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SHOULD PARENTS BE NOTIFIED OF THEIR MINOR DAUGHTER'S ABORTION? A PREGNANT QUESTION FOR FLORIDA LEGISLATORS

CHARLOTTE E. PARSONS

SINCE the United States Supreme Court's decision in Roe v. Wade, state legislatures have struggled with the issue of permissible regulation of abortion. The Florida Legislature is no exception; twice it has enacted statutes regulating abortions for minors, and both times the statutes were held unconstitutional.

The purpose of this Comment is to analyze the latest proposal to regulate minors' abortions, Committee Substitute for House Bill 80, in light of developing case law. The bill passed the House of Representatives during the 1986 Regular Session but died in the Senate Committee on Health and Rehabilitative Services.

The final version of the 1986 abortion bill proposed that the physician or his agent obtain the written informed consent of a pregnant minor before performing an abortion. In addition, the bill proposed that actual notice of the abortion be given to both parents or to the minor's legal guardian. These requirements would not have applied in medical emergencies or, so long as the mother was notified, in cases where the father or legal guardian had impregnated the minor. In giving notice, the physician could have relied, if in good faith, on the statement of the one giving consent that he or she was the parent of the minor. In addition, the physician could have relied on the patient's representation that she was married or of age. The physician also would have been required to inform the minor that she could petition the circuit court to waive the notice requirement. The court would have ensured that her identity and all proceedings would be confidential, that she would

4. Fla. CS for HB 80 (1986) (Second Engrossed). The Senate companion, Fla. SB 125 (1986), was almost identical to the House bill. Because the Senate bill never had a hearing, only the House bill is discussed in this Comment.
6. For ease of discussion, future references to physicians or doctors in regard to giving notice or obtaining consent include the physicians' agents.
7. Future references to parents also refer to guardians or anyone else to whom notice or consent may be given to satisfy a notice or consent statute.
be given assistance in filing her petition, and that counsel would be provided at her request. A confidential appeal would have been available, and no minor would have been charged fees for using the bypass procedures. All proceedings would have been given such precedence as necessary to ensure a prompt decision.

The court could have waived the notice requirement if it found the minor sufficiently mature and well-informed to make the abortion decision or that termination of the pregnancy would be in the minor’s best interest. If the court failed to render an opinion within two weeks of the filing of the petition or appeal, actual notice requirements would have been automatically waived.

I. CURRENT STATE OF FLORIDA LAW

Florida’s statute regulating abortions for minors was under attack in Coe v. Gerstein when the Supreme Court concluded in Roe v. Wade that the constitutional right to privacy included the right to choose abortion. Two years later, the United States Court of Appeals for the Fifth Circuit acknowledged that Roe had reserved judgment on the constitutionality of parental consent requirements. Nevertheless, the court balanced the state’s interest in requiring parental consent against the minor’s right to choose whether to have an abortion and, finding the state’s interest insufficient to merit a veto over the minor’s decision, struck down the statute.

8. FLA. STAT. § 458.22(3) (1973) provided: “If the pregnant woman is under eighteen years of age and unmarried, in addition to her request, the written consent of a parent, custodian, or legal guardian must be obtained.”
12. Poe, 517 F.2d at 791-94 (state’s interests in deterring illicit teenage sexual conduct, improving quality of minor’s abortion decision, fostering parental control over children, and supporting family not compelling interests and not achieved by requiring parental consent).
13. Coe, 376 F. Supp. at 699. The three-judge panel held the parental consent statute invalid, stating:

We do not learn from the opinion in Roe v. Wade, the age of . . . the pregnant woman who enjoyed the “fundamental”, “personal right of privacy” . . . recognized by the Supreme Court. But we do know that a pregnant woman under 18 years of age cannot, under the law, be distinguished from one over 18 years of age in reference to “fundamental”, “personal”, constitutional rights.

. . . . . . . . . . [A] state which has no power to regulate abortions in certain areas simply cannot constitutionally grant power to . . . parents to regulate in those areas.
In 1979, Florida again tried to regulate minors' abortions by amending the Medical Practice Act. The Act required a minor to have informed written consent of a parent or a court order before she could obtain a legal abortion. The court order could be based on a showing that the minor was sufficiently mature to give her own informed consent, the fact that a parent unreasonably had withheld consent, the minor's fear of physical or emotional abuse if her parent was requested to consent, or upon any other good cause. Ultimately, however, the statute provided that "[t]he court shall determine the best interest of the minor and enter its order in accordance with such determination."

Legislators may have thought they had eliminated any constitutional infirmities by providing a judicial bypass procedure as an alternative to the third-party veto which parental consent requirements made possible. Soon after passage, however, the consent provisions were challenged as an abridgement of the right to privacy. In Scheinberg v. Smith, Dr. Mark Scheinberg sought declaratory and injunctive relief on behalf of all unmarried pregnant minors who desired abortions and on behalf of their physicians.

