ORIGINAL

In the

Supreme Court of the United States

FRANCIS X. BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL., APPELLANTS,	)	
V.	)	
WILLIAM BAIRD, ET AL., APPELLEES:	)	
AND	)	
JANE HUNERWADEL, ETC., APPELLANT,	)	No. 78-329 and No. 78-330 (Consolidated)
V.	)	
WILLIAM BAIRD, ET AL., APPELLEES.	)	

Washington, D. C.
February 27, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

FRANCIS X. BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL., Appellants, v. WILLIAM BAIRD, ET AL., Appellees; and JANE HUNERWADEL, ETC., Appellant, v. WILLIAM BAIRD, ET AL., Appellees.	Number 78-329 and Number 78-330 (Consolidated)

Washington, D. C.
Tuesday, February 27, 1979

The above-entitled matter came on for argument at 2:02 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

GARRICK F. COLE, ESQ., Assistant Attorney General of Massachusetts, Department of the Attorney General, One Ashburton Place, Boston, Massachusetts 02108, on behalf of the Appellants in No. 78-329.

APPEARANCES (Cont'd):

BRIAN A. RILEY, ESQ. Suite 520, 40 Court Street, Boston, Massachusetts 02108, on behalf of the Appellant in No. 78-330.

JOSEPH J. BALLIRO, ESQ., One Center Plaza, Boston, Massachusetts, on behalf of the Appellees.

JOHN H. HENN, ESQ., 10 Post Office Square, Boston, Massachusetts 02109, on behalf of the Appellees.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Bellotti against Baird and the consolidated case.

Mr. Cole, you may proceed when you are ready.

ORAL ARGUMENT OF GARRICK F. COLE, ESQ.,

ON BEHALF OF APPELLANTS IN NO. 78-329

MR. COLE: Mr. Chief Justice, and may it please the Court:

My name is Garrick Cole. I am an Assistant Attorney General of the Commonwealth of Massachusetts. I appear before you today on behalf of the Attorney General of the Commonwealth and its District Attorneys, the named Defendants in this matter.

The Attorney General was sued because he is the chief law enforcement officer charged with enforcement of the statute.

After summarizing briefly the prior proceedings in this case, reviewing the results of the abstention process and stating the significant facts, I propose to concentrate my argument this afternoon on two questions: Whether the Court should consider the statute constitutional on its face, and whether the District Court's remedy, a declaration of the total unconstitutionality and an injunction against enforcement of any aspect of the statute in the first trimester, the second trimester, the third trimester, as to immature minors or as to mature minors -- whether the Court should consider that remedy appropriate.

We are content to rely upon the arguments in our briefs concerning the other issues, the District Court's handling of discovery and the matter of costs on appeal in this Court, on our prior appeal.

As the Court may review from the briefs, this matter was commenced in 1974 in the District of Massachusetts before a three-judge district court, as a civil rights action seeking invalidation of a state statute.

The Court had this case before it for decision in July of 1976 in which it vacated the District Court's decision on abstention grounds and sent it back for further proceedings. Those further proceedings occurred in 1977 and the case was retried in October of 1977. In May of 1978, the District Court entered its decision, an order which we seek review of in this Court here today, enjoining the enforcement of the statute in its entirety and declaring the statute unconstitutional on its face.

Now, the process of abstention, which this Court directed the District Court pursue, has had a substantial impact on the issues that are before us today. As a result of abstention, the meaning of the statute is now clear and its purposes certain. Those purposes, as authoritatively construed by our Supreme Judicial Court, are to promote the best interests of pregnant adolescents and children by stimulating parental consultation, accompanied by judicial supervision, within the

framework of the Constitution.

As a result of abstention, gone is any suggestion of parental veto. Gone also is any question concerning the promptness of judicial proceedings, and gone is any implication of improper or discriminatory intent.

The statute, we submit, that is before the Court today, stands in the long tradition of state legislation enacted to protect and promote the best interests of its minor citizens.

QUESTION: Is there possible disagreement as to this now?

MR. COLE: I am sorry, Your Honor, as to the meaning of the statute?

QUESTION: No, as to just what you said, that the best interest of the minors is the rule under the Massachusetts statute.

MR. COLE: Mr. Justice Blackmun, I believe not. I believe that the Supreme Judicial Court's opinion on this in this regard is quite definite, that the judge's decision --

QUESTION: That's the way I read it, but I wondered whether you knew, as between counsel on the opposing side of the podium, whether there is any disagreement as to this.

Maybe I'll ask them.

MR. COLE: Perhaps, you might, Your Honor. I think they may make an argument that -- well, I'll let them make that argument, whatever argument it may be.

QUESTION: Well, anyway, what the court clearly also held was that the District Judge was not permitted to find that this was a mature minor, capable of -- equivalent to an adult so far as being able to decide her best interests by her own lights, and that was sufficient, therefore, to approve the abortion.

It had to say that -- Your Supreme Judicial Court held that no, that's not enough and that's not the judge's function. The judge's function is to decide, even if this is equivalent to an adult woman so far as maturity and ability to make her own decisions, that nonetheless it is the judge's function to decide, in his opinion, whether it is in the best interest of this person to have the abortion. That's correct, isn't it?

MR. COLE: That's correct, Your Honor.

QUESTION: And I think that is one of the issues between you.

MR. COLE: Well, let me just suggest why I don't think that means that an answer to Mr. Justice Blackmun's question should have been different.

QUESTION: I didn't suggest it should have.

