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

GERRY D. ABEL LOZANO

I. INTRODUCTION

A significant number of unmarried minors are choosing abortions more frequently than carrying their pregnancies to term.[1] Teenage abortions in 1976 represented one-third of all reported legal abortions performed in the United States,[2] while abortions performed on unmarried minors from thirteen to seventeen years of age constituted approximately one-sixth.[3] Both the sexual activity of minors[4] and laws reducing minors' access to

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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.

2. *Id.* at 22; *see* ALAN GUTTMACHER INSTITUTE, 11 MILLION TEENAGERS: WHAT CAN BE DONE ABOUT THE EPIDEMIC OF ADOLESCENT PREGNANCIES IN THE UNITED STATES 48 (1976); Forrest, Tietze & Sullivan, *Abortion in the United States, 1976-1977*, 10 FAM. PLAN. PERSPECTIVES 271, 271 (1978).

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

	Age	Total Abortions	% of Total Teenage Abortions
a.	13	1,307	.7%
b.	14	5,544	3.0%
c.	15	14,475	7.8%
d.	16	25,792	13.8%
e.	17	34,711	18.8%

PUB. HEALTH SERV., U.S. DEP'T HEALTH, EDUC. & WELFARE, CENTER FOR DISEASE CONTROL: ABORTION SURVEILLANCE 1976, at 22 (1978) (HEW Pub. No. (CDC) 78-8205).

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[5] ensure that abortion services will continue to be in demand.[6] The total number of minors actually receiving abortions is unknown because only twenty-six states report data specifically delineating abortions provided to minors.[7]

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*.[8] 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

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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 9 (1976).

5. Legal barriers reduce the accessibility of contraceptives. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 689 (1977). Where contraceptive devices are not accessible, teenage pregnancies increase. Premarital teenage pregnancies, however, could be reduced by 40 percent if all young people who chose to be sexually active were to use contraception consistently. *See* Tietze, *Teenage Pregnancies: Looking Ahead to 1984*, 10 FAM. PLAN. PERSPECTIVES 205, 205-06 (1978); Zelnik & Kanter, *Contraceptive Patterns and Premarital Pregnancy Among Women Age 15-19 in 1976*, 10 FAM. PLAN. PERSPECTIVES 135, 142 (1978); Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001, 1009-10 (1975).

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).

7. *See* PUB. HEALTH SERV., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, CENTER FOR DISEASE CONTROL: ABORTION SURVEILLANCE 1976, at 22 (1978) (HEW Pub. No. (CDC) 78-8205) (statistics are by distinct age groups: 13, 14, 15, 16, 17) (Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Illinois, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Virginia). In 1976 forty states reported statewide abortion data while ten states including the District of Columbia reported partial data. *See id.* at 15. Thirty-six states provide data that identify abortions performed on minors less than 15 years of age and teenagers in the 15-19 year old group. *See id.* at 21. A recent study analyzed state laws requiring abortion providers to report statistics on their services to state health agencies. *See* Note, *Abortion Statutes After Danforth: An Examination*, 15 J. FAM. L. 537, 560-62 (1976-77).

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.[9] More recently in *Bellotti v. Baird (Belloti II)*,[10] the Supreme Court reaffirmed the *Danforth* holding and continued the controversial inquiry into minors' abortion rights.[11]

Disputes concerning abortion rights for minors will undoubtedly con-

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9. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976); *see, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977); Bellotti v. Baird, 428 U.S. 132, 147 (1976) (*Bellotti I*); Wynn v. Carey, 582 F.2d 1375, 1390 (7th Cir. 1978). *See generally* Note, *The Minor's Right of Privacy: Limitations of State Action After Danforth and Carey*, 77 COLUM. L. REV. 1216, 1226 (1977). Unmarried pregnant minors have been emancipated in law for purposes of terminating their pregnancies by abortion. *See* Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 661 (1977).

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 interpretation of the statute by 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 should have abstained from deciding 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)*.

11. *See id.* at ___, 99 S. Ct. at 3038, 3046, 3048, 61 L. Ed. 2d at 802, 811, 813; Pilpel & Law, *Bellotti v. Baird: A Victory For Minor's Rights of Reproductive Choice*, 8 FAM. PLAN. POPULATION REP. 39, 39 (1979). "Unless the Supreme Court reconsiders its decision in *Danforth, Bellotti II* stands as nothing more than fragmented guidance to thousands of judges." Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3053, 61 L. Ed. 2d 797, 819 (Rehnquist, J., concurring). *Bellotti II* is potentially more restrictive than *Danforth* because the lead opinion went beyond consideration of the statute in issue and has addressed a hypothetical statute. "It is difficult to conceive that any legislature would in the absence of this advisory opinion have enacted a statute comparable to the one suggested by the lead opinion." Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3054-55, 3055 n.4, 61 L. Ed. 2d 797, 821 n.4 (1979) (Stevens, J., concurring).

tinue for years because of fundamental and, perhaps, irreconcilable disagreement over the degree to which the law should reflect religious and social values.[12] 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.[13] A statute will then be proposed to demonstrate constitutional requirements for regulation of the abortion rights of minors.[14] 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.[15] States legislated anti-abortion laws to prevent women from exposure to medical risks unless the abortion was necessary to preserve the woman's life.[16] Modern medical techniques now make early abortions safer than childbirth.[17] Although abortion was a crime at common law, abortions performed before "quickening"—first movement of the fetus in the uterus—were not a

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12. George, *The Evolving Law of Abortion*, 23 Case W. Res. L. Rev. 708, 708 (1972). Statutory approval of particular ethical, religious, or political beliefs is something the state should not attempt in a society founded constitutionally upon the ideals of individual liberty and freedom of choice. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3045, 61 L. Ed. 2d 797, 810 (1979); Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The legal imposition of religious beliefs is constitutionally invalid. *See* Wisconsin v. Yoder, 406 U.S. 205, 243-46 (1972) (Douglas, J., dissenting in part); State v. Koome, 530 P.2d 260, 265 (Wash. 1975).

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.

14. See Appendix II, Proposed Uniform Abortion Control Act for Minors.

15. Doe v. Bolton, 410 U.S. 179, 190 (1973); Roe v. Wade, 410 U.S. 113, 148 (1973).

16. *See* Doe v. Bolton, 410 U.S. 179, 191 (1973); Roe v. Wade, 410 U.S. 113, 149, 151 (1973).

17. *See* Roe v. Wade, 410 U.S. 113, 149 (1973). One author wrote a detailed analysis of abortion laws from 1200 to the present demonstrating how the technology of fertility control, contraception, and abortion technology have affected legislation on abortion. *See* Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359, 365 (1979).

crime.[18] 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.[19] By the time the fourteenth amendment was adopted in 1868, thirty-six states and territories had passed laws limiting abortion.[20] By August 1970, twenty-one of these anti-abortion laws were still in effect and enforceable.[21] 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.[22]

B. *Abortion Legalized*

In 1973 the United States Supreme Court's landmark decision, *Roe v. Wade*,[23] held anti-abortion laws unconstitutional.[24] *Roe* announced that an individual's right of privacy encompassed a woman's right to decide "whether or not to terminate her pregnancy."[25] 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.[26] After the first trimester and before viability of the

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18. *See* Roe v. Wade, 410 U.S. 113, 132 (1973); 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129 (1872).

19. *See* Roe v. Wade, 410 U.S. 113, 138 (1973); Conn. Gen. Stat. tit. 20, § 1 (1821). The abortion laws of two states classify abortion as criminal only when the fetus is quick. *See* N.H. REV. STAT. ANN. § 585:13 (1974) (entitled "Intent to Destroy Quick Child"); R.I. GEN. LAWS § 11-23-5 (1970) (entitled "Willful Killing of Unborn Quick Child"). "Quick child" is defined by the Rhode Island Legislature as "an unborn child whose heart is beating, who is experiencing electronically-measurable brain waves, who is discernably moving, and who is so far developed and matured as to be capable of surviving the trauma of birth with the aid of usual medical care and facilities available in this state." R.I. GEN. LAWS § 11-23-5 (1970).

20. *See* Roe v. Wade, 410 U.S. 113, 174 n.1 (1973) (Rehnquist, J., dissenting).

21. *See id.* at 176 n.2 (Rehnquist, J., dissenting).

22. *See id.* at 139; Comment, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*, 1972 U. ILL. L.F. 177, 179 n.25. In 1973 when the Supreme Court declared anti-abortion laws unconstitutional in *Roe*, twenty-nine states had anti-abortion laws. *See* Roe v. Wade, 410 U.S. 113, 118 n.2 (1973). In response to *Roe*, by September 1973 over 228 abortion bills were introduced compared to 134 bills proposed in 1972. *See* Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305, 305-06 (1974).

23. 410 U.S. 113 (1973).

24. *See id.* at 164. *"Roe . . .* effectively nullified as unconstitutional the anti-abortion laws of all fifty states." Uddo, *A Wink From the Bench: The Federal Courts and Abortion*, 53 TUL. L. REV. 398, 398 (1979); *accord*, Tribe, *The Supreme Court, 1972 Term-Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 2 (1973).

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

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.[27] 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.[28]

C. *Current Laws*

Approximately nine states have anti-abortion statutes that have been challenged and held unconstitutional.[29] Rhode Island has both an unconstitutional anti-abortion statute[30] and a statute prohibiting abortion of a

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Roe, 432 U.S. 464, 473-74 (1977) (regulation rationally related to legitimate state interest upheld unless obstructs right to abortion); Bellotti v. Baird, 428 U.S. 132, 147 (1976) (state requirement constitutional unless "unduly burdens right to seek an abortion"); Connecticut v. Menillo, 423 U.S. 9, 11 (1975) (per curiam) (requirement which does not impinge right to abortion is constitutional).

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).

29. *See* ARIZ. REV. STAT. ANN. § 13-3603 (West 1978) (held unconstitutional in State v. New Times, Inc., 511 P.2d 196, 198 (Ariz. Ct. App. 1973), State v. Wahlrab, 509 P.2d 245, 245 (Ariz. Ct. App. 1973), and Nelson v. Planned Parenthood Center, 505 P.2d 580, 586 (Ariz. Ct. App. 1973)); CAL. HEALTH & SAFETY CODE § 25951(c) (Deering 1975) (held unconstitutional in People v. Barksdale, 503 P.2d 257, 262, 271, 15 Cal. Rptr. 1, 6, 15 (1972); CAL. PENAL CODE § 274 (Deering 1975) (unchallenged); COLO. REV. STAT. §§ 18-6-101 to 18-6-104 (1978) (held unconstitutional in People v. Norton, 507 P.2d 862, 863 (Colo. 1973)); CONN. GEN. STAT. ANN. §§ 53-29 to 53-31 (West Supp. 1979) (held unconstitutional in State v. Sulman, 339 A.2d 62, 63 (Conn. 1973) but upheld for non-physicians in Connecticut v. Menillo, 423 U.S. 9, 11 (1975) (per curiam)); GA. CODE ANN. § 26-1202 (1977) (all subsections of section 26-1202 held unconstitutional in Doe v. Bolton, 410 U.S. 179, 201-05 (1973) except sections 1202(b)(7) (recordkeeping requirement), 1202(b)(8) (reporting requirement), 1202(b)(9) (records confidential), 1202(d) (no wrongful death for dead fetus), and 1202(e) (no person or hospital may be required to perform abortions)); MD. ANN. CODE art. 43, §§ 137, 139 (1957 & Supp. 1978) (held constitutional in Vuitch v. Hardy, 473 F.2d 1370, 1371 (4th Cir.), *cert. denied*, 414 U.S. 824 (1973); TEX. REV. CIV. STAT. ANN. arts. 4512.1 to 4512.4 (Vernon 1977 & Supp. 1980) (held unconstitutional for abortions performed by physicians prior to viability in Roe v. Wade, 410 U.S. 113 (1973)); W. VA. CODE § 61-2-8 (1977) (held unconstitutional in Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638, 644 (4th Cir. 1975)); WIS. STAT. ANN. § 940.04 (West 1958) (held unconstitutional in McCann v. Kerner, 436 F.2d 1342, 1343 (7th Cir. 1971)).

