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Parental Notification Prior to Abortion: Is Minnesota's Statute Consistent with Current Standards

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PARENTAL NOTIFICATION PRIOR TO ABORTION: IS MINNESOTA'S STATUTE CONSISTENT WITH CURRENT STANDARDS

The United States Supreme Court recently heard a case, Hartigan v. Zbaraz, which could have determined the constitutionality of statutes requiring parental notice prior to abortion. However, the eight-member Court issued a split decision without an opinion. A Minnesota statute, similar to the Illinois statute at issue in Zbaraz, has been reviewed by the Eighth Circuit Court of Appeals in Hodgson v. State. This Note contrasts the two statutes and discusses the content of parental notification statutes in light of the few Supreme Court decisions that have some bearing on the issue. The author suggests revisions of Minnesota's Act. The Note concludes that both the Illinois and Minnesota statutes must be scrutinized by the Supreme Court in order to completely set the parameters for parental notification.

INTRODUCTION

When the United States Supreme Court decided *Roe v. Wade*[1] in 1973, many aspects of the extent to which states could regulate abortion remained unanswered.[2] One significant area left void of regula-

1. 410 U.S. 113 (1973).

2. Issues involved in state regulation include whether a state may require spousal or parental consent, require hospitalization for the procedure or require a waiting period before obtaining the procedure. *See infra* note 67 for a review of the Supreme Court's attempts at abortion regulation.

tory standards has been the regulation of abortion with respect to minors.

The regulation of health care for minors differs somewhat from that of adults.[3] Both adults and minors need to be protected from the risks of medical procedures. Judicial proceedings that apply to minors must also protect them from public exposure and from potential familial conflicts.[4] These potentially diverging considerations must be balanced by legislatures and courts in determining the extent to which minors' access to abortions may be constrained.

The Supreme Court has concluded that statutory requirements of parental notification or consent before allowing a minor to obtain an abortion are constitutional.[5] The Court, however, has not ruled definitively on the parameters of those requirements, particularly with regard to prior parental notice.[6] The lack of firmly articulated standards has left lower courts with a tenuous framework with which to interpret parental consent/notification statutes.[7] State legislatures have been without guidance in their attempts to balance the competing interests of protection and regulation of juveniles regarding abortions.[8]

Recently, the United States Supreme Court had the opportunity to clarify the extent to which states may burden a minor's right to an abortion in *Hartigan v. Zbaraz*,[9] a case from the Seventh Circuit.[10] The Supreme Court, however, was split in its decision,[11] leaving regulation in the area uncertain. In *Hodgson v. State*,[12] the Eighth Circuit Court of Appeals enjoined Minnesota's statute requiring parental

3. *See infra* notes 71-77 and 93-98 and accompanying text.

4. *See infra* notes 93-98 and accompanying text.

5. *See infra* notes 100-40 and accompanying text.

6. *See infra* notes 255-57, 277-92, 297-303 and accompanying text for a discussion of the lack of agreement in parental notification/consent statutes.

7. *See* Note, *Zbaraz v. Hartigan: Mandatory Twenty-Four Hour Waiting Period After Parental Notification Unconstitutionally Burdens A Minor's Abortion Decision*, 19 J. MARSHALL L. REV. 1071, 1079-80 n.57 (1986).

The Court has not always applied a consistent level of scrutiny to abortion cases. For a discussion of the inconsistency of United States Supreme Court opinions in abortion decisions, see Note, *Rational Basis? Strict Scrutiny? Intermediate Scrutiny? Judicial Review in the Abortion Cases*, 9 OKLA. CITY U.L. REV. 317, 319 (1984) [hereinafter *Judicial Review*]. For further discussion of the inconsistency of the Supreme Court's decisions on abortion regulation, see *infra* note 68.

8. *See infra* note 69 for a discussion of the inconsistent nature of Supreme Court decisions on the regulation of abortions for minors.

9. 108 S. Ct. 479 (1987). The court did not write an opinion for its decision. *Id.*

10. Zbaraz v. Hartigan, 763 F.2d 1532 (7th Cir. 1985).

11. 108 S. Ct. 479 (1987). The Supreme Court voted four to four to uphold the statute. *Id.* The petition for rehearing of the case was denied by the eight-member Court. 108 S. Ct. 1064 (1988).

12. Nos. 86-5423-MN, 86-5431-MN (8th Cir. filed Aug. 27, 1987), *vacated*, 835

notice prior to a minor's abortion.[13] The Eighth Circuit's opinion has since been vacated and a rehearing with the full appellate court granted.[14]

The Minnesota act is more burdensome to a minor seeking an abortion than the Illinois act at issue in *Zbaraz*.[15] The act is also more burdensome than other existing parental notification statutes.[16] The issues presented in *Zbaraz* and *Hodgson* require a definitive ruling by the Supreme Court on parameters of parental notification.

Hodgson and *Zbaraz* involve a unique blend of constitutional law and minors' rights. A tracing of the history of abortion regulation and the development of our juvenile court system reveals the concerns that legislatures must balance in regulating minors' access to a constitutional right.

F.2d 1545 (8th Cir.), and *reh'g granted en banc*, 835 F.2d 1546 (8th Cir. 1987) [hereinafter Nos. 86-5423-MN, 86-5431-MN].

H.L. v. Matheson, 450 U.S. 398 (1981), is the only parental notification statute to date to reach the Supreme Court after having been in effect. The trial court in *Matheson*, however, did not issue any findings with respect to the operation of the statute. *Id.* at 401-04. The trial judge held a trial at which the appellant, a pregnant minor, was the only witness. *Id.* at 401. The trial judge then "adopted, verbatim, findings of fact and conclusions of law prepared by appellant." *Id.* at 404 n.10. Therefore, *Hodgson* is important because it is the only parental notification statute so far to have its operational effects carefully studied by a district court.

13. MINN. STAT. § 144.343 (1986).

14. *See Hodgson*, 835 F.2d 1545 (8th Cir. Nov. 13, 1987) (vacating opinion filed Aug. 27, 1987); *Hodgson*, 835 F.2d 1546 (Dec. 31, 1987) (granting rehearing en banc).

15. *See infra* notes 212-47 and accompanying text.

16. At present, thirteen states have parental notification statutes, including Illinois and Minnesota. The remaining states include Georgia, Idaho, Maine, Maryland, Montana, Nebraska, Nevada, Ohio, Tennessee, Utah and West Virginia. *See infra* note 251 for full citations. A few, including Georgia, Illinois, Maine, Minnesota and Nevada, have been enjoined. *See* Zbaraz v. Hartigan, 763 F.2d 1532, 1545 (7th Cir. 1985), *aff'd*, 108 S. Ct. 479 (1987) (statute enjoined until the Illinois Supreme Court enacts rules assuring expedition and confidentiality in proceedings); Planned Parenthood Ass'n v. Harris, 670 F. Supp. 971, 994 (N.D. Ga. 1987) (statute enjoined as unduly burdensome and further judicial proceedings stayed pending the outcome of *Zbaraz*); Hodgson v. State, 648 F. Supp. 756, 780-81 (D. Minn. 1986) (statute enjoined because 48 hour waiting period and two parent notification requirements found to be excessively burdensome); Glick v. McKay, 616 F. Supp. 322, 325-27 (D. Nev. 1985) (act enjoined until provisions mandating confidentiality and expedition of judicial bypass proceedings are added); Women's Community Health Center v. Cohen, 477 F. Supp. 542, 545-48 (D. Maine 1979) (statute enjoined because it required that parents always be informed of a minor's decision to seek an abortion which is inconsistent with current Supreme Court precedent requiring an alternative to parental notification).

In contrast, Utah has recently upheld a parental notification statute. H.B. v. Wilkinson, 639 F. Supp. 952, 953-55 (D. Utah 1986) (motion to enjoin statute dismissed because minor was "immature" and the court stated that parental notification statutes are constitutional as to immature minors).

This Note will summarize several issues concerning the regulation of abortion for minors. First, it will trace the history of abortion regulation in the United States. Second, a discussion of the development of the juvenile court and the current rights of minors is provided. Third, the major United States Supreme Court decisions on abortion regulation with respect to minors will be outlined. Finally, the Note will summarize and compare the Illinois and Minnesota statutes with the other current notification/consent statutes. The Note concludes that Minnesota should amend its act prior to seeking reinstatement of the statute or appealing the decision to the Supreme Court.

I. The History of Abortion Regulation

The movement to regulate abortions in the United States began in the early nineteenth century.[17] Prior to that time, abortion was a widely used technique,[18] performed by midwives,[19] physicians,[20] "herbal healers,"[21] and by use of home remedies.[22] Abortion was advertised in newspapers. The government was indifferent to this dissemination of abortion information.[23] American courts followed English common law, which did not condemn abortion before "quickening," the point at which the mother could feel the fetus

17. Rubin, Abortion, Politics, and the Courts: *Roe v. Wade* and Its Aftermath 11 (1987) [hereinafter Rubin]. Rubin is a very recent treatise on the legality and politics involved in modern abortion legislation.

18. "[T]he practice of aborting unwanted pregnancies was, if not common, almost certainly not rare in the United States during the first decades of the nineteenth century." Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800-1900 16 (1978) [hereinafter Mohr]. Mohr is often cited as the most complete treatise on the history of abortion in early America.

19. *Id.* at 11.

20. *Id.* at 14-16. Physicians did not always know whether a woman was pregnant. In early pregnancy, it was difficult to be certain that she was pregnant, given the medical technology at the time. Therefore, physicians often treated a woman for "obstruction" or "menstrual blockage," pursuant to the knowledge that the woman failed to menstruate. The cause of such a condition often could not be determined. *Id.* at 14-15. Whether or not the physicians actually knew or intended to perform an abortion is not known. *Id.* It is clear that at this time physicians could not be held criminally liable for performing an abortion, even if the abortion was intended. *Id.* at 16.

21. *Id.* at 11-14. "Herbal healers" or folk doctors were informally trained individuals who treated ailments using potions derived from plants. *Id.*

22. *Id.* at 6-7. Many home medical manuals contained information on how to induce an abortion. *Id.*

23. Rubin, *supra* note 17, at 11-12. Change began in 1873 with the passage of the Comstock law by Congress. Mohr, *supra* note 18, at 196. The law forbade any drug, medicine or articles used for abortion or contraceptive purposes from being circulated by mail or from being advertised. *Id.* The law is considered "a turning point in anti-contraceptive legislation and . . . the closest the federal government ever came to . . . the anti-abortion crusade. *Id.* at 196-97.

move, about sixteen to eighteen weeks into her pregnancy.[24]

The first abortion statutes were passed in the early 1800's[25] and were aimed at regulating the safety of abortion.[26] In the mid-1800's, the "quickening" doctrine was abandoned because of new knowledge that a fetus develops gradually.[27] At the same time, some members of the newly formed American Medical Association (AMA) began to tire of competing with those not formally trained in medicine.[28] These concerns, fueled by the fear that newly admitted immigrants would outnumber "Americans"[29] and the resentment toward upper and middle class women for shirking their familial obligations,[30] combined to produce a strong anti-abortion movement. The AMA was aided by the Roman Catholic church and many Protestant clergy in the movement.[31] Consequently, abortion was illegal everywhere from 1880 to the 1970's.[32]

In the 1950's, American society began to undergo changes such as population growth,[33] concern for the environment and depletion of world resources,[34] the emergence of women in the work force,[35] and

24. RUBIN, *supra* note 17, at 10-11. By 1860, seven out of nine state supreme court decisions on abortion held that abortion before quickening was not a criminal offense. C. SMITH-ROSENBERG, DISORDERLY CONDUCT 219 (1985) [hereinafter SMITH-ROSENBERG]. SMITH-ROSENBERG is a discussion of the American Medical Association's involvement in the anti-abortion movement in the nineteenth century. As late as 1879, Kentucky followed these early decisions, as did New York in 1872 and Wisconsin in 1923. *Id.* at 219-20.

25. MOHR, *supra* note 18, at 20. Connecticut passed its statute in 1821, Missouri in 1825, Illinois in 1827 and New York in 1828. *Id.* at 20-26.

26. RUBIN, *supra* note 17, at 13. The concern was prompted by the use of "unsafe practices, poisonous remedies and criminally incompetent practitioners." *Id.*

27. *Id.* at 14.

28. SMITH-ROSENBERG, *supra* note 24, at 229-31. Formally trained physicians, known as "regulars," objected to midwives and to a newly-emerged group of physicians known as "irregulars." Both of these groups advocated home treatment and alternatives to the harsh drugs used by the "regulars." *Id.* at 229. SMITH-ROSENBERG postulates that "regulars" may have been economically motivated. They were not as free to perform abortions as the "irregulars," and therefore risked losing patients to "irregulars" who would perform them. *Id.* at 232-33.

29. RUBIN, *supra* note 17, at 15.

30. SMITH-ROSENBERG, *supra* note 24, at 236-37. The medical profession complained that the women seeking abortions were mostly "affluent bourgeois matron[s]," not "deceived young women," toward whom they claimed to be sympathetic. *Id.* at 236. The profession claimed that the matrons acted in discord to a woman's traditional roles of "domesticity, nurturing, self-sacrifice, devotion to the needs of others and especially the biological drive for impregnation." *Id.* at 237. One commentator at the time remarked that women who sought abortions were "self-indulgent." *Id.*

31. *Id.* at 218.

32. RUBIN, *supra* note 17, at 15-16.

33. *Id.* at 19.

34. *Id.*

35. *Id.* at 17.

the equal rights movement.[36] Also at this time, physicians became concerned with the unsafe and unsanitary conditions under which many abortions were being performed.[37] Further, many abortions resulted in severe complications or death.[38] These factors combined to produce the abortion reform movement,[39] which sought to reform existing abortion legislation.[40] The first abortion reform statutes were passed in 1967.[41] By 1970, twelve states had adopted some type of reform legislation.[42]

In the late nineteenth century, many states passed laws prohibiting the sale or use of contraceptives.[43] Although the statutes were rarely enforced by the 1960's, some remained on the books.[44] Several challenges to these statutes reached the United States Supreme Court, but the constitutional issues were not decided due to technicalities.[45] Finally, the issue of contraceptive use came to rest in 1965, with the Supreme Court's decision in *Griswold v. Connecticut*.[46] In *Griswold*, the right to privacy was first recognized as a constitutionally protected right.[47] Justice Douglas, writing for the Court, stated that the expressed rights in the Bill of Rights create zones of privacy which, when read in conjunction with the ninth amendment, yield several penumbral rights.[48] The right of married couples to use contraceptives was found to be "within the zone of privacy created by several fundamental constitutional guarantees."[49] The right to sexual privacy was extended to single persons in *Eisenstadt v. Baird*.[50]

36. *Id.* Commentators have stated that equal rights are dependent upon the ability to control reproduction. *Id.*

37. *Id.* at 17-18.

38. SMITH-ROSENBERG, *supra* note 24, at 223. "In one year alone, 1964, 10,000 women suffering from severe complications from criminal abortions were admitted to New York City's public hospitals." *Id.*

39. RUBIN, *supra* note 17, at 15-16.

40. *Id.* at 22.

41. *Id.* at 22-23. Although the first statutory challenge had begun in California, Colorado's statute actually passed first. After a struggle, California's statute was reluctantly signed by Governor Reagan. North Carolina was third in the same year. *Id.*

42. *Id.* The statutes were based on the Model State Abortion Law, drafted by the American Law Institute (ALI) in the early 1960's. *Id.*

43. *Id.* at 38.

44. *Id.*

45. *Id.* Lack of standing or absence of a case or controversy prevented consideration of the merits of the constitutional challenge. *Id.* at 210 n.17.

46. 381 U.S. 479 (1965).

47. *Griswold*, 381 U.S. at 485-86.

48. 381 U.S. at 484-86. "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484.

49. *Id.* at 485.

50. 405 U.S. 438 (1972). "[I]f the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intru-

The significance of *Griswold* is that it established the constitutional grounds for a challenge to abortion legislation.

