for abortion; therefore, such a delay is an unconstitutional barrier for a minor’s right to abortion.228 Although the expressed intent of the Illinois Legislature in enacting the Illinois Abortion Parental Consent Act of 1977 was to balance the rights of parents with the rights of unmarried pregnant minors,229 the Seventh Circuit in Carey concluded the Act “left the rights of the pregnant minor in a precarious position on the light side of

221. 448 F. Supp. 997 (N.D. Ill.), aff’d sub nom. Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978).
222. See id. at 1006.
223. 582 F.2d 1375, 1390 (7th Cir. 1978).
224. See id. at 1388-90.
225. See id. at 1388 (knowledge of judicial remedy would not be possessed by many minors).
226. Id. at 1388; accord, Bellotti v. Baird, ___ U.S. ___, 99 S. Ct. 3030, 3050, 61 L. Ed. 2d 797, 816 (1979) (pregnant minors “particularly vulnerable to parents’ efforts to obstruct both an abortion and . . . access to court”).
227. See Wynn v. Carey, 582 F.2d 1375, 1388 (7th Cir. 1978).
the scale."  

C. **Bellotti II: From the Known to the Unknown**

In *Bellotti II* the Supreme Court continued their review of the Massachusetts parental-judicial consent statute commenced in *Bellotti I*. The Court acknowledged states have a special responsibility to enact laws that are necessarily supportive of parental authority to ensure the well-being and proper rearing of society’s minors. Believing it would be “irresponsible” merely to invalidate the parental-judicial statute in issue, the *Bellotti II* Court proposed a hypothetical statute to guide states in constitutionally mandating third party involvement in the minor’s abortion decision, reiterating the necessity of a case by case evaluation.

1. **Bellotti II’s Hypothetical Alternative Consent Law.** If a state requires consent from at least one parent as a prerequisite to a minor’s abortion, then that state must also provide an alternative consent procedure. Every minor must have access to this alternative without parental notice or consultation. At the alternative proceeding, the minor must

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230. Wynn v. Carey, 582 F.2d 1375, 1390 (7th Cir. 1978). The *Carey* court provided: She [the minor] is the one who is required to shoulder all the burdens of trying to obtain her parents' consent and, if unsuccessful in that regard, of commencing and satisfactorily treading the inadequate judicial framework delineated in the Act—all at a time when she is experiencing one of the most physically and psychologically critical periods of her life. To pass constitutional muster, a statute such as this must be drafted in a way to aid the minor by easing her burdens rather than adding to them. *Id.* at 1390. “[T]here are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.” *Bellotti* v. *Baird*, — U.S. ___, ___; 99 S. Ct. 3035, 3048, 61 L. Ed. 2d 797, 813 (1979).


233. See id. at ___, 99 S. Ct. at 3047-49, 3052 n.32, 61 L. Ed. 2d at 812-14, 818 n.32. The *Bellotti II* hypothetical law was criticized as being an advisory opinion:

Until and unless Massachusetts or another state enacts a less restrictive statutory scheme, this court has no occasion to render an advisory opinion on the constitutionality of such a scheme. A real statute—rather than a mere outline of a possible statute—and a real case or controversy may well present questions that appear quite different from the hypothetical questions Mr. Justice Powell has elected to address. *Id.* at ___, 99 S. Ct. at 3055 n.4, 61 L. Ed. 2d at 821 n.4. (Stevens, J., concurring). *But see* Wynn v. Carey, 582 F.2d 1375, 1389 (7th Cir. 1979) (court refused to go beyond the issue at hand and declare all judicial hearings as unconstitutional).