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 statutes[33] 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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1973), *cert. denied*, 416 U.S. 993 (1974).

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).

32. *See* N.H. Rev. Stat. Ann. § 585:13 (1974) (unchallenged).

33. *See* Ala. Code § 13-8-4 (1977) (constitutionality of statute upheld against non-physician in State v. Wilkerson, 305 So. 2d 378, 382 (Ala. Crim. App. 1974)); Del. Code Ann. tit. 24, § 1790 (1975); D.C. Code Ann § 22-201 (1967); Miss. Code Ann. § 97-3-3 (1972); Vt. Stat. Ann. tit. 13, § 101 (1974).

34. *See* Connecticut v. Menillo, 423 U.S. 9, 10-11 (1975) (per curiam) (anti-abortion statute constitutionally enforceable against non-physician); State v. Wilkerson, 305 So. 2d 378, 382 (Ala. Crim. App. 1974) (Alabama anti-abortion statute constitutional against non-physician).

35. *See* Maher v. Roe, 432 U.S. 464, 473-74 (1977); Doe v. Bolton, 410 U.S. 179, 189 (1973); Florida Women's Medical Clinic, Inc. v. Smith, 478 F. Supp. 233, 236 (S.D. Fla. 1979); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 545 (D. Me. 1979). The abortion decision is made by the physician who exercises his best medical judgment in light of all factors relevant to the health and well being of the patient. *See* Doe v. Bolton, 410 U.S. 179, 191-92 (1973).

36. Planned Parenthood v. Danforth, 428 U.S. 52, 81 (1976); *see* Baird v. Department of Pub. Health, 599 F.2d 1098, 1101, 1102 (1st Cir. 1979); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 547 (D. Me. 1979); Westchester Women's Health Organization v. Whalen, 475 F. Supp. 734, 739-40 (S.D. N.Y. 1979).

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.[38] The *Roe* decision did not hold anti-abortion statutes void and unenforceable against a non-physician abortionist.[39] In *Connecticut* v. *Menillo*[40] 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.[41] 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*,[42] 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).[43] Such a requirement was found indefensible since there was no evidence showing non-JCAH hospitals were inadequate to perform medically safe abortions.[44] The Court further stated performance of first trimester abortions could not be limited to hospitals.[45] 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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38. *See* Connecticut v. Menillo, 423 U.S. 9, 10 (1975) (per curiam); Roe v. Wade, 410 U.S. 113, 120 (1973).

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 predicate is valid only if the abortion is performed by a physician under conditions ensuring maximum safety for the woman. *Id.* at 11.

40. 423 U.S. 9 (1975).

41. *Id.* at 11; *accord*, Roe v. Wade, 410 U.S. 113, 165 (1973) (state may proscribe abortion by any person other than currently licensed physician); Wright v. State, 351 So. 2d 708, 709 (Fla. 1977) (registered nurse convicted for performing abortion). *But see* Cook & Dickens, *A Decade of International Change in Abortion Law: 1967-77*, 68 AM. J. PUB. HEALTH 637, 638-39 (1978) (not all laws outside United States require physicians for first trimester abortions).

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).

45. *See* Doe v. Bolton, 410 U.S. 179, 195 (1973); Roe v. Wade, 410 U.S. 113, 163-64 (1973); Arnold v. Sendak, 416 F. Supp. 22 (S.D. Ind.), *aff'd mem.*, 429 U.S. 968, 969 (1976). *See generally* Note, *Constitutional Analysis of the New Oklahoma Abortion Statute*, 32 OKLA. L. REV. 139, 142-43 (1979) (statute requiring abortions be performed in hospital is constitutionally deficient).

protect the health and safety of the abortion patient.[46]

Eleven states have unchallenged laws in conflict with the holdings of *Doe*. California and Maryland require all abortions be performed in a JCAH hospital.[47] Somewhat less restrictive, but nevertheless unconstitutional, Hawaii and Oklahoma statutes direct all abortions be performed in a hospital.[48] Seven other states require a hospital be used for abortions done either after twelve weeks[49] or during the second trimester.[50]

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.[51] As examples of permissible state regulations, *Roe* listed licensing of both the person performing the abortion and the facility housing the abortion procedure.[52] Since the Supreme Court subsequently allowed states to impose licensing requirements upon persons performing abortion

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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).

48. *See* HAWAII REV. STAT. § 453-16(a)(2) (1976); OKLA. STAT. ANN. tit. 63, § 1-737 (West Supp. 1979).

49. *See* N.D. CENT. CODE § 14-02.1-04(2) (Supp. 1977).

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).

52. *See* Roe v. Wade, 410 U.S. 113, 163 (1973).

before the end of the first trimester,[53] the First Circuit Court of Appeals in *Baird v. Department of Public Health*[54] reasoned it was, therefore, permissible for states to enforce licensing of facilities performing first trimester abortions.[55] Unless these restrictions are unduly burdensome or significantly impact the availability of abortion services, such laws do not violate *Roe*.[56]

States may promulgate laws necessary to maintain medical standards.[57] "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."[58] State restrictions may not, however, cause significant impact or consequence to the abortion decision or upon the physician-patient relationship during the first trimester.[59] 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 analagous procedures.[60] Following this gui-

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53. *See* Connecticut v. Menillo, 423 U.S. 9, 11 (1975) (per curiam).

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).

56. *See* Baird v. Department of Pub. Health, 599 F.2d 1098, 1102 (1st Cir. 1979). If state law does impact a woman's abortion decision or her access to abortion services, the law is not unconstitutional unless it "unduly burdens the right to seek an abortion." Bellotti v. Baird, 428 U.S. 132, 147 (1976) (*Bellotti I*). Even a burdensome regulation may be justified by a compelling state interest. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977); Roe v. Wade, 410 U.S. 113, 155 (1973). "Decisions subsequent to *Roe* make clear that not all regulation of first trimester abortions is impermissible." Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 545 (D. Me. 1979). Application of New York general statutory law regulating health facilities to abortion facilities effectively increases the cost of an abortion, but such consequence "does not constitute undue interference with the abortion decision." Westchester Women's Health Organization v. Whalen, 475 F. Supp. 734, 741 (S.D. N.Y. 1979).

57. *See* Roe v. Wade, 410 U.S. 113, 154 (1973).

58. *Id.* at 149-50.

59. *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).

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

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Michigan Dep't of Pub. Health, 426 F. Supp. 471, 475, 477 (E.D. Mich. 1977) (restrictions applied to all clinics not just abortion clinics); Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554, 582 (E.D. Pa. 1975) (upheld Pennsylvania statute authorizing state licensing of abortion clinics but did not address non-existent licensing restrictions). *But see* Sendak v. Arnold, 429 U.S. 968, 968-69 (1976) (restrictions excessively burdensome); Friendship Medical Center, Ltd. v. Chicago Bd. of Health, 505 F.2d 1141, 1143 (7th Cir. 1974) (restrictions applied solely to abortion clinics), *cert. denied*, 420 U.S. 997 (1975); Word v. Poelker, 495 F.2d 1349, 1350 (8th Cir. 1974) (restrictions for abortion clinics only); Hallmark Clinic v. North Carolina Dep't of Human Resources, 380 F. Supp. 1153, 1157-58 (E.D. N.C. 1974) (emergency transfer agreement unreasonable), *aff'd*, 519 F.2d 1315 (4th Cir. 1975).

61. *See* Abortion Coalition of Michigan, Inc. v. Michigan Dep't of Pub. Health, 426 F. Supp. 471, 477 (E.D. Mich. 1977); Note, *Constitutional Law: A Constitutional Analysis of the New Oklahoma Abortion Statute*, 32 OKLA. L. REV. 138, 142 (1979).

62. *See* Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U. L. REV. 783, 808-09.

63. *See* FLA. STAT. ANN. §§ 390.011 to .021 (West Supp. 1978); LA. REV. STAT. ANN. § 40:1299.35.16 (West Supp. 1980); MINN. STAT. ANN. § 145.416 (West Supp. 1979); N.C. GEN. STAT. § 14-45.1(a) (Supp. 1979).

64. *See* Baird v. Department of Pub. Health, 599 F.2d 1098, 1099, 1102 (1st Cir. 1979) (upholding application of Massachusetts clinic licensing law); Westchester Women's Health Organization, Inc. v. Whalen, 475 F. Supp. 734, 735-36 (S.D. N.Y. 1979) (upholding application of New York Public Health Law).

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

66. Planned Parenthood v. Danforth, 428 U.S. 52, 79-81 (1976); *accord*, Westchester Women's Health Organization, Inc. v. Whalen, 475 F. Supp. 734, 740 (S.D. N.Y. 1979).

67. Planned Parenthood v. Danforth, 428 U.S. 52, 80 (1976); *accord*, Baird v. Department of Pub. Health, 599 F.2d 1098, 1101 (1st Cir. 1979). Reporting requirements vary widely between states. *Compare* LA. REV. STAT. ANN. § 40:1299.35.10 (West Supp. 1980) (report includes 24 specific items) *with* MONT. CRIM. CODE ANN. § 94-5-619 (1977) (report requires five items). For an analysis of the state abortion statutes that require recordkeeping

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

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and reporting, see Note, *Abortion Statutes After Danforth: An Examination*, 15 J. FAM. L. 537, 559-62 (1976-77).

68. Planned Parenthood v. Danforth, 428 U.S. 52, 81 (1976); *accord*, Baird v. Department of Pub. Health, 559 F.2d 1098, 1101-02 (1st Cir. 1979); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 545 (D. Me. 1979).

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*, 35 THE JURIST 66, 68 (1975).

71. *See* Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U. L. REV. 783, 810-11.

72. *See, e.g.*, Bellotti v. Baird, 428 U.S. 132, 147-48 (1976); Planned Parenthood v. Danforth, 428 U.S. 52, 81 (1976); Baird v. Department of Pub. Health, 599 F.2d 1098, 1101 (1st Cir. 1979).

73. See Appendix II, § III.

statute should expressly provide that abortions may be performed only by licensed physicians, specifically trained for such procedures.[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.[75] To ensure monitoring of these services, states should impose reporting and recordkeeping requirements on physicians and facilities providing abortions to minors.[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.[77] The abortion decision is primarily a medical one[78] wherein the physician's medical judgment should be exercised in light of all factors affecting the patient: physical, emotional, psychological, and familial.[79] Compelled parental interference with this physician-patient decision is unconstitutional[80] because it negates a minor's constitutional right to make her decision privately and independently.[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.[82] One author has observed that the justification for emancipation

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74. See Appendix II, § IV.

