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## Parental Notification and Abortion: A Review and Recommendation to West Virginia's Legislature

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## STUDENT MATERIAL

### Student Notes

# PARENTAL NOTIFICATION AND ABORTION: A REVIEW AND RECOMMENDATION TO WEST VIRGINIA'S LEGISLATURE

## I. INTRODUCTION

Justice Blackmun<sup>1</sup> seemed to be thinking aloud during oral arguments late last year (1982) when the Court entertained “the most comprehensive review of national abortion policy”<sup>2</sup> since *Roe v. Wade*.<sup>3</sup> In one of the five cases argued before the Court on November 30th,<sup>4</sup> the defendant, Dr. Simopoulos, operated an abortion clinic in Falls Church, Virginia. His patient was a minor, six months pregnant, who was anxious to conceal her condition from her parents.<sup>5</sup> An abortion was induced by saline amniocentesis. This method, commonly used during the mid-trimester period of pregnancy, accomplishes the abortion by inserting a hollow needle through the woman’s abdomen into the amniotic sac, withdrawing some of the amniotic fluid and injecting a hypertonic solution. Within several hours, the fetus dies of acute salt poisoning. About twenty-four hours later, labor begins, and the dead fetus is ultimately delivered.<sup>6</sup> The defendant’s youthful patient was injected and left the clinic without supervision (her parents were not made aware of the operation). She subsequently checked into a motel, where, two days later, the fetus was expelled and left in a trash can.<sup>7</sup>

Justice Blackmun interjected, “[i]t’s distressing that she went to a motel and not a hospital.”<sup>8</sup> Similar distress has been expressed by many who oppose abortions generally, but are more particularly concerned with the results of allowing an adolescent to have such a traumatic experience without the advice or support of her parents. So far, at least fifteen states have responded to this concern with legislation requiring parental involvement in a minor’s abortion

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<sup>1</sup> Justice Harry Blackmun, who represented the world famous Mayo Clinic when he was a practicing lawyer, authored the opinion of the Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), and has been in the forefront of the Court’s efforts to secure women’s rights to choose to terminate pregnancies—consistently expressing opinions which favor liberal access to abortions. See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

<sup>2</sup> 51 U.S.L.W. 3433 (Dec. 7, 1982).

<sup>3</sup> 410 U.S. 113 (1973).

<sup>4</sup> *Simopoulos v. Commonwealth*, 221 Va. 1059, 277 S.E.2d 194 (1981).

<sup>5</sup> 221 Va. at 1063-64, 277 S.E.2d at 196.

<sup>6</sup> J. WILKE, *HANDBOOK ON ABORTION* 30 (1975).

<sup>7</sup> *Simopoulos*, 221 Va. at 1063-64, 277 S.E.2d at 196.

<sup>8</sup> 51 U.S.L.W. 3434. The editors of the *United States Law Week* provide summaries of oral arguments before the Court, occasionally quoting the participants.

decision.<sup>9</sup>

West Virginia is not among the states which have enacted such legislation, although a parental notification bill was introduced and given considerable attention in the last two legislative sessions.<sup>10</sup> If the proposed law had been passed, it would have required a treating physician to notify the parents of a minor who intends to have an abortion.<sup>11</sup> Of course, it is not as simple as that. The bill included, among other provisions, an exception for minors who are deemed to be mature enough to make the decision independently and an exception for minors who demonstrate that parental notification would not be in their best interests. The law would have also imposed criminal penalties on physicians who failed to comply with the notification requirements.

Despite the failure of the parental notification bill in the last two sessions of the legislature, its proponents intend to introduce it again, if possible. Therefore, the main objective of this Note is to determine the constitutional status of the proposed law. If the constitutionality of the bill is settled at the outset, the legislature will be left with the duty of determining whether the interests fostered by this law reflect the values of West Virginians.

Section II of this Note discusses some general and historical background on the abortion issue. Section III examines the constitutional parameters of parental involvement as established by a series of United States Supreme Court cases decided since *Roe v. Wade*.<sup>12</sup> Section IV examines the constitutionality of West Virginia's proposed parental notification law. Section V discusses parental involvement from a "policy" perspective. Section VI suggests a model parental notification statute for consideration by the legislature.

## II. BACKGROUND

### A. *Abortion In The United States*

Twenty-five years ago abortion was prohibited in all fifty states, except when necessary to preserve the life or health of the mother.<sup>13</sup> In contrast, over ten million abortions have been legally performed in this country in less than

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<sup>9</sup> FLA. STAT. ANN. § 390.001(4)(a) (West 1983); ILL. REV. STAT. ch. 38 § 81-23.3 (1982); IND. CODE ANN. § 35-1-58.5-2.5 (Burns Supp. 1982); LA. REV. STAT. ANN. § 40: 1299.35.5 (West Supp. 1983); ME. REV. STAT. ANN. tit. 22 § 1597 (1980); MASS. GEN. LAWS ANN. ch. 112, § 12 S (West Supp. 1982); MINN. STAT. § 144.343 (1983); MO. REV. STAT. § 188.028 (1983); NEB. REV. STAT. § 28-347 (1982 Cum. Supp.); N.D. CENT. CODE § 14-02.1-03 (Supp. 1981); PA. CONS. STAT. ANN. § 3206 (1982); R.I. GEN. LAWS § 23-4.7-6 (1982); TENN. CODE ANN. § 39-4-202 (1982); UTAH CODE ANN. § 76-7-304 (1978).

<sup>10</sup> Senate Bill No. 243 was introduced January 25, 1982, by Senator Huffman and referred to the Committee on the Judiciary; Senate Bill No. 188 was introduced January 21, 1983, by Senators Ash and Huffman, and also referred to the Committee on the Judiciary.

<sup>11</sup> See *infra* notes 89 and 95.

<sup>12</sup> 410 U.S. 113 (1973).

<sup>13</sup> L. WARDLE & M. WOOD, A LAWYER LOOKS AT ABORTION 3 (1982). "[*Roe*] invalidated every abortion statute then in effect in the United States, and, in practical effect, legalized abortion on demand in this country." Moore, *Moral Sentiment in Opinions in Abortion*, 15 SANTA CLARA L. REV. 591, 633 (1975); See also Tribe, *The Supreme Court 1972 Term, Foreword: Toward A Model of Roles in the Due Process of Law*, 87 HARV. L. REV. 1, 2 (1973).

ten years since *Roe v. Wade*.<sup>14</sup> Current statistics indicate that approximately thirty percent of all pregnancies are terminated by abortion,<sup>15</sup> and in some areas (e.g., Washington, D.C. and New York City) there are more abortions than live births.<sup>16</sup> Abortion is the most common operation in the United States.<sup>17</sup> Yet it is a medical procedure that remains shrouded in controversy. Serious attempts to pass a Human Life Amendment to the Constitution<sup>18</sup> and widespread involvement in local and national pro-life organizations<sup>19</sup> indicate that there is still substantial opposition to legalized abortion.

Abortions performed on minors have become a singularly emotional issue in the national controversy. The ratio of abortions to pregnancies is substantially higher among teenagers than any other age group. Fifty-eight percent of all pregnancies of girls under age fifteen are aborted. Girls aged fifteen through nineteen terminate forty-three percent of their pregnancies by abortion.<sup>20</sup> Nearly one-third of all abortions performed in the United States are on teenagers.<sup>21</sup>

### B. Abortion in West Virginia

The abortion issue is no less volatile in the State of West Virginia and has been the subject of litigation and, more recently, legislation. In West Virginia, the statute prohibiting abortion<sup>22</sup> has never been repealed. However, it was ruled unconstitutional by the Fourth Circuit Court of Appeals in *Doe v. Charleston Area Medical Center*,<sup>23</sup> pursuant to the clear mandate of the United States Supreme Court in *Roe v. Wade*<sup>24</sup> and *Doe v. Bolton*.<sup>25</sup> The challenge arose in West Virginia when a pregnant woman sought injunctive relief

<sup>14</sup> L. WARDLE & M. WOOD, *supra* note 13.

<sup>15</sup> CENTER FOR DISEASE CONTROL, 1979 ANNUAL SUMMARY, 103 (1980).

<sup>16</sup> *Id.*

<sup>17</sup> C. RICE, FIFTY QUESTIONS ON ABORTION 1 (1979).

<sup>18</sup> In 1981 alone, 12 different pro-life amendments were proposed. For example, the Garn-Oberstar Amendment provides:

SECTION 1. With respect to the right to life, the word "person" as used in this article and in the fifth and fourteenth Articles of Amendment to the Constitution of the United States applies to all human beings irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.

SECTION 2. No unborn person shall be deprived of life by any person: *Provided however*, That nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

SECTION 3. The Congress and the several states shall have power to enforce this article by appropriate legislation.