235. *Id.* at ___, 99 S. Ct. at 3050, 61 L. Ed. 2d at 816; *accord*, Women’s Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 547 (D. Me. 1979) (parental notification or consultation could result in obstacles and undue burden for minor seeking judicial consent).
be allowed to show either that she is capable of informed consent, or that the abortion is in her best interests. If capable of informed consent in consultation with her physician, the minor will be permitted to consent to her own abortion. If the minor is incapable of informed consent, but she has shown the abortion to be in her best interests, she must be given official or judicial consent for the abortion. Both the resolution of the minor’s request and any appeal should be executed with “anonymity and sufficient expedition” to permit the minor to receive a timely abortion. Existence of the parental consent option must not result in veto of the minor’s abortion decision. The Bellotti II concurring opinion expressed doubt that any legislature could enact a statute satisfying the criteria set forth by the hypothetical statute.

2. Massachusetts’ Parental-Judicial Consent Law. Comparing the Massachusetts section 12S judicial alternative statute to Bellotti II’s hypothetical proceeding, the Court held section 12S unconstitutional for two reasons. The law denied judicial consent to a minor who was m-
ture and capable of making her own decision.\textsuperscript{347} Further, it mandated parental notice or consultation in every case without allowing the minor to seek judicial consent based upon a showing of maturity or a showing that an abortion would be in the minor's best interests.\textsuperscript{347}

3. \textit{Current Law}. Two states have parental-judicial consent laws on the books although they have been held unconstitutional.\textsuperscript{348} Two other states have unchallenged parental-judicial consent laws.\textsuperscript{348}

D. \textit{Bellotti II's Best Interests Abortion}

The only standard \textit{Bellotti II} provided for granting judicial consent to a minor at the hypothetical hearing was the "best interests of the child" criteria.\textsuperscript{347} To apply the "best interests" standard, \textit{Bellotti II} explained the judge must disregard parental objections and other considerations not based solely on the best interests of the child.\textsuperscript{348} A judge may also consider whether the child is living with one or both parents and whether there is a strong family relationship between parent and child.\textsuperscript{349} Whether the minor is capable of making an informed and reasonable decision to have an abortion will be given "great weight," but the judge ultimately must determine the "best interests" of the minor on the basis of all relevant views presented.\textsuperscript{350}

\begin{itemize}
\item \textsuperscript{243} See id. at _, 99 S. Ct. at 3052, 61 L. Ed. 2d at 818.
\item \textsuperscript{244} See id. at _, 99 S. Ct. at 3052, 61 L. Ed. 2d at 818.
\item \textsuperscript{247} See Bellotti v. Baird, __ U.S. ___, 99 S. Ct. 3035, 3054, 61 L. Ed. 2d 797, 821 (1979) (Stevens, J., concurring).
\item \textsuperscript{248} See id. at ___, 99 S. Ct. at 3052, 61 L. Ed. 2d at 805.
\item \textsuperscript{249} See id. at ___, 99 S. Ct. at 3052-51, 61 L. Ed. 2d at 816.
\item \textsuperscript{250} See id. at ___, 99 S. Ct. at 3051-52, 61 L. Ed. 2d at 817; Baird v. Attorney General, 360 N.E.2d 288, 293 (Mass. 1977) (state judicial construction of statute in issue). The "best interests of the child" standard used by child placement agencies should include protecting both the physical and psychological well-being of the child. \textit{See J. Goldstein, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OP THE CHILD} 4 (1973). In order to apply the "best interests" standard the child's needs must be paramount to all other considerations. \textit{See id. at 7}. Goldstein proposed that instead of "best interests," child placement agencies should adopt "the least detrimental available alternative for safeguarding the child's growth and development" standard. \textit{Id.} at 53. Goldstein justifies the new standard as an important change because it conveys to the "decisionmaker that the child in question is already a victim of his environmental circumstances, that he is greatly at risk, and that speedy action is necessary to avoid further harm . . . ." \textit{Id.} at 53. The old guideline often made the child's interests subordinate to adults' rights and interests. Weighing the adult's interests against
"Best interests" is necessarily a subjective standard that will be determined primarily by the personal views of the third party appointed to preside at the hearing and decide whether an abortion is in the minor's best interests. Regardless of how objectively a judge or hearing officer might evaluate a minor's best interests, his resulting negative decision will still constitute a third party veto prohibited by Danforth, Bellotti I, and Bellotti II. The decisions of the Supreme Court have consistently held unconstitutional any third party involvement in the abortion decision of a minor and her physician. Lower courts have also followed this trend. The minor's constitutional right to abortion encompasses her privacy interests of avoiding disclosure of personal matters and of independence in making personal decisions. Any judicial proceeding as hypothetically described by Bellotti II would necessarily violate the minor's privacy interests as well as create a greater burden than was imposed by those of the child is hazardous because most often the child's needs are forgotten. See id. at 54. To use "detrimental" rather than the word "best" will "reduce the likelihood" that decisionmakers will become "amnesiac in the hope and magic associated with best" which often misleads decisionmakers into thinking they have a greater power for doing good rather than bad. Decisionmakers should weigh the advantages and disadvantages of the "actual options" open to the child. See id. at 62-63.