By 1970, thirteen states had both civil and/or criminal challenges to abortion statutes pending in their courts.[51] Decisions of the lower courts varied markedly,[52] indicating the need for a Supreme Court ruling. Many appeals and petitions for certiorari began to reach the Supreme Court in the early seventies.[53]

Two cases, *Roe v. Wade*[54] and *Doe v. Bolton*,[55] were accepted for hearing on May 31, 1971.[56] The cases were argued in 1971 and reargued in 1972.[57] The opinions of both cases were announced in January, 1973.[58] *Roe* was an appeal from a Texas district court,[59] and *Doe* from a Georgia district court.[60] In the same year, the United

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sion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453.

51. RUBIN, *supra* note 17, at 48. RUBIN contains a thorough discussion of the cases brought at this time. *See id.* at 48-57.

52. *Id.* at 55. Some abortion statutes had been upheld and others struck down. Courts had granted or denied injunctions of the various statutes. *Id.*

53. *Id.*

54. 410 U.S. 113 (1973).

55. 410 U.S. 179 (1973).

56. RUBIN, *supra* note 17, at 55.

57. *Doe*, 410 U.S. 179; *Roe*, 410 U.S. 113.

58. *Doe*, 410 U.S. 179; *Roe*, 410 U.S. 113.

59. *Roe*, 410 U.S. at 116. The Texas statute made abortion a crime, unless it was done to save the mother's life. *Id.* at 117-18. Three parties challenged the statute, seeking a declaratory judgment and injunction. *Id.* at 120-21. Jane Roe, a pregnant single woman, claimed that the statute was unconstitutional because it denied her access to a safe abortion, performed by a competent doctor. *Id.* at 120. A physician objected to the statute because it kept him from prescribing proper treatment for many of his patients. *Id.* at 120-21. A married couple claimed that the wife's medical condition would endanger her life if she became pregnant and was not allowed a legal abortion under safe conditions. *Id.* at 121. The district court had issued declaratory relief to the physician and to Roe, but dismissed the married couple's complaint. The injunction was denied for all parties. All three appealed the denial of the injunction. *Id.* at 122.

60. *See Doe*, 410 U.S. at 184-87. The Texas statute had been passed before the Civil War. Georgia's statute was an ALI version passed in 1968. RUBIN, *supra* note 17, at 57.

The Georgia statute at issue in *Doe* permitted some abortions beyond those necessary to save the mother's life. For example, if the fetus were likely to be born with birth defects or if the pregnancy resulted from rape or incest abortions, were allowed. *Doe*, 410 U.S. at 183. The statute also contained several provisions that made an abortion very difficult to obtain. The woman was required to be a resident of Georgia, the abortion had to be performed in an accredited hospital and approved by an abortion committee and rape cases had to be certified. *Id.* at 184. Mary Doe, a pregnant married woman, was informed that a pregnancy would endanger her life. She applied for an abortion but her application was denied. She sought a declaratory judgment that the statute was unconstitutional and an injunction against its continued enforcement. *Id.* at 185. The district court granted declaratory relief but denied the injunction. *Id.* at 186-87.

States Supreme Court was changing. Justices Harlan and Black left the bench, and Lewis Powell and William Rehnquist were appointed to the Court.[61]

The new Court decided that a logical extension of the given right to privacy was a woman's right to an abortion.[62] The *Roe* decision indicated, however, that the abortion right was not absolute. The decision was predicated upon a balancing of the rights of the state and the rights of a woman.[63] State intervention in the rights of a woman is not allowed in the first trimester of pregnancy,[64] but is allowed in the second trimester if the regulation "reasonably relates to the preservation and protection of maternal health."[65] States may completely prohibit abortion in the third trimester, except to preserve the mother's life or health.[66]

The prior abortion movements, both in favor of legalizing and in favor of outlawing abortion, demonstrate that the conflict underlying abortion regulation lies between one's moral perceptions (i.e., fetal development, the role of women in society), and the need to monitor a potentially unsafe procedure.

Legislative measures to regulate abortion have created obstacles and burdens for women seeking abortions.[67] The balance between

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61. RUBIN, *supra* note 17, at 57.

62. *Roe*, 410 U.S. at 153. ("[T]he right to privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.") *Id.*

63. *Id.* at 155. The states' interests are the preservation and protection of maternal health and safety and protecting potential human life. *Id.* at 154-56. The Court stated that a compelling state interest must exist in order to intervene in the abortion right. *See id.* at 162-64. Such a compelling state interest cannot exist in the first trimester. *See id.* at 163.

After determining that abortion in the first trimester of pregnancy is less dangerous to the mother's health than is actual childbirth, the Court concluded that the state's interest in maternal health becomes compelling at the end of the first trimester of pregnancy. *Id.* at 163. Therefore, the abortion decision during the first trimester should be left to the woman and her physician. *Id.* at 164.

64. *See supra* note 63.

65. Roe v. Wade, 410 U.S. at 163. According to the Court, examples of state regulation that would be permissible are the requirements concerning the qualifications and licensing of the person who would perform the abortion and those concerning the licensing of the facility where the abortion may be performed. *Id.*

66. *Id.* at 163-64. The Court determined that when the third trimester begins, the fetus has become viable. *Id.* at 160. After viability, a state may "proscribe abortion . . . except when it is necessary to preserve the life or health of the mother." *Id.* at 163-64.

67. For example, the statutes at issue in *Doe* made an abortion very difficult to obtain. *See supra* note 60. Statutes creating obstacles to abortions have been enacted since *Doe*. Provisions creating obstacles have included informed consent, spousal consent, waiting periods, mandatory hospitalization, record-keeping and parental consent or notification.

Statutes requiring the woman to receive information about abortion before giving her consent to the procedure have been both approved and disapproved by the

the regulation and the burdening of abortion has been particularly difficult for the United States Supreme Court in its decisions after *Roe v. Wade*.[68] The balance has been even more difficult for the court

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Supreme Court. *See, e.g.*, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 760-61 (1986) (provision requiring presentation of seven classes of information to the woman before she consents to an abortion is unconstitutional); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 66-67 (1976) (written informed consent approved by the court).

A 24 hour waiting period before a woman could consent to the procedure, after reading information on the procedure, was held to be unconstitutional by the Supreme Court. *See* City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983). A waiting period for adult women has not been challenged since.

Statutes requiring mandatory hospitalization for abortions performed in the second trimester have been rejected by the Supreme Court. *See, e.g.*, Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 481-82 (1983) (requirement that all abortions after the first 12 weeks be done in a hospital found too restrictive); *Akron*, 462 U.S. at 435-37 (second trimester hospitalization requirement deemed unnecessary). *But see* Simopoulos v. Virginia, 462 U.S. 506, 512-15 (1983) (second trimester hospitalization requirement upheld because Virginia did not require all abortions to be performed in full service hospitals and allowed them to be done in licensed abortion clinics).

Statutes requiring record keeping or reporting of the abortion to local authorities have been evaluated with different outcomes by the Court. *See, e.g., Thornburgh*, 476 U.S. at 766-67 (record keeping and reporting requirement struck down because found to be for identification purposes and not for health related interests); *Danforth*, 428 U.S. at 80 (reporting and record keeping requirement upheld because it was reasonably related to health preservation and properly respected the patient's confidentiality and privacy).

A spousal consent requirement was struck down in *Danforth*. 428 U.S. at 69 (Court found an "absolute and possibly arbitrary" veto of one spouse over another to be offensive). This issue has not been challenged since *Danforth*. For a discussion of the parental notification/consent provisions, see *infra* notes 99-140 and accompanying text.

68. The United States Supreme Court opinions on abortion regulation after *Roe* have not been consistent with each other. One problem has been the lack of application of a consistent standard of review to the abortion decisions. For a discussion of the varying standards of review that have been applied to post-*Roe* decisions, see *Judicial Review*, *supra* note 7. *Roe* stated that a strict scrutiny standard was to be used in making abortion decisions because of the privacy right involved. *Roe*, 410 U.S. at 155. But several post-*Roe* decisions did not use a strict scrutiny standard of review. *See, e.g., Thornburgh*, 476 U.S. at 758-72 (1986) (it is not clear what standard was used); Bellotti v. Baird, 443 U.S. 622, 639-51, *reh'g denied*, 444 U.S. 887 (1979) (a standard higher than the rational basis was used, but unclear whether intermediate or strict scrutiny used); H. L. v. Matheson, 450 U.S. 398, 406-13 (1981) (something less than strict scrutiny used).

Post-*Roe* decisions have also been inconsistent in their analysis. In *Roe*, 410 U.S. at 163, the Court had stated that states may not *regulate* abortions during the first trimester of pregnancy. But in some subsequent decisions, the Court has permitted some state regulation in the first trimester. *See, e.g., Akron*, 462 U.S. at 434 (some regulation of abortion in the first trimester is permissible); *Danforth*, 428 U.S. at 66 (states may not *restrict* access to abortion during the first trimester). *Roe* had also stated that the regulation of abortion after the first trimester must reasonably relate

to maintain when the abortion right as applied to minors is at issue.[69] This results from the unique place of minors in our society.[70]

II. THE RIGHTS OF MINORS

At common law, minors had only limited personal rights,[71] and were considered to be the property of their parents.[72] Minors could not give consent to their own medical care because they were not individuals with individual rights.[73] Minors were also deemed to lack

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"to the preservation and protection of maternal health." 410 U.S. at 163. *Akron*, however, states that a regulation that reasonably relates to the state interest in protecting maternal health does not deviate from "accepted medical practices." 462 U.S. at 434. Thus, *Akron* adds present knowledge of the medical profession to the standard of "accepted practice" in determining the reasonableness of the regulation. *Id.* The Court's opinions on the abortion right with respect to minors have also been inconsistent.

Several of the abortion decisions have been pluralities. All, with the exception of *Thornburgh*, have been decisions on the right with respect to minors. *Thornburgh*, 476 U.S. at 753. *See infra* note 69 for a discussion of the divided nature of the Court on minors' abortion rights.

69. While opinions on the regulation of abortion with respect to adults have not been unanimous, the opinions on the right with respect to minors have been deeply divided. For example, in *Matheson*, 450 U.S. at 399, the Court upheld a parental notification statute in a six to three decision, with five justices limiting the holding to a narrow class of minors. In *Belotti*, 443 U.S. at 644-51, the Court was divided four to four in its decision to strike a parental consent statute that failed to allow minors to go to an independent decision-maker in lieu of their parents, to argue their maturity or that parental consultation would not be in their best interests. In *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), the justices failed to agree on the reasoning for voiding a statute which prohibited distribution of contraceptives to minors.

In contrast, decisions on abortion regulations that affect adults have been more definitive. *Roe v. Wade* was a seven to two decision. 410 U.S. 113 (White, J. and Rehnquist, J., dissenting). In *Ashcroft*, 462 U.S. at 481-82, the Court voted six to three that a second trimester hospitalization requirement infringes upon a woman's right to an abortion. But the same Court could not agree on a reason for upholding a parental consent statute. *Id.* at 490-93. In an eight to one vote, the Court upheld a requirement that second trimester abortions be performed in licensed outpatient clinics. *Simopoulos*, 462 U.S. at 516-17. Nine justices agreed that a spousal consent requirement was unconstitutional in *Danforth*. 428 U.S. at 67-72. But only five justices agreed that a parental consent provision was unconstitutional. *Id.* at 72-75. In contrast, all of the provisions of the Akron ordinance were held unconstitutional by the Court in a six to three vote, including parental consent. The provisions included mandatory hospitalization, informed consent, a 24 hour waiting period and parental consent. *Akron*, 462 U.S. at 452.

70. *See infra* note 76 and accompanying text.

71. *See* 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 446-66 (1890).

72. *See* Pilpel, *Minor's Rights to Medical Care*, 36 ALB. L. REV. 462, 463 (1972). Pilpel provides a discussion of a minor's right to consent to medical treatment and regulations affecting that right.

73. *See id.* at 463. However, there are three exceptions to this rule. The first exception is for emergency treatment of the minor. This has been construed nar-

the experience necessary to give effective consent to their own medical treatment.[74] Despite the fact that minors are now viewed as people with constitutional rights,[75] the "lack of capacity to consent" theory still exists, because minors are still believed to possess a unique "vulnerability" and lack of experience.[76] Since minors are presumed to lack the capacity to consent to their own medical treatment, the state gives the minors' parents the authority to consent to treatment for their children.[77]

Since the United States Supreme Court decision *In re Gault*,[78] minors have been viewed as individuals with constitutional rights[79] in-

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rowly to apply to medical procedures necessary to save life or limb. *Id.* at 464. The second exception is for emancipated minors. An emancipated minor may consent to medical treatment provided that the minor understands the nature and consequences of the treatment in question. A minor may become emancipated by marriage, judicial decree, parental consent, by becoming self-supporting or by failure of the minor's parents to meet their legal responsibilities. *Id.* at 464-65. Third, mature minors may give consent to medical treatment in some states. The mature minor must be able to understand the nature and consequences of the treatment and the treatment itself must benefit the minor. *Id.* at 466.

74. *Id.* at 464.

75. *See infra* notes 78-83 and accompanying text for a discussion on the effect that *In re* Gault, 387 U.S. 1 (1967) has had on the development and recognition of a minor's constitutional rights.

76. In *Bellotti v. Baird*, the Supreme Court states three reasons why minors' constitutional rights are not equal to those of adults. First, they have a vulnerability to harm. Second, they lack the experience and perspective needed to make informed decisions. Third, parental guidance is important in the development of responsible citizens. 443 U.S. at 634-39. *See also* Wisconsin v. Yoder, 406 U.S. 205, 229-34 (1972) (Court recognized the importance of parental direction in the religious upbringing and the education of their children and the need to balance this interest with the state's parens patriae power); Prince v. Massachusetts, 321 U.S. 158, 169 (1944) (Court upheld a state law which prohibited involvement of children in the sale of religious literature on the street, stating that "streets afford dangers for them not affecting adults").

77. *See* Note, *Restrictions on the Abortion Rights of Minors: Bellotti v. Baird*, 3 HARV. WOMEN'S L.J. 119, 122 (1980).

78. 387 U.S. 1 (1967). The Court stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Id.* at 13. Consequently, the Court's decision in *Gault* extended to minors the due process rights of the privilege against self-incrimination, *id.* at 55, notice, *id.* at 49, counsel, *id.* at 56, confrontation, *id.*, and cross-examination. *Id.*

79. *See* Pilpel, *supra* note 72, at 463. Since *Gault*, minors have been extended all of the constitutional protections of adults, except for the right to a jury trial. *See, e.g.*, Planned Parenthood of Mo. v. Danforth, 428 U.S. 52, 74-75 (1976) (right to privacy extended to minors); Breed v. Jones, 421 U.S. 519, 541 (prohibition against double jeopardy applies to juveniles subject to juvenile court system) *on remand to*, Jones v. Breed, 519 F.2d 1314 (9th Cir. 1975); *In re* Winship, 397 U.S. 358, 365 (1970) (proof beyond a reasonable doubt must be established in juvenile criminal cases); *see also* Gallegos v. Colorado, 370 U.S. 49, 54-55, (juveniles are afforded protection from coerced confessions) *reh'g denied*, 370 U.S. 965 (1962). *But see* McKeiver v. Penn-

stead of the property of their parents.[80] The *Gault* decision was aimed at limiting the "unbridled discretion" that lower courts had exercised[81] because of the civil, rather than criminal, nature of juvenile proceedings.[82] The effect of the *Gault* decision was that minors were granted many of the procedural safeguards of adult criminal trials during juvenile delinquency proceedings.[83]

Although minors are afforded many of the procedural protections provided adults,[84] the protective nature of the juvenile court system itself is responsible for the different treatment of minors and adults in the court system. The juvenile court system was established to ensure the humane and protective judicial treatment of juveniles, emphasizing the rehabilitation, rather than punishment, of juvenile offenders.[85] Thus, juvenile proceedings are considered to be civil

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sylvania, 403 U.S. 528, 545 (1971) (minors do not have the constitutional right to jury trials in juvenile delinquency proceedings).

80. The Court stated that individual rights are predicated upon the affording of procedural due process and that "[d]ue process is the primary and indispensible foundation of individual freedom." *Gault*, 387 U.S. at 20.