75. See Appendix II, § IX.

76. See Appendix II, § V.

77. Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 661 (1977); *see* Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

78. Roe v. Wade, 410 U.S. 113, 166 (1973); *accord*, Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 545 (D. Me. 1979); Note, *Baird v. Bellotti: Abortion—The Minor's Right to Decide*, 33 U. MIAMI L. REV. 705, 719-20 (1979).

79. Doe v. Bolton, 410 U.S. 179, 192 (1973).

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).

81. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3054, 61 L. Ed. 2d 797, 820-21 (1979) (Stevens, J., concurring).

82. *See* Ballard v. Anderson, 484 P.2d 1345, 1352, 95 Cal. Rptr. 1, 8 (1971); State v. Koome, 530 P.2d 260, 267 (Wash. 1975); Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 661-62 (1977); Note, *The Validity of Parental Consent Statutes After Planned Parenthood*, 54 J. URB. L. 127, 158-59

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

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(1976).

83. Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 661-62 (1977).

84. A minor has a special need for counseling and consultation before the abortion. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3047 n.21, 61 L. Ed. 2d 797, 812 n.21 (1979).

85. *See* State v. Koome, 530 P.2d 260, 265 (Wash. 1975); Paul & Scofield, *Informed Consent for Fertility Control Services*, 11 FAM. PLAN PERSPECTIVES 159, 160 (1979). It is entirely feasible for states to direct by statute that the attending physician counsel a minor prior to the abortion. *See* Note, *Baird v. Bellotti: Abortion—The Minor's Right To Decide*, 33 U. MIAMI L. REV. 705, 720 n.58 (1979) (cites KY. REV. STAT. ANN. § 311.730 (1977) as example of a possible statute). A statute requiring a woman to spend fifteen to thirty minutes counseling with her physician before finalizing an abortion decision can scarcely be characterized as an "unduly burdensome interference" with the abortion decision. Such a statute merely assures materialization of the doctor-patient consultation that has been a keystone of the Supreme Court's decisions from the beginning. Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U. L. REV. 783, 806; *cf.* KY. REV. STAT. ANN. § 311.730 (1977) (physician must counsel patient before second trimester abortion). This Kentucky statute was challenged and upheld as constitutional in Wolfe v. Schroering, 541 F.2d 523, 526 (6th Cir. 1976).

86. *See* Bennett v. Graves, 557 S.W.2d 893, 895 (Ky. Ct. App. 1977). At the minimum, informed consent statutes merely ensure an abortion is not performed upon a woman against her will. Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U. L. REV. 783, 818. "In the *Roe* Court's mythology of the doctor-patient relationship, the woman reaches the decision whether or not to terminate her pregnancy only after careful and sensitive consultation with a medical expert . . . ." Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U. L. REV. 783, 830; *see* Roe v. Wade, 410 U.S. 113, 153 (1973). The newly enacted Maine statute requires that the physician consult with the patient before obtaining her informed consent. *See* ME. REV. STAT. ANN. tit. 22, § 1598(2) (West Supp. 1979). This statute was challenged on the grounds that it was "medically unnecessary for the doctor to give informed consent information to the woman. . . . The woman is better served by having trained counselors deal with her." Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 550 (D. Me. 1979). The court held that regardless of whether a counselor or physician informs the woman in preparation for her informed consent, there is no proof the state's requiring the physician himself to ascertain if the woman has received necessary information imposes any undue burden on the woman's decision. *See id.* at 550. Upon challenge, KY. REV. STAT. ANN. § 311.730 (1977) which requires a physician to counsel a patient prior to a *second* trimester abortion was held consti-

has been interpreted as impliedly assuming a physician-patient consultation would occur.[87] This assumption was supported by *Doe's* description of the physician's special skill as a counselor.[88] In contrast to the implication in *Roe* and *Doe* that physicians would necessarily counsel their patients,[89] abortion clinics have been stereotyped as business enterprises where the physician never sees the patient before the abortion.[90] 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.[91] 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.[92] Even if doctor-patient consultation were required, the physician's medical judgment may be distorted by the financial gains inherent in performing abortions.[93] 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

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

87. Uddo, *A Wink From the Bench: The Federal Courts and Abortion*, 53 TUL. L. REV. 398, 441 (1979); *accord*, Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U. L. REV. 783, 783-84, 830.

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.

90. Uddo, *A Wink From The Bench: The Federal Courts and Abortion*, 53 TUL. L. REV. 398, 442 (1979); *accord*, Planned Parenthood v. Danforth, 428 U.S. 52, 91 n.2 (1976) (Stewart, J., concurring). "Typically the [abortion] clinics are run by entrepreneurs and physicians on a profitmaking basis. Maximizing clinic revenue demands minimizing the amount of time the doctor spends with each patient . . . ." Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U. L. REV. 783, 806.

91. Planned Parenthood v. Danforth, 428 U.S. 52, 91 n.2 (1976) (Stewart, J., concurring); *accord*, Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U. L. REV. 783, 785 (physician first sees patient when she is on the operating table awaiting the abortion).

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).

93. *See* Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U. L. REV. 783, 806.

only on the basis of carefully deliberated medical judgments relating to life and health."[94]

Kentucky has a consultation statute requiring the physician to counsel patients prior to a second trimester abortion.[95] In *Wolfe v. Schroering*[96] the Sixth Circuit Court of Appeals upheld the constitutionality of this statute.[97] 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.[98]

Maine's newly enacted statute directs the attending physician to counsel a woman to ensure her consent is truly informed.[99] Challenging the statute in *Women's Community Health Center, Inc. v. Cohen,*[100] 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."[101] 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.[102]

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.*[103]

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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.

95. *See* KY. REV. STAT. ANN. § 311.730 (1977).

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

97. *See id.* at 526.

98. *See id.* at 526.

99. *See* ME. REV. STAT. ANN. tit. 22, § 1598(2) (West Supp. 1979).

100. 477 F. Supp. 542 (D. Me. 1979).

101. *Id.* at 549.

102. *Id.* at 549.

103. Planned Parenthood v. Danforth, 428 U.S. 52, 66, 67 n.8 (1976).

> 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.[104] The patient's consent should be informed, freely given, and not the result of any third party influence.[105] Informed consent was defined by *Danforth* as telling the patient about the procedure and its correlative consequences.[106]

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.[107] The Eighth Circuit Court of Appeals addressed this issue in *Freiman v. Ashcroft*[108] and held the Missouri informed consent statute[109] invalid in part because it directed the physician to tell the patient about another statute[110] concerning disposition of infants born alive during abortion.[111] This information was consid-

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

104. Kovnat, *Medical Malpractice Legislation in New Mexico*, 7 N.M. L. REV. 5, 14-15 (1976); *see* Plante, *An Analysis of Informed Consent*, 36 FORDHAM L. REV. 639, 640-48 (1968). "Part of what is going on in the informed consent area reflects a practical concern to circumvent the conspiracy of doctor silence in order to make it easier for malpractice cases to get to the jury." Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U. L. REV. 783, 820. Even in the absence of an informed consent statute, a physician would be vulnerable to traditional tort liability if he operated on a minor who was incapable of giving valid consent. *See* Note, *Baird v. Bellotti: Abortion—The Minor's Right To Decide*, 33 U. MIAMI L. REV. 705, 719-20 (1979). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 102-03 (4th ed. 1971).

105. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 65 (1976).

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).

107. *See* Freiman v. Ashcroft, 584 F.2d 247, 250-51 (8th Cir. 1978) (Missouri); Wolfe v. Schroering, 541 F.2d 523, 526 (6th Cir. 1976) (Kentucky); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 549-50 (D. Me. 1979) (Maine); Doe v. Deschamps, 461 F. Supp. 682, 685-86 (D. Mont. 1976) (Montana); Wynn v. Scott, 449 F. Supp. 1302, 1316-17 (N.D. Ill. 1978) (Illinois), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193, 194 (7th Cir. 1979).

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

109. *See* MO. ANN. STAT. § 188.045 (Vernon Supp. 1980).

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).

ered not to be reasonably related to the purpose of informed consent.[112] Although the Supreme Court approved informed consent statutes, it did not require physicians to disclose any and all information regardless of its legality, truth, constitutionality, or medical advisability.[113] The *Freiman* court characterized the Missouri informed consent requirement as irrelevant and extraneous to the decision-making process between physician and patient and to services being offered.[114] Such a "straightjacket requirement" violates due process by invading the "delicate and private" physician-patient relationship.[115]

It is uncertain whether statutes that specify the content of informed consent will be held unconstitutional by the Supreme Court.[116] The *Freiman* decision, however, supports the Supreme Court's guidance in *Danforth* against the imposition of "straightjacket" informed consent requirements upon the attending physician.[117] In light of the *Freiman* decision, state informed consent statutes specifying the content of informed consent forms may not withstand constitutional challenge.[118]

D. *Physician Immunity*

Under contract law, a person who consented to a contract during minority could disaffirm and void the agreement once she reached major-

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112. *Id.* at 251.

113. Planned Parenthood v. Danforth, 428 U.S. 52, 67 (1976); *accord,* Freiman v. Ashcroft, 584 F.2d 247, 251 (8th Cir. 1978); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 549 (D. Me. 1979).

114. *See* Freiman v. Ashcroft, 584 F.2d 247, 251 (8th Cir. 1978); Wynn v. Scott, 449 F. Supp. 1302, 1316-17 (N.D. Ill. 1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193, 196 (7th Cir. 1979).

115. *See* Freiman v. Ashcroft, 584 F.2d 247, 252 (8th Cir. 1978); Wynn v. Scott, 449 F. Supp. 1302, 1316-17 (N.D. Ill. 1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193, 196 (7th Cir. 1979).

116. *See generally* Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship,* 1978 B.Y.U. L. REV. 783, 821-26 (analyzes pre and post *Danforth* decisions on informed consent statutes and favors detailed informed consent statutes).

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).

118. *See* N.D. CENT. CODE § 14-02.1-02(4) (Supp. 1977); TENN. CODE ANN. § 39-302(b) (Supp. 1979).

ity.[119] Neither *Danforth* nor *Bellotti II* addressed whether a minor, during her majority, could disaffirm her prior consent to abortion.[120] State law, therefore, should expressly protect the physician against such liability through disaffirmance[121] by stating that a minor's consent to abortion is final and not subject to subsequent disaffirmance.[122] 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.[123]

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*.[124] 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.[125] In addition, subjecting the physician's decision to a review by his copractitioners unnecessarily infringes on the doctor's licensed right to practice medicine.[126] According to *Doe* this approach is one founded upon suspicion and discloses a lack of confidence in the integrity of physicians.[127]

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119. *See, e.g.*, Keser v. Chagnon, 410 P.2d 637, 639 (Colo. 1966) (en banc); Mosko v. Forsythe, 76 P.2d 1106, 1108 (Colo. 1938); Kiefer v. Fred Howe Motors, Inc., 158 N.W.2d 288, 290 (Wis. 1968).

120. *See generally* Bellotti v. Baird, ___ U.S. ___, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

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).

122. *See* Note, *Children: Health Services for Minors in Oklahoma: Capacity To Give Self-Consent to Medical Care and Treatment*, 30 OKLA. L. REV. 385, 405 (1977). *See generally* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3050 n.27, 61 L. Ed. 2d 797, 815 n.27 (1979); Ballard v. Anderson, 484 P.2d 1345, 1348-49, 95 Cal. Rptr. 1, 4-5 (1971).

123. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 73-74 (1976). *Compare* Stump v. Sparkman, 435 U.S. 349, 351 (1978) (Court authorized mother to have fifteen year old daughter sterilized without daughter's consent or knowledge) *with In re* Smith, 295 A.2d 238, 246 (Md. Ct. Spec. App. 1972) (parents denied authority to compel abortion for sixteen year old daughter without minor's voluntary consent).

124. *See* Doe v. Bolton, 410 U.S. 179, 201 (1973); Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U. L. REV. 783, 802.

125. *See* Doe v. Bolton, 410 U.S. 179, 198 (1973).

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.[128] In Kansas and Virginia a physician must secure the written approval of additional physicians.[129] Excepting the California statute which has been held unconstitutional, these unchallenged laws are probably unconstitutional since they are contrary to *Doe*.[130]

F. *Viability: Medical v. Legislative Determination*

Roe recognized the state's right to protect fetal life.[131] This right becomes dominant or "compelling" at viability.[132] The legal definition of viability, established by the *Roe* Court, is the time when the fetus is potentially able to live outside the mother's womb.[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.[134]

When viability occurs is a medical determination left to the judgment

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128. *See* CAL. HEALTH & SAFETY CODE § 25951(b) (Deering 1975) (abortion recommendation approved by hospital staff committee unconstitutional after People v. Barksdale, 503 P.2d 257, 260, 105 Cal. Rptr. 1, 41 (1972)); MD. ANN. CODE art. 43, § 137(2) (1971 & Supp. 1979) (approval from hospital abortion review authority) (unchallenged).

129. *See* KAN. STAT. ANN. § 65-444 (1972) (three additional physicians) (unchallenged); VA. CODE § 18.2-74(b) (1975) (abortion after second trimester requires two additional physicians) (unchallenged).

130. *See* Doe v. Bolton, 410 U.S. 179, 201 (1973).

131. *See* Roe v. Wade, 410 U.S. 113, 154 (1973).

132. *See id.* at 155.

133. *Id.* at 160; *see* Colautti v. Franklin, ___ U.S. ___, ___, 99 S. Ct. 675, 678, 58 L. Ed. 2d 596, 600 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 63 (1976).

> 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.

Uddo, *A Wink From The Bench: The Federal Courts and Abortion*, 53 TUL. L. REV. 398, 420-21 (1979).

134. *See, e.g.*, Colautti v. Franklin, ___ U.S. ___, ___, 99 S. Ct. 675, 681, 58 L. Ed. 2d 596, 600 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 61 (1976); Roe v. Wade, 410 U.S. 113, 164-65 (1973). The *Roe* decision held that in the period prior to viability the state may not act in the interest of fetal life. In the period after viability, the state may either prohibit or regulate abortions. *See* Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554, 572 (E.D. Pa. 1975), *aff'd sub nom.* Colautti v. Franklin, ___ U.S. ___, ___, 99 S. Ct. 675, 688, 58 L. Ed. 2d 596, 613 (1979). For a criticism and analysis of the Supreme Court's *Colautti* decision, see Uddo, *A Wink From the Bench: The Federal Courts and Abortion*, 53 TUL. L. REV. 398, 423-25 (1979).

of the attending physician.[135] The time when viability is reached varies with each pregnancy, as well as with advancement in medical technology.[136] As enunciated recently by the Supreme Court in *Colautti v. Franklin*,[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.[138]

Even medical experts may disagree whether a particular second trimester fetus has become viable because the precise determination of viability is difficult.[139] *Danforth* rejected the argument that the legislature may specify a set number of weeks as the point of viability.[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.[141]

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

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135. *See, e.g.*, Colautti v. Franklin, ___ U.S. ___, ___, 99 S. Ct. 675, 682, 58 L. Ed. 2d 596, 604 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 64-65 (1976); Roe v. Wade, 410 U.S. 113, 160-61, 164-66 (1973).

136. *See* Colautti v. Franklin, ___ U.S. ___, ___, 99 S. Ct. 675, 682, 58 L. Ed. 2d 596, 604 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 64 n.4 (1976).

137. ___ U.S. ___, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979).

138. *Id.* at ___, 99 S. Ct. at 686, 58 L. Ed. 2d at 609.

139. *See id.* at ___, 99 S. Ct. at 686, 58 L. Ed. 2d at 609.

140. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 65 (1976).

141. Colautti v. Franklin, ___ U.S. ___, ___, 99 S. Ct. 675, 682, 58 L. Ed. 2d 596, 605 (1979) (emphasis added).

142. Roe v. Wade, 410 U.S. 113, 164-65 (1973).

143. *See* IOWA CODE ANN. § 707.7 (West 1979) (abortion after second trimester is felony); MINN. STAT. ANN. §§ 145.411(2), 145.412(3)(2), (3) (West Supp. 1979) (abortion prohibited during second half of gestation); N.Y. PENAL LAW § 125.05(3)(b) (McKinney 1975) (abortion prohibited after 24th week); N.C. GEN. STAT. §§ 14-44 to 14-45.1 (1969 & Supp. 1979) (abortion prohibited after 20th week).

144. *See* Colautti v. Franklin, ___ U.S. ___, ___, 99 S. Ct. 675, 682, 58 L. Ed. 2d 596, 605 (1979).

bility.[145] Except Minnesota law, which prohibits abortion during the second half of gestation,[146] 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.[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.[148] Prior to performing the abortion, the physician should be required to consult with the patient[149] and obtain her written informed consent for the abortion.[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.[151] The attending physician's medical decision to perform the abortion should be sufficient without concurrence by other physicians.[152] Furthermore, physicians should be prohibited from performing an abortion on a minor when the physician has determined her fetus is viable.[153]

V. Parental Role in the Minor's Abortion Decision

A. *Parental Consent Laws*

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.[154] In *Danforth* two Missouri physicians challenged a

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145. *See* Idaho Code § 18-604(5) (1979) (legal presumption viability occurs at 25th week); Okla. Stat. Ann. tit. 63, § 1-732(B) (West Supp. 1979) (viability is legally presumed at 24th week).

146. *See* Minn. Stat. Ann. §§ 145.411(2), 145.412(3)(2), (3) (West Supp. 1979). Held unconstitutional in Hodgson v. Anderson, 378 F. Supp. 1008, 1016-17, 1018 (D. Minn. 1974), *appeal dismissed*, 420 U.S. 903 (1975), *aff'd in part, rev'd in part, sub nom.* Hodgson v. Lawson, 542 F.2d 1350, 1354, 1358-59 (8th Cir. 1976).

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).

148. See Appendix II, § VI.

149. See Appendix II, § XI.

150. See Appendix II, § X.

151. See Appendix II, § VI.

152. See Appendix II, § XI.

153. See Appendix II, § XII.

154. Roe v. Wade, 410 U.S. 113, 165 n.67 (1973); *see* Planned Parenthood v. Danforth, 428 U.S. 52, 55 (1976); Poe v. Gerstein, 517 F.2d 787, 789 (5th Cir. 1975), *aff'd*, 428 U.S. 901

newly enacted Missouri abortion statute requiring the written consent of at least one parent when the patient was unmarried and under eighteen years old.[155] *Danforth* followed several lower court decisions that had concluded parental consent statutes were unconstitutional.[156] 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.[157]

The *Danforth* Court reasoned minors' constitutional rights do not commence "magically only when one attains the state-defined age of majority."[158] Minors possess constitutional rights[159] although the Court has historically permitted broader state regulation of children than adults.[160] The Court then questioned whether there was any significant state interest in conditioning a minor's abortion decision on the consent of a parent.[161] 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.[162]

(1976); Uddo, *A Wink From the Bench: The Federal Courts and Abortion*, 53 TUL. L. REV. 398, 432 (1979).

155. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 62 (1976). A new Missouri law enacted 29 June 1979 in part restricts the right of a minor to obtain an abortion unless she first receives judicial consent or is an emancipated minor or has the written consent of one parent. *See* MO. ANN. STAT. § 188.028.1, .2(1) (Vernon Supp. 1980). These newly enacted provisions are probably unconstitutional after Bellotti v. Baird, ___, U.S. ___, ___, 99 S. Ct. 3035, 3052, 61 L. Ed. 2d 797, 818 (1979). *Compare* MASS. ANN. LAWS ch. 112, § 12S (Michie/Law Co-op Supp. 1978) (statute held unconstitutional in *Bellotti II) with* MO. ANN. STAT. § 188.028.1, .2(1) (Vernon Supp. 1980) (Missouri parental/judicial consent statute).

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

157. *See, e.g.*, Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3046, 61 L. Ed. 2d 797, 813 (1979); Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977); Bellotti v. Baird, 428 U.S. 132, 147 (1976).

158. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

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).

160. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976); McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971) (juveniles are not entitled to trial by jury); Ginsberg v. New York, 390 U.S. 629, 634 (1968) (crime to sell sexually oriented magazines to minor but not crime to sell to adult); Prince v. Massachusetts, 321 U.S. 158, 162, 170 (1944) (sale of religious literature by a child violated state child-labor laws).

161. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976).

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.[163] 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.[164] 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.[165] 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.[166] 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.[167]

In justifying their consistent negation of parental consent laws, the Court pointed out that the abortion decision is unique.[168] 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.[169] A minor and her fiance may postpone their marriage plans for an indefinite period; abortion, however, ceases to be an alternative both legally and medically approximately halfway through pregnancy.[170] 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

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imposed parental consent unlikely to restore parental control).

163. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3038, 61 L. Ed. 2d 797, 801-02 (1979).

164. *See id.* at ___, 99 S. Ct. at 3039, 61 L. Ed. 2d at 801; MASS. ANN. LAWS ch. 112, § 12S (Michie/Law Co-op Supp. 1980).

165. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3046, 61 L. Ed. 2d 797, 811 (1979).

166. *Compare* Planned Parenthood v. Danforth, 428 U.S. 52, 72 (1976) (statute required consent of one parent) *with* MASS ANN. LAWS ch. 112, § 12S (Michie/Law Co-op Supp. 1980) (consent of both parents or if parents refuse, judicial consent).

167. *See, e.g.*, Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3046-47, 61 L. Ed. 2d 797, 812-13 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976); Wynn v. Carey, 582 F.2d 1375, 1384-85 (7th Cir. 1978).

168. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3047, 61 L. Ed. 2d 797, 812 (1979).

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

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171. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3048, 61 L. Ed. 2d 797, 813 (1979).

172. *See* ALASKA STAT. § 18.16.010(a)(3) (Supp. 1979); ARK. STAT. ANN. § 41-2555 (Supp. 1978); NEV. REV. STAT. § 442.250(3) (1977); OR. REV. STAT. § 435.435(a) (1977-1978); S.C. CODE § 32-683(b) (Supp. 1975); S.D. CODIFIED LAWS ANN. § 34-23A-7 (1977); TEX. FAM. CODE ANN. § 35.03(a)(4) (Vernon 1975). The Texas statute is probably unconstitutional after *Danforth*. *See* Farrell, *Consent to Medical Care of Minors: Who Has Authority in Texas?*, 43 TEX. B.J. 25, 27 (1979).

173. *See* S.C. CODE § 32-683(b) (Supp. 1975).

