PROTECTING OUR DAUGHTERS: THE NEED FOR THE VERMONT PARENTAL NOTIFICATION LAW

Teresa Stanton Collett*

INTRODUCTION

For several years, lawmakers in the Vermont House of Representatives have filed bills that would require a minor to notify a parent of her intent to obtain an abortion.[1] Routinely these bills have been assigned to committees where they languished or died.[2] In contrast, House Bill 218 received a favorable vote of seventy-eight to fifty-five in the House of Representatives in 2001.[3] The State Senate is expected to consider this bill in the spring.

While Vermont statutes permit minors to make a limited number of medical decisions without parental involvement,[4] the general rule is that a parent must consent to all medical procedures performed on his or her child due to the legal incapacity of minors.[5] House Bill 218 places abortion within

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* Professor of Law, South Texas College of Law, Houston, Texas. The author testified in favor of House Bill 218 before the Health and Welfare Committee and the Judiciary Committee of the Vermont House of Representatives.

1. H. 363, 1993-1994 Leg. Sess. (Vt. 1994), http://www.leg.state.vt.us/docs/1994/bills/intro/h%2D363.htm; H. 479, 1997-1998 Leg. Sess. (Vt. 1998), http://www.leg.state.vt.us/docs/1998/bills/intro/h%2D479.htm; H. 450, 1999-2000 Leg. Sess. (Vt. 1999), http://www.leg.state.vt.us/docs/2000/bills/intro/H-450.HTM; H. 218, 2001-2002 Leg. Sess. (Vt. 2000), http://www.leg.state.vt.us/docs/2002/bills/house/H-218.HTM.

2. Tracy Schmaler, *Hard to Peg: Flory takes her own approach*, RUTLAND HERALD, Feb. 5, 2001, rutlandherald.nybor.com/To_Print/19729.html ("The [parental notification] bill failed, though it is expected to be revisited by lawmakers this year."). *See also* Letter from David Millson, ADDISON EAGLE, October 21, 1999, www.addisoneagle.com/Archive/Comment/1099/Letters1021.htm ("why is the House Health and Welfare Committee waiting to bring the parental notification bill (H. 450) to the floor for full debate?").

3. H. 218, May 11 at 16 (Vt. 2001), www.leg.state.vt.us/docs/2002/journal/hj010511.htm. For the favorable report of the Health & Welfare Committee, see House Calendar, March 1, 2001 (Vt. 2001), www.leg.state.vt.us/docs/2002/calendar/HC010301.htm (reporting favorable vote of 6-5-0). For the favorable report of the Judiciary Committee, see House Calendar, May 8, 2001 (Vt. 2001) at www.leg.state.vt.us/docs/2002/calendar/hc010508.htm (reporting favorable vote of 6-4-1). For an unfavorable report issued by the House Ways & Means Committee, see House Calendar, May 9, 2001 (Vt. 2001), www.leg.state.vt.us/docs/2002/calendar/hc010509.htm (reporting by vote of 7-4-0 that the bill ought not pass).

4. *See* VT. STAT. ANN. tit. 18, § 4226 (2000) (allowing a minor over twelve years of age to consent to medical treatment and hospitalization for alcoholism, drug, addictions, or sexually transmitted diseases unless immediate hospitalization is required); VT. STAT. ANN. tit. 18, § 9 (2000) (allowing blood donation by minors seventeen years of age).

5. In describing the rights of parents the Vermont Supreme Court has stated:

> Parental rights and responsibilities are defined as those "rights and responsibilities related to a child's physical living arrangements, parent child contact, education, medical and dental care, religion, travel, and any other matter involving a child's welfare and upbringing." Rights and responsibilities are comprised of "physical responsibility," and "legal responsibility," which is defined as "*the rights and*

this general rule. The bill creates a legal duty on the part of abortion providers to comply with existing professional codes regarding information and counseling given to a minor prior to performance of an abortion.[6] Abortion providers must also notify a parent or guardian forty-eight hours prior to performing an abortion on an unemancipated minor.[7] A minor desiring to avoid notification may petition a court for an order exempting her from the notification requirement.[8]

This article outlines the provisions of House Bill 218, describes the current national consensus regarding parental involvement laws, and examines the arguments relating to the proposed passage of this law. A careful examination of the arguments reveals that parental notification benefits Vermont minors through improved medical care and protection from sexual assault. Notification also insures that Vermont parents are able to assist their daughters in responding to an unplanned pregnancy. In the rare cases where parental involvement is not appropriate, the judicial bypass contained in House Bill 218 provides a safe and effective means of protecting a girl who wishes to obtain a secret abortion.

I. OVERVIEW OF HOUSE BILL 218

Under House Bill 218, abortion providers must furnish minors information and counseling regarding their options in responding to their pregnancies to the extent the providers' codes of professional conduct already require.[9] When originally introduced as an alternative to parental notification,[10] this provision failed. However, supporters of parental notification recognized the merit of creating an enforcement mechanism for professional codes directed at insuring informed consent by minors. Therefore, they reintroduced the language as an *addition* to parental notification, rather than its alternative, and the amendment passed on a voice vote.[11] The exact meaning and effect of this provision is somewhat unclear,

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> ***responsibilities to determine and control*** various matters affecting a child's welfare . . . includ[ing] but . . . not limited to education, ***medical and dental care***, religion and travel arrangements."

Shea v. Metcalf, 167 Vt. 494, 497-98, 712 A.2d 887, 889 (1998) (discussing the allocation of parental responsibilities in a divorce proceeding) (emphasis added) (citations omitted).

6. H. 218 § 1870.

7. H. 218 § 5277.

8. H. 218 § 5278(3)(A).

9. H. 218 § 1870.

10. Journal of the House, May 10, 2001 (Vt.), http://www.leg.state.vt.us/docs/2002/journal/hj010510.htm.

11. Journal of the House, May 11, 2001 (Vt.), http://www.leg.state.vt.us/docs/2002/journal/hj010511.htm. Interestingly, the representatives initially proposing the idea of insuring adequate

because the duty to provide information and counseling is "to the extent already required by the providers' code of professional conduct."[12] Few, if any, codes of professional conduct address the counseling of pregnant adolescents to the level of detail provided in House Bill 218, although many professional groups have policy statements or practice guidelines related to this matter.[13]

The original and primary goal of the bill, found in the first section of the bill, requires written notification to a parent or guardian of a minor's intent to obtain an abortion at least forty-eight hours prior to performing the procedure.[14] The provider or his/her agent may deliver this notice in person, or it may be mailed to the parent's or guardian's usual place of abode.[15] A medical emergency may operate to waive this requirement,[16] as may certification by a parent, in writing, that he or she has been notified.[17] If a girl wishes to obtain an abortion without parental notification, she may seek judicial authorization to bypass this requirement.[18] The girl may initiate this process by filing a petition stating that: (1) she is an unemancipated minor who is pregnant; (2) she wishes to obtain an abortion without notifying either of her parents; (3) notification has not been waived; and (4) she has not previously petitioned any court for judicial bypass of notification relating to this pregnancy.[19] Upon receiving the petition, the bill requires the court to appoint an attorney *ad litem* and an appropriately-trained guardian *ad litem* to represent the girl.[20]

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information and counseling of minors opposed the amendment to add the requirement to parental notification. "Republicans responded later with an amendment identical to one offered the day before by Democrats. That amendment would effectively require health care and mental health providers to give objective advice and explanation to a teen-age girl seeking an abortion, even though health care professionals already do so under professional guidelines. The measure passed on a voice vote, even though the original sponsor of the bill, Rep. Margaret Hummel, D-Underhill, called for its defeat." Mike Eckel, *House Passes Parental Notification Bill*, BURLINGTON FREE PRESS, May 12, 2001 http://www.burlingtonfreepress.com/bfpnews/local/2000h.htm.

12. H. 218 § 1870.

13. *E.g.*, Planned Parenthood Federation of America, *Policy Statement on Patients' Rights* (adopted 1984), http://www.plannedparenthood.org/about/thisispp/mission.html; American Academy of Pediatrics, Committee on Adolescence, *Counseling the Adolescent about Pregnancy Options*, 101 PEDIATRICS 938 (1998), http://www.aap.org/policy/Re9743.html; Clinicians for Choice, *Options Counseling: An Important Skill for All Clinicians*, Clinicians for Choice Newsletter, (Aug. 2000), http://www.cliniciansforchoice.org/cfc/aug00.htm.

14. H. 218 § 5277.

15. *Id.*

16. H. 218 § 5278.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

House Bill 218 requires the court to hear and rule on the application within three business days of the application's filing, subject to any postponement the minor requests.[21] The bill permits the hearing to be held in chambers, or some setting other than a traditional courtroom.[22] In camera hearings have the advantage of diminishing the formality of the proceedings, which may reduce a girl's anxiety about appearing before a judge. The hearing must be informal and closed to the public.[23]

During the hearing, the minor, through her attorney, must present evidence that she is entitled to bypass parental notification because she satisfies one of the following conditions: (1) she is sufficiently mature and well-informed to consent to the abortion without parental involvement; (2) notification would place her at substantial risk of physical or emotional harm from a parent or guardian; (3) parental notification would cause irreparable harm to the minor's relationship with her parent or guardian; or (4) notification is not in her best interest.[24]

The hearing is ex parte, attended only by the minor, her representatives, and the witnesses called to testify.[25] This appears to be required under current judicial interpretations of the United States Constitution.[26] Nonetheless, in reflecting upon the ex parte nature of a similar bypass procedure one justice of the Texas Supreme Court observed:

> Unlike virtually any other judicial proceeding I am aware of, this proceeding is not only "non-adversarial," but notice to the very persons (besides the minor) likely to have the most interest in the outcome of the hearing—the parents who stand not to be notified of their minor child's decision—is prohibited. And the secrecy of the proceeding assures that the hearing will be entirely one-sided.[27]

Judges in other states have echoed these concerns.[28]

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21. H. 218 § 5278. The three business days requirement for ruling is more restrictive than the requirement of ruling within five business days approved by the United States Supreme Court in *Ohio v. Akron Center for Reproductive Health (Akron II)*, 497 U.S. 502, 513-14 (1990).

22. H. 218 § 5278 (3)(C).

23. *Id.*

24. H. 218 § 5278 (3)(F).

25. *See* H. 218 § 5278 (3)(B)–(C)

26. *See Akron II*, 497 U.S. 502 at 513 (anonymity of judicial bypass proceedings required); Causeway Medical Suite v. Ieyoub, 109 F.3d 1096 (5th Cir. 1997) (rejecting power of courts to notify parents of proceedings) *overruled on other grounds by* Okpalbi v. Foster, 244 F.3d 405 (5th Cir. 2001).

27. *In re* Doe, 19 S.W.3d 249, 258 (Tex. 2000) (Enoch, J., concurring).

