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THE ILLINOIS ABORTION PARENTAL CONSENT ACT OF 1977: A FAR CRY FROM PERMISSIBLE CONSULTATION

INTRODUCTION

In *Griswold v. Connecticut* the Supreme Court legitimized the claim that the Constitution contains a right of privacy protecting an individual's right to retain the decision-making authority in matters of intimate personal choice. As an outgrowth of the *Griswold* decision, the Supreme Court acknowledged in *Roe v. Wade* that an adult female, in consultation with her physician, has the right to terminate an unwanted pregnancy within the first trimester. The Court relied, as it had in *Griswold*, on the concept of a constitutional right to personal privacy in matters "deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" But the *Roe* Court expressly rejected any assertion "that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses."

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1. 381 U.S. 479 (1965).
2. Id. at 485.
4. Id. at 153.
5. Id. at 152. Three cases prior to *Roe* illustrate the Court's initial pangs in defining and establishing a right of privacy and giving it an origin. The leading case acknowledging a right of privacy is *Griswold v. Connecticut*, 381 U.S. 479 (1965), wherein Justice Douglas, writing for the majority, found that the Bill of Rights has certain "penumbras, formed by emanations from those guarantees that help give them life and substance," from which the right of privacy is derived. 381 U.S. at 484. Justice Douglas relied on the first amendment as applied to the states to find a right of privacy in the Constitution through the fourteenth amendment and a possible role for the ninth amendment which Justice Goldberg expounded on in his concurring opinion. 381 U.S. at 486-89. Following *Griswold*, *Wyman v. James*, 400 U.S. 309 (1971), and *Stanley v. Georgia*, 394 U.S. 557 (1969), began to limit the breadth of this recently created right. In *Stanley* the Court did not rely on *Griswold* to find that a Georgia statute criminalizing the possession of obscene literature was unconstitutional. Relying on the first and fourteenth amendments, the Court held that "also fundamental is the right to be free, except in . . . limited circumstances, from unwarranted governmental intrusions into one's privacy." 394 U.S. at 564. In *Wyman* the Court held that a New York requirement that persons on public assistance admit caseworkers into their homes was "not an unwarranted invasion of personal privacy." 400 U.S. at 326. *Roe* held that regardless of where the right emanated from, it was clear that a right of privacy did exist though "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy." 410 U.S. at 152.
6. 410 U.S. at 153. Prior to the end of the first trimester an adult wo-
The state still retained an interest which must be weighed against the woman's right to privacy. The longer the pregnancy continued, the greater the state interest became in the health of the mother, the qualifications of both the physician and the facility performing the abortion, and the protection of potential life.

Griswold and Roe not only recognized a right of personal privacy in areas dealing with marriage and family, but elevated the right to a status that only a showing of "compelling" state interest could derogate. In the abortion area since Roe, most states have not subscribed to the establishment of this newly found right of privacy. Instead, the states have tested the extent of their interest in controlling the abortion decision on a step-by-step, case-by-case basis.7

There has recently been enacted legislation that substantially burdens the woman's decision to abort in consultation with her physician.9 One of the areas addressed by this legislation and unresolved in Roe is the scope of a minor's right to privacy. The extent of a minor's right to privacy has been defined by cases contesting the constitutionality of parental consent statutes. These statutes require the minor to obtain the consent of a parent, or parents, prior to obtaining an abortion.9

The first case to test the constitutionality of a parental consent statute for minors seeking elective abortions10 was Planned Parenthood of Missouri v. Danforth.11 In Danforth the Supreme Court held that it is unconstitutional for the state to impose a blanket veto "requiring the consent of a parent or person in loco parentis as a condition for an abortion of an unmarried minor. . . ."12

The importance of the Danforth decision is that in finding this portion of the Missouri statute unconstitutional,13 the Court

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7. See notes 18 & 22 infra.
8. Id.
9. 410 U.S. at 165 n.67.
10. An elective abortion is one chosen by the woman for reasons other than the fact that continued pregnancy would endanger her life or seriously impair her health; the fetus would likely be born with a serious defect; or the pregnancy resulted from rape.
12. Id. at 74. (emphasis in original).
13. Mo. Ann. Stat. § 188.020-0.040 (Vernon 1976) states in relevant part:
   Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:
   
   (4) With the written consent of one parent or person in loco parentis
for the first time expressly recognized that a minor, like an adult, has a right of privacy in personal decision-making matters. Although the Danforth Court did not delineate the limits of the minor's right to privacy, the Court did intimate that this right was subject to qualification.

In response to the Supreme Court's decision in Danforth, the Illinois legislature has enacted the Illinois Abortion Parental Consent Act of 1977, (hereinafter referred to as the Illinois Act). The Illinois Act is similar to the Missouri statute challenged in Danforth, but does differ in one important respect. The Illinois Act, in order to avoid the Danforth proscription against blanket vetos, permits a minor, who is otherwise refused parental consent, to obtain a judicial consent order allowing the minor to have an abortion. This Act in pertinent part provides:

If such [parental] consent is refused or cannot be obtained, consent may be obtained by order of a judge of the circuit court upon a finding, after such hearing as the judge deems necessary, that the pregnant minor fully understands the consequences of an abortion to her and her unborn child and has achieved sufficient maturity to assume full responsibility for her decision. . . .

The Illinois Act attempts to abide by the Court's decisions in Roe and Danforth; yet it also attempts to circumvent these holdings since it vests almost total control of the minor's decision to abort in third parties. Whether or not this difference in the Illinois Act is consistent with the Court's decisions in Roe and Danforth remains an unanswered question.

The purpose of this comment is to analyze the constitutionality of the Illinois Act against the background of federal and state decisions that have balanced the interests of the state, the parents, and the minor. In addition this comment will also explore the viable alternatives which would on one hand appease the interests of all the parties, and on the other, be within the bounds mandated by the Supreme Court and the United States Constitution.

DANFORTH'S LEGACY

The wealth of scholarly commentary and litigation over
parental consent statutes culminated in *Planned Parenthood of Missouri v. Danforth.* In *Roe v. Wade* the sole issue was the state's authority to interfere with a female adult's right to make an independent choice on whether to bear a child; in *Danforth,* however, the issue was the state of Missouri's authority to allow parental interference in a minor's right to decide whether to have an abortion. Missouri contended that this interference issue in the *Danforth* decision, but do not address a statute which provides a judicial procedure similar to that proposed in the Illinois Act of 1977. Note, Constitutional Law: Abortion, Parental and Spousal Consent Requirements, Right to Privacy, 10 Akron L. Rev. 367 (1976); Comment, Right To Abortion: The End of Parental and Spousal Consent Requirements, 31 Ark. L. Rev. 122 (1977); Note, Constitutional Law—Abortion—Statute Requiring Spousal and Parental Consent Declared Unconstitutional, 7 Cumb. L. Rev. 539 (1977); Comment, Parental Consent Abortion Statutes: The Limits of State Power, 52 Ind. L.J. 337 (1977); Comment, Third Party Consent to Abortion Before and After Danforth: A Theoretical Analysis, 15 J. Family L. 508 (1977); Comment, Abortion Statutes After Danforth: An Examination, 15 J. Family L. 537 (1977); Comment, Abortion—Possible Alternatives to Unconstitutional Spousal and Parental Provisions of Missouri's Abortion Law, 42 Mo. L. Rev. 291 (1977); Comment, Abortion: An Unresolved Issue—Are Parental Consent Statutes Unconstitutional?, 55 Neb. L. Rev. 256 (1976); Comment, Right To an Abortion—Problems with Parental and Spousal Consent, 22 N.Y.L.S.L. Rev. 65 (1976); Note, Planned Parenthood v. Danforth: Resolving the Antinomy, 4 Ohio N. L. Rev. 425 (1977); Note, Constitutional Law—Blanket Parental Consent Requirement For Minor's Abortion Decision Is Unconstitutional, 8 Tex. Tech. L. 394 (1976); Comment, Validity of Parental Consent Statutes After Planned Parenthood, 54 U. Det. Urb. L. Rev. 127 (1976); Comment, Sexual Privacy: Access of a Minor to Contraceptives, Abortion, and Sterilization Without Parental Consent, 12 U. Richmond L. Rev. 221 (1977); Comment, Elimination of Spousal and Parental Consent Requirements for Abortion, 16 Washburn L.J. 462 (1977).