parental consent laws.256 Consequently, to constitutionally regulate the minor's abortion decision, statutory law must only regulate the conduct of the two parties whose involvement in the abortion decision is approved by the Supreme Court—the physician and the patient.257 It is unclear after Bellotti II whether a physician could perform an abortion on a minor when the minor is incapable of informed consent and the physician determines the


abortion would be in her best interests. If a judge or hearing officer in Bellotti II's hypothetical hearing can grant such consent, however, it is reasonable to permit a physician to perform a "best interests" abortion as long as he had the minor's voluntary consent.

E. Proposals

State abortion laws for minors should abolish any mandatory third party parental or judicial involvement. The physician, however, should be expressly encouraged to consult or notify a third party when he believes such action is necessary to protect the minor's health and best interests. State law should also provide that a physician may perform an abortion on a minor when she is not capable of informed consent as long as the minor voluntarily consents in writing and the physician believes the abortion is in the minor's best interests.

258. **See generally** Bellotti v. Baird, _ U.S. __, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979). One author has predicted that if a minor is incapable of giving valid consent, the physician who, nevertheless performs an abortion, would be subject to tort liability for such an operation. **See Note, Baird v. Bellotti: Abortion—The Minor's Right To Decide, 33 U. MIAMI L. REV. 705, 719-20 (1979).**

259. **See Bellotti v. Baird, _ U.S. __, 99 S. Ct. 3035, 3048, 3050, 3052, 61 L. Ed. 2d 797, 813, 815, 817-18 (1979).** The line between mere voluntary consent and informed consent would be difficult to draw in some cases because the information disclosed to the patient as a prelude to her informed consent is entirely up to the judgment and discretion of the attending physician. **See Planned Parenthood v. Danforth, 428 U.S. 52, 67 n.8 (1976); Freiman v. Ashcroft, 584 F.2d 247, 251 (8th Cir. 1978); Cobbs v. Grant, 502 P.2d 1, 10-11, 104 Cal. Rptr. 505, 514-15 (1972).** The amount of disclosure by a physician is dependent upon what is best for the welfare of the patient. **See Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 317 P.2d 170, 181 (Cal. Dist. Ct. App. 1957).**


261. **See Appendix II, §§ VII, VIII.**

262. **See Appendix II, § XIII.**
VII. CONCLUSION

Perhaps no perfect solution exists to the issue of controlling abortion services available to minors. The United States Supreme Court, however, has provided sufficient allowance for states to exert reasonable controls over those who provide abortion services to minors without parental involvement. Until some thorough objective data proves physicians are incapable of evaluating a minor's abortion request, state law should expressly protect, regulate, and guide the physician in this controversial role. To do less could jeopardize the quality of care minors receive when they choose to terminate their pregnancies without consulting their parents.
### APPENDIX I