81. *Id.* at 18. The Court stated that "[j]uvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *Id.*

82. *See infra* note 86 and accompanying text.

83. *See supra* note 78 and accompanying text for a discussion of the *Gault* case.

84. *See supra* notes 78-79 and accompanying text.

85. H. LOU, JUVENILE COURTS IN THE UNITED STATES 30-31 (1927) [hereinafter LOU]. LOU provides a good background discussion of the philosophical origins of the juvenile court. *Id.* at 1-12.

The juvenile court is an outgrowth of the court of chancery or equity. *Id.* at 3. Courts of chancery were the means by which the state excercised its parens patriae power, or power as "father of the country," to care for minors and others who were incapable of caring for themselves. *Id.* at 4. "The essential idea of chancery is welfare or balancing of interests." *Id.* at 4. In the United States, the state has taken the place of the monarch as the parens patriae of minors. *Id.* The court of chancery orginally dealt with "neglected" or "dependent" children. The doctrine of parens patriae was then extended to include delinquent children. *Id.* at 5.

The juvenile "reform movement" of the early nineteenth century was not entirely an American phenomenon. *Id.* at 14. Attempts to give juveniles an alternate method of trial had existed in other countries prior to reform in the United States. *Id.* at 14-15. The reform movement in America sought initially to keep child criminals in separate confinement from adults. Later, the movement modified court procedure, such as separate hearings with separate record and docket and probation. *Id.* at 15-16. The first juvenile court was established in Illinois in 1899. *Id.* at 19. The novel feature of this court was that a juvenile breaking the law was not treated as a criminal but as a ward of the state, subject to the care, guardianship and control of the juvenile court. *Id.* at 20.

Since it is thought that juveniles are more capable of rehabilitation than adults, the aim of the juvenile court is rehabilitation of the criminal through "reformation, protection and education rather than punishment." *Id.* at 7. As part of the rehabilitation effort, the state seeks to minimize stigmatizing juvenile offenders. *Id.*

rather than criminal.[86]

Juvenile courts typically focus on the minor's "best interests" in making their decisions.[87] The term seems to encompass all aspects of the minor's life.[88]

Minnesota's Juvenile Court Act[89] contains a requirement that judges of lower courts state in writing the basis for their dispositional decisions.[90] The two-part evidentiary requirement limits the discretion of trial court judges in determining what is in a minor's best interests. The best interests standard is also important in a minor's

86. *See, e.g., In re* J.E.C. v. State, 302 Minn. 387, 401, 225 N.W.2d 245, 253-54 (1975) (purpose of juvenile act is rehabilitation of juvenile, not punishment for crime, so proceedings are "civil", not "criminal"); State *ex rel.* Miller v. Bryant, 94 Neb. 754, 144 N.W. 804 (1913) (juvenile law is not criminal in nature); *In re* Santillanes, 47 N.M. 140, 151, 138 P.2d 503, 510 (1943) (delinquency proceedings are civil, not criminal), Cope v. Campbell, 175 Ohio 475, 477, 196 N.E.2d 457, 458 (1964) (juvenile courts are civil, not criminal).

87. For example, the best interest standard is used in adoption, neglect and custody proceedings, and in dispositional orders. For a discussion of how the term is used in each type of proceeding, see *infra* note 88.

88. In Oregon divorce proceedings, the court will not assume that either men or women are more suitable for child-rearing in determining the best interests of the child. Banta, *The Welfare and Best Interest of the Child*, 5 WILLIAMETTE L.J. 82, 84-85 (1968). Refraining from constant litigation is also thought to be in a child's best interests. *Id.* at 91.

In adoption proceedings, commentators have said that the identity of religion between the child and the adoptive parent, the age of the prospective adoptive parents, the child's choice of parents, the love and affection that the prospective parents can offer, and "racial factors" are all to be balanced in determining which placement would be in the child's best interests. Edwards, *Adoption—The Welfare and Best Interests of the Child*, 5 WILLAMETTE L.J. 93, 93-102 (1968).

One commentator has stated that in custody determinations the "best interests standard generally includes the physical, mental, and moral well-being of the child." Comment, *Domestic Relations—Child Custody—Sufficiency of Record to Determining the Best Interests of the Child*, 52 IOWA L. REV. 1017, 1018 (1967). This encompasses the "home surroundings," the "character of individuals seeking custody," "school factors," the "sanitary conditions of the home," and the "ability of individuals claiming . . . custody to provide food, clothing, and education." *Id.* at 1018 n.6.

Dispositional decisions are made pursuant to a child's "social report which is the result of an investigation of the child made by a court-appointed social worker." The report discusses the "child's general social, emotional, and educational background." Kay & Segal, *The Role of the Attorney in Determining the Best Interests of the Child in Delinquency Proceedings*, 61 GEO. L.J. 1401, 1415 (1973).

For a discussion of the "best interests" standard and its lack of defined standards and direction, see Comment, *The Custody Question and Child Neglect Rehearings*, 35 U.CHI. L. REV. 478 (1968).

89. MINN. STAT. §§ 260.011-.301 (1986 and Supp. 1987) are referred to as the Juvenile Court Act.

90. Dispositional orders must discuss both the best interest of the child standard and how the court's order serves that standard. In addition, a dispositional order must discuss alternative dispositions that were considered and why they were not appropriate. MINN. STAT. § 260.185, subd. 1 (1986).

access to abortion. If a minor can convince a judge that parental notification or consent would not be in her best interests, she can obtain an abortion through waiver of consent or notice.[91] Minnesota's parental notification statute requires a judge making such a determination to state the basis for the decision.[92]

Regulation of the abortion right for minors has been difficult for the Supreme Court.[93] Concern for a minor's lack of capacity to consent and other state interests[94] must be balanced against the need to protect her from judicial discretion while maintaining her best interests and constitutional rights.

Many commentators believe that minors should not undergo pregnancy to term, due to increased physical risks to the mother[95] and

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91. *See infra* notes 110-21 and accompanying text.

92. MINN. STAT. § 144.343, subd. 6(c)(iii) (1986). "A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision . . . ." *Id.*

93. *See supra* note 69 and *infra* notes 100-38 and accompanying text.

94. States have justified parental notification statutes upon the following state interests: discouraging adolescent sexual activity; ensuring that the minor make an informed decision regarding abortion; protecting potential life; and promoting parent-child intereaction. Comment, *Parent versus Child: H.L. v. Matheson and the New Abortion Litigation*, 1982 WIS. L. REV. 75, 98. The Comment discusses the problems in the states' asserted interests in enacting parental notification statutes.

Commentators have indicated that notification statutes may be an "ineffective . . . means to an end." *Id.* at 105. The fact that a minor has already engaged in "premarital sexual activity may indicate a substantial degree of independence which has already undercut the parents' interest in continued control over their daughter." *Id.* The fact that the minor does not wish to tell her parents about the abortion indicates already weakened parent-child relations. *Id.* Parental notification itself may create a parent-child conflict. *Id.* at 106.

Social scientists have reported that increasing the consequences of teenage sexual activity does not deter it. Zelnick, *Sexual Activity, Contraceptive Use and Pregnancy Among Metropolitan Area Teenagers: 1971-1979*, 12 FAM. PLAN. PERSP. 230, 237 (1980); Jaffe, *Fertility Control Services for Adolescents: Access and Utilization*, 8 FAM. PLAN. PERSP. 167, 168 (1976).

95. Studies show that teenagers are subject to greater health risks as a result of pregnancy and childbirth than are adults. *See, e.g.*, ALAN GUTTMACHER INSTITUTE, ELEVEN MILLION TEENAGERS 22-23 (1976) [hereinafter ALAN GUTTMACHER]; Menken, *The Health and Social Consequences of Teenage Childbearing*, 4 FAM. PLAN. PERSP. 45 (1972). Parental notification requirements may even cause minors to attempt self-induced abortions or seek illegal abortions. *See* Kahan, *The Effect of Legalized Abortion on Morbidity Resulting from Criminal Abortion*, 121 AM. J. OBSTETRICS AND GYNECOLOGY 114, 120 (1975); Paul, *Pregnancy, Teenagers and the Law*, 6 FAM. PLAN. PERSP. 142, 145 (1974). Some teenagers denied an abortion may even commit suicide. Teicher, *A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide*, CURRENT ISSUES IN ADOLESCENT PSYCHIATRY 136, 137-38 (1973). Since women under age eighteen tend to seek abortions at a later stage in pregnancy than adults, parental notification or consent may further delay the entire process, increasing the danger of the abortion itself. *H.L. v. Matheson*, 450 U.S. at 438 n.24 (Marshall, J., dissenting).

the child.[96] Some have said that teenage pregnancy may also result in severe social consequences for the minor[97] and may instigate familial discord.[98] Thus, legislation concerning a minor's abortion decision should have as its primary purpose the protection of the minor from potential family conflict, judicial discretion and the public.

The regulation of abortion began with *Roe v. Wade* and progressed to cover issues that were not addressed in that decision. The following section traces the Supreme Court decisions pertaining to the regulation of the abortion right with respect to minors.

III. The United States Supreme Court on Abortion

After *Roe*, questions remained as to the extent that states could burden the abortion right. States attempted to regulate abortions by such methods as spousal consent, informed consent, hospitalization requirements and parental notice or consent.[99] This section enumerates the various United States Supreme Court decisions on abortion regulation, with concentration on those cases that address the regulation of abortion with respect to minors.

Planned Parenthood of Central Missouri v. Danforth[100] was the Court's first opportunity to respond to a state statute that required unmarried minors to obtain the consent of one parent, prior to the abortion.[101] Adult women and their spouses were required to give written consent prior to an abortion.[102]

All nine justices agreed that the spousal consent requirement was

96. Children born to minors are more likely to suffer physical problems than children born to adult women. Infants born to mothers under age sixteen are three times more likely to die in the first year of life than children of a mother between the ages of 20 and 24. Publ. Health Service, U.S. Dept. of Health, Ed. and Welfare, D.H.E.W. Pub. No. (HSA), Teenage Pregnancy: Everybody's Problem 2 (1979). Children born to minors under age 15 are three times more likely to suffer nervous system disorders than children born to mothers older than age fifteen. *Id.* Children of teenage mothers are often neglected soon after birth. *Id.* at 3.

97. The younger a woman when she gives birth, the more likely her family will live in poverty. Alan Guttmacher, *supra* note 95, at 27. Teenage mothers are more likely to drop out of school, *id.* at 25, to be unemployed and on welfare, *id.*, to have one and a half times more children than those who wait until twenty to twenty-four to have their children. *Id.* at 29. Teen marriages are two to three times more likely to end in divorce than adult marriages. *Id.* at 28.

98. Some parents abuse their daughter mentally and physically, when informed of her pregnancy. Osofsky, *Teenage Pregnancy: Psychological Considerations*, 21 Clinics in Obstetrics and Gynecology 1161-65 (1978). In addition to physical and mental abuse, minors may face "withdrawal of financial support or obstruction of the abortion decision." *Matheson*, 450 U.S. at 438 n.24 (Marshall, J., dissenting).

99. *See supra* note 67.

100. 428 U.S. 52 (1976).

101. *Id.* at 58.

102. *Id.*

unconstitutional.[103] The Court stated that "the [s]tate cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.' "[104] Only five justices agreed that the parental consent provision was unconstitutional.[105] The justices reasoned that states may not impose the absolute prerequisite of parental consent on a minor seeking an abortion.[106] As a result of *Danforth*, legislatures in several states passed statutes providing for judicial consent as an alternative to parental consent to a minor's abortion.[107]

Only one year later, in *Carey v. Population Services International*, the Supreme Court extended its holding in *Griswold v. Connecticut* to minors.[108] The Court relied on *Danforth*'s prohibition against arbitary vetoes. In a plurality opinion, the Court determined that minors have the constitutional right to purchase non-prescriptive contraceptives, reasoning that states may not impose blanket parental consent requirements for minors' abortions and that contraception is a less drastic measure than an abortion.[109]

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103. *Id.* at 69-71. "[S]ince the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period." *Id.* at 69. Since the woman bears the child and "is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." *Id.* at 71.

104. *Id.* at 69, *citing Danforth*, 392 F. Supp. 1362, 1375 (E.D. Mo. 1975).

105. *Id.* at 74-75.

106. *Id.* at 74. The Court stated that minors as well as adults possess constitutional rights. *Id.* It stated:

> [T]he [s]tate may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first twelve weeks of her pregnancy. Just as with the requirement of consent from the spouse, so here, the [s]tate does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

Id.

107. Annotation, *Judicial Consent to Abortion by a Minor*, 23 A.L.R. 4TH 1061, 1062 (1983).

108. 431 U.S. 678, 694 (1977). The Court stated that "[s]tate restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest . . . that is not present in the case of an adult.' " *Id.* (quoting *Danforth*, 428 U.S. at 75). The statute at issue made it a crime "for any person to sell or distribute any contraceptives of any kind to a minor under the age of 16 years. . . ." *Id.* at 681.

109. The Court stated:

> Since the [s]tate may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is *a fortiori* foreclosed. The [s]tate's interests in protection of the mental and physical health of the pregnant minor, and in protection of potential life are clearly more implicated by the abortion decision than by the decision to use a nonhazardous contraceptive.

Three years after *Danforth* the issue of parental consent was again before the Supreme Court. The Massachusetts' statute at issue in *Bellotti v. Baird*[110] (*Bellotti II*) required unmarried minors to obtain the consent of both parents (or guardian) prior to an abortion, unless one parent had "died or has deserted [the] family. . . ."[111] If one or both parents refused consent, an order could be obtained from a superior court "for good cause shown."[112]

The Court held in *Bellotti II,* a plurality opinion, that because parental consent is an undue burden on a minor, a state requiring a minor to obtain parental consent before obtaining an abortion must provide an independent, alternative procedure whereby authorization can be obtained from a court.[113] This procedure is often referred to as "judicial bypass."

The *Bellotti II* Court reasoned that, because the rights of minors are not equal to those of adults,[114] juveniles need the guidance of their parents in making their abortion decision.[115] But the Court also recognized the need for an alternative to direct parental con-

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Carey, 431 U.S. at 694.

The Court found that the statute did not further the state's interest in deterring teenage intercourse. *Id.* at 695-96. One of the concurring justices stated that he would encourage parental involvement in the minor's decision to use contraceptives. *Id.* at 709 (Powell, J., concurring). Another justice stated that a ban on contraceptives is an inadequate means of deterring sex and would increase the incidence of pregnancy and venereal disease. *Id.* at 714-15 (Stevens, J., concurring).

110. 443 U.S. 622 (1979) (plurality opinion). In 1974, Massachusetts passed a statute mandating parental consent prior to a minor's abortion. Upon appeal to the Supreme Court, the statute was upheld. The statute afforded mature minors the opportunity of judicial waiver of consent and immature minors the opportunity to prove that an abortion would be in their best interest. Bellotti v. Baird, 428 U.S. 132, 145 (1976) [hereinafter *Bellotti I*]. In 1975, Massachusetts enacted another section of the act, adding exceptions for "emergencies" and "mature minors." The constitutionality of this statute was also challenged and the case eventually reached the Supreme Court. Bellotti v. Baird, 443 U.S. 622 (1979) [hereinafter *Bellotti II*].

111. *Bellotti II*, 443 U.S. at 625; *see* MASS. GEN. LAWS ANN. ch. 12S (West Supp. 1979).

112. 443 U.S. at 625.

113. *Id.* at 647-48. "[E]very minor must have the opportunity . . . to go directly to a court without first consulting or notifying her parents." *Id.* at 647.

114. *Id.* at 634. "We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Id.*

115. *Id.* at 641.

> [Abortion] is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.

