10-1980

H.L. v. Matheson

Lewis F. Powell Jr.

Probably Note Q is substantial, + could let Reverse or affirm w/o more briefing

Utah statute requires a minor to notify parents before she has an abortion, & Utah S/Ct unanimously upheld this - reading Bellotti as supporting.

In Bellotti, I held that minor had option to go to Court w/o notifying parents;

Utah statute does not provide this option. Nor does it require parental consent - only notification.

PRELIMINARY MEMORANDUM

February 22, 1980 Conference
List 2, Sheet 1

No. 79-5903

H. L. (a minor)

v.

MATHESON (Gov. of Utah)

Appeal from Utah Supreme Ct. (Crockett, Maughan, Wilkins, Hall & Stewart)

State/Civil

Timely

1. SUMMARY: Appt, a minor seeking an abortion, contends that the Utah statute requiring her physician to notify her parents of her decision to have an abortion is unconstitutional.

2. FACTS: Appt, a 15-year-old pregnant woman who wished to have an abortion, brought the present action on her own behalf and on behalf of all women similarly situated. She alleged that she did not want to notify her parents of her intentions, and that her physician would have performed the operation but for a criminal statute requiring a physician conducting an abortion on a minor to "notify, if possible, the parents or

Contrary to Tom's suggestion, your opinion in Bellotti rather clearly indicates that notice to parents is may

guardian of the woman upon whom the abortion is to be performed. . . ." The trial court interpreted the statute as requiring a physician to notify the minor's parents whenever physically possible. In doing so, it rejected appe's suggestion that it interpret the words "if possible" as meaning "medically, socially, psychologically, and physically" appropriate. Nevertheless, the trial court went on to uphold the constitutionality of the statute as a reasonable effort by the state to protect parental rights.

On appeal, the Utah S. Ct. affirmed in a unanimous opinion. It traced the history of this Court's decisions on abortion from Roe v. Wade, 410 U.S. 113 (1973), through Bellotti v. Baird, Nos. 78-329, 78-330 (filed July 2, 1979). It focused in particular upon Bellotti, where this Court considered the constitutionality of Massachusetts' regulatory scheme. Under that statute, known as § 12S, Massachusetts required a minor to secure either the consent of both parents or the permission of a judge of the Superior Ct. before having an abortion. As interpreted by the Mass. S. Ct., § 12S required the minor to seek parental consent before resorting to the courts and also required the judge whose permission was sought to notify the minor's parents of the judicial proceedings brought under § 12S. Justice Powell, joined by the Chief Justice, and Justices Stewart and Rehnquist concluded that § 12S was unconstitutional insofar as it required parental involvement in the minor's decision to seek an abortion. Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, found § 12S offensive because it subordinated the minor's decision to have an abortion to an absolute veto by either her parents or a judge of the Superior Ct. Justice White filed a dissenting opinion.

Faced with this fragmentation, the Utah S. Ct. felt it could not "discern a clear constitutional doctrine inhibiting the state from enacting a statute [such as that at issue here], which merely provides for notification, if possible, of the parents of a minor contemplating an abortion." The court concluded that the challenged statute served a significant state interest by placing the minor's parents "in a position to provide valuable information concerning the factors which the physician may consider in exercising his best clinical judgment" as to whether the minor should have an abortion. Finally, the Utah S. Ct. agreed with the trial court that the words "if possible" in the statute meant if physically possible, and not if medically, socially, psychologically, and physically appropriate.

3. CONTENTION: Appt contends that the Utah statute is an impermissible intrusion into her relationship with her physician and improperly burdens her constitutional right to have an abortion. She relies, in particular, upon Justice Powell's opinion in Bellotti as mandating a finding of unconstitutionality.

Appes' counter-arguments substantially track the opinion of the Utah S. Ct. In addition, they suggest that the statute at issue here is fundamentally different from § 12S, which was struck down in Bellotti. They point out that the Utah statute does not require any parental participation in the decisionmaking process at all, but only requires the physician to notify the parents of the impending abortion. Such notification, according to appes, is essential to ensure that the physician has an opportunity to obtain all the information necessary to make an informed decision as to the medical advisability of the abortion.

4. DISCUSSION: The issue of parents' rights to notificatin obviously posed some difficulty for this Court in Bellotti. Justice

~ It did indeed!

Powell's opinion did not specifically preclude the possibility of a statutory requirement that parents be notified of an impending abortion. Instead, it condemned a requirement of "parental involvement" in the decision-making process:

> "If, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement. On the other hand, the court may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interest would be served thereby, or the court may in such a case defer decision until there is parental consultation in which the court may participate. But this is the full extent to which parental involvement may be required."

The opinion thus leaves open the possibility that mere notification of the parents, as opposed to mandatory "involvement" or "consultation," might be a permissible prerequisite to an abortion. Dual-21?

Justice Stevens' opinion did not reach the notification issue at all and, in fact, stressed that "neither Danforth nor this case determines the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto." Justice White, in dissent, characterized the Court's holding as follows:

> "The Court now holds it unconstitutional for a State to require that in all cases parents receive notice that their daughter seeks an abortion and, if they object to the abortion, an opportunity to participate in a hearing that will determine whether it is in the 'best interest' of the child to undergo the surgery."

Given the Court's fragmentation in Bellotti and the ambiguities left after that decision, I do not believe that the federal question raised by appt can be labeled insubstantial. I therefore recommend that the Court note probable jurisdiction.

There is a motion to dismiss.

2/13/80 McGough Op in J.S.
CMS

February 22, 1980

Court .... Voted on ...., 19...

Argued ...., 19... Assigned ...., 19... No. 79-5903

Submitted ...., 19... Announced ...., 19...

H. L., ETC.

vs.

MATHESON

Also motion to dismiss.

CJ see nothing wrong with requiring notice

WHR thinks this is different from Bellotti.

Note

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.						✓							
Brennan, J.				✓									
Stewart, J.				✓									
White, J.						✓							
Marshall, J.				✓									
Blackmun, J.				✓									
Powell, J.				✓									
Rehnquist, J.						✓							
Stevens, J.						✓							

not be required before a minor is given access to court: "We conclude ... that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity — if she so desires — to go directly to court without first consulting or notifying her parents." The opinion also discusses why notice alone would burden the minor's right even if she has access to court.

Here, there was apparently no alternative court procedure, but also no requirement of parental consent. Where there is no veto — either parental or judicial — the notice requirement may have a different effect. Therefore, I doubt that summary reversal is appropriate even if 4 other Justices thought so. Nor are the questions insubstantial. Although it seems a shame for the Court to embroil itself in these issues yet again, I see no real alternative to a note.

Ellen

Reviewed 8/29-30 Excellent memo. JLP

· Utah statute, §304(2), requires notification of parents (when possible) in all cases before a ~~minor~~ doctor lawfully may abort a minor.

GM 8/20/80

I'm inclined to agree with Greg that the reasoning of my Bellotti op. requires reversal of Utah S/Ct because its requirement for notice in all cases will effectively deny the right to abortion in some cases.

BENCH MEMORANDUM

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To: Mr. Justice Powell August 20, 1980

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No. 79-5903: H---L--- v. Matheson, et al.

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· Greg's views - 24-25. Greg favors notice

Question Presented as the "norm" but there should be an alternative procedure for a neutral decision maker to by-pass notice when desirable. See my Bellotte op.

This case, like Bellotti v. Baird, 442 U.S. 622 (1979), presents a challenge to the constitutionality of a state statute regulating the access of minors to abortion. The question is whether Utah may require the physician of a pregnant minor, before performing an abortion, to "[n]otify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed."

Facts

In 1974, the Utah Legislature passed a new statute regulating abortions. Utah Laws 1974, ch. 33; Utah Code Ann.

§ 76-7-300, et seq.1/ Section 303 of the new statute provides that no abortion may be performed in Utah "without the concurrence of the attending physician, based on his best medical judgment;" and § 304 provides that:

> To enable the physician to exercise his best medical judgment, he shall:
> (1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed, including, but not limited to,
> (a) Her physical, emotional and psychological health and safety
> (b) Her age,
> (c) Her familial situation.
> (2) Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor, or the husband of the woman is she is married.

Utah's notice requirement

By operation of § 314, failure to comply with § 304(2) is a Class A misdemeanor.2/

Appellant, H---L---, brought this action seeking declaratory and injunctive relief from the notification requirement of § 304(2). She is an unmarried minor who lives in Utah with her parents and is dependent upon them. She was in the first trimester of a pregnancy when she filed her complaint. After consulting with a physician and a social worker, H---L--- decided that an abortion was in her best interest. Both the social worker and her physician concurred in her decision, but her physician informed her that he could not perform the abortion without first notifying her parents, as required by § 304(2), even though he shared her belief that it was also in her

Physician agreed abortion was desirable & in minor's best interest.

best interest that her parents not be notified of her pregnancy or abortion.

Appellees Matheson and Hansen are, respectively, the Governor and Attorney General of Utah, and they are charged by the Utah Constitution to enforce the laws of the State. H---L--- brought this action against them on behalf of herself and others similarly situated. She contends that the notification requirement of § 30(2) imposes an overbroad and unduly burdensome interference on her right to secure an abortion and on her right to her physician's medical care.

Decisions Below

The District Court for the Third Judicial District of Utah denied H---L---'s motion for a preliminary injunction on the grounds that no decision of this Court or the Utah Supreme Court precludes a parental notification requirement in the case of a minor, and that, but for H---L---'s allegation that parental notification was not in her best interest, "there [had] been no special showing of detriment that might result if the parents were notified." (Appendix, at 14). In a subsequent hearing, H---L--- argued that no special showing of detriment is necessary before she may effectuate her decision to terminate her pregnancy without parental notification. Rather, she argued, her reasons for believing that notification was not in her best interest were irrelevant so long as she and her physician shared that belief. In a memorandum of findings and

conclusions without an opinion, the District Court held that H---L--- is a proper representative of the class that she purports to represent,3/ that the abortion of her pregnancy did not moot her claim, and that § 304(2) does not unconstitutionally restrict a minor's right to secure an abortion or to enter into a physician-patient relationship (Appendix, at 39).

The Utah Supreme Court affirmed unanimously. In that Court's view, § 304(2) does not unduly burden a minor's right to an abortion because notification does not confer on parents an absolute veto over their daughter's decision. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976). The Court noted that your opinion in Bellotti v. Baird, 442 U.S. 122 (1979), "would appear to hold unconstitutional a statutory provision requiring parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interest," (Appendix, at 54). But the Court did not feel itself bound by your opinion and chose not to follow it. Instead, the Court held that § 304(2) serves two significant state interests which are not present in the case of abortions by adults, and that § 304(2) is therefore constitutional.

The first of the two interests which the Utah Supreme Court considered sufficient to support § 304(2) is the state's

Consultation with parents may aid physician in exercising "best medical judgment"

interest in enabling the physician to exercise his best medical judgment. The considerations listed in § 304(2) are precisely those that Doe v. Bolton, 410 U.S. 179, (1973), lists as factors which a physician will necessarily consider in exercising his medical judgment: his patient's physical, emotional, and psychological health, her familial situation, and her age. Id., at 192. The Utah Supreme Court held that the notification requirement of § 304(2) "is substantially and logically related" to those factors because the parents of a minor will "frequently possess additional information which might prove invaluable to the physician in exercising his 'best medical judgment.'" (Appendix, at 51).

The second interest which the Court considered sufficient to support § 304(2) is the state's interest in encouraging unmarried minors to seek their parents' advice in making the decision whether to abortion their pregnancies. In this regard, the Court choose to follow the statement of general principles in your Bellotti opinion, and particularly your reaffirmation of the principle that "the State can 'properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of the responsibility.'" 443 U.S. at 639.4/

Second State interest

See my "general principles" in Bellotti

L.F.P. in Bellotti

The Utah Supreme Court filed its opinion on December 6, 1979. H---L--- appealed, and this Court noted probable

jurisdiction on February 25, 1980.

Contentions

(A) Arguments of Appellant and Amici in Support of Appellant against § 304(2)

In brief, appellant and amici supporting her argue that § 304(2) is an overbroad and undue burden upon minors' right to abortion and their right to enter into a physician-patient relationship and receive their physician's medical care. Section 304(2) is overbroad because it applies uniformly despite the varying circumstances in which the abortion decision is made. It is an undue burden because it interferes with the decisional process between pregnant minor and physician, because it may lead to obstruction of the decision, and because it will not promote family values or physicians' medical judgment. In somewhat fuller exposition, the arguments against § 304(2) are the following:

Arguments against Utah notice requirement

(1) Section 304(2) is insensitive to the variety of circumstances in which minors must make the abortion decision.

The circumstances in which a pregnant minor must decide whether to abort her pregnancy vary greatly. In some cases, the minor needs and receives her parents' counsel and support; in others, the minor has good reason to believe that

learning that their daughter has decided to abort a pregnancy, will prevent her from effectuating her decision. Thus, a parental-notification requirement which allows no exceptions will in some cases have the same harmful consequence as a parental-consent requirement: it will allow someone other than the pregnant woman and her physician to decide whether the pregnancy will be aborted. This veto, although not granted on the face of § 304(2), will be granted in effect in those inevitable cases where a parent exploits notification as a license to obstruct. The danger of veto by obstruction is particularly acute for young pregnant minors, like H---L---, who live with their parents and are dependent upon them. Under the rationale of Danforth, then, § 304(2) is an undue burden on the minor's right to an abortion. 428 U.S. at 74.

Utah allows no exception

(3) Section 304(2) does not promote family values. ?

Section 304(2) does not serve a state interest in safeguarding the family unit or encouraging parental guidance, for Utah "cannot hope, by statute, to enforce an environment of love and trust." (Brief for Planned Parenthood Federation, et al., at 31). Minors will seek parental guidance without state compulsion in those families where notification would be likely to result in such guidance. A minor who does not want parental involvement is as likely to reject guidance as accept it, if it is offerred after compelled notification, and may suffer the unsupportive or abusive reaction which initially led her to fear

May be valid point in some but not all cases.

her parents' involvement. Furthermore, the frustration felt by parents who learn that their minor daughter is aborting a pregnancy against their beliefs, and that they are legally powerless to prevent her, will more often spur the already existing discord than it will somehow create unity where none has existed before. To be sure, § 304(2) would in some cases serve the state interest in promoting parental guidance by compelling the hesitant minor to notify parents who will lovingly support her. Nonetheless, § 304(2) cannot be justified for all cases by the state's interest in promoting family values, for notification promotes those values only in some cases, and it probably promotes antithetical evils in other cases. This is the conclusion reached by lower courts that have considered parental-notification requirements applying to all abortions. Wynn v. Carey, 582 F.2d 1375, 1388 (7th Cir. 1978); Akron Center for Reproductive Health Inc. v. City of Akron, 479 F.Supp. 1172, 1202 (N.D. Ohio 1979); Women's Community Health Cetner, Inc. v. Cohen, 477 F.Supp. 542, 548 (D.Maine 1979); Margaret S. v. Edwards, ___ F.Supp. ___ (E.D.La. 1980), (appeal pending in 5th Cir.).

(4) Section 304(2) does not improve the physician's exercise of his medical judgment.

Section 304 requires parental notification for the express purpose of enabling the physician to exercise his best medical judgment, and the Utah Supreme Court upheld § 304(2) in

part because, in that Court's view, a minor's parents will frequently possess information about the minor which the physician will need. In many instances, however, the minor seeking abortion will herself possess all the information her physician needs and would conceal relevant information only because, in light of § 304(2), she would not trust her physician to keep her confidences. Furthermore, a physician properly exercising his judgment is unlikely to be misled by a minor who does not know or attempts to conceal relevant information. Without all necessary information, the physician will not perform the abortion. Thus, in those cases where parental notification is needed to enable the physician to exercise his best medical judgment, the physician will notify the parents or refuse to perform the abortion without the compulsion of § 304(2).

Abortion clinic physicians may be interested primarily in making a fee

(5) Section 304(2) interferes with the pregnant minor's *right to her physician's medical care*.

Possibly true

A physician is essential to a safe and legal abortion, and the abortion decision, especially for a minor, should be made only after thorough consultation. But a pregnant minor who wants to avoid parental involvement will not consult a physician who is legally bound to notify her parents. Thus, § 304(2) in some cases precludes a proper physician-patient relationship and interferes with the "woman's right to receive medical care in accord with her licensed physician's best judgment." Doe v.

Bolton, 410 U.S. at 197.

(6) Section 304(2) increases the risks which abortion poses to health.

Abortion of a minor's pregnancy during the first trimester poses little risk to health. A pregnant minor who fears or is unsure of her parents' reaction to notification is like to procrastinate, however, and rather than allow notification, she will allow her pregnancy to continue. If she then relents, allows notification, and proceeds with an abortion in her second trimester, the risk to her health will have dramatically increased. Even more dangerous are the risks which abortion poses to the health of those minors who, rather than allow notification, seek out illegal abortion by nonphysicians or resort to attempts at self-abortion. Furthermore, undesired notification or notification which produces an angry or abusive reaction may increase the psychological risks of an abortion even in the first trimester.

(7) Section 304(2) interferes with the physician's exercise of his medical judgment.

Section 304(2) requires parental notification whether or not the physician believes that notification is in his patient's best interest. H---L---'s physician, for example, shared H---L---'s belief that notification was not in her best interest, but he could not perform an abortion despite that judgment. Thus, beyond merely failing to improve the

physician's medical judgment, § 304(2) interferes with the physician's ethical duty and "the physician's right to administer" medical care in accordance with his best judgment. Bolton, 410 U.S. at 197.

(B) Arguments of Appellee and Amici in Support of Appellee for § 304(2).

In brief, appellee and amici in support of it argue that § 304(2) violates neither minors' right to an abortion nor their right to their physicians' medical care. It does not violate the right to an abortion because it is a minimum intrusion which is necessary to preserve parents' right to know about the significant decisions of their minor children. It does not interfere with the physician-patient relationship because it promotes the physician's exercise of his medical judgment. In fuller exposition, the arguments for § 304(2) are the following:

(1) Section 304(2) is a minimally burdensome interference with the minor's right to abortion.

Section 304(2) requires parental notification, and nothing more. It does not require the pregnant minor to obtain the consent of her parents or anyone else. It encourages, but does not require, the minor to consult with her parents after

"consent" not required

notification. It does not even require the minor to wait for any period of time after notification before having the abortion. Cf. Women's Community Health Center, Inc. v. Cohen, 477 F.Supp. 542, 546 (D. Maine, 1979)(Maine statute required parental notification at least 24 hours before abortion of pregnancy of unemancipated minor). Nor does § 304(2) attempt to compel the minor to reach a particular decision with respect to the abortion. For these reasons, § 304(2) is distinctly less burdensome than a requirement of parental consent, which four Justices considered constitutionally permissible in some cases. Bellotti, 443 U.S. at 648. In short, the notification requirement of § 304(2) in no way affects the minor's abortion decision; it is merely the least burdensome means of safeguarding the parents' right to know about the significant decisions of their minor daughter.

In Bellotti four Justices thought parental consent was necessary

(2) Section 304(2) serves the significant state interest in encouraging parental involvement in the abortion decision.

Utah may encourage an unmarried, pregnant minor "to seek the help and advice of her parents in making the very important decision whether or not to bear a child." Danforth, 428 U.S. at 91 (Stewart, J., concurring); Bellotti, 442 U.S. at 640. Section 304(2) encourages parental involvement by assuring that parents know when their daughter is facing the abortion decision. This state interest is significant for "mature" as

well as "immature" minors, for the parental interest is not dependent on the minor's maturity or immaturity, and the State may act to promote that interest. Furthermore, the State may decide that minors are generally not mature enough to make the abortion decision without parental involvement. Finally, and put bluntly, a holding that the Constitution allows pregnant minors to obtain abortions without parental notification will sanction deception by minors of those whom tradition and law charge with their care and custody.

(3) Section 304(2) establishes a rational means of protecting the parents' right.

Parents also have rights (I agree)

Physicians are precisely the proper people to charge with the duty of notifying the minor's parents. They are essential to an abortion, and therefore they will know of each minor's decision. Also, they are licensed professionals who are likely to heed their professional duty. Requiring the physician to notify the parents inures to the minor's benefit as well, for notification may allow the physician to assess the parents' reaction and to advise his patient in light of that reaction. Thus, § 304(2) is a rational means of effectuating the state interest.

(4) Section 304(2) does not grant to parents a "de facto" veto.

No parental veto

Section 304(2) "does no more than require notice to the parents, without affording them or any other third party an

absolute veto." Bellotti, 443 U.S. at 654 n.) (Stevens, J.). Accordingly, the constitutionality of § 304(2) is not predetermined by the decisions in Danforth and Bellotti that state statutes which on their face grant a veto over the decision of the pregnant woman and her physician are unconstitutional. Section 304(2) does not grant a veto on its face and the State does not intend it to grant a veto in effect: "What the parents may do beyond mere awareness is strictly within their own province and they act without the aid or blessing of the state." (Brief for Appellee, at 13). If in some cases parents react to notification by abusing their daughter or obstructing the effectuation of her decision, the minor can be protected under Utah's child-abuse and neglect laws. E.g., Utah Code Ann. §§ 78-3a-29, 78-3a-48; 78-3a-50; 78-3b-6.

(5) Section 304(2) aids the physician in exercising his medical judgment.

This often would be true

Section 304(2) adheres to the notion that the "abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician." Roe v. Wade, 410 U.S. at 166. Pregnant minors seeking abortion do not always know their medical histories and therefore cannot provide their physician with all the information a physician needs to exercise his medical judgment responsibly. In some cases, a pregnant minor

may attempt to conceal incidents in her medical history or other relevant information. In most cases, the minor's parents will possess the the additional medical information which the physician needs in order to advise his patient. Thus § 304(2) serves the purpose for which it is expressly designed: to "enable the physician to exercise his best medical judgment."

(6) Section 304(2) does not unduly interfere with the physician's exercise of his medical judgment.

The question whether parental notification serves the minor's best interest is not essentially a medical one. Thus, the State's decision that parents must be notified before an abortion is performed interferes with the physician's medical judgment no more than a State requirement, for example, that a physician take his patient's blood pressure before operating, whether or not the physician believes that to be necessary in the particular case. Thus, § 304(2) does not unduly interfere with the physician's right to administer medical care in accordance with his best judgment.

(7) Section 304(2) especially aids the physician's best medical judgment where the physician has no prior relationship with the minor.

Minors are "less likely than adults to know or be able to recognize ethical, qualified physicians, or to have the means to engage such professionals." Bellotti, 443 U.S. at 641 n.21. Parental notification is especially important in cases where the

physician has no prior relationship with the pregnant minor, as where, for example, the minor turns to an abortion clinic rather than to a family doctor. Such a clinic is as likely to advocate abortion than to help the minor decide whether or not to terminate her pregnancy. If the minor decides to have an abortion, the clinic physician is unlikely to spend more than the minimum amount of time acquainting himself with the minor and her medical history. Danforth, 428 U.S. at 91-92 n.2 (Stewart, J., concurring). In these cases, parental notification is especially important both to encourage parental support and guidance in the minor's decision and to improve the physician's medical judgment.

(8) Section 304(2)'s alleged overbreath is not a question before the Court.

Appellee suggests that the application of § 304(2) to a minor who, unlike H---L---, lives outside her parents' home and supports herself is not a question before the Court. Rather, this Court needs only decide whether § 304(2) is constitutional as applied to H---L--- and others similarly situated.

Discussion

I find this case extremely difficult for three reasons. First, § 304(2) implicates substantial and competing

interests of minors, parents, and the State. Second, this Court's previous attempts at reconciling the interests of those three in matters of sex provide little guidance for reconciling the interests here. Third, the arguments both for and against § 304(2) depend heavily on speculation as to how parents, minors, and physicians will behave with and without the notification requirement.

(1) The interests at stake.- Minor's Interests

Parents, minors, and the State each have substantial interest at stake in this case. For the pregnant minor, the requirement of parental notification touches upon her interests in effectuating her abortion decision, in effectuating it without the emotional or psychological difficulty of parental involvement, and in making the decision as wisely as possible. Appellant B---L--- and amici supporting her emphasize the minor's interest in effectuating her decision to terminate her pregnancy. This seems to me a very strong interest, and one which has behind it the weight of the conclusions in Danforth and Bellotti (Stevens, J.) that no third party can override the decision of the pregnant women and her physician. This interest is implicated in this case because of the plain fact, which the State does not dispute, that some parents will prevent their daughter by force, or other "persuasion" which is not addressed to her best interests, from effectuating her decision. This

Yes

Some parents will prevent the abortion (withhold support, etc)

interest is not as clearly at stake in this case as it was in Danforth or Bellott, however, because § 304(2) does not grant a veto on its face, and the number of cases in which parents will obstruct a decision to abort can only be guessed at. Nonetheless, for those minors whose decision to abort is obstructed after notification, the interest in effectuating the decision has been abridged as effectively as if § 304(2) did grant a parental veto on its face.

Minors have another interest at stake which I find very strong: the interest in making the abortion decision as wisely as possible. Until effectuated, the decision to abort is not irreversible. Upon learning that their minor daughter has decided to abort her pregnancy, some parents will coerce their daughter through the decisional process once again, pressuring her at each step to decide as they see fit and without regard for her best interest. To be sure, § 304(2) allows a minor to have an abortion immediately after notification; but for minors who do not foresee this parental reaction, or in cases where the physician refuses to perform the abortion before parental consultation because of a strongly negative reaction to notification, the minor will be subjected to pressures to decide in ways that do not serve her best interests. Thus, the parental notification requirement implicates the minor's interest in making the decision wisely, as well as the interest in effectuating her decision.

H---L--- asserts a third interest that is at stake: an interest in effectuating the abortion decision without the emotional or psychological difficulties of parental disapproval. This interest strikes me as weak, for trouble-free exercise has never been considered a component of constitutional rights. Accordingly, parental reaction to notification that does not amount to obstruction of as wise a decision as possible, or to obstructionof the decision's effectuation, does not impringe upon a substantial interest of the minor. For example a mature minor who wishes merely to avoid an emotional, but nonobstructing parental reaction does not present a substantial interest.

The Parental Interest

For parents, the notification requirement serves their interest in knowing of the significant decisions of their minor daughter. I find this interest a very important one because parents cannot guide and support their child--a role which, aside from the fact that society places it on parents, most parents earnestly want--unless they know the questions that and children usually need their child faces. Parental knowledge, then, is a prerequisite of the parental role recognized, among other places, in your Bellotti opinion and in Parham v. J.R., 442 U.S. 584, 601-04 (1979). Yes

I have reservations, however, about how significantly the invalidation of § 304(2) would impair this parental interest in knowing. The parental role in guiding the child does not

begin and end, resume and relapse, only at those moments when the child faces particularly difficult or significant questions. It is, rather, a "process of teaching, guiding, and inspiring by precept and example." Bellotti, 443 U.S. at 638 (Powell, J.). Thus, a minor who makes her decision without parental involvement is not necessarily without parental guidance. Her decision may rest firmly upon the guidance that her parents have given her in the past. Similarly, a parent who is not consulted in the abortion decision is not precluded from his or her parental role in the future. Cf. Doe v. Irwin, ___ F.2d (6th Cir. 1980)(parents have no constitutional right to notification when their minor child attends a voluntary birth-control clinic: "The plaintiffs remain free to exercise their traditional care, custody and control over their unemancipated children....[W]e can find no deprivation of the liberty interest of parents in the practice of not notifying them of their children's voluntary decisions to participate in the acitivities of the Center.").

For the State, the notification requirement serves its interest in encouraging parental involvement in the minor's decision whether or not to terminate her pregnancy. This, too, is a strong interest, for it comprehends both the parents' interest in knowing and the minor's interest in making as wise a decision as possible. Also, this state interest carries with it the weight of your recognition in Bellotti and Mr. Justice

Stewart's in Danforth. The State contends that § 304(2) also serves an interest in enabling the physician to exercise his best medical judgment, but I find this dubious. This Court has decided that physicians can be trusted as a general matter to exercise their best medical judgment. Roe v. Wade, 410 U.S. at 153, 165-66; Doe v. Bolton, 410 U.S. at 196-97; Danforth, 428 U.S. at 64. Accordingly, the question whether parental notification will enhance his medical judgment can be left to the attending physician.

(2) The prior cases.

This Court's recent cases involving state regulation of minors in sexual matters--Danforth, Carey, Bellotti--provide considerable directive dicta, but little authority, for reconciling the competing interests at stake in this case.

Prior cases not controlling

The majority opinion in Danforth does not address the issue of parental notification, but Mr. Justice Stewart's concurrence, in which you joined, states, "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child." 428 U.S. at 91. The plurality opinion in Carey held that the State may not absolutely prohibit the distribution of contraceptives to minors, but it did not consider whether parents have a right to know about their

Potter's language in Danforth that I joined

child's purchase of contraceptives. 428 U.S. at 694. Your concurring opinion in Carey was primarily concerned with the State's interference with parental authority, not with State attempts to aid that authority, but you suggested that a "statute assuring in most instances consultation between the parent and child" would present a materially different constitutional issue. 431 U.S. at 710 (emphasis added).

Your opinion in Bellotti contains language which addresses the issue of parental notification of a minor's abortion, but I disagree with appellant's contention that that opinion, applied to this case, requires that Utah reconcile the competing interests here by completely exempting from regulation those minors who are mature or whose best interest is served by an abortion. Your opinion does not require complete exemption of those two kinds of minors because, it seems to me, your conclusion that these minors can bypass parental consent was premised on the fact that someone other than the minor and her physician makes the determination as to the minor's maturity or best interest. It makes little sense in this case, however, to propose reconciling the interests by providing an alternative procedure by which those two kinds of minors can give notice of their abortions to someone other than their parents. Notification to whom--if not to the parents?--for no one but parents are in a position to do any of the beneficial things that parents can do upon notification (e.g., guide and support

the child; provide additional medical information).