**ABORTION LAWS IN THE UNITED STATES: SUMMARY, CLASSIFICATION, AND STATUS**

<table>
<thead>
<tr>
<th>STATE</th>
<th>STATUTE</th>
<th>CLASSIFICATION</th>
<th>STATUS</th>
</tr>
</thead>
<tbody>
<tr>
<td>5. California</td>
<td>CAL. HEALTH &amp; SAFETY CODE § 25951(c) (Deering 1975); CAL. PENAL CODE § 274 (Deering 1975).</td>
<td>Anti-abortion</td>
<td>Challenged-unconstitutional</td>
</tr>
</tbody>
</table>

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1. Anti-abortion statutes that prohibit all abortions unless necessary to preserve the life or health of the mother are unconstitutional because such a statute denies a woman's right to choose abortion rather than childbirth. See Roe v. Wade, 410 U.S. 113, 153 (1973).


6. See note 1 supra.


9. See note 1 supra.

10. See note 4 supra.
<table>
<thead>
<tr>
<th>State</th>
<th>Code Reference</th>
<th>Description</th>
<th>Constitutionality</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indiana</td>
<td>Ind. Code Ann. § 35-1-58.5-2(b)(2) (Burns 1979);</td>
<td>Second trimester abortions must be performed in hospitals</td>
<td>Unchallenged-probably unconstitutional¹⁸</td>
</tr>
</tbody>
</table>

¹¹ See note 1 supra.

¹² Minors should be permitted to choose abortion without third party involvement. See Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

¹³ Statutory licensing requirements of statute were upheld as a non-objectionable intrusion into the woman's constitutionally protected right of privacy. See Florida Women's Medical Clinic, Inc. v. Smith, 478 F. Supp. 233, 236 (S.D. Fla. 1979). Licensing standards may be required of facilities where first trimester abortions are performed as long as the standards do not interfere with a woman's right to elect an abortion. Baird v. Department of Pub. Health, 599 F.2d 1098, 1102 (1st Cir. 1979) (upholding Mass. Ann. Laws ch. 111, § 52 (Michie/Law Co-op 1975)).


¹⁵ Statute requiring all abortions be performed in a hospital held unconstitutional because such statute unreasonably restricted first trimester abortions. See id. at 195.


¹⁷ Wynn v. Carey, 582 F.2d 1375, 1390


¹⁹ Any legislation that burdens an individual's fundamental right of privacy must be
<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
<th>Description</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iowa</td>
<td>IOWA CODE ANN. § 707.7 (West 1979).</td>
<td>Prohibits abortion after second trimester</td>
<td>Unchallenged-constitutional³⁷</td>
</tr>
<tr>
<td>Kansas</td>
<td>KAN. STAT. ANN. § 65-444 (1972).</td>
<td>Physician’s decision approved by three additional physicians</td>
<td>Unchallenged-unconstitutional³⁸</td>
</tr>
<tr>
<td>Kentucky</td>
<td>KY. REV. STAT. ANN. § 311.740(3) (1977); id. § 311.730; id. § 436.023 (Supp. 1978).</td>
<td>Parental consent for second trimester abortion; Physician must counsel patient prior to a second trimester abortion; 24 hour waiting period between consent and abortion</td>
<td>Challenged-unconstitutional³⁹; Challenged-constitutional⁴⁰; Challenged-constitutional⁴¹</td>
</tr>
<tr>
<td>Louisiana</td>
<td>LA. REV. STAT. ANN. § 40:1299.35.5(B) (West Supp. 1980);</td>
<td>Parental/judicial consent (for minors under 15)</td>
<td>Unchallenged-unconstitutional⁴²</td>
</tr>
</tbody>
</table>

1980]

Comments 987

id. § 35-1-58.5-5. Record and reporting requirements

16. Iowa

17. Kansas

18. Kentucky

19. Louisiana

drawn specifically so as only to support compelling state interests. Roe v. Wade, 410 U.S. 113, 155 (1973). The Roe court recognized the state had a legitimate interest in protecting the health of the mother during the second trimester. Id. at 162. It is questionable whether a state could prove that hospitalization is necessary to protect the health of every woman who terminates her pregnancy during the second trimester.


24. Id. at 526.

25. Id. at 526 (24 hour delay could not cause transition from the first into the second trimester or from the second trimester into viability).