Id. (citing *Danforth*, 428 U.S. at 91 (Stewart, J., concurring)).

frontation because of the nature of the abortion decision,[116] the age of the minor[117] and most importantly, because of the policy against absolute and arbitrary vetoes.[118]

Thus, the *Bellotti II* Court decided that a minor must be afforded the opportunity to obtain judicial, instead of parental, consent to an abortion by demonstrating to a court that she is either mature enough to make the decision herself or that the abortion would be in her best interests.[119] If one of those two criteria is not found, the state may require parental consent.[120] The judicial hearings on the matter must be anonymous and expedient.[121]

Danforth and *Bellotti II* dealt with parental consent prior to a minor's abortion. The first and only Supreme Court case prior to *Zbaraz v. Hartigan* addressing the constitutionality of parental notice prior to a minor's abortion is *H.L. v. Matheson*.[122] The statute at is-

116. *See id.* at 642. "[T]he unique nature and consequences of the abortion decision make it inappropriate 'to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.' " *Id.* at 643 (citing *Danforth*, 428 U.S. at 74). In facing an abortion decision, "[t]he pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry." *Id.* at 642. "In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." *Id.*

117. *Id.* "Moreover, the potentially severe detriment facing a pregnant woman, . . . is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor." *Id.*

118. Justice Powell's opinion in *Bellotti II* seemed most concerned with the *Danforth* Court's reasoning, that minors have the opportunity to prevent an "absolute and arbitrary" parental veto. *Id.* at 643-51. "In sum, the [parental notification procedure] must ensure that the provision requiring parental consent does not in fact amount to the absolute and possibly arbitrary veto that was found impermissible in *Danforth*." *Id.* at 644.

119. *Id.* at 643-44. "A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests . . ." *Id.* Subsequent courts have defined the minor's best interests regarding her abortion decision to include "her maturity, her ability to make an informed decision, and her understanding of the abortion process." Annotation, *Requisites and Conditions of Judicial Consent to Minor's Abortion*, 23 A.L.R. 4TH 1061, 1064 (1983).

120. *See Bellotti II*, 443 U.S. at 648. "If . . . the court is not pursuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation." *Id.*

121. *Id.* at 645. "The [judicial bypass] proceeding . . . must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Id.* at 644.

122. 450 U.S. 398 (1981).

sue in *Matheson* required a physician providing an abortion for a minor to "[n]otify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married."[123]

The holding of the Court was narrow. It stated that the "mere requirement of parental notice" does not impermissibly burden the right of "immature dependent" minors.[124] Thus, the Court did not determine whether parental notification is constitutional as applied to *all* minors, including those who are mature and whose best interests would not be served by such notice. The Court upheld the statute, reasoning that a parental notification statute, unlike a consent statute, does not provide a third party absolute veto.[125]

The standards of *Bellotti II* were reaffirmed in *City of Akron v. Akron Center for Reproductive Health*.[126] The Ohio ordinance at issue in *Akron* required all physicians providing abortions for minors under age fifteen to obtain the written consent of one of their parents twenty-four hours before the abortion was to be performed.[127] Consent could also be obtained by judicial order of a Court with jurisdiction over the minor.[128] The statute also contained a provision requiring adult women to wait twenty-four hours after signing the consent form.[129]

The Supreme Court found the parental consent provision to be unconstitutional for failing to meet standards set forth in *Bellotti II*, requiring the state to provide procedures for minors to obtain judicial consent.[130] The Court also objected to the underlying assump-

123. *Id.* at 400. There was no consent provision.

124. *Id.* at 409. The Court stated that the statute enhanced parental consultation "concerning a decision that has potentially traumatic and permanent consequences" and "serves a significant state interest by providing an opportunity for parents to supply essential medical information to a physician." *Id.* at 411-12.

125. *Id.* at 411.

126. 462 U.S. 416 (1983).

127. *Id.* at 422. The statute also required physicians performing or inducing abortions on minors under age 18 to give notice to one of the parents of the minor 24 hours before the abortion was to be performed. *See id.* This portion of the statute was not appealed to the Supreme Court. *See id.* at 439 n.29. All abortions were to be performed in a hospital after the first trimester. *Id.* at 422. Certain information was required to be presented to the woman before she consented to the abortion. *Id.* at 423. Women were required to wait 24 hours after signing a consent form before the abortion could be performed. *Id.* at 424. Fetal remains were required to be disposed of in a "humane and sanitary manner." *Id.*

128. *Id.* at 422. Consent was required unless the woman had "obtained an order from a court having jurisdiction over her that the abortion be performed or induced." *Id.*

129. *Id.* at 424.

130. *See Akron*, 462 U.S. at 439-42. "The Court has held that 'the State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor.' " *Id.* at 439 (citing Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 74 (1976)). The Court

tion that all minors under the age of fifteen are too immature to make the abortion decision or that the procedure may never be in a minor's best interests.[131]

The "arbitrary and inflexible" waiting period was deemed unconstitutional, because no legitimate state purpose was furthered by the provision.[132] The Court did not find any evidence that the abortion would be performed more safely or that the woman's decision would be more informed by the extra time.[133]

In a decision reached the same year as *Akron*, the Supreme Court upheld a parental consent statute in *Planned Parenthood Association v. Ashcroft*.[134] The Missouri statute in *Ashcroft* required anyone providing an abortion for a minor to obtain the written consent of one parent (or guardian) if the minor was unemancipated.[135] The statute also provided the minor with an alternative to parental consent via a judicial bypass provision, the requirements of which were explicitly stated in the statute.[136] In a plurality decision, the statute was upheld as consistent with standards set forth in *Bellotti II*.[137]

In sum,[138] the four Supreme Court decisions addressing parental consent yield the following rules. States may require the *consent* of one parent prior to a minor's abortion if the state also provides for

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added that the statute, without a provision whereby the minor could demonstrate her maturity or that the abortion would be in her best interests, burdens the abortion right of mature minors. *See id.* at 439-40 (citing *Bellotti II*, 443 U.S. at 643-44).

131. *Akron*, 462 U.S. at 440. The Court stated that in accordance with prior Supreme Court precedent, "it is clear that Akron may not make a blanket determination that *all* minors under the age of 15 are too immature to make this decision or that an abortion never may be in the minor's best interests without parental approval." *Id.*

132. *Id.* at 450. "No legitimate state interest" is furthered by an "arbitrary and inflexible waiting period." *Id.* The statute's second trimester hospitalization requirement was found to be a "heavy and unnecessary burden" on a woman's access to abortion. *Id.* at 434-39. The Court found the informed consent provision to be unconstitutional. Although the state may require a physician to make certain that the woman understands the physical and emotional implications of having an abortion, the state cannot adopt regulations which influence the woman's choice. *Id.* at 442-45.

133. *Id.* at 450.

134. 462 U.S. 476 (1983).

135. *Id.* at 479 n.4; MO. REV. STAT. § 188.028, subd. 1(1) (Supp. 1982).

136. *Ashcroft*, 462 U.S. at 479-80, n.4; MO. REV. STAT. § 188.028, subd. 1(4), 2(3)-(4) (Supp. 1982).

137. 462 U.S. at 490-93. The Court stated that parental consent provisions can be upheld, as long as the state provides an alternative for the minor to demonstrate that she is mature enough to make the decision herself or that, if immature, the abortion would be in her best interests. *Id.* at 491 (citing *Akron*, 462 U.S. at 439-40).

138. The above decisions are not the only cases the Supreme Court has decided concerning abortion. In the same year as *Akron* and *Ashcroft*, Simopoulos v. Virgina, 462 U.S. 506 (1983), was decided. In *Simopoulos*, the Court upheld a Virginia statute requiring all second trimester abortions to be performed in licensed abortion clinics. *Id.* at 519. The Court did not find the provision burdensome because it did not re-

an expedient and confidential judicial hearing in lieu of parental consent. The minor must be given the opportunity to persuade the court either that she is sufficiently mature and able to make the decision herself, or that the abortion would be in her best interests. If neither condition is found, the court may require parental consent. Parental *notice* may be required before an immature or unemancipated minor obtains an abortion. The constitutionality of requiring parental notice prior to providing abortions for mature or emancipated minors or minors whose best interests would not be served by notification has yet to be determined.

If a full Supreme Court had ruled on *Zbaraz*, some of the open issues regarding parental notification statutes may have been addressed. Some issues surrounding Minnesota's statute on parental notification, however, would not have been answered by a ruling on *Zbaraz*. This is because the statutes at issue in each case contain subtle differences. Both of the statutes need to be decided by the Supreme Court in order to set all of the parameters of parental notification.

Without firmly articulated standards for notification statutes, states have offered different versions of parental notification statutes.[139] States seem to agree, however, on the need to protect juveniles from judicial discretion, potential family discord, public scrutiny and bur-

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quire second trimester abortions to be performed in full-service hospitals. *Id.* at 512-15, 519.

More recently, the Court addressed another informed consent provision in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). The statute at issue in *Thornburgh* contained several provisions regulating the performance of abortions. An informed consent provision required seven classes of information to be presented to the woman twenty-four hours before she consented to the procedure. *Id.* at 760-61. A "record-keeping" provision required that certain information about the woman and her physician be reported to the authorities. *Id.* at 765-66. Physicians performing abortions on a woman past her first trimester were required to report the basis for a determination that the child was not viable. *Id.* A "standard of care" provision required the physician to use the method most likely to result in the birth of a live fetus unless there was a risk to the mother; a second physician was to be present in post-viability abortions. *Id.* at 768-69. In a plurality decision, the Court struck all of the provisions. The Court reasoned that the informed consent provision was designed to discourage women from seeking abortions, and the required information was deemed to be possibly non-relevant and confusing. *Id.* at 760. The "record-keeping" requirements were struck because records were made public and seemed to be more for identification purposes than for "advancing any legitimate interest." *Id.* at 765. The "standard of care" provision was struck because it did not contain an exception for medical emergencies. *Id.* at 770-71.

139. States are split on whether or not to contain waiting period requirements in parental notification statutes. *See infra* notes 255-59 and accompanying text. States also disagree on whether or not to require judicial bypass provisions. *See infra* notes 277-80 and accompanying text. Most statutes require notification of only one parent. *See infra* notes 297-300 and accompanying text.

dening the abortion right, while simultaneously seeking their goals of "parental guidance" and "informed decisions" of the minor.[140] As will be demonstrated, the Minnesota statute may not adequately protect its minors while implementing its goals.

IV. *HODGSON V. STATE*—THE FACTS OF THE CASE

The Minnesota statute at issue in the *Hodgson* case requires the person providing an abortion for a minor to notify[141] both parents[142] of the minor at least forty-eight hours before performing the abortion.[143] Failure to do so subjects the abortion provider to civil

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140. This can be demonstrated by the fact that many parental consent statutes contain bypass provisions requiring the minor's anonymity to be preserved and that judicial procedures be expedited. *See infra* notes 281-92 and accompanying text.

141. *See generally* MINN. STAT. § 144.343 (1986). Subdivision 1, which discusses guidelines for treatment of various medical problems of minors, is not at issue. *Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 3.

MINN. STAT. § 144.343, subd. 2 reads as follows:

> [N]o abortion operation shall be performed upon an unemancipated minor or upon a woman for whom a guardian or conservator has been appointed . . . because of a finding of incompetency, until at least 48 hours after written notice of the pending operation has been delivered in the manner specified in subdivisions 2 to 4.
>
> (a) The notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.
>
> (b) In lieu of the delivery required by clause (a), notice shall be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee which means postal employee can only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

Id. § 144.343, subd. 2 (1986).

The district court found that the waiting period could reach "a week or more." Hodgson v. Minnesota, 648 F. Supp. 756, 765 (D.Minn. 1986). The Eighth Circuit Court of Appeals found the waiting period could go up to 72 hours, due to mail delays. *Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 4.

142. *See* MINN. STAT. § 144.343, subd. 3 (1986). Subdivision 3 defines "parent":

> For purposes of this section, "parent" means both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one.

Id.

143. *Id.* § 144.343, subd. 2.

Subdivision 4, which provides when notice is not required, reads as follows:

> No notice shall be required under this section if:
>
> (a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; or
>
> (b) The abortion is authorized in writing by the person or persons who are entitled to notice; or
>
> (c) The pregnant minor woman declares that she is a victim of sexual

and criminal liability.[144] The statute also provides that if the notification requirement is ever restrained or enjoined, which it has been since 1981,[145] the minor has two choices. The minor can either notify both parents forty-eight hours before the abortion or demonstrate to the court in a confidential and expedited hearing that she is "mature and capable of giving informed consent" or that the abortion would be in her best interests.[146] The final statutory section provides that any portion of the statute which is held invalid should

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abuse, neglect, or physical abuse as defined in section 626.556. Notice of that declaration shall be made to the proper authorities as provided in section 626.556, subdivision 3.

Id. § 144.343, subd. 4.

144. *Id.* § 144.343, subd. 5. Subdivision 5 is the "penalty" provision of the statute:

> Performance of an abortion in violation of this section shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant woman regarding information necessary to comply with this section are bona fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so.

Id. § 144.343, subd. 5.

145. Act of May 19, 1981, ch. 228, § 1, 1981 Minn. Laws 1011. The statute was to become effective August 1, 1981. It was challenged in a class action by minors, a parent, four clinics and two physicians, seeking a declaratory judgment and an injunction. *Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 7. On July 31, 1981, the district court issued a temporary restraint of subdivision 2, the notice provision, but not of subdivision 6, the judicial bypass procedure. On March 2, 1982, the court issued a preliminary injunction against enforcement of subdivision 2. *Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 7.

146. MINN. STAT. § 144.343, subd. 6 (1986). Subdivision 6 reads as follows:

> If subdivision 2 of this law is ever temporarily or permanently restrained or enjoined by judicial order, subdivision 2 shall be enforced as though the following paragraph were incorporated as paragraph (c) of that subdivision; provided, however, that if such temporary or permanent restraining order or injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition of the following substitute paragraph which shall have no force or effect until or unless an injunction or restraining order is again in effect.
>
> (c)(i) If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.
>
> (ii) Such a pregnant woman may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court ap-

not affect the portions of the statute which can be given effect without the invalidated portion and is therefore severable from the rest of the statute.[147]

Before the statute was to take effect on August 1, 1981, plaintiffs sought a declaratory judgment and an injunction.[148] The plaintiffs included several unemancipated minors, facilities which provide abortion services and two physicians.[149] The district court allowed the judicial bypass provision to remain in force but temporarily restrained enforcement of the notice provision.[150] On March 2, 1982, the court issued a preliminary injunction against enforcement of the parental notification provision.[151] In January, 1985, the district court rendered a partial summary judgment[152] in favor of the defendants.[153]

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pointed counsel, and shall, upon her request, provide her with such counsel.

(iii) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions.

(iv) An expedited confidential appeal shall be available to any such pregnant woman for whom the court denies an order authorizing an abortion without notification. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant woman at either the trial or the appellate level. Access to the trial court for the purpose of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant woman 24 hours a day, seven days a week.

Id.

147. *Id.* § 144.343, subd. 7. Subdivision 7 contains the severability portion of the statute:

> If any provision, word, phrase or clause of this section or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this section which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end the provisions, words, phrases, and clauses of this section are declared to be severable.

Id. § 144.343, subd. 7.

148. *Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 7.

149. *Id.* Plaintiffs argued that the statute violated due process on its face and as applied. They claimed that it violated equal protection, first amendment rights of custodial parents and various provisions of Minnesota's state constitution. *Id.*

150. *Id.*

151. *Id.*

152. *Hodgson*, 648 F. Supp. at 773. The district court denied the defendants' motion for summary judgment with respect to plaintiffs' claim of a due process violation. *Id.* at 770. It found that a dispute existed as to the issues of material fact, including the confidentiality of the judicial bypass procedure, delays, inconvenience and lack of access to courts in rural counties. *Id.*

153. *Id.* at 773.

