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## *Baird v. Bellotti: Abortion-The Minor's Right to Decide*

Kathleen McGilvray

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immunities clause in equal protection analysis. With the adoption of the middle level scrutiny in equal protection analysis, it is more likely that the two provisions will continue to be confused; even if a fundamental right is not found under a privileges and immunities analysis, greater scrutiny might be allowed in an equal protection analysis on the basis of classification.

Finally, under the Court's definition of the privileges and immunities clause in *Baldwin*, the rights of individuals will continue to be determined in conjunction with the rights of states. States will be allowed to discriminate against nonresidents as long as such discrimination results from a proper exercise of state powers.

Even so, to the extent that the principles of federalism are inherent in the structure of the Constitution and govern its interpretation, the Court's decision in *Baldwin* should be welcomed as a recognition that the privileges and immunities clause provides more than lip service to the protection of needed constitutional rights without allowing an aggressive judiciary to impose its value judgments upon the Constitution or to interfere unnecessarily with the political processes of state government. Thus, the *Baldwin* decision acts to reaffirm the vitality of a provision of the Constitution important to judicial notions of federalism without unnecessarily infringing upon principles of state sovereignty.

JEAN G. HOWARD

## ***Baird v. Bellotti*: Abortion—The Minor's Right to Decide**

*In the recent case of Baird v. Bellotti, a Massachusetts federal district court struck down state legislation providing for judicial and parental intrusion into a minor's informed decision to abort. The policies behind the statute and reasoning offered by the court in its invalidation are examined below in light of relevant case law and constitutional strictures. The author's exploration of the present boundaries of minors' rights in the abortion choice concludes with approval of the continued protection of these rights by the court in Baird.*

A minor, like an adult, has a constitutional right to be free of unwarranted state intrusion into her decisionmaking in matters concerning childbearing.<sup>1</sup> The scope of this freedom in the context

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1. *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). See generally Letwin, *After Goss v. Lopez: Student Status as a Suspect Classification?*, 29 STAN. L. REV. 627, 631-35 (1977); see also Rehnquist, *The Adver-*

of abortions is unclear, since the Supreme Court of the United States has not established permissible degrees of governmental and parental involvement in the minor's decision. In 1974, the Massachusetts Legislature enacted a statute<sup>2</sup> making it a criminal offense to perform an abortion on an unmarried minor without parental consent or judicial approval. A nonprofit corporation, its director and medical director, and a pregnant, unwed minor instituted a class action against the the state attorney general and county district attorneys in the United States District Court for the District of Massachusetts. The plaintiffs sought declaratory and injunctive relief, claiming that the statute on its face violated the due process and equal protection clauses of the fourteenth amendment. The district court, by divided vote, found the statute unconstitutional and enjoined its enforcement "as it relates to parental consent in any fashion."<sup>3</sup> On appeal, the Supreme Court of the United States, in a unanimous decision, found the statute susceptible of an alternative interpretation which would avoid or substantially modify the constitutional challenge<sup>4</sup> and held that the district court should have abstained pending construction of the statute by the Supreme Judicial Court of Massachusetts.<sup>5</sup> In response to questions certified

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*sary Society: Keynote Address of the Third Annual Baron de Hirsch Meyer Lecture Series*, 33 U. MIAMI L. REV. 1, 9 n.20 (discussing minors' rights vis-à-vis parents').

2. MASS. GEN. LAWS ANN. ch. 112, § 12P (West 1974) (current version at *id.* § 12S (West Supp. 1978-79)). The pertinent part of the statute provides:

If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary.

Such a hearing will not require the appointment of a guardian for the mother.

Thus, in each case, the minor would first have to seek parental consent. If one or more parents withholds consent, the child would have to initiate a court proceeding at which the judge could give authorization for the abortion if he determined it to be in the minor's best interests. *Baird v. Attorney Gen.*, 77 Mass. Adv. Sh. 96, 103-04, 360 N.E.2d 288, 293 (1977) (construction of statute by Supreme Judicial Court of Massachusetts).

The federal district court which decided the constitutionality of this legislation faced a difficult problem of interpretation. *Baird v. Bellotti*, 450 F. Supp. 997, 1005-06 (D. Mass. 1978), *prob. juris. noted*, 47 U.S.L.W. 3292 (U.S. Oct. 31, 1978) (No. 78-329). The statutory construction by the supreme judicial court included the proviso that the legislation was to include whatever degree of parental consultation the district court would deem constitutionally permissible. 77 Mass. Adv. Sh. at 112, 360 N.E.2d at 297. The district court dismissed this state deference to federal statutory construction and accepted the explicit portions of the state court's interpretation. 450 F. Supp. at 1005-06; *see* note 8 and accompanying text *infra*.

3. *Baird v. Bellotti*, 393 F. Supp. 847, 857 (D. Mass. 1975).

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

5. *Id.* at 146. Justice Brennan subsequently granted a stay of enforcement of the statute pending construction by the supreme judicial court. *Bellotti v. Baird*, 429 U.S. 892 (1976). After the state court answered the certified questions, the district court stayed the operation of the statute pending determination of its constitutionality. *Baird v. Bellotti*, 428 F. Supp. 854 (D. Mass. 1977).

to it by the district court, which retained jurisdiction, the state court construed the statute to require, *inter alia*, parental notification and consultation in all cases and to allow a judge, in determining a minor's best interests, to override her informed consent to an abortion.<sup>6</sup> The state court, however, also concluded that the district court would be allowed to make the final determination of the extent to which parental consultation was constitutionally permissible.<sup>7</sup> On rehearing, the district court held, reaffirming its previous decision: The statute is overbroad and unconstitutional on its face in requiring parental notification regardless of the minor's best interests and is violative of due process and equal protection in permitting judicial override of a minor's informed consent to abortion. *Baird v. Bellotti*, 450 F. Supp. 997 (D. Mass. 1978), *prob. juris. noted*, 47 U.S.L.W. 3292 (U.S. Oct. 31, 1978) (No. 78-329).

In deciding *Baird*, the district court resolved the longstanding problem of statutory meaning by accepting as authoritative only the narrowly drawn portion of the supreme judicial court's construction and by dismissing the state court's explicit deference to federal interpretation of the constitutional limits of parental and state involvement in the minor's decision to abort.<sup>8</sup> The Massachusetts

6. *Baird v. Attorney Gen.*, 77 Mass. Adv. Sh. 96, 103-04, 112, 360 N.E.2d 288, 293, 297 (1977).

7. *Id.* at 112, 360 N.E.2d at 297. The state court's deference to the district court seems to defeat the entire purpose of certification procedures. There is little value in requesting certification of state law only to receive an answer which leaves final construction to the federal court, since the federal court is then left in the same position as before certification was requested. *But see* Brown, *Certification—Federalism in Action*, 7 CUM. L. REV. 455 (1977). *See generally* Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717 (1969).

