

JOURNEY THROUGH THE COURTS: MINORS, ABORTION AND THE QUEST FOR REPRODUCTIVE FAIRNESS

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I. INTRODUCTION

In 1974, the year after the Supreme Court's decision in *Roe v. Wade*,¹ a pregnant Massachusetts teenager, known only as "Mary Moe," sought to terminate her pregnancy without involving her parents. Although she confided in an older sister, she feared telling her father because he had previously threatened to throw her out of the house and kill her boyfriend if she ever became pregnant. Also, perhaps because her parents had not provided her with any "sexual instruction," she wanted to "spare her parents' feelings."²

However, unable to obtain an abortion without first seeking the permission of both parents under a recently enacted state statute,³ Mary Moe, on behalf of a "class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent, and who do not wish to involve their parents," challenged the constitutionality of this limitation on a young woman's right to reproductive privacy.⁴

This case spawned nearly a quarter-century of litigation in both federal and state court seeking to establish the right of young women to self-consent to an abortion. This journey through the courts, which included two trips to the United

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1. *Roe v. Wade*, 410 U.S. 113 (1973). For further discussion of the decision in *Roe*, see *infra* text accompanying notes 7-11.

2. *Baird v. Bellotti*, 393 F. Supp. 847, 850 (D. Mass. 1975).

3. MASS. GEN. LAWS ch. 112, § 12S (1974). The law was originally designated § 12P ch. 112. In 1977, it was redesignated § 12S, although no substantive changes were made. For the sake of clarity, this article will refer to the law as § 12S or simply as 12S.

4. *Baird v. Bellotti*, 393 F. Supp. at 850. Other plaintiffs included Parents Aid Society, a medical clinic that performed abortions, the clinic's founder, William Baird, and its medical director, Dr. Gerald Zupnick. It should be noted that as the case progressed through the courts, some confusion arose over whether Mary Moe was certified to represent the interests of all minors or only those minors who had "adequate capacity" to consent to an abortion. The court eventually determined that the interests of "immature" minors could be asserted by medical director, Dr. Gerald Zupnick. *Baird v. Bellotti*, 450 F. Supp. 997, 1001 & n.6 (D. Mass. 1978), discussed in *Bellotti v Baird*, 443 U.S. 622, 626-27 (1979). Textual references to the Supreme Court case will be denoted as *Bellotti II*. Defendants included Francis Bellotti, Attorney General for the Commonwealth, the District Attorneys of all the counties in the Commonwealth, and Ms. Hunerward, a defendant intervenor representing "parents of all nubile minor females in Massachusetts who may, in their opinion unwisely or improperly, wish to have an abortion without informing them." *Baird v. Bellotti*, 393 F. Supp. at 850. For details about these parties, including a discussion about plaintiffs' standing to maintain the action, see *id.* at 849-52.

States Supreme Court and the resulting landmark *Bellotti v Baird*⁵ decision, appears to have come to an end with the recent decision of the Massachusetts Supreme Judicial Court upholding the Massachusetts parental consent statute on state constitutional grounds.⁶

By examining this multi-decade challenge to the constitutionality of the Massachusetts parental consent law, this Article seeks to show that despite consistent judicial language to the contrary, parental involvement laws have more to do with limiting abortion rights than with promoting family communication and prudent teenage decision-making. Through a textual analysis of key decisions, we gain insight into how courts have sought to reconcile the reproductive rights of teens with the rights of parents to direct the upbringing of their children, and the ways in which their accommodationist, pro-family rhetoric serves to conceal an underlying anti-abortion animus. To chart our course, this Article begins with an examination of the Court's decision in *Roe v. Wade*, the foundational case in abortion jurisprudence. From there, it looks at the federal constitutional challenge to the Massachusetts parental consent law and then turns to the state constitutional challenge to reveal the discordant strains in the courts' thinking about abortion, when the woman desiring to avoid maternity is a teenager.

II. A CLASH OF INTERESTS — YOUNG WOMEN AND THE DILUTION OF ROE V. WADE

In 1973, repudiating a historic vision of women as too lacking in scientific knowledge⁷ and too influenced by self-interest to make informed reproductive decisions,⁸ the Supreme Court, in *Roe v. Wade*, made clear that, at least until viability, decisional authority regarding reproductive outcomes must be vested in the pregnant woman.⁹ Recognizing the potential detriment of undesired maternity, the Court held that women have a fundamental right to privacy that includes the right to decide whether or not to terminate a pregnancy.¹⁰

5. *Bellotti v. Baird*, 443 U.S. 622 (1972). The landmark decision is actually the second of the two Supreme Court decisions in this case. The first time the case reached the Court, it vacated the district court's judgment holding that it should have abstained from deciding the case pending construction of the statute by the Massachusetts courts. *Bellotti v. Baird*, 428 U.S. 132, 146-52 (1976). Textual references to the *Bellotti II* decision are to the second of these two cases.

6. See *Planned Parenthood League v. Attorney Gen.*, 677 N.E.2d 101 (Mass. 1997).

7. See KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 20-23, 42-45 (1984).

8. In the nineteenth century, physicians waged a campaign to criminalize abortion. A pervasive theme of this campaign was that women who sought to terminate a pregnancy were self-indulgent and unmindful of their proper domestic role. See AUGUSTUS K. GARDNER, *CONJUGAL SINS AGAINST THE LAWS OF LIFE AND HEALTH* (J.S. Redfield, 1870); HORATIO STORER, *WHY NOT? A BOOK FOR EVERY WOMAN* (Lee and Shepard, 1866). For a discussion of the physicians' campaign, see LUKER, *supra* note 7, at 20-39; JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 147-70* (Oxford University Press, 1978); and Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 277-323 (1992).

9. See *Roe v. Wade*, 410 U.S. 113, 153-54, 163 (1973).

10. See *id.* at 153-55. Although *Roe* held that the right of choice is fundamental, it made clear that the right is not absolute and can be limited by the state's compelling interest in protecting the health of the pregnant woman and the potentiality of life. However, as pregnancy is a dynamic process, the Court held that

Locating the right to privacy in the “Fourteenth Amendment’s concept of personal liberty,”¹¹ the *Roe* Court spoke in terms of all women—it drew no distinction based upon age or capacity. Nonetheless, within the year, a number of states sought to limit the reproductive autonomy of young women by enacting laws requiring minors to either obtain the consent of their parents or provide them with notice before having an abortion.¹² Embodying a view of teenage incapacity, these laws assumed a difference in the reproductive status of adolescent and adult women.

In 1974, Massachusetts enacted one of the nation’s first parental involvement laws. This law required a minor to obtain the consent of both parents before having an abortion.¹³ If parental consent was denied, she could seek the consent

these interests were not of compelling magnitude until certain stages in the pregnancy had been reached. Thus, the state’s interest in health is not considered compelling until the second trimester, when the abortion procedure becomes potentially more complex, and its interest in the potentiality of life is not considered compelling until the third trimester when the fetus becomes viable. *See id.* at 163-64.

11. *Id.* at 153. In reaching this result, the *Roe* Court relied on a long line of cases recognizing a right of personal privacy in matters relating to family and procreation, including: *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married couples to use contraceptives); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to procreate); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right of family to make educational decisions).

Almost twenty years later, in the case of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court reiterated the importance of this privacy right:

[T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

Id. at 852. Although *Casey* purported to affirm a woman’s fundamental right of choice, it also made effectuation of that choice more difficult by scuttling the *Roe* trimester approach in favor of the “undue burden” standard. Under this standard, a state may enact laws regulating abortion from the time of conception forward in order to promote its interest in the potentiality of life, so long as the right of choice is not “unduly burdened.” For a discussion of *Casey*, see Janet Benshoof, *The Pennsylvania Abortion Case*, 9 *TOURO L. REV.* 217 (1993).

It is also important to recognize that prior to *Casey*, the Court, in addition to validating parental involvement laws, had already made it more difficult for poor women to effectuate the decision to terminate a pregnancy by upholding laws denying Medicaid reimbursement for abortions and prohibiting the performance of abortions in public facilities. *See* Carole A. Cohn, *The Impact of Public Abortion Funding Decisions on Indigent Women: A Proposal to Reform State Statutory and Constitutional Abortion Funding Provisions*, 24 *U. MICH. J.L. REFORM* 371 (1991); Walter Dellinger & Gene Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 *U. PA. L. REV.* 83 (1989); Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 *STAN. L. REV.* 1113 (1980); Note, *Abortion, Medicaid, and the Constitution*, 54 *N.Y.U. L. REV.* 120 (1979).

12. Although in theory parental notification laws are less intrusive than parental consent laws, in reality, the distinction between them may be meaningless. If a minor is unable to ask her parents for permission for an abortion, it is unlikely that she will be able to give them notice of her intent to have an abortion, thus requiring her to go to court in either situation. Accordingly, the term “parental involvement law” as used in this article, refers to either kind of statute.

13. *MASS. GEN. LAWS* ch. 112 § 12S. As written, the law contained an exception for parental death or desertion. Thus, a minor was excused from having to devise a way to communicate with a deceased or departed parent. If both parents had died or abandoned the young woman, she had to obtain the consent of her guardian or other adult in charge of her care. The law also exempted married minors from the consent requirement. *See id.*

of a superior court judge for "good cause" shown.¹⁴ However, before the law could take effect, the federal district court, in response to the action filed by Mary Moe,¹⁵ declared the law unconstitutional and permanently enjoined its enforcement.

