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The Undue Burden of Parental Consent Laws for Minors Seeking an Abortion in Massachusetts

What regulations and limitations should be placed on a woman's right to choose? What about a minor? Does a minor have the same rights as an adult when deciding? These and many other questions have been a part of the national and international debate on the issue of a woman's right to terminate her pregnancy. The current political climate makes these questions important now more than ever. One area of abortion law that is a difficult issue to settle is parental consent laws. Some argue that minors are too young to decide whether to terminate their pregnancy without an adult involved whereas certain situations make it very difficult for minors to tell their family about their pregnancy. Based on legal precedent, I argue that parental consent laws for minors create an undue burden for those seeking an abortion, especially in Massachusetts and we need to pass the ROE Act to eliminate parental consent laws for minors. Specifically, abortion clinics may worry about liability and laws may force women to travel out of the state to obtain an abortion, and pregnant minors may face repercussions from family members if they need consent. Conversely, the laws in Massachusetts are arguably lenient with a judicial bypass so many argue that it is not a large burden on women. However, there is a substantial waiting period for women who go through a bypass which creates a substantial burden on women.

Legal Precedent and Massachusetts Law related to minor parental consent

First, let's begin by looking at the legal precedent behind abortion regulations and the general law in Massachusetts. A very well-known case that made it a woman's right to choose to terminate her pregnancy, *Roe v. Wade*, is fundamental to understanding the argument over abortion rights. Specifically, in 1973, the Supreme Court ruled that Texas criminal abortion law which only allowed abortion to save the mother's life was ruled unconstitutional under the Fourteenth Amendment due process clause (United States, Supreme Court. *Roe v. Wade*.). The court ruled that the state did not have a compelling interest to regulate abortions and set up the trimester framework to determine state intervention. Moreover, during the first trimester, there is no valid state interest so the decision involves only the mother and the physician (United States, Supreme Court. *Roe v. Wade*., 164). However, during the second trimester, the state may regulate the procedure for the woman's health (United States, Supreme Court. *Roe v. Wade*., 164). This can include ensuring the physician has certain qualifications and their licensure, the qualifications of the facility it will be performed in, and the licensure of the facility (United States, Supreme Court. *Roe v. Wade*., 163). After viability or the point that a baby delivered could survive, the state can regulate the procedure for the woman's health (United States, Supreme Court. *Roe v. Wade*., 164-165). Though the trimester framework has since been struck down by subsequent court rulings, the right of a woman to choose to terminate her pregnancy still stands. This right declared by this case is what makes *Roe v. Wade* a landmark decision and one that has been debated since it was announced. Thus, *Roe v. Wade* is central to understanding the debate today regarding a mother's right to choose and understanding why parental consent laws for minors create an undue burden on expecting mothers.

There are two cases decided by the Supreme Court, *Bellotti v. Baird* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, that are crucial to the issue of parental consent laws surrounding abortion. In 1979, the Supreme Court decided on *Bellotti v. Baird*, which was challenging the constitutionality of the Massachusetts statute regarding parental consent. Specifically, the statute required either parental consent for minors seeking abortion or permission from a judge. The Supreme Court upheld the statute as it did not unduly burden the mother. The decision laid the framework which the Commonwealth uses for minors to obtain an abortion. For example, if a state requires that either one or more parents be informed of the procedure, the state must also have an alternative procedure so the minor can get permission without consulting her parents (United States, Supreme Court. *Bellotti v. Baird*). The procedure is called judicial bypass and a judge of the superior court needs to grant permission (United States, Supreme Court. *Bellotti v. Baird*). During the bypass, the mother must prove to a judge that she is either mature enough to decide after speaking with her physician or if she is not, the judge decides the procedure is in the mother's best interest (United States, Supreme Court. *Bellotti v. Baird*). So, per this decision, a minor either has to notify and get permission from her parents to obtain an abortion or go through the time and resources for a judicial bypass. Depending on her familial relationship or resources to go to a courthouse that may or may not be available, there is not always a choice and this decision creates an undue burden for minors seeking the procedure.

