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H. 319: Ohio Adopts an Abortion Notification Statute

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H. 319: OHIO ADOPTS AN ABORTION NOTIFICATION STATUTE

I. INTRODUCTION

Each year in Ohio approximately 5,900 abortions are performed on teenagers below the age of eighteen.[1] The parents of a significant percentage of these teenagers are never informed of their daughters' abortion.[2] Nevetheless, many parents believe that they have a right to know of the medical procedures performed on their children,[3] and in general, many people believe that minors who decide to have abortions without consulting their parents are making the decision improvidently.[4] In response to these concerns, the Ohio Legislature enacted H. 319 which requires all unmarried and unemancipated minors to notify their parents of their intent to have an abortion unless they obtain a court order permitting the abortion without parental notification.[5] The

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1. This figure is based on 1983 Ohio Department of Health statistics which indicate that 259 abortions were performed on minors below the age of 15 and that 9,651 abotions were performed on women between the ages of 15 and 19. Dividing the total number of abortions performed on women in the latter category by five indicates that on average 1,982 abortions were performed on women at each age level. By subtracting the total number of abortions attributable to 18 and 19 year olds (3,964) from the total number of abortions performed on 15 to 19 year olds (9,651), and adding the number of abortions performed on minors below the age of 15 (259), it can be approximated that 5,946 abortions were performed on minors in Ohio during 1983.

2. Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescent's Use of Family Planning and Abortion Services*, 12 FAM. PLAN. PERSP. 284, 288–89 (1980) (nationally, 46% of minor teenagers do not tell their parents of their abortions). According to Jerome Leubbers, the Ohio State Represetative who sponsored H. 319, 15% of the minors in Ohio do not inform parents of their abortions. Telephone interview with Jerome Leubbers, Ohio State Representatives, Columbus, Ohio (Jan.____, 1986) [hereinafter Leubbers Interview] (tape recording on file with University of Dayton Law Review). It is probably impossible to know exactly how many teenagers tell their parents of their abortions in Ohio or nationally, but it is reasonable to estimate that it is somewhere between 15% and 45%.

3. Luebbers Interview, *supra* note 2.

4. Telephone interview with Stephanie Varga, Executive Director of the Ohio Right to Life Society, Columbus, Ohio (Feb. 6, 1986) [hereinafter Varga Interview] (tape recording on file with University of Dayton Law Review).

5. Act of Nov. 20, 1985, Ohio Legis. Serv. 5-797 (Baldwin) (codified in scattered sections of tit. 14, 21, 23, 25, 29 & 47 OHIO REV. CODE ANN. (Anderson Supp. 1985).

Ohio is not the first state to adopt legislation requiring parental notification or consent for a minor's abortion. *E.g.*, ARIZ. REV. STAT. ANN. § 36-2152 (West 1984) (parental notice); ILL. ANN STAT. ch. 38, para. 81-61–81-68.1 (Smith-Hurd Supp. 1986) (parental notice); IND. CODE ANN. § 35-1-58.5-2.5 (West 1986) (parental consent); LA. REV. STAT. ANN. § 40:1299.35.5 (West Supp. 1986) (parental consent); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983) (parental consent); MINN. STAT. ANN. § 144.343 (West Supp. 1986) (parental notice); MO. ANN. STAT. § 188.028 (Vernon 1983) (parental consent); NEV. REV. STAT. § 442.255–.2555 (1986) (parental notice); R.I. GEN. LAW § 23-4.7-6 (Supp. 1984) (parental consent). Because this area of the law is largely preempted by federal constitutional law, the statutes adopted in other states are substantively similar to each other and to H. 319. *See generally infra* notes 10–67 and accompanying text for a summary of Supreme Court cases concerning the abortion rights of minors.

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court order is issued only to minors who are mature enough to decide independently to have an abortion or to those minors whose best interests are not served by parental notification.[6]

The enactment of H. 319 raises many questions. Although similar abortion notification and consent statutes enacted in other jurisdictions have been found to be constitutional, H. 319 has been held to be invalid.[7] Furthermore, the standards the bill provides for determining when a minor must notify her parents, whether she is mature, or whether notification is in her best interest, are vague and indefinite.[8] Finally, mandatory parental notification of a minor's abortion is a drastic form of state interference with family relationships. Our nation has a long tradition of discouraging state interference in family life absent severe family discord.[9] The departure of H. 319 from this traditional policy, taken with the legal questions which inhere in H. 319's provisions, raise the ultimate question of whether the bill can successfully solve the problems it purports to address.

II. BACKGROUND: MINORS, ABORTION, AND PRIVACY

In 1976, the United States Supreme Court first addressed the issue of what restraints may be placed on a minor's access to abortion in *Planned Parenthood v. Danforth*.[10] In this case, the Court struck down a Missouri statute requiring unmarried women below the age of eighteen to obtain parental consent for an abortion, unless the abortion was necessary to preserve the woman's life.[11] The Court held that a state "may not impose a blanket provision . . . requiring the consent of a parent . . . as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy,"[12] and that the state does not have

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For general background reading see H. RODMAN, S. LEWIS & S. GRIFFITH, THE SEXUAL RIGHTS OF ADOLESCENTS (1984); Buchanan, *The Constitution and the Anomaly of the Pregnant Teenager*, 24 ARIZ. L. REV. 553 (1982); Keiter, *Privacy, Children, and Their Parents: Reflections On and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. 459 (1982); Comment, *Parental Notification: A State Created Obstacle to a Minor's Right to Privacy*, 12 GOLDEN GATE U.L. REV. 579 (1982) (arguing against the adoption of parental notice statutes); Note, *Parental Notification and Abortion: A Review and Recommendation to West Virginia's Legislature*, 85 W. VA. L. REV. 943 (1983) (arguing in favor of the adoption of parental notice statutes); Annotation, *Right of Minors to Have Abortion Performed Without Parental Consent*, 42 A.L.R. 1406 (1972).

6. OHIO REV. CODE ANN. § 2151.85 (Anderson Supp. 1985).

7. Akron Center for Reproductive Health v. Rosen, 633 F. Supp. 1123 (N.D. Ohio 1986) (H. 319 found to violate constitutional rights protected by the fourteenth amendment).

8. *See infra* notes 191–93, 221–35 and accompanying text.

9. *See* H.L. v. Matheson, 450 U.S. 398, 448 (1981) (Marshall, J., dissenting) ("The critical thrust of [the Court's] decisions has been to protect the privacy of individual families from unwarranted state intrusion.").

10. 428 U.S. 52 (1976).

11. *Id.* at 72–75.

12. *Id.* at 74.

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the "constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of [a] physician and his patient to terminate the patient's pregnancy."[13]

The State of Missouri contended that the imposition of a consent requirement was justified by the state's interest in safeguarding the family unit and parental authority.[14] The Court recognized that a minor's constitutional rights are not as broad as those of an adult[15] but declined to find that the state had a significant interest at stake.[16] The Court did not believe that a blanket consent requirement would promote the family unit or parental authority "where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure."[17] The Court observed that the interest parents "may have in the termination of [their] minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor,"[18] but warned that not "every minor, regardless of age or maturity, may give effective consent" for the termination of her pregnancy.[19]

Three years later in *Bellotti v. Baird (Bellotti II)*[20] a divided Court again faced the teenage abortion issue.[21] This time the Court was confronted with a Massachusetts statute requiring minors to obtain the consent of both parents before an abortion or to obtain a court order allowing an abortion without parental consent upon a showing of good cause.[22] The Supreme Court of Massachusetts had interpreted the statute and construed it narrowly.[23] Under its interpretation, a minor was not eligible for a court order until she first attempted to gain her parents' consent for the abortion, and the court order could only be granted if the abortion was determined to be in the minor's best inter-

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13. *Id.*

14. *Id.* at 75.

15. *Id.* at 74.

16. *Id.* at 75.

17. *Id.*

18. *Id.*

19. *Id.*

20. 443 U.S. 622 (1979). This case is commonly referred to as *Bellotti II*. The parties that were present and the Massachusetts law that was challenged in *Bellotte II* are the same as those in Bellotti v. Baird, 428 U.S. 132 (1976) (*Bellotti I*). In *Bellotti I*, the Court remanded the case back to the federal district court on the basis of the abstention doctrine because there had been no authoritative state court interpretation of the statute at issue. *Id.* Such an interpretation was given to the statute by the Massachusetts Supreme Judicial Court in Baird v. Attorney Gen., 371 Mass. 741, 360 N.E.2d 288 (1977), before the Supreme Court heard *Bellotti II*.

21. *Bellotti II*, 443 U.S. at 625.

22. MASS. GEN. LAWS ANN. ch. 112, § 12S (West Supp. 1979) (amended 1980 to conform with the Supreme Court rulings).

23. Baird v. Attorney Gen., 371 Mass. 741, 360 N.E.2d 288 (1977).

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est.[24] The statute was expressly construed to grant courts authority to deny consent to a mature minor if the court was not convinced that an abortion was in the minor's best interest.[25]

The United States Supreme Court held that the statute was unconstitutional.[26] Justice Powell, writing for a plurality of four justices, delivered the opinion of the Court.[27] In his opinion, Justice Powell identified three reasons that have traditionally justified the state interest in placing restrictions on the ability of minors to exercise basic constitutional rights: (1) the protection of the unique vulnerability of children,[28] (2) the child's diminished capacity to make intelligent decisions,[29] and (3) the traditional parental role in child rearing.[30] Nevertheless, Justice Powell distinguished the right to have an abortion from other rights the state restricts minors from exercising.[31] Unlike other rights, such as the right to marry which may be postponed until the minor reaches the age of majority, the right to have an abortion ceases to exist if not exercised immediately.[32] Because the result of preventing a minor from having an abortion would mean that the minor would be forced to bear a child and face the "exceptionally burdensome"[33] consequences of parenthood herself, Justice Powell concluded that parents cannot be given an absolute veto over their daughter's decision to terminate her pregnancy.[34]

Justice Powell did not believe, however, that a law requiring parental involvement in a minor's abortion decision was *per se* invalid.[35] Indeed, he noted that the decision to have an abortion is a grave one, and that "a girl of tender years, under emotional stress, may be ill-equipped to make it without [the] mature advice and emotional support"[36] which only a parent can provide. Therefore, Justice Powell suggested that if a state wished to require parental involvement in a minor's abortion decision, the state must also provide the minor with an

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24. *Id.* at 757, 360 N.E.2d at 297.
25. *Id.* at 748, 360 N.E.2d at 293.
26. *Bellotti II*, 443 U.S. at 651.
27. *Id.* at 624. The Chief Justice, Justice Stewart, and Justice Rehnquist joined Justice Powell in his opinion. *Id.* Justice Rehnquist commented that he joined in the opinion only for the purpose of providing guidance to lower courts but did not approve of the Court's holding. *Id.* at 651–52.
28. *Id.* at 634–35.
29. *Id.* at 635–37.
30. *Id.* at 637–39.
31. *Id.* at 642.
32. *Id.*
33. *Id.*
34. *Id.* at 642–43.
35. *Id.* at 640.
36. *Id.* at 641.