It makes more sense to me to propose reconciling the interests by requiring that a State which generally insists upon notification must provide an "alternative procedure" by which minors can bypass the notification requirement after someone other than the minor and her physician determines that the minor's best interest will be served by abortion without notification. A minor who shows only that she is "mature" would not be allowed to bypass the notification requirement.[1] Such a scheme would generally serve parents' interest in knowing about their minor daughter's decision by requiring notification as the norm. It would, on the other hand, protect the minor's interest in making a wise decision and in effectuating her decision in those instances where there is good reason to believe that her parents would act to obstruct her upon notification. It would not, however, neglect parents' interest in those cases where the only interest at stake for a mature minor is an interest in effectuating her decision without an emotional, but nonobstructing parental reaction. Conceivably, those Justices who did not join your proposal along these lines in Bellotti, because the proposal there still imposed a veto over the minor's decision, would join the proposal here because it imposes only a burden that is clearly something less than a veto.

This proposal strikes me as more sensible than the Utah statute, but that conclusion does not, of course, mean that

the Utah statute is unconstitutional--and that leads me to my third difficulty: the speculation abounding in this case -- especially in oral argument.

(3) The speculative arguments.

The arguments both for and against § 304(2) rely heavily on speculation as to how parents, minors, and physicians would behave with and without the parental notification requirement. The bottom line of all this speculation must be simply this: sometimes parental notification will be a good thing; sometimes it will not. For that reason, the question which lies at the core of this case is whether the State can decide that parental notification will be a good thing often enough to warrant a blanket requirement. As to that question, I believe that you have already decided in Bellotti that the State may not. Rather, because of the "need to preserve the constitutional right and the unique nature of the abortion decision," the State must "act with particular sensitivity when it legislates to foster parental involvement in this matter." 443 U.S. at 642. 5/ Utah has not legislated sensitively. It has subordinated, in all cases, the pregnant minor's interests in deciding wisely and in effectuating her decision to her parents' interest in knowing of her decision.

Exactly!

Yes

Greg Hunter - tightly - that my Bellotte opinion requires reversal here because Utah compels notification in all cases

I therefore conclude that reversing the Utah Supreme Court would be consistent with your opinion in Bellotti.

8/20/80 GM

FOOTNOTES

1/ Much of the abortion statute passed by the Utah Legislature in 1973 had been held unconstitutional by a unanimous three-judge district court in Doe v. Rampton, 366 F.Supp. 189 (C.D.Utah), vacated and remanded, 410 U.S. 950 (1973).

2/ Class A misdemeanors are punishable by imprisonment for a term not exceeding one year and a fine not exceeding $1,000. Utah Code Ann. §§ 76-3-204(1) & 76-3-301(3).

3/ The constitutionality of the spousal-notification requirement of § 304(2) has not been challenged in this action.

4/ In addition to her constitutional claim, B---L--- argued in the Utah Supreme Court, as she had in the District Court, that the phrase "if possible" in § 304(2) could be construed to grant a physician the discretion to determine whether, in light of all the medical, social, psychological, and physical facts, notification of the minor's parents would be appropriate. The Supreme Court rejected this argument, and construed "if possible" to mean that a minor's physician must notify the minor's parents

if under the circumstances, in the exercise

> of reasonable diligence, he can ascertain their identity and location and it is feasible and practicable to give them notification. Furthermore, within the context of what is reasonable under the circumstances, the time element is an important factor, for there must be sufficient expedition to provide an effective opportunity for an abortion.

H---L--- does not renew her statutory argument.

5/ The Juvenile Justice Standards Project of the American Bar Association has suggested one "sensitive" means of fostering parental involvement in this matter while preserving the constitutional right. See Standards Relating to Rights of Minors, Standard 4.2 (1977):

> A. Where prior parental consent is not required to provide medical services or treatment to a minor, the provider should promptly notify the parent or responsible custodian of such treatment and obtain his or her consent to further treatment, except as hereinafter specified.
> B. Where the medical services provided are for the treatment of...pregnancy,...the physician should first seek and obtain the minor's permission to notify the parent of such treatments.
> 1. If the minor-patient objects to notification of the parent, the physician should not notify the parent that treatment was or is being provided unless he or she concludes that failing to inform the parent

could seriously jeopardize the health of the minor, taking into consideration:

a. the impact that such notification could have on the course of treatment;

b. the medical considerations which require such notification;

c. the nature, basis, and strength of the minor's objections;

d. the extent to which parental involvement in the course of treatment is required or desirable.

2. A physician who concludes that notification of the parent is medically required should:

a. indicate the medical justifications in the minor-patient's file; and

b. inform the parent only after making all reasonable efforts to persuade the minor to consent to notification of the parent.

The Standards proposes this rule because "[t]he complexity of the issues and the variability in individual situations preclude adopting an absolute rule either barring disclosure or requiring notification under all circumstances where a minor has received medical treatment without parental consent." Id., at 56.

lfp/ss 9/15/80

79-5903 U.S. v. Matheson

Memo to File:

The briefs in 79-5932 Doe v. Delaware may be helpful - though certainly not in any sense necessary - in identifying authorities and arguments in support of the rights of both parents and children.

See particularly the brief of ACLU. It reflects a good deal more respect for parental rights than, according to my recollection, the ACLU has manifested in the abortion cases.

L.F.P., Jr.

ss

79-5903 H.L. ETC. v. MATHESON (abortion case) Argued 10/6/80

Utah statute requires the physician, before performing an abortion on a minor, "to notify the parents" - if "possible". Stated purpose is to enable physician to exercise his best medical judgment.

Parents, however, are not given a veto right.

There is no provision for access to a court, as in Bellotti.

Dolowitz (Appellant)

Doctor/patient relationship violated by this statute. It also is over-broad. Facially invalid.

Tinker (Asst Atty Gen of Utah)
Statute passed @ 1974 before Baby Doe.
Q whether "minor" includes emancipated minors or not in this case. Not in, however, a Q in the pending case (Fed case)
(J. Stewart says challenge here on face of statute).
Minors become emancipated upon marriage.

See no conflict bet. the Fed. case & this case.

J. Stevens says the certified class includes both emancipated & unemancipated minors. Johns says Q in before us & we should decide it. But J. Stewart disagrees & said op. of S/Ct Utah defines Q before us in terms of minors like one before us.

27

Tinker (cont.)

If parents veto abortion there is no State action - it is private parental action. (But statute ~~shall~~ statute sets stage for this by requiring notice to parents.

Statute is silent as to mature minor & emancipated minors. Nothing in statute about either. Tinker expressed her op. that if emancipated, statute does not apply. He also ~~expressed~~ ~~his~~ op. that maturity alone would not take minor out of statute. These are counsel's opinions. Not even an op. of AG of Utah.

May not be bound on confused series of Q as to what minors are within statute

Statute applies to all minors

Reverse 5 - 4

79-5903 H.L., Etc. v. Matheson Conf. 10/8/80

The Chief Justice Affirm

Q is narrow - not controlled by any prior decision. I see no whether requirement to give notice is invalid. Need not address "maturity" issue.

Non statute protects doctors. Utah does not permit a parent to delay abortion

Statute imposes minimum burden on minors.

Mr. Justice Brennan Reverse

Danforth controls on principle

Mr. Justice Stewart Reverse

Mass statute in Bellotti II was not simply a notice requirement. But rationale controls

Non statute is Const. deficient in that it fails to provide for independent decision ~~maker~~ as in Bellotti

Mr. Justice White Affirm

Extension of prior cases

Mr. Justice Marshall [redacted] Reverse

Can't limit minor's right

Mr. Justice Blackmun Reverse

A non-neutral statute

Criminal statute - clear departure from Roe.

Mr. Justice Powell Reverse

#5 at p 40 of appendix for finding of Dist. Court. The doctor thought notice was undesirable.

Acko Ballatti doesn't control, the rationale of my op. requires reversal here. There should be an impartial decision maker

Mr. Justice Rehnquist Affirm

Will go back to views expressed in Tate

Mr. Justice Stevens Affirm

Statute is valid because minor can go ahead with abortion.

GM 10/28/80

To: Mr. Justice Powell

From: Greg Morgan

Re: H---L--- v. Matheson: "The Ambiguous Finding"
No. 79-5903

I summarize below our discussion about Justice Stewart's concern over the ambiguity in the trial court's finding of fact.

At oral argument, Justice Stewart asked HL's attorney whether the trial court found as a fact that HL's doctor had determined that an abortion without notification to HL's parents was in HL's best interests. In response, HL's attorney relied upon the trial court's Finding # 7 (Appendix, at 40). Justice Stewart considers that finding ambiguous. If not ambiguous, I think record is clear that sole reason advanced by HL was her desire for consultation with doctor

From a conversation with Carl Schneider, one of Justice Stewart's clerks, I gather that Justice Stewart is concerned about HL's standing to raise the question whether parental obstruction of an abortion as a result of notification unconstitutionally burdens the right to abortion. Justice Stewart's thinking appears to run as follows: Unless HL's doctor determined that it is in her best interest to have an abortion without parental notification, then the Court does not know whether HL is (1) a pregnant minor whose parents, if notified, will prevent her abortion, or (2) a pregnant minor whose parents, if notified, will make her abortion more difficult, but will not prevent it. If HL is a minor of the

second type -- one who will receive the abortion she desires despite some adverse parental reaction -- then the question which she has standing to raise is whether the parental-notification requirement unconstitutionally burdens the right to abortion by requiring minors to face, in the course of exercising the right, a parental reaction which is adverse but not obstructing. HL would not have standing to raise the claim that can be raised by a minor of the first type -- one who will not receive the abortion she desires because of parental reaction -- and that claim, again, is whether the parental notification requirement unconstitutionally burdens the right to abortion by making possible complete parental obstruction of the abortion.

If I have construed Justice Stewart's concern correctly, I believe that it is misplaced. First, this is a class action, and HL purports to represent both types of pregnant minor. Second, it seems to me that all HL needs to do to acquire standing for the tough question is to allege that her parents will prevent her abortion if notified. Whether in fact there is evidence to support the allegation is a question for the independent decisionmaker; it is not a prerequisite to taking one's case before the independent decisionmaker. Of course, if the minor cannot show convincingly that her parents will prevent her abortion -- that is, if she shows only that her parents will react adversely, not that they are likely to

prevent the abortion -- then the independent decisionmaker should not allow the minor to bypass the notification requirement. In this way, the parental interest in notification will be preserved except where that interest threatens to undermine completely the minor's right to abortion. (I discuss this point in my bench memo, at 24).

lfp/ss 10/29/80

There is memo. I sent to Justice Stewart

79-5903 Matheson

In view of the unsettled state (at least in my mind) of this case, I have today reviewed more carefully the bill of complaint, the testimony, and the decisions below. It is perfectly clear that counsel for H.L. (the plaintiff) brought this class action as a test case to determine whether parental notification may ever be required constitutionally by a minor who merely states that she desires an abortion and will consult only a physician. By repetitive arguing, and even badgering, her counsel finally persuaded the trial court to rule that this was the only issue presented by this case under the statute.

The only relevant averment in the complaint is as follows:

> "6. Plaintiff does not wish to inform her parents of her condition and believes that it is in

her best interests that her parents not be informed." (A. 4)

The complaint, in the next paragraph, states that plaintiff consulted a "counselor", who referred her to a physician, who - in turn - advised her that he was "unwilling to perform her abortion without complying" with the notice provisions of the statutes. The trial court first denied a preliminary injunction, stating that there has been "no special showing of detriment which might result if her parents are notified". [A. 17].

An evidentiary hearing followed that was largely a farce. (A. 24-36). H.L. was put on the stand, and - by leading questions - simply affirmed what was said in the complaint. She never went beyond stating that she wanted the abortion and did not want to notify her parents. Counsel for the State attempted to cross examine her, and indeed the Court - for several pages of testimony - argued with

plaintiff's counsel that the "validity of her reasons" was relevant to the Court's judgment. Counsel responded, repetitively, as follows:

> "It is our position constitutionally that she has the right to make that decision . . . The specifics of the reasons are quite irrelevant to the constitutional issue." (A. 28, 29, 32).

At another point, the importance of the doctor/patient relationship was emphasized in conjunction with counsel's statement as follows:

> "The specific facts of any individual case, no matter how ridiculous they are or how strong or weak they are, really become irrelevant." (34)

After considerable haggling, the Court finally capitulted and sustained counsel's objection to any cross examination as to plaintiff's reasons for not wishing her parents to be notified. Then, plaintiff's counsel framed the Court's ruling as follows:

> "If your ruling is that 'if possible' [in the statute means "physically possible"], and there are no circumstances whatever that justify the violation of the statute, then the issue is closed." (A. 35)

The judge acquiesced in the foregoing statement and sustained the validity of the statute. In his order to this effect, he certified the class.

In addition, the judge made the "findings of fact" that were discussed at oral argument, including the ambiguous sentence on page A.4C. In light of what transpired at the evidentiary hearing, I now read the finding on A. 40 as meaning only that the doctor thought plaintiff should be allowed to go ahead with the abortion. I recall nothing in the record that indicates the doctor had even examined her. Nor does she rely on any medical necessity argument. Nor, indeed, do I find any testimony to support an interpretation of the ambiguous language as stating that the doctor thought that notification of the parents would be detrimental to the

minor's health, or that he had any information about her parents.

Thus, we have presented precisely the issue that our Brothers WJB, TM and HAB think is here, and they - agreeing with counsel for plaintiffs - think that the facts are irrelevant so long as a minor can find someone licensed to practice medicine who will agree to abort her. We may presume, here, that the doctor would testify that he thought the abortion was medically "necessary". But this is not the theory of H.L's case. Whether the minor is mature, whether she is 12 years or 17-1/2 years old, whether her parents will be loving or likely to object, whether in fact the abortion is in her best interest - all of these, and similar facts, are irrelevant.

~~Believe that~~ Because this is a class action, perhaps we could assume that the class includes minors whose

parents would obstruct even where there were medical reasons for an abortion. Similarly, although parents would have no legal power to veto an abortion, the class may be presumed to include minors who are fully mature and capable of making their own decision. If the case is postured to include situations of this kind, I am still of the view that the failure of the statute to provide an opportunity for such a minor to go to an independent decision-maker, with proper authority, renders the statute invalid.

On the other hand, making this sort of decision is rendering an advisory opinion. There are no facts in this case to support it.

This brings me to ask whether the case is postured so that one rationally could decide it along the following lines: Plaintiff's counsel has made no showing as to who composes the class beyond averring that "the claims of H.L.,

as class representative are typical of the claims of all members of the class. . ." (Complaint, A 4). Thus, the class may be considered as including only those minors who want to be aborted but give no reason - medically, psychologically, by virtue of maturity or otherwise - other than ~~her only~~ their personal wish, a wish that could and no doubt would be rubber stamped by some physician in a clinic who may spend 10 or 15 minutes with the minor patient. In short, on the complaint and evidence in this case, plaintiff and her class have shown no reason not to notify parents. This class of minors apparently wish to be as free from independent decision-makers as from their parents. They want abortions on demand.

If the case may be viewed in the light just described, I could join an affirmance and write - in substance - what I said in Bellotti.

lfp/ss 10/29/80

File Copy
(Gray's memo attached)

79-5903 Matheson

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lfp/ss 10/29/80

Dear in memo I sent to P.S.

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If the case may be viewed in the light just described, I could join an affirmance narrowly written on an "as applied" basis. I also would write - in substance - repeating what I said in Bellotti.

GM 10/30/80

Greg's Comments on my memo of 10/29

To: Mr. Justice Powell

From: Greg Morgan

Re: H---L--- v. Matheson: H---L---'s Allegations & Proof

No. 79-5903

I have now looked again at the complaint, testimony, and findings in the trial court. The short answer to the question in your memo of 10/29 is--yes, the case is postured in such a way that you can decide, substantially for the reasons expressed in Bellotti II, that the Constitutional does not guarantee to a minor the right to an abortion without parental notice simply because the minor does not wish her parents to know. Interestingly, I think that this is the conclusion upon which we agree before oral argument. I, at least, did not understand fully until now that that is the guarantee HL seeks.

For the file, I note my conclusions upon re-reading the record. HL never alleged that her parents would obstruct her abortion, and she never presented any evidence to support a finding that her parents would do so. Neither did HL allege or prove that her doctor believed that her parents would obstruct her abortion. Therefore, although I otherwise would read the trial court's Finding # 7 to find that the doctor believed (1) that an abortion of HL's pregnancy was in her best medical interest and (2) that an abortion without parental notification

was in her best interest, I am constrained to say that that reading lacks any evidence in the record.

What BL did allege, as your memo notes, is that she did not wish to notify her parents of her abortion for her own reasons. What the evidentiary hearing reveals, again as your memo notes, is that BL does not wish to have to justify or even reveal those reasons to anyone (other than a doctor). Furthermore, there is nothing in the allegations or the testimony to show that members of the class which BL purports to represent have any more reason than BL has to wish not to notify their parents. Upon this record, you could join in an affirmance, with the reservation that your opinion in Bellotti II indicates that you would reverse if the courts below had decided that the State can require notification even where evidence exists to indicate that parental obstruction will result.

October 31, 1980

79-5903 H.L. v. Matheson

Dear Potter:

Here is a memorandum that I wrote in an effort to clarify my thinking. Also enclosed is a copy of my clerk Greg Morgan's comment on my memo.

For the reasons we both state, Greg now agrees that - on the very restricted record before us - I could join a carefully written affirmance and accompany it with a concurring opinion reiterating our views with respect to the need for an impartial decision-maker where the minor considers herself mature or that it would not be in her bests interests to notify parents.

I no longer think I could join even the judgment that the present statute is invalid. What do you think?

If you agree with me, perhaps we should notify the Brothers.

Sincerely,

Mr. Justice Stewart

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 7, 1980

Re: 79-5903 - H.L., etc. v. Matheson

MEMORANDUM TO: Mr. Justice Stewart
Mr. Justice White
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

I will have a dissent out next week. I hope you are willing to "hold" until I get it to you.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 10, 1980

Re: No. 79-5903, H. L. v. Matheson

Dear Thurgood,

Your proposed opinion of the Court strikes me as an admirably thorough exposition of your position. It is, however, a position that I do not share, as you know from our Conference discussion. Accordingly, I shall be unable to join your opinion.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

November 12, 1980

79-5903 H. L., etc. v. Matheson

Dear Thurgood:

My vote at the Conference was to reverse because the Utah statute provides no independent decision-maker, a provision I considered necessary in my Bellotti opinion.

I agree with Potter that your proposed opinion for the Court is a most thorough exposition of your position, but it accepts appellant's argument that a pregnant minor, regardless of age or circumstances and without notice to parents, has a constitutional right to decide for herself, in consultation with a physician, whether to have an abortion.

As this is a view that I rejected in Bellotti, I cannot join your opinion, nor am I at rest as to the judgment. I will await further writing, and probably will reiterate in summary my Bellotti view that a state validly may require, before a minor may decline to notify her parents, that she satisfy an independent decision-maker either that she is mature or that her best interests require no such notification.

Sincerely,

Mr. Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 13, 1980

Re: No. 79-5003 - H.L. v. Matheson

Dear Thurgood:

I join your opinion.

Your opinion is thoughtful, thorough, and well crafted. I feel that of particular interest are the discussion of family interactions, the ideal as contrasted with the actual (pp. 8-13), the important role played by physician obligations and capabilities (pp. 14, 23), and the careful but unobtrusive intimations about ways in which state statutes might pass constitutional muster (notes 39 and 42). The opinion accords constitutional recognition to the mature minor and emancipated minor doctrines (pp. 20-22), which I guess necessary and even overdue in light of the "undoubted social reality," with which I so heartily agree.

I say again that this is a helpful opinion and I deeply regret that it probably will not prove to be one for the Court. I need not say how disappointed I have been in what I perceive to be the Court's noticeable withdrawal in recent cases from the more positive position taken in Roe, Doe and Danforth.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 13, 1980

RE: No. 79-5903 M.L. etc. v. Matheson

Dear Thurgood:

I agree.

Sincerely,

Mr. Justice Marshall

cc: The Conference

Fur 15 yr. old is called a "woman" not a child -
Utah Ct found two interests.

state interests - 4, 12

Role of family - 8, 9

Begs Q to refer to minor's "right" to preserve her "privacy" from her parents - 9. We have never so held. Parents also have rights

Silly argument as to "state's interest" - 13, 14

As to benefit of information from parents - 13-15

As to encouraging consultation - 16

As to "parental authority" - 17, 18 (unbelievable!)

Statute reaches "mature as well as other" minors - 5-20 (Defect in statute in its treatment of all minors as fundamentally different. This also is defect of this opinion)

For: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: 17 NOV 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-5903

H. L., etc., Appellant, v. Scott M. Matheson et al. | On Appeal from the Supreme Court of Utah.

[November —, 1980]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this case is the constitutionality of a Utah statute, Utah Code Ann. § 76-7-304 (2),[1] which imposes criminal sanctions against a physician who fails to notify parents prior to performing an abortion on their unmarried minor daughter. The Supreme Court of Utah upheld the statute. We reverse.

I

The facts, according to the stipulations filed with the trial court, are as follows. When the suit was initiated appellant

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[1] Appellant challenges pt. 2 of § 76-7-304, which appears in the "Offenses Against the Family" chapter of the Utah Criminal Code. In its entirety, § 76-7-304 provides:

"To enable the physician to exercise his best medical judgment, he shall:

"(1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,

"(a) Her physical, emotion and psychological health and safety,

"(b) Her age,

"(c) Her familial situation.

"(2) Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married."

A violation of this provision is a misdemeanor, § 76-7-314 (3), punishable by a maximum one-year sentence, § 76-3-204 (1), and a maximum fine of $1,000 § 76-3-301.

Opinion doesn't state - as I recall - that a 3rd party decision maker would be invalid though this is plain import.

H. L. was an unmarried minor[1] in her first trimester of pregnancy. She was financially dependent on her parents and resided in their home in Utah. She did not wish to inform her parents of her pregnancy and believed it was in her best interest that they not be so informed. After conferring with a counselor[2] to assist her decision about whether to complete or terminate her pregnancy, appellant consulted her physician, who advised her that he believed that an abortion would be in her best medical interest. The physician nonetheless refused to perform an abortion without first notifying her parents as required by Utah law. The statute in question, Utah Code Ann. § 76-7-304 (2) requires a treating physician to "[n]otify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married."[3] Failure to comply with the statute is a criminal offense punishable by a one-year prison term and a $1,000 fine.[4]

Appellant opposed notification of her parents, and filed a class action on April 27, 1978, challenging the constitutionality of the notification requirement. The class she sought to represent included all "minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies but are unable to do so inasmuch as their physician will not perform an abortion upon them without compliance with the provisions of Section 76-7-304 (2)."[5] In a series of related

[1] The Utah district court granted appellant's request to proceed under a pseudonym, H. L. That is the only name by which she is known to the Court.

[2] By statute in Utah, "[t]he period of minority extends in males and females to the age of eighteen years; but all minors obtain their majority by marriage." Utah Code Ann. § 15-2-1.

[3] The counselor apparently was a social worker. See Hearing Transcript, May 26, 1978, reprinted in App. to [illegible] App. 2a; Appellant's Brief [illegible].

[4] See n. 7, supra.

[5] Complaint para. 10, App. 4. By the terms of the class [illegible] unemancipated minor women residing with their parents and [illegible]

elusive, appellant's complaint asserted that the statute infringed each class member's right to have in her first trimester of pregnancy an abortion free from state regulation, that the statute was unconstitutionally overbroad, and that it lacked justification by a compelling state interest.[3] Appellant requested class certification, declaratory and injunctive relief, and attorneys' fees.

On May 8, 1978, the District Court denied appellant's motion for a temporary restraining order or preliminary injunction. The court held a brief hearing on May 31[4] and subsequently[5] entered a written order finding appellant an appropriate representative of the designated class but rejecting her challenges to the Utah statute.[6] The court rejected

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were not living independently. [illegible] For a minor woman [illegible] the Utah statute requires the physician to notify her parents prior to an abortion. Utah Code Ann. § 76-7-304(2). The class also included [illegible] minors. For these women, the statute requires notice [illegible] to their husbands. For the sake of simplicity, and in keeping with the approach taken in the lower court, [illegible] of the summary [illegible] refer only to [illegible] the limited term.

[3] No challenge here is raised to the statutory requirement of spousal notice when a married adult woman seeks an abortion.

[4] The in-chambers hearing consisted of brief examination of appellant which elicited statements essentially identical to the complaint. At the hearing counsel for appellant objected to appellee's effort to discover [illegible] particulars regarding appellant's reasons for not wanting to talk with her parents about problems related to the abortion. The trial judge sustained the objection [illegible] that answers to the questions were irrelevant because the statute was construed to apply whenever it was physically possible for the physician to notify the minor's parents.

[5] The court also concluded that [illegible] of appellant's pregnancy would not moot the case. [illegible] capable of repetition, yet evading review." *Roe* v. *Wade*, 410 U. S. 113, 125 (1973), quoting *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911).

The trial court also [illegible] appellee's [illegible] that appellant could proceed in the litigation without the appointment of a guardian ad litem. That ruling is not [illegible] to [illegible]

appellant's argument that the statute should be construed as reserving discretion to the physician in deciding whether in a particular case, parental notification would be in the minor's interests, the court interpreted § 76-7-304 (2) to "require the treating physician to notify [the parents] if it is physically possible; that is, if he knows or can determine the identity of the parents of a minor and he is physically able to notify them" prior to the abortion.[illegible] Finally, the court ruled that the statute passed constitutional muster.

The Supreme Court of Utah affirmed.[illegible] The court acknowledged that this Court has held unconstitutional statutes granting third parties, including parents, an absolute veto over a pregnant minor's decision to terminate her pregnancy, but concluded that this Court had never invalidated an unqualified parental notification requirement. The court determined that the State's notice requirement served two important state interests: (1) improving the exercise of the physician's medical judgment by permitting parents to provide additional information, and (2) encouraging that per-

State interests served

appellant [illegible] [illegible] May 30, 1978 [illegible]

H. L. v. Matheson, Civ. No. C-78-2729 (Dist. Ct. Salt Lake County, [illegible] 1978), Conclusions of Law ¶ 1, App. 13.

H. L. v. Matheson, No. 16219 (Supreme Court, Utah, [illegible] 1979), App. 47. [illegible] § 76-7-304 (2) [illegible]

H. L. v. Matheson, No. 16219 (Supreme Court, Utah, [illegible] 1979), App. 57-58 [illegible]

requiring an unemancipated pregnant minor to seek her parents' [illegible] in her abortion decision. We noted probable jurisdiction, 445 U. S. 903 (1980), and we now reverse.

II

Our cases have established that a pregnant woman has a fundamental right to choose whether to obtain an abortion or carry the pregnancy to term. *Roe* v. *Wade*, 410 U. S. 113 (1973); *Doe* v. *Bolton*, 410 U. S. 179 (1973). Her choice, like the deeply intimate decisions to marry, to procreate, and to use contraceptives, is guarded from unwarranted state interference by the right to privacy. Grounded in the Due Process Clause of the Fourteenth Amendment, the right to

[illegible]

only notice - not consent or even advice

privacy "protects both the woman's 'interest in independence in making certain kinds of important decisions' and her individual interest in avoiding disclosure of personal matters." *Whalen* v. *Roe*, 429 U. S. 589, 599–600 (1977).

In the abortion context, we have held that the right to privacy shields the woman from undue state intrusion in and external scrutiny of her very personal choice. Thus, in *Roe* v. *Wade*, *supra*, 410 U. S., at 164, we held that during the first trimester of the pregnancy, the State's interests in protecting maternal health or the potential life of the fetus could not override the pregnant woman's right to make the abortion decision through private unfettered consultation with her physician. We further emphasized the restricted scope of permissible state action in this area when, in *Doe* v. *Bolton*, *supra*, 410 U. S., at 198–200, we struck down state-imposed procedural requirements that subjected the woman's private decision with her physician to review by other physicians and a hospital committee.

It is also settled that the right to privacy, like many constitutional rights,[2] extends to minors. *Planned Parenthood* [illegible]

[1] The right [illegible] the right to be let alone [illegible] *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting) [illegible] *Stanley* v. *Georgia*, *supra*, 394 U. S. 557, 564 (1969), and *Eisenstadt* v. *Baird*, *supra*, 405 U. S., at 453 [illegible] [illegible] governmental [illegible] [illegible] *Poe* v. *Ullman*, 367 U. S. 497, 521 (1961) (Douglas, J., dissenting).

[2] [illegible] rights do not mature [illegible] *Goss* v. *Lopez*, 419 U. S. 565 (1975) [illegible] *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969); *In re Gault*, 387 U. S. 1 (1967) [illegible]

of *Central Missouri* v. *Danforth*, 428 U. S. 52 (1976); *Bellotti* v. *Baird*, 443 U. S. 622, 639 (1979) (POWELL, J.); *id.*, at 653 (STEVENS, J.) (plurality); *T. H.* v. *Jones*, 425 F. Supp. 873, 881 (Utah 1975), aff'd on other grounds, 425 U. S. 986 (1976). Indeed, because an unwanted pregnancy is probably more of a crisis for a minor than for an adult, and because the abortion decision cannot be postponed until her majority, "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." *Bellotti* v. *Baird*, *supra*, 443 U. S., at 642 (POWELL, J.). Thus, for both the adult and the minor woman, state-imposed burdens on the abortion decision can be justified only upon a showing that the restrictions advance important state interests. *Roe* v. *Wade*, *supra*, 410 U. S. [illegible]

[illegible] U. S., at 170; *Griswold* v. *Connecticut*, 381 U. S. 479 [illegible] (1965) [illegible] *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 74–75 (1976) [illegible] *Brown* v. *Board of Education*, 347 U. S. 483 (1954) [illegible]

[illegible] *Planned Parenthood of Central Missouri* v. *Danforth* [illegible] 428 U. S. [illegible]

[illegible] Utah Code Ann. § 78-14-5 [illegible] Utah Code Ann. § 76-7-305 (1978); § 78-14-5 (1953). This appeal does not present the [illegible] *H. L.* v. *Matheson*, No. 16250 (Supreme Court [illegible] 1979), App. 23 [illegible]

[illegible] *T. H.* v. *Jones*, 425 F. Supp. 873, 881 (Utah 1975), aff'd on other grounds, 425 U. S. 986 (1976).

at 131; accord *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U. S., at 91. Before examining the state interests asserted here, we first consider Utah's claim that its statute does not "impinge[] on a woman's decision to have an abortion" or "place[] obstacles in the path of effectuating such a decision." Brief for Appellee 9. We therefore consider whether the parental notice requirement of the Utah statute imposes any burdens in the abortion decision.