21. *Roe* held that the state cannot interfere with an adult woman's decision to abort during the first 12 weeks of her pregnancy. 410 U.S. at 164.

22. Missouri's consent statute, in relevant part, states:

Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

1. By a duly licensed, consenting physician in the exercise of his best clinical judgment.

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

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


Other states having consent statutes are:

did not infringe upon a minor's constitutional right of privacy because of the parents' purported right to control and to determine his children's actions.23 Missouri justified its parental consent statute not upon a compelling state interest in protecting the minor, but upon the alleged historical authority which parents have maintained in the rearing of their children. Thus the state of Missouri, in Danforth, argued that the parents' right to control the upbringing of their children outweighed the minor's right to an abortion. Such a right, alleged the state, created in the words of the Roe Court, an interest "sufficiently compelling to sustain regulation of factors that govern the abortion decision."24 In prior Supreme Court cases the argument had been made that a minor was not yet "possessed of that full capacity for individual choice"25 which is an essential ingredient to the exercise of various constitutionally protected interests. This incapacity therefore justified the parents' right to impinge upon the minor's ability to control her own destiny.

The subordinate position of minors to make decisions affecting themselves echoes the historical foundation from which the parent's assertion of unfettered discretion over their children's affairs is rooted. This attitude stems from early common law notions of the status of minors. Like wives, minors were deemed to be personal property and, hence, were not allowed to assert their own legal rights. A fortiori, minors were not able to

23. Constitutional interpretation has consistently recognized that the parent's claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, where privacy function and freedom include preparation for obligations the state can neither supply nor hinder. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

24. 410 U.S. at 154.

25. Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring). Ginsberg involved the constitutionality of a New York penal law which prohibited the sale of obscene material to a minor under the age of 17. The Court found the law constitutional, relying on the state's greater authority to control the conduct of minors than of adults.
assert any constitutional rights.  

The Supreme Court rejected the concept of children as chattel in In re Gault, wherein the Court held that "neither the Fourteenth Amendment, nor the Bill of Rights is for adults alone." The decision in Gault, however, was expressly restricted to a minor's procedural guarantees in juvenile proceedings under the due process clause; it did not provide any guideline by which to determine the constitutional rights of a minor in other areas. Subsequent to Gault, the Supreme Court has still not provided any yardstick by which to measure the minor's constitutional rights; preferring to extend only certain first amendment, due process, and equal protection rights to minors on a case-by-case basis.


27. 387 U.S. 1 (1967). In re Gault focused on the constitutionality of the Arizona juvenile code and the procedure used when juveniles are charged as delinquents. Gault involved a 15 year-old who was committed to the state industrial school until he reached majority, for making lewd telephone calls. The minor was denied the same procedural due process rights accorded adults charged with a criminal offense. Relying on Haley v. Ohio, 332 U.S. 596 (1948) and Gallegos v. Colorado, 370 U.S. 49 (1962) the Court found this to be an unconstitutional deprivation of a minor's right to due process of law.

In Haley the Court held that the procedural due process rights of a 15 year-old minor were violated when he signed a confession to murder after 5 hours of questioning without benefit of counsel or any friend to advise him of his rights. In Gallegos the court again found the rights of a minor violated when he was convicted of murder based on a confession which was the result of 5 days of incarceration without opportunity to see a lawyer, a parent or other friendly adult.

28. 387 U.S. at 13. See also Breed v. Jones, 421 U.S. 519 (1975) (prosecution of 17 year-old as an adult following a juvenile proceeding finding the youth guilty of violating a criminal statute, and a subsequent finding that he was unfit for treatment as a juvenile, violated minor's fifth and fourteenth amendment rights); Goss v. Lopez, 419 U.S. 565 (1975) (high school student denied due process of law in violation of fourteenth amendment when temporarily suspended without a hearing); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) (minor's freedom of speech under first amendment was violated when suspended from school for wearing armbands protesting the government's policy in Vietnam).

29. See generally In re Winship, 397 U.S. 358 (1970) (where the standard of proof for an adult when a crime has been committed is beyond a reasonable doubt, the same proof must be accorded juveniles charged with an act which would constitute a crime for adults, and failure to do so is a denial of due process); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) (suspension from school for wearing armbands protesting Vietnam war violates first amendment) Levy v. Louisiana, 391 U.S. 68 (1968) (preclusion of illegitimate child from recovering from wrongful death of mother created an invidious discrimination in violation of the equal protection clause of the fourteenth amendment); In re Gault, 387 U.S. 1 (1967) (see note 28 supra); School Dist. of Abington v. Schempp, 374 U.S. 203 (1963) (requirement of reciting lord's prayer at beginning of school day vio-
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The Supreme Court's indolence in granting minors the same constitutional rights accorded adults is the result of two factors. First, there is the greater control that a state preserves over a minor than an adult; second, there is the right of parents to raise their children as they see fit. In many controversies, these two interests are in conflict with each other. In controversies involving parental consent statutes, like Illinois', the unique situation occurs in which the state and the parents interests are aligned against the interest of the minor. The state is acting to protect the parent's rights as a vehicle to establish the compelling state interest to justify impingement on the minor's limited right of privacy. This nonrecognition of a minor's personal freedom stems from the state's historic interest in the well-being of its youth. Also, the preservation of the family, a hallowed fundamental institution of our society, is another consideration that augments the legal deference given to a parent.

Federal and state courts have noted two important qualifications to the deference given the state and the parents with regard to their interests in the upbringing and welfare of the


30. See Ginsberg v. New York, 390 U.S. 629, 638 (1968) “[E]ven where there is an invasion of protected freedoms ‘the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.” Prince v. Massachusetts, 321 U.S. 158, 168 (1944) “The state’s authority over children’s activities is broader than over like actions of adults.” (No denial of equal protection in excluding children of particular religious sect from using the streets for a purpose which is prohibited by all other children).

31. See Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) “The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” In Pierce the Supreme Court held unconstitutional an Oregon law requiring the parent, guardian, or other person having custody of a child between 8 and 16, to send that child to public school on pain of criminal liability. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (the liberty protected by the due process clause of the fourteenth amendment includes the right “to . . . bring up children” as one sees fit, and concomitantly, the right to send one’s child to a private school that offers specialized training in a foreign language).

32. See generally note 26 supra.

33. Stanley v. Illinois, 405 U.S. 645 (1972) (the state violates the due process rights of its citizens when it presumes that unwed fathers are unsuitable or neglectful parents). The Court stated that the interest “of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.” Id. at 651 (emphasis added).
minor. First, "[w]here minors' rights have been held subject to curtailment by the state in excess of that permissible in the case of adults it has been because some peculiar state interest existed in the regulation and protection of children, not because the rights themselves are of some inferior kind." Second, the cases which have upheld parental rights to control the conduct of children have not involved a conflict between the fundamental rights of each, with the state taking the parents' side; rather the cases involve joint opposition by parent and child against the state.

It was against this background that the Court in Danforth had to decide an issue not previously confronted: can the interests of the state and the parent, in controlling adolescent activity, outweigh the minor's interest in determining whether to bear a child? If answered in the affirmative, a direct conflict would arise since the state would then be allowed to grant a blanket veto to a parent in a matter which had already been deemed a fundamental right of an adult woman.