See also L. WARDLE & M. WOOD, A LAWYER LOOKS AT ABORTION, Appendix A (1982).

<sup>19</sup> TIME, April 6, 1981 at 21.

<sup>20</sup> Henshaw, Forrest, Sullivan & Tietze, *Abortion in the United States*, 1978, 13 FAM. PLAN. PERSP. 1, 17, 18, Tables 10 and 11 (1981).

<sup>21</sup> Tietze, *Teenage Pregnancies: Looking Ahead to 1984*, 10 FAM. PLAN. PERSP. 205 (1978).

<sup>22</sup> W. VA. CODE § 61-2-8 (1977).

<sup>23</sup> 529 F.2d 638 (4th Cir. 1975).

<sup>24</sup> 410 U.S. 113 (1973).

<sup>25</sup> 410 U.S. 179 (1973).

against the Charleston Area Medical Center (C.A.M.C.). C.A.M.C. had refused to perform the abortion she desired, based on the unrepealed prohibition in the West Virginia Code. The judge of the federal district court refused to grant the injunction and dismissed the complaint because, in his opinion, "Doe" had failed to show irreparable harm. The rationale for Judge Knapp's futile rebellion is characterized in his query: "Who can say that irreparable injury will result from the inability to terminate a pregnancy which has the potential to give life and love beyond measure?"<sup>26</sup> The dutiful circuit court was not long detained by this argument, responding: "The court's statement is surely an accurate reflection of human experience where the birth of a child is desired. It is not an accurate statement of the law where a woman wishes to terminate her pregnancy."<sup>27</sup> With the Fourth Circuit's ruling in *Doe v. Charleston Area Medical Center*, West Virginia is left with no operative law on abortion.<sup>28</sup>

In West Virginia, no government agency has been designated to accumulate information regarding abortions; so it is difficult to estimate the number of abortions being performed. The Federal Center for Disease Control (CDC) in Atlanta, Georgia, attempts to obtain this information from individual suppliers of abortion services, but admits that such information is inaccurate and incomplete.<sup>29</sup> The most recent year for which CDC has information on West Virginia is 1978, and its sources indicate that 2,758 abortions were performed in West Virginia that year, with 425 involving nonresidents. Information from other states indicates that another 1,990 West Virginians had abortions outside the state during 1978.<sup>30</sup>

Historically, many West Virginians went out of state to preserve anonymity.<sup>31</sup> Several neighboring states have private clinics close to West Virginia. Such private clinics typically offer quick service with maximum confidentiality. Two private clinics have opened more recently in West Virginia: Women's Health Center, in Charleston, and Wheeling Medical Services, in Wheeling. Information provided by the Charleston clinic indicated that approximately fifteen abortions are performed per day on three days of the week.<sup>32</sup> This amounts to 2,340 abortions per year at that facility, if its estimate is accurate. Abortions are also performed by private physicians in hospitals to some extent in West Virginia. Since there is no legislative guidance or administrative regulation, West Virginia hospitals and private physicians adopt their own guidelines within the constitutional parameters of *Roe v. Wade* and its progeny. For example, West Virginia University Medical Center performs nontherapeutic

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<sup>26</sup> *Doe v. Charleston Area Medical Center*, 529 F.2d at 644.

<sup>27</sup> *Id.*

<sup>28</sup> At least one circuit court in West Virginia has ruled that section 61-2-8 is defunct. *See Roe v. Winter*, No. 13,228 (W. Va. Cir. Ct. Kanawha County 1975). This decision was apparently not reviewed by the West Virginia Supreme Court of Appeals.

<sup>29</sup> Telephone interview with CDC representative, Atlanta, Georgia (Feb. 22, 1983).

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

<sup>31</sup> Telephone interview with Bob Russell, Assistant Project Director, State-wide Family Planning, Charleston, W. Va. (Feb. 22, 1983).

<sup>32</sup> Telephone interview with Flo Benson, Monongalia County Health Department (Feb. 22, 1983).

abortions up to the twentieth week of pregnancy.<sup>33</sup>

The statistical information supplied by CDC does not reflect the age of those having abortions, but one of the private clinics, mentioned above, reports that approximately 18 percent of the abortions performed there were on girls under eighteen.<sup>34</sup> Neither of the private clinics requires parental notification or consent. The West Virginia University Medical Center does require consent from the parents of unemancipated minors.<sup>35</sup>

### C. Legislation and Litigation

Abortion generally and abortions for minors particularly are issues of substantial interest and widespread disagreement. There is enough support for limiting access to abortions to keep all state legislatures busy considering regulatory laws. There is also enough opposition to such regulation to keep the courts busy reviewing the laws. The parental involvement legislation has followed this pattern. So far every statute involving parental notification has come under searching judicial scrutiny.<sup>36</sup>

Some respected legal scholars have suggested that the inevitable cycle of legislation and litigation which occurs over virtually every attempt to regulate abortion services is reminiscent of the *Lochner* era of "substantive due process."<sup>37</sup> The United States Solicitor General recommended that the Court should relinquish its role as a superlegislature or legislative overseer by voluntarily abstaining in abortion cases.<sup>38</sup> However, the Court has not shown any inclination to retreat from its activist role in shaping abortion policy. The next section will discuss the policy which has been formulated by the Court, particularly as it relates to the parental notification issue.

<sup>33</sup> Telephone interview with Dr. Reamy at West Virginia University Medical Center in Morgantown (Jan. 13, 1983).

<sup>34</sup> WHEELING MEDICAL SERVICES, INC., CLINIC UPDATE—JANUARY 1982 TO DECEMBER 1982 (a statistical report in the author's possession).

<sup>35</sup> Interview, *supra* note 32.

<sup>36</sup> *H.L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Akron Center for Reproductive Health, Inc., v. City of Akron*, 651 F.2d 1198 (6th Cir. 1981), *cert. granted*, 102 S. Ct. 2266 (1982); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 655 F.2d 848 (8th Cir. 1981), *cert. granted*, 102 S. Ct. 2267 (1982); *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981); *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980); *Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1978); *Am. College of Obstetricians and Gynecologists v. Thornburgh*, 552 F. Supp. 791 (E.D. Pa. 1982); *Planned Parenthood v. Pearson*, No. 1P 82-1766-C (S.D. Ind. Oct. 11, 1982); *Hodgson v. Minn.*, No. 3-81 CIV. 538 (D. Minn. March 23, 1982); *Women's Medical Center of Providence Inc. v. Roberts*, 530 F. Supp. 1136 (D.R.I. 1982); *Orr v. Knowles*, No. CV-81-0-301 (D. Neb. May 30, 1981); *Planned Parenthood of Memphis v. Alexander*, No. 78-2310 (W.D. Tenn. March 23, 1981); *Leigh v. Olson*, 497 F. Supp. 1340 (D.N.D. 1980); *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D. La. 1980); *Women's Community Health Center v. Cohen*, Civ. No. 79-1628 (D. Me. Sept. 17, 1979); *Scheinberg v. Smith*, 482 F. Supp. 529 (S.D. Fla. 1979).

<sup>37</sup> A. VAN ALSTYNE, *SUM AND SUBSTANCE OF CONSTITUTIONAL LAW* 381-83 (2d ed. 1979).

<sup>38</sup> See Arguments Before the Court, *Simpoulos v. Va.*, 51 U.S.L.W. at 3435 (U.S. Solicitor General Rex Lee).

### III. CONSTITUTIONALITY

A majority of the states regarded abortion to be a criminal act prior to 1973. Then, with a single, Bunyan-like, stroke, *Roe v. Wade*<sup>39</sup> cleared the legal landscape of laws prohibiting abortion. But, despite the broad implications of the *Roe* decision, the factual setting only raised a limited number of related issues. The Court specifically reserved the issue of parental involvement for later consideration.<sup>40</sup>

Since *Roe v. Wade*, the Court has reviewed the parental involvement issue in three cases. From this trilogy emerges a fairly clear model of a parental notification law which the Court would sustain. The first case, *Planned Parenthood of Central Missouri v. Danforth*,<sup>41</sup> arose in 1976 over a Missouri statute requiring parental consent for any minor before she could obtain an abortion. In 1979, *Bellotti v. Baird (Bellotti II)*<sup>42</sup> gave the Court an opportunity to treat a variation of the consent issue. Then in 1981, the Court dealt with a Utah law requiring physicians to "notify, if possible, the parents or guardian of the [minor] woman upon whom [an] abortion is to be performed . . ." <sup>43</sup> in *H.L. v. Matheson*.<sup>44</sup>

The parental involvement issue came up again in two cases argued late last year, which have not yet been decided.<sup>45</sup> The remainder of this section will discuss the constitutional model of parental notification which emerges from the decided cases and the possible impact of the undecided case.