The ideal of a supportive family so pervades our culture that it may seem incongruous to examine "burdens" imposed by a statute requiring parental notice of a minor daughter's decision to terminate her pregnancy. This Court has long deferred to the bonds which join family members for mutual sustenance. See *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925); *May* v. *Anderson*, 345 U. S. 528, 533 (1953); *Griswold* v. *Connecticut*, 381 U. S. 479, 485 (1965); *Stanley* v. *Illinois*, 405 U. S. 645, 651 (1972); *Moore* v. *East Cleveland*, 431 U. S. 494, 504–505 (1977) (POWELL, J.) (plurality). Especially in times of adversity, the relationships within a family can offer the security of constant caring and love. See *Moore* v. *East Cleveland*, *id.*, at 505. Ideally, a minor facing an important decision will naturally seek advice and support from her parents, and they in turn will respond with comfort and wisdom.[2] If the pregnant minor herself confides in her family, she plainly relinquishes her right to avoid telling or involving them. For a minor in that circumstance, the statutory requirement of parental notice hardly imposes a burden.

yes

Role of family

[1] [illegible] Brief for Appellee [illegible] *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U. S., at 75.

[2] The [illegible] however, [illegible] See *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944); *Moore* v. *East Cleveland*, *supra*, 431 U. S., at [illegible].

Realistically, however, many families do not conform to this ideal. Many minors, like appellant, oppose parental notice and seek instead to preserve the fundamental, personal right to privacy. It is for these minors that the parental notification requirement creates a problem. In this context, involving the minor's parents against her wishes[?] effectively cancels her right to avoid disclosure of her personal choice. See *Whalen* v. *Roe*, *supra*, 429 U. S., at 599–600. Moreover, the absolute notice requirement publicizes her private consultation with her doctor and interjects additional parties in the very conference held confidential in *Roe* v. *Wade*, *supra*, 410 U. S., at 164. Besides revealing a "confidential decision," the parental notice requirement may limit "access to the means of effectuating that decision." *Carey* v. *Population Services International*, 431 U. S. 678, 688 (1977). Many minor women will encounter interference from their parents after the state-imposed notification.[?] In addition to parental

Yes

Begs Q to refer to "her right" — we have never so held

[illegible]

[illegible]

[illegible]

disappointment and disapproval, the minor may confront physical or emotional abuse, withdrawal of financial support, or actual obstruction of the abortion decision. Furthermore, the threat of parental notice may cause some minor women to delay past the first trimester of pregnancy, after which the health risks increase significantly. Other pregnant

488 F. Supp. 1362 (E.D. La. 1980). Parents also may oppose a minor's [illegible] See generally F. Furstenberg, Unplanned Parenthood: The Social Consequences of Teenage Childbearing 54 (1976); [illegible]

[illegible]

[illegible]

minors may attempt to self-abort or to obtain an illegal abortion rather than risk parental notification.[13] Still others may foresake an abortion and bear an unwanted child, which, given the minor's "probable education, employment skills, financial resources and emotional maturity, . . . may be exceptionally burdensome." *Bellotti* v. *Baird*, *supra*, 443 U. S., at 642 (POWELL, J.). The possibility that such problems may not occur in particular cases does not alter the hardship created by the notice requirement on its face.[14] And that hardship is not a mere disincentive created by the State,[15] but is instead an actual, state-imposed obstacle to the exercise

[illegible] Perspectives 2[illegible] (1978). [illegible] *Zelnik* [illegible] [illegible] complications associated with childbirth [illegible]

[13] [illegible] *Health Center* [illegible] *supra*, [illegible] F. Supp. [illegible] illegal abortion [illegible] than [illegible] parental notification. See also [illegible] The Effect of Legalized Abortion on Morbidity Resulting from Criminal Abortion, [illegible] when legal abortion [illegible] [illegible] 33 Cal. App. 3d [illegible] Rptr. [illegible] (App. 1973); [illegible] Medicine 287 (1977) [illegible] [illegible] Adolescent [illegible] [illegible] (1976) [illegible] [illegible] pregnant.

[14] [illegible] *Planned Parenthood of Central Missouri* v. *Danforth* [illegible]

[15] [illegible] *Harris* v. *McRae*, [illegible] U. S. [illegible] (1980) [illegible] *Harris* v. *McRae*, [illegible] U. S. [illegible] [illegible] *Maher* v. *Roe*, 432 U. S. 464 (1977).

of the minor woman's free choice.[29] For the class of pregnant minors represented by appellant, this obstacle is so onerous as to bar the desired abortions.[30] Significantly, the interference sanctioned by the statute does not operate in a neutral fashion. Because no notice is required for other pregnancy-related medical care,[31] only the minor women who wish to abort encounter the burden imposed by the notification statute. Because the Utah requirement of mandatory parental notice unquestionably burdens the minor's privacy right, we must turn to the State's profferred justifications for the infringements posed by the statute.

III

As established by this Court in *Planned Parenthood of Central Missouri v. Danforth*, *supra*, the statute cannot survive appellant's challenge unless it is justified by a "significant state interest."[32] Further, the State must demonstrate that the means it selected are closely tailored to serve that in-

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[29] See [illegible]

[illegible]

[30] [illegible]

[31] [illegible] Utah [illegible]

[32] [illegible] *Planned Parenthood* [illegible]

erest. Where regulations burden the rights of pregnant adults we have held that the state legitimately may be concerned with "protection of health, medical standards, and prenatal life." *Roe* v. *Wade*, *supra*, 410 U. S., at 155. We concluded, however, that during the first trimester of pregnancy none of these interests substantially justifies state interference with the decision reached by the pregnant woman and her physician. *Roe* v. *Wade*, *id.* at 162–163. Nonetheless Utah asserts here that the parental notice requirement advances additional state interests not implicated by a pregnant adult's decision to abort. Specifically, Utah contends that the notice requirement improves the physician's medical judgment about a pregnant minor in two ways: it permits the parents to provide additional information to the physician and it encourages consultation between the parents and the minor woman. Utah also advances an independent state interest in preserving parental rights and family autonomy. We consider each of these asserted interests in turn.[9]

V

In upholding the statute, the Utah Supreme Court reasoned that the notification provision might encourage parental transmission of "additional information which might prove valuable to the physician in exercising his best medical judgment." Yet neither the Utah courts nor the statute itself specifies the kind of information sought to be supplied nor why it is available to the parents but not to the minor woman herself. Most parents lack the medical expertise necessary to supplement the physician's

[9] *E. g.*, *Roe* v. *Wade*, *supra*, 410 U. S., at 155; *Griswold* v. *Connecticut*, *supra*, 381 U. S., at 485.

[10] Utah also argues that the notice requirement furthers a legitimate state interest in enforcing its criminal laws against statutory rape, fornication, adultery, and incest. Brief for Appellee 28–30. These interests were not asserted below, and are too remote to be considered seriously here.

[11] *H. L.* v. *Matheson*, No. 79-5303 (Dec. 6, 1979), App. 51.

Silly.

not a quest. of "med. expertise" Parents know med. history of child, physiological characteristics, etc

medical judgment, and at best could provide facts about the patient's medical history. It seems doubtful that a minor mature enough to become pregnant and to seek medical advice on her own initiative would be unable or unwilling to provide her physician with information crucial to the abortion decision. In addition, by law the physician already is obligated to obtain all information necessary to form his best medical judgment,[36] and nothing bars consultation with the parents should the physician find it necessary.

Even if mandatory parental notice serves a substantial state purpose in this regard, the Utah statute fails to implement it. Simply put, the statute on its face does not require or even encourage the transfer of information; it does not

[36] Section 76-7-304 (1) requires the physician to

"[c]onsider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,

"(a) Her physical, emotional and psychological health and safety,

"(b) Her age,

"(c) Her familial situation."

Violations of this requirement are punishable by a year imprisonment and $1,000 fine. Utah Code Ann. §§ 76-3-204 (1), 76-3-301 (3), 76-7-314 (3). Criminal sanctions also apply if the physician neglects to obtain the minor's informed written consent, and such consent can be secured only after the physician has notified the patient:

"(a) Of the names and addresses of two licensed adoption agencies in the state of Utah and the services that can be performed by those agencies, and nonagency adoption may be legally arranged; and

"(b) Of the details of development of unborn children and abortion procedures, including any foreseeable complications, risks, and the nature of the post-operative recuperation period; and

"(c) Of any other factors he deems relevant to a voluntary and informed consent." Utah Code Ann. § 76-7-305 (2).

The risk of malpractice suits also ensures that the physician will acquire whatever information he finds necessary before performing the abortion. See Utah Code Ann. § 78-14-5.

Moreover, "[I]f a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure and deprivation of his license are available remedies." *Doe* v. *Bolton*, *supra*, 410 U. S., at 199.

even call for a conversation between the physician and the parents. A letter from the physician to the parents would satisfy the statute, as would a brief telephone call made moments before the abortion.[19] Moreover, the statute is patently underinclusive if its aim is the transfer of information known to the parents but unavailable from the minor woman herself. The statute specifically excludes married minors from the parental notice requirement; only her husband need be told of the planned abortion. Utah Code Ann. § 76-7-304(2) and Utah makes no claim that he possesses any information valuable to the physician's judgment but unavailable from the pregnant woman. Furthermore, no notice is required for other pregnancy-related care sought by the minor. See Utah Code Ann. § 78-14-5(4)(f) (authorizing woman of any age to consent to pregnancy-related medical care). The minor woman may consent to surgical removal and analysis of amniotic fluid (amniocentesis) and any other medical care related to pregnancy. The physician's decisions concerning such procedures would be enhanced by parental information as much as would the abortion decision, yet only the abortion decision triggers the parental notice requirement. This result is especially anomalous given the comparatively lesser health risks associated with abortion as contrasted with other pregnancy-related medical care. Thus, the statute not only fails to promote the transfer of information as is claimed, it does not apply to other closely related contexts in which such exchange of information would be no less important. The goal of promoting consultation between the physician and the parents of the pregnant minor cannot sustain a statute that is so ill fitted to serve it.

[illegible] 18 [illegible] 29 [illegible] 35

[19] [illegible]

[illegible]

Check this
most states require consent of parents

B

The State also claims the statute serves the legitimate purpose of improving the minor's decision by encouraging consultation between the minor woman and her parents. The State does not dispute that it cannot legally or practically require such consultation.[17] Nor does the State contest the fact that the decision is ultimately the minor's to make. See Utah Code Ann. §78-14-5(4)(f).[18] Nonetheless, the state seeks through the notice requirement to give parents the opportunity to contribute to the minor woman's abortion decision.

Ideally, facilitation of supportive conversation would assist the pregnant minor during an undoubtedly difficult experience. Again, however, when measured against the rationality of the means employed, the Utah statute simply fails to advance this asserted goal. The statute imposes no requirement that the notice be sufficiently timely to permit any discussion between the pregnant minor and the parents. Moreover, appellant's claims require us to examine the statute's purpose in relation to the parents who the minor believes are likely to respond with hostility or opposition. In this light the statute is plainly overbroad. Parental consultation

[illegible]

[17] [illegible]

[18] [illegible]

hardly seems a legitimate state purpose where the minor's pregnancy resulted from incest, where a hostile or abusive parental response is assured, or even where the minor's fears of such a response deter her from the abortion she desires. The absolute nature of the statutory requirement, with exception permitted only if the parents are physically unavailable, violates the requirement that regulations in this fundamentally personal area be carefully tailored to serve a significant state interest. "The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter." *Bellotti v. Baird*, *supra*, 443 U. S., at 642 (POWELL, J.). Because Utah's absolute notice requirement demonstrates no such sensitivity, we cannot approve its interference with the minor's private consultation with the physician during the first trimester of her pregnancy.

How could it require less

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Finally, the state asserts an interest in protecting parental authority and family integrity. This Court, of course, has recognized that the "primary role of the parents in the upbringing of their children is now established beyond debate

[illegible] 574, 580, 585 (1975).

[illegible] Utah Code Ann. § 76-7-301 [illegible] § 76-7-305 [illegible] § 76-7-314 [illegible] §§ 76-7-301-76-7 [illegible]

as are enduring American tradition." *Wisconsin* v. *Yoder*, 406 U. S. 205, 232 (1972). See *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923). Indeed, "those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce* v. *Society of Sisters*, *supra*, 268 U. S., at 535 (1925). Similarly, our decisions "have respected the private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, *supra*, 321 U. S., at 166. See also *Moore* v. *East Cleveland*, *supra*, 431 U. S., at 499.

The critical thrust of these decisions has been to protect the privacy of individual families from unwarranted state intrusion. Utah ironically invokes these decisions in seeking to justify state interference in the normal functioning of the family. Through its notice requirement, the State in fact enters the private realm of the family rather than leaving unaltered the pattern of interactions chosen by the family. Whatever its motive, state intervention is hardly likely to resurrect parental authority that the parents themselves are unable to preserve.[11] In rejecting a statute permitting parental veto of the minor woman's abortion decision in *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U. S., at 75, we found it difficult to conclude that

Incredible

"providing a parent with absolute power to overrule a determination, made by the physician and his minor

[illegible], *supra*, 542 F. 2d, at 1183 [illegible]; Note, The Minor's Right of Privacy: Limitations on State Action After *Danforth* and *Carey*, 77 Colum. L. Rev. 1216, 1221 (1977).

[11] [illegible] 428 U. S. 52, [illegible]

patient to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure.

More recently, in *Bellotti* v. *Baird*, *supra*, 443 U. S., at 638, JUSTICE POWELL observed that efforts to guide the social and moral development of young people are "in large part . . . beyond the competence of impersonal political institutions."

Utah maintains, however, that its statute "merely safeguards a reserved right which parents have to know of the important activities of their children by attempting to prevent a denial of the parental rights through deception." Brief for Appellee 3. Casting its purpose this way does not salvage the statute. For when the threat to parental authority originates not from the State but from the minor child, invocation of "reserved" rights of parents cannot sustain blanket state intrusion into family life such as that mandated by the Utah statute. Such a result not only runs counter to the private domain of the family which the State may not breach; it also conflicts with the limits traditionally placed on parental authority. Parental authority is never absolute, and has been denied legal protection when its exercise threatens the health or safety of the minor children. *E. g.*, *Prince* v. *Massachusetts*, *supra*, 321 U. S., at 166-170. Indeed, legal protection for parental rights is frequently tempered if not replaced by concern for the child's interests.

[illegible] *Prince* v. *Massachusetts* [illegible] *Wisconsin* v. *Yoder*, *supra* [illegible] *Prince* [illegible]

Whatever its importance elsewhere, parental authority deserves de minimis legal reinforcement where the minor's exercise of a fundamental right is burdened.

We need not, however, decide whether parental rights never deserve legal protection when their assertion conflicts with the minor's rights and interests.[illegible] We conclude that this statute cannot be defended as a mere reinforcement of existing parental rights, for the statute reaches beyond the legal limits of those rights. The statute applies without exception to emancipated minors,[illegible] mature minors,[illegible] and minors

[illegible] See generally [illegible] Power [illegible] Parents and the State [illegible] Future [illegible]

[illegible]

[illegible]

[illegible]

with emergency health care needs,[illegible] all of whom, as Utah recognizes by law, have long been entitled to medical care unencumbered by parental involvement. In this area, the

[illegible]

Court must join the state courts and legislatures which have acknowledged the undoubted social reality: some minors in some circumstances have the capacity to determine their health care needs without involving their parents. As we recognized in *Planned Parenthood of Central Missouri* v. *Danforth, supra*, 428 U. S., at 75, "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." Utah itself has allocated pregnancy-

[illegible] *Bellotti* [illegible] JUSTICE POWELL [illegible] such a statute, and because it would expose the minor to the arduous public rigors of administrative or judicial process, four other Members of the Court rejected it as advisory and at odds with the privacy interest [illegible] *Bellotti* [illegible] under JUSTICE POWELL's reasoning in *Bellotti*, the instant statute is unconstitutional. Not only does it preclude case-by-case consideration of the maturity of the minor, it also prevents individualized [illegible]

[illegible]

[illegible]

related health care decisions entirely to the pregnant minor. Where the physician has cause to doubt the minor's actual ability to understand and consent, by law he must pursue the requisites of the State's informed consent procedures. The State cannot have a legitimate interest in adding to this scheme mandatory parental notice of the minor's abortion decision. This conclusion does not affect parents' traditional responsibility to guide their children's development, especially in personal and moral concerns. We are persuaded that the Utah notice requirement is not necessary to assure parents this traditional child-rearing role, and that it burdens the minor's fundamental right to choose whether or not to terminate her pregnancy.[illegible]

IV

The challenged statute infringes upon the constitutional right to privacy attached to a minor woman's decision whether to complete or terminate her pregnancy. None of the reasons offered by the State justifies this intrusion, for the statute is not tailored to serve them. Rather than serving to enhance the physician's judgment in cases such as appellant's, the statute prevents implementation of the physician's medical recommendation. Rather than promoting the transfer of information held by parents to the minor's physician, the statute neglects to require anything more than a communication from the physician moments before the abor-

[illegible] their responsibility [illegible] to seek professional assistance for [illegible] mature enough to consent to [illegible] [illegible] Consent and Confidentiality [illegible] Adolescent [illegible] Medical Care of the Adolescent [illegible] 1975 [illegible] Goldstein, Medical Care for the Child at Risk: On State Supervention of Parental Autonomy, 86 Yale L. J. 645, 665 (1977).

[illegible] Utah Code Ann. § 78-14-5 [illegible]

[illegible] Utah Code Ann. § 76-7-305 [illegible]

[illegible]

tion. Rather than respecting the private realm of family life the statute invokes the criminal machinery of the State in an attempt to influence the deliberations within the family. Accordingly we reverse the judgment of the Supreme Court of Utah insofar as it upheld the statute against constitutional attack and remand for further proceedings not inconsistent with this opinion.

It is so ordered.

L.F.P

Supreme Court of the United States
Washington, D. C. 20543

Reversed hurriedly. The C.J. makes an appealing argument for parental rights that T.M's opinion largely ignores. But C.J. does not come to grips with the limitations of prior opinions on what we now are free to decide - e.g. Roe, Danforth, & Bellotti I & II. Not does C.J. focus only whether we analyze case on a facial or "as applied" basis. This makes a difference.

November 17, 1980

MEMORANDUM TO: Mr. Justice Stewart
Mr. Justice White
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

Re: No. 79-5903, H.L. v. MATHESON

Before undertaking to draft an "opinion", either by way of dissent or otherwise, I have concluded to expose my views on this case by memorandum to those who appear not ready to join the proposed opinion reversing the Utah Supreme Court. If the general thrust of these views is acceptable, I will proceed to develop them in an opinion.

At the outset, it is important to set out just what this case involves. First, it deals with the traditional authority of states to regulate family relationships -- a power reserved to the states, not delegated to federal authority -- judicial or otherwise. Second, it deals with the equally traditional and constitutionally protected authority -- that of the parents in relation to their children -- rights not delegated by the parents to any governmental authority -- federal, state, or local. The Court has

repeatedly made this point over the years, as I will undertake to demonstrate.

Of course, these rights are not absolute; under some circumstances, for example, under the parens patriae power, minor children may be removed from parental control and custody; they may be compelled to attend school. But the discussion in the proposed opinion of "parental authority and family integrity" [pp. 17-23] casts aside centuries of human experience with human values. From dubious premises concerning the role of the family and parents in our society, the proposed opinion leaps to an unsupportable conclusion that simply giving notice to parents violates a minor's privacy. This seems to me a new and wholly unwarranted invasion of the family unit and an unwarranted extension of the "rights" of minors, if that is a correct characterization.

The proposed opinion then sets up a series of straw men and proceeds to conclusions once the straw figures are rendered prostrate. For example, much is made of the failure of the statute to exempt "emancipated minors, mature minors, and minors with emergency health care needs." [pp. 20-21.] Yet the Utah courts -- if given a chance -- could, and likely would,

construe the statute to mean that notice need not be given in such cases. Clearly a married minor girl is emancipated. The Utah statute calls for no more than notice "if possible". In relation to medical treatment, the common law has long recognized exceptions for medical treatment in emergencies as it has for emancipated minors.

We have never said -- or even hinted -- that every step that promotes abortions is desirable or that every step that may tend to deter some abortions is per se evil. Under our cases, the Utah statute should be sustained if it can be seen as a rational means to serve any "significant state interest". Proposed opinion at 12; Danforth, 428 U.S. at 75.

But Doe created a specific "fundamental" right.

The Utah statute manifestly serves at least two compelling state interests -- (1) the constitutionally protected right of family privacy and family unity and (2) the important state interest in protecting the health and well-being of minor girls by seeking to provide that abortions are based only upon the best informed medical judgments.

?

Concurring in Danforth, 428 U.S. at 91, Potter appears to have anticipated the question now presented:

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.[1]

So true

To similar effect, concurring in Carey, Lewis wrote:

> Under our prior cases, the States have broad latitude to legislate with

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[1] Potter went on to describe in detail the assembly-line mode of operation of such a clinic:

> "The counseling *** occurs entirely on the day the abortion is to be performed ***. It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another ***. The physician takes no part in this counseling process ***. Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques ***.
>
> "The abortion itself takes five to seven minutes ***. The physician has no prior contact with the minor, and on the days that abortions are being performed at the [clinic], the physician, *** may be performing abortions on many other adults and minors ***. On busy days patients are scheduled in separate groups, consisting usually of five patients ***. After the abortion [the physician] spends a brief period with the minor and others in the group in the recovery room ***."
>
> 428 U.S. at 91-92n.2, quoting from the record in Bellotti II.

> respect to adolescents. The principle is well settled that "a State may permissibly determine that, at least in some precisely delineated areas, a child ... is not possessed of that full capacity for individual choice" which is essential to the exercise of various constitutionally protected interests. Ginsburg v. New York, 390 U.S. 629, 649-650 (1968) (STEWART, J., concurring in result). This principle is the premise of our prior decisions ... holding that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." Prince v. Massachusetts, 321 U.S. 158, 170 (1944). Restraints on the freedom of minors may be justified "even though comparable restraints on adults would be constitutionally impermissible." Planned Parenthood of Central Missouri v. Danforth, [428 U.S.] at 102 (STEVENS, J., concurring in part and dissenting in part].
>
> 431 U.S. at 705-706.

In a similar vein, later in the opinion, Lewis said:

> Requiring minors to seek parental guidance would be consistent with our prior cases. * * *
>
> A requirement of prior parental consultation is merely one illustration of permissible regulation in this area.
>
> 431 U.S. at 709-10, emphasis supplied.

The proposed opinion relies on Doe v. Bolton, 410 U.S. 179 (1973). [pp. 5-6.] However, in a crucial part of the Doe opinion, we emphasized that medical decisions take into account physical and emotional factors as well as the patient's

age: "This allows the attending physician the room he needs to make his best medical judgment [about whether an abortion is medically indicated]." 410 U.S. at 192. In applying this concept to a particular case, it is not the business of judges to act on an assumption either that the parents will be hostile to the idea of an abortion or that they will be sympathetic and understanding. Some parents may be anxious to approve an abortion, some opposed; others may be indifferent and uncaring. Legislatures, however, act on the generality of human experience.

If anything has been made clear in our opinions dealing with sensitive familial problems, it is that parents are presumed to act in the best interests of their minor children. This was the essence of our holding in Parham v. J.R., 442 U.S. 584, 602 (1979). That parents do so act is not an irrebuttable presumption, but it is the starting point: the presumption is valid until rebutted, Id. at 602-03, and there is nothing in this record to rebut it. That presumption is an adequate basis for legislative enactments. See McGowan v. Maryland, 366 U.S. 420, 425-28 (1961).

The proposed opinion treats that long accepted presumption as per se bad. To reject the

ancient presumption, the proposed opinion offers no evidence at all, unless we are to say that a 10-, 12- or 15-year-old unmarried, dependent, pregnant girl's reluctance to let her parents know of her predicament is enough to rebut the presumption. Of course, no court would dare go so far. The shibboleth that an unmarried girl old enough to get pregnant is old enough to make a decision on abortion uncounseled by parents [pp. 14,22] is not a barrier to Utah's notice statute.

Much is made of the value of doctors' and social workers' counsel in the decision whether to have the abortion. Counseling is doubtless desirable, but to exclude even minimal notice to the girl's parents is to use the Constitution to reject centuries of tradition and accepted practice. The whole of our social structure and the concepts of family unity rest on this fabric, and courts have relied on it for centuries.

The proposed opinion seems to proceed on an unspoken assumption -- unsupported by a scintilla of evidence -- that giving notice to the parents is equivalent to giving them a veto power. The two ideas are not the same. Such notice to the parents may, in some situations, create an opportunity for them to counsel their child, but

this can hardly be thought an evil to be shunned when the counsel of doctors and social workers is applauded by the Court.

Surely one of the important purposes of the legislature in requiring this minimal notice was to afford the opportunity for the doctor to learn of the factors thought by this Court in Doe to be relevant to the medical decision in order "that the medical judgment may be exercised in the light of all factors - physical, emotional, psychological, familial." 410 U.S. at 192. In the generality of experience, who is more likely than the parents to provide this information?

Now, abandoning the carefully worked out concepts of Doe, the proposed opinion casts them to the wind to sustain a rush to judgment by a dependent, unmarried, and very likely, a distraught 15-year-old girl caught in a tragic web which would readily render a mature unmarried woman distraught.

The fabric of a society at its peak strength is fragile. Even at its peak it can be no stronger than the collective endurance of not just the individuals, but of the family unit and structure. Anything that weakens the family, weakens the whole society. As Bill Brennan noted

in Ginsburg, 390 U.S. at 639, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." The proposed opinion threatens the cohesiveness and unity of the family and, therefore, the strength of the society.

The Legislature of Utah gave expression to its concern for family integrity in its notice statute. However much the statute might be improved by judges with the benefit of hindsight, it articulates what has been accepted as a matter of state law since the beginning of the Republic and before that in England and the Colonies: family law is the province of the States. It bears repeating that regulation of domestic relations was clearly not one of the powers delegated to the Federal Government or any of its branches. In exercise of their reserved powers, the states for nearly two centuries have defined what constitutes a minor child. They have also defined emancipation of minors by state common law or statutes, and they have defined the criteria for contractual liability for "necessaries", and for child custody, divorce, adoption, and

guardianships.

Counsel for appellant, at trial and in this Court, has made much of the crucial need for counseling of minor girls in this dilemma by social workers and doctors. More likely than not, such counselors would be strangers to the pregnant girl. The doctor, of course, unlike the public social worker, has a financial interest in the decision he advocates. Far from discounting the value of such counseling, I repeat that it is of the utmost importance. But to give controlling weight to the analysis of a distraught 10- 12- 14- or 16 year old pregnant unmarried girl in deciding whether to notify her parents and to hold by implication that she does not need their help is to jettison centuries of human experience and values of Western civilization.

I can readily assume that a minor girl in this tragic predicament is likely to cringe from informing her parents, no matter whether they are model parents or otherwise. The very emotional state of the girl could well render her incapable of predicting accurately whether they will be understanding and supportive or hostile, indifferent, or uncaring. But courts should not abandon the presumption that parents, once over

an initial shock, are more likely to give support than to deny it or to seek to prevent the abortion.

Yet, speculating in areas where we have neither authority nor competence, the proposed opinion tells us that the Constitution forbids a state to provide that even minimal notice is to be given. This surely trivializes and demeans the Constitution.

Apart from the Court's opinions in Parham, Pierce, and Meyer, there are numerous expressions relevant to our decision.[2] In his concurring opinion in Parham, Potter emphasized the parental role:

> For centuries it has been a canon of the common law that parents speak for their minor children. So deeply embedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it. Meyer v. Nebraska, 262 U.S. 390; Pierce v.

[2] In two cases to be argued later in this term, we will consider the constitutionality of state action in conflict with these rights. Doe v. Delaware, No. 79-5932 (cert. granted, March 24, 1980; Johnson v. J.O.L. II, No. 80-45 (cert. granted, Oct. 6, 1980). The right of parents to rear their children is enshrined in the Fourteenth Amendment. A principal purpose of the Thirteenth and Fourteenth Amendments wa to prohibit interference with "parental relation, robbing the offspring of the care and attention of his parents". See sources cited in footnote at page 19 of AUL amicus brief.

> Society of Sisters, 268 U.S. 510. In ironic contrast, the District Court in this case has said that the Constitution in this case requires the State ... to disregard this established principle. I cannot agree.
>
> 442 U.S. at 621 (emphasis in original).

Parham was concerned with the authority of parents to hospitalize a disturbed minor child for medical diagnosis and therapy. Relying on the presumption that parents act in the best interests of their children, we concluded that an adversary type hearing to test the correctness of the initial step to hospitalize the child was not required to reexamine the parental decision to hospitalize the child. Concurring, Potter wrote:

> [T]he basic question in this case is whether the Constitution requires Georgia to ignore basic principles so long accepted by our society. For only if the State in this setting is constitutionally compelled always to intervene between parent and child can there be any question as to the constitutionally required extent of that intervention. I believe this basic question must be answered in the negative.
>
> 442 U.S. at 623.

Earlier, Thurgood had articulated similar concepts in Quilloin v. Walcott, 434 U.S. 246 (1978):

> We have recognized on numerous occasions that the relationship between

> parent and child is constitutionally protected. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 231-233 (1972); Stanley v. Illinois, [405 U.S. 645 (1972)]; Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Masssachusetts, 321 U.S. 158, 166 (1944). And it is now firmly established that "freedom of personal choice in matters of ... family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Cleveland Board of Education v. La Fleur, 414 U.S. 632, 639-640 (1974).
>
> 434 U.S. at 255.

Marshall's

On the purely medical and psychiatric aspects of this case, important considerations are implicated. The statute promotes sound medical judgment in three ways: by facilitating the obtaining of data pertaining to a minor patient; by permitting the parents to suggest consultation with a family physician familiar with the minor; by making it possible for parents to protect their children against overreaching by zealous abortion clinics.

Some truth to this

This does no more than recognize what the medical profession has long recognized in terms of the physician's need for the maximum information concerning a patient as a predicate for medical

treatment. Indeed one of the reasons for the physician-patient privilege is to encourage maximum disclosure to the physician. Parham underscored the need for the fullest cooperation between parents and the physicians treating a minor child. Both the State and its amici in this case have pointed to voluminous empirical data relating to the traumatic emotional, psychological, and medical consequences of an abortion, and particularly to the impact of an abortion performed on a minor child. In most instances a girl in the 10-17 age range has need of parental help in the days following an abortion, and their awareness could well serve to foster family unity and give emotional support to the girl.

