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Constitutional Law - Due Process: Minor's Abortion Rights - Ohio's Parental Notification Statute - An Anti-Abortion Statute in Disguise - Ohio v. Akron Center for Reproductive Health

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CONSTITUTIONAL LAW—Due Process: Minor's Abortion Rights—Ohio's Parental Notification Statute—An Anti-abortion Statute in Disguise? *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990).

In March 1986, Rachael Roe requested an abortion from Akron Center for Reproductive Health Services (Akron Center).[1] Rachael was a single minor, still dependent on her parents, and pregnant. Akron Center refused to perform an abortion on Rachael unless one of Rachael's parents was notified, pursuant to an Ohio statute restricting the performance of abortions on minors.[2] Had Dr. Gaujean, a physician employed by Akron Center, induced an abortion on Rachael without notifying one of her parents, he would have been subject to criminal penalties.[3] Rachael's only legal opportunity to obtain an abortion without parental notification was by employing a section of Ohio's statute[4] which permits a minor to bypass the parental notice

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1. Ohio v. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972 (1990).

2. *See id.*, 110 S. Ct at 2977 (citing OHIO REV. CODE ANN. § 2919.12(A)-(B)(1) (Baldwin 1988)).

(A) No person shall perform or induce an abortion without the informed consent of the pregnant woman.

(B)(1)(a) No person shall knowingly perform or induce an abortion upon a woman who is pregnant, unmarried, under eighteen years of age, and unemancipated unless at least one of the following applies:

(i) Subject to division (B)(2) of this section, the person has given at least twenty-four hours actual notice, in person or by telephone, to one of the woman's parents, her gurdian, or her custodian as to the intention to perform or induce the abortion . . . .

3. *See id.* at 2977 (citing OHIO REV. CODE ANN. § 2919.12(D) (Baldwin 1988)).

(D) Whoever violates this section is guilty of unlawful abortion, a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of this section, unlawful abortion is a felony of the fourth degree.

4. *See id.* at 2977-78 (citing OHIO REV. CODE ANN. § 2151.85 (Baldwin 1988)).

(A) A woman who is pregnant, unmarried, under eighteen years of age, and unemancipated and who wishes to have an abortion without the notification of her parents, guardian, or custodian may file a complaint in the juvenile court of the county in which she has a residence or legal settlement, or in the juvenile court of the county in which the hospital, clinic, or other facility in which the abortion would be performed or induced is located, requesting the issuance of an order authorizing her to consent to the performance or inducement of an abortion without the notification of her parents, guardian, or custodian.

The complaint shall be made under oath and shall include all of the following:

(1) A statement that the complainant is pregnant;

(2) A statement that the complainant is unmarried, under eighteen years of age, and unemancipated;

(3) A statement that the complainant wishes to have an abortion without the notification of her parents, guardian, or custodian;

(4) An allegation of either or both of the following:

(a) That the complainant is sufficiently mature and well enough informed to intelligently decide whether to have an abortion without the notification of her parents, guardian, or custodian;

(b) That one or both of her parents, her guardian, or her custodian was engaged in a pattern of physical, sexual, or emotional abuse against her, or that the notification of her parents, guardian, or custodian otherwise is not in her best interest.

provision through a judicial process. To begin the process, Rachael would have had to submit a pleading form which required her signature and her parents' names.[5] After filing her pleading, Rachael would have had to prove clearly and convincingly to a judge that (a) she possessed the maturity and information to make an intelligent decision about abortion by herself, or (b) that an abortion without parental notification was in her best interest. If she could prove either (a) the maturity issue or (b) the best interest issue, the court could have permitted Rachael to consent to her own abortion without parental notification.

Using Rachael Roe's circumstances as an exemplar, Appellees[6] brought suit in the United States District Court for the Northern District of Ohio.[7] They alleged that Ohio's Amended Substitute House Bill 319 (H.B. 319)[8] was unconstitutional on its face.[9] Appellees contended that the bypass provision[10] contained in H.B. 319 imposed an undue burden on a minor seeking an abortion and failed to meet the due process requirements of the Fourteenth Amendment.[11] Appellant, the State of Ohio,[12] asserted that the statutory provision provided a sufficient method whereby a minor might obtain an abortion without parental notification.[13]

The district court entered judgment for appellees, holding that four provisions of the judicial bypass procedure contained in H.B. 319 violated the Due Process Clause of the Fourteenth Amendment.[14] The United States Court of Appeals for the Sixth Circuit affirmed and

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(5) A statement as to whether the complainant has retained an attorney, the name, address, and telephone number of her attorney.

5. Although the statute does not state the requirement that a minor sign the complaint, this requirement was added by the Ohio Supreme Court Clerk, who drafted the complaint forms. The Sixth Circuit Court found the statute unconstitutional and, therefore, did not address the issue of amending the court-created complaint form.

6. Appellees include: the Akron Center for Reproductive Health Services, a facility which provides birth control, pregnancy and abortion services; Max Gaujean, M.D., a physician at the Center who performs abortions; and Rachael Roe (a pseudonym), a pregnant, unmarried, unemancipated minor who sought and was refused an abortion at the Center. *Akron Ctr.*, 110 S. Ct. at 2978.

7. *Id.*

8. Ohio Amended Substitute House Bill 319, enacted by the Ohio legislature in November 1985, amended Ohio Revised Code Annotated § 2919.12 (1987) and created §§ 2151.85 and 2505.073 (Baldwin 1988). *Akron Ctr.*, 110 S. Ct. at 2977.

9. Brief for Appellees at 2, 13, Ohio v. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972 (1990) (No. 88-805).

10. The bypass provision permits a minor to obtain a court order allowing her to consent to her abortion. If a minor obtains a court order, a physician may proceed with the minor's abortion without notifying the minor's parents. Section 2151.85 of the Ohio Revised Code Annotated contains the bypass provision.

11. *See supra* note 9, Brief for Appellees at 2.

12. *Akron Ctr.*, 110 S. Ct. at 2978.

13. Brief for Appellant at 13, Ohio v. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972 (1990) (No. 88-805).

14. The four provisions considered by the district court were the pleading requirement, confidentiality, expedition, and constructive authorization. *See supra* note 13, Brief for Appellant, at 5.

held that the bypass provision did not comply with the standards set forth by the United States Supreme Court in *Bellotti v. Baird (Bellotti II)*.[15] On appeal, the United States Supreme Court reversed and concluded that, because H.B. 319's bypass procedure met the parental consent requirements established in five Supreme Court cases, the provision was constitutional.

