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## Constitutional Law--Supreme Court Is Undecided on Parental Notification Requirement for Minor's Abortion, *Bellotti v. Baird*, 99 S. Ct. 3035 (1979)

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**CONSTITUTIONAL LAW — SUPREME COURT IS UNDECIDED ON PARENTAL NOTIFICATION REQUIREMENT FOR MINOR'S ABORTION, *Bellotti v. Baird*, 99 S. Ct. 3035 (1979).**

I. INTRODUCTION

In *Bellotti v. Baird*,<sup>1</sup> the United States Supreme Court held that a Massachusetts statute that required either parental or judicial consent before a pregnant minor could obtain an abortion unconstitutionally infringed on the minor's right to privacy. In an opinion written by Justice Powell, four Justices concluded that the statute's parental notification provision also was unconstitutional.<sup>2</sup> In considering this notification issue, the Court analyzed the privacy rights of the minor vis-a-vis her parents and the state, and affirmed the principle that the constitutional rights of a minor are not equal to those of an adult.<sup>3</sup>

A woman's right to privacy in relation to her abortion decision was first recognized in *Roe v. Wade*,<sup>4</sup> in which the Supreme Court held that a state statute that prohibited a woman from obtaining an abortion unconstitutionally infringed on her right to privacy. The Court concluded that a state could not prohibit an abortion in the first trimester, although some state interests would justify burdening a woman's privacy right in the later stages of pregnancy.<sup>5</sup> In reaching this decision, the Court expressly reserved judgment on the rights of a pregnant minor.<sup>6</sup> Three years later, however, in the widely criticized<sup>7</sup> case of *Planned Parenthood v. Danforth*,<sup>8</sup> the Court struck down a Mis-

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1. 99 S. Ct. 3035 (1979).

2. *Id.* at 3052.

3. *Id.* at 3043.

4. 410 U.S. 113 (1973).

5. *Id.* at 163.

6. *Id.* at 165 n.67.

7. See, e.g., Note, *Parental Consent Abortion Statutes: The Limits of State Power*, 52 IND. L.J. 837 (1977); Note, *Third Party Consent to Abortions Before and After Danforth: A Theoretical Analysis*, 15 J. FAM. L. 508 (1977); Note, *Abortion Statutes After Danforth: An Examination*, 15 J. FAM. L. 537 (1977); Note, *The Illinois Abortion Parental Consent Act of 1977: A Far Cry from Permissible Consultation*, 12 J. MAR. J. PRAC & PROC. 135 (1978); Comment, *Abortion: An Unresolved Issue — Are Parental Consent Statutes Unconstitutional?*, 55 NEB. L. REV. 256 (1976); Comment, *Constitutional Law: Elimination of Spousal and Parental Consent Requirements for Abortion*, 16 WASHBURN L.J. 462 (1977); 31 ARK. L. REV. 122 (1977); 7 CUM. L. REV. 539 (1977); 8 TEX. TECH. L. REV. 394 (1976).

8. 428 U.S. 52 (1976).

souri parental consent statute because it gave the parent an "absolute veto" over the abortion decision of the pregnant minor in the first trimester.<sup>9</sup> Drawing on the principles established in *Roe* and *Danforth*, the Court in *Bellotti* attempted to further define the constitutional privacy rights of a minor in the context of the abortion decision.<sup>10</sup>

In *Bellotti* plaintiffs brought suit in the Massachusetts federal district court to enjoin enforcement of section 12S of the Massachusetts general abortion statute<sup>11</sup> and to challenge its constitutionality on fourteenth amendment due process and equal protection grounds.<sup>12</sup>

The district court declared section 12S unconstitutional on the ground that the restrictions it imposed on the privacy rights of minors could not be justified, either by the state interests as-

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9. *Id.* at 74. A number of lower courts have declared parental consent statutes unconstitutional based on *Danforth*. *Wolfe v. Schoering*, 541 F.2d 523 (6th Cir. 1976); *Wynn v. Scott*, 448 F. Supp. 997 (N.D. Ill. 1978); *Floyd v. Anders*, 440 F. Supp. 535 (D.S.C. 1977); *Hoe v. Brown*, 446 F. Supp. 329 (N.D. Ohio 1976); *Gary-Northwest Indiana Women's Servs. v. Bowen*, 421 F. Supp. 734 (N.D. Ind. 1976).