28. The judicial bypass process in Nebraska has "no adversarial aspect" as noted by the Nebraska Supreme Court. *See* Orr v. Knowles, 337 N.W.2d 699, 706 (Neb. 1983). "This statute does not provide that the state or anyone else will contest the minor's claim that she is mature enough to make the abortion decision herself. Rather, she will present evidence, and the judge will then make the decision as to her

House Bill 218 requires the minor to show by clear and convincing evidence that she is entitled to bypass parental notification. The United States Supreme Court approved this standard in 1990:

> A State does not have to bear the burden of proof on the issues of maturity or best interests. The principal opinion in *Bellotti* indicates that a State may require the minor to prove these facts in a bypass procedure. A State, moreover, may require a heightened standard of proof when, as here, the bypass procedure contemplates an ex parte proceeding at which no one opposes the minor's testimony. We find the clear and convincing standard used in [Ohio's] H.B. 319 acceptable.[29]

The heightened evidentiary standard compensates, in part, for the hearing's ex parte nature and its increased risk of misjudgment due to inadequate factual development. It also provides a small measure of protection against exaggerated or false claims of prospective harm from parental notification, or of the minor's maturity and understanding of the options related to her pregnancy.

The court must issue a written entry order reflecting its judgment within three business days of the filing of the petition.[30] The bill does not permit

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maturity." *Id. See also* Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873, 1891-92 (1996):

> Because such a scenario does not involve judges' employing normal rules concerning proof in the litigation process, the result of these hearings is practically preordained: no opposing party challenges the evidence and the court, thus, bases its finding regarding the minor's maturity either on the one-sided evidence presented, or on idiosyncratic biases.

Id. A trial judge in Nebraska observed:

> There is nobody on the other side, unless a judge takes it on himself. Now I know of no other case that is like that, where it is truly one-sided. If after that one-sided hearing, the judge finds that the girl is mature and can give an informed consent, then the judge is *required* to authorize the abortion physician to perform the abortion.

JOSEPH W. MOYLAN, *No Law Can Give Me the Right to Do What is Wrong*, *in* LIFE AND LEARNING V: PROCEEDINGS OF THE FIFTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 234, 235 (Joseph W. Koterski ed., 1995) (explaining Judge Moylan's decision to resign from the juvenile court bench he had occupied for more than twenty years).

29. *Akron II*, 497 U.S. at 515-16 (italics and internal citations omitted). *See also* Lambert v. Wicklund, 520 U.S. 292, 294 (1997); State of Florida Dep't of Health v. N. Fla. Women's Health and Counseling Service, Nos. 1D00-1983, 1D00-2106, 2001 WL 111037 (Fla. App. 1 Dist., Feb. 9, 2001). Nebraska adopted the clear and convincing standard by judicial interpretation of the statute. *In re* Petition on Anonymous 1, 558 N.W.2d 784, 787 (Neb. 1997). *Cf.* Santosky v. Kramer, 455 U.S. 745, 748 (1982) (requiring clear and convincing evidence prior to termination of parental rights); Addington v. Texas, 441 U.S. 418, 423 (1979) (requiring clear and convincing evidence where possible injury to the individual is significantly greater than any possible harm to the state).

30. H. 218 § 5278(E).

appeal of a bypass order.[31] A minor denied a bypass, however, may seek *de novo* review by the presiding judge of the family court in the county in which the original order was sought.[32]

House Bill 218's description of the bypass process may confuse an unfamiliar reader. The sheer number of paragraphs explaining the bypass procedure might lead one to believe that the thrust of the legislation is judicial, rather than parental, involvement. One witness, in fact, made this claim before the House Health & Welfare Committee.[33] Such claims, however, are incorrect.

The general rule the bill embodies is simple. It takes but one sentence to state. "No abortion shall be performed upon an unemancipated minor or upon a pregnant minor for whom a guardian has been appointed because of a finding of incompetency, until forty-eight hours after written notice of the pending abortion has been delivered to at least one parent of the unemancipated minor or to the guardian of the incompetent minor."[34] The remainder of the three-page bill defines the judicially-created exception to the rule, and the unique procedures attendant to the exception. Nonetheless, the purpose for and general rule established by House Bill 218 is that parents are legally entitled to notice before their minor daughter undergoes an abortion.

II. PARENTAL INVOLVEMENT: THE NATIONAL CONSENSUS

Laws requiring parental notification or consent prior to the performance of an abortion upon a minor (collectively known as "parental involvement laws") are the product of widespread agreement that parents should be involved in their minor daughter's decision to continue or terminate an unplanned pregnancy. Neither abortion rights activists nor pro-life advocates dispute this point.[35] The fact that parental involvement laws exist on the

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31. H. 218 § 5280.

32. H. 218 § 5279.

33. *Parental Notification of Abortion: Hearings on H. 218 Before the House Comm. on Health and Welfare*, 2001-2002 Legis. Sess. (Vt. 2001) [hereinafter *Health Hearings*] (testimony of Jamie Sabino, on February 20, 2001) (characterizing bill as a "judicial notification bill").

34. H. 218 § 5277.

35. "Responsible parents should be involved when their young daughters face a crisis pregnancy." National Abortion Rights Action League, *Minors' Issues*, www.naral.org/issues/issues minors.html (last visited Sept. 11, 2001). "Few would deny that most teenagers, especially younger ones, would benefit from adult guidance when faced with an unwanted pregnancy. Few would deny that such guidance ideally should come from the teenager's parents." Planned Parenthood Federation of America, Inc., *Teenagers, Abortion, and Government Intrusion Laws*, Fact Sheets, *at* http://www.plannedparenthood.org/library/ABORTION/laws.html (Aug. 1999).

> Physicians should strongly encourage minors to discuss their pregnancy with their parents. Physicians should explain how parental involvement can be helpful and that parents are generally very understanding and supportive. If a minor expresses

books in forty-three of the fifty states illustrates a national consensus on this issue.[36] Of forty-three state statutes requiring parental involvement, seven have been determined to violate state or federal constitutional provisions.[37]

> concerns about parental involvement, the physician should ensure that the minor's reluctance is not based on any misperceptions about the likely consequences of parental involvement.

Council on Ethical and Judicial Affairs, American Medical Association, *Mandatory Parental Consent to Abortion*, 269 J. AM. MED. ASS'N 82 (1993) (opposing laws mandating parental involvement on the basis that such laws may expose minors to physical harm, or compromise "the minor's need for privacy on matters of sexual intimacy.").

36. See ALA. CODE §§ 26-21-1 to-8 (1992); ALASKA STAT. §§ 18.16.010-030 (Michie 1998); ARIZ. REV. STAT. ANN. § 36-2152 (West 1993 & Supp. 2001); ARK. CODE ANN. §§ 20-16-801 to-808 (Michie 2000); CAL. HEALTH & SAFETY CODE § 123450 (West 1996); COLO. REV. STAT. ANN. §§ 12-37.5-101 to-108 (2000); CONN. GEN. STAT. ANN. § 19(a)-601 (West 1997); DEL. CODE ANN. tit. 24, §§ 1780-1789B (1997); FLA. STAT. ANN. § 390.01115 (West Supp. 2000); GA. CODE ANN. §§ 15-11-110 to-118 (Harrison 1998); IDAHO CODE § 18-609(6) (Michie 1997); 750 ILL. COMP. STAT. 70/1-70/99 (West 1999); IND. CODE ANN. §§ 16-18-2-267, 16-34-2-4 (West 1997); IOWA CODE ANN. §§ 135L.1-8 (West 1997 & Supp. 2001); KAN. STAT. ANN. § 65-6705 (1992 & Supp. 2000); KY. REV. STAT. ANN. § 311.732 (Michie 1995 & Supp. 2000); LA. REV. STAT. ANN. § 40:1299.35.5 (West 1992 & Supp. 2000); ME. REV. STAT. ANN. tit. 22, § 1597-A (West 1992 & Supp. 2000); MD. CODE ANN., HEALTH-GEN. § 20-103 (Michie 2000); MASS. ANN. LAWS ch. 112, § 12s (Law. Co-op. 1991 & Supp. 2000); MICH. STAT. ANN. §§ 25.248 (101)-(109) (Law. Co-op. 1999 & Supp. 2000); MINN. STAT. ANN. § 144.343 (West 1998); MISS. CODE ANN. §§ 41-41-51 to-63 (2001); MO. ANN. STAT. §§ 188.015, 188.028 (West 1996 & Supp. 2000); MONT. CODE ANN. §§ 50-20-201 to-215 (1999); NEB. REV. STAT. §§ 71-6901 to- 6909 (1996); NEV. REV. STAT. §§ 442.255-.257 (2000); N.J. STAT. ANN. §§ 9:17A-1 to-1.12 (West 1993 & Supp. 2000); N.M. STAT. ANN. §§ 30- 5-1 to-3 (Michie 2000); N.C. GEN. STAT. §§ 90-21.6 to .10 (1999); N.D. CENT. CODE §§ 14-02.1 to 03.1 (1997); OHIO REV. CODE ANN. § 2919.12 (Anderson 1996); 18 PA. CONS. STAT. ANN. § 3206 (West 1983 & Supp. 2000); R.I. GEN. LAWS § 23-4.7-6 (1996); S.C. CODE ANN. §§ 44-41-30 to-37 (Law. Co-op. 1985 & Supp. 2000); S.D. CODIFIED LAWS § 34-23A-7 (Michie 1994 & Supp. 2001); TENN. CODE ANN. § 37-10-301 to-304 (1996 & Supp. 2000); TEX. FAM. CODE ANN. § 33.001-.004 (Vernon Supp. 2000); UTAH CODE ANN. § 76-7-304 (1999); VA. CODE ANN. § 16.1-241(D) (Michie 1999); W. VA. CODE §§ 16-2F-1 to-8 (1998); WIS. STAT. ANN. § 48.375 (West 1997); WYO. STAT. ANN. § 35-6-118 (Michie 1999).

37. Courts have permanently enjoined implementation of six state statutes in the face of claims of state or federal constitutional infirmity. *See* Planned Parenthood of Rocky Mountain Services Corp. v. Owens, 107 F.Supp.2d 1271, 1280 (D. Colo. 2000) (holding medical emergency exception in parental notice statute impermissibly narrow); Glick v. McKay, 616 F. Supp. 322, 327 (D. Nev. 1985), aff'd, 937 F.2d 434 (9th Cir. 1991) (holding judicial bypass provision inadequate); American Acad. of Pediatrics v. Lungren, 940 P.2d 797, 800 (Cal. 1997) (holding parental consent statute violated state constitutional right to privacy); Planned Parenthood of Central New Jersey v. Farmer, 762 A.2d 620 (N.J. 2000) (holding parental notification law with judicial waiver violates state constitution); Zbaraz v. Ryan, No. 84 C 771 (Ill. Supreme Ct. refused to issue rules implementing Ill. Stat.); Wicklund v. State, No. ADV-97-671 (Mont. Dist. Ct. Feb. 25, 1999) (parental notification law violated state constitution), http://www.mtbizlaw.com/1stjd99/WICKLUND_2_11.htm. A New Mexico statute was ruled unconstitutional by the state attorney general. N.M. Op. Att'y Gen. 90-19 (1990), 1990 WL 509590. Enforcement of the parental laws in Arizona and Florida, while upheld as constitutional by lower courts, are stayed pending disposition of appeals regarding their constitutionality. The Arizona federal district court upheld the constitutionality of the Arizona parental consent law on August 8, 2001. Planned Parenthood of S. Ariz. v. Lawall, No. CV 00-386-TUC-RCC (D. Ariz. filed Aug. 9, 2001). A local newspaper, however, reports that enforcement of the law has been stayed pending the outcome of an appeal of the decision. Carol Sowers, *Judge Stays Abortion Law, Appeal Challenges Consent Measure*, ARIZ. REPUBLIC, Sept. 15, 2001 at A1, http://www.