In a review of the Ohio statute, the Supreme Court considered separately the pleading, confidentiality, expedition, and constructive authorization provisions, as well as the clear and convincing evidence standard. The Court found each provision met standards set forth in prior cases and was therefore constitutional.[16] At each step in its analysis, however, the Court failed to consider important factors affecting a pregnant minor. This casenote analyzes the weakness of the Supreme Court's holding and argues that the Supreme Court is, in effect, allowing the State to prohibit a minor from obtaining an abortion.

BACKGROUND

In 1973, the United States Supreme Court declared that the right to privacy derived from the Fourteenth Amendment includes a woman's choice of whether or not to terminate her pregnancy. In *Roe v. Wade*,[17] the Court held that statutory restrictions on abortions during the first trimester of pregnancy were unconstitutional, provided that abortions were performed by a licensed physician. The Court determined that during the second trimester, a state may require abortions to be performed in a hospital. During the third trimester, a state possesses the right to restrict abortion except where the mother's health or life is endangered by the continuation of her pregnancy. In *Roe v. Wade*, the Court acknowledged that the right to have an abortion must be weighed against state interests.[18] The Court concluded that for a state to pass regulations restricting abortion, those regulations must be supported by a compelling state interest.[19]

The decision in *Roe v. Wade* concerned an adult woman, thus the Court did not discuss whether a pregnant minor possesses the same rights. Accordingly, in the aftermath of that case, many states enacted statutes restricting a minor's access to abortion services by requiring

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15. *See supra* note 13, Brief for Appellant at 10-11 (citing Bellotti v. Baird (*Bellotti II*), 443 U.S. 622 (1979)).

16. The Court relied on Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird (*Bellotti II*), 443 U.S. 622 (1979); H.L. v. Matheson, 450 U.S. 398 (1981); Akron v. Akron Ctr., 462 U.S. 416 (1983); and Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983). Ohio v. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972, 2978 (1990).

17. 410 U.S. 113 (1973).

18. *Id.* at 154.

19. *See id.* at 155. State interests which have been used to limit the rights of minors include "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the impotance of the parental role in child rearing." *Bellotti II*, 443 U.S. at 634.

parental involvement.[20]

Following *Roe v. Wade*, the Supreme Court decided several cases which questioned the constitutionality of state laws restricting abortion. In *Planned Parenthood v. Danforth*,[21] the Court struck down a Missouri statute requiring a physician to obtain consent[22] of the parents prior to performing an abortion on a minor.[23] The Court held that a state had no authority under the Constitution to give a third party, even a parent, the power to veto a minor's decision to have an abortion.[24] It found that a parent's interest is no more weighty than the right of a competent minor who is mature enough to become pregnant.[25] However, the Court qualified that holding, adding that not every minor possesses the maturity to give effective consent to termi-

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20. The following states have a parental consent law: Alabama: ALA. CODE §§ 26-21-1 to 26-21-8 (Supp. 1987); Alaska: ALASKA STAT. § 18.16.010(3) (1986); Arizona: ARIZ. REV. STAT. ANN. § 36-2152 (1986 & Supp. 1990); California: CAL. HEALTH & SAFETY CODE § 25958 (West 1984 & Supp. 1991; Deleware: DEL. CODE ANN. tit. 24, § 1790 (b)(3) (unconstitutional); Florida: FLA. STAT. ANN. § 390.001 (4)(a) (West 1986 & Supp. 1990); Illinois: ILL. ANN. STAT. ch. 38, ¶ 81-51 (Smith-Hurd 1977 & Supp. 1990); Indiana: IND. CODE ANN. §§ 35-1-58.5-1(g), 35-1-58.5-2.5 (Burns Supp. 1990); Kentucky: KY. REV. STAT. ANN. § 311.732 (2)(a) (Michie/Bobbs-Merrill 1990); Louisiana: LA. REV. STAT. ANN. § 40.1299-35.5 (West Supp. 1991); Massachuesetts: MASS. GEN. L. ch. 112, § 12S (1988); Mississippi: MISS. CODE ANN. § 41-41-51 (1981 & Supp. 1990); Missouri: MO. REV. STAT. §§ 188.028.2 (1983); New Mexico: N.M. STAT. ANN. § 30-5-1(C) (1978); North Dakota: N.D. CENT. CODE § 1402.1-03.1 (1981); Pennsylvania: PA. STAT. ANN. tit. 18, § 3206 (Purdon 1983 & Supp. 1990); Rhode Island: R.I. GEN. LAWS § 23-4.7-6 (1988); South Carolina: S.C. CODE ANN. § 44-41-30 (Law. Co-op. 1985); South Dakota: S.D. CODIFIED LAWS ANN. § 34-23A-7 (1986); Tennessee: TENN. CODE ANN. §§ 37-10-301 to 37-19-307 (1984); Wahington: WASH. REV. CODE ANN. § 902.070 (1988 & Supp. 1991); Wyoming: WYO. STAT. § 35-6-118 (Supp. 1990).

The following sixteen states have notification statutes which require parental notice rather than parental consent: Arkansas: ARK. CODE ANN. § 20-16-801 (Michie 1991); Georgia: GA. CODE ANN. § 15-11-112 (1991); Idaho: IDAHO CODE § 18-609 (1991); Illinois: ILL. REV. STAT. ch. 38, para. 81-64 (1991); Maine: ME. REV. STAT. ANN. tit. 22, § 1597 (West 1990); Maryland: MD. CODE ANN., HEALTH-GEN. § 20-103 (1991); Minnesota: MINN. STAT. ANN. § 144.343 (West 1991); Montana: MONT. CODE ANN. § 50-20-107 (1991); Nebraska: NEB. REV. STAT. § 28-347 (1990); Nevada: NEV. REV. STAT. ANN. § 442.255 (Michie 1989); North Dakota: N.D. CENT. CODE § 14-02.1-03 (1991); Ohio: OHIO REV. CODE ANN. § 2919.12 (Baldwin 1991); Tennessee: TENN. CODE ANN. § 39-15-202 (1991); Utah: UTAH CODE ANN. § 76-7-304 (1991); West Virginia: W. VA. CODE § 16-2F-3 (1991); Wyoming: WYO. STAT. § 35-6-118 (1991).

21. 428 U.S. 52 (1976).

22. Parental consent laws require one parent or both parents to give written permission before their daughters can obtain an abortion. Parental notification statutes require that one or both parents be notified in advance of their daughter's abortion. Although the requirements differ, Justice Blackmun has stated that the result is the same. In his dissenting opinion in Ohio v. Akron Center for Reprod. Health, 110 S. Ct. 2972, 2985 (1990), he stated that, "[a]s a practical matter, a notification requirement will have the same deterrent effect on a pregnant minor seeking to exercise her constitutional right as does a consent statute."

23. *Danforth*, 428 U.S. at 74.