Beginning with the recognition that minors possess "personal rights," the district court embraced a vision of minors as autonomous persons who are able, at least in most cases, to make informed decisions about whether or not to terminate a pregnancy.¹⁶ Determining that the essential purpose of the consent requirement was to recognize the separate rights of parents in their daughter's abortion decision,¹⁷ the court, rooted in social reality, questioned why parents should be given this authority:

It is not they who have to bear the child. Once born, the minor, and not they, will be responsible for it in all senses, financially and otherwise. It is difficult to think of any self interest that a parent would have that compares with those significant interests of the pregnant minor.¹⁸

Although rejecting the statute's presumptive acceptance of a parent's right to override his or her daughter's abortion decision, the court, perhaps seeking to deflect anticipated criticism of its refusal to subordinate the reproductive rights of minor to the rights of parents, made clear that it was not denying the importance of parents in the lives of their children. Recognizing that parents "have years in which to teach their children, counsel them and guide them," the court suggested that where communication was good, a minor facing an unwanted pregnancy would likely turn to her parents for guidance and support, but where parents had failed to teach, guide, and counsel their daughter, they in effect would have waived their right to her confidence.¹⁹

14. *Id.*

15. See *infra* note 4 and accompanying text. Mary Moe was not the only plaintiff, but as it is her voice that captures the experience of young women, this article will refer to it as her lawsuit.

16. *Baird v. Bellotti*, 393 F. Supp. 847, 854-855 (D. Mass. 1975). In this regard, the court noted with irony that under Massachusetts law, a minor was deemed capable of consenting to sexual intercourse at age 16, but was deemed incapable of deciding to terminate a resulting pregnancy until age 18. See *id.* at 855.

17. In characterizing the statute as a parental rights law, the court rejected the view that it was intended to protect minors, thus distinguishing it from laws that it identified as protective of minors, such as those limiting the sale of pornographic materials. See *id.* at 856 (citing *Ginsburg v. New York*, 390 U.S. 629, 638 (1968)).

18. *Id.* (citation omitted). The court did, however, acknowledge that parents might have some constitutionally based claim, but made clear that any such claim would be subordinate to the rights of their daughter: "[E]ven if it should be found that parents may have rights of a Constitutional dimension . . . we would find that in the present area the individual rights of the minor outweigh the rights of the parents, and must be protected." *Id.* at 857.

Having rejected the legitimacy of the parental consent requirement, the court considered whether the availability of a judicial consent procedure, in the event parental permission was denied, saved the statute from the constitutional dustbin. The court concluded that since a minor had no obligation to involve her parents in the first place, an override mechanism was constitutionally irrelevant and simply operated as a "constraint on the assertion of unreasonable claims of her parents." *Id.* at 856.

19. *Id.* For instance, consider Mary Moe. Clearly, her parents' silence about sexual matters, punctuated only by her father's threats about what he would do if she became pregnant, did not create an atmosphere

This judicial acceptance of a minor's right to make her own decision about having an abortion proved short-lived. Less than three months after the district court's decision, the United States Supreme Court, hearing the case on appeal, concluded that the Massachusetts parental consent law could be interpreted in a way that would "avoid or substantially modify the federal constitutional challenge."²⁰ Persuaded by the defendants that the statute could be read to: (1) prohibit parents from withholding consent based on their own interests; (2) permit minors to seek court consent without consulting their parents based upon either maturity or the best interest of the minor; and (3) prohibit judges from overriding the choice of a mature minor,²¹ the Court held that the district court should have abstained from hearing the case until the statute had been construed by the Massachusetts Supreme Judicial Court (SJC). The Court vacated the judgment and remanded the case to the district court for the certification of questions to the SJC regarding the meaning of the statute.

Although grounded in the doctrine of abstention, the Court, in remanding the case, was clearly mindful of its same-day decision in the case of *Planned Parenthood v. Danforth*²² and hinted that it might look with favor on the Massachusetts statute if it could be construed to avoid the *Danforth* veto problem.²³ In *Danforth*, the Court had invalidated a Missouri law requiring minors to obtain parental consent before having an abortion without giving them a judicial bypass option.²⁴ Of primary concern to the Court was that the statute vested parents with veto power over their daughter's decision, which they potentially could use in "an absolute, and possibly arbitrary" manner.²⁵

Following remand and the certification of questions by the district court, the SJC sought to interpret the statute so as to "avoid, or at least limit, any

conductive to intimate disclosure. Had the parental message been different, Mary Moe, like the majority of teens in Massachusetts, might well have turned to her parents for support.

Approximately one-third of minors who terminate a pregnancy in Massachusetts have court consent. See Brief for Appellant at 15 n.9, *Baird v. Bellotti*, 393 F. Supp. 847 (D. Mass. 1975) (No. SJC-7121) [hereinafter Plaintiffs' Brief]. Thus, the majority of minors obtaining an abortion in Massachusetts have parental consent. See *id.* at 15. Also, as Massachusetts has been a two-parent consent state, some of the minors who have gone to court may have already involved or obtained the consent of one parent.

20. *Bellotti v. Baird*, 428 U.S. 132, 148 (1976).

21. See *id.* at 144. The defendants apparently changed their interpretation of the statute when arguing before the Supreme Court. Previously, they had maintained that a parent could consider his or her own interests when deciding whether to grant consent. Before the Supreme Court, however, they argued that the statute limited parents to a consideration of their daughter's interests. See *id.* at 143 & n.10; *Baird v. Bellotti*, 450 F. Supp. 997, 999-1000 (D. Mass. 1978).

22. 428 U.S. 52 (1976).

23. See *Bellotti v. Baird*, 428 U.S. at 148.

24. See *id.* at 74. The Court grounded its analysis in the recognition that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority," thus clearly acknowledging the constitutional foundation of a minor's right to reproductive autonomy. *Id.*

25. *Id.* The Court did, however, indicate that parents might have an independent interest in their daughter's abortion decision that could be taken into account in fashioning a parental involvement law so long as it was not given more weight "than the right of privacy of the competent minor mature enough to have become pregnant." *Id.* at 75.

constitutional questions.”²⁶ Two issues facing the court were what the standard parents and the court were supposed to use in deciding whether to grant or deny consent and whether the statute allowed minors to seek court consent without first seeking parental permission.²⁷

With respect to the standard for parental decision-making, the SJC, noting that the statute did not provide an explicit standard, concluded that to avoid the *Danforth* veto problem, parents, in deciding whether to grant or deny consent, were to disregard their own views and focus exclusively on the “best interest” of their daughter.²⁸ Reasoning in an apparent social vacuum, the SJC ignored the obvious fact that a parent who is opposed to abortion or outraged to learn that a daughter is sexually active is unlikely to be able to set aside his or her own views to objectively consider a daughter’s needs.²⁹

Similarly, the SJC concluded that a judge could not base his or her decision on parental objections to the abortion, but had to be guided by the minor’s best interest.³⁰ The court, concluded, however, that even where a minor was mature and her decision to terminate her pregnancy was both “informed and reasonable,” a judge could nonetheless decide that the abortion was not in her best interest and deny consent.³¹

26. *Baird v. Attorney Gen.*, 360 N.E.2d 288, 291 (Mass. 1977). In its desire to save the statute from invalidation, the SJC enunciated a unique rule of statutory construction: “If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we should or that we have otherwise burdened the minor’s choice unconstitutionally, we add as a general principal that we would have construed the statute to conform to that interpretation.” *Id.* at 292. Subsequently denounced by the district court as a “coloring-book” approach, *see Baird v. Bellotti*, 450 F. Supp. at 1006, the SJC, in essence, was saying that it was interpreting the statute to mean whatever the Court eventually interpreted it to mean.

27. In all, the district court certified nine questions to the SJC. Consideration of these issues corresponds to the first three certified questions, as follows:

‘1. What standards, if any, does the statute establish for a parent to apply when considering whether or not to grant consent?

‘a) Is the parent to consider exclusively . . . what will serve the child’s best interest’?

‘b) If the parent is not limited to considering exclusively the minor’s best interest, can the parent take into consideration the ‘long-term consequences to the family and her parents’ marriage relationship’?

‘c) Other?’

‘2. What standard or standards is the superior court to apply?

‘a) Is the superior court to disregard all parental objections that are not based exclusively on what would serve the minor’s best interests?

‘b) If the superior court finds that the minor is capable, and has, in fact, made and adhered to an informed and reasonable decision to have an abortion, may the court refuse its consent based on a finding that a parent’s or its own, contrary decision is a better one?

‘c) Other?’

‘3. Does the Massachusetts law permit a minor (a) ‘capable of giving informed consent,’ or (b) ‘incapable of giving informed consent,’ ‘to obtain (a court) order without parental consultation’?

Baird v. Attorney Gen., 360 N.E.2d at 292-93 nn. 4-6 (internal references omitted). For text of questions four through nine and the SJC’s response to them, *see id.* at 297-303, nn. 10-12, 17 & 21-22 .

28. *Id.* at 293.

29. *See id.* Suggesting, however, at least some awareness that parents might not heed its interpretive gloss, the court did note that the statute contained no penalty for applying an incorrect legal standard.

30. *See id.* at 293. Here the court was guided by the statutory “good cause” language, as 12S expressly provided that a judge could grant consent for “good cause shown.” MASS. GEN. LAWS ch. 112 § 12S (1974).

31. *Baird v. Attorney Gen.*, 360 N.E.2d at 293. Ironically, given its concern over the parental veto, the SJC seemed oblivious to the fact that it was granting judges similar authority over a minor’s decision.

Despite the certainty with which the SJC purported to exclude parental objections, one must wonder why else a judge would require a teenager to become a mother, despite her reasoned desire to defer maternity.³² This concern is heightened by the fact that the Court further interpreted the statute to require that parents be given notice of and the opportunity to participate in the bypass hearing.³³ Given that parents would have already expressed their views by denying consent, it is hard to imagine that they would welcome the court hearing as an opportunity to provide a dispassionate presentation of their daughter's best interest.

The Court, adhering closely to the statutory language, made clear that absent an emergency, a minor could not seek judicial authorization without first going to her parents.³⁴ Oblivious to the risk that parents might prevent their daughter from going to court upon learning she was pregnant, the SJC apparently believed that this court option preserved a minor's reproductive autonomy.³⁵ With the statute now authoritatively construed by the SJC, the district court again considered its constitutionality. Staunchly unmoved by the SJC's desire to save the statute from an early demise, the district court was particularly troubled that the statute had been interpreted to require parental consultation in all cases and to give judges the authority to override the decision of a mature minor.³⁶ Rejecting the sterile reasoning of the SJC and its blithe assumption that the existence of a court option meant that parents did not have veto power over their daughter's decision, the district court again rooted its analysis in the social realm. Understanding that some minors, out of fear of injury or traumatic family disruption, would not seek parental consent and thus not satisfy the precondition for access to court, and that others, upon informing their parents, would be forcibly prevented from going to court, the district court recognized that mandatory involvement could result in a

32. Unless, perhaps a judge's own views about abortion would lead him or her to conclude that regardless of the actual circumstances, abortion is never in a woman's best interest.