#### A. The Decided Cases

The Missouri statute considered in *Danforth*<sup>46</sup> required written consent from one parent or person in *loco parentis* of any unmarried woman under the age of eighteen years who desired an abortion.<sup>47</sup> The Court held this no-exceptions consent requirement unconstitutional. Justice Blackmun, writing for the Court, objected to the state having "absolute power to overrule a determination"<sup>48</sup> of the minor. He said that the state "does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."<sup>48.1</sup>

Justice Blackmun, however, was careful to point out that the Court's hold-

<sup>39</sup> 410 U.S. 113 (1973), and its companion case, *Doe v. Bolton*, 410 U.S. 179 (1973).

<sup>40</sup> 410 U.S. 113, 165 n. 67 (1973).

<sup>41</sup> 428 U.S. 52 (1976).

<sup>42</sup> 443 U.S. 622 (1979) (*Bellotti II*).

<sup>43</sup> UTAH CODE ANN. § 76-7-304 (1978).

<sup>44</sup> 450 U.S. 398 (1981).

<sup>45</sup> *Akron Center for Reproductive Health v. City of Akron*, 651 F.2d 1198 (6th Cir. 1981), *cert. granted*, 102 S. Ct. 2266 (1982); *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, 655 F.2d 848 (8th Cir. 1981), *cert. granted*, 102 S. Ct. 2267 (1982).

<sup>46</sup> 428 U.S. 52 (1976).

<sup>47</sup> *Id.* at 85 (Appendix to Opinion of the Court H.C.S. House Bill No. 1211).

<sup>48</sup> *Id.* at 75.

<sup>48.1</sup> *Id.* at 74.

ing does not stand for the proposition that "every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."<sup>49</sup>

Justice Stewart, concurring, went a step further by suggesting a legislative model which the Court might sustain. He said:

[A] materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interests. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between parent and child.<sup>50</sup>

Justice Stewart explained the policy behind this model:

There can be little doubt that the state furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That 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.<sup>51</sup>

At the same time the *Danforth* case was being decided, the Court was also presented with a challenge to the Massachusetts parental consent statute mentioned above.<sup>52</sup> But after briefing and oral argument, it was determined that the statute "was susceptible of a construction that 'would avoid or substantially modify the federal constitutional challenge'. . . ."<sup>53</sup> The federal district court judgment, which had been appealed, was, therefore, vacated with the explanation that the district court should have abstained and certified to the Supreme Judicial Court of Massachusetts appropriate questions concerning the meaning of the Massachusetts statute.<sup>54</sup> Several years passed before the case made its way back to the United States Supreme Court.<sup>55</sup>

Finally, by 1978, *Bellotti v. Baird (Bellotti II)*,<sup>56</sup> had matured in the lower courts, and was ready for reconsideration by the Court. The Massachusetts statute at issue<sup>57</sup> required that an unmarried minor have consent of both her parents. If one or both parent refused consent, a court of general jurisdiction could override their veto "for good cause shown." The United States Supreme Court held that the statute was unconstitutional.

<sup>49</sup> *Id.* at 75.

<sup>50</sup> *Id.* at 91-92.

<sup>51</sup> *Id.* at 91.

<sup>52</sup> *Bellotti v. Baird*, 428 U.S. 132 (1976)(*Bellotti I*).

<sup>53</sup> *Bellotti v. Baird*, 443 U.S. 622, 628 (1979)(*Bellotti II*).

<sup>54</sup> *Id.* at 628-29.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> MASS. GEN. LAWS ANN., ch. 112, § 125 (West Supp. 1979).



Justice Powell's opinion said that "alternative procedures" must be provided to accommodate two classes of minors: (1) those who can demonstrate that they are mature and well enough informed to make the abortion decision independent of their parents, and (2) those who can demonstrate that their best interests would not be served by the consent requirement.<sup>58</sup> "In sum, the 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*."<sup>59</sup>

Although eight justices agreed on the result of the case, there was no majority opinion, since the eight divided evenly over the manner in which the conclusion was reached (Justice White dissented). Justice Powell, however, announced the judgment of the Court and set out some procedural guidelines as an "attempt to provide some guidance as to how a state constitutionally may provide for adult involvement . . . in the abortion decision of minors."<sup>60</sup> He said:

We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity—if she so desires—to go directly to a Court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation.<sup>61</sup>

A quick head-count indicates that five members of the Court would have found the statute constitutional if it had conformed to Justice Powell's model. The Chief Justice and Justices Stewart and Rehnquist joined Justice Powell in his opinion, and since Justice White dissented on the ground that he found the statute before the Court constitutional, it seems plain that he would uphold a less restrictive version.<sup>62</sup> Of course, Justice O'Connor's recent replacement of Justice Stewart casts some uncertainty on the outcome of a similar case. Before this change in the Court's personnel, the First Circuit Court of Appeals sustained a statute tailored to resemble the *Bellotti II* model.<sup>63</sup> The legislature of Massachusetts did its homework after *Bellotti II*, and, in less than two years, took its new statute back to the circuit court where it was sustained.<sup>64</sup>

The message of the *Danforth-Bellotti II* holdings is that a statute merely requiring notification as opposed to consent, would pass constitutional scrutiny

<sup>58</sup> *Bellotti v. Baird*, 443 U.S. 622 (1979).

<sup>59</sup> *Id.* at 644.

<sup>60</sup> *Id.* at 651-52 n.32.

<sup>61</sup> *Id.* at 647-48.

<sup>62</sup> *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1010 n.6 (2d Cir. 1981).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

if it provided the alternative procedures laid out in the *Bellotti II* model. This interpretation of the cases was confirmed in *H. L. v. Matheson*.<sup>65</sup>

The Utah statute requiring a physician to “[n]otify, if possible, the parent or guardian of the woman upon whom the abortion is to be performed, if she is a minor . . .”<sup>66</sup> was upheld by a 6-3 margin in *Matheson*.<sup>67</sup> The statute does not provide the alternative procedures for mature minors or those for whom abortion would be in their best interests. The Court did not consider the absence of these provisions fatal because the pregnant minor had not alleged maturity or emancipation, and she advanced no evidence to support her allegation that notification of her parents would not be in her best interests. She challenged the statute as a facially unconstitutional invasion of her privacy, “arguing that a mere notice requirement is invalid *per se* without regard to the minor’s age, whether she is emancipated, whether her parents are likely to be obstructive, or whether there is some health or other reason why notification would not be in the minor’s best interests.”<sup>68</sup> The Court disagreed with her argument and upheld the statute as it applied to immature, unemancipated minors.

The Court obviously considered notification to be less intrusive than consent. Chief Justice Burger, writing for the majority, said: “Although we have held that a state may not constitutionally legislate a blanket, unreviewable power of parents to veto their daughter’s abortion, a statute setting out a ‘mere requirement of parental notice’ does not violate the constitutional rights of an immature, dependent minor.”<sup>69</sup>

The *Matheson* Court only addressed a very narrow question:

The only issue before us, then, is the facial constitutionality of a statute requiring a physician to give notice to parents ‘if possible’, prior to performing an abortion on their minor daughter, (a) when the girl is living with and dependent upon her parents, (b) when she is not emancipated by marriage or otherwise, and (c) when she has made no claim or showing as to her maturity or as to her relations with her parents.<sup>70</sup>

The facts did not require the Court to decide in what circumstances a state must provide alternative procedures to parental notification.<sup>71</sup> The majority opinion, therefore, left the issue open—which suggests<sup>72</sup> that a no-exceptions parental notification statute could conceivably be upheld by the Court. Justices Stevens, Rehnquist, and White would clearly uphold such a statute.<sup>73</sup>

<sup>65</sup> 450 U.S. 398 (1981).

<sup>66</sup> UTAH CODE ANN. § 76-7-304 (1978).

<sup>67</sup> 450 U.S. 398 (1981).

<sup>68</sup> *Bellotti v. Baird*, 428 U.S. 132, 147 (1976) (*Bellotti I*).

<sup>69</sup> *Id.* at 409.

<sup>70</sup> *Id.* at 407.

<sup>71</sup> *Id.* at 412 n.22.

<sup>72</sup> At least to those with a penchant for prognostication.

<sup>73</sup> See *Planned Parenthood v. Danforth*, 428 U.S. 52, 94-95 (1976) (White, J., concurring in part and dissenting in part) (Justice White was joined by Chief Justice Burger and Justice Rehnquist); *H.L. v. Matheson*, 450 U.S. 398, 421 (1981) (Stevens, J., concurring).