Nine of the remaining states have laws that are substantially ineffectual in assuring parental involvement in a minor's decision to obtain an abortion.[38] However, laws in twenty-seven states virtually guarantee the right to parental notification or consent in most cases.[39]

This consensus in favor of parental involvement is also reflected in the decisions of the federal courts. In *Planned Parenthood of Central Missouri v. Danforth*, the first of a series of United States Supreme Court cases dealing with parental involvement laws, Justice Stewart wrote, "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision of whether or not to bear a child."[40] Three years later, in *Bellotti v. Baird*,[41] the Court acknowledged that parental consultation is critical for minors considering abortion because "minors often lack the experience, perspective and judgment to recognize and avoid choices that could be detrimental to them."[42] The *Bellotti* Court also observed that parental consultation is important because the situation raises profound moral and religious concerns.[43] More recently, in *Planned Parenthood v. Casey*, Justices O'Connor, Kennedy, and Souter observed that parental consent and

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arizonarepublic.com/special12/articles/0915abortion15.html. A Florida intermediate appellate court has upheld the Florida parental notification law as constitutional in *State v. N. Fla. Women's Health and Counseling Service*, Nos. 1D00-1983, 1D00-2106, 2001 WL 111037 (Fla. App. 1 Dist., 2001). The Florida Supreme Court has granted review. N. Fla Women's Health & Counseling Service v. State, 2001 WL 402634 (Fla. 2001). In Alaska, the state supreme court has reversed a trial court determination that the parental consent law violates the state constitution, and returned the case to the trial court in order to allow the state an opportunity to establish that the law serves compelling state interests by narrowly tailored means. State v. Planned Parenthood of Alaska, 2001 WL 1448754 at *10 (Alaska 2001).

38. *See* CONN. GEN. STAT. ANN. § 19(a)-601 (stating that the abortion provider need only discuss the possibility of parental involvement); DEL. CODE ANN. tit. 24, § 1783(a) (allowing notice to a licensed mental health professional not associated with an abortion provider); KAN. STAT. ANN. § 65-6705(j) (allowing a physician to bypass parental notice in cases where the physician determines that an emergency exists that threatens the "well-being" of the minor); ME. REV. STAT. ANN. tit. 22, § 1597- A(2) (allowing a minor to give informed consent after counseling by the abortion provider); MD. CODE ANN., HEALTH-GEN. § 20-103(c) (allowing a physician to determine that parental notice is not in the minor's best interest); OHIO REV. CODE ANN. § 2919.12 (stating that notice may be given to a brother, sister, step-parent, or grandparent if certain qualifications are met); UTAH CODE ANN. § 76-7-304 (stating that a physician need notify only if possible); W. VA. CODE § 16-2F-3(c) (stating physician not affiliated with an abortion provider may waive the notice requirement); WIS. STAT. ANN. § 48.375 (4)(1) (stating that the notice may be given to any adult family member).

39. The guarantee is qualified by the fact that every state with an effective parental involvement law has judicial bypass of parental involvement for mature and well informed minors and minors for whom the court determines that abortion is in their best interest.

40. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 91 (1976) (Stewart, J., concurring).

41. Bellotti v. Baird, 443 U.S. 622, 640 (1979) (*Bellotti II*) (plurality opinion).

42. *Bellotti II*, 443 U.S. at 635.

43. *Id.* at 640-41; *see also id.* at 657 (White, J., dissenting).

notification laws "are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart."[44]

Notwithstanding the value of parental involvement in a minor's decision to obtain an abortion, the Supreme Court has placed some limits on the traditional authority of parents to consent to medical intervention on behalf of their minor children.[45] In *Danforth*, the Supreme Court struck down a statute requiring parental consent in all cases,[46] observing 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 patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."[47] The Court retained this rule in *Bellotti v. Baird*,[48] while providing guidance to state legislatures regarding the requirements for a constitutionally valid parental consent statute:

> We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.
>
> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.[49]

Thus, a consent statute must include a process for judicial bypass in situations where a minor is well-informed and mature, or where a court finds an abortion is in the minor's best interest.

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44. Planned Parenthood v. Casey, 505 U.S. 833, 895 (1992).

45. On the authority of parents to make medical decisions for their minor children see *Parham v. J.R.*, 442 U.S. 584 (1979) (holding parents have a constitutional right to direct psychiatric treatment for minor child, over minor's objection); Newmark v. Williams, 588 A.2d 1108, 1121 (Del. Super. Ct. 1991) (upholding parents' rejection of chemotherapy in favor of prayer treatment where survival was not assured even with medical intervention.); Eric B. v. Ted B., 189 Cal. App. 3d 996, 998-99 (Cal. Ct. App. 1987) (requiring medical monitoring of child following court-ordered chemotherapy treatments over renewed parental objections); *In re* Green, 292 A.2d 387, 392-93 (Pa. 1972) (dismissing court ordered medical intervention for seventeen-year-old poliomyelitis patient suffering from ninety-four percent curvature of the spine on basis that condition is not considered life-threatening).

46. *Danforth*, 428 U.S. at 52.

47. *Id.* at 74. The Court observed that "any independent interest the parents may have in the termination of the minor daughter's pregnancy [was] no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." *Id.* at 75.

48. *Bellotti II*, 443 U.S. at 643.

49. *Id.* at 643-44 (citations omitted).

The Supreme Court has recognized that notification laws do not, however, give parents the legal authority to prevent their daughter's abortion. In *Hodgson v. Minnesota*, Justice Stevens observed, "Although the Court has held that parents may not exercise 'an absolute, and possibly arbitrary, veto' over that decision [by a minor to terminate her pregnancy], it has never challenged a State's reasonable judgment that the decision should be made after notification to and consultation with a parent."[50]

To date, the Court has explicitly declined to rule on the question of whether a judicial bypass process is required to preserve the constitutionality of notification statutes, absent a case presenting such a statute.[51] Lower federal courts are split on this issue.[52] Due to this unresolved constitutional question, and to varied political judgments regarding the issue,[53] state legislatures typically include a judicial bypass process to insulate the statute from constitutional attack. House Bill 218 follows this conventional wisdom.

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50. Hodgson v. Minnesota, 497 U.S. 417, 445 (1990) (citation omitted).

51. "This case [does not] determin[e] the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto." Lambert v. Wicklund, 520 U.S. 292, 296 n.3 (1997), *citing Bellotti II*, 443 U.S. at 654 n.1 (Stevens, J., concurring). For an extensive review of Supreme Court precedent on this issue, see *Planned Parenthood of the Blue Ridge v. Camblos*, 155 F.3d 352, 361-67 (4th Cir. 1998).

52. The U.S. Court of Appeals for the Second Circuit has never ruled on this question. The most recent and thorough opinion on the issue held that bypass was not required in all notification statutes if the notice provision contained appropriate exceptions. *Camblos*, 155 F.3d at 384. However, the U.S. Courts of Appeals for the Sixth, Seventh, and Eighth Circuits have ruled to the contrary. Akron Ctr. for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988) *rev'd sub nom* on other grounds, Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502 (1990); Indiana Planned Parenthood Affiliates Ass'n Inc. v. Pearson, 716 F.2d 1127, 1131-32 (7th Cir. 1983); Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452 (8th Cir. 1995), *cert. denied sub nom*, Janklow v. Planned Parenthood Sioux Falls Clinic, 517 U.S. 1174 (1996).

53. According to a Wirthlin Worldwide survey, 72% of Vermonters support parental notification prior to performance of an abortion on a girl under the age of eighteen. *Wirthlin Survey*, copy on file with author (Survey conducted by Withlin Worldwide for Vermont Right to Life—401 registered voters were surveyed by telephone on January 6-7, 2000). This support drops to 39% when notification is required only for girls age sixteen and younger ("Do you favor or oppose a law which would require doctors to notify the parent or guardian of a girl 16 years old or less seeking an abortion? Favor 39%, Oppose 55%, Not sure 6%"). *Vermont Poll Results / May 2001*, http://rutlandherald.com/avermontpoll/results_may.html (last visited May 13, 2000) (Survey conducted by Research 2000 of Rockville, Md. for the *Rutland Herald*—601 likely Vermont voters were surveyed by telephone between April 30 and May 2, 2001). Notwithstanding the strong support for parental notification for all minors seeking an abortion, the editorial board of the Rutland Herald and The Barre-Montpelier Times Argus have run editorials against H. 218. *See No to Notification*, RUTLAND HERALD, Feb. 23, 2001, http://rutlandhearld.nybor.com/To_Print/20881.html; *No to Parental Notification*, TIMES ARGUS, Feb. 23, 2001, http://timesargus.nybor.com/Archive/Articles/Article/20959.

III. THE BENEFITS OF PARENTAL NOTIFICATION

The national agreement that parents should be involved in their minor daughter's decisions regarding an unplanned pregnancy is mirrored by an overwhelming consensus among the people of Vermont in favor of parental involvement laws.[54] According to a poll conducted in January of 2000, seventy-two percent of Vermonters support parental notification prior to performance of abortion on a minor.[55] On an issue as contentious and divisive as abortion, it is both remarkable and instructive that there is such firm support for laws requiring parental involvement.

Various reasons underlie this broad support. Foremost among the reasons are the potential benefits to the girl responding to an unplanned pregnancy. Parental involvement leads to improved medical care for minors seeking abortions and increases their protection from sexual exploitation by adult men.

A. Improved Medical Care for Minor Girls

Parental notification ultimately improves medical care for minors seeking abortions in three ways. First, parental notification will allow parents to assist their daughter in the selection of an abortion provider. As with all medical procedures, one of the most important guarantees of patient safety is the professional competence of those who perform the medical procedure. In *Bellotti v. Baird*,[56] the United States Supreme Court acknowledged the parents' superior ability to evaluate and select appropriate healthcare providers:

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54. The Wirthlin Poll of Vermonters revealed that 58% of the respondents identifying themselves as pro-choice and 92% of those identifying themselves as pro-life supported parental notification. The poll also showed that 59% of Democrats, 69% of the Independents, and 87% of Republicans support parental notification. *Wirthlin Survey, supra* note 53. Similar broad-based support is found in national surveys. A Kaiser Family Foundation/MTV Survey of 603 people ages 18-24 found that 68% favored laws requiring parental consent prior to performance of an abortion on girls under 18. *Sex Laws: Youth Opinion on Sexual Health Issues in the 2000 Election* (Survey conducted by Princeton Survey Research Associates between July 5-17, 2000), *at* http://www.mtv.comsendme.tin?page=/mtv/news/chooseorlose/features/feature_1009.html (last visited April 21, 2001). Similar results are also found in polls taken from January 1992 to January 1998, which consistently reflect at least 70% of the American public support parental consent or notification laws. *See, e.g., CBS News / NY Times Poll, summary at* http://www.publicagenda.org/issues/major_proposals_detail.cfm?issue_type=abortion&list=6 (Survey conducted between Jan. 10-12, 1998 shows 78% of those polled favor requiring parental consent before a girl under 18 years of age could seek an abortion.); George Gallup, Jr., THE GALLUP POLL: PUBLIC OPINION 1996 (Survey conducted July 25-28, 1996 shows 74% favor "requiring women under age 18 to get parental consent for any abortion." Survey conducted January 16-19, 1992 shows 70% favor requiring parental consent).