The Legislature could reasonably believe that notice to the parents is essential to provide regulation to control unethical medical practitioners[3] and those providing inadequate

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[3] The statute may well be superfluous in the case of an ethical medical practitioner. Such a practitioner will either insist on notice to the parents or require the consent of a guardian ad litem in every case simply for the physician's protection if for no other reason. A physician performing an abortion on an unmarried girl under age 17 may be confronted with a damage claim later by or on behalf of the girl, claiming a battery due to the absence of a

facilities and services. Central to the problem addressed by the State is that a minor girl under great emotional stress must often deal with the operators of an abortion clinic. Such a clinic, even if medically scrupulous, has an obvious conflict of interest that calls for independent counseling. To advance that interest, the Legislature could reasonably believe that parental notification is a proper first step. See Carey, 431 U.S. at 710 (Powell, J., concurring).[4] A requirement of parental notification "if possible" clearly serves the state's interest in assuring that the potentially devastating experience and the irreversible consequences of an abortion occur only upon exercise of the "best judgment" of a qualified physician using the traditional sources to secure the most complete medical history available. We can hardly assume that parental

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legally binding consent or the absence of an informed consent, notwithstanding the statute, which may be a fragile protection in a malpractice or battery suit.

[4] The proposed opinion suggests that the absence of a detailed description in the statute of the information parents may provide to physicians, or of a mandatory delay period, somehow undermines the constitutionality of the statute. [pp. 13-15,16.] That notion finds no support in our decisions.

support in the days preceding and following the abortion is undesirable as a purely medical matter.

In an effort to carry across some sort of equal protection theory, the proposed opinion would attach significance to the fact that Utah allows minors to obtain childbirth delivery without notice to the parents. Pp. 12,15. The state's interests in that situation, however, are vastly different. The reason this case is before us is precisely that the parents are ordinarily to be notified about their child's decision whether or not to carry the unborn child to term. If the pregnant girl does elect to carry the child to term, the medical decisions to be made in themselves entail few, if any, of the emotional and psychological consequences of the abortion decision. Moreover, Nature, not physicians, fixes the time of delivery.

In our Roe, Doe, Danforth, and Bellotti II decisions, we focused on the rights of the pregnant woman or girl. We recognized, however, that these rights are not absolute and that they do not justify complete disregard of either traditional or constitutional rights of others. E.g., Bellotti II, 443 U.S. at 634-39 (Powell,

J.); Roe, 410 U.S. at 153; see also Danforth, 428 U.S. at 79-81; Doe, 410 U.S. at 208 (Burger, C.J., concurring).

Nowhere is this more clear than in the area of abortions for minors. See Bellotti II, 443 U.S. at 637-39 (Powell, J.). The reason is self-evident: absent record evidence to the contrary, protection of family privacy and the historic rights of parents is itself an essential vehicle to protection of the rights and best interests of minors.

Here we deal with a minor girl not emancipated by marriage or otherwise. The record is totally silent as to her maturity or lack of maturity, silent as to her relations with her parents,[5] silent as to whether the doctor or social worker thought that giving the statutory notice was against the minor's interest. We have no more than the naked assertion of a 15-year-old that in her judgment it was not in her interest to notify the parents.[6] On this record it is

True - and important

[5] There is no record support for the "surmise" at page 9,n.24, of the proposed opinion that "appellant expects family conflict over the abortion decision."

[6] Indeed, the premise in the proposed opinion that appellant's physician "advised her that he believed that an abortion would be in her best medical

inconceivable that the Constitution can be read to forbid a state to require that a physician contemplating an abortion on a minor unmarried girl must give some minimal notice.

For the foregoing reasons, I would affirm. I expect to write along these lines. Obviously if I write a dissent for myself, as this memo is cast, the approach will not be the same as writing a Court or plurality opinion affirming. An opinion could be considerably shorter than this exposition.

Regards,

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interest" [pp. 2, 20n.47] and the conclusion that the Utah statute "prevents implementation of the physician's medical recommendation" [p.23] are totally unsupported by the record. The factual premise is not even alleged in appellant's complaint.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 18, 1980

Re: No. 79-5903, H.L. v. MATHESON

Dear John:

I welcome your comments. My purpose in sending the memorandum of November 17, was to probe for a common denominator that might possibly grow into a narrow opinion. I am for making it narrow.

Regards,

WEB

Justice Stevens

cc: Justice Stewart
Justice White
Justice Powell
Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

November 18, 1980

Re: 79-5903 - H.L. v. Matheson

Dear Chief:

Thank you for sharing your preliminary memorandum with me. One can never be sure until a memorandum is converted into an opinion, but I am presently inclined to believe that I do not agree with a good deal of what you have written. My view is that the state's interest in protecting young people from harm justifies the parental notice requirement. I would say little more than I said in my separate opinion in Danforth, 428 U.S., at 102, 105.

Respectfully,

The Chief Justice

cc: Justice Stewart
Justice White
Justice Powell
Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 19, 1980

Re: No. 79-5903, U.L. v. Matheson

Dear Chief,

My views closely parallel those expressed by Lewis in his letter to you of today.

Sincerely yours,

P.S.

The Chief Justice

Copies to Justice White
Justice Powell
Justice Rehnquist
Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 19, 1980

No. 79-5903 H. L. v. Matheson

Dear Chief:

This refers to your memorandum of November 17 in which you sketch out a draft opinion in this case, and ask whether it is generally acceptable.

As you know, Potter and I voted to reverse. Each of us, however, has advised Thurgood that we cannot join his opinion. See my letter to him of November 12.

You have written a strong memorandum. Although I agree with a good deal of what you say, I am not sure that portions of it can be harmonized with our precedents. In any event, I could not join you because - as I read the memorandum - you would sustain a statute that required notice to the parents, but provided no independent decision maker to whom a minor could have recourse if she thinks she is mature or that notification would not be in her best interests.

Thus, if the pregnant minor in this case (petitioner) had shown that she was mature enough to be emancipated or even that notification of her parents would be detrimental to her best interests, I would hold the Utah statute invalid as applied to such a minor because of the absence of any independent decision maker to whom she could turn.

In this case, however, as you point out, the record is silent as to petitioner's maturity and as to whether notification would be adverse to her best interest. You correctly state that we have "no more than the naked assertion of a 15-year-old that in her judgment it was not

in her best interest to notify the parents." Moreover, the class certified by the trial court appears to include only minors similarly situated. Accordingly, as presently advised, I believe I can join a judgment of affirmance.

I will write briefly to reaffirm my Bellotti II views.

Sincerely,

Lewis

The Chief Justice

LFP/lab

cc: Mr. Justice Stewart
Mr. Justice White
Mr. Justice Rehnquist
Mr. Justice Stevens

November 19, 1980

No. 79-5903 H. L. v. Matheson

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This refers to your memorandum of November 17 in which you sketch out a draft opinion in this case, and ask whether it is generally acceptable.

As you know, Potter and I voted to reverse. Each of us, however, has advised Thurgood that we cannot join his opinion. See my letter to him of November 12.

You have written a strong memorandum. Although I agree with a good deal of what you say, I am not sure that portions of it can be harmonized with our precedents. In any event, I could not join you because - as I read the memorandum - you would sustain a statute that required notice to the parents, but provided no independent decision maker to whom a minor could have recourse if she thinks she is mature or that notification would not be in her best interests.

Thus, if the pregnant minor in this case (petitioner) had shown that she was mature enough to be emancipated or even that notification of her parents would be detrimental to her best interests, I would hold the Utah statute invalid as applied to such a minor because of the absence of any independent decision maker to whom she could turn.

In this case, however, as you point out, the record is silent as to petitioner's maturity and as to whether notification would be adverse to her best interest. You correctly state that we have "no more than the naked assertion of a 15-year-old that in her judgment it was not

in her best interest to notify the parents.* Moreover, the class certified by the trial court appears to include only minors similarly situated. Accordingly, as presently advised, I believe I can join a judgment of affirmance.

I will write briefly to reaffirm my Bellotti II views.

Sincerely,

The Chief Justice

LFP/lab

cc: Mr. Justice Stewart
Mr. Justice White
Mr. Justice Rehnquist
Mr. Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

JUSTICE BYRON R. WHITE

November 24, 1980

Re: No. 79-5903: H. L. v. Matheson

Dear Chief,

I could join major parts of your circulating memorandum if converted to an opinion, whether majority, concurring or dissenting. Some parts I would not embrace since I continue to disagree with the original abortion opinions and would very likely say so.

I shall await developments.

Sincerely yours,

The Chief Justice

Copies to the Conference

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

Strong opinion for view that a parental notice requirement is valid

79-5903 - H.L. v. Matheson

From: Mr. Justice Stevens

Circulated: DEC 16 '80

Recirculated: _____

JUSTICE STEVENS, dissenting.

In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 72-75 (1976), the Court held that a pregnant minor's right to make the decision to obtain an abortion may not be conditioned on parental consent. My dissent from that holding, id., at 102-105, does not qualify my duty to respect it as a part of our law. See Bellotti v. Baird, 443 U.S. 622, 652-656 (1979) (STEVENS, J., concurring). However, as I noted in Bellotti, neither that case nor Danforth "determines the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto." 443 U.S., at 654 n.1. Since the outcome in this case is not controlled by Danforth, the principles that I considered dispositive of the parental consent issue in that case plainly dictate that the Utah statute now before us be upheld.

Renewed 12/17

The fact that a State statute may have some impact upon a minor's exercise of his or her rights begins, rather than ends, the constitutional inquiry. Once the statute's impact is identified, it must be evaluated in light of the State interests underlying the statute. The State interest that the Utah statute at issue in this case attempts to advance is essentially the same State interest at issue in Danforth. As I noted in Danforth, that interest is fundamental and substantial:

> "The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible. Therefore, the holding in Roe v. Wade [410 U.S. 113 (1973)] that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision; it does not lead to the conclusion that the state legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision.
>
> "The abortion decision is, of course, more important than the decision to attend or to avoid an adult motion picture, or the decision to work long hours in a factory. It is not necessarily any more important than the decision to run away from home or the decision to marry. But even if it is the most important kind of a decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative." 428 U.S., at 102-103.

In my opinion, the special importance of a young woman's abortion decision, emphasized by the Court, ante, at 6-7, provides a special justification for reasonable State efforts intended to ensure that the decision be wisely made. Such reasonable efforts surely may include a requirement that an abortion be procured only after consultation with a licensed

physician. And, because "the most significant consequences of the [abortion] decision are not medical in character," 428 U.S., at 103, the State unquestionably has an interest in ensuring that a young woman receive other appropriate consultation as well. In my opinion, the quality of that interest is plainly sufficient to support a State legislature's determination that such appropriate consultation should include parental advice.

Of course, the Court's conclusion that the Utah statute is invalid does not prevent young pregnant women from voluntarily seeking the advice of their parents prior to making the abortion decision. But the State may legitimately decide that such consultation should be made more probable by ensuring that parents are informed of their daughter's decision:

> "If there is no parental-[notice] requirement, many minors will submit to the abortion procedure without ever informing their parents. An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which would in fact be loving, supportive, and, indeed, for some indispensable. It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will . . . [act] arbitrarily to further a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested in the welfare of their children,[1] and further,

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Footnote(s) 1 appear on following page(s).

> that the imposition of a parental-[notice] requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and to implement a correct decision." 428 U.S., at 103-104.

Utah's interest in its parental-notice statute is not diminished by the fact that there can be no guarantee that meaningful parent-child consultation will actually occur.[2] Good faith compliance with the statute's requirements would tend to facilitate communication between daughters and parents regarding the abortion decision. The possibility that some parents will

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[1] My conclusion, in this case and in Danforth, that a state legislature may rationally decide that most parents will, when informed of their daughter's pregnancy, act with her welfare in mind is consistent with the "pages of human experience that teach that parents generally do act in the child's best interests" relied upon by the Court in Parham v. J.R., 442 U.S. 584, 602-603 (1979). It is also consistent with JUSTICE BRENNAN's opinion in Parham, which I joined. Id., at 625-639.

As the Court noted in Parham, the presumption that parents act in the best interests of their children may be rebutted by "experience and reality." Id., at 602-603. In my opinion, nothing in the fact that a minor child has become pregnant, and therefore may be confronted with the abortion decision, undercuts the general validity of the presumption. However, when parents decide to surrender custody of their child to a mental hospital and thereby destroy the ongoing family relationship, that very decision raises an inference that parental authority is not being exercised in the child's best interests. See id., at 631-632 (BRENNAN, J., dissenting in part). Accordingly, while the abortion decision and the commitment decision are of comparable gravity, reliance upon the "pages of human experience" is, in my judgment, more appropriate in the former case than in the latter.

[2] Indeed, the Court's criticism of this aspect of the Utah statute, ante, at 16, is curious in light of the Court's statement that Utah "cannot legally or practically require such consultation." Id. Certainly the statute cannot be constitutionally defective because the State failed to require what the Court believes it is without legal authority to require.

not react with compassion and understanding upon being informed of their daughter's predicament or that, even if they are receptive, they will incorrectly advise her, does not undercut the legitimacy of the State's attempt to establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision.

The opinion of the Court properly emphasizes the important and sensitive nature of a minor's decision to procure an abortion; the Court improperly, in my judgment, bars the State from taking reasonable steps to ensure that this decision is well-advised and wisely made. Because my view in this case, as in Danforth, is that the State's interest in protecting a young pregnant woman from the consequences of an incorrect abortion decision is sufficient to justify the parental-notice requirement, I respectfully dissent.

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: DEC 16 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Reviewed LFP 12/16

No. 79-5903

H. L., etc., Appellant, v. Scott M. Matheson et al. | On Appeal from the Supreme Court of Utah.

[December —, 1980]

1. A vast improvement over CJ's memo originally circulated.
2. The "overbreadth" attack by TM is properly rejected. These appellants have no standing to allege overbreadth. 5-
3. I would defined properly - 6 (though I would frame it differently.
4. I probably could join Parts I & II. But III B (pp 6-10 purports to restate the law of abortion in a way I'd have trouble joining.
5. Part III B is good in some respects, but I want to write separately as to all of III.

CHIEF JUSTICE BURGER, dissenting.

The question presented in this case is whether a state statute which requires a physician to "notify, if possible" the parents of a dependent, unmarried minor girl prior to performing an abortion on the girl violates federal constitutional guarantees.

I

In the spring of 1978, appellant was an unmarried 15-year-old girl living with her parents in Utah and dependent on them for her support. She discovered she was pregnant. She consulted with a social worker and a physician. The physician advised appellant that an abortion would be in her best medical interest. However, because of Utah Code Ann. (1953) § 76-7-304, he refused to perform the abortion without first notifying appellant's parents.

Section 76-7-304, enacted in 1974, provides:

> "To enable a physician to exercise his best medical judgment [in considering a possible abortion], he shall:
>
> "(1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,
>
> "(a) Her physical, emotional and psychological health and safety,
>
> "(b) Her age,
>
> "(c) Her familial situation.

"(2) *Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor* or the husband of the woman, if she is married." (Emphasis supplied.)[1]

Violation of this section is a misdemeanor punishable by imprisonment for not more than one year or a fine of not more than $1,000.[2]

Appellant believed "for [her] own reasons" that she should proceed with the abortion without notifying her parents. According to appellant, the social worker concurred in this decision. While still in the first trimester of her pregnancy, appellant instituted this action in the Third Judicial District Court of Utah.[3] She sought a declaration that § 76-7-304 (2) is unconstitutional and an injunction prohibiting appellees, the Governor and the Attorney General of Utah, from enforcing the statute. Appellant sought to represent a class consisting of unmarried "minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies but may not do so" because of their physicians' insistence on

[1] Utah also requires that no abortion may be performed unless a voluntary and informed written consent is first obtained by the attending physician from the patient. In order for such a consent to be "voluntary and informed," the patient must be advised at a minimum about available adoption services, about fetal development, and about foreseeable complications and risks of an abortion. See Utah Code Ann. (1978) § 76-7-305. In *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 65-67 (1976), we rejected a constitutional attack on written consent provisions.

[2] Utah Code Ann. (1978) §§ 76-7-314 (3), 76-3-204 (1), 76-3-301 (1).

[3] Appellant's complaint also contained the unsubstantiated statement [illegible] not only that an abortion would be in appellant's best interests but also that parental notification would not be in appellant's best interests. However, at oral argument, counsel conceded that there was no record evidence to support this assertion. Tr. of Oral Arg. 17.

[4] The record does not reveal whether appellant proceeded with the abortion.

complying with § 76-7-304(2). The trial judge declined to grant a temporary restraining order or a preliminary injunction.[3]

The trial judge held a hearing at which appellant was the only witness. He construed the statute to require the treating physician to notify appellant's parents "if he is able to physically contact them." In sustaining appellant's objection, the judge refused to allow the State to inquire into the specific reasons why appellant did not wish to notify her parents.[4] Thereafter, the trial judge entered findings of fact and conclusions of law. He first certified the class represented by appellant, then reaffirmed his ruling that the statute requires notice if "physically possible." He concluded that § 76-7-304(2) "does not unconstitutionally restrict the right of privacy of a minor to obtain an abortion or to enter into a doctor-patient relationship."[5] Accordingly, he dismissed the complaint.

On appeal, the Supreme Court of Utah unanimously upheld the statute. *H. L.* v. *Matheson*, 604 P. 2d 907 (1979). Relying on our decisions in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976), *Carey* v. *Population Services International*, 431 U. S. 678 (1977), and *Bellotti* v. *Baird*, 443 U. S. 622 (1979) (*Bellotti II*), the court concluded that the statute serves "significant state interest[s]" that are present with respect to minors but absent in the case of adult women.

The court looked first to subsection (1) of § 76-7-304. This provision, the court observed, expressly incorporates the

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[3] The trial judge allowed appellant to proceed without appointment of a guardian ad litem. He noted that a guardian would be required to notify the parents.

[4] There is [illegible] in the proposed Court opinion [illegible] 21 [illegible] appellant expressly [illegible] the abortion decision.

[5] The trial judge also concluded that the statute does not violate 42 U. S. C. § 1983.

factors we identified in *Doe* v. *Bolton*, 410 U. S. 179 (1973), as pertinent to exercise of a physician's best medical judgment in making an abortion decision. In *Doe*, we stated:

> "We agree with the District Court . . . that the medical judgment may be exercised in the light of *all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient*. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment." *Id.*, at 192 (emphasis supplied).

Section 76-7-304.10 of the Utah statute suggests that the legislature sought to reflect the language of *Doe*.

The Utah Supreme Court held that notifying the parents of a minor seeking an abortion is "substantially and logically related" to the *Doe* factors set out in § 76-7-304.10 because *parents ordinarily possess information essential to a physician's exercise of his best medical judgment* concerning the child. 694 P. 2d, at 608-610. The court also concluded that encouraging an unmarried pregnant minor to seek the advice of her parents in making the decision of whether to carry her child to term promotes a significant state interest in supporting the important role of parents in child-rearing. 694 P. 2d, at 612. The court reasoned that since the statute allows no veto power over the minor's decision it does not unduly intrude upon a minor's rights.

The Utah Supreme Court also rejected appellant's argument that the phrase "if possible" in § 76-7-304.12 should be construed to give the physician discretion whether to notify appellant's parents. The court concluded that the physician is required to notify parents "if under the circumstances, in the exercise of reasonable diligence, he can ascertain their identity and location and it is feasible or practicable to give them notification." The court added, however, that "the time element is an important factor, for there must be sufficient expedition to provide an effective opportunity for an abortion." 694 P. 2d, at 613.

Parents ordinarily possess relevant info.

II

Appellant challenges the statute as unconstitutional on its face. She contends it is overbroad in that it can be construed to apply to all unmarried minor girls, including those who are mature and emancipated. However, she did not allege or offer evidence that either she or any member of her class is mature or emancipated.[8] The record shows only that appellant is an unmarried female living at home and wholly dependent on her parents. That affords an insufficient basis for a finding that she is either mature or emancipated. Under *Harris* v. *McRae*, — U. S. —, — (1980), she lacks "the personal stake in the controversy needed to confer standing" to advance the overbreadth argument.

There are particularly strong reasons for applying established rules of standing in this case. The United States District Court for Utah has held that § 76–7–304 (2) does not apply to emancipated minors and that, if so applied, it would be unconstitutional. *L. R.* v. *Hansen*, Civil No. C–80–0078J (Feb. 8, 1980). Since there was no appeal from that ruling, it is controlling on the State. We cannot assume that the statute, when challenged in a proper case, will not be construed also to exempt demonstrably mature minors. See *Bellotti* v. *Baird*, 428 U. S. 132, 146–148 (1976) (*Bellotti I*). Nor is there any reason to assume that a minor in need of emergency treatment will be treated in any way different from a similarly situated adult.[9] The Utah Supreme Court has

[8] In *Bellotti II*, by contrast, the principal class consisted of "unmarried [pregnant] minors in Massachusetts *who have adequate capacity to give a valid and informed consent* [to abortion], and who do not wish to involve their parents." *Id.*, at 626 (emphasis supplied). The courts considered the rights of "all pregnant minors who might be affected" by the statute. *Id.*, at 627, n. 5.

[9] There is no authority for the view expressed in the proposed Court opinion that the statute would apply to "minors with emergency health care needs" —, at 20–21. Appellant does not so contend, and the Utah Supreme Court in this case took pains to say that time is of the essence

had no occasion to consider the application of the statute to such situations. In *Bellotti I*, *supra*, we unanimously declined to pass on constitutional challenges to an abortion regulation statute because the statute was "susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least substantially change the nature of the problem." *Id.*, at 147, quoting *Harrison* v. *NAACP*, 360 U. S. 167, 177 (1959). *See Kleppe* v. *New Mexico*, 426 U. S. 529, 546–547 (1976); *Askew* v. *Tennessee Valley Authority*, 297 U. S. 288, 340–341 (1936) (concurring opinion). I reaffirm that precedent and find it controlling here insofar as appellant's allegations purported statutory exclusion of mature and emancipated minors.

The only issue before us, then, is the "facial" constitutionality of a statute requiring a physician to give notice to parents "if possible," prior to performing an abortion on their minor daughter who is living with and dependent upon her parents or who is not emancipated by marriage or otherwise and is too young that she has made no claim or showing as to her maturity or as to her relations with her parents or that her parents would intervene

I issue defined narrowly!

III

A

Appellant contends the statute violates the right to privacy recognized in our prior cases with respect to abortions. She places primary reliance on *Bellotti II*, *supra*, 443 U. S., at 642, 655. In *Danforth*, *supra*, we struck down state statutes that imposed a requirement of prior written consent of the patient's

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[illegible] Justice [illegible] at 22 at 903. When the specific question was properly [illegible] *Bellotti II*, the Massachusetts statute was construed [illegible] [illegible]. *Id.*, at 641.

The same is true for minors with hostile home situations [illegible] by appellant's [illegible] and for the pregnant minor [illegible].

note

spouse and of a minor patient's parents as a prerequisite for an abortion. We held that a state

> "does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Id.*, at 74.

We emphasized, however, "that our holding . . . does not suggest that every minor, regardless of age or maturity may give effective consent for the termination of her pregnancy." *Id.*, at 75, n. 13 (citing *Bellotti II*, *supra*). There is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion.

In *Bellotti II*, dealing with a class of concededly mature pregnant minors, we struck down a Massachusetts statute requiring parental or judicial consent before an abortion could be performed on a[n] unemancipated minor. There the State's highest court had construed the statute to allow a court to override the minor's decision, even if the court found that the minor was capable of consenting and in fact had made an informed and reasonable decision to have an abortion. We held, among other things, that the statute was unconstitutional for failure to allow mature minors to decide to undergo abortions without parental consent. Four Justices concluded that the flaws in the statute were that, as construed by the state court, it permitted overruling of a mature minor's decision to abort her pregnancy, and it "requires parental notification or participation in every instance, without affording the pregnant minor an opportunity to prove that she is mature enough to consent or that an abortion would be in her best interest." *Id.*, at 651. Four Justices concluded that the defect was in making the abortion decision of a minor subject to veto by a third party, whether parent or judge. "No matter how mature

Check this.

and capable of informed decisionmaking" the minor might be. *Id.*, at 653–656.

Our cases to date stand for three propositions:

(a) Although there is no *per se* prohibition of state regulation affecting abortions during the first trimester of pregnancy,[10] any such regulation must be carefully scrutinized in light of the important and sensitive interests at stake.[11]

(b) The power of the state to regulate abortions of minor children "reaches beyond the scope of its authority over adults." [12] This is so because minors are more vulnerable and generally lack the experience, perspective, and judgment to recognize and avoid choices that are detrimental to their best interests. We have also recognized that parents have an important "guiding role" to play in the upbringing of their children,[13] which must include some right to counsel with them on important decisions. Legislation regulating minors' access to abortions therefore need only serve a significant state interest. *Danforth, supra*, 428 U. S., at 75.

(c) Although a state may not constitutionally legislate a blanket, unreviewable power of parents to veto their daughter's abortion,[14] a statute setting out a "mere requirement of parental notice" does not unconstitutionally invade

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[10] *E. g., Bellotti II, supra*, 443 U. S., at 643–644; *Bellotti I, supra*, 428 U. S., at 148–149; *Danforth, supra*, 428 U. S., at 65–67, 79–81; *Connecticut* v. *Menillo*, 423 U. S. 9, 11 (1975); *West Side Women's Services, Inc.* v. *City of Cleveland*, 450 F. Supp. 796, 798 (ND Ohio), aff'd mem., 582 F. 2d 1281 (CA6), cert. denied, 439 U. S. 983 (1978).

[11] *See Bellotti II, supra*, 443 U. S., at 642.

[12] *Bellotti II, supra*, 443 U. S., at 636, quoting *Ginsberg* v. *New York*, 390 U. S. 629, 638 (1968).

[13] *Bellotti II, supra*, 443 U. S., at 633–639; accord, *id.*, at 656–657 (dissenting opinion); see *Danforth, supra*, 428 U. S., at 75, 90–91; *Bellotti I, supra*, 428 U. S., at 145, 147.

[14] *Bellotti II, supra*, 443 U. S., at 642–643, 653–656; *Danforth, supra*, 428 U. S., at 74.

a minor's privacy or unconstitutionally burden her right to seek an abortion.[7]

Five Members of this Court in *Bellotti II* agreed that as a general rule, a mere requirement of parental notice does not offend the Constitution. Four Justices joined in stating:

> "[Plaintiffs] suggest . . . that the mere requirement of parental notice [unduly] burdens the right to seek an abortion. As stated in Part II above, however, parental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make im- [illegible] . . . As immature minors often lack the [illegible] [fu]lly informed choices that take account of both [illegible] and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It [m]ay further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns.
>
> * * *
>
> "[illegible] can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried [pregnant minor] to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place." *Id.*, at 640-641, quoting

[7] *Bellotti II* [illegible] (dissenting opinion); [illegible] 428 U. S. [illegible] (concurring opinion); [illegible] U. S., [illegible] 75-76.

Danforth, supra, 428 U. S., at 91 (concurring opinion) (footnotes omitted).

Accord, *id.*, at 657 (dissenting opinion).

In addition, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg* v. *New York*, 390 U. S. 629, 639 (1968) (plurality opinion). In *Quilloin* v. *Walcott*, 434 U. S. 246 (1978), the Court expanded on this theme:

> "[W]e have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. See, e. g., *Wisconsin* v. *Yoder*, 406 U. S. 205, 231–233 (1972); *Stanley* v. *Illinois*, 405 U. S. 645 (1972); *Meyer* v. *Nebraska*, 262 U. S. 390, 399–401 (1923). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Id.*, at 232; *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944)."

See also *Parham* v. *J. R.*, 442 U. S. 584, 602 (1979); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925).

E

The Utah statute, as I have noted earlier, gives neither parents nor judges a veto power over the minor's abortion decision. As in *Bellotti I*, *supra*, we are concerned with a statute directed toward minors, as to whom there are unquestionably greater risks of inability to give an informed consent.

[illegible]

consent." *Id.*, at 147. The important considerations of family integrity[illegible] and protecting adolescents[illegible] which we identified in *Bellotti II* are plainly served by the statute. Also, the Utah Supreme Court correctly held that the statute serves a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician. The medical, emotional, and psychological consequences of an abortion are to put it mildly serious; and this is particularly so when the patient is immature.[illegible] An adequate medical and psychological case history is important to the physician. Besides providing medical and psychological data, parents are in an excellent position to refer the physician to other sources of medical history, such as family physicians.

Appellant intimates that the statute's failure to declare, in terms, a detailed description of what information parents may provide to physicians, or of a mandatory period of delay after the physician notifies the parents, renders the statute unconstitutional. She reasons that with these lapses it is much less likely that meaningful parental consultation will occur. The notion that the statute must itemize that kind of information finds no support in logic, experience, or our decisions. And as the Utah Supreme Court recognized, 604 P. [illegible]

[illegible] *Bellotti II*, supra, 443 U. S., at 637-639. The short time given by the [illegible]

[illegible] *Bellotti II*, supra, [illegible]

[illegible]

Id., at 933, time is of the essence in an abortion decision. The Utah statute is reasonably calculated to protect minors in appellant's class by enhancing the potential for parental consultation concerning a decision that has potentially traumatic consequences.

Appellant also contends that the constitutionality of the statute is undermined by the fact that Utah allows a pregnant minor to consent to other medical procedures without formal notice to her parents if she carries the child to term. The State's interests in full-term pregnancies, however, are sufficiently different to justify the line drawn by the statutes. Cf. *Maher* v. *Roe*, 432 U. S. 464, 473-474 (1977). If the pregnant girl elects to carry her child to term, the *medical* decisions to be made entail few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort.

That the requirement of notice to parents may inhibit some minors from seeking abortions is not a valid basis to void the statute. Some unmarried pregnant minors may desire to avoid disclosing their condition to their parents no matter what may be the family relationship. But the Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state

[illegible] Ill. Rev. Stat. Ann. [illegible]; Me. Rev. Stat. Ann. tit. 22, § 1597 [illegible] Tenn. Code Ann. [illegible]

[illegible]

[illegible] Utah Code Ann. [illegible]

the past year, we recognized that state action "encouraging childbirth except in the most urgent circumstances" is "rationally related to the legitimate governmental objective of protecting potential life." *Harris* v. *McRae*, *supra*, — U. S., at — —. Accord, *Maher* v. *Roe*, *supra*, 432 U. S., at 473-474.