MR. COLE: I think it is important in responding to your question that we realize that the Supreme Judicial Court placed its comments in that regard in a context. And it said that assuming that this requirement, this purpose on the part

of the Superior Court judge is constitutional, then we believe that it is consonant with the long-established tradition of judicial supervision over the welfare of minors that the Court not stop simply at a finding of maturity of informed understanding, but rather look and see whether there are things which it sees which the child or adolescent may not see, for whatever reason, and make a determination on that basis.

So, I think, for that reason the Supreme Judicial Court's suggestion as to the judge's proper role is consonant once again with the tradition for which this statute stands.

QUESTION: I suspect, for the purposes of your case, you might be willing to accept the very emphatic argument that you just heard in the preceding case, that a 16 year-old is not capable of making any decision affecting his rights or her rights, alone and without advice.

MR. COLE: Well, Your Honor, we don't share that view. I don't think the evidence supports that view. I think the District Court found, however, and the expert testimony is that age does bear relationship to the ability of a child or adolescent to make an informed decision, that the older the child, generally the more probable is --

QUESTION: You are not arguing for any per se rule, in any event?

MR. COLE: No, Your Honor, we are not. We are certainly not.

QUESTION: But, as I understand it -- I want to be sure I do understand it, because it is quite important to me.

Your Supreme Judicial Court held that even though the trial judge finds that this particular minor is the equivalent of a rational, mature adult, so far as decision-making goes, nonetheless, since she is in fact a minor, then the District Judge, despite her ish to have an abortion, can say, "I find it is in your best interest not to," which of course he could not do if she were, in fact, an adult.

MR. COLE: That's absolutely true, Your Honor, he could not do that if she were an adult. And the Supreme Judicial Court's suggestion in its opinion is that the Superior Court should perform that function if it is constitutional to do so.

We suggest that, under our analysis of the situation, it ought to be constitutional for the judge to do that, because maturity, in the sense of informed understanding, is not always a guarantee -- indeed, I would suspect in this area it is virtually no guarantee at all -- that an adolescent or a child has the life experience, has the understanding of the abortion decision which a judge who is familiar with these problems, perhaps over a sequence of cases may acquire.

QUESTION: It is undoubtedly true that most adults during the course of their lifetime make decisions which are foolish decisions, but a free society allows them to do so, and protects them in doing so.

MR. COLE: Absolutely, Your Honor, and I think, as this Court has recognized in other contexts, it is the peculiar circumstances of minority which sometimes justify, indeed, do justify the state's taking a more protective role than it otherwise would be permitted to do in the case of an adult.

And I believe that the SJC's suggestion in that regard, Your Honor, is consistent with this Court's observation in other contexts.

QUESTION: Mr. Cole, just straighten me out.

If this mature minor were a widow, the situation would be different, would it not?

MR. COLE: Well, the situation is that -- Your Honor is referring to Section 12(f) of the statute, and the answer is yes, as a result of the provision, except for the proposition that Section 12(f) does not apply to abortions. So the fact that -- and I think I should perhaps explore that point at this point, so that you understand it.

Section 12(f) is a general, as the Supreme Judicial Court says in its opinion, legislative mature minor rule. But it applies only in a very limited set of circumstances. It applies only to those minors who meet its six criteria. And they are narrow criteria. To some degree they codify the common law notion of emancipation, but they go a little broader. But they are still quite narrow. And Section 12(f), on its face, does not apply, as a result, to the vast majority of

children, male or female, who live with their families in Massachusetts.

Now, it is also true, Mr. Justice Blackmun, that it does not apply to abortion or sterilization, neither does Section 12(e), dealing with methadone maintenance.

The Legislature has made a determination -- and we suggest one which ought to be within its constitutional power to do -- that some health care decisions, maybe a lot of them, maybe ones which include very serious surgical procedures or other things of that nature, ought to be within the adolescent's ability to decide for his or herself, and others should not. And abortion, sterilization and methadone maintenance are three of those legislatively singled out severe and controversial decisions which the Legislature has determined an adolescent or child should not be able to decide.

As a result of the Supreme Judicial Court's ruling, we suggest that there are only two questions of substantive quality before the Court. First, is the statute invalid simply because -- on its face now -- it requires parental consultation and notice in every case, all cases, and is it invalid, on its face, simply because it requires parents who attend mature minors adhere to the same requirements which govern the conduct of physicians who attend immature minors?

Now, the appreciation of the narrowness of these questions, it seems to me -- narrowness which derives from the

process of abstention, is a helpful basis for turning to a consideration of the facts at issue in this case.

The facts are important, we believe, because they show the tenor and complexity of the judgment which the Legislature has made. They are predominantly legislative in nature, however, because we are not talking about an "as applied" attack, not talking about any individual minors, we are talking about the general power of the Legislature.

Skipping briefly through them, I want to suggest to the Court that pregnancy among adolescents is an increasingly serious and common phenomenon. Approximately one million adolescents, between the ages of 15 and 19 become pregnant each year, and approximately 30,000 adolescents, under the age of 15, become --

QUESTION: How about a young -- below 18 -- who has left home?

MR. COLE: As a person who has no parental -- yes, the statute deals with that, Mr. Justice Marshall.

QUESTION: The statute deals with the parents who have left home, parents who have deserted their child.

QUESTION: I am talking about the child who gets an apartment and lives by herself.

MR. COLE: Right. I am sorry, your question prompts my memory.

