

5-15-1980

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David C. Boatwright

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Recommended Citation

David C. Boatwright *Where for Art Thou Danforth: Bellotti v. Baird*, 7 Pepp. L. Rev. Iss. 4 (1980)
Available at: <https://digitalcommons.pepperdine.edu/plr/vol7/iss4/8>

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Where for Art Thou Danforth: *Bellotti v. Baird*

The author's focus is upon a Supreme Court opinion dealing with the constitutional parameters of a minor's right to make an independent decision with respect to abortion. The majority, in an attempt to balance the often conflicting interests of the minor, the minor's parents, and the state, sets forth the minimum requirements with which parental consent statutes must comply. The author emphasizes the significance of the high court's plurality split regarding this issue, and cautions the practitioner as to the possibility of inconsistent rulings on such statutes in the future.

I. INTRODUCTION

The right of a woman to have an abortion in the United States is well established and derives support from a massive body of judicial pronouncements and scholarly treatises.¹ In *Bellotti v. Baird*,² the United States Supreme Court reaffirmed a prior decision that a minor has the right to seek an abortion and may do so without parental consent. However, the *Bellotti* decision does not significantly alter the body of authority supporting abortion inasmuch as it does not deal primarily with the right to abortion. Rather, it represents a significant development in the area of a minor's constitutional right of privacy.

Bellotti, a plurality decision, is suspect in value because a measure of confusion exists regarding the impact and intent of the decision and which opinion will be followed.³ If the opinion of Justice Powell is followed in subsequent decisions,⁴ *Bellotti* will restrict the impact of the landmark decision in *Planned Parenthood v. Danforth*.⁵ Conversely, if the opinion of Justice

1. *Roe v. Wade*, 410 U.S. 113 (1973). See also notes 39 and 55 *infra*.

2. 99 S. Ct. 3035 (1979).

3. Chief Justice Burger and Justices Stewart and Rehnquist joined in the opinion of Justice Powell. Justices Blackmun, Brennan and Marshall joined in the opinion of Justice Stevens. Justice White dissented.

4. See notes 102-04 and 109-12 *infra*, and accompanying text.

5. 428 U.S. 52 (1976). Under review by the Court in *Danforth* was a parental consent abortion statute similar to the statute scrutinized in the *Bellotti* decision. See notes 14 and 89 *infra*. The Court, in *Danforth*, held that the parental consent provision of the statute was unconstitutional because it was overbroad. The Court stated: "[t]he State does not have the constitutional authority to give a third party an *absolute* and possibly arbitrary veto over the decision of the physician and his [minor] patient to terminate the patient's pregnancy regardless of the reason for withholding the consent." (emphasis added). 428 U.S. at 74.

Stevens is followed,⁶ the impact of *Bellotti* will be minimal, amounting to little more than a reaffirmation of the *Danforth*⁷ precedent.

Justice Powell's analysis involves a balancing of the procedural due process rights of the minor to make an independent abortion decision and the procedural due process rights of the state and of parents to direct the upbringing of minors. The substantive due process aspects of *Bellotti* do not appear to have been of critical importance to either Justice Powell or Justice Stevens, neither of whom discussed the appropriate level of review to be applied. However, when specific portions⁸ of the Court's decisions in *Bellotti*, *Danforth*, and *Carey v. Population Services International*⁹ are read in conjunction, it seems that the Court is applying a level of review less stringent than traditional "strict scrutiny"¹⁰ but with more bite than the traditional "rational basis"¹¹ standard.

This note will examine the minor's right of privacy as it arose in the *Bellotti* case. Discussion will focus on the appropriate constitutional standard of review to be applied to legislation which restricts such rights of privacy, and on the way in which the rights of the state and of the parents relate to the rights of the minor in this area. Thereafter, the possible implications of the *Bellotti* decision will be noted.

The significance of the *Bellotti* decision lies in the possibility that Justice Powell's opinion will, in the future, be followed by the Court and in the possibility that state legislatures will draft or amend statutes in accordance with the opinion's advisory nature. The discussion in this note will, therefore, be developed with these possibilities in mind.

II. FACTUAL BACKGROUND

At the time this action arose,¹² Mary Moe, the central figure in the case, was sixteen years of age and approximately eight weeks pregnant.¹³ Her desire to obtain an abortion without her parents'

6. 99 S. Ct. 3053.

7. 428 U.S. 52 (1976).

8. See notes 50-51, 62, 59-62 *infra*, and accompanying text.

9. 431 U.S. 678 (1977) (neither the state nor the minor's parents can prevent the distribution of contraceptives to minors because the overriding right of privacy in connection with decisions affecting procreation extends to minors as well as adults).

10. See note 54 *infra*, and accompanying text.

11. See note 53 *infra*, and accompanying text.

12. *Bellotti v. Baird*, 393 F. Supp. 847 (D. Mass. 1975) *vacated*, 438 U.S. 132 (1976).

13. *Id.* at 850.

knowledge was precluded by a Massachusetts statute¹⁴ which required her to procure the prior consent of both of her parents.¹⁵ Mary brought an action in the United States District for the District of Massachusetts to declare the statute unconstitutional as a denial of her due process rights and to allow her to terminate her pregnancy without the requirement of parental consent.¹⁶ Upon an analysis of Mary's situation and other surrounding circumstances, the district court allowed the suit to be brought as a class action after a determination that Mary was "fairly representative of a substantial class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent and who do not wish to involve their parents."¹⁷ Thereafter, the dis-

14. MASS. GEN. LAWS ANN. ch. 112, § 12S (West Supp. 1979) (formerly § 12P) reads as follows:

If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both the parents have died or have deserted their family, consent of the mother's guardian, or any person who has assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve U.

