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Comment

Abortion: An Unresolved Issue—Are Parental Consent Statutes Unconstitutional?

I. INTRODUCTION

In the companion cases of *Roe v. Wade*[1] and *Doe v. Bolton*,[2] the Supreme Court acknowledged that a woman has the right to terminate an unwanted pregnancy. This right is fundamental and is encompassed within the constitutional right to privacy. Despite the Court's definitive position, many tangential issues regarding abortion remain unresolved.[3] One such issue which the Court raised but did not decide in *Roe*[4] concerns the constitutionality of statutes requiring parental consent in addition to the minor's consent before the minor can have an abortion. There has been considerable commentary[5] and litigation[6] surrounding this question.

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1. 410 U.S. 113 (1973).
2. 410 U.S. 179 (1973).
3. Such issues include whether spousal and parental consent requirements before a woman can have an abortion are constitutional; whether states may limit or prohibit medicaid payments for elective abortions; whether public hospitals may refuse to permit elective abortions; whether private hospitals may refuse to permit abortions to be performed in their facility; and lastly, whether statutes may limit or prohibit dissemination of information or advertising on abortion.
4. > Neither in this opinion nor in Doe v. Bolton . . . do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example . . . requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age, . . .; if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional.

   410 U.S. at 165 n.67.
5. Note, *Abortion—Parental Consent—Minors' Rights to Due Process, Equal Protection and Privacy*, 9 AKRON L. REV. 158 (1975); Comment, *Constitutional Law—Right to Privacy—Spousal Consent to Abortion:*

Of all the decisions handed down by state and federal district courts on this issue, only one, *Planned Parenthood v. Danforth*,[7] has held that such statutes are constitutional. All the others have found them to be unconstitutional. Since certiorari has been granted in *Danforth*, it is assumed that the Supreme Court will soon speak definitively on whether a parental consent provision in an abortion statute is constitutionally permissible.[8]

This comment will analyze the constitutional question presented by these consent statutes. The analysis requires a multi-tiered

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Foreshadowing the Fall of Parental Consent—Doe v. Doe, — Mass. —, 314 N.E.2d 128 (1974)., 9 SUFFOLK L. REV. 841 (1975); Comment, *The Minor's Right to Consent to Medical Treatment: A Corollary of the Constitutional Right of Privacy*, 48 S. CAL. L. REV. 1417 (1975); *Abortion Statistics and Parental Consent: A State-By-State Review*, 1 FAMILY L. RPTR. 4039 (1975); Note, *Implications of the Abortion Decisions: Post* Roe *and* Doe *Litigation and Legislation*, 74 COLUM. L. REV. 237 (1974); Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305 (1974); Paul, Pilpel & Wechsler, *Pregnancy, Teenagers and the Law*, 1974, 6 FAMILY PLANNING PERSPECTIVES 142 (1974); Note, *Constitutional Law—Minor's Right to Refuse Court-Ordered Abortion*—In re Smith, 16 Md. App. 209, 295 A.2d 238 (1972)., 7 SUFFOLK L. REV. 1157 (1972); Note, *Parent and Child: Minor's Right to Consent to an Abortion:* Ballard v. Anderson, 12 Cal. App. 3d 846, 90 Cal. Rptr. 468 (1970)., 11 SANTA CLARA LAW. 469 (1971); Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115 (1973); Pilpel & Zuckerman, *Abortion and the Rights of Minors, A Symposium*, 23 CASE W. RES. L. REV. 779 (1972).

6. Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975); Word v. Poelker, 495 F.2d 1349 (8th Cir. 1974); Doe v. Exon, Civil No. 75-L-146 (D. Neb. 1975); Baird v. Bellotti, 393 F. Supp. 847 (D. Mass.), *cert. granted*, 96 S. Ct. 390 (1975); Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975); Planned Parenthood of Cent. Mo. v. Danforth, 392 F. Supp. 1362 (E.D. Mo.) *prob. juris. noted*, 96 S. Ct. 31 (1975); Foe v. Vanderhoof, 389 F. Supp. 947 (D. Colo. 1975); Wolfe v. Schroering, 388 F. Supp. 361 (W.D. Ky. 1974); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973); *In re* Diane, 318 A.2d 629 (Del. 1974); Ballard v. Anderson, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971); *In re* P.J., 12 Crim. L. Rptr. 2549 (Sup. Ct., D.C. 1973); *In re* Smith, 16 Md. App. 209, 295 A.2d 238 (Ct. Spec. App. 1972); State v. Koome, 84 Wash. 2d 901, 530 P.2d 260 (1975).
7. 392 F. Supp. 1362 (E.D. Mo.), *enforcement of the statute stayed*, 420 U.S. 918, *prob. juris. noted*, 96 S. Ct. 31 (1975).
8. Baird v. Bellotti, wherein the Massachusetts parental consent statute was held to be unconstitutional, will be reviewed by the Supreme Court. *See* 44 U.S.L.W. 3304 (U.S. Nov. 18, 1975). Conceptually the statutes in *Danforth* and *Bellotti* are similar in that they both require parental consent before a minor may have an abortion. However, the Massachusetts statute is more restrictive than the Missouri one in that it requires the consent of *both* parents, whereas Missouri only requires that one parent consent. The argument also can be made that the

approach. Initial focus will be on the individual's right to decide to have an abortion, with a concomitant examination of the *Roe* and *Doe* decisions and their implications. The next area of consideration will be whether a minor enjoys this same constitutional right. If she does have the right to decide to terminate her pregnancy, does the state have an interest in this matter that is sufficiently compelling to justify infringing on this fundamental right? Furthermore, if the state does have such an interest, are such restrictive state statutes necessary to achieve the state's objectives, or can the result be achieved by a less onerous means?[9] There will be an examination of the two objectives which usually are espoused as justifying the consent statutes: preserving parental control over children and thereby solidifying the family unit; and ensuring that the minor's decision is intelligently made. To understand this latter objective better there will be a discussion of the issue of a minor's ability to consent to medical treatment.

From the foregoing analysis it will be concluded that parental consent statutes in the abortion area, as presently drafted, do not pass the constitutional test. The final section of this comment will consider whether a statute can and should be drafted that will satisfy the state's interest and yet not place unconstitutional constraints on a minor seeking an abortion.

II. THE RIGHT TO AN ABORTION

A. For an Adult Woman

Roe and *Doe* have been hailed by civil libertarians and feminists and denounced by moralists and religious devotees.[10] A dispassion-

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Massachusetts statute is less stringent since it enables the court to intervene "for good cause shown." *See* note 45 *infra*.

9. In Poe v. Gerstein, although the court approached the problem by looking to the nature of the right itself in order to determine its availability to minors, it acknowledged that there were other ways to analyze the issue. The first method of doing so was adopted in State v. Koome. It applied all fundamental rights to minors, although the state may sometimes assert an interest sufficient to justify action infringing on these rights. The second analysis, followed by the Foe v. Vanderhoof court, denied that minors necessarily have all the fundamental rights of adults. 517 F.2d at 790.