26. Similar parental-judicial consent statutes have been found unconstitutional. See Bellotti v. Baird, — U.S. —, 99 S. Ct. 3035, 3052, 61 L. Ed. 2d 797, 818 (1979) (Massachusetts statute); Wynn v. Carey, 582 F.2d 1375, 1390 (7th Cir. 1978) (Illinois statute).
Parental notice Unchallenged—probably unconstitutional  
Second trimester abortions must be performed in hospital Unchallenged—probably unconstitutional  
Record & reporting requirements Unchallenged—constitutional  
Licensing of abortion facilities Unchallenged—probably constitutional  

<table>
<thead>
<tr>
<th>State</th>
<th>Act/Statutory Reference</th>
<th>Requirement</th>
<th>Status</th>
</tr>
</thead>
</table>

27. See note 18 supra.  
28. See note 19 supra.  
30. Licensing standards may be applied to facilities where first trimester abortions are performed as long as the standards do not interfere with a woman's right to elect or obtain an abortion. See Baird v. Department of Pub. Health, 599 F.2d 1098, 1102 (1st Cir. 1979) (upholding MASS. ANN. LAWS ch. 111, § 52 (Michie/Law Co-op 1975)). A recent case upheld the application of a general licensing statute to first trimester abortion clinics even though the cost of abortions would increase at facilities subject to licensing. See Westchester Women's Health Organization v. Whalen, 475 F. Supp. 734, 741 (S.D. N.Y. 1979) (increased cost effect does not constitute undue interference with a woman's abortion decision) (upholding application of N.Y. PUB. HEALTH LAW § 2801(1) (McKinney 1979 & Supp. 1979) to abortion clinics).  
<table>
<thead>
<tr>
<th>State</th>
<th>Code and Section(s)</th>
<th>Description</th>
<th>Constitutional Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minnesota</td>
<td>MINN. STAT. ANN. § 145.412 (1), (2) (West Supp. 1979); id. §§ 145.411(2), 145.412(3)(2),(3); id. § 145.416.</td>
<td>Second trimester abortions must be performed in hospital; Abortion prohibited during second half of gestation because fetus is presumed potentially viable; Licensing of abortion facility</td>
<td>Unchallenged-probably unconstitutional</td>
</tr>
<tr>
<td>Mississippi</td>
<td>MISS. CODE ANN. § 97-3-3 (1972).</td>
<td>Anti-abortion</td>
<td>Unchallenged-unconstitutional</td>
</tr>
<tr>
<td>Missouri</td>
<td>MO. ANN. STAT. § 188.028.1, .2(1) (Vernon Supp. 1980); id. § 188.028.2(2).</td>
<td>Parental/judicial consent</td>
<td>Unchallenged-unconstitutional</td>
</tr>
<tr>
<td>Montana</td>
<td>MONT. CRIM. CODE ANN. § 94-5-616(2)(b) (1977); id. § 94-5-619.</td>
<td>Parental notice</td>
<td>Unchallenged-probably unconstitutional</td>
</tr>
</tbody>
</table>

37. See note 19 supra.
39. See note 30 supra.
40. See note 1 supra.
41. See note 26 supra.
42. See note 18 supra.
43. See note 18 supra.
<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
<th>Provision</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nebraska</td>
<td>Neb. Rev. Stat. § 28-333 (Supp. 1979);</td>
<td>Minor must present written statement to physician that she consulted with her parents about abortion</td>
<td>Unchallenged-probably unconstitutional</td>
</tr>
<tr>
<td>Nevada</td>
<td>Nev. Rev. Stat. § 442.250(3) (1977);</td>
<td>Parental consent</td>
<td>Unchallenged-unconstitutional</td>
</tr>
<tr>
<td>New York</td>
<td>N.Y. Penal Law § 125.05(3)(b) (McKinney 1975).</td>
<td>Abortion prohibited after 24th week</td>
<td>Unchallenged-unconstitutional</td>
</tr>
</tbody>
</table>


47. See note 4 supra.


49. Roe held states may prohibit abortions at and after viability. See Roe v. Wade, 410 U.S. 113, 164-65 (1973). Only one other state has an abortion statute that limits the abortion prohibition to quickened fetus; upon challenge it was upheld as constitutional based on the technical similarity between Roe "viability" and common law "quickening." See Rodos v. Michaelson, 527 F.2d 582, 582 (1st Cir. 1975) (Rhode Island statute).