55. *Wirthlin Survey, supra* note 53 and accompanying text.

56. *Bellotti II*, 443 U.S. at 641.

> In this case, however, we are concerned only with minors who, according to the record, may range in age from children of twelve years to 17-year-old teenagers. Even the latter are less likely than adults to know or be able to recognize ethical, qualified physicians, or to have the means to engage such professionals. Many minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent or unethical.[57]

The Court's concern for the ability of minors to distinguish between competent and ethical abortion providers is particularly well-justified in Vermont where non-physicians perform abortions.[58] According to Clinicians for Choice, a national organization of midwives, nurse practitioners, and physician assistants, "nurse practitioners and physicians assistants perform about 80% of the abortions provided by the Planned Parenthood affiliate in Vermont," sometimes with no doctor even on site.[59] The National Abortion Federation (NAF) has recommended that patients seeking an abortion confirm that the abortion will be performed by a licensed physician in good standing with the state Board of Medical Examiners. The NAF has also recommended that the doctor have admitting privileges at a local hospital not more than twenty minutes away from the location where the abortion is to occur.[60] A well-informed parent is more likely to inquire into the qualifications of the person performing the abortion, and the availability of a physician with local admitting privileges, than is a panicky teen who just wants to no longer be pregnant.

Second, parental notification will insure that parents have the opportunity to provide additional medical history and information to abortion providers.[61]

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57. *Id.* at 641 n.21.

58. *See* NARAL, WHO DECIDES? A STATE-BY-STATE REVIEW OF ABORTION AND REPRODUCTIVE RIGHTS 273 (10th ed. 2001). The quality of care provided by non-physicians was recently questioned by a Texas physician who performs abortions:

> In general, [Dr.] Hansen agreed that the requirement that freestanding abortion clinics be licensed and regulated by the state has done some good in deterring "individuals who would establish corner clinics, multistate clinics, and be interested only in it for a remunerative basis." When non-physicians own abortion clinics, Hansen said, he sees the possibility that quality medical care may be sacrificed to the "bottom line."

Women's Med. Ctr. of N.W. Houston v. Archer, 159 F.Supp.2d 414, 425 (S.D. Tex. 1999) *aff'd in part rev'd in part* 248 F.3d 411 (5th Cir. 2001) (court's summary of testimony of Dr. Fred Hansen).

59. Clinicians for Choice, *Clinicians and Abortion Care*, *at* http://www.cliniciansforchoice.org/care.htm (last visited Sept. 12, 2001).

60. *See* National Abortion Federation, *Having an Abortion? Your Guide to Good Care*, *at* http://www.prochoice.org/pregnant/default6.htm (changed since visited Sept. 11, 2001).

61. In *Edison v. Reproductive Health Services*, 863 S.W.2d 621 (Mo. Ct. App. 1993), the court

> The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.[62]

Abortion providers, in turn, will have the opportunity to disclose the medical risks of the procedure to an adult who can advise the girl in giving her informed consent to the procedure. Parental notification insures that the abortion providers will inform a mature adult of the risks and benefits of the proposed treatment, after having received a more complete and accurate medical history of the patient.[63]

The third way parental notification will improve medical treatment of pregnant minors is by insuring that parents have adequate knowledge to recognize and respond to post-abortion complications.[64] While it is often

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confronted the question of whether an abortion provider could be held liable for the suicide of Sandra, a fourteen-year-old girl, due to depression following an abortion. Learning of the abortion only after her daughter's death, the girl's mother sued the abortion provider, alleging that her daughter's death was due to the failure to obtain a psychiatric history or monitor Sandra's mental health. An eyewitness to Sandra's death testified that he saw Sandra

> holding on to a fence on a bridge over Arsenal Street and then jumped in front of a car traveling below on Arsenal. She appeared to have been rocking back and forth while holding onto the fence, then deliberately let go and jumped far out to the driver's side of the car that struck her. A second car hit her while she was on the ground. Sandra was taken to a hospital and died the next day of multiple injuries.

Id. at 624. The court ultimately determined that Sandra was not insane at the time she committed suicide. Therefore, her actions broke the chain of causation required for recovery. Yet evidence was presented that the daughter had a history of psychological illness, and that her behavior was noticeably different after the abortion. *Id.* at 628. If Sandra's mother had known that her daughter had obtained an abortion, it is possible that this tragedy may have been avoided.

62. H.L. v. Matheson, 450 U.S. 398, 411 (1981). *Accord* Ohio v. Akron Ctr. For Reproductive Health, 497 U.S. 502, 518-19 (1990).

63. *See* State v. N. Fla. Women's Health and Counseling Service, Nos. 1D00-1983, 1D00-2106, 2001 WL 111037 at *6 n.3 (Fla. App. 1 Dist., 2001). The court noted:

> In circumstances where non-abortion surgery is necessary, moreover, the patient is more likely to have a substantial relationship with her treating physician. Absent emergency circumstances—circumstances which would eliminate the requirement to notify a parent or guardian anyway—the surgeon is supposed to advise the minor fully of the nature of the procedure and attendant risks and receive informed consent before performing pregnancy-related surgery. This provides an opportunity to give advice specific to the patient about possible post-surgical complications, how to avoid them or minimize the risk of their occurrence, and what to do if they arise.

Id.

64. *See Akron II*, 497 U.S. at 519.

claimed that abortion is one of the safest surgical procedures performed today, the actual occurrence rate of many complications is simply unknown.[65] In part this is due to the fact that the vast majority of abortions occur in abortion clinics.[66] Women typically have no pre-existing relationship with an abortion provider,[67] and only about one-third return to the provider for their post-operative exam.[68] Teens are even less likely to return for post-operative exams.[69] Arguably, therefore, failure to return for post-operative exams prevents providers from discovering post-abortion complications. Other healthcare providers may be reluctant to report any complications for fear of compromising the secrecy that often surrounds abortions.

While abortion rights activists characterize abortion-related complications as rare or unusual, at least one American court has held that a perforated uterus is a "normal risk" associated with abortion.[70] Untreated, a

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65. "The abortion reporting systems of some countries and states in the United States include entries about complications, but these systems are generally considered to underreport infections and other problems that appear some time after the procedure was performed." Stanley K. Henshaw, *Unintended Pregnancy and Abortion: A Public Health Perspective, in* A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTIONS 20 (Maureen Paul et al., eds. 1999).

66. Of the 1748 abortions performed in Vermont in 1999, 1438 (or 82%) were performed in a clinic. Vermont Bureau of Vital Statistics, *1999 Vital Statistics*, table E-7, *at* http://www.state.vt.us/health/_hs/pubs/2000/vitals/e070809.htm (last visited Sept. 14, 2001). *See also Parental Notification of Abortion: Hearings on H.218 Before the House Judiciary Comm.*, 2001-2002 Legis. Sess. (Vt. 2001) [hereinafter *Judiciary Hearings*] (testimony of Nancy Mosher, President and CEO of Planned Parenthood of N. New England on April 16, 2001) (estimating that Planned Parenthood performs about 83% of the abortions in Vermont). The quality of services provided by abortion clinics, as opposed to private physician's offices, has been questioned: "Unfortunately in clinics sometimes there is the cattle herd mentality where a number of patients are brought in, sent through procedures, and tender love and care is not given to them as much as in the private office." Women's Med. Ctr. of N.W. Houston v. Archer, 159 F.Supp. 2d 414, 428 (S.D. Tex. 1999) *aff'd in part rev'd in part* 248 F.3d 411 (5th Cir. 2001) (court's summary of testimony by Dr. Tad Davis).

67. State v. N. Fla. Women's Health and Counseling Service, Nos. 1D00-1983, 1D00-2106, 2001 WL 111037 at *6 n. 3 (Fla. App. 1 Dist., 2001):

> On the other hand, evidence at trial showed the physician-patient relationship is often attenuated in the abortion context, almost to the point of non-existence. *Planned Parenthood v. Danforth*, 428 U.S. 52, 91, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) ("It seems unlikely that [the minor] will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place."). Abortion patients ordinarily see their physicians only once or twice, very briefly. Most of their interaction is with the clinic's staff. Physicians performing abortions often perform several in the space of a single hour.

Id. (*citing Danforth*, 428 U.S. at 91).

68. Henshaw, *supra* note 65, at 20. *Cf.* RICHARD S. MOON, *Why I Don't Do Abortions Anymore*, MEDICAL ECONOMICS 61 (Mar. 4, 1985).

69. *Health Hearings*, *supra* note 33 (testimony of Nancy Mosher, President and CEO of Planned Parenthood of N. New England on April 16, 2001) (estimating that two-thirds of Vermont women keep their follow up appointments, and that "[t]eenagers are notorious for no-showing about a quarter of the time" for all types of appointments).

70. Reynier v. Delta Women's Clinic, 359 So.2d 733, 738 (La. Ct. App. 1978). "All the medical testimony was to the effect that a perforated uterus was a normal risk, but the statistics given by the experts

perforated uterus may result in an infection, complicated by fever, endometritis, and parametritis.[71] Moreover,

> The risk of death from post-abortion sepsis [infection] is highest for young women, those who are unmarried, and those who undergo procedures that do not directly evacuate the contents of the uterus. . . . A delay in treatment allows the infection to progress to bacteremia, pelvic abscess, septic pelvic thrombophlebitis, disseminated intravascular coagulophy, septic shock, renal failure, and death.[72]

Even with the present limited knowledge of complications, there is a medical consensus that the number of complications increases the later in the pregnancy the abortion occurs.[73] An online medical treatise on emergency medicine indicates a fifty percent or greater complication rate accompanies abortions performed in the second trimester.[74]

Legislators witnessed the human dimension of abortion complications in the testimony of two Vermont mothers whose names were not included in the public record in order to protect their childrens' privacy. In the first instance, a mother described the high fever and hemorrhaging her sixteen-year-old daughter experienced, as well as the girl's attempts to cope with suicidal

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indicated that it was an infrequent occurrence and it was rare for a major blood vessel to be damaged." *Id.* For a discussion of the frequent injuries related to incomplete abortions see *Swate v. Schiffers*, 975 S.W.2d 70 (Tex. Ct. App. 1998) (discussing an abortionist's unsuccessful claim of libel against journalist for reports based in part upon one disciplinary order that doctor failed to complete abortions performed on several patients, and that he failed to repair lacerations which occurred during abortion procedures). *Cf.* Sherman v. District of Columbia Bd. of Medicine, 557 A.2d 943 (D.C. 1989):

> Dr. Sherman placed his patients' lives at risk by using unsterile instruments in surgical procedures and by intentionally doing incomplete abortions (using septic instruments) to increase his fees by making later surgical procedures necessary. His practices made very serious infections (and perhaps death) virtually certain to occur. Dr. Sherman does not challenge our findings that his misconduct was willful nor that he risked serious infections in his patients for money."

Id. at 944.

71. *See* Phillip G. Stubblefield & David A. Grimes, *Current Concepts: Septic Abortions*, 331 NEW ENGLAND J. MED. 310 (1994).