24. *See id.*

25. *Id.* at 73-74. Although a minor need not be mature to become pregnant, the Court implied that an adequate amount of maturity exists in a pregnant minor to weigh a minor's interests against those of her parents. *Id.* As discussed in the analysis section of this casenote, the Supreme Court has not yet set forth a clear definition of maturity. *See infra* pp. 36-38.

nate her pregnancy.[26]

In 1979, in *Bellotti v. Baird* (*Bellotti II*),[27] the Supreme Court set forth requirements for parental consent bypass provisions. In *Bellotti II*, the Court struck down a Massachusetts parental consent statute which imposed an undue burden on a minor's right to seek an abortion.[28] The Court found that compelled parental involvement, either by consent or notification, could result in efforts by the individual's parents to block her access to abortion services.[29] If a state required parental involvement, the Court concluded, a minor must be given access to an alternative procedure through which she could obtain an abortion without parental consent.[30]

Under *Bellotti II*, an alternative procedure must give a minor the *opportunity* to prove to a court both (a) that she is mature and well enough informed to make the abortion decision by herself, and (b) that parental involvement would not be in her best interest.[31] If given the opportunity to prove both aspects, a minor could obtain an abortion by proving to a court *either* (a) that she is sufficiently mature and adequately informed, or (b) that parental involvement would not be in her best interest. Without the opportunity to prove both issues, however, parental involvement would be unduly burdensome and not narrowly tailored to meet state interests in protecting immature minors.[32] In addition, the Court required that the resolution of the bypass proceeding and any appeals from that proceeding be completed with anonymity and sufficient timeliness to provide a minor an effective opportunity to obtain an abortion.[33]

In 1981, the Utah legislature enacted a statute requiring physicians to notify the parents of a minor requesting an abortion.[34] The Supreme Court found in *H. L. v. Matheson*[35] that since the parental notification provision did not require parental consent, no opportunity existed for a parent's absolute veto of a minor's decision.[36] Relying on *Bellotti II* and *Danforth,* the Court held that the statute was

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26. *Id.* at 75.

27. 443 U.S. 622 (1979). *Bellotti I*, Bellotti v. Baird, 428 U.S. 132 (1976), entailed a review of a decision by the United States District Court for the District of Massachusetts which invalidated ch. 112, §12S of the Massachusetts General Laws (1974). The Supreme Court noted that the statute was susceptible to an interpretation that would render it unconstitutional. Therefore, the Court remanded the case for interpretation of the statute in question by the Massachusetts Supreme Judicial Court. Once the statute was interpreted, the Supreme Court noted jurisdication for a second time and hence the decision in *Bellotti II*.

28. *Id.* at 647.

29. *Id.*

30. *Id.* at 643.

31. *Id.* at 643-44.

32. *Id.* at 647.

33. *Id.* at 644.

34. H.L. v. Matheson, 450 U.S. 398, 399 (1981).

35. *Id.* at 398.

36. *Id.* at 410.

constitutional.[37]

In 1983, the Supreme Court decided two additional cases concerning a minor's right to seek abortions. The first case, *Akron v. Akron Center*,[38] concerned an earlier Ohio statute which prohibited physicians from performing an abortion on a minor under the age of fifteen without consent of one of her parents or a court order.[39] The Court determined that the statute made a blanket determination that all minors under the age of fifteen were too immature to make an informed decision about abortion.[40] The statute also implied that an abortion may never be in a minor's best interest without parental consent.[41] Thus, the Court held that the statute was unconstitutional.[42]

In the second case decided in 1983, *Planned Parenthood v. Ashcroft*,[43] the Supreme Court applied both the anonymity and expedience requirements of *Bellotti II*. The Missouri legislature did not ensure a minor's anonymity when it enacted a statute requiring a minor to sign her name and provide her parents' names on her petition.[44] The Court did not rule on the lack of anonymity contained in this particular statute, but found that other provisions of Missouri law, which allowed a minor to file a petition using her initials, assured anonymity.[45] Despite the lack of anonymity, the Court upheld the parental consent provision of the statute because Missouri included a bypass procedure.[46] The Court also found that the state's interest in protecting immature minors sustained the parental consent requirement.[47]

In addition to anonymity, the Court considered in *Ashcroft* the expedience with which a bypass procedure should be conducted. The Court held that a period of sixteen to seventeen days provided sufficient expedition for a minor to complete the necessary legal procedures and still obtain an abortion within the time constraints outlined in *Roe v. Wade*.[48] The Court, however, pointed out that no minor had yet had occasion to comply with the bypass section of the statute at the time of the Court's decision.[49] The Court in *Ashcroft* assumed that Missouri would follow the expediency requirements set forth in previous cases, such as *Bellotti II*. Therefore, the Court did not specify time restraints with regard to appellate review of initial decisions

37. *Id.* at 413.
38. 462 U.S. 416 (1983).
39. *Id.* at 439.
40. *Id.*
41. *Id.*
42. *Id.* at 441-42.
43. 462 U.S. 476 (1983).
44. *Id.* at 476.
45. *Id.* at 490-91.
46. *Id.* at 493.
47. *Id.* at 490-91.
48. *Id.* at 491 (citing Roe v. Wade, 410 U.S. 113 (1973)).
49. *Ashcroft*, 462 U.S. at 491.

concerning parental involvement.[50]

PRINCIPAL CASE

In *Ohio v. Akron Center for Reproductive Health*, the United States Supreme Court addressed the question of whether the bypass procedure of H.B. 319 provided due process for a pregnant minor seeking an abortion.[51] The Court applied legal principles established in *Danforth, Bellotti II, Ashcroft, Akron, and Matheson*.[52] In a 6-3 decision, with Justices Blackmun, Brennan, and Marshall dissenting, the Court concluded that Ohio's bypass procedure was consistent with those cases and was therefore constitutional.[53]

The Court first considered whether the judicial bypass provision met the requirements set forth in *Bellotti II*.[54] To satisfy the first requirement of *Bellotti II*, a minor must be given the opportunity to show that she possesses ample maturity and adequate information to make an abortion decision by herself.[55] According to the Ohio statute, a minor must file a complaint in juvenile court stating that she has sufficient maturity and information to terminate her pregnancy without notifying her parents.[56] The Court found that this provision satisfied the *Bellotti II* requirement.[57]

Similarly, the Court concluded the second requirement of *Bellotti II* was satisfied through Ohio's pleading provision.[58] *Bellotti II* established that if a minor could not prove that she was able to make the decision herself, she could show that abortion without parental notification was in her best interest.[59] Exploring Ohio Revised Code Annotated section 2151.85, the Court found that Ohio would require the juvenile court to allow the minor to consent to her abortion if it found abortion was in her best interest, such as in cases where a minor showed a pattern of parental abuse.[60] Thus, the second requirement was fulfilled.