51. This statute has been challenged but the parental consent portion was kept as valid because the abortion at issue was performed on a woman who was not under eighteen years of age. See State v. Strance, 506 P.2d 1217, 1220 (N.M. Ct. App. 1973). The dissenting opinion, however, stated that the entire criminal abortion statute was unconstitutional. See id. at 1220 (Sutin, J., dissenting in part, concurring in part). The U.S. Supreme Court has subsequently held parental consent statutes unconstitutional. See Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

52. See note 21 supra.
| 35. North Dakota | N.D. CENT. CODE § 14-02.1-04(2) (Supp. 1977); id. § 14-02.1-07; id. § 14-02.1-02. (4). | Abortion after 12th week prohibited unless performed in hospital | Reporting requirement | Unchallenged-constitutional\(^{14}\) |
| 36. Ohio | OHIO REV. CODE ANN. § 2919.12(B) (Baldwin 1979). | Parental consent | Unchallenged-unconstitutional\(^{16}\) |
| 37. Oklahoma | OKLA. STAT. ANN. tit. 63, § 1-737 (West Supp. 1979); id. § 1-732(B); id. § 1-738, -739. | Abortions legal but must be performed in hospital | Viability presumed at 24th week | Unchallenged-unconstitutional\(^{17}\) |

\(^{13}\) See note 21 supra.
\(^{14}\) See note 30 supra.
\(^{15}\) See note 19 supra.
\(^{17}\) Cf. Freiman v. Ashcroft, 584 F.2d 247, 251-52 (8th Cir. 1978) (legislature cannot dictate specific contents of informed consent).
<table>
<thead>
<tr>
<th>State</th>
<th>Code Reference</th>
<th>Description</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rhode Island</td>
<td>R.I. GEN. LAWS §§ 11-3-1 to 11-3-5 (1969 &amp; Supp. 1979);</td>
<td>Anti-abortion</td>
<td>Challenged-constitutional¹⁴</td>
</tr>
<tr>
<td>Tennessee</td>
<td>TENN. CODE ANN. § 39-301(e)(2) (1975).</td>
<td>Second trimester abortion must be performed in hospital</td>
<td>Unchallenged²⁰</td>
</tr>
<tr>
<td></td>
<td>id. 39-302(b) (Supp. 1979);</td>
<td>Specifies content of informed consent</td>
<td></td>
</tr>
<tr>
<td></td>
<td>id. §39-302(f).</td>
<td>Parental notice</td>
<td>Unchallenged-probably un-constitutional¹⁴</td>
</tr>
<tr>
<td>Texas</td>
<td>TEX. REV. CIV. STAT. ANN. arts. 4512.1-4512.4 (Vernon 1977 &amp; Supp. 1980);</td>
<td>Anti-abortion</td>
<td>Challenged-constitutional¹¹</td>
</tr>
<tr>
<td></td>
<td>TEX. FAM. CODE ANN. § 35.03(a)(4) (Vernon 1975).</td>
<td>Parental consent</td>
<td>Unchallenged-constitutional¹²</td>
</tr>
<tr>
<td>Utah</td>
<td>UTAH CODE ANN. § 76-7-304(2) (1978); id. § 76-7-302(2).</td>
<td>Parental notice</td>
<td>Challenged-constitutional¹³</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Second trimester abortion must be performed in hospital</td>
<td>Unchallenged-probably un-constitutional¹⁴</td>
</tr>
</tbody>
</table>