The Danforth Decision

In Danforth, the Court recognized the somewhat broader authority of the state and the parents to regulate the activities of children than that of adults. The Court, however, realized that this authority is not absolute and must yield to the constitutional rights of the child. The Danforth Court held that the state must show a "compelling interest" and a rational relationship between the state statute and that interest to justify "an absolute, and possibly arbitrary, veto over the decision of the physician and his patient."

By implicitly employing a substantive due process analysis, weighing the fundamental right of the minor against the asserted "compelling interest" of the state, the Danforth Court did

35. 84 Wash. 2d at 904, 530 P.2d at 263.
37. 428 U.S. at 74.
38. Id.
acknowledge that it was dealing with a right, established in Roe, which is so fundamental and personal that "[i]nasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between [the parent and the child] the balance [therefore] weighs in [the minor's] favor",39 and a "state may not impose a blanket provision, . . ., requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first twelve weeks of her pregnancy."40 The qualified right found to be possessed by the adult woman in Roe is now also possessed by the minor, and is deemed fundamental. The degree to which the interests of the parent and the state may delimit the minor's interest is the essence of the problem presented by the Illinois Act. The rationale of the Danforth decision provides some insight into resolving this issue.

The Danforth Rationale

In determining the degree to which the Court would acknowledge a minor's fundamental right to an abortion, as compared with an adult's, the Court in Danforth noted the state's argument that "[t]he decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences."41 The Court pointed out that these factors were even more pronounced when a minor is involved. Accepting this as true, the Court, in Danforth, nevertheless, found that a physician's consent and consultation would sufficiently guarantee that the minor would be adequately informed42 and was preferable, given a choice, to the blanket veto Missouri proposed. Accordingly, the Missouri statute exceeded the legitimate state interest it sought to protect.

39. Id. at 71.
40. Id. at 74 (emphasis in original).
41. Id. at 67.
42. Informed means "[T]he giving of information to the patient as to just what would be done and as to its consequences." Id. at 67 n.8.

In State v. Koome, 84 Wash. 2d 901, 530 P.2d 260 (1975), the state Supreme Court stated:
The physician-patient consultation which should precede any abortion, see Proceedings of the AMA Delegates 220 (June 1970), provides information, advice as to alternatives and time for deliberation. If professional responsibility is not safeguard enough, the common law requires that physicians determine that a minor's decision to consent to any form of medical care, including abortion, is adequately informed and considered, and civil liability is available to enforce this injunction. (emphasis in original).

84 Wash. 2d at 907, 530 P.2d at 265.
In order to protect the state's legitimate interest in assuring that the minor receive adequate consultation the statute should have been narrowly drawn to effectuate that purpose. The Court rejected Missouri's argument that the statute was narrowly drawn, for the plain meaning of the actual statutory language belied such a contention. The state's argument to the contrary was defeated because "the natural and legal effect" of the statute governed its interpretation and its "proclaimed purpose" would not be allowed to obscure its patent unconstitutionality. The Court relied on a stricter scrutiny whereby the words of the statute meant what they said, and conjectural interpretations could not eliminate the effect of the plain meaning.

44. In Lochner v. New York, 198 U.S. 45, 64 (1905) the Court stated: The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.
45. The Danforth Court's interpretation of the Constitution and the constitutionality of the Missouri statute in light of that interpretation, was based on the aegis of established constitutional law. Albeit, the right of privacy in minors is qualified, as is that of adults, and there is no expressed right of privacy for minors contained in the Constitution, as there is none for adults, nevertheless the Court concluded that it is inconsequential where the right is derived from. Whether that right emanates from the "[Fourteenth Amendment's concept of personal liberty and restrictions upon state action, . . ., or . . . in the Ninth Amendment's reservation of rights to the people, 428 U.S. at 60, a minor shall not be subject to the arbitrary veto of his parents in matters deemed so fundamental to a constitution premised on personal freedom and ordered liberty.

Commentators have criticized the Court for extending protection to persons which, they argue, are not entitled to receive the protection presently being accorded, thereby chastising the Court for construing the Constitution as a flexible document which takes on new meaning with succeeding generations. See Fairman, Does The Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 STAN. L. REV. 5 (1949). Such critics of this approach rely on the history of the Constitution rather than the spirit of the Bill of Rights. The Court's decision in Danforth to accord minors an equivalent degree of freedom accorded to adults cannot be grounded on the debates of the thirty-ninth Congress. For the thirty-ninth Congress could not have foreseen the enormous societal changes that would have made such a decision in accordance with the history of our times.

The Court's approach to extending and justifying the granting of a minor's right to an abortion under the circumstances presented in Danforth is not a novel concept, but based on precedent not likely to be set aside. Chief Justice Hughes, writing for the majority in 1934, in Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1934) stated:

If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard
Having earlier held, in the opinion, that imposition of a spousal consent requirement is unconstitutional, the Danforth Court, relying on the plain meaning of the Missouri statute, concluded that a minor was entitled to protection of her right to privacy in matters of intimate personal concern, subject to the state's acknowledged interest in assuring that the minor's decision be made with the same understanding that is presumed of an adult. The Court found that such assurance allows the state to require some form of consultation before a minor can obtain an abortion. Under the facts presented in Danforth, however, the minor's right of privacy was entitled to greater deference than the state's asserted interest in assuring adequate consultation. Thus, the state was acting beyond its authority when it subjected the minor's right to privacy to an absolute parental veto—a veto which was possibly the result of the parent's religious, social or other personal beliefs and not of a rational solicitude for the minor's best interest.

By recognizing a minor's qualified right to decide whether to abort, and by precluding third parties from exercising absolute veto power on the grounds that its arbitrary nature is impermissible, the Danforth decision has an immediate impact on future

against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"'We must never forget, that it is a Constitution we are expounding'" (McCulloch v. Maryland), "'a constitution intended for ages to come, and, consequently, adapted to the various crises of human affairs. . . . .'"

An analogous example of this need to expound and expand on the constitution which was used in Danforth, and which is necessary in determining the constitutionality of the Illinois Act, can be found in the Supreme Court's celebrated case of Brown v. Board of Education, 347 U.S. 483 (1954). The history and stated purpose of the fourteenth amendment did not justify the Court's ban against racial segregation in public schools. The records of the proceedings of the thirty-ninth Congress indicated that the fourteenth amendment was not expected, in 1866, to apply to segregation. See Fairman, Does The Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 STAN L. REV. 5 (1949). But as Professor Bickel observed, there was "an awareness on the part of [the framers of the 14th amendment] that it was a constitution they were writing, which led to a choice of language capable of growth," [and] "the record of history, properly understood, left the way open to, in fact invited, a decision based on the moral and material state of the nation in 1954, not 1866." Bickel, The Original Understanding and the Segregation Decision, 69 HARV. L. REV. 1, 63, 65 (1955).

46. 428 U.S. at 69.
47. See An Unresolved Issue, supra note 18, at 267 n.63.

Parental consent statutes can have the effect of imposing a parent's religious beliefs upon children who do not share these views. See Doe v. Exon, Civil No. 75-L-146 (D. Neb. 1975); In re Diane, 318 A.2d 629 (Del. 1974); In re P.J., 12 Crim. L. Rptr. 2549 (Sup. Ct., D.C. 1973); State v. Koome, 84 Wash. 2d 901, 530 P.2d 260 (1975). In this situation, such statutes can be considered to be state action which establishes a religion. As such, they would be unconstitutional.
abortion legislation. State's wishing to implement more stringent abortion legislation will have to devise a method that allows the minor to exercise her constitutional right while granting the state the assurance it desires. In other words, the state will have to find another justification for imposing on the minor's right to privacy.