As applied to the class properly before us, the statute plainly serves important state interests, is narrowly drawn to protect only those interests, and does not violate any guarantees of the Constitution. I would affirm the judgment of the Supreme Court of Utah.

See discussion [illegible] n. 20, supra.

[illegible] the right to [illegible] We decline to reach this question. [illegible]

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 18, 1980

Re: 79-5903 - H. L. v. Matheson

Dear Chief:

I agree with the views that Lewis has expressed in his letter to you of December 18.

Sincerely yours,

P. S.

The Chief Justice

Copies to: Justice White
Justice Powell
Justice Rehnquist
Justice Stevens

December 18, 1980

79-5903 H.L., etc. v. Matheson

Dear Chief:

This refers to your opinion circulated December 16, characterized as a dissent.

As stated in my letter to Thurgood of November 12, I cannot join his opinion as it recognizes a far more absolute right in a minor than I could accept. I still adhere generally to the views expressed in my Bellotti II opinion.

I agree with you that, on the basis of the facts in this case, appellants have no standing to argue overbreadth. Your statement of the "issue before us" on page 6 is quite close to my view as to the posture of the case. I therefore believe I can join your Parts I and II.

Part III, as presently written, gives me some difficulty in view of Bellotti II. I believe that portion of your opinion will be read as holding that a state validly may require notice to parents in cases that may differ substantially from this one. In Bellotti, four of us stated that a statute of this kind should provide for an independent decision maker to whom a minor could have recourse if she thinks she is mature and needs no parental guidance, or if she thinks that notification otherwise would not be in her best interests.

Your Part III also purports to summarize our abortion decisions, and quotes selectively from several opinions including Bellotti II. As there has been so much writing in these decisions, with varying shades of opinion expressed, I would prefer not to try to make a general "restatement" of abortion law. I wonder whether in this case it is useful to undertake this.

At Conference, Potter and I voted to reverse. At that time I read the trial court's finding on page 40 of the appendix as saying - though inartfully - that a physician

had concluded it would not be in the best interest of this minor to notify her parents. Now that I have read the record with greater care, I am satisfied that my initial reading of the ambiguous language on App. 40 was incorrect. Thus, as you state, we have a test case that presents the most extreme situation: a 15-year-old minor, living with her parents, claims an absolute right to be aborted without being required to give any reason other than her own personal wish and belief that it is in her best interest not to inform her parents. I find nothing in the record that indicates even that the doctor had examined her or that there were medical reasons for not notifying her parents. Accordingly, I will now join a judgment to affirm, holding that the statute is valid as applied to these facts.

I am drafting a concurring opinion along the foregoing lines, and should have it shortly. I would like to be able also to join your opinion. Since I am committed to my Bellotti II views, would it be possible for you to revise your Part III to accommodate the two concerns expressed above: (i) reserve the notion that an independent decision maker should be required, and (ii) reduce substantially the selective quotations from other decisions especially Bellotti II?

Sincerely,

The Chief Justice

LFP/lab

cc: Justice Stewart
Justice White
Justice Rehnquist
Justice Stevens

lfp/ss 12/26/80

MEMORANDUM

TO: Greg DATE: Dec. 26, 1980

FROM: Lewis F. Powell, Jr.

79-5903 H. L. v. Matheson

Despite what at times seemed almost like a losing battle with the flu, I have reviewed your draft memorandum of 12/18. Its substance is fine, and in accordance with our previous discussion and memos.

I have redictated a substantial part of it. My preimary purpose was to reduce the length, incorporating by reference the relevant portions of Bellotti II. I also have omitted from the text the discussion of the famous ambiguous finding on page 40 of the appendix. My recollection is that Justice Marshall does not rely primarily on it. Even if he did, I would prefer to deal with this in a footnote. Your treatment of the evidence, demonstrating that it did not enlarge on the complaint averments and indeed can be said to have narrowed them, would have left the trial court's finding unsupported by evidence even if it were not ambiguous. Not only was there an absence of supportive evidence, but - as you noted - appellant's counsel expressly argued that the facts beyond the complaint's averments were irrelevant. I would prefer, however, to take the position

in the note that at best the Court's finding is ambiguous; in light of the evidence and statements by counsel, it must be construed as we have read it; but, in any event, in view of counsel's concession as to irrelevancy, the finding is redundant.

I approve of your setting forth in the footnotes the entire pertinent testimony. You might also include counsel's final summation, as the end of the hearing, of what the trial court ruled. I included this in my memorandum.

In describing the interests that may be weighed where a minor is concerned, I would like to add a reference to the state's interest in the family itself as one of the great humanizing institutions of civilization. I think you will find a good quote along these lines in my opinion in Moore v. East Cleveland. I suggest that you put this "humpty-dumpty" together again in a second draft, having a co-clerk read it and send it down for a Chambers draft.

L.F.P., Jr.

ss

1-5-81

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-5903

H. L., etc., Appellant,
v.
Scott M. Matheson et al.
On Appeal from the Supreme Court of Utah.

[January -, 1981]

JUSTICE POWELL, concurring in the judgment.

This case requires the Court to consider again the divisive questions raised by a state statute intended to encourage parental involvement in the decision of a pregnant minor to have an abortion. See *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976); *Bellotti* v. *Baird*, 443 U. S. 662 (1979) (*Bellotti II*). I join Parts I and II of the Court's opinion, and concur in the judgment of the Court. I agree that Utah Code Ann. § 76-7-304 (2) does not unconstitutionally burden this appellant's right to an abortion. I do not join Part III of the opinion however, for the views that I express in *Bellotti II* lead me to conclude that a State cannot properly require, without allowing for exceptions that parents be notified of their minor daughter's abortion decision.

I

Section 304 (2) requires that a physician "[n]otify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor." Appellant attacks this notice requirement on the ground that it burdens the right of a minor who is emancipated, or who is mature enough to make the abortion decision independent of parental involvement, or whose parents will react obstructively upon notice. See *infra*, at 5. The threshold question, as the

[Section 304 (2) is quoted in full in the Court's opinion. *Ante*, at 1-2.]

Court's opinion notes, is whether appellant has standing to make such a challenge. Standing depends initially on what the complaint alleges. *Warth* v. *Seldin*, 422 U. S. 490, 498, 501 (1975), as courts have the power "only to redress or otherwise to protect against injury to the complaining party." *Id.*, at 499. The complaint in this case was carefully drawn. Appellant's allegations about herself and her familial situation are few and laconic. She alleged that she did "not wish to inform her parents of her condition and believe[d] that it [was] in her best interest that her parents not be informed of her condition." Complaint ¶ 6. She also alleged that she understood "what is involved in her decision," ¶ 9, and that the physician she consulted had told her that "he could not and would not perform an abortion upon her without informing her parents prior to aborting her." ¶ 7.

Appellant was 15 years of age and lived at home with her parents when she filed her complaint. She did not claim to be mature, and made no allegations with respect to her relationship with her parents. Nor, indeed, did she aver that there was reason to believe that they would be hostile or obstructive if notified. Similarly, the complaint contains no allegation that the physician, while apparently willing to perform the abortion, believed that notifying her parents would have adverse consequences. In fact, nothing in the record shows that the physician had any information about appellant's parents or familial situation, or even that he had examined appellant.

A

This case does not come to us on the allegations of the complaint alone. An evidentiary hearing occurred after the trial court had denied appellant's motion for a preliminary injunction. Appellant was the only witness, and her testimony[2] and statements by her counsel[3] make clear beyond any question that the "bare bones" averments of the complaint were deliberate, and that appellant is arguing that a

mere notice requirement is invalid *per se* without regard to the minor's age, whether she is emancipated, whether her parents are likely to be obstructive or understanding and sympathetic, or whether there is some health or other reason why notification would not be in the minor's best interests.

On direct examination appellant merely verified the allegations of her complaint by affirming each allegation as paraphrased for her by her lawyer.[2] Her testimony added nothing

[2] Appellant's total testimony about her decision and her family is as follows:

"Q [By MR. DOLOWITZ, appellant's lawyer]: At the time that the complaint in this matter was signed, you were pregnant?

"A Yes.

"Q You had consulted with a counselor about that pregnancy?

"A Yeah.

"Q You had determined after talking to the counselor that you felt you should get an abortion?

"A Yes.

"Q You felt that you did not want to notify your parents—

"A Right.

"Q —of that decision? You did not feel for your own reasons that you could discuss it with them?

"A Right.

"Q After discussing the matter with a counselor, you still believed that you should not discuss it with your parents?

"A Right.

"Q And they shouldn't be notified?

"A Right.

"Q After talking the matter over with a counselor, the counselor concurred in your decision that your parents should not be notified? [In response to a question from the bench, appellant's lawyer agreed that 'that shouldn't be recorded in this opinion.' Tr. of Oral Arg. [illegible].]

"A Right.

"Q You were advised that an abortion couldn't be performed without notifying them?

"A Yes.

"Q You therefore came to see about filing a suit?

"A Right.

"Q You understand that you're seeking to have the right to do what you want to do?

to the complaint. In addition, appellant's lawyer insistently objected to all questions by counsel for the State as to the appellant's reasons for not wishing to notify her parents.[5] The trial court, on its own initiative, pressed unsuccessfully to elicit some reasons, inquiring how it could "find out the validity of [appellant's] reasons without [the state's lawyer]

"A Yes.

"Q You decided that, after our discussion, you should still proceed with the action to try to obtain an abortion without notifying your parents?

"A Right.

"Q You feel that, from talking to the counselor and thinking the situation over and discussing it with me, that you could make the decision on your own that you wished to abort the pregnancy?

"A Yes.

"Q You are living at home?

"A Yes.

"Q You still felt, even though you were living at home with your parents, that you couldn't discuss the matter with them?

"A Right.

"MR. DOLOWITZ: I think that would be those questions to support the allegations we put out in the complaint."

[5] Appellant's total testimony on cross-examination was the following:

"MR. McCARTHY [the State's lawyer]: Let's start out this way. Are you still living at home?

"A Yes.

"Q Are you dependent on your parents?

"A Yes.

"Q All your money comes from them?

"A Yes.

"Q How old are you now?

"A. Fifteen.

"Q Aside from the issue of abortion, do you have any reason to feel that you can't talk to your parents about other problems?

"A Yes.

"Q What are those reasons?

MR. DOLOWITZ: Now you are moving into the problem area that I initiated. . . ."

being permitted to cross-examine her." Tr., at 86. Appellant's lawyer replied:

> "It is our position constitutionally that she has the right to make [the abortion] decision and if she has consulted with a counselor and the counselor concurs that those are valid reasons, why then—. . . . In terms of going beyond [the complaint allegations], our point is that the specifics of *the reasons are really irrelevant to the constitutional issue.*" Tr., at 86–87 (emphasis supplied).

When appellant's lawyer insisted that the facts with respect to this particular minor were irrelevant, the trial court sustained the validity of the statute.[4]

In sum, appellant alleges nothing more than that she desires an abortion, that she has decided—for reasons which she declined to reveal—that it is in her best interest not to notify her parents, and that a physician has agreed to perform the abortion. Although the trial court did not rule in terms of standing, it is clear that these bald allegations do not confer standing to claim either that § 304 (2) unconstitutionally burdens the right of a mature minor or a minor whose parents will react obstructively to notification.[5] They confer stand-

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[4] At the end of the evidentiary hearing, appellant's lawyer framed the trial court's ruling as follows:

"If your ruling is that 'if possible' [in the statute means "physically possible"] and there are no circumstances whatever that justify the violation of the statute, then the issue is closed." Tr., at 96.

[5] Because this case is a class action, it might be presumed that other members could raise the question whether a pregnant minor woman has a right to abortion, without parental notice, upon a showing that she is mature or that her parents will interfere with her abortion. But the record in this case contains no facts to support a presumption that the class includes such members. The only complaint allegations about the class are that appellant's claims "are typical of the claims of all members of the class," and that the class consists of "minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies but may not do so inasmuch as their physicians will not perform an abortion upon

ing only to claim that § 304 (2) is an unconstitutional burden upon an unemancipated minor who desires an abortion without parental notification but also desires not to explain to anyone her reasons either for wanting the abortion or for wanting it without parental notification.[5]

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them without compliance with the provisions of Section 76-7-304(2)." Complaint ¶ 10. Thus, the record only supports the conclusion that the other class members assert the identical claim that appellant presents: a constitutional right to an abortion without notifying their parents or explaining their reasons to anyone else if they and their physicians agree that an abortion is in their best interest.

[5] The trial court entered findings of fact and conclusions of law after the evidentiary hearing. Paragraph 7 of the trial court's findings reads:

"The plaintiff consulted with a counselor to assist her in deciding whether or not she should terminate her pregnancy. She determined, after consultation with her counselor, that she should secure an abortion but was advised when consulting her physician that under the provisions of Section 76-7-304(2), Utah Code Annotated, 1953, that he believed along with her that she should be aborted and that he felt it was in her best medical interest to do so but he could not and would not perform an abortion upon her without informing her parents prior to aborting her because it was required of him by that statute and he was unwilling to perform an abortion upon her without complying with the provisions of the statute even though he believed it was best to do so." *H. L.* v. *Matheson*, Civil No. C-78-2719 (Dec. 20, 1978).

Precisely what this paragraph holds is ambiguous. At the least, it finds that appellant "consulted" a physician and that the physician agreed with appellant that an abortion would be in appellant's best medical interest. The final portion of the finding—"he was unwilling to perform an abortion upon her without complying with the provisions of the statute even though he believed it was best to do so"—could be read to find that the physician also agreed with appellant that "it was best" to "perform an abortion upon her without complying with the provisions" requiring parental notice. Or, the final portion could be read to find only that the physician would not perform an abortion without complying with the statute even though he believed that it was best to abort appellant's pregnancy. In light of appellant's limited allegations and testimony, and the legal arguments of her lawyer, the trial court's finding cannot be read to find that the physician determined that appellant's parents would react hostilely [illegible] of appellant's abortion decision.

B

On the facts of this case I conclude that § 304 (2) is not an unconstitutional burden on appellant's right to an abortion. Numerous and significant interests compete when a minor decides whether or not to abort her pregnancy. The right to make that decision is constitutionally protected, of course. *Roe* v. *Wade*, 410 U. S. 113, 154 (1973); *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, at 74–75. In addition, the minor has an interest in effectuating her decision to abort, if that is the decision she makes. *Id.*, at 75; *Bellotti II*, *supra*, at 647. The State, aside from the interest it has in encouraging childbirth rather than abortion, cf. *Maher* v. *Roe*, 432 U. S. 464 (1977); *Harris* v. *McRae*, — U. S. — (1980), has an interest in fostering such consultation as will assist the minor in making her decision as wisely as possible. *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, at 91 (STEWART, J., concurring); *post*, at — (STEVENS, J., dissenting). The State also may have an interest in the family itself, the institution through which "we inculcate and pass down many of our most cherished values, moral and cultural." *Moore* v. *City of East Cleveland*, 431 U. S. 494, 503–504 (1977). Parents have a traditional and substantial interest in, as well as a responsibility for, the nurture and welfare of their children, especially during immature years. *Bellotti II*, *supra*, at 637–639.

None of these interests is absolute. Even an adult woman's right to an abortion is not unqualified. *Roe* v. *Wade*, *supra*, at 154. Particularly when a minor becomes pregnant and considers an abortion, the relevant circumstances may vary widely depending upon her age, maturity, mental and physical condition, the stability of her home if she is not emancipated, her relationship with her parents, and the like. If we were to accept appellant's claim that § 304 (2) is *per se* an invalid burden on the asserted right of a minor to make the abortion decision, the circumstances which may

nally are relevant would—as her counsel conceded—be immaterial. The Court would have to decide that the minor's wishes are virtually absolute. To be sure, our cases have emphasized the necessity to consult a physician. But we have never held with respect to a minor that the opinion of a single physician as to the need or desirability of an abortion outweighs all state and parental interests.[2]

Although I join the judgment of affirmance in this case, I am not able to join Part III of the Court's opinion. It apparently would hold that a State validly may require notice to parents in all cases, without providing any type of independent decisionmaker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently or that notification otherwise would not be in her best interests. My opinion in *Bellotti II*, joined by three other Justices, stated at some length the reasons why such a decisionmaker is needed. *Bellotti II*, *supra*, at 642–648. The circumstances relevant to the abortion decision by a minor can and do vary so substantially that absolute rules—requiring parental notice in all cases or in none[2]—would create an inflexibility that often would allow for no consideration of the rights and interests identified above. Our cases have never gone to this extreme, and in my view should not. Accordingly, I cannot join Part III of the Court's opinion.

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[1] While the medical judgment of a physician or minister is to be respected, there is no reason to believe as a general proposition that even the most conscientious decision as to the overall welfare of a minor can be equated with that of most parents. Moreover, clear and objective tests readily available in most circumstances, must be applied on a constitutional basis where absolute rules may be challenged as unsound. *See Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, at 91–92 n. 2 (Stevens, J., concurring); *Bellotti II*, *supra*, at 641, n. 21.

[2] The dissenting opinion of Justice Marshall, which would hold the Utah statute invalid as it is now drawn, devotes the bulk of its analysis to an elaborate state-weighing state and parental interests

January 6, 1981

No. 79-5903 H. L., Etc. v. Matheson

Dear Potter:

Here is a first draft of a concurring opinion in this unattractive little case. As I have heard nothing further from the Chief, what would you think of circulating our draft at this time? It might get the process moving, and give the Chief a clear understanding of our position.

The alternative would be to send him the draft privately.

Sincerely,

Mr. Justice Stewart

LFP/lab

Enclosure

6

1/5/81

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-5003

B. L., etc., Appellant,
v.
Scott M. Matheson et al.
On Appeal from the Supreme Court of Utah.

[January --, 1981]

JUSTICE POWELL, concurring in the judgment.

This case requires the Court to consider again the divisive questions raised by a state statute intended to encourage parental involvement in the decision of a pregnant minor to have an abortion. *See Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976); *Bellotti* v. *Baird*, 443 U. S. 622 (1979) (*Bellotti II*). I join Parts I and II of the Court's opinion, and concur in the judgment of the Court. I agree that Utah Code Ann. § 76-7-304 (2) does not unconstitutionally burden this appellant's right to an abortion. I do not join Part III of the opinion, however, for the views that I express in *Bellotti II* lead me to conclude that a State cannot properly require, without allowing for exceptions, that parents be notified of their minor daughter's abortion decision.

I

Section 304 (2) requires that a physician "[n]otify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor."[1] Appellant attacks this notice requirement on the ground that it burdens the right of a minor who is not anticipated, or who is mature enough to make the abortion decision independent of parental involvement, or whose parents will react obstructively upon notice. *See ante*, at 5. The threshold question, as the

[1] Section 304 (2) is quoted in full in the Court's opinion. *Ante*, at 1-2.

Court's opinion notes, is whether appellant has standing to make such a challenge. Standing depends initially on what the complaint alleges. *Warth* v. *Seldin*, 422 U. S. 490, 498, 501 (1975), as courts have the power "only to redress or otherwise to protect against injury to the complaining party." *Id.*, at 499. The complaint in this case was carefully drawn. Appellant's allegations about herself and her familial situation are few and laconic. She alleged that she did "not wish to inform her parents of her condition and believe[d] that it [was] in her best interest that her parents not be informed of her condition." Complaint ¶ 6. She also alleged that she understood "what is involved in her decision," ¶ 9, and that the physician she consulted had told her that "he could not and would not perform an abortion upon her without informing her parents prior to aborting her." ¶ 7.

Appellant was 15 years of age and lived at home with her parents when she filed her complaint. She did not claim to be mature, and made no allegations with respect to her relationship with her parents. Nor, indeed, did she give that there was reason to believe that they would be hostile or obstructive if notified. Similarly, the complaint contains no allegation that the physician, while apparently willing to perform the abortion, believed that notifying her parents would have adverse consequences. In fact nothing in the record shows that the physician had any information about appellant's parents or familial situation, or even that he had examined appellant.

A

This case does not come to us on the allegations of the complaint alone. An evidentiary hearing occurred after the trial court had denied appellant's motion for a preliminary injunction. Appellant was the only witness, and her testimony and statements by her counsel make clear beyond any question that the "bare bones" averments of the complaint were deliberate, and that appellant is arguing that a

mere notice requirement is invalid *per se* without regard to the minor's age, whether she is emancipated, whether her parents are likely to be obstructive ~~or understanding and sympathetic~~, or whether there is some health or other reason why notification would not be in the minor's best interests.

On direct examination, appellant merely verified the allegations of her complaint by affirming each allegation as paraphrased for her by her lawyer.[1] Her testimony added nothing

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[1] Appellant's total testimony about her decision and her family is as follows:

"Q [by MR. DOLOWITZ, appellant's lawyer]: At the time that the complaint in this matter was signed you were pregnant?

"A Yes.

"Q You had consulted with a counselor about that pregnancy?

"A Yeah.

"Q You had determined after talking to the counselor that you felt you should get an abortion?

"A Yes.

"Q You felt that you did not want to notify your parents—

"A Right

"Q —of that decision? You did not feel for your own reasons that you could discuss it with them?

"A Right.

"Q After discussing the matter with a counselor, you still believed that you should not discuss it with your parents?

"A Right

"Q And they shouldn't be notified?

"A Right.

"Q After discussing the matter once with a counselor, the counselor concurred in your decision that your parents should [not] be notified? [In response to a question from the bench, appellant's lawyer agreed that 'not' should be inserted in this question. Tr. of Oral Arg., at —]

"A Right.

"Q You were advised that an abortion couldn't be performed without notifying them?

"A Yes.

"Q You then came to me to see about filing a suit?

"A Right.

"Q You and I discussed it as to whether or not you had a right to do what you wanted to do?

to the complaint. In addition, appellant's lawyer insistently objected to all questions by counsel for the State as to the appellant's reasons for not wishing to notify her parents.[2] The trial court, on its own initiative, pressed unsuccessfully to elicit some reasons, inquiring how it could "find out the validity of [appellant's] reasons without [the state's lawyer]

"A Yes.

"Q You decided that, after our discussion, you should still proceed with the action to try to obtain an abortion without notifying your parents?

"A Right.

. . . . .

"Q You feel that, from talking to the counselor and thinking the situation over and discussing it with me, that you could make the decision on your own that you wished to abort the pregnancy?

"A Yes

"Q You are living at home?

"A Yes.

"Q You still felt, even though you were living at home with your parents, that you couldn't discuss the matter with them?

"A Right.

"MR. DOLOWITZ: I think this would be those questions to support the allegations we just put in the complaint."

[2]Appellant's total testimony on cross-examination was the following:

"MR. McCARTHY [the State's lawyer]: Let's start out this way. Are you still living at home?

"A Yes.

"Q Are you dependent on your parents?

"A Yes.

"Q All your money comes from them?

"A Yes.

"Q How old are you now?

"A. Fifteen.

"Q Aside from the issue of abortion, do you have any reason to feel that you can't talk to your parents about other problems?

"A Yes.

"Q What are those reasons?

MR. DOLOWITZ: Now you are moving into the problem area that I indicated. . . ."

being permitted to cross-examine her." Tr. at 86. Appellant's lawyer replied:

> "It is our position constitutionally that she has the right to make [the abortion] decision and if she has consulted with a counselor and the counselor concurs that these are valid reasons, why then -. . . . In terms of going beyond [the complaint allegations], our point is that the specifics of *the reasons are really irrelevant to the constitutional issue.*" Tr., at 86-87 (emphasis supplied).

When appellant's lawyer insisted that the facts with respect to this particular minor were irrelevant, the trial court sustained the validity of the statute.[4]

In sum, appellant alleges nothing more than that she desires an abortion, that she has decided -for reasons which she declined to reveal- that it is in her best interest not to notify her parents, and that a physician has agreed to perform the abortion. Although the trial court did not rule in terms of standing, it is clear that these bald allegations do not confer standing to claim either that § 304 (2) unconstitutionally burdens the right of a mature minor or a minor whose parents will react obstructively to notification.[5] They confer stand-

[4] At the end of the evidentiary hearing, appellant's lawyer framed the trial court's ruling as follows:

"If your ruling is that of 'possible' [in the statute means "physically possible"] and there are circumstances whatever that justify the violation of the statute, then the issue is closed." Tr. at 98.

[5] Because this case is a class action it might be argued that other members could raise the question whether a pregnant minor woman has a right to abortion, without parental notice, upon a showing that she is mature or that her parents will react with her abortion. But the record in this case contains no facts to support a proposition that the class includes such members. The only complaint allegation about the class are that appellant's claims "are typical of the claims of all members of the class," and that the class consists of "pregnant women who are suffering unwanted pregnancies and desire to terminate the pregnancies but may not do so because their physicians will not perform an abortion upon

if notice was not required.

would be willing

best interests would not be served by parental notification

ing only to claim that § 304 (2) is an unconstitutional burden upon an unemancipated minor who desires an abortion without parental notification but also desires not to explain to anyone her reasons either for wanting the abortion or for ~~wanting it without parental notification.~~[6]

not wanting to notify her parents

them without compliance with the provisions of Section 76–7–304 (2)." Complaint, ¶ 10. Thus, the record only supports the conclusion that the other class members assert the identical claim that appellant presents: a constitutional right to an abortion, without notifying their parents or explaining their reasons to anyone else, if they and their physicians agree that an abortion is in their best interest.

[6] The trial court entered findings of fact and conclusions of law after the evidentiary hearing. Paragraph 7 of the trial court's findings reads:

"The plaintiff consulted with a counselor to assist her in deciding whether or not she should terminate her pregnancy. She determined, after consultation with her counselor, that she should secure an abortion, but was advised when consulting her physician that under the provisions of Section 76-7-304 (2), Utah Code Annotated, 1953, that he believed along with her that she should be aborted and that he felt it was in her best medical interest to do so but he could not and would not perform an abortion upon her without informing her parents prior to aborting her because it was required of him by that statute and he was unwilling to perform an abortion upon her without complying with the provisions of the statute even though he believed it was best to do so." *H. L.* v. *Matheson*, Civil No. C–78–2719 (Dec. 26, 1978).

Precisely what this paragraph finds is ambiguous. At the least, it finds that appellant "consulted" a physician and that the physician agreed with appellant that an abortion would be in appellant's best medical interest. The final portion of the finding—"he was unwilling to perform an abortion upon her without complying with the provisions of the statute even though he believed it was best to do so"—could be read to find that the physician also agreed with appellant that "it was best" to "perform an abortion upon her without complying with the provision[]" requiring parental notice. Or, the final portion could be read to find only that the physician would not perform an abortion without complying with the statute even though he believed that "it was best" to abort appellant's pregnancy. In light of appellant's limited allegations and testimony, and the legal argument of her lawyer, the trial court's finding cannot be read to find that the physician determined that appellant's parents would react hostilely or obstructively to notice of appellant's abortion decision.

B

On the facts of this case, I conclude that § 304 (2) is not an unconstitutional burden on appellant's right to an abortion. Numerous and significant interests compete when a minor decides whether or not to abort her pregnancy. The right to make that decision is constitutionally protected, of course. *Roe* v. *Wade*, 410 U. S. 113, 154 (1973); *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, at 74–75. In addition, the minor has an interest in effectuating her decision to abort, if that is the decision she makes. *Id.*, at 75; *Bellotti II*, *supra*, at 647. The State, aside from the interest it has in encouraging childbirth rather than abortion, cf. *Maher* v. *Roe*, 432 U. S. 464 (1977); *Harris* v. *McRae*, —— U. S. —— (1980), has an interest in fostering such consultation as will assist the minor in making her decision as wisely as possible. *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, at 91 (STEWART, J., concurring); *post*, at —— (STEVENS, J., dissenting). The State also may have an interest in the family itself, the institution through which "we inculcate and pass down many of our most cherished values, moral and cultural." *Moore* v. *City of East Cleveland*, 431 U. S. 495, 503–504 (1977). Parents have a traditional and substantial interest in, as well as a responsibility for, the rearing and welfare of their children, especially during immature years. *Bellotti II*, *supra*, at 637–639.

None of these interests is absolute. Even an adult woman's right to an abortion is not unqualified. *Roe* v. *Wade*, *supra*, at 154. Particularly when a minor becomes pregnant and considers an abortion, the relevant circumstances may vary widely depending upon her age, maturity, mental and physical condition, the stability of her home if she is not emancipated, her relationship with her parents, and the like. If we were to accept appellant's claim that § 304 (2) is *per se* an invalid burden on the asserted right of a minor to make the abortion decision, the circumstances which nor-

mally are relevant would—as her counsel conceded—be immaterial. The Court would have to decide that the minor's wishes are virtually absolute. To be sure, our cases have emphasized the necessity to consult a physician. But we have never held with respect to a minor that the opinion of a single physician as to the need or desirability of an abortion outweighs all state and parental interests.[7]

Although I join the judgment of affirmance in this case, I am not able to join Part III of the Court's opinion. It apparently would hold that a State validly may require notice to parents in all cases, without providing any type of independent decisionmaker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently or that notification otherwise would not be in her best interests. My opinion in *Bellotti II*, joined by three other Justices, stated at some length the reasons why such a decisionmaker is needed. *Bellotti II*, *supra*, at 642–648.[8] The circumstances relevant to the abortion decision by a minor can and do vary so substantially that absolute rules—requiring parental notice in all cases or in none[9]—would create an inflexibility that often would allow for no consideration of the rights and interests identified above. Our cases have never gone to this extreme, and in my view should not. ~~Accordingly, I cannot join Part III of the Court's opinion.~~

[7] While the medical judgment of a physician of course is to be respected, there is no reason to believe as a general proposition that even the most conscientious physician's interest in the overall welfare of a minor can be equated with that of most parents. Moreover, abortion clinics, now readily available in most urban communities, may be operated on a commercial basis where abortions often may be obtained "on demand." See *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, at 91–92, n. 2 (STEWART, J., concurring); *Bellotti II*, *supra*, at 641, n. 21.

[8] The dissenting opinion of JUSTICE MARSHALL, which would hold the Utah statute invalid on its face, elevates the decision of the minor and her physician to an absolute status ignoring state and parental interests.