Planned Parenthood of Southeastern Pennsylvania v. Casey is also crucial to the abortion debate as it sets a standard to assess abortion regulations in the country. The case was decided in 1992 and determined that the Pennsylvania Abortion Control Act of 1982 was constitutional and would be upheld. The act required women to give informed consent for the procedure and that

she is given certain information at least 24 hours before the procedure. It also upheld that a minor must get informed consent from one parent to get an abortion (United States, Supreme Court. *Planned Parenthood of Southeastern Pennsylvania v. Casey*). The court used the standard of the undue burden rather than the trimester framework to analyze the Pennsylvania statute and subsequent regulations. Specifically, the court explained that an undue burden exists and law is invalid “if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability” (United States, Supreme Court. *Planned Parenthood of Southeastern Pennsylvania v. Casey*). This ruling is a shift away from the trimester framework implemented in *Roe v. Wade*. This case, with *Bellotti v. Baird*, has had a substantial impact on a minor’s ability to obtain an abortion, especially in the Commonwealth.

In Massachusetts, the decision in *Bellotti v. Baird* is still the law. In General Law, section 12SL Consent to abortion; form; persons less than eighteen years of age outlines the process for minors seeking the procedure. To illustrate, the law states that the physician performing the abortion needs to have both the woman’s informed consent and the parents (“Section 12S.”). If one of the parents has passed away or they are divorced, the remaining parent or the parent that has custody can solely give consent (“Section 12S.”). If both parents cannot give consent in time then the legal guardian of the woman can consent (“Section 12S.”). If the woman does not want to get consent from her parents, she would need to go through judicial bypass with a superior court judge (“Section 12S.”). This shows the impact that *Bellotti v. Baird* has had on a minor’s ability to get an abortion as it is still the law in Massachusetts. And, this law does pose an undue burden on a minor’s ability to get an abortion.

Parental Consent Laws in Massachusetts present an undue burden

Parent consent laws place an undue burden on abortion clinics and minors obtaining an abortion in the Commonwealth. Parental consent laws pose a liability issue for abortion clinics. The potential for unconscious liability for performing an abortion on a minor could pose a chilling effect on minors seeking an abortion that makes it difficult for a minor to have the operation (Quinn, 301). Specifically, an abortion provider does not fully know they will not be liable unless they stop performing abortions on minors or patients who look like they are eighteen (Quinn, 325). The remedies to possible liabilities also pose an undue burden on women. For example, abortion providers could either require the written consent parents give to be notarized or the provider has to witness in the clinic the parent's sign off (Quinn, 326). Both would mean substantial travel, either to the notary office or the parent accompanying the minor to a clinic which presents a burden to a minor. Parental consent laws also pose a burden on women as they may avoid getting an abortion in this jurisdiction and have to travel elsewhere. This was the case for many women after the Massachusetts parental consent law went into effect in April of 1981. Specifically, the number of women who traveled outside the state shifted dramatically; the rate that women traveled out of state for the procedure increased by 130 percent the month after the law went into effect compared to four months prior (Cartoff, 398). And, this trend continued as there was a 300 percent increase in women leaving the state to get an abortion in the last three months of 1981 (Cartoff, 398). Basically, when parental consent laws were first introduced, women were more likely to travel outside of the state to have their procedure than either discuss the matter with their family or go before a judge. And yes, times have changed since the 1980s, but this is still a burden that women face today as those who do travel have to pay expenses and often have to miss work and/or school to obtain the procedure. Thus, parental

consent laws pose an undue burden on abortion providers as well as minors seeking the procedure.