Danforth's Silver Lining

Whether exercised by an adult or a minor, the right to an abortion is not absolute. In Roe the state's interest was in the potential life of the unborn, more so than in the welfare of the adult woman since it was presumed she acted with knowledge. In Danforth the state's interest is in both the minor mother and the unborn child. In Roe the Court was able to use a pragmatic approach in determining when the adult woman's right to an abortion remains unfettered by state interference; providing a specified time, within which an abortion can be obtained, relative to the viability of the unborn child. In Danforth the Court could adopt the viability test to protect the unborn child, but what about the acknowledged state interest in the minor's welfare? Justice Stewart in his concurring opinion in Danforth provided a "loophole" for legislatures purportedly seeking to protect the interests of the state and the parents in the welfare of minors who desire abortions.48 The "loophole" was that though a blanket veto was unconstitutional, something less may not be.

This truism derived from the fact that any requirement placing an undue burden on a minor seeking an abortion would be an unconstitutional deprivation of her fundamental right.49 By giving a parent an absolute veto over the decision of both the patient and the physician, in a matter deemed fundamental under the Constitution, the Missouri legislature had overstepped the constitutional boundaries of legitimate state power.50 The Missouri statute in Danforth had given to a third party the authority which under the strictures of Griswold and Roe was to be exercised by the woman in consultation with her physician. The blanket veto was therefore the major obstacle to be overcome for future legislation.

Justice Stewart intimated that a state statute requiring parental consent might withstand judicial review if it provided for "prompt . . . judicial resolution of any disagreement between the parent and the minor, or . . . judicial determination that the

48. See text accompanying notes 51-53 infra.
49. 428 U.S. at 75.
50. Id. at 74.
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minor is mature enough to give an informed consent without parental concurrence, or that abortion in any event is in the minor's best interest."51 Such a statute was before the Court the same day that Danforth was decided.52

Justice Stewart acknowledged that the Massachusetts statute under consideration in Bellotti v. Baird53 posed a materially different constitutional issue since that statute, besides requiring parental consent or consultation, also provided for a prompt judicial resolution of any conflict between the parent and the minor, or at least an independent judicial determination that sufficient consultation had been given the child in lieu of the consent of her parents.54 The validity of this procedure was suggested and discussed only by Justice Stewart. The Supreme Court did not rule on the constitutionality of the Massachusetts statute because the Court thought that the Supreme Judicial Court of Massachusetts should first determine if the apparent language of the statute and the inopposite interpretation of the state could be reconciled. But like Thoreau's concept of a majority of one, the Illinois legislature recognized Justice Stewart's proffering of a silver lining to avoid the Danforth decision and passed, what it believes, is a parental consent abortion act that will pass judicial scrutiny.

THE ILLINOIS ACT

The Illinois legislature has seized upon Justice Stewart's dicta as a preface to the Illinois Act, acknowledging the rights of parents and the interests of the unmarried minor. The preface states:

It is the intent of the General Assembly of the State of Illinois that the rights and responsibilities of parents be respected, that the health and welfare of minors and their unborn children be protected and that no minor child who has not married shall be allowed to undergo an abortion operation without the consultation and consent of her parents, or a court order as part of the informed consent of the minor child seeking the abortion.55

The preface, however, fails to comport with the Danforth holding. Instead of acknowledging any "rights" of the minor, it declares that the state recognizes that the child has an "inter-

51. Id. at 90-91 (Stewart, J., concurring).
54. 428 U.S. at 91. The Massachusetts statute in Bellotti: (see note 100 infra), unlike the Illinois Act (see text accompanying note 16 supra), authorizes the judicial officer to proscribe an abortion for a minor even if he finds that the minor is neither cognizant of, nor mature enough to understand the consequences of her proposed action.
est," but believes the state is best able to protect it. Rather than attempt to balance the rights of parents and minors, the preface is parent-oriented. This absence of rights for the pregnant minor in the 1977 Act is similar to the disregard of the adult females' rights in the Illinois Abortion Law of 1975.\textsuperscript{56} The 1975 Law states that:

\begin{quote}
[T]he intention . . . of the State of Illinois [is] to reasonably regulate abortion in conformity with the decisions of the United States Supreme Court of January 22, 1973 [\textit{Roe}] . . . [A]nd . . . if those decisions . . . are ever reversed or modified . . . then the former policy of this state to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.\textsuperscript{57}
\end{quote}

Notwithstanding the separate preface to the Illinois Act of 1977, it appears that the general assembly was actually guided by the policy statement in the general introduction to the Abortion Law of 1975. As a result, the Illinois Act is weighted in favor of parental control and is, thus, if not contrary to, at least in conflict with the spirit of \textit{Danforth}.

\section*{Procedural Requirements}

The \textit{Danforth} decision has caused legislatures to respond to public demand for assuring adequate consultation to the minor by enacting abortion regulations that would take into account the minor's right of privacy and yet, provide for valid state and parental concerns. The Illinois response, embodied in the 1977 Act, is merely a proscription for abortion—failing to take into account the rights or best interests of the pregnant minor.

Prefacing the procedural requirements of the Illinois Act with the caveat that the Illinois Act is only applicable to an unmarried minor, section 81-54 sets out the procedure to be followed by a minor wishing to obtain an abortion. First, the Act defines a minor as one under the age of eighteen, and excludes minors who are married.\textsuperscript{58} Before an abortion can be performed, the minor must obtain the consent of a physician.\textsuperscript{59} Also, the minor must wait forty-eight hours after she has acknowledged in writing that her consent was informed and voluntary.\textsuperscript{60} The minor's consent must be on a form provided by the Department of Public Health which the physician shall maintain.

\begin{footnotesize}
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\item \textsuperscript{56} \textit{Id.} §81-21 (1977).
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Id.} §81-54 (Supp. 1977). \textit{See} text accompanying notes 67-74 \textit{infra} for a discussion of a possible denial of equal protection on this point.
\item \textsuperscript{59} "(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment;" \textit{Id.} § 81-54(1).
\item \textsuperscript{60} "(2) After the minor, 48 hours prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion;" \textit{Id.} §81-54(2).
\end{itemize}
\end{footnotesize}
in his permanent files. After this waiting period, the minor must obtain the written consent of both her parents, or a single parent if one is dead, or, if both are dead or otherwise unavailable, the written consent of a party in loco parentis. Only when such consent is refused, or unavailable may the minor seek permission from a judge to have the abortion. Judicial permission may be granted if the judge is satisfied that the minor understands the consequences of an abortion to her and her unborn child, and that the minor is mature enough to accept the responsibility for her decision. Notice of the judicial hearing must be mailed to the minor's parents.

The above procedure sets out the major portion of the Illinois Act. This procedure imposes a significant burden upon

61. Id. §81-54(3). The form to be signed by the minor is not spelled out. This lack of specificity is a recurring problem throughout the Act. There is no indication of what purposes the form can be used for subsequent to the performance of the abortion. There is no indication that it is for statistical purposes only and will remain confidential. The state has a legitimate right to assure that all abortions are performed in accordance with the law and that the preservation of records shall be intended for such purposes. One purpose for preserving and requiring such a form is to aid in the advancement of medical knowledge, and as a record of the patient's confidential health file, for the benefit of subsequent medical proceedings at some later time. If the state wants the form for such purposes it should be spelled out and precautions indicated to protect the file from any abusive use. An open-ended form, as suggested by the Illinois Act, only serves to further burden the decision between the minor and her physician.

62. (3) After the consent of her parents is secured and certified in writing.

If one of the parents has died, has deserted his or her family, or is not available, consent by the remaining parent is sufficient. If both parents have died, have deserted their family, or are not available, consent of the minor's guardian or other person standing in loco parentis is sufficient. Id. § 81-54(3).

63. Maturity should not be an issue. It is the minor's right of privacy that permits her to elect to have an abortion. Once the minor, as an individual, has made this very private, intimate and difficult choice she should not have to prove her maturity to the rest of the world. The fact that she reached such a decision against the knowledge that it may be against her parent's will, or religious beliefs may be prima facie evidence of her maturity.

64. "Notice of such hearing shall be sent to the parents of the minor at their last known address by registered or certified mail. The procedure shall be handled expeditiously." Id. § 81-54(3).