10. These cases challenged the constitutionality of the Texas and Georgia statutes respectively. The Texas statute had made it a crime to procure an abortion at any stage of pregnancy except to save the life of the mother. The Georgia statute represented a more modern stance regarding abortion and proscribed abortion while recognizing three situations in which an abortion was permitted: when, in the physician's best clinical judgment, to continue the pregnancy would endanger a pregnant woman's life or injure her health; when the fetus would

ate examination of these two cases shows that the Court's position falls somewhere between these extreme poles. While it is true that a woman may now more easily obtain an abortion, the Court did *not* conclude that she may have an abortion on demand.[11] The Court and state have circumscribed the time, place, and conditions under which she may get an abortion.[12] During the first trimester of her pregnancy, the state has no sufficiently compelling reason to regulate abortions.[13] Viable fetal life outside the womb is not possible, and abortion is a safer medical procedure than normal childbirth, in terms of maternal mortality. At this stage, a woman decides to have an abortion, gets the agreement of her doctor, and then the procedure is performed. Arguably, the physician's agreement is pro forma and the pregnant woman has the unfettered right to decide what to do with her own body. However, two facts seem to undermine this position. First, a physician's professional integrity would necessitate his making independent assessment as to the advisability of a particular medical procedure. Second, a physician must obtain the informed consent of his patient before undertaking any surgical procedure. Failure to do so, with resulting aberrant surgical complications, could subject him to charges of malpractice. Therefore, in order to protect himself, legally and professionally, a physician would probably exercise independent professional judgment as to the advisability of abortion for a particular patient and would not serve as a rubber stamp for the patient's preferences. If this analysis is accurate, then a woman does not have an independent right to decide what will happen to her body. She only exercises this right with the concurrence of and in concert with another.

As a woman's pregnancy advances, the state's interest also grows.[14] At approximately the end of the first trimester, regula-

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likely be born with serious defects; or when the pregnancy resulted from rape.

11. ". . . [S]ome *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree." 410 U.S. at 153.

12.
> The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. . . . [A] state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision.

Id. at 153-54.

13. ". . . [U]ntil the end of the first trimester mortality in abortion is less than mortality in normal childbirth." *Id.* at 163.

14.
> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be

tion is directed at ensuring that the mother's health is protected. This is accomplished by requiring that the abortion be performed by qualified personnel in a certain prescribed hospital environment. When the fetus becomes viable,[15] the state's concern for fetal life transcends all of the mother's rights and an abortion cannot be performed. This latter stance satisfies those who are repulsed by the thought of aborting a viable fetus, but in no way placates those who believe that life begins at the moment of conception.

B. For the Minor Woman

Although *Roe* and *Doe* make it certain that an adult woman has the right to decide whether to have an abortion, the Supreme Court has not yet specifically affirmed that this right is also enjoyed by a minor woman. In several cases dealing with parental consent statutes, lower courts have acknowledged that a minor has the same right as an adult woman to decide to have an abortion.[16]

> left to the medical judgment of the pregnant woman's attending physician.
> (b) For the stage subsequent to approximately the end of the first trimester, the state, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Id. at 164-65.

15. The state's interest at this point is justified because the fetus then presumably has the capability of meaningful life outside the mother's womb.
16. In Foe v. Vanderhoof, the court expressed this opinion by stating:

> . . . the right to privacy as expounded in *Roe* and *Doe* to include a decision to terminate a pregnancy extends to minors. The right is a personal one guaranteeing to the individual the right to make basic decisions concerning his or her life without interference from the government. . . . Minors are entitled to this personal right as well as adults. . . . The detriments discussed in *Roe* . . . which would be suffered by a woman should the state totally deny her the choice to have an abortion are equally applicable to a minor as to an adult.

389 F. Supp. at 953-54. A similar position was taken by the court in State v. Koome.

> Prima facie, the constitutional rights of minors, including the right of privacy, are coextensive with those of adults. Where minors' rights have been held subject to curtailment by the state in excess of that permissible in the case of adults it has been because some peculiar state interest existed in the regulation and protection of children, not because the rights themselves are of some inferior kind.

84 Wash. 2d at 904, 530 P.2d at 263. *See also* Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. at 566-67; Poe v. Gerstein, 517 F.2d at 791.

This conclusion can be reached by looking to decisions in which the courts have recognized that minors enjoy certain other fundamental rights and then making the analogy that if some such rights are accorded the minor, so too are others.

One decision using this approach was *Poe v. Gerstein*,[17] a case involving a challenge to the constitutionality of a Florida abortion consent provision. There the court buttressed its position that the right to have an abortion applies to minors by referring to a number of Supreme Court cases holding that minors have certain first amendment rights and that they also are to be accorded certain procedures complying with due process. The cases cited primarily acknowledged minors' rights in the context of the educational system[18] or juvenile court proceedings.[19] This limitation may not be exclusive, but only reflective of a minor's common experiences today. Until recently, education was the focal point of a child's life; therefore, assertion of fundamental rights would arise in this context. When a child's life goes awry, juvenile court is the place where an attempt is made to ameliorate the situation; therefore, in this setting it would be essential that juveniles be accorded certain rights that adults enjoy in order to protect their interests. As young people's sphere of experience expands with changing mores and opportunities, the need for recognizing their constitutional rights will arise in different contexts. Such a situation is presented by the minor seeking an abortion.

III. COMPELLING STATE INTEREST

Assuming that the minor's right to personal privacy includes the right to decide to have an abortion, that right is not unqualified and must be weighed against certain important state interests which are not applicable in the case of an adult woman. The next step in the constitutional analysis of parental consent statutes is to look at these alleged compelling state interests and see if they are sufficiently weighty to justify infringement on a fundamental right.[20] While doing this, consideration must be given to the

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17. 517 F.2d 787 (5th Cir. 1975). The court referred to *In re* Gault, 387 U.S. 1, 13 (1967), wherein the Supreme Court said: "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."
18. *See* Tinker v. Des Moines Community School Dist., 393 U.S. 503 (1969); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).
19. *See In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967).
20. However, at least one commentator would stop the constitutional inquiry at this point. Since a minor has the privacy interest, parental consent provisions go beyond the administrative and procedural regulations envisioned by *Roe* and *Doe*.

    If a minor's constitutional privacy interest is coextensive

state's acknowledged broader authority over children's activities than over comparable activities engaged in by an adult.[21]

A. Preserving Parental Control

The parental consent statutes are supposedly justified on the basis of the state's desire to maintain the family as a social unit

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> with that of an adult woman, thus permitting her to make the abortion decision with the consultation and concurrence of her physician, then a parental consent provision limiting the ability to make that decision would clearly be impermissible. Parental consent provisions go beyond procedural or administrative regulations of the kind the Court considered in *Doe v. Bolton*, and which could be upheld if reasonably related to a legitimate state purpose.

Virginia Comment, *supra* note 5, at 308. This position received support in *Poe*, where the court emphasized that all the dire consequences enumerated in *Roe*, which would befall a woman wanting an abortion and not being able to get it, apply with greater force for the pregnant teenager.

> [T]eenage motherhood involves serious consequences including adverse physical and psychological effects upon the minor and her children, the stigma of unwed motherhood, impairment of educational opportunities caused by the need to drop out of school, and numerous other social dislocations.

517 F.2d at 791. The consequences were expressed by the *Roe* Court in the following manner:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

410 U.S. at 153.

Most authors and courts will not stop a constitutional analysis of parental consent statutes with an acknowledgement of the minor's right to have an abortion. Instead, they will go beyond this point and make a determination as to whether the state had a sufficiently compelling interest to justify such a regulation.