Plaintiffs argued that several portions of the statute were unconstitutional. First, the notification provision was argued to be "facially unconstitutional because it did not contain a judicial bypass provision."[154] Second, plaintiffs alleged that the notification provision "unduly burdened the fourteenth amendment due process rights of pregnant minors," even when the judicial bypass is in effect, as it is when the statute is enjoined.[155] Third, plaintiffs claimed the statute's requirement that minors notify both parents, with exception only when one parent is dead or if one parent cannot be located, is unconstitutional.[156] Fourth, the waiting period is unconstitutional because it "impermissibly burdens a minor's right to choose abortion."[157]

The court found that issues of material fact existed as to the confidentiality of the judicial bypass procedure, delays and inconvenience and lack of access to the courts in rural counties.[158] The action proceeded to trial on these and other issues.[159]

In November, 1986, after a full trial, the district court enjoined subdivision two of the statute because it did not contain a judicial bypass procedure in effect at all times.[160] The court reasoned that the statute was not consistent with the *Bellotti II* standards requiring the opportunity to go to a court as an alternative to seeking parental notice or consent.[161] The court rejected the plaintiffs' challenge to subdivisions two through seven as a whole, based on findings that the procedures have been confidential and expedited, in accordance with *Bellotti II*.[162] The district court enjoined enforcement of the two

154. *Id.* at 770.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. Plaintiffs claimed that subdivisions two through seven of the statute were unconstitutional because, as a whole, they burdened the rights of minors. They argued that the statute was not narrowly drawn and did not meet the state's interests. *Id.* at 773. Defendants wanted the court only to determine whether the statute complied with the *Bellotti II* guidelines. *Id.*

The district court, agreeing with the defendants on the appropriate scope of review, cited *Bellotti II*'s requirement that a minor be afforded judicial bypass as an alternative to parental notification. *Id.* The court therefore held that the statute was unconstitutional, since it provided judicial bypass only if enforcement was enjoined. *Id.*
161. *Id.* at 773.
162. *Id.* at 777. The district court determined compliance of the statute with *Bellotti II's* requirements of confidentiality and expedition based on its study of the actual operation of the statute between 1981-86. *Id.* at 776-77. The court concluded that judicial procedures have been expedited based on its findings that courts in Hennepin, Ramsey and St. Louis counties have adopted procedures for hearing petitions "outside of normal business hours and on an emergency basis." *Id.* at 762. Although

parent notification provision,[163] concluding that the requirement "places a significant burden upon pregnant minors who do not live with both parents"[164] and that the requirement did not further any state interest.[165] The court then enjoined enforcement of the "unreasonable" forty-eight hour waiting period.[166] The court cited the Seventh Circuit's invalidation of the twenty-four hour waiting period in *Zbaraz*, and its own findings that current conditions in Minnesota make the provision burdensome.[167]

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the court found that scheduling delays may greatly increase the burden, it concluded that the delay did "not reflect a systematic failure to provide a judicial bypass option in the most expeditious practicable manner." *Id.* However, it also found that since minors have had to wait two to three days between their first contact with the court and the actual hearing, "[t]his delay may combine with other scheduling factors to result in a delay of a week or more." *Id.* at 763.

The district court also found:

> [t]hose involved in the proceedings take steps to insure confidentiality, including destroying interview notes, holding hearings in judges' chambers rather than in open court, and referring to petitioners by first name only. . . . The record discloses that the confidentiality of minors electing the judicial bypass option has been breached only in a small number of isolated cases.

Id. at 763.

163. *Id.* at 778.

164. *Id.* at 777. The court based this conclusion on its findings that "[n]o exception is made for parents likely to react with psychological, sexual or physical violence toward either the minor or the custodial parent." *Id.* at 764. Further, "[n]otification of an abusive or even a disinterested absent parent may reintroduce that parent's disruptive or unhelpful participation into the family at a time of acute stress." *Id.* The court reasoned that notification of the second parent or a court appearance, even when the two parents live together, may interfere with parent-child communication and discourage the state's interest in promoting family communication. *Id.* at 778.

165. *Id.*

166. *Id.* at 780.

167. *Id.* at 779. The district court found that most of the state's abortion providers are in the Twin Cities or Duluth. Women outside of these areas must travel, adding to the delay and expense of the abortion. *Id.* at 761.

The court also found that there are usually two or three days between a minor's first contact with the court and the actual hearing. This delay can combine with "scheduling difficulties" to produce a longer delay. The court concluded that although the delay is burdensome to minors, they are "unavoidable and do not reflect a systemic failure to provide a judicial bypass option in the most expeditous practicable manner." *Id.* at 762.

Further findings of the court indicate that some counties do not have a judge who "is willing to hear bypass petitions." *Id.* at 763. Therefore, "[a] minor in one of these counties must travel to another . . . to obtain an expeditious hearing of her petition." *Id.* The court concluded that, although this is burdensome to the minor, it "also does not reflect a systemic failure to provide a judicial bypass option in the most expeditious practicable manner." *Id.*

The district court stated in its findings that, when necessitated by pressing needs, courts in Hennepin, Ramsey and St. Louis counties will hear more petitions than are scheduled in a single day. *Id.* at 762. In addition, "[t]hese courts also have in place procedures for hearing bypass petitions outside of normal business hours on

The court found that the forty-eight hour waiting period, but not the two-parent notification provision, was severable from the rest of the statute.[168] The district court reasoned that the words "at least forty-eight hours after" could be deleted from the statute without defeating the intent of the legislature.[169] The court held that the language of the two-parent notification provision, however, was "inseparably intertwined" within subdivisions two through seven of the statute because the rest of the statute could not be given effect without defining the word "parent."[170]

Both parties appealed to the United States Court of Appeals for the Eighth Circuit.[171] Plaintiffs sought to keep the injunction against enforcement of subdivision two.[172] They argued that subdivision two "is unconstitutional on its face, because it fails to afford mature minors and minors whose best interests are contrary to parental involvement, with an opportunity to obtain a judicial or administrative waiver of the notification requirement."[173] Defendants maintained "that no Supreme Court majority opinion has ever squarely extended the blanket consent proscription to a blanket notice requirement."[174] They claimed "a notice requirement is less burdensome than a consent requirement, and is therefore a constitutional means of furthering the State's significant interest in encouraging parental involvement in a minor's abortion decision."[175]

Recognizing that the state has a broader authority to regulate the activities of minors than those of adults, the Eighth Circuit Court of Appeals looked for a "significant" state interest.[176] The state argued that the statutory purposes were to "foster intra-family communication and to protect pregnant minors, by promoting parental involvement in the minor daughter's abortion decision."[177] Plaintiffs claimed that "the statute unduly burdens the minor's exercise of her right to seek an abortion," particularly where both parents do not

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an emergency basis." *Id.* Without any express time limitation set forth in the statute, it seems to be in a court's discretion to decide when to hear the petitions.

168. *Id.* at 780.

169. *Id.*

170. *Id.* "The Minnesota legislature would not have enacted a statute requiring notification of a minor's parents prior to the abortion without identifying the individuals entitled to such notice." *Id.*

171. *Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 8.

172. *Id.*

173. *Id.*

174. *Id.* at 11-12 (footnote omitted). The statutes in *Ashcroft*, *Akron*, *Danforth* and *Bellotti II* were *consent* statutes. The *Matheson* court ruled on a *notification* statute, but the majority never decided whether it would be constitutional to apply a notice requirement to mature, emancipated or "non-best interest" minors. *Id.* at 12 n.3.

175. *Id.* at 12.

176. *Id.* at 8.

177. *Id.* at 6.

live at home.[178]

The court of appeals found the statute to be unconstitutional for several reasons. First, it did not have a judicial bypass procedure which would enable the minor to demonstrate in court either that she is sufficiently mature to decide for herself or that the performance of an abortion would be in her best interests, without parental notification.[179] Second, it was unconstitutional to require a pregnant minor to notify both of her parents.[180] Third, the requirement of notifying both parents when possible was not severable from the statute.[181] Finally, the court of appeals upheld the district court's injunction of sections two through seven of the statute.[182]

V. *ZBARAZ V. HARTIGAN*—THE FACTS OF THE CASE

At issue in *Zbaraz* is the Illinois Parental Notice of Abortion Act of 1983.[183] The act requires anyone providing an abortion for a minor to give notice to both parents at least twenty-four hours before the abortion is performed.[184] The minor may procure waiver of such

178. *Id.* at 14.

179. *Id.* at 13. The court found that, although the state has a significant interest in promoting family communication, the notice requirement failed to promote the state's asserted interest. *Id.* at 8. The court based its decision on the following findings of the district court: 1) Fifty percent of all marriages in Minnesota end in divorce and forty-two percent of all minors in Minnesota do not live with both biological parents. *Hodgson*, 648 F. Supp. at 768. 2) Many children in dysfunctional families "live in fear of violence by family members" and parental notification exacerbates family violence. *Id.* at 768-69. 3) Minors who would notify one parent might be dissuaded from doing so because of the two parent notification requirement. *Id.* The district court concluded that the notification requirement actually discourages, rather than encourages, parent-child communication. *Id.* at 778.

180. *Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 2-3. The court reasoned that the minor herself or her parents are in a better position than the court to decide whether notification of the non-custodial parent would be in the best interests of the minor. *Id.* at 22. It does not make sense to require the minor to go first to the court for determination of her maturity or best interests. *Id.*

Bellotti II upheld a requirement that a pregnant minor obtain both parents' consent but did not address the constitutionality of such a provision where both parents were not residing together. *Bellotti II*, 443 U.S. at 649.

181. *Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 25-26. The court of appeals found that the statute would leave ambiguous which parent would have a cause of action if denied notification. *Id.* at 24. It further found that the legislature intended that both parents be notified, even when divorced. *Id.* at 24-25. The court explained that although *Bellotti II* allows for a provision requiring notification of both parents where they are residing together and the minor is at home, the notification of both parents in any situation other than the above would be too drastic to remain constitutional. *Id.* at 25.

182. *Id.* at 3.

183. ILL. ANN. STAT. ch. 38, para. 81-64-68 (Smith-Hurd 1987).

184. (a) No person shall perform an abortion upon an unemancipated minor or upon an incompetent unless he or his agent has given at least twenty-

notice[185] if the court finds that the minor is "mature and well-informed enough to make the abortion decision on her own" or that parental notice would not be in the minor's best interests.[186] Failure to comply with the act is a misdemeanor and may result in the imposition of civil penalties.[187]

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four hours actual notice to both parents or to the legal guardian of the minor pregnant woman or incompetent of his intention to perform the abortion or unless he or his agent has received a written statement or oral communication by another physician, hereinafter called the "referring physician," certifying that the referring physician or his agent has given such notice.

(b) If the minor's or incompetent's parents are divorced, or one parent is not available to the person performing the abortion or his agent or the referring physician or his agent in a reasonable time or manner, then notice to the parent with custody or to the parent who is available shall be sufficient. If neither parent nor the legal guardian is available to the person performing the abortion or his agent or the referring physician or his agent within a reasonable time or manner, notice to any adult person standing in loco parentis shall be sufficient.

Id. para. 81-64(a), (b).

185. Section 4(c) provides:

A minor or incompetent who objects to notice being given her parents or legal guardian under this section may petition, on her own behalf or by next friend, the circuit court of the county in which the minor resides or in which the abortion is to be performed for a waiver of the notice requirement of this section pursuant to the procedures of Section 5 of this Act.

ILL. ANN. STAT. ch. 38, para. 81-64(c) (Smith-Hurd 1987) (footnote omitted).

The applicable portions of paragraph 81-65 are as follows:

(c) Court proceedings under this Section shall be confidential and shall ensure the anonymity of the minor or incompetent. These proceedings shall be given such precedence over other pending matters as is necessary to ensure that the court may reach a decision promptly, but in no case shall the court fail to rule within 48 hours of the time of application, provided that the 48 hour limitation may be extended at the request of the minor or incompetent.

(e) A court that conducts proceedings under this Section shall issue written and specific factual findings and legal conclusions supporting its decision and shall order that a confidential record of the evidence be maintained.

(f) An expedited confidential appeal shall be available, as the Supreme Court provides by rule, to any minor or incompetent to whom the circuit court denies a waiver of notice.

(g) The Supreme Court is respectfully requested to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner.

Id. para. 81-65 (c), (e), (f), (g).

186. (d) Notice shall be waived if the court finds either:

(i) That the minor or incompetent is mature and well-informed enough to make the abortion decision on her own, or

(ii) That notification of those to whom Section 4 of this Act requires that notice be given would not be in the best interests of the minor or incompetent.

Id. para. 81-65(d) (footnote omitted).

187. The "penalty" provision reads as follows:

Any person who intentionally performs an abortion with knowledge that, or with reckless disregard as to whether the person upon whom the abortion is to be performed is an unemancipated minor or an incompetent,

The act was temporarily restrained in January, 1984 by the district court, pursuant to plaintiff's suit.[188] In May, 1984, the district court declared the act unconstitutional and permanently enjoined it.[189] Plaintiffs claimed that the statute's twenty-four hour waiting period was unconstitutional because, while the Supreme Court has not ruled on a waiting period regarding minors, they had struck down waiting periods for adult women.[190] Plaintiffs objected to the statute's judicial bypass provision because of its failure to provide an expedited appeal or anonymous court proceedings.[191] Defendants argued that the district court should abstain from deciding the constitutional issues because Illinois courts had not yet had an opportunity to rule on the procedural aspects of the statute.[192] The district court based its injunction on several findings. First, the twenty-four hour waiting period after parental notification unconstitutionally burdens a minor's right to an abortion.[193] Second, the judicial bypass procedure fails to require the procedures to be conducted expe-

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and who intentionally, knowingly, or recklessly fails to conform to any requirement of this Act, is guilty of a Class A misdemeanor.

Failure to provide persons with information pursuant to the requirements of this Act is prima facie evidence of failure to obtain informed consent and of interference with family relations in appropriate civil actions. The law if this State shall not be construed to preclude the award of exemplary damages in any appropriate civil action relevant to violations of this Act. Nothing in this Act shall be construed to limit the common law rights of parents.

Such prima facie evidence shall not apply to any issue other than failure to inform the parents or guardian and interference with family relations in appropriate civil actions.

Id. para. 81-68.

188. Zbaraz v. Hartigan, 584 F. Supp. 1452, 1454 (N.D. Ill. 1984). Plaintiffs consisted of all licensed physicians performing abortions for unemancipated minors and disabled persons, plus all unemancipated minors capable of giving informed consent to an abortion or whose best interests would not be served by notice to both parents. *Id.* at 1454 n.1. Defendants consist of all of the County Attorneys of Illinois. *Id.* at 1454 n.2.

189. *Id.* at 1467.

190. *Id.* at 1458. The district court cited the fact that the Supreme Court struck down the waiting period in *Akron*. *Id.* The district court also cited the fact that the Eighth Circuit Court of Appeals struck down the waiting period in *Ashcroft*, 763 F.2d at 1536. The court then cited the Seventh Circuit case of Indiana Planned Parenthood v. Pearson, 716 F.2d 1127 (7th Cir. 1983), in which a parental notification statute containing a 24 hour waiting period was struck down. *Id.* at 1458. The *Pearson* court had held the waiting period unconstitutional. 716 F.2d at 1143-44.

191. *Zbaraz*, 584 F. Supp. at 1461. Objection was also made to the failure to provide assistance in initiating a petition. *Id.* at 1462. The statute also required a physician to notify an incompetent patient's guardian. Plaintiffs claimed that this provsion would burden those individuals who had guardians appointed but who are able to make their own decisions regarding abortion. *Id.*

192. *Id.* at 1457.

193. *Id.* at 1458-59.

ditiously and confidentially, and is therefore unconstitutional.[194] Third, since the unconstitutional provisions of the act were not severable from the rest of the act,[195] the entire act was unconstitutional and must be enjoined.[196]

In June, 1984, after the district court's decision, the act was amended to provide that the judicial bypass procedures "shall ensure . . . anonymity,"[197] and a severability clause was added.[198] The amendments were immediately enjoined.[199] The defendants then appealed the district court's holding to the Seventh Circuit Court of Appeals.[200]

The court of appeals, in ruling on the amended statute, upheld the district court's finding that the twenty-four hour waiting period was unconstitutional.[201] The Supreme Court held in *Bellotti II* that the judicial bypass provision must be "completed with anonymity" and

194. *Zbaraz*, 584 F. Supp. at 1459-62. The court discussed the requirements of *Bellotti II* and *Ashcroft* of expeditious and anonymous proceedings in procuring the judicial bypass alternative to parental notice of a minor's abortion decision. *Id.* at 1459 (citing *Bellotti II*, 443 U.S. at 644).