33. In keeping with its flexible approach to statutory interpretation, the SJC stated that if parental notification and participation were subsequently deemed unconstitutional, its opinion should be read to conform to the subsequent ruling. *See id.* at 297-98.

34. Defendants had argued before the Supreme Court that, despite the language of § 12S stating that "[i]f one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court," parental consultation was not always a necessary precondition to seeking judicial consent, and that a minor who could demonstrate her maturity or that an abortion was in her best interest could obtain consent directly from court. *Id.* at 294.

In rejecting defendants' interpretation of the statute, the SJC made clear that § 12S abrogated the common law mature minor rule under which a mature teenager might have been permitted to self-consent to an abortion or seek a court order authorizing an abortion without prior parental consultation. *See id.* at 293-97.

35. As discussed below, the Supreme Court recognized that the requirement of parental consultation could, in fact, be the equivalent of giving parents veto power over their daughter's decision. *See infra* text accompanying note 45.

36. In rejecting the SJC's understanding of the statute, the district court noted that, at the defendants urging, the Supreme Court had envisioned a statute that:

prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where . . . the abortion would be in her best interests.

Bellotti v. Baird, 428 U.S. 132, 145 (1976), *quoted in Baird v. Bellotti*, 450 F. Supp. 997, 1000 (1978).

parental veto where the parental response, whether anticipated or actualized, prevented the minor from seeking judicial relief.³⁷

As for allowing a judge to override the decision of a mature minor to have an abortion, the court concluded that since the common law mature minor rule allowed a qualified minor to consent to all other medical procedures, this feature of the statute imposed “an undue burden in the due process sense” and constituted a “discriminatory denial of equal protection.”³⁸ The court thus clearly grasped the irrationality of singling abortion out for differential treatment, stating that “[d]efendants, in dwelling upon the dangers of abortion, proceed as if the only issue were to abort or not to abort The evidence fully supports the conclusion . . . that continued pregnancy and childbirth involve greater risks than a properly performed first trimester abortion.”³⁹

Following the district court’s declaration of invalidity and its permanent enjoinder of the statute, the United States Supreme Court, in its landmark *Bellotti II* decision, again considered the constitutionality of the Massachusetts parental consent law. Starting from the premise that minors possess constitutional rights, including the right to seek an abortion, the Court recognized that the “potentially severe detriment facing a pregnant . . . woman is not mitigated by her minority,”⁴⁰ and acknowledged that unwanted motherhood may be especially burdensome for a minor in light of her “probable education, employment skills, financial resources, and emotional maturity.”⁴¹ However, the Court quickly made clear that it was not about to equate the rights of minors with the rights of adults. Proclaiming “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing,”⁴² the Court fashioned a new state interest to address these

37. The court further recognized that even where not forcibly prevented from seeking court relief, some minors would simply not have the fortitude to confront their parents in court. Thus, upon being denied permission, they would simply give up and perhaps resort to an illegal abortion. See *Baird v. Bellotti*, 450 F. Supp. at 1001-02.

Although limiting its holding to situations where parental consultation was not in the minor’s best interest, the court, based on testimony regarding the potential destructive impact of the judicial proceeding on family relationships, noted the persuasiveness of plaintiffs’ argument that the “entire concept of a court proceeding to remedy the unconstitutionality of the parental veto, as struck down in *Danforth*, is but an ignis fatuus, and itself imposes too great a burden upon the exercise of the minor’s rights.” *Id.* at 1002.

38. *Id.* at 1004. See *infra* note 34 regarding the mature minor rule.

39. *Id.* at 1004 (citations omitted). Although not referred to directly, it appears that the court premised its analysis on a recently enacted statute giving some minors, including pregnant teens, authority to consent to their own medical treatment. See MASS. GEN. LAWS ch. 112 § 12F (1970).

40. *Bellotti v. Baird*, 443 U.S. 622, 633 & n. 12; 642 (1979).

41. *Id.* at 642. The Court thus recognized that from the perspective of a pregnant woman, the desirability of reproductive control is not age dependent.

42. *Id.* at 634. The Court cited a number of cases to support limiting the rights of minors in favor of parental authority over their children, including *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (right of Amish parents to educate children beyond the eighth grade at home) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right of parents to send children to private schools). See *Bellotti v. Baird*, 443 U.S. at 637, 638. However, the Court’s reliance on these cases is misplaced as they involve a conflict between the parents and the state regarding the upbringing of the child, with no indication of a conflict between the parents and the child. For further discussion, see J. Shoshanna Ehrlich & Jamie Ann Sabino, *A Minor’s Right to Abortion - The Unconstitutionality of Parental Participation in Bypass Hearings*, 25 NEW ENG. L. REV. 1185, 1191 n.25 (1991).

concerns—“the *special* interest of the state in encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child.”⁴³ The Court thus made clear that unlike adult women, young women require special treatment to protect them from their presumed vulnerability and decisional incapacity.⁴⁴

Having identified the nature of a young woman’s rights, as well as the special interest of the state, the Court examined the Massachusetts statute to determine if it appropriately balanced these competing considerations. Of primary concern was whether the statute gave parents veto power over their daughter’s decision, in violation of *Danforth*.

In contrast to the SJC, the *Bellotti II* Court grasped that the statute, by requiring minors to seek parental consent as a precondition to seeking judicial consent, indirectly vested parents with veto power over their daughter’s decision. As explained by the Court, “many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents’ efforts to obstruct both an abortion and their access to court.”⁴⁵ The Court thus held that the requirement of prior parental consultation impermissibly burdened a young woman’s right of choice. The Court also found that the statute was flawed because, as construed by the SJC, it allowed a judge to disregard the informed decision of a mature minor and deny consent if “he determine[d] that the best interests of the minor [would] not be served by an abortion”⁴⁶

Having invalidated the statute on due process grounds, the Court did not consider plaintiffs’ equal protection claim,⁴⁷ in which they had argued that the state had impermissibly distinguished between childbirth and abortion since, under Massachusetts law, a pregnant minor intending to carry her pregnancy to term was entitled to self-consent to her own medical treatment.⁴⁸ However, by its acceptance of a special state interest, the Court implicitly accepted that abortion may be treated differently from other medical procedures, including childbirth—

In further support, the Court drew a moving picture of nurturing parents seeking to fulfill “their central role in assisting their children on the way to responsible adulthood,” through “teaching, guiding, and inspiring by precept and example.” *Bellotti v. Baird*, 443 U.S. at 638. However, in this paean to parental nurturance, the Court disregarded the concrete reality that prompted the challenge to § 12S—family disharmony, including parental threats of physical harm, and the abdication of parental responsibility to “educate and guide” their daughter in matters of sexuality. In idealizing parental involvement, the Court thus discounted the ability of young women to comprehend the fragile ecosystems of their own families.

43. *Id.* at 639 (emphasis added).

44. For an excellent discussion of the contrasting “equal” and “special” approaches to minors’ rights, see Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children’s Rights*, 9 HARV. WOMEN’S L. J. 1 (1986), in which the author states that: “[l]ike the contest between special and equal treatment claims for women, the contest between rights and custody as principles for children’s legal treatment hints at a choice between seeing the child as basically the same as or basically different from adults.” *Id.* at 14.

45. *Bellotti v. Baird*, 443 U.S. at 647.

46. *Id.* at 650 (quoting *Baird v. Attorney Gen.*, 360 N.E.2d 288, 293 (Mass. 1977)).

47. *See id.* at 650 n.30.

48. *See infra* note 39.

a result that raises profound doubts about the sincerity of its purported acceptance of a minor's fundamental right to abortion.⁴⁹

The Court then explained how states could constitutionally provide for parental involvement in the abortion decisions of minors.⁵⁰ First, to avoid vesting parents with indirect veto power over their daughter's decision, a minor must be given the option of going directly to court without first consulting or notifying her parents.⁵¹ Second, she must be given the opportunity to show that she is mature and able to consent to the abortion; if maturity is established, she is entitled to make her own decision, the court cannot make it for her.⁵² If the court decides that the minor is not mature enough to give informed consent, she must be given the opportunity to show that the abortion is in her best interest.⁵³ Third, the hearing and any appeals that follow must "be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained."⁵⁴

Pausing for a moment at this seminal point in the litigation, it is apparent that Mary Moe's quest for reproductive fairness for young women has met with only partial success. On the one hand, it is clear that minors have a constitutionally protected right to terminate an unwanted pregnancy and that parents may not be vested with direct or indirect veto power over their daughter's decision to have an abortion. On the other hand, it is equally clear that minors do not possess the

49. This doubt is strengthened by the fact that the Court here permits a minor's right to an abortion to be limited by a "special" as distinct from the usual "compelling" state interest.

50. See *Bellotti v. Baird*, 443 U.S. at 651 n.31. In his concurring opinion, Justice Stevens argued that once the Court had invalidated § 12S, it had no business discussing the "constitutionality of an abortion statute that Massachusetts had not enacted," and that any such discussion was "advisory" in nature. *Id.* at 656 & n.4 (Stevens, J., joined by Brennan, J., Marshall, J., and Blackmun, J.).

The Court, however, has since made clear that *Bellotti II* is not advisory, but establishes the applicable legal standards against which parental consent laws are to be measured. See, e.g., *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 511-14 (1990); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 439-40 (1983); *Planned Parenthood Ass'n. v. Ashcroft*, 462 U.S. 476, 490 (1983).