The decision in Scheinberg was based on developing case law, with two Supreme Court decisions providing guidance on the standards to be used in judging parental consent provisions. In Planned Parenthood v. Danforth, the Court struck down a Missouri parental consent statute which, in effect, created an absolute power of veto over the minor's decision. The Court found the
state's asserted interest was not sufficiently compelling to permit a possibly arbitrary, third-party veto. Yet the Court intimated that states’ interests in the welfare of minors were sufficiently important to merit some restrictions on the ability of minors to consent to abortions.\textsuperscript{19}

The Supreme Court suggested a framework for permissible abortion regulation when it was asked to rule on a Massachusetts statute in \textit{Bellotti v. Baird}.\textsuperscript{20} The statute required minors to obtain a parent’s consent before an abortion but provided a judicial mechanism through which minors could obtain court approval without parental consent. The statute, however, also required that the court base its decision on the best interest of the minor. This gave the court an absolute veto power over the wishes of even a mature minor who had given informed consent, if the judge thought that abortion was not in the minor’s best interest.\textsuperscript{21} The statute was struck down as unduly burdensome. In so doing, the Court analyzed the alternative procedure and instructed the state to permit the minor to show that she is sufficiently mature to make the decision or that the abortion is in her best interest. Furthermore, the alternative procedure must guarantee anonymity for the minor and be expedited to allow time for the abortion after appeals.\textsuperscript{22}

The Court also addressed a provision of the Massachusetts statute which required parents to be notified of judicial proceedings in all cases where a minor had elected to seek judicial approval for an abortion. The Court found this provision burdensome because some parents might try to dissuade their daughters from using the alternative procedure. It concluded that minors must be able to pursue the alternative procedure without notifying their parents.\textsuperscript{23}

The \textit{Scheinberg} court relied primarily on the \textit{Bellotti} criteria in analyzing Florida's abortion statute. Once again, the statute fell short of constitutional muster. The sticking point was the word

\textsuperscript{19} \textit{Id.} at 74-75. The Court reasoned:

Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.

We emphasize that our holding that [the parental consent section] is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy.

\textit{Id.}

\textsuperscript{20} 443 U.S. 622 (1979).

\textsuperscript{21} \textit{Id.} at 630.

\textsuperscript{22} \textit{Id.} at 643-44.

\textsuperscript{23} \textit{Id.} at 647.
"shall." The statute provided that the court "may" base its decision on the pregnant minor's maturity, her fear of abuse if a parent is requested to consent, or any other good cause; but, the court "shall" determine the minor's best interest and enter its decision in accord with that determination. The Fifth Circuit found that the statute required a court to disregard a mature minor's wishes if it found the abortion was not in her best interest. This amounted to an impermissible third-party veto similar to the one in \textit{Bellotti}. Consequently, the Fifth Circuit held the statute unconstitutional.

The state argued that the court should sever the objectionable phrase and leave the statute relatively intact, asserting that the Florida Legislature would have passed the statute without the phrase had the Supreme Court's decision in \textit{Bellotti} been available. But the Fifth Circuit reasoned that the test was not whether the legislature would now adhere to the constitutional mandate in \textit{Bellotti}, but whether the statute would have been enacted without the phrase at the time the measure passed. "The last sentence of subsection 4(a) is mandatory. As such, it is not only an integral part of section 390.001(4)(a), but, in fact, it serves as the legislative directive that clarifies and implements the overriding purpose of the entire subsection." Thus, the court refused to sever the phrase and struck down the entire section dealing with parental consent.

Since \textit{Scheinberg}, the Florida Legislature has been unable to pass legislation regulating minors' abortions. After a federal district court ordered a preliminary injunction against enforcement of the parental consent provisions, legislation was introduced in 1980 to repeal the challenged law. The bill had no Senate companion and died in the House Committee on Health and Rehabilitative Services. Every year since, at least one bill regulating abortions for minors has been introduced in the House or Senate—all have failed. Thus, Florida has been operating without a valid

26. \textit{id.} at 481.
27. \textit{id.} at 482.
31. FLA. LEGIS., HISTORY OF LEGISLATION, 1981 REGULAR SESSION, HISTORY OF SENATE BILLS at 317, SB 1080; FLA. LEGIS., HISTORY OF LEGISLATION, 1982 REGULAR SESSION, HISTORY OF HOUSE BILLS at 183, HB 613; \textit{id.}, HISTORY OF SENATE BILLS at 285, SB 984; FLA. LEGIS.,
statute since the district court injunction in 1979. Minors may lawfully give written consent and obtain abortions without giving notice to or obtaining consent from their parents, custodians, guardians, or the courts.\(^{32}\) Current Florida law does not distinguish between minors and adults regarding abortions.

### II. The Law in Other States

Not all states have been so paralyzed. At least six states have parental notice or consent statutes with some form of the bypass provisions set forth by the Supreme Court.\(^{33}\) The statutes range from those that are very detailed to those with just enough bypass framework to survive constitutional scrutiny. A look at two of these statutes, one detailed and the other not, may be useful in evaluating Florida’s abortion bills.

**A. Louisiana**

Louisiana has a detailed parental consent statute.\(^{34}\) It requires a minor wanting an abortion to have either a notarized statement of consent from a parent or a court order. The court order bypass procedure requires that the girl be given instructions for filing, and assistance if requested. Each application must be heard confidentially within forty-eight hours of filing. Appeals are by trial de novo in the court of appeal, and the same assistance and procedure apply.\(^{35}\)

At both the hearing and appellate stages, the court must authorize the minor to act without parental consultation or consent if she is found sufficiently mature and well-informed. Even if the minor is not sufficiently mature to make the decision, the court must still

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\(^{32}\) 1979 FLA. ATT’Y GEN. ANN. REP. 12 (minor not required to have parental consent for abortion).