8. The supreme judicial court apparently tried to forestall the district court's invalidation of the statute as construed on the basis of the parental notification requirement: [Section] 12P must be construed to require as much parental consultation as is permissible constitutionally. In such a situation, the [superior court] judge will have to determine whether circumstances exist which make prior parental consultation impermissible constitutionally.

. . . .  
 . . . To the extent the District Court concludes that parental consultation is not permissible constitutionally, but only to that extent, is parental consultation not required.

*Baird v. Attorney Gen.*, 77 Mass. Adv. Sh. 96, 107, 112, 360 N.E.2d 288, 294-95, 297 (1977). Notwithstanding this, "[p]arental consultation for an abortion is required by the statute in all cases." *Id.* at 111, 360 N.E.2d at 296. The district court answered:

This perceived adaptability presents a number of problems . . . . Here something more is involved than construing language. The Massachusetts court, in addition to contradicting its specific terms, suggests reading into the statute affirmative provisions made out of nothing but a generally announced purpose to pass constitutional muster. In so doing, the court seems to have found the ultimate remedy for all constitutional infirmities. If a statute which, in terms, requires parental consultation without exception, can be "construed to require as

court read the statute to require that a minor invariably must seek parental consent.<sup>9</sup> If such consent were withheld, the child could obtain a hearing at which a judge of the superior court would approve the abortion if he determined it to be in her best interests.<sup>10</sup> The state court found the mature minor exception to the parental consent requirement inapposite to the abortion situation;<sup>11</sup> parental

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much parental consultation as is permissible constitutionally," here, at once, is an instant cure, both for overbreadth, and for lack of standards. Regardless of whether a statute says too much, or too little, so long as the legislature intended it to be constitutional, when it comes before a court it will be appropriately rewritten. With due respect, we cannot believe this to be possible.

450 F. Supp. at 1005-06 (citations and footnote omitted).

9. The supreme judicial court determined that the parents must consider only the minor's best interests in deciding whether to consent to the abortion. *Baird v. Attorney Gen.*, 77 Mass. Adv. Sh. 96, 102, 360 N.E.2d 288, 292 (1977). As a result, the issue of parents' rights of control over the nurture and well-being of the child was diminished in importance, since parents could not consider their independent concerns for the family structure and authority patterns. *See id.* (court declined to answer question whether parents could consider long-term consequences to the family and marriage relationship). Since the district court had, prior to this answer, invalidated the statute on the basis of its perceived preference for parents' rights, *Baird v. Bellotti*, 393 F. Supp. 847, 857 (D. Mass. 1975), the abstention pending state court construction was justified. The district court ultimately found, however, that the statute still "improperly suggests the existence of parents' rights" despite the state court construction. 450 F. Supp. at 1004.

10. *Baird v. Attorney Gen.*, 77 Mass. Adv. Sh. 96, 103-04, 360 N.E.2d 228, 293 (1977). The "best interests" standard, however, is of questionable utility. It is so indefinite as to give the judge no objective principles to work with, since it allows subjective perceptions and propensities to dominate. Several commentators have suggested that the standard be discarded in child neglect cases. *See, e.g., J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD* 53, 67 (1973); Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383, 1394 (1974).

11. The supreme judicial court determined that legislative intent was to preclude the use of the mature minor exception to mandatory parental consent because of the exclusion of married minors in the statute challenged in *Baird*, as well as the creation of a limited exemption from the requirement of parental consent for certain minors in a separate statute. MASS. GEN. LAWS ANN. ch. 112, § 12F (West Supp. 1978-79), which provides in pertinent part:

No physician, dentist or hospital shall be held liable for damages for failure to obtain consent of a parent, legal guardian, or other person having custody or control of a minor child, or of the spouse of a patient, to emergency examination or treatment, including blood transfusions, when delay in treatment will endanger the life, limb, or mental well-being of the patient.

Any minor may give consent to his medical or dental care at the time such care is sought if (i) he is married, widowed or divorced; or (ii) he is the parent of a child, in which case he may also give consent to medical or dental care of the child; or (iii) he is a member of any of the armed forces; or (iv) she is pregnant or believes herself to be pregnant; or (v) he is living separate and apart from his parent or legal guardian, and is managing his own financial affairs; or (vi) he reasonably believes himself to be suffering from or to have come in contact with any disease defined as dangerous to the public health pursuant to section six of chapter one hundred and eleven; provided, however, that such minor may only consent to care which relates to the diagnosis or treatment of such disease.

Consent shall not be granted under subparagraphs (ii) through (vi) inclusive, for abortion or sterilization.

notification and consultation would be required in all cases, even where the minor would be capable of giving informed consent.<sup>12</sup>

In light of the countervailing, identified legislative intent that the statute be constitutional, however, the supreme judicial court also stated: "To the extent the District Court concludes that parental consultation is not permissible constitutionally, but only to that extent, is parental consultation not required."<sup>13</sup> Thus, the state court not only construed the statute, but also attempted to give the federal court latitude to establish an alternative constitutional meaning.<sup>14</sup> Judge Aldrich, writing for the district court majority, discounted the Massachusetts court's effort to avoid the possible constitutional infirmity of the statutory interpretation<sup>15</sup> and treated the remainder of the construction as definitive.<sup>16</sup> Arguably, however,

The mature minor rule developed as a common law defense to a physician's tort liability for performing medical services for a minor without parental consent. Three other defenses are accepted in the Massachusetts statute: parental consent is not required for emergency operations, for emancipated minors and for married minors. For a discussion of these common law doctrines, see Paul, *Legal Rights of Minors to Sex-Related Medical Care*, 6 COLUM. HUMAN RIGHTS L. REV. 357, 359-63 (1974-75); Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305, 309-13 (1974).

The statutory exclusion of the mature minor exception was one of the constitutional infirmities of the Massachusetts statutory scheme held invalid by the district court. 450 F. Supp. at 1004. A similar result, also on equal protection grounds, was reached in a case decided after *Baird*. Wynn v. Carey, 582 F.2d 1375, 1387 (7th Cir. 1978), *appeal filed*, 47 U.S.L.W. 3183 (U.S. Aug. 11, 1978) (No. 78-239).

12. See note 8 *supra*.

13. *Baird v. Attorney Gen.*, 77 Mass. Adv. Sh. 96, 112, 360 N.E.2d 288, 297 (1977). The intent of the legislature to enact a constitutionally permissible statute is evidenced by the title of the Act: An Act to Protect Unborn Children and Maternal Health Within Present Constitutional Limits, ch. 706, 1974 Mass. Acts 713, *reprinted in* MASS. GEN. LAWS ANN. ch. 112 app., at 164-72 (West Supp. 1978-79).

14. One such alternative could be that the minor's parents need not be notified where it would be an undue burden for the minor, particularly if she is capable of giving informed consent to the termination of her pregnancy. A problem would still remain, however, in the selection of the person to make any such determination of the minor's interests. See text accompanying notes 55-57 *infra*.