72. *Id.*

73. Henshaw, *supra* note 65, at 20. National medical reporting indicates that risks associated with abortion increase the later in the pregnancy the abortion occurs:

> An important risk factor for mortality is gestational age. According to CDC [Center for Disease Control] calculations, for the period 1972-1987 mortality ranged (per 100,000 abortions) from .05 at less than 9 weeks to 2.9 at 13-15 weeks, 9.3 at 16-20 weeks, and 12.0 for more than 20 weeks . . . .

Id.

74. Slava V. Gaufberg, M.D., *Abortion, Complications*, eMedicine Journal: Emergency Medicine: Obstetrics & Gynecology, *at* http://www.emedicine.com/emerg/topic4.htm (Roy Alson, ed.) (last visited Sept. 13, 2001).

impulses following a secret abortion.[75] When the girl sought the assistance of the abortion provider, she was given the name and fee structure of a mental health counselor. Her suffering continued since she had exhausted her financial resources by paying for the abortion, and was unable to access her parents' health insurance without their knowledge.[76] Only after the parents insisted that their daughter reveal the reason for her changes in behavior did the girl obtain professional counseling through which she is learning to deal with the emotional aftermath of her abortion.[77]

A second mother and father provided a written account of their teenage son's struggle to overcome depression following his girlfriend's secret abortion, as well as her hospitalization for infection following the failure to remove all fetal parts during the abortion. The sixteen-year-old girl had revealed the abortion to her mother, and they had sought post-abortion help from the clinic, but the clinic "dismissed her symptoms as normal, and sent them along."[78] Two days later the girl collapsed, was rushed to the hospital, and emergency surgery was performed.[79] Both the pregnant girl and her boyfriend are healing from the after-effects of the abortion through the loving intervention and support of their parents.

These stories are not unique. Testimony of similar experiences persuaded a Florida appellate court to uphold that state's parental notification law:

> The State proved that appropriate aftercare is critical in avoiding or responding to post-abortion complications. Abortion is ordinarily an invasive surgical procedure attended by many of the risks accompanying surgical procedures generally. If post-abortion nausea, tenderness, swelling, bleeding, or cramping persists or suddenly worsens, a minor (like an adult) may need medical

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75. *Health Hearings*, *supra* note 33 (testimony of "Sue" an anonymous Vermont mother, on March 20, 2001).

76. *Judiciary Hearings*, *supra* note 66 (exchange between Representative Margaret Flory and Nancy Mosher, President and CEO of Planned Parenthood of N. New England on April 16, 2001). As excerpted from the transcript:

> Rep. Flory: If they [pregnant minors seeking abortions] have insurance, it would be billed to the insurance or not?
>
> Ms. Mosher: Not if they don't want their parents to know.
>
> Rep. Flory: But if–
>
> Ms. Mosher: It would be billed to their parent's insurance if their, you know, if their mom's with them while they're having the pregnancy test, absolutely.

Id.

77. *Health Hearings*, *supra* note 33 (testimony of "Sue" *supra* note 75).

78. *Id.* (Rutland Constituents in Pain, written testimony submitted to House Health and Welfare, dated February 21, 2001).

79. *Id.*

> attention. A guardian unaware that her ward or a parent unaware that his minor daughter has undergone an abortion will be at a serious disadvantage in caring for her if complications develop. An adult who has been kept in the dark cannot, moreover, assist the minor in following the abortion provider's instructions for post-surgical care. Failure to follow such instructions can increase the risk of complications. As the plaintiffs' medical experts conceded, the risks are significant in the best of circumstances. While abortion is less risky than some surgical procedures, abortion complications can result in serious injury, infertility, and even death.[80]

Without knowledge of their daughters' abortions, parents cannot insure that their children obtain necessary post-operative care or provide an adequate medical history to physicians called upon to treat any complications that may arise. The first omission may allow complications such as infection, perforation, or depression, to continue untreated. The second omission may be lethal. When parents do not know that their daughter has had an abortion, ignorance prevents swift and appropriate intervention by emergency room professionals responding to a life-threatening condition.

Opponents of House Bill 218 argue that mandatory parental notification causes girls to delay their decisions to obtain abortions, thus increasing the risks attendant to the procedure.[81] While it is true that the risks of abortion increase as the pregnancy progresses,[82] there is little evidence that parental involvement laws actually result in medically significant delays in obtaining abortions. Researchers reviewing the effects of the Minnesota parental consent law concluded:

> Regardless [of the reason], the claim that the law caused more minors to obtain late abortions is unsubstantiated. In fact, the reverse is true. For ages 15-17 the number of late abortions per 1,000 women decreased following the enactment of the law. Therefore, an increased medical hazard due to a rising number of late abortions was not realized.

Assuming arguendo that parental notification delays performance of the abortion by one week, any slight increase in risk to the girl is more than offset by the enhanced safety due to the provider's enhanced knowledge of the

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80. State v. N. Fla. Women's Health and Counseling Service, Nos. 1D00-1983, 1D00-2106, 2001 WL 111037 at *6 (Fla. App. 1 Dist., 2001).

81. *Judiciary Hearings*, *supra* note 66 (written testimony of Karyn M. Patno, President, Vermont Chapter, American Academy of Pediatrics).

82. Henshaw, *supra* note 65, at 20.

minor's medical history and the parents' ability to facilitate postoperative care for their daughter.[83]

B. Increased Protection from Sexual Assault

In addition to improving the medical care young girls receive in dealing with an unplanned pregnancy, parental notification will provide these minors with increased protection against sexual exploitation by adult men. Of the minors who have not told their parents of their pregnancy, fifty eight percent are accompanied by their sexual partners when seeking abortions.[84] This is significant since a substantial number of teen pregnancies are the result of sexual assault.[85]

National studies reveal that "[a]lmost two thirds of adolescent mothers have partners older than twenty years of age."[86] In a study of over 46,000 pregnancies by school-age girls in California, researchers found that:

> 71%, (or over 33,000), were fathered by adult post-high-school men whose mean age was 22.6 years, an average of 5 years older than the mothers. . . . Even among junior high school mothers aged 15 or younger, most births are fathered by adult men 6-7 years their senior. *Men aged 25 and older father more births among California school-age girls than do boys under age 18.*[87]

Other studies have found that most teenage pregnancies are the result of predatory practices by men who are substantially older.[88]

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83. James L. Rogers et al., *Impact of the Minnesota Parental Notification Law on Abortion and Birth*, 81 AMER. J. PUB. HEALTH 294, 297 (1991). *But see* Charlotte Ellertson, *Mandatory Parental Involvement in Minors' Abortions: Effects of the Laws in Minnesota, Missouri, and Indiana*, 87 AMER. J. PUB. HEALTH 1367 (1997). "Evidence concerning delay is mixed." *Id.* at 1372. "During periods of the laws' enforcement in Minnesota and Indiana, the two states with gestational age at abortion, in-state abortions for minors were probably delayed into the second month of pregnancy, although probably not into the second trimester." *Id.* at 1374.

84. Stanley Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, *in* 24 FAM. PLAN. PERSPECTIVES 196 (1992).

85. M. Joycelyn Elders, *Adolescent Pregnancy and Sexual Abuse*, 280 J. AM . MED. ASS'N 648 (1998).

86. American Academy of Pediatrics Committee on Adolescence, *Adolescent Pregnancy—Current Trends and Issues: 1998*, 103 PEDIATRICS 516, 519 (1999), http://www.aap.org/policy/re9828.html.

87. Mike A. Males, *Adult Involvement in Teenage Childbearing and STD*, 346 LANCET 64 (1995) (emphasis added).

88. *Id.*, *citing* H. P. Boyer & D. Fine, *Sexual Abuse as a Factor in Adolescent Pregnancy and Child Maltreatment*, 24 FAM. PLAN. PERSPECTIVES 4 (1992); Harold P. Gershenson, et al., *The Prevalence of Coercive Sexual Experience Among Teenage Mothers*, 24 J. INTERPERS. VIOL. 4 (1989). "Younger teenagers are especially vulnerable to coercive and nonconsensual sex. Involuntary sexual activity has been reported in 74% of sexually active girls younger than 14 years and 60% of those younger than 15 years." American Academy of Pediatrics Committee on Adolescence, *supra* note 86, at 516.

While no comparable studies of pregnant Vermont teens exist, public records relating to minors giving birth in Vermont in 1999 raise troubling questions.[89] Of the eight babies born to mothers under the age of fifteen, two fathers were identified as being ages fifteen to seventeen, one was between the ages of eighteen and nineteen, and five were not identified by age.[90] Of the 156 babies born to mothers who were between the ages of fifteen and seventeen, ten of the fathers were between fifteen and seventeen years of age, ninety fathers were identified as eighteen or older and fifty-six of the fathers were not identified by age.[91] This means that only six percent of the males impregnating minors were known to be under the age of eighteen. The remaining ninety-four percent were adults or of unidentified age.

A 1989 study of coercive sexual experiences among teenage mothers found that, of the pregnant teens that had had unwanted sexual experiences, only eighteen percent of the perpetrators were within two years of the victim's age.[92] Another eighteen percent were three to five years older than the victim.[93] Seventeen percent were six to ten years older, and forty-six percent were more than ten years older than their victims.[94] If all fifty-six fathers whose ages were not reported to the Vermont Health Department are more than ten years older than the minors they impregnated, when added with the three fathers known to be thirty or older, the Vermont statistic of thirty-nine percent would almost mirror that of the 1989 study.

Vermont law criminalizes sex with a child under the age of sixteen.[95] Healthcare providers in Vermont learning of such conduct must report it to the state welfare authorities.[96] Abortion providers have resisted any reporting obligation designed to insure that men who unlawfully impregnate minors are identified and prosecuted.[97] For example, a lawsuit recently filed in Arizona

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89. *See* Vermont Bureau of Vital Statistics, *1999 Vital Statistics*, table B-9, *at* http://www.state.vt.us/health/hs/pubs/2000/vitals/b09.htm (age of mother by age of father) (last visited Sept. 13, 2001). No statistics are available regarding the age of the sexual partner of minors obtaining abortions. However, the House Judiciary Committee heard testimony that at least twelve girls under the age of sixteen obtained abortions in 2000 at Vermont Planned Parenthood facilities. Thirty-three sixteen-year-olds and forty-seven seventeen-year-old minors also obtained abortions from these facilities during this period. *Judiciary Hearings*, *supra* note 68 (testimony of Nancy Mosher, President and CEO of Planned Parenthood of N. New England on April 16, 2001).