Justice Burger would possibly join this group requiring only one more vote to sustain. Justice O'Connor's views may be more clearly revealed by the decision in the cases now pending.<sup>74</sup> Her vote could supply the necessary fifth to form a majority.

Concurring in *H.L. v. Matheson*, Justices Stewart and Powell expressed their view that the alternative procedures of the *Bellotti II* model would also be necessary in a notification statute:

[A] state may not validly require notice to parents in all cases, without providing an independent decision maker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently or that notification otherwise would not be in her best interests.<sup>75</sup>

### B. Undecided Cases

On November 30, 1982, lawyers from Virginia, Missouri, and Akron, Ohio, defended abortion legislation in their respective states and city in oral arguments before the United States Supreme Court.<sup>76</sup> Of five cases argued, two included issues relating to parental notice and consent.

The first case, *Akron Center for Reproductive Health v. City of Akron*<sup>77</sup> is identical to *H. L. v. Matheson*<sup>78</sup> in regard to the parental notice issue. The city ordinance in dispute is being challenged because it does not provide for judicial determination of the minor's maturity or best interests, as required by *Bellotti II*.<sup>79</sup> The appellants were abortion clinics and a physician; no minor female was questioning the validity of the Akron ordinance. The Sixth Circuit Court of Appeals reversed a lower court finding of unconstitutionality,<sup>80</sup> explaining that "[U]ntil the requirements of § 1870.05(A) are questioned by a minor who claims to be mature or emancipated or claims that notice would not be in her best interest, we cannot hold the section facially invalid."<sup>81</sup> It seems unlikely that the standing argument will be disputed on review, since the other case more clearly presents the issue reserved in *H.L. v. Matheson*.<sup>82</sup>

*Planned Parenthood Association of Kansas City, Missouri, Inc., v. Ashcraft*,<sup>83</sup> presents the question "left open in *Matheson*,"<sup>84</sup> which is, "whether it

<sup>74</sup> *Akron Center for Reproductive Health v. City of Akron*, 651 F.2d 1198 (6th Cir. 1981), cert. granted, 50 U.S.L.W. 3934 (U.S., May 22, 1982) (Nos. 81-746, 81-1172); *Planned Parenthood Association, Inc. v. Ashcroft*, 655 F.2d 848 (8th Cir. 1981), cert. granted, 50 U.S.L.W. 3934 (U.S., May 22, 1982) (Nos. 81-1255, 81-1623).

<sup>75</sup> 450 U.S. at 420.

<sup>76</sup> 51 U.S.L.W. 3433 (Dec. 2, 1982).

<sup>77</sup> 651 F.2d 1198 (6th Cir. 1981), cert. granted, 50 U.S.L.W. 3934 (U.S. May 22, 1982) (Nos. 81-746, 81-1172).

<sup>78</sup> 450 U.S. 398.

<sup>79</sup> 443 U.S. 622 (1979).

<sup>80</sup> *Akron*, 651 F.2d 1198.

<sup>81</sup> *Id.* at 1206.

<sup>82</sup> 450 U.S. 398 (1981).

<sup>83</sup> 655 F.2d 848 (8th Cir. 1981), cert. granted, 50 U.S.L.W. 3934 (U.S. May 22, 1982) (Nos. 81-746, 81-1172).

is constitutionally permissible to require mature or 'best interests' minors to notify their parents prior to a court hearing in which they seek judicial consent for an abortion."<sup>85</sup> Citing the concurring opinion of Justices Powell and Stewart, the Eighth Circuit Court of Appeals held that the alternative procedures are necessary to sustain a notification requirement.<sup>86</sup> The circuit court acknowledged that the *Matheson* opinion explicitly "left open" the question, but they noted that since Justices Powell and Stewart would require the alternative procedures and since three other justices (Brennan, Marshall, and Blackmun) would not uphold any notice requirement, these five votes would clearly defeat a no-exceptions notice requirement. As mentioned earlier, Justice O'Connor's replacement of Justice Stewart makes her vote pivotal in this issue. At any rate, the Court will have its opportunity to answer the question in *Ashcroft*.<sup>87</sup>

A number of other issues related to consent were raised by the *City of Akron* and *Ashcroft* cases. For example, the Akron ordinance requires consent from one parent of a pregnant girl under fifteen, or from the court. The outcome of these issues will not affect the validity of a "mere requirement of parental notice."<sup>88</sup>

Although there are several issues which may yet be refined regarding parental involvement in a minor's abortion decision, the Court has clearly approved a notification requirement with alternative procedures for "mature" or "best interests" minors. Barring the possibility of outright reversal, a state legislature would appear to be safe in enacting a provision already tested and sustained if it reflects a policy which would meet with the approval of the lawmakers' constituents. In light of this conclusion, the next section will consider whether West Virginia parental notification bill is constitutional.

#### IV. WEST VIRGINIA'S PARENTAL NOTIFICATION STATUTE

##### A. *Legislative History of the West Virginia Bill*

In West Virginia, Senate bill No. 243<sup>89</sup> was introduced on January 25, 1982

<sup>84</sup> *Id.* at 859.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* It is expected that the Court will issue an opinion by mid-summer on the cases argued November 30, 1982.

<sup>88</sup> *H.L. v. Matheson*, 450 U.S. 398, 409 (1981).

<sup>89</sup> Senate Bill No. 243, Parental consent required for abortion performed on minors.

(a) No physician may perform an abortion upon an unemancipated pregnant woman under the age of eighteen years without first having given at least twenty-four hours actual notice to one of the parents or the legal guardian of the minor pregnant woman as to the intention to perform such abortion or if such parent or guardian cannot be reached after a reasonable effort to find him, without first having given at least forty-eight hours of notice of legislation and litigation which occurs over virtually every attempt to regulate abortion services is reminiscent of last known address of one of the parents or guardian, computed from the time of mailing.

(b) Notice under this section may be waived by the circuit court for the county in which the minor resides if the court finds that the minor is mature enough to make the abor-

and referred to the Committee on the Judiciary by Senator Odell Huffman. It required, in substance, that a physician notify the parents of unemancipated minors who intend to have an abortion twenty-four hours before performing the abortion. The requirement could be waived by a judicial determination that the minor is mature enough to make the decision independently or that it would not be in her best interests to notify her parents. The physicians failure to comply would be a misdemeanor, punishable by fine and imprisonment.

The bill was ultimately approved by the 1982 legislature but vetoed by the governor. The veto was based on a technical defect in the bill's title. The original title, "Parental Consent (sic)<sup>90</sup> Required For Abortion Performed on Minors" lacked the constitutionally required notice that violation of the bill could result in criminal prosecution. The governor said the title did not comport with the West Virginia Constitution<sup>91</sup> as interpreted in *State ex rel. Myers v. Wood*<sup>92</sup> in this respect. Other statutes meet this requirement by simply adding the word "penalties" following the title and a semicolon. For example, West Virginia's drunk driving law is titled "Driving under the influence of alcohol, controlled substances or drugs; penalties."<sup>93</sup>

The 1982 legislative session had already ended, and a special session to correct this minor flaw would be very costly, so the bill failed. George Carenbauer, the governor's legal advisor, refused to comment on whether the governor objected to the substantive content of the bill, saying it was not necessary to reach that question since they considered the bill constitutionally defective on its face.<sup>94</sup> The bill was reintroduced in 1983 with the appropriate addition—"penalties"—to the title.

On January 21, 1983, the bill was reintroduced by Senators Ash and Huffman and referred to the Committee on the Judiciary as Senate Bill No. 188.<sup>95</sup> This time the bill had several significant changes. The revised bill pro-

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tion decision independently or that notification would not be in the minor's best interests.

(c) This section does not apply where there is an emergency need for an abortion to be performed such that continuation of the pregnancy provides an immediate threat and grave risk to the life or health of the pregnant woman and the attending physician so certifies in writing.

(d) Any physician performing an abortion upon an unemancipated pregnant woman under the age of eighteen years shall provide the department of health a written report of the procedure within thirty days after having performed the abortion. The report shall be on a form and in the manner prescribed and provided by the director of the department of health.

(e) Anyone who violates this section is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than twenty dollars nor more than fifty dollars or imprisoned in the county jail not more than thirty days, or both fined and imprisoned.

<sup>90</sup> The title on the bill, as it was introduced, uses the word "consent", but the content of the bill only requires notice; so this is either a typo or a misstatement.

<sup>91</sup> W.Va. Const. art. VI, sec. 30.

<sup>92</sup> 154 W.Va. 431, 175 S.E.2d 637 (1970).

<sup>93</sup> W. VA. CODE § 17C-5-2 (Supp. 1982).

<sup>94</sup> Telephone interview with George Carenbauer, the governor's legal advisor (Jan. 25, 1983).