15. See note 8 *supra* (quoting 450 F. Supp. at 1005-06).

16. Judge Aldrich's rejection of the state court's method was correct, since to have accepted the indefiniteness would have created a plethora of constitutional problems. His assumption that the state court's opinion was a final construction of the statute, despite the state court's ambivalence, can be variously supported. First, the certification procedure required the supreme judicial court to state the law governing the questions certified. SUP. JUD. CT.R. 3:21 § 7. Second, federalism considerations preclude a federal court from making state law, and institutional concerns prevent courts from rewriting statutes. See *United States v. Reese*, 92 U.S. 214, 221 (1875); note 49 *infra*. Third, to have accepted the state court's deference to the federal court as a part of the statutory meaning would have been to sanction a law so vague and indefinite as arguably to violate due process requirements. See Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 873-75 (1970); *cf.* note 61 *infra* (discussing vagueness inherent in "as applied" litigation). Fourth, since unconstitutional portions of statutes are often severable from constitutional parts, an impermissible component of a statutory construction should be separable from the remainder. See 450 F. Supp.

the district court could have found the construction inadequate and could have rephrased and recertified the questions a second time for an authoritative answer.<sup>17</sup>

Judge Aldrich chose to use the definite portions of the supreme judicial court's opinion as a proper construction of the statute. Even so construed, however, the statute was unconstitutional. Judge Aldrich identified two infirmities. First, the legislation had an absolute requirement of parental notification before a judge could pass on a minor's application for a consent order.<sup>18</sup> This provision was overbroad in that it provided no exception for those minors whose best interests dictated that their parents not be made aware of their pregnancies.<sup>19</sup> Second, the statute permitted judicial override of a minor's informed and reasoned consent where the abortion would not be in her "best interests" as the judge perceived them.<sup>20</sup> Judge

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at 1015-16 (Julian, J., dissenting) (arguing that the judicial override portion of the state court's interpretation of the statute was severable).

17. Cf. *Green v. American Tobacco Co.*, 409 F.2d 1166, 1168-69 (5th Cir. 1969) (Brown, J., dissenting) (maintaining that question certified to Supreme Court of Florida was too narrowly drawn and should have been redrafted and recertified for a direct, specific ruling by the state court on Florida law).

Similar considerations underlie the federal statute providing for direct appeal from the highest court of a state to the Supreme Court of the United States. Such an appeal can only be prosecuted from a final judgment or decree. 28 U.S.C. § 1257 (1970). The Supreme Court will refuse to review the case if the element of finality is lacking; otherwise, its decision could be invalidated by a subsequent state ruling. See, e.g., *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 159-62 (1973); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 123-24 (1945).

The same concerns are reflected in the abstention doctrine generally. See, e.g., P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 985-1009 (2d ed. 1973); Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 *passim* (1974).

18. 450 F. Supp. at 1002.

19. Judge Aldrich presented several reasons for the determination that certain minors' rights could be safeguarded only if their parents were not notified:

Parents, physically or emotionally unwell, may be injured by the shock, thus causing the minor deep feelings of guilt. Some parents are child abusers; others at least may become actively hostile on such disclosure. . . . [T]he evidence shows that an appreciable number of parents are not supportive. These include not only those who would inflict physical harm, but parents who would insist on an undesired marriage, or on a continuance of the pregnancy as punishment. We may suspect, in addition, that there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court.

*Id.* at 1001; see, e.g., *Wynn v. Carey*, 582 F.2d 1375, 1388 n.24 (7th Cir. 1978), *appeal filed*, 47 U.S.L.W. 3183 (U.S. Aug. 11, 1978) (No. 78-239); *Poe v. Gerstein*, 517 F.2d 787, 793 (5th Cir. 1975); Note, *The Minor's Right of Privacy: Limitations on State Action after Danforth and Carey*, 77 COLUM. L. REV. 1216, 1238-41 (1977); note 47 *infra*.

20. "The state's power to limit this right [to freedom of decision] should extend only to protect the minor from the special consequences of her minority—immaturity, and the lack of informed understanding." 450 F. Supp. at 1003. As Judge Julian argued in his dissent, the proposition that a minor's reasoned decision could be against her best interests was irrational. *Id.* at 1014-15 (Julian, J., dissenting).

Aldrich's determination of the constitutionality of the statutorily allowed scope of state and parental involvement in a minor's abortion decision was largely based on the Supreme Court's dicta in *Bellotti v. Baird*<sup>21</sup> and, implicitly, on his original evaluation of the relative significance of the rights involved.<sup>22</sup> Judge Aldrich repeatedly compared the supreme judicial court's construction of the statute with the language used by the Supreme Court of the United States, apparently inferring from its dicta the guidelines<sup>23</sup> that the Court denied establishing. In his analytical framework, Judge Aldrich consistently considered the rights of minors as preeminent over those of the state and the parents. Inherent in his reasoning was the view that any outside interference with the minor's exercise of her right of decision must be in her interest rather than those of others. Thus, the only valid state goal in the regulatory scheme was that of protecting the minor.<sup>24</sup>

Judge Julian's dissent, in contrast, followed the established analytical method of evaluating the conflicting interests of the state, the minor and the parents.<sup>25</sup> He concluded that the govern-

21. 428 U.S. 132 (1976). Although the Supreme Court expressly refrained from establishing criteria for constitutionally permissible degrees of parental and state involvement in the minor's decision to abort, *id.* at 148, one statement has received particular attention in subsequent cases and commentaries:

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

*Id.* at 145. See, e.g., *Doe v. Irwin*, 428 F. Supp. 1198, 1208-09 (W.D. Mich. 1977), *vacated and remanded*, 559 F.2d 1219 (4th Cir. 1977); 42 Mo. L. Rev. 291 (1977).

22. *Baird v. Bellotti*, 393 F. Supp. 847, 855-57 (D. Mass. 1975). Judge Aldrich initially identified two sets of competing rights, those of minors and those of their parents.

23. See, e.g., 450 F. Supp. at 1001 ("the Court recognized that even if incapable of informed consent, it may be to a minor's best interest that the hearing be held, and the abortion be performed, without her parents' knowledge"); *id.* at 1005.

24. *Id.* at 1002-03 (minors' interests are sole justification for statute). In his first opinion, Judge Aldrich had concluded that since the statute subordinated minors' interests to their parents', it was unconstitutional. *Baird v. Bellotti*, 393 F. Supp. 847, 855-56 (D. Mass. 1975). Since the state court's statutory construction vitiated the issue of parents' rights, Judge Aldrich determined in his latest opinion that the legislation was overbroad because it failed to protect those minors whose best interests dictated that their parents not be involved. 450 F. Supp. at 1003.