65. The remaining portion of the Illinois Act states that:

Nothing in this Section shall be construed as abolishing or limiting any statutory or common law rights of any other person or persons relative to consent to the performance of an abortion for the purposes of any civil action or any injunctive relief. This Section does not apply to any abortion performed which is necessary for the preservation of the life of the mother.

Section 5. Any person who performs an abortion in violation of this Act commits a Class A misdemeanor.
the minor who desires an abortion. As enacted, the Illinois Act fails to comply with *Danforth* and subsequent decisions that have restricted the burden which the state may impose upon a minor seeking an abortion. The remainder of this paper will analyze each principal provision of the Illinois Act to determine whether it is a workable model for other states concerned with integrating some form of required consultation, or whether it is an unconstitutional invasion of the minor's right to privacy.\(^6\)

Before examining the procedural aspects of the Illinois Act there exists an equal protection issue which must initially be resolved.

**Equal Protection**

The common law rationale behind requiring parental consent in matters affecting a minor has been that this requirement is a protection imposed by society in the best interests of the minor. Proponents of the Illinois Act have resorted to this rationale, although the Act has the opposite effect.

The state’s asserted purpose is to protect the best interests of the minor via parental consent. The state has chosen the age of eighteen as the cut-off between majority and minority. Consequently, the legislature presumes that anyone under the age of eighteen is incapable of acting in her own best interest without guidance. Therefore the state requires parental consent, or a judicial determination of competency.\(^6\)\(^7\) Since the Illinois Act affects a fundamental right and is an attempt to ensure the state’s interest in protecting its right by requiring parental consent, the statute is not narrowly drawn to accomplish the legitimate purpose of protecting persons who are incapable of acting in their own best interests. Why eighteen has been chosen as a cut-off age seems based more on legislative habit than on reason. The state does not have any empirical data to support the irrefutable presumption that persons under the age of eighteen need parental consent or judicial approval in order to ensure that the minor makes an informed decision. In reference to this type of arbitrary classification, the Supreme Court has stated that a "[c]lassification, must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and sub-

\(^6\) See generally Pilpel, *Minors’ Rights to Medical Care*, 36 *Albany L. Rev.* 462 (1972). The author assumes that the age of 18 was chosen because it is the voting age, and not because there is anything magical about the age.
stantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike."

The arbitrary age classification in the Illinois Act between those over eighteen or under eighteen and married, and those under eighteen and not married discriminates between married and unmarried minors, and minors over and under eighteen. In State v. Koome, which involved a challenge to Washington's parental consent act, the state Supreme Court considered a similar classification and held that:

The distinction between unmarried pregnant women under 18 and those over the age of majority corresponds at best roughly to the state's interest in parental authority and reflective decision making. Parental authority wanes gradually as a child matures; it does not suddenly disappear at adulthood. Similarly, the ability to competently make an important decision, such as that to have an abortion, develops slowly and at different rates in different individuals. Both law and science have realized that children below voting age are capable of making many important decisions.

Intruding upon a female's fundamental right to decide whether to bear a child by establishing an arbitrary age contingency that differentiates an individual's presumption of maturity on the basis of "time served," disregards the individual's background which ought to be considered in determining one's ability to make a mature decision.

The absence of logic in creating an arbitrary age to measure maturity is emphasized by other legislative acts which serve to foster both the interest of the minor and the interest of the state. The Illinois legislature has recognized the need for a minor's personal autonomy in making important decisions affecting, not only himself, but others. Illinois allows minors twelve or older to obtain treatment for venereal disease without the consent of a parent. And if a minor wishes to release her baby for adoption, regardless of the mother's minority, her parents have no

68. Royster Guano Co., v. Virginia, 253 U.S. 412, 415 (1920). See also Eisenstadt v. Baird, 405 U.S. 438, 450-51 (1972) (by providing dissimilar treatment for married and unmarried persons who are similarly situated, the statute regulating contraceptive dispensing was found to violate the equal protection clause of the fourteenth amendment); Dunn v. Blumstein, 405 U.S. 330, 357 (1972) (voting rights which hinge on durational residency requirements are violative of the equal protection clause of the fourteenth amendment, as they are not necessary to further a compelling state interest); Reed v. Reed, 404 U.S. 71, 75-76 (1971) (probate code giving preference to men over women in applying for appointment as administrator of decedent's estate is discriminatory and therefore violative of the equal protection clause of the fourteenth amendment).

69. 84 Wash. 2d 901, 530 P.2d 260 (1975).
71. 84 Wash. 2d 901, 907, 530 P.2d 260, 266 (1975).
legal rights or control over her decision.\textsuperscript{73} If the legislature's purpose is to ensure that a decision is made in the minor's best interest, the Illinois Act is self-defeating because it places obstacles in the minor's path. The state has realized the importance of treating venereal disease and therefore, has not placed restrictions on minors seeking treatment. The embarrassment and stigmatization of having to go to one's parents was the most serious hindrance in the state's attempt to treat the disease effectively. For the same reason under the Illinois Act, a pregnant teenager will resort to the back-street-abortionist, or carry an unwanted pregnancy to term, or be forced to go to court.\textsuperscript{74} Such discrimination on the basis of age and status must be viewed by the courts under a strict scrutiny standard with the state having a severe burden in attempting to justify such an indiscriminate application of the statute.

\textit{Dual Consent}

In \textit{Danforth} the Supreme Court held that a state did not possess the authority to grant a parent the absolute prerogative to permit or prohibit the parent's minor daughter from having an abortion.\textsuperscript{75} The provision in the Illinois Act requiring the consent of both parents presents constitutional problems not only because of the decision in \textit{Danforth}, but also because such a procedure poses a myriad of unresolved problems never before addressed by the Supreme Court.

In what way does the requirement of dual parental consent further the best interests of the minor? The interest of the minor and a parent may be so opposed to each other that the additional possibility of conflict between a parent and parent together with the minor's already difficult task diminishes any benefit of this requirement. The right of parental control ceases when "it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."\textsuperscript{76} Health, safety and social burdens are doubly jeopardized by the requirement of dual consent. Where there exists a viable family structure the minor will, on her own, seek family counsel. The fact that the child does not, indicates that

\textsuperscript{73} \textit{Id.} ch. 40, § 1513 (1977). The parents, under the Illinois Act will decide whether their minor daughter shall bear a child, but after birth they retain no authority to decide whether the new born is to be kept by their minor daughter, or adopted. At present there are 28,000 wards of the state of Illinois.

\textsuperscript{74} For the effects of the judicial procedure provided for in the Illinois Act, see text accompanying notes 93-97 infra.

\textsuperscript{75} \textit{See} text accompanying note 12 supra.

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the family relationship is already strained, or that the minor has intuitively created a belief of an adverse reaction by her parents which may produce a sufficient amount of anxiety as to preclude the benefits of a parent-child confrontation. The health and safety of the pregnant minor is jeopardized the longer her pregnancy continues, and the ability to obtain parental consent could be impeded by a dispute between both parents, which will likely involve considerations outside the minor's best interests. Besides the health and safety consequences, what of the social consequences to the family torn apart by religious, moral and social questions which plague their decision? Because the primary focus on the decision of whether to obtain an abortion is the best interest of the minor, demanding further confrontation would create unnecessary barriers between parent and child, and parent and parent thereby adversely affecting the minor's best interests.

Assuming that the majority of parents act in a manner which they perceive to be in the minor's best interests, this still cannot be a substitute for the minor's right to be free from the arbitrary curtailment of her personal liberty, regardless of her parents' good intentions. The difficulty in designing a procedure that takes into account the interests of the parents and the minor is due to the minor's constitutional right to privacy. Any intrusion which substantially affects that privacy is unconstitutional, thereby making any procedure designed to comply with the minor's right to privacy while also retaining some control over the decision contradictory. Thus any procedure which extends beyond "consultation" can result in parental control for which there is no remedy.