10. The scope of a minor's right to privacy in the abortion context depends not only upon an assessment of the minor's as yet unsettled constitutional status, but also upon the conflicts of this status with the constitutional rights of parents to supervise the upbringing of their children and the power of the state to regulate matters of public health and safety.

Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305, 306 (1974).

11. MASS. GEN. LAWS ANN. ch. 112, § 12S (West Supp. 1979) provides in part: If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

This statute was enacted in 1974, as § 12P of chapter 112. Amendments in 1977 changed the numbering of the section but not the substance. Throughout the text and footnotes, this Comment refers to the statute by its current designation, § 12S. Bracketed references to § 12S in quotations indicate that the original reference to § 12P has been changed for consistency and to avoid confusion.

Section 12T of the current statute provides for imprisonment as punishment for violation of § 12S.

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

serted or by the recognized rights of parents to raise their children.<sup>13</sup> Defendants appealed directly to the Supreme Court.<sup>14</sup> The Supreme Court vacated the district court's decision and stated that the district court should have abstained and certified questions to the Supreme Judicial Court of Massachusetts concerning the meaning of the statute.<sup>15</sup>

After questions were certified to and answered by the Massachusetts court,<sup>16</sup> the district court again found section 12S uncon-

13. Baird v. Bellotti, 393 F. Supp. 847, 854-57 (D. Mass. 1975).

14. Before its repeal by Pub. L. No. 94-381, § 1, 90 Stat. 1119 (1976), 28 U.S.C. § 2281 authorized the convening of a three-judge court to determine suits to enjoin enforcement of allegedly unconstitutional state statutes. Direct appeal of these suits to the Supreme Court was available under 28 U.S.C. § 1253 (1976).

15. 428 U.S. at 151-52. The Court concluded that the procedure for certifying questions to the state court for an authoritative interpretation was authorized under the Massachusetts rules of court. See MASS. SUP. JUD. CR. R. 3:21.

16. The nine questions certified by the district court are:

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 interests'?

(b) If the parent is not limited to considering exclusively the minor's best interests, 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?

4. If the court answers any of question 3 in the affirmative, may the superior court, for good cause shown, enter an order authorizing an abortion, (a) without prior notification to the parents, and (b) without subsequent notification?

5. Will the Supreme Judicial Court prescribe a set of procedures to implement c. 112, [§ 12S] which will expedite the application, hearing, and decision phases of the superior court proceeding provided thereunder? Appeal?

6. To what degree do the standards and procedures set forth in c. 112 § 12F (Stat. 1975, c. 564), authorizing minors to give consent to medical and dental care in specific circumstances, parallel the grounds and procedures for showing good cause under c. 112, [§ 12S]?

7. May a minor, upon a showing of indigency, have court appointed counsel?

8. Is it a defense to his criminal prosecution if a physician performs an abortion solely with the minor's own, valid, consent, that he reasonably, and in good faith, though erroneously, believed that she was eighteen or more

stitutional.<sup>17</sup> This decision was based on three grounds: (1) parental notice could not be required in cases in which a superior court judge could decide that the minor was mature enough to make her own decision, or that an abortion was in her best interests; (2) an absolute third-party veto over the decision of a mature minor is unconstitutional under *Danforth*; and (3) the statute contained "formal overbreadth" and was not limited to legitimate state interests.<sup>18</sup>