25. In his dissent, Judge Julian viewed parents' rights in controlling and nurturing their children as a still viable force to be considered in evaluating the statute. 450 F. Supp. at 1019. In addition, he identified a "compelling" state interest in enforcing parents' rights. *Id.* The supreme judicial court, however, construed the statute to allow parents to consider only the interests of the minor in deciding whether to consent to the abortion. See note 9 *supra*. Thus, parents could have no independent interests such as those recognized by Judge Julian. The state could, however, assert a goal of preserving traditional family structure and parental authority which could be effected by requiring the minor to consult with her parents. See,



mental goals of ensuring reasoned decisionmaking to safeguard the minor's welfare, of reinforcing parental control and authority, and of protecting potential human life<sup>26</sup> justified the statutory regulation.<sup>27</sup> In addition to countering Judge Aldrich's reasoning on a point-by-point basis, Judge Julian confronted issues omitted in the majority opinion, but which could have increased the substantiality of that decision.<sup>28</sup> Judge Julian also identified the contradiction inherent in Judge Aldrich's conclusion that the statute was overbroad although "the exact number of minors who are injured is unimportant."<sup>29</sup> Nevertheless, Judge Julian's dissent does not dis-

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*e.g.*, *Wynn v. Carey*, 582 F.2d 1375, 1385 (7th Cir. 1978), *appeal filed*, 47 U.S.L.W. 3183 (U.S. Aug. 11, 1978) (No. 78-239). Such a governmental interest would be insufficient to justify the burden the regulation placed upon a minor's right of privacy. *Id.* at 1388. For a discussion of this interest analysis mode of reasoning, see notes 34-36 and accompanying text *infra*.

26. 450 F. Supp. at 1018. Judge Julian cited the recent Supreme Court decision in *Maher v. Roe*, 432 U.S. 464 (1977), to support the validity of the state interest in potential human life. The Court in *Maher* held that a state did not violate the equal protection clause in providing medical benefits to indigent women for therapeutic abortions and childbirth but denying them for nontherapeutic abortions. The state interest in potential human life made it reasonable to encourage women to carry their pregnancies full term. *Id.* at 478.

The state goal of ensuring reasoned decisionmaking by a minor concerning an abortion takes on significant proportion when combined with the state interest in future citizens. The government could well take all steps possible to prevent an ill-considered abortion by a minor, both for her own sake and that of the potential life she carries. Logically, however, the reasoning should be extended to require that the state assume responsibility for the child by supporting it once it is born, since the child's birth was due to governmental interference. See Jaggar, *Abortion and a Woman's Right to Decide*, in *WOMEN AND PHILOSOPHY* 347, 350-51 (1976).

27. 450 F. Supp. at 1018-20.

28. *Id.* at 1018 (discussing arguable equal protection problems in statutory distinction between married and unmarried minors and between abortion and other medical procedures). See *Wynn v. Carey*, 582 F.2d 1375, 1387-88 (7th Cir. 1978), *appeal filed*, 47 U.S.L.W. 3183 (U.S. Aug. 11, 1978) (No. 78-239); *Baird v. Attorney Gen.*, 77 Mass. Adv. Sh. 96, 117-20, 360 N.E.2d 288, 299-300 (1977).

29. 450 F. Supp. at 1002. Judge Julian's criticism is not unfounded. Overbreadth analysis, which is used most frequently but not exclusively in first amendment challenges, is indeed concerned with numbers. A law should not be struck down as facially overbroad unless it involves a substantial number of impermissible applications. See, *e.g.*, Note, *supra* note 16, at 859. If a *per se*, "brightline" rule can be established to define impermissible applications of the statute, then the constitutional application can be severed from the unconstitutional. *Id.* at 882. If a brightline rule cannot be defined, however, and if the statute would retain a latent vagueness causing a "chilling effect," then the legislation should be invalidated as overbroad. *Id.* at 897. When a *per se* line is unattainable, considerations of judicial competency should prevent a court from rewriting the statute. *Id.* at 892-93; see, *e.g.*, *Aptheker v. Secretary of State*, 378 U.S. 500, 515-16 (1964).

Thus, despite his ill-advised statement about the irrelevance of the number of minors affected, Judge Aldrich's result may be correct. The court could not have defined a *per se* rule of privilege with which to salvage the statute, because of the extent of the judicial rewriting involved and of the fact that such a rule might create an atmosphere of vagueness and uncertainty which would interfere unduly with the minors' exercise of their right to privacy. See note 61 *infra*. The language of the statute would still require that the minor notify her parents. Assuming that the minor was aware that she could, possibly, avoid such

pose of the issues of regulation of minors' access to abortion. Similarly, Judge Aldrich's reasoning was less than thorough. He made little explicit analysis of the underlying issues, the competing interests. To evaluate properly the constitutionality of the regulation of a minor's decisionmaking about abortion, one must move beyond the terms used and examine more closely the basic structure of the law and the state interests involved in the conflict.

In *Planned Parenthood v. Danforth*,<sup>30</sup> the Supreme Court held invalid a statute requiring spousal or parental consent to a woman's abortion. Justice Blackmun, writing for the majority, framed the issues in terms of an improper delegation.<sup>31</sup> Since the state lacked the authority to prohibit first trimester abortions, it could not entitle third parties to do so.<sup>32</sup> While Justice Blackmun acknowledged the conventional "compelling state interest" approach,<sup>33</sup> he apparently considered the asserted state interests irrelevant once the delegation was found invalid.<sup>34</sup> This reasoning is different from that generally used in situations involving fundamental rights, where even a burdensome regulation can be upheld if the state advances a sufficiently compelling interest.<sup>35</sup>

The delegation analysis was workable in *Planned Parenthood* because the consent provisions there were tantamount to absolute vetoes of the woman's decision to abort. Since, in a family situation, absent governmental regulation, one individual would not have complete control over another, the state was clearly the source of the

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consultation if it were in her best interests, she still might not be sufficiently experienced to appreciate the significance or the functioning of the exception in order to be able to convince a superior court judge of the permissibility of her claim. Such statutory vagueness could violate the requirements of due process.

30. 428 U.S. 52 (1976).

31. *Id.* at 69.

32. *Id.* at 69, 74. The analytical approach may have arisen from the framing of the right in *Roe v. Wade*, 410 U.S. 113, 153 (1973). The concept of freedom from unwarranted state interference with the woman's decision to abort could lead to the reasoning that private parties' interests were encompassed in those of the state. See 428 U.S. at 60-61. Actually, of course, the interests are independent and are not derived from, although they may be protected by, the government. See *id.* at 94-95 (White, J., concurring in part and dissenting in part).

33. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977). The test, however, developed from "compelling" to "significant" state interest where the state restricts the privacy rights of minors. For a discussion of the desirability of this moderation in intensity, see Note, *supra* note 19, at 1232 n.88.

34. 428 U.S. at 71, 75 (mentioning the asserted state interests of protecting the marriage institution, the family unit and parental authority).