21. *See* Ginsberg v. New York, 390 U.S. 629 (1968) (the Court upheld a variable obscenity law that altered the definition of obscenity for materials sold to minors under seventeen); Prince v. Massachusetts, 321 U.S. 158 (1944) (a Massachusetts child labor law was unsuccessfully challenged by parents who wanted their nine year old child to be permitted to distribute religious literature). In these cases, the Court held that the state could limit a minor's rights because it was demonstrated that to permit the minor to exercise these rights would contravene a defined public policy designed to protect the minor.

and to foster parental control over children.[22] However, the constitutional challenges to such statutes, which have involved pregnant minors as the plaintiffs,[23] have presented factual circumstances indicating that the social unit and parental control had already broken down. It could be conjectured that in these situations it was unlikely that state-supported imposition of the parental will would have remedied the cracks.[24]

One such case, *Foe v. Vanderhoof*,[25] involved a challenge to

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22. Those cases in which the state has recognized the primacy of parental control over children have involved circumstances where there was a conflict between the parents and the state, but where there was apparent harmony between the parents and children. The most common situation involved the state's interfering with parents' religious values. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish children were exempted from compulsory school attendance laws). *See also* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). It can be argued that parental consent statutes raise similar issues. Many parents refuse to consent to their child's abortions for religious reasons; therefore, the state should recognize the parents' control in this situation as it has done previously. However, cases in the area of parental consent to abortions usually have taken place in a milieu of differing views between parent and child. For the courts to favor the parents in this situation would mean imposing the parents' will upon the child.

    In discussing this issue, the court in Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975), stated:

    > The cases relied on by defendants arise from a factual situation where there was a conflict between the parent and the state as to what was in the best interest of the child. In the instant case, however, we are faced with a clearly distinguishable factual situation where there is merely a potential conflict between the parent and the child as to what is in the best interests of the child. Where there is such a potential conflict . . ., the state cannot statutorily mandate that the parent must always prevail, for parental consent may not simply be unilaterally substituted for consent of the child; particularly, where as here, the fundamental right is infringed without affording the child any rights of due process.

    Id. at 567.

23. Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975); Doe v. Exon, Civil No. 75-L-146 (D. Neb. 1975); Baird v. Bellotti, 393 F. Supp. 847 (D. Mass.), *cert. granted*, 96 S. Ct. 390 (1975); Foe v. Vanderhoof, 389 F. Supp. 947 (D. Colo. 1975); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973); *In re* Diane, 318 A.2d 629 (Del. 1974); Ballard v. Anderson, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971); *In re* P.J., 12 Crim. L. Rptr. 2549 (Sup. Ct., D.C. 1973); *In re* Smith, 16 Md. App. 209, 295 A.2d 238 (Ct. Spec. App. 1972); State v. Koome, 84 Wash. 2d 901, 530 P.2d 260 (1975).

    Other cases challenging the constitutionality of parental statutes have had physicians as plaintiffs, and, therefore, discuss minors' rights in theoretical, non-factual terms.

24. It should be noted that in all these cases the courts made findings that the minor had made an informed decision. *See* p. 274 *infra*.

25. 389 F. Supp. 947 (D. Colo. 1975).

the Colorado parental consent statute. The plaintiff was sixteen, unmarried, pregnant and already the mother of a five-month old baby. She had left her parents' home under circumstances which the court considered as showing hostility between her and her parents and at the time of the litigation was living in a foster home. If this minor were forced to accede to her parents' wishes, arguably nothing would have been gained as far as reestablishing the already fractured family unit. Supportive of this proposition is the case of *In re Diane*.[26] It involved a sixteen year old minor who had been placed in the custody of the State Department of Health and Social Services after her mother had deserted the family and after her father had indicated that he was unable to care for his children. Even after her father had remarried and the family situation had stabilized, the girl found that living with her father was unworkable. When she discovered she was pregnant, she received counseling before reaching her decision to have an abortion. Her father originally agreed to the abortion, but later, after consultation with his priest, he refused because of religious scruples. To enforce the parental consent statutes in a situation like this does nothing to advance the state's interest in preserving the family unit; rather, it superimposes one person's will upon another. Although in daily matters a child usually accedes to parental wishes, this situation is different in that a fundamental right is involved and the child's desire are at odds with the parents.[27]

A similar factual pattern was presented in *In re P.J.*[28] with similar results. There, a seventeen year old girl, who had one child being cared for by the baby's grandmother, wished to have an abortion to which her mother would not consent.[29] Here, as in *Vanderhoof*, the determinative factor for the court was the minor's appearance of being emancipated. It was difficult to justify imposing parental will on one who was already a parent herself and who appeared to be capable of making an informed decision.[30]

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26. 318 A.2d 629 (Del. 1974).
27. In regard to this issue, Justice Douglas' dissent in Wisconsin v. Yoder, 406 U.S. 205 (1972), should be noted. The case dealt with imposing parental preference regarding education upon children. Education, although not a fundamental right, was deemed to have a sufficiently important impact on the child's future that his wishes should be taken into consideration. "Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's right to permit such an imposition without canvassing his views. . . ." *Id.* at 242 (Douglas, J., dissenting).
28. 12 Crim. L. Rptr. 2549 (Sup. Ct., D.C. 1973).
29. In this situation, there might have been better family relations than in *Foe*, since the grandmother cared for her daughter's baby.
30. In this case, although the question can be raised as to what, if any,

State v. Koome[31] presented a successful challenge to the Washington abortion statute in a criminal setting. An abortion had been performed on a sixteen year old girl who had been a ward of the juvenile court for eighteen months and had asked the court for an order allowing her to have an abortion. The court had consented, the case was appealed to the Washington Supreme Court, and an immediate stay was granted pending review. This had the effect of suspending the juvenile court's consent. The doctor performed the abortion anyway and was subsequently convicted of having committed a crime. His defense had been that the statute was unconstitutional. The minor in this case was not living at home. Her parents and temporary guardian, Catholic Children's Services, refused to consent on religious grounds. Again, the family unit was already torn apart, the minor's views were disparate from those of her parents, and enforcement of the statute would accomplish little in terms of preserving parental control.[32]

From the discussion of these cases it seems that the courts have never been confronted with a situation presenting a more difficult issue, namely that posed by a girl living in an emotionally stable family environment where the parents refuse to consent, and where there appears to be a viable family unit for the state to preserve. The failure of such a case to appear may demonstrate that in such a situation, consent would not be withheld, or that the minor might be persuaded as to the wisdom of her parent's decision. Both of these possibilities would explain the dearth of litigation. Whichever may be the more valid hypothesis, state action would not be necessary to preserve the family unit.

Many of the court decisions in which consent statutes have been held to be unconstitutional have found that preserving parental control is not a sufficiently compelling state interest to justify infringing on a fundamental right. Some have taken the position that in a family that has a stable structure, premarital pregnancy does not occur and that such pregnancy indicates a breakdown of

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rights the grandmother has if she expresses a willingness to care for the unborn child, it seems clear that she has none. Supportive of this position is the "parental presumption" which operates against grandparents in custody cases. *See, e.g.*, Marcus v. Huffman, 187 Neb. 798, 194 N.W.2d 221 (1972).

31. 84 Wash. 2d 901, 530 P.2d 260 (1975).
32. The recent Nebraska case, Doe v. Exon involved a comparable fact pattern however, there was no criminal issue involved. There, a seventeen year old girl was living in a foster home. Her parents would not consent to her getting an abortion on grounds of conscience and morality. As in *Vanderhoof* and *In re P.J.*, the court made a factual determination that the minor's decision was intelligently made.

the family unit.[33] This may be considered an extremely moralistic posture and one that is not within the judicial province. The courts could arrive at the same conclusion by viewing the minor's engaging in sexual activity as a sign of increasing independence from the family.

Although most of the plaintiffs in these cases were living in foster homes, this fact alone should not be determinative of whether or not the family unit is irretrievably broken. Often a foster placement is not meant to be a permanent situation, but rather an interim arrangement. During this time parents and child can receive professional assistance in helping to work out their problems. To exclude parental involvement totally in a decision regarding abortion might irreparably undermine whatever progress had been made in improving intra-family communication.