## II. THE DIVIDED SUPREME COURT DECISION

On appeal to the Supreme Court for the second time, eight Justices agreed that the statute, as construed by the Massachusetts Supreme Judicial Court, was unconstitutional. The majority split, however, on the basis for this conclusion. In a short opinion written by Justice Stevens, four Justices concluded that section 12S required every minor, no matter how mature, to obtain consent, either from her parents, or from a superior court judge.<sup>19</sup> This Massachusetts statute, like the Missouri statute struck down in *Danforth*, subjected the minor's decision to an absolute third-party veto.<sup>20</sup> These Justices rested their opinion squarely on *Danforth* alone, since that case held that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding consent."<sup>21</sup>

In a separate opinion written by Justice Powell, four Justices found pertinent distinctions between issues raised by the Massachusetts statute and those decided in *Danforth*. These Justices agreed with the Stevens plurality that section 12S was unconsti-

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years old or had been married?

9. Will the Court make any other comments about the statute which, in its opinion, might assist us in determining whether it infringes the United States Constitution?

Baird v. Attorney General, 371 Mass. 741, 360 N.E.2d 288, 292-302 (1977) (questions appear in footnotes)(citations omitted). For the major requirements of the statute, as construed by the Massachusetts Supreme Judicial Court, see notes 35-36 and accompanying text *infra*.

17. Baird v. Bellotti, 450 F. Supp. 997 (D. Mass. 1978).

18. *Id.* at 1000-05.

19. 99 S. Ct. at 3053-54.

20. *Id.*

21. *Id.* (quoting *Danforth*, 428 U.S. at 74).

tutional because it permitted a court to withhold authorization for an abortion from a minor who is mature and capable of making the decision independently.<sup>22</sup> Additionally, however, the Powell plurality found that section 12S imposed an impermissible burden on the privacy rights of a minor because it required parental notification and consultation *before* the minor could obtain an independent judicial determination whether she was mature enough to make her own decision, or whether an abortion would be in her best interests.<sup>23</sup> This requirement of parental consultation was precisely the issue that fragmented the Court.

The Missouri statute challenged in *Danforth* required, in all cases, that a pregnant minor obtain the consent of her parents as a prerequisite to a legal abortion during the first trimester.<sup>24</sup> The Massachusetts statute at issue in *Bellotti* had a parental consent requirement, but it alternatively authorized a circuit judge to allow the minor to have an abortion without her parents' consent "for good cause shown."<sup>25</sup> As construed by the Massachusetts court, section 12S required every minor seeking an abortion to first attempt to obtain the consent of her parents, unless the parents were unavailable, or unless an emergency existed.<sup>26</sup> Both parents, if available, had to receive notice of any judicial proceedings brought by the minor under the statute. If such proceedings were instituted, the judge could authorize the abortion only if convinced that it would serve the minor's best interests.<sup>27</sup> Previously, the Court had observed that a notification provision might present issues "fundamentally different from a statute that creates a 'parental veto.'"<sup>28</sup> Justice Stewart, in his concurring opinion in *Danforth*, implied that a statute that required parental consultation along with a provision for an accessible judicial hearing, might be constitutional.<sup>29</sup> Several lower courts had made this same observation.<sup>30</sup>

The Massachusetts statute, however, required either the con-

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22. 99 S. Ct. at 3052.

23. *Id.*

24. 428 U.S. at 85.

25. See note 9 *supra*.

26. *Baird v. Attorney General*, 371 Mass. at 749, 360 N.E.2d at 294.

27. *Id.* at 748, 360 N.E.2d at 293.

28. 428 U.S. at 145 (quoting *Danforth*, 428 U.S. at 52).

29. 428 U.S. at 90-91 (Stewart, J., concurring).

30. *E.g.*, *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975); *State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1975).

sent of the parents or the consent of a judge. Since both the parents and the judge are "third parties" with respect to the pregnant minor, the three Justices concurring with Justice Stevens concluded that the statutory provisions amounted to an absolute veto over the minor's abortion decision.<sup>31</sup> Therefore, section 12S infringed upon the minor's privacy right to the same degree as the Missouri statute that was declared unconstitutional in *Danforth*.

