September 1998

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Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z386QJSG54

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Mandating Parental Involvement in Minors' Abortions

Elizabeth L. Mussert†

On August 5, 1997, the Supreme Court of California handed down its ruling in American Academy of Pediatrics v. Lungren.1 American Pediatrics questioned the constitutionality of a California statute requiring women under eighteen to obtain parental consent or judicial authorization before getting abortions. The California Legislature first enacted the statute in 1987 through Assembly Bill No. 2274, 1987–1988 Regular Session (hereinafter Assembly Bill 2274), and encoded it in section 25958 of the California Health and Safety Code. California never enforced the statute, however, because of immediate challenges to its constitutionality and resulting judicial injunctions.

The California Supreme Court initially heard American Pediatrics in March 1997, and at that time found Assembly Bill 2274 constitutional. The Court soon thereafter voted to rehear the case. In the August ruling following the rehearing, the Court held the parental consent statute unconstitutional under the privacy clause of the California Constitution.2 Three justices joined in the majority opinion written by Chief Justice George. Justice Kennard wrote a separate concurring opinion which reiterated the dissent he had written in the original holding, and three justices wrote separate dissenting opinions.

The language in Assembly Bill 2274 closely tracks the language of parental consent statutes held constitutional by the U.S. Supreme Court.3 The Supreme Court has held that parental consent statutes must be lim-

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1. 940 P.2d 797 (Cal. 1997).
2. See CAL. CONST. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.").
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ited in scope and include a judicial bypass option. The judicial bypass option allows judges effectively to waive parental consent requirements. It has been required since Planned Parenthood v. Danforth, and has typically been applied to mature minors or to cases where a court deems that an abortion is in the “best interests” of the minor.

The California Constitution is subject to different interpretation with regard to privacy than the U.S. Constitution. The Fifth and Fourteenth Amendments of the U.S. Constitution do not refer explicitly to privacy; rather, the right of privacy is inferred as part of the Amendments’ general reference to the right of liberty. The California Constitution, on the other hand, refers specifically to the right of privacy. California voters added this specific guarantee in 1972 through Proposition 11. The state provision protects individuals from privacy invasions by both private and public employers, and has generally been interpreted more broadly than its federal counterpart. Parental consent provisions which are permissible under the U.S. Constitution will thus not necessarily be permissible under the broader privacy guarantees of the California Constitution.

The majority in American Pediatrics found that Assembly Bill 2274 represents a substantial invasion of minor women’s privacy which does not further a “compelling” state interest. The Court based its opinion largely on information advanced by experts during the trial stage, who testified that a parental consent statute simply does not serve to effectuate and further the health or best interests of pregnant minors. The various dissents opined that minors need the support and advice of their parents, and that it is unconscionable and irrational to allow minor women to obtain abortions without their parents’ consent, particularly given the judicial bypass alternative.

6. See Bellotti, 443 U.S. at 647-48. The case law is slightly unclear about which “best interests” the judiciary should attempt to evaluate in exercising its bypass option. Some cases seem to suggest that the judiciary must evaluate whether an abortion is in the minor’s best interests. See Bellotti, 443 U.S. at 647-48. While other cases suggest that the judiciary must evaluate whether parental notification is in the minor’s best interests. See Akron, 497 U.S. at 508; Lambert, 117 S. Ct. at 1170. In Lambert, the Court hinted that the two different “best interests” standards could be conflated to a standard considering the general best interests of the minor. See id. at 1171 (upholding a judicial bypass provision requiring that parental notification not be in the minor’s best interests).
7. See CAL. CONST. art. I, § 1.
8. See Hill v. National Collegiate Athletic Ass’n, 865 P.2d 633, 644 (Cal. 1994) (reaffirming causes of action against private as well as government entities, although NCAA drug testing program did not violate athletes’ right to privacy).
10. Id. at 818-19 (discussing compelling interest standard); id. at 826-28 (applying compelling interest standard).
11. See id. at 828-29; id. at 833-36 (Kennard, J., concurring).
12. See id. at 848-65 (Mosk, J., dissenting) (opining that minors have lower privacy expectations than adults, and that even if minors’ privacy interests are violated, Assembly Bill 2274 advances a compelling state interest and is narrowly tailored); id. at 865-71 (Baxter, J., dissenting)
The *American Pediatrics* ruling immediately provoked varying responses from Californian observers. California State Senators Tim Leslie and Robert Hurtt have proposed an amendment to the California Constitution, Senate Constitutional Amendment ("SCA") 17, which would revive the intent of Assembly Bill 2274 by again limiting minors' right to privacy in seeking abortions. Conversely, the California Nurses Association has publicly announced that it opposes the adoption of SCA 17. The California Pro-Life Council, and other organizations which had supported the parental consent statute, have begun campaigns to oust the justices who joined in the *American Pediatrics* majority opinion holding the statute unconstitutional, including Chief Justice George and Justice Chin.