35. 428 U.S. at 74-75. That Justice Blackmun was aware of the usual interest evaluation approach is clear from his statement that "[t]he fault with [the statute] is that it imposes a special-consent provision . . . without a sufficient justification for the restriction." *Id.* at 75. He chose, however, not to base his analysis on the state's asserted interest in the regulation but to use the delegation concept.

veto power.<sup>36</sup> Thus, Justice Blackmun appropriately reasoned that the state could not validly confer upon parents or husbands a power that it did not itself possess. In addition, the analysis necessarily limited the scope of the holding. The Court avoided confronting the more difficult issue of permissible degrees of state and third party involvement in the abortion decision,<sup>37</sup> which would require evaluating the competing interests and the government's justifications for the regulation. Furthermore, by basing the invalidation of the parental consent requirement on his assessment of the spousal consent provision, Justice Blackmun did not have to examine in any depth the allowable differences between state regulation of adults and of minors.<sup>38</sup> The considerations inherent in a minor's freedom of decision to abort are distinct from those in an adult's; there is a greater risk that a minor will be unable to give informed consent.<sup>39</sup> The state can more readily intervene in the minor's decisionmaking because of its special concern for the welfare of children.

Three Justices in *Planned Parenthood* structured the issue of parental consent in terms of this governmental responsibility. Each suggested that the state's interest in the welfare of minors could be effectuated through requirements of parental involvement in the child's abortion decision as a means of avoiding physical or psychological harm to the minor from an ill-considered abortion.<sup>40</sup> The fun-

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36. Cf. *Smith v. Allwright*, 321 U.S. 649 (1944) (constitutional safeguards invoked in voting rights case when state action was found in membership criteria established by state Democratic Party). The Court in *Smith* identified the government as the source of the party's power to determine the qualifications of participants in the party primary, because that right could not otherwise have existed in a political party. *Id.* at 663-64.

37. This avoidance, however, comports with the theory, underlying the *Ashwander* doctrine, that the Court should not resolve constitutional issues unless necessary. See *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). The detriment, of course, is the lack of guidance in subsequent related decisions. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 55-56 (1978).

38. "[O]ur holding . . . does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." 428 U.S. at 75. An adult is presumed capable of consenting to medical procedures, while a minor is not. There were recognized common law exceptions to the incapacity rule. See note 11 and materials cited therein *supra*.

39. 428 U.S. at 75 (1976): *Bellotti v. Baird*, 428 U.S. 132, 147 (1976). Because of the inherent differences between minors and adults, the Supreme Court has in essence taken a case by case approach to the issue of minors' rights. "The question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer. We have been reluctant to attempt to define 'the totality of the relationship of the juvenile and the state.'" *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 (1977) (quoting *In re Gault*, 387 U.S. 1, 13 (1967)). See also L. TRIBE, *supra* note 37, at 1080 (contending that determination of minor's ability to obtain sex-related health care should be made on individualized basis).

40. 428 U.S. at 91 (Stewart, J., concurring); *id.* at 94-95 (White, J., concurring in part and dissenting in part); *id.* at 102-03 (Stevens, J., concurring in part and dissenting in part).

damental difficulty thus becomes evaluating the constitutionality of the method used by the government to ensure that the minor's consent be the product of an informed and reasoned decision.<sup>41</sup> The validity of such a regulation must be determined by close analysis of its effect upon meaningful exercise of the minor's right to privacy. If the interference is burdensome and is unsupported by a significant state interest, then it is an unconstitutional deprivation of due process.<sup>42</sup> Generally, rather than specifically, *Planned Parenthood* is relevant to such examination because it established that the right of decision is individual<sup>43</sup> and belongs to minors as well as adults.<sup>44</sup>

A corollary of the notion that people have rights is that the state can create structures within which those rights can be meaningfully exercised.<sup>45</sup> In other words, to protect guaranteed rights, the state

These views have been reflected in subsequent decisions. See, e.g., *Baird*, 450 F. Supp. at 1019-20 n.20 (Julian, J., dissenting).

41. In his opinion, Justice Stevens concluded that chronological age would be an acceptable criterion. 428 U.S. at 104-05 (Stevens, J., concurring in part and dissenting in part). Such a conclusive presumption, however, would be violative of due process because a minor's ability to give effective consent is necessarily an individual characteristic, and the state's administrative convenience could not validate such a rule. Cf. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644-47 (1974) (mandatory maternity leave violated due process).

Two other ways in which the state could realize its goal of protecting the minor are by determining that she has the capacity to make an informed choice or by ensuring that she has access to the information needed for her to make such a reasoned decision. See text accompanying notes 54-60 *infra*.

42. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 (1977). Interestingly, in *Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1978), *appeal filed*, 47 U.S.L.W. 3183 (U.S. Aug. 11, 1978) (No. 78-239), decided after *Baird*, a similar abortion statute was invalidated on not only due process but also equal protection grounds. The court's analysis was excellent. The opinion first identified as significant the state interests of ensuring informed consent and preserving the traditional family unit. The court made an equal protection analysis, finding that the state goals were undermined by the unjustified distinction between married and unmarried minors and between mature and immature minors. The court then determined that the statute violated due process by requiring that a minor seek parental consent as a precondition to a judicial proceeding, which was itself infirm in that it failed to safeguard the minor's right through explicit procedural standards. This shotgun tactic departed from the usual "significant state interest" approach and emphasized the superficiality of Judge Aldrich's opinion in *Baird*, 450 F. Supp. at 998-1006. See text accompanying notes 21-24 *supra* (discussing Judge Aldrich's reasoning). Perhaps the court's thoroughness in *Wynn* was a response to the various Supreme Court dicta apparently favoring parental involvement in the minor's abortion decision. See, e.g., *Planned Parenthood*, 428 U.S. at 91 (Stewart, J., concurring); Note, *Abortion Statutes After Danforth: An Examination*, 15 J. FAM. L. 537, 555-56 (1976-77).

43. The individuality of the right follows from the Court's assumption that parents and husbands lack the power to forbid the abortion decision of the pregnant woman. 428 U.S. at 69, 74. The right to privacy belongs to each woman. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1962).

44. 428 U.S. at 74.

45. Ronald Dworkin has characterized constitutional rights as moral rights against the state. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 174 (1977). Not only do citizens have personal rights to be free from state interference, but they also have rights to the state's protection. *Id.* at 193. Government is charged with the responsibility of preventing the abridgment of

must restrict their exercise to a certain degree. Such a framework in the abortion context would consist of rules functioning as constitutionally acceptable limitations on the right to freedom of decision-making by a minor. These boundaries would be determined by the permissible state interest in regulating the minor's decision. Only where that governmental interest is significant, as where the state seeks to ensure the child's welfare, and the legislation is effective without creating too great a restriction, would the rule then be justifiable, even though it might burden the freedom of decisionmaking.