\(^{35}\) Id.
permit an abortion if it is in the minor's best interest. In all cases, every minor who applies is entitled to a hearing and an appeal without notice to her parents. If she has insufficient funds, she is allowed to proceed in forma pauperis.\footnote{36}

The Louisiana parental consent statute was validated by a federal district court in \textit{Margaret S. v. Treen}.\footnote{37} In opposing summary judgment, Margaret S. contended the statute was unconstitutional for three reasons. First, parental consent does not promote maternal health or protect minors in every case. Second, the statute on its face fails to give adequate guidance for determining the minor's maturity or best interest. And third, as a practical matter, the court procedure is unduly burdensome for minors seeking abortions.\footnote{38}

In considering summary judgment, the judge assumed the truth of the allegations but found them insufficient to defeat the statute's constitutionality. He decided that the statute does not allow the absolute third-party veto prohibited by the Court in \textit{Danforth} and does contain the elements essential to a bypass mechanism as outlined by the Supreme Court in \textit{Bellotti}.\footnote{39}

The basis of the court's holding was unclear, however, because the judge stated that the decision was based on the assumed truth of the allegations, yet he also explained why he disagreed with those allegations.\footnote{40} If the judge did assume the validity of the plaintiff's contentions—which is doubtful considering his disagreement—there could be subtle yet serious implications for "unconstitutional as applied" challenges of parental consent and notification statutes. The decision suggested that as long as state legislators follow the form outlined by the Supreme Court in \textit{Bellotti}, the practical effects of the procedure are irrelevant. This tension between form and reality is a recurring theme in abortion debate and decisions.

\section*{B. Missouri}

Missouri legislators were not as specific as their Louisiana counterparts. A few gaps in the details of a bypass procedure, however,
will not render a statute unconstitutional. In *Planned Parenthood Association v. Ashcroft*, the Supreme Court refused to consider ambiguities or missing procedural details as fatal flaws. The approved Missouri bypass mechanism provides:

(4) In the decree, the court shall for good cause: (a) Grant the petition for majority rights for the purpose of consenting to the abortion; or (b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or (c) Deny the petition, setting forth the grounds on which the petition is denied.

This statute permits the court to choose among the alternatives. Nothing on the statute’s face requires the court to permit the abortion, even if it finds the minor sufficiently mature to make her own decision. Therefore, a court could, “for good cause,” deny the abortion against a mature minor’s wish. This construction would make the statute unconstitutional under *Bellotti* because it gives the court an absolute veto power.

However, the Supreme Court determined that, where possible, ambiguities must be resolved to render the statute constitutional. Thus, the Court construed the statute to allow only what had been permitted in earlier decisions. That is, “good cause” meant that to deny the petition, the court must first find that the minor is not sufficiently mature to make her own decision, and then that the abortion would not be in her best interest.

The Missouri Legislature directed the state supreme court to provide the necessary rules to ensure expedited judicial review. The Supreme Court again found no constitutional flaws. “We believe this section provides the framework for a constitutionally suf-

41. *See Margaret S.*, 597 F. Supp. at 652 (lack of criteria to determine whether minor may have abortion not sufficient to defeat statute, and establishment of specific criteria may unnecessarily restrict decision-maker).
44. *Ashcroft*, 462 U.S. at 492-93.
45. Mo. Ann. Stat. § 188.028.2(6) (Vernon 1983). For the expedition of appeals, this section provides:

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 cases appealed under this section.

*Id.*
ficient means of expediting judicial proceedings. . . . There is no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions."\textsuperscript{46} Unfortunately, nothing in the Missouri court's rules ensured expedited consideration, either. The Missouri Supreme Court amended Missouri Rule of Civil Procedure 84.02 to provide merely that "[a]ppellate review of cases appealed under [the parental consent bypass provision] . . . shall be expedited."\textsuperscript{47}

The dearth of detail in this rule—which was supposed to fill the statute's gaps—resulted in the statute being challenged on its face and as applied in \textit{T.L.J. v. Webster}.\textsuperscript{48} T.L.J. argued that the rule is constitutionally deficient because it directs that appeals be expedited but provides no detailed instructions. The plaintiffs relied on a decision by the United States Court of Appeals for the Third Circuit\textsuperscript{49} regarding a similar Pennsylvania statute.\textsuperscript{50} In examining the Missouri procedure, the United States Court of Appeals for the Eighth Circuit stated: "To 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."\textsuperscript{51} In finding Missouri's statute facially valid, the Eighth Circuit distinguished it from the Pennsylvania statute:

[T]he Third Circuit [in \textit{American College of Obstetricians & Gynecologists v. Thornburgh}] expressly contrasted the Pennsylvania statute to the Missouri statute . . . and noted that the Missouri statute stood on its own. The statute itself sets out the procedure

\textsuperscript{46} Ashcroft, 462 U.S. at 491 n.16.
\textsuperscript{47} Mo. R. Civ. P. 84.02.
\textsuperscript{48} 792 F.2d 734 (8th Cir. 1986).
\textsuperscript{49} American College of Obstetricians & Gynecologists v. Thornburgh, 737 F.2d 283 (3d Cir. 1984), aff'd in part and rev'd in part on other grounds, 106 S. Ct. 2169 (1986). The section on parental consent had been enjoined by the Third Circuit until the Supreme Court of Pennsylvania promulgated rules ensuring confidentiality and promptness. Therefore, that section was not before the Supreme Court on appeal. Thornburgh v. American College of Obstetricians & Gynecologists, 106 S. Ct. 2169, 2177 n.9 (1986).
\textsuperscript{50} 18 PA. CONS. STAT. § 3206 (1983). Essentially, the statute provides that if the pregnant minor elects not to seek her parent's consent, the court of common pleas in the district where she resides or where the abortion is to be performed shall, after an appropriate hearing, authorize the abortion if the court finds the minor mature or that the abortion is in her best interest. The minor may participate in the proceedings and have appointed counsel upon request. Court proceedings shall be confidential and be given precedence over pending matters so the court may reach a decision promptly to serve the best interest of the pregnant minor.
\textsuperscript{51} T.L.J., 792 F.2d at 737 (quoting American College, 737 F.2d at 297).
for judicial bypass of parental consent, instructs the juvenile
court on the evidence to be taken, directs court clerks to assist
petitioners with filing their petitions, and sets up a timetable for
commencing appeals. The Pennsylvania statute was not similarly
detailed."