90. Vermont Bureau of Vital Statistics, *supra* note 89.

91. Forty of the remaining fathers were between eighteen and nineteen, forty-three were twenty to twenty-four, one was identified as being between thirty and thirty-four, one between thirty-five and thirty-nine, one between forty and forty-four, but fifty-six of the fathers were not identified by age. *Id.*

92. Gershenson, *supra* note 89, at 212.

93. *Id.*

94. *Id.*

95. VT. STAT. ANN. tit. 13, § 3252 (2000).

96. VT. STAT. ANN. tit. 33, § 4913 (2000).

97. *See* Brief of Plaintiffs/Appellants, § III.A.2, Planned Parenthood of Cent. N.J. v. Farmer, (N.J. 1999) (No. BERL-8026-99EM), http://www.aclu.org/court/plannedparenthood_v_farmer.html. *See also*

alleges that Planned Parenthood's failure to report the sexual molestation of a twelve year-old led to her continued molestation and impregnation.[98] If these allegations are proven, this conduct is consistent with the position taken by many abortion providers that encouraging medical care through insuring confidentiality is more important than insuring legal intervention to stop the sexual abuse.[99]

The practice of Vermont abortion providers regarding the reporting of sexual assault is unclear. Testimony before the Judiciary Committee of the Vermont House of Representatives established that Planned Parenthood of Northern New England, the largest abortion provider in the state, recognizes a legal obligation to report instances of sexual assault.[100] According to testimony before the committee, twelve girls under the age of sixteen obtained abortions in 2000 from Planned Parenthood. These pregnancies were presumptively the result of criminal conduct, yet the organization representative testified that Planned Parenthood had not notified the authorities in any case.[101] Nor could she identify any instances of reported abuse during the year 2000.[102] This is troubling since cooperation by abortion providers in reporting is especially important for the successful prosecution of sexual abuse cases. At least one appellate court has thrown out a sexual assault conviction because the fetal tissue that would have provided DNA evidence related to the perpetrator's identity was destroyed.[103]

Patricia Donovan, *Can Statutory Rape Laws Be Effective in Preventing Adolescent Pregnancy?*, 29 FAM. PLAN. PERSPECTIVES 30, 33 (1997) (quoting representatives of various family planning associations and clinics), *available at* http://www.agi-usa.org/pubs/journals/2903097.html.

98. *Girl Sues Planned Parenthood*, ASSOCIATED PRESS NEWSWIRES, Sept. 1, 2001, Westlaw document 9/1/01 APWIRES 15:16:00.

99. "So, our belief and I believe the belief of the entire public health system and the people who founded the family planning movement in this country is that by protecting minor's rights to privacy, you can create an atmosphere where minors are less afraid to come and seek services, more likely to develop a long-term relationship with a provider where trust can build over time and more likely to divulge some of these extremely unsafe and worrisome realities." *Judiciary Hearings*, *supra* note 66 (testimony of Nancy Mosher, President and CEO of Planned Parenthood of N. New England on April 16, 2001). For similar views see sources collected in note 97 *supra*. *But see* Henry L. Miller, et al., *Issues in Statutory Rape Law Enforcement: The Views of District Attorneys in Kansas*, 30 FAM. PLAN. PERSPECTIVES 177, 179 (1998) (reporting only seventeen percent of the district attorneys believed that enforcement of statutory rape laws would discourage teens from seeking health care).

100. *Judiciary Hearings*, *supra* note 66 (testimony of Nancy Mosher, President and CEO of Planned Parenthood of N. New England on April 16, 2001) ("We are mandated reporters."). This duty arises under VT. STAT. ANN. tit. 33, § 4913 (2000).

101. *Id.*

102. *Id.*

103. Commonwealth v. Sasville, 35 Mass. 15 (Mass. App. Ct. 1993) (holding state's failure to preserve aborted fetal tissue for examination by a defendant charged with the rape required the dismissal of the indictment against the defendant). *See also* Anderson v. State, 544 A.2d 265 (Del. 1988) (suggesting evidence of abortion tends to prove penetration requirement for rape conviction).

Secret abortions do not advance the best interests of minor girls.[104] Experience in other states suggests that sexual predators take advantage of their victims' ability to obtain an abortion.[105] The proposed parental notification law would insure that Vermont parents have the opportunity to protect their daughters from those who would victimize their daughters again and again.

C. Improved Parental Right to Control Minors' Medical Care

In addition to the benefits directly enjoyed by minors in the form of better medical care and increased protection against continuing sexual abuse, House Bill 218 provides parents the necessary information to fulfill their responsibility to care for their minor children. Just this past year, the United States Supreme Court described parents' right to control the care of their children as "perhaps the oldest of the fundamental liberty interests recognized by this Court."[106] Contrary to the claims of House Bill 218 opponents,[107]

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104. *See* Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997). In disposing of a constitutional challenge to a reporting duty imposed in the North Carolina parental consent statute, the court stated:

> Appellants would have a judge, who is sworn to uphold the law, withhold vital information regarding rape or incest which would allow state authorities to end the abuse, protect the victim, and punish the abuser. Not only would Appellants' position prevent the judge from helping the victim seeking the abortion, but it would prevent the judge from helping other juveniles in the same household under the same threat of incest. This Court does not believe that the Constitution requires judges be placed in such an untenable position.... Appellants' position would instead afford protection to rapists and perpetrators of incest. This can only serve the interests of the criminal, not the child.

Id. at 273-74.

105. On June 14, 2000 a thirty-six year-old Omaha man who impersonated the father of his teen-age victim in order to assist her in obtaining an abortion was sentenced to one-and-a-half to two years in prison for felony child abuse. Angie Brunkow, *Man Who Said He Was Girl's Dad Sentenced*, OMAHA WORLD-HERALD (June 14, 2000) at 20, 2000 WL 4366417. A similar attempt to hide the consequences of statutory rape is reflected in the testimony of Joyce Farley before the United States House of Representatives, Committee on the Judiciary, Subcommittee on the Constitution. *Child Custody Protection Act: Hearings on H.R. 3682 Before the Subcomm. on the Constitution, of the House Comm. on the Judiciary* (1998) 105th Cong., 2d Sess. (testimony of Joyce Farley), http://www.house.gov/judiciary/222460.htm (last visited Nov. 30, 2001).

106. Troxel v. Granville, 530 U.S. 57, 63 (2000) (overturning Washington visitation statute which unduly interfered with parental rights).

107. *Health Hearings, supra* note 33 (testimony of Judith Sutphen, Executive Director of the Governor's Commission on Women on Feb. 21, 2001). "Another issue I'd like to address is the assertion that a teenager must get parental permission to get her ears pierced, take an aspirin, or get a tatoo. This may be true, but is not based on any law, but rather on policies established by schools, tattoo parlors, etc., for liability protection." *Id. See also* Policy memorandum from Planned Parenthood of N. New England, Parental Notification and Consent Law 1 (Jan. 15, 2001) (on file with author). "Parental consent or notification requirements for ear piercing, school trips and getting aspirin from the school nurse are based in policy, not law." *Id.*

Vermont law recognizes the responsibility and right of parents to make medical decisions for their minor children in various statutes and cases.

The general law of Vermont surrounding medical care of children was summarized by the authors of a 1998 Vermont Bar Journal article:

> Prior to treating their patients, health care providers must obtain informed consent. One of the general rules of informed consent, with, of course, several exceptions, is that minors are not able to give legally binding consent to medical treatment. Accordingly, health care providers who treat minors must obtain the consent of the minor's parent or guardian or must find a basis to rely on the minor's consent either under statutory or common law.[108]

A parent's right to consent to a minor's care derives from the parent's duty to provide medical care to his or her child. This duty arises from the relationship of parent and child, rather than from any affirmative acts of the parent.[109] In describing the rights of parents, the Vermont Supreme Court has stated:

> Parental rights and responsibilities are defined as those rights and responsibilities related to a child's physical living arrangements, parent child contact, education, medical and dental care, religion, travel, and any other matter involving a child's welfare and upbringing. Rights and responsibilities are comprised of "physical responsibility," and "legal responsibility," which is defined as *the rights and responsibilities to determine and control various matters affecting a child's welfare . . . includ[ing] but . . . not limited to education, medical and dental care*, religion and travel arrangements.[110]

Numerous Vermont statutes evidence the parents' right to control the medical care of their children.[111]

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108. Jeffrey J. McMahon & Anne Cramer, *Minors' Consent to Treatment: Weighing Common Law and Vermont's Emancipated Minors Act*, VT. BAR. J. & L.DIG. 49 (June 1998).

109. Vermont v. Valley, 153 Vt. 380, 390-1, 571 A.2d 579, 584 (Vt. 1989).

110. Shea v. Metcalf, 167 Vt. 494, 497-8, 712 A.2d 887, 889 (1998) (discussing the allocation of parental responsibilities in a divorce proceeding) (emphasis added) (internal citations omitted).

111. VT. STAT. ANN. tit. 18, § 1122 (2000) provides an exemption from the immunization requirement "[i]f the person, or *in the case of a minor the person's parent* or guardian states in writing that the person, parent or guardian has religious beliefs or moral convictions opposed to immunization." *Id.* (emphasis added). VT. STAT. ANN. tit. 12, § 1611 (2000) provides: "In civil cases, a written statement of a person who has been injured and is under the care of a physician and confined in a hospital, taken without the permission of the attending physician, or *if the person is a minor, without the permission of the parent as well*, shall not be admissible in any court proceeding either as an admission or as impeaching evidence." *Id.* (emphasis added). VT. STAT. ANN., tit. 15, § 670 (2000) provides "Access to records and information pertaining to a minor child, including but not limited to medical, dental, law enforcement and school

Not only is this right recognized under Vermont law, but the parents' right to control the care of their children is also protected by the U.S. Supreme Court's interpretation of the United States Constitution:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." *Surely, this includes a "high duty" to recognize symptoms of illness and to seek and follow medical advice.* The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.[112]

Opponents of House Bill 218 claim that "Parental consent or notification requirements for ear piercing, school trips and getting aspirin from the school nurse are based in policy, not law. Individual policies are generally developed to guard against lawsuits."[113]

The need to "guard against lawsuits" arises because parents have the legal right to control the care of their children. Ignoring or violating parents' legal right to direct the upbringing of their children, including the right to direct the medical care those children receive, can result in liability. For example, unauthorized medical examinations of minors have resulted in liability.[114] House Bill 218 simply places abortion within the general rule that parents have the legal right to be involved in medical decisions relating to their minor children.

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records shall not be denied to *a parent* solely because that parent has not been awarded parental rights and responsibilities." *Id.* (emphasis added). VT. STAT. ANN. tit. 28, § 1104 (2000) provides "For the purpose of granting consent for the rendering of needed medical assistance, the state shall stand in the relationship of parent and legal guardian of the child needing the assistance, and the state shall have exclusive authority to grant consent for the assistance, notwithstanding the provisions of any other statute or law." *Id.*

112. Parham v. J.R., 442 U.S. 584, 602 (1979) (rejecting claim that minors had right to adversarial proceeding prior to commitment by parents for treatment related to mental health) (emphasis added) (internal citations omitted).

113. Policy memorandum from Planned Parenthood of N. New England, Parental Notification and Consent Law 1 (Jan. 15, 2001) (on file with author); *see also supra* note 107 and accompanying text.

114. *See* Tenebaum v. Williams, 193 F.3d 581, 597-99 (2d Cir. 1999) (parental consent required for gynecological exam); van Emrik v. Chemung County Dep't of Soc. Servs., 911 F.2d 863, 867 (2d Cir. 1990) (parental consent required for x-ray).