8. Although *Bellotti II* involved a statute requiring parental consent, the rationale of the plurality opinion with respect to this need is applicable here.

1-7-81

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-5993

H. L., etc., Appellant,
v.
Scott M. Matheson et al.

On Appeal from the Supreme Court of Utah.

[January —, 1981]

Memorandum of Justice Powell.

This case requires the Court to consider again the divisive questions raised by a state statute intended to encourage parental involvement in the decision of a pregnant minor to have an abortion. See *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976); *Bellotti* v. *Baird*, 443 U. S. 622 (1979) (*Bellotti II*). I join Parts I and II of Mr. Chief Justice Burger's opinion. I also agree that Utah Code Ann. § 76-7-304 (2) does not unconstitutionally burden this appellant's right to an abortion. I do not join Part III of his opinion, however, for the views that I express in *Bellotti II* lead me to conclude that a State cannot properly require without allowing for exceptions, that parents be notified of their minor daughter's abortion decision.

Section 401 (2) requires that a physician "[n]otify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed if she is a minor." Appellant attacks this notice requirement on the ground that it burdens the right of a minor who is immature, or who is mature enough to make the abortion decision independent of parental involvement, or whose parents will react obstructively upon notice. See [illegible]. The threshold question on the Court's normal rules, is whether appellant has standing to

[illegible]

make such a challenge. Standing depends initially on what the complaint alleges. *Warth* v. *Seldin*, 422 U. S. 490, 498, 501 (1975), as courts have the power "only to redress or otherwise to protect against injury to the complaining party." *Id.*, at 499. The complaint in this case was carefully drawn. Appellant's allegations about herself and her familial situation are few and laconic. She alleged that she did "not wish to inform her parents of her pregnancy and believe[d] that it [was] in her best interest that her parents not be informed of her condition." Complaint ¶ 6. She also alleged that she understood "what is involved in her decision," ¶ 11, and that the physician she consulted had told her that "he could not and would not perform an abortion upon her without informing her parents prior to aborting her." ¶ 7.

Appellant was 15 years of age and lived at home with her parents when she filed her complaint. She did not claim to be mature, and made no allegations with respect to her relationship with her parents. She did not aver that they would be objectively notified or advance any other reason why notice to her parents would not be in her best interest. Similarly the complaint contains no allegation that the physician—while apparently willing to perform the abortion believed that notifying her parents would have adverse consequences. In fact nothing in the record shows that the physician had any information about appellant's parents or familial situation or even that he had examined appellant.

5

This case does not come to us on the allegations of the complaint alone. An evidentiary hearing occurred after the trial court had denied appellant's motion for a preliminary injunction. Appellant was the only witness, and her testimony and statements by her counsel make clear beyond any question that the "bare bones" averments of the complaint were deliberate and that appellant is arguing that a

mere notice requirement is invalid *per se* without regard to the minor's age, whether she is emancipated, whether her parents are likely to be obstructive, or whether there is some health or other reason why notification would not be in the minor's best interests.

On direct examination, appellant merely verified the allegations of her complaint by affirming each allegation as paraphrased for her by her lawyer.[2] Her testimony added nothing

---

[2] Appellant's total testimony about her decision and her family is as follows:

"Q [by MR. DANILOWITZ, appellant's lawyer]: At the time that the complaint in this matter was signed, you were pregnant?

"A Yes.

"Q You had consulted with a counselor about that pregnancy?

"A Yeah.

"Q You had determined after talking to the counselor that you felt you should get an abortion?

"A Yes.

"Q You felt that you did not want to notify your parents—

"A Right.

"Q —of this decision? You did not feel for your own reasons that you could discuss it with them?

"A Right.

"Q After discussing the matter with a counselor, you still believed that you should not discuss it with your parents?

"A Right.

"Q And they shouldn't be notified?

"A Right.

"Q After talking the matter over with a counselor, the counselor concurred in your decision that your parents should [not] be notified? [In response to a question from the bench, appellant's lawyer agreed that 'not' should be inserted in this question. Tr. of Oral Arg. —.]

"A Right.

"Q You were advised that an abortion couldn't be performed without notifying them?

"A Yes.

"Q You then came to see me about filing a suit?

"A Right.

"Q You and I discussed it as to whether or not you had a right to do what you wanted to do?

to the complaint. In addition, appellant's lawyer insistently objected to all questions by counsel for the State as to the appellant's reasons for not wishing to notify her parents. The trial court, on its own initiative, pressed unsuccessfully to elicit some reasons, inquiring how it could "find out the validity of [appellant's] reasons without [the state's lawyer] [illegible]

"A. Yes.

"Q. You decided that, after our discussion, you should still proceed with the action to try to obtain an abortion without notifying your parents?

"A. Right.

"Q. You feel that, after talking to the counselor and thinking the situation over and discussing it with me, that you could make the decision on your own that you wished to abort the pregnancy?

"A. Yes.

"Q. You are living at home?

"A. Yes.

"Q. You still felt, even though you were living at home with your parents, that you couldn't discuss the matter with them?

"A. Right.

"MR. ISOLOWITZ: I think that would be all the questions to support the allegations [illegible] complaint."

Appellant's entire testimony on cross-examination was the following:

"(MR. McCARTHY [the State's lawyer]): Let's start out this way. Are you still living at home?

A. Yes.

Q. Are you dependent on your parents?

A. Yes.

Q. All your money comes from them?

A. Yes.

Q. How old are you now?

"A. Fifteen.

"Q. Aside from the question of abortion, do you have any reason to feel that you can't talk to your parents about other problems?

A. Yes.

Q. What are those reasons?

MR. ISOLOWITZ: Now you are moving into the problem area that I reserved.

being permitted to cross-examine her." Tr., at 86. Appellant's lawyer replied:

> "It is our position constitutionally that she has the right to make [the abortion] decision and if she has consulted with a counselor and the counselor concurs that these are valid reasons why then . . . . In terms of going beyond [the complaint allegations], our point is that the specifics of *the reasons are really irrelevant to the constitutional issue*." Tr., at 86-87 (emphasis supplied).

When appellant's lawyer insisted that the facts with respect to this particular minor were irrelevant, the trial court sustained the validity of the statute.[6]

In sum, appellant alleges nothing more than that she desires an abortion, that she has decided—for reasons which she declined to reveal—that it is in her best interest not to notify her parents, and that a physician would be willing to perform the abortion if notice were not required. Although the trial court did not rule in terms of standing, it is clear that these bald allegations do not confer standing to claim either that § 304 (2) unconstitutionally burdens the right of a mature minor or a minor whose best interests would not be served by parental notification. They confer standing only to claim

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[6] At the end of the preliminary hearing, appellant's lawyer framed the trial court's ruling as follows:

"[illegible] that 'if possible' [in the statute] means 'physically possible' and there are no circumstances whatever that justify [illegible] other than [illegible]." Tr., at 90.

[7] Because this is a class action, it might be presumed that other members of the class [illegible] the question whether a pregnant minor was entitled to an abortion without parental notice upon a showing that she is mature or that her parents would interfere with her abortion. But the record [illegible] no facts to suggest a presumption that the class includes such members. The only complaint allegations regarding the class are that appellant is "representative of the class of all members of the class [illegible] of minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies but may

that § 76-7-304 (2) is an undue additional burden upon an unemancipated minor who desires an abortion without parental notification but also desires not to explain to anyone her reasons either for wanting the abortion or for not wanting to notify her parents.

[illegible]

The [illegible] will not perform an abortion upon [illegible] without compliance with the provisions of Section 76-7-304 (2) [illegible] Thus the record only supports the conclusion that the other class members [illegible] parents [illegible] without notifying their parents [illegible] abortions [illegible]

[illegible]

[illegible] Section 76-7-304 (2), Utah Code Annotated, 1953 [illegible]

[illegible]

[illegible]

B

On the facts of this case, I conclude that § 304 (2) is not an unconstitutional burden on appellant's right to an abortion. Numerous and significant interests compete when a minor decides whether or not to abort her pregnancy. The right to make that decision is constitutionally protected, of course. *Roe* v. *Wade*, 410 U. S. 113, 154 (1973); *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, at 74-75. In addition, the minor has an interest in effectuating her decision to abort, if that is the decision she makes. *Id.*, at 75; *Bellotti II*, *supra*, at 647. The State, aside from the interest it has in encouraging childbirth rather than abortion, cf. *Maher* v. *Roe*, 432 U. S. 464 (1977); *Harris* v. *McRae*, — U. S. [illegible] (1980), has an interest in fostering such consultation as will assist the minor in making her decision as wisely as possible. *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, at 91 (STEWART, J., concurring); *post*, at [illegible] (STEVENS, J., dissenting). The State also may have an interest in the family itself, the institution through which "we inculcate and pass down many of our most cherished values, moral and cultural." *Moore* v. *City of East Cleveland*, 431 U. S. 494, 503-504 (1977). Parents have a traditional and substantial interest in, as well as a responsibility for, the rearing and welfare of their children, especially during immature years. *Bellotti II*, *supra*, at 637-639.

None of these interests is absolute. Even an adult woman's right to an abortion is not unqualified. *Roe* v. *Wade*, *supra*, at 154. Particularly when a minor becomes pregnant and considers an abortion, the relevant circumstances may vary widely depending upon her age, maturity, mental and physical condition, the stability of her home if she is not emancipated, her relationship with her parents, and the like. If we were to accept appellant's claim that § 304 (2)

to find that the phys[illegible] determined that appellant's parents might react [illegible] [illegible] of [illegible] appellant's abortion decision.

is *per se* an invalid burden on the asserted right of a minor to make the abortion decision, the circumstances which normally are relevant would be her counsel overruled by immaterial. The Court would have to decide that the minor's wishes are virtually absolute. To be sure, our cases have emphasized the necessity to consult a physician. But we have never held with respect to a minor that the opinion of a single physician as to the need or desirability of an abortion outweighs all state and parental interests.[5]

Although I would join a judgment of affirmance in this case, I am not able to join Part III of Mr. Chief Justice's opinion. It apparently would hold that a State validly may require notice to parents in all cases, without providing any type of independent decisionmaker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently or that notification otherwise would not be in her best interests. My opinion in *Bellotti II*, joined by three other Justices, stated at some length the reasons why such a decisionmaker is needed. *Bellotti II*, *supra*, at 642 (OS).[6] The circumstances relevant to the abortion decision by a minor can and do vary so substantially that absolute rules requiring parental notice in all cases or in none[7] would create an inflexibility that often

---

[5] While the medical judgment of a physician of course is to be respected, there is no reason to believe as a general proposition that even the most conscientious physician's interest in the overall welfare of a minor can be equated with that of most parents. Moreover, abortion clinics, now readily available in most urban communities, are frequently not a minor's "family physician" or even "personal physician." *See Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, at 91-92, n. 2 (Stevens, J., concurring); *Bellotti II*, *supra*, at 641, n. 21.

[6] Although *Bellotti II* involved a statute requiring parental consent, my remarks on the notification issue will respond to the most appropriate form.

[7] The opinion of Justice Marshall, which would hold the Utah statute invalid because it gives the decision to the minor's parents rather than to an independent decisionmaker, ignores the parental interests

would allow for no consideration of the rights and interests identified above. Our cases have never gone to this extreme, and in my view should not

January 8, 1981

79-79-5903 H.L., etc. v. Matheson, et al

Dear Chief and Thurgood:

As Potter and I were somewhere "in the middle" in this case, and as I cannot join either of the circulated opinions, I have written the enclosed memorandum.

On the facts of this case I do not believe that appellant has standing, as she makes an insufficient showing of injury to herself or the class she describes. Thus, the Utah statute does not burden appellant's right to an abortion. On the other hand, for the reasons stated in Bellotti II, I cannot agree that a state may require parental notification by every pregnant minor, desiring an abortion, regardless of the circumstances.

Thus, in the present posture of the writing in this case, I could join the Chief in a judgment of affirmance but would write separately along the lines of the enclosed memorandum.

Sincerely,

The Chief Justice
Mr. Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 9, 1981

Re: No. 79-5003, H.L. v. Matheson

Dear Lewis,

I agree with your memorandum, circulated yesterday.

Sincerely yours,

P.S.
1.

Justice Powell

Copies to the Conference

1-2, 7-12 and stylistic

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

1/10/81

Mr. Justice:

I think that you still can join parts I & II, but cannot join part III. (In particular, I draw your attention to the sentence beginning "That the..." at the bottom of p. 11).

GM

2nd DRAFT

Circulated:

Recirculated: JAN 10 1981

SUPREME COURT OF THE UNITED STATES

No. 79-5903

H. L., etc., Appellant, v. Scott M. Matheson et al. | On Appeal from the Supreme Court of Utah.

I'll make suggestions to C J and may be able to join & write separately

[January —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this case is whether a state statute which requires a physician to "notify, if possible" the parents of a dependent, unmarried minor girl prior to performing an abortion on the girl violates federal constitutional guarantees.

I

In the spring of 1978, appellant was an unmarried 15-year-old girl living with her parents in Utah and dependent on them for her support. She discovered she was pregnant. She consulted with a social worker and a physician. The physician advised appellant that an abortion would be in her best medical interest. However, because of Utah Code Ann. (1953) § 76-7-304, he refused to perform the abortion without first notifying appellant's parents.

Section 76-7-304, enacted in 1974, provides:

> "To enable a physician to exercise his best medical judgment [in considering a possible abortion], he shall:
>
> "(1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,
>
> "(a) Her physical, emotional and psychological health and safety,
>
> "(b) Her age,
>
> "(c) Her familial situation.

"(2) *Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor* or the husband of the woman, if she is married." (Emphasis supplied.)

Violation of this section is a misdemeanor punishable by imprisonment for not more than one year or a fine of not more than $1,000.[5]

Appellant believed "for [her] own reasons" that she should proceed with the abortion without notifying her parents. According to appellant, the social worker concurred in this decision.[6] While still in the first trimester of her pregnancy, appellant instituted this action in the Third Judicial District Court of Utah.[7] She sought a declaration that § 76-7-304 (2) is unconstitutional and an injunction prohibiting appellees—the Governor and the Attorney General of Utah—from enforcing the statute. Appellant sought to represent a class consisting of unmarried "minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies

[3] Whether parents of a minor are liable under Utah law for the expense of an abortion and/or follow-up care is not discussed by the parties.

[4] Utah law also provides that no abortion may be performed unless a "voluntary and informed written consent" is first obtained by the attending physician from the patient. In order for such a consent to be "voluntary and informed," the patient must be advised at a minimum about available adoption services, about fetal development, and about foreseeable complications and risks of an abortion. See Utah Code Ann. § 76-7-305 (1978). In *Planned Parenthood Association v. Matheson*, ___ F. Supp. ___ (1980), we rejected constitutional attacks on the consent provisions.

[5] Utah Code Ann. (1978) §§ 76-7-314 (1), 76-3-204 (1), 76-3-301 (1)(d).

[6] Appellant's [illegible]

[7] The record does not reveal whether appellant proceeded with the abortion.

tect, was not done because of their physician's insistence on complying with § 76-7-304 (2). The trial judge declined to grant a temporary restraining order or a preliminary injunction.

The trial judge held a hearing at which appellant was the only witness. He construed the statute to require the treating physician to notify appellant's parents "if he is able to physically contact them." Sustaining appellant's objection, the judge refused to allow the State to inquire into the specific reasons why appellant did not wish to notify her parents. Thereafter, the trial judge entered findings of fact and conclusions of law. He first certified the class represented by appellant, then reaffirmed his ruling that the statute requires notice if "physically possible." He concluded that § 76-7-304 (2) "do[es] not unconstitutionally restrict the right of privacy of a minor to obtain an abortion or to enter into a doctor-patient relationship." Accordingly, he dismissed the complaint.

On appeal, the Supreme Court of Utah unanimously upheld the statute. *H. L. v. Matheson*, 604 P. 2d 907 (1979). Relying on our decisions in *Planned Parenthood of Central Missouri v. Danforth*, 428 U. S. 52 (1976), *Carey v. Population Services International*, 431 U. S. 678 (1977), and *Bellotti v. Baird*, 443 U. S. 622 (1979) (*Bellotti II*), the court concluded that the statute serves "significant state interest[s]" that are present with respect to minors but absent in the case of adult women.

The court looked first to subsection (1) of § 76-7-304. This provision, the court observed, expressly incorporates the

[illegible]

[illegible]

[illegible]

factors we identified in *Doe* v. *Bolton*, 410 U. S. 179 (1973), as pertinent to exercise of a physician's best medical judgment in making an abortion decision. In *Doe* we stated:

> "We agree with the District Court . . . that the medical judgment may be exercised in the light of all factors—*physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient*. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment." *Id.*, at 192 (emphasis supplied).

Section 76-7-304 (1) of the Utah statute suggests that the legislature sought to reflect the language of *Doe*.

The Utah Supreme Court held that notifying the parents of a minor seeking an abortion is "substantially and logically related" to the *Doe* factors set out in § 76-7-304 (1) because parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child. 604 P. 2d, at 909-910. The court also concluded that encouraging an unmarried pregnant minor to seek the advice of her parents in making the decision of whether to carry her child to term promotes a significant state interest in supporting the important role of parents in child-rearing. 604 P. 2d, at 910. The court reasoned that since the statute grants no veto power over the minor's decision, it does not unduly intrude upon the minor's rights.

The Utah Supreme Court also rejected appellant's argument that the notice "if possible" in § 76-7-304 (2) should be construed to give the physician discretion whether to notify appellant's parents. The court concluded that the physician is required to notify parents "if under the circumstances and the exercise of reasonable diligence, he can ascertain their identity and location, and it is feasible or practicable to give them notice." *Ibid.* The court added, however, that "the time element is an important factor for time must be sufficient to provide an effective opportunity for an abortion." 604 P. 2d, at 913.

II

Appellant challenges the statute as unconstitutional on its face. She contends it is overbroad in that it can be construed to apply to all unmarried minor girls, including those who are mature and emancipated. However, she did not allege or offer evidence that either she or any member of her class is mature or emancipated. The record shows only that appellant is an unmarried female living at home and wholly dependent on her parents. That affords an insufficient basis for a finding that she is either mature or emancipated. Under *Harris* v. *McRae*, — U. S. —, — (1980), she lacks "the personal stake in the controversy needed to confer standing" to advance the overbreadth argument.

There are particularly strong reasons for applying established rules of standing in this case. The United States District Court for Utah has held that § 76-7-304 (2) does not apply to emancipated minors and that, if so applied, it would be unconstitutional. *L. R.* v. *Hansen*, Civil No. C 80-0078J (Feb. 8, 1980). Since there was no appeal from that ruling, it is controlling on the State. We cannot assume that the statute, when challenged in a proper case, will not be construed also to exempt demonstrably mature minors. See *Bellotti* v. *Baird*, 428 U. S. 132, 146–148 (1976) (*Bellotti I*). Nor is there any reason to assume that a minor in need of emergency treatment will be treated in any way different from a similarly situated adult. The Utah Supreme Court has

In *Bellotti II* the plaintiffs [illegible] class consisted of "unmarried pregnant minors in Massachusetts [illegible]" [illegible] *Id.*, at 626 [illegible]. The courts considered [illegible] minors [illegible] affected" by the statute. *Id.*, at 627, n. 5.

[illegible] statute would [illegible] health care needs. [illegible] Appellant [illegible] and the Utah Supreme Court [illegible] the statute [illegible] an abortion

had no occasion to consider the application of the statute to such situations. In *Bellotti I*, *supra*, we unanimously declined to pass on constitutional challenges to an abortion regulation statute because the statute was "susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.'" *Id.*, at 147, quoting *Harrison* v. *NAACP*, 360 U. S. 167, 177 (1959). See *Kleppe* v. *New Mexico*, 426 U. S. 529, 546-547 (1976); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346-347 (1936) (concurring opinion). We follow that approach and find it unnecessary here in so far as appellant challenges a purported statutory exclusion of mature and emancipated minors.

The only issue before us, then, is the facial constitutionality of a statute requiring a physician to give notice to parents "if possible," prior to performing an abortion on their minor daughter, (a) when the girl is living with and dependent upon her parents, (b) when she is not emancipated by marriage or otherwise, and (c) when she has made no claim or showing as to her maturity or as to her relations with her parents.

III

A

Appellant contends the statute violates the right to privacy recognized in our prior cases with respect to abortions. She places primary reliance on *Bellotti II*, *supra*, 443 U. S., at 642-651. In *Danforth*, *supra*, we struck down state statutes that imposed a requirement of prior written consent of the patient's

[illegible]

spouse and of a minor patient's parents as a prerequisite for an abortion. We held that a State

> "does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Id.*, at 74.

We emphasized, however, "that our holding . . . does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." *Id.*, at 75, citing *Bellotti I*, *supra*. There is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion.

In *Bellotti II*, dealing with a class of concededly mature pregnant minors, we struck down a Massachusetts statute requiring parental or judicial consent before an abortion could be performed on any unmarried minor. There the State's highest court had construed the statute to allow a court to override the minor's decision even if the court found that the minor was capable of making, and in fact had made, an informed and reasonable decision to have an abortion. We held, among other things, that the statute was unconstitutional for failure to allow mature minors to decide to undergo abortions without parental consent. Four Justices concluded that the flaws in the statute were that, as construed by the state court, (i) it permitted overruling of a mature minor's decision to abort her pregnancy; and (ii) it requires parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interest." *Id.*, at 651. Four other Justices concluded that the defect was in making the abortion decision of a minor subject to veto by a third party, whether parent or judge, "no matter how mature

[illegible] capable of [illegible] [illegible] [illegible] (1979).

[illegible] we have held that a State may not constitutionally [illegible] blanket [illegible] their daughter's abortion, a statute setting out a "mere requirement of parental notice" does not violate the constitutional rights of an immature, dependent minor.[17] Four Justices in *Bellotti II* joined in stating:

> "[Plaintiffs] suggest [illegible] that the mere requirement of parental notice [illegible] the right to seek an abortion. [illegible] Part II above [illegible] parental [illegible] that [illegible] by the State [illegible] minor's right to make [illegible] decisions. [illegible] ability to make [illegible] of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision [illegible] for some [illegible] profound moral and religious concerns.
>
> . . . . .
>
> "[illegible] that the State [illegible] constitutionally permissible end [illegible] pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. [illegible] emotional stress may be [illegible]

[illegible]

[illegible]

> ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place." *Id.*, at 640–641 (quoting *Danforth*, *supra*, 428 U. S., at 91 (concurring opinion), (footnotes omitted))

(record *id.*, at 647 (dissenting opinion)).

In addition, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg* v. *New York*, 390 U. S. 629, 639 (1968) (plurality opinion). In *Quilloin* v. *Walcott*, 434 U. S. 246 (1978), the Court expanded on this theme:

> "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. See, *e. g.*, *Wisconsin* v. *Yoder*, 406 U. S. 205, 231–233 (1972); *Stanley* v. *Illinois*, 405 U. S. 645, 651 (1972); *Meyer* v. *Nebraska*, 262 U. S. 390, 399–401 (1923). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Id.*, at 233 (quoting *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944))

(see also *Parham* v. *J. R.*, 442 U. S. 584, 602 (1979); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925)). We have recognized that parents have an important "guiding role" to play in the upbringing of their children. *Bellotti II*, *supra*, at 638–639, which presumptively includes some counseling them on important decisions.

E

The Utah statute gives neither parents nor judges a veto

power over the minor's abortion decision. As in *Bellotti I*, supra, "we are concerned with a statute directed toward minors, as to whom there are unquestionably greater risks of inability to give an informed consent." *Id.*, at 147. As applied to immature and dependent minors, the statute plainly serves the important considerations of family integrity and protecting adolescents which we identified in *Bellotti II*. In addition, as applied to that class, the statute serves a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician. The medical, emotional and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.

Appellant intimates that the statute's failure to declare, in terms, a detailed description of what information parents

[illegible]

Bellotti II, supra, [illegible]

[illegible] (1979).

[illegible]

may provide to physicians, or to provide for a mandatory period of delay after the physician notifies the parents,[1] renders the statute unconstitutional. The notion that the statute must require information to be supplied by parents finds no support in logic, experience, or our decisions. And as the Utah Supreme Court recognized, 604 P. 2d, at 913, time is likely to be of the essence in an abortion decision. The Utah statute is reasonably calculated to protect minors in appellant's class by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences.[2]

Appellant also contends that the constitutionality of the statute is undermined because Utah allows a pregnant minor to consent to other medical procedures without formal notice to her parents if she carries the child to term.[3] But a State's interests in full-term pregnancies are sufficiently different to justify the lines drawn by the statutes. Cf. *Maher v. Roe*, 432 U. S. 464, 473-474 (1977). If the pregnant girl elects to carry her child to term, the *medical* decisions to be made entail few, perhaps none, of the potentially grave emotional and psychological consequences of the decision to abort.

That the *requirement of notice to parents may inhibit some*

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[1] Five states have enacted parental notification statutes similar to Utah's but have no waiting period. See Ky. Rev. Stat. Ann. § 20.125 (Supp. 1980) (requiring 24 hours' notice of 72 hours' constructive notice by mail); Mo. Rev. Stat. Ann. tit. 22, § 1205 (Supp. 1980) (48 hours); N. D. Cent. Code § 14-02.1-03 (Supp. 1979); Tenn. Code Ann. § 39-308 (Supp. 1979); Va. Code.

[2] Members of the particular class now before us in this case have no constitutional right to notify a parent as part of receiving their parents. See *Bellotti II*, supra, 443 U. S., at 647. We need not and do not decide whether a State must provide alternatives to parental notification.

[3] See Utah Code Ann. (1953) § 78-14-5 (1977) (permitting any female to give consent to any surgical or medical care not prohibited by law . . . notwithstanding the minority or disability of such person).

minors from seeking abortions is not a valid basis to void the statute. The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action "encouraging childbirth except in the most urgent circumstances" is "rationally related to the legitimate governmental objective of protecting potential life." *Harris* v. *McRae*, *supra*, — U. S., at — [Armed *Markey* v. *Rice*, *supra*, 432 U. S., at 473–474.

As applied to the class properly before us, the statute plainly serves important state interests, is narrowly drawn to protect only those interests, and does not violate any guarantees of the Constitution. The judgment of the Supreme Court of Utah is

Affirmed.

January 15, 1981

79-5903 H.L. v. Matheson

Dear Chief:

I will be happy to join your most recent circulation if you could clarify footnote 17, and add the few words to the sentence at the top of page 12 that I have suggested.

I enclose these two pages with the suggested changes.

Potter agrees that he also will join you if these changes are made and also will join my separate concurring opinion.

Sincerely,

The Chief Justice

lfp/ss

cc: Mr. Justice Stewart

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 15, 1971

Re: 70-5003 - Ely v. Matheson

Dear Lewis:

Since I see no difference in the suggested changes in your January 15 memo and my January 13 draft, I am glad to make the changes.

Sincerely,

Warren

Justice Powell

Copy to Justice Stewart

January 16, 1981

79-5903 H.L. v. Matheson

Dear Chief:

As your opinion (3rd draft) now meets the concerns I have previously expressed, I am happy to join it.

I am making appropriate changes in the memorandum I circulated to convert it to a concurring opinion.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

JUSTICE LEWIS F. POWELL, JR.

January 16, 1981

79-5903 H.L. v. Matheson

Dear Chief:

As your opinion (3rd draft) now meets the concerns I have previously expressed, I am happy to join it.

I am making appropriate changes in the memorandum I circulated to convert it to a concurring opinion.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Pgs 1,5,7,8

Mr. The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From Mr. Justice Powell

Circulated: _____

Recirculated: JAN 21 1981

1-21-81

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-5903

H. L. etc., Appellants, v. Scott M. Matheson et al. | On Appeal from the Supreme Court of Utah.

[January -, 1981]

JUSTICE POWELL, concurring.

This case requires the Court to consider again the diverse questions raised by a state statute intended to encourage parental involvement in the decision of a pregnant minor to have an abortion. *See Planned Parenthood of Central Missouri v. Danforth*, 428 U. S. 52 (1976); *Bellotti v. Baird*, 443 U. S. 622 (1979) (*Bellotti II*). I agree with the Court that Utah Code Ann. § 76-7-304 (2) does not unconstitutionally burden this appellant's right to an abortion. I join the opinion of the Court on the understanding that it leaves open the question whether § 304 (2) unconstitutionally burdens the right of a mature minor or a minor whose best interests would not be served by parental notification. *See ante*, at — — n. 17. I write to make clear that I continue to entertain the views on this question stated in my opinion in *Bellotti II*. *See infra*, at 1, n.

Section 304 (2) requires that a physician "notify if possible the parents or guardian of the woman upon whom the abortion is to be performed if she is a minor."[1] Appellant attacks this notice requirement on the ground that it burdens the right of a minor who is emancipated, or who is mature enough to make the abortion decision independent of parental involvement, or whose parents will react obstructively upon

[1] Section 304 (2) is quoted in full in the Court's opinion. *Ante*, at 1-2.

notice. See *ante*, at 5. The threshold question, as the Court's opinion notes, is whether appellant has standing to make such a challenge. Standing depends initially on what the complaint alleges. *Warth* v. *Seldin*, 422 U. S. 490, 498, 501 (1975), as courts have the power "only to redress or otherwise to protect against injury to the complaining party." *Id.*, at 499. The complaint in this case was carefully drawn. Appellant's allegations about herself and her familial situation are few and laconic. She alleged that she did "not wish to inform her parents of her condition and believe[d] that it [was] in her best interest that her parents not be informed of her condition." Complaint ¶ 6. She also alleged that she understood "what is involved in her decision," ¶ 9, and that the physician she consulted had told her that "he could not and would not perform an abortion upon her without informing her parents prior to aborting her." ¶ 7.

Appellant was 15 years of age and lived at home with her parents when she filed her complaint. She did not claim to be mature, and made no allegations with respect to her relationship with her parents. She did not aver that they would be obstructive if notified, or advance any other reason why notice to her parents would not be in her best interest. Similarly, the complaint contains no allegation that the physician—while apparently willing to perform the abortion—believed that notifying her parents would have adverse consequences. In fact, nothing in the record shows that the physician had any information about appellant's parents or familial situation, or even that he had examined appellant.