In the SJC opinion, there is a mention -- and perhaps

my associate can find it for me -- of a situation in which no substitute parent is available, and the situation there would be that -- I suppose that someone either who could perform that function would do it for the child on the child's behalf --

QUESTION: Here's a child who is living by herself, taking care of herself and not depending on anybody. Whose business is it except her's? It seems like a lot different from the ordinary case.

MR. COLE: I agree with you. What you are really talking about, I suppose, in the common law notion --

QUESTION: Is the exception.

MR. COLE: -- is the emancipated minor situation.

I see the thrust of that argument. The Legislature's judgment is that abortion is a terribly difficult consideration. And a child who is able to make many other decisions, indeed, virtually all of them on her own behalf, may find herself totally at sea when she faces this one.

QUESTION: Yes, but she also has to face suicide and she gets over that.

MR. COLE: If she doesn't do it.

I understand your point, Your Honor.

QUESTION: I guess the real question is that some people that you and I know are mature at 17 and some people who are not mature at 30. I guess that's the answer, isn't it?

MR. COLE: It's absolutely true, Your Honor, and we use bright lines, somewhat arbitrary distinctions. There is no question about it. We face that problem.

The cite, if you are interested, Mr. Justice Marshall, appears in the Northeastern Reporter on page 294, to that discussion of the --

QUESTION: I didn't get the volume.

MR. COLE: I am sorry. It is 360 Northeastern 2d 294.

We turn to the facts in this case. The evidence establishes that abortion surgery, although it is, from a medical risk point of view, relatively safe, is not without its hazards. And the evidence indicates that complication rates vary from ½ of 1% to as much as 5% for abortions performed in the first trimester by the usual suction method. They are much higher when one considers abortions performed in the second trimester by other methods.

The evidence also establishes that pregnancy and abortion have serious psychological ramifications, for adolescents in particular, and that the problem of recidivism -- and I should define that term in the way the experts at trial used it. The recurrence of unwanted pregnancies among adolescents and children -- is astonishingly severe.

And Plaintiff's expert testified that among her patients the rate was approximately 25%. That is to say that one out of every 4 children whom she counsels comes back again

with another unwanted pregnancy. And the literature supports in varying places that the rates can be as high as 95% in a given sampling.

QUESTION: While we are talking about what the record shows as to the facts of life, am I correct in my recollection or understanding that I read in this brief that there are cases on record where girls as young as 5 years old can become pregnant?

MR. COLE: Yes, Your Honor, that's true. It is in the record. It's in the request for admissions. If I can just find that in my notes here, I can give you the exact cite. It's approximately request for admission No. 50, or something like that, in our request for admissions Volume I of the transcript. Yes,sir, that is true. There is a reported case.

QUESTION: In the United States of America?

MR. COLE: No. It was not. It was in, I believe, Peru. It's in a volume -- We got it from a book on adolescent gynecology.

QUESTION: Are years the same length down there as they are here?

MR. COLE: Your Honor, it is an astonishing fact,but there are children -- I believe she commenced menstruating at 18 months.

I should note in passing, quickly now, as my time is flying, that we object and continue to object to the introduction

of evidence in the briefs of Appellees in this case concerning the actual operation of the Massachusetts Superior Court System. We feel this matter, as Judge Aldrich ruled at trial, was an issue not relevant to a facial attack, and therefore we do not think that it is a matter which the Court should properly consider.

Turning quickly to my argument on the merits-- Although this is a facial attack on a statute, a state statute, Plaintiffs claim and the District Court's opinion concentrate on very narrow criticisms. They concentrate upon the effect the statute has on very narrow groups of minors.

We don't believe that -- We submit that this Court's cases don't permit the District Court to strike down a state statute under these circumstances.

Starting from the beginning, parental consent and its appropriateness. Our argument is that it's a longstanding tradition recognized in the law and Mr. Justice Stevens' opinions and the opinions of Mr. Justice Brennan in the Carey case, note the importance of parental counseling. And the parties all agree that supportive parental counseling is in the best interest of minors. So we start from that proposition.

The evidence also contains support of the importance of parental support in the minds of professionals. The American Academy of Pediatrics -- as the Court may be aware from reading our brief and looking at the record -- in 1973 had before it

the question precisely of whether minors, adolescents and children, should be able to consent to the performance of abortion and sterilization on their own behalf. And the testimony and exhibits on file indicate that the American Academy of Pediatrics decided the answer to that question ought to be no.

Of what then do Plaintiffs complain?

QUESTION: The important word in your phrasing of it is "supportive," isn't it?

MR. COLE: Yes, Your Honor, that's quite so. And I am going to turn to that question right now.

Of what, then, do Plaintiffs complain?

Placing aside the immature minor question, the confusion which we deal with in our brief over that --

QUESTION: Am I not correct your statute requires it irrespective of whether or not it is supportive?

MR. COLE: Your Honor, on its face, the statute applies to the relationship, does not probe beneath it, and yes, consultation is required, even though some parents may not be supportive.

Now we appreciate that problem -- We have never denied --

I see my time has expired. I'll have to stop there.

MR. CHIEF JUSTICE BURGER: Mr. Riley.

ORAL ARGUMENT OF BRIAN A. RILEY, ESQ.,

ON BEHALF OF THE APPELLANT IN NO. 78-330

MR. RILEY: Mr. Chief Justice, and may it please the Court.

My name is Brian Riley. I represent the Appellant Jane Hunerwadel, who was permitted to intervene in the District Court.