For example, the Missouri statute in *Ashcroft* assured anonymity by allowing a minor to use her initials on the court petition. The statute also provided a framework for the means of expediting judicial proceedings by requiring that the appeal be perfected within five days from the filing of notice to appeal. *Id.* (citing *Ashcroft*, 462 U.S. at 493-94). *See* MO. ANN. STAT. § 188.028.2(5) (Vernon Supp. 1988).

195. *Zbaraz*, 584 F. Supp. at 1464. The district court reasoned that since two basic provisions of the statute were unconstitutional (the waiting period and the judicial bypass procedure), the portions of the statute that would remain would not have operative significance standing by themselves. *Id.*

The act's severability was based on a general statutory provision which, in substance, provided that if "any provision of an Act . . . is held invalid, such invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid application or provision, and to this end the provisions of each Act enacted . . . are severable . . . ." ILL. REV. STAT. ch. 1, para. 1032 (1986).

196. *Zbaraz*, 584 F. Supp. at 1467. In addition, the district court struck down the plaintiffs' challenges that: 1) the judicial bypass procedures are unconstitutional because they fail to provide for assistance in initiating a petition, thus limiting the ability of some minors to go to the court to initiate bypass; 2) the requirement that a physician notify an incompetent patient's guardian is overbroad. *Id.* at 1462-64. These were not issues addressed by the court of appeals and will not be discussed further.

197. ILL. ANN. STAT. ch. 38, para. 81-65(c)(Smith-Hurd 1986).

198. ILL. ANN. STAT. ch. 38, para. 81-68.1 (Smith-Hurd 1986). The new severability provision reads as follows:

> If any provision, word, phrase or clause of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this Act which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end the provisions, words, phrases, and clauses of this Act are declared to be severable.

Id.

199. Zbaraz v. Hartigan, 763 F.2d 1532, 1535 (7th Cir. 1985).

200. *Id.*

201. *Id.* at 1537-38. The court of appeals acknowledged the state's significant in-

expedition.[202] The court of appeals vacated the district court's opinion holding that the bypass procedure was unconstitutional due to its lack of rules assuring an expeditious and confidential hearing. The entire act was enjoined until the Illinois Supreme Court could enact rules to assure an expeditious and confidential hearing.[203]

In determining that the waiting period was unconstitutional, the court cited numerous cases holding that waiting periods are burdensome to a woman seeking an abortion,[204] and reasoned that the burden of a waiting period is the same for minors and adults.[205] The court of appeals, however, held that the waiting period, because of its unconstitutionality, could be severed from the rest of the act, leaving the requirement of mere parental notice.[206]

The Illinois Attorney General appealed the case to the United States Supreme Court in October, 1985.[207] Two issues were consid-

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terest in promoting parental consultation, but reasoned that this was outweighed by the burden it placed on the minor's right to obtain an abortion. *Id.* at 1538.

202. The bypass procedure "must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Id.* at 1539, *quoting Bellotti II*, 443 U.S. at 644.

203. *Id.* at 1545. In addition, the court compared the statute upheld by the Supreme Court in *Ashcroft*. The *Ashcroft* statute contained a time limitation from the date of issuance of the order, to the notice of intent to appeal and a five-day limit to perfect the appeal from the time of filing of notice, to appeal. *Id.* at 1540, *citing* MO. REV. STAT. § 188.028.2(5) (Vernon Supp. 1988). The Illinois statute does not contain any similar regulations. Instead, it instructs the Illinois Supreme Court to promulgate rules requiring a confidential and expedited appeal. ILL. ANN. STAT. ch. 38, para. 81-65(g) (Smith-Hurd 1987). In Illinois, rules governing appellate procedure must be enacted by the Illinois Supreme Court. ILL. CONST. art. VI, § 16.

Since the judicial bypass provision was in operation without rules, the court of appeals deferred judgment on its constitutionality and enjoined its enforcement until some rules could be promulgated. *Zbaraz*, 763 F.2d at 1545.

The *Ashcroft* statute also allows the minor to use her initials on the petition of waiver of consent. *Ashcroft*, 462 U.S. at 491 n.16. In contrast, the Illinois statute does not contain any specific provisions to assure anonymity. *Zbaraz*, 763 F.2d at 1543.

204. *Zbaraz*, 763 F.2d at 1536-37 (citing *Bellotti II*, 443 U.S. at 642).

205. *Id.* at 1537. The court also discussed the fact that scheduling and travel delays may increase the waiting period and the medical risks by pushing pregnancy into another trimester in addition to increasing mental anguish. *Id.*

206. *Id.* at 1545. The court concluded that the provisions of the act pertaining to the 24 hour waiting period could be severed from the act because the essential purposes of the act would not be affected by the severance. *Id.* The opinion stated that unconstitutional statutory provisions may "be severed if it appears that the legislature would have enacted the constitutional provisions of the statute independently of those provisions." *Id.* (quoting Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 931-32 (1983), *citing* Buckley v. Valeo, 424 U.S. 1, 108 (1976)). A statutory provision cannot be severed if it is " 'an integral part of the statutory enactment viewed in its entirety.' " *Id.* at 1545 (quoting Scheinberg v. Smith, 659 F.2d 476, 481 (5th Cir. 1981)).

207. *Hartigan v. Zbaraz*, 55 U.S.L.W. 3039 (1986).

ered. First, the Court considered whether Illinois may "constitutionally impose [a] waiting period, applicable only to minors and incompetents, after parental notification but before [the] abortion is performed, where it also provides judicial alternative to notification." Second, the Court evaluated whether a "judicial alternative to parental notification of [the Illinois act] provide[s] [a] constitutionally sufficient framework for ensuring confidential and expedited appeals."[208]

The case reached the Supreme Court, but the Court was split four to four in its decision.[209] Thus, the decision of the Seventh Circuit is controlling. The Court did not issue an opinion for its ruling.[210]

VI. Comparison of the Illinois and Minnesota Statutes

Although the Illinois and Minnesota statutes are similar, their subtle differences affected the factors that each circuit court chose to emphasize in its analysis. Both statutes contain a notification provision, a waiting period, a judicial bypass provision, and a severability provision. The statutes differ in the given waiting period, in the content of their judicial bypass provisions, and in the content of their notification provisions.

A. The Waiting Period

Minnesota's statute requires a forty-eight hour waiting period, whereas Illinois requires a twenty-four hour period.[211] The Seventh Circuit Court of Appeals found the twenty-four hour waiting period in *Zbaraz* to be unconstitutionally burdensome to a minor.[212] In contrast, the *Hodgson* court did not rule on the constitutionality of its statutory waiting period alone.[213] Instead, the court considered the provision to be one factor[214] in its analysis of the notice requirement as a whole.[215] It concluded that the entire section was unconstitu-

208. 56 U.S.L.W. 3070 (1986). The case was postponed in October, 1986 for further consideration of the question of jurisdiction. 107 S. Ct. 267 (1986). In March, 1987, oral argument was deferred to a later date. *Zbaraz*, 107 S. Ct. 1600 (1987). The parties were directed to file supplemental briefs addressing the merits of the jurisdictional statement and the question whether the court of appeals' decision is sufficiently final to permit the Court to take jurisdiction of the case. 107 S. Ct. 1636 (1987).

209. Hartigan v. Zbaraz, 108 S. Ct. 479 (1987).

210. *Id.*

211. Ill. Ann. Stat. ch. 38, para. 81-64(a) (Smith-Hurd 1987); Minn. Stat. § 144.343, subd. 2 (1986).

212. *See Zbaraz*, 763 F.2d at 1538.

213. *See Hodgson*, Nos. 86-5423-MN, 86-5431-MN.

214. *See id.* at 12.

215. *Id.* at 8-20.

tional on its face,[216] but based its decision largely on its objection to the two parent notification requirement.[217]

B. *The Judicial Bypass Procedure*

Minnesota's judicial bypass procedure only goes into effect if the act is enjoined or restrained.[218] The court of appeals held the act unconstitutional for failure to provide a judicial alternative to notice at all times.[219] The court found that the mere presence of the required bypass procedure did not save the notification requirement.[220] In contrast, Illinois' "procedure for waiver of notice"[221] is effective even when the act has not been enjoined or restrained.[222] The Seventh Circuit objected to this provision because it failed to provide the means by which the minor will be assured of a confidential and expedited petition or appeal.[223] The section contains language mandating anonymity and promptness, but it does not explicitly state the means by which those ends should be accomplished, and directs the Illinois Supreme Court to compile such rules.[224]

Minnesota's act also contains similar language mandating speed and anonymity, and like Illinois' statute, it does not address the means by which they can be assured.[225] Minnesota's act does not contain provisions directing the state supreme court or any legislative body to promulgate such rules. The Eighth Circuit Court of Appeals did not discuss the absence of such provisions in its opinion.[226] The district court did not discuss the absence either.[227]

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216. *Id.* at 19-20.

217. *Id.* at 14-20.

218. MINN. STAT. § 144.343, subd. 6 (1986).

219. Nos. 86-5423-MN, 86-5431-MN, slip op. at 13. The court of appeals reasoned that operating the statute without judicial bypass would make the statute into a "blanket" notice requirement. Since the Supreme Court objected to a blanket *consent* requirement in *Bellotti II*, the Eighth Circuit objected to a blanket notice requirement. *Id.* at 12-13. It then stated that "both parental consent and notice requirements are burdensome to a pregnant minor." *Id.* at 12.

220. *Id.* at 20. The court stated that there were two reasons that the bypass provisions were unconstitutional. Nos. 86-5423-MN, 86-5431-MN, slip op. at 21-22. First, the bypass provision itself constitutes a burden or obstacle. *Id.* at 21. Second, where parents are divorced, the minor and/or the remaining parent are in the best position to decide whether or not to notify the non-custodial parent. *Id.* at 22.

221. ILL. ANN. STAT. ch. 38, para. 81-65 (Smith-Hurd 1987).

222. *Id.* para. 81-64(c).

223. *Zbaraz*, 763 F.2d at 1539-44. *See also* ILL. ANN. STAT. ch. 38, para. 81-65 (Smith-Hurd 1987).

224. ILL. ANN. STAT. ch. 38, para. 81-65(f)-(g).

225. *See* MINN. STAT. § 144.343, subd. 6(c)(iii) and (iv) (1986).

226. *See Hodgson*, Nos. 86-5423-MN, 86-5431-MN.

227. *See* Hodgson v. Minnesota, 648 F. Supp. 756, 773-77 (D. Minn. 1986).

The *Hodgson* court objected to Minnesota's provison that a minor always notify *both* of her parents of her pending abortion.[228] The *Zbaraz* court did not object to this provision of the Illinois statute.[229] The discrepancy is probably due to the difference in the way the two statutes are drafted. Minnesota defines "parent" as "both parents of the pregnant woman if they are both living."[230] Notice of only one parent is required only if one parent is living, if one parent cannot be located, or if the minor has a legal guardian.[231] The act does not contain a provision for divorced parents. The Illinois act requires notice to "both parents or to the legal guardian."[232] In contrast to Minnesota, however, notice to only one parent is allowed if the minor's parents are divorced, or if "one parent is not available."[233]

C. *Severability*

The Seventh and Eighth Circuits reached different conclusions regarding the severability of the unconstitutional portions of their statutes. The *Hodgson* court concluded that the two parent notification provision was not severable from the rest of the statute.[234] The *Zbaraz* court did sever the twenty-four hour waiting period, the portion of the statute that it found to be the most offensive, from the rest of the statute.[235]

Both courts agree that severance of an invalid portion of a statute is proper if the remaining portion of the statute remains operative,[236] but that it is improper if the offending portion is "an integral part of the statutory enactment viewed in its entirety."[237] The courts also looked to the intent of their legislatures and to whether the invalid sections of the statutes would have been enacted independently of the remainder of the act.[238]

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228. This was the Eighth Circuit's primary objection to the statute. *See Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 14-20. The court objected to the burden imposed by notification of the non-custodial parent. *See id.*

229. *See generally Zbaraz*, 763 F.2d at 1534-45.

230. MINN. STAT. § 144.343, subd. 3 (1986).

231. *Id.*

232. ILL. ANN. STAT. ch. 38, para. 81-64(a) (Smith-Hurd 1987).

233. *Id.* at para. 81-64(b).

234. *Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 23-25.

235. *Zbaraz*, 763 F.2d at 1545. The bulk of the court's decision is devoted to the discussion of the burdensome nature of the waiting period. *Id.* at 1535-39.

236. *Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 23 (the court quotes Buckley v. Valeo, 424 U.S. 1, 108 (1976) noting that "the invalid part [of the statute] may be dropped if what is left is fully operative as a law"); *Zbaraz*, 763 F.2d at 1545 (the Illinois statute provides for severence when there are "provisions which can be given effect without the invalidating provisions").

237. *Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 23; *Zbaraz*, 763 F.2d at 1545 (quoting Scheinberg v. Smith, 659 F.2d 476, 481 (5th Cir. 1981)).

238. *Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 23; *Zbaraz*, 763 F.2d at

The Eighth Circuit concluded that the two-parent notification requirement was not severable from the statute for three reasons. First, the statute would be left ambiguous without the provison.[239] Second, the Minnesota legislature had intended to require notification of both parents.[240] Third, the court felt that the rewriting of the statute should be done by the legislature, not the courts, in order to maintain legislative intent.[241]

The Seventh Circuit found that the unconstitutional twenty-four hour waiting period could be severed from the act, because the amending of the act to add a severability clause evidenced the legislature's intent to keep the constitutional portions of the statute in effect.[242] Furthermore, the remainder of the statute would not be hampered by the severance.[243]

Both courts seemed to be concerned with whether severing the provision would maintain the legislative intent of the remainder of the statute. The courts were considering different statutory provisions for severability and reached different conclusions on the severability of their provisions. Severability of specific provisions, therefore, is one aspect of parental notification statutes that the Supreme Court needs to address. Lower courts need guidance on severability of particular portions of notification statutes. The Court needs to hear both *Zbaraz* and *Hodgson* in order to address all of the parameters of parental notification statutes. The parameters include the waiting period, the one versus two-parent notification requirement and the extent to which guidelines assuring expediency and anonymity must be set out.

1545. The *Zbaraz* court noted that the legislature had amended the act to add the severability clause. It concluded that the Illinois legislature intended the act to go into effect without the unconstitutional provisions. *Zbaraz*, 763 F.2d at 1545. The *Hodgson* court stated that one of the bill's authors had specifically stated in a hearing that "parent" was intended to mean both parents, even when divorced. The *Hodgson* court concluded that the Minnesota legislature intended to require notification of both parents. *Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 24-25.

239. The court cited subdivision five as an example, which states that since performance of an abortion without notice is grounds for a civil action by one who was denied notification, "[i]f the statute were modified to require notification of only one parent, then it would be impossible to determine which of the two parents would have a cause of action. This would be particularly difficult where both parents are residing together and the pregnant minor is living at home." Nos. 86-5423-MN, 86-5431-MN, slip op. at 24.

240. *Id.*

241. *Id.* at 25. " '[T]his court is ill-suited to determine what alternative the legislature would employ to remedy the constitutional infirmity in this decision.' " *Id.* (quoting *Hodgson*, 648 F. Supp. at 780-81).

242. *Zbaraz*, 763 F.2d at 1545.

243. *Id.* The court stated that removing the words "at least twenty-four hours" from the statute would not affect the notice requirement, which would not hinder the statute's goals. *Id.*

Both lower courts and the Supreme Court agree that parental notification prior to a minor's abortion is constitutional. What is not clear, however, is just how burdensome the states may make their regulations by manipulating the factors listed above.

The split decision of the Supreme Court in *Zbaraz*, the vacated *Hodgson* decision, Justice O'Connor's dissent in *Akron*,[244] and the plurality decision of *Thornburgh v. American College of Obstetricians and Gynecologists*[245] all demonstrate the lack of agreement in the area of abortion regulation, and indicate that the articulation of the parameters of parental notification statutes is not in sight. The changing composition of the Supreme Court makes prediction of the outcome of future abortion decisions impossible.[246] Although the Eighth Circuit Court of Appeals has enjoined Minnesota's parental notification statute pending amendment of the statute,[247] comparison of the act with Illinois' and the other existing parental notification statutes reveals infirmities of the statute beyond the findings of the court of appeals.