The *American Pediatrics* majority opinion represents an articulation of a compelling body of scholarship suggesting that parental consent statutes do not protect the interests of young women. Parental consent statutes were initially enacted in response to the fact that a large number of minor women become pregnant each year, and a significant number of these consider having, and actually have, abortions. In 1995, for example, more than 2500 abortions were performed on minors in Ohio. Thirty thousand teenagers in California have abortions each year. Experts are essentially unanimous in their agreement that women, particularly very young women, should have support during their decision about whether to have an abortion. For young women, it is preferable that support come from family members, ideally parents. Indeed, physicians are encouraged to discuss young women's family situations with their patients and to encourage them, whenever possible, to confide in a parent or guardian. Encouraging pregnant adolescents to seek parental or familial support is beneficial, but legal coercion is not. Although parental support may be ideal, confiding in a parent or guardian is not a safe or viable option for many young women.

(stressing the mitigating influence of the judicial bypass option and decrying the majority's lack of deference to the legislature); *id.* at 871-91 (Brown, J., dissenting) (arguing that the majority has ignored the federal Constitution and disregarded parental rights).


14. *See id.*


19. *See Committee on Adolescence, supra* note 18, at 747; Resnick et al., *supra* note 18, at 314.

20. *See Committee on Adolescence, supra* note 18, at 750.

21. *See id.* at 746.
Teenage women will generally evaluate whether they can confide in family members, and if they feel they can, they will usually choose to do so. A study by the Alan Guttmacher Institute indicated that sixty percent of minor women in the United States will seek parental involvement when considering having an abortion. This suggests that parental consent laws have limited efficacy in achieving their purported results; young women who can safely tell a parent tend to do so, and a legal requirement to obtain parental consent has no positive benefit for those young women who cannot confide safely.

Proponents of parental consent statutes frequently attempt to analogize abortion rights to other rights of minors. After all, the argument goes, schools are not permitted to dispense aspirin to minors without parental permission, and minor women must have permission to get married, go on field trips, or get their ears pierced. Women under seventeen cannot see R-rated films unless they are accompanied by a parent or guardian. These analogies are inappropriate and misleading. First, many restrictions on minors’ activities are not enforced with particular strictness, and restrictions typically become less and less strictly enforced as young women approach eighteen. Second, other activities do not present options which will forever be lost to the young woman should her parents not permit her to exercise them before she is eighteen. A young woman can pierce her ears or marry several years down the road. The abortion decision is a time-pressured one, and a decision to give birth to a child will have extremely far-reaching consequences. Further, the privacy concerns implicated by abortion decisions are particularly significant. For a decision as personal and private as terminating a pregnancy, it makes sense to leave the discussion of maturity, parental involvement, and the best interests of the woman and her unborn child to the woman seeking the abortion and her doctor, not to the judiciary.

Some parents and politicians seem to believe that imposing parental consent laws will vest them with control over their children and their children’s activities. In discussing a proposed constitutional amendment

22. See American Academy of Pediatrics v. Lungren, 940 P.2d 797, 828–29 (Cal. 1997); Committee on Adolescence, supra note 18, at 747–48; Resnick et al., supra note 18, at 312 (finding that over half of adolescents consulted a parent and three-quarters consulted an adult in a study of pregnant adolescents at six clinics in Minnesota and Wisconsin); Enid Gruber & Martin M. Anderson, Legislating Parental Involvement in Adolescent Abortion: Reexamining the Arguments of Worthington and His Colleagues, 45 AM. PSYCHOLOGIST 1174, 1174 (1990). Also, although many young women will voluntarily confide in a supportive family member, statutes typically mandate parental notification. See Committee on Adolescence, supra note 18, at 747.


to the Florida constitution, the legislature expressed an interest in ensuring that parents are recognized as the primary authority figures in their children's lives. Brown's dissent in American Pediatrics voiced similar concerns.