In *T.L.J.*, the Eighth Circuit affirmed the district court’s dismiss-
sal of the “as applied” challenge on the grounds that it was moot,
because T.L.J. had obtained a legal abortion after the district
court had temporarily enjoined the state from enforcing the stat-
ute. In addition, she had turned eighteen before the final decision,
putting her beyond the terms of the statute. Thus, the constitu-
tionality of the Missouri statute as applied is still undetermined.

III. THE FLORIDA LEGISLATION

In recent years, the Florida Legislature has considered several
parental involvement statutes, often varying dramatically from one
year to the next, depending upon whether the sponsors were con-
cerned with notice or consent or both. At least one of the propos-
als, had it passed, presumably could not have withstood constitu-
tional analysis.

A. A Parade of Bills

With the steady stream of Florida bills attempting to regulate
minors’ abortions during the past five years, one might expect to
find an evolution culminating in the 1986 version. This has not
been the case. Compare, for example, the various proposals on the
degree of parental involvement required. In 1982, the House bill
would have mandated the written informed consent of both par-
ents in most cases and a judicial bypass alternative. The 1983
House bill would have required notice to only one parent and a
waiting period of twenty-four hours in the case of actual written
notice and forty-eight hours for constructive notice before a physi-

52. *T.L.J.*, 792 F.2d at 737-38.
53. *Id.* at 738-39.
54. *See supra* note 31 and accompanying text.
55. Fla. HB 613 (1982). The bill died in the House Health and Rehabilitative Services
Bills* at 183, HB 613. A similar Senate bill died in the Senate Rules and Calendar Commit-
tee. *Id., History of Senate Bills* at 308, SB 984.
ABORTION NOTIFICATION

A physician could perform an abortion on a minor. Again, the bill provided a judicial waiver mechanism. In 1984, proponents returned to an informed written consent provision, this time proposing that consent be required from only one parent. In addition, judicial proceedings would have required service of the minor's petition on a parent. Thus, parental consent would have been required in most cases and notice in all cases. The House bill introduced in 1985 was a notice proposal which would have required a physician to give actual notice to both parents by telephone or in person. The bill also provided a judicial bypass without notice to the parents. This bill, sponsored by Representative Watt, was identical to the one he introduced in the 1986 Regular Session.

B. Amendment Analysis

Although past bills are of limited help, the amendments offered to the 1986 bill—whether they were adopted or failed—offer some insight into the theoretical and practical problems lawmakers encounter in attempting to legislate on this subject.

1. Notice

As filed, House Bill 80 would have amended section 390.001, Florida Statutes, to require a physician or his agent to give actual notice in person or by telephone to both parents when planning to terminate the pregnancy of an unmarried minor. If the parents


58. Fla. HB 714 (1984). This bill's notice requirement would have run into constitutional trouble when judged by the standard in Bellotti v. Baird, 443 U.S. 622, 647 (1979) (every minor must have opportunity to go to court without first notifying her parents).


were divorced or one was unavailable, notice to the parent who was available or had custody of the minor would have been sufficient. The bill did not provide for constructive notice when a physician tried but was unable to give actual notice. Notice would not have been required where a medical emergency dictated an immediate abortion based on the doctor's best medical judgment. The bill would have applied to residents and nonresidents alike.

a. Legislative Exceptions to Parental Notice

Almost immediately, legislators recognized limited circumstances where notice to only one parent would be sufficient. One amendment, offered by Representative Thomas during a meeting of the House Subcommittee on Health and Economic Services, would have permitted notice to only one parent in cases of legal separation. Representative Thomas explained that this provision would cover situations where notice to both parents could cause more family strife than help. Without the amendment, only the judicial bypass procedure would have been available to avoid notice to a legally separated spouse living in the same town or otherwise available.

The incest amendment, which was adopted during the House floor debate, provided that notice to the mother alone would be sufficient when the father had impregnated the minor. Proponents suggested that in other cases of incest, notice would have to be given to both the mother and father unless the minor obtained a judicial waiver.

63. The bill's silence regarding constructive notice, coupled with application to out-of-state residents, seems to indicate that a parent's absence from the state would not trigger a nonjudicial exemption from notifying both parents.
64. Fla. HB 80, sec. 1, at 2, line 27 (1986).
65. For ease of discussion, several amendments have been labeled by the author although they were not referred to as such by legislators.
68. Id.
69. Fla. H.R., tape recording of proceedings (May 6, 7, 1986) (on file with Clerk) (discussion of amendments 6, 9 to HB 80) [hereinafter cited as House Tape I and House Tape II respectively]. The first proposed incest amendment was not adopted because it would have permitted a notice exception for any kind of incestuous relationship which caused the pregnancy. House Tape I, supra. For the text, see Fla. H.R. Jour. 264-65 (Reg. Sess. May 6, 1986) (amendment 6 to HB 80). For the text of the final version of the incest amendment, see Fla. H.R. Jour. 277 (Reg. Sess. May 7, 1986) (amendment 9 to HB 80).
70. House Tape I, supra note 69; House Tape II, supra note 69.
Discussion on the House floor suggested that if the minor's parents were alive and not within the above exceptions (that is, not divorced, legally separated, or involved in an incestuous relationship with the minor), actual notice to both parents would have to be given, not simply attempted. The legislators' rejection of an amendment that would have waived the notice and bypass requirements for minors who attested by a sworn affidavit that they were victims of child abuse, including aggravated child abuse supports this implication. Lawmakers also rejected an amendment which would have permitted abandoned minors or those without parents to receive a legal abortion without the bypass procedure.