<sup>95</sup> Senate Bill No. 188, Parental notification required for abortion performed on minors; penalties.

vided that the child's maturity level be determined by a second disinterested physician, instead of the circuit court. The revised bill also attached an additional paragraph making it a felony for anyone other than a licensed physician to perform, or attempt to perform, an abortion on a minor. Several amendments were made after the bill was introduced, Bill No. 243 is the form in which the sponsors ultimately wished to enact the law. Certain modifications to Senate Bill No. 188 were made to conciliate opponents of the bill; although the sponsors hoped to amend these provisions after discussion of the bill and before a final reading and vote. These modifications either limit the effect of the bill or cast serious constitutional doubts on the bill. The modifications and other amendments made after the bill was introduced will be considered next.

### B. *Changes in the Original Legislation*

As mentioned earlier, significant changes were made in the form of the bill, since its inception as Senate Bill No. 243. Three significant changes were made: (1) Senate Bill No. 188 would allow a second disinterested physician (not performing the abortion) to make the determination of whether the pregnant minor is mature or the abortion would serve her best interest. This proce-

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- (a) No physician may perform an abortion upon an unemancipated pregnant woman under the age of eighteen years without first having given at least twenty-four hours actual notice to one of the parents or the legal guardian of the minor pregnant woman as to the intention to perform such abortion or if such parent or guardian cannot be reached after a reasonable effort to find him or her, without first having given at least forty-eight hours constructive notice to one of the parents or the legal guardian of the minor pregnant woman by certified mail to the last known address of one of the parents or guardian, computed from the time of mailing: *Provided*, That the parents may, in a personal interview with the physician, execute a written waiver of the twenty-four hour notice requirement of this section.
- (b) Notice under this section may be waived by a physician other than the attending physician if such physician finds that the minor is mature enough to make the abortion decision independently or that notification would not be in the minor's best interest: *Provided*, That such physician shall not be associated professionally or financially with the physician proposing to perform the abortion.
- (c) This section does not apply where there is an emergency need for an abortion to be performed such that continuation of the pregnancy provides an immediate threat and grave risk to the life or health of the pregnant woman and the attending physician so certifies in writing.
- (d) Any physician performing an abortion upon an unemancipated pregnant woman under the age of eighteen years shall provide the department of health a written report of the procedure within thirty days after having performed the abortion. The report shall be on a form and in the manner prescribed and provided by the director of the department of health. The report shall not contain the name, address or other information by which the woman receiving the abortion may be identified.
- (e) Anyone who violates this section is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than twenty dollars nor more than fifty dollars or imprisoned in the county jail not more than thirty days, or both fined and imprisoned.
- (f) Any person who, without being first duly licensed as a physician in this state, performs or attempts to perform an abortion upon another person who is an unemancipated pregnant woman under the age of eighteen years is guilty of felony, and, upon conviction thereof, shall be fined ten thousand dollars or imprisoned not less than ten years, or both fined and imprisoned.

ture would replace the judicial determination of Senate Bill No. 243. (2) Senate Bill No. 188 was amended to provide for waiver of the notification if the pregnant minor receives professional counselling. (3) Senate Bill No. 188 was further amended to require notification of the putative father's parents as well as the pregnant woman's parents. The first change was apparently a good faith attempt by the sponsors to conciliate opponents of the bill. But the other amendments were probably efforts by opponents to defeat the bill indirectly.

(1) Determination of "maturity" or "best interests" by second physician.—Substituting the second opinion of a disinterested physician for the judicial determination would surely subject the bill to judicial scrutiny, although it may be constitutional. In *Bellotti II*, Justice Powell said, "We do not suggest, however, that a State choosing to require parental consent could not delegate the alternative procedure to a juvenile court or an administrative agency or officer. Indeed, much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction."<sup>96</sup> In *Matheson* the concurring justices merely referred to "an independent decision maker,"<sup>97</sup> but whether this would extend to a disinterested physician is highly questionable.

(2) Professional counselling as substitute for notification.—The amendment of Senate Bill No. 188, providing for waiver of notification if the pregnant minor receives professional counselling, is constitutional inasmuch as it would clearly be less restrictive than provisions already sustained by the Supreme Court. The provision would, however, defeat the intent of the legislation. Most, if not all, private abortion clinics already have staff counselors who counsel the prospective patients. The inherent bias of a staff counselor would probably not serve the state's interests in parental involvement and informed decision making. Professor Lynn Wardle, whose *amicus* brief was relied on extensively by the Chief Justice in *H.L. v. Matheson*, said elsewhere, "(a) pregnant unmarried teen-age girl is especially vulnerable to the guiles and pressures of pro-abortion counselors outside the family whose commitment to her individually (as distinguished from commitment to the clinic or the 'cause') is questionable to begin with, and (unlike her parent's concern) transitory at best."<sup>98</sup>

Writing for the Court in *Matheson*, the Chief Justice said:

While the medical judgment of a physician of course is to be respected, there is no reason to believe as a general proposition that even the most conscientious physician's interest in the overall welfare of a minor can be equated with that of most parents. Moreover, abortion clinics, now readily available in most urban communities, may be operated on a commercial basis where abortions often may be obtained 'on demand'.<sup>99</sup>

It is unlikely that a perfunctory interview with a staff counselor at a private

<sup>96</sup> *Bellotti v. Baird*, 443 U.S. 622, 643 n.22 (1979) (plurality opinion (*Bellotti II*)).

<sup>97</sup> 450 U.S. at 420.

<sup>98</sup> L. WARDLE AND M. WOOD, *supra* note 13, at 88.

<sup>99</sup> 450 U.S. at 420 n.8 (emphasis added).

abortion clinic will change this.

(3) Notification to parents of putative father.—The amendment to Senate Bill No. 188 requiring notification to the parents of the putative father was a blatant attempt to make the law “unduly burdensome”<sup>100</sup> and thereby unconstitutional. Depending on the drafting of this provision and the inclusion of a severability clause, it might not completely invalidate the bill, but its purpose is transparent.

Considering the discussion in section II, the basic substantive provisions of Senate Bill No. 243 are constitutional. The bill provides for a judicial determination regarding whether the minor was mature enough to make her decision independently or whether for some reason notifying her parents would not be in her best interests. This would satisfy a majority of the Court. However, the modifications and amendments to Senate Bill No. 188 would create some constitutional problems, as previously discussed.

As the 1983 session of the legislature drew to a close, the bill had been amended many times. By the time it was ready for a final reading and a vote on the floor of the legislature, it still contained provisions which either defeated the sponsor’s intent or endangered its constitutional status. As a result, the bill was not put to a vote.

After overcoming the hurdle of drafting a constitutional bill, the legislature can devote its energy to deciding whether it should be enacted as a matter of policy. Some policy matters are discussed in the following section.

## V. POLICY

The “privacy” rights found in the penumbras of the United States Constitution encompass a woman’s decision to terminate her pregnancy by abortion.<sup>101</sup> Legislation restricting the exercise of such “fundamental” constitutional rights must be justified by some compelling state interest.<sup>102</sup> The Supreme Court has ruled that states may not enact laws which “unduly burden”<sup>103</sup> a woman’s right to choose to terminate her pregnancy, but, on the other hand, “[t]he Constitution does not compel a state to fine-tune its statutes so as to encourage and facilitate abortions.”<sup>104</sup> Parental involvement clearly burdens a minor’s abortion decision, and therefore, must be based on some compelling policy reasons.

The proponents of parental involvement argue that it is justified by the state’s interest in parental authority, family integrity, and protection of adolescents. The arguments against such involvement are based on a minor’s right to privacy. Within the permissible limits established by the Supreme Court precedent, each state must assign weight to these opposing interests, as it sees fit. Some of these interests are considered in this section.

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<sup>100</sup> See *Roe*, 410 U.S. 113.

<sup>101</sup> *Id.* at 153.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> 450 U.S. at 413.



### A. Parental Authority

Justice Marshall, dissenting in *Matheson*, concedes that “[t]his Court, of course, has recognized that the ‘primary’ role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”<sup>105</sup> Nevertheless, a long list of counselors and pro-abortion groups, submitting *amicus* briefs in the *Matheson* case<sup>106</sup> “insist that parents *must*, as a matter of constitutional law, be denied any favored position . . . in the competition over *who* will provide . . . counsel to pregnant adolescents.”<sup>107</sup>

The extreme egalitarianism of these groups is opposed to the traditional social structure as well as the history of the law. There is abundant precedent granting parental rights constitutional protection.<sup>108</sup> Chief Justice Burger noted in *Matheson* that “the short shrift given by the dissent to ‘parental authority and family integrity’ . . . runs contrary to a long line of constitutional cases in this Court.”<sup>109</sup> Justice Stewart noted, in *Parham v. J. R.*,<sup>110</sup> that “[f]or centuries it has been a canon of the common law that parents speak for their

<sup>105</sup> *Id.* at 447.