Mrs. Hunerwadel is the mother of three unmarried girls of child-bearing age. At the time this action was commenced, she had no knowledge of the true identity of Mary Moe. She was permitted to intervene on behalf of herself and as representative of a class of Massachusetts parents, having minor girls of child-bearing age who are or who might become pregnant and choose not to inform their parents as to the nature of their pregnancy and as to whether or not they were going to seek an abortion.

The Intervenor contends that the Massachusetts statute, as interpreted by a unanimous decision of the Supreme Judicial Court, is constitutional on its face. The Intervenor contends that the Massachusetts statute is constitutional because it reflects a long line of decisions of this Court holding that parents have the primary right, duty and obligation to provide guidance and protection to their minor children.

This Court has only interfered with the primary right and duty of parents when the parents have not acted in the best

interest of their minor children. This Court has held that parents are entitled to laws with aid them in the discharge of their obligations.

The Massachusetts statute is consistent with this body of law. First, it provides that the minor must seek parental consent and guidance before she may obtain an abortion. This part of the statute reflects the primacy of the family unit. However, it does provide that a judge of the Superior Court, an inbred mechanism in the statute, may grant consent where such consent is in the best interest of the minor child.

The record demonstrates the rationale for such a statute. All of the experts agreed that for a minor girl an unplanned pregnancy is accompanied by a period of great stress. Typically, these girls are scared, they are frightened, they are desperate.

One of the experts described these girls as upset, withdrawn, noncommunicative and anxious. Expert testimony also reveals that such girls are compelled to seek an immediate solution to the problem. In short, they want immediate relief. And yet the experts state in this case that immediate relief is not proper. There ought to be a period of reflection.

This is where the role of the parents becomes critically important, although the experts again agree that the great majority of parents will give support and guidance to their children. They also agreed that parental support and involvement

is extremely important and should be encouraged in every instance.

It is important that if the girl makes the decision to have the abortion that it is the product of reflection and thought, not the reaction to a crisis.

The testimony of the Intervenor, Mrs. Hunerwadel, demonstrates the important role the parents can play in this decision. First, parents are made aware of the pregnancy, and they have an opportunity to discuss the pregnancy and the reasons and the circumstances that led to it. That's a fundamental right. If their daughter is pregnant, the parents ought to be made aware of that. It shouldn't be kept secret.

Second, if the pregnancy is symptomatic of other problems, whether they be emotional or not, affecting the girl, the parents can begin to initiate steps to resolve those problems.

Third, if it is determined that the abortion is in the best interest of the minor girl, the parents will be given the opportunity to assist their daughter in selecting the proper medical facility that best fits the girl's needs.

QUESTION: That depends on the wealth of the parents, doesn't it?

MR. RILEY: I think there are various facilities that are available that could be provided to a minor, some may be more expensive or less expensive --

QUESTION: You think?

MR. RILEY: I think that some doctors may charge a small fee and provide a better service than some --

QUESTION: Again, you say "I think."

QUESTION: Some are free, are they not?

MR. RILEY: Yes, Your Honor, some are free.

QUESTION: Psychiatric is free in Massachusetts?

MR. RILEY: Depending on the --

QUESTION: Depending on whether or not a young girl should have an abortion?

MR. RILEY: There are neighborhood counseling services, Your Honor, that are available, and I don't think that -- It's the availability that the parents have to seek this type of --

QUESTION: Money is an important factor.

MR. RILEY: It is, Your Honor, but then again, the girls, if they need it, should be given the opportunity to get it. Whether or not everyone is entitled to it, is another issue, which I think is beyond the scope of this case.

The parents will have the opportunity to insure that the child receives the best possible medical treatment, by selecting the appropriate physician and medical facility. By so doing, the parents can insure that the child receives proper counseling and backup care in the event of an emergency.

Finally, the parents can insure that the child receives proper post-abortion counseling and psychiatric care if

necessary.

A majority of the District Court found that the statute's requirement of parental consultation is unconstitutional because some parents may be physically or emotionally unwell.

First of all, the record establishes that it is rare that a minor's fears about adverse parental reaction are, in fact, realized. It is also common that children have many fears about adverse parental reaction which are plainly unfounded and never realized in fact. It is common knowledge.

Second, the statute should not be judged on the rare exceptions to the rule, but should be judged on the broad sweep of the statutes purpose.

The majority of the District Court questions the value of giving parents a "last minute" consultation with their daughter. The majority seems to imply that if parents have not discussed the problem of the unplanned pregnancy that it probably won't be beneficial to give them an opportunity to talk to the girl when it is time that she may want one.

Despite the obvious shortcomings of this statement, it is far better to give parents that last opportunity to help their daughter than to let them have a last-minute consultation, possibly, with a physican that may only have a narrow clinical interest in the abortion procedure, or have solely a moretary interest in the abortion procedure.

The facts of the present case illustrate this point.

QUESTION: Mr. Riley, may I interrupt for just one second.

Are you and your associate asking the Court to overrule Danforth? It seems to me all the arguments you have made are met by that decision, aren't they?

MR. RILEY: Excuse me, Your Honor.

QUESTION: Are you asking the Court to overrule the Danforth case?

MR. RILEY: No, Your Honor.

QUESTION: Have you said anything that really is an attack on that case?

MR. RILEY: I attempted to make the point earlier that the statute first provides for parental consultation and secondarily provides for judicial review of that decision.

QUESTION: The only difference -- There are two differences. You need two parents here and you only need one parent there, and you have judicial review here. They are the only differences. All these other arguments fit that statute, too.