174. *See* KY. REV. STAT. ANN. § 311.740(3) (1977) (held unconstitutional by Wolfe v. Schroering, 541 F.2d 523, 525 (6th Cir. 1976)); N.M. STAT. ANN. § 30A-5-1(C) (1978) (challenged but upheld because subject abortion did not involve minor in State v. Strance, 506 P.2d 1217, 1220 (N.M. Ct. App. 1973)); OHIO REV. CODE ANN. § 2919.12(B) (Baldwin 1979) (unconstitutional after Hoe v. Brown, 446 F. Supp. 329, 330 (N.D. Ohio 1976)); PA. STAT. ANN. tit. 35, § 6603(b)(ii) (Purdon 1977) (unconstitutional after Doe v. Zimmerman, 405 F. Supp. 534, 538 (M.D. Pa. 1975)); WASH. REV. CODE ANN. § 9.02.070(a) (1977) (unconstitutional after State v. Koome, 520 P.2d 260, 268 (Wash. 1975)).

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, 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.[177] The dissent, however, analyzed the plurality opinion as holding all parental notice unconstitutional.[178] Since there is disagreement among the Justices on what the *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.[179]

Validity of parental notice statutes was squarely addressed by the Seventh Circuit Court of Appeals in *Wynn v. Carey*[180] wherein the court concluded that in some cases even simple parental notice may be contrary to a minor's best interests.[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.[182] These possible detrimental conse-

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177. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3053 n.1, 61 L. Ed. 2d 797, 820 n.1 (Stevens, J., concurring).

178. *See id.* at ___, 99 S. Ct. at 3055, 61 L. Ed. 2d at 822 (White, J., dissenting); Pilpel & Law, *Bellotti v. Baird: A Victory for Minors' Rights of Reproductive Choice*, 8 FAM. PLAN. POPULATION REP. 39, 39 (1979) (*Bellotti II* held all parental notice requirements unconstitutional).

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. *See* Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 548 (D. Me. 1979). The *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 *Bellotti II's* standards. The standards, as analyzed by the *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. *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. *See* H— L— v. Matheson, 604 P.2d 907, 912 (Utah 1979).

180. 582 F.2d 1375 (7th Cir. 1978).

181. *See id.* at 1388. Statutes on parental notice should not apply to all minors, but rather should allow for a case by case evaluation of the appropriateness of parental notice. *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." Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 548 (D. Me. 1979).

182. *See* Wynn v. Carey, 582 F.2d 1375, 1388 n.24 (7th Cir. 1978); *cf.* Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 548 (D. Me. 1979) (parental notice statute held unconstitutional). "Notifying . . . parents of a child's pregnancy can create physical and psychological risk. . . . [I]t may cause an adolescent to delay seeking assistance . . . may cause some minors to refuse competent professional advice concerning a pregnancy or to seek out abortion providers who will illegally agree not to notify the parents." Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 548 (D. Me. 1979). *Contra*, H— L— v. Matheson, 604 P.2d 907, 912 (Utah 1979).

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]

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183. *See* Wynn v. Carey, 582 F.2d 1375, 1387-88 (7th Cir. 1978); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 546-47 (D. Me. 1979).

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).

187. 477 F. Supp. 542 (D. Me. 1979).

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

189. *See* Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 546 (D. Me. 1979). *Compare* ME. REV. STAT. ANN. tit. 22, § 1597 (West Supp. 1979) *with* MASS ANN. LAWS ch. 112, § 12S (Michie/Law Co-op Supp. 1980).

190. Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 547 (D. Me. 1979); *see* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3052, 61 L. Ed. 2d 797, 818 (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*[192] upheld the Utah parental notification statute.[193] 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.[194] 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.[195]

Two states have parental notice statutes that were challenged based upon *Bellotti II*—one statute was upheld[196] and the other was enjoined.[197] Five other jurisdictions possess varying notice statutes that remain unchallenged.[198] 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.[199]

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.[200] Statutes recommending parental notice of a minor's abor-

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Me. 1979).

192. 604 P.2d 907 (Utah 1979).

193. *See id.* at 912.

194. *See id.* at 912.

195. *See id.* at 912.

196. *See id.* at 912 (upholding UTAH CODE ANN. § 76-7-304(2) (1978)).

197. *See* Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 549-50 (D. Me. 1979) (upholding ME. REV. STAT. ANN. tit. 22, § 1597 (West Supp. 1979)).

198. *See* ILL. ANN. STAT. ch. 38, § 81-54(3) (Smith-Hurd Supp. 1979); LA. REV. STAT. ANN. § 40:1299.35, .35.5(A) (West Supp. 1980); MO. ANN. STAT. § 188.028.2(2) (Vernon Supp. 1980); MONT. CRIM. CODE ANN. § 94-5-616(2)(b) (1977); TENN. CODE ANN. § 39-302(f) (Supp. 1979).

199. *Compare* Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 546-47 (D. Me. 1979) *with* H— L— v. Matheson, 604 P.2d 907, 910-12 (Utah 1979). It is most likely, however, that mandatory parental notice statutes will not withstand constitutional challenge in most jurisdictions. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3051-52, 61 L. Ed. 2d 797, 817-18 (1979) (minor's access to alternative judicial consent may not be burdened by parental notice); Wynn v. Carey, 582 F.2d 1375, 1387-88 (7th Cir. 1978) (mandatory parental notice contrary to best interests of some minors and violates minor's right of privacy); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 548 (D. Me. 1979) (court granted preliminary injunction against enforcement of Maine notice statute); Pilpel & Law, *Bellotti v. Baird: A Victory for Minor's Rights of Reproductive Choice*, 8 FAM. PLAN. POPULATION REP. 39, 39 (1979) (mandatory parental notice unconstitutional after *Bellotti II*).

200. See Appendix II, § VI.

tion decision should leave such notice to the discretion of the attending physician.[201]

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,[202] the Court reviewed the validity of a statute allowing judicial consent in lieu of parental consent.[203] In *Bellotti v. Baird (Bellotti I),*[204] 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.[205]

Proponents of the statute contended it was fundamentally different from the *Danforth* parental veto statute.[206] Upon request, a minor would be allowed to consent to abortion if the court determined she was capable of giving informed consent.[207] If the minor was found incapable of informed consent, a judge could grant consent provided "good cause" was shown.[208] Good cause means demonstrating the abortion is in the minor's best interests.[209]

The opponents, however, argued an entirely different interpretation of the statute.[210] Because the statute created a right to a parental veto, it raised the presumption the minor was incapable of informed consent.[211] Once refused parental consent, the minor has the burden of proving to a

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201. See Appendix II, § VII.

202. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976).

203. *See* Bellotti v. Baird, 428 U.S. 132, 134-35 (1976).

204. 428 U.S. 132 (1976).

205. *Id.* at 134-35, 147; Mass. Ann. Laws ch. 112, § 12P (Michie/Law Co-op 1974) (current version renumbered at Mass Ann. Laws ch. 112, § 12S (Michie/Law Co-op. Supp. 1980)).

206. *See* Bellotti v. Baird, 428 U.S. 132, 145 (1976). One writer has agreed with the proponents that the statute at issue would be held constitutional and represented a successful accomodation of the rights of both the unmarried minor and her parents. *See* Note, *The Permissible Scope of Parental Involvement in the Abortion Decision of an Unmarried Minor,* 2 Geo. Mason U. L. Rev. 235, 236 (1978).

207. *See* Bellotti v. Baird, 428 U.S. 132, 144 (1976).

208. *See id.* at 145.

209. *See id.* at 145. The Court did not discuss how "best interests" would be determined. *See generally* Bellotti v. Baird, 428 U.S. 132 (1976).

210. *See id.* at 145.

211. *See id.* at 146.

judge that good cause exists for her abortion.[212] 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.[213]

Since the statute was susceptible of two vastly different interpretations, the Court abstained from ruling pending state construction of the statute.[214] *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.[215]

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.[216] Subsequent to *Bellotti I*, the Illinois Legislature, "seizing on this possibility,"[217] enacted the Illinois Abortion Parental Control Act of 1977.[218] The statute provided, in part, that the minor must secure the written consent of her parents and:

> [i]f 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.

215. *Id.* at 147. One writer has predicted the *Bellotti I* decision indicated a statute with a modified parental consent or notice provision would be upheld. *See* Note, *The Minor's Right of Privacy: Limitations on State Action After Danforth and Carey*, 77 COLUM. L. REV. 1216, 1231 (1977); *cf.* Note, *The Permissible Scope of Parental Involvement in the Abortion Decision of an Unmarried Minor*, 2 GEO. MASON U. L. REV. 235, 236 (1978) (Massachusetts statute predicted constitutional).

216. *See* Bellotti v. Baird, 428 U.S. 132, 148 (1976); Note, *The Permissible Scope of Parental Involvement in the Abortion Decision of an Unmarried Minor*, 2 GEO. MASON U. L. REV. 235, 241 (1978).

217. Note, *The Permissible Scope of Parental Involvement in the Abortion Decision of an Unmarried Minor*, 2 GEO. MASON U. L. REV. 235, 241 (1978); *accord*, Note, *The Illinois Abortion Parental Consent Act of 1977: A Far Cry From Permissible Consultation*, 12 J. MAR. J. PRAC. & PROC. 135, 146-47 (1978).

218. *See* ILL. ANN. STAT. ch. 38, § 81-54(3) (Smith-Hurd Supp. 1979) (effective 1 January 1978). *See generally* Note, *The Illinois Abortion Parental Consent Act of 1977: A Far Cry From Permissible Consultation*, 12 J. MAR. J. PRAC. & PROC. 135, 147-160 (1978).

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. Scott*[221] 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

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219. ILL. ANN. STAT. ch. 38, § 81-54(3) (Smith-Hurd Supp. 1979).

220. *See* Wynn v. Scott, 448 F. Supp. 997, 1001 (N.D. Ill.), *aff'd sub nom.* Wynn v. Carey, 582 F.2d 1375, 1390 (7th Cir. 1978).

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).

228. *Id.* at 1389; *accord,* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3048-49, 61 L. Ed. 2d 797, 814 (1979).

229. *See* ILL. ANN. STAT. ch. 38, § 81-51 (Smith-Hurd Supp. 1979). The expressed intent does not comply with the *Danforth* decision. *See* Note, *The Illinois Abortion Parental Consent Act of 1977: A Far Cry From Permissible Consultation,* 12 J. MAR. J. PRAC. & PROC. 135, 147-48 (1978).

the scale."[230]

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*.[231] 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.[232] 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.[233]

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.[234] Every minor must have access to this alternative without parental notice or consultation.[235] 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).

231. *See id.* at ___, at 99 S. Ct. at 3040, 61 L. Ed. 2d at 804; Belloti v. Baird, 428 U.S. 132, 134-35 (1976); MASS. ANN. LAWS ch. 112, § 12S (Michie/Law Co-op Supp. 1980).

232. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3045-46, 61 L. Ed. 2d 797, 810-11 (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).

234. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3048, 61 L. Ed. 2d 797, 813 (1979).

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.[236] If capable of informed consent in consultation with her physician, the minor will be permitted to consent to her own abortion.[237] 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.[238] 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.[239] Existence of the parental consent option must not result in veto of the minor's abortion decision.[240] The *Bellotti II* concurring opinion expressed doubt that any legislature could enact a statute satisfying the criteria set forth by the hypothetical statute.[241]

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.[242] The law denied judicial consent to a minor who was ma-

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Although the majority opinion referred to a judicial proceeding or court, it suggested a state could delegate the alternative procedure to a juvenile court or to an administrative agency or officer. In fact they implied a less formal procedure would be preferable to a court proceeding. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3048 n.22, 61 L. Ed. 2d 797, 813 n.22 (1979).

236. *See id.* at ___, 99 S. Ct. at 3048, 61 L. Ed. 2d at 813-14.