A

This case does not come to us on the allegations of the complaint alone. An evidentiary hearing occurred after the trial court had denied appellant's motion for a preliminary injunction. Appellant was the only witness, and her testimony—and statements by her counsel—make clear beyond any question that the "bare bones" averments of the com-

plaint were deliberate, and that appellant is arguing that a mere notice requirement is invalid *per se* without regard to the minor's age, whether she is emancipated, whether her parents are likely to be obstructive, or whether there is some health or other reason why notification would not be in the minor's best interests.

On direct examination, appellant merely verified the allegations of her complaint by affirming each allegation as paraphrased for her by her lawyer.[2] Her testimony added nothing

---

[2] Appellant's total testimony about her decision and her family is as follows:

"Q [By MR. DOLOWITZ, appellant's lawyer:] At the time that the complaint in this matter was signed, you were pregnant?

"A Yes.

"Q You had consulted with a counselor about that pregnancy?

"A Yeah.

"Q You had determined after talking to the counselor that you felt you should get an abortion?

"A Yes.

"Q You felt that you did not want to notify your parents—

"A Right

"Q —of that decision? You did not feel for your own reasons that you could discuss it with them?

"A Right

"Q After discussing the matter with a counselor, you still believed that you should not discuss it with your parents?

"A Right

"Q And they shouldn't be notified?

"A Right.

"Q After talking the matter over with a counselor, the counselor concurred in your decision that your parents should [not] be notified? [In response to a question from the bench, appellant's lawyer agreed that "not" should be inserted in this question. Tr. of Oral Arg. at —.]

"A Right

"Q You were advised that an abortion couldn't be performed without notifying them?

"A Yes

"Q You then came to us to see about filing a suit?

"A Right.

to the complaint. In addition, appellant's lawyer insistently objected to all questions by counsel for the State as to the appellant's reasons for not wishing to notify her parents.[1] The trial court, on its own initiative, pressed unsuccessfully to elicit some reasons, inquiring how it could "find out the

---

"Q You and I discussed it as to whether or not you had a right to do what you wanted to do?

"A Yes

"Q You decided that, after our discussion, you should still proceed with the action to try to obtain an abortion without notifying your parents?

"A Right.

"Q You feel that, from talking to the counselor and thinking the situation over and discussing it with me, that you could make the decision on your own that you wished to abort the pregnancy?"

"A Yes

"Q You are living at home?

"A Yes

"Q You still felt, even though you were living at home with your parents, that you couldn't discuss the matter with them?

"A Right

"MR. DOLOWITZ: I think that would be those questions to support the allegations we put out in the complaint.

"Appellant's total testimony on cross-examination was the following:

"MR. McCARTHY: The state's lawyer: Let's start off this way. Are you still living at home?

"A Yes

"Q Are you dependent on your parents?

"A Yes.

"Q All your needs come from them?

"A Yes

"Q How old are you now

"A. Fifteen.

"Q Aside from the issue of abortion, do you have any reason to feel that you can't talk to your parents about other problems?

"A Yes

"Q What are those problems?

MR. DOLOWITZ: Now you are moving into the problem area that I indicated . . . ."

validity of [appellant's] reasons without [the state's lawyer] being permitted to cross-examine her." Tr., at 86. Appellant's lawyer replied:

> "It is our position constitutionally that she has the right to make [the abortion] decision and if she has consulted with a counselor and the counselor concurs that those are valid reasons, why then—. . . . In terms of going beyond [the complaint allegations], our point is that the specifics of *the reasons are really irrelevant to the constitutional issue.*" Tr., at 86-87 (emphasis supplied).

When appellant's lawyer insisted that the facts with respect to this particular minor were irrelevant, the trial court sustained the validity of the statute.[4]

In sum, and as the Court's opinion emphasizes, appellant alleges nothing more than that she desires an abortion, that she has decided—for reasons which she declined to reveal—that it is in her best interest not to notify her parents, and that a physician would be willing to perform the abortion if notice were not required. Although the trial court did not rule in terms of standing, it is clear that these bald allegations do not confer standing to claim either that § 304 (2) unconstitutionally burdens the right of a mature minor or a minor whose best interests would not be served by parental notification.[5] They confer standing only to claim that § 304 (2) is an

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[4] At the end of the evidentiary hearing, appellant's lawyer framed the trial court's ruling as follows:

"If your ruling is that 'practicable' in the statute means 'physically possible'[] and there are no circumstances whatever that justify the violation of the statute, then the case is closed." Tr., at 98.

[5] Because this case is a class action, it might be presumed that other pregnant minors would join the question whether a pregnant minor woman has a right to abortion, without parental notice, upon a showing that she is mature or that her parents will interfere with her abortion. But the record in this case contains no facts to support a presumption that the class includes or is limited to such minors. The only complaint allegations about the class are that appellant's "claim [is] typical of the claims of all members of

unconstitutional burden upon an unemancipated minor who desires an abortion without parental notification but also desires not to explain to anyone her reasons either for wanting the abortion or for not wanting to notify her parents."

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the class," and that the class consists of "minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies but may not do so inasmuch as their physicians will not perform an abortion upon them without compliance with the provisions of Section 76-7-304 (2)." Complaint, ¶ 10. Thus, the record only supports the conclusion that the other class members assert the identical claim that appellant presents: a constitutional right to an abortion, without notifying their parents or explaining their reasons to anyone else, if they and their physicians agree that an abortion is in their best interest.

The trial court entered findings of fact and conclusions of law after the evidentiary hearing. Paragraph 7 of the trial court's findings reads:

"The plaintiff consulted with a counselor to assist her in deciding whether or not she should terminate her pregnancy. She determined, after consultation with her counselor, that she should secure an abortion, but was advised when consulting her physician that under the provisions of Section 76-7-304(2), Utah Code Annotated, 1953, that he believed along with her that she should be aborted and that he felt it was in her best medical interest to do so but he could not and would not perform an abortion upon her without informing her parents prior to aborting her because it is required of him by that statute and he was unwilling to perform an abortion upon her without complying with the provisions of the statute even though he believed it was best to do so." *H. L. v. Matheson*, Civil No. C-75-271 (Dec. 26, 1978).

Precisely what this paragraph finds is ambiguous. At the least, it finds that appellant "consulted" a physician and that the physician agreed with appellant that an abortion would be in appellant's best medical interest. The final portion of the finding—"he was unwilling to perform an abortion upon her without complying with the provisions of the statute even though he believed it was best to do so"—could be read to find that the physician also agreed with appellant that "it was best" to "perform an abortion upon her without complying with the provisions[,]" requiring parental notice. Or the final portion could be read to find only that the physician would not perform an abortion without complying with the statute even though he found that "it was best" to abort appellant's pregnancy. In light of appellant's limited allegations and testimony, and the legal argument of her lawyer, the trial court's finding cannot be read

B

On the facts of this case, I agree with the Court that § 309 (2) is not an unconstitutional burden on appellant's right to an abortion. Numerous and significant interests compete when a minor decides whether or not to abort her pregnancy. The right to make that decision may not be unconstitutionally burdened. *Roe* v. *Wade*, 410 U. S. 113, 154 (1973); *Planned Parenthood of Central Missouri* v. *Danforth*, *supra* at 74-75. In addition, the minor has an interest in effectuating her decision to abort, if that is the decision she makes. *Id.*, at 75; *Bellotti II*, *supra*, at 647. The State, aside from the interest it has in encouraging childbirth rather than abortion, cf. *Maher* v. *Roe*, 432 U. S. 464 (1977); *Harris* v. *McRae*, — U. S. — (1980), has an interest in fostering such consultation as will assist the minor in making her decision as wisely as possible. *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, at 91 (STEWART, J., concurring); *post*, at — (STEVENS, J., dissenting). The State also may have an interest in the family itself, the institution through which "we inculcate and pass down many of our most cherished values, moral and cultural." *Moore* v. *City of East Cleveland*, 431 U. S. 494, 503–504 (1977). Parents have a traditional and substantial interest in, as well as a responsibility for, the rearing and welfare of their children, especially during immature years. *Bellotti II*, *supra*, at 637–639.

None of these interests is absolute. Even an adult woman's right to an abortion is not unqualified. *Roe* v. *Wade*, *supra*, at 154. Particularly when a minor becomes pregnant and considers an abortion, the relevant circumstances may vary widely depending upon her age, maturity, mental and physical condition, the stability of her home if she is not emancipated, her relationship with her parents, and the like. If we were to accept appellant's claim that § 309 (2)

to find that the physician determined that appellant's parents would react hostilely or obstructively to notice of appellant's abortion decision.

is *per se* an invalid burden on the asserted right of a minor to make the abortion decision, the circumstances which normally are relevant would—as her counsel conceded—be immaterial. The Court would have to decide that the minor's wishes are virtually absolute. To be sure, our cases have emphasized the necessity to consult a physician. But we have never held with respect to a minor that the opinion of a single physician as to the need or desirability of an abortion outweighs all state and parental interests.[3]

In sum, a State may not validly require notice to parents in all cases, without providing any type of independent decisionmaker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently or that notification otherwise would not be in her best interests. My opinion in *Bellotti II*, joined by three other Justices, stated at some length the reasons why such a decisionmaker is needed. *Bellotti II*, *supra*, at 642–648.[4] The circumstances relevant to the abortion decision by a minor can and do vary so substantially that absolute rules requiring parental notice in all cases or in none would create an inflexibility that often would allow for no consideration of the rights and interests identified above. Our cases have never gone to this extreme, and in my view should not.

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[3] While the medical judgment of a physician of course is to be respected, there is no reason to believe as a general proposition that even the most conscientious physician's interest in the overall welfare of a minor can be equated with that of most parents. Moreover, abortion clinics, now readily available in most urban communities, may be operated on a commercial basis where abortions often may be obtained "on demand." *See Planned Parenthood of Central Missouri v. Danforth*, *supra*, at 91–92, n. 2 (STEWART, J., concurring); *Bellotti II*, *supra*, at 641, n. 21.

[4] Although *Bellotti II* involved a statute requiring parental consent, the rationale of the plurality opinion with respect to the need to provide

[5] The dissenting opinion of Justice Marshall, which would hold the Utah statute invalid on its face, also rests the decision of the minor and her physician to an absolute as the governing state and private interests,

Supreme Court of the United States
Washington, D. C. 20543

JUSTICE POTTER STEWART

January 22, 1981

Re: No. 79-5903, H.L. v. Matheson

Dear Chief,

I have greatly regretted our previous fragmentation in cases falling into the area that this one falls. Accordingly, I am particularly glad to join your opinion for the Court.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 22, 1981

Re: No. 79-5903, H. L. v. Matheson

Dear Lewis,

Please add my name to your concurring opinion, which also joins the opinion of the Court.

Sincerely yours,

P.S.

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 22, 1981

Re: No. 79-5903, H.L. v. Matheson

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

This creates a plurality - John has written separately, as will Byron

1,34-6

1-2 81

4th DRAFT

MAR 3 1981

SUPREME COURT OF THE UNITED STATES

No. 79-5908

H. L., etc. Appellant, v. Scott M. Matheson et al. | On Appeal from the Supreme Court of Utah.

[January —, 1981]

JUSTICE POWELL, with whom JUSTICE STEWART joins, concurring.

This case requires the Court to consider again the divisive questions raised by a state statute intended to encourage parental involvement in the decision of a pregnant minor to have an abortion. *See Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976); *Bellotti* v. *Baird*, 443 U. S. 662 (1979) (*Bellotti II*). I agree with the Court that Utah Code Ann. § 76-7-304 (2) does not unconstitutionally burden this appellant's right to an abortion. I join the opinion of the Court on the understanding that it leaves open the question whether § 304 (2) unconstitutionally burdens the right of a mature minor or a minor whose best interests would not be served by parental notification. *See ante*, at — —, n. 17. I write to make clear that I continue to entertain the views on this question stated in my opinion in *Bellotti II*. See *infra*, at 1, 5.

I

Section 304 (2) requires that a physician "[n]otify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor."[1] Appellant attacks this notice requirement on the ground that it burdens the right of a minor who is emancipated, or who is mature enough to make the abortion decision independent of parental involvement, or whose parents will react obstructively upon

[1] Section 304 (2) is quoted in full in the Court's opinion. *Ante*, at 1-2

notice. See *ante*, at 5. The threshold question, as the Court's opinion notes, is whether appellant has standing to make such a challenge. Standing depends initially on what the complaint alleges, *Warth* v. *Seldin*, 422 U. S. 490, 498, 501 (1975), as courts have the power "only to redress or otherwise to protect against injury to the complaining party." *Id.*, at 499. The complaint in this case was carefully drawn. Appellant's allegations about herself and her familial situation are few and laconic. She alleged that she did "not wish to inform her parents of her condition and believe[d] that it [was] in her best interest that her parents not be informed of her condition." Complaint ¶ 6. She also alleged that she understood "what is involved in her decision," ¶ 9, and that the physician she consulted had told her that "he could not and would not perform an abortion upon her without informing her parents prior to aborting her." ¶ 7.

Appellant was 15 years of age and lived at home with her parents when she filed her complaint. She did not claim to be mature, and made no allegations with respect to her relationship with her parents. She did not aver that they would be obstructive if notified, or advance any other reason why notice to her parents would not be in her best interest. Similarly, the complaint contains no allegation that the physician—while apparently willing to perform the abortion—believed that notifying her parents would have adverse consequences. In fact, nothing in the record shows that the physician had any information about appellant's parents or familial situation, or even that he had examined appellant.

A

This case does not come to us on the allegations of the complaint alone. An evidentiary hearing occurred after the trial court had denied appellant's motion for a preliminary injunction. Appellant was the only witness, and her testimony—and statements by her counsel—make clear beyond any question that the "bare bones" averments of the com-

plaint were deliberate, and that appellant is arguing that a mere notice requirement is invalid *per se* without regard to the minor's age, whether she is emancipated, whether her parents are likely to be obstructive, or whether there is some health or other reason why notification would not be in the minor's best interests.

On direct examination, appellant merely verified the allegations of her complaint by affirming each allegation as paraphrased for her by her lawyer in a series of leading questions.[1]

---

[1] Appellant's total testimony about her decision and her family is as follows:

"Q [by MR. DOLOWITZ, appellant's lawyer]: At the time that the complaint in this matter was signed, you were pregnant?

"A Yes.

"Q You had consulted with a counselor about that pregnancy?

"A Yeah.

"Q You had determined after talking to the counselor that you felt you should get an abortion?

"A Yes.

"Q You felt that you did not want to notify your parents—

"A Right.

"Q —of that decision? You did not feel for your own reasons that you could discuss it with them?

"A Right.

"Q After discussing the matter with a counselor, you still believed that you shou'd not discuss it with your parents?

"A Right

"Q And they shouldn't be notified?

"A Right.

"Q After talking the matter over with a counselor, the counselor concurred in your decision that your parents should [not] be notified? [In response to a question from the bench, appellant's lawyer agreed that 'not' should be inserted in this question. Tr. of Oral Arg., at —]

"A Right.

"Q You were advised that an abortion couldn't be performed without notifying them?

"A Yes.

"Q You then came to me to see about filing a suit?

"A Right.

Her testimony added nothing to the complaint.[3] In addition, appellant's lawyer insistently objected to all questions by counsel for the State as to the appellant's reasons for not wishing to notify her parents.[4] The trial court, on its own

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"Q You and I discussed it as to whether or not you had a right to do what you wanted to do?

"A Yes

"Q You decided that, after our discussion, you should still proceed with the action to try to obtain an abortion without notifying your parents?

"A Right.

"Q You feel that, from talking to the counselor and thinking the situation over and discussing it with me, that you could make the decision on your own that you wished to abort the pregnancy?

"A Yes

"Q You are living at home?

"A Yes.

"Q You still felt, even though you were living at home with your parents, that you couldn't discuss the matter with them?

"A Right

"MR. DOLOWITZ: I think that would be those questions to support the allegations we put out in the complaint."

[4] Appellant's total testimony on cross-examination was the following:

"MR. McCARTHY [the State's lawyer]: Let's start out this way. Are you still living at home?

"A Yes.

"Q Are you dependent on your parents?

"A Yes.

"Q All your money comes from them?

"A Yes.

"Q How old are you now?

"A Fifteen.

"Q Aside from the issue of abortion, do you have any reason to feel that you can't talk to your parents about other problems?

"A Yes

"Q What are those reasons?

MR. DOLOWITZ: Now you are moving into the problem area that I objected. . . ."

[3] After the direct examination of appellant, supra n. 2, and the State's brief cross-examination, supra n. 4, appellant's lawyer rested repeatedly

initiative, pressed unsuccessfully to elicit some reasons, inquiring how it could "find out the validity of [appellant's] reasons without [the state's lawyer] being permitted to cross-examine her." Tr., at 86. Appellant's lawyer replied:

> "It is our position constitutionally that she has the right to make [the abortion] decision and if she has consulted with a counselor and the counselor concurs that those are valid reasons, why then . . . . . In terms of going beyond [the complaint allegations], our point is that the specifics of *the reasons are really irrelevant to the constitutional issue*." Tr., at 86–87 (emphasis supplied).

When appellant's lawyer insisted that the facts with respect to this particular minor were irrelevant, the trial court sustained the validity of the statute.[4]

In sum, and as the Court's opinion emphasizes, appellant alleges nothing more than that she desires an abortion, that she has decided—for reasons which she declined to reveal—that it is in her best interest not to notify her parents, and that a physician would be willing to perform the abortion if notice were not required. Although the trial court did not rule in terms of standing, it is clear that these bald allegations

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during subsequent argument that "there is no necessity to set other facts," Tr., at 94, that "the particular facts that come before [a minor's doctor] are irrelevant," id., at 96, and that "[t]he specific facts of any individual case, no matter how ridiculous they are or how strong or weak they are, really become irrelevant." *Ibid.* In summarizing his position, appellant's lawyer stated: "Our position is that it is the doctor patient relationship that is the key. If the doctor determines he should go ahead with the patient, then he should. The specific facts in any case, whether [the doctor] is wrong or right, are constitutionally protected to make that decision and go ahead and act on it. That is why [it] is irrelevant." *Ibid.*

[4] At the end of the evidentiary hearing, appellant's lawyer framed the trial court's ruling as follows:

"If your ruling is that it is possible [as used in the statute means 'physically possible'] and there are no circumstances whatever that justify the violation of the statute, then the point is closed." Tr., at 98.

do not confer standing to claim either that § 304 (2) unconstitutionally burdens the right of a mature minor or a minor whose best interests would not be served by parental notification.[6] They confer standing only to claim that § 304 (2) is an unconstitutional burden upon an unemancipated minor who desires an abortion without parental notification but also desires not to explain to anyone her reasons either for wanting the abortion or for not wanting to notify her parents.[7]

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[6] Because the case is a class action, it might be presumed that other minors could raise the question whether a pregnant minor has a right to abortion, without parental notice, upon a showing that she is mature or that her parents will interfere with her abortion. But the record in this case contains no facts to support a presumption that the class includes such members. The only complaint allegations about the class are that appellant's claims "are typical of the claims of all members of the class," and that the class consists of "minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies but may not do so inasmuch as their physicians will not perform an abortion upon them without compliance with the provisions of Section 78-7-304 (2)." Complaint, ¶ 10. Thus the record supports only the conclusion that the class consists merely of pregnant minors who assert the identical claim that appellant presents: a constitutional right to an abortion without notifying their parents, and without claiming to be mature or that notification would not be in their best interest. In short, the class members—like appellant—assert an absolute right to make this decision themselves, independently of everyone except a physician.

[7] The trial court entered findings of fact and conclusions of law after the evidentiary hearing. Paragraph 7 of the trial court's findings reads:

"The plaintiff consulted with a counselor to assist her in deciding whether or not she should terminate her pregnancy. She determined, after consultation with her counselor that she should secure an abortion, but was advised when consulting her physician that under the provisions of Section 78-7-304 (2), Utah Code Annotated, 1953, that he believed along with her that she should be informed and that he felt it was in her best medical interest to do so but he would not and would not perform an abortion upon her without informing her parents prior to aborting her because it was required of him by that statute and he was unwilling to perform an abortion upon her without complying with the provisions of

B

On the facts of this case, I agree with the Court that § 304 (2) is not an unconstitutional burden on appellant's right to an abortion. Numerous and significant interests compete when a minor decides whether or not to abort her pregnancy. The right to make that decision may not be unconstitutionally burdened. *Roe* v. *Wade*, 410 U. S. 113, 154 (1973); *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, at 74-75. In addition, the minor has an interest in effectuating her decision to abort, if that is the decision she makes, *id.*, at 75; *Bellotti II*, *supra*, at 647. The State, aside from the interest it has in encouraging childbirth rather than abortion, cf. *Maher* v. *Roe*, 432 U. S. 464 (1977); *Harris* v. *McRae*, — U. S. — (1980), has an interest in fostering such consultation as will assist the minor in making her decision as wisely as possible. *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, at 91 (STEWART, J., concurring); *post*, at — (STEVENS, J., dissenting). The State also may have an interest in the family itself, the institution through which "we inculcate and pass down many of our most cherished values,

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the statute even though he believed it was best to do so." *H. L.* v. *Matheson*, Civil No. C-78-270 (Dec. 26, 1978).

Precisely what this paragraph finds is ambiguous. At the least, it finds that appellant "consulted" a physician and that the physician agreed with appellant that an abortion would be in appellant's best medical interest. The final portion of the finding—"he was unwilling to perform an abortion upon her without complying with the provisions of the statute even though he believed it was best to do so"—could be read to find that the physician also agreed with appellant that "it was best" to "perform an abortion upon her without complying with the provision[]" requiring parental notice. Or, the final portion could be read to find only that the physician would not perform an abortion without complying with the statute even though he believed that "it was best" to abort appellant's pregnancy. In light of appellant's limited allegations and testimony, and the legal argument of her lawyer, the trial court's finding cannot be read as saying that the physician determined that appellant's parents would react hostilely or otherwise to notice and that appellant's abortion decision

moral and cultural." *Moore v. City of East Cleveland*, 431 U. S. 495, 503–504 (1977). Parents have a traditional and substantial interest in, as well as a responsibility for, the rearing and welfare of their children, especially during immature years. *Bellotti II*, *supra*, at 637–639.

None of these interests is absolute. Even an adult woman's right to an abortion is not unqualified. *Roe v. Wade*, *supra*, at 154. Particularly when a minor becomes pregnant and considers an abortion, the relevant circumstances may vary widely depending upon her age, maturity, mental and physical condition, the stability of her home if she is not emancipated, her relationship with her parents, and the like. If we were to accept appellant's claim that § 304 (2) is *per se* an invalid burden on the asserted right of a minor to make the abortion decision, the circumstances which normally are relevant would, as her counsel insisted, be immaterial. *Supra*, at 5. The Court would have to decide that the minor's wishes are virtually absolute. To be sure, our cases have emphasized the necessity to consult a physician. But we have never held with respect to a minor that the opinion of a single physician as to the need or desirability of an abortion outweighs all state and parental interests.[*]

In sum, a State may not validly require notice to parents in all cases, without providing an independent decisionmaker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently or that notification otherwise would not be in her best interests. My opinion in *Bellotti II*, joined by

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[*] While the medical judgment of a physician of course is to be respected, there is no reason to believe as a general proposition that even the most conscientious physician's interest in the overall welfare of a minor can be equated with that of most parents. Moreover, abortion clinics, now readily available in most urban communities, may be operated on a commercial basis where abortions often can be obtained "on demand." *See Planned Parenthood of Central Missouri v. Danforth*, *supra*, at 91–92, n. 2 (STEVENS, J., concurring); *Bellotti II*, *supra*, at 641, n. 21.

three other Justices, stated at some length the reasons why such a decisionmaker is needed. *Bellotti II*, *supra*, at 642–648.* The circumstances relevant to the abortion decision by a minor can and do vary so substantially that absolute rules—requiring parental notice in all cases or in some[†]—would create an inflexibility that often would allow for no consideration of the rights and interests identified above. Our cases have never gone to this extreme, and in my view should not.

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* Although *Bellotti II* involved a statute requiring parental consent, the rationale of the plurality opinion with respect to this need is applicable here.

† The dissenting opinion of Justice MARSHALL, which would hold the Utah statute invalid on its face, elevates the decision of the minor and her physician to an absolute status, ignoring state and parental interests.

Supreme Court of the United States
Washington, D. C. 20543

March 4, 1981

Re: 79-5903 - H. L. v. Matheson

Dear Chief,

I join your circulating opinion of January 16.

Sincerely yours,

The Chief Justice

Copies to the Conference

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

Pages 3,4,5,7,8,12,13;
stylistic changes;
and footnotes renumbered.

Most of these changes were "lifted" almost bodily from my opinion!

From: The Chief Justice

Circulated: MAR 5 1981

4th DRAFT

I have had to revise revise my concurring op. substantially

SUPREME COURT OF THE UNITED STATES

No. 79-5903

H. L., etc., Appellant,
v.
Scott M. Matheson et al.

On Appeal from the Supreme Court of Utah.

[March ,1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this case is whether a state statute which requires a physician to "notify, if possible" the parents of a dependent, unmarried minor girl prior to performing an abortion on the girl violates federal constitutional guarantees.

I

In the spring of 1978, appellant was an unmarried 15-year-old girl living with her parents in Utah and dependent on them for her support. She discovered she was pregnant. She consulted with a social worker and a physician. The physician advised appellant that an abortion would be in her best medical interest. However, because of Utah Code Ann. (1953) § 76-7-304, he refused to perform the abortion without first notifying appellant's parents.

Section 76-7-304, enacted in 1974, provides:

> "To enable a physician to exercise his best medical judgment [in considering a possible abortion], he shall:
> "(1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,
> "(a) Her physical, emotional and psychological health and safety,
> "(b) Her age,
> "(c) Her familial situation.

"(2) *Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she* is a minor or the husband of the woman, if she is married." (Emphasis supplied.) [3]

Violation of this section is a misdemeanor punishable by imprisonment for not more than one year or a fine of not more than $1,000.[4]

Appellant believed "for [her] own reasons" that she should proceed with the abortion without notifying her parents. According to appellant, the social worker concurred in this decision.[5] While still in the first trimester of her pregnancy, appellant instituted this action in the Third Judicial District Court of Utah.[6] She sought a declaration that § 76-7-304 (2) is unconstitutional and an injunction prohibiting appellees, the Governor and the Attorney General of Utah, from enforcing the statute. Appellant sought to represent a class consisting of unmarried "minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies

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[3] Whether parents of a minor are liable under Utah law for the expense of an abortion and related after care is not discussed by the record.

Utah also provides by statute that no abortion may be performed unless a "voluntary and informed written consent" is first obtained by the attending physician from the patient. In order for such a consent to be "voluntary and informed," the patient must be advised at a minimum about available adoption services, about fetal development, and about foreseeable complications and risks of an abortion. See Utah Code Ann. (1953) § 76-7-305. In *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 65 n. 7 (1976), we rejected a constitutional attack on written consent provisions.

[4] Utah Code Ann. (1953) §§ 76-7-314 (3), 76-3-204 (1), 76-3-301 (3).

[5] Appellant's counsel stated in his jurisdictional statement and again in his brief that the physician concluded not only that an abortion would be in appellant's best interests, but also that parental notification would not be in appellant's best interests. However, at oral argument counsel corrected this statement and conceded that there is no record evidence to support this contention. Tr. of Oral Arg., at 8, 17.

[6] The record does not reveal whether appellant proceeded with the abortion.

but may not do so" because of their physicians' insistence on complying with § 76-7-304 (2). The trial judge declined to grant a temporary restraining order or a preliminary injunction.[5]

The trial judge held a hearing at which appellant was the only witness. Appellant affirmed the allegations of the complaint by giving monosyllabic answers to her attorney's leading questions.[6] However, when the State attempted to

[5] The trial judge allowed appellant to proceed without appointment of a guardian *ad litem*. He noted that a guardian would be required to notify the parents.

[6] The testimony was as follows:

[BY MR. DOLOWITZ, appellant's counsel]:

"Q. At the time that the Complaint in this matter was signed, you were pregnant?

"A. Yes.

"Q. You had consulted with a counselor about that pregnancy?

"A. Yeah.

"Q. You had determined after talking to the counselor that you felt you should get an abortion?

"A. Yes.

"Q. You felt that you did not want to notify your parents—

"A. Right.

"Q. —of that decision? You did not feel for your own reasons that you could discuss it with them? —

"A. Right.

"Q. After discussing the matter with a counselor, you still believed that you should not discuss it with your parents?

"A. Right.

"Q. And they shouldn't be notified?

"A. Right.

"Q. After talking the matter over with a counselor, the counselor concurred in your decision that your parents should not be notified?

"A. Right.

"Q. You were advised that an abortion couldn't be performed without notifying them?

"A. Yes.

"Q. You then came to me to see about filing a suit?

"A. Right.

"Q. You and I discussed it as to whether or not you had a right to do what you wanted to do?

cross-examine appellant about her reasons for not wishing to notify her parents, appellant's counsel vigorously objected,[7] insisting that "the specifics of the reasons are really irrelevant to the Constitutional issue."[8] The only consti-

"A. Yes.
"Q. You decided that, after our discussion, you should still proceed with the action to try to obtain an abortion without notifying your parents?
"A. Right.
"Q. Now, at the time that you signed the Complaint and spoke with the counselor and spoke with me, you were in the first trimester of pregnancy, within your first twelve weeks of pregnancy?
"A. Yes.
"Q. You feel that, from talking to the counselor and thinking the situation over and discussing it with me, that you could make the decision on your own that you wished to abort the pregnancy?
"A. Yes.
"Q. You are living at home?
"A. Yes.
"Q. You still felt, even though you were living at home with your parents, that you couldn't discuss the matter with them?
"A. Right."
Tr., at 82–84.

[7] [BY MR. McCARTHY, counsel for the State]:
"Q. . . . Are you still living at home?
"A. Yes.
"Q. Are you dependent on your parents?—
"A. Yes.
"Q. All your money comes from them?
"A. Yes.
"Q. How old are you now?
"A. Fifteen.
"Q. Aside from the issue of abortion, do you have any reason to feel that you can't talk to your parents about other problems?
"A. Yes.
"Q. What are those reasons?
"MR. DOLOWITZ: Now you are moving into the problem area that—I indicated. . . ."
Tr., at 85.