Additionally, members rejected an amendment by Representative Gustafson which would have strongly encouraged, but not mandated, parental notice. The minor could have consented to the abortion as though she were an adult. The doctor would have had to make a good faith attempt to notify or persuade the minor to notify her parents and would have had to inform the minor of her duty to tell her parents. If the parents learned of the abortion, they would have been allowed access to their daughter's medical records and have been permitted to talk with her. Taken together, the action on these amendments suggest that in all but the most limited situations, actual notice or a judicial waiver would have been necessary before an unmarried minor could obtain a legal abortion.

b. Minors' Rights Amendments

Two amendments were designed to inform minors of their rights under House Bill 80. One amendment, proposed in the House Appropriations Committee, prohibited any person from notifying the parents without first informing the minor of her right to a judi-

71. House Tape I, supra note 69; House Tape II, supra note 69.
72. Fla. H.R. Jour. 264-65 (Reg. Sess. May 6, 1986). Lawmakers believed that requiring children to take advantage of the judicial bypass would put them in touch with agencies that could help put an end to the abusive situations. House Tape I, supra note 69.
73. Rep. Deutsch, Dem., Sunrise, offered the amendment during House floor debate. It would have exempted those minors living on their own from the notice requirement and, by implication, from the bypass alternative. The amendment was tabled. Fla. H.R. Jour. 264 (Reg. Sess. May 6, 1986) (amendment 5 to HB 80).
74. Dem., Ft. Lauderdale.
76. Id.
77. Fla. H.R., Comm. on Approp., tape recording of proceedings (Apr. 29, 1986) (hearing on HB 80) (on file with committee) [hereinafter cited as Appropriations Tape].
cial waiver, and without providing her with the proper application form for the procedure.\textsuperscript{78} This amendment passed without objection.\textsuperscript{79} Another amendment, adopted during House debate,\textsuperscript{80} would have required a physician to ascertain whether a minor was being coerced into an abortion and inform her of her right to complete the pregnancy.\textsuperscript{81} These amendments attempted to ensure that the minor's decision—either for or against abortion—would be made with full knowledge of her rights and without undue pressure.

2. Bypass

As introduced, House Bill 80 would have allowed a minor to petition the circuit court for a waiver of the notice requirements. The court would have assisted in filing the petition and ensured confidentiality. The minor could have participated on her own behalf or through a next friend.\textsuperscript{82} She would have been advised of her right to court-appointed counsel, and have been provided counsel at her request. No minor would have been assessed fees or costs. The court could have waived the notice requirement\textsuperscript{83} if it found that the minor was sufficiently mature and well-informed to make the abortion decision, or that the abortion would be in her best interest. Finally, an expedited confidential appeal would have been available.\textsuperscript{84} These provisions survived the sometimes heated debate to emerge unchanged in the final version of the bill.\textsuperscript{85}

\textsuperscript{78} Fla. CS for HB 80, sec. 1, at 2, line 25 (1986).
\textsuperscript{79} Appropriations Tape, \textit{supra} note 77.
\textsuperscript{80} \textsc{Fla. H.R. Jour.} 264 (Reg. Sess. May 6, 1986) (amendment 2 to HB 80).
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} During House debate, Rep. Upchurch, Dem., St. Augustine, defined next friend as someone, not necessarily a lawyer, who informally represents a person incompetent to represent herself in court. Generally, minors are not considered competent to participate in court proceedings. House Tape II, \textit{supra} note 69. House Bill 80 would have removed that disability, but also would have permitted the minor to petition through a next friend if desired. Fla. CS for HB 80, sec. 1, at 3, line 3 (1986) (Second Engrossed).
\textsuperscript{83} Rep. Watt emphasized that the judge would not decide whether the abortion would occur, only whether the parents would have to be notified. Appropriations Tape, \textit{supra} note 77.
\textsuperscript{84} Fla. HB 80, sec. 1, at 3, line 22 (1986). Rep. Watt explained that only a minor could appeal. Since the proceedings would be confidential, no one—certainly no adverse party—would be aware the proceedings had taken place. Appropriations Tape, \textit{supra} note 77.
\textsuperscript{85} Fla. CS for HB 80 (1986) (Second Engrossed).
a. Records Amendment

Concerns about confidentiality prompted Representative Gustafson to introduce an amendment on record-keeping. The concern arose from the bill's requirement that the court issue written findings of fact and conclusions of law to support its decision, and that it maintain confidential records of evidence. Representative Gustafson explained that "confidential records have a way of . . . becoming unconfidential." The better approach, he suggested, would be to reaffirm that all evidence and records be confidential, and leave it to the court to decide what to keep. His amendment modified the provision so that "[a]ny court that conducts proceedings under this subparagraph shall order all records of the proceeding and evidence introduced pursuant to the proceeding be kept confidential [sic]." The amendment was adopted without objection.

b. Time Limit Amendment

To ensure that the waiver process would be expedited, Representative Martin introduced an amendment that would have compelled the court to render an opinion within two weeks of filing the petition or appeal. Notice would not be required if the court failed to rule within the time limit. The court clerk would promptly indicate that failure on the petition and mail a copy to the minor. Representative Martin suggested that by forcing the court to act promptly, the amendment made the right to bypass parental notice more realistic. The time limit amendment also was adopted without objection.

c. Bypass Choice Amendment

The House agreed with making judicial bypass the only alternative to notice. Members rejected an amendment by Representative Deutsch that would have given minors a choice of seeking a waiver

86. Appropriations Tape, supra note 77.
87. Id.
88. Fla. CS for HB 80, sec. 1, at 3, line 30 (1986).
89. Appropriations Tape, supra note 77.
90. Id.
91. Dem., Hawthorne.
92. Fla. CS for HB 80, sec. 1, at 4, line 7 (1986).
93. Appropriations Tape, supra note 77.
94. Id.
of notice through the court system or from two independent physicians. The physicians would have used the same standards as a court in granting a notice waiver—the minor's maturity or best interest.