Since section 12S was unconstitutional on this ground alone, the Court had no need to consider whether a state could require notification to or consultation with the parents before resort to a judicial hearing. According to Justice Stevens, "[n]either *Danforth* nor this case determines the constitutionality of a statute which does no more than require notice to the parents without affording them or any other third party an absolute veto."<sup>32</sup> To have held that every minor must be given an opportunity to seek a judicial hearing without having to consult with her parents first would have necessitated consideration of hypothetical issues not before the Court.<sup>33</sup>

Justice Powell apparently conceded that the Massachusetts statute may not have placed the question of parental notification squarely before the Court. He responded, however, to Justice Stevens' charge that he was addressing hypothetical issues:

Apparently this is criticism of our attempt to provide some guidance as to how a State constitutionally may provide for adult involvement — either by parents or a state official such as a judge — in the abortion decisions of minors. In view of the importance of the issues raised, and the protracted litigation to which these parties have been subjected, we think it would be irresponsible simply to invalidate § 12S without stating our views as to the controlling principles.<sup>34</sup>

On this rationale, the Powell plurality analyzed the constitutionality of the Massachusetts parental notification requirement.

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31. 99 S. Ct. at 3053.

32. *Id.* n. 1.

33. *Id.* at 3055 n.4.

34. *Id.* at 3052 n.32. Justice Rehnquist, concurring with Powell, indicated he was also concerned with providing guidance to the state legislatures and lower courts. He stated that, "literally thousands of judges cannot be left with nothing more than the guidance offered by a truly fragmented holding of this Court." *Id.* at 3053 (Rehnquist, J., concurring).

### III. ANALYSIS OF THE POWELL OPINION

Whether a minor has a constitutional right to privacy equal to that of an adult is the fundamental constitutional issue upon which the constitutionality of an abortion parental notification requirement turns. Justice Powell considered this issue and concluded that a minor's right is not equal to that of an adult.<sup>35</sup> Justice Powell did not employ the "compelling state interest" test or the trimester approach used by the Court in *Roe* and to some extent in *Danforth*, even though the Massachusetts parental notification and consent requirements were effective throughout pregnancy. Rather, he concluded that for purposes of the constitutionality of a parental notification provision, the stage of a minor's pregnancy makes no difference.<sup>36</sup> Finally, although Justice Powell affirmed the principle that unrestrained access to the courts is necessary to protect the privacy rights of minors, he failed to provide any guidelines for lower courts or to describe the relevant factors that a judge should consider in order to protect the minor's constitutional right.<sup>37</sup>

#### A. Comparison of a Minor's and an Adult's Constitutional Rights

In *Danforth* the Court said that although minors have constitutional rights,<sup>38</sup> the state has broader authority to regulate the activities of children than of adults.<sup>39</sup> In the case of a pregnant minor, the Court held that the state has the additional interests of safeguarding the family unit and supporting parental authority and control.<sup>40</sup> These interests justify a greater intrusion into a minor's right of privacy than into an adult's right of privacy. They do not, however, justify complete veto power over the abor-

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35. *Id.* at 3043.

36. *Id.* at 3052 n.31.

37. See notes 68-71 and accompanying text *infra*.

38. 428 U.S. at 74 (citing *Breed v. Jones*, 421 U.S. 519 (1975) (right against being put in jeopardy twice for the same offense); *Goss v. Lopez*, 419 U.S. 565 (1975) (right against denial of public education without due process of law); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (first amendment freedom of expression); *In re Gault*, 387 U.S. 1 (1967) (right to the essentials of procedural due process in criminal proceedings — adequate notice, right to counsel, privilege against self-incrimination, confrontation of witnesses)).