237. *Id.* at ___, 99 S. Ct. at 3050, 61 L. Ed. 2d at 816. A mature minor is one who has the capacity to understand what the medical procedure involves. *See id.* at ___, 99 S. Ct. at 3050 n.27, 61 L. Ed. 2d at 815 n.27. "Immature minors" are incapable of giving informed consent. *See id.* at ___, 99 S. Ct. at 3042, 61 L. Ed. 2d at 806. Maturity is difficult to define as well as to determine. *See id.* at ___, 99 S. Ct. at 3048 n.23, 61 L. Ed. 2d at 814 n.23. "Immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences . . . ." *Id.* at ___, 99 S. Ct. at 3046-47, 61 L. Ed. 2d at 811.

238. *Id.* at ___, 99 S. Ct. at 3050, 61 L. Ed. 2d at 816; *accord*, Wynn v. Carey, 582 F.2d 1375, 1390 n.30 (7th Cir. 1978).

239. *E.g.*, Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3048-49, 61 L. Ed. 2d 797, 814 (1979); Bellotti v. Baird, 428 U.S. 132, 144-45 (1976); Wynn v. Carey, 582 F.2d 1375, 1389 (7th Cir. 1978). The "opportunity" for abortion expires in a matter of weeks after the pregnancy commences. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3047, 61 L. Ed. 2d 797, 813 (1979).

240. *Id.* at ___, 99 S. Ct. at 3049, 61 L. Ed. 2d 814; *accord*, Wynn v. Carey, 582 F.2d 1375, 1390 (7th Cir. 1978); *see* Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). If a minor voluntarily tells her parents and they refuse to consent to the abortion, the minor's access to judicial authorization should not be impeded due to her parents' prior disapproval. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3050 n.28, 61 L. Ed. 2d 797, 816 n.28 (1979).

241. *See id.* at ___, 99 S. Ct. at 3055 n.4, 61 L. Ed. 2d at 821 n.4 (Stevens, J., concurring).

242. *See id.* at ___, 99 S. Ct. at 3049, 3052, 61 L. Ed. 2d at 814-15, 818.

ture and capable of making her own decision.[243] 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.[244]

3. *Current Law.* Two states have parental-judicial consent laws on the books although they have been held unconstitutional.[245] Two other states have unchallenged parental-judicial consent laws.[246]

D. *Bellotti II's Best Interests Abortion*

The only standard *Bellotti II* provided for granting judicial consent to a minor at the hypothetical hearing was the "best interests of the child" criteria.[247] To apply the "best interests" standard, *Bellotti II* explained the judge must disregard parental objections and other considerations not based solely on the best interests of the child.[248] 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.[249] 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.[250]

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243. *See id.* at ___, 99 S. Ct. at 3052, 61 L. Ed. 2d at 818.

244. *See id.* at ___, 99 S. Ct. at 3052, 61 L. Ed. 2d at 818.

245. *See* ILL. ANN. STAT. ch. 38, § 81-54(3) (Smith-Hurd Supp. 1979) (unconstitutional after Wynn v. Carey, 582 F.2d 1375, 1390 (7th Cir. 1978)); MASS. ANN. LAWS ch. 112, § 12S (Michie/Law Co-op Supp. 1980) (unconstitutional after Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3052, 61 L. Ed. 2d 797, 818 (1979)).

246. *See* LA. REV. STAT. ANN. § 40:1299.35.5(B) (West Supp. 1980); MO. ANN. STAT. § 188.028.1, .2(1) (Vernon Supp. 1980).

247. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3054, 61 L. Ed. 2d 797, 821 (1979) (Stevens, J., concurring).

248. *See id.* at ___, 99 S. Ct. at 3041, 61 L. Ed. 2d at 805.

249. *See id.* at ___, 99 S. Ct. at 3050-51, 61 L. Ed. 2d at 816.

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. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 4 (1973). In order to apply the "best interests" standard the child's needs must be paramount to all other considerations. *See id.* at 7. Goldstein proposed that instead of "best interests," child placement agencies should adopt "the least detrimental available alternative for safegarding the child's growth and development" standard. *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 . . . ." *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.[251] 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.*[252] The decisions of the Supreme Court have consistently held unconstitutional any third party involvement in the abortion decision of a minor and her physician.[253] Lower courts have also followed this trend.[254] The minor's constitutional right to abortion encompasses her privacy interests of avoiding disclosure of personal matters and of independence in making personal decisions.[255] 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

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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 "emeshed 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.

251. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3054, 61 L. Ed. 2d 797, 821 (1979); Goldstein, *Medical Care for the Child At Risk: On State Supervention of Parental Autonomy,* 86 YALE L.J. 645, 662-63 (1977); Katz, Schroeder & Sidman, *Emancipating Our Children—Coming of Legal Age in America,* 7 FAM. L.Q. 211, 213 (1973); Note, *Parental Consent Abortion Statutes: The Limits of State Power,* 52 IND. L.J. 837, 849 (1977); Note, *Baird v. Bellotti: Abortion—The Minor's Right To Decide,* 33 U. MIAMI L. REV. 705, 708 n.10 (1979).

252. Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3054, 61 L. Ed. 2d 797, 820 (1979) (Stevens, J., concurring); *see, e.g., id.* at ___, 99 S. Ct. at 3049, 61 L. Ed. 2d at 814; Bellotti v. Baird, 428 U.S. 132, 151 (1976); Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

253. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3052, 61 L. Ed. 2d 797, 818 (1979) (Massachusetts parental or judicial consent statute unconstitutional). According to the dissenting opinion, *Bellotti II* also held notice to parents of a minor's abortion decision unconstitutional. *See id.* at ___, 99 S. Ct. at 3055, 61 L. Ed. 2d at 822 (White, J., dissenting); *cf.* Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (Missouri parental consent statute unconstitutional). The Supreme Court has also held unconstitutional a statute that prohibited the sale or distribution of contraceptives to minors under sixteen. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 681, 691-92, 695 (1977) (New York contraceptive sale and distribution statute unconstitutional).

254. *See, e.g.,* Wynn v. Carey, 582 F.2d 1375, 1384 (7th Cir. 1978) (Illinois parental or judicial consent statute unconstitutional); Poe v. Gerstein, 517 F.2d 787, 794 (5th Cir. 1975), *aff'd mem.,* 428 U.S. 901 (1976) (Florida parental consent statute unconstitutional); State v. Koome, 530 P.2d 260, 268 (Wash. 1975) (Washington parental consent statute unconstitutional).

255. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3054, 61 L. Ed. 2d 797, 821 (1979) (Stevens, J., concurring); Whalen v. Roe, 429 U.S. 589, 599-600 (1976).

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

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256. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3054, 61 L. Ed. 2d 797, 821 (1979) (judicial hearing will impose burden probably greater than that imposed by parental consent); Bellotti v. Baird, 428 U.S. 132, 144-45 (1976) (alternative procedure must be speedy, nonburdensome, anonymous); Wynn v. Carey, 582 F.2d 1375, 1388-89 (7th Cir. 1978) (formidable burden for minor); State v. Koome, 530 P.2d 260, 264 (Wash. 1975) (third party hearing adds extra delay, cost, and anxiety). "But even well intentioned judicial intervention presents problems of cost, . . . delay . . . added stress of a judicial atmosphere, and the judiciary's reluctance to extend jurisdiction into personal, familial problems." Note, *The Illinois Abortion Parental Consent Act of 1977: A Far Cry From Permissible Consultation*, 12 J. MAR. J. PRAC. & PROC. 135, 162 (1978); *see* Note, *The Minor's Right of Privacy: Limitations on State Action After Danforth and Carey*, 77 COLUM. L. REV. 1216, 1239, 1246 (1977) (right of privacy guaranteed by *Danforth* largely undermined if minor's decision is subject to judicial review); Note, *Parental Consent Abortion Statutes: The Limits of State Power*, 52 IND. L.J. 837, 842, 843-44 (1977) (unreasonable time delay violative of right of privacy).

257. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3048, 61 L. Ed. 2d 797, 813-14 (1979) (minor's abortion decision is made in consultation with her physician); Bellotti v. Baird, 428 U.S. 132, 148 (1976) (statute's interference with the doctor-patient relationship is a factor to weigh); Planned Parenthood v. Danforth, 428 U.S. 52, 73-74 (1976) (minor entitled to assess her options with the advice of her physician and no parental veto); Doe v. Bolton, 410 U.S. 179, 199-200 (1973) (attending physician will decide when consultation with a third party is necessary to medical decision as physicians have done historically); Note, *The Minor's Right of Privacy: Limitations on State Action After Danforth and Carey*, 77 COLUM. L. REV. 1216, 1246 (1977) (state required involvement of third parties in minor abortion decision serves no significant state interest); Note, *The Illinois Abortion Parental Consent Act of 1977: A Far Cry From Permissible Consultation*, 12 J. MAR. J. PRAC. & PROC. 135, 162-63 (1978) (requiring physician to refer minor for professional counseling prior to her decision and leaving parental notification up to discretion of physician removes need for third party involvement); Comment, *The Validity of Parental Consent Statutes After Planned Parenthood*, 54 J. URB. L. 127, 159 (1976) (abortion is medical decision that physician is better able to evaluate objectively than parents). *But see* Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 662-63 (1977) (judicial consent for minor's abortion decision denies autonomy of patient, child, and family privacy) (author disapproves state supervening parental authority by authorizing emancipation of minors for abortion); Uddo, *A Wink From The Bench: The Federal Courts and Abortion*, 53 TUL. L. REV. 398, 438-46 (1979) (criticizes the *Bellotti* decision for rejecting parental/judicial involvement in the minor's abortion decision); Comment, *The Permissible Scope of Parental Involvement in the Abortion Decision of an Unmarried Minor*, 2 GEO. MASON U. L. REV. 235, 259-60, 262, 263 n.105 (1978) (upholds parental consent unless state can prove parental failure).

abortion would be in her best interests.[258] 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.[259]

E. *Proposals*

State abortion laws for minors should abolish any mandatory third party parental or judicial involvement.[260] 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.[261] 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.[262]

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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).

260. See Appendix II, § VIII. Minors have the legal right to consent to abortions which are in their own best interests without parental or third party interference. *See* Bellotti v. Baird, ___ U.S. ___, ___, 99 S. Ct. 3035, 3048, 61 L. Ed. 2d 797, 813-14 (1979) (Massachusetts statute); Wynn v. Carey, 582 F.2d 1375, 1384 (7th Cir. 1978) (Illinois statute); Poe v. Gerstein, 517 F.2d 787, 794 (5th Cir. 1975) (Florida statute), *aff'd* mem., 428 U.S. 901 (1976); State v. Koome, 530 P.2d 260, 268 (Wash. 1975) (Washington statute). *See generally* Pilpel & Zuckerman, *Abortion and the Rights of Minors*, 23 CASE W. RES. L. REV. 779 (1972); Note, *The Minor's Right of Privacy: Limitations on State Action After Danforth and Carey*, 77 COLUM. L. REV. 1216 (1977); Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001 (1975); Note, *Abortion Statutes After Danforth: An Examination*, 15 J. FAM. L. 537 (1976-77); Note, *The Illinois Parental Consent Act of 1977: A Far Cry From Permissible Consultation*, 12 J. MAR. J. PRAC. & PROC. 135 (1978); Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305 (1974).