3. Penalties

As filed, House Bill 80 would have greatly increased physicians' exposure to liability by making the failure to give notice prima facie evidence of failure to obtain informed consent and of interference with family relations. In addition, the bill provided that Florida law would not be construed to preclude punitive damages for violations of the notice provisions.

a. Liability Amendment

The House Appropriations Committee struck the paragraph outlining physicians' heightened liability under the bill. Members were concerned about creating a new tort which would increase physicians' exposure, especially when only actual oral notice would have satisfied the bill's provisions. Verbal notice would have exposed doctors to the risk of having to prove they had indeed given notice if unhappy parents accused the physicians were not.

The liability amendment reinstated the status quo with regard to civil and criminal liability for obtaining informed consent. Parents not notified before an abortion and minors not told of their right to seek judicial waiver of notice still could have sued the physician. By analogy, the physician also might have been held liable for not determining whether the minor was coerced and for not informing her of her right to carry to term. A doctor would still have been subject to any criminal penalties under Florida law for failure to obtain an informed consent.

96. Id.
97. Fla. HB 80, sec. 1, at 4, line 1 (1986).
98. Appropriations Tape, supra note 77.
99. See id.; Fla. H.R., Comm. on Health & Rehab. Servs., tape recording of proceedings (Apr. 8, 1986) (on file with committee) (testimony of attorney representing Florida Coalition for Choice). The problem of complying and proving compliance with the bill would have been further exacerbated by a parent's refusal to record the notice information. See infra note 109 and accompanying text.
100. Appropriations Tape, supra note 77.
b. Good Faith Amendment

The House Appropriations Committee also adopted an amendment to permit a physician to rely in good faith on the statement that one was the minor's parent.101 Discussion centered on what a doctor would have to do to rely “in good faith.” Representative Gordon102 suggested that it would be reasonable if “the physician simply has to believe that—take it on faith—[the name the patient submits as the parent's is in fact the parent’s name] and not be required to make any other determination if it sounds like it’s a mature adult on the other end [of the telephone].”103

The physician could have relied in good faith on a patient's representations that she was not a minor or that she was married.104 A doctor without actual knowledge to the contrary could have relied on the patient’s representations “without having to do any type of background check relative to compliance with this statute.”105 Thus, it would seem—to the apparent chagrin of some legislators106—that a physician would not have needed to check drivers’ licenses, marriage licenses, or other identification.107

The good faith amendment introduced two potential problems. First, it would have permitted a physician to rely in good faith on the representations of “the person giving consent.”108 This language suggested that parents must not only be notified, but also must consent. The rest of the bill mandated notice only. Representative Watt always explained the bill in terms of notice, not consent. The consent language made the bill unnecessarily ambiguous.


102. Dem., North Miami.

103. Appropriations Tape, supra note 77.

104. The notice requirements would have applied only to unmarried minors. Rep. Watt explained that a divorced minor would not be considered married under the proposal, but would be exempt nonetheless because she would be emancipated. Id. The notice requirement would not have applied because an emancipated person is not considered a minor. By analogy, widowed minors also would have been exempt.


106. Rep. Watt said the good faith amendment was an attempt to dilute the impact of the bill by relieving doctors of responsibility for giving actual notice to the parents. Id. Another representative said the bill with the amendment would have encouraged pregnant minors to lie about their status as unmarried minors and to have imposters take the notice for their parents. See House Tape II, supra note 69.

107. Appropriations Tape, supra note 77.

Second, the good faith amendment provided that the person receiving notice record the date and other facts regarding notice. Recording the information “shall meet the informed consent requirements of law relating to the giving of such notice.” This provision raised the question of whether the physician could fulfill his informed consent obligations if a parent receiving notice refused to record the information. Neither problem was discussed by legislators.

C. Constitutional Analysis

Only once has the Supreme Court addressed the constitutionality of a statute requiring parental notice, rather than consent. *H.L. v. Matheson* involved a Utah statute which required the physician in all cases to “[n]otify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor.”

H.L. argued that the statute was overbroad because it could be construed to apply to all unmarried minor girls, including those who were mature or emancipated. The Court did not address that question because the appellant did not allege, nor was it found, that she was mature or emancipated; therefore, she lacked standing to raise that issue. The Court rendered a narrow decision, holding that a statute requiring notice (but not giving parents or the courts a veto) was constitutional as applied to a minor “(a) when the girl is living with and dependent upon her parents, (b) when she is not emancipated by marriage or otherwise, and (c) when she has made no claim or showing as to her maturity or as to her relations with her parents.”

The narrowness of the holding, coupled with the Court’s refusal in *Bellotti* to require notice in every case where a minor seeks to bypass parental consent, suggested that the Court may require the same kind of bypass mechanism for parental notification statutes as for parental consent. At least two courts have applied the Supreme Court’s consent analysis and standards to parental notice.

111. UTAH CODE ANN. § 76-7-304(2) (1978).
112. *Matheson*, 450 U.S. at 407. But see *Matheson*, 450 U.S. at 420 (Powell, J., concurring) (state may not require notice to parents in all cases without providing independent decision-maker to whom the minor has recourse).
113. *Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985) (“This standard [for judging consent bypass provisions] also governs provisions requiring parental notification.”), *cert.*
1. Notice

Assuming that the state’s interests in maternal health and family involvement are sufficient to allow notice requirements,\textsuperscript{114} the notice provisions of House Bill 80 probably would have been constitutional. Notification of both parents is not considered unduly burdensome\textsuperscript{115} and the House bill would have made the requirement even less burdensome by providing that under some circumstances notification of only one parent would be sufficient.

Additionally, House Bill 80 did not contain a mandatory waiting period between the time of notice and abortion. Waiting periods for adults were struck down by the Court in \textit{City of Akron v. Akron Center for Reproductive Health,}\textsuperscript{116} but courts have given conflicting answers to the question as applied to minors. A mandatory waiting period for minors was struck down by the Seventh Circuit in \textit{Zbaraz v. Hartigan}.\textsuperscript{117} The court reasoned that the waiting period created a substantial burden on a woman seeking abortion and found that the state had failed to tailor the requirement to apply only to immature minors.\textsuperscript{118} Conversely, in \textit{Akron Center for Reproductive Health v. Rosen,}\textsuperscript{119} a federal district court found a waiting period requirement sufficiently tailored to meet the state’s interest in promoting consultation with parents.\textsuperscript{120}

Finally, the notice provisions of House Bill 80 would have diminished any burden by providing that either the physician or his agent could give the notice.\textsuperscript{121} This approach would have avoided the infirmities of statutes which have been struck down because

\textsuperscript{114}See Matheson, 450 U.S. 398; \textit{Bellotti}, 443 U.S. 622.

\textsuperscript{115}See \textit{Bellotti}, 443 U.S. 622 (1979).

\textsuperscript{116}462 U.S. 416, 450 (1983) (state failed to demonstrate its legitimate interest was furthered by imposition of arbitrary and inflexible waiting period).

\textsuperscript{117}763 F.2d 1532, 1539 (7th Cir. 1985), \textit{cert. granted}, 55 U.S.L.W. 3247 (U.S. Oct. 14, 1986) (No. 85-673). The Court granted certiorari to consider whether a state may constitutionally require minors seeking abortions to wait a specified time after their parents have been notified before the abortion is performed.

\textsuperscript{118}Id.


\textsuperscript{120}Id. at 1139.

\textsuperscript{121}Fla. CS for HB 80, sec. 1, at 2, line 14 (1986).
the state could not justify requiring only the physician to give notice.\footnote{122}

2. Judicial Bypass

In \textit{Bellotti}, the Supreme Court set forth standards required for a constitutionally adequate bypass procedure. The minor must be able to show that she is mature enough to make her own decision regarding abortion or that parental involvement is not in her best interest. This process must be confidential and sufficiently expeditious to ensure that a safe abortion would still be possible after an appeal.\footnote{123}

\textbf{a. Time Limit}

Although the Fiscal Note on Committee Substitute for House Bill 80 stated that the bill’s bypass procedure conformed with the time frame delineated by the Supreme Court,\footnote{124} the hearing and appeal process might have taken too long to have provided a real alternative to parental notification. The bill originally specified that the court proceeding be given such precedence as necessary to ensure a prompt decision and an expedited appeal.\footnote{125} The Appropriations Committee attempted to put teeth into those provisions by providing that the notice requirement would be invalidated if the court did not render an opinion within two weeks of the petition or appeal.\footnote{126} Therefore, under this amendment, the process could have taken four weeks to complete, excluding time for filing.

Other states with comparable statutes require considerably shorter maximum time periods. Louisiana requires a summary hearing within forty-eight hours after the petition or appeal is filed.\footnote{127} The Missouri statute, considered the benchmark for waiver bypass statutes,\footnote{128} provides that a hearing on the merits be held within five days of filing the petition. Furthermore, Missouri re-

\footnotetext{122}{Rosen, 633 F. Supp. at 1135; cf. Akron, 462 U.S. at 447-49 (requirement that only a physician could inform and counsel the woman found unreasonable).}
\footnotetext{123}{Bellotti, 443 U.S. at 643-44.}
\footnotetext{124}{See Staff of Fla. H.R. Comm. on Approp., HB 80 (1986) Fiscal Note 2 (Apr. 29, 1986) (on file with committee).}
\footnotetext{125}{Fla. HB 80, sec. 1, at 3, line 8 (1986).}
\footnotetext{126}{Fla. CS for HB 80, sec. 1, at 4, line 3 (1986).}
\footnotetext{127}{LA. REV. STAT. ANN. § 40:1299.35.5.B.(3),(8) (West 1977).}
\footnotetext{128}{See Zbaraz v. Hartigan, 763 F.2d 1532, 1541 (7th Cir. 1985), cert. granted, 55 U.S.L.W. 3247 (U.S. Oct. 14, 1986) (No. 85-673); American College of Obstetricians & Gynecologists v. Thornburgh, 737 F.2d 283, 297 (3d Cir. 1984).}
quires notice of appeal within twenty-four hours after an order is issued and the appeal must be perfected within five days after the notice. House Bill 80's four-week process would have allowed courts longer to decide than either the Missouri or Louisiana statutes.

In *Rosen*, the district court compared an Ohio statute with the Missouri statute and found Ohio's three-week time period too long. The court stated: "Judicial notice may be taken of the fact that teenage women are inclined towards irregular periods. Consequently, a minor will require at least eight to ten weeks to discover and confirm that she is pregnant and to consider her options." The three-week process of obtaining permission for the abortion without parental notification could push the girl into the second trimester of pregnancy. At this time, abortion may be so risky and expensive that it would be an unrealistic alternative. If the Supreme Court were to accept the *Rosen* reasoning, the four-week time frame permitted by House Bill 80 would have been unconstitutional.

It seems unlikely that a court would engage in such blatant judicial legislating as to sever the unconstitutional time requirements and suggest that the Florida Supreme Court promulgate rules for expedition in their place. Unlike the Missouri statute, which directs the state supreme court to create the necessary rules to expedite the bypass mechanism, the Florida bill contained no such directive. Even had House members deleted the time constraints, it is unlikely that the bill's provision for an expeditious appeal contained the constitutionally necessary framework for a realistic appellate procedure.