39. 428 U.S. at 74-75 (citing *Ginsberg v. New York*, 390 U.S. 629, 638-39 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 169 (1944)).

40. 428 U.S. at 75.



tion decision of those minors who are mature enough to make an informed decision on their own.<sup>41</sup>

In order to rule on the parental notification requirement, Justice Powell re-examined the quality of a minor's right to privacy and the interests the state must assert in order to have a constitutional justification for infringing upon that right. The precedent for use of this type of constitutional analysis had been set by the Court in abortion cases before *Bellotti*. *Roe v. Wade* held that the state must assert a "compelling state interest" in order to infringe upon the privacy right of a pregnant adult woman.<sup>42</sup> In *Danforth* the Court implied that a "significant" state interest was required in the case of a minor; Justice Blackmun, writing for the majority, phrased the issue as "whether there is any significant state interest in conditioning an abortion on the consent of a parent or person *in loco parentis*."<sup>43</sup>

In *Roe* the Court seemed to use the term "significant" state interest synonymously with "compelling" state interest.<sup>44</sup> At least one Justice has stated that in applying these tests the Court had shown that the "significant" state interest test, "for all practical purposes approaches the 'compelling state interest' standard."<sup>45</sup> Yet, there may be a difference. In *Carey v. Population Services International*,<sup>46</sup> a case involving the constitutionality of a statute prohibiting the sale of contraceptives to minors under the age of sixteen, the Court also required the state to show a "significant" state interest that justified the statutory restriction on the privacy rights of minors.<sup>47</sup> The plurality in *Carey* stated that the significant state interest test as applied to minors, "is apparently less rigorous than the 'compelling state interest' test applied to restrictions on the privacy rights of adults."<sup>48</sup>

Justice Powell, in *Bellotti*, did not attempt to clarify this issue. He referred neither to the significant nor the compelling state interest tests. At two points, however, he did indirectly refer to the level of interest that the state asserted in the case. First, he mentioned "the special interest of the State in encouraging an

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41. *Id.* at 74-75.

42. 410 U.S. at 163-64.

43. 428 U.S. at 75.

44. 410 U.S. at 159.

45. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 706 (1977)(Powell, J., concurring).

46. 431 U.S. 678 (1977).

47. *Id.* at 693 (quoting *Danforth*, 428 U.S. at 75).

48. *Id.* at 693 n.15.

unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child.”<sup>49</sup> Second, he recognized “an important state interest in encouraging a family rather than a judicial resolution of a minor’s abortion decision.”<sup>50</sup> One might reasonably infer from this language that the Powell plurality believes the state need not assert a compelling state interest in order to constitutionally infringe on a minor’s, as compared to an adult’s, right to make her own abortion decision. This conclusion seems to follow from the Court’s acceptance of the proposition that the constitutional rights of a minor are not equal to those of an adult.<sup>51</sup>

Justice Powell fully discussed three reasons supporting the conclusion that a minor’s constitutional rights are not equal to those of an adult: “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.”<sup>52</sup> The obvious implication of this analysis is that regulations affecting a minor’s privacy rights need not be subjected to strict scrutiny. Justice Powell does not explicitly come to this conclusion; his holding, however, seems to have been based primarily on practical considerations.

In most cases, according to Justice Powell, parents should be involved and their consent should be necessary for a minor’s abortion decision.<sup>53</sup> Yet, the point at which parental involvement overburdens a minor’s privacy right seems to be determined not by the point at which the state’s interests cease to be compelling or significant, but rather by the point at which mandatory parental involvement becomes detrimental to the child.<sup>54</sup> The practical nature of Justice Powell’s analysis is evident from his statement:

[M]any 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. It would be unrealistic, therefore, to assume that the mere existence of a legal right to

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49. 99 S. Ct. at 3046.

50. *Id.* at 3050.

51. *Id.* at 3043-46.

52. *Id.* at 3043.

53. *Id.* at 3051.