The Court also addressed the third requirement of *Bellotti II* which stipulated that a minor's anonymity be maintained. The Ohio statute required that a minor submit a signed pleading form which also provided the names of her parents in four places. The Court, however, determined that H.B. 319 satisfied the anonymity require-

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50. *Id.*
51. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972, 2978-79 (1990).
52. *Id.*
53. *Id.* at 2983-84.
54. *Id.* at 2979 (citing *Bellotti II*, 443 U.S. 622 (1979)).
55. *Id.* at 2979 (citing *Bellotti II*, 443 U.S. 622, 643 (1979)).
56. Akron Ctr., 110 S. Ct. at 2979 (citing OHIO REV. CODE ANN. § 2151.85(A)(4) (Baldwin 1988)).
57. *Id.* at 2979.
58. *Id.*
59. *Akron Ctr.*, 110 S. Ct. at 2979 (citing *Bellotti II*, 443 U.S. 622, 644 (1979)).
60. *Id.*

ment,[61] reasoning that a combination of Ohio statutes provided sufficient anonymity. Ohio Revised Code Annotated section 2151.85(D)[62] prohibited juvenile courts from notifying parents that a minor was pregnant and seeking an abortion.[63] Section 2151.85(F)[64] required that juvenile courts and appellate courts preserve a minor's anonymity and confidentiality on all papers and stated that such papers were not public record.[65] Section 102.03(B) made it a crime for state employees to disclose documents not designated as public record.[66] The Court determined that when examined together, sections 2151.85(D), 2151.85(F), and 102.03(B) assured the confidentiality of a minor's identity, since her identity would be known only by state employees and used only for administrative purposes.[67] Although *Ashcroft*[68] and *Bellotti II*[69] employed alternatives which provided complete anonymity, such as the use of a minor's initials or a pseudonym, the Court concluded that the difference between anonymity and confidentiality had no constitutional significance.[70] The Court stated that complete anonymity was not critical under *Bellotti II* and *Ashcroft*.[71] Therefore, the Court concluded that since reasonable steps had been taken to prevent the public from learning a minor's identity, Ohio's statute satisfied the anonymity requirement.[72]

Finally, because health risks and the expenses of an abortion increase as pregnancy progresses, *Bellotti II* required that a bypass procedure be completed quickly enough to provide a minor with a reasonable time period in which to obtain an abortion.[73] The Supreme Court

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61. *Id.*

62. *Akron Ctr.*, 110 S. Ct. at 2979 (citing OHIO REV. CODE ANN. § 2151.85(D) (Baldwin 1988)).

> (D) The court shall not notify the parents, guardian, or custodian of the complainant that she is pregnant or that she wants to have an abortion.

63. *Id.*

64. *Akron Ctr.*, 110 S. Ct. at 2979 (citing OHIO REV. CODE ANN. § 2151.85(F) (Baldwin 1988)).

> (F) Each hearing under this section shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to this section shall be kept confidential and are not public records under section 149.43 of the Revised Code.

65. *Id.*

66. *Akron Ctr.*, 110 S. Ct. at 2979 (citing OHIO REV. CODE ANN. §102.03(B) (Balwin 1988)).

> (B) No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official dutites which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

67. *Akron Ctr.*, 110 S. Ct. at 2979-80.

68. Planned Parenthood v. Ashcroft, 103 S. Ct. 2517 (1983).

69. Bellotti v. Baird (*Bellotti II*), 443 U.S. 622 (1979).

70. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972, 2980 (1990).

71. *Id.*

72. *Id.*

73. *Id.* at 2980 (citing *Bellotti II*, 443 U.S. at 644).

determined that H.B. 319 satisfied that requirement.[74] Even though the bypass procedure could take up to twenty-two days,[75] including weekends and legal holidays,[76] the Court felt that such an amount of time would rarely be necessary. It seemed unlikely that the judicial process would begin on a date including the number of weekends and legal holidays which would require the full twenty-two-day procedure. The Court ruled that this possibility was not enough to invalidate the statute on its face.[77]

Satisfied that H.B. 319 met the requirements of *Bellotti II*, the Court discussed whether additional requirements should be imposed on bypass procedures. First, the Court considered whether the constructive authorization provision in H.B. 319[78] was unconstitutional.[79] Under the Ohio statute, a minor was permitted to consent to her own abortion if the court did not grant a hearing within five business days after the minor filed her complaint. The court then was not required to issue an affirmative order authorizing a physician to proceed with a minor's abortion. The Supreme Court reasoned that a state could expect its judges to adhere to the statutory time requirements.[80] In the instant case there was no indication that the time limits would be disregarded.

The Court also found that a physician could determine whether constructive authorization had occurred through other means, such as the absence of the minor's case on the court's docket.[81] According to *Ashcroft*, Ohio was not required to add a constructive authorization provision to the statute. The Court acknowledged that Ohio included the provision to protect a minor's interest if the time limits were not met.[82]

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74. *Akron Ctr.*, 110 S. Ct. at 2981.

75. *Id.* 2980 (citing OHIO REV. CODE ANN. §§ 2151.85(B)(1), 2505.073(A) (Baldwin 1988)). The Court explained that H.B. 319 requires a court to make its decision within five business days after a minor files her complaint, requires the court of appeals to docket an appeal within four days after a minor files a notice of appeal, and requires the court of appeals to render a decision within five days after docketing the appeal. *Id.* Depending upon the interpretation of the word "days" used throughout the Ohio statutes, the bypass procedure could take up to twenty-two days. *Id.*

76. *Akron Ctr.*, 110 S. Ct. at 2981.

77. *Id.*

78. *Id.* at 2981 (citing OHIO REV. CODE ANN. § 2151.85(B)(1) (Baldwin 1988)).

> If the hearing required by this division is not held by the fifth business day after the complaint is filed, the failure to hold the hearing shall be considered to be a constructive order of the court authorizing the complainant to consent to the performance of inducement of an abortion without the notification of her parent, guardian, or custodian, and the complainant and any other person may rely on the constructive order to the same extent as if the court actually had issued an order under this section authorizing the complainant to consent to the performance or inducement of an abortion without such notification.

79. *Akron Ctr.*, 110 S. Ct. at 2981.

80. *Id.*

81. *See id.*

82. *Id.* at 2981.

The Court in *Bellotti II* indicated that a statute could require a minor to bear the burden of proof on the issues of her maturity and best interests.[83] The Ohio statute required a stronger proof of maturity and best interest by stating that a minor must present "clear and convincing evidence" of those characteristics.[84] This tougher standard was upheld by the Court in part because a minor could be represented by an attorney as well as a guardian ad litem, and because the proceeding was *ex parte*, where no one opposed the minor's testimony.[85] Because clear and convincing evidence was defined as an intermediary degree of proof, the Court determined that there was no precedent to require Ohio to lower its standard.