VII. ANALYSIS

The waiting period requirements, judicial bypass provisions and two-parent consent provisions have not been addressed in the context of parental notification statutes by the United States Supreme Court.[248] The statutes at issue in *Bellotti II*, *Ashcroft* and *Akron* that did address these provisions were consent statutes. Some legislatures have incorporated those requirements into their notification statutes. Every federal court that has considered a parental notification law since *Akron* has construed *Matheson* to mandate a judicial alternative to parental notification.[249] At present, sixteen states

244. Justice O'Connor stated that *Roe*'s trimester framework "is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth." City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting). O'Connor further stated that courts do not possess the expertise to review legislative determinations concerning abortion regulation. *Id.*

245. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). *Thornburgh* is the Court's most recent abortion decision.

246. New Supreme Court Justices Scalia and Kennedy have not issued opinions on any major abortion cases. In addition, the Court is under the new leadership of Justice Rehnquist as chief justice. Chief Justice Rehnquist is generally known to be more extreme than former Chief Justice Burger.

247. The *Hodgson* court stated that "[t]he job of rewriting . . . [the statute] must . . . fall to the Legislature, and not to the courts." *Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 25.

248. *See supra* notes 99-140 and accompanying text.

249. Planned Parenthood Ass'n v. Harris, 670 F. Supp. 971, 985 (N.D. Ga. 1987).

require parental *consent* prior to a minor's abortion.[250] Thirteen states have enacted parental *notification* statutes.[251]

A comparison of the parental notification and consent statutes, Supreme Court precedent and Minnesota's own goals for its juvenile courts[252] indicate the need for revision of the following portions of Minnesota's act: the forty-eight hour waiting period, the content of the judicial bypass provisions and the two-parent notification provision.

A. The Waiting Period

The United States Supreme Court has not specifically addressed the application of waiting periods to minors after parental consent or notification. It found the twenty-four hour waiting period imposed upon adult women in *Akron* to be unconstitutional because it was burdensome to women seeking an abortion and it failed to further any state interest.[253] *Matheson*, the only definitive Supreme Court ruling to date on a parental notification statute, did not require a waiting period after notification.[254]

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250. *See* ALA. CODE § 26-21-1 to -8 (Supp. 1987); ALASKA STAT. § 18.16.010 (1986); ARIZ. REV. STAT. ANN. § 36-2152-2153 (Supp. 1987); CAL. HEALTH & SAFETY CODE § 25958 (West Supp. 1988); FLA. STAT. ANN. § 390.001(4) (West 1986); IND. CODE ANN. § 35-1-58.5-2.5 (West 1986); KY. REV. STAT. ANN. § 311.732 (Michie/Bobbs-Merril 1 Supp. 1986); LA. REV. STAT. ANN. § 40:1299.35.5 (West Supp. 1987); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983); MISS. CODE ANN. § 41-41-53 to 63 (Supp. 1987); MO. ANN. STAT. § 188.028 (Vernon Supp. 1988); N.M. STAT. ANN. § 30-5-1(c) (1987); N.D. CENT. CODE § 14-02.1-03.1 (Supp. 1987); PA. CONS. STAT. ANN. § 3206 (Purdon 1983); R.I. GEN. LAWS § 23-4.7-6 (1985); S.C. CODE ANN. § 44-41-30 (Law. Co-op. 1985).

251. *See* GA. CODE ANN. § 15-11-112 (Harrison Supp. 1987); IDAHO CODE § 18-609 (1987); ILL. ANN. STAT. ch. 38, para. 81-64 to -67 (Smith-Hurd Supp.1987); ME. REV. STAT. ANN. tit. 22, § 1597 (1980); MD. HEALTH-GEN. CODE ANN. § 20-103 (1987); MINN. STAT. § 144.343 (1986); MONT. CODE ANN. § 50-20-107 (1987); NEB. REV. STAT. § 28-347 (1985); NEV. REV. STAT. § 442.255 (1985); OHIO REV. CODE ANN. § 2919.12 (Anderson 1987); TENN. CODE ANN. § 39-4-202 (1982); UTAH CODE ANN. § 76-7-304 (1978); W. VA. CODE § 16-2F-1 to 16-2F-6 (1985).

252. Minnesota's Juvenile Court Act mandates that judicial proceedings protect a minor's welfare. MINN. STAT. § 260.011, subd. 2 (1986).

253. *Akron*, 462 U.S. at 450-51. The Court viewed the 24 hour waiting period as "arbitrary and inflexible" and decided that the city failed to demonstrate any legitimate state interest would be furthered by it. The Court found no evidence showing that, because of the waiting period, the abortion procedure would be performed more safely and was unconvinced that the purpose of the statute, to give the woman time to think and make a well-informed decision, was a legitimate state interest. The Court appeared to agree with the plaintiffs' position that the waiting period would be a burden in that it would increase the cost of obtaining an abortion by requiring two trips to the abortion facility, and the resulting delay from scheduling difficulties would increase the risk of abortion. *Id.*

254. *Matheson*, 450 U.S. at 413. In *Matheson*, the Utah statute at issue required the physician to "[n]otify, if possible, the parents or guardian of the woman upon whom

Of the thirteen states with parental notification statutes, six require a twenty-four hour waiting period between actual notice and the abortion.[255] One state, in addition to Minnesota, requires a forty-eight hour waiting period.[256] The remaining five states do not contain a waiting period requirement.[257] None of the current statutes that require parental consent prior to a minor's abortion contain waiting period provisions.

Virtually all lower courts determining the constitutionality of waiting periods after parental consent or notification have found that portion of the statute to be unconstitutional.[258] These courts found the waiting periods unconstitutional because they "place[] a direct and substantial burden on women who seek an abortion" and the "burden is the same for minors as for adults . . . ."[259]

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the abortion is to be performed, if she is a minor or the husband of the woman, if she is married." UTAH CODE ANN. § 76-7-304 (1978).

255. *See* IDAHO CODE § 18-609(6) (1987); ILL. ANN. STAT. ch. 38, para. 81-64, § 4 (Smith-Hurd Supp. 1987); ME. REV. STAT. ANN. tit. 22 § 1597(2)(A) (1980); NEB. REV. STAT. § 28-347(1) (1985); OHIO REV. CODE ANN. § 2919.12(B)(1)(a)(i) (Anderson 1987); W. VA. CODE § 16-2F-3(a) (1985).

256. TENN. CODE ANN. § 39-4-202(d) (1982).

257. *See* GA. CODE ANN. § 15-11-112 (Harrison Supp. 1987); MD. HEALTH-GEN. CODE ANN. § 20-103(a) (1987); MONT. CODE ANN. § 50-20-107(1)(b) (1987); NEV. REV. STAT. § 442.255(1) (1985); UTAH CODE ANN. § 76-7-304(2) (1978).

258. *See, e.g.*, Indiana Planned Parenthood v. Pearson, 716 F.2d 1127, 1143 (7th Cir. 1983) ("the state cannot require that an abortion be delayed once notification has been effected upon a minor's parents"); Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006, 1014-16 (1st Cir. 1981) (promoting informed decisions insufficient justification to burdens of time, money, travel and work schedules); Leigh v. Olson, 497 F. Supp. 1340, 1348 (D.N.D. 1980) (48 hour waiting period held to be a direct and substantial burden on a woman's fundamental right to terminate her pregnancy); Margaret S. v. Edwards, 488 F. Supp. 181, 212 (E.D.La. 1980) (waiting period may result in trimester shifts).

The statute construed in *Ashcroft* originally contained a 48 hour waiting period, which was deemed unconstitutional by the Eighth Circuit Court of Appeals. However, the state did not appeal the waiting period which was severed from the statute. Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft, 655 F.2d 848, 866 (8th Cir. 1981), *aff'd*, 462 U.S. 476 (1983).

Only one case was found in which the waiting period was upheld. Wolfe v. Schroering, 541 F.2d 523, 526 (6th Cir. 1976). The court held that "given the imprecision of the trimesters and 'viability,' a delay of 24 hours could not result in a transition from the first into the second trimester or from the second trimester into 'viability.' " *Id.* The court also referred to the emergency situation exemption if the woman's life was in imminent peril as a result of the waiting period. *Id.* This part of the opinion was overruled by the Sixth Circuit in Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1208 (6th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 462 U.S. 416 (1983).

259. *Zbaraz*, 763 F.2d at 1537, *citing Bellotti II*, 443 U.S. at 642 (burden resulting from waiting period combined with scheduling factors to increase the risk and cost of the abortion); *Pearson*, 716 F.2d at 1143 (burden described as the increased cost of requiring two trips to the clinic, noting that few minors have significant amounts of money independent of their parents' control); Charles v. Carey, 627 F.2d 772, 785

While the consensus indicates disfavor for waiting periods, legislatures are split between a twenty-four hour waiting period and no waiting period at all. Both lower courts and the Supreme Court agree that waiting periods are burdensome to the adult or minor seeking an abortion. Even if the twenty-four hour provision is upheld by the Supreme Court, Minnesota should amend its forty-eight hour waiting period to conform to the current consensus and require a twenty-four hour waiting period or no waiting period at all.

B. The Judicial Bypass Provision

In *Bellotti II*, the United States Supreme Court held that if states require one or both parents' consent before a minor may obtain an abortion, they must also provide an alternate procedure whereby judicial authorization of the abortion may be obtained.[260] This judicial alternative to parental notification "must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained."[261] For example, the Missouri statute that was upheld by the Supreme Court in *Ashcroft* allowed the minor to use her initials in the petition requesting waiver of consent.[262] The statute also contained specific time limitations to ensure the expedition of appeals.[263]

The Seventh Circuit Court of Appeals particularly objected to the Illinois' statute of guidelines to assure that a minor, in procuring a waiver of notice, is afforded expeditious and confidential court proceedings.[264] The court did not object to the guidelines pertaining to the hearing,[265] which guarantee that "in no case shall the court fail

(7th Cir. 1980) (burden described as resulting delay from requiring two trips which increases risk).

260. *Bellotti II*, 443 U.S. at 644-51.

261. *Id.* at 644. *See also Ashcroft*, 462 U.S. at 491 n.16 (upholding the requirements set forth in *Bellotti II*).

262. *Ashcroft*, 462 U.S. at 491 n.16. Although *Bellotti II* was a plurality decision, the *Ashcroft* and *Akron* opinions upheld its provisions.

263. The statute reads as follows: "The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal." MO. ANN. STAT. § 188.028, subd. 2(6) (Vernon Supp. 1988).

264. *Zbaraz*, 763 F.2d at 1539-44. The Seventh Circuit also objected to the fact that the Illinois Supreme Court Rules do not require an expedited hearing but give the reviewing court discretion to grant such a hearing. *Id.* at 1541-42. In *Pearson*, the Seventh Circuit held such discretion to be a factor in concluding that the Indiana Rules of Appellate Procedure did not assure an expeditious hearing on appeal. *Pearson*, 716 F.2d at 1136.

265. *Zbaraz*, 763 F.2d at 1539.

to rule within 48 hours of the time of application. . . ."[266] Instead, the court objected to the lack of a provision mandating expedition of the appeal.[267] The court cited the *Ashcroft* statute as an example of a statute which does provide adequate guidelines for expediting an appeal because it sets out a specific time limitation.[268]

The *Zbaraz* court also objected to the Illinois statute's lack of provisions assuring the minor's anonymity at the hearing and after the proceedings.[269] Although the statute states that all proceedings under the bypass section must be "confidential," it does not state the means by which to achieve such confidentiality.[270] The Ashcroft statute, which was found by the Supreme Court to provide sufficient anonymity, allowed a minor to use her initials on the petition for waiver of consent.[271]

In *Hodgson*, the Eighth Circuit Court of Appeals objected to the Minnesota act's "substitute notification provisions,"[272] because that section of the statute is not operative unless the act is enjoined or restrained.[273] However, the court did not discuss the statute's absence of guidelines assuring anonymity and expedition. The district court had made findings that, in general, Minnesota courts have established procedures that maintain speed[274] and confidentiality,[275] both in the initial hearing and the appeal.

Minnesota's statute does contain language mandating anonymity and expedition,[276] but, like the Illinois statute, it does not contain

266. ILL. ANN. STAT. ch. 38, para. 81-65(c) (Smith-Hurd 1987).

267. *Zbaraz*, 763 F.2d at 1539.

268. *Id.* at 1540. *See supra* note 263 for the applicable portion of the Missouri statute.

269. 763 F.2d at 1543. *See* ILL. ANN. STAT. ch. 38, para. 81-65(c), (e), (f), (g) (Smith-Hurd 1987) (provisions governing anonymity).

270. *Zbaraz*, 763 F.2d at 1543.

271. *Ashcroft*, 462 U.S. at 491 n.16. *See also Zbaraz*, 763 F.2d at 1542.

272. MINN. STAT. § 144.343, subd. 6 (1986).

273. *Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 20-22.

274. *Hodgson*, 648 F. Supp. at 777. The district court found that lower courts have made provisions to hear bypass petitions outside of normal business hours in emergency situations. *Id.* at 762. The court also found, however, that two to three days usually elapse between a minor's first contact with the court and the actual hearing on the petition, which combines with scheduling difficulties to produce an even longer delay. *Id.* In addition, some court systems in non-metropolitan areas do not have a judge who will hear bypass petitions. *Id.* at 763. The district court concluded that, while the situation as it stands is burdensome to a minor, it "does not reflect a systemic failure to provide a judicial bypass option in the most expeditious practicable manner." *Id.*

275. *Id.* at 763. The court found that measures taken to assure confidentiality included "destroying interview notes, holding hearings in judges' chambers rather than in open court, and referring to petitioners by first name only." *Id.* at 763.

276. MINN. STAT. § 144.343, subd. 6(c)(iii) (1986). The anonymity provision reads as follows: "Proceedings in the court under this section shall be confidential and

specific time limitations to assure expedition, nor other provisions, such as use of initials, to maintain anonymity. Further, the findings of the district court can be interpreted to mean that too much judicial discretion and not enough expedition enters the bypass process, despite the district court's conclusions to the contrary. If a time limit is not specifically set out in the statute, it is up to the court to determine which cases to hear first.

Four of the sixteen states that require parental consent prior to a minor's abortion do not contain judicial bypass provisions.[277] Seven of the thirteen notification statutes do not contain judicial bypass provisions.[278] Fortunately, the remaining six notification statutes, which include Illinois and Minnesota, do contain provisions for judicial alternative to notification.[279] Twelve of the consent statutes contain bypass provisions.[280]

The statutes that do contain judicial bypass provisions contain varied safeguards for protection of anonymity. Of the consent statutes, only three require the minor to use her initials on the petition.[281] The remaining nine consent statutes merely require the proceedings to be "confidential," but do not state how that should be accom-

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shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman." *Id.*

The expedition requirement reads:

> An expedited confidential appeal shall be available to any such pregnant woman for whom the court denies an order authorizing an abortion without notification . . . . Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal . . . shall be afforded such a pregnant woman twenty-four hours a day, seven days a week.

MINN. STAT. § 144.343, subd. 6(c)(iv) (1986).

277. ALASKA STAT. § 18.16.010(a)(3) (1986); FLA. STAT. ANN. § 390.001(4) (1986); N.M. STAT. ANN. § 30-5-1 (1984); S.C. CODE ANN. § 44-41-30 (Law. Co-op. 1985).

278. IDAHO CODE § 18-609 (1987); ME. REV. STAT. ANN. tit. 22, § 1597 (1980); MD. HEALTH-GEN. CODE ANN. § 20-103 (1987); MONT. CODE ANN. § 50-20-107 (1)(b) (1987); OHIO REV. CODE ANN. § 2919.12 (B) (Anderson 1987); TENN. CODE ANN. § 39-4-202(f) (1982); UTAH CODE ANN. § 76-7-304 (1978).

279. GA. CODE ANN. § 15-11-114(c) (Supp. 1987); NEB. REV. STAT. § 28-347(2) (1985); NEV. REV. STAT. § 442.255, subd. 2 (1985); W. VA. CODE § 16-2F-4 (1985).