MR. RILEY: One of the reasons advanced by the District Court for declaring the statute unconstitutional was because it required consultation in all instances. And I don't think that was resolved in the Danforth case.

We are attempting to demonstrate to the Court why

the broad sweep of the statute is beneficial to the child. Inbred in the statute and consistent with previous cases of this Court, if the parents fail, if the parents don't accomplish what they are under a duty to perform, then the state can move in. And I think once the state moves in they are acting in the best interest of the minor girl.

Never once has this Court ever advanced the theory that the child should become removed from both the state, removed from the family and placed into the hands of a third party who is in no way responsible, either legally, by the parent-child relationship, or by the parens patriae relationship of the state, for the welfare of that child in the long run.

But the facts of this case demonstrate the need -- why this should be the intervention by the parents or the court. In the present case, Dr. Zupnick, one of the Plaintiffs, resides in New York. He travels to Boston two days a week to perform abortions at Parents Aid. He receives anywhere from $600 to $900 for two days work in Boston. He does not participate in pre-abortion decision-making processes. Counseling is done in groups by paraprofessionals.

At the time this action was commenced, Mary Moe was 16 years old and living at home with her parents. Mary Moe received an abortion by Dr. Zupnick. Her entire involvement with Dr. Zupnick lasted five to seven minutes, the time it took to perform the abortion. Had Mary Moe's parents been

involved or the court been involved, the last-minute consultation may very well -- whether it be with the parents or the court -- have given rise to the selection of a physician who would have given her much more thorough medical treatment and much more thorough pre-abortion counseling.

Mary Moe was aborted on October 31, 1976. Several weeks later, at deposition she was asked whether she had received the required follow-up medical exam. She had not. Two months later, at the time of trial, she was again asked whether she had received the required follow-up medical exam. Again, she responded that she had not. When asked why, she responded that she had to wait until she received her Christmas money from her grandmother and her brother so she could pay for the post-abortion checkup.

The Intervenor contends that such an untenable situation should not be tolerated by the Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Balliro.

ORAL ARGUMENT OF JOSEPH J. BALLIRO, ESQ.,

ON BEHALF OF THE APPELLESS

MR. BALLIRO: Mr. Chief Justice, and may it please the Court:

My name is Joseph Balliro. I will address the Court with respect to those issues involved in Appellees' brief concerned with the undue burdens, in the context of the due

process argument.

My colleague, Mr. Henn, will address the Court on behalf of the Appellees with respect to the equal protection arguments.

At the outset, I'd like to say that it should be emphasized that this is a criminal statute that effectively prevents, by its sanctions, the minor from obtaining access to abortion facilities that she may want in order to terminate a pregnancy.

QUESTION: Against whom do the criminal sanctions run?

MR. BALLIRO: The ones performing the abortions, Your Honor.

QUESTION: Not against the minor?

MR. BALLIRO: Not against the minor.

I might point out in response to Justice Stewart's question, that the penalties provide for fines between $100 and $2,000, and were the maximum or practically any amount of those fines imposed it would effectively preclude abortion facilities being available for the overwhelming majority of minors.

QUESTION: That is minors who have not received the consent of their parents?

MR. BALLIRO: Who don't have a great deal of money.

QUESTION: Well, now, this doesn't talk anything about

money. It is just talking about consent of parents.

MR. BALLIRO: That's correct.

QUESTION: It might be in a free clinic, might it not? I take it you have some free clinics in Massachusetts.

MR. BALLIRO: We not only have free clinics, but even clinics run by the Appellees in this case, Mr. Chief Justice, provide in a very substantial percentage of cases free services for those who they are satisfied are indigent, and the record amply demonstrates that.

QUESTION: Are those free clinics supported by the State of Massachusetts or by private funding or federal, do you know?

MR. BALLIRO: None of them are supported either by the Commonwealth of Massachusetts or by federal funding.

As a matter of fact, I can't think offhand, Your Honor, of any entirely free clinic, but with respect to the existing clinics that provide abortion services, almost all of them in one way or another, or to some extent or another, will afford indigents free services.

To a greater degree, if Your Honor pleases, with respect to the Appellees in this case, and more often than not, other existing abortion facilities in Massachusetts will refer indigents to the Appellee clinic in this case.

In a long line of cases, beginning perhaps as early as Griswold, this Court has clearly established that the right

to decide whether or not to terminate a pregnancy is a fundamental right, constitutionally protected and insulated from interference unless warranted by some compelling state interest. And in Bellotti v. Baird, this Court recognized that the unmarried minor has a fundamental right to an abortion and that that right cannot be unduly burdened.

When this case first came before this Court, the burdens imposed by the statute were somewhat unclear. And I don't think that it makes too much difference, Your Honors, whether or not it was unclear either because of the representations that were made concerning the interpretation of the statute at that time by the Attorney General's office, or whether they were unclear as a result of the fact that the District Court failed to abstain. But the fact of the matter is that we now have the benefit or the answers provided by the Supreme Judicial Court of the Commonwealth of Massachusetts to some nine questions that were certified to it.

And I would suggest respectfully that those burdens fall generally into two categories. First, those required by the necessity for two-parent consent, and those required by what the District Court described and which we adopt as judicial override.

The statute first requires that the minor obtain the consent of both parents. And it makes no difference that the minor is mature and capable of giving an informed consent.