The analytical framework provided by this infrastructure approach gives dimension to Judge Aldrich's reasoning in *Baird*. The state interest in requiring parental notification in all cases was to ensure that the minor receive effective assistance in making her decision about abortion.<sup>46</sup> Parents, however, could not necessarily be expected to provide the minor with the support and guidance she required.<sup>47</sup> Therefore, the restriction imposed by the regulation on

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individual constitutional rights by the majority. The most efficient way of safeguarding rights is to ensure directly their free exercise. Thus, the state fulfills its role by creating an infrastructure designed to maximize the effectiveness of constitutional rights. The support for the institution would be created by a framework of brightline rules. Necessarily, such rules would realize their function by acting, in part, as restrictions on the exercise of the right. As long as the limitation is not unduly burdensome, the rules would be a constitutionally permissible means of protecting individual rights while simultaneously respecting the democratic process and pressures, the force of the majority.

The infrastructure approach to constitutional rights is not novel. In *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), Chief Justice Burger reasoned that the FCC could regulate the broadcasting medium in order to preserve a substantial degree of first amendment journalistic independence for broadcast licensees. *Id.* 116-18. Similarly, in *Sosna v. Iowa*, 419 U.S. 393 (1975), Justice Rehnquist concluded that a state could impose a durational residency requirement as a condition for a divorce decree because of the state interest in providing a safeguard against collateral attack. *Id.* at 407-09.

46. The state could properly have had no interest in strengthening parental control, because parents' rights were not involved in the statutory scheme. See *Baird v. Attorney Gen.*, 77 Mass. Adv. Sh. 96, 102, 360 N.E.2d 288, 291 (1976); notes 9 & 25 *supra*. The state goal of preserving the traditional family structure could not justify restricting the minor's right of decision, because such an attempt would be logically inconsistent where the parents could consider nothing but the well-being of the minor. There is scant basis for the assumption that it would necessarily benefit the majority of minors to be in a subordinate position. Furthermore, parental notification would often be detrimental to the minor and, in a variety of ways, would make the exercise of her right significantly more difficult, if not impossible. See notes 21 *supra* & 47 *infra*. The parents' knowledge of the pregnancy could fracture the family structure. See *Planned Parenthood*, 428 U.S. at 75. In requiring that the parents be made aware of their daughter's pregnancy, the state undercuts the very institution it would preserve. "[T]he integrity of the family structure could best be maintained without state encroachment upon the minor's fundamental right to abortion, if the state refrained from interfering with the family decision-making processes at all." *Poe v. Gerstein*, 517 F.2d 787, 794 (5th Cir. 1975); see notes 62-65 and accompanying text *infra*. The child would be in the best position to determine whether the confession to her parents would improve her mental state or magnify her feelings of guilt and dismay.

47. A minor could well suffer from having to inform her parents of her pregnancy. Parental response could be hostile. The child, fearing such result, could be forced to avoid telling

the minor's freedom of decision was inappropriately burdensome and constitutionally impermissible; it was a regulation beyond the limits of the infrastructure. Similarly, the state interest in allowing judicial override of a minor's reasoned decision to abort was to ensure that the minor's resolution of her problem be in her best interests. This governmental method of protecting the right of decision was patently inconsistent with the framework of permissible regulation; the state prohibited, rather than protected, the exercise of the right. The effectuation of a meaningful, informed consent would necessarily be in the minor's best interests, since she would benefit from not only the termination of a potentially psychologically and physically dangerous pregnancy, but also from the personal gain in independent decisionmaking.<sup>48</sup>

The parental notification and judicial override provisions were beyond the state's power to impose. Neither regulation justifiably restricted the minor's right of decision, since both nearly vitiated free decisionmaking. In its protection of the minor, the state, in effect, was destroying the right. Thus, Judge Aldrich was correct in his conclusion that the statute was unconstitutional on these two grounds. He found these bases sufficient to invalidate the entire statutory scheme. Judge Aldrich further determined that severing the impermissible applications would require judicial rewriting of the legislation.<sup>49</sup> If he were mistaken, and the statute was severable, then its constitutional applications may have been able to stand

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her family by seeking an illegal abortion or attempting to self-abort, or she might delay the confession and unwittingly increase the medical risks of the operation. See *Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1978), *appeal filed*, 47 U.S.L.W. 3183 (U.S. Aug. 11, 1978) (No. 78-239); *Baird*, 450 F. Supp. at 1001; Note, *supra* note 19, at 1240; Note, *Parental Consent Abortion Statutes: The Limits of State Power*, 52 IND. L.J. 837, 843 (1977).

48. "[I]t is the privilege and proper condition of a human being, arrived at the maturity of his faculties to use and interpret experience in his own way . . . . The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference are exercised only in making a choice." J.S. MILL, ON LIBERTY 70-71 (Bobbs-Merrill 1956).

Adolescents are capable of mature thought well before they reach the age of majority. See Note, *supra* note 10, at 1395-96. The benefit to these minors from personal decisionmaking would equal the benefit to an adult.

49. 450 F. Supp. at 1005 n.10. Judge Julian disagreed; he argued that the invalid application of the statute to judicial override of a minor's informed decision could be severed from the remainder, which he found constitutional. *Id.* at 1015-16.

Judge Aldrich's conclusion may have been precipitate. Resolution of severability would depend upon two factors: (1) whether "standing alone, legal effect can be given to [the provision] ;" and (2) whether "the legislature intended the provision to stand, in case others included in the act and held bad should fall." *Dorcy v. Kansas*, 264 U.S. 286, 290 (1924). *But see United States v. Reese*, 92 U.S. 214, 221 (1875) (Court cannot rewrite statute to separate constitutional from unconstitutional applications). As Judge Julian pointed out, the legislative intent was for severability in the Massachusetts statute. 450 F. Supp. at 1016. The ultimate decision would depend upon whether the statute had constitutional provisions that could stand alone. See notes 50-54 and accompanying text *infra*.

alone. Evaluation of the complete statutory scheme, however, demonstrates that the legislation was invalid in toto.

The most obvious constitutional objection to the statutory scheme is its exclusion of the mature minor exception to the requirement of third party, either parental or judicial, consent to the child's abortion decision.<sup>50</sup> This limitation on the right of freedom of decisionmaking departs from the framework of justifiable regulation and, therefore, is unconstitutional. The regulation does not serve the state interest in ensuring a meaningful exercise of the minor's right. The informed consent of a mature minor, capable of understanding the physical and mental ramifications of her abortion, fully satisfies the state goal of protecting her well-being. The restriction is unwarranted not because it is an attempt to safeguard the minor's right to decide, but rather because it unnecessarily delimits that right. In order for the right to be effective, any regulation of minors' access to abortions must exempt mature minors from its strictures.<sup>51</sup>

The statute struck down in *Baird* provided for individualized hearings in which consent could be judicially granted. This regulation, however, is also an unwarranted state intrusion into the minor's freedom of decision.<sup>52</sup> As before, the state interest is in ensuring meaningful decisionmaking by providing for adult guidance. It is problematic whether a judge could give such counsel to the minor in the context of a court hearing.<sup>53</sup> In view of this institutional constraint, the statutory procedure departs from the infrastructure of allowable regulation. The effect of the court hearing is to substitute another decisionmaker for the minor. In application, this would be tantamount to the absolute veto power struck down in *Planned Parenthood*. The government lacks authority to regulate the right of decision to the point of extinguishing it; rather, the state function

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50. In construing the statute, the supreme judicial court concluded that in Massachusetts the mature minor doctrine applies to all medical procedures except abortion and sterilization. *Baird v. Attorney Gen.*, 77 Mass. Adv. Sh. 96, 116-20, 360 N.E.2d 288, 298-300 (1977); see note 11 *supra*.

51. Similarly, the United States Court of Appeals for the Seventh Circuit held that an Illinois statute regulating minors' access to abortions violated the equal protection clause by including mature minors within the statutory scheme. *Wynn v. Carey*, 582 F.2d 1375, 1387 (7th Cir. 1978), *appeal filed*, 47 U.S.L.W. 3183 (U.S. Aug. 11, 1978) (No. 78-239).

52. The judicial consent provision would be invalid even if the mature minor rule were incorporated into the statute and the requirement of parental notification were eliminated where it would be detrimental to the minor for her parents to be informed. See note 54 *infra*.

53. Of course, the statute as construed would allow the judge to consider only the best interests of the minor in deciding whether to approve the abortion. *Baird v. Attorney Gen.*, 77 Mass. Adv. Sh. 96, 103-04, 360 N.E.2d 288, 293 (1977). For a discussion of the unconstitutionality of this provision, which would permit judicial override of informed consent, see text accompanying note 48 *supra*.

is to provide a regulatory framework within which the right can be meaningfully exercised. Minors independently incapable of making reasoned decisions need this governmental protection. The state, therefore, must structure the limitation of the minors' rights so as to enable them, as effectively as possible, to make informed decisions whether to abort.

Minors capable of reasoned decisionmaking do not require state protection of their right to decide any more than adults do. Thus, the first object of governmental intervention must be to distinguish these minors from all others. While that determination could be made at a court proceeding, any judicial process necessarily involves problems of access and timing, which are magnified when the person is a pregnant minor.<sup>54</sup> In view of the recognized importance of the physician in the abortion decision,<sup>55</sup> the state could effectuate

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54. It is unclear whether such judicial proceedings could be designed so as to protect sufficiently the minor's due process rights. See, e.g., *Wynn v. Carey*, 582 F.2d 1375, 1388-90 (7th Cir. 1978), *appeal filed*, 47 U.S.L.W. 3183 (U.S. Aug. 11, 1978) (No. 78-239). First, the hearing provision presupposes a degree of legal sophistication not possessed by many minors; the court proceeding is meaningless if they are unaware of the possibility of obtaining a judicial consent decree. *Id.* at 1388. Second, although the Supreme Judicial Court of Massachusetts determined that counsel could be appointed for indigent minors, the child would have to demonstrate that the appointment would be in her "best interests." *Baird v. Attorney Gen.*, 77 Mass. Adv. Sh. 96, 120-22, 360 N.E.2d 288, 301 (1977). That determination would not require judicial objectivity. If the court denied counsel to the minor, she would be forced to obtain legal assistance on her own. Moreover, she would have to provide compensation for the lawyer, since Legal Services Corporation funds are unavailable for nontherapeutic abortions. See *Wynn*, 582 F.2d at 1389 n.28; 42 U.S.C. § 2996f(b)(8) (Supp. V 1975). Third, the procedure would have to be speedy, for delay increases the risks inherent in abortion. See, e.g., *Wynn*, 582 F.2d at 1389 n.29. The supreme judicial court did foresee expeditious proceedings in the superior court, although rulemaking would be undertaken by the lower court. *Baird v. Attorney Gen.*, 77 Mass. Adv. Sh. 96, 113-16, 360 N.E.2d 288, 297-98 (1977). Fourth, the court procedure would lack a specific, objective standard to be used by the judge in determining whether to approve the minor's decision. The "best interest" test is vague and would allow judicial subjectivity to dominate. See note 10 *supra*. Finally, there would be evidentiary problems. Since the parents would not be present to attest to the minor's best interests or her maturity, the judge would either have to rely on his own perceptions or accept at face value the child's claim of maturity and understanding. An effort to call outside witnesses would be impractical and would invade the minor's right to privacy and confidentiality. In sum, any constitutionally permissible procedure would have to provide ready access to the courts and avoid deterrence to the minor.

55. The Supreme Court has recognized that the medical determination of whether to perform the abortion must include consideration of the woman's psychological as well as physical well-being. *Doe v. Bolton*, 410 U.S. 179, 192, 197 (1973). The Court there held unconstitutional a statute requiring approval by a hospital committee of the decision to abort made by the woman and her physician. The regulation impermissibly interfered with the doctor-patient relationship and the woman's right to receive medical care in accordance with her physician's best judgment. *Id.* at 197.

Other courts have noted that the physician provides both guidance and counsel to the minor. *E.g.*, *Wynn v. Carey*, 582 F.2d 1375, 1387 n.22 (7th Cir. 1978), *appeal filed*, 47 U.S.L.W. 3183 (U.S. Aug. 11, 1978) (No. 78-239); *Poe v. Gerstein*, 517 F.2d 787, 793 (5th Cir. 1975). The view is also reflected in commentary. *E.g.*, Note, *supra* note 19, at 1241; Note, *supra* note 11, at 332.



its goal by allowing the doctor to determine, as at common law, whether the minor's consent is valid.<sup>56</sup> Should the physician conclude that the minor is able to make an informed decision, he should be allowed to perform the abortion without risking criminal liability, particularly since he could be liable in tort in any event. For those situations, in which the doctor determines that the minor is not sufficiently mature to give valid consent, the state could assume the role of the protector through a regulatory framework designed to safeguard the right of decision. Under this approach, an immature minor would require the information necessary to enable her to understand the physical and psychological consequences of abortion.<sup>57</sup> This counsel could be provided by the physician whom she consulted about terminating her pregnancy.<sup>58</sup> In the alternative, the state could establish independent third party counseling.<sup>59</sup> Finally, the state could, by statute, permit a minor to obtain an abortion without any consent beyond her own.<sup>60</sup>

The entire statute challenged in *Baird* was a violation of the due process and equal protection guarantees. Any attempt to salvage parts of it would have required extensive judicial rewriting. The statute was unconstitutional on its face.<sup>61</sup> Yet, even if a statute

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56. The mature minor doctrine "focuses on subjective factors such as an individual's maturity, intelligence, and ability to understand the medical procedures and alternatives involved. The procedure's benefit to the minor, its complexity, and its relative dangers are also evaluated. Age is merely an additional element to be weighed, and is not alone dispositive." Note, *supra* note 11, at 310 n.29.