The threat of parents insisting upon the minor's continuation of her pregnancy as a punishment for her indiscretion, or a punishment to one of the parents who may side with the minor, is not hard to imagine. Such punishment is not de minimis. "[T]he stigma of unwed motherhood, impairment of educational

77. See In re Roger S., 19 Cal. 3d 921, 141 Cal. Rptr. 298, 569 P.2d 1286 (1977) (parent or guardian may not waive the right of a minor 14 years of age or more to procedural due process to determine whether the minor is mentally ill or disordered, or is better off in a state hospital).


There are parents . . . who because of ignorance or prejudice or neglect, and sometimes even viciousness, are either incapable or unwilling to do the things necessary for the protection of their own offspring. There are parents who will by act do that which is harmful to the child and sometimes will fail to do that which is necessary to permit a child to lead a normal life in the community.
opportunities", 79 "[m]aternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent . . . distress for all concerned, associated with the unwanted child" 80 and the harm to the child going into an undesirable family structure are all a result of compelling an unwanted pregnancy. The Illinois Act makes no attempt to limit the possible adversity of parental consent by requiring that the parents only consider the best interests of the child. 81 Legislation which contains a dual consent provision is further removed from the constitutional protections afforded a minor since such a provision allows the possibility that ulterior motivations of third parties will intervene in the minor's decision to have an abortion.

When is a Parent Unavailable?

Paragraph one of section 81-54(3) of the Illinois Act states that "[i]f one of the parents has died, has deserted his or her family, or is not available, consent by the remaining parent is sufficient. If both parents have died, have deserted their family, or are not available, consent of the minor's guardian or other person standing in loco parentis is sufficient." 82 The statute does not define what unavailability or desertion of a parent means, or how long a minor must wait while that fact is determined. Who shall determine unavailability or desertion? What about a divorced couple; must the child receive the consent of both parents or only the one she resides with? What if the minor does not reside with either parent? The opportunity for the noncustodial spouse, in the case of a divorce, to make a decision in response to the divorce or separation instead of in the best interests of the minor is ominous. Is the mental condition of the parent a factor in determining unavailability, or is physical absence the sole criteria? What if the child becomes pregnant through rape or incest? Without defining unavailability, the possible situations requiring prolonged investigation is limitless. The delay in resolving these issues while the minor seeks


82. ILL. REV. STAT. ch. 38, § 81-54 (Supp. 1977).
the termination of an unwanted pregnancy is unduly burdensome on the exercise of the minor's fundamental right. Fortunately, the courts are not without precedent to guide them in determining the constitutionality of such an incumbrance upon the minor.

**Previous Arguments Applicable to the Illinois Act**

The Illinois Act's posture in light of recent right of privacy decisions by the Supreme Court indicates that to allow a parental veto, or a judge to ratify a parental veto is a circuitous way of achieving adequate consultation. In essence, under the Illinois Act, the minor is subjected to the state acting as the ultimate arbiter, and attempting to mask this effect by delegating the power to the parents.

In the recent case of *Carey v. Population Services International*, the Supreme Court held that a New York statute regulating the sale and distribution of contraceptives to minors, as well as adults, was unconstitutional. Just as *Danforth* had prohibited the granting of an absolute veto power to the parents of a minor seeking an abortion, *Carey* prohibited a total ban on the distribution or sale of contraceptives. Neither case, however, had indicated how far state regulation could go, nor to what extent the right of privacy applied to minors.

Both the New York statute considered in *Carey* and the Illinois Act discussed herein intrude upon an individual's protected right in deciding the intimate matter of whether to bear a child. Since the New York statute concerned a total prohibition in regard to the sale of contraceptives to minors under sixteen the Court felt the compelling interest test used in *Danforth* was appropriate in deciding *Carey*.

The *Carey* Court prefaced its remarks by recognizing that "the question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer." But without a showing of a compelling state interest, a state can-

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84. The statute reads, in relevant part:
   
   It shall be a class A misdemeanor for: Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of contraception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy, is hereby prohibited.

85. 431 U.S. at 692.
not impose a blanket prohibition on the distribution of contraceptives to minors just as it is prohibited from imposing one on elective abortions. One of New York's arguments in support of its statute was that it would discourage sexual activity by the young by increasing the hazards resulting from promiscuous activity. The Carey Court responded by stating that "[i]t would be plainly unreasonable to assume that the state had prescribed pregnancy and the birth of an unwanted child . . . as punishment for fornication."\textsuperscript{86} Likewise, the failure of the Illinois Act to require the parents to consider only the best interests of the minor, can also produce the same possibility for abuse that would result from implementing the New York statute.\textsuperscript{87}

Another argument of the state in Carey is that the prohibition was not absolute, in that the minor could seek contraceptives from his or her physician.\textsuperscript{88} This contention is analogous to the judicial override of the parent's veto provided in the Illinois Act.\textsuperscript{89} The Court's answer to New York's argument is that, as with adults, "less than total restrictions on access to contraceptives that significantly burden the right to decide whether to bear children must also pass constitutional scrutiny."\textsuperscript{90} And under these circumstances, it is improper to delegate such authority to a third party "who may exercise [such authority] arbitrarily, either to deny contraceptives to young people, or to undermine the state's policy of discouraging illicit early sexual behavior."\textsuperscript{91} If a requirement of having a physician prescribe contraceptives to a minor in the privacy of his office is prohibited, what justification can be made for parading a pregnant minor through an open court proceeding to get the permission of a judge to exercise her fundamental right to an abortion within

\textsuperscript{86} Id. at 695. (Court quoting from Eisenstadt v. Baird, 405 U.S. at 448).

\textsuperscript{87} In respect to the state's contention the Court also questioned the deterrent effect of the New York statute. The Court noted studies cited by the state indicating no deterrent effect of restricting access to contraceptives. But regardless of the effect the Court stated that absent any supporting evidence to establish a compelling state interest the state may not burden a fundamental right. The Court treats such an intrusion of fundamental rights similar to a suspect class; placing the burden of proof on the state rather than the complainant. It would seem more equitable in cases of abortion for minors, to force the parents to show cause why the abortion should not be performed rather than place the burden on the minor to get permission from either her parents, or a judge. \textit{But see An Unresolved Issue, supra} note 18, at 278-79.

\textsuperscript{88} The statute states in relevant part that "nothing contained herein should be construed to prevent any physician . . . from supplying his patients with such drugs as he . . . deems proper in connection with his practice." New York Education Laws § 6807(b) (McKinney, Supp. 1976-1977).

\textsuperscript{89} \textit{See} text accompanying note 16 \textit{supra}.

\textsuperscript{90} 431 U.S. at 697.

\textsuperscript{91} Id. at 699.
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The Judicial Procedure: Far From Assuring Mere Consultation

One of the sponsors of the Illinois Act stated:

The purpose of the Bill is to encourage the family to work as a unit and make sure that the minor is protected in a matter that can be physically and emotionally dramatic. The Bill seeks to make sure that the minor makes a decision that is mature and in her best interests.93

The state claims that the purpose of the Illinois Act is to ensure consultation between the minor and her parents thereby guaranteeing that her decision to abort is "freely, knowingly, and intelligently given."94 However, it is questionable whether the language of the statute as drafted assures that these asserted purposes will be achieved.95

The judicial procedure that the minor may resort to does not assure consultation, but instead gives an arbitrary veto to another party who happens to be a judge.96 The judicial provision subjects the minor to public notoriety, making no provision for the use of a pseudonym, and further requires that the parents be notified of the hearing. The judge is not mandated to give consent upon certain findings of fact, but may give his consent after a hearing, the process of which is not defined, and a finding that the minor is cognizant of the consequences of an abortion to herself and her unborn child and mature enough to assume the responsibility for her decision. The Constitution has not

92. Justice Powell, in his concurring opinion in Carey stresses the right of anonymity. The New York statute also prohibited mail distribution of contraceptives, which would have forced adults to go to the public pharmacist where his anonymity may be disclosed. Justice Powell sees this as an invasion of privacy. Id. at 711 n.5. How does this compare with the embarrassment and burden accompanying the minor in seeking judicial consent? See text accompanying notes 98-103. See also Friendship Medical Center, LTD., v. Chicago Bd. of Health, 505 F.2d 1141 (7th Cir. 1974), cert. denied, 95 S. Ct. 1438 (1975) in which the seventh circuit struck down a Chicago city ordinance, which promulgated burdensome medical conditions in granting and maintaining a clinic which performed abortions, as requiring the physician to "prove up" too much. Id. at 1153. Such a burden was in response to the Roe decision in 1973. In response to the injunction of the Illinois Act in Wynn, handed down on Feb. 23, 1978 by Judge Prentice Marshall, see note 66 supra, Ald. Edward M. Burke (14th) has proposed a Chicago City ordinance which requires prospective abortion patients to receive negative information; that husbands get 24 hr. notice; similar notice to one parent of a girl under 18; and written consent of a parent for girls under 15.