Parental consent laws also rest on the assumption that minors can comfortably tell their family and this poses a substantial burden on minors. This poses a burden on minors who wish to get an abortion as these requirements favor minors in a sympathetic household. For example, studies have shown that there are adverse consequences for minors whose families find out about the pregnancy versus being informed from the minor such as physical abuse or being forced to leave home (Rex, 116). And, health organizations have also advocated against legislation mandating parental involvement. Specifically, there is a lack of evidence that going against a minor's desire to leave her family out of the decision and forcing her parents to be involved improves the family dynamics and communication (Rex, 112). In general, laws requiring parental consent do not assist in helping minors if they live in an unhealthy household and this is another obstacle they have to battle to get an abortion. Thus, parental consent laws are problematic as they assume minors live in a healthy household. This was the case for one Massachusetts resident who is now twenty-three. Moreover, at the time she was raped, she was fifteen and she knew she couldn't discuss the matter with her mother nor her immediate family as the sexual assault was from a family friend (Bebinger). And, her home "wasn't necessarily a safe or healthy one at the time" so she had to get permission from a state judge (Bebinger). She is now twenty-three, showing how current the issue still is and how the issue of parental consent in the state depends on the ability of a minor to discuss the issue with their family. If they cannot, then more burden is placed on them than necessary. Thus, parental consent laws pose another undue burden concerning family notification.

Conversely, many argue it is much easier to get a judicial bypass in Massachusetts than in other states. There is evidence to show that Massachusetts is less strict in its judicial bypass proceedings than other states. To illustrate, evidence shows that judicial bypass is a “mere pass-through proceeding”, or some would say a hoop to jump through, and almost every minor who goes through bypass obtains approval (Abortion Rights., 2785-2786). However, this is because Massachusetts has a different standard for evidence than other states. Specifically, the courts have never clearly nor outright said what the standard for evidence is to show it is suitable to grant bypass (Abortion Rights., 2786). This contrasts with other states such as Arizona, where there is a different standard for evidence. Moreover, the parental consent requirement must show they are suitable for bypass by evidence that is clear and convinces a judge (Abortion Rights., 2785). This standard requires that the court has to deliberately search and review the petition before granting bypass such as ask more questions, explore the logic and reasoning of the minor and develop a complete record for appellate review (Abortion Rights., 2787). So, in comparison to Arizona, it is easier for a minor in Massachusetts to get a judicial bypass and obtain an abortion. Thus, it is easier in Massachusetts than in other states for a minor to get an abortion.

Minors seeking judicial bypass had the burden of a longer time than those with parental consent refuting claims that it is easier to get an abortion through a judicial bypass in Massachusetts. There is a longer wait time between inquiring of abortion services and actual procedure for minors who go through a judicial bypass. To illustrate this a study, conducted from 2010-2016 in Massachusetts of 2,026 abortions provided to minors (Janiak, 981) found that for the 77% of minors seeking an abortion through parental consent there was a 9-day wait period between first scheduling an abortion to the procedure in contrast to the 15-day wait period experienced by the 23% of minors who went through judicial bypass (Janiak, 983). Those who

sought judicial bypass also experienced delays in treatment as their procedures needed “additional cervical priming, increased time spent at the clinic, patient discomfort, and... financial burden” (Janiak, 983). The study also found that there was a higher rate of using Medicaid for insurance for judicial bypass than parental consent, specifically, 75% of those who sought judicial bypass were on Medicaid (Janiak, 982). And, judicial bypass overwhelmingly involves minors that are of racial or ethnic minorities and low socioeconomic status (Janiak, 982-983). As the study showed, there is a substantial undue burden on women who are minors in obtaining abortions in the Commonwealth.

Connecting to the point of delays with judicial bypass, the twenty-three-year-old discussed earlier also experienced similar obstacles. Specifically, the judge did grant her request but “the additional time it took to get that permission pushed the 15-year old past the point that would allow her to take pills to induce abortion” (Bebinger). So, she had to get a “more invasive surgical procedure” (Bebinger). And, the judge in the case treated her coldly as he said to her “think harder next time” before having sex (Bebinger). Not only did the minor have the burden of delayed abortion procedure due to judicial bypass, but she also had to go before an insensitive judge which left a psychological impact on her. Both of these factors affect many other minors in the state and pose an undue burden in obtaining an abortion. Thus, parental consent laws pose an undue burden on minors in Massachusetts.

The current debate about minor consent laws in Massachusetts: The ROE Act

Currently, there is legislation such as the Act to remove obstacles and expand abortion access or ROE Act and the amendment to the FY 2021 budget that would impact the minor consent law in place as they create an undue burden for the minor.

The Act to remove obstacles and expand abortion access or ROE Act was proposed in 2019 and eliminated the minor consent law in Massachusetts. For example, the Act requires that the physician would only need the pregnant patient's written informed consent and not the parent of a minor (Chandler, Harriette L.). The bill would also allow for an abortion at 24 weeks when there is a fatal fetal anomaly (Reed, Jodi). The more controversial and debated aspect of the bill is the elimination of minor consent law and the bill has been stuck in committee since June 2019. The proposed legislation shows how the issue is still highly debated in the political arena today and shows how people view the role of a minor's family when it comes to a minor getting an abortion. It's an interesting debate as people have both expressed support and opposition for parental consent laws, especially giving the reasoning that a minor's parents should be involved without realizing that not every family dynamic or situation allows for that. Unfortunately, it can be the case, but we have to admit that not every minor can tell their family about the pregnancy to truly tackle the issue as the current law does pose an undue burden on minors.

There have been strides toward progress in the current debate regarding minor consent laws with a proposed budget amendment. In response to the current political climate, lawmakers in the Massachusetts House of Representatives put forward an amendment to the budget expanding the age for minor consent. The current amendment is put forth because of the fear that *Roe v. Wade* will be overturned with a new conservative majority on the Supreme Court with the confirmation of Justice Amy Coney Barrett (Reed, Jodi) (Buskirk, Chris Van). Specifically, the amendment was debated on November 13th and passed into law on December 29th overriding the Governor's veto (Buskirk, Chris Van) (Lannan, Katie). In contrast to the ROE Act, the amendment only lowers the age that a minor can choose to have an abortion without parental consent or judicial bypass from eighteen to sixteen. The amendment allows the bypass to be in a

teleconference or in-person (Buskirk, Chris Van). This is progress as going to the physical courthouse can be a burden in itself and going into a courthouse where the minor could recognize friends or family members can be embarrassing and traumatizing (Buskirk, Chris Van). The amendment is progress, even though it only lowers the age for minor consent by two years compared to the ROE Act. There was pushback regarding how they made the progress in seeking to implement it by an amendment in the budget versus a bill. Moreover, Governor Baker expressed the feeling of aggravation of Republican lawmakers who thought they agreed with Democrats to not put policy into the budget as it needed to be passed quickly (DeCosta-Klipa, Nik.). And, the budget has not passed yet so the law that is currently in the books continues to be. Even though Democrats did break this agreement, it is progress for the reproductive rights of minors in the Commonwealth and helps to alleviate part of the burden placed on them. But, it does not eradicate parental consent laws for minors as the ROE Act does. Thus, we need to pass the ROE Act so minors can access the procedure regardless of their family home life.

In conclusion, parental consent laws pose an undue burden on minors seeking an abortion in Massachusetts. We need to pass the ROE Act as current law impacts abortion clinic practices, women may travel out of state, and women may be punished if they disclose the pregnancy to their family. In contrast, it is easier to obtain judicial bypass in Massachusetts than in other states, but the waiting period poses an undue burden on women. When looking at the topic and people's opinions was how decisive people were about a woman's right to choose, but when the topic switched to a minor's right to choose, there was more indecisiveness. Some regard it as simple: minors and adults should have the same rights. Others viewed the issue as a reflection of the minor's fault in getting pregnant or there was a presumption that every minor could have a safe conversation with their family about their right to terminate their pregnancy. Regardless, the

topic of minor's rights with the issue of abortion needs to be discussed as much as the right to choose is discussed in general for adults. With more education on the impacts that limiting the rights of minors to obtain an abortion and conversation on the issue, people would hopefully view the topic differently and as more nuanced.

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