280. ALA. CODE § 26-21-4 (Supp. 1987); ARIZ. REV. STAT. ANN. § 36-2152(B)(1) (Supp. 1987); CAL. HEALTH & SAFETY CODE § 25958(b) (West Supp. 1988); IND. CODE ANN. § 35-1-58.5-2.5(b) (West 1986); KY. REV. STAT. ANN. § 311.732(3) (Michie/Bobbs-Merrill Supp. 1986); LA. REV. STAT. ANN. § 40:1299.35.5(B)(4) (West Supp. 1987); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983); MISS. CODE ANN. § 41-41-55 (Supp. 1987); MO. ANN. STAT. § 188.028, subd. 2 (Vernon Supp. 1988); N.D. CENT. CODE § 14-02.1-03.1, subd. 2 (Supp. 1987); 18 PA. CONS. STAT. ANN. § 3206(c) (Purdon 1983); R.I. GEN. LAWS § 23-4.7-6 (1985).

281. ARIZ. REV. STAT. ANN. § 36-2153(B) (Supp. 1987); CAL. HEALTH & SAFETY CODE § 25958(b) (West Supp. 1988); MO. ANN. STAT. § 188.028, subd. 2(1) (Vernon Supp. 1988).

plished.[282] With respect to the notification statutes, the West Virginia statute provides for "in camera" bypass proceedings and for anonymous documentation of the proceeding.[283] Nevada allows minors to use their initials on the petition.[284] Georgia's statute requires the record and appeal to be anonymous.[285] Nebraska merely requires the courts to "maintain confidentiality as to all proceedings."[286]

Statutory provisions also vary in the expedition requirement. Most of the consent statutes set time limits between the actual hearing and the initial petition,[287] and/or from the filing of the appeal

282. ALA. CODE § 26-21-4(g), (h) (Supp. 1987); IND. CODE ANN. § 35-1-58.5-2.5(g) (West 1986); KY. REV. STAT. ANN. § 311.732(3)(d), (5), (7) (Michie/Bobbs-Merrill Supp. 1986); LA. REV. STAT. ANN. § 40:1299.35.5(B)(8) (West Supp. 1987); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983); MISS. CODE ANN. § 41-41-55(3), (6) (Supp. 1987); N.D. CENT. CODE § 14-02.1-03.1, subd. 3 (Supp. 1987); 18 PA. CONS. STAT. ANN. § 3206(f) (Purdon 1983); R.I. GEN. LAWS § 23-4.7-6 (1985).

283. "All proceedings held pursuant to this article shall be confidential and the court shall conduct all proceedings in camera." W. VA. CODE § 16-2F-4(d) (1985). In addition:

> All testimony, documents and other evidence presented to the court, as well as the petition and any orders entered thereon and all records of whatsoever nature and kind relating to the matter shall be sealed by the clerk and shall not be open to any person except upon order of the court and, then, only upon good cause being shown therefor. A separate order book for the purposes of this article shall be maintained by such clerk and shall likewise be sealed and not open to inspection by any person save upon order of the court for good cause shown.

Id. § 16-2F-4(e).

284. "The court shall take the necessary steps to ensure that the interview and any other proceedings held pursuant to this subsection or NRS 442.2555 are confidential." NEV. REV. STAT. § 442.255 (4) (1985). In addition, "[t]he petition must set forth the initials of the minor. . . ." NEV. REV. STAT. § 442.2555(2) (1985).

285. GA. CODE ANN. § 15-11-114(d), (e) (Supp. 1987).

286. NEB. REV. STAT. § 28-347(2) (1985).

287. ALA. CODE § 26-21-4(e) (Supp. 1987) ("in no case . . . shall the court fail to rule within 72 hours of the time the petition is filed . . ."); CAL. HEALTH AND SAFETY CODE § 25958(b) (West Supp. 1988) ("[t]he hearing shall be set within three days of the filing of the petition"); IND. CODE ANN. § 35-1-58.5-2.5(d) (West 1986) ("[t]he juvenile court must rule on a petition filed by a pregnant minor . . . within . . . forty-eight(48) hours of the filing of the petition"); KY. REV. STAT. ANN. § 311.732(3)(d) (Michie/Bobbs-Merrill Supp. 1986) ("in no case shall the court fail to rule within . . . 72 hours of the time of application . . . ."); LA. REV. STAT. ANN. § 40:1299.35.5(B)(3) (West Supp. 1988) ("[e]ach application shall be heard . . . within forty-eight hours of the filing thereof"); MISS. CODE ANN. § 41-41-55(3) (Supp. 1987) ("in no case shall the court fail to rule within . . . 72 hours of the time the application is filed"); MO. ANN. STAT. § 188.028, subd. 2(2) (Vernon Supp. 1988) ("[a] hearing on the merits of the petition . . . shall be held as soon as possible within five days of the filing of the petition"); N.D. CENT. CODE § 14-02.1-03.1, subd. 2 (Supp. 1987) ("[a]ll applications . . . shall be heard by the juvenile judge or referee within forty-eight hours . . . of receipt of the application"); 18 PA. CONS. STAT. ANN. § 3206(f) (Purdon 1983) ("in no case shall the court fail to rule within three business days of the date of application").

until its completion.[288] Three statutes state that the hearings and appeals take "precedence" over all other actions.[289] In states with notification statutes, West Virginia and Nevada provide statutory limitations on the length of time between the filing of the petition and the actual hearing, and set a prescribed time for the court to render its final decision.[290] Nebraska sets limits only on the time the court takes to issue its final decision.[291] Georgia's statute, similar to Minnesota's and Illinois', contains language projecting expedition but does not set any time limits.[292]

Both the Seventh and the Eighth Circuits agree that a bypass provision is mandatory in parental notification statutes. Minnesota's statute was deemed unconstitutional for failure to provide a judicial alternative to notification, even when the statute is not enjoined. The Eighth Circuit Court of Appeals did not object to the statute's

288. ALA. CODE § 26-21-4(h) (Supp. 1987) ("the record of appeal shall be completed and the appeal shall be perfected within five days from the filing of the notice of appeal"); CAL. HEALTH AND SAFETY CODE § 25958(d) (West Supp. 1988) ("[t]hese procedures . . . shall be set within five court days of the filing of the notice of appeal . . . ."); LA. REV. STAT. ANN. § 40:1299.35.5(B)(8) (West Supp. 1987) ("[e]ach appeal shall be heard . . . within forty-eight hours of the filing thereof"); MO. ANN. STAT. § 188.028, subd. 2(5) (Vernon Supp. 1988) ("[t]he record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal"); N.D. CENT. CODE § 14-02.1-03.1, subd. 10 (Supp. 1987) ("[a]fter hearing the matter the supreme court shall issue its decision within forty-eight hours").

289. ARIZ. REV. STAT. ANN. § 36-2153(A), (C) (West Supp. 1987); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983); R.I. GEN. LAWS § 23-4.7-6 (1985).

290. NEV. REV. STAT. § 442.255, subd. 2 (1985). The Nevada statute provides: "[T]he court shall interview the woman at the earliest practicable time, which must be not more than 2 judicial days after the request is made. . . . [T]he court shall issue an order within 1 judicial day after the interview . . . ." *Id.* In addition, "[i]f the court does not enter an order either authorizing or denying the performance of the abortion within 1 judicial day after the interview, authorization shall be deemed to have been granted." *Id.* § 442.255, subd. 3. Another section provides: "A hearing on the merits of the petition, on the record, must be held as soon as possible and within 5 judicial days after the filing of the petition." *Id.* § 442.2555, subd. 3.

The West Virginia statute provides: "The court shall conduct a hearing upon the petition without delay, but in no event shall the delay exceed the next succeeding judicial day . . . and its judgment shall be endorsed by the judge thereof not later than twenty-four hours following such submission . . . ." W. VA. CODE § 16-2F-4(e) (1985).

291. NEB. REV. STAT. § 28-347(2) (1985). Nebraska's statute provides: "The court shall expedite all proceedings filed by a minor pursuant to this subsection and shall render a decision within twenty-four hours of the initial proceeding on such petition." *Id.*

292. GA. CODE ANN. § 15-11-114(e) (Supp. 1987). Georgia's statute reads: "An expedited appeal preserving the anonymity of the parties shall be available to any unemancipated minor to whom the court denies a waiver of notice. The appellate courts are authorized and requested to issue promptly such rules as are necessary to preserve the anonymity and to ensure the expeditious disposition of procedures provided by this Code section." *Id.*

lack of explicit requirements to assure anonymity and expediency. However, any provision addressing a minor's contact with the court should provide protection for the minor. In addition to enabling the bypass portion of the act to be effective at all times, Minnesota should explicitly state in its act the means by which a minor will be protected when involved in the judicial process.

C. *The Two-Parent Notification Provision*

The Eighth Circuit Court of Appeals objected to Minnesota's statutory requirement that a minor always notify *both* of her parents before an abortion.[293] Minnesota requires notification of both parents if they are both living, but notification of only one parent if the second one cannot be located or notification of a legal guardian.[294]

Illinois' statute requires notice to both parents, to a guardian, or to one parent if the other cannot be found. However, the statute also contains a provision that minors whose parents are divorced need only notify the parent with custody of the minor.[295]

The United States Supreme Court upheld a two-parent consent requirement in *Bellotti II*, but did not rule definitively on the constitutionality of a consent requirement where the parents and the minor are not living together.[296] Of the notification statutes, three states in addition to Illinois and Minnesota require notification of both parents of the minor, but do not include a divorce provision.[297] The remaining eight statutes require notification of only one parent.[298] Of the sixteen consent statutes, twelve require the consent of only

293. *Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 19-20.

294. MINN. STAT. § 144.343, subd. 3 (1986).

295. ILL. ANN. STAT. ch. 38, para. 81-64 (a) and (b) (Smith-Hurd 1987).

296. "We are not pursuaded that, as a general rule, the requirement of obtaining both parents' consent unconstitutionally burdens a minor's right to seek an abortion . . . . At least when the parents are together and the pregnant mother is living at home, both the father and mother have an interest—one normally supportive—in helping to determine the course that is in the best interests of a daughter." *Bellotti II*, 443 U.S. at 649.

297. IDAHO CODE § 18-609(6) (1987); TENN. CODE ANN. § 39-4-202(f) (1982); UTAH CODE ANN. § 76-7-304(2) (1978).

298. GA. CODE ANN. § 15-11-112 (a)(1)(A) (Supp. 1987) ("such parent or guardian shall furnish an affidavit signed by such parent or guardian"); ME. REV. STAT. ANN. tit. 22, § 1597(2) (1980) ("to one of her parents or guardians"); MD. HEALTH-GEN. CODE ANN. § 20-103(a) (1987) ("notice to a parent or guardian of the minor"); MONT. CODE ANN. § 50-20-107(b) (1987) ("to a parent, if living or the custodian or legal guardian"); NEB. REV. STAT. § 28-347(1) (1985) ("to one of the parents or the legal guardian"); NEV. REV. STAT. § 442.255(1) (1985) ("a custodial parent or guardian"); OHIO REV. CODE ANN. § 2919.12 (B)(1)(a)(i) (Anderson 1987) ("to one of the woman's parents, her guardian, or her custodian"); W. VA. CODE § 16-2F-3(a) (1985) ("notice to one of the parents or to the legal guardian").

one parent.[299] Only four require the consent of both parents, if living.[300]

The Eighth Circuit based its objection to the two-parent notification requirement on the high divorce rate in Minnesota and the tendency toward violence in dysfunctional families, found by the district court.[301] The court of appeals reasoned that parental notification would exacerbate potential family violence and dissuade voluntary notification of one parent.[302] The court concluded that the state's interest in promoting family communication would not be furthered often enough to justify the burden imposed upon the minor woman's fundamental right.[303]

It seems that Minnesota could meet the goals of its statute by either adding a provision for divorced parents or by requiring notification of only one parent. The solution would not only be more realistic in light of the numerous single parent homes but would be less burdensome and more protective of the minor from family violence.

CONCLUSION

If the state of Minnesota wishes to regulate the activities of minors more closely than those of adults, it must protect the minor from the very considerations that make the regulation of juveniles unique. The state seeks to promote family interaction and parental guidance, yet it must protect juveniles from potential family conflict. A two-parent notification requirement is burdensome to many, if not most, minors. The statute should be amended to require either notification of only one parent or to include a provision for divorce.

The juvenile court system is unique in that it is protective of minors, rather than punitive, as is the adult system. Minors are afforded anonymity in record-keeping and reporting of cases. Minnesota should explicitly add provisions requiring anonymity in such proceedings to protect minors from public view and stigmatization.

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299. ALA. CODE § 26-21-3(a) (Supp. 1987); ALASKA STAT. § 18.16.010(a)(3) (1986); ARIZ. REV. STAT. ANN. § 36-2152(a) (Supp. 1987); CAL. HEALTH & SAFETY CODE § 25958(a) (Supp. 1988); FLA. STAT. ANN. § 390.001(4)(a) (West 1986); IND. CODE ANN. § 35-1-58.5-2.5(a) (West 1986); LA. REV. STAT. ANN. § 40:1299.35.5(A)(1) (West Supp. 1987); MO. ANN. STAT. § 188.028, subd. 1 (1) (Vernon 1983); N.M. STAT. ANN. § 30-5-1(C) (1978); 18 PA. CONS. STAT. ANN. § 3206(a) (Purdon 1983); R.I. GEN. LAWS § 23-4.7-6 (1985); S.C. CODE ANN. § 44-41-30(b) (Law. Co-op. 1985).

300. KY. REV. STAT. ANN. § 311.732(1),(2) (Michie/Bobbs-Merrill 1983); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983); MISS. CODE ANN. § 41-41-53(1), (2)(a), (2)(b) (Supp. 1987); N.D. CENT. CODE § 14.02.1-03.1, subd. 1(a) (Supp. 1987).

301. *Hodgson*, Nos. 86-5423-MN, 86-5431-MN, slip op. at 14-19.

302. *Id.* at 16-17.

303. *Id.* at 19-20.

Judicial discretion is also a concern in juvenile proceedings, particularly in Minnesota. Judicial bypass proceedings are to be completed promptly due to the nature of abortion. Unless Minnesota's act explicitly sets forth statutory time limits, the judiciary is afforded discretion in setting up and completing such hearings.

Any state requiring parental consent before a minor's abortion is required to provide a judicial bypass provision. Many legislatures have not extended this requirement to parental notification statutes. But it seems that any state burdening a minor's fundamental right, when it does not similarly burden an adult's exercise of the same right, must provide additional safeguards for minors who must endure the burdens of the court system.

The abortion right, as applied to adult women, is not to be overly burdensome. Parental consent and notification provisions impose burdens on minors that do not apply to adults. Minnesota's statute imposes a requirement in addition to parental notification: a forty-eight hour waiting period.[304] Waiting periods are not allowed for adults seeking abortions.[305] The statute states that proceedings must be expedient,[306] yet it adds two days to the entire process. The state could accomplish parental notification without imposing a waiting period. The least burdensome means should be implemented to achieve the state's ends.

Juveniles are people with constitutional rights. The Minnesota statute burdens a constitutionally protected right. But minors are presumed to lack the experience and maturity necessary to make decisions as to their own medical care. If Minnesota must burden a constitutionally protected right in order to protect juveniles from their own decisions, they are entitled to be shielded from the public.

Perhaps the Eighth Circuit Court of Appeals was correct in refusing to sever the unconstitutional portions of the statute from the act, thereby disabling the entire act. Illinois' statute is less burdensome than Minnesota's statute overall. Illinois has a shorter waiting period, a judicial bypass procedure that is in effect even if the statute is enjoined, and a one parent versus a two-parent notification requirement. Minnesota should, at the very least, amend its act to conform to the Illinois standards or completely put parental notification to rest.

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304. MINN. STAT. § 144.343, subd. 2 (1986).

305. *See* City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983). *See also* discussion *supra* note 67.

306. MINN. STAT. § 144.343, subd. 6(c)(iii) (1986). "Proceedings . . . under this section . . . shall be given . . . precedence over other pending matters . . . ." *Id.*