It makes no difference that her physician may agree with her, or that concerned friends, adults, or otherwise, may agree with her. It makes no difference whether or not one or both of the parents have previously expressed views that very strongly indicate the probability of aggression or hostility toward the child, were she ever to get pregnant. And, as a matter of fact, this --

QUESTION: A minor in Massachusetts, for this purpose, is a girl 18 or younger or --

MR. BALLIRO: Under 18, Your Honor.

QUESTION: If she's reached her eighteenth birthday, she's not a minor?

MR. BALLIRO: She's an adult.

And as a matter of fact, this record, with respect to the Appellee Mary Moe, describes exactly that kind of hostility and aggression having been expressed by at least one of her parents, her father, who she testified had indicated that -- this was before she was pregnant -- that if she ever got pregnant, he was likely to kill her boy friend.

It makes no difference if the parents have expressed unalterable views that are opposed to abortion. Even if those views include the forcing of her carrying to term as punishment for whatever transgression the parent might feel the child did by becoming pregnant. And it makes no difference if the parents have been separated for years and one or the other or

both have never displayed any warmth, any love or any affection for the child. The only exception to that, as far as the statute is concerned, is with respect to the legal definition of desertion, whether or not one of the parents has deserted the other parent. And it makes no difference, if it please the Court, if the most renowned physician or group of physicians or psychiatrists were to attest to irreparable or long-lasting harm to the minor if forced unreasonably or arbitrarily or against her will to have an abortion.

And, according to the statute as it is written, in the face of that kind of overwhelming interest as to what would be in the best interest of the child, even a dispassionate judge could not order that that abortion proceed without notification and consultation of the parents, both of them.

In short, this statute that talks in terms of a good cause and the statute that the Supreme Judicial Court of the Commonwealth of Massachusetts discussed in terms of both the court and parents conducting themselves in a manner that would be to the best interest of the child, would compel notification, consultation and the obtaining of consent of both parents, in total disregard of what every thinking person in a significant number of cases,I submit, would agree was totally irrational and dangerously harmful both to the child, herself, and very well to her parents, as the record in this case shows, because that judge would be forced to direct that notification

of that pregnancy be made to parents, even though, for example, one of them may be suffering from a very severe heart condition that could very well be triggered into something a lot more serious were that parent to find out that its child was pregnant.

As far back as Roe v. Wade, and reaffirmed by this Court in Carey v. Population Services, this Court has spoken in terms of the necessity of there being a compelling state interest as necessary to justify regulation of a right so fundamental as whether to bear a child, and that more importantly, any such regulation be narrowly drawn.

Now, far from being narrowly drawn, we suggest that obbiously the two-parent consent requirement of this statute, is about as broadly drawn as any statute could be.

QUESTION: Mr. Balliro, just to use that as an example, as I remember the Supreme Judicial Court's comments on the case, they suggested that if the statute were too broadly construed the federal court might sustain its constitutionality only in part, rather than taking it as a whole. What would be wrong with the view that the court should have simply held the two-parent consent unconstitutional, or maybe unconstitutional as applied to the mature minor, but that the statute should be saved with respect to the immature minor, wherein at least in cases where the consent of one parent might be supportive, or at least consultation? Is it necessary to

examine the whole thing on a facial basis, in other words?

MR. BALLIRO: I believe that it is, and I would adopt the District Court finding in that respect, and more particularly its description of the Supreme Judicial Court's method of saving part -- the major part of the constitutionality of this statute by its chameleon change of color to satisfy whatever this Court might feel was necessary in order for any part of it to survive constitutionally, is not a view of severability that I can adopt. I would adopt the District Court's view, Justice Stevens, with respect to --

QUESTION: I am sure you would, but do you want to try and persuade us why we should do it?

MR. BALLIRO: Well, first of all, I think, you wouldn't be doing justice to the Legislature of the Commonwealth of Massachusetts. I think if you did that you would then wind up with a statute that was directly contrary to what the expressed view of the Legislature of the Commonwealth was, that there be a two-parent consent. And I don't think it should be the function of the federal court to make that kind of a distortion.

QUESTION: The highest court of the state has said if we can't have the total picture that has been presented, we want as much of it as can possibly be saved.

MR. BALLIRO: That's what the Supreme Judicial Court said.

QUESTION: That's the highest court of Massachusetts.

MR. BALLIRO: That's correct, but that's not the Legislature.

QUESTION: But our cases have said many times that when the Supreme Court of a state speaks interpreting a statute it's just as if the legislature had spoken.

QUESTION: They have said what the Legislature provided.

MR. BALLIRO: Well, Justice Rehnquist and Mr. Chief Justice, perhaps the greatest difficulty I have with severing out that portion of the legislative requirement is in my strong feelingthat with respect to the rest of the statute, in almost every aspect that so unduly burdens that it would not survive if that were to be done anyway.

QUESTION: Well,that's a separate argument.

MR. BALLIRO: But it's my answer to your question.

QUESTION: Mr. Balliro, have you ever known of another instance where your Supreme Judicial Court has said this is the way the statute is construed, but if it isn't all right and the Federal Court thinks it ought to go another way, we will go along that way? Is this common in the halls of the Supreme Judicial Court of Massachusetts?

MR. BALLIRO: Your Honor, it is not only uncommon in Massachusetts, nor do I know of any other instance with respect to the Commonwealth of Massachusetts, where the Supreme

Judicial Court has evern spoken in that sense. But I don't know of any other decision, at least I've never been acquainted with one, in which--

QUESTION: Well, there are a couple of ex-Harvard law professors on that court, and I wondered if this is what they are teaching these days.

MR. BALLIRO: I don't think they teach that at Harvard, if Your Honor pleases.