<sup>106</sup> In an *amicus* brief submitted on behalf of the state of Utah, Professor Lynn Wardle comments:

The list of *amici curiae* who have filed briefs urging that the parental notification law be declared unconstitutional underscores the point that the critical question in this case concerns *who* will be given the primary opportunity to counsel with minors, and dramatically suggests the very real *consequences* that will result if this Court nullifies the Utah law. *Amici* supporting Appellant include: The Planned Parenthood Federation of America, Inc., which operates 744 family planning clinics (some of which offer abortions) in 43 states and the District of Columbia (Brief of Planned Parenthood *Amici* at 2); the American Association of Sex Educators, Counselors and Therapists; the National Association of Social Workers, Inc., a “substantial portion of [whose] 80,000 members are employed in child welfare, in school social work and in family service agencies” (*id.* at 5), the American Public Health Association, with membership of over 50,000 “professional health workers and consumers” (*id.* at 4); the National Abortion Federation, “composed of both professional individuals and groups providing abortion services” (*id.* at 6). The members of these organizations are engaged in the business of offering counsel regarding abortion to pregnant women, including teenagers. Not surprisingly, they agree that mandatory abortion counselling is constitutionally appropriate (indeed necessary). But they insist that parents *must*, as a matter of constitutional law, be denied any favored position (mandatory notification) in the competition over *who* will provide that counsel to pregnant adolescents. (In fact, they artfully imply that since they are experts whose judgment would not be warped by emotional attachments, they ought to be preferred over amateur, emotionally involved parents. They fail to recognize that the parents will be dealing with their daughter for years to come, long after the “professionals” have disappeared from the scene.)

<sup>107</sup> *Id.*

<sup>108</sup> See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 639 n.18 (1979) (citing *Smith v. Organization of Foster Families*, 431 U.S. 816, 842-44 (1977)); *Carey v. Population Serv. Int'l*, 431 U.S. 678, 708 (1977) (Powell, J., concurring); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion); *Meyer v. Nebraska*, 262 U.S. 390 (1923). See also *Parham v. J.R.*, 442 U.S. 584, 602-05 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>109</sup> 450 U.S. at 411 n.18.

<sup>110</sup> 442 U.S. 584 (1979).

minor children."<sup>111</sup> In *Parham* the Court reflected on "[t]he law's concept of the family," saying that it "rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically, it has been recognized that natural bonds of affection lead parents to act in the best interests of their children."<sup>112</sup>

The chapter of the West Virginia Code dealing with child welfare speaks of the "fundamental rights of parenthood."<sup>112.1</sup> The right of parents to raise their children as they see fit is constitutionally protected.<sup>113</sup>

Constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our own society. It is cardinal with us that the custody, care, and nurture reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . *The legislature could properly conclude that parents and others . . . who have the primary responsibility for children's well being are entitled to the support of laws designed to aid discharge of that responsibility.*<sup>114</sup>

A parental notification statute arguably provides just such aid.<sup>115</sup>

### B. *Protection of Adolescents*

In 1968, the United States Supreme Court rejected the argument that no distinction between an adult and a minor was permissible regarding "the scope of . . . constitutional freedom."<sup>116</sup> The state may treat minors unequally, in some circumstances, to protect them from the consequences of their own immature judgment. The minor's capacity for sound discretion in regard to abortions is a subject of disagreement. For example, Justice Marshall joins those who believe the state should take a *laissez-faire* approach to adolescent abortions because "one can well argue that an adolescent old enough to make the decision to be sexually active . . ., and who then is responsible enough to seek professional assistance for his or her problem, is *ipso facto* mature enough to consent to his own health care."<sup>117</sup> Justice Burger disagrees, saying: "there is

<sup>111</sup> *Id.* at 621.

<sup>112</sup> *Id.* at 602.

<sup>112.1</sup> W.VA. CODE § 49-1-1 (1982 Supp.).

<sup>113</sup> See, e.g., *Parham v. J.R.*, 442 U.S. 584 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>114</sup> *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (emphasis added).

<sup>115</sup> Consider the fact that tort cases have been instituted against parents who failed in their obligations to guide their children properly and many states have "neglect" laws which impose a duty of appropriate care on the parents. See, e.g., CONN. GEN. STAT. § 46b-120 (1981), imposing on parents a duty to provide "adequate food, clothing, shelter, education and medical care," also, "proper care and attention emotionally and morally." See generally, Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756 (1981).

<sup>116</sup> *Ginsberg v. New York*, 390 U.S. 629, (1968) (Brennan, J., majority opinion).

<sup>117</sup> *H.L. v. Matheson*, 450 U.S. 398, 433 (1981) (Marshall, J., dissenting, quoting Hoffman, CONSENT AND CONFIDENTIALITY AND THEIR LEGAL AND ETHICAL IMPLICATIONS FOR ADOLESCENT MEDICINE, IN *MEDICAL CARE OF THE ADOLESCENT* 51 (J. Gallagher, F. Heald and D. Garrel eds. 3d

no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion."<sup>118</sup>

There seems to be little dispute over the proposition that the risks of physical and emotional complications after abortions are significantly greater among minors.<sup>119</sup> In *Matheson*, Chief Justice Burger cites medical authorities supplied by Professor Wardle's *amicus* brief to support the fact that "[a]bortion is associated with an increase of complications in subsequent pregnancies,"<sup>120</sup> and "[t]he emotional and psychological effects of the pregnancy and abortion experience are markedly more severe in girls under 18 than in adults."<sup>121</sup> The Chief Justice had earlier expressed the fear that "[m]any minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent and unethical."<sup>122</sup> Parents could provide badly needed guidance regarding this serious medical procedure.

One of the striking ironies of abortion policy is that it is treated so differently from other medical procedures. "As the law now stands, for no other medical procedure performed on a minor are parental rights as severely restricted by Constitutional doctrine. Indeed, in most states, virtually no other medical procedure can be performed on a minor without parental consent."<sup>123</sup>

Another protective factor is that parental involvement will help the doctor exercise his best medical judgment.<sup>124</sup> In initiating the current abortion policy, the Supreme Court clearly relied on physicians' commitment to consider "all factors physical, emotional, psychological, familial and the woman's age relevant to the well being of the patient,"<sup>125</sup> before recommending an abortion. Parental involvement fulfills this commitment. Physicians generally strongly recommend parental involvement when a minor desires an abortion.<sup>126</sup>

### C. *Family Integrity*

The state interest in preserving the integrity of the family tradition should not be passed over lightly. The family, as an institution, has historically en-

ed. 1976).

<sup>118</sup> 450 U.S. at 408.

<sup>119</sup> *H.L. v. Matheson*, 450 U.S. at 411 n.20.

<sup>120</sup> *Id.*, citing Maine, *Does Abortion Affect Later Pregnancies?* 11 *FAM. PLAN. PERSP.* 98 (1979).

<sup>121</sup> 450 U.S. at 408 n.20, citing Wallerstein, Kurtz & Bur-Din, *Psychological Sequelae of Therapeutic Abortions in Young Unmarried Women*, 27 *ARCH. GEN. PSYCHIATRY* 828 (1972); See also Babikial & Goldman, *A Study in Teen-age Pregnancy*, 128 *AM. J. PSYCHIATRY* 955 (1971).

<sup>122</sup> *Bellotti v. Baird*, 443 U.S. 622, 641 n.21 (1979) (*Bellotti II*).

<sup>123</sup> L. WARDLE & M. WOOD, *supra* note 13 at 89.

<sup>124</sup> *Id.*

<sup>125</sup> *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

<sup>126</sup> Hanson, *Abortion in Teenagers*, 21 *CLIN. OB. AND GYN.* 1175, 1180-81 (1978); Butler & Fujtu, *Abortion Screening and Counselling: A Brief Guide for Physicians*, 50 *POST GRAD. MED.* 208, 212 (1971); American Academy of Pediatrics, *Pregnancy and Abortion Counselling*, 63 *PEDIATRICS* 920, 921 (1979); Perez-Reyes & Falk, *Follow-up After Therapeutic Abortion in Early Adolescence*, 28 *ARCH. GEN. PSYCHIATRY* 120, 124 (1973).

joyed a preferred status as a mechanism for support and conflict resolution. Defeat of legislation facilitating parental involvement in important moral decisions of their children is tantamount to an institutional vote of "no confidence" to the family tradition. Rejecting the legislation in order to protect those few minors whose parents will not act in the best interests of their child is like the proverbial burning the barn to kill the rat.