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opportunity to judicially bypass such involvement if the minor should so desire.[37] Specifically, he wrote that a minor is entitled to a proceeding in which she can "show either: (1) that she is mature enough and well enough informed to make her abortion decision . . . independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests."[38] Justice Powell also specified that such a proceeding should be held expediently and in a manner that maintains the minor's anonymity.[39] Thus, Justice Powell concluded that the Massachusetts' statute was unconstitutional because it did not allow minors to go to court before they sought parental consent and because it did not grant mature minors the right to make their abortion decisions independently.[40]

Four other Justices joined in the Court's judgment but did not concur in Justice Powell's opinion.[41] They believed that the Court's decision in *Danforth* was controlling and that the Massachusetts' statute was invalid because it gave a third party an absolute veto over a minor's decision to end her pregnancy.[42] They also believed that the option of going to court to avoid the parental consent requirement would be as burdensome as the consent requirement itself.[43]

The next Supreme Court decision to deal with the problem of teenage abortions was *H.L. v. Matheson*.[44] This case upheld the validity of a Utah statute which required parental notification of abortions performed on minors.[45] The plaintiff was a fifteen-year-old who was not married or otherwise emancipated and was living at home where she was dependent on her parents.[46] The plaintiff made no showing as to her maturity or her relationship with her parents.[47] Although the plaintiff challenged the statute on overbreath grounds by alleging that it unduly burdened the abortion rights of all minors, mature or immature, the Court did not allow the overbreath challenge and limited plaintiff's class to those teenagers who were similarly situated to the plaintiff.[48]

The Court held that, as applied to the plaintiff's class, the statute

37. *Id.* at 643–44.

38. *Id.* (footnotes omitted).

39. *Id.* at 648.

40. *Id.* at 651.

41. *Id.* at 652 (Justices Stevens, Brennan, Marshall and Blackmun).

42. *Id.* at 654.

43. *Id.* at 655 (also noting that the best-interest standard provides judges with little guidance for making a decision).

44. 450 U.S. 398 (1981).

45. UTAH CODE ANN. § 76-7-304 (1978).

46. *Matheson*, 450 U.S. at 400.

47. *Id.* at 407.

48. *Id.* at 405–07.

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served the important state interests of maintaining family integrity and protecting adolescents and also the significant state interest of providing parents with an opportunity to communicate medical information regarding the child to the physician.[49] Emphasizing that the statute allowed parents to communicate with their children regarding a potentially profound decision, the Court concluded that the statute was reasonably calculated to protect minors.[50] Justice Powell wrote a concurring opinion in which he stated that he joined in the Court's judgment on the basis that it left open the question of whether Utah's abortion notice statute would be constitutional if applied to mature minors or to minors whose best interest would not be served by parental notification.[51] He emphasized that the Court's decision was extremely narrow and based solely upon the facts before it.[52]

Subsequent to *Matheson*, the Court addressed the teenage abortion issue in *City of Akron v. Akron Center For Reproductive Health, Inc.*,[53] and *Planned Parenthood Association v. Ashcroft*.[54] In *City of Akron*, decided by a majority of the Court, an Akron, Ohio ordinance requiring parental consent for abortions performed on minors below the age of fifteen was invalidated.[55] The ordinance allowed minors to go to court to avoid its consent requirement, but it did not establish a proce-

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49. *Id.* at 411.

50. *Id.* at 412–13.

51. *Id.* at 414.

52. *Id.* at 416. In a dissenting opinion, Justice Marshall pointed out that the Court has protected parental authority for the purpose of preventing government interference in family life. *Id.* at 448. He noted that it was ironic that the Court should use this same rationale as a means of allowing governmental interference in the family in this instance. *Id.*

53. 462 U.S. 416 (1983) (Powell, J., majority). Decided a decade after Roe v. Wade, 410 U.S. 113 (1973), the *Akron* decision is a strong affirmation of the principle that a woman's right to abortion is protected by the right to privacy. *See City of Akron*, 462 U.S. at 419–20, 426–31.

54. 462 U.S. 476 (1983). Lower federal courts have also adjudicated the validity of abortion notification and consent statutes on numerous occasions. *See* Zbaraz v. Hartigan, 763 F.2d 1532 (7th Cir. 1985), *appeal filed*, 53 U.S.L.W. 2604 (U.S. Oct. 16, 1985) (enjoining enforcement of Illinois' notification statute pending issuance of rules by the Illinois Supreme Court); American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283 (3d Cir. 1983) (3d Cir. 1983), *aff'd*, 106 S. Ct. 2169 (1986) (enjoining enforcement of Pennsylvania's abortion consent statute pending the issuance of rules by the Pennsylvania Supreme Court); Indiana Planned Parenthood Affiliated v. Pearson, 716 F.2d 1127 (7th Cir. 1983) (permanently enjoining enforcement of an Indiana parental notification statute); Planned Parenthood League v. Bellotti, 641 F.2d 1006 (1st Cir. 1981) (upholding Massachusetts' abortion consent statute); C.L.G. v. Webster, 616 F. Supp. 1182 (W.D. Mo. 1985) (refusing to enjoin enforcement of Missouri's abortion consent statute); Glick v. McKay, 616 F. Supp. 322 (D. Nev. 1985) (preliminary injuntion issued against the enforcement of a Nevada abortion notification statute); Margaret S. v. Treen, 597 F. Supp. 636 (E.D. La. 1984) (upholding validity of Louisiana's abortion consent statute); T.L.J. v. Ashcroft, 585 F. Supp. 712 (W.D. Mo. 1983) (enjoining enforcement of Missouri's parental consent statute pending the issuance of procedural rules by the Missouri Supreme Court).

55. *City of Akron*, 462 U.S. at 439–442.

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dure that ensured minors access to courts for this purpose.[56]

The Court asserted that the legal standards for judging the ordinance were not in dispute.[57] The Court recognized that the state interest of protecting minors was significant, and that this interest would uphold a statute requiring parental consent for a minor's abortion as long as the statute's requirements could be judicially bypassed by mature minors or minors whose best interests were not served by the statute's requirements.[58] Because the Akron ordinance did not ensure minors' access to courts for this purpose, the Court found the statute to be constitutionally deficient.[59] In *Ashcroft* the Court upheld a newly enacted Missouri parental consent statute.[60] The statute allowed mature minors and minors whose best interests would not be served by the consent requirement to have the requirement waived in a court hearing.[61] The statute also contained provisions to expedite the minor's hearing and ensure the minor's confidentiality.[62]

The Supreme Court has demonstrated that it applies an intermediate level of scrutiny to statutes restricting the abortion rights of minors.[63] The Court upholds such statutes if they advance the significant state interest of protecting minors.[64] The Court, nevertheless, has also held that this interest is not advanced by a blanket requirement of parental consent or notice.[65] Thus, a state may enact a statute mandating parental involvement in a minor's decision to abort, but it must also grant minors an opportunity to judicially avoid parental involvement if the minor is mature or if notification is not in the minor's best interest.[66] Furthermore, the hearing to which the minor is entitled must be

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56. *Id.*

57. *Id.*

58. *Id.* at 439. "In addition, the Court has recognized that, in view of the unique status of children under the law, the States have a 'significant' interest in certain abortion regulations aimed at protecting children 'that is not present in the case of an adult.'" *Id.* at 427 n.10 (citing *Danforth*, 428 U.S. at 75; Carey v. Population Servs. Int'l 431, U.S. 678, 693 n.15 (1977) (invalidating a New York statute prohibiting the distribution of contraceptive devices to minors)). "The plurality in *Bellotti II* concluded that a state choosing to encourage *parental involvement* must provide an alternative procedure through which a minor may demonstrate that she is mature enough to make her own decision or the abortion is in her best interest." *City of Akron*, 462 U.S. at 427 n.10 (emphasis added).

59. *City of Akron*, 462 U.S. at 439–42.

60. *Ashcroft*, 462 U.S. at 476.

61. MO. ANN. STAT. § 188.023 (Vernon 1983).

62. *Id.*

63. *See supra* notes 57–58. The Court at times employs an intermediate level of scrutiny falling somewhere between the lenient rational-basis test and the severe strict-scrutiny test. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 590–594 (2d ed. 1983).

64. *See supra* note 58.

65. *Danforth*, 428 U.S. at 72–76; *see also Akron*, 462 U.S. at 427 n.10.

66. *Bellotti II*, 443 U.S. at 643–44.

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held expediently and conducted in a manner which maintains the minor's anonymity.[67]

III. H. 319: SUBSTANCE AND PROCEDURE

H. 319 creates a comprehensive scheme for regulating a minor's access to abortion. The statute requires that before an unemancipated and unmarried minor can procure an abortion, the minor must obtain the consent of her parents or the physician must notify the minor's parents of the pending operation.[68] If the minor does not wish to have her parents notified of the abortion, H. 319 allows notice to be given to the minor's siblings, stepparents, or grandparents.[69] For the minor who does not wish to have anyone notified of her abortion, H. 319 permits the minor to go to juvenile court and obtain a court order completely avoiding the notification requirement if the minor can prove that she is mature or that notification is not in her best interest.[70]

For a minor who does not take action to avoid the notification requirement, H. 319 permits a physician to accept written consent for the minor's abortion from the minor's parents, guardian, or custodian.[71] When a minor does not have written consent, the physician is required to make a reasonable effort to give the minor's parents, guardian, or custodian twenty-four hours actual notice, in person or by telephone, of the abortion to be performed.[72] If the person to be notified cannot be reached, the physician must give forty-eight hours constructive notice by regular and certified mail to that person's last known address.[73] Forty-eight hours after constructive notice is mailed, the abortion may be performed even if the notice sent by certified mail has not been received.[74]

H. 319 permits a minor's brothers and sisters twenty-one years of age or older, stepparents, or grandparents to receive notice in lieu of the minor's parents, guardian, or custodian, when certain conditions are satisfied.[75] First, the minor must request that the physician give notice to one of these individuals.[76] Second, if the person to receive notice is a

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67. *Id.* at 644.

68. OHIO REV. CODE ANN. § 2919.12(B)(1)(a) (Anderson Supp. 1985). The term "unemancipated" refers to a minor who is unmarried, is under eighteen years of age, has not entered the armed services, has not become employed and self-subsisting, or has not otherwise become independent from the care and control of her parent, guardian, or custodian. *Id.* § 2919.12(F).

69. *Id.* § 2919.12(B)(1)(b)–(c).

70. *Id.* §§ 2919.12(B)(1)(a), 2551.85(A)–(B).

71. *Id.* § 2818.12(B)(1)(a)(ii).

72. *Id.* § 2919.12(B)(1)(c)(2).

73. *Id.*

74. *Id.*

75. *Id.* § 2919.12(B)(1)(b).