IV. EFFECTIVENESS OF JUDICIAL BYPASS UNDER HOUSE BILL 218

In those few cases where it is not in the girl's best interest to disclose her pregnancy to her parents, House Bill 218 allows the pregnant minor the option of seeking a court determination that either notification of her parent is not in her best interest or that she is sufficiently mature to make decisions regarding the continuation or termination of her pregnancy. Opponents have argued that House Bill 218 will not increase the number of parents notified of their daughters' intentions to obtain abortions, since minors will commonly seek and obtain judicial bypass of the notification requirement.[115] Assessing the accuracy of this claim is difficult, since parental notification or consent laws rarely impose reporting requirements regarding the use of judicial bypass.[116]

The Idaho parental consent law enacted in 2000 is one of the few exceptions to this general rule.[117] Based upon the reporting required under

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115. *Health Hearings*, *supra* note 33 (testimony of Jamie Sabino, February 20, 2001) (reporting no change in the percentage of teens notifying their parents in Massachusetts after enforcement of parental consent law).

116. Offsetting the need to maintain the anonymity of the minor is the need to insure open judicial proceedings. This has led one court to order public access to results of all judicial bypass cases after redacting information that might compromise the anonymity of the minor unless the minor can show that a redacted record of the case would reveal her identity. State *ex rel.* The Cincinnati Post v. Second Dist. Ct. of Appeals, 604 N.E.2d 153 (Ohio 1992).

117. The Idaho statute provides:

> (a) The vital statistics unit of the department of health and welfare shall, in addition to other information required pursuant to section 39-261, Idaho Code, require the complete and accurate reporting of information relevant to each abortion performed upon a minor which shall include, at a minimum, the following:
>
> (i) Whether the abortion was performed following the physician's receipt of:
>
> 1. The written informed consent of a parent and the minor; or
> 2. The written informed consent of an emancipated minor for herself; or
> 3. The written informed consent of a minor for herself pursuant to a court order granting the minor the right to self-consent; or
> 4. The written informed consent of a court pursuant to an order which includes a finding that the performance of the abortion, despite the absence of the consent of a parent, is in the best interests of the minor; or
> 5. The professional judgment of the attending physician that the performance of the abortion was immediately necessary due to a medical emergency and there was insufficient time to obtain consent from a parent or a court order.
>
> (ii) If the abortion was performed due to a medical emergency and without consent from a parent or court order, the diagnosis upon which the attending physician determined that the abortion was immediately necessary due to a medical emergency.
>
> (b) The knowing failure of the attending physician to perform any one (1) or more

that law, only two of the fifty-eight minor abortions in Idaho were obtained pursuant to a judicial bypass order from September 1, 2000, when the reporting requirement went into effect, through August 31, 2001.[118] Fifty-four abortions were performed after obtaining parental consent.[119] One minor was legally emancipated, and did not need parental consent, and one report did not indicate the nature of the consent obtained prior to performance of the abortion.[120] After implementation of the Idaho parental involvement law, ninety-three percent of the minors obtained parental consent.

Obtaining comparable information in states having parental involvement laws with no mandatory reporting requirement is difficult. State agencies will not accumulate such information absent a legislative mandate. Nonetheless, it is safe to say that the use of judicial bypass to avoid parental involvement varies significantly among the states. While reported to be commonly used in Massachusetts,[121] judicial bypass is seldom used in many states.[122] An Alabama newspaper reported that "[f]ew girls turn to the courts. In 1999, 1015 girls got abortions in Alabama with a parent's approval."[123] Indiana also

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> of the acts required under this subsection is grounds for discipline pursuant to section 54-1814(6), Idaho Code, and shall subject the physician to assessment of a civil penalty of one hundred dollars ($100) for each month or portion thereof that each such failure continues, payable to the center for vital statistics and health policy, but such failure shall not constitute a criminal act.

IDAHO CODE § 18-609A(4) (Michie 1997).

118. Email from Janet M. Wick, Vital Statistics Unit of the Idaho Department of Health and Welfare, to Teresa S. Collett (October 10, 2001) (on file with author).

119. *Id.*

120. *Id.*

121. Testimony of Jamie Sabino before the Vermont House of Representatives' Committee on Health & Welfare, February 20, 2001 (reporting that 13 of 16,000 bypass applications have been denied). *See also* Robert Blum et al., *The Impact of Parental Notification Law on Adolescent Abortion Decision-Making*, 77 AM. J. PUB. HEALTH 619, 619 (1987) (finding 43.2% of the minors in Minnesota participating in the study utilized judicial bypass); Robert H. Mnookin, *Bellotti v Baird, A Hard Case in* IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 149, 239 (Robert H. Mnookin ed., 1985) (survey of Massachusetts cases filed between 1981 and 1983 found that every minor who sought judicial authorization to bypass parental consent received it); Susanne Yates & Anita J. Pliner, *Judging Maturity in the Courts: The Massachusetts Consent Statute*, 78 AM. J. PUB. HEALTH 646, 647 (1988) (orders were refused to only 1 of 477 girls seeking judicial authorization from Massachusetts courts between December 1981 and June 1985 with the average hearing lasting only 12.12 minutes, and "more than 92 percent of the hearings [were] less than or equal to 20 minutes.").

122. "No one is really sure which choices girls are making in the 39 states that have 'parental involvement' laws. But lawyers and clinic directors in Pennsylvania and Virginia say few girls choose to brave the legal system." Nancy Parello, *Few Pregnant Girls Turn to the Courts: Abortion Notification Laws Vary*, THE RECORD (Bergen County, N.J.), May 24, 1999, at A3, 1999 WL 7138379.

123. Associated Press, *Court Approves Abortion for Teen*, DECATUR DAILY (Nov. 10, 2000), www.decaturdaily.com/decaturdaily/news/001110/abortion.shtml. These statistics were confirmed by the Alabama Department of Public Health. E-mail to Teresa S. Collett from K. Chapman, Alabama Dept. of Public Health (May 25, 2001) (on file with author) (reporting 1015 minors obtained abortions with parental consent, 12 with judicial orders).

conducts few bypass proceedings according to an informal study.[124] Texas implemented its Parental Notification Act in 2000. While no official statistics regarding the number of judicial bypass proceedings are available, the Texas Department of Health compiles statistics regarding the payment of attorneys *ad litem* in judicial bypass proceedings.[125] Based on the number of claims for payment, it appears that ninety-five percent of all minors in Texas now notify a parent prior to the performance of an abortion.[126] This represents up to a twenty-six percent increase in parental involvement over the rate of involvement prior to passage of the Texas Parental Notification Act.[127]

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124. "In Indiana's most populous county, for instance, from mid-1985 to mid-1991, only four minors asked the juvenile court for bypasses. In the state's second most populous county, over the same six year period, only one minor requested a bypass." Steven F. Stuhlbarg, Note, *When is a Pregnant Minor Mature? When is an Abortion in her Best Interests? The Ohio Supreme Court Applies Ohio's Abortion Parental Notification Law:* In re Jane Doe 1, *566 N.E.2d 1181 (Ohio 1991)*, 60 U. CIN. L. REV. 907, 929-30 (1992).

125. Texas law requires the appointment of an attorney ad litem in every bypass proceeding. TEX. FAM. CODE § 33.003 (Vernon Supp. 2000).

126. The Texas Parental Notification Act took effect January 1, 2000. On January 28, 2001, a Houston newspaper article quoted a lawyer working with the Texas Civil Liberties Union as stating that during 2000 "the state has paid more than $125,000 for lawyers representing 172 girls who have taken their cases to court." *Group Offers Online Abortion Aid/Web Site Guides Underage Girls Who Want Legal Permission*, HOUS. CHRON., Jan. 28, 2001, at 3. This number is slightly lower than the annual average of 180 judicial bypass proceedings that can be derived from the Texas Department of Health statistics reflecting payment of 225 orders for attorney ad litem fees during the fifteen month period from January 1, 2000, to April 1, 2001. Email from Susan Steeg, General Counsel, Texas Department of Health, to Teresa S. Collett (April 2, 2001) (on file with author).

Preliminary data from the Texas Department of Health indicates that there were 3830 abortions performed on minors in Texas in 2000. See Tex. Dept. of Health, Bureau of Vital Statistics, Table 33 - Resident Induced Termination of Pregnancy, Texas 2000 at http://www.tdh.state.tx.us/bvs/stats00/ANNR_HTM/00t33.HTM. Assuming that all abortion providers are complying with the law, and taking into account the statement of the Texas Department of Health that no certificates of abortions performed without parental notification due to emergency circumstances, as defined under TEX. FAM. CODE 33.002(a)(4) (Vernon Supp. 2000), had been received as of April 1, 2001, 3650 Texas minors should have had parents notified. This means that 95% of the Texas parents now know of their daughters' decisions and therefore are able to help them respond to the unplanned pregnancies.

127. *See Hearing on Tex. H.B. 1073 Before the House State Affairs Comm.*, 76th Leg., R.S. 21 (Apr. 19, 1999) (submission of Texas Family Planning Association). Of the 245 minors obtaining abortions at Planned Parenthood of Dallas, 67% involved a parent. Of the 131 minors obtaining abortions at Planned Parenthood of Houston, 67% involved a parent. Of the 23 minors obtaining abortions at Planned Parenthood of San Antonio, 91% involved a parent. Of the 22 minors obtaining abortions at Planned Parenthood of Central Texas, 73% involved a parent. Of the 21 minors obtaining abortions at Planned Parenthood of West Texas, 76% involved a parent. *Id.* During the survey period, 305 of the 442 minors obtaining abortions (69%) involved a parent. After passage of the Texas Parental Notification Act, 424 would have involved a parent. *But see Health Hearings, supra* note 33 (testimony of Diana Philip, Executive Director of Jane's Due Process, April 16, 2001) (suggesting that 95% of Texas minors involved parent in obtaining abortions prior to passage of the law based upon conversation with local abortion provider).

V. OPPONENTS' CONSTITUTIONAL CHALLENGES TO PARENTAL NOTIFICATION

Unable to argue against the obvious benefits of parental involvement in most minors' decisions to obtain abortions, opponents of House Bill 218 have sought to defeat its passage with claims of constitutional infirmity.[128] The federal constitutional claims are contrary to the holdings of the United States Supreme Court, and the state constitutional claims are speculative at best.

A. House Bill 218 Comports with Federal Constitutional Requirements

House Bill 218 meets all federal constitutional requirements. The United States Supreme Court has repeatedly stated that states are free to require parental involvement in a minor's decision to obtain an abortion.[129] While the United States Supreme Court has not ruled on the question of whether judicial bypass is *required* in a parental notification law,[130] House Bill 218 meets the Court's requirements for a constitutional parental consent law. House Bill 218 offers a minor unwilling to involve a parent a judicial process during which the minor may establish that she is entitled to consent to the abortion without parental notification.[131] The bill also insures the minor's anonymity in the proceedings,[132] and guarantees that the proceedings are expeditious.

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128. *Judiciary Hearings*, *supra* note 66 (written testimony of Dara Klassel at 3, Mar. 30, 2001); *Id.* (testimony of Caitlin Boardman, ACLU Foundation Reproductive Freedom Project, April 16, 2001).

129. *E.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 899 (1992).

130. In *Hodgson v. Minnesota*, Justice Stevens observed, "Although the Court has held that parents may not exercise 'an absolute, and possibly arbitrary, veto' over that decision [by a minor to terminate her pregnancy], it has never challenged a State's reasonable judgment that the decision should be made after notification to and consultation with a parent." Hodgson v. Minnesota, 497 U.S. 417, 445 (1979) (quoting Planned Parenthood of Mo. v. Danforth, 428 U.S. 52, 74 (1975)). Nonetheless, the United States Supreme Court has explicitly declined to rule on the question of whether a judicial bypass process is required to preserve the constitutionality of notification statutes, absent a case presenting such a statute. Bellotti v. Baird, 443 U.S. 622, 654 n.1 (1979) (Stevens, J. concurring). *See also supra* notes 51, 52 and accompanying text.