65. Statute upheld as constitutional since it only prohibits abortion when the child is “quick.” See Rodos v. Michaelson, 527 F.2d 582, 582 (1st Cir. 1975).
66. See note 4 supra.
67. See note 4 supra.
68. See note 19 supra.
70. See note 18 supra.
72. See note 4 supra.
74. See note 19 supra.
<table>
<thead>
<tr>
<th>States</th>
<th>Codes/Statutes</th>
<th>Description</th>
<th>Constitutional Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Virginia</td>
<td>VA. CODE § 18.2-74(a) (1975); id. § 18.2-74(b).</td>
<td>Second trimester abortion must be performed in hospital; Physician's decision must be approved by two additional physicians</td>
<td>Unchallenged-unconstitutional</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>WIS. STAT. ANN. § 940.04 (West 1958).</td>
<td>Anti-abortion</td>
<td>Challenged-unconstitutional</td>
</tr>
</tbody>
</table>

75. See note 1 supra.
76. See note 19 supra.
77. See note 22 supra.
79. Doe v. Charleston Area Medical Center, Inc. 529 F.2d 638, 644 (4th Cir. 1975).
81. See note 36 supra.
PROPOSED UNIFORM ABORTION CONTROL ACT FOR MINORS

I. PHILOSOPHY: Abortion is a health service that will be provided with the same standards of safety and professional skill as other health services.

II. DEFINITIONS: (as used in this act)

A. "Abortion" means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.

B. "Hospital" means a hospital approved and licensed by the state department of health or operated under the auspices of the United States government or any agency thereof.

C. "Licensed Physician" means a medical doctor who is licensed by the state in which he resides to practice medicine, surgery, or whatever specialty in which he performs or professes competence.

D. "Licensed Facility" means any medical facility other than a hospital licensed by the state board of health and whose medical services meet minimum standards of the community's medical profession.

E. "Viability" means the point at which the fetus is potentially able to live outside the mother's womb with artificial aid. Viability may not be defined as a set point of gestation weeks because viability varies with each pregnancy. Therefore, viability is a medical term ascertainable only by a physician.

III. CONSTITUTIONAL RIGHT: All women have the right to request termination of their pregnancies by physicians during the first trimester without any interference by the state.

IV. LICENSED PHYSICIAN: Abortions on minors must be performed only by state licensed physicians who have been trained for such procedure according to the standards of their profession.

V. REPORTS AND RECORDS: All facilities that provide abortion services to minors shall comply with the below listed requirements as implemented and directed by the state department of public health.

1. FLA. STAT. ANN. § 390.011(1) (West Supp. 1978); MO. ANN. STAT. § 188.015(1) (Vernon Supp. 1980); REVISED UNIFORM ABORTION ACT § 1(1).

2. REVISED UNIFORM ABORTION ACT § 1(2).

3. Id. § 1(4).


A. Reporting Requirements: All physicians who perform abortions must report the following data on each abortion to the state department of public health within 30 days after the procedure is completed.11

1. Age of patient;
2. Marital status of patient;
3. Weeks of gestation;
4. Name and address of facility where abortion was performed;
5. Abortion procedure used;
6. Laboratory tests performed prior to the procedure and results;
7. Laboratory analysis of the aborted tissue;
8. Size and length of fetus aborted, if determinable;
9. Complications including maternal death that occurred during or after the procedure;
10. Patient’s history of pregnancies, miscarriages, spontaneous abortions therapeutic abortions, and elective abortions; and
11. Name and address of the physician who performed the abortion and his state license number.

B. Record Keeping Procedures: Individual records containing each patient’s name and all other required data shall be kept at the facility for seven years.12 This information may not be disclosed without expressed permission of the patient to anyone outside the facility.13

VI. MINOR’S CAPACITY TO CONSENT: Minors are emancipated at the age of fertility for the purpose of consenting to their own abortion.14 This consent when freely given is not subject to subsequent disaffirmance by the minor based on her minority.15 A physician may not perform an abortion on a minor regardless of parental or judicial consent if the minor does not also grant her consent.16 A physician should ensure a minor’s abortion decision is her own and is not based on the pressure or influence of some interested third party.17

VII. PARENTAL NOTICE AND CONSULTATION: Neither notice to nor consultation with the minor’s parent or guardian is mandatory.18 Communication with the minor’s parent or guardian is at the discretion of the attending physician.19 The physician’s pri-
mary consideration is the health and best interests of the minor.\textsuperscript{10}

VIII. No THIRD PARTY CONSENT: Third party involvement in the minor's abortion request and decision shall not be required.\textsuperscript{11} The physician, however, is allowed to consult or notify a third party against the wishes of the minor when he knows that his failure to do so would seriously jeopardize the minor's health.\textsuperscript{12}

IX. FACILITY: All abortions for minors must be performed in a licensed facility or in a hospital.\textsuperscript{13} After the first trimester, abortions shall be performed in a hospital only if the physician decides such measure is necessary to preserve the health and safety of the patient.\textsuperscript{14}

X. INFORMED CONSENT: Prior to performing an abortion on a minor, the physician must obtain the written informed consent of the patient.\textsuperscript{15} Informed consent includes giving the patient information on the procedure, its risks, and its alternatives.\textsuperscript{16} Informed consent is not necessary when the physician decides the abortion is necessary to preserve the life of the minor.

XI. PHYSICIAN: The recommending physician's decision to perform an abortion on a minor is sufficient and does not require concurrence or approval by other physicians.\textsuperscript{17} The physician must, however, consult with the minor before he performs the abortion.\textsuperscript{18} It is the physician's duty alone to decide if the minor is capable of informed consent.\textsuperscript{19} The physician may refer the minor to other health professionals to assist him in arriving at these determinations.\textsuperscript{20}

\begin{itemize}
\item[] 22. See generally Freiman v. Ashcroft, 584 F.2d 247 (8th Cir. 1978); Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542 (D. Me. 1979).
\item[] 23. See Baird v. Department of Pub. Health, 599 F.2d 1098, 1102-03 (1st Cir. 1979); Hodgson v. Lawson, 542 F.2d 1350, 1358 (8th Cir. 1976); Florida Women's Medical Clinic, Inc. v. Smith, 478 F. Supp. 233, 236 (S.D. Fla. 1979).
\item[] 24. During the second trimester, the state may only assert restrictions necessary to protect the health of the mother. See Roe v. Wade, 410 U.S. 113, 162 (1973).
\item[] 26. See id. at 67 n.8; Freiman v. Ashcroft, 584 F.2d 247, 251 (8th Cir. 1978); Wynn v. Carey, 582 F.2d 1375, 1385 (7th Cir. 1978); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 549 (D. Me. 1979).
\end{itemize}
XII. Viable Fetus: A physician is prohibited from performing an abortion on a minor when he has determined to the best of his ability that her fetus is viable.11

XIII. Best Interests Abortion: A physician may perform an abortion on a minor when he finds she is not capable of informed consent as long as he has the minor's voluntary written consent and he judges the abortion to be in the minor's best interest.12


32. If a judge in Bellotti II's hypothetical hearing can grant consent for a minor to have an abortion when such is in her best interests, it is also reasonable to permit a physician to perform a "best interests" abortion as long as he has the minor's voluntary consent. See Bellotti v. Baird, ___ U.S. ___, 99 S. Ct. 3035, 3048-52, 61 L. Ed. 2d 797, 813-18 (1979). Since the content of informed consent is designed by the physician, it would be difficult to determine whether a physician had merely the minor's voluntary consent or her informed consent. See Planned Parenthood v. Danforth, 428 U.S. 52, 67 n.8 (1976); Freiman v. Ashcroft, 584 F.2d 247, 251 (8th Cir. 1978); Cobbs v. Grant 502 P.2d 1, 10-11, 104 Cal. Rptr. 505, 514-15 (1972).