76. *Id.*

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brother or sister, the minor must specify that the person is at least twenty-one years old.[77] Third, the minor and the person to be notified must each file affidavits with the juvenile court in the county in which the minor lives, any county bordering thereon, or the county where the abortion is to be performed.[78]

The affidavits must state that the minor's parents, guardian, or custodian has subjected the minor to physical, sexual, or severe emotional abuse, and that the minor fears such abuse again if that person is notified of the abortion.[79] Finally, when the affidavits are filed with the juvenile court and the court is given the name and address of the physician who is to perform the abortion, the court contacts the physician and tells him that notice can be given to the person specified by the minor.[80]

H. 319 also permits the minor to obtain a court order completely avoiding the notification requirement if the minor is mature or if notification is not in the minor's best interest.[81] To obtain such an order, the minor must file a complaint in the juvenile court of the county in which the minor lives, any county bordering thereon, or in the county in which the abortion will be performed.[82] The complaint must state that the minor is pregnant, unmarried, unemancipated, and desires an abortion without parental notification.[83] The complaint must also state that the minor is "sufficiently mature and well enough informed to intelligently decide whether to have an abortion"[84] on her own, and/or "[t]hat one or both of her parents, her guardian, or her custodian was engaged in a pattern of physical, sexual, or emotional abuse against her or that the notification of her parents, guardian or custodian otherwise is not in her best interest."[85]

Within five business days after the date the complaint is filed, the minor must attend a hearing at the juvenile court.[86] If the minor does not have an attorney, the court appoints one for her and the court also appoints her a guardian ad litem.[87] At the hearing, the court must first consider whether the minor is of sufficient maturity to decide indepen-

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77. *Id.*
78. *Id.*
79. *Id.* § 2919.12(B)(1)(b)(ii)–(iii).
80. *Id.* § 2919.12(b)(1)(c).
81. *Id.* § 2919.12(b)(1)(a)(iii)–(iv).
82. *Id.* § 2151.85(A).
83. *Id.* § 2151.85(A)(1)–(3).
84. *Id.* § 2151.85(A)(4)(a).
85. *Id.* § 2151.85(A)(4)(b). If the minor has already retained an attorney, his or her name, address, and telephone number must also be placed in the complaint. *Id.* § 2151.85(A)(5).
86. *Id.* § 2151.85(B)(1).
87. *Id.* § 2151.85(B)(2).

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dently to have an abortion.[88] If the court decides that the minor is mature, it allows the minor to have the abortion without notification.[89] Where the court does not find that the minor is mature, the court then considers whether notification is in the minor's best interest.[90] If the court finds that the minor's best interests are not served by notification the minor is excused from the notification, requirement.[91] But where the court does not make such a finding, the court must dismiss the minor's complaint.[92] Where a minor's complaint states only one of the specified allegations, the court considers only that allegation.[93] In all cases, the minor is required to prove her claim by clear and convincing evidence, and the court announces its judgment immediately upon completion of the hearing.[94]

A dismissal of the minor's complaint is appealable.[95] Within four days after notice of appeal is filed, the case must be placed on the appellate court's docket.[96] Within four days of the date the case is placed on the docket, the appellant must file her brief, and within five days of the date the case is placed on the docket, the court must hear the case and announce its decision.[97] Should the juvenile court or the court of appeals fail to hear the minor's case within the prescribed time periods, the court's inaction constitutes a constructive order for the performance of the abortion without parental notification.[98]

H. 319 is enforced by subjecting the physician who knowingly performs an abortion in violation of its requirements to both criminal and civil penalties.[99] For a first time offender, a violation of H. 319 is a first-degree misdemeanor, and for all subsequent convictions a violation is a fourth-degree felony.[100] In addition, the physician who violates H. 319 is also subject to civil liability from the minor's parents for both compensatory and exemplary damages.[101] H. 319 provides the physician charged with a violation of its provisions with two affirmative de-

88. *Id.* § 2151.85(C)(1)–(3).
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* § 2151.85(E).
96. *Id.* § 2502.073(A).
97. *Id.* At this point the attorney has the option of presenting an oral argument. *Id.* If the attorney chooses not to give an oral argument the court of appeals must still announce its judgment on the fifth day after the case is placed on its docket. *Id.*
98. *Id.* §§ 2151.85(B)(1), 2505.073(A).
99. *Id.* § 2919.12(B)(1)(a),(D),(E).
100. *Id.* § 2919.12(D).
101. *Id.* § 2919.12(E).

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fenses.[102] Physicians can be exonerated from a violation of H. 319 if they can show that the minor gave them false information which they had no reasonable cause to believe was not true, or if it can be shown that the abortion was performed in an emergency to save the minor's life.[103]

In short, H. 319 requires all minors to submit to some form of outside involvement in their abortion decision. A minor's parents must either consent to her abortion or be given notification of its occurrence. When this is not appropriate, the minor can arrange for notice to be given to a family member other than her parents, or the minor can go to court and have her decision reviewed by a judge. The minor who does not submit to one of these procedures cannot obtain an abortion in Ohio.

IV. ANALYSIS

A. Constitutional Questions

H. 319 generally meets the Supreme Court's guidelines for abortion notification statutes.[104] It allows a minor to avoid notification if she is mature or if notification is not in her best interest. It makes provisions for the minor's privacy, and it expedites a minor's hearing and any appeals which may follow. Yet, a district court in *Akron Center for Reproductive Health v. Rosen*,[105] held that H. 319 violated a minor's fourteenth amendment due process rights and permanently enjoined its enforcement. This section of the note explores two of the grounds upon which the *Rosen* court relied to invalidate H. 319 and analyzes the soundness of those grounds and the correctness of the court's reasoning.

1. Expedited Hearings and Appeals

One feature of H. 319 which the *Rosen* court found unconstitutional is the time frame H. 319 establishes for a minor's notification

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102. *Id.* § 2919.12(C)(1)–(2).

103. *Id.*

104. *See supra* notes 63–67.

105. 633 F. Supp. 1123,1144 (S.D. Ohio 1986) (holding that H. 319 violated the fourteenth amendment due process rights of minors because (1) its constructive notice provision provided no means for a physician to find out whether or not a court has ruled on a minor's waiver petition within the required amount of time; (2) the statute required the physician personally to give notice of the minor's abortion to her parents; (3) the statute did not guarantee that a court would always consider both whether a minor is mature enough to decide to have an abortion and whether notification is in the minor's interest; (4) the statute required minors to prove their maturity or their best interest by *clear and convincing* evidence; (5) the statute did not sufficiently expedite a minor's notification waiver hearing or appeal; and (6) the statute did not provide a minor with a sufficient degree of confidentiality).

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waiver hearing and appeal.[106] According to the court's interpretation of the statute, three weeks may pass between the time a minor files her complaint and the time an appeal (if any) is completed.[107] The court took judicial notice of the fact that a teenager often experiences irregular menstrual periods and that this may cause her not to discover and confirm her condition until the ninth or tenth week of pregnancy.[108] The court concluded that a three-week wait pushes minors who are late in discovering their pregnancies into their second trimester when abortions become more dangerous and more expensive.[109] Accordingly, the court found that H. 319 did not sufficiently expedite a minor's appeal so as to provide a minor with an effective opportunity to obtain an abortion and thus held that the timing established by H. 319 was unconstitutionally long.[110]

The court's analysis of H. 319's bypass procedure is, however, somewhat flawed. It is a fundamental rule that a federal court should not interpret a state statute so as to render the statute unconstitutional.[111] The *Rosen* court violates this principle by its interpretation of the time periods that H. 319 establishes for expediting a minor's appeal. H. 319 states that a minor's initial hearing will take place within five *business days* after the minor files her complaint.[112] By contrast, H. 319 instructs that a minor's appeal should be docketed no later than four *days* after notice of appeal is filed and decided within five *days* after being docketed.[113] The legislature's use of the phrase *business*

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106. *Id.* at 1141–43.

107. *Id.* at 1141–42.

108. *Id.* at 1142.

109. *Id.*

110. *Id.* at 1142–43.

111. Planned Parenthood Ass'n. v. Ashcroft, 462 U.S. 476, 493, 494 n.21 (1983). The *Ashcroft* Court observed that "[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." *Id.* at 493. If a state statute is susceptible to a construction which cures its constitutional deficiencies, and a federal court does not wish to give it such a construction, the federal court should abstain from ruling on the constitutionality of the statute until it is authoratatively construed by a state court. *Bellotti I*, 428 U.S. 132, 147–52 (1976) (abstaining from ruling on the validity of Massachusetts' abortion consent statute). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 99–1009 (2d. ed. 1983). The *Rosen* court itself cited these rules. *Rosen*, 633 F. Supp. at 1133.

112. OHIO REV. CODE ANN. § 2151.85(B)(1) (Anderson Supp. 1985) ("The hearing shall be held at the earliest possible time, but not later than the fifth *business day* after the day that the complaint is filed.") (emphasis added).

113. *Id.* at 2505.073(A). Subsection (A) state:

> Within *four days* after a notice of appeal is filed in an action arising under . . . section [2151.85], the clerk of the juvenile court shall deliver a copy of the notice of appeal and the record on appeal to the clerk of the court of appeals named in the notice. . . .
>
> . . .[T]he court of appeals shall hear oral argument within *five days* after the appeal is docketed. The court of appeals shall enter judgment in the appeal immediately after the oral argument or, if oral argument has been waived, within *five days* after the appeal is

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days for describing when a minor's hearing shall be held is conspicuously absent from its description of when a minor's appeal will be scheduled.[114] This demonstrates an intent on the part of the Ohio legislature that weekends should be included when calculating the deadline for a minor's appeal. Yet, the *Rosen* court held that weekends were not to be counted when calculating the schedule of an appeal.[115] This resulted in the court's finding that it would take a minor nearly three weeks from the time she filed her complaint to the time the minor's appeal would be decided,[116] as compared to the two weeks it would take if weekends were counted.

As its rationale for deciding that weekends should not be counted the *Rosen* court "assumed"[117] that Ohio Civil Rule 6, which prescribes that weekends and holidays are not to be counted when calculating time periods, applies to H. 319.[118] However, in making this assumption the court appears to have overlooked two facts, one of which should have led the court in another direction.

The first fact the court overlooked is that Civil Rule 6 does not apply to appellate court procedure.[119] Instead, Appellate Rule 14 prescribes the time calculation requirements for the courts of appeals.[120] This mistake is not significant, however, because the time calculation provisions of Appellate Rule 14 are the same as those in Civil Rule 6.

The second fact the court overlooked is substantially more significant—that the rulemaking power of the Ohio Supreme Court is limited by section 5(B) of article IV of the Ohio Constitution to making rules of "practice and procedure."[121] The rules are not supposed to "*abridge*, enlarge, or *modify*" an individual's substantive rights.[122] When the rules do abridge or modify a substantive right they have been held to

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docketed.

Id. (emphasis added).

114. *See supra* notes 112–13.

115. *Rosen*, 633 F. Supp. at 1141–42.

116. *Id.*

117. *Id.*

118. *Id.*

119. The rules of civil procedure "to the extent that they would by their nature be clearly inapplicable, shall *not* apply to procedure (1) upon *appeal* to review any judgment, order or ruling . . . ." OHIO R. CIV. P. 1 (C) (emphasis added). Thus, if the application of Civil Rule 6 to H. 319 results in making the statute unconstitutional, the application of Civil Rule 6 to H. 319's appellate time periods would appear to be clearly inapplicable and should not be applied.

120. OHIO R. APP. P. 14; *see also* OHIO R. APP. P. 1 (regarding scope of Ohio Rules of Appellate Procedure).

121. OHIO CONST. art. IV, § 5(B).

122. *Id.* (emphasis added).

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be inapplicable.[123] For this reason the rule's time calculation provisions should not be applied to proceedings held under H. 319.

The Supreme Court made it clear in *Bellotti II*[124] that a minor has a right to a speedy determination of whether parental involvement is required in her abortion.[125] This is a part of a minor's substantive right to privacy.[126] The provisions of H. 319 which establish the time frame for when a minor's appeal must be held embody the minor's right to a speedy hearing upon which the privacy right depends. Hence, any procedural rules which will abridge or modify a minor's right to a speedy hearing should not be applicable to H. 319. Considering that the application of Appellate Rule 14 to H. 319 accentuate a possible unconstitutional characteristic of the statute, the *Rosen* court erred in holding that Appellate Rule 14 (or Civil Rule 6) is applicable to proceedings held pursuant to H. 319.

When H. 319 is interpreted such that weekends and holidays are counted when calculating the time limits for a minor's hearing and appeal, H. 319 may be seen in a much different light then the one in which the *Rosen* court saw it. The time periods in H. 319 now become similar to the time periods contained in Missouri's abortion consent statute.[127] In 1983, the Supreme Court considered the constitutionality

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123. Boyer v. Boyer, 46 Ohio St. 2d 83, 346 N.E.2d 286 (1976); Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 739 (1972).

124. 443 U.S. 622 (1979).

125. *Id.* at 644.

126. As specified by the Supreme Court in Roe v. Wade, 410 U.S. 113 (1973), a woman's right to an abortion stems from the right of privacy found in the penumbras of the Bill of Rights and made enforceable upon the states through the due process clause of the 14th amendment. *Id.*

127. MO. ANN. STAT. § 188.028 (Vernon 1983) (the statute has recently been amended). Missouri's abortion consent statute reads in subsection two as follows:

> (1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority right for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;
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> . . . .
>
> (3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible within five days of the filing of the petition. If any party is unable to afford counsel, the court shall appoint counsel at least twenty-four hours before the time of the hearing. At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible conse-

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of Missouri's abortion consent statute in *Planned Parenthood Association v. Ashcroft*[128] and found it to be valid.[129]

The Missouri statute requires a minor's initial hearing to be held within five days of when a minor files her complaint.[130] For any appeals that may follow, the Missouri statute requires that the record on appeal be perfected within another five days, but the statute does not set a time limit for when the appeal must be decided.[131] Instead, it states that time may be of the essence regarding the performance of an abortion and that the state supreme court should enact a rule which would allow a minor's appeal to be expedited.[132] Under this statutory scheme, it takes ten days from the time a minor files her complaint for her case to be placed on the appellate court's docket, and then the appellate court still must decide the case. It could easily take another five days for the case to be decided which means that the minor must wait about two weeks for the final disposition of her case. Upon consideration of these provisions the Supreme Court held that Missouri's statute "provides the framework for a constitutionally sufficient means of expediting judicial proceedings."[133]

Under H. 319, if weekends and holidays are counted, it would take no longer than two weeks and two days for the final disposition of a minor's case.[134] This is comparable to Missouri's statute.[135] As such, H.

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quences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interest of the minor;

. . . .

. . . .

(6) An appeal from an order issued under the provisions of this section may be taken to the court of appeals of this state by the minor or by a parent or guardian of the minor. The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of the cases appealed under this section.

Id.

128. 462 U.S. 476 (1983).

129. *Id.* at 493. Enforcement of Missouri's abortion consent statute was, nevertheless, enjoined because the Missouri Supreme Court had not yet adopted a procedural rule for expediting a minor's appeal. T.L.J. v. Achcroft, 585 F. Supp. 712 (W.D. Mo. 1983). The statute was later allowed to be enforced when such a rule was adopted. C.L.G. v. Webster, 161 F. Supp. 1182 (W.D. Mo. 1985); *see* MO. R. CIV. P. 84.02 (allowing for expedition of a minor's appeal from a proceeding held pursuant to section 188.028 of Missouri's Annotated Statutes).

130. MO. ANN. STAT. § 188.028(2.)(3)(Vernon 1983). *See supra* note 127.

131. MO. ANN. STAT. § 188.028(2.)(6).

132. *Id.*

133. *Ashcroft*, 462 U.S. at 491 n.16.

134. For instance, if a minor filed her complaint on a Monday her case would have to be decided by the following Monday. If her complaint were dismissed and she filed her notice of appeal on the same day, her case would have to be docketed with the court of appeals by the

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319's time limits are constitutional.

As for a minor who does not discover that she is pregnant until her tenth week, a two-week waiting period still pushes her into her second trimester. However, H. 319 allows courts, based on a showing of good cause, to lengthen or shorten the time limits for an appeal.[136] Presumably, Ohio courts would interpret the good cause provision to mean that the deadline for a minor's appeal can be shortened if the application of H. 319's prescribed time periods would force a minor to have a second trimester abortion.

The *Rosen* court addressed the good cause provision but did not conclude that Ohio's appellate courts would interpret it to shorten the deadlines for a minor's appeal.[137] Instead, the court intimated that Ohio's appellate courts would use the good cause provision to lengthen the maximum time periods for a minor's appeal because it would be too difficult for the courts to convene within a period of five days.[138] Such speculation has no place in the court's decision. H. 319 has not been enforced, and thus, the provisions for shortening or lengthening the deadline for a minor's appeal have never been applied. On their face, these provisions support H. 319's constitutionality. The *Rosen* court should have presumed that the provisions for lengthening or shortening the time periods for a minor's appeal would be interpreted and applied in a constitutional manner.[139] Until such time as the provisions of H. 319 are applied in an unconstitutional manner the court should refrain from ruling on their constitutionality on an as-applied basis.

In sum, H. 319 appears on its face to provide a constitutionally viable system for expediting a minor through the judicial system if the time calculation provisions of Appellate Rule 14 are not applied. H. 319 permits a minor to complete her initial hearing and a subsequent appeal in a period of approximately two weeks.[140] This is comparable to the amount of time it will take for a minor to complete the same process under Missouri's abortion consent statute which the Supreme Court has approved.[141] In addition, H. 319 allows appellate courts to shorten or lengthen the maximum time limits based on a showing of

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following Friday and decided no later than the following Wednesday. It must be noted that these time periods would be shortened if one of the deadlines fell on a weekend or holiday. In this case, the deadline would have to be met by the last weekday before the weekend or holiday.

135. *See supra* text accompanying notes 130–33.

136. OHIO REV. CODE ANN. § 2505.073(A) (Anderson Supp. 1985).

137. *Rosen*, 633 F. Supp. at 1142–43.

138. *Id.*

139. *See supra* note 111.

140. *See supra* note 134 and accompanying text.

141. *See supra* notes 130–31 and accompanying text.

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good cause.[142] H. 319 does provide minors an effective opportunity for an abortion to be obtained.

2. Confidentiality

Another area in which the *Rosen* court found that H. 319 failed to meet constitutional muster was that of confidentiality.[143] The court held that H. 319 was "fraught with confidentiality problems."[144] However, H. 319 does contain a number of provisions designed to insure a minor's confidentiality throughout the judicial bypass procedure. H. 319 specifies that courts are forbidden from informing a minor's parents of her pregnancy or her desire to have an abortion,[145] that a minor's hearing is to be conducted in a confidential manner,[146] and that all records and papers filed with a court pursuant to H. 319 are also to be confidential.[147] In addition, the complaint forms issued by the Ohio Supreme Court state that minors are to be referred to as either "Jane Doe" or "the complainant" in all court proceedings and legal documents.[148] Finally, H. 319 amends Ohio Revised Code section 149.43 on public records to prevent the records of a minor's hearing from being available to the public.[149]

The *Rosen* court nevertheless found that these provisions were constitutionally insufficient to secure a minor's confidentiality.[150] Among the items the court found insufficient were H. 319's lack of specific provisions to guarantee a minor's confidentiality,[151] especially the statute's failure to provide specific guidelines for the storage of records resulting from a minor's hearing;[152] H. 319's requirement that the minor sign her name to the bottom of her complaint and give the court an address where she can be reached if she does not have an attorney;[153] and H. 319's venue provisions which limit the locations in which a minor may file her complaint to the county in which the minor lives, any county bordering thereon, or the county in which the minor will have her abortion.[154]

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142. *See supra* note 136 and accompanying text.
143. *Rosen*, 633 F. Supp. at 1143–44.
144. *Id.* at 1143.
145. OHIO REV. CODE ANN. § 2151.85(D) (Anderson Supp. 1985).
146. *Id.* §§ 2151.85(F), 2505.073(B).
147. *Id.* §§ 2151.85(F), 2105.073(B).
148. *See Rosen*, 633 F. Supp. at 1143 (citing the instructions to the complaint forms the supreme court issued pursuant to H. 319).
149. OHIO REV. CODE ANN. § 149.43(A)(1) (Anderson Supp. 1985).
150. *Rosen*, 633 F. Supp. at 1144.
151. *Id.* at 1143.
152. *Id.* at 1143–44.
153. *Id.* at 1143.
154. *Id.* at 1143–44.

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In addition, the court claimed that other provisions of Ohio law contradict H. 319's confidentiality requirements and would act to nullify them.[155] These laws include Ohio Revised Code section 2151.42.1 and Rule 16 of the Ohio Rules of Juvenile Procedure.[156] Ohio Revised Code section 2151.42.1 requires attorneys who suspect that a child may be the victim of abuse to report the suspected abuse to the proper authorities so that an investigation may commence.[157] The *Rosen* court claimed that this statute would compel an attorney representing a minor who claimed in a notification waiver hearing that her parent abused her to report this abuse and thus violate the minor's confidentiality.[158] Rule 16 of the Ohio Rules of Juvenile Procedure requires that a summons be issued to the parents of minors who are to attend a hearing at the juvenile court.[159] Because this rule would require the parents of a minor seeking to avoid H. 319's abortion notification requirement to be made aware of their daughter's actions, the court found that H. 319 was invalid for not specifying that this rule would not apply to hearings held pursuant to H. 319.[160]

Although the list of faults the *Rosen* court found in H. 319's confidentiality provisions is long, a close evaluation of the court's reasoning brings to light numerous factors which the court failed to consider. Foremost among the factors not considered by the court is that H. 319 provides many more safeguards for maintaining a minor's confidentiality than the Missouri abortion consent statute approved by the Supreme Court in *Ashcroft*.[161] The only provision the Missouri statute contains for maintaining a minor's privacy is that it allows a "next friend" of the minor to fill out her complaint for her, and that it allows the minor to use her initials in the complaint's caption.[162] It still re-

155. *Id.* at 1143.

156. *Id.*

157. *See* OHIO REV. CODE ANN. § 2151.42.1 (Anderson Supp. 1985).

158. *Rosen*, 633 F. Supp. at 1144.

159. OHIO R. JUV. PRO. 16.

160. *Rosen*, 633 F. Supp. at 1144.

161. 462 U.S. at 476. One authority upon which the *Rosen* court relied on was American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283 (3d Cir. 1984). The *Thornburgh* court while analyzing the constitutionality of Pennsylvania's abortion consent statute stated that "[t]o pass constitutional muster, the alternative judicial procedure must be an established and practical avenue and may not rely solely on generally stated principles of availability, confidentiality, and form." *Id.* at 297. This statement reflects the *Thornburgh* court's interpretation of the Supreme Court's approval of Missouri's abortion consent statute. *Id.* The *Rosen* court relied on this statement when evaluating the validity of H. 319's confidentiality provisions and in holding that they were inadequate. *Rosen*, 633 F. Supp. at 1143–44. However, when it is considered that Missouri's statute contains fewer provisions pertaining to confidentiality than H. 319 and is less specific than H. 319, the *Thornburgh* court's statement lends support to the constitutionality of H. 319, not its unconstitutionality.

162. *See* MO. ANN. STAT. § 188.028(2)(1) (Vernon 1983). *See supra* note 127.

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quires the minor to sign the complaint if she does not have a next friend fill it out for her and provide the court with her parent's address[163] while making no provisions for the confidentiality of the minor's hearing or the confidentiality of the records resulting therefrom.[164]

But regardless of the Supreme Court's approval of Missouri's statute, the *Rosen* court has little basis for holding that H. 319 fails to provide minors with confidentiality. The court's criticism of H. 319's lack of specific guidelines for regulating the storage of a minor's records is groundless. The court failed to take notice of the existence of the Ohio Privacy Act.[165] The Privacy Act applies to all records kept by a governmental body, made confidential by law, and which contain information describing "anything" about a person.[166] The records pertaining to a minor's notification waiver hearing are such records. For these records the Privacy Act supplies strict regulations.[167] The Act requires the governmental departments which handle the records to appoint an individual to be responsible for them and to adopt and implement rules to prevent their unauthorized disclosure.[168] The Act further provides that the information contained in the records be used only for lawful purposes[169] and that information which has no continuing lawful use be eliminated.[170] Moreover, the Act permits civil and criminal sanctions against persons who intentionally violate its terms.[171] In effect, the Privacy Act requires that the records of a minor's notification waiver hearing be segregated from other records that are available to the public and maintained in secrecy. Hence, there is no need for H. 319 to contain any additional regulations governing the storage of records.

The Privacy Act makes it irrelevant that the minor must sign her name to her complaint. The act insures that a minor's records will not be seen by anyone and that the information contained in her record will be used only for lawful purposes. Thus, any public employees who would see the records are forbidden from disclosing their content to the public.

The court also has little basis to hold that a minor's confidentiality is violated by having her provide the court with an address where she

163. MO. ANN. STAT. § 188.028(2.)(1) (Vernon 1983). *See supra* note 127.
164. MO. ANN. STAT. § 188.028(2.)(1) (Vernon 1983). *See supra* note 127.
165. OHIO REV. CODE ANN. § 1347.01–.99 (Anderson Supp. 1985).
166. *See id.* §§ 1347.01(A), (B), (D), (E), 1347.04, 1347.05.
167. *See id.* §§ 1347.05–.08, 1347.10, 1347.99.
168. *Id* .at § 1347.05.
169. *Id.* at § 1347.07.
170. *Id.* at § 1347.05(H).
171. *See* §§ 1347.06, 1347.99.

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can be reached. The court stated that "it is difficult to believe that a minor could give any such address except that of her parents."[172] It is quite conceivable, however, that a minor could give the court the address of the doctor or the clinic that is to perform the abortion. In states which already have abortion notification or consent statutes, the abortion providers are actively involved in assisting minors through the court system.[173] They provide minors with extensive counseling and instructions on completing the steps required for having the notification or consent requirement waived.[174] It is not difficult to imagine that as part of their services abortion clinics in Ohio will allow minors to use clinic addresses and accept letters for the minors whom they serve.

The *Rosen* court believed that H. 319's venue provisions would not allow a minor to go to a court in a location where she would not be recognized.[175] This holding is, however, contrary to the weight of authority and unsupported by an objective view of the facts. The United States District Court for the Eastern District of Louisiana had an opportunity to consider a similar venue question in *Margaret S. v. Treen*,[176] a case where the constitutionality of Louisiana's abortion consent statute was challenged.[177] The Louisiana statute directed a minor to file her waiver petition in either the parish in which she lived or the parish in which she would have her abortion.[178] The court held that these provisions were satisfactory in that they allowed a minor to "obtain a [c]ourt order in an area in which she reside[d] or in another area if she fear[ed] that her presence in court [would] alert the public that she [was] seeking an abortion."[179] Ohio's statute is even more flexible than the Louisiana statute in that it allows a minor to file her complaint in any of the counties surrounding the one in which the minor lives.[180] Each Ohio county borders on at least three other counties and most border on five or six different counties. Thus, an Ohio minor who seeks a waiver of the abortion notification requirement will have a sufficient variety of locations in which to file a complaint to ensure that she is able do so in privacy.

As to the other Ohio laws the court claimed conflicted with H. 319's confidentiality requirements, the court errs in believing that they

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172. *Rosen*, 633 F. Supp. at 1143.

173. Donovan, *Judging Teenagers: How Minors Fare when They Seek Court-Authorized Abortions*, 15 FAM. PLAN. PERSP. 259, 261, 266–67 (1983).

174. *Id.*

175. *Rosen*, 633 F. Supp. at 1144.

176. 597 F. Supp. 636 (E.D. La. 1984).

177. *Id.*

178. LA. REV. STAT. ANN. § 40:1299.35.5(B)(1) (West Supp. 1983).

179. *Margaret S.*, 597 F. Supp. at 652.

180. OHIO REV. CODE ANN. § 2151.85(A) (Anderson Supp. 1985).

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are applicable to proceedings conducted pursuant to H. 319. The court cites Ohio Revised Code section 2151.42.1, which requires attorneys to report suspected child abuse, as a section which abrogates H. 319's confidentiality requirements.[181] By presuming that this section will apply to proceedings under H. 319, however, the court apparently overlooked Revised Code section 1.51. Section 1.51 provides that when interpreting the Ohio Revised Code, a specific statute governs over a general statute where two such statutes are in conflict.[182] H. 319's confidentiality requirements are specific in that they apply only to hearings held pursuant to H. 319,[183] whereas the reporting requirement of section 2151.42.1 is general in that it is supposed to apply whenever an attorney comes in contact with a child he suspects is abused.[184] In light of section 1.51, and in light of the clear intent of H. 319 to maintain a minor's privacy,[185] the court's conclusion that the child abuse reporting requirements of section 2151.42.1 should apply to proceedings conducted pursuant to H. 319 is a misinterpretation of Ohio law. Properly interpreted, H. 319 should govern over section 2151.42.1, so the reporting requirements do not interfere with a minor's confidentiality.

The same can be said for Rule 16 of the Ohio Rules of Juvenile Procedure and its requirement that the parents of a minor who is to have a hearing at the juvenile court be sent a summons. As with the time calculation provisions of the Rules of Civil Procedure discussed in the proceeding section of this note,[186] Juvenile Rule 16 should not apply to hearings held pursuant to H. 319 if application of Rule 16 violates a minor's substantive rights.[187] In this instance, the application of Rule 16 violates a minor's right to confidentiality and thus should not apply to a minor's notification waiver hearing. Again, the *Rosen* court misconstrued Ohio law.

The provisions of H. 319 do provide minors with a constitutionally sufficient degree of confidentiality. The standards set by H. 319 exceed those of the Missouri abortion consent statute, and interpreted properly, H. 319 prevents discovery of the identity of minors who attempt to judicially bypass parental notification. The grounds upon which the *Rosen* court relied in holding H. 319's confidentiality requirements insufficient do not exist if the statute is given a fair interpretation.

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181. *Rosen*, 633 F. Supp. at 1144.

182. *E.g.*, State v. Frost, 57 Ohio St. 2d 121, 387 N.E.2d 235 (1979) (following Ohio Revised Code Section 1.51).

183. OHIO REV. CODE ANN. §§ 2151.85, 2505.073, 2919.12 (Anderson Supp. 1985).

184. *Id.* at § 2151.42.1.

185. *See supra* notes 145–49 and accompanying text.

186. *See supra* notes 121–23 and accompanying text.

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B. *Maturity and Best Interests: Defining the Indefinable*

Thus far, this note has dealt with issues which affect the constitutionality of H. 319 on its face. However, H. 319 may also be prone to constitutional problems in its application. The maturity and best-interest standards incorporated into H. 319 are vague and indefinite. Without guidelines for interpretation, they could be a source of unprincipled decisionmaking and allow some courts unjustly to deny a minor's request to forego notification.

1. Maturity

It is apparent from the Supreme Court decisions that the capacity to become pregnant is not the measure of maturity for the purpose of determining competency to decide to have an abortion.[188] It is equally apparent, however, that the law's traditional method of measuring maturity, by assigning arbitrary age limits for when one has the capacity to engage in certain acts, is also inadequate for the sensitive decision of whether or not to have an abortion.[189] Instead, the Court has recognized that different people attain the ability to decide to have an abortion at different times in their lives and that when a minor gains this capacity she should be allowed to make the decision without interference.[190]

The question then, is when does a minor gain the capacity to competently decide to have an abortion? The Supreme Court has held that it occurs when a minor is "mature and well enough informed to make intelligently the abortion decision on her own."[191] This same statement is echoed by H. 319.[192] The Court, however, has not defined its own standard. This is particularly dangerous when one realizes that abortion is one of the most emotional and controversial issues of our time. A pro-life judge may find that every minor who wants an abortion lacks maturity or is not sufficiently informed to decide to have an abortion on her own.[193] A pro-choice judge may permit every minor who comes

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188. H.L. v. Matheson, 450 U.S. 398, 408 (1981) (There is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion.).

189. *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

190. *Bellotti II*, 443 U.S. at 647 (When a minor "is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent."); *see also* City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 427 n.10 (1983). *See supra* note 58.

191. *Bellotti II*, 443 U.S. at 647.

192. OHIO REV. CODE ANN. § 2151.85(C)(1) (Anderson Supp. 1985).

193. For instance, Representative Luebber believes that a pregnant teenager is irresponsible simply for wanting an abortion without informing her parents that she is pregnant. To him this means that the teenager is running away from her problems and responsibilities and is therefore

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before his court to have an abortion without any coerced third-party involvement. Thus, the Supreme Court's failure to lay out ascertainable standards for determining the point at which a minor is mature has caused Ohio to enact a statute with extraordinary potential for application in an arbitrary and capricious fashion.

One commentator, however, has suggested that a definition for the maturity standard exists.[194] The concept of maturity can be defined by reference to the state's legitimate justifications for restricting the liberty of minors.[195] These justifications as articulated by Justice Powell in *Bellotti II*[196] are: (1) the protection of childhood vulnerability,[197] (2) the protection of children from their inability to make reasoned and informed decisions,[198] and (3) the preservation of the guiding role of parents in rearing their children.[199] A minor may be considered mature, in light of these these justifications, if she can bear the consequences of an abortion and if she is capable of giving informed consent for an abortion.[200] Where a minor possesses these two qualities, the third justification for state restrictions, that of preserving the guiding role of parents, becomes moot because the purpose of the parental role

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not sufficiently mature to decide to have an abortion on her own. Leubbers Interview, *supra* note 2 (while the opinion of a legislator would usually be of importance in interpreting the provisions of a bill, in this case it is virtually irrelevant because this area of the law has been preempted by federal constitutional law).

An excellent example of the discretion that the maturity standard leaves to judges is *In re* Moe, 12 Mass. App. Ct. 298, 423 N.E.2d 1038 (1981). In this case a 14-year-old woman appealed from the trial court's denial of permission for her to have an abortion without parental consent. *Id.* The minor had "described the medical procedures which would be used and the risks attendant to them. Whatever her maturity in an overall sense, as to the specific question at hand, informed consent to an abortion, the minor demonstrated that she possessed the relevant information, had evaluated that information, and had made decisions based on those exaluations." *Id.* at 299 n.1, 423 N.E.2d at 1040 n.1. Nevertheless, the trial court denied her petition. *Id.* at 299–300, 423 N.E.2d at 1041. The appeals court reversed on other grounds. *Id.* at 305, 423 N.E.2d at 1043. *See generally* Annotation, *Requisites and Conditions of Judicial Consent to Minor's Abortion*, 23 A.L.R. 4th 1061 (1983).

194. Buchanan, *The Constitution and the Anomaly of the Pregnant Teenager*, 24 ARIZ. L. REV. 553 (1982). Another article that addresses the issue of determining maturity is Note, *Judicial Consent to Abortion: Assessing a Minor's Maturity*, 54 GEO. WASH. L. REV. 90 (1985). This article conforms with the views expressed in the Buchanan article in that the student author believes that maturity should be determined by assessing a minor's ability to make an intelligent decision and a minor's vulnerability. *See id.* at 102 ("The Court should require judges to assess qualities . . . useful . . . [to a determination of] an individual's ability to understand and *bear the consequences* of a serious decision.") (emphasis added). *See infra* note 200 and accompanying text.

195. Buchanan, *supra* note 194, at 574.

196. 443 U.S. at 634–39.

197. *Id.* at 634–35.

198. *Id.* at 635–37.

199. *Id.* at 637–39.

200. Buchanan, *supra* note 194, at 574.

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is to nurture children until they become mature.[201]

A minor may reasonably be able to prove that she is capable of giving informed consent, but it would be extremely difficult, if not impossible, for a minor to prove that she can bear the consequences of an abortion.[202] This difficulty arises because the minor would have to show that she has the emotional fortitude to endure an abortion without experiencing an emotional crises—that she can "take it."[203] It would be very difficult for a minor to make such a showing since there is no tangible evidence a minor can offer a court to show that she can bear the consequences of having an abortion. In fact, psychologists differ as to whether it is possible to predict how a person will react emotionally to such a future event.[204] Thus, a court's assessment of a minor's vulnerability must be based on subjective factors.[205] The problem with making the determination on the basis of subjective factors is, of course, that it allows for judgments based upon a judge's personal values and beliefs.

It is, however, inappropriate to accord the vulnerability factor significant weight in the determination of a minor's maturity for making an abortion decision. Every unmarried and unemancipated pregnant teenager is in an exceptionally vulnerable position whether or not she has an abortion.[206] If a teenager decides to have her baby, she must either give the child up for adoption, or keep the child to raise herself. Severe emotional and psychological consequences may result from either one of these choices. If the teenager decides to give the baby up for adoption, she may anguish for years over the fact that she will never know the child or see the child grow up.[207] If the teenager decides to keep the child, she may endure a multitude of difficulties as a young unwed mother.[208] These difficulties could also have severe and lasting emotional and psychological consequences.

Thus, by the time a minor reaches the point at which she must decide whether or not to have an abortion, the issue of vulnerability is irrelevant and should not be a factor used to determine maturity.

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201. *See Bellotti II*, 443 U.S. at 638.

202. Buchanan, *supra* note 194, at 574.

203. *Id.* at 581.

204. Interview with Berthold Burg, Associate Professor of Psychology, University of Dayton (Feb. 2, 1986) [hereinafter Burg Interview] (tape recording on file with University of Dayton Law Review).

205. Buchanan, *supra* note 194, at 581.

206. *See Bellotti II*, 443 U.S. at 642; Burg Interview, *supra* note 204.

207. Burg Interview, *supra* note 204.

208. *See Bellotti II*, 443 U.S. at 642 ("[C]onsidering [a teenager's] probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome.").

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Therefore, only one factor remains—the need to protect minors from their inability to make informed and competent decisions.[209] This factor is much more easily determined and leaves much less room for judges to impose their own subjective beliefs and values on the court's determination.[210]

Determining whether a minor is mature on the basis of her ability to make an informed and competent decision requires a determination of the extent to which the minor has rationally analyzed the decision to be made.[211] This determination resembles the common law's "mature-minor" rule.[212] The mature-minor rule is an exception to the common-law requirement of parental consent for a minor's medical treatment.[213] It requires a determination of whether a minor is capable of giving informed consent to a particular medical procedure.[214] Where a minor is capable of giving informed consent, parental consent is no longer a condition precedent to the performance of that procedure upon the minor.[215] The mature-minor rule involves a determination of the minor's understanding of the medical procedure and appreciation of its consequences.[216] Under this rule, a minor would be mature for the purpose of deciding to have an abortion if she knows and understands the medical procedure to be performed on her, if she knows and understands the risks and benefits attendant to that procedure, and if her decision to undergo the procedure is the voluntary result of a rational process of weighing the pros and cons of having the procedure performed.[217] Thus, if a minor can prove to a court that she understands the abortion procedure in this manner, she should be considered sufficiently mature to decide independently whether or not to have an abortion. Assuming that maturity is defined in terms of the state's legitimate justifications for restricting the rights of minors, this is the logical method of determining whether a minor is mature. It should also be noted that this definition of maturity is strongly compelled by the Supreme Court's admonitions that the decision to have an abortion is primarily a medi-

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209. *See id.* at 635.

210. *See* Buchanan, *supra* note 194, at 574.

211. *See id.* at 575–76.

212. *Id.*; Bennett, *Allocation of Child Medical Care Decision-Making Authority: A Suggested Interest Analysis*, 62 VA. L. REV. 285, 289; Brown & Truitt, *The Right of Minors to Medical Treatment*, 28 DEPAUL L. REV. 289, 294 (1979); *see also* Lacey v. Laird, 166 Ohio St. 12, 139 N.E.2d 25 (1956) (adopting "mature-minor" rule in Ohio).

213. *See supra* note 212.

214. *Id.*

215. *Id.*

216. *Id.*

217. Weithorn & Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1590 (1982).

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cal one.[218]

2. Best Interest

The second test promulgated by Justice Powell for determining whether a pregnant teenager's abortion decision requires parental notification is a best-interest test.[219] H. 319 provides that a minor's parents are not to be notified if such "notification . . . is not in her best interest."[220] The best-interest test has, however, been criticized in the context of child custody cases for the lack of guidance it provides judges,[221] leaving them free to make custody determinations on the basis of their own values and beliefs.[222] The use of the best-interest test in the context of deciding whether a minor's parents should be notified of her abortion poses the same problem as the use of the maturity test—judges may make arbitrary and capricious decisions based on their own personal beliefs and values.

The reason the best-interest test is so indeterminate is because it requires judges to predict future events and make value judgments.[223] Child custody cases exemplify the problem. Custody cases require judges to make a decision between two alternatives—whether a child should live with his father or his mother.[224] To make this decision, the judge must have a great deal of information regarding the father, the mother, and the child's relationship with each individual.[225] With this information, the judge must make a prediction as to what outcomes will result from placing the child with either the father or the mother and decide which outcome is the most "preferable."[226]

The problem is that this decisional process is extremely indefinite. Psychologists and psychiatrists agree that the future state of a child's relationship with his parents is not capable of prediction.[227] Therefore, a judge's prediction as to how the child will get along with either par-

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218. *See City of Akron*, 462 U.S. at 427.

219. *Bellotti II*, 443 U.S. at 644–45.

220. OHIO REV. CODE ANN. § 2151.86(A)(4)(b) (Anderson Supp. 1985).

221. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 263–64.

222. *See id.* at 263.

223. *Id.* at 257.

224. Although most custody disputes are likely to be between a child's natural parents, they may involve people other than the natural parents, such as grandparents or older siblings.

225. Mnookin, *supra* note 221.

226. *Id.* at 257–261. The decision making process which takes place when one is called upon to choose the better of two competing alternatives has been described by decision theorists as being a process of "rational choice." *Id.* at 256. Such a decision making process is said to involve two specific abilities: (1) the ability to specify alternative outcomes, and (2) the ability to measure the utility of each outcome by a particular standard. *Id.*

227. *Id.* at 258–259.

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ent in the future can be little more than an educated guess. Secondly, the decision as to which outcome is most "preferable" requires the judge to have a standard by which each outcome can be compared.[228] This standard must consist of a set of values for how children should be raised.[229] Since no consensus exists as to what the "best" method for raising children is, judges often decide custody cases on the basis of their own beliefs.[230] The result is that child-custody best-interest determinations are made in a standardless manner and cannot be predicted.[231]

These problems associated with the use of the best-interest test in child custody cases will be exacerbated in the context of deciding whether an immature minor's parents should be notified of her abortion. The problem of predicting future events is made worse because the judge cannot see or talk with the minor's parents, and hence, he or she must rely exclusively on the minor's information. The judge can only guess as to what the parents are really like and how they will react to the knowledge of their daughter's plans to obtain an abortion. The judge does, of course, have an opportunity to examine the minor and form an opinion as to her credibility, but in many cases this amounts to no more than a guess as to whether the minor is miscalculating her parents' feelings. At least in a child custody case, a judge has a complete set of facts pertaining to the child's relationship with his parents. Thus, the prediction the judge must make as to the parents' reaction to the news of their daughter's abortion has an even higher probability of being incorrect. The only solution to this problem would be for the judge to have the minor examined by a psychologist or psychiatrist to determine the accuracy of the minor's perception of her parents, yet even this determination must ultimately be speculative.

The impact of value judgments is also more severe in the context

228. *See id.* at 260–61.

229. *Id.*

230. *Id.* at 263.

231. *Id.* For instance, in a custody dispute where a child has a good relationship with his father and mother, and both his father and mother are employed at good full-time jobs and are otherwise equally capable of being fine parents, the judge's decision as to which parent the child should live with must ultimately be based on the judge's own belief as to whether a child is better off living with his father or his mother. If one of the parents lives in a racially mixed, middle-class, inner-city neighborhood and the other lives in the country, the judge must decide whether a child can be brought up better in an urban or rural area, and in addition, whether the child should be exposed to a racially mixed environment. If one of these parents, who are both competent in every other respect, is a homosexual, the judge's personal views as to alternate lifestyies are likely to be determinative. *See generally* Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties*, 11 U. DAYTON L. REV. 275, 327–371 (1986) (a gay parent is generally denied custody). Obviously, any decision as to which parent it is in the child's "best" interest to be placed with will be influenced by the judge's beliefs, prejudices, and biases.

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of deciding which outcome is "best" for the minor. The only guidance that can be garnered directly from the Supreme Court decisions is that the mere fact that a minor does not want to tell her parents of her abortion is insufficient to sustain a best-interest argument.[232] The Supreme Court decisions also indicate that notification does not serve a minor's best interest if her parents would absolutely prevent her from having an abortion. This follows from the prohibition against allowing a parent the power to consent to the daughter's abortion unless the minor is first given the opportunity for a judicial determination of whether the *abortion* is in the minor's best interest.[233] H. 319 does not provide for this; it only provides for a determination whether *notification* is in the minor's best interest.[234] Thus, issuing notification to parents who would prevent their daughter's abortion would be the equivalent of allowing the parents the blanket ability to consent to their daughter's abortion regardless of the daughter's best interest. Such a blanket ability to consent is, of course, prohibited by the Court's decision in *Danforth*.[235]

The problem lies in the gray area between a showing of mere reluctance and discomfort on the part of the daughter and a showing of absolute opposition on the part of the parents. In this middle ground, a judge's personal opinions will have the greatest impact on a court's decision. For instance, the pro-choice judge might deny parental notification simply on the basis that the minor's parents would attempt to impose restrictions on her personal or social life if they knew of her pregnancy. The pro-life judge might deny a minor's request to avoid notification as long as there was no showing that physical abuse might result even where it is evident that notification would permanently jeopardize the minor's relationship with her parents.[236] Thus, specific stan-

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232. *See Matheson*, 450 U.S. at 398 (ruling that it is constitutional for the state to force a minor to inform her parents of her abortion). *See supra* notes 44–52 and accompanying text.

233. *Bellotti II*, 443 U.S. at 647–48 (invalidating a Massachusetts' parental consent law that required minors to seek consent from their parents as a precondition to going to court to avoid the consent requirement). *See supra* notes 20–43 and accompanying text.

This note only suggests legal standards applicable to a determination of whether notification is in a minor's best interest. It does not attempt to suggest legal standards applicable to a determination of whether an abortion is in a minor's best interest as would be the question under an abortion consent statute. However, the analysis provided in the best-interest portion of this note should be applicable to an abortion consent statute to the extent that the enforcement of an abortion consent statute requires a minor's parents to be notified of their daughter's pregnancy. This would be the case in which a minor seeks a waiver of the consent requirement before attempting to gain consent from her parents or otherwise informing her parents that she is pregnant.

234. OHIO REV. CODE ANN. § 2151.85(A)(4)(b) (Anderson Supp. 1985).

235. 428 U.S. at 72–75.

236. Representative Leubbers believes that it would not be in a minor's best interest for her parents to know of her abortion if the parents would throw her out of their home or if the parents would beat her. Leubbers Interview, *supra* note 2.

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dards are needed to guide courts in the application of the best-interest test.

As with the maturity test, such standards can be found by looking to the state interests identified by Justice Powell in *Bellotti II*.[237] The second interest Justice Powell identified, that of protecting minors from their inability to make sound decisions,[238] and the third interest, that of preserving parental guidance,[239] provide standards for an objective determination of when parental notification is "best" for the immature minor.

The state interest in protecting children from their inability to make informed decisions goes to the heart of the abortion notice issue. This interest usually justifies state laws allowing parents to control their children because parents are presumed to be better able to make intelligent decisions than their children.[240] This implies, however, that notification is not in a minor's best interest if the parents cannot assist the minor in making an informed abortion decision. Thus, if the parents' reaction to knowledge of their daughter's pending abortion would be irrational or hysterical, it is doubtful that they could provide her with the guidance necessary to make an informed abortion decision. Unfortunately, many parents may react in this manner,[241] and if it is evident that they will, the minor's request to avoid notification should be granted. This does not mean that notification should be denied simply because the minor's parents do not approve of abortion. So long as the parents will not prevent the minor from obtaining the abortion and will not react to notification in an irrational manner, notification would be in the minor's best interest.

The state interest in preserving the guiding role of parents is also pertinent to defining a minor's best interest. As Justice Powell ex-

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237. 443 U.S. at 622.

238. *Id.* at 635–37 (citing Ginsberg v. New York, 360 U.S. 629 (1968), in which the Court upheld a New York law which forbade the selling of pornographic materials to minors as an example of a permissible state law protecting minors from their inability to make informed decisions).

239. *Id.* at 637–39.

240. *See id.* at 635–37.

241. It has been observed that parents may react irrationally to the news that their daughter is pregnant and seeking an abortion. Dembitz, *The Supreme Court and a Minor's Abortion Decision*, 80 COLUM. L. REV. 1251,1255 (1980). One New York family court judge writes:

> [M]others who have opposed their unmarried daughters' efforts to secure abortions variously have expressed a vengeful desire to punish the daughter for her sexual activity by making her suffer the unwanted child, a fervor to impose a religious conviction the mother has failed to instill in her daughter, a hope of caring for her daughter's baby as her own because of an inability or unwillingness to bear another child herself, a defensive or resentful attitude because *she* bore illegitimate children without seeking or being able to secure an abortion, or a general distaste for abortion.

Id. (footnotes omitted).

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plained this interest in *Bellotti II*, its purpose is to ensure that parents will be able to prepare their children to lead a responsible adult life.[242] To explain the origin of this interest, Justice Powell quoted from *Pierce v. Society of Sisters*[243] where the Supreme Court invalidated an Oregon law requiring parents to educate their children in public schools.[244] In *Pierce*, the Court declared that the "child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high *duty*, to recognize and prepare him for additional obligations."[245] Justice Powell went on to quote from *Wisconsin v. Yoder*[246] in which the Court further explained that it is the parents' *duty* to inculcate in their children "moral standards, religious beliefs, and elements of good citizenship."[247] Because the state does not have the authority to sponsor particular "ethical, religious, or political beliefs,"[248] it is essential that the "custody, care and nurture of the child reside first in the parents, whose *primary function* and freedom include *preparation for obligations* the state can neither supply nor hinder."[249] Thus, parents have the right to direct the rearing of their children because parents have a *duty* to assist their children "on the way to responsible adulthood."[250]

It follows that it is not in a minor's best interest for her parents to know of her pregnancy and subsequent choice to have an abortion, if the parental reaction would defeat the goals of parental authority. Accordingly, if this news would cause a disruption in family relationships such that the parents would no longer have the necessary influence over their child to further prepare the child for the obligations of adulthood, it would clearly not be in the child's best interest to have her parents notified of her abortion.[251] For instance, the judge who would allow

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242. *Bellotti II*, 44 U.S. at 637–39.

243. *Id.* at 637 (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925)).

244. 1923 Or. Laws § 1243.

245. *Bellotti II*, 443 U.S. at 638 (quoting *Pierce*, 258 U.S. at 535) (emphasis added).

246. *Id.* at 638 (quoting Wiscosin v. Yoder, 406 U.S. 205 (1972) (permitting Amish children to be exempt from a Wisconsin law requiring all children to attend school until they are 16)).

247. *Id.* at 638 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)) (emphasis altered).

248. *Id.* at 638.

249. *Id.* at 638 (quoting *Prince*, 231 U.S. at 158).

250. *Id.* 433 U.S. at 638.

251. An interest in maintaining family harmony and integrity has often guided the Court in its decisions on family issues. *See* Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their *family life.*") (emphasis added); Keiter, *Privacy, Children, and Their Parents: Reflections On and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. 459 (1982). From the child's perspective, parental guidance throughout childhood may be critical in assuring that the child develops into a mature, capable adult." *Id.* at 505. "If discord and distrust characterize the family relationship between parent and child, it is unlikely that the child will receive much

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notification to take place where it could permanently jeopardize the child's relationship with one or both of her parents would not be acting in the child's best interest because the child would be losing the opportunity to receive further guidance and education from the parents. Likewise, notification would be in the child's best interest if it would only result in a moderate and reasonable parental attempt to direct their daughter's future. Such a parental regulation would support the goal of parental guidance because it would have educational value. It would teach the child that becoming pregnant out of wedlock or having irresponsible sex is a practice to be avoided. Thus, it might result in the minor abstaining from sex or in having sex in a responsible manner so that pregnancy could be prevented.

In conclusion, the definition of best interest is most appropriately found in the state interests that support parental control over children. The interest in protecting minors from their inability to make reasoned and informed decisions[252] supports the proposition that notification is not in a minor's best interest if the parental reaction to the news of their daughter's abortion would be irrational. An irrational reaction would not add to the minor's ability to make an informed decision, and therefore it would not further the state's interest in protecting children. In addition, the state interest of preserving parental guidance[253] supports the proposition that notification would not be in a minor's best interest if it would so jeopardize the parent-child relationship so that the parents would not be able to fulfill the role of preparing their children for a responsible adult life. The use of these guidelines for determining when parental notification is in the best interest of an immature minor should result in objective and predictable decisions.

C. *Effectiveness of H. 319: What Will It Accomplish*

Although a legal analysis of H. 319 is vitally important to understanding the stautue, it does not explain what the statute will accomplish or whether it will solve the problems it is purportedly designed to address.

Ohio State Representative Jerome Luebbers, sponsor of H. 319, characterizes it as a "parental rights bill."[254] Because parents are re-

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concerned, sensitive guidance from his or her parents." *Id.* at 506. "State intervention [by notification] may undermine whatever rapport exists between parent and child, and may finally rupture an already tenuous relationship." *Id.* at 510. "This is ultimately inconsistent with the interests of both parent and child, and with the state's primary interest in assuring and maintaining a relatively harmonious, stable, and ongoing family environment." *Id.*

252. *Bellotti II*, 443 U.S. at 635–36.

253. *See id.* at 637–39.

254. Luebbers Interview, *supra* note 2.

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sponsible for the well-being of their children and have the right to control their activities, parents should also have the right to consent to or at least be notified of a child's abortion.[255] In support of this proposition, Representative Leubbers points out that parents have the right to consent to all other medical procedures performed on their children.[256] However, he does not believe that H. 319 will enhance family communication or consultation on the minor's abortion decision because he recognizes that family relationships cannot be legislated.[257]

The Ohio Right to Life Society, H. 319's primary supporter and lobbyist, does believe that H. 319 will promote parental consultation on a minor's decision to have an abortion.[258] Right to Life opines that it is of the utmost importance for a minor to consult with someone who has a true stake in her welfare before she decides to terminate her pregnancy, a decision that could impact on the rest of her life.[259] Right to Life representatives point out that many women grow to regret their abortions and lament the fact that they did not receive better pre-abortion counseling.[260]

The concerns voiced by Representative Luebbers and the Ohio Right to Life Society are quite similar to the concerns that have motivated other jurisdictions to adopt abortion notice and consent statutes.[261] Thus, in determining whether H. 319 can effectively address these problems, it should be instructive to examine what similar statutes have accomplished in other states.

Three states which have had abortion notice or consent statutes since the early 1980s are Massachusetts, Rhode Island, and Minnesota.[262] The Massachusetts and Rhode Island statutes require minors to obtain parental consent for their abortions, while the Minnesota statute

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255. *Id.*

256. *Id.* This is not entirely true. Statutory law has created exceptions to the general rule that parents must always consent to medical treatment performed on their children. Parental consent is not necessary for a minor to be treated for drug addiction, OHIO REV. CODE ANN. § 3719.012 (Anderson Supp. 1984), or for a minor to be treated for venereal disease. *Id.* at 3709.241. And because Ohio has adopted into its common law the "mature-minor" rule, a minor could legally receive various medical treatments without parental consent as long as the minor is capable of giving informed consent. Lacey v. Laird, 166 Ohio St. 12, 139 N.E.2d 25 (1956) (adopting the "mature minor" rule in Ohio). *See supra* note 212.