Finally, the Court found that the pleading procedure did not deny an unwary and unrepresented minor the opportunity to prove her case.[86] The statute required that a minor choose among three pleading forms. The first form alleged that the minor possess the maturity and the information to make the abortion decision herself, the second alleged that an abortion without parental notification is in her best interest, and the third alleged both maturity and best interest.[87] If a minor chose the first or second form, she would have the opportunity to prove only maturity or only best interest, but not both as required by *Bellotti II*.[88] The Court determined that even though a minor might be confused about which form to file, it was unlikely that a court would treat her choice of forms without an understanding for her unrepresented status at the time she filed her pleading.[89] Moreover, a minor was not bound by her initial choice of pleading forms since she could amend her pleading with the help of her appointed counsel.[90] The issue of time required for plea amendment was not addressed.

Justices Blackmun, Brennan, and Marshall dissented from the plurality opinion.[91] Justice Blackmun wrote the dissenting opinion, asserting that H.B. 319 was constitutionally unacceptable.[92] In arriving at that conclusion, he considered five aspects of the bypass procedure: the pleading requirement; the anonymity provided for the minor; the expedience with which the procedure is conducted; the constructive authorization provision; and the clear and convincing standard of proof.

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83. *Akron Ctr.*, 110 S. Ct. at 2981 (citing *Bellotti II*, 443 U.S. 622, 644 (1979)).
84. *Id.*
85. *Id.* at 2981-82.
86. *Id.* at 2982.
87. *Akron Ctr.*, 110 S. Ct. at 2982 (citing OHIO REV. CODE ANN. § 2151.85(C) (Baldwin 1988)).
88. *Id.*
89. *Id.*
90. *Id.* (citing OHIO REV. CODE ANN. § 2151.85(B)(2) (Baldwin 1988)).
91. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972, 2984 (1990) (Blackmun, J., dissenting).
92. *Id.* at 2991.

Justice Blackmun first discussed H.B. 319's pleading requirement. This requirement compelled a minor to choose among three pleading forms; one alleging maturity, another best interest, and a third alleging both maturity and best interest.[93] Only the third of these forms satisfied the demonstration of both maturity and best interest specified in *Bellotti II*. Justice Blackmun concluded that if the selection of forms prevented some minors from showing either that they were mature or that an abortion without parental notice was in their best interest, the pleading requirement was unconstitutional.[94]

Justice Blackmun further asserted that, because Ohio required a minor to sign her pleading form and to include the names of her parents, anonymity was not guaranteed.[95] The plurality stated that a minor's papers would not be considered public record and her identity would remain confidential.[96] Justice Blackmun argued that nothing existed in Ohio's statutes or the plurality opinion to ensure that records of abortion cases would be distinguished from all other records available to the public.[97] Ohio offered no devices to protect a minor's papers from accidentally being released to the public. Finally, Justice Blackmun asserted that true anonymity was necessary to furnish a minor with the opportunity to obtain an abortion since giving her name and the names of her parents would deter a minor from choosing the option of abortion.[98]

Justice Blackmun next addressed the expedition requirement. He stated that because a minor often does not learn of her pregnancy until late in her first trimester, time lost during that trimester is critical.[99] The Ohio bypass procedure allowed a maximun of twenty-two days for legal processing. Justice Blackmun maintained that a delay of three weeks could push a woman into her second trimester of pregnancy during which health risks, costs, and the legal regulations of abortion increased greatly.[100]

Justice Blackmun then considered possible delays created by the constructive authorization provision of H.B. 319.[101] That clause allowed a minor to consent to her own abortion if the court failed to grant a hearing within five business days after the minor filed her petition. It did not provide, however, for notification to a doctor that constructive authorization had occurred. Justice Blackmun contended

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93. *Id.* at 2985-86.
94. *Id.* at 2986.
95. *Id.* at 2987.
96. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972, 2979-80 (1990).
97. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972, 2987 (1990) (Blackmun, J., dissenting).
98. *Id.* at 2987-88.
99. *Id.* at 2988.
100. *Id. See also* Roe v. Wade, 410 U.S. 113, 150 (1973) and H.L. v Matheson, 450 U.S. 398, 439 n.25.
101. Akron Ctr. for Reprod. Health, 110 S. Ct. 2979, 2989 (1990) (Blackmun, J., dissenting).

that a physician, facing criminal penalties, would thus be deterred from performing an abortion on a minor.[102] Therefore, he concluded, the constructive authorization provision further frustrated a minor's right to medical treatment.[103]

Finally, Justice Blackmun addressed Ohio's standard of proof, which required clear and convincing evidence.[104] Justice Blackmun argued that a judge would base his decision on the maturity of a minor's statements and her demeanor in court since no other evidence would be presented.[105] Even without a heightened standard of proof, a minor would have to demonstrate to the judge that she was mature or that abortion was in her best interest.[106] Justice Blackmun stated that the clear and convincing standard of proof would substantially burden all minors seeking an abortion, but particularly those who had been abused.[107] The trauma of abuse could impede a minor's ability to clearly and convincingly present her case to strangers outside of her home.[108]

The dissent found that H.B. 319 did not provide due process for a pregnant minor seeking an abortion without having her parents notified. The "pleading trap," lack of anonymity, lack of expedition, and the heightened standard of proof unduly burdened a minor's right to seek an abortion.

ANALYSIS

On its face, Ohio House Bill 319 appears to offer protection to minors seeking abortion. The decision of the Supreme Court to uphold H.B. 319, however, deprives a minor of due process under the Fourteenth Amendment. Although the Supreme Court considered each provision in the Ohio statute separately and found each to be constitutional, the Court's analysis failed to consider the practical and social implications for a pregnant minor at each step of the bypass procedure. Nor did the Court consider the serious impediments placed on a minor by the statute as a whole. When compared to previous Supreme Court cases dealing with parental involvement, especially *Bellotti II*, the Court's ruling on the Ohio statute reflects a number of inconsistencies. The weight of these inconsistencies places an unfair burden on a minor seeking an abortion and arguably renders the statute unconstitutional, despite the Court's holding. In allowing Ohio to become one of thirty-three states to demand parental consent or notification,[109] the Court has enabled Ohio to regulate abortion for minors

102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 2990.
106. *Id.*
107. *Id.*
108. *Id.* at 2991.
109. Margaret Carlson, *Abortion's Hardest Cases*, TIME July 9, 1990, at 23.

so strictly that it is practically impossible for a minor to obtain an abortion without parental involvement. This analysis will demonstrate how the Court's interpretation of the individual provisions of the bypass procedure, as well as the statute in its entirety, fails to protect the rights of a pregnant minor.

Delivering the majority opinion in *Danforth*,[110] Justice Blackmun stated that "[c]onstitutional 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."[111] In *Roe v. Wade*,[112] the Court ruled that abortion falls within the constitutional right of privacy under the Fourteenth Amendment.[113] Guaranteed rights, once correctly determined, "always have more weight than any possible combination of opposing interests, private or public."[114] A minor's right to privacy should not be weighed against other interests any more than the same rights in the case of an adult woman.[115] According to Janet Benshoof, director of the American Civil Liberties Union/Reproductive Freedom Project, "[i]f anything, young women need privacy more than adult women because they have fewer resources to overcome state-imposed obstacles to abortion."[116] The Court, however, vascillates between allowing equal rights for minors and protecting minors. The issue of parental notification and consent in the case of teenage abortions exemplifies this dilemma.

Each year 400,000 teenage girls have abortions. While 75 percent of these young women share the decision with their parents, others are unable to do so.[117] Some, such as Becky Bell of Indiana,[118] will go to

110. Planned Parenthood v. Danforth, 428 U.S. 52 (1976).
111. *Id.* at 74.
112. 410 U.S. 113 (1973).
113. *Id.* at 154.
114. Laurence D. Houlgate, *The Child as a Person: Recent Supreme Court Decisions, in* WHOSE CHILD? 221, 228 (William Aiken & Hugh LaFollette eds., 1980).
115. *Id.* at 228-29.
116. *Supreme Court Decides Parental Notification Cases*, REPROD. RTS. UPDATE (ACLU/Reprod. Freedom Project, New York, N.Y.), June 27, 1990, at 2. Others argue that a minor needs her parents' guidance more than her privacy when seeking an abortion. In her article entitled *Unplanned Parenthood*, Fredrica Mathewes-Green maintains that "secret abortions" are based on a teenager's irrational, disproportionate fears of her parents discovering that she has failed or made a mistake. POL'Y REV. Summer 1991, at 31. Mathewes-Green asserts that, "[a]lthough a parent may be more or less stunned, worried, angered by the initial news, fierce love sweeps in and seeks to protect and guide the errant daughter through the difficult days ahead." *Id.* Mathewes-Green refers to only a "handful of bad parents" who abuse their children. *Id.* There are, however, many minors who are in serious danger of being abused when they anger or disappoint a parent. The American Civil Liberties Union has determined that, "minors accurately assess their family circumstances and base their decisions on mature analysis and judgement," and even minors from severely troubled families demonstrate maturity and sensitivity when seeking confidential health services. *Reproductive Freedom: The Rights of Minors*, ACLU BRIEFING PAPER (ACLU, New York, N.Y.), No. 7, at 2. The privacy interest of those minors must be protected.
117. Carlson, *supra* note 109, at 23-24.
118. *Id.* at 22.

great lengths to forestall parental disapproval or confrontation.[119] To avoid the parental consent law in her own state, Becky traveled to a neighboring state for an illegal abortion. Becky, age 17, died.[120]

Although many minors are not considered mature by society, and while sexual activity is not an indicator of maturity,[121] at least half the young people in the United States between the ages of 15 and 19 are sexually active, and 24 percent of teenage girls will become pregnant by age 18.[122] The privacy of a sexually-active teenage girl was addressed by Justice Blackmun in *Danforth*. He emphasized that "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."[123] A prominent Washington psychiatrist explained that the secrecy of adolescent sexual activity is embedded in certain cultural norms.[124] He maintained, "[p]arents and children don't want to know about each other as sexual beings. Sex is the point of separation, the country into which a parent does not travel with a child."[125]

The requirement of parental notification and consent implies a world in which parents care about their children and that pregnant teenagers will be able to communicate with and receive support from the significant adults in their lives. Justice Kennedy stated in *Webster v. Reproductive Health Services*,[126] that to fail to inform parents of a child's abortion "is to risk, or perpetuate, estrangement or alienation from the child when she is in the greatest need of parental guidance and support."[127] However, even Kennedy acknowledged that there are

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119. *Reproductive Freedom: The Rights of Minors*, ACLU BRIEFING PAPER (ACLU, New York, N.Y.), No. 7, at 1. A minor may forestall informing her parent that she is pregnant for fear that her parent may respond with physical or sexual violence. A minor may be afraid that enlightening her parents as to her condition may aggravate a parent's unstable mental or physical condition or encourage a parent's drug and alcohol abuse. The American Civil Liberties Union publication stated that a minor's "right to privacy must come first since she is in the best position to know whether she is in danger." *Id.* at 1.

120. Frederica Mathewes-Green, *Unplanned Pregnancy*, POL'Y REV. Summer 1991, at 31. Although autopsy results are controversial, the death of Becky Bell argues against parental notification. Some medical experts argue that Becky died from causes not related to her abortion. *Id.* Becky, however felt compelled to risk her life in obtaining an illegal abortion rather than sharing her situation with her parents.

121. The Supreme Court has never clearly defined maturity. A limited discussion of maturity appears in the majority and dissenting opinions of *H.L. v. Matheson*, 450 U.S. 398 (1981). The majority opinion implied, but did not explicitly state, that maturity occurs upon emancipation from one's parents. The dissent, on the other hand, indicated that minors are considered mature if they are "capable of appreciating its [an abortion's] nature and consequences." *Id.* at 451 n.49. In *Akron v. Akron Center*, the Court did determine that "maturity" cannot be determined by establishing an age cutoff below which minors are presumed to be immature. 462 U.S. 419 (1983).

122. Carlson, *supra* note 109, at 24.

123. Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976).

124. Carlson, *supra* note 109, at 24.

125. *Id.*

126. 109 S. Ct. 3040 (1990).

127. Carlson, *supra* note 109, at 22 (citing Webster v. Reprod. Health Services,

times, such as in cases of rape and incest, when "notifying one or both parents will not be in the minor's best interest."[128] According to *Bellotti II*, for a minor to obtain an abortion on her own, she must be given the opportunity to demonstrate maturity and best interest.[129] It is in regard to those two issues that the Supreme Court in *Akron Center for Reproductive Health* upholds Ohio's first legal roadblock.

Pleading

Ohio first attempts to deter a minor from obtaining an abortion by requiring the selection of one of three printed forms on which she must file her pleading. If a minor chooses the form alleging maturity only, or the form alleging best interest only, she will not have the opportunity to prove both issues as required in *Bellotti II*.[130] Under the Ohio statute, if a minor alleges maturity and the court finds her immature, the court must dismiss her complaint.[131] A similar provision holds true for the best interest allegation.[132] The Supreme Court found that this provision was constitutional, stating that a court would take into consideration a minor's unrepresented status.[133] The Supreme Court assumes that a state court, sympathetic to a minor's lack of representation, would allow a minor to amend her pleading once the court found that a minor did not prove the initial issue pleaded. However, neither the Ohio statute nor the Supreme Court imposes a requirement that a state court must determine whether a

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109 S. Ct. 3040 (1990)).

128. *Id.*

129. Bellotti v. Baird (*Bellotti II*), 443 U.S. 622, 644 (1979).

130. *Id.* at 647. A minor would be able to amend her pleading with the help of an attorney. She would not have the opportunity to prove both issues, however, if the attorney felt that amendment was not necessary or believed that the minor would prevail on the single issue pleaded. Time expended in the amendment process also becomes a factor (see discussion of expediency).

131. Ohio v. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972, 2982 (1990) (citing OHIO REV. CODE ANN. § 2151.85(C)(1) (Baldwin 1988)).

> (C)(1) If the complainant makes only the allegation set forth in division (A)(4)(a) of this section and if the court finds, by clear and convincing evidence, that the complainant is sufficiently mature and well enough informed to decide intelligently whether to have an abortion, the court shall issue an order authorizing the complainant to consent to the performance or the inducement of an abortion without the notification of her parents, guardian, or custodian. If the court does not make the finding specified in this division, it *shall* dismiss the complaint.

132. *Id.* (citing OHIO REV. CODE ANN. § 2151.85(C)(2) (Baldwin 1988)).

> (C)(2) If the complainant makes only the allegation set forth in division (A)(4)(b) of this section and if the court finds, by clear and convincing evidence, that there is evidence of a pattern of physical, sexual, or emotional abuse of the complainant by one or both of her parents, her guardian, or her custodian, or that the notification of her parents, guardian, or custodian otherwise is not in the best interests of the complainant, the court shall issue an order authorizing the complainant to consent to the performance or inducement of abortion without the notification of her parents, guardian, or custodian. If the court does not make these findings specified in this division, it *shall* dismiss the complaint.

133. *Akron Ctr.*, 110 S. Ct. at 2982. Unless she has previously retained an attorney, a minor will not be appointed counsel until after she has filed her pleading.

minor was represented by counsel when she filed her pleading. A court that strictly interprets the statutory provisions for dismissal would not take into account whether a minor was represented by counsel when she filed her pleading. Thus, because Ohio's statute allows a minor's pleading to be dismissed without providing an opportunity for a minor to prove both issues, it violates constitutionally mandated requirements set forth in *Bellotti II*.

Anonymity

Another concern with the Supreme Court's upholding of the Ohio bypass procedure is the lack of anonymity. The Court reasoned that a combination of Ohio statutes provided sufficient confidentiality to meet the anonymity requirement set forth in *Bellotti II*.[134] Anonymity, however, is a broader concept than confidentiality. In *Thornburgh v. American College of Obstetricians*, the Supreme Court found that a "confidential audience" may consist of many people.[135] On the other hand, when a minor's identity is kept anonymous, no one knows her true identity.[136] In *Bellotti II*, the Supreme Court required that a judicial bypass procedure "assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity."[137] In the instant case, the Court found that although Ohio's bypass procedure requires a minor to sign the pleading form with her full name, her identity would remain confidential. This conclusion is inconsistent with the requirement of anonymity set forth in *Bellotti II*. A minor who is faced with the prospect of many people finding out that she is pregnant and who wants an abortion will find another alternative.[138]

Expedience

The expedience with which Ohio's bypass procedure is conducted also has a detrimental effect upon a minor's opportunity to choose abortion. Although the Court has stated that a "pregnant adolescent . . . cannot preserve for long the possibility of aborting, which effec-

134. *See Akron Center*, 110 S. Ct. at 2980 (The Court admitted that confidentiality differs from anonymity, but stated that the difference has no constitutional significance. The Court held that complete anonymity was not critical).

135. 476 U.S. 747, 766 (1983).

136. In his dissent, Justice Blackmun quoted the definition of anonymity from Webster's Ninth New Collegiate Dictionary 88 (1983) as "not named or identified." *Akron Center*, 110 S. Ct. at 2987 (Blackmun, J., dissenting).

137. *Akron Ctr.*, 110 S. Ct. at 2986 (quoting Bellotti v. Baird (*Bellotti II*), 443 U.S. 622, 644 (1979)).

138. A minor who is attempting to obtain an abortion and is refused one by a court, or who feels that she will not be able to obtain an abortion because her identity will be known or the judicial procedure will take too long, has few alternatives. A minor who has decided that an abortion is her only option may solicit the services of an illegal abortionist or attempt to abort herself. Serious health risks, even death, may result. *See* Henry P. David, *Unwantedness: Demographic and Psychosocial Perspectives in*, BORN UNWANTED: DEVELOPMENTAL EFFECTS OF DENIED ABORTION 23, 29-30 (Henry P. David, Ph.D. et al. eds, 1988).

tively expires in a matter of weeks from the onset of pregnancy," the Court found the provision of twenty-two days, or three weeks, for Ohio's bypass procedure was expedient and constitutional.[139] The Court believed that few, if any, minors would need the full amount of time allowed by the statute. It therefore based its time limitation upon a "worst-case" scenario in regard to expedience. That worst-case interpretation stemmed from the consideration of temporal factors affecting the courts, such as weekends and legal holidays. The Court's decision failed to adequately consider pragmatic, logistical concerns in a teenager's life and overlooked certain medical considerations.

These concerns and considerations are exacerbated by the fact that an adolescent may be slower than an adult woman to recognize her pregnancy.[140] Once the possibility of pregnancy is acknowledged, a minor may engage in a process of denial by attributing the pregnancy to other illnesses, such as the flu.[141] A minor may also be uncertain of whom to turn to for help and may fear a confrontation with her parents.[142] Even if the minor has realized and accepted her pregnancy, she may delay its resolution for a substantial amount of time.[143]

The Court did not adequately consider the pragmatic concerns for a pregnant minor which include the availability of money, contacting a lawyer, and delays inherent in a judicial bypass system. A minor who is financially dependent on her parents but who does not want them to know that she is pregnant and seeking an abortion must save her own money in order to afford the process. Her concern with monetary issues might cause her to wait to initiate the bypass procedure. Should the delay for financial preparation, coupled with the length of time inherent in the bypass procedure, extend into the second trimester of her pregnancy, the cost of abortion will rise and financing may become an insurmountable burden.[144]

The Court did not recognize other delays which may occur when a minor attempts to contact an attorney. A minor's initial reluctance at sharing such intimate information may be compounded by the problems of obtaining the privacy needed to make a confidential phone call.[145] Whether or not a minor has taken the initiative of contacting her own attorney, she may experience delays inherent in the judicial bypass system itself. Such delays may result from scheduling problems and technical and bureaucratic complications. For example,

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139. *Akron Ctr.*, 110 S. Ct. at 2980-81.

140. Akron Ctr. for Reprod. Health v. Slaby, 854 F.2d 852, 867 (6th Cir. 1989).

141. Nancy E. Adler & Peggy Dolcini, *Psychological Issues in Abortion for Adolescents, in* ADOLESCENT ABORTION 74, 76 (Gary B. Melton ed., 1986).

142. *Id.* at 75.

143. *Id.* at 76.

144. *See* Nancy Felipe Russo, *Adolescent Abortion: The Epidemiological Context, in* ADOLESCENT ABORTION 40, 58 (Gary B. Melton ed., 1986).

145. J. Shoshanna Ehrlich & Jamie Ann Sabino, *A Minor's Right to Abortion—The Unconstitutionality of Parental Participation in Bypass Hearings*, 25 NEW ENG. L. REV. 1185, 1204 (1991).

it may take several days for an attorney to schedule a hearing after being contacted by a minor.[146]

Additionally, the Supreme Court did not sufficiently consider that health risks associated with abortion increase significantly when a woman moves into her second trimester of pregnancy. In *Hodgson v. Minnesota*, the district court stated that a "[d]elay of any length in performing an abortion increased the statistical rate of mortality and morbidity."[147] A state's interest in an individual's health also increases significantly when a woman moves into the second trimester of pregnancy.[148] Thus, a state may regulate second-trimester abortions more strictly. Such additional regulations augment the emotional turmoil of a minor.

Constructive Authorization

Realizing that from time to time a state court might be unable to adhere to statutory time requirements, Ohio included a constructive authorization provision. The purpose of the provision was to assure expediency in the event that the court failed to grant a hearing within five business days after a minor filed her complaint. In such an event, a doctor could proceed with the abortion under the legal assumption that the minor had consented to her own abortion. Rather than expediting an abortion, however, this provision created resistance on the part of some doctors and further delayed the operation.

The Supreme Court found this provision to be constitutional, reasoning that Ohio could expect its courts to adhere to time limitations imposed by the statute and that there was no indication that those limitations would be disregarded.[149] Essentially the Court believed the provision acted as little more than a legal safeguard for minors and would probably never be invoked. This reasoning by the Supreme Court, however complimentary to Ohio's judicial system, seems in opposition to Ohio's own presumption that delays are inherent in its legal system.

Another limitation, created by Ohio itself and upheld by the Supreme Court, was the failure to require a court to issue an affirmative order to a doctor stating that constructive authorization had occurred. The Supreme Court determined that the lack of an affirmative order presented no constitutional defects, concluding that a physician could determine whether constructive authorization had occurred through

146. *See id.* at 1203.

147. Hodgson v. Minnesota, 648 F. Supp. 756, 765 (D. Minn. 1986).

148. During the second trimester of pregnancy, the state's interest in protecting the health of a pregnant woman becomes compelling and the state may enact legislation which is narrowly and carefully drawn to promote this goal. Roe v. Wade, 410 U.S. 113, 154-55 (1973).

149. Ohio v. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972, 2981 (1990).

other means.[150] Without an order from the court, however, a physician, who could face criminal sanctions, would be reluctant to perform an abortion on a minor. In *Glick v. McKay*,[151] the Ninth Circuit Court determined that without a tangible order to safeguard a doctor from criminal penalties, the doctor would be unwilling to proceed with an abortion.[152] Additionally, a physician who is uncertain whether constructive authorization has occurred may delay performing an abortion on a minor. Thus, precious days may be wasted. The time lost while the doctor is waiting to determine if constructive authorization has occurred may cause a minor to lose her opportunity to obtain an abortion altogether. In this circumstance, the Court failed to consider the natural reluctance of a medical practitioner to act without specific, tangible authorization from a court.

Clear and Convincing Evidence Standard

Finally, the Supreme Court upheld Ohio's requirement that a minor must meet a heightened "clear and convincing" evidence standard.[153] *Bellotti II* requires only that a minor *convince* the trier of fact as to her maturity and best interest, but does not specify precisely what evidence standard should be used.[154] The Supreme Court reasoned that Ohio could impose its higher standard because the bypass proceeding was ex parte and because a minor could be represented by counsel, as well as a guardian *ad litem*.[155] The Court's analysis, however, failed to consider that, while best interest is usually associated with circumstances of abuse, no clear definition exists of what constitutes maturity.[156] Without a clear definition, courts could vary significantly as to what factors are involved in determining maturity.

Given the ambiguity of its definition, a minor could be hindered in attempting to prove clearly and convincingly her maturity. In *Akron*, the Court established that for a minor to give effective informed consent, she must be capable of understanding the nature and purpose of the procedure, its material risks and the available alternatives.[157] To show that she possesses the maturity to make the abortion decision herself, a minor could also be required to show that she has prior work experience, that she is able to manage her personal finances, that she understands the gravity of her alternatives, and that she has considered each alternative rationally and independently. Al-

150. *Id.*
151. 616 F.2d. 322 (D. Nev. 1985), *aff'd*, 937 F.2d 434 (9th Cir. 1991).
152. *Id.* at 325.
153. *Akron Ctr.*, 110 S. Ct. at 2981.
154. Bellotti v. Baird (*Bellotti II*), 443 U.S. 622, 644 (1979).
155. *Akron Ctr.*, 110 S. Ct. at 2981-82.
156. *See supra* note 121.
157. Akron v. Akron Ctr., 462 U.S. 416, 439-40 (1983). This test is known as the "mature minor" rule. *Id.*

though a minor is not required to show these qualities by the Ohio statute, a court could reasonably look to these characteristics in determining maturity. Justice Blackmun pointed out in his dissent in the instant case that "[e]ven if the judge is satisfied that the minor is mature or that an abortion is in her best interest, the court may not authorize the procedure unless it additionally finds that the evidence meets a 'clear and convincing' standard of proof."[158] For a young woman, still dependent on her parents, proving each of these criteria clearly and convincingly is unduly burdensome.

CONCLUSION

A state-imposed burden for a minor seeking an abortion exists at each stage of Ohio's bypass procedure. Each phase of the procedure passed the scrutiny of the Supreme Court, however weak the Court's analysis. The Court did not contemplate the burden placed on a pregnant minor by the procedure as a whole. Instead, it considered H.B. 319 in a provision-by-provision manner and decided that the bypass procedure is constitutionally acceptable. By applying the *Bellotti II* requirements loosely to each provision of the bypass procedure, the Court reached an unacceptable result. A scared or desparate young woman would find each step of the bypass procedure truly burdensome. The Supreme Court's analysis of Ohio Amended Substitute House Bill 319 allows Ohio to regulate abortion for minors so strictly as to practically eliminate the possibility entirely.

STEPHANIE R. BRYANT

158. Ohio v. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972, 2990 (1990) (Blackmun, J., dissenting).