The automatic waiver of notice provision might have withstood constitutional scrutiny if prompt notice of the waiver could be made without endangering confidentiality. No procedure for prompt notification was provided, however, and mailing notice to the minor might alert her parents. Still, the minor must be notified

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131. *Id.* at 1142.
132. *Id.*
134. See T.L.J. v. Webster, 792 F.2d 734, 737-38 (8th Cir. 1986).
or the automatic waiver could become an unconstitutional "pocket veto."  

b. Confidentiality

The House bill would have encountered additional problems regarding the confidentiality of the bypass mechanism. The bill would have required that the court "ensure that the minor's identity is kept confidential," and that the court "order all records of the proceeding and evidence introduced pursuant to the proceeding [to] be kept confidential."  

The Third Circuit in American College of Obstetricians & Gynecologists v. Thornburgh stated, however, that "to 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."  

Prevented by the Pennsylvania Constitution from delineating specific judicial procedures, legislators in that state directed the Pennsylvania Supreme Court to promulgate rules to ensure confidentiality and speed in the process. The Third Circuit has delayed judgment on Pennsylvania's bypass mechanism until the state supreme court creates the supporting rules. Because the Florida bill did not contain a similar state supreme court directive, it would have had to stand or fall on its own. Measured against the specificity of provisions in the Missouri and Massachusetts abortion statutes, the Florida bill would likely have been found lacking.

Zbaraz v. Hartigan is one of the few cases dealing with confidentiality in any detail. The court compared an Illinois statute with the Missouri statute—which had been approved in Ashcroft—requiring that only a minor's initials be used on the bypass petition. The Seventh Circuit also observed that Massachusetts does not require the minor's name on the petition. Because the Illinois statute lacked these and other safeguards, the Zbaraz court suggested that the statute would be invalid on its face. Nevertheless, it has withheld judgment until the state supreme court can

138. Id. at 297.
139. Id.
promulgate rules. House Bill 80 suffered from a similar infirmity, but it lacked the curing directive. Consequently, these shortcomings could have caused House Bill 80's bypass mechanism to fail judicial scrutiny.

3. Constitutional "As Applied"

As more states adopt facially valid abortion statutes, doctors, clinics, and minors are challenging those laws on the grounds that they are unconstitutional as applied. The Supreme Court has not addressed this argument. "As applied" challenges focus on implementation procedures—usually the bypass mechanism—to determine if there is an undue burden on the minor.141 Litigants have asserted that a pattern of undue delay exists, that minors are not given the necessary help to file petitions, or that judges harass the minors and incorrectly apply the law or are unavailable because they abstain from abortion cases.142

The minor in T.L.J. argued that even if the Missouri statute were constitutional on its face, "there exist[ed] a pattern of grave deficiencies in its application, and that as a result the rights of the appellants . . . [were] being infringed."143 The Eighth Circuit dismissed the argument as moot,144 but noted that the juvenile court judge had not applied "the law of the land" as announced by the Supreme Court.145 The court suggested that the juvenile judge should have abstained.

The Supreme Court has announced that it is a woman's right to control the issue of her body up until the time that issue can live separately. This decision is the law of the land. Regardless of personal discomfort with the law, it is the duty of judges to apply it. If they cannot do so with a clear conscience, then they should remove themselves from this class of cases.146

141. This analysis is different from the analysis which focuses on whether the statute achieves its stated purpose, such as the state's interest in facilitating parental involvement and improving the quality of the minor's decision.
143. T.L.J., 792 F.2d at 738.
144. Id. at 738-39. For discussion, see text accompanying supra note 55.
145. T.L.J., 792 F.2d at 738-39 n.4.
146. Id. at 739 n.4. The Eighth Circuit included the following excerpt of the transcript from the juvenile court proceedings as illustrative of the tone of the hearing:

MR. ZOLLENER: [T]he petition asked you to determine whether this minor has sufficient intellectual capacity and is intelligent enough to consent to this abortion
But abstention—especially in rural areas where there may not be another judge available—poses other problems. How constitutional is a judicial bypass mechanism if there are no judges to hear the cases?

In Massachusetts, the plaintiffs sought a declaration and order that judges are "de facto unavailable" because of a pattern of judicial harassment.\textsuperscript{147} Plaintiffs are also using results from a court-ordered study with the hope of showing undue delay and burden on minors in the administration of the parental consent law.\textsuperscript{148} The study recorded "the number of minors' abortion petitions processed, length of time involved, the number of trips a minor must make to the courthouse and other facts pertinent to the administration" of Massachusetts' judicial bypass provisions.\textsuperscript{149} The federal district court abstained because a similar case was pending in a Massachusetts state court.\textsuperscript{150} The outcome could have a profound effect on this phase of the constitutional challenges to abortion statutes.

If successful, "as applied" challenges would imply that legislators must do more than carefully draft parental involvement statutes to be facially constitutional. They also would have to provide sufficient monetary, administrative, and judicial resources to overcome the inherent problems suggested above.

IV. Conclusion

House Bill 80 failed to become law in 1986. Had it passed, it might have been vulnerable to a constitutional challenge on its face. The extended time frame and lack of specific judicial procedures ensuring confidentiality could have proved fatal. To ensure constitutionality, statutes of this kind should include provisions permitting minors to use only first names or initials when they petition the court and should detail a procedure for notifying minors without contacting them at home. Abortion legislation should also contain the framework for a bypass procedure which will produce

\textsuperscript{148} Id.
\textsuperscript{149} Id. at 802-03.
\textsuperscript{150} Id. at 811.
final decisions within two weeks, including appeals. Even then, if it withstands a facial attack, an abortion statute for minors would still be vulnerable to an "as applied" challenge. Florida legislators should keep both the theoretical and practical considerations in mind if they reconsider this issue.