15. For other states requiring parental consent, see 1979 FLA. SESS. LAW SERV. ch. 79-302, § 1, 458.505(4)(a) (tent. codified at 390.001) (previously codified in FLA. STAT. ANN. § 458.22(3)(b)) (West Supp. 1979) (repealed); IDAHO CODE § 18-609 (Supp. 1977); IND. CODE § 35-1-58.5-2 (1976) (amended 1978); NEB. REV. STAT. § 28-333 (Supp. 1979); N.D. CENT. CODE § 14-02.1-03 (Supp. 1979); OR. REV. STAT. § 435.435(a) (1977); PA. STAT. ANN. tit. 35, § 6603(b) (Purdon 1977); S.D. COMPILED LAWS ANN. § 34-23A-7 (1977); WASH. REV. CODE ANN. § 9.02-070 (1977).

16. 393 F. Supp. at 850. Mary's decision was based upon three factors: an apprehension of what her parents may have done to her, a fear of what her father might have done to her boyfriend, and a desire to spare the feelings of her parents. Mary's father had previously commented to her, in connection with a similar incident involving a friend of Mary's, that he would have evicted the girl and killed the boy. Other plaintiffs included William Baird, Parents Aid Society, Inc., and Gerald Zupnick, M.D. *Id.* at 849.

17. *Id.* at 850. The district court also determined Mary to have standing because "[s]he exhibit[ed] 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of the issues.'" *Id.* at 851 quoting from *Baker v. Carr*, 369 U.S. 186, 204 (1962). See also *FED. R. CIV. P.* 23.

strict court held the Massachusetts statute¹⁸ unconstitutional because, within the particular fact situation presented, the interests of the minor outweighed any competing interests that her parents or the state might have had.¹⁹ The court's rationale indicated that once a child is born to a minor, it is the minor, not the minor's parents, who must be responsible for the child's welfare.²⁰ The appellants²¹ sought immediate review from the United States Supreme Court, which noted probable jurisdiction.²² In its initial confrontation with the issues presented, the Court was unable to discern whether the Massachusetts statute was to be construed as establishing an absolute parental veto,²³ held unconstitutional in *Danforth*,²⁴ or whether parental consultation was merely a suggested practice, allowing mature minors to give an independent consent.²⁵ The Court, through Justice Blackmun stated: "[it] is sufficient that the statute is susceptible of the interpretation offered by the appellants, and we so find, and that such an interpretation would avoid or substantially modify the federal constitutional challenge to the statute" ²⁶ Consequently, the Supreme Court vacated the judgment of the district court and remanded the case so that the Massachusetts Supreme Court, upon certification from the district court, could answer appropriate questions concerning the interpretation of the statute.²⁷

In *Baird v. Attorney General*,²⁸ the Massachusetts Supreme Court authoritatively construed the important aspects of the statute.²⁹ Based upon this interpretation,³⁰ the federal district court

18. MASS. GEN. LAWS ANN. ch. 112, § 12S (West Supp. 1979). See also note 14 *supra*.

19. 393 F. Supp. at 857. The Court further stated "[i]t is difficult to think of any self interest that a parent would have that compares with those significant interests of the pregnant minor." *Id.* at 856.

20. *Id.*

21. The appellants consisted of Francis Bellotti, Attorney General of the Commonwealth; Garrett Byrne, district attorney for the County of Suffolk; and the district attorneys of all other counties in Massachusetts. Kathleen Roth was permitted to intervene on behalf of, and as a representative of, Massachusetts parents having unmarried minor daughters who are, or might become, pregnant. *Id.* at 849-50.

22. *Bellotti v. Baird*, 423 U.S. 982 (1975).

23. *Bellotti v. Baird*, 428 U.S. 132, 145-46 (1976).

24. 428 U.S. 52 (1976).

25. 428 U.S. at 145-46.

26. *Id.* at 148.

27. *Id.* at 151-52.

28. 371 Mass. 741, 360 N.E.2d 288 (1977).

29. The Massachusetts Supreme Court concluded that the minor's parents must consider only their daughter's best interests when making the determination as to whether or not to grant their consent. *Id.* at 745-46, 360 N.E.2d at 292-93. The court also held that while the statutory standard for a judicial order granting consent was the "good cause" standard, in applying the standard the judge must disregard all parental objections and other considerations which were not based

again held the statute unconstitutional and issued an order permanently enjoining its enforcement.³¹ Once more appellants sought, and were granted, review from the United States Supreme Court.³² The Court found the statute to be unconstitutional as an undue burden on a minor's right to obtain an abortion.³³

III. THE SUPREME COURT'S ANALYSIS

Justice Powell devoted the bulk of his analysis to balancing the relative interests of the child, the parent, and the state.³⁴ It was

exclusively on what would serve the minor's best interest. *Id.* at 476, 360 N.E.2d at 293. Even if the judge makes the determination that the minor is capable of giving informed consent, he may still withhold judicial consent if he determines that the abortion would not be in the minor's best interests. *Id.* A minor must attempt to obtain parental consent as an absolute prerequisite to procuring judicial consent. *Id.* at 750, 360 N.E.2d at 297. The disposition of § 12S cases will be prompt and the names of the child and her parents will be held in confidence. *Id.* at 750-51, 360 N.E.2d at 297-98. Neither the Massachusetts "mature minor" rule nor the fact that certain minors are permitted to give valid consent to other modes of medical treatment create exceptions to § 12S. *Id.* at 750, 360 N.E.2d at 298-99.

30. For a discussion of the disposition of *Baird v. Attorney General*, 371 Mass. 741, 360 N.E.2d 288, see Case Notes, 16 J. FAM. L. 116 (1977).

31. *Baird v. Bellotti*, 450 F. Supp. 997, 1006 (D. Mass. 1978). The district court identified three aspects of the statute, as construed by the Massachusetts Supreme Court, which rendered it unconstitutional as overbroad. First, the requirement that a child's parents be given notice, if available, as an absolute condition to the minor's eligibility for procuring an abortion was held invalid because it gave no consideration to whether the child was capable of giving informed consent. *Id.* at 1001. Second, § 12S did not allow for a judicial determination as to whether or not parental notice would be in the child's best interests. *Id.* at 1003. This was viewed by the district court as a denial of due process "liberty" and equal protection because there was no "reasonable basis" for distinguishing between a minor capable of giving an informed consent and an adult. *Id.* at 1004. Finally, § 12S was determined to create a "chilling effect" on a minor's rights because it failed to inform parents that they may only consider the minor's best interests in making the consent decision. *Id.* The court also noted that the statute was a prominent public issue, and that the legislature was aware of its judicial course. The court stated:

Under these circumstances it may be thought that the legislature prefers the chilling effect rather than the 'terms that the ordinary person exercising ordinary common sense can sufficiently understand' . . . This in turn evokes the statement of the Court in *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977). 'When there is proof that a discriminatory purpose has been a motivating factor in the decision . . . judicial deference is no longer justified.' This response seems particularly warranted when the overbreadth serves no other purpose. *Id.* at 1005 (citations omitted).

32. *Bellotti v. Baird*, 99 S. Ct. 307 (1978).

33. See note 37 *infra*, and accompanying text.

34. 99 S. Ct. at 3043-47. For excellent discussions of this legal trichotomy, see generally Garvey, *Child, Parent, State, and The Due Process Clause: An Essay On*

his conclusion that there are situations, as found in *Bellotti*, where the due process rights of a minor outweigh parental and state authority. The *Danforth* decision had relied on a similar balancing³⁵ with similar results.³⁶ Thus, while Justices Stevens and Powell are in accord with regard to the ultimate result in *Bellotti*,³⁷ Justice Powell modified *Danforth* by setting forth the minimum requirements with which a parental consent abortion statute must comply and, in doing so, created a split in the Court's reasoning.³⁸ This split shall be examined in more detail following a discussion of the level of review used by Justices Stevens and Powell in *Bellotti*.

A. The Appropriate Level of Review

Although Justice Powell never explicitly addresses the minor's right of privacy,³⁹ he does state that a "child, merely on account of

The Supreme Court's Recent Work, 51 S. CAL. L. REV. 769 (1978); Comment, *The Minor's Right of Privacy: Limitations on State Action After Danforth and Carey*, 77 COLUM. L. REV. 1216 (1977); Comment, *Parental Consent Abortion Statutes: The Limits of State Power*, 52 IND. L.J. 837 (1977); Comment, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305 (1974).

35. 428 U.S. at 72-75.

36. As in *Bellotti*, the Court determined that the minor's right to decide in favor of an abortion was superior to the interests of the state and of the parents. 428 U.S. at 74-75.

37. This is because Justice Stevens felt that *Bellotti* should have been governed by *Danforth*. Thus, even though the means of reaching their results differed, Justices Stevens and Powell did reach the same result; that the statute was unconstitutional as an undue burden on a minor's right to obtain an abortion. For Justice Powell's discussion, see 99 S. Ct. at 3048. For Justice Stevens' discussion, see 99 S. Ct. at 3054-55.

38. *Id.* at 3054-55.

39. Although a fundamental right to privacy is not specifically provided for in the Federal Constitution, the Supreme Court has recognized that such a right is implicit within various amendments: *e.g.*, the first amendment, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); the fourth and fifth amendments, *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Katz v. United States*, 389 U.S. 347, 350 (1967); the ninth amendment and the penumbra of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965); or in the concept of personal liberty guaranteed by the fourteenth amendment, *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

Most lower courts confronting statutory provisions requiring parental consent as a prerequisite to a minor's right to procure an abortion have held them unconstitutional as an undue burden on a minor's right of privacy. See, *e.g.*, *T—H— v. Jones*, 425 F. Supp. 873, 881 (D. Utah 1975), *aff'd mem.*, 425 U.S. 986 (1976); *Doe v. Zimmerman*, 405 F. Supp. 534, 537-38 (M.D. Pa. 1975); *Planned Parenthood Ass'n. v. Fitzpatrick*, 401 F. Supp. 554, 566 (E.D. Pa. 1975), *aff'd*, 99 S. Ct. 675 (1979); *Foe v. Vanderhoof*, 389 F. Supp. 947, 955 (D. Colo. 1975); *Wolfe v. Schroering*, 388 F. Supp. 631, 638 (W.D. Ky. 1974), *aff'd in part and rev'd in part*, 541 F.2d 523 (6th Cir. 1976); *Coe v. Gerstein*, 376 F. Supp. 695, 698 (S.D. Fla. 1973), *aff'd sub nom.*, *Poe v. Gerstein*, 517 F.2d 787, 794 (5th Cir. 1975), *aff'd mem.*, 428 U.S. 901 (1976); *Doe v. Rampton*, 366 F. Supp. 189, 203 (D. Utah), *vacated*, 410 U.S. 950 (1973); *State v. Koome*, 84 Wash. 2d 901, 904, 530 P.2d 260, 263 (1975); *Ballard v. Anderson*, 4 Cal. 3d 873, 878, 484 P.2d 1345, 1348, 95 Cal. Rptr. 1, 4 (1971).

his minority, is not beyond the protection of the Constitution,"⁴⁰ and that, in terms of constitutional protection of the minor against "deprivations of liberty or property interests by the state . . . ,"⁴¹ the rights of a child are "*virtually* coextensive with [those] of an adult."⁴² Thus, in consideration of the *Meyer v. Nebraska*⁴³ holding that a right of privacy was implicit within the concept of personal liberty as guaranteed by the fourteenth amendment,⁴⁴ it would seem that Justice Powell intended his analysis to encompass a right of privacy.

Justice Stevens directly addressed the right of privacy issue by stating that "[t]he constitutional right to make the abortion decision affords protection to both of the *privacy* interests recognized . . ."⁴⁵ by the Court in *Whalen v. Roe*.⁴⁶ These two interests are "avoiding disclosure of personal matters . . ."⁴⁷ and "the interest in independence in making certain kinds of important deci-

40. 99 S. Ct. 3043. See *In re Gault*, 387 U.S. 1, 13 (1967) where the Court stated: "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."

41. 99 S. Ct. at 3043.

42. *Id.* (emphasis added). See note 94 *infra*, and accompanying text. As to Constitutional rights which have previously been held to be applicable to minors as well as adults, see generally, *Ingraham v. Wright*, 430 U.S. 651 (1977) (corporal punishment of school children implicates constitutionally protected liberty interest); *Breed v. Jones*, 421 U.S. 519 (1975) (double jeopardy prevents prosecution of a minor for the same crime in a juvenile court and an adult court); *Goss v. Lopez*, 419 U.S. 565 (1975) (children may not be deprived of their property and liberty interests without due process); *In re Winship*, 397 U.S. 358 (1970) (a minor is entitled to the procedural safeguards of the fourteenth amendment and of the fifth amendment); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (minor students have first amendment rights); *In re Gault*, 387 U.S. 1 (1967) (fourteenth amendment and Bill of Rights are not for adults alone); *Gallegos v. Colorado*, 370 U.S. 49 (1962) (minor has right against police obtaining coerced confessions); *Brown v. Board of Education*, 347 U.S. 483 (1954) (equal protection requires that there be no racial discrimination in public schools); *Haley v. Ohio*, 332 U.S. 596 (1948) (minor has right against police obtaining coerced confessions); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (minors have first amendment rights to freedom of speech). See also N. WEINSTEIN, *MINORS AND THE LAW* 38 (1978); N. WEINSTEIN, *SUPREME COURT DECISIONS AND JUVENILE JUSTICE* 26 (1973).

43. 262 U.S. 390 (1923) (Nebraska state law prohibiting the teaching of any language other than English, to any child who has not yet passed the eighth grade, invades the liberty guaranteed by the fourteenth amendment and unconstitutionally exceeds the power of the state).

44. *Id.* at 400.

45. 99 S. Ct. at 3054 (emphasis added).

46. 429 U.S. 589 (1977) (New York statute requiring that the state be provided with a copy of every prescription for certain dangerous drugs does not unduly burden the individual's or the physician's right of privacy).

47. 99 S. Ct. at 3054, quoting from *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

sions.”⁴⁸ Justice Stevens felt both interests were involved because “inherent in the right to make the abortion decision [is] that the right may be exercised without public scrutiny and in defiance of the contrary opinion . . .” of others.⁴⁹

The Court, in *Danforth* and in *Carey* also addressed the issue of a minor’s constitutional right of privacy. These cases, when read with *Bellotti*, set forth the appropriate level of review to be applied in cases involving an intrusion of a minor’s right of privacy. In *Carey*, Justice Brennan, writing for the majority, stated that “the right to privacy in connection with decisions affecting procreation extends to minors as well as adults.”⁵⁰ The Court went on to hold that “[s]tate restrictions inhibiting privacy rights of minors are valid only if they serve ‘any *significant state interest* . . . that is not present in the case of an adult.’”⁵¹

The relevant query regards where the “significant state interest” standard fits into the traditional two-tiered analysis developed by the Warren Court.⁵² The answer can be found in the analysis of the Court in *Carey*, *Danforth*, and *Bellotti*. Under the traditional analysis, the first tier, known as the “rational basis” test, gave presumptive validity to the state law being examined⁵³ while the second tier, known as “strict scrutiny,” required the application of the “compelling state interest” standard and created presumptive invalidity of the state law being scrutinized.⁵⁴ The new “significant state interest” standard is seemingly less harsh than the “compelling state interest” standard and harsher than the “rational basis” standard.

The *Carey* Court, after citing a group of post-*Roe v. Wade*⁵⁵ cases involving factual situations wherein a woman’s access to procurement of an abortion was limited, stated:

The significance of these cases is that they establish that the same test must be applied to state regulations that burden an individual’s right to decide to prevent conception or terminate pregnancy by substantially lim-

48. *Id.*

49. 99 S. Ct. at 3054.

50. 431 U.S. at 693.

51. *Id.*, quoting from 428 U.S. at 75 (emphasis added).

52. See Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

53. *Id.*

54. *Id.*

55. 410 U.S. 113 (1973). *Roe v. Wade* and its companion case, *Doe v. Bolton*, 410 U.S. 179 (1973) are the landmark cases handed down by the Court. They establish that a woman has a fundamental right to make an abortion decision, without interference by the state, during the first trimester of pregnancy and thereafter, prior to the point in time when the fetus becomes viable, the state may only place reasonable regulations on the abortion procedure. It is at the point in time when the fetus becomes viable that the state is deemed to have a compelling interest in preservation of the life of the fetus.

iting access to the means of affectuating that decision . . . Both types of regulation 'may be justified only by a *compelling state interest*.'⁵⁶

Because the right of privacy relating to decisions affecting procreation applies to minors and adults alike,⁵⁷ the logical conclusion would be that state regulation of a minor's decision in this area could be justified only by a showing of a compelling state interest and and only if the regulation was narrowly drawn.⁵⁸ However, in *Danforth*, the Court avoided this conclusion by stating that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights. The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults."⁵⁹

In *Bellotti*, Justice Powell was in accord with the *Danforth* Court in avoiding "strict scrutiny" in minor's right of privacy cases. He recognized that the constitutional rights of minors are not on a level equal with those of adults for several reasons, including their peculiar vulnerability and "their inability to make critical decisions in an informed and mature manner."⁶⁰ The importance of the parental role in child rearing was also seen as a factor.⁶¹ Moreover, Justice Powell reasoned that "our acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders may be treated differently from adults."⁶² Justice Stevens, though never discussing an appropriate level of review, would seem to agree with Justice Powell due to his reaffirmation of the *Danforth* decision.⁶³

With regard to the appropriateness of applying the traditional "rational basis" standard to minor's right of privacy cases, it is important to note that this standard was neither discussed nor applied in *Bellotti*, *Carey*, or *Danforth*. Furthermore, in all three

56. 431 U.S. at 688, quoting from *Roe v. Wade*, 410 U.S. at 155 (emphasis added).

57. See note 50 *supra*, and accompanying text.

58. These were the requirements set forth by the Court in *Roe v. Wade*, 410 U.S. at 155, with which regulations limiting the fundamental right to procurement of an abortion, prior to the point in time when the fetus becomes viable, must comply.

59. 428 U.S. at 74.

60. 99 S. Ct. at 3043.

61. *Id.*

62. *Id.* at 3044. See *In re Gault*, 387 U.S. at 30 where the Court held that a juvenile hearing need not "conform with all the requirements of a criminal trial or even of the usual administrative hearing," although it must measure up to the essentials of due process and fair treatment.

63. 99 S. Ct. at 3054.

cases the portions of the statutory schemes affecting either the minor's right to obtain contraceptives or to procure an abortion without parental consent were invalidated.⁶⁴

Accordingly, it would appear that the "significant state interest" standard⁶⁵ is either a new tier to be utilized in minor's right of privacy cases or that it is a stricter form of the traditional "rational basis" standard.⁶⁶ Regardless of the label attributed to this level of review, it is evident that the state is required to show interests more weighty than the "[s]afeguarding of the family relationship and of parental authority"⁶⁷ or "regulation of the morality of minors, in furtherance of the state's policy against promiscuous sexual intercourse among the young."⁶⁸

B. *The Right of Parents and the State to Control Minors*

In determining whether the State of Massachusetts had any sig-

64. For discussions of the statutory invalidations see *Bellotti*, note 37 *supra*; *Carey*, 431 U.S. at 694; *Danforth*, 428 U.S. at 74.

65. See *Wynn v. Carey*, 582 F.2d 1375, 1385 (7th Cir. 1978) (significant interest standard is applied in determining whether a parental consent abortion statute is valid); *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1265 (M.D. Pa. 1975), *aff'd mem.*, 429 U.S. 964 (1976) ("Unlike a classification based upon race, alienage, and national origin, which are inherently suspect, age is not a suspect classification."); *Cf.*, *Roe v. Wade*, 410 U.S. 113 (a state must show a "compelling state interest" in order to infringe upon the fundamental right to have an abortion prior to viability); *Poe v. Gerstein*, 517 F.2d 787, 791 (5th Cir. 1975), *aff'd mem.*, 428 U.S. 901 (1976) (minors have a fundamental right to have an abortion and the state must prove a compelling interest in order to limit that right); *T—H— v. Jones*, 425 F. Supp. 873, 881, *aff'd mem.*, 425 U.S. 986 (D. Utah 1975) (in a factual setting similar to *Bellotti*, the court held that the compelling state interest standard was the appropriate standard of review); *Foe v. Vanderhoof*, 389 F. Supp. 947, 954 (D. Colo. 1975) (after holding that the right of privacy encompasses the decision of a woman to terminate her pregnancy, and that such a right is extended to minors, the court stated, "the state may infringe on the constitutional right to privacy; however, before it may do so, it must demonstrate interests so compelling as to justify the intrusion on the fundamental right involved."); *Wolfe v. Schroering*, 388 F. Supp. 631, 636 (W.D. Ky. 1974) (the court, after holding a parental consent provision invalid, stated that "[the] requirement fails to meet constitutional scrutiny in that it is overbroad; it intrudes into the decision making process and includes the first trimester where the state has no compelling interest."). See generally Pilpel and Wechsler, *Birth Control, Teenagers and the Law*, 1 Fam. Plan. Perspectives 29 (1969), where the authors take the position that because, as to a minor, abortion during the first trimester is actually safer than subsequent child birth, a minor should be afforded even greater judicial protection than a adult.

See also Comment, *The Minor's Right of Privacy: Limitations on State Action After Danforth and Carey*, 77 COLUM. L. REV. 1216, 1232 n.88 (1977), where the author recommends that a more logical approach would have been to maintain a uniform compelling state interest standard to be applied to minors and adults alike, except that in the case of minors the state may possess additional compelling interests.

66. See Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. at 12.

67. 428 U.S. at 75.

68. 431 U.S. at 692-96.

nificant interests with regard to the enactment of the parental consent abortion statute, Justice Powell compared the rights of the parents, the rights of the child, and the rights of the state.⁶⁹ In the past, the Court has engaged in similar comparisons and, in the right of privacy context,⁷⁰ the child's rights have been uniformly subordinated, until recently,⁷¹ to the due process rights of the parents⁷² and the rights of the state as *parens patriae*.⁷³ However, the decisions have not been as uniform regarding the rights of the parents and the rights of the state as they relate to one another. The Court has, in the past, established that the parents' right to rear their children is not subject to unwarranted interference by the state.⁷⁴ In *Bellotti*, Justice Powell expressed the view that "the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather the former is one of the basic presuppositions of the latter."⁷⁵ His principal reasoning was that the parental role is extremely important in assuring a minor full growth and maturation so that "participation in a free society [will be] meaningful and rewarding."⁷⁶

Conversely, the Court has also established that, in some circumstances, the rights of the state as guardian of the child's best

69. 99 S. Ct. at 3043-46.

70. See note 39 *supra*.

71. See 431 U.S. 678 and 428 U.S. 52.

72. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (The Court stated that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.") (emphasis added); *Accord*, *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *May v. Anderson*, 345 U.S. 528, 533 (1953); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Drollinger v. Milligan*, 552 F.2d 1220, 1226 (7th Cir. 1977); *Doe v. Irwin*, 441 F. Supp. 1247, 1249 (W.D. Mich. 1977).

73. For a discussion of the development of the doctrine of *parens patriae*, see Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978); Comment, *The Minor's Right of Privacy: Limitations on State Action After Danforth and Carey*, 77 COLUM. L. REV. 1216, 1221 (1977).

74. See *Planned Parenthood v. Danforth*, 428 U.S. at 73 (parental rights are accorded constitutional protection against unwarranted or unreasonable state interference); *Ginsberg v. New York*, 390 U.S. at 639 (the Court stated that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."); *Prince v. Massachusetts*, 321 U.S. at 166 (the Court stated that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation the state can neither supply nor hinder."). See also *Doe v. Irwin*, 441 F. Supp. at 1249 (parental authority is plenary and prevails over claims of the state).

75. 99 S. Ct. at 3046.

76. *Id.*

interests⁷⁷ are superior to any rights the parents might have concerning the control and direction of their children.⁷⁸ Examples of the exercise of this right include compulsory schooling, rehabilitation of juvenile delinquents, and vaccination programs; all of which represent affirmative action by the state as *parens patriae* in aiding parents in the raising of their child.⁷⁹ Although it has been asserted that the doctrine of *parens patriae* is gradually losing its force,⁸⁰ limitations on a minor's right to contract,⁸¹ to purchase liquor,⁸² and to have access to sexually related materials⁸³ seems to indicate that judicial concern with a minor's incapacity and lack of guile remains an important factor in several areas.

In *Bellotti*, two questions of critical importance were whether a state may limit a minor's right of privacy by requiring parental involvement in the minor's abortion decision,⁸⁴ and thereafter, whether the state⁸⁵ or the child's parents⁸⁶ may reform the decision of the minor. With regard to the former, the Court's response appears to be in the affirmative. With regard to the latter, however, uncertainty remains.

In *Bellotti*,⁸⁷ the judgment of the district court was vacated and remanded because the Court felt that the parental consent statute was constitutional if it did not amount to an absolute parental veto.⁸⁸ Moreover, in *Danforth*, a Missouri statutory provision,⁸⁹

77. See note 73 *supra*.

78. *Wisconsin v. Yoder*, 406 U.S. at 232 (the parents' right to rear their children is not absolute and, in certain circumstances, the state's right as *parens patriae* will prevail) (dicta); *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (the state's educational requirements prevail over the idiosyncratic views of the parents); *Prince v. Massachusetts*, 321 U.S. at 166 (neither the rights of the parents nor the rights of religion are beyond limitation by the state); *Accord*, *Wynn v. Carey*, 582 F.2d 1375, 1386 (7th Cir. 1978); *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1264 (M.D. Pa. 1975).

79. See Comment, *The Minor's Right of Privacy: Limitations on State Action After Danforth and Carey*, 77 COLUM. L. REV. 1216, 1221 (1977).

80. See Katz, Schroeder and Sidman, *Emancipating Our Children: Coming of Legal Age in America*, 7 FAM. L.Q. 211 (1973).

81. See generally Kleinfeld, *The Balance of Power Among Infants, Their Parents, and the State* (pt. III), 5 FAM. L.Q. 64, 67-70 (1971).

82. *Id.*

83. *Id.*

84. 99 S. Ct. at 3047.

85. *Id.* at 3048.

86. *Id.* at 3052.

87. 428 U.S. 132.

88. *Id.* at 145. The Court stated:

[A] statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a

similar to the Massachusetts statute,⁹⁰ was held to be unconstitutional primarily because it imposed an absolute "blanket provision" of parental consent as a condition to the minor's eligibility to procure an abortion.⁹¹ Viewed contemporaneously, the Court's handling of *Bellotti* and its earlier disposition of *Danforth* establish that such legislation is not *per se* unconstitutional, but is a proper exercise of the state's power. It is in the Court's handling of the issue of whether the state or the parents may reform the decision of the minor that the true significance of *Bellotti* appears.

With the exception of Justice White, the entire Court agreed that, upon a determination by a judge that abortion would be in a child's best interests, a state may not reform the decision of a minor by withholding judicial consent.⁹² Justice Powell would qualify this assertion by requiring that the minor show that she is capable of making an informed and quasi-adult decision.⁹³ No explicit rationale for this qualification is given by Powell, but it can be reasonably inferred that his view is that once a minor has demonstrated his or her adult capacity to make a mature decision, he or she merits a greater degree of constitutional protection against invasions of the right of privacy. Accordingly, if this tacit rationale is accepted, Justice Powell rejects at least one aspect of the doctrine of *parens patriae*; the ability of the state to control

showing that the abortion would be in her best interests . . . would be fundamentally different from a statute that creates a 'parental veto.'

89. MO. REV. STAT. § 188.020 (Supp. 1977). The statute provided in relevant part:

No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

- (1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment;
- (2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion;
- (3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother;
- (4) With the written consent of one parent or person in *loco parentis* of the woman if the woman is unmarried and under the age of eighteen years; unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

90. Justice Stevens stated in his opinion in *Bellotti*: "The differences between the two statutes are few." 99 S. Ct. at 3054.

91. 428 U.S. at 74.

92. See Justice Powell's opinion, 99 S. Ct. at 3052 and Justice Stevens' opinion, 99 S. Ct. at 3054.

93. *Id.* at 3048.

certain decisions of a minor regardless of the minor's capacity to make informed determinations.⁹⁴ However, because he felt that a minor's abortion decision differed in several significant aspects from other decisions in which a minor engages,⁹⁵ it could be asserted that the state's powers as *parens patriae* remain in force except with regard to the unique abortion setting.

It is evident that conflicting views concerning the issue of whether the parents may reform the decision of the minor was the source of the split of the Court in *Bellotti*.⁹⁶ In *Danforth*, the Court held that "the state does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his [minor] patient to terminate the patient's pregnancy. . . ."⁹⁷ Justice Stevens felt that the similarity of the Massachusetts statute under review in *Bellotti*⁹⁸ with the Missouri statute reviewed in *Danforth*⁹⁹ compelled the use of *Danforth* as binding precedent.¹⁰⁰ He also felt that Justice Powell erred by going beyond the holding of *Danforth* and establishing the minimum requirements with which all parental consent abortion statutes must comply in order to be held constitutional.¹⁰¹ Justice Powell stated "if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it must also provide an alternative procedure whereby authorization for the abortion can be obtained."¹⁰² This procedure must be completed with "anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained."¹⁰³ He concluded that "every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents."¹⁰⁴ This portion of Justice Powell's opinion seems to contradict the due process right the

94. Note, however, that another aspect of the doctrine, the ability of the state to legislate parental involvement into the decisions of a minor, remains intact so long as the legislation does not amount to a "blanket provision" requiring parental consent as an absolute condition to a minor's ability to exercise certain recognized constitutional rights. See *Planned Parenthood v. Danforth*, 428 U.S. at 74.

95. 99 S. Ct. at 3047.

96. *Id.* at 3055.

97. 428 U.S. at 74.

98. See note 14 *supra*.

99. See note 89 *supra*.

100. 99 S. Ct. at 3054.

101. *Id.* at 3055.

102. *Id.* at 3048.

103. *Id.* See *Ballard v. Anderson*, 4 Cal. 3d 874, 876, 484 P.2d 1345, 1347, 95 Cal. Rptr. 1, 3, where the California Supreme Court, in a factual setting similar to *Bellotti* except that eight months transpired from the time of filing *mandamus* to the date of decision, stated that "[n]ature proved to be more fleet than the judicial process. Therefore, we face a threshold question of mootness."

104. 99 S. Ct. at 3050.

parents might have had to direct the upbringing of their children.¹⁰⁵ Justice Powell alleviates this incongruity by stating that "[t]he abortion decision differs in important ways from other decisions that may be made during minority."¹⁰⁶ The reasons asserted are that a pregnant minor's possibility of obtaining an abortion expires in a relatively short period of time¹⁰⁷ and that "considering her probable education, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor."¹⁰⁸ At the determinative proceeding,¹⁰⁹ the minor must be allowed to prove either that she is "mature and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes;"¹¹⁰ or, failing in that regard, that "the desired abortion would be in her best interests."¹¹¹ He concluded that, unless a parental consent abortion statute provides for such a procedure, it must be held unconstitutional as "an undue burden upon the exercise by minors of the right to seek an abortion."¹¹²

A careful examination of Justice Powell's opinion in *Bellotti*¹¹³

105. See note 72 *supra*.

106. 99 S. Ct. at 3047. Justice Powell also stated: "a state may require a minor to wait until the age of majority before being permitted to exercise legal rights independently. But we are concerned here with the exercise of a constitutional right of unique character." *Id.* at 3052.

107. *Id.* at 3048. The possibility of aborting effectively expires in a matter of weeks from the onset of pregnancy.

108. *Id.* See also Pilpel and Wechsler, *Birth Control, Teenagers and the Law*, 1 FAM. PLAN. PERSPECTIVES 29 (1969); Comment, *Parental Consent Abortion Statutes: The Limits of State Power*, 52 IND. L.J. 837 (1977).

109. Justice Powell, in a footnote, stated: "[w]e discuss the alternative procedure . . . in terms of judicial proceedings. We do not suggest, however, that a State choosing to require parental consent could not delegate the alternative procedure to a juvenile court or an administrative agency or officer." 99 S. Ct. at 3048 n.22.

110. *Id.* at 3048.

111. *Id.* Justice Powell went on to state:

There is however, an important state interest in encouraging a family rather than a judicial resolution of a minor's abortion decision. Also . . . parents naturally take an interest in the welfare of their children—an interest that is particularly strong where a normal family relationship exists and where the child is living with one or both parents. These factors may be properly taken into account by a court called upon to determine whether an abortion in fact is in a minor's best interests.

99 S. Ct. at 3050-51.

112. *Id.* at 3050. Justice Powell felt that an undue burden would be present because "there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court." *Id.*, quoting from *Bellotti v. Baird*, 450 F. Supp. at 1001.

113. 99 S. Ct. 3035, 3038.

reveals that it is incongruous with *Danforth* in two respects. First, should the minor fail to carry the burden of showing her maturity or that the abortion would be in her best interests she would be faced with only one feasible alternative,¹¹⁴ the procurement of her parents' consent. Thus, a minor's parents would be vested with the right to absolutely veto the concerted decision of the minor and her physician so long as the statute in question meets the minimum requirements specified by Justice Powell. Secondly, allowing the minor an alternative to procurement of her parents' consent by going to court vests the judge with the power of exercising "an absolute veto over the minor's decisions, based on his judgment of her best interests."¹¹⁵ It was because of these modifications of *Danforth* that Justices Blackmun, Brennan, Marshall, and Stevens declined to join Justice Powell in his opinion.¹¹⁶ They felt that the Court had "no occasion to render an advisory opinion"¹¹⁷ and that "[a] real statute—rather than a mere outline of a possible statute—and a real case or controversy may well present questions that appear quite different from the hypothetical questions Justice Powell has elected to address."¹¹⁸

IV. IMPACT OF *BELLOTTI*

The exact impact that the *Bellotti* decision will have on future cases with similar factual settings is unclear. If the Stevens opinion¹¹⁹ is subsequently followed by the Court, the impact of *Bellotti* will be little more than a reaffirmation of *Danforth*. However, if the Powell opinion is ultimately followed, *Bellotti* would significantly restrict the precedent established in *Danforth*. In states which have enacted,¹²⁰ or will enact, a parental consent abortion statute, the effect of Powell's decision will be to establish a rebuttable presumption of a minor woman's incapacity to make the abortion decision. This presumption would be rebutted by a showing of the minor woman's capacity to make an informed decision or that, despite her incapacity, the abortion would be in her best interests.¹²¹ The effect would be to place the burden of proof on a minor already troubled by her undesirable circumstance.

114. Other alternatives that may be considered unfeasible in a given situation include: to bear the unwanted child, run away, try to self-abort, or seek an illegal and possibly unsafe abortion. See Comment, *Parental Consent Abortion Statutes: The Limits of State Power*, 52 IND. L.J. 837, 838 (1977).

115. 99 S. Ct. at 3054 (Stevens, J.).

116. *Id.*

117. 99 S. Ct. at 3055 n.4.

118. *Id.*

119. 99 S. Ct. at 3054.

120. See note 15 *supra*.

121. 99 S. Ct. at 3048.

This would, as Justice Stevens observed, "impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of a parent."¹²² The child must, for example, attempt to secure the assistance of counsel. Unless she has an adequate amount of independent wealth, she can only hope for court appointed counsel,¹²³ which is not guaranteed.¹²⁴ The Massachusetts Supreme Court stated that "the statutes of the Commonwealth . . . authorize the appointment of counsel or a guardian *ad litem* for an indigent at public expense, if necessary, if the judge, *in his discretion*, concludes that the best interests of the minor would be served by such an appointment."¹²⁵ Moreover, the only standard provided to the judge to determine whether the abortion would be best for the minor is whether or not it would be in her "best interests."¹²⁶ This standard is extremely vague and, as Justice Stevens stated, "provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor—particularly when contrary to her own informed and reasonable decision—is fundamentally at odds with the privacy interests underlying the constitutional protection afforded to her decision."¹²⁷ Furthermore, as discussed above, the Powell approach vests the judge with the power to exercise "an absolute veto over the minor's decisions, based upon his judgment of her best interests"¹²⁸ and, should the judge choose to exercise his veto, the child's parents also will become vested with that power.

The effect that *Bellotti* will have on the litigation of juvenile rights other than the right to an abortion prior to viability, is similarly difficult to predict. If the Stevens opinion is subsequently followed, the *Bellotti* decision may arise in any case in which a minor "individual's interest in avoiding disclosure of personal matters . . ." is present¹²⁹ or when the minor is determined to have "an interest in independence in making certain kinds of im-

122. *Id.* at 3054 (footnotes omitted).

123. *Id.* at 3054 n.3.

124. *Id.*

125. *Id.*, quoting from *Baird v. Attorney General*, 371 Mass. at 744, 360 N.E.2d at 301 (emphasis added).

126. 99 S. Ct. at 3054.

127. *Id.*

128. *Id.*

129. See *Whalen v. Roe*, 429 U.S. at 599-600 (footnotes omitted).

portant decisions."¹³⁰ Justice Stevens, by referring to these two individual privacy interests specified in *Whalen v. Roe*,¹³¹ certainly implied that a minor individual's right of privacy is equivalent to that of an adult individual. Thus, any decision that a minor makes which is determined to be within his or her privacy interest will not be subject to scrutiny by either the minor's parents or the state, unless the state can show some sufficiently significant interest. If Justice Powell's view is adopted by the Court, a showing of adult-like maturity by the minor will effectively endow her with adult-like rights. Whether the Court will, under this view, entitle a minor, upon a showing of adult-like maturity, to enjoy other rights currently guaranteed to adults only or whether it will limit the application of *Bellotti* to the particular factual setting involved—is open for speculation. Certainly, the creative attorney would not neglect the opportunity to analogize the implicit rationale of the Powell opinion to the circumstances presented in the case before him.

V. CONCLUSION

The *Bellotti* decision does no more than place one in a quandary as to the status of the *Danforth* precedent. The Court has created two distinct and mutually exclusive paths between which it must choose. If the path outlined by Justice Stevens is chosen, the *Danforth* precedent shall remain secure, possibly expanded somewhat by an application of the universal individual privacy interests specified in *Whalen v. Roe*.¹³² If the path outlined by Justice Powell is chosen, the *Danforth* precedent will be substantially modified by allowing a third party veto over the minor's abortion decision so long as the parental consent abortion statute meets the minimum criteria specified by Justice Powell. Finally, there remains the possibility that the Court may later create and follow a third and entirely distinct path.

DAVID C. BOATWRIGHT

130. *Id.*

131. 99 S. Ct. at 3054.

132. 429 U.S. at 599-600.