Conceding the uncontradicted fact that parental guidance is a desirable, nonetheless the also uncontradicted fact in this record is that in an appreciable number of cases the requirement of obtaining parental consent of both parents will lead to a disaster either for the child, the parents or both.

I note, Mr. Chief Justice, that my time is up.

MR. CHIEF JUSTICE BURGER: Mr. Henn.

ORAL ARGUMENT OF JOHN H. HENN, ESQ.

ON BEHALF OF THE APPELLEES

MR. HENN: Mr. Chief Justice, and may it please the Court:

My name is John Henn, and I represent the Appellees Planned Parenthood League of Massachusetts and others in this case.

The Massachusetts Statute Section 12(s) singles out the unmarried minor who chooses abortion for imposition of a

uniquely burdensome and discriminatory set of restrictions. What the state has done is to invidiously classify into one group all minors who have never been married and who want an abortion and into the other group every other kind of minor.

Now, these other kinds of minors consist of, first, any minor who wants to continue her pregnancy; second, any minor who has ever been married and who wants an abortion; and third, any minor who wants any kind of medical treatment, however serious, other than abortion.

For all these other minors, Massachusetts either has no requirement of parentsl involvement at all, or has requirements which are much less burdensome than those imposed by Section 12(s).

Now, let me illustrate this. The case of the minor who wants to continue her pregnancy is obviously the most simple. She faces no requirements of parental involvement whatever, regardless of her maturity.

The case of the minor who is or ever has been married and who wants an abortion is also simple. Under the Massachusetts Emancipated Minor Statute, Section 12(f), she is exempted from all parental involvement requirements regardless of her maturity.

QUESTION: Is it possible, under Massachusetts law, this statute or any other, for a parent to compel the child to submit to an abortion?

MR. HENN: It is not, Your Honor.

QUESTION: The law makes all sorts of distinctions between married and unmarried people, minors, doesn't it? I mean until a person is married and during his or her minority, under the ordinary concepts of common law, his or her parents speak for the minor. After marriage that's no longer true, and that's been from time immemorial recognized by the law. There are all sorts of distinctions made, depending on that difference in status, aren't there?

MR. HENN: There are a number of distinctions with respect to minority, obviously.

QUESTION: And with respect to marriage.

MR. HENN: And with respect to marriage. But I am focusing now in the medical treatment area, and I want to distinguish how uniquely Massachusetts has treated only the minor who has the status of being unmarried and who wants the treatment of abortion.

QUESTION: It treats unmarried minors differently from married minors in many, many other different ways, doesn't it?

MR. HENN: It does, Your Honor.

QUESTION: The very concept of emancipation does so, does it not?

MR. HENN: That does, Your Honor, and emancipation has now been statutorily codified. So that, if I may turn to

the third case of the minor who wants any form of medical treatment whatever, other than abortion, from plastic surgery to amputation, she may obtain that in one of three ways, all of which are more liberal than what the unmarried minor wanting an abortion uniquely faces. That minor who wants some other medical treatment may, if she fits within one of the protected categories of the emancipated minor statute, be exempted from all parental involvement whatever, regardless of her factual maturity. Even if she does not fit within the statute, she can if mature be exempted,under the common law mature minor rule, from all parental involvement, at least if her doctor decides that parental notification is against her best interest.

And finally, if she neither falls under the statute nor under the common law rule, she will have to obtain the consent of but one parent.

QUESTION: Mr. Henn, these are all equal protection arguments, as I understand it. The remedy for that, I suppose, would be to enjoin the enforcement of the statute to the extent that there is any disparity. In other words, change it to require one parent consent or, in the case of mature minor, hold it invalid as to that.

MR. HENN: In response to that and in response to your earlier question to Mr. Balliro, with respect to preservations of some portion of the statute, we suggest that this statute cannot be preserved. First, for the reason my brother

already mentioned, namely that the state court has authoritatively spoken as to the legislative intent. Second, that it would be unprecedented for the federal court to take a statute, eliminate its construction and, indeed, its text, and rewrite it; and third, you would have here, by way of the construction suggested, distinguishing between mature and immature minor, a criminal statute, which would make a physician's potential exposure to criminal liability turn on whether he correctly assessed maturity versus immaturity, just as this last month this Court considered a statute where a physician could or could not be criminally liable, depending on how he assessed the question of viability.

Each of those questions are questions on which experts have differed.

QUESTION: I suppose the doctors have to make that precise judgment in the non-abortion area, in the cases you just described.

MR. HENN: They do. They do, Your Honor, but they do only with respect to exposure to a potential battery suit in connection with an immature minor.

The result of the Massachusetts overall system is that for any case you can think of, except the unmarried minor wanting an abortion, Massachusetts law either leaves it up to the minor and her physician or at most requires one parent's consent.

Section 12(s) stands in stark contrast to this otherwise liberal approach. Under Section 12(s) and only under that statute, an umarried minor can actually be forced to bear an unwanted child. And the consequence of letting the statute go into effect, as the facts found by the District Court show, which have not been challenged as clearly erroneous, the consequence would be to deter unmarried minors from seeking legal abortions, to force some of them to travel out of state or into the hands of back-room abortionists, and to force still others to bear unwanted and usually illegitimate children.

QUESTION: But your argument is it is irrational, or close to that, for the Legislature to say that the abortion decision is different from these other medical decisions?