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

STATE	STATUTE	CLASSIFICATION	STATUS
1. Alabama	ALA. CODE § 13-8-4 (1975).	Anti-abortion	Unchallenged-unconstitutional[1]
2. Alaska	ALASKA STAT. § 18.16.010 (a)(3) (Supp. 1979).	Parental-consent	Unchallenged-unconstitutional[2]
3. Arizona	ARIZ. REV. STAT. ANN. § 13-3603 (West 1978).	Anti-abortion	Challenged-unconstitutional[3]
4. Arkansas	ARK. STAT. ANN. § 41-2555 (Supp. 1978).	Parental-consent	Unchallenged-unconstitutional[4]
5. California	CAL. HEALTH & SAFETY CODE § 25951(c) (Deering 1975);	Anti-abortion	Challenged-unconstitutional[5]
	CAL. PENAL CODE § 274 (Deering 1975).	Anti-abortion	Unchallenged-unconstitutional[6]
6. Colorado	COLO. REV. STAT. §§ 18-6-101 to 18-6-104 (1978).	Anti-abortion	Challenged-unconstitutional[7]
7. Connecticut	CONN. GEN. STAT. ANN. §§ 53-29 to 53-31 (West Supp. 1979).	Anti-abortion	Challenged-unconstitutional[8]
8. Delaware	DEL. CODE ANN. tit. 24, § 1790 (1975);	Anti-abortion	Unchallenged-unconstitutional[9]
	id. tit. 13, § 708 (Supp. 1978) (minors may not consent to therapeutic abortion).	Parental-consent	Unchallenged-unconstitutional[10]

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).

2. Minor's right to abortion may not be vetoed by any third party. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976); *accord,* Williams, *Consent to Surgical Procedure,* 31 ARK. L. REV. 493, 497 n.36 (1977) (ARK. STAT. ANN. § 41-2555 requiring parental consent unconstitutional after *Danforth).*

3. Former sections 13-211 to 13-213 renumbered as sections 13-3603 to 13-3605 were held unconstitutional. *See* State v. New Times, Inc., 511 P.2d 196, 198 (Ariz. Ct. App. 1973).

4. Parental consent statute unconstitutional because it permits a third party veto of the minor's abortion decision. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

5. People v. Barksdale, 503 P.2d 257, 262, 271, 105 Cal. Rptr. 1, 6, 15 (1972).

6. See note 1 *supra.*

7. People v. Norton, 507 P.2d 862, 863 (Colo. 1973).

8. Abele v. Markle, 369 F. Supp. 807, 809 (D. Conn. 1973); State v. Sulman, 339 A.2d 62, 63 (Conn. 1975).

9. See note 1 *supra.*

10. See note 4 *supra.*

9. District of Columbia	D.C. CODE ANN. § 22-201 (1967).	Anti-abortion	Unchallenged-unconstitutional[11]
10. Florida	FLA. STAT. ANN. § 458.215 (West Supp. 1978);	Abortion legal for minors	Unchallenged-constitutional[12]
	id. § 390.011-.021.	Licensing abortion clinics	Challenged-constitutional[13]
11. Georgia	GA. CODE ANN. §§ 26-1201 to 26-1204 (1977).	Anti-abortion	Challenged-unconstitutional in part[14]
12. Hawaii	HAWAII REV. STAT. § 432-16(a)(2) (1976).	Abortion legal but must be performed in hospital	Unchallenged-unconstitutional[15]
13. Idaho	IDAHO CODE § 18-604(5) (1979).	Abortion legal but viability presumed at 25th week.	Unchallenged-unconstitutional[16]
14. Illinois	ILL. ANN. STAT. ch. 38, § 81-54(3) (Smith-Hurd Supp. 1979);	Parental/judicial consent	Challenged-unconstitutional[17]
	id.	Parental notice	Unchallenged-probably unconstitutional[18]
15. Indiana	IND. CODE ANN. § 35-1-58.5-2(b)(2) (Burns 1979);	Second trimester abortions must be performed in hospitals	Unchallenged-probably unconstitutional[19]

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)).

14. Doe v. Bolton, 410 U.S. 179, 194-201 (1973).

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

16. Legislature may not set a definite point for viability. *See* Colautti v. Franklin, ___ U.S. ___, ___, 99 S. Ct. 675, 682, 58 L. Ed. 2d 596, 605 (1979).

17. Wynn v. Carey, 582 F.2d 1375, 1390

18. Mandatory parental notice held unconstitutional. *See* Wynn v. Carey, 582 F.2d 1375, 1388 (7th Cir. 1978) (Illinois Abortion Control Act of 1977).

19. Any legislation that burdens an individual's fundamental right of privacy must be

	id. § 35-1-58.5-5.	Record and reporting requirements	Unchallenged-constitutional[20]
16. Iowa	IOWA CODE ANN. § 707.7 (West 1979).	Prohibits abortion after second trimester	Unchallenged-unconstitutional[21]
17. Kansas	KAN. STAT. ANN. § 65-444 (1972).	Physician's decision approved by three additional physicians	Unchallenged-unconstitutional[22]
18. Kentucky	KY. REV. STAT. ANN. § 311.740(3) (1977);	Parental consent for second trimester abortion	Challenged-unconstitutional[23]
	id. § 311.730;	Physician must counsel patient prior to a second trimester abortion	Challenged-constitutional[24]
	id. § 436.023 (Supp. 1978).	24 hour waiting period between consent and abortion	Challenged-constitutional[25]
19. Louisiana	LA. REV. STAT. ANN. § 40:1299.35.5(B) (West Supp. 1980);	Parental/judicial consent (for minors under 15)	Unchallenged-unconstitutional[26]

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.

20. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 80-81 (1976).

21. Abortion may only be prohibited by states at and after viability. *See* Roe v. Wade, 410 U.S. 113, 164-65 (1973).

22. Statute requiring attending physician's decision be approved by additional physicians held an unconstitutional infringement of a doctor's license to practice medicine. *See* Doe v. Bolton, 410 U.S. 179, 197-99, 201 (1973).

23. *See* Wolfe v. Schroering, 541 F.2d 523, 525 (6th Cir. 1976).

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).

	id. § 40:1299.35. & .35.5(A);	Parental notice	Unchallenged-probably unconstitutional[27]
	id. § 40:1299.35.3;	Second trimester abortions must be performed in hospital	Unchallenged-probably unconstitutional[28]
	id. § 40:1299.35.10;	Record & reporting requirements	Unchallenged-constitutional[29]
	id. § 40:1299.35.16.	Licensing of abortion facilities	Unchallenged-probably constitutional[30]
20. Maine	ME. REV. STAT. ANN. tit. 22, § 1596 (West Supp. 1979);	Record & reporting requirements	Unchallenged-constitutional[31]
	id. § 1597;	Parental notice	Challenged-unconstitutional[32]
	id. § 1598(2).	Physician required to counsel patient for informed consent	Challenged-constitutional[33]
21. Maryland	MD. ANN. CODE art. 43, §§ 137, 139 (1957 & Supp. 1978).	Anti-abortion	Challenged-unconstitutional[34]

27. See note 18 *supra.*

28. See note 19 *supra.*

29. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 80-81 (1976).

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).

31. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 80-81 (1976).

32. Statute held unconstitutional because the state could offer no compelling reason for unduly burdening a minor woman's abortion decision. *See* Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 548 (D. Me. 1979) (plaintiffs granted preliminary injunction against section 1597).

33. Statute's validity upheld. *See* Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 549-50 (D. Me. 1979).

34. *See* Vuitch v. Hardy, 473 F.2d 1370, 1371 (4th Cir.), *cert. denied*, 414 U.S. 824 (1973); *cf.* State v. Ingel, 308 A.2d 223, 226-27, 229 (Md. Ct. Spec. App. 1973) (criminal statute held unconstitutional is retroactively applied).

22. Massachusetts	MASS. ANN. LAWS ch. 112, § 12S (Michie/Law Co-op Supp. 1980).	Parental/judicial consent	Challenged-unconstitutional[35]
23. Michigan	MICH. STAT. ANN. § 14.15 (2835) (Supp. 1979).	Abortion legal	Unchallenged-constitutional[36]
24. Minnesota	MINN. STAT. ANN. § 145.412 (1), (2) (West Supp. 1979);	Second trimester abortions must be performed in hospital	Unchallenged-probably unconstitutional[37]
	id. §§ 145.411(2), 145.412(3)(2),(3);	Abortion prohibited during second half of gestation because fetus is presumed potentially viable	Challenged-unconstitutional[38]
	id. § 145.416.	Licensing of abortion facility	Unchallenged-probably constitutional[39]
25. Mississippi	MISS. CODE ANN. § 97-3-3 (1972).	Anti-abortion	Unchallenged-unconstitutional[40]
26. Missouri	MO. ANN. STAT. § 188.028.1, .2(1) (Vernon Supp. 1980);	Parental/judicial consent	Unchallenged-unconstitutional[41]
	id. § 188.028.2(2).	Parental notice	Unchallenged-probably unconstitutional[42]
27. Montana	MONT. CRIM. CODE ANN. § 94-5-616(2)(b) (1977);	Parental notice	Unchallenged-probably unconstitutional[43]
	id. § 94-5-619.	Reporting requirement	Unchallenged-constitutional[44]

35. Bellotti v. Baird, — U.S. —, —, 99 S. Ct. 3035, 3052, 61 L. Ed. 2d 797, 818 (1979).

36. Women have constitutional right to choose abortion. *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

37. See note 19 *supra.*

38. Legislative presumption of viability at a set point is unconstitutional. *See* Hodgson v. Anderson, 378 F. Supp. 1008, 1016-17, 1018 (D. Minn. 1974), *appeal dismissed,* 420 U.S. 903, 903 (1975), *aff'd in part, rev'd in part,* Hodgson v. Lawson, 542 F.2d 1350, 1354, 1358-59 (8th Cir. 1976) (affirmed unconstitutionality of sections 145.411(2) and 145.412(3)(2), (3)).

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.*

44. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 80-81 (1976).

28. Nebraska	NEB. REV. STAT. § 28-333 (Supp. 1979);	Minor must present written statement to physician that she consulted with her parents about abortion	Unchallenged-probably unconstitutional[45]
	id. §§ 28-343, 28-345.	Record and reporting requirements	Unchallenged-constitutional[46]
29. Nevada	NEV. REV. STAT. § 442.250(3) (1977);	Parental consent	Unchallenged-unconstitutional[47]
	id. § 442.260(2).	Reporting requirement	Unchallenged-constitutional[48]
30. New Hampshire	N.H. REV. STAT. ANN. § 585:13 (1974).	Anti-abortion (quickened fetus)	Unchallenged-probably constitutional[49]
31. New Jersey	N.J. STAT. ANN. § 2A:87-1, :87-2 (West Supp. 1979-1980).	Formerly anti-abortion	Repealed[50]
32. New Mexico	N.M. STAT. ANN. § 30A-5-1(C) (1978).	Parental consent	Challenged[51]
33. New York	N.Y. PENAL LAW § 125.05(3)(b) (McKinney 1975).	Abortion prohibited after 24th week	Unchallenged-unconstitutional[52]

45. The Supreme Court has held third party involvement in a minor's abortion decision unconstitutional. See Bellotti v. Baird, — U.S. —, —, 99 S. Ct. 3035, 3053 n.1, 61 L. Ed. 2d 797, 820 n.1 (1979) (Stevens, J., concurring) (parental notice); Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (parental consent).

46. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 80-81 (1976).