54. *Id.* at 3050.

seek relief in superior court provides an effective avenue of relief for some of those who need it the most.<sup>55</sup>

Since mere knowledge that a minor is seeking an abortion will, in some cases, cause parents to obstruct the minor's exercise of her privacy right, Justice Powell concluded that a notification requirement, just as effectively as a consent requirement, unconstitutionally burdens that right.<sup>56</sup> The notification requirement is unconstitutional, not because the state lacks a compelling or significant state interest to justify it, but because, in some family situations, it will have a detrimental effect on the health of a pregnant minor and her ability to exercise her privacy right.<sup>57</sup> The possibility that parental obstruction may jeopardize the health of the minor has been documented in other cases and commentary.<sup>58</sup> "She [the minor] may decide to bear the unwanted child, run away, try to self-abort, or seek an illegal and possibly unsafe abortion, as a result of the obstacles that a statute requiring parental consultation puts upon her right to decide whether or not to terminate her pregnancy.)"<sup>59</sup> The state interest in protecting maternal health, as recognized in *Roe v. Wade*,<sup>60</sup> may require an effective judicial procedure for noninvolvement of a minor's parents in those cases in which parental involvement could be detrimental to the minor's health.

### B. Parental Notification Unconstitutional at All Stages of Pregnancy

The holding in *Danforth* was limited specifically to the first trimester of pregnancy. Sensitive to the trimester approach used by the Court in *Roe v. Wade*, a majority of the Court in *Danforth* held that, "the State may not impose a blanket provision, such as [the Missouri parental consent statute], requiring the consent

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55. *Id.*

56. *Id.*

57. See generally Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

58. *Wynn v. Carey*, 582 F.2d 1375, 1386 (7th Cir. 1978); Pilpel & Zuckerman, *Abortion and the Rights of Minors*, in ABORTION, SOCIETY AND THE LAW 275, 296 (D. Walbert & J. Butler eds. 1973); Note, *Parental Consent Abortion Statutes: The Limits of State Power*, 52 IND. L.J. 837, 841-42 (1977); Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305, 311 (1974).

59. Note, *Parental Consent Abortion Statutes: The Limits of State Power*, 52 IND. L.J. 837, 842 (1977).

60. 410 U.S. at 163.

of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of pregnancy.”<sup>61</sup> The Massachusetts statute challenged in *Bellotti*, however, did not limit its parental consent or parental notification and judicial consent requirements to the first trimester.<sup>62</sup> The Stevens plurality made no reference to this point. Justice Powell concluded that it made no difference:

The propriety of parental involvement in a minor’s abortion decision does not diminish as the pregnancy progresses and legitimate concerns for the pregnant minor’s health increase. . . . Thus, although a significant number of abortions within the scope of § 12S might be performed during the later stages of pregnancy, we do not believe a different analysis of the statute is required for them.<sup>63</sup>

This result may not be so simple. As stated in *Roe v. Wade*, viability is the “compelling” point after which the state can proscribe abortion in the interest of protecting a potential life.<sup>64</sup> The state may also require measures reasonably related to the preservation and protection of maternal health after the first trimester.<sup>65</sup> Hence, in the later stages of pregnancy, an adult woman’s privacy right competes with increasing state interests. Arguably then, these state interests, in combination with the additional state interest in the protection of minors,<sup>66</sup> could reach the “compelling” level and justify a parental consent or consultation requirement.<sup>67</sup> Because an abortion is more dangerous for the mother in the later stages of pregnancy, the state’s interest in the health of the pregnant minor and the parents’ interest in the health of their daughter could be recognized as “compelling” and justify a parental consent or consultation requirement after the first or second trimester. In addition, the parents may have an interest in protecting the life of the fetus as a potential grandchild.<sup>68</sup> If these parental and/or state interests were recognized as

61. 428 U.S. at 74.

62. See generally note 9 *supra*.

63. 99 S. Ct. at 3052 n.31.