51. The Court noted that since § 12S provided for a court bypass, it would describe the alternative in terms of a judicial proceeding, but that this was not the only permissible option. See *Bellotti v. Baird*, 443 U.S. at 643 n.22.

52. See *id.* at 647. Thus, although significantly diluting the *Roe* right in the first instance by permitting third-party involvement, the decision makes clear that if a minor demonstrates that she is mature, the rationale for "special protection" evaporates and she is entitled to be treated like an adult. See *id.* For a critique of the maturity standard, see Satsie Veith, Note, *The Judicial Bypass Procedure and Adolescents' Abortion Rights: The Fallacy of the "Maturity" Standard*, 23 HOFSTRA L. REV. 453 (1994).

53. See *Bellotti v. Baird*, 443 U.S. at 647-48. Although it is difficult to comprehend how it could be in the best interest of a young woman to have a baby when she has been found to be too immature to decide for herself whether or not to have an abortion, the Court apparently anticipates the possibility of this result. As stated earlier in the decision,

an abortion may not be the best choice for the minor. . . . In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor's best interests.

Bellotti v. Baird, 443 U.S. at 642-43.

54. *Id.* at 644.

same rights as adult women, since their ability to obtain an abortion can be made contingent upon securing third-party authorization.⁵⁵

Following *Bellotti II*, the Massachusetts statute was amended,⁵⁶ giving minors the right to go directly to court without first having to seek parental permission and divesting judges of their authority to override the decision of a mature minor.⁵⁷ This revised statute was again challenged in federal court.⁵⁸ This time, however, the court, finding that the statute carefully tracked *Bellotti II*'s guidance, refused to enjoin its enforcement and made clear that a due process challenge to the facial validity of the statute was doomed to failure.⁵⁹ The court also made short shrift of plaintiffs' claim that the statute violated the Equal Protection Clause by treating abortion differently from other medical procedures, including childbirth.⁶⁰ Stating that "[t]he views expressed in *Bellotti II* implicitly assume that a state may rationally conclude that the decision to have an abortion poses risks to the physical, mental, or emotional well-being of a minor which are greater than the risks posed by the decision to bear a child," the court concluded that the aborting teen is in a uniquely perilous situation and may thus be burdened by third-party consent requirements.⁶¹

55. It should be noted that since *Bellotti II*, the Court has heard a number of other parental consent and notification cases, but this decision still provides the operative constitutional framework. Subsequent cases include *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981).

56. See MASS. GEN. LAWS ch. 112 § 12S (1970), amended by 1980 Mass. Acts 240. It should be noted that the amendments also added informed consent and waiting period requirements for all women. See *id.*

57. See *id.*

58. See *Planned Parenthood League v. Bellotti*, 499 F. Supp. 215, 217 (D. Mass. 1980) (denying plaintiff's request for an injunction and stay of enforcement), *aff'd*, 641 F.2d 1006, 1010-11 (1st Cir. 1981). These decisions also address the constitutionality of the informed consent and waiting period requirements that were added to § 12S in 1980. See *id.* at 1013-23; *Planned Parenthood League*, 499 F. Supp. at 218-20, 221-23. It should be noted that the full name of the plaintiff in this lawsuit is the Planned Parenthood League of Massachusetts.

59. See *Planned Parenthood League*, 499 F. Supp. at 217; *Planned Parenthood League*, 641 F.2d at 1009-11. Although similar in composition, the identity of the plaintiffs changed in this post-*Bellotti II* round of federal litigation. Here plaintiffs included: the Planned Parenthood League of Massachusetts, a non-profit foundation that provided abortion counseling and referral; the Critteton Hastings House, a medical clinic that performed abortions and abortion-related services; Phillip Stubblefield, M.D., a physician whose practice included the performance of abortions; and Jane Doe, a pregnant minor who wanted to terminate her pregnancy without parental or judicial approval. See *Planned Parenthood League*, 641 F.2d at 1007. Defendants included the state Attorney-General, the Commissioner of Public Health, and the state District Attorneys, represented by the District Attorney of Suffolk County. See *id.* Following the denial of the injunction, plaintiffs filed a state court action challenging the validity of § 12S under the Massachusetts Constitution. See *infra* note 63 and accompanying text. Thus, for a period of time, plaintiffs were simultaneously seeking relief in federal and state court.

60. Recall that under MASS. GEN. LAWS ch. 112 § 12F (1970), a pregnant minor, as well as certain other classes of minors, are allowed to self-consent to their own medical treatment.

61. *Planned Parenthood League*, 641 F.2d at 1012. Having dealt plaintiffs' facial challenge a resounding blow, the court did, however, leave open the possibility of a future "as applied" challenge, noting that even if a statute is facially valid, it can be struck down if it is unduly burdensome in its operation. See *id.* at 1011. But, in 1990, this door was essentially slammed shut when the United States Supreme Court, although recognizing that the judicial bypass process causes "fear, tension, anxiety, and shame among minors," nonetheless upheld Minnesota's parental notification law. *Hodgson v. Minnesota*, 497 U.S. 417, 441 (1990) (citing Finding 44 from the district court's decision, 648 F. Supp. 756, 763 (D. Minn. 1986)).

III. TURNING TO THE STATE CONSTITUTION—THE QUEST FOR REPRODUCTIVE RESPECT CONTINUES

In April of 1981, after the circuit court of appeals essentially told the plaintiffs that their federal constitutional challenge was the legal equivalent of tilting at windmills,⁶² the plaintiffs brought an action in state court challenging the validity of the parental consent law on state constitutional grounds.⁶³ In turning to the state constitution as a source of individual rights, the plaintiffs were pursuing an alternative that had become increasingly popular over the course of the previous decade as the federal courts had begun to retreat from the liberalism of the Warren Court era. With this re-entrenchment, the role of the federal judiciary as the preferred protector of civil liberties had been called into doubt, and state courts were increasingly being asked to “step into the breach” and protect individual rights on state constitutional grounds.⁶⁴

Responding to the Court’s disengagement, plaintiffs decided to dismiss their federal action “insofar as it challenged the parental/judicial consent provisions of § 12S.” Plaintiffs’ Brief at 8. It should be noted that prior to dismissing the case, plaintiffs did shift their focus from a facial to an “as applied” challenge. For details on this phase of the litigation, see *Planned Parenthood League v. Bellotti*, 608 F. Supp. 800 (D. Mass. 1985), *aff’d*; 868 F.2d 459 (1st Cir. 1989).

62. See *supra* notes 59-61 and accompanying text.

63. As mentioned above in note 59, this meant that the plaintiffs were simultaneously seeking relief in the federal and state courts from 1981 until 1990, when they dismissed their federal court action.

Following is a brief explanation of the procedural history of the state case. The state challenge was initially filed in the Supreme Judicial Court for Suffolk County (SJC) by the same plaintiffs who had filed the federal court challenge. See Plaintiffs’ Brief at 2. See *supra* note 59 for the identity of the plaintiffs. The SJC denied plaintiffs’ request for a preliminary injunction, and on April 23, 1981, some seven years after its enactment, § 12S went into effect. See *Planned Parenthood League*, 868 F.2d at 461. Shortly thereafter, plaintiffs amended their complaint to add an “as-applied” challenge. *Id.*

The case was then transferred to the Suffolk Superior Court and the chief justice of that court issued an order requiring superior court judges to maintain statistical records on the operation of the statute. See *id.* In 1986, the case was transferred to the court’s suspended docket, and occasional status reports were filed by the parties. See Plaintiff’s Complaint at 10.

Beginning in 1991, in an unusual procedural step, the parties, seeking to avoid the need for trial, began to work cooperatively to review data and negotiate a stipulation of facts. See *id.* In 1995, the parties filed a new complaint with the SJC, together with extensive stipulations. See Plaintiffs’ Brief at 2; Stipulation of the Parties, *Planned Parenthood League v. Attorney Gen.*, 677 N.E.2d 101 (Mass. 1997) (No. 95-498) [hereinafter Stipulations]. The prior superior court action was then dismissed. See *id.* at 9. Shortly thereafter, the parties filed a “Further Stipulations of the Parties” asking the court to decide the case on the basis of the written stipulations, and jointly moved for a reservation and report. See Plaintiffs’ Brief at 3. The parties then filed cross motions for summary judgment and a single justice of the SJC reported the case to the full court for disposition. See Plaintiffs’ Brief at 4. In March 1997, the SJC issued its decision on the merits in *Planned Parenthood League v. Attorney General*, 677 N.E.2d 101 (Mass. 1997). This decision is the focus of our discussion.

64. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977). For other decisions involving challenges to parental involvement laws on state constitutional grounds, see *American Academy of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997) (holding that the California parental consent law violated a minor’s right to privacy under the California constitution); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (holding that the Florida parental consent law violated a minor’s right to privacy under the Florida constitution); *Planned Parenthood v. State of Alaska*, Case No. Jan-97-6014 CI (1997) (finding at the summary judgment stage that the Alaska parental consent law violated the state constitution’s equal protection clause).

Significantly for the plaintiffs, the SJC, in a recent abortion funding case,⁶⁵ had signaled its willingness to jump into this breach. Rejecting the Supreme Court's conclusion in *Harris v. McRae* that the denial of Medicaid funds for abortion does not interfere with a woman's right of choice,⁶⁶ the SJC determined that abortion is a protected fundamental right under the state constitution and ruled that by "injecting coercive financial incentives favoring childbirth" into the decision-making process, the denial of funds impermissibly interferes with an indigent woman's freedom to "choose abortion over maternity."⁶⁷ In what could only have been an encouraging nod to the plaintiffs, the SJC, in ruling that abortion cannot be singled out for differential treatment, signaled its willingness to go further than the Supreme Court in protecting a woman's right of choice.⁶⁸ However, plaintiffs' hope for a more generous state right was dashed with the SJC's decision in *Planned Parenthood League v. Attorney General*.⁶⁹ Renouncing the promise of *Moe*, the court failed to recognize that, like the denial of Medicaid funding, consent rules impose unique conditions on teens seeking to terminate a pregnancy and thus discriminate against the exercise of a fundamental right.