The state need not provide additional deterrence to the physician in the form of criminal sanctions. The doctor would be subject to traditional tort liability in the absence of a consent statute were he to operate on a minor incapable of giving valid consent. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 102-03 (4th ed. 1971).

Of course, the state would retain the option to enact a statute requiring the informed consent of the woman, adult or minor, seeking the abortion. See *Planned Parenthood*, 428 U.S. at 67.

57. A court proceeding designed to effect this goal constitutionally, however, would be difficult to devise and unworkable in practice. See text accompanying notes 52-54 *supra*. The state could not constitutionally provide for the parents of the pregnant minor to fill this function, because such a regulation would, in many cases, interfere with the exercise of the right of freedom in decisionmaking. See notes 46-47 and accompanying text *supra*.

58. It would be feasible to require by statute counseling by the minor's physician prior to the abortion. Cf. KY. REV. STAT. § 311.730 (Bobbs-Merrill 1977) (mandatory counseling by doctor of physical and mental consequences of performance or nonperformance of abortion after first trimester). Of course, the physician could also explain the benefits of contraception to the child.

59. See, e.g., Note, *supra* note 19 at 1240-41; Comment, *The Constitutionality of Mandatory Parental Consent in the Abortion Decision of a Minor: Bellotti II in Perspective*, 4 N. KY. L. REV. 323, 343 (1977).

60. See, e.g., CAL. CIV. CODE § 34.5 (West Supp. 1977).

61. The feasibility of "as applied" proceedings was properly rejected by the *Baird* majority. Since no per se rules defining permissible conduct could be judicially extracted from the entire statutory scheme, the legislation was unconstitutional on its face. If the court had

regulating minors' access to abortions could be drafted so as to be within constitutional limits, the desirability of such legislation is doubtful. State intrusion into family privacy is inappropriate unless absolutely required.<sup>62</sup> Where governmental intervention is necessary, the state should refrain from disturbing the intrafamily structure. Individual family members will have established their own balance of power and authority;<sup>63</sup> there will be existing methods for the resolution of disputes.<sup>64</sup> The law cannot force interpersonal relationships to develop. It can only give existing interactions legal recognition.<sup>65</sup> If the parent-child relationship is viable, then the minor will voluntarily discuss her pregnancy with her parents. State-compelled confession, however, cannot restore lost family unity. Indeed, by destroying a fragile bond of mutuality, such mandatory interplay might well damage not only the pregnant minor, but also the family as a whole. Neither the judiciary nor the legislature may reorder society by enforcing notions of parental authority at the expense of individual and familial autonomy. When the state intervenes, it should be in a directly constructive manner. The incidence of pregnancies among unwed minors will not be decreased by legislatively enforced parental or judicial control. Instead, continued judicial scrutiny of state interference, such as that accomplished in *Baird*, would more readily ameliorate the problem by

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attempted to salvage parts of the statute, the judicial interpretation would have encompassed so many alterations in the language and in the state court construction, that the statutory meaning and procedure would have been so vague as to offend due process requirements. Minors not fully comprehending the various judicially designed exceptions to the statutory requirements would have been hesitant to involve themselves in the court proceedings contemplated by the legislature, because they would not have known whether their decisions to abort would have been protected. Similarly, if the district court had obviated the requirement of a court order in these instances, physicians would have been reluctant to accept a minor's apparently informed consent, since in performing the abortion, they could have been subject to criminal and civil liability were that consent to have been shown invalid. In addition, there would have been no guarantee of judicial regularity. See generally Note, *supra* 16, at 873-75.

62. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-05 (1977); *Poe v. Gerstein*, 517 F.2d 787, 794 (5th Cir. 1975); Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 646 n.5 (1977); Note, *supra* note 19, at 1244-45.

63. Courts have respected the structures created by individuals for dealing with family members. When those methods were unusual, courts have expanded their interpretation of existing law in order to recognize their validity. See, e.g., *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (enforcing agreement between unmarried cohabiting couple about property distribution after separation); *De Cicco v. Schweizer*, 221 N.Y. 431, 117 N.E. 807 (1917) (enforcing marriage contract between a father and his daughter's husband because of perception that parties intended to effect legal relationship).

64. See, e.g., *Poe v. Gerstein*, 517 F.2d 787, 794 (5th Cir. 1975); *Baird*, 460 F. Supp. at 1003; Note, *supra* note 19, at 1244-45; Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001, 1018-10 (1975).

65. J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *supra* note 10, at 49-50.

increasing minors' access to efficient means of terminating unwanted pregnancies.

KATHLEEN MCGILVRAY

### ***Wellenkamp v. Bank of America: Exercise of Due-on-Sale Clauses as an Unreasonable Restraint Upon Alienation***

*The author examines the history of due-on-sale clauses, tracing its treatment in the Supreme Court of California to its most recent pronouncement, where the court found the clause to be an unreasonable restraint on alienation absent proof from the institutional lender that enforcement was necessary to protect against risk of default or impairment of its security. The author concludes that the rationale of the court reasonably balances the common law rule against restraint on alienation and the lender's interest.*

In July 1973, Birdie, Fred and Dorothy Mans purchased real property and obtained financing through defendant, Bank of America. The bank received a promissory note, secured by a deed of trust, which contained a standard due-on-sale clause. The clause provided, *inter alia*, that if the Manses sold the property, the defendant bank could, at its option, accelerate the maturity of the loan.<sup>1</sup>

Two years later, the Manses sold the property to plaintiff, Cynthia Wellenkamp, for the amount of their equity in the property along with plaintiff's assumption of the outstanding balance on the Manses' loan from defendant. When the bank was notified of the transfer of title and received plaintiff's check for the monthly payment of the loan, it returned the check and notified plaintiff of its intention to accelerate the loan payment unless plaintiff agreed to accept a one and one-quarter percent increase per annum in the interest rate on the original loan. When the plaintiff would not agree to the higher interest rate, defendant elected to file a notice of default and sell the property under the deed of trust.

Plaintiff filed for an injunction against enforcement of the due-

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1. *Wellenkamp v. Bank of Am.*, 21 Cal. 3d 943, 946, 582 P.2d 970, 972, 148 Cal. Rptr. 379, 381 (1978). The deed of trust provided that if the trustor (the Manses) sells, conveys, alienates . . . said property or any part thereof, or any interest therein . . . or becomes divested of [his] title or any interest therein . . . in any manner or way, whether voluntarily or involuntarily. . . . Beneficiary shall have the right at its option, to declare said note . . . secured hereby . . . immediately due and payable without notice.

*Id.*