Also, many proponents of consent laws seem to believe that the presence of parental consent provisions will lead young women to think twice about engaging in sexual intercourse. Arizona Right To Life lobbyist Judith Connell expressed her delight when the Arizona Senate passed a parental consent law in April 1996, saying that the law should "stop the State's growing teen pregnancy rate," and opining that teens will "stop having sex if they know abortion isn't so available." Governor George W. Bush of Texas hoped that passing a parental consent statute would send an "abstinence message" to young people. It is difficult to know where such ideas have their genesis, and why politicians and lobbyists persist in holding views accompanied by so little empirical support. Most people would agree that the teen pregnancy rate is alarmingly high; however, to profess a belief that the existence of parental consent laws will promote a teen abstinence movement seems naive at best.

The opinions advanced by proponents of consent statutes seem intended to play on American parents' fear that they are collectively losing control of their children. Politicians and lobbyists advance parental consent statutes as an easy way to regain control. In cases of teenage pregnancy and abortion, fear tactics are effective because concerns about the high rates of teenage pregnancy resonate with many parents.

Playing on popular fears to attain political ends is not a unique tactic. Fear-based campaigns are utilized in every area of the political arena, from the anti-abortion film "Silent Scream," to commercials for political candidates, to the Cold War demonization of the Soviet Union. Although, using fear to garner support for political candidates or ideas may

27. See 940 P.2d at 871–91 (Brown, J., dissenting).
30. One statistical study indicated that parental involvement laws may reduce teen pregnancy rates by 8%, but also may reduce teen abortion rates by 18%, resulting in a net increase in the number of children born to adolescent mothers. At any rate, a possible 8% reduction in teen pregnancy rates seems a small gain for the large toll exacted by parental consent statutes. See Robert L. Ohsfeldt & Stephan F. Gohmann, Do Parental Involvement Laws Reduce Adolescent Abortion Rates?, 12 CONTEMP. ECON. POL'Y 65, 74 (1994).
31. "If the fear of AIDS did not induce increased primary contraception among adolescents, a parental involvement law is unlikely to increase pregnancy averting behavior dramatically." Id.
32. About one million teenagers become pregnant each year; approximately 400,000 of these young women are under eighteen. See Committee on Adolescence, supra note 18, at 747.
33. George Bush's use of Willie Horton in his 1988 campaign against Michael Dukakis represents a (successful) attempt to play on the public's fear of crime.
be successful in the short term,\textsuperscript{35} such appeals ultimately may promote public feelings of helplessness and cynicism.\textsuperscript{36} Further, fear-based campaigns tend to oversimplify complex and nuanced issues.\textsuperscript{37} Ultimately, playing on popular fears may get politicos and lobbyists at least some of the votes they want; in the process, however, they have undermined the public’s intelligence, increased cynicism, and avoided a rational discourse about the real issues involved. Most importantly in the case of parental consent to abortion, scare tactics do nothing to solve the underlying problem of teen pregnancy. In fact, the societal tensions created by fear-driven campaigns may reduce the likelihood of seeking efficacious solutions. In addition, resultant paranoia and hysteria may serve as formidable barriers to communication between young women and their parents.

Another frustrating element in parental consent statute debates is the reluctance of consent statute advocates to provide any social programs for young women who become pregnant or who are having or considering having sexual intercourse. The Adolescent Family Life Act (“AFLA”))\textsuperscript{38} provides grants for care services and programs seeking to prevent adolescents from having sex. However, it is hesitant to provide funding for educational programs or for birth control, and categorically refuses to assist programs which advocate, promote, or encourage abortions. This leaves programs that provide access to or information about abortions, such as Planned Parenthood, underfunded and struggling for resources. Unfortunately, these are often the same programs that provide young women with much-needed sex education and parenting materials, and information regarding safer sex. This not only deprives young women of access to safe, legal abortions, it also severely limits their resources regarding prenatal care, the prevention of unplanned pregnancies, parenting skills, and adoption opportunities.

A young woman in a state with a parental consent law, faced with the unattractive and perhaps dangerous options of talking to her parents or to a judge, may decide to travel out of state to obtain an abortion. After Massachusetts passed its parental consent statute, up to one-third of minors traveled to other states for abortions.\textsuperscript{39} The possibility of traveling out of state will be more readily available to teenagers from higher income brackets; in effect, therefore, consent statutes result in inequitable treatment of teens based on socioeconomic status. Further, the decision.

\textsuperscript{35} See id. at 54; see also Howard Levanthal, Findings and Thoery in the Study of Fear Communication, 5 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 119, 131–36 (1970).

\textsuperscript{36} See generally Levanthal, supra note 35.


\textsuperscript{38} 42 U.S.C. 300z (1994).