131. H. 218 § 5278.

132. In *Akron II* the Court discussed the anonymity requirement:

> [T]he requirement that a bypass procedure ensure the minor's anonymity is satisfied, since H.B. 319 prohibits the juvenile court from notifying the parents that the complainant is pregnant and wants an abortion and requires both state courts to preserve her anonymity and the confidentiality of court papers, and since state law makes it a crime for any state employee to disclose documents not designated as public records. Neither the mere possibility of unauthorized, illegal disclosure by state employees nor the fact that the H.B. 319 complaint forms require the minor to provide identifying information for administrative purposes is dispositive. Complete anonymity is not critical under this Court's decisions, and H.B. 319 takes reasonable steps to prevent the public from learning of the minor's identity.

Akron II, 497 U.S. at 503 (1990). Also in *Akron II*, the Court upheld an Ohio statute that merely required the court issue its ruling within five business days of receiving the application. *Id.* at 514.

Thus, there can be little doubt that the bill satisfies federal constitutional requirements.

B. The Absence of Vermont Constitutional Limitations on Parental Notification

Recognizing that federal constitutional law may provide no impediment to the passage and enforcement of House Bill 218, opponents have argued that "[t]here is good reason to expect that legislation like House Bill 218, whatever its fate under federal constitutional analysis, would likely be held unconstitutional under the Vermont Constitution."[133] Citing *Baker v. State*[134] and *In re G.T.*,[135] opponents have argued that House Bill 218 could run afoul of "state constitutional privacy rights of minors" since the Vermont Supreme Court is "receptive to expanding state constitutional protections beyond those afforded by the federal constitution."[136] This objection is speculative at best.

In *Baker v. State*, the Vermont Supreme Court recognized a legal status comparable to marriage for same-sex couples. In explaining its reasoning, the court expressed its view that such a status was needed to protect the relationship of gay or lesbian parents to their children.[137] The Vermont Legislature echoed this concern in its findings relating to the recognition of civil unions.[138] Parental notification required under House Bill 218 advances this same interest in protecting the relationship between parents and children.

In re G.T. similarly fails to establish the likelihood that House Bill 218 is unconstitutional as a matter of state constitutional law. The Vermont Supreme Court explicitly declined to find a state constitutional right for teens to engage in consensual sex.[139] Citing *State v. Barlow*,[140] the court reiterated its opinion that the state had a compelling interest in protecting minors from statutory rape by adults:

> We noted [in *Barlow*] concerns about the dangers of pregnancy, venereal disease, damage to reproductive organs, the lack of

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133. *Judiciary Hearings, supra* note 66 (written testimony of Dara Klassel, Mar. 30, 2001, at 3).

134. Baker v. State, 170 Vt. 194, 744 A.2d 864 (1999).

135. *In re* G.T., 170 Vt. 507, 758 A.2d 301 (2000).

136. *Judiciary Hearings, supra* note 66 (written testimony of Dara Klassel, Mar. 30, 2001, at 5).

137. "Therefore, to the extent that the State's purpose in licensing civil marriage was, and is, to legitimize children and provide for their security, the statutes plainly exclude many same-sex couples who are no different from opposite sex couples with respect to these objectives." *Baker*, 170 Vt. at 218-19, 744 A.2d at 882.

138. "The state has a strong interest in promoting stable and lasting families, including a family based upon a same-sex couple." Legislative Findings ¶ 7 VT. STAT. ANN. tit. 15 §1201 (2001).

139. *In re* G.T., 170 Vt. at 516, 758 A.2d at 307.

140. State v. Barlow, 160 Vt. 528, 630 A.2d, 1300 (1993).

> considered consent, heightened vulnerability to physical and psychological harm, and the lack of mature judgment among the many significant interests of the state. We also stressed our concern for protecting the well-being of minors from exploitation.[141]

The U.S. Supreme Court expressly relied on three of the last four factors in upholding parental involvement laws more stringent than House Bill 218,[142] and the fourth factor is particularly supportive of parental notification in light of contemporary research establishing that a substantial number of teen pregnancies are the result of sexually predatory practices by adults.[143]

The New Jersey case of *Planned Parenthood v. Farmer*[144] is the primary case opponents of House Bill 218 cite as support for their claim that an activist court might strike down the proposed law.[145] In *Farmer*, the New Jersey Supreme Court ruled that a minor's right to obtain a secret abortion outweighed the state's interest in requiring parental notification.[146] This case is *sui generis* in that it is the only case in the country to find that a properly-crafted parental notification law containing a judicial bypass offends the state or federal constitution. The opinion is even more peculiar in that the New Jersey Supreme Court rendered its opinion without the benefit of a trial on the merits, and overturned the law on the basis of what the court itself characterized as "advocates' affidavits."[147] This unprecedented New Jersey opinion hardly seems compelling evidence of what the Vermont Supreme Court would do if asked to determine the constitutionality of House Bill 218.

In short, opponents of House Bill 218 have no persuasive evidence that parental notification violates the Vermont constitution. The Vermont Supreme Court's willingness to afford constitutional protections to same-sex unions has little predictive value in assessing the outcome of any prospective ruling on House Bill 218. *Baker* nonetheless suggests that the court will sustain legislative efforts to protect and promote the parent-child relationship.

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141. *In re* G.T., 170 Vt. at 516, 758 A.2d at 307.

142. *Bellotti II*, 443 U.S. 641.

143. *See* M. Joycelyn Elders & Alexa E. Albert, *Adolescent Pregnancy and Sexual Abuse*, 280 J. AM. MED. ASS'N 648 (1998). Additional studies are collected and discussed in my testimony before the House Health and Welfare Committee, Feb. 20, 2001, at 5.

144. Planned Parenthood v. Farmer, 762 A.2d 620 (N.J. 2000).

145. *Judiciary Hearings*, *supra* note 66 (testimony of Dara Klassel on Mar. 30, 2001); *Health Hearings*, *supra* note 33 (testimony of Caitlin Boardman, ACLU Foundation Reproductive Freedom Project, April 16, 2001).

146. *Farmer*, 762 A.2d at 620.

147. "In analyzing those burdens, we rely on extensive and detailed certifications submitted by the plaintiffs. Mindful that those submissions have been presented by advocates, and that there is little in the record to contradict the factual context that they provide, we nonetheless believe that they are a source of important information and useful insights into the impact of the Notification Act on young women who seek abortions." *Id.* at 633 (citations omitted).

VI. NONCONSTITUTIONAL OBJECTIONS: EVADING PARENTAL NOTIFICATION BY SEEKING ILLEGAL OR OUT-OF-STATE ABORTIONS

During testimony before the House Health and Welfare Committee, an opponent of House Bill 218 argued that passage of parental notification would lead girls to "risk their lives attempting an illegal abortion."[148] This is a phantom fear. Parental involvement laws are on the books in over two-thirds of the states, some for over twenty years, and there is no evidence that these laws have led to an increase in illegal abortions.[149] Similarly, no case has established that these laws lead to parental abuse or to self-inflicted injury.[150]

Opponents also have argued that House Bill 218 will prove ineffective since teens will travel to neighboring states to avoid complying with parental involvement laws. Researchers have reached varied conclusions on how frequently this occurs.[151] A comprehensive national study found "crossing state borders to avoid parental involvement does not appear to be a common phenomenon."[152]

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148. Judy Murphy, testimony before the Vermont House of Representatives' Committee on Health & Welfare, February 21, 2001 (recounting her experience in obtaining an illegal abortion in 1950 in Ottawa, Canada). *See also* Governor's Commission on Women, 1999-2000 Public Policy Statement on Parental Notification at www.women.state.vt.us/notification.html (required parental notification results in "an increase in illegal and self-induced abortions, family violence, suicide, later abortions, and unwanted childbirth"); *A Question of Safety*, RUTLAND HERALD, (Feb. 25, 2000), http://www.rutlandherald.nybor.com (opposing parental notification legislation because of a belief that it will drive young girls to "take desperate and potentially harmful actions, such as illegal or self-induced abortions, in order to keep their pregnancies secret").

149. *See Hearing on Tex. H.B. 1073 Before the House State Affairs Comm.*, 76th Leg. Sess., R.S. 21 (1999) (testimony of Jamie Sabino that there had been no increase in the number of illegal abortions in Massachusetts since the enactment of the statute in 1981).

150. A 1989 memo prepared by the Minnesota Attorney General regarding Minnesota's experience with its parental involvement law states that "after some five years of the statute's operation, the evidence does not disclose a single instance of abuse or forceful obstruction of abortion for any Minnesota minor." Undated Memorandum from the Minesota Attorney General, Background Briefing Concerning the Minnesota Parent Notification Law 3 (1989) (on file with author). Testimony before the Texas House of Representatives on Massachusetts' experience with its parental consent law revealed a similar absence of unintended, but harmful, consequences. Ms. Jamie Sabino, chair of the Massachusetts Judicial Consent for Minors Lawyer Referral Panel, could identify no case of a Massachusetts minor being abused or abandoned as a result of the law. *Hearing on Tex. H.B. 1073 Before the House State Affairs Comm.*, 76th Leg. Sess., R.S. 21 (1999) (testimony of Jamie Sabino).

151. Blum et al., *supra* note 121, at 620 (concluding that Minnesota teens did not travel out of state to avoid parental consent law); Virginia G. Cartoof & Lorraine V. Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 AM. J. PUB. HEALTH 397 (1986) (concluding that Mass. minors left the state to avoid parental consent law); Stanley K. Henshaw, *The Impact of Requirements for Parental Consent on Minors' Abortion in Mississippi*, 27 FAM. PLAN. PERSPECTIVES 120 (1995) (concluding that Mississippi teens traveled out of state).

152. Nancy Altman-Palm & Carol Horton Tremblay, *The Effects of Parental Involvement Laws and the AIDS Epidemic on the Pregnancy and Abortion Rates of Minors*, 79 SOCIAL SCIENCE 846, 858 (1998). After evaluating the data from all states reporting the number of abortions by age of the female, the authors

CONCLUSION

This spring, the Vermont Senate will have the opportunity to capitalize on a rare piece of common ground between those who believe that human life should be legally protected from the moment of conception, and those who believe that abortion is a tragic, but necessary, choice that must remain available to women if sexual equality is ever to be achieved. A substantial majority of both groups in Vermont are confident that girls facing unplanned pregnancies will benefit from parental involvement. Their confidence is not misplaced. Medical research establishes that abortion is not a risk-free procedure. It can result in infection, physical injury, and emotional trauma. Parental involvement reduces each of these risks by insuring adequate medical care before and after the abortion. Parental notification also gives parents the necessary knowledge to intervene and protect their daughters when the girls are being sexually victimized. If enacted into law, House Bill 218 will insure that when their daughters face unplanned pregnancies Vermont parents will be among the first to help, instead of the last to know.

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conclude that "[p]olicymakers can use enactment and enforcement of parental involvement laws to curtail teen sexual activity." *Id.* at 846.