257. Leubbers Interview, *supra* note 2.

258. Varga Interview, *supra* note 4; Telephone interview with Peggy Lainer, President Ohio Right to Life Society, Dayton, Ohio (Feb. 12, 1986) [hereinafter Lainer Interview] (tape recording on file with University of Dayton Law Review).

259. Varga Interview, *supra* note 4; Lainer Interview, *supra* note 258.

260. Varga Interview, *supra* note 4.

261. *See Matheson,* 450 U.S. at 408–11; *Danforth,* 428 U.S. at 73–76.

262. *See* MASS. GEN. LAWS ANN. ch. 122, § 12S (West 1983); MINN. STAT. ANN. § 144.343 (West Supp. 1986); R.I. GEN. LAWS § 23-4.7-6 (1985).

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requires only parental notification.[263] In accordance with the Supreme Court's commands, all three statutes allow minors to avoid parental involvement if they are mature or if parental involvement is not in the minor's best interest.[264] In general, the experience each state has had with its statute has been essentially the same, and this experience indicates that the statutes have been a resounding failure.[265]

The statutes have failed because they have not been able to compel unwilling minors to involve their parents in their abortion decisions.[266] One way or another, minors have successfully evaded the parental involvement requirement and have obtained abortions regardless of the statutes.[267] Minors in Massachusetts and Rhode Island have been able to obtain abortions in neighboring states which do not have parental notice or consent statutes.[268] However, the primary way in which minors have evaded the parental involvement requirement is by judicial consent. Nearly every minor in all three states who has attempted to gain judicial permission to avoid parental involvement has been successful.[269] In the majority of cases, courts have found the minors to be mature.[270] As for the remainder, courts have decided that notification or consent was not in their best interest.[271]

Two reasons appear to account for why minors have been so successful at obtaining judicial consent for their abortions. The first reason is that the statutes are not being vigorously enforced. Judges do not allot an adequate amount of time to a minor's hearings to make a meaningful determination of a minor's claim. A minor's hearing usually lasts only five or ten minutes, with the longest hearings lasting no more than thirty minutes.[272] In the Minneapolis region the outcome of the hearings is considered so definite that abortions are scheduled for

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263. *See supra* note 262.

264. *Id.*

265. *See* Donovan, *Judging Teenagers: How Minors Fare when They Seek Court-Authorized Abortions*,15 FAM. PLAN. PERSP. 259 (1983) [hereinafter Donovan II]; Donovan, *Your Parents or the Judge: Massachusetts' New Abortion Consent Law*, 13 FAM. PLAN. PERSP. 224 (1981) [hereinafter Donovan I]; Telephone Interview with Julie Andberg, Regional Services Administrator for Planned Parenthood of Minnesota, Minneapolis, Minn. (Jan 30, 1986) [hereinafter cited as Andburg Interview] (tape recording on file with University of Dayton Law Review); Telephone interview with Dave Duffy, Hennepin County Public Defender, Hennepin County, Minnesota (Jan. 31, 1986) [hereinafter cited as Duffy Interview] (tape recording on file with University of Dayton Law Review).

266. *See supra* note 265.

267. *Id.*

268. Donovan II, *supra* note 265 at 261–62.

269. *See supra* note 265.

270. Donovan I, *supra* note 265, at 224; *see* Donovan II, *supra* note 265, at 261.

271. *See supra* note 270.

272. Donovan II, *supra* note 265, at 260–61.

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the same day as the hearings.[273] When asked to explain this, one Hennepin County Public Defender admitted that the hearings tend to be a "rubber stamp."[274] Moreover, it has been suggested that a portion of the judges who hear these cases are pro-choice as indicated by the fact that many judges in all three states refuse to hear these cases for religious and political reasons.[275]

The second reason why minors have been so successful at obtaining judicial consent for their abortions would appear to be because most of the minors who request such consent are legitimately eligible. It is probable that many minors who go to court are mature enough to independently decide to have an abortion. Most of the minors who go to court are in the fifteen-to seventeen-year-old age group.[276] Psychological evidence indicates that the average minor in this age group has about the same ability to give informed consent to most medical procedures as the average adult.[277] This should not be surprising because the requirements of informed consent are not particularly difficult to meet. One need only show an understanding of the procedure, along with knowledge of its potential risks and benefits, and a voluntary decision to undergo the procedure as a result of a rational process of weighing the pros and cons of having the procedure performed.[278] It is evident that this does not require a mental ability in excess of that required for

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273. Telephone interview with Susan Stacy, Guardian Ad Litem, Hennepin County, Minn. (Jan. 31, 1986) [hereinafter Stacy Interview] (tape recording on file with University of Dayton Law Review).

274. Duffy Interview, *supra* note 265.

275. Andberg interview *supra* note 265; Donovan II, *supra* note 265 at 210, 214; Telephone interview with Bill Kennedy, Assistant Chief Public Defender, Hennepin County, Minn. (Feb. ____, 1986) [hereinafter Kennedy Interview) (tape recording on file with University of Dayton Law Review).

276. Donovan II, *supra* note 265, at 261. The analysis given in this paragraph and in the proceeding paragraph assumes that the judge is determining a minor's maturity and best interest by using standards similar to those proposed in section B of this note. It not fully known what standards judges are using to make these determinations because there exists only a handful of reported decisions addressing this question. These are *In re* T.H., 484 N.E.2d 568 (Ind. 1985); *In re* T.P., 475 N.E. 312 (Ind. 1985); *In re* Moe, 18 Mass. App. Ct. 727, 469 N.E.2d 1312 (1984); *In re* Moe, 15 Mass. App. Ct. 966, 446 N.E.2d 740 (1983); *In re* Moe, 12 Mass. App. Ct. 298, 423 N.E.2d 1038 (1981); *see also* Annotation, *Requisites and Conditions of Judicial Consent to Minor's Abortion*, 23 A.L.R. 4th 1061 (1983).

277. Weithorn & Campell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1595 (1982). The authors of this article conducted a psychological experiment specifically designed to measure the capacity of minors to give informed consent for medical treatment. *Id.* The study which tested subjects at ages 9, 14, 18, and 21 showed that 14 year olds possessed about the same ability as adults to give informed consent to a variety of medical procedures. *Id. See also* H. RODMAN, S. LEWIS & S. GRIFFITH, THE SEXUAL RIGHTS OF ADOLESCENTS 136–38 (1984) (surveying a variety of psychological studies and concluding that sufficient evidence exists to support the proposition that 15 year olds generally have the capacity to give informed consent for an abortion).

278. *See* Weithorn & Campell, *supra* note 277.

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high school studies. Thus, with sufficient counseling it is conceivable that most minors are capable of giving informed consent for their abortions.[279]

As for immature minors, it is also not surprising that the large majority have been able to obtain judicial permission for their abortions. Many parents initially react in an irrational manner to the news that their daughter is pregnant and planning to have an abortion.[280] Thus, the minor's self interest in making claims against her parents is counter balanced by the reality that many parents do not react rationally to such information. Judges are thereby often justified in believing the minor's claim that her parents cannot assist her in reaching an informed abortion decision and in granting her request to avoid parental involvement in her abortion.

H. 319 is, however, different from the statutes adopted in other states in that it requires minors to prove their case by clear and convincing evidence.[281] The higher burden of proof required by of H. 319 should make it much more difficult for minors to prove that they are mature or that notification is not in their best interest. Its inclusion in H. 319 could result in fewer minors being successful when they go to court to avoid H. 319's notification requirement. This standard will result in H. 319 being more effective than other abortion notice and consent statutes in achieving the articulated goal of involving parents in their daughter's abortion decision. But there is a substantial likelihood that the clear and convincing evidentiary standard will be found to be unconstitutional and thereby struck from the statute.[282] If this standard is removed from the statute, there is no reason to believe that the results achieved under H. 319 will be any different from the results achieved under the abortion notice and consent statutes adopted in other jurisdictions. The only other significant difference between H. 319 and the statutes adopted in other states is the provision of H. 319 which allows minors to have notification given to members of their family other than their parents.[283] Obviously, this provision will not increase *parental* involvement in a minor's abortion decision.

In sum, the experiences other states have had with similar abortion

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279. Typically minors are counseled a great deal before they have their hearings. Stacy Interview, *supra* note 273; *see also* Donovan II, *supra* note 265, at 261 ("Several judges and public defenders have remarked that the minors are so well prepared for these hearings that it is virtually impossible not to find them mature.").

280. *See* Dembitz, *supra* note 241; *see also* H.L. v. Matheson, 450 U.S. 398, 438–39 n.24 (1981) (Marshall, J., dissenting). *See supra* note 276.

281. OHIO REV. CODE ANN. § 2919.85(C)(4)(a)–(b) (Anderson Supp. 1985).

282. The *Rosen* court reached this result and its reasoning on this issue appears sound. *Rosen*, 633 F. Supp. at 1123.

283. *See supra* text accompanying notes 75–80.

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notice and consent statutes indicate that H. 319 will be an ineffective means of enhancing parental authority or of encouraging parental consultation on a minors abortion decision. Minors will continue to be able to procure abortions without their parent's knowledge. H. 319 will only make doing so substantially more difficult. From now on every minor who wants to have an abortion without her parents' knowledge will be forced to postpone her abortion and attend an essentially meaningless court hearing. The fact that H. 319 will not be able to achieve its stated goal of promoting parental involvement in decision making, the fact that this information was readily available, and the fact that H. 319 was adopted by a large majority of the Ohio legislature[284] suggest only one conclusion: The true purpose of H. 319 is to make abortions more difficult for minors to obtain. Viewed from this perspective, however, H. 319 will accomplish the purpose for which it was created.

CONCLUSION

The most accurate characterization of H. 319 is not as a "parental rights bill" but as an "anti-abortion" bill. The Supreme Court which has generally given states very little room to regulate the public's access to abortion allows states increased flexibility when regulating a minor's access to abortion. States have used this freedom not to provide additional care and support to pregnant teenagers, but to make abortions more difficult for them to obtain. This objective is readily apparent in H. 319. It presumes that a minor is mature enough to bear a child, but at the same time not mature enough to have an abortion. Additionally, H. 319 seeks to discourage minors from having abortions by playing on the very vulnerability the statute is purportedly designed to "protect."

The rationale of *Bellotti II*[285] would presumably support other forms of legislation enacted for the purpose of protecting minors from making abortion decisions which are less than fully informed. For instance, it would probably support legislation mandating minors to undergo professional counseling before having an abortion, provided that such counseling was directed at assisting minors in making an informed abortion decision and at encouraging minors to inform their parents of their abortion voluntarily. Instead of being innovative by enacting legislation truly designed to provide support for the pregnant teenager, Ohio

284. *Abortion Notification and Budget Correction Bills Passed*, Gongwer News Serv., Inc., Ohio Report, Nov. 19, 1985, at 1 (H. 319 passed in Senate by 26 to 6 votes); *House Passes Parent Notification of Abortion Bill*, Gongwer News Serv., Inc., Ohio Report, June 28, 1985, at 3 (H. 319 passed in House by 69 to 23 notes).

285. 443 U.S. at 622.

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has enacted legislation designed to make the abortion experience as upsetting and painful as possible.

Robert F. Salvin

Code Sections Affected: To amend sections 149.43, 2305.11, 2919.21 and 4731.22 and to enact sections 2151.85 and 2505.073

Sponsor: Luebbers (H)

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