Turning to this decision, I first consider the SJC's broad analysis of the law's constitutionality. Although plaintiffs argued that the law was unconstitutional on both due process and equal protection grounds, the court essentially ignored the equal protection argument, disposing of it in a single paragraph which, adding insult to injury, was relegated to a footnote. Next, I will look at the court's response to the narrower question of whether a state may impose a two-parent as distinct from a one-parent consent requirement.

In evaluating the constitutionality of § 12S, the SJC, like the Supreme Court in *Bellotti II*, recognized that minors have a constitutional right to have an abortion.⁷⁰ Unlike the Supreme Court, however, which expressed some insight into the life circumstances of pregnant teens (noting that "unwanted motherhood may be exceptionally burdensome for a minor"),⁷¹ the SJC did not even pause to consider the importance of reproductive choice for minors, but only stated that "[t]he constitutional right is the same as it was in the *Moe* case."⁷² Thus, although presumably affording fundamental status to the right by equating it with the right

65. See *Moe v. Secretary of Admin. and Fin.*, 417 N.E.2d 387 (Mass. 1981).

66. 448 U.S. 297 (1980).

67. *Moe*, 417 N.E.2d at 402 (quoting Justice Brennan, writing in dissent to *Harris v. McRae*, 488 U.S. 297, 332-33 (1980)).

68. See *id.* at 399 (citing cases in which the state due process clause had been interpreted more broadly than the cognate federal clause).

69. 677 N.E.2d 101 (Mass. 1997). For the procedural history of the case, see *supra* note 63.

Although upholding the statute, the court did invalidate a two-parent consent requirement, as distinct from a one-parent consent requirement, thus departing from the Supreme Court's decision in *Hodgson* that a two-parent consent requirement is acceptable, so long as there is a bypass option. See *Hodgson*, 497 U.S. at 2969-71; see also discussion of *Hodgson*, *infra* notes 129-30 and accompanying text and note 134.

70. See *Planned Parenthood League*, 677 N.E.2d at 104; see also *Bellotti v. Baird*, 443 U.S. 622, 642 (1979).

71. *Bellotti v. Baird*, 443 U.S. at 642.

72. *Planned Parenthood League*, 677 N.E.2d at 104.

in *Moe*, the SJC then callously proceeded to treat the desirability of reproductive autonomy as a theoretical abstraction unanchored to the concrete reality of young women's lives.⁷³

Having identified, however cursorily, the underlying right, the SJC then sought to determine whether the "obvious" interest of the state in the "welfare of minors and in the promotion of the interests of parents in the care and upbringing of their children . . . counterbalance[s] the unquestioned limitation that § 12S imposes on a woman's constitutional right of choice."⁷⁴ In balancing these considerations, the court rejected the compelling state interest standard that is customary when a fundamental right is at stake in favor of a "more flexible, less mechanical balancing of interests."⁷⁵ This leads one to wonder whether the court is saying, without actually stating it, that the right to have an abortion is not truly fundamental when the woman in question happens to be a teenager.⁷⁶

In constructing this balancing test, the SJC's use of the phrase "unquestioned limitation"⁷⁷ is quite revealing. After remarking that plaintiffs had not shown that "§ 12S was not being implemented according to its terms,"⁷⁸ thus suggesting this might have been problematic, the SJC recognized that the bypass process causes delay and can be emotionally traumatic, but concluded that these harms are not burdens because they are a natural consequence of the normal operation of a parental consent law. As expressed in the following quotes, delay and trauma are to be expected: "[c]ertainly, the operation of § 12S delays a minor's exercise of

73. Again, however, it is not clear what it means to characterize a right as fundamental if the court, as it does here, permits it to be limited by something less than a compelling state interest. See *supra* note 49 and accompanying text (raising this concern in the context of the *Bellotti II* decision) and text accompanying note 76 (raising this concern in the context of the present decision).

Reasoning as if pregnancy is disassociated from motherhood, the court did have evidence before it, by way of the Stipulations, regarding the impact of maternity on the educational and economic status of young women. See Stipulations ¶¶ 49-51.

Although a detailed discussion of teen motherhood is beyond the scope of this article, it is clear that becoming a mother at a young age has important life consequences. Most studies indicate that women who become mothers as teenagers are "more likely to have reduced educational attainment than later childbearers." RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREGNANCY, AND CHILDBEARING 126 (Cheryl D. Hayes ed., 1986) (citations to supporting studies omitted). Early childbearing is also likely to have a negative impact on work status and income. See *id.* at 130-32. Although the impact may diminish somewhat over time, "women who enter parenthood as teenagers are at greater risk of living in poverty, both in the short and long term." *Id.* at 132; see also *id.* at 130-32 (discussing how the impact of teen motherhood may be less pronounced for black than for white teens). For a different perspective on this issue, see KRISTEN LUKER, DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY (1996), in which she suggests a reverse causal relationship, arguing that poverty is a causal factor in teen pregnancy, rather than simply an outcome of early child-bearing.

74. *Planned Parenthood League*, 677 N.E.2d at 104 (emphasis added).

Seeking to distinguish this case from *Moe*, the court asserted that "the State's interests in support of § 12S have a stronger basis in legally and constitutionally grounded principles than the State's interest (preservation of expected life) implicated in the *Moe* decision." *Id.* at 106.

75. *Id.* at 103. In adopting this standard, the court looked to *Moe*, where the court eschewed reliance on strict scrutiny in favor of a more flexible standard. However, unlike this court, the *Moe* court clearly recognized the importance of the right of choice by, for example, analogizing carrying an unwanted pregnancy to term as a "bodily intrusion." *Moe v. Secretary of Admin. & Fin.*, 417 N.E.2d 387, 404 (Mass. 1981).

76. See *supra* note 49 and accompany text (raising this concern in the context of the *Bellotti II* decision).

77. *Planned Parenthood League*, 677 N.E.2d at 104.

78. *Id.* at 102.

her constitutional right;⁷⁹ “it is *reasonable to assume* that pregnant minors may be fearful and anxious about seeking parental or judicial approval and that delays in obtaining abortions result;⁸⁰ “[t]here is *inevitable* delay in such a process;⁸¹ and simply, “the judicial bypass process *can be* traumatic for a young woman.”⁸²

In accepting delay and trauma as “obvious,” “reasonable,” and “inevitable,” the court displayed the same social disconnect that it demonstrated when “discussing” the underlying abortion right and appeared oblivious to the fact that delay imposes significant burdens on the abortion right. First, delay increases the medical risks associated with abortion.⁸³ This is particularly troubling in light of the fact that, even without the compounding influence of a parental involvement law, minors tend to have abortions later in their pregnancies than do adult women.⁸⁴ Second, where delay pushes a minor into the second trimester, she must come up with additional funds to pay for the abortion, as second trimester abortions are usually more expensive than those performed in the first trimester—an obvious concern for low income teens. Third, delay increases the risk that a minor’s parents will learn she is pregnant. With the passage of time, she may become increasingly anxious, be unable to conceal her efforts to coordinate getting to court, or may simply begin to show.⁸⁵ Despite these very real concerns, the court wrote as if the delay were free-standing and unlinked to an event with direct and immediate implications for the mental and physical well-being of young women.

Similarly, in treating fear and anxiety as reasonable consequences of the bypass process, the court minimized how difficult the experience actually is for young women. But, as expressed in the Stipulations, minors are often “upset,” “panicky,” “frightened,” “hysterical,” or “nervous” about going to court.⁸⁶ Many

79. *Id.* at 104 (emphasis added).

80. *Id.* (emphasis added).

81. *Id.* (emphasis added).

82. *Id.* at 105 (emphasis added).

83. The court did note this concern in passing, stating in a somewhat skeptical manner, “it is said that delay in obtaining an abortion increases the risk to the minor,” but it failed to consider the implications of a requirement that puts minors at greater medical risk. *Id.* at 104. In fact, the risk of abortion may increase by as much as 20% for each week past the eighth week of pregnancy. See Stanley K. Henshaw, *The Impact of Requirements for Parental Consent on Minor’s Abortions in Mississippi*, 27 FAM. PLAN. PERSP. 120, 122 (1995). However, as the author notes, abortion at all gestational stages is considered a relatively safe medical procedure. See *id.*

84. Minors delay seeking an abortion for many reasons. As would have been testified to at trial by Dr. Henshaw, the Deputy Director for Research at the Alan Guttmacher Institute, a leading research institute on reproductive issues:

many minors have little experience with the health care system; many minors have difficulty raising the necessary funds; . . . some minors have difficulty planning an explanation for their absence from school or from home; young girls with irregular menstrual cycles often take longer to recognize the signs of pregnancy; even some girls who do recognize their pregnancy may deny it or be ambivalent about accepting it.

Stipulation ¶ 72.

85. Parents are more likely to react with anger when they learn of their daughter’s pregnancy in an indirect manner rather than through intentional disclosure. See Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors’ Abortion Decisions*, 24 FAM. PLAN. PERSP. 196, 203 (1992).

86. Stipulation ¶ 85.

dread the prospect of discussing sex and their pregnancy with a stranger.⁸⁷ Others fear that they will run into someone they know at the court.⁸⁸ One minor reported fearing that her lack of immigration status would be revealed and she would be deported.⁸⁹ Another feared that the judge would decide that she was a bad mother and take away the child she already had.⁹⁰ Minors reported having nightmares about going to court⁹¹ and becoming ill prior to or during the court hearing.⁹² For some, going to court makes them feel ashamed, or like a criminal; others experience court as a punishment.⁹³ Dismissing the emotional consequences as obvious, the court silenced these voices. Reducing these young women to shadow figures and consigning them to the margins of the opinion, the court reasoned around, and not about, the impact of this law on pregnant teens.⁹⁴

With the burdens quietly folded into the normal workings of the bypass process, the court focused on the state's interest in requiring parental or judicial consent, maintaining that this adult involvement is necessary to ensure that a minor's decision is "truly free and informed."⁹⁵ Extolling the benefits of parental participation in the abortion decision, the court ignored the fact that a majority of minors voluntarily choose to involve their parents and that the existence of a parental consent or notification law appears to have minimal impact on the number of teens who turn to their parents.⁹⁶ As the court itself acknowledged, "[w]e have no way of knowing how many minors elect to seek parental consent in order to avoid the judicial process."⁹⁷

Moreover, the court's assumption that parental involvement ensures a free and informed decision was misguided. Clearly, many minors are gifted with parents who can provide them with constructive and compassionate guidance. Seemingly forgotten by the court, however, is the reality that underlies the entire bypass construct, which is that "many parents hold strong views on the subject of

87. See *id.* ¶ 87.

88. See *id.*

89. See *id.* ¶ 85.

90. See *id.* ¶ 88.

91. See *id.*

92. See *id.* ¶ 87.

93. See *id.* ¶ 89.

94. The court also ignored the very real logistical difficulties minors encounter in seeking access to the court. Although Massachusetts has a well coordinated counseling and lawyer referral program to assist young women, see Ehrlich & Sabino, *supra* note 42, at 1202, making the necessary arrangements is nonetheless stressful and complex. At a minimum, a minor must connect with a lawyer, arrange to miss school, and find her way to a court (which may be some distance from her home) without arousing the suspicions of her parents. See Stipulation ¶ 78; Ehrlich & Sabino, *supra* note 42, at 1202.

95. *Planned Parenthood League v. Attorney Gen.*, 677 N.E.2d 101, 105 (Mass. 1997). The court also claimed that this requirement is "entirely compatible with the fundamental principle that stands behind *Roe v. Wade*," which is "not one of facilitating abortion but of respecting the privacy right of an individual in choosing an abortion." *Id.* The court never explained how mandating third-party involvement respects, rather than negates, the privacy rights of teens. Given, however, the court's belief that this involvement improves teen decision-making, it may be suggesting that third-party involvement enhances the teenager's right of choice.

96. See Robert Blum, et al., *The Impact of a Parental Notification Law on Adolescent Abortion Decision-Making*, 77 AM. J. PUB. HEALTH 619, 619 (1987); Patricia Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 FAM. PLAN. PERSP. 259, 260 (1983).

97. *Planned Parenthood League*, 677 N.E.2d at 106.

abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court."⁹⁸ Perhaps inadvertently, the court itself acknowledged the possibility that parental involvement might dissuade a minor from seeking an abortion: "[w]e will also never know how many young women initially decided to have an abortion and, after consulting a parent, changed their minds."⁹⁹ Unfortunately, we will also never know how many of those changes of heart would have been truly "free and informed" and how many the result of parental efforts to obstruct an abortion.

Even where parents do not actively seek to prevent their daughter from having an abortion, inducing a minor to involve her parents by imposing the distasteful alternative of a court hearing is unlikely to improve the nature of her decision-making. As would have been testified to at trial by Dr. Gary Melton, an expert in adolescent and family psychology:

There is no empirical evidence to suggest that compelling communication between parents and their pregnant teenager over the pregnancy and its resolution will improve the quality of communications between them The most common reaction of parents to knowledge of a teenage daughter's pregnancy is to be upset. An atmosphere of discomfort, stress or anger generally will not facilitate a reasoned, dispassionate discussion about the pregnancy.¹⁰⁰

Moreover, many minors elect not to involve their parents because of the fragility of their family structure.¹⁰¹ Reasons given by Massachusetts minors for not informing their parents about a pregnancy include the following: parents are in the middle of a difficult divorce; a parent is critically ill; parents are recovering alcoholics; father was brutally murdered two weeks earlier; mother is a single parent overwhelmed by working two jobs and dealing with her son's drug problems; family was evicted and is under stress living with relatives; father recently attempted suicide.¹⁰² Seeking to protect their parents from further turmoil, minors fear that disclosure will make family problems worse. As explained by a Minnesota judge, "We hear of an amazing amount of [family] turmoil These girls are living in homes where the parties are together physically but rarely relate to one another. The girl doesn't feel comfortable

98. *Bellotti v. Baird*, 443 U.S. 622, 647 (1979).

99. *Planned Parenthood League*, 667 N.E.2d at 1061. See *infra* text accompanying note 111 regarding the significance of this quote.

100. Stipulation ¶ 106. See also *Donovan*, *supra* note 96, at 266 (noting that the consensus among experts is that compelled disclosure does not improve parent-child communication).

101. According to a 1991 study, 25% of minors who did not tell their mother about their pregnancy and 12% of those who did not inform their father said that it was because their parent was "already under too much stress." *Henshaw & Kost*, *supra* note 85, at 203.

102. These examples are taken from the counseling records of the Planned Parenthood League of Massachusetts. See Stipulation ¶ 113.

bringing a problem into the house because it will just exacerbate all the other problems."¹⁰³ Similarly, another Minnesota judge observed, "There are problems at home in almost all the cases. The father is alcoholic and violent; or the parents are in poor health or have marital difficulties, and the girl fears that the news of her pregnancy will jeopardize her parents' health or marriage"¹⁰⁴

It is hard to imagine how disclosure under these kinds of circumstances would promote the state's interest in "free and informed" decision-making. Parents who are overwhelmed and caught up in the turmoil of their own lives are unlikely to be able to respond to their daughter in an engaged and constructive manner. Rather than enhancing family communication and the quality of a minor's decision-making, the introduction of this information into an already burdened family environment is likely to exacerbate the existing difficulties.

For those minors who cannot involve their parents, the SJC maintained that judicial intervention similarly ensures that the decision to abort is "free and considered."¹⁰⁵ However, the court's casual assumption that the involvement of a judge will enhance the quality of a minor's decision is profoundly flawed. First, a minor who goes to court has already made up her mind about terminating her pregnancy. She is seeking to effectuate this decision, not to obtain judicial input into whether it is a wise one. In fact, the SJC itself was apparently aware that judges are not actually participating in the decision-making process, but are instead simply affirming a pre-existing choice: "The fact that virtually every minor who seeks judicial approval of *her decision* to have an abortion obtains that approval does not mean that judicial bypass . . . is unnecessary or irrational. At the least, that approval helps assure that *the choice* is free and voluntary."¹⁰⁶ Approval is thus apparently read back into the decision-making process to sanction the outcome. The fact that approval is almost always granted and, although not mentioned by the court, that it is almost always based on a finding of maturity, strongly suggests that minors are making thoughtful, informed decisions about their pregnancies on their own.¹⁰⁷

Second, as recognized by the SJC, many minors are "fearful and anxious" about going to court and the hearing process is frequently a traumatic situation. Thus, even if a minor had not already decided to terminate her pregnancy, this tension-laden experience is hardly compatible with free and informed decision-making, which, at a minimum, requires the ability to engage in an unburdened assessment of one's options. Additionally, some judges, perhaps because of the

103. Donovan, *supra* note 96, at 262 (1983) (quoting Judge Allen Oleisky). At the time of this statement, Judge Oleisky was hearing most of the bypass petitions filed in Minneapolis. *See id.*

104. *Id.* at 262 (quoting Judge Gerald Martin of Duluth, Minnesota).

105. *Planned Parenthood League*, 677 N.E.2d at 106.

106. *Id.* (emphasis added).

107. From April 23, 1981, the effective date of the statute, through the present, only 14 of the judicial consent petitions that have been heard in Massachusetts have been denied. Of these, 11 were overturned on appeal. *See* Stipulation ¶ 131. Virtually all of these have been based on a finding of maturity. *See* Stipulation ¶¶ 130-31 (citing Anita Pliner & Susan Yates, *Judging Maturity in the Courts: The Massachusetts Consent Statute*, 78 AM. J. PUB. HEALTH 646, 647 (1988)).

intimate nature of the inquiry or because of an unarticulated awareness of the underlying sexual activity, may be uncomfortable hearing these cases. Other judges may actually be hostile towards the minor for various reasons, including opposition to abortion, disdain of teenage sexual activity, or displeasure with the minor's decision not to involve her parents.¹⁰⁸ Rooted in discomfort or possibly even animosity, the judicial inquiry is thus unlikely to engage the minor in a meaningful consideration of her options. As succinctly stated by Judge Garrity of Massachusetts who, it should be noted, is morally opposed to abortion, the law is "utterly preposterous . . . [t]he court is a pure rubber stamp. All the law does is to harass kids."¹⁰⁹

Perhaps, however, we should not attach too much meaning to the court's balancing of interests, as its actual feelings about the beneficial purpose of this law may in fact be captured by the following language: "[I]t is unquestionable that § 12S tends to encourage, but not to require, the minor to seek support within her family We will also never know how many young women initially decided to have an abortion and, after consulting a parent, changed their minds."¹¹⁰ Apparently identifying this change of heart as a positive outcome, it appears that the court, despite its focus on family intimacy and informed decision-making, recognized and embraced the anti-abortion animus that underlies the pro-family rhetoric of parental involvement laws.¹¹¹

Having decided that the law was not unduly burdensome, the court was still faced with plaintiffs' argument that the law discriminated against minors seeking an abortion in violation of the equal protection and equal rights guarantees of the state constitution.¹¹² Raising multiple instances of differential treatment, the plaintiffs' most compelling claim was that the statute created an impermissible

108. It is important to note that many judges treat the minors appearing before them with utmost respect and make every effort to put them at ease and make the hearings as painless as possible.

109. Donovan, *supra* note 96, at 267. According to Donovan, "most of those who are involved with minors who go to court do not believe that the process increases the minor's ability to give informed consent." *Id.* at 266.

110. *Planned Parenthood League*, 677 N.E.2d at 106.

111. The view that parental involvement laws are actually anti-abortion laws is supported by the fact that these laws are almost always sponsored by anti-choice groups. According to a 1986 report of the American Civil Liberty's Reproductive Freedom Project, all of the parental involvement laws passed in the 13 years prior to the report's publication were "drafted by anti-choice groups which have as their primary goal ending *all* abortions." ACLU REPRODUCTIVE FREEDOM PROJECT, PARENTAL NOTICE LAWS—THEIR CATASTROPHIC IMPACT ON TEENAGERS' RIGHT TO ABORTION 3 (1986). Moreover, these laws are "frequently introduced as part of omnibus anti-abortion statutes designed to restrict or completely prohibit abortions." *Id.*

At the same time, most major professional, social service, and medical groups, such as the American Psychiatric Association (AMA), who work directly with teens are opposed to parental involvement laws. *See id.* at 3 and accompanying endnote. Thus, for example, the Council on Ethical and Judicial Affairs of the American Medical Association issued a report in 1992 taking the position that while physicians should encourage minors to discuss their pregnancies with at least one parent, parental involvement should not be required because of the risk of abuse and the importance of privacy in matters of health care. This Council Report was adopted by the House of Delegates of the AMA in 1992. *See Report of the Council on Ethical and Judicial Affairs, American Medical Association, Mandatory Parental Consent to Abortion*, 269 JAMA 82 (1993).

112. *See* MASS. CONST. art. I & X. These claims were raised together without any doctrinal distinction, *see* Plaintiffs' Complaint at 11, and no distinction was made by the court. Accordingly, this article will simply refer to this as the equal protection part of the case.

distinction between pregnant minors intending to carry their pregnancy to term and those intending to abort.¹¹³

In contrast to a minor seeking to avoid motherhood, a pregnant minor in Massachusetts may make the decision to carry to term on her own and self-consent to her medical treatment while pregnant, including both pregnancy and non-pregnancy related care; once a mother, she can continue to make her own medical decision, as well as consent to the medical care of her child.¹¹⁴ Moreover, unless the minor's "life or limb" are endangered, all information and records concerning her medical care are confidential between her and her doctor.¹¹⁵

The contrasting treatment of teens intending to carry a pregnancy to term and those intending to abort under Massachusetts law could not be starker. Rooted in a vision of young women as immature, inexperienced, and lacking judgment,¹¹⁶ a pregnant minor may not avoid becoming a mother without mandated third-party involvement. As the decision not to become a mother cannot exist apart from its effectuation through an abortion, a minor's decision-making power and the resulting medical choice are thus subject to adult review and approval. However, should a minor change her mind and decide to carry to term, she is suddenly able to act unencumbered by the concerns that supposedly make the minor who intends to abort incapable of functioning independently. The pregnancy-outcome decision of a minor who carries to term, as well as related medical decisions with potentially profound and lasting consequences, such as whether to undergo chemotherapy while pregnant or to be tested for and possibly begin treatment for the AIDS virus, are entrusted to the minor.

Although this differential treatment is clear on its face, let us take the comparison one step further. Assume that a young woman who previously

113. Plaintiffs also charged that the statute discriminated between married or previously-married teens, who are exempt from 12S's consent requirements, and never-married teens; between minors seeking abortions and minors seeking other kinds of medical treatment, who presumably can self-consent to the treatment under the common law mature minor rule; between male minors wishing to undergo medical treatment and procedures and female minors seeking to terminate a pregnancy; and between minors with divorced parents who must obtain the consent of both parents for an abortion and minors in other circumstances who need only obtain the consent of one parent. *See* Plaintiffs' Complaint at 11-13.

Plaintiffs also asserted that 12S discriminated between "physicians, counseling organizations, and clinics that perform or provide any form of medical treatment or treatment-related services . . . other than abortions or abortion-related services" and those performing or providing abortions or abortion-related services. *See* Plaintiffs' Complaint at 12.

114. *See* MASS. GEN. LAWS ch. 112, § 12(F) (1970). Massachusetts is not alone in this regard. According to a 1992 study by the Alan Guttmacher Institute, 27 states and the District of Columbia had laws giving minors the authority to obtain prenatal care and delivery services without parental consent or notification; of these states, almost one-third had laws requiring parental notification or consent for abortion. *See* PATRICIA DONOVAN, THE ALAN GUTTMACHER INSTITUTE, OUR DAUGHTERS' DECISIONS: THE CONFLICT IN STATE LAW ON ABORTION AND OTHER ISSUES 10, app. A (1992).

Also, it should be noted that a majority of states permit a teen to place her child for adoption without the permission or knowledge of her parents. *See id.* at 16, app. A.

115. MASS. GEN. LAWS ch. 112, § 12F (1970).

116. In so characterizing minors, the SJC quoted from the Supreme Court's decision in *Hodgson* as follows: "[I]mmaturity, inexperience, and lack of judgment may sometimes impair [minors'] ability to exercise their rights wisely." *Planned Parenthood League v. Attorney Gen.*, 677 N.E.2d 101, 105 (Mass. 1997) (citing *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1980)).

decided to carry to term, and is now a parent with full decisional authority over her own and her child's medical treatment, becomes pregnant again, but decides this time to abort. Suddenly she is recast as vulnerable and immature. Her decisional capacity, although unimpaired as to all other medical decisions, takes wing leaving her unable to make this decision without the involvement of her parents or the court. Of course, should she change her mind and decide to have the child, her pregnancy-based decisional capacity would be fully restored.

Given this obvious discrimination against the exercise of a fundamental right, one would think that the court would have felt some obligation to engage in a meaningful equal protection analysis. However, the entire discussion is tucked into a footnote at the end of the due process section. By inserting it as what seems to be an afterthought, the court effectively collapsed plaintiffs' two-pronged challenge into a challenge premised primarily on the due process clause. This leads one to wonder whether sheer avoidance was the only way the court could find to justify this differential treatment.

The court's half-hearted analysis of the equal protection challenge reads as follows:

The claim that a pregnant unmarried minor is denied equal protection of the laws fails because the classification made by § 12S has a *rational* basis. The differences between an adult and a minor; between married, widowed, or divorced pregnant minors and an unmarried pregnant minor; and between the *special considerations* applicable to an abortion as opposed to some other intrusive medical procedure justify the *special treatment* that § 12S accords to an unmarried pregnant minor who seeks to terminate her pregnancy.¹¹⁷

Although clearly enumerating some of the complained of discriminatory classifications,¹¹⁸ the court ducked the direct comparison between teens intending to abort and teens intending to carry to term. However, this distinction is undoubtedly embedded in the court's belief that abortion should be treated differently from other medical procedures because of the "special considerations" that apply when a woman chooses to terminate a pregnancy. In a remarkably circular fashion, the court reasoned that because abortion is "special," it can be singled out for "special"—meaning different—treatment without running afoul of the equal protection clause. Accordingly, teens seeking to abort can be singularly burdened by consent requirements because they are not similarly situated to teens seeking to become mothers—different circumstances permit differential treatment. The court, however, failed to tell us what the "special considerations" are that justify this differential treatment. When one seeks to distinguish between these two classes of teens based on any factor other than the

117. *Planned Parenthood League*, 677 N.E.2d at 106 n.10 (emphasis added). The court also rejected plaintiffs' claim that § 12S discriminates against physicians, counseling organizations, and clinics that perform abortions.

118. See *supra* note 113.

intended pregnancy outcome, it quickly becomes apparent that, even under the rational basis standard the court appears to have used here,¹¹⁹ the only salient difference is the abortion itself.

For the sake of discussion, let us assume (as did the court) that mandated third-party involvement does in fact benefit teens who are thinking about having an abortion; it is clear that teens thinking about becoming mothers would also benefit from such involvement. Thus, although the court attempted to create a safe harbor for itself by labeling abortion as “special,” a comparative analysis makes clear that the only “rational” reason for treating abortion differently is that the court regarded it as a more troubling outcome than birth.

The court maintained that because of her “[i]mmaturity, inexperience and lack of judgment,”¹²⁰ a teen’s decision to abort may not be a wise one, and parental or judicial involvement is needed to ensure that her decision is “truly free and informed.”¹²¹ Adult intervention thus serves as the counterweight to her decisional incapacity. Certainly, if the state has an interest in making sure that a minor does not terminate a pregnancy without grasping the full import of her decision, it is reasonable to assume that it would have a parallel interest in ensuring that a minor does not become a mother without understanding the full import of this decision. In light of the profound impact of early motherhood on the future course of a young woman’s life, one might well conclude that the state has an even greater interest in making certain that this decision is fully informed.¹²²

Although the court held that the involvement of either a parent or a judge would ensure that a minor’s decision is free and informed, it clearly preferred a family-centered approach, identifying several benefits that come only with parental involvement:

A minor may seek parental consent, and the family unit will be strengthened. Parents can help their daughter select a competent physician to whom they may be able to provide helpful information. Parents can provide emotional support and counsel to their daughter concerning the choice that is to be made, and continue to provide support after the choice has been made.¹²³

119. Under the guise of preferring a more flexible, less mechanical test, the court appears to have abandoned strict scrutiny for the toothless rational relationship standard, suggesting that flexibility means a court can simply pick and choose the reviewing standard at will.

120. *Planned Parenthood League*, 677 N.E.2d at 105 (citing *Hodgson*, 497 U.S. at 444).

121. *Id.* at 105.

122. *See supra* note 73.

123. *Id.* at 105. Again, for purposes of this discussion, we are assuming that these objectives are in fact served by mandated parental involvement. This discussion is not meant in any way to suggest that teens do not stand to benefit from involving their parents, as many parents are clearly able to provide their daughters with valuable support and guidance. The concern here is the element of compulsion.

It is clear from an examination of these assumed benefits that a minor carrying to term would gain as much, if not more, from this parental nurture and guidance as would a minor seeking to abort.

First, the court seemed to assume that the mere seeking of parental consent for an abortion, regardless of parental views on the subject, would strengthen the family unit. As the benefit is apparently conferred by the act of reaching out, the parallel act of seeking consent to become a mother should likewise strengthen the family unit.