64. 410 U.S. at 163.

65. *Id.*

66. See notes 40-41 and accompanying text *supra*.

67. *But see* Wolfe v. Schoering, 541 F.2d 523, 525 (6th Cir. 1976).

68. This interest is similar to, though not as strong as, the interest of a father in the life of his unborn child, discussed in *Danforth*. 428 U.S. at 69; *Id.* at 93 (White, J., dissenting).

compelling, those asserting such interests would still be required to show furtherance of the interests by a parental consent or notification requirement. Since Justice Powell did not explicitly use either the "compelling state interest" or "important state interest" test, relevance of the trimester approach to parental notification is left to speculation.

### C. *Guidance for the Lower Courts*

Absent from either of the major *Bellotti* opinions or from the *Danforth* opinion are any explicit guidelines for lower courts to use in determining whether a minor is mature enough to make her own decision or whether an abortion is in her best interests. Justice Powell mentioned that a court may take into account parental interest in the welfare of the child when a normal family relationship exists.<sup>69</sup> Similarly, one commentator recently has emphasized the importance of making an "assessment of the personal circumstances of each case."<sup>70</sup> The overall task of the judge, however, is to determine if the minor is mature enough to make an informed decision, or alternatively, if an abortion would be in her best interests.<sup>71</sup> It is this decision that will determine whether the power of the state will be invoked to protect the privacy rights of the minor.

One potential source of guidelines for determination of a minor's maturity to make the abortion decision is the guidelines used by courts in states that recognize exceptions to the general common-law requirement of parental consent to other medical treatment for minors.<sup>72</sup> Courts have considered such subjective factors as the minor's mental capacity and emotional maturity, and more objective factors, such as the minor's age, the seriousness of the treatment, the potential benefit of the treatment to the minor, the parent-child relationship, and the opinion of the physician involved.<sup>73</sup> Age is one factor to consider, but it alone is

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69. 99 S. Ct. at 3051.

70. 26 *DRAKE L. REV.* 716 (1977).

71. 99 S. Ct. at 3052.

72. Wadlington, *Minors and Health Care: The Age of Consent*, 11 *OSGOODE HALL L.J.* 115, 119 (1973); Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 *VA. L. REV.* 305, 310 (1974).

73. Wadlington, *supra* note 72, at 119; Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 *VA. L. REV.* 305, 310 (1974).

not dispositive.<sup>74</sup> An additional factor to consider is the recommendations of social workers or other professional counselors involved. In the case of a minor with hostile parents, the availability of professional or para-professional counselling would seem to be a primary consideration.

In cases such as *Bellotti*, in which a plurality of the Court argued that unencumbered access to the courts is necessary to protect a constitutional right, it would seem appropriate to outline for lower court judges the factors deemed important in the judicial decision involved. Justice Powell stated that one of the major purposes of his opinion was to provide guidance to state legislatures in the area of parental consent for a minor's abortion. An opportunity to provide guidelines to the judiciary was present as well. When the decision to be made is one as sensitive as the maturity of a minor to make a decision concerning the termination of her pregnancy, and whether parental involvement in the decision is required, explicit guidelines to judges are especially important.

#### IV. CONCLUSION

While *Bellotti* affirmed the *Danforth* decision that a state cannot require parental consent for a minor's abortion, the case did not decide whether a parental notification requirement unconstitutionally infringes upon a minor's right to privacy. Four Justices declined to rule on the issue. Four others concluded that a state could not constitutionally impose such a requirement, even though they had concluded that, in the abortion context at least, the rights of a minor are not equal to those of an adult. Unfortunately, Justice Powell's practical approach did not provide a theoretical framework for further definition of a minor's right to privacy in the abortion context. Consequently, the question of a state's power to require parental notification before a minor can obtain an abortion was left undecided, and the Court's approach to defining a minor's privacy right in the abortion context remains unresolved.

*John R. McArthur*

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74. Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305, 332 (1974).