Shortly after the *Roe v. Wade* decision, commentators anticipated the impact on families. They wrote:

[T]he family unit does not simply co-exist with our constitutional system; it is an integral part of it. In democratic theory as well as in practice, it is in the family that children are expected to learn the values and beliefs that democratic institutions later draw on to determine group directions. The immensely important power of deciding about matters of early socialization has been allocated to the family, not the government.<sup>127</sup>

#### D. *The Minor's Right to Choose*

Opponents of parental involvement dispute the minor's lack of judgment, saying, "a minor's abortion decision in itself tends to show the foresight and deliberation that mark mature decision making."<sup>128</sup> They bolster their opposition by predicting dire consequences if parental notice is mandatory. For example, a student commentator wrote:

The effects of requiring parental notification can be dramatic. One study on the probable impact of parental notification estimates tht 19,000 minor women would resort to self-induced or illegal abortions and that 18,000 more minor women would bear unwanted children, were parental notification required. In addition, another 5,000 minors would run away from home either to have the unwanted child or to obtain an illegal abortion. If the minor woman gives birth as a result of parental pressure, there are increased health risks to the child. For example, the infant death rate is higher for children born to women under twenty and minor women are far more likely to have premature, or low-birth-weight babies.<sup>129</sup>

These arguments demonstrate the diametric disagreement of proponents and opponents of parental involvement, underscoring the need for legislatures to determine the opinions of their constituencies on this divisive issue. In West Virginia no effort has been made by the legislature to ascertain public opinion on this issue, other than that represented by lobbyists or participants in public hearings on the bill.<sup>129.1</sup>

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<sup>127</sup> Heymann & Barzelay, *The Forest and the Trees; Roe v. Wade and its Critics*, 53 B.U.L. REV. 765, 772-73 (1973).

<sup>128</sup> Dembitz, *The Supreme Court and the Minor's Abortion Decision*, 80 COLUM. L. REV. 1251, 1262 (1980).

<sup>129</sup> Comment, *Parental Notification: A State Created Obstacle to a Minor's Right to Privacy*, 12 GOLDEN GATE L. REV. 579, 587 (1982). The Golden Gate Law Review Comment and the article cited in note 128, *supra*, are typical of recently published material opposing parental involvement in the minor's abortion decision. This Note does not undertake to present the policy arguments against parental involvement. They are adequately, indeed vigorously, presented elsewhere.

<sup>129.1</sup> The author of this Note attempted to obtain funds to commission a public opinion poll,

VI. MODEL STATUTE<sup>130</sup>

In order to accurately define the policy of parental notice and to properly present the issue to the legislature, the bill presented to the legislators must be constitutionally sound. This Note has attempted to illuminate the essential provisions of such a bill. The conclusion has been asserted that Senate Bill No. 243 meets these standards. The bill could, however, be improved. Therefore, this section suggests a model parental notice statute which may clarify the meaning and intent of the bill and protect it against judicial challenge.

Although the major substantive provisions of a constitutional parental notice statute seem to be settled, opponents of the statute will continue to look for chinks in the law. The following discussion and recommended provisions are an attempt to anticipate such challenges.

The statute should contain sections on: (1) legislative intent, (2) definitions, (3) the basic notice requirement, with an opportunity for the minor to have a judicial determination of her "maturity" or "best interests" if she desires one, (4) mandatory procedures relating to the judicial determination, (5) emergency exceptions to the notice requirement, (6) penalties for violation of the statute, including scienter (state of mind) requirements, (7) a requirement that the abortion be reported to a state agency without identifying the patient, and (8) a severability clause. Following are sample sections and an explanation of each:

§ (1) *Legislative Intent.*

In accordance with the U.S. Supreme Court's decisions in *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*), and *H.L. v. Matheson*, 450 U.S. 398 (1981), which acknowledge the existence of important and compelling state interests in 1) protecting minors against their own immaturity; 2) fostering the family structure and preserving it as a viable social unit; and 3) protecting the rights of parents to rear their children in their own household, it is the intent of the legislature to further these interests by enacting this parental notice provision. The legislature finds as fact that 1) immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences; 2) the medical, emotional and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature; 3) the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not logically related; 4) parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child; 5) parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after her abortion. The legislature further finds that parental consultation is usually desirable and in the best interests of the minor.

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but was unable to do so. An issue of this magnitude should merit such a study.

<sup>130</sup> This model notice statute is adapted from a model statute recommended by Americans United For Life, Legal Defense Fund, 230 N. Michigan # 915, Chicago, Ill. 60601, (312) 263-5029. The discussion in this section is based on material supplied by Americans United for Life, Legal Defense Fund, 230 N. Michigan # 915, Chicago, Ill. 60601, (312) 263-5029. The model statute is adapted from the statute which they recommend.

Particularly in states like West Virginia which do not maintain records of legislative history (e.g. hearings, committee reports, and floor debates), including a section which sets out the legislative intent is helpful. It ensures that all the legislators who voted in favor of the law understood its purpose and intent. A statement of legislative intent obviates the possibility of an attack on the basis of unconstitutional intent, and it frames the issues for litigation.<sup>131</sup>

§ (2) *Definitions.*

For purposes of this Act, the following definitions will apply:

- (a) "minor" means any person under the age of 18;
- (b) "emancipated minor" means any minor who is or has been married or has by court order otherwise been freed from the care, custody, and control of her parents;
- (c) "actual notice" means the giving of notice directly, in person or by telephone;
- (d) "constructive notice" means the giving of notice by certified mail to the last known address of the parent(s) or legal guardian;
- (e) "abortion" means the use of any instrument, medicine, drug or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant with intent other than to cause live birth.

Although there do not appear to be any definitions in the West Virginia Code which conflict with important terms in this notice statute, providing definitions which expressly apply to the statute precludes any possible conflict. This measure may also prevent a challenge on the grounds of vagueness.<sup>132</sup>

§ (3) *Parental Notice Required.*

(a) No physician may perform an abortion upon an unemancipated minor unless he or his agent has given at least twenty-four (24) hours actual notice to one of the parents or to the legal guardian of the minor pregnant woman of his intention to perform the abortion, or, if the parent or guardian cannot be reached after a reasonable effort to find him or her, without first having given at least forty-eight (48) hours constructive notice computed from the time of mailing to the parent or to the legal guardian of the minor. If neither parent nor the legal guardian is available to the person performing the abortion within a reasonable time or manner, notice to any adult person standing in *loco parentis* shall be sufficient.

(b) A minor who objects to notice being given her parent or legal guardian under this section may petition, on her own behalf or by next friend, the circuit court in 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 4 of this Act.

The basic provisions in this section have been discussed throughout this Note, but special care has been taken to draft this section so that it cannot be construed to be unduly burdensome. This section allows a physician "or his agent" to notify parents. This prevents a challenge on the basis of undue expense and burden caused by requiring the physician to personally locate and

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<sup>131</sup> Americans United For Life, Permissible Parental Involvement In the Minor's Abortion Decision, 9-10 (unpublished memorandum).

<sup>132</sup> See *also Id.* at 12-13.

notify the parents.<sup>133</sup> This section also allows notice to only one parent which reduces the burden in cases where parents are divorced and one or both are hard to locate.

The twenty-four and forty-eight hour delay provision should not be a problem. Indeed, the whole policy of parental involvement would be a sham if parents were not given time to advise their daughter and possibly consult with the physician. The statute could be attacked on the ground that its requirements are not rationally related to its purpose if some reasonable delay is not provided.<sup>134</sup>

The judicial determination of subsection (b) satisfies the alternative procedures requirement discussed earlier in this Note,<sup>135</sup> but this judicial procedure must be carried out fairly and expeditiously or it may be subject to challenge.<sup>136</sup> Therefore, mandatory procedures are set out in the next section.

§ (4) *Judicial Proceedings.*

(a) The requirements and procedures under this Act apply and are available to minors whether or not they are residents of this State.

(b) The minor may participate in proceedings in the court on her own behalf and the court shall appoint a guardian *ad litem* for her. The court shall advise her that she has a right to court appointed counsel and shall provide her with such counsel upon her request or if she is not already adequately represented.

(c) Court proceedings under this section shall be confidential and 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.

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

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

(ii) That notification of those to whom section 3 of this Act requires notice be given would not be in the best interests of the minor.

(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 to any minor to whom the court denies a waiver of notice. The Supreme Court of Appeals shall issue promptly such rules as are necessary to preserve confidentiality and to ensure the expeditious disposition of procedures provided by this section.

(g) No filing fees shall be required of any minor or incompetent who avails herself of the procedures provided by this section.