Second, if minors stand to benefit from parental assistance in selecting a competent doctor to perform an abortion, they would similarly benefit from this guidance when choosing a doctor to provide prenatal care and deliver the baby. The same is true of the provision of “helpful information” to the attending doctor. Abortion is medically safer for teens than is pregnancy and childbirth¹²⁴ and carrying to term, unlike abortion (which is a singular medical event), may entail multiple decisions with profound implications for the well being of both the pregnant woman and the child she carries, such as how best to treat gestational diabetes, hypertension, or preeclamptic toxemia, and whether delivery by cesarean section is indicated. Thus, one could easily conclude that there is a greater need for adult involvement where the decision is to continue the pregnancy rather than abort.

A third identified benefit is that parents can provide “emotional support and counsel” while the minor is deciding what to do. As this benefit is conferred during the decision-making process and is not dictated by the eventual outcome, the outcome cannot be read back into the decision-making process to say that where it leads to abortion, rather than birth, the minor would have required more decisional guidance. Thus, clearly support and counsel would be equally valuable regardless of what a young woman ultimately chooses to do.

Closely related is the presumed support and counsel that parents can provide after the decision has been made. Although studies show that “[t]here appears to be a consensus that abortion rarely has adverse psychological sequelae,”¹²⁵ there is no doubt that engaged and loving parents could provide their daughter with beneficial attention. Similarly, it is clear that a pregnant teenager would benefit from constructive parental engagement as she carries to term and becomes a mother.

Hiding behind its unexamined circular reasoning—abortion is different, therefore it can be treated differently—the court obscures the fact that there is no rational basis for limiting the decisional capacity of a teen intending to terminate a pregnancy rather than carry to term. It is clear that abortion is being singled out

124. See ROBERT A. HATCHER ET AL., *CONTRACEPTIVE TECHNOLOGY* 481-82.(1994); *RISKING THE FUTURE*, *supra* note 73, at 278.

125. Laurie Schwab Zabin et al., *When Urban Adolescents Choose Abortion: Effects on Education, Psychological Status and Subsequent Pregnancy*, 21 *FAM. PLANNING PERSP.* 248, 248 (1989) (citing numerous studies). The authors also note that unmarried women are more likely to experience negative sequelae, but that “family support for abortion is salutary.” *Id.*

for unique treatment because it is the rejection, or at least the postponement, of motherhood.

Having disposed of plaintiffs' broad challenge to the constitutionality of the statute, the court focused on the narrower question of whether its two-parent, as distinct from a one-parent, consent requirement was unduly burdensome.¹²⁶ Suddenly acknowledging the reality of family life, the court introduced the possibility of the disengaged or even the "bad" parent—a parenting type that is notably absent from the warm, loving family prototype presented in the first part of the opinion. Lifting the veil from the ever-present, ever-perfect family, the court recognized that in situations such as where a child has been abused, never lived with a parent, or been impregnated by her father, parental involvement serves no beneficial purpose.¹²⁷

Moving beyond these concrete examples where the "two-parent requirement is obviously unjustifiable,"¹²⁸ the court considered whether this requirement is ever justifiable. In looking beyond the situation of the bad or disengaged parent, where the court expressed some concern for the well-being of the minor, the court, in considering the impact of the two parent consent requirement on "normal" families, shifted its focus from the impact on the minor to the rights of the informed parent.

Assuming without discussion that most minors initially turn to one parent, and that one-parent involvement ensures an informed decision, the court concluded that mandated involvement of the other parent encroaches upon the autonomy of the notified parent. The court quoted from *Hodgson*:

The second parent may well have an interest in the minor's abortion decision, making full communication among all members of a family desirable . . . but such communication may not be decreed by the State. The State has no more interest in requiring all family members to talk with one another than it has in requiring certain of them to live together.¹²⁹

The court continued:

126. As noted by the court, most states that have a consent law only require the consent of one parent. *Planned Parenthood League v. Attorney Gen.*, 677 N.E.2d 101, 106 n.11 (Mass. 1997) (citing the Report of the American Medical Association's Council on Ethical and Judicial Affairs, *Mandatory Parental Consent to Abortion*, 269 JAMA 82, 85 (1993)).

127. Although the court recognized that a child may have been abused by "one or both" parents, it never explained why this justifies a one-parent as opposed to a no-parent rule.

128. *Planned Parenthood League*, 677 N.E.2d at 107.

129. *Id.* at 107 (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 452 (1980)). See *supra* note 69 regarding the Court's decision in *Hodgson*.

In the ideal family setting, of course, notice to either parent would normally constitute notice to both In many families, however, the parent notified by the child would not notify the other parent. In those cases the State has no legitimate interest in questioning one parent's judgment that notice to the other parent would not assist the minor or in presuming that the parent who has assumed parental duties is incompetent to make decisions regarding the health and welfare of the child.¹³⁰

Having evinced no respect for the decisional capacity of teens, at least with respect to the abortion decision, and having ignored the negative implications of a statutory scheme that seeks to compel "full communication" by a teen, the court concluded that, at least between its adult members, family communication is best when it proceeds on a voluntary basis.¹³¹ This conclusion is not unreasonable, but it again highlights the court's uneasiness with allowing teens to make their own abortion decisions.

After concluding that the two-parent consent requirement is never justifiable,¹³² the court considered whether the availability of a judicial bypass cures the problem because a minor can avoid the burden of involving both parents by going to court.¹³³ Having relied on *Hodgson* to determine that a two-parent requirement is one parent too many, the Massachusetts court departed from the U.S. Supreme Court's conclusion in *Hodgson* that provision of a bypass resolves the problem. Suddenly more sympathetic to the delay and emotional stress imposed by the bypass process, the court concluded that as the state's interest is fully served by the involvement of one parent, requiring a minor to go to court where one but not the other parent consents is a burden without sufficient justification.¹³⁴ However, recalling its earlier days of creative statutory interpretation, the court, rather than invalidating the statute, concluded that from this day forward, the statute shall be "enforced as if it stated a requirement only of one-parent consent."¹³⁵

130. *Id.* at 107-108 (quoting *Hodgson*, 497 U.S. at 450).

131. *Id.* at 108.

132. *See id.* at 107.

133. *See id.* at 108.

134. *See id.* As articulated by Justice Stevens, dissenting in *Hodgson* from the holding that the provision of a bypass cures the unconstitutionality of a two-parent notice requirement:

A judicial bypass that is designed to handle exceptions from a reasonable general rule, and thereby preserve the constitutionality of that rule, is quite different from a requirement that a minor—or a minor and one of her parents—must apply to a court for permission to avoid the application of a rule that is not reasonably related to legitimate state goals The requirement that the bypass procedure must be invoked when the minor and one parent agree that the other parent should not be notified represents an . . . unjustified governmental intrusion into the family's decisional process.

Hodgson, 497 U.S. at 457.

135. *Planned Parenthood League v. Attorney Gen.*, 677 N.E.2d 101, 109 (Mass. 1997). Although clearly a positive result for those minors who do involve one parent, as they are spared the burden of going to court, perhaps accompanied by the consenting parent, it is of no benefit to those young women who cannot turn to either parent. Lacking a supportive family structure, these minors must still endure the indignity of the judicial consent requirement as they seek to exercise a right essential to their own sense of self as young women.

Dissenting from the majority's conclusion that a two-parent requirement is unconstitutional, two justices expressed the concern that a one-parent rule is inadequate because a minor might turn to the parent who had never supported her, financially or otherwise, or who had impregnated her, and that this parent might consent to the abortion for selfish reasons.¹³⁶ Although rowing in a different direction, it is ironic that in seeking complete validation of the existing statute, these justices most clearly articulate the concern of many who oppose these laws—that parents do not always act in the best interest of their children. According to the dissenters, motivated by self-interest, this parent would neglect to tell a daughter that “. . . abortion does not simply terminate a potentiality of life . . . but that, while the fetus resides in the mother's womb the fetus takes nourishment and grows, and early in the pregnancy the fetus has a readily detectable heartbeat.”¹³⁷ So that she may “choose life,” perhaps salvage her “immortal soul,” and avoid a “disabling sense of guilt and grief that otherwise might occur,” the minor must be made to confer with the other parent.¹³⁸

Although the dissenters' concern that a minor would turn to a disengaged or abusive parent rather than a supportive, involved parent, defies both common sense as well as reported studies about who minors tend to involve in their decision,¹³⁹ their candor is nonetheless instructive. Unlike the majority, who, in upholding the law, swaddled itself in pro- family rhetoric, the dissenters mince no words about the intended purpose of parental involvement laws—encouraging minors to “choose life” over abortion.

IV. CONCLUSION

With the decision in *Planned Parenthood League v. Attorney General* coming some twenty three years after Mary Moe sought to obtain an abortion without parental involvement because she both feared her father and hoped to spare her parents' feelings, the challenge to the constitutionality of the Massachusetts' parental consent law has wound to an end. The motivating vision behind this challenge—that young women have the right to decide for themselves whether or not they are ready to become mothers—has been partially realized. The United States Supreme Court and the highest court in Massachusetts have both made clear that minors have a constitutional right to abortion (although it is not clear if this right is actually fundamental as it can be

It should also be noted that the court denied the Massachusetts Citizens for Life's (MCFL) motion to intervene. MCFL had sought party status because it did not believe that its interest in defending the statute would be adequately represented by the Attorney General. *See id.* at 108-09.

136. *See id.* at 112.

137. *Id.* at 113.

138. *Id.* (dissenting opinion of Justice O'Connor, joined by Justice Lynch) (citations omitted).

139. Although it may seem obvious, studies indicate that minors tend to involve parents, or other adults, in decisions based on a sense of closeness and connection to them. *See, e.g.,* Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors Abortion Decisions*, 24 FAM. PLANNING PERSP. 196, 198 & 202 (1992). As far as I have been able to determine, no research supports the concern of the dissenters.

limited by something less than a compelling state interest) and that any cognizable interest parents may have in directing the upbringing of their children is subordinate to this ultimate right. At the same time, however, rooted in a distorted vision of the decisional capacity of teens, these courts have upheld the validity of third-party consent requirements as a precondition to the exercise of this right. Thus, at the journey's end, the proverbial glass is both half full and half empty.