\textsuperscript{39} See LEON FRIEDMAN, THE SUPREME COURT CONFRONTS ABORTION 123 (1993).
to travel to another state may create other complications. In Pennsylvania, for example, a woman who drove her son’s minor girlfriend out of state for an abortion ended up in court for violating the custody rights of the young woman’s mother.40

Most frighteningly, young women who feel unable to talk to their parents, and who are also too intimidated or time-pressed to take advantage of the judicial bypass options, may resort to illegal abortions or attempt to self-induce abortions. One often-cited story is that of Becky Bell, a teenager from the parental consent law state of Indiana.41 Ms. Bell felt unable to confide in her parents because she feared she would “disappoint” them, so she obtained an illegal abortion or attempted to self-abort.42 She died from a resulting infection.43 Ms. Bell’s mother and father have spoken publicly against parental consent laws, which, they strongly feel, effectively killed their daughter.44 Mario Gallegos, a senator in the Texas state legislature, recently voted against a parental notification bill in his senate sub-committee.45 He explained that through his work at a fire department he had seen a number of young women who had attempted to perform abortions on themselves.46

Young women from abusive homes will undoubtedly feel particularly unable to discuss their situation with their parents, either out of fear of violent repercussions or because the pregnancy is the result of sexual abuse by a young woman’s family member. An Idaho case involved a thirteen-year-old girl who had been sexually assaulted by her father; when he discovered she was planning to terminate the resulting pregnancy, he shot her in the stomach, killing her.47 A supporter of parental consent laws wrote in the Arizona Republic that the father in the Idaho case was obviously so disturbed that the example was a rather silly one; the problem in this situation, the reader wrote, was the girl’s father, not the parental consent laws.48 The Idaho situation may be an extreme one. However, its extremity does not mean that it cannot be used in evaluating the efficacy of parental consent laws generally.

In the Idaho case, the existence of parental consent laws acted to exacerbate already volatile circumstances. Parental consent laws will likely aggravate less extreme situations as well. A young woman may al-

42. See Marcus, supra note 41, at A3.
43. See id.
44. See id.; Levin, supra note 41, at 1; Manson, supra note 24, at B1.
46. See id.
47. See Friedman, supra note 39, at 123; Coburn, supra note 23, at B7.
ready have difficulty communicating with her parents, or she may be suffering from emotional or physical abuse at the hands of one or more parents or guardians. Revealing an unplanned pregnancy may inflate or accelerate the family problems she is already experiencing. Even extremely supportive parents and daughters may have difficulties when confronting a potentially painful and emotional issue such as an unplanned pregnancy and a subsequent abortion.\textsuperscript{49} It is hardly surprising that young women with negative or unsupportive familial relationships would be frightened to talk with their parents.

Some states currently require parental notification rather than parental consent.\textsuperscript{50} However, to a young woman concerned about abusive and violent repercussions, it makes little difference whether a parent is asked to consent or is merely told of the impending abortion.\textsuperscript{51} Either way, the young woman’s privacy has been violated, and she may be endangered.\textsuperscript{52} The power to choose whom to tell, and in what manner, has been removed from her hands.

Many proponents of parental consent laws have acknowledged the existence of the problems discussed above, but have argued that judicial bypass options alleviate them. The U.S. Supreme Court has required that parental consent statutes contain a judicial bypass option.\textsuperscript{53} To effectively exercise this option, young women must go into court for a judicial hearing. Typically, judicial authorization will be granted to young women who are considered mature, or to those women whose “best interests” require having an abortion without parental notification.\textsuperscript{54} The judicial bypass option undoubtedly ameliorates some of the problems caused by parental consent statutes, but it does not erase them. Courtrooms tend to be intimidating to everyone. For a young woman, the stress of pregnancy coupled with the necessity of discussing personal concerns in front of a judge may be overwhelming.\textsuperscript{55} Even the prospect of such distress may be enough to dissuade young women from seeking judicial authorization. The judicial bypass system is also problematic because it leaves much to the discretion of judges. In some states and areas, judges will grant nearly every petition

\textsuperscript{49} See Friedman, supra note 39, at 40.
\textsuperscript{50} Seventeen states have parental notification statutes, including Arizona, Delaware, Georgia, Idaho, Illinois, Iowa, Kansas, Maryland, Minnesota, Montana, Nebraska, Nevada, Ohio, South Dakota, Utah, Virginia, and West Virginia. See National Abortion and Reproductive Rights Action League, Restrictions on Minors’ Access to Abortion (1997).
\textsuperscript{51} See Committee on Adolescence, supra note 18, at 748.
\textsuperscript{52} See id.
\textsuperscript{55} See Committee on Adolescence, supra note 18, at 750.
from minors seeking abortions. Even if a young woman is able and willing to successfully navigate the system to receive authorization, the process takes time. Delays in receiving abortions increase the risk of complications; if a young woman has postponed determining whether she is pregnant, and has also put off considering her options, the delays in the judicial bypass procedure serve to exacerbate potential problems and risks. After the eighth week of pregnancy, for example, every week’s further delay represents a fifty percent increase in the mortality rate for abortion.

Recognizing the privacy interests of minors involves balancing minors’ rights with the rights of parents to be involved in their children’s lives. Corinne A. A. Packer, discussing abortion rights and parental notification laws in an international context, emphasizes the balance which must be struck between parents’ rights and children’s rights. Parental rights certainly should not be disregarded, but neither should they obscure a young woman’s right to decide, with the help of her doctor and a comfortable support system, whether or not to terminate a pregnancy.

Laurence Tribe points out the asymmetry in a system which requires parental consent for minors’ abortions, but which would generally not permit parents to demand that their daughter have an abortion. Surely it would be considered against public policy for parents to mandate that their daughters undergo abortions. It is inconsistent, therefore, not to permit these young women to choose for themselves whether or not a pregnancy is in their best interests.

Parental consent statutes represent an active and current concern in state legislatures nationwide. Thirty-nine states currently have parental consent or parental notification statutes, and new statutes or augmentations of statutes are being proposed in a number of states. The Florida Legislature has recently discussed implementing a constitutional change requiring parental consent to abortion. The issue is expected to appear on the 1998 ballot. The Ohio Legislature passed House Bill 421 in September of 1997, which proposes changing Ohio’s current parental notifi-

57. See FRIEDMAN, supra note 39, at 123.
58. See FRIEDMAN, supra note 39, at 124.
59. See id.
62. See id.; see also supra note 6 for a discussion of “best interests.”
63. See NATIONAL ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE, supra note 50.
64. See Hladky, supra note 26, at A1.
65. See id.
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cation statute to a parental consent statute. Representative James S. Gilmore III of the Virginia Legislature has proposed that a parental consent law replace the parental notification law that went into effect on July 1, 1997. At the beginning of 1997, in his State of the State address, Governor Bush of Texas asked the Texas Legislature to consider passing a parental consent statute. In February 1997, the Health and Human Services Committee of the Texas Senate passed the first form of a parental notification bill. In Louisiana, the Legislature changed the language of a parental consent statute from providing that a judge “shall” authorize abortions when they are in the best interest of the minor or when the minor is sufficiently mature to make her own decisions, to providing that a judge “may” authorize abortions in such circumstances. In an April 1997 ruling, the Fifth Circuit decided that this change in language was unconstitutional, basing its decision on Supreme Court cases outlining standards for parental consent laws. The U.S. Supreme Court declined to review the case.

The California decision in American Pediatrics and the Fifth Circuit’s decision in Ieyoub seem to be rare examples of judicial willingness to limit parental consent statutes. The latest U.S. Supreme Court opinion regarding parental consent appears in Lambert v. Wicklund. In a per curiam opinion, the Court reversed the Ninth Circuit to uphold a Montana parental notification law with a judicial bypass option. The Montana law authorized judicial bypass when notification is not in the minor’s best interest, not, as has been the case with most upheld parental consent laws, when the abortion is in the minor’s best interest. This language represents a relatively small deviation, perhaps, but it indicates the willingness of the Supreme Court to uphold a flexible range of consent laws.

Despite the national trend toward enacting parental involvement statutes, the American Pediatrics majority recognized what many psychologists and social workers have been saying for years: parental consent statutes cannot provide young women with ideal support networks or manufacture a close parent-child bond. Rather, they increase young

66. See Schottenstein et al., supra note 16.
68. See Texas: Bush Asks for Parental Consent Bill, supra note 29.
69. See Texas: Senate Committee Passes Parental-Notification Bill, supra note 45.
73. 117 S. Ct. 1169 (1997).
74. See id. at 1170.
76. See Committee on Adolescence, supra note 18, at 750.
women's anxiety and promote the possibility that young women will experience severe complications because of delays in treatment, or because of the negative reactions of family members. From a policy standpoint, it is better to seek to foster parent-child relationships from the beginning, provide women with the information and resources allowing them to choose when they will have children, and promote a variety of social programs to assist struggling families.