95. See note 44 supra.

96. Planned Parenthood of Missouri v. Danforth indicated that the state does not have the constitutional authority to give any party an arbitrary veto. 428 U.S. at 74.
recognized the unborn child and, therefore, such a consideration by a judge is improper. There is no mention that the judge should only consider the best interests of the minor. The Illinois Act neither provides for counsel to the minor, nor indicates whether the parent or the child may appeal the judge's decision.

In *Bellotti v. Baird*, the Supreme Court had an opportunity to consider a Massachusetts parental consent statute similar to the Illinois Act. The Massachusetts statute required parental consent, or in lieu thereof, judicial consent "for good cause shown." The enforcement of the statute had been enjoined by a three-judge district court. The lower court objected to the clear meaning of the statute which failed to advise parents that all they may consider is the best interests of the minor. The statute gave parents the freedom to refuse consent, making it more likely that the minor would have to go to court. The need to go to court was held to be an impermissible burden. It was also found to be unnecessary that parental involvement be required in the judicial proceeding whether or not it was in the minor's best interest.

97. Until a child becomes viable the state's only interest is in the health of the mother. And until viability the mother's constitutionally protected right to terminate her pregnancy or not prevails over any state interest in the fetus. A fetus in the womb is neither alive nor a person under the fourteenth amendment. See *Roe v. Wade*, 410 U.S. 113 (1973); *Floyd v. Anders*, 440 F. Supp. 535, 538-39 (D. S.C., 1977).

98. In *State v. Koome*, 84 Wash. 2d 901, 530 P.2d 264 (1975), the court stated that:

> Even if juvenile court intervention were established and automatic, the delays and costs inherent in litigation themselves would comprise an unreasonable burden. Minor women unwilling to add litigation against their parents to their already acute personal difficulties would gain little from the possibility of court intervention. And even those who were sufficiently determined to go to court would find the costs of publicity, delay, and anxiety substantial. Such hearings imposing such costs were held impermissible in *Doe v. Bolton*, 410 U.S. 179, 197-99 (1973).

Other considerations, obviously not considered by the legislature, are that the death rate of teenage mothers giving birth is 60% higher than for adult women; the mortality rate of infants born to teenage mothers is 2 to 3 times greater; stunted career opportunities; dependency on state welfare; hasty marriages and hasty divorces. Letter from Information & Education Dept., Planned Parenthood Federation of America, N.Y., N.Y. to Rep. Robert E. Mann (24th) Chicago, Illinois (March 15, 1977).


100. The Mass. Stat. provides in relevant part: "If one or both of the [minor's] parents refuse such consent, consent may be obtained by an order of a judge of the Superior court for good cause shown, after such hearing as he deems proper." MAss. GEN. LAWS ANN. ch. 112, § 12P(1) (1974).

The lower court also noted a paradox in the state's legislation by allowing "minors [to] consent to intercourse at the age of sixteen,\textsuperscript{102} but cannot consent to get rid of the product until she is two years older."\textsuperscript{103} The district court recognized that in those cases where the parent's rights have been upheld, the rights of the parent and child were compatible not adverse.\textsuperscript{104} Under the Massachusetts statute, like the Illinois Act, the rights of the parties were in conflict. Since the weight of the interest is clearly with the minor, who must bear the child, the granting to the parents of control over the minor's decision to abort is an eleventh hour opportunity to accomplish what could not be communicated earlier.

On appeal Massachusetts urged a strained construction of the statute\textsuperscript{105} resulting in the Supreme Court holding that the district court should have abstained from deciding the constitutional issue and should have certified to the Massachusetts Supreme Judicial Court appropriate questions concerning the 1974 statute and the procedure it imposes.\textsuperscript{106}

Justice Blackmun's opinion for the Court acknowledged the prospect of the constitutionality of a statute requiring parental consent, or a court hearing, as long as it did not unduly burden the rights of the minor. Adoption of the appellant's claim that the statute seeks only to provide consultation in the best interest of the minor would "at least materially change the nature of the problem" that [the state's] claim has presented."\textsuperscript{107}

On remand\textsuperscript{108} to the Supreme Judicial Court of Massachusetts, the appellant's construction of the statute was still found unconstitutional based on the plain meaning of the words used. The court held that the statute left no room for obtaining an abortion without parental or judicial consent as the appellants

\textsuperscript{103} 393 F. Supp. at 855.
\textsuperscript{104} Id. at 856.
\textsuperscript{105} Bellotti v. Baird, 428 U.S. 132, 133 (1976): (b) Here the 1974 statute is susceptible of appellants' interpretation that while it prefers parental consultation and consent it permits a minor capable of giving informed consent to obtain a court order allowing abortion without parental consultation and further permits even a minor incapable of giving informed consent to obtain an abortion if it would be in her best interest, and such an interpretation would avoid or substantially modify the federal constitutional challenge to the statute.
\textsuperscript{107} 428 U.S. at 147 (quoting from Harrison v. NAACP, 360 U.S. 167, 177 (1959)).
suggested,\textsuperscript{109} that the judge is not directed to consider the best interests of the minor,\textsuperscript{110} that the statute takes no account of the minor's maturity or emancipation\textsuperscript{111} and that the state has not justified the inconsistency in failing to require parental consent for other medical procedures.\textsuperscript{112}

Based on the Massachusetts Supreme Judicial Court's response to certified questions proffered by the United States Supreme Court, the district court again granted a stay of enforcement of the statute,\textsuperscript{113} stating three reasons. First, the statute does not advise the parents and the court that all they may consider is the minor's best interest and that the court procedures, without further explanation, are an undue burden.\textsuperscript{114} Second, the court was without the power to prevent notifying the parents of the minor's condition even if it is found to be in her best interest.\textsuperscript{115} And third, there was no recognition of the minor's emancipation or maturity and, therefore, a "mature minor who is determined by a court to be capable of giving informed consent will [not] be allowed to do so"\textsuperscript{116} without the knowledge of her parents.

The procedural uncertainties of the judicial provision in the Illinois Act suffer the same constitutional infirmities of the Massachusetts statute. The \textit{Bellotti} history clearly establishes that any judicial remedy in lieu of parental consent must be one "without undue burden."\textsuperscript{117} The court procedure provided for in the Illinois Act fails to alleviate the great disadvantage in time, humiliation, and added strain to the minor's already traumatic experience and decision. The judicial recourse provided in the Illinois Act unduly burdens the minor's fundamental right to an abortion by failing to provide for detailed procedures which would effectively utilize the court hearing. The extent of the judicial inquiry does not focus on that which has been held constitutionally permissible, and also parental notice is mandatory, thereby placing an additional obstacle upon the minor. Assuming the legitimate right of the state and the parent

\begin{itemize}
\item 109. \textit{Id.} at 293-94.
\item 110. \textit{Id.}
\item 111. \textit{Id.} at 296.
\item 112. \textit{Id.} at 303.
\item 114. \textit{Id.} at 855-56.
\item 115. \textit{Id.}
\item 116. \textit{Id.}
\item 117. 428 U.S. at 145.
\end{itemize}
to exercise greater control over the conduct of minors than over adults, the judicial procedure in the Illinois Act is a far cry from the type of proceeding which the Supreme Court has intimated would be permissible.\textsuperscript{118}

**A Viable Alternative**

A young woman confronted with the decision of whether to have an abortion needs, more than anything else, to be counseled in an atmosphere sympathetic to her dilemma. A minor who feels incapable, or afraid of turning to her relatives obviously opposes any procedure that requires the involvement of

\textsuperscript{118} Before the United States Supreme Court can consider the constitutionality of the Illinois Act the Seventh Circuit must consider the State and intervenors' appeal of the district court's final judgment holding the judicial override provision unconstitutional.