The provision making this statute applicable to nonresidents prevents an attack on the basis that the law violates the Privileges and Immunities Clause of the United States Constitution.<sup>137</sup> The mandatory expedited hearing and

<sup>133</sup> Charles v. Carey, 627 F.2d 772, 784 (7th Cir. 1980).

<sup>134</sup> See H. L. v. Matheson, 450 U.S. at 412; Hodgson v. Minnesota, No. 3-81 CIV. 538 (D. Minn. Mar. 23, 1982); Planned Parenthood v. Pearson, No. IP 82-1766-C (S.D. Ind. Oct. 11, 1982).

<sup>135</sup> See *supra* text accompanying notes 40-88.

<sup>136</sup> See Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978).

<sup>137</sup> U.S. CONST. art. IV, sec. 2. See Planned Parenthood v. Pearson, No. IP 82-1766-C (S.D.

appeal would prevent an attack such as one which was successful in the Seventh Circuit Court of Appeals. In *Wynn v. Carey*,<sup>138</sup> the circuit court said that, “[b]ecause of the fundamental nature of the rights involved, because of the lack of legal sophistication of minors generally, and because of the urgency inherent in an abortion decision itself, it is imperative that the procedures be spelled out in detail in the statute itself.”<sup>139</sup> The other various provisions of this section are drafted to ensure that the judicial procedures are uniform, fair, expeditious, and inexpensive.

§ (5) *Exception.*

This section does not apply where there is an emergency need for an abortion to be performed such that continuation of the pregnancy provides an immediate threat and grave risk to the life or health of the pregnant woman and the attending physician so certifies in writing.

Without this section the statute would clearly be unduly burdensome, even dangerous.

§ (6) *Reporting.*

Any physician performing an abortion upon an unemancipated minor shall provide the department of health a written report of the procedure within thirty days after having performed the abortion. The report shall be on a form and in the manner prescribed and provided by the director of the department of health. The report shall not contain the name, address or other information by which the woman receiving the abortion may be identified.

This section serves a number of salutary purposes such as aiding medical research and guiding the government in allocating funds to health care agencies. The requirement imposes a minimal burden on the physician. Further, if the section is deemed too burdensome, it can be severed without invalidating the remainder of the statute.<sup>140</sup>

§ (7) *Penalties.*

Any person who performs an abortion with knowledge that, or with reckless disregard as to whether, the person upon whom the abortion is performed is an unemancipated minor, and who intentionally, knowingly, and recklessly fails to conform to any requirement of this statute is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than twenty dollars nor more than fifty dollars or imprisoned in the county jail not more than thirty days, or both fined and imprisoned.

This section provides the critical *scienter* requirement which is necessary when a criminal penalty is imposed.<sup>141</sup>

§ (8) *Severability.*

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 af-

Ind. Oct. 11, 1982).

<sup>138</sup> 582 F.2d 1375 (7th Cir. 1978).

<sup>139</sup> *Id.* at 1389; See also *Bellotti v. Baird*, 428 U.S. 132, 144-45 (1976) (*Bellotti I*) and *Planned Parenthood v. Bellotti*, 641 F.2d 1006, 1011 (1st Cir. 1981).

<sup>140</sup> *Cf.* 18 PA. CONS. STAT. ANN. § 3214 (1982).

<sup>141</sup> See *Colautti v. Franklin*, 439 U.S. 379 (1979).



fect 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.

This type of provision is commonly used to save constitutional provisions of a statute where other distinct provisions in a statute are not valid.<sup>142</sup>

In this matter of constitutional hair-splitting, the drafting of the bill is a critical task. The proposed provisions set out above may not be immune to every possible assault—there are some very imaginative constitutional lawyers out there—but, in light of the litigation and literature to date, it appears to be quite sound.

## VII. CONCLUSION

In the decade since national abortion policy was revolutionized by *Roe v. Wade*, the controversy has not diminished but increased. A particularly emotional issue is the abortion rights of minors. Laws requiring parental involvement in their minor daughter's abortion decision have met with varying degrees of success nationwide. West Virginia's legislature has failed to enact a parental notification law which was introduced and considered in both 1982 and 1983. The bill in its original form (Senate Bill No. 243) meets the standards suggested by the Supreme Court of the United States in the *Danforth*, *Bellotti*, and *Matheson* cases. The law serves important state interests which justifies the added burden on a minor's abortion decision. The legislature should determine whether the policy of parental involvement is consistent with the values of West Virginians and act on such a bill accordingly. This Note also suggests a model statute which is designed to clarify the legislature's meaning and intent and avoid some problems of implementation.<sup>143</sup>

*David W. Frame*

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<sup>142</sup> See e.g., West Virginia Uniform Gifts to Minors Act, W. VA. CODE § 36-7-11 (1982 Supp.).

<sup>143</sup> The entire text of the model notice statute is set out below:

Parental notification required for abortion performed on minors; penalties.

§ (1) *Legislative Intent.*

In accordance with the U.S. Supreme Court's decisions in *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*), and *H.L. v. Matheson*, 450 U.S. 398 (1981), which acknowledge the existence of important and compelling state interests in 1) protecting minors against their own immaturity, 2) fostering the family structure and preserving it as a viable social unit, and 3) protecting the parental rights as severely restricted by Constitutional doctrine. Indeed, in most states, virtually no other medical proceduts by enacting this parental notice provision.

The legislature finds as fact that 1) immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, 2) the medical, emotional and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature, 3) the the current abortion policy, the Supreme Court clearly relied on physicians' commitment to consider "all factors physical, eted, 4) parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child, 5) parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after her abortion. The legislature further finds that parental consulta-

tion is usually desirable and in the best interests of the minor.

§ (2) *Definitions.*

For purposes of this Act, the following definitions will apply:

- (a) "minor" means any person under the age of 18;
- (b) "emancipated minor" means any minor who is or has been married or has by court order otherwise been freed from the care, custody, and control of her parents;
- (c) "actual notice" means the giving of notice directly, in person or by telephone;
- (d) "constructive notice" means the giving of notice by certified mail to the last known address of the parent(s) or legal guardian;
- (e) "abortion" means the use of any instrument, medicine, drug or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant with intent other than to cause live birth.

§ (3) *Parental Notice Required.*

(a) No physician may perform an abortion upon an unemancipated minor unless he or his agent has given at least twenty-four (24) hours actual notice to one of the parents or to the legal guardian of the minor pregnant woman of his intention to perform the abortion, or, if the parent or guardian cannot be reached after a reasonable effort to find him or her, without first having given at least forty-eight (48) hours constructive notice computed from the time of mailing to the parent or to the legal guardian of the minor. If neither parent nor the legal guardian is available to the person performing the abortion within a reasonable time or manner, notice to any adult person standing in *loco parentis* shall be sufficient.

(b) A minor who objects to notice being given her parent or legal guardian under this section may petition, on her own behalf or by next friend, the circuit court in 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 4 of this Act.

§ (4) *Judicial Proceedings.*

(a) The requirements and procedures under this Act apply and are available to minors whether or not they are residents of this State.

(b) The minor may participate in proceedings in the court on her own behalf and the court shall appoint a guardian *ad litem* for her. The court shall advise her that she has a right to court appointed counsel and shall provide her with such counsel upon her request or if she is not already adequately represented.

(c) Court proceedings under this section shall be confidential and 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.

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

- (i) That the minor is mature and well-informed enough to make the abortion decision on her own, or
- (ii) That notification of those to whom section 3 of this Act requires notice be given would not be in the best interests of the minor.

(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 to any minor to whom the court denies a waiver of notice. The Supreme Court of Appeals shall issue promptly such rules as are necessary to preserve confidentiality and to ensure the expeditious disposition of procedures provided by this section.

(g) No filing fees shall be required of any minor or incompetent who avails herself of the procedures provided by this section.

§ (5) *Exception.*

This section does not apply where there is an emergency need for an abortion to be performed such that continuation of the pregnancy provides an immediate threat and grave risk to the life or health of the pregnant woman and the attending physician so certifies in writing.

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§ (6) *Reporting.*

Any physician performing an abortion upon an unemancipated minor shall provide the department of health a written report of the procedure within thirty days after having performed the abortion. The report shall be on a form and in the manner prescribed and provided by the director of the department of health. The report shall not contain the name, address or other information by which the woman receiving the abortion may be identified.

§ (7) *Penalties.*

Any person who performs an abortion with knowledge that, or with reckless disregard as to whether, the person upon whom the abortion is performed is an unemancipated minor, and who intentionally, knowingly, and recklessly fails to conform to any requirement of this statute is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than twenty dollars nor more than fifty dollars or imprisoned in the county jail not more than thirty days, or both fined and imprisoned.

§ (8) *Severability.*

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.