[8] Tr., at 87. Appellant repeatedly pressed this point despite the trial court's statements that it could "conceive of a situation where a child probably wouldn't have to tell the parents" and that the statute "might

tutionally permissible prerequisites for performance of an abortion, he insisted, were the desire of the girl and the medical approval of a physician.[9] The trial judge sustained the objection, tentatively construing the statute to require appellant's physician to notify her parents "if he is able to physically contact them."

Thereafter, the trial judge entered findings of fact and conclusions of law. He concluded that appellant "is an appropriate representative to represent the class she purports to represent." [10] He construed the statute to require notice to appellant's parents "if it is physically possible." He concluded that § 76–7–304 (2) "do[es] not unconstitutionally restrict the right of privacy of a minor to obtain an abortion or to enter into a doctor-patient relationship." [11] Accordingly, he dismissed the complaint.

On appeal, the Supreme Court of Utah unanimously upheld the statute. *H. L.* v. *Matheson*, 604 P. 2d 907 (1979). Relying on our decisions in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976); *Carey* v. *Population Services International*, 431 U. S. 678 (1977), and *Bellotti* v. *Baird*, 443 U. S. 622 (1979) (*Bellotti II*), the court concluded that the statute serves "significant state interest[s]" that are present with respect to minors but absent in the case of adult women.

The court looked first to subsection (1) of § 76–7–304,

be unconstitutional as it relates to a particular fact situation but constitutional as it relates to another fact situation." *Id.*, at 87, 94.

There is accordingly no evidence to support the "surmise" in the dissent, *post*, at 13, n. 24, that "appellant expects family conflict over the abortion decision."

[9] Tr., at 95.

[10] The trial judge adopted, verbatim, findings of fact and conclusions of law prepared by appellant. Neither the findings nor the conclusions nor the opinion of the State Supreme Court make any mention whatsoever of the precise limits of the class.

[11] The trial judge also ruled that the statute does not violate 42 U. S. C. § 1983.

This provision, the court observed, expressly incorporates the factors we identified in *Doe* v. *Bolton*, 410 U. S. 179 (1973), as pertinent to exercise of a physician's best medical judgment in making an abortion decision. In *Doe*, we stated:

> "We agree with the District Court . . . that the medical judgment may be exercised in the light of *all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient.* All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment." *Id.*, at 192 (emphasis supplied).

Section 76–7–304 (1) of the Utah statute suggests that the legislature sought to reflect the language of *Doe*.

The Utah Supreme Court held that notifying the parents of a minor seeking an abortion is "substantially and logically related" to the *Doe* factors set out in § 76–7–304 (1) because parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child. 604 P. 2d, at 909–910. The court also concluded that encouraging an unmarried pregnant minor to seek the advice of her parents in making the decision of whether to carry her child to term promotes a significant state interest in supporting the important role of parents in child-rearing. 604 P. 2d, at 912. The court reasoned that since the statute allows no veto power over the minor's decision, it does not unduly intrude upon a minor's rights.

The Utah Supreme Court also rejected appellant's argument that the phrase "if possible" in § 76–7–304 (2) should be construed to give the physician discretion whether to notify appellant's parents. The court concluded that the physician is required to notify parents "if under the circumstances, in the exercise of reasonable diligence, he can ascertain their identity and location and if it is feasible or practicable to give them notification." The court added, however, that "the time element is an important factor, for there must be sufficient

expedition to provide an effective opportunity for an abortion." 604 P. 2d, at 913.

II

Appellant challenges the statute as unconstitutional on its face. She contends it is overbroad in that it can be construed to apply to all unmarried minor girls, including those who are mature and emancipated. We need not reach that question since she did not allege or proffer any evidence that either she or any member of her class is mature or emancipated.[12] The trial court found that appellant "is unmarried, fifteen years of age, resides at home and is a dependent of her parents." That affords an insufficient basis for a finding that she is either mature or emancipated. Under *Harris* v. *McRae*, — U. S. —, — (1980), she therefore lacks "the personal stake in the controversy needed to confer standing" to advance the overbroadth argument.

There are particularly strong reasons for applying established rules of standing in this case. The United States District Court for Utah has held that § 76-7-304 (2) does not apply to emancipated minors and that, if so applied, it would be unconstitutional. *L. R.* v. *Hansen*, Civil No. C-80-0078J (Feb. 8, 1980). Since there was no appeal from that ruling, it is controlling on the State. We cannot assume that the statute, when challenged in a proper case, will not be construed also to exempt demonstrably mature minors.[13] See

[12] In *Bellotti II*, by contrast, the principal class consisted of "unmarried [pregnant] minors in Massachusetts *who have adequate capacity to give a valid and informed consent* [to abortion], and who do not wish to involve their parents." *Id.*, at 626 (emphasis supplied). The courts considered the rights of "all pregnant minors who might be affected" by the statute. *Id.*, at 627, n. 5.

[13] The record shows that the State unsuccessfully argued in the trial court that it should be permitted to inquire into appellant's degree of maturity. Tr., at 88.

JUSTICE STEVENS and the dissent argue that the Utah Supreme Court held that the statute may validly be applied to all members of the class

Bellotti v. *Baird*, 428 U. S. 132, 146–148 (1976) (*Bellotti I*). Nor is there any reason to assume that a minor in need of emergency treatment will be treated in any way different from a similarly situated adult.[14] The Utah Supreme Court has had no occasion to consider the application of the statute to such situations. In *Bellotti I*, *supra*, we unanimously declined to pass on constitutional challenges to an abortion regulation statute because the statute was "susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.'" *Id.*, at 147, quoting *Harrison* v. *NAACP*, 360 U. S. 167, 177 (1959). See *Kleppe* v. *New Mexico*, 426 U. S. 529, 546–547 (1976); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346–347 (1936) (concurring opinion). We so affirm that approach and find it controlling here insofar as appellant challenges a purported statutory exclusion of mature and emancipated minors.

The only issue before us, then, is the facial constitutionality of a statute requiring a physician to give notice to parents, "if possible," prior to performing an abortion on their minor daughter, (a) when the girl is living with and dependent upon

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described in the complaint. *Post*, at —, —. However, as we have shown, neither the trial court's findings and conclusions nor the State Supreme Court's opinion mention the scope or limits of the class. See n. 11 *supra*. Moreover, appellant's counsel prepared the findings and conclusions. In addition to considerations of standing, we construe the ambiguity against appellant.

[14] There is no authority for the view expressed in the dissent that the statute would apply to "minors with emergency health care needs." *Post*, at 25–26. Appellant does not so contend, and the Utah Supreme Court in this case took pains to say that time is of the essence in an abortion decision. 604 P. 2d, at 913. When the specific question was properly posed in *Bellotti II*, the Massachusetts statute was construed by the state court not to apply in such cases. *Id.*, at 630.

The same is true for minors with hostile home situations, a class referred to by appellant's *amici curiae* and by the dissent, *post*, at 13–14.

her parents, (b) when she is not emancipated by marriage or otherwise, and (c) when she has made no claim or showing as to her maturity or as to her relations with her parents.

III

A

Appellant contends the statute violates the right to privacy recognized in our prior cases with respect to abortions. She places primary reliance on *Bellotti II*, *supra*, 443 U. S., at 642, 655. In *Danforth*, *supra*, we struck down state statutes that imposed a requirement of prior written *consent* of the patient's spouse and of a minor patient's parents as a prerequisite for an abortion. We held that a state

> "does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Id.*, at 74.

We emphasized, however, "that our holding . . . does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." *Id.*, at 75, citing *Bellotti I*, *supra*. There is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion.

In *Bellotti II*, dealing with a class of concededly mature pregnant minors, we struck down a Massachusetts statute requiring parental or judicial consent before an abortion could be performed on any unmarried minor. There the State's highest court had construed the statute to allow a court to overrule the minor's decision even if the court found that the minor was capable of making, and in fact had made, an informed and reasonable decision to have an abortion. We held, among other things, that the statute was unconstitutional for failure to allow mature minors to decide to undergo

abortions without parental consent. Four Justices concluded that the flaws in the statute were that, as construed by the state court, (a) it permitted overruling of a mature minor's decision to abort her pregnancy; and (b) "it requires parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interest." *Id.*, at 651. Four other Justices concluded that the defect was in making the abortion decision of a minor subject to veto by a third party, whether parent or judge, "no matter how mature and capable of informed decisionmaking" the minor might be. *Id.*, at 653–656.

Although we have held that a state may not constitutionally legislate a blanket, unreviewable power of parents to veto their daughter's abortion,[15] a statute setting out a "mere requirement of parental notice" does not violate the constitutional rights of an immature, dependent minor.[16] Four Justices in *Bellotti II* joined in stating:

> "[Plaintiffs] suggest . . . that the mere requirement of parental notice [unduly burdens the right to seek an abortion]. As stated in Part II above, however, parental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor.

[15] *Bellotti II, supra*, 443 U. S., at 642–643, 653–656; *Danforth, supra*, 428 U. S., at 74.

[16] *Bellotti II, supra*, 443 U. S., at 640, 649; *id.*, at 657 (dissenting opinion); *Danforth, supra*, 428 U. S., at 90–91 (concurring opinion); see *Bellotti I, supra*, 428 U. S., at 145, 147; cf. *Carey, supra*, 431 U. S., at 709–710.

It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns.

. . . . .

"'There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.'" *Id.*, at 640–641, quoting *Danforth, supra*, 428 U. S., at 91 (concurring opinion); (footnotes omitted).

Accord, *id.*, at 657 (dissenting opinion).

In addition, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg* v. *New York*, 390 U. S. 629, 639 (1968) (plurality opinion). In *Quilloin* v. *Walcott*, 434 U. S. 246 (1978), the Court expanded on this theme:

"We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. See, *e. g.*, *Wisconsin* v. *Yoder*, 406 U. S. 205, 231–233 (1972); *Stanley* v. *Illinois*, [405 U. S. 645 (1972)]; *Meyer* v. *Nebraska*, 262 U. S. 390, 399–401 (1923). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'"

Id., at 255, quoting *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944).

See also *Parham* v. *J. R.*, 442 U. S. 584, 602 (1979); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925). We have recognized that parents have an important "guiding role" to play in the upbringing of their children, *Bellotti II*, *supra*, at 633–639, which presumptively includes counseling them on important decisions.

B

The Utah statute gives neither parents nor judges a veto power over the minor's abortion decision.[17] As in *Bellotti I*, *supra*, "we are concerned with a statute directed toward minors, as to whom there are unquestionably greater risks of inability to give an informed consent." *Id.*, at 147. As applied to immature and dependent minors, the statute plainly serves the important considerations of family integrity[18] and protecting adolescents[19] which we identified in *Bellotti II*. In addition, as applied to that class, the statute serves a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician. The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature.[20] An

[17] The main premise of the dissent seems to be that a requirement of notice to the parents is the functional equivalent of a requirement of parental consent. *See post*, at 12–16. In *Bellotti II*, however, we expressly declined to equate notice requirements with consent requirements. *Id.*, at 640, 657.

[18] *Bellotti II*, *supra*, 443 U. S., at 637–639. The short shrift given by the dissent to "parental authority and family integrity," *post*, at 22, runs contrary to a long line of constitutional cases in this Court. See cases cited *supra*, at 9.

[19] *Bellotti II*, *supra*, 443 U. S., at 634–637.

[20] Abortion is associated with an increased risk of complication in subsequent pregnancies. D. Maine, Does Abortion Affect Later Pregnancies?, 11 Fam. Plng. Persp. 98 (1979). The emotional and psychological effects

adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.

Appellant intimates that the statute's failure to declare, in terms, a detailed description of what information parents may provide to physicians, or to provide for a mandatory period of delay after the physician notifies the parents,[21] renders the statute unconstitutional. The notion that the statute must itemize information to be supplied by parents finds no support in logic, experience, or our decisions. And as the Utah Supreme Court recognized, 604 P. 2d, at 913, time is likely to be of the essence in an abortion decision. The Utah statute is reasonably calculated to protect minors in appellant's class by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences.[22]

Appellant also contends that the constitutionality of the statute is undermined because Utah allows a pregnant minor to consent to other medical procedures without formal notice

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of the pregnancy and abortion experience are markedly more severe in girls under 18 than in adults. J. Wallerstein, et al., Psychosocial Sequelae of Therapeutic Abortion in Young Unmarried Women, 27 Arch. Gen. Psychiatry 828 (1972); see also H. Babikian & A. Goldman, A Study in Teen-Age Pregnancy, 128 Am. J. Psychiatry 755 (1971).

[21] Five states have enacted parental notification statutes containing brief mandatory waiting periods. La. Rev. Stat. Ann. § 40:1200.35.6 (1980 Supp.) (24 hours actual notice or 72 hours constructive notice except for court-authorized abortions); Mass. G. L. A. ch. 112, § 12S (1981 Supp.) (24 hours); Me. Rev. Stat. Ann. tit. 22, § 1597 (1980) (24 hours); N. D. Cent. Code § 14-02.1-03 (24 hours); Tenn. Code Ann. § 39-302 (1979 Supp.) (two days).

[22] Members of the particular class now before us in this case have no constitutional right to notify a court in lieu of notifying their parents. See *Bellotti II*, *supra*, 443 U. S., at 647. This case does not require us to decide in what circumstances a State must provide alternatives to parental notification.

to her parents if she carries the child to term.[23] But a State's interests in full-term pregnancies are sufficiently different to justify the line drawn by the statutes. Cf. *Maher* v. *Roe*, 432 U. S. 464, 473–474 (1977). If the pregnant girl elects to carry her child to term, the *medical* decisions to be made entail few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort.

That the requirement of notice to parents may inhibit some minors from seeking abortions is not a valid basis to void the statute as applied to appellant and the class properly before us. The Constitution does not compel a State to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action "encouraging childbirth except in the most urgent circumstances" is "rationally related to the legitimate governmental objective of protecting potential life." *Harris* v. *McRae*, *supra*, ___ U. S., at ___. Accord, *Maher* v. *Roe*, *supra*, 432 U. S., at 473–474.[24]

As applied to the class properly before us, the statute plainly serves important state interests, is narrowly drawn to protect only those interests, and does not violate any guarantees of the Constitution.[25] The judgment of the Supreme Court of Utah is

Affirmed.

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[23] See Utah Code Ann. (1953) § 78-14-5 (4)(f) (permitting any female to give informed consent "to any health care not prohibited by law in connection with her pregnancy or childbirth").

[24] See also *Bellotti II*, *supra*, 443 U. S., at 643–644; *Bellotti I*, *supra*, 428 U. S., at 148–149; *Danforth*, *supra*, 428 U. S., at 65–67, 79–81; *Connecticut* v. *Menillo*, 423 U. S. 9, 11 (1975); *West Side Women's Services, Inc.* v. *City of Cleveland*, 450 F. Supp. 796, 798 (ND Ohio), aff'd mem., 582.

[25] Appellant argues that the statute violates her right to secure necessary treatment from a physician who, in the exercise of his best medical judgment, does not believe the parents should be notified. Since there is no evidence that the physician had such an opinion, we decline to reach this question. See p. 2, n. 3, and pp. 5–6, *supra*.

7-9

P.3

3-3-81

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-5903

H. L., etc., Appellant,
v.
Scott M. Matheson et al.
On Appeal from the Supreme Court of Utah.

[January —, 1981]

JUSTICE POWELL, with whom JUSTICE STEWART joins, concurring.

This case requires the Court to consider again the divisive questions raised by a state statute intended to encourage parental involvement in the decision of a pregnant minor to have an abortion. See *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976); *Bellotti* v. *Baird*, 443 U. S. 662 (1979) (*Bellotti II*). I agree with the Court that Utah Code Ann. § 76-7-304 (2) does not unconstitutionally burden this appellant's right to an abortion. I join the opinion of the Court on the understanding that it leaves open the question whether § 304 (2) unconstitutionally burdens the right of a mature minor or a minor whose best interests would not be served by parental notification. See *ante*, at —, n. 17. I write to make clear that I continue to entertain the views on this question stated in my opinion in *Bellotti II*. See *infra*, at n. 3.

I

Section 304 (2) requires that a physician "[n]otify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor."[1] Appellant attacks this notice requirement on the ground that it burdens the right of a minor who is emancipated, or who is mature enough to make the abortion decision independent of parental involvement, or whose parents will react obstructively upon

[1] Section 304 (2) is quoted in full in the Court's opinion. *Ante*, at 1-2.

notice. *See ante*, at 5. The threshold question, as the Court's opinion notes, is whether appellant has standing to make such a challenge. Standing depends initially on what the complaint alleges. *Warth* v. *Seldin*, 422 U. S. 490, 498, 501 (1975), as courts have the power "only to redress or otherwise to protect against injury to the complaining party." *Id.*, at 499. The complaint in this case was carefully drawn. Appellant's allegations about herself and her familial situation are few and laconic. She alleged that she did "not wish to inform her parents of her condition and believe[d] that it [was] in her best interest that her parents not be informed of her condition." Complaint ¶ 6. She also alleged that she understood "what is involved in her decision," ¶ 9, and that the physician she consulted had told her that "he could not and would not perform an abortion upon her without informing her parents prior to aborting her." ¶ 7.

Appellant was 15 years of age and lived at home with her parents when she filed her complaint. She did not claim to be mature, and made no allegations with respect to her relationship with her parents. She did not aver that they would be obstructive if notified, or advance any other reason why notice to her parents would not be in her best interest. Similarly, the complaint contains no allegation that the physician—while apparently willing to perform the abortion—believed that notifying her parents would have adverse consequences. In fact, nothing in the record shows that the physician had any information about appellant's parents or familial situation, or even that he had examined appellant.

A

This case does not come to us on the allegations of the complaint alone. An evidentiary hearing occurred after the trial court had denied appellant's motion for a preliminary injunction. Appellant was the only witness, and her testimony—and statements by her counsel—make clear beyond any question that the "bare bones" averments of the com-

plaint were deliberate, and that appellant is arguing that a mere notice requirement is invalid *per se* without regard to the minor's age, whether she is emancipated, whether her parents are likely to be obstructive, or whether there is some health or other reason why notification would not be in the minor's best interests.

On direct examination, appellant merely verified the allegations of her complaint by affirming each allegation as paraphrased for her by her lawyer in a series of leading questions.[2] Her testimony on cross-examination added nothing to the complaint. In addition, appellant's lawyer insistently objected to all questions by counsel for the State as to the appellant's reasons for not wishing to notify her parents.[3] The trial court, on its own initiative, pressed unsuccessfully to elicit some reasons, inquiring how it could "find out the validity of [appellant's] reasons without [the state's lawyer] being permitted to cross-examine her." Tr., at 8a. Appellant's lawyer replied:

> "It is our position constitutionally that she has the right to make [the abortion] decision and if she has consulted with a counselor and the counselor concurs that those are

[2] Appellant's testimony on direct examination is quoted in full in the Court's opinion. *Ante*, at 1 to 6.

[3] Appellant's testimony on cross-examination is quoted in full in the Court's opinion. *Ante*, at 6 to 7.

[4] After the brief examination of appellant and the State's brief cross-examination of appellant's lawyer quoted [illegible] appellant's lawyer stated: "Our position is that it is the doctor-patient relationship that is the key. If the doctor determines he should go ahead with the patient, that he should. The specific facts in any case, whether [the doctor] is wrong or right, are not for us to be concerned in making that decision and go ahead and act on it. That is why I object to [illegible]. *Ibid.*

> valid reasons, why then—. . . . In terms of going beyond [the complaint allegations], our point is that the specifics of *the reasons are really irrelevant to the constitutional issue.*" Tr., at 86–87 (emphasis supplied).

When appellant's lawyer insisted that the facts with respect to this particular minor were irrelevant, the trial court sustained the validity of the statute.[7]

In sum, and as the Court's opinion emphasizes, appellant alleges nothing more than that she desires an abortion, that she has decided—for reasons which she declined to reveal—that it is in her best interest not to notify her parents, and that a physician would be willing to perform the abortion if notice were not required. Although the trial court did not rule in terms of standing, it is clear that these bald allegations do not confer standing to claim either that § 304 (2) unconstitutionally burdens the right of a mature minor or a minor whose best interests would not be served by parental notification.[8] They confer standing only to claim that § 304 (2) is an

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[7] At the end of the evidentiary hearing, appellant's lawyer framed the trial court's ruling as follows:

"If your ruling is that 'if possible' [as used in the statute means 'physically possible'] and there are no circumstances whatsoever that justify the violation of the statute, then the issue is closed." Tr., at 98.

[8] Because this case is a class action, it might be presumed that other members could raise the question whether a pregnant minor has a right to abortion without parental notice upon a showing that she is mature or that her parents will interfere with her abortion. But the record in this case contains no facts to support a presumption that the class includes such members. The only complaint allegations about the class are that appellant's claims "are typical of the claims of all members of the class" and that the class consists of "minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies but may not do so inasmuch as their physicians will not perform an abortion upon them without compliance with the provisions of Section 76-7-304 (2)." Complaint, ¶ 10. Thus, the record supports only the conclusion that the class consists entirely of pregnant minors who assert the identical claim that appellant presents, a constitutional right to an abortion without notifying their parents, and without claiming to be mature or that notification

unconstitutional burden upon an unemancipated minor who desires an abortion without parental notification but also desires not to explain to anyone her reasons either for wanting the abortion or for not wanting to notify her parents.[1]

B

On the facts of this case I agree with the Court that § 304 (2) is not an unconstitutional burden on appellant's right to

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would not be in their best interest. To start, the class members—like appellant—assert an absolute right to make the decision themselves independently of any state-compelled physician.

[1] The trial court entered findings of fact and conclusions of law after the evidentiary hearing. Paragraph 7 of the trial court's findings reads:

"The plaintiff consulted with a counselor to assist her in deciding whether or not she should terminate her pregnancy. She determined, after consultation with her counselor, that she should secure an abortion, but was advised when consulting her physician that under the provisions of Section 76-7-304 (2), Utah Code Annotated, 1953, that he believed along with her that she should be aborted and that he felt it was in her best medical interest to do so but he could not and would not perform an abortion upon her without informing her parents prior to aborting her because it was required of him by that statute and he was unwilling to perform an abortion upon her without complying with the provisions of the statute even though he believed it was best to do so." *H. L. v. Matheson*, Civil No. C-78-270 (Dec. 26, 1978).

Precisely what this paragraph finds is ambiguous. At the least, it finds that appellant "consulted" a physician and that the physician agreed with appellant that an abortion would be in appellant's best medical interest. The final portion of the finding—"he was unwilling to perform an abortion upon her without complying with the provisions of the statute even though he believed it was best to do so"—could be read to find that the physician also agreed with appellant that "it was best" to "perform an abortion upon her without complying with the provisions" requiring parental notice. Or the final portion could be read to find only that the physician would not perform an abortion without complying with the statute even though he believed that "it was best" to abort appellant's pregnancy. In light of appellant's limited allegations and testimony, and the legal argument of her lawyer, the trial court's finding cannot be read as saying that the physician determined that appellant's parents would pose hostile or obstructive reactions to appellant's abortion decision.

an abortion. Numerous and significant interests compete when a minor decides whether or not to abort her pregnancy. The right to make that decision may not be unconstitutionally burdened. *Roe* v. *Wade*, 410 U. S. 113, 154 (1973); *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, at 74–75. In addition, the minor has an interest in effectuating her decision to abort, if that is the decision she makes. *Id.*, at 75; *Bellotti II*, *supra*, at 647. The State, aside from the interest it has in encouraging childbirth rather than abortion, cf. *Maher* v. *Roe*, 432 U. S. 464 (1977); *Harris* v. *McRae*, — U. S. — (1980), has an interest in fostering such consultation as will assist the minor in making her decision as wisely as possible. *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, at 91 (STEWART, J., concurring); *post*, at — (STEVENS, J., dissenting). The State also may have an interest in the family itself, the institution through which "we inculcate and pass down many of our most cherished values, moral and cultural." *Moore* v. *City of East Cleveland*, 431 U. S. 495, 503–504 (1977). Parents have a traditional and substantial interest in, as well as a responsibility for, the rearing and welfare of their children, especially during immature years. *Bellotti II*, *supra*, at 637–639.

None of these interests is absolute. Even an adult woman's right to an abortion is not unqualified. *Roe* v. *Wade*, *supra*, at 154. Particularly when a minor becomes pregnant and considers an abortion, the relevant circumstances may vary widely depending upon her age, maturity, mental and physical condition, the stability of her home if she is not emancipated, her relationship with her parents, and the like. If we were to accept appellant's claim that § 304 (2) is *per se* an invalid burden on the asserted right of a minor to make the abortion decision, the circumstances which normally are relevant would—as her counsel insisted—be immaterial. *Supra*, at 5. The Court would have to decide that the minor's wishes are virtually absolute. To be sure, our

cases have emphasized the necessity to consult a physician. But we have never held with respect to a minor that the opinion of a single physician as to the need or desirability of an abortion outweighs all state and parental interests.[9]

In sum, a State may and validly require notice to parents in all cases without providing an independent decisionmaker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently or that notification otherwise would not be in her best interests. My opinion in *Bellotti II*, joined by three other Justices, stated at some length the reasons why such a decisionmaker is needed. *Bellotti II*, *supra*, at 642–648. The circumstances relevant to the abortion decision by a minor can and do vary so substantially that absolute rules—requiring parental notice in all cases or in none[10]—would create an inflexibility that often would allow for no consideration of the rights and interests identified above. Our cases have never gone to this extreme, and in my view should not.

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[9] While the medical judgment of a physician of course is to be respected, there is no reason to believe as a general proposition that even the most conscientious physician's interest in the overall welfare of a minor can be equated with that of may parents. Moreover, abortion clinics, now readily available in most urban communities, may be operated on a commercial basis where abortions often may be obtained "on demand." See *Planned Parenthood of Central Missouri v. Danforth*, *supra*, at 91–92, n. 2 (STEWART, J., concurring); *Bellotti II*, *supra*, at 641, n. 21.

[10] Although *Bellotti II* invalidated a statute requiring parental consent, the rationale of the plurality opinion with respect to this need is applicable here.

[10] The dissenting opinion of JUSTICE MARSHALL, which would hold the Utah statute invalid on its face, elevates the decision of the minor and her physician to an absolute status ignoring state and parental interests.

GM 03/09/81

I agree

To: Mr. Justice Powell

From: Greg Morgan

Re: No. 79-5903: D.L. v. Matheson

Martha Minow has given me a copy of Justice Marshall's latest draft in this case. Footnote 12, the note which we considered to misstate our position, has been redrafted. As it now stands, I think note 12 states a sensible position (albeit one we disagree with) and a sensitive reading of our note 6. I do not think that we need to do anything with our opinion.

I also note that Justice Marshall has expanded his note 7 by adding a paragraph in response to our description of the argument of H.L.'s lawyer at the evidentiary hearing. This note emphasizes that HL's lawyer objected to cross-examination by the State after the trial judge had ruled that the statute applied without regard to circumstances. As a matter of timing, Justice Marshall is correct; but it is perfectly clear from reading the transcript that HL's lawyer badgered the trial judge into making that holding. In short, and we have known all along, HL's lawyer "ran the show" at the evidentiary hearing.

But having said this, I do not suggest that we respond in our opinion to this footnote. Our position is clear, as is Justice Marshall's; and neither position is going

to change because of quibbling in footnotes. So long as Justice Marshall's opinion does not misstate our position -- and it no longer does -- then I suggest that we stand upon what we have written.

Greg - Thanks
Martha + tell
her we will
not respond
further.

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-5903

H. L., etc., Appellant, v. Scott M. Matheson et al. | On Appeal from the Supreme Court of Utah.

[March —, 1981]

JUSTICE MARSHALL, dissenting.

The decision of the Court is narrow. It finds shortcomings in appellant's complaint and therefore denies relief. Thus, the Court sends out a clear signal that more carefully drafted pleadings could secure both a plaintiff's standing to challenge the overbreadth of Utah Code Ann. (1953) § 76-7-304 (2), and success on the merits.[1]

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[1] Under the majority's view, to assure standing, the plaintiff pregnant minor simply need allege her desire to obtain an abortion, her inability to do so because of the statute, and her claim that she is emancipated, mature, or that it is in her best interests to have an abortion performed without notifying her parents. The majority finds no standing problem where the complaint alleges that the plaintiff is emancipated or mature, and then evaluates the standing analysis employed in Bellotti v. Baird, 443 U. S. 622 (1979) (Bellotti II). See ante, at 5, n. 8 (opinion of BURGER, C. J.). In addition, the Court relies in part on a decision by the Federal District Court in Utah which enjoined application of the same Utah statute involved here to emancipated minors. L. R. v. Hansen, Civil No. C-80-0078J (D. Utah, 1980). The Court apparently contemplates that similar challenges will meet with success in the future. For example, the District Court in L. R. v. Hansen also accorded anonymous status and awarded preliminary relief to a minor woman who, like appellant, is under 17 years old and is dependent upon a parent with whom she resides. The only difference between the allegations of the instant complaint and those of that intervenor is the latter's express allegation that parental notice would result in her expulsion from home and destruction of her relationship with her parent. L. R. v. Hansen, Civil No. C-80-0078J (Findings of Fact and Conclusions of Law ¶ 4) (Dec. 21, 1980). Finally, the Court

Nonetheless, I dissent. I believe that even if the complaint is defective, the majority's legal analysis is incorrect and it yields an improper disposition here. More important, I cannot agree with the majority's view of the complaint, or its standing analysis. I therefore would reverse the judgment of the Supreme Court of Utah.

I

The Court finds appellant's complaint defective because it fails to allege that she is mature or emancipated, and neglects to specify her reasons for wishing to avoid notifying her parents about her abortion decision. As a result, the Court reasons, appellant lacks standing to challenge the overbreadth of the Utah parental notification statute.[2]

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today does not question our prior decision upholding the standing of physicians to challenge abortion restrictions. See n. 4, infra.

[2] In essence, the Court concludes that because appellant neglected to make specific allegations about her [illegible] and her [illegible], she "lacks the personal stake in the controversy needed to confer standing" to advance the overbreadth argument," ante, at 5 (opinion of Burger, C. J.) (quoting *Warth v. Seldin*, — U. S. — (1975)). The majority thus [illegible] [illegible]. The quotation from *Warth* [illegible] refers to an entirely different form of standing [illegible] [illegible]. None of [illegible] See *Roe v. Wade*, 410 U. S. [illegible] (1973) [illegible] [illegible] