THE EROSION OF MINORS' ABORTION RIGHTS: *An Analysis of* Hodgson v. Minnesota *and* Ohio v. Akron Center for Reproductive Health

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INTRODUCTION

In the summer of 1988, Becky Bell, a seventeen year old from Massachusetts, died from complications from an illegal abortion.[1] When she first realized she was pregnant, she turned to her boyfriend for help. He "threw her out of his car,"[2] forcing her to face the prospect of her pregnancy alone. She went to Planned Parenthood where she discovered that Massachusetts is one of fourteen states that require notification or consent of the minor's parents before her pregnancy can be terminated.[3] Although Becky had a close relationship with her parents, she was afraid of disappointing them by revealing that she was pregnant.[4] Becky was also convinced that a judge would refuse to grant her an exemption, and her parents would ultimately be notified.[5] Consequently, Becky obtained an illegal abortion. She died shortly thereafter.[6]

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1. Wash. Post, Aug. 8, 1990, at A3, col. 1.

2. English, *Mindless Law, Needless Death,* Boston Globe, Aug. 22, 1990, at 29, col. 1.

3. Wash. Post, Aug. 8, 1990, at A3, col. 1. These states are Alabama, Arkansas, Indiana, Louisiana, Massachusetts, Minnesota, Missouri, North Dakota, Ohio, Rhode Island, South Carolina, Utah, West Virginia, and Wyoming. *Id.*

4. *Id.*

5. The Minnesota law provided for a judicial-bypass procedure so that minors could go to court and ask a judge's permission to obtain an abortion without their parents' knowledge. *Id.* For a discussion of judicial-bypass procedures see *infra* section II.

6. *Id.*

Becky's story illustrates the tragic consequences that can result from parental notification statutes. These laws are so oppressive that they induce minors to take incredible risks to avoid their parents' disappointment, anger, or abuse. Parental notification statutes should not be constitutionally permissible because they impose a severe burden on the minor's right to abortion, and can lead to disastrous results.

The Supreme Court established nineteen years ago that women have the right to abortion.[7] In *Roe v. Wade*, the Court held that the right to privacy encompasses a woman's decision whether to terminate her pregnancy.[8] The Court further held that a state cannot prohibit abortion during the first two trimesters of a woman's pregnancy.[9] In *Planned Parenthood of Central Missouri v. Danforth,*[10] the Court extended the fundamental right of abortion to minors. The Court denied a state the right to confer on parents an absolute veto power over the minor's decision to terminate her pregnancy. Later in *Bellotti v. Baird*, Justice Powell stated in dicta that although a state may require parental consent prior to a minor's abortion, the state must also provide a judicial-bypass procedure whereby a minor has an opportunity to prove she is mature enough to decide to obtain an abortion, or in the alternative, that the abortion is in her best interest.[11]

The Court has thus established that minors have a right to abortion. In *Hodgson v. Minnesota*[12] and *Ohio v. Akron Center for Reproductive Health,*[13] however, the Court upheld statutes which impose severe burdens on a minor's right to procure an abortion. The Minnesota statute in *Hodgson* requires that both parents receive notification forty-eight hours before a female under the age of eighteen may obtain an abortion.[14] The statute also provides an es-

7. Roe v. Wade, 410 U.S. 113 (1973).

8. *Id.* at 153.

9. *Id.* at 164. In Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989), the court replaced the trimester framework with a viability standard. Therefore, after *Webster* the state cannot regulate abortion in a way that unduly burdens the right of the female before viability of the fetus.

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

11. 443 U.S. 622 (1979). The validity of Powell's dicta is questionable. A judicial-bypass procedure does very little to ease the burdens of a parental-notification or consent requirement. For a discussion on the problems of judicial-bypass procedures see *infra* section II.

12. 110 S. Ct. 2926 (1990).

13. 110 S. Ct. 2972 (1990).

14. *Hodgson*, 110 S. Ct. at 2931. This notice is mandatory unless (1) the attending physician certifies that an immediate abortion is necessary to prevent the woman's death, and there is insufficient time to provide the required notice; (2) both of her par-

cape clause in the event a court holds the two-parent notification requirement unconstitutional. This escape clause consists of a judicial-bypass procedure.[15] This procedure allows the minor to receive a court's permission to circumvent the required notification of her parents.

The Court was extremely fractured in upholding the Minnesota statute. Four Justices would have upheld the statute even without the judicial-bypass procedure.[16] Another four indicated that they would have invalidated the two-parent notification requirement even when it included a judicial-bypass provision.[17] Justice O'Connor, who cast the deciding vote, held that the two-parent notification requirement is only constitutional when it is supplemented with the judicial-bypass provision. The Minnesota statute was, therefore, upheld because the bypass procedure provides the minor an alternative to parental notification, and, in Justice O'Connor's view, is not unduly burdensome on the minor's right to abortion.[18] This rationale undervalues the extreme burden on the minor's privacy rights when she is forced to divulge sensitive and personal information about herself during an intimidating court procedure. Justice O'Connor's holding also recognizes parental notification requirements as valid state legislation, which conflicts with well-established constitutional doctrine that a state cannot interfere with a female's decision to terminate her pregnancy before the third trimester.[19]

The Court further curtailed a minor's access to abortion in *Ohio v. Akron Center for Reproductive Health.*[20] Under the Ohio law, it is a crime for a physician to perform an abortion on an un-

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ents have consented in writing; or (3) the woman declares that she is a victim of parental abuse or neglect, in which case notice of her declaration must be given to the proper authorities. *Id.* at 2932.

15. *Id.* Therefore, if the notice provision of the statute were declared unconstitutional by the courts, the judicial-bypass procedure would take effect to preserve the statute's constitutionality. *See id.* at 2933 n.9 (citing MINN. STAT. § 144.343(6) (1988)).

16. Justices Kennedy, Scalia, White, and Rehnquist would have upheld the law out of paternalistic notions that a "girl of tender years" needs guidance from her parents. *See id.* at 2961 (Kennedy, J., dissenting and concurring).

17. Justices Brennan, Blackmun, and Marshall would have invalidated the law because it infringes upon the minor's right to abortion. Justice Stevens, on the other hand, would have invalidated the statute because it unduly infringed upon the parents' rights. *See id.* at 2952–56.

18. *Id.* at 2949–50 (O'Connor, J., concurring).

19. *See* Roe v. Wade, 410 U. S. 113 (1973). *But cf.* Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (changing the trimester test into a viability standard).

20. 110 S. Ct. 2972 (1990).

married woman under eighteen years of age without notifying one of her parents.[21] While the minor also has the option of obtaining judicial authorization in lieu of parental notification,[22] this option is severely limited by the various procedural traps in the Ohio bypass procedure. From the moment the minor files the complaint, she is subjected to complicated procedures, a lack of anonymity, and a heightened burden of proof standard. Additionally, the process could take days or weeks, yet the state provides no practical recourse for the minor if the court fails to make a ruling. The length of the process will prohibit some minors from obtaining an abortion until later in their pregnancies, thereby increasing the costs and health risks of the surgical procedure.[23]

This Recent Development will illustrate how the Court, in both *Hodgson* and *Akron Center*, overlooked the practical effects of the statutes involved. Specifically, the Court failed to appreciate the position of minors in modern families and the extent to which notification statutes and judicial-bypass procedures burden their right to privacy. The Court upheld these parental notification statutes even though the states failed to prove any resulting benefits to minors, parents, or families. Under a traditional fundamental rights analysis, a state cannot impose burdens on minors' abortion rights without effectively furthering a compelling state interest. The Court, however, applied only a rational basis review in examining these statutes. The Court was unwilling to speculate on the underlying intentions of the parental notification statutes, even though the purported intentions of the statutes were not being furthered by the statutes. Under this lower standard of scrutiny, these statutes should be held unconstitutional because Minnesota and Ohio failed to prove that their laws are even rationally related to their pur-

21. *Id.* at 2977. The statute provides for some narrow exceptions to this notification requirement. The physician can notify a close relative other than the parent if the minor and the other relative each file an affidavit in the juvenile court stating that the minor fears physical, sexual, or severe emotional abuse from one of her parents. If the physician is unable to contact the parents after reasonable effort, she or he may perform an abortion forty-eight hours after constructive notice by both ordinary and certified mail. The physician may also perform an abortion if a parent has consented in writing. *Id.*

22. *Id.*

23. Before the ninth week of pregnancy the risk of death from an abortion is one in 500,000. Between the ninth and twelfth week the risk is one in 67,000. Between the thirteenth and the fifteenth week of pregnancy the risk of death is one in 23,000. And after the fifteenth week the risk of death is one in 8,700. R. HATCHER, F. STEWART, J. TRUSSELL, D. KOWAL, F. GUEST, G. STEWART, & W. CATES, CONTRACEPTIVE TECHNOLOGY 1990-1992 146 (1990) [hereinafter CONTRACEPTIVE TECHNOLOGY].

ported interests. The Court's application of a lower standard of review when examining these abortion statutes raises serious questions about the future of abortion rights of all women.

I. THE BURDENS OF A PARENTAL NOTIFICATION REQUIREMENT

Although *Hodgson* appeared at first glance to be a victory for abortion rights because the Court declared the two-parent notification statute unconstitutional without a judicial-bypass procedure, the Court's reasoning reveals an undervaluation of minors' abortion rights. This reasoning led to the Court's subsequent upholding of the one-parent notification statute in *Akron Center.*

Several members of the Court believe that a woman's decision to control her own reproduction is a "liberty interest" not a "fundamental right" protected by the fourteenth amendment.[24] This change in terminology is significant because a state can subject a liberty interest to regulation that would be impermissible under a traditional fundamental rights analysis.[25] Under a traditional fundamental rights analysis, state laws which regulate abortion must be *necessary* to further a *compelling* state interest.[26] Nevertheless, a majority of the Court is now willing to allow states to regulate abortion, if the state's means are reasonably related to a legitimate state interest.[27] Thus, statutes that abridge abortion rights will only be given a rational basis examination.[28] In *Hodgson,* the state purported to have three interests in implementing a parental notification statute: (1) an interest in the pregnant minor's welfare; (2) an interest in preserving parents' right to raise their children; and (3) an interest in protecting the family unit.[29] As the following discus-

24. This is the opinion of Justices Rehnquist, Kennedy, O'Connor, White, Scalia and Stevens. *See Hodgson,* 110 S. Ct. at 2937 (Stevens, J., concurring and dissenting). *See also id.* at 2949 (O'Connor, J. concurring); Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3058 (1989).

25. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 172–73 (Rehnquist, C.J., dissenting).

26. *See, e.g., id.* at 153–55.

27. *See Hodgson,* 110 S. Ct. at 2944 (Stevens, J., concurring and dissenting). *See also id.* at 2967 (Kennedy, J., concurring and dissenting). Justice O'Connor believes that a statute only receives a higher level of scrutiny if its requirements are unduly burdensome. *See, e.g.,* City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 461–66 (1983) (O'Connor, J., dissenting). The statute in *Hodgson* is the first restriction on abortion that Justice O'Connor held to be unconstitutional.

28. *Id.* at 2937. In Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989), a plurality of the court first suggested applying this lower standard of review — a standard previously unheard of under traditional fundamental rights analysis. This is more evidence that a majority of the Court no longer views abortion as a fundamental right.

29. *Hodgson,* 110 S. Ct. at 2941–42.

sion illustrates, none of these purported interests are furthered by requiring parental notification.

A. *The Welfare of the Pregnant Minor*

Justices Kennedy, Rehnquist, White, and Scalia held that the state has a legitimate interest in ensuring that minors have the assistance of their parents when deciding whether to obtain an abortion.[30] Justice Stevens also maintained that the state has a legitimate interest in the protection of minors whose "immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."[31] The failure in Justice Stevens's analysis is that it is precisely this immaturity that supports enabling minors to obtain an abortion without parental notification. The younger and more immature the minor, the less equipped she will be to cope with an unintended child. Older minors, on the other hand, are better able to determine, without state interference, whether the abortion is in their best interest.

Forced notification will also deter minors who fear revealing their pregnancy to their parents from obtaining an abortion as soon as they are aware of the pregnancy. The resulting delay is potentially dangerous to the minor's health,[32] and in extreme cases the minor may choose to obtain an illegal abortion[33] to avoid parental notification.[34] Moreover, many parental notification statutes require that a minor wait a certain period of time after both parents have been notified before terminating her pregnancy, which will cause even greater delay. Minnesota's statute requires that the minor wait forty-eight hours, while the Ohio statute imposes a twenty-four hour waiting period on the minor.[35] According to the Court, this requirement serves the state's interest in ensuring informed decision making while imposing only a minimal burden on the minor's right.[36] This reasoning, however, overlooks the increased health

30. *See id.* at 2962.

31. *Id.* at 2942.

32. CONTRACEPTIVE TECHNOLOGY, *supra* note 23, at 146.

33. The risk of death with an illegal abortion is 1 in 3,000. *Id.*

34. *See supra* notes 1–6 and accompanying text.

35. *See* Hodgson v. Minnesota, 110 S. Ct. 2926, 2932 (1990) (citing MINN. STAT. §§ 144.343 (1988)). *See also* Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972, 2977 (1990) (citing OHIO REV. CODE ANN. § 2919.12 (B)(1)(a)(i) (Anderson Supp. 1988)).

36. *Hodgson*, 110 S. Ct. at 2944 (Stevens, J., concurring and dissenting).

risks caused by the delay.[37] Such an increase in the health risks of the abortion procedure imposes a severe — not a minimal — burden on the minor's rights and should not be allowed by the Court.

Besides the health risks, waiting periods combined with parental notice requirements like those found in both *Hodgson* and *Akron Center* will severely limit certain minors' access to abortion. The waiting period enables parents who have religious or personal beliefs opposing abortion the opportunity to interfere with the minor's personal decision. To hold that mere notification does not burden the minor's choice is misguided and disregards the extent to which parents exert control over their children's lives. The distinction between a parental notification and a parental consent requirement is meaningless to many minors. Parents usually exert a great amount of economic control over their children, and many could even physically prevent their daughters from asserting their abortion rights.

Thus, parental notification requirements deprive minors of their established constitutional right to abortion.[38] This deprivation is harmful to the minor and does nothing to further any interest in her welfare. The notification requirement, therefore, is not rationally related to the state interest in the welfare of the pregnant minor. The minor's welfare could be advanced more effectively by allowing the minor to choose for herself whether informing her parents is in her best interest. Therefore, even using the Court's lower standard of scrutiny, parental notification statutes appear unconstitutional. Furthermore, under Justice O'Connor's "unduly burdensome" analysis, parental notification requirements are unconstitutional because they unduly infringe upon minors' abortion rights; and these requirements are not necessary to advance the states' interest in pregnant minors' welfare.

B. *The Interest in Protecting Parental Authority*

According to Justice Stevens, the state's purported interest in protecting parental rights directly conflicts with the right of one parent to assert his or her authority without the interference of the other parent.[39] Justice Stevens viewed this intrusion on the parents' rights as unjustified, particularly in the case of the divorced family, where an ongoing relationship is lacking between the minor and the

37. *See* CONTRACEPTIVE TECHNOLOGY, *supra* note 23, at 146. *See also Hodgson*, 110 S. Ct. at 2954 (Marshall, J., concurring and dissenting). ("[A] delay of any length in performing an abortion increases the statistical risk of mortality and morbidity.").

38. *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

39. *Hodgson*, 110 S. Ct. at 2946.

absent parent.[40] He believed that forcing notification of both parents unreasonably burdens parental rights, as one parent should be allowed to decide whether it is in the best interest of the minor to inform the other parent.

Justice Stevens distinguished *Hodgson* from other cases addressing one-parent notification requirements by concentrating on the additional issue of parental rights implicated in the Minnesota statute. It is clear from other Supreme Court opinions that Justice Stevens believes that one-parent notification is constitutionally acceptable.[41] Therefore, Justice Stevens's concern for parental rights — not his concern for minors' abortion rights — persuaded him to hold the two-parent requirement unconstitutional.

It is distressing that Justice Stevens focused on the burden imposed upon parental rights instead of the severe infringement upon the minor's privacy rights that a parental notification requirement imposes. To ignore the minor's rights is to ignore the severe financial, emotional, and physical strains that can occur when a minor is forced to bear a child. It is precisely this disregard for the abortion rights of minors that led the Court to uphold the one-parent notification statute in *Akron Center*. Even more disturbing is the Court's implication that it may be willing to allow a one-parent notification requirement even in the absence of a judicial-bypass procedure.[42] Justice Stevens's reasoning in *Hodgson*, therefore, could result in a law which gives the minor no alternative to parental notification.

C. *An Interest In Protecting the Family Unit*

Parental notification statutes also fail to further any state interest in protecting the family unit.[43] Forced notification is potentially

40. *Id.* at 2938.

41. *See* Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972, 2993–34 (1990) (Stevens, J. concurring). *See also* Planned Parenthood v. Danforth, 428 U.S. 52 (1976), where the majority held that a state cannot constitutionally require parental consent before a minor could obtain an abortion. Justice Stevens, in dissent, however, urged recognition of a state's power to ensure that the pregnant minor consult with her parents before making her decision. *Id.* at 102. *See also* H. L. v. Matheson 450 U.S. 398 (1981), where the Court held that parental notification is permissible in the case of an unemancipated minor who has not demonstrated her maturity or that the abortion would be in her best interest. Stevens stated that he would have upheld the notification requirement as applied to all minor pregnant women. *Id.* at 422–25.

42. *See Akron Center,* 110 S. Ct. at 2978–79.

43. Minnesota claimed that the two-parent notification requirement was enacted in order to protect the family unit. *See Hodgson,* 110 S. Ct. at 2941–42. It is debatable whether protecting the family unit is a legitimate state interest. Furthermore, assuming the interest is legitimate, the state is actually affirmatively interfering with the family

devastating in dysfunctional families[44] and could spark violence and abuse.[45] Although Justice Stevens views this as a problem with two-parent notification requirements, he fails to recognize the same difficulties with a one-parent notification requirement.[46] It is doubtful that familial communications will improve in dysfunctional families as a result of parental notification of even one parent. In functional families where minors would probably consult with their parents regardless of any notification requirement, the parental notification statutes will have no effect. Furthermore, Becky Bell's death illustrates that even in functional families forcing notification could be devastating.[47] Any interest in protecting the family unit by fostering familial communications is not effectively furthered by parental notification requirements. Moreover, by interfering with the family the states are actually threatening the family unit.[48] Therefore, the statutes are not rationally related to the state's purported goal of protecting the family unit.

II. THE INADEQUACIES AND BURDENS OF A JUDICIAL-BYPASS PROCEDURE

Justice O'Connor, who cast the deciding vote in *Hodgson*, was the only Justice to hold that the two-parent notification requirement is constitutional when coupled with the judicial-bypass procedure.[49] She reasoned that, although the statute lacks a sufficient justification for the state's interference with family decision making, a judicial-bypass provision rescues the statute because requiring the minor to appear before a court does not unduly burden the minor's

unit; and thus the state action appears to be adverse to the state's interest. Therefore, the statute is neither rational nor legitimate.

44. Justice Stevens's definition of dysfunctional families refers to cases in which there is domestic violence, child abuse or neglect, and sexual molestation. He is also concerned about the divorced, separated, or never-married families where the absent parent does not participate in the child's life in any significant manner. *See id.* at 2939–40.

45. *See id.* at 2938–39 (citing the district court's findings, 648 F. Supp. 756, 769 (1986)).

46. *See e.g.*, Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2976, 2993–94 (1990).

47. *See supra* notes 1–6 and accompanying text.

48. *Id.*

49. Justices Kennedy, Rehnquist, White, and Scalia held that the two-parent notification requirement is constitutional even without the judicial-bypass procedure. Justices Marshall, Blackmun, Brennan, and Stevens held that the statute was unconstitutional even with the judicial-bypass procedure.

right.[50] In Justice O'Connor's view, if the statute is not unduly burdensome, then it need only be rationally related to a legitimate state purpose.[51]

In *Hodgson,* none of the judges who testified at the District Court level identified any positive effects of the bypass procedure.[52] These judges testified that the bypass procedure produced "fear, tension, anxiety, and shame among minors, causing some who were mature, and some whose best interests would have been served by an abortion" to notify their parents or to continue the pregnancy.[53] The bypass procedure sometimes caused delays of over one week, which increased the medical risks "to a statistically significant degree."[54]

Other considerations support these judges' testimony that a judicial-bypass procedure is oppressive. A court proceeding could be so frightening and confusing for the minor, that she may choose to forgo asserting her right simply to avoid the uncomfortable and potentially humiliating situation.[55] In a judicial-bypass procedure the minor must admit to a total stranger that she is sexually active, that perhaps she did not take any precautions to avoid pregnancy, and that she is pregnant. This type of experience could be extremely traumatic. Moreover, in large cities, the ability of minors, especially economically disadvantaged minors, to get transportation to the courthouse could be extremely limited. Thus, a teenager, who is incapable of raising a child emotionally and financially, may be forced to bear a child, precisely because of a lack of resources, confusion, or her fear of the judicial process. It is difficult to imagine why the Court would not view the above procedures as unduly burdensome on minors' abortion rights.

In *Akron Center,* the Court upheld an Ohio parental notification statute coupled with a judicial-bypass procedure that is even more burdensome than the one in *Hodgson*. The Court again failed to acknowledge how unduly burdensome these procedures are and

50. Hodgson v. Minnesota, 110 S. Ct. 2926, 2950–51 (1990). Justice O'Connor continued the undue burdens analysis that she articulated most recently in Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3063 (1989). According to this analysis, heightened scrutiny is only applied to state legislation if it unduly burdens the right to abortion.

51. 110 S. Ct. at 2949–50.

52. *Id.* at 2940 (citing 648 F. Supp. 756, 762 (D. Minn. 1986)).

53. *Id.*

54. *Id.* (citing 648 F. Supp. at 763).

55. One doctor testified that the minors often dread the court procedure more than the abortion and often have to take a sedative before the bypass procedure. *Id.* at 2940 n.29.

how they will deter minors from obtaining an abortion. One wonders if the Court majority is unaware of the practical implications of these restraints on minors' abortion rights, or merely unconcerned because it fails to fully understand the importance of the right to an abortion.

Ohio's judicial-bypass procedure is faulty on several grounds: the complicated pleading requirements, the imposition of a clear and convincing evidence standard, the lack of anonymity, the ineffective constructive authorization provisions, and the inadequacy of the expedited procedures. Each of these components, as well as the practical implications of the Court's sustaining such a restrictive judicial-bypass procedure, will be discussed below.

A. *The Pleading Trap*

The Court, in *Akron Center,* held that Ohio's judicial-bypass procedure satisfied the requirements established in *Bellotti v. Baird.*[56] *Bellotti* mandated that the bypass procedure enable the minor to demonstrate that she can make a mature and informed decision to have an abortion without regard to her parents' wishes, or, in the alternative, that the abortion would be in her best interest.[57] *Bellotti* also required that the procedure be anonymous and expeditious.[58] The Court appears to be adopting the *Bellotti* requirements even though the requirements are of doubtful constitutional validity.[59] Moreover, although the requirements established by *Bellotti* are vague, it is apparent that Ohio's judicial-bypass procedure does not meet *Bellotti's* general guidelines — yet the court upheld the judicial bypass.

Ohio has established what is termed by the dissent as a "pleading trap" that the minor must negotiate to assert her claims.[60] Ohio set up procedures likely to confuse a young and frightened minor. Under the statute the minor is required to choose one of four forms, claiming either (1) maturity; (2) that parental notification is not in her best interest; (3) both maturity and best interest; or

56. 443 U.S. 622 (1979) (Powell, J., plurality opinion).

57. *Id.* at 643–44.

58. *Id.*

59. These guidelines for judicial bypass were only adopted by Justice Powell. No other justice concurred with this part of his opinion. The Court, however, in *Hodgson* and *Akron Center* adopted the *Bellotti* guidelines even though the district court found no positive effects of the bypass procedure, and in fact found the procedure to be extremely oppressive. *See supra* notes 52–55 and accompanying text.

60. Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972, 2985–86 (1990) (Blackmun, J., dissenting).

(4) sexual, emotional or physical abuse by her parents.[61] The majority implied that these forms do not place any significant burdens on the minor's liberty interests.[62] This assumption disregards the fact that complicating the judicial procedure will further discourage some minors from approaching the courts. Moreover, even if the minor submits to the judicial process, but is unable to understand the required forms, she may fail to assert her guaranteed claims because of her confusion. Many adults may not be sophisticated enough to wade through these confusing forms.

The majority in *Akron Center* erroneously relied on the understanding and flexibility of state judges to give the minor "leave to amend" if she chooses the wrong form.[63] This option, however, should not be left completely in the hands of judicial discretion.[64] A judge could easily refuse to grant the minor the opportunity to amend her complaint because of her or his personal views against abortion. Even if the judge grants leave to amend, the additional time it takes to amend the complaint could increase the risks and costs of abortion.[65]

Burdens that increase both health risks and trauma to the minor should not be allowed without the justification of some profound state interest. Ohio's primary justification is administrative convenience.[66] When weighing the administrative convenience of the state against a minor's personal right to an abortion, the balance should weigh in the favor of the minor.

Moreover, rather than giving the minor the option of proving that the abortion is in her best interest, the Ohio and Minnesota statutes only permit the minor to show that notification *is not* in her best interest. This change marks a significant departure from *Bellotti*. Under these statutes, the minor may try to show that her parents would be unsympathetic, or incapable of coping with the news of her pregnancy. A judge is unlikely to respond favorably to these arguments, however, because she or he may believe that these typical teenage perceptions underestimate parents' ability to empathize

61. *Id.*

62. *See id.* at 2979, 2982. It will be very difficult for a minor alone to determine which form she needs to fill out to maximize her chances of successfully participating in the judicial-bypass procedure. This is especially true since the court is not required to appoint an attorney to represent her until after she has already filed the complaint. *Id.* at 2985.

63. *Id.* at 2982.

64. *See id.* at 2986 (Marshall, J., dissenting).

65. See CONTRACEPTIVE TECHNOLOGY, *supra* note 23, at 146.

66. *Akron Center,* 110 S. Ct. at 2986.

with their daughters. Judges holding "traditional values," who believe that parents should always be involved in their children's decisions, will frequently require parental notification.[67]

On the other hand, if the minor were required to prove that the abortion was in her best interest, she could explain that she did not feel emotionally, financially, or physically prepared to bear and raise a child. The evidence presented could consist solely of her own testimony, as the minor is in the best position to measure her own emotional readiness for motherhood.[68] In contrast, under the Ohio statute, the minor may have to introduce independent evidence of her parents' neglect, abuse, or instability to convince a judge to authorize her decision to abort her pregnancy, thereby rendering the process even more burdensome.

B. *The Extra Evidentiary Burden on the Minor*

The clear and convincing evidence standard required by the statute in *Akron Center* makes the minor's successful participation in the judicial-bypass procedure even more unlikely. The extra burden on the minor is acceptable, according to the majority in *Akron Center*, because the procedure was designed so that no one will oppose the minor's testimony during the bypass procedure.[69] The dissent, however, noted that by imposing a heightened standard of proof, the statute places "the risk of an erroneous decision on the minor, the very person whose fundamental right is at stake."[70] In some circumstances a court may be satisfied that the minor is mature but will be unable to authorize the abortion procedure because clear and convincing evidence has not been presented.[71] This extra evidentiary standard will directly affect the ability of some minors to obtain an abortion.

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67. Like Justice Kennedy, a state court judge may believe that for most people "the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature." *Id.* at 2984.

68. Since the minor knows best whether or not she is adequately prepared to bear a child, it is irrational to force her to prove this to a judge, who is not in a position to know what is best for the minor.

69. *Akron Center*, 110 S. Ct. at 2981. According to the majority, the preponderance of the evidence standard is inappropriate in an ex parte proceeding as no opposing evidence is presented in such a hearing. In their view, under a preponderance of the evidence standard the minor will always carry her burden no matter how weak the evidence presented. *Id.*

70. *Id.* at 2989.

71. *Id.* at 2990.

C. *The Lack of Anonymity*

Both Ohio's and Minnesota's judicial-bypass procedures fail to satisfy the anonymity requirement established in *Bellotti*.[72] The *Akron Center* majority found little constitutional significance in the difference between confidentiality and anonymity.[73] The Court reasoned that a guarantee of confidentiality is sufficient as long as reasonable steps are taken to prevent the public from learning the minor's identity.[74] Although the statute in *Akron Center* states that the minor's complaint form will not become a public record, Ohio's court procedures require that the minor sign her name and place her parents' names at several locations on the complaint form.[75] For a minor trying to avoid notification of her parents, this requirement is insensitive. The dissent remarked that "A minor, whose very purpose in going through a judicial-bypass proceeding is to avoid notifying a hostile or abusive parent, would be most alarmed at signing her name and the name of her parent on the complaint form."[76] A judicial-bypass procedure, therefore, will deter those minors who are especially fearful of their parent's discovery of their pregnancy from approaching the court.[77]

D. *The Lack of Procedure for Constructive Authorization*

The Ohio statute provides for constructive authorization if the court fails to hold a hearing within five business days after the minor files her complaint. Constructive authorization is a procedure whereby the physician is given permission to perform the abortion because the court has failed to make a ruling. Constructive authorization will be of little help to minors because Ohio does not provide documentation for the minor to present to the physician. Given that the physician faces criminal penalties if she or he fails to notify a minor's parents before performing an abortion, it is unlikely that the physician will accept anything short of an official document au-

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72. In Hodgson v. Minnesota, the District Court found that the bypass procedure ensured the minor's confidentiality, but not her anonymity. The Court, however, did not address this issue in that case. *Hodgson*, 110 S. Ct. 2926, 2940 (1990) (citing 648 F. Supp, 756, 763 (1986)).

73. *Akron Center*, 110 S. Ct. at 2980.

74. *Id.*

75. *Id.* at 2979–80.

76. *Id.* at 2987–88.

77. It may be impossible to maintain complete anonymity, because the minor will have to appear in person before the court. This is especially true in small towns where it is quite possible that the minor is acquainted with the either the court clerks, administrators or judge.

thorizing her or him to perform the abortion.[78] Ohio's Attorney General asserts that some type of document, such as a court calender, could be given to the minor to demonstrate that the court failed to reply.[79] As the dissent points out, however, the "mere absence of an entry on the court's docket sheet hardly would be reassuring to a physician facing such dire consequences."[80]

According to the majority, the constructive authorization provision is permissible absent evidence of a pattern of judicial abuse or defiance in following the time limits.[81] Therefore, while waiting for such evidence, a minor may be forced to inform her parents of her pregnancy in order to obtain a timely abortion. If the Court is going to allow these burdensome procedures, it should, at the very least, require states to create a document that the minor can show the doctor to prove that she has been given constructive authorization to obtain an abortion.

E. *A Failure to Meet the Expeditious Requirement*

Most importantly, judicial-bypass procedures do not satisfy the *Bellotti* requirement for expediency. The Ohio statute requires the trial court to hold a hearing within five business days after the complaint is filed.[82] The statute also mandates that the court of appeal schedule the appeal within four days after the notice of appeal is filed and then announce its decision within five days of hearing the case.[83] Interpreting "days" to mean business days, opponents of the statute calculated that Ohio's judicial-bypass procedure could take up to twenty-two days. The Minnesota statute's bypass procedure also created delays of one or more weeks for some minors.[84] Such delays could substantially increase the risks and costs of abortion to the minor.[85]

The majority in *Akron Center* contended that days should be interpreted as calender days, but stated that in any event, "the mere possibility that the procedure may require up to twenty-two days in

78. *See* OHIO REV. CODE ANN § 2919.12 (B)-(D) (Anderson Supp. 1988).

79. *Akron Center,* 110 S. Ct. at 2981 (1990).

80. *Id.* at 2989.

81. *Id.* at 2981.

82. *Id.* at 2977 (citing OHIO REV. CODE ANN. § 2951.85 (B)(1) (Anderson Supp. 1988)).

83. *Id.* at 2978, (citing OHIO REV. CODE ANN § 2505.073 (A) (Anderson Supp. 1988)).

84. Hodgson v. Minnesota, 110 S. Ct. 2926, 2940 (1990) (citing 648 F. Supp 756, 765).

85. CONTRACEPTIVE TECHNOLOGY, *supra* note 23, at 146.

a rare case is plainly insufficient to invalidate the statute on its face."[86] The majority failed to address the increased risk of delaying abortion, especially to minors who are more likely to seek later abortions than adult females.[87] The fear of parental notification may discourage minors from obtaining the medical care they critically need during the early stages of their pregnancy. Moreover, a time consuming judicial-bypass procedure could so increase the costs and dangers of abortion that the minor may no longer be able to obtain an abortion. By failing to give minors an expedient method by which they can avoid parental notification, the Ohio and Minnesota statutes and all such procedures increase the risks to minors' health and lives[88] and unjustifiably burden their right to an abortion.

III. THE COURT'S UNWILLINGNESS TO QUESTION STATE MOTIVES BEHIND PARENTAL NOTIFICATION REQUIREMENTS

The Court has demonstrated an unwillingness to examine states' underlying motives behind the parental notification statutes. It is quite likely that Ohio and Minnesota wanted to prevent and dissuade minors from obtaining abortions. Both statutes place severe burdens on minors who fear their parents' notification. The Ohio and Minnesota statutes may have been enacted to limit minors' access to an abortion, rather than to further the states' interest in the welfare of the parents, the minor or the family. As shown above, these state interests are not advanced by parental notification statutes. The District Court's findings in *Hodgson* demonstrate that neither the parental notification requirement nor the bypass procedure had any positive effects on the pregnant minor.[89] Furthermore, the statutes had only a negligible effect on family communication, and, in many cases, had a devastating effect on the family.[90] The Court upheld the notification statute in the face of uncontested evidence that the notification requirement and the bypass procedure fail to further the states' interest in promoting the family unit, parental authority, or the minor's welfare.

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86. *Akron Center,* 110 S. Ct. at 2981.

87. *Id.* at 2988 (Blackmun, J. dissenting) (citing Ashcroft v. Planned Parenthood Ass'n, 462 U.S. 476, 497–98 (1983)).

88. CONTRACEPTIVE TECHNOLOGY, *supra* note 23, at 146.

89. Hodgson v. Minnesota, 110 S. Ct. at 2940 (1990) (citing Hodgson v. Minnesota, 648 F. Supp. 756, 762 (Minn. 1986)).

90. *Id.* at 2939, 2941 (citing 648 F. Supp. at 764, 775). *See also* notes 1–6 and accompanying text.

The states' motivation is suspicious given that neither state requires any parental notification when the minor first discovers her pregnancy. It is only when the minor makes the decision to obtain an abortion that the states mandate parental involvement. The states are apparently uninterested in the minor's decision to carry the pregnancy to term, and are solely focused on her abortion decision. The statutes, therefore, appear to have been enacted for the sole purpose of imposing a burden on the minor's abortion right.

The Court's deference to the states' asserted "purpose" is disturbing. States should be required to prove that their purported interest is being furthered by the abridgment of the abortion right. The states could not prove this in either *Hodgson* or *Akron Center* because all the evidence shows that notification statutes do more harm than good for everyone involved.[91]

CONCLUSION

The Supreme Court in *Akron Center* and *Hodgson* further eroded a minor's right to abortion. *Hodgson* stands for the proposition that even though a state action severely abridges the minor's ability to assert her constitutional right to an abortion, the Court will uphold the law as long as it is coupled with a judicial-bypass procedure. The Court condoned a judicial-bypass procedure although all evidence illustrated that the procedure is quite burdensome on minors. Furthermore, *Akron Center* established that the judicial-bypass procedure can be a "tortuous maze"[92] that makes parental notification difficult to circumvent.

When joined with a parental consent statute, a watered-down version of the *Bellotti* bypass procedure, such as the one used in Ohio, could completely destroy a minor's choice to assert her abortion right. Judges, utilizing Ohio's bypass procedure, could find it within their discretion to deny authorization in almost every circumstance. Hence, the minor would be completely at the mercy of a judge's personal view on abortion. The judge would have the power to deny the pregnant minor an exception to the consent law, and she would be forced to bear an unwanted child if her parents then refuse to consent to the abortion.

The refusal of the Court to question states' justifications for the abridgment of abortion rights combined with its apparent inability

91. *See, e.g., Hodgson*, 110 S. Ct. at 2940.

92. Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972, 2985 (1990) (Blackmun, J., dissenting).

to understand the impact of the states' interference on the minor's life has serious implications for all women's abortion rights. If the Court is only willing to apply a rational basis standard to laws that abridge abortion rights, opponents of these laws will rarely succeed in contesting them. Similarly, if the Court is adopting Justice O'Connor's undue burden analysis, almost every abortion restriction will be upheld unless the Court views the restriction as essentially an absolute ban on abortion rights. The fact that the majority perceived the onerous parental notification requirements and judicial-bypass procedures in *Akron Center* and *Hodgson* as only insignificant burdens on the minor's abortion right foreshadows a grave future for the abortion rights of all women.[93]

93. Justice Souter has now replaced Justice Brennan on the Court. His presence could change the character of the Court, given that Justice Brennan was the fifth vote invalidating the two-parent notification requirement in *Hodgson*. Abortion rights activists wait with anticipation for Souter's stand on the abortion issue. As a conservative, it is possible that he will support well-established constitutional doctrine and will not further erode this basic fundamental right. Justice Souter's appointment, however, may indicate that women need to turn to state legislatures to protect their abortion rights because we may no longer be able to rely on federal constitutional protections.