47. See note 4 *supra.*

48. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 80-81 (1976).

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).

50. Statute repealed by 1978 N.J. Laws, ch. 95, § 2C:98-2, effective 1 September 1979. No replacement section has been enacted. *See* N.J. STAT. ANN. § 2C:98-2 (Spec. Pamph. 1979).

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.*

34. North Carolina	N.C. GEN. STAT. §§ 14-44 to 14-45.1 (1969 & Supp. 1979);	Abortion prohibited after 20th week	Unchallenged-unconstitutional[53]
	id. § 14-45.1(a) (Supp. 1979).	Abortion clinics subject to state licensing	Unchallenged-probably constitutional[54]
35. North Dakota	N.D. CENT. CODE § 14-02.1-04(2) (Supp. 1977);	Abortion after 12th week prohibited unless performed in hospital	Unchallenged-probably unconstitutional[55]
	id. § 14-02.1-07;	Reporting requirement	Unchallenged-constitutional[56]
	id. § 14-02.1-02. (4).	Specifies content of informed consent	Unchallenged[57]
36. Ohio	OHIO REV. CODE ANN. § 2919.12(B) (Baldwin 1979).	Parental consent	Challenged-unconstitutional[58]
37. Oklahoma	OKLA. STAT. ANN. tit. 63, § 1-737 (West Supp. 1979);	Abortions legal but must be performed in hospital	Unchallenged-unconstitutional[59]
	id. § 1-732(B);	Viability presumed at 24th week	Unchallenged-unconstitutional[60]
	id. § 1-738, -739.	Record & reporting requirements	Unchallenged-constitutional[61]
38. Oregon	OR. REV. STAT. § 435.435(a) (1977-1978).	Parental consent	Unchallenged-unconstitutional[62]
39. Pennsylvania	PA. STAT. ANN. tit. 35, § 6603(b)(ii) (Purdon 1977).	Parental consent	Challenged-unconstitutional[63]

53. See note 21 *supra.*
54. See note 30 *supra.*
55. See note 19 *supra.*
56. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 80-81 (1976).
57. *Cf.* Freiman v. Ashcroft, 584 F.2d 247, 251-52 (8th Cir. 1978) (legislature cannot dictate specific contents of informed consent).
58. Hoe v. Brown, 446 F. Supp. 329, 330 (N.D. Ohio 1976).
59. See note 15 *supra.*
60. See note 16 *supra.*
61. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 80-81 (1976).
62. See note 4 *supra.*
63. Doe v. Zimmerman, 405 F. Supp. 534, 538 (M.D. Pa. 1975).

40. Rhode Island	R.I. GEN. LAWS §§ 11-3-1 to 11-3-5 (1969 & Supp. 1979);	Anti-abortion	Challenged-unconstitutional[64]
	id. § 11-23-5 (1970).	Crime to kill quick child	Challenged-constitutional[65]
41. South Carolina	S.C. CODE § 32-683(b) (Supp. 1975).	Parental consent for minors under 16	Unchallenged-unconstitutional[66]
42. South Dakota	S.D. CODIFIED LAWS ANN. § 34-23A-7 (1977).	Parental consent	Unchallenged-unconstitutional[67]
43. Tennessee	TENN. CODE ANN. § 39-301 (e)(2) (1975).	Second trimester abortion must be performed in hospital	Unchallenged-probably unconstitutional[68]
	id. 39-302(b) (Supp. 1979);	Specifies content of informed consent	Unchallenged[69]
	id. §39-302(f).	Parental notice	Unchallenged-probably unconstitutional[70]
44. Texas	TEX. REV. CIV. STAT. ANN. arts. 4512.1-4512.4 (Vernon 1977 & Supp. 1980);	Anti-abortion	Challenged-Unconstitutional[71]
	TEX. FAM. CODE ANN. § 35.03(a)(4) (Vernon 1975).	Parental consent	Unchallenged-unconstitutional[72]
45. Utah	UTAH CODE ANN. § 76-7-304(2) (1978);	Parental notice	Challenged-constitutional[73]
	id. § 76-7-302(2).	Second trimester abortion must be performed in hospital	Unchallenged-probably unconstitutional[74]

64. Doe v. Israel, 358 F. Supp. 1193, 1202 (D. R.I. 1973), *cert. denied,* 416 U.S. 993 (1974).

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.*

69. *Cf.* Freiman v. Ashcroft, 584 F.2d 247, 251-52 (8th Cir. 1978) (legislature cannot dictate specific contents of informed consent).

70. See note 18 *supra.*

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

72. See note 4 *supra.*

73. H—L— v. Matheson, 604 P.2d 907, 912 (Utah 1979).

74. See note 19 *supra.*

46. Vermont	VT. STAT. ANN. tit. 13, § 101 (1974).	Anti-abortion	Unchallenged-unconstitutional[75]
47. Virginia	VA. CODE § 18.2-74(a) (1975);	Second trimester abortion must be performed in hospital	Unchallenged-probably unconstitutional[76]
	id. § 18.2-74(b).	Physician's decision must be approved by two additional physicians	Unchallenged-unconstitutional[77]
48. Washington	WASH. REV. CODE ANN. § 9.02.070(a) (1977).	Parental consent	Challenged-unconstitutional[78]
49. West Virginia	W. VA. CODE § 61-2-8 (1977)	Anti-abortion	Challenged-unconstitutional[79]
50. Wisconsin	WIS. STAT. ANN. § 940.04 (West 1958).	Anti-abortion	Challenged-unconstitutional[80]
51. Wyoming	WYO. STAT. §§ 35-6-101 to 35-6-115 (1977).	Abortion legal	Unchallenged-constitutional[81]

75. See note 1 *supra.*
76. See note 19 *supra.*
77. See note 22 *supra.*
78. State v. Koome, 530 P.2d 260, 268 (Wash. 1975).
79. Doe v. Charleston Area Medical Center, Inc. 529 F.2d 638, 644 (4th Cir. 1975).
80. *E.g.*, McCann v. Kerner, 436 F.2d 1342, 1343 (7th Cir. 1971); Harling v. Department of Health & Social Servs., 323 F. Supp. 899, 901 (E.D. Wis. 1971); Babbitz v. McCann, 310 F. Supp. 293, 302 (E.D. Wis. 1970).
81. See note 36 *supra.*

APPENDIX II

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.[1]

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.[2]

C. "Licensed Physician" means a medical doctor who is licensed by the state in which he resides to practice medicine, surgery, or whatever speciality in which he performs or professes competence.[3]

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.[4]

E. "Viability" means the point at which the fetus is potentially able to live outside the mother's womb with artificial aid.[5] Viability may not be defined as a set point of gestation weeks because viability varies with each pregnancy.[6] Therefore, viability is a medical term ascertainable only by a physician.[7]

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.[8]

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.[9]

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.[10]

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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).

4. *See* Baird v. Department of Pub. Health, 599 F.2d 1098 (1st Cir. 1979); Hodgson v. Lawson, 542 F.2d 1350 (8th Cir. 1976); Westchester Women's Health Organization, Inc. v. Whalen, 475 F. Supp. 734 (S.D. N.Y. 1979).

5. Roe v. Wade, 410 U.S. 113, 160 (1973).

6. *See* Colautti v. Franklin, — U.S. —, —, 99 S. Ct. 675, 682, 58 L. Ed. 2d 596, 604 (1979).

7. *See id.* at —, 99 S. Ct. at 682, 58 L. Ed. 2d at 604; Planned Parenthood v. Danforth, 428 U.S. 52, 64-65 (1976); Roe v. Wade, 410 U.S. 113, 160-61, 164-66 (1973).

8. Roe v. Wade, 410 U.S. 113, 153, 163 (1973).

9. *See* Connecticut v. Menillo, 423 U.S. 9, 10 (1975) (per curiam); Roe v. Wade, 410 U.S. 113, 120, 165 (1973).

10. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 79-81 (1976); Westchester Women's Health Organization, 475 F. Supp. 734, 740 (S.D. N.Y. 1979).

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-

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11. *See* LA. REV. STAT. ANN. § 40:1299.35.10 (West Supp. 1980); MO. ANN. STAT. § 188.052 (Vernon Supp. 1980); MONT. CRIM. CODE ANN. § 94-5-619 (1977).

12. *See* LA. REV. STAT. ANN. § 40:1299.35.8 (West Supp. 1980); MO. ANN. STAT. § 188.060 (Vernon Supp. 1980).

13. *See* MONT. CRIM. CODE ANN. § 94-5-619(5) (1977).

14. *See* Ballard v. Anderson, 484 P.2d 1345, 1352, 95 Cal. Rptr. 1, 8 (1971); State v. Koome, 530 P.2d 260, 267 (Wash. 1975); Goldstein, *Medical Care For the Child At Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 661-62 (1977).

15. *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 (1971 & Supp. 1979).

16. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 73-74 (1976). *See generally* Bellotti v. Baird, __ U.S. __, __, 99 S. Ct. 3035, 3048-52, 61 L. Ed. 2d 797, 813-18 (1979); 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).

17. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 65 (1976).

18. *See generally* Bellotti v. Baird, __ U.S. __, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

19. *See* Wynn v. Carey, 582 F.2d 1375, 1388 n.25 (7th Cir. 1978).

mary consideration is the health and best interests of the minor.[20]

VIII. NO THIRD PARTY CONSENT: Third party involvement in the minor's abortion request and decision shall not be required.[21] 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.[22]

IX. FACILITY: All abortions for minors must be performed in a licensed facility or in a hospital.[23] 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.[24]

X. INFORMED CONSENT: Prior to performing an abortion on a minor, the physician must obtain the written informed consent of the patient.[25] Informed consent includes giving the patient information on the procedure, its risks, and its alternatives.[26] 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.[27] The physician must, however, consult with the minor before he performs the abortion.[28] It is the physician's duty alone to decide if the minor is capable of informed consent.[29] The physician may refer the minor to other health professionals to assist him in arriving at these determinations.[30]

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20. *See id.* at 1388; Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542 (D. Me. 1979); H—L— v. Matheson, 604 P.2d 907 (Utah 1979).

21. *See* Bellotti v. Baird, __ U.S. __, __, 99 S. Ct. 3035, 3052, 61 L. Ed. 2d 797, 818 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

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).

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).

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).

25. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 66-67, 67 n.8 (1976).

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).

27. *See* Doe v. Bolton, 410 U.S. 179, 196-201 (1973).

28. *See* Belotti v. Baird, __ U.S. __, __, 99 S. Ct. 3035, 3047 n.21, 61 L. Ed. 2d 797, 812 n.21 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 91 n.2 (1976) (Stewart, J., concurring); Doe v. Bolton, 410 U.S. 179, 197 (1973); Roe v. Wade, 410 U.S. 113, 153 (1973); Bennett v. Graves, 557 S.W.2d 893, 895 (Ky. Ct. App. 1977); State v. Koome, 530 P.2d 260, 265 (Wash. 1975). *See generally* Wood & Durhan, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U. L. REV. 783.

29. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 66-67, 67 n.8 (1976); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 549 (D. Me. 1979).

30. *See* Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 549 (D. Me. 1979).

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.[31]

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.[32]

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31. The state may proscribe abortion at and after viability. *See, e.g.*, Colautti v. Franklin, — U.S. —, —, 99 S. Ct. 675, 681, 58 L. Ed. 2d 596, 600 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 61 (1976); Roe v. Wade, 410 U.S. 113, 164-65 (1973).

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).