MR. HENN: In terms of all of the range of other abortion decisions, it is probably --

QUESTION: But you are saying that distinction between abortions and other medical procedures, where consent of only one parent is required, that the Legislature could not rationally consider one of those decisions more serious than the other.

MR. HENN: I think the test would be a test of more heightened scrutiny, namely the significant state interest test, but I think it is even irrational to single abortion out where there is still a system which provides substantially the same kind of protection for minors who at least are incapable of

making decisions. That is, the common law rule does not say that a minor incapable of consenting to abortion can, nevertheless, get an abortion. The common law rule is still the common law rule of battery which would --

QUESTION: I was focusing on the cases outside the common law rule, those where you do not have a mature minor. Your objection there is --

MR. HENN: There are two common law rules, Your Honor. There is the new mature minor common law rule --

QUESTION: Let's take the case of the minor who is not a mature minor. Your argument is that in medical procedures, other than abortion, the consent of one parent is sufficient, whereas the consent of two parents is required in the abortion case. And you are saying there is no valid distinction between abortions and other medical procedures that would justify a difference in the kind of parental consent required.

MR. HENN: There at least is no significant state interest in that distinction because the two-parent consent rule here is not only implementally burdensome in itself, adding an additional consent requirement, but it triggers the minor's exposure to all the other burdens of the statute. For example, the discriminatory burden of judicial veto, where in the case other than abortion a minor may obtain the medical treatment she wants upon the concurrent consents of herself, to the extent of her capacity, one parent and her physician. But

uniquely, under this statute, a judge may veto those concurrent consents, even if the other parent has not opposed to abortion in court, but merely declines to execute the required consent form. And the statute requires that a consent form be executed.

Now, Your Honor --

QUESTION: Mr. Henn, it probably is not terribly important, but I wonder if, either in presentations to the Legislature or the arguments in the Supreme Judicial Court of Massachusetts, there was expression of any kind about the predicament of the physician who performs the abortion after this Supreme Judicial Court decision, assuming it is sustained, who is later confronted with a malpractice suit or a battery suit by a 14 year-old, 15 year-old girl after she has matured, several years later, on the grounds that she was incapable of giving consent, and therefore it would be a battery, in most states, if there was no adequate consent.

MR. HENN: If Section 12(s) were invalidated, I think -- In other words, if the District Court opinion in this case were upheld, then I think the physician would have a good faith defense, under the, I believe, the third paragraph of Section 12(f), which in my view ought to apply, which would provide a good faith defense, either if he was reasonably misled by the minor as to her competence or misled as to her age. Otherwise, it is and, indeed, would be the common law rule as to all medical procedures, comparing the common law mature minor

rule with the more traditional common law battery rule, that a physician's judgment, with respect to maturity, is subject to exposure, if he errs and decides the minor is mature, to a possible battery suit.

I think there should properly be a good faith defense in that, and I can't say the common law itself is clear, in part because the mature minor rule was only announced in this case by the Supreme Judicial Court.

Now, the deterrent burdens which my brother, Mr. Balliro, has discussed at some length, are ones which, in our view, make this statute a statute which is not saved from the Court's holding in Danforth.

The suggestion has been that Section 12(s), its provision for going to court as an alternative, somehow makes this case different from Danforth, but the burdens of going to court were found as a fact to be severely detrimental. And I call the Court's attention to the finding at pages 1001 and 1002 of 450 F.Supp. in this case. Those findings were that the burden of going to court is a "heavy burden," that an expert witness testified credibly and without contradiction that going to court would be severely detrimental to the minor, testified that most minors at least if obliged to get parents' consent would not -- or many minors -- go to court, but instead would seek illegal alternatives, and quite importantly found that if a minor did go to court, she was in an impossible situation.

If she prevailed, that is, she beat her parents in court, that was hardly going to help her family situation. And if she lost, if her parents forced her to bear an unwanted child, that was hardly going to help her family situation either.

Now, Your Honors, I would like to turn to the suggested state interest which Appellants have proposed in this case. The first suggested state interest is that of protecting against immature decision-making.

I submit this state interest is already met by existing Massachusetts law which provides for physicians to make individual assessments of maturity, and surely a requirement of parental notice when by hypothesis against the minor's best interest, not to mention judicial veto of a mature minor's decision, have nothing whatever to do with protecting against immature decision-making. Indeed, were the state truly concerned to prevent immature decisions, this statute is obviously under-inclusive. It does not impose any requirements even of consultation or counseling on any minor who wants to have a child, however foolish or immature that wish may be.

And similarly, this statute sweeps far beyond any requirement of encouraging parental consultation. It requires consent or notice of a lawsuit in every case, even if, by hypothesis, harmful to the minor.

An example of a consultation statute is attached to our brief — Our brief is the buff-colored brief -- It is the

Maryland statute. And while the factual workings of that statute I can't speak to, that is at least an example of the kind of statute which would encourage consultation in the normal case but leave it up to the physician to decide whether to dispense with it in cases where parental notice would be harmful to the minor. There are no judicial proceedings required,and the physician may not be made criminally liable for his decision.

As to the matter of remedy, the District Court was surely correct in invalidating this statute on its face. The claims of all unmarried minors who wish abortion were before the District Court and those are the minors to whom the statute applies. There is no "as applied" analysis, therefore, that would be appropriate and this Court has not applied such analysis in its review of prior abortion statutes.

In summary, we submit that the District Court properly invalidated the entire statute, as imposing undue burdens and unjustified discriminations with respect to a minor's abortion choice.

Thank you, very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon at 3:30 o'clock, p.m. the case was submitted.)