Judge Marshall's original order in the district court holding § 81-54(3) unconstitutional was only interlocutory and the injunction issued was preliminary. After the Seventh Circuit affirmed, intervening defendants filed an appeal to the United States Supreme Court. In the meantime, the district court, which had maintained jurisdiction of all aspects of the case except the preliminary injunction question, issued an order to show cause why a permanent injunction should not be entered. In response, the plaintiffs moved for a summary judgment as to § 81-54(3) as well as to § 81-54(2), providing for a 48-hour waiting period. (In the initial district court proceeding the 48-hour waiting period portion of the Illinois Act was held constitutional and the plaintiffs did not appeal the issue). The plaintiffs also sought to have the miscarriage provision of § 81-53 declared unconstitutionally vague.

The State and the intervenor indicated they could show no cause for not permanently enjoining § 81-54(3), but pursuant to rule 54(b) of the F.R. Civ. P., moved the court to issue a final judgment with respect to § 81-54(3) and resolve the other claims, i.e., 48-hour waiting period and definition of criminal abortion, at a later time.

Judge Marshall allowed the motion and permanently enjoined the judicial override provision in §81-54(3) and deferred ruling on the waiting period and the miscarriage provision.

The State and the intervenor thereupon appealed on the merits the permanent injunction of §81-54(3) and sought an expedited judgment from the Seventh Circuit based on the briefs of the first appeal. The plaintiffs objected to this and sought to have the appellate proceeding stayed until the other two issues could be consolidated for appeal.

The Seventh Circuit denied both motions. A month later, the district court issued a final judgment concerning the 48-hour waiting period issue and the definition of criminal abortion issues. Plaintiffs then requested a "docketing conference" before the Clerk of the Court pursuant to local rules and raised the issue of possible disagreement of different judicial panels of the Seventh Circuit Court of Appeals concerning the constitutionality of the definition of criminal abortion, since the term was similarly defined in the 1975 Illinois Abortion Law case, which was also pending before the Seventh Circuit. The plaintiffs suggested all pending abortion cases be consolidated. The Clerk accepted this suggestion and presented it to the court which issued an order consolidating all remaining issues of the unargued abortion cases pending before the Seventh Circuit. The case is presently before the Seventh Circuit on appeal of the district court's granting of a permanent injunction of the judicial override provision in § 81-54(3).
the persons whom the minor feels are incapable of making a decision that is in her best interests. Accepting the appropriateness of requiring some form of third party involvement to assure consultation, the use of the judiciary would require analysis of a variety of factors.

A judicial proceeding must protect the minor's anonymity. The procedure should consider only what is in the best interest of the minor, using as criteria for determining whether further consultation is necessary, the minor's maturity, intelligence, economic independence, and freedom from parental control. No parental involvement should be necessary when a minor is found to have freely and knowingly made a decision to abort. Only when the court determines that the minor is incapable of understanding the nature of her actions, or that parental involvement would be in her best interest should the parents be notified. But even well intentioned judicial intervention presents problems of cost, the possibility of delay when time is of the essence, the added stress of a judicial atmosphere, and the judiciary's reluctance to extend jurisdiction into personal, familial problems.

Ensuring reflective consultation while protecting the minor's qualified right of privacy and the state's interest in an intelligently made decision can be accomplished by a requirement of professional counseling. All physicians and organizations who are solicited to provide abortion services should be required to provide the minor with a list of American Medical Association or state recommended counselors not associated with any anti-abortion group or abortion clinic.

119. In some cases the lack of all of the above, or the extreme youth of the minor may warrant the necessity of an abortion because the minor would be incapable of providing effective parenting, or the minor's health may be severely jeopardized because of her youth.

120. Such circumstances under which it may be advisable to notify the parents are:

1. the minor appears to be a threat to her own life.
2. the child's expressed desire to abort is a result of coercion.
3. follow-up treatment following the abortion shows severe physical or psychological instability.
4. the minor's pregnancy resulted out of the commission of a crime.

121. The Illinois Act fails to provide for the appointment of counsel to the minor which the Seventh Circuit, in Wynn, finds creates the burdensome necessity of the minor proceeding pro se, or hiring counsel. Wynn v. Carey, 582 F.2d 1375, 1389 n.28 (1978).

122. See generally An Unresolved Issue, supra note 18, at 276-80 for a discussion of alternative consent statutes that involve judicial or parental involvement, but which the author concludes are either procedurally impractical or antithetical to the minor's best interests.

123. Individual counselors cannot be expected to be free from personal
Professional counseling can offer the minor an objective ear to explore all the viable choices open to the pregnant minor. Whereas the physician performing the abortion is primarily preoccupied with the minor's physical well-being, the counselor will discuss social and moral issues, and options other than abortion which the minor may be unaware of.

The counselor's findings should be reported to the physician performing the abortion, who shall have the authority to notify the minor's parents when it would be in her best interests. This type of mandatory consultation avoids the anxiety of the parent-child relationship, offers information and guidance that neither the parent nor the minor may be aware of, and ensures that the minor's decision is made freely and knowingly.

CONCLUSION

The Illinois legislature is groping for a parental consent statute that will circumvent the strictures placed upon the states by Roe and its progeny. The Illinois legislature has tried to give a living platform to Justice Rehnquist's lamentation, in Carey, over the reaction of our country's stalwart founders to the use to which our Constitution is being peddled.

The Illinois legislature cannot remain indifferent to the reality that young people will continue to engage in sexual activity which will lead to unwanted pregnancies. Prohibiting abortion, or giving the absolute right to veto abortions to third parties will not cause mass abstention by the young, or offer the protections which parental consent statutes are supposed to accomplish. These obstacles will compel young women to resort to the same

feelings on abortion, but they should not be committed, by allegiance to a particular organization, to advocating a subjective position on whether the minor should have an abortion.

124. See note 120 supra.
125. 431 U.S. 678, 717 (1977):

Those who valiantly but vainly defended the heights of Bunker Hill in 1775 made it possible that men such as James Madison might later sit in the first Congress and draft the Bill of Rights to the Constitution. The post-Civil War Congresses which drafted the Civil War Amendments to the Constitution could not have accomplished their task without the blood of brave men on both sides which was shed at Shiloh, Gettysburg, and Cold Harbor. If those responsible for these Amendments, by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's room of truck stops, notwithstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction.
illegal abortion services that adult women resorted to prior to Roe.

If the state's concern in enacting the Illinois Act is in ensuring consultation to assist the minor in making a decision of such importance then the state should work with the minor, rather than against her, which is the present effect of the Illinois Act.

What is in the best interest of the pregnant minor is in the best interest of the state and the parents, not vice-versa. Whatever the ultimate format of the procedure established to ensure consultation, it must be one which makes the minor feel protected and secure at a moment when she must exercise discretion. The Illinois Act assures only that a child will be guaranteed notoriety, humiliation, shame and stigmatization. Such a result does not appear to ensure the type of consultation that comports with the Supreme Court's interpretation of the Constitution, or that was envisioned by the sponsors of the Illinois Act.

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