There has been only one case in this area in which the minor was living at home and in which there was a semblance of a functioning family unit. This was *Baird v. Bellotti.*[34] Yet even this case did not present a factual situation from which the court could deduce that the family unit would be strengthened by requiring the parents to consent before their daughter could have an abortion. Although the girl lived at home, she feared telling her father about her pregnancy since he had said that he would kill her boyfriend if he ever found that she was pregnant. She also did not wish to tell her family in order to spare their feelings. Of course, it can be argued that in a situation like this it is good to force communication between the parents and child. If the parents react in an understanding and supportive manner, much will have been accomplished toward making the family relationship more meaningful.

The case law has not shown that preservation of the family unit is a sufficiently compelling state interest to justify legislative infringement on a fundamental right. What the abortion consent statutes really do is subject a pregnant minor's fundamental right to privacy to the control of her parents. They are given the power to withhold consent for no reason, for a valid reason entirely unrelated to the pregnancy or to the minor's health, or for less than admirable reasons.[35] Falling within these latter two categor-

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33. "The fact that the minor became pregnant and sought an abortion contrary to the parents' wishes indicates that whatever control the parent once had over the minor has diminished, if not evaporated entirely." 517 F.2d at 793-94.
34. 393 F. Supp. 847 (D. Mass.), *cert. granted,* 96 S. Ct. 390 (1975).
35. The court in *Bellotti* acknowledged that pregnancy is a stressful period, particularly for minors, and that it is helpful if parents are

ies would be consents withheld on religious grounds[36] and those which are withheld so as to punish the girl and deter her from future illicit sexual conduct.[37]

The statutes are defective in that they give parents an absolute veto over their minor daughter's decision to have an abortion. As the cases indicate, the statutes fail in their unstated purpose of supporting the concepts of family unity and parental control. Legislation cannot dictate ties of affection and obedience nor set up channels of communication where the pathways have been destroyed.[38]

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supportive, but at the same time, it recognized that "an appreciable number are not . . ." 393 F. Supp. at 853.

36. The court in *In re* P.J. was solely concerned with the *minor's* religious beliefs. ". . . [H]aving an abortion does not violate any of her religious beliefs, which are distinguished from those of her parents." 12 Crim. L. Rptr. 2549 (Sup. Ct., D.C. 1973). However, this is not the usual situation.

Parental consent statutes can have the effect of imposing a parent's religious beliefs upon children who do not share these views. *See* Doe v. Exon, Civil No. 75-L-146 (D. Neb. 1975); *In re* Diane, 318 A.2d 629 (Del. 1974); *In re* P.J., 12 Crim. L. Rptr. 2549 (Sup. Ct., D.C. 1973); State v. Koome, 84 Wash. 2d 901, 530 P.2d 260 (1975). In this situation, such statutes can be considered to be state action which establishes a religion. As such, they would be unconstitutional.

37. In reaching its decision, the *Bellotti* court considered the fact that some parents would seek to continue the pregnancy as a lesson—a punishment. 393 F. Supp. at 853-54. This position was staunchly rejected, just as in Eisenstadt v. Baird, 405 U.S. 438, 448 (1972), the Court rejected the state's argument that preventing fornication was justification for not making contraceptives available to unmarried adults.

38. The court supported this position in *Koome* by stating that

> [i]n the circumstances envisioned by this statute, there seems to be little parental control left for the State to help salvage: An unmarried minor has become pregnant, and her determination to get an abortion is unalterably opposed by her parents. Reestablishment of parental control by resort to the pure force of the criminal law seems both futile and manifestly unwise in such a situation . . . . She herself is on the verge of becoming a mother, and if she bears the child she will be entitled to its custody and control. . . . The decision to continue or terminate her pregnancy is, in effect, her first "parental" decision. It should not arbitrarily be subordinated to her parents' last.
>
> Nor does the asserted state interest in ensuring that the decision to complete or terminate a pregnancy be informed justify the decisive impact of this statute on the minor woman's rights. . . . Intelligence . . . is not what the statute here requires. The statute requires parental consent, and allows parents to refuse to consent not only where their judgment is better informed and considered than that of their daughter, but also where it is colored by personal religious belief, whim, or even hostility to her best interests.

84 Wash. 2d at 907-08, 530 P.2d at 265. *See also* Poe v. Gerstein, 517

B. The Minor's Ability to Consent

1. The Common Law and Statutory Exceptions

The state's interest in seeing that a minor's decision to have an abortion is made intelligently has been cited as justification for requiring parental consent. The bases for this theory are rooted in the common law. Minors were considered to be charges of their family and the state, and, therefore, were unable to consent. If a physician rendered medical treatment to a minor, he could be liable for a battery, since the treatment involved a nonconsensual touching. The rationale for this appears to be based on the premise that the minor did not have sufficient intelligence and maturity to understand the nature and consequences of the medical procedure that would be undertaken. Physicians would be further deterred from treating a minor because she could disavow her contract and the physician would not be paid for his services. The justification for permitting the minor to disaffirm her contractual obligations is also based on the notion of protecting the child from herself and her own improvident actions and protecting her from others who would take advantage of her immaturity and inexperience.

Three exceptions developed to the common law rule. Under the first, the court would consider such objective factors as the minor's emancipation as indicative of her ability to consent. Situations from which emancipation can be inferred are having a child of one's own, being self-supporting, living away from home, and being in the armed services. The second exception occurs in emergency situations where conditions necessitate immediate treatment. Here the minor's consent alone is deemed sufficient. Lastly, the courts would look to subjective factors to ascertain if a particular minor were capable of consenting. This is known as the mature minor exception. This, together with the emancipated minor exception, permits a minor who is sufficiently mature and intelligent enough to appreciate the nature and likely consequences of medical treatment to give valid consent.

In addition to these judicially created exceptions, certain statutory developments have had an impact on the area of a minor's consent. First, most states have lowered the age of majority from twenty-one to eighteen. Second, and more importantly, there are a considerable number of states which have enacted legislation that enables minors to donate blood and to receive treatment for venereal

F.2d 787, 794 (5th Cir. 1975) wherein the court said: "If a minor's pregnancy has fractured the family structure, imposition of a parental prohibition of abortion cannot reasonably be expected to restore the family's viability as a unit."

disease, drug abuse, and alcoholic problems without parental consent. These situations can be distinguished from consenting to an abortion since abortion is a surgical procedure, while the others are not. In addition, the decision to have an abortion has emotionally charged implications that may have to be dealt with long after the pregnancy has been terminated. Donating blood without parental consent can be rationalized since it is a nontraumatic experience, and furthermore, it is essentially altruistic. The state can justify permitting the minor alone to consent to certain forms of medical treatment because it has a vested interest in stopping the spread of venereal disease and curbing drug abuse and alcoholism among minors. In addition, treatment for these problems might never be obtained if a minor had to confront her parents and get their consent before treatment could proceed.[39]

Besides these statutory acknowledgements of a minor's ability to consent to certain quasi-medical procedures, there are a number of enactments which permit minors to consent in areas related to sexual activity. These reflect a realistic approach to life as it is and dispense with the fiction of infancy.[40] Rape statutes usually set up a minimum age at which a minor is presumed to be capable of consenting to intercourse. As was indicated previously, a minor can consent to treatment for venereal disease, a by-product of intercourse. Statutes in some states also permit a minor to receive contraceptives without parental consent.[41] Finally, there are pregnancy care statutes which enable minors to get treatment for pregnancy without parental consent. One pre-*Roe* case, *Ballard v. Anderson*,[42] construed a California statute which permitted a minor to

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39. Venereal disease, drug abuse and alcoholism are deviant conditions, and, therefore, may be distinguished from pregnancy which is a more normal condition, although this is not necessarily so when it appears in the unmarried minor.

40. > . . . [T]he law in many areas relating to sexual conduct deals with the realities of maturity and consent and . . . the legal fiction of infancy should be dispensed with where it is contrary to the best interests of the minor and where it is inconsistent with the general fabric of the law.

Pilpel & Zuckerman, *supra* note 5, at 788-89.

41. > . . . [I]f a minor is legally able to obtain medical treatment to avoid an unwanted pregnancy [by getting contraceptives], it makes little sense (and is legally inconsistent as well) to negate her implicit right of choice by denying her an abortion where contraception was unavailable or unsuccessful.

Id. at 788. In *Bellotti*, the court exposed the hypocrisy of presuming that a minor can consent to intercourse but not to an abortion. "We may also remark, parenthetically, that it is singular for the state to provide that a minor may consent to intercourse at age 16 . . . but cannot consent to get rid of the product until she is two years older." 393 F. Supp. at 855.

42. 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971).

consent to pregnancy-related treatment as encompassing abortion. The court reasoned that a legal abortion was a surgical procedure and was "care" of the prospective mother related to her pregnancy.[43] The Delaware court, in *In re Diane*,[44] reached the same conclusion but by an easier route, since one section of the Delaware statute permitted a minor to consent to legal therapeutic procedures associated with pregnancy and another part defined abortion as being such a procedure.

When all these permissive consent statutes dealing with sexual activity are compared with the abortion veto legislation, it can be concluded that the state will preserve the minor's freedom to

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43. The statute involved provided that:

> . . . an unmarried, pregnant minor may give consent to the furnishing of hospital, medical and surgical care related to her pregnancy, and such consent shall not be subject to disaffirmance because of minority. The consent of the parent or parents of an unmarried, pregnant minor shall not be necessary in order to authorize hospital, medical and surgical care related to her pregnancy.

CAL. CIV. CODE, § 34.5 (West 1954). The court found that this section was a limitation on a minor's power to disaffirm contracts. Looking at the statutory purpose within this limited framework, the court was able to find that legal abortion was a surgical procedure and was "care" of the prospective mother related to her pregnancy. Further, according to the court, if the legislature had intended to exclude abortion it would have said "maternity care."

In *In re* Smith, the court dealt with a similar Maryland statute which permitted a minor to consent to treatment concerning pregnancy and also defined such treatment to include abortion.

44. 318 A.2d 629 (Del. 1974). This case was not brought as a constitutional challenge to the Delaware statute which provided that parental consent was required before a minor under the age of eighteen could get an abortion. Instead, the action sought to have the Division of Social Services appointed as the girl's guardian so that it could furnish the necessary consent. The court concluded that this action was unnecessary and that the minor herself could consent. It arrived at this position by reconciling the abortion statute, which was passed in 1969, with another statute passed in 1970, which permitted a minor twelve years of age or over who thought she was pregnant or had a contagious disease to give written consent for any diagnostic and lawful therapeutic procedures. Consent given in this manner would have the same effect as if the minor were twenty-one years of age. The reason for this provision was to ensure that the minor would not be able to disaffirm her legal obligation to pay for services for which she had contracted. The 1970 statute defined "lawful therapeutic procedures" as including abortions; therefore, the court reasoned that the girl could consent to her abortion since the controlling statute was the one enacted latest in time. 318 A.2d at 629.

The court could have reached this same conclusion by utilizing the analysis of Ballard v. Anderson. *See* note 42 and accompanying text *supra*.

experiment sexually, but should she become pregnant, she must bear her baby. She can consent to get treatment for but not termination of her pregnancy. In this manner, the state is seeking to proscribe abortion in whatever situations it can.

2. Intelligently-made Decisions

Authors who have commented on the statutes requiring parental consent before a minor can obtain an abortion always focus on a minor's common law inability to consent. They suggest that parental consent is necessary because a minor presumptively cannot consent. Parental consent is justified because it supposedly ensures that the minor's decision will be made intelligently. While the minor's statutorily created ability to consent to certain treatment presumes that she can make an informed consent and does not provide for a showing to the contrary, the abortion consent statutes presume her incapable of consenting and do not permit this to be rebutted by a showing of intelligence and maturity.

Interestingly, parental consent statutes can be viewed as another kind of legislative enactment in the area of expanding a minor's right to consent. They provide that the minor and one or both of her parents must consent to the abortion.[45] By requiring that the minor give her consent to the abortion, she is statutorily acknowledged to be able to consent. Furthermore, this requirement bolsters the premise, previously set forth, that a minor has the same right to consent to an abortion that an adult woman

45. A typical statute is the one challenged in Doe v. Exon.

> **Abortion; written consent of parent or guardian.**—No abortion shall be performed or prescribed on any minor child in the State of Nebraska without her written consent and the consent of the parent or guardian of such minor child.

NEB. REV. STAT. § 28-4,151 (Supp. 1974). A different kind of statute was challenged in Baird v. Bellotti.

> Section 12 P(1). 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.

393 F. Supp. at 857 n.1 (emphasis added).

This statute does provide for overcoming the parental veto by appeal to the judiciary. However, such a provision may be impractical in this situation where timing is very important and where the minor would probably be reluctant to take her parents to court. The court also criticized this statute because it required consent of *both* parents, whereas all other consent statutes only required the agreement of one parent. In this way, abortion in Massachusetts was being singled out for a more restrictive treatment.

has.[46] Just as an adult woman must consent to the abortion, so too must a minor child. The *Roe* decision requires that the attending physician also agree to the procedure. This consent is judicially mandated and not overtly provided for in the consent statutes. The parental veto statutes then take the fatal unconstitutional step of requiring a parent or parents to consent as well. Other statutes which give the minor the right to consent to receive various medical treatments and procedures do not take this additional step of requiring parental consent to ensure that the decision to receive treatment is intelligently made. The difference can only be attributable to the procedure involved, abortion.[47] Presumably, the parental consent statutes require the parent(s)' approval to ensure a reasoned decision and provide for the minor's agreement in order to protect her from being coerced into having an abortion that she does not want. But, if a minor is presumed unable to make an informed decision to abort the fetus without parental consent, how can that same minor be presumed to be mature enough to decide to continue her pregnancy? Arguably, this involves a far more difficult physical and emotional commitment for a minor to make.[48] It appears that in this situation, the state is making a value judgment regarding abortions and is making it more difficult for minors to get abortions. The state is also placing similar restrictions on the freedom of adult women to decide to have an abortion.[49] This

46. *See* Section IIB *supra*.
47. This additional consent may be necessary. Because of potential emotional ramifications from an abortion, parents should be involved in and aware of the decision so they will be attuned to any future problems.
48. The court in *Vanderhoof* alluded to these inconsistencies. It noted that one Colorado statute permitted a minor over the age of fourteen, who was living apart from her parents and managing her own financial affairs or who was married, to consent to any medical or surgical treatment, *except abortion*. Another provided that a minor could receive birth control information and devices. 389 F. Supp. at 956.

    When these statutes are read together, the conclusion can be reached that the state will sanction a minor's having intercourse and using birth control devices and will recognize that under certain circumstances a minor is mature enough to consent to medical treatment. *But* if the minor is careless enough to become pregnant, the state will force her to carry her pregnancy to completion.

    One court has suggested that in those states without spousal consent requirements, by permitting a married minor to consent to an abortion, but denying the same right to an unmarried minor, the state encourages pregnant minors to marry so that they may terminate unwanted pregnancies. 84 Wash. 2d at 912, 530 P.2d at 267. This analysis, admittedly far-fetched, is reflective of the irrationality and emotionalism surrounding the entire abortion issue.
49. The declaration of purpose preceding the Nebraska abortion statute

is accomplished by statutory provisions requiring that a pregnant woman's husband must consent before she can get an abortion.[50] While the state tries to justify parental consent provisions because of its compelling interest in seeing that a minor makes an informed choice, spousal consent statutes allegedly are based on the state's compelling interest in preserving marital harmony. By reading all these restrictions together, however, it reasonably can be conjectured that the state's only interest is in restricting abortions and it is endeavoring to do this in whatever way it can and under whatever premise it may resort to.[51] The state's interest may be meritorious, but the means it uses to infringe on a fundamental right are not the least onerous ones available.

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graphically sets out one state's inimicable feelings toward abortion.

> (1) . . . Sections 28-4,143 to 28-4,164 are in no way to be construed as implementing, condoning, or approving abortions at any stage of unborn human development, but is rather an expression of the will of the people of the State of Nebraska and the members of the Legislature to provide protection for the life of the unborn child whenever possible until such protection can be afforded by an appropriate amendment to the United States Constitution;
> (2) . . . [T]he members of the Legislature expressly deplore the destruction of the unborn human lives which has and will occur in Nebraska as a consequence of the Supreme Court's decision on abortion;

NEB. REV. STAT. § 28-4,143 (Supp. 1974).

50. The constitutionality of these provisions is also being challenged. *See* Word v. Poelker, 495 F.2d 1349 (8th Cir. 1974); Pound v. Pound, Civil No. 74-CH-4 (6th Cir. Ill. Jan. 31, 1974); Doe v. Bellin Memorial Hosp., 479 F.2d 756 (7th Cir. 1973); Planned Parenthood of Cent. Mo. v. Danforth, 392 F. Supp. 1362 (E.D. Mo. 1975); Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975); Wolfe v. Schroering, 388 F. Supp. 631 (W.D. Ky. 1974); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973); Coe v. Gerstein, 376 F. Supp. 695 (S.D. Fla. 1973), *aff'd in part* 417 U.S. 281 (1974), *aff'd sub nom.* Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975); Jones v. Smith, 278 So. 2d 339 (Fla. Ct. App. 1973), *cert. denied*, 415 U.S. 958 (1974); Doe v. Doe, — Mass. —, 314 N.E.2d 128 (1974); Murray v. Vandevander, 522 P.2d 302 (Okla. Ct. App. 1974).

51.
> . . . the numerous statutory exceptions to parental consent requirements indicate that in certain circumstances the interest in protecting the minor's health is paramount to concerns of parental authority. Moreover, an inference from these exceptions—that the parents will not necessarily act in the minor's best interest—refutes the underlying justification for parental consent, namely protection of the minor. For instance, the statutes providing for treatment of venereal disease and drug addiction recognize that minors with intimate personal health problems are frequently unwilling to confide them to parents and that the need for medical treatment is dominant. Because of the intimate nature of the problem, the delay that may be entailed and the alternatives to which the pregnant teenager may resort, abortion is a compelling case for not imposing parental consent conditions.

9 SUFFOLK L. REV., *supra* note 5, at 867.

The courts have been able to find the veto statutes to be unconstitutional without adopting this more radical analysis. They have recognized that the state does have an interest in being assured that a minor's decision to have an abortion is intelligently made; however, the statutes are not framed so as to insure this. Superimposing a blanket parental veto on the minor's decision does not guarantee an informed decision.

As was indicated previously,[52] the cases in this area can be divided on the basis of plaintiffs. Where physicians or planned parenthood groups are plaintiffs, the case holdings have focused on the irrationality of the statutes when measured against the ends they wish to accomplish and have stressed the absence of any provision whereby the minor could make an affirmative showing of her maturity and ability to make an intelligent decision. In cases with minor pregnant girls as plaintiffs, the courts have all made findings that these girls had made their decisions in an informed manner;[53] in most instances, they had not only talked with physicians, but had also talked with child guidance counselors.[54] By proceeding in this manner, the courts are effectuating the intent of the parental consent statutes, but by a less onerous means.

Planned Parenthood v. Danforth, the only case to hold that a parental consent statute was constitutional, did not set forth any

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52. *Supra* note 23.
53. One court has expressly rejected any interest in the concept of informed consent. The facts, however, are distinguishable. *In re* Smith, 16 Md. App. 209, 295 A.2d 238 (Ct. Spec. App. 1972), concerned a sixteen year old girl who was adjudged to be in need of supervision and was placed in the custody of her mother. The girl became pregnant and her mother sought to compel her to have an abortion. The court upheld the girl's right to refuse to consent. "Consent cannot be the subject of compulsion; its existence depends upon the exercise of voluntary will of those from whom it is obtained . . ." *Id.* at 225, 295 A.2d at 246. In this case, the court talks of "voluntary" will, but does not seem to be concerned with whether an informed decision was made. The court should have explored the reasons why the minor was considered to be in need of parental supervision and adjudged whether they would affect the quality of her decision. Since this case involved a girl who did *not* want an abortion, it can be conjectured that the state was not as concerned that her decision be informed since the decision was the one that they would wish her to make.
54. > . . . [S]he was adequately and professionally counselled and . . . her decision to terminate her pregnancy was an informed and intelligent decision based on her "projections for her future, her best interests and that of her five month old child, and realities of her present dilemma . . . and on a clear understanding of the consequences."

    389 F. Supp. at 950. *See also* Baird v. Bellotti, 393 F. Supp. at 850; *In re* P.J., 12 Crim. L. Rptr. 2549 (Sup. Ct., D.C. 1973).

innovative legal analysis to counterbalance the other decisions in the area. It involved a challenge to the entire Missouri abortion statute and so considerable time was spent in the decision on the more controversial portions of the statute.[55] In discussing the parental and spousal consent provisions of the statute, the court based its decision on the pregnant woman's need for good advice[56] and rationalized its holding by using traditional language.[57] It was noted that the parental consent statute did not single out the abortion procedure for this restriction on consent, since parental agreement was required for all surgical treatment of a minor because minors were deemed incapable of giving legal consent. For the court, preserving the authority of the family was another compelling state interest justifying the consent statutes. In conclusion it cited the following "horrible" that might become common if parental consent statutes were invalidated:

> Testimony at the trial of this case disclosed that children as young as ten years old have sought abortions. . . . A girl of that age cannot be presumed capable of making a decision as profound as the abortion decision without proper advice and counsel of her parents or a person in loco parentis.[58]

The weight to be accorded to the *Danforth* decision should be slight. As the court pointed out in *Doe v. Exon*: the decision in *Danforth* was filed on January 31, 1975, appeal to the Supreme Court was filed on February 5 and

> we think it significant that on February 18, 1975, the Supreme Court took the unusual step of staying enforcement of the Missouri abortion statute pending appeal. This was done long before probable jurisdiction was noted. Under these circumstances, we would be inclined to regard *Danforth* as doubtful precedent even if we found its reasoning persuasive.[59]

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55. Among these was a provision defining viability as that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life supportive systems and a section which stated that aborted fetuses which survived were made wards of the court and parental rights were severed. 392 F. Supp. at 1365-66.
56. "Given the fact that even with counseling the decision of whether to terminate a pregnancy is often a stressful one . . . it is imperative that a woman be well advised of the options available, and the physical and psychological ramifications of choosing a particular course of action." *Id.* at 1368.
57. "The state's interest in safeguarding the authority of the family relationship would appear to this Court to be a compelling basis for allowing regulation of a minor's freedom to consent to an abortion." *Id.* at 1370.
58. *Id.* at 1371. What the court overlooked was the more horrifying prospect of a ten year old carrying a pregnancy to term.
59. Slip Opinion at 2-3.

IV. CONSENT STATUTES OF THE FUTURE

If the Supreme Court finds that current abortion consent statutes are unconstitutional, the next legal question to be raised in this area will be whether legislation can be drafted which will be constitutional.[60] All proposals propounded by courts dealing with this issue have centered on insuring that there will be informed consent. By focusing on this, it is tacitly acknowledged that preserving parental control in this area is not a proper subject for legislation.

The *Foe* and *Koome* courts have stated that statutes can be drafted that would achieve the state's objectives but would not set up unconstitutional presumptions. While the court in *Foe v. Vanderhoof* acknowledged that the statute might be drawn better but had no suggestions,[61] the *Koome* court was more definitive, suggesting some statutory enactments and pointing out already existing methods of ensuring that the minor's decision was informed.

One proposed statute that presumably would be constitutionally acceptable would require parental *consultation* before a minor could have an abortion. As stated in *Koome*, "if parental supervision is considered valuable in itself, perhaps the State could make a certificate of parental *consultation* prerequisite to a minor's abortion."[62] A statute drafted in this manner would avoid the irrebut-

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60. The court in Coe v. Gerstein said:

> We are persuaded that if the State cannot interfere to protect the fetus' interest in its potential life until the compelling point of viability is reached, neither can it interfere on behalf of husbands or parents to protect their interests in that potential life until the fetus becomes viable. We are persuaded, also, that if the State cannot interfere to protect the pregnant woman's physical or mental health until approximately the end of the first trimester, neither can it interfere on behalf of husbands or parents to protect their interests in her health until that point is reached. *If the State could demonstrate that the third-party interests sought to be protected by this provision attach at the moment of conception and are interests which fall completely outside the categories of protection of maternal health and potential life,* Roe v. Wade . . . *would not be controlling and the provisions would withstand constitutional attack.*

376 F. Supp. at 697 (emphasis added).

61. 389 F. Supp. at 959.

62. 84 Wash. 2d at 909, 530 P.2d at 266. Poe v. Gerstein echoed this sentiment.

> . . . [T]he ability of the parent to improve the "quality" of the abortion decision is questionable, for the ameliorative qualities of a third person's wisdom and experience in this decision are uncertain. Moreover, there is no reason to expect the parents to always act in the child's best interest; numerous cases

table presumption that all minors are incapable of consenting. Although its purpose would be to ensure that the decision were made in an informed manner, all it would really do would be to provide that one additional person have input in the decisionmaking process. Potentially, little is to be gained by requiring parental consultation except to create a more stressful situation for the minor, particularly if she had not wished to tell her parents about her pregnancy, but did wish to continue to live at home. On the other hand, keeping a pregnancy secret may not be a sufficiently valid reason to exclude parental participation in this important moment in the daughter's life. Another drawback to consultation is that if parents present views opposite to those of their daughter, perhaps based on religious principles, returning to the home environment may be difficult if not impossible for the girl. The avowed state interest of preserving family control and unity would be undermined.

Parental consultation could be provided for in another manner. Judge Newcomer, in a concurring opinion in *Fitzpatrick*, suggested that

> . . . the state could reasonably and constitutionally require a doctor who plans to perform an abortion . . . on an unmarried minor, to notify . . . at least one parent, of his plans. In this way the affected family member would be given the opportunity to fulfill his or her role as a source of guidance for . . . the pregnant woman.[63]

A better reasoned statute might set up a requirement of professional counseling rather than parental consultation. This would guarantee that an objective third party would make an impartial assessment of a minor's ability to make a decision to have an abortion. Furthermore, the counselor would provide professional guidance to the minor in making her decision and explore optional situations.

In addition to parental consultation, another suggestion put forth in *Koome*, but rejected as being impractical, would have permitted the juvenile court to intervene and provide the necessary consent if a minor could not get parental consent. Under this scheme, the parental veto would not be absolute and irrevocable. Problems with this are multitudinous: the great costs; the poten-

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> have noted parents refusing operations on their children for nonsensical or even punitive reasons. *At the very least, the statute would more narrowly achieve the state's result if it called for parental "consultation" rather than permission prior to abortion.*

517 F.2d at 793 (footnotes omitted) (emphasis added).

63. 401 F. Supp. at 593.

tial delay at a time when expediency is crucial; the unpleasantness of litigation which would occur at a time that is already stressful;[64] and the usual reluctance of the court to intervene in disputes involving united families.

The court also proposed that the minor be considered able to consent, but that parents be permitted to stop the abortion on a showing that their daughter was not capable of acting in her own best interests.[65] The burden of proof would be on the parents. A problem with this proposal is that parents might never be aware of their daughter's action, and, therefore, would be foreclosed from appearing before the court. Currently drafted statutes do not require that maturity and intelligence be affirmatively proven by anyone. For constitutional purposes it would be equally as satisfactory to draw up a statute which permitted the pregnant minor

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64. The court further elaborated on the problems presented by permitting resort to juvenile court.

> Even if juvenile court intervention were established and automatic, the delays and costs inherent in litigation themselves would comprise an unworkable burden. Minor women unwilling to add litigation against their parents to their already acute personal difficulties would gain little from the possibility of court intervention. And even those who were sufficiently determined to go to court would find the costs of publicity, delay and anxiety substantial.

84 Wash. 2d at 906, 530 P.2d at 264. *See also* note 45 *supra* for a discussion of the Massachusetts statute which provided for resort to the court in order for the minor to get consent.

65.
> . . . [W]e find that the parental consent requirement . . . violates the due process principles of *Roe* and *Doe* and the requirements of the equal protection clause. By so holding, however, we do not rule that the State cannot in any way regulate the performance of abortions on minors. The interests put forth by the State for doing so are not without weight. A statutory scheme which protected them without sacrificing the privacy rights of pregnant minor women could pass constitutional muster. A requirement of consultation with parents or others able to advise would seem arguably permissible. . . . Even a law allowing parents to stop an abortion where they can show that their daughter is not acting or capable of acting in her own best interests might be sustainable. But the present statute, which forces a woman who may have made her decision maturely and intelligently to resort to trying and possibly prolonged court action at best, or submit to an arbitrary and absolute veto at worst, cannot be upheld.

Id. at 914, 530 P.2d at 268. The court in Coe v. Gerstein concurred with this analysis.

> . . . [A]t least a portion of the interests which husbands and parents have in their pregnant wives or minor daughters may be reasonably related to protection of maternal health and protection of potential life. *The failure of the Florida "spousal or parental consent" requirement is that it gives to husbands and parents the authority to withhold consent for abortions for any reason or no reason at all.*

393 F. Supp. at 698 (emphasis added).

to consent to an abortion if she could show that she were capable of and was making an informed decision.[66]

Resorting to such statutory schemes may not be necessary since it is possible to ensure that the minor's decision is an informed one by utilizing existing, nonstatutory procedures. The *Koome* court said:

> The physician-patient consultation which should precede *any* abortion . . . provides information, advice as to alternatives, and time for deliberation. If professional responsibility is not safeguard enough, the common law requires that physicians determine that a minor's decision to consent to any form of medical care, including abortion, is adequately informed and considered, and civil liability is available to enforce this injunction.[67]

As was mentioned earlier,[68] one of the provisions of *Roe* is that the abortion decision be made in conjunction with physician consultation. A doctor in his professional judgment could refuse to perform an abortion if he felt that a pregnant girl did not have the intellectual maturity and perception necessary to evaluate the medical and social consequences of having an abortion or could not cope with the attendant emotional and psychological stresses.[69]

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66. Justice Finley, who concurred in *Koome*, set out two reasons which he felt were sufficiently compelling to justify a parental consent statute. If there were a physical ailment that made an abortion more dangerous than childbirth, or if there were a greater probability of serious emotional instability resulting to the particular minor from an abortion than from childbirth, the parent might deny consent. 84 Wash. 2d at 916, 530 P.2d at 269. He proposed that:

> What is needed is a procedure which assures access to the judicial system for a determination of whether legally justifiable reasons exist to prevent a minor from having an abortion. . . .
>
> One viable possibility . . . would be to require each physician who is requested to perform an abortion upon a minor to promptly notify the juvenile court and the parents or guardian of the minor. Then an opportunity could be afforded by law for the *parents* to petition the juvenile court for a hearing.

Id. at 917, 530 P.2d at 270. In Justice Finley's proposal, parents would assume the burden of proving one of the two reasons and by so doing could legitimately prevent abortion.

67. *Id.* at 909, 530 P.2d at 265-66.
68. *See* p. 259 *supra*.
69. > . . . [T]he decision to perform an abortion is essentially a medical judgment based on the peculiar circumstances of each case and made by the physician in consultation with the patient. This necessarily requires the physician to evaluate each patient's emotional stability and intellectual maturity and to consider relevant social, psychological, and physiological factors. At the same time, to protect himself from tort liability, the physician must make a determination of the patient's capacity for rational decision-making. Informed consent is a

The *Poe* court also advocated no statutory proscription. Instead, it suggested that where there was a good parent-child relationship, the family would have significant input into their daughter's decision. Where there were poor patterns of communication, the parents' sentiments would not be a meaningful factor in their child's decision.[70] *Bellotti* further noted that by invalidating parental consent statutes parents are not being denied their rights since they have all their children's formative years in which to indoctrinate them with their thinking.[71]

V. CONCLUSION

The parental consent statutes have been attacked as being violative of the equal protection clause.[72] The state's interests in

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> prerequisite to medical treatment regardless of the age of the patient or the type of treatment involved.

Virginia Comment, *supra* note 5, at 332. *See also* 84 Wash. 2d at 909, 530 P.2d at 265.

The court in *Koome*, in addition to proposing reliance on a physician's judgment to ensure informed consent, also posited that the age of fertility would provide a practical minimum age at which consent to abortion may be given. *Id.* at 911, 530 P.2d at 267. *Bellotti* rejected this proposal. "Fertility marks a physical, not emotional or intellectual maturity, and a 'fertile' minor may become pregnant precisely because she lacks the capacity to reason and consent maturely." 393 F. Supp. at 854.

Using the age of fertility as satisfying a minimum age requirement for a minor to be presumed able to consent to an abortion was also suggested in Ballard v. Anderson. The court did not express disapproval of this limitation on the minor but was more concerned with looking to the requirement of informed medical consent as setting up all the needed protections for the minor.

> The age of fertility provides the practical minimum age requirement under section 34.5. However, there is an additional limitation implicit in each of the medical emancipation statutes: the minor must be of sufficient maturity to give an *informed consent* to any treatment procedures.

4 Cal. 3d at 883, 484 P.2d at 1352, 95 Cal. Rptr. at 8.

70.
> The absence of a parental consent requirement would not portend the lack of parental input into the minor's abortion decision. Rather, in the absence of the statutory requirement, the family will resolve the problem in the manner by which the minor's problems are generally resolved: where the parent-child relationship is strong, the parent will have a great deal of input into the abortion decision; where the parent-child relationship has broken down, the parents will have less direct input. In any case, we believe that the importance of interfamilial relationship and family privacy is sufficient to outweigh the state's interest in the enforcement of the parental prohibition.

517 F.2d at 794.

71. "We may wonder how much would be accomplished by compulsorily affording a parent an eleventh hour opportunity, if adequate communication had not been established before." 393 F. Supp. at 856.

72. The statutes also can be considered unconstitutional in that they are

ensuring that the minor's decision is an informed one are not sufficiently compelling to justify proscribing the minor's fundamental right to have an abortion. The statutes impose a blanket parental veto over the entire length of the pregnancy.[73] All minors are irrebuttably presumed to be incapable of consenting and all parental decisions are irrebuttably presumed to be made intelligently.[74] There is a second equal protection violation in that a statutory scheme which prevents minors from getting abortion services without parental consent, yet permits them to consent to receiving other kinds of medical services, unreasonably discriminates against a minor needing a certain kind of medical care.[75]

It can be postulated that the state has an equally compelling interest in permitting the pregnant minor to get an abortion if she desires it, as it does in preventing the abortion. If such pregnancies are carried to term, the state may have helped to increase the number of welfare recipients. A pregnant teenager may drop out

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overbroad and do not set forth any situations in which the parental veto can be overridden.

> Finally, the asserted state interest in ensuring that the minor's decision be informed does not justify the parental consent provision of the Act. Under the terms of the Act, parental consent is mandated under every circumstance except where "necessary in order to preserve the life of the mother." Thus, a minor must obtain parental consent even if carrying to term endangers her health. The provision here in question is overbroad for it provides an absolute parental veto where less restrictive means are available to ensure that the minor's decision is a "knowing and intelligent" one.

401 F. Supp. at 568.

73. The court in *Vanderhoof* addressed this issue.

> The Colorado statute . . . does not serve to further . . . legitimate state interests recognized in *Roe* as it makes no differentiation according to length of pregnancy nor does it specify reasons for which consent may be withheld. The statute contains an unconditional requirement of adult consent regardless of any danger to maternal health or viability of the fetus. We have been shown no distinction in regard to either of these interests between the pregnancy of a minor and that of an adult which would justify the difference in treatment contained in the statute.

389 F. Supp. at 954-55. In this case, the girl seeking the abortion had talked with a physician and social worker. The court concluded that ". . . the statute did not operate to protect her from an improvident decision or to protect her welfare, but gave to another absolute authority to decide for her the question of an abortion." *Id.* at 955.

74. "The 'conclusive presumption' that the parents' judgment is better than the pregnant woman's cannot withstand constitutional scrutiny." 84 Wash. 2d at 908, 530 P.2d at 265.

75. By singling out abortion for these heavy proscriptions, such statutes may also be attacked as being state action in the form of establishment of religion.

of school[76] and become vocationally unqualified and unable to assume the financial responsibility for herself and her child. In addition, a comparison of the health hazards of abortion as opposed to teenage childbearing militate against parental consent requirements.[77]

Whatever reasoning the Supreme Court adopts, it seems certain that it should and will declare such statutes, as presently formulated, to be unconstitutional. Legislatures will probably respond to the anticipated public outcry with new statutes, which hopefully will be more carefully and constitutionally drafted than those currently enacted. Such legislation should be formulated so as to carry out valid state concerns in the most rational way possible. In this way, they will avoid the appearance of existing merely to proscribe abortion.[78]

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76. "Pregnancy is the leading cause of school dropouts among females in lower socioeconomic classes." 9 SUFFOLK L. REV., *supra* note 5, at 870 and citations therein.

77. The infant mortality rate is higher for mothers under twenty years of age than for other age groups. Teenage mothers are more likely to develop toxemia, to give birth prematurely and to have brain-damaged children. Most important, maternal mortality is higher among teenagers than other age groups and the risk of mortality in childbirth increases as the mother's age decreases. *Id.* at 870-71 and citations therein.

78. One suggestion that has been made is to pattern a minor's abortion consent statute after the Illinois birth control statute. It provides that:

> Birth control services and information may be rendered by doctors licensed in Illinois to practice medicine in all of its branches to any minor:
> 1. who is married; or
> 2. who is a parent; or
> 3. who is pregnant; or
> 4. who has the consent of his [her] parent or legal guardian; or
> 5. as to whom the failure to provide such services would create a serious health hazard; or
> 6. who is referred for such services by a physician, clergyman or a planned parenthood agency.

ILL. ANN. STAT. ch. 91 § 18.7 (1969). *See generally* Pilpel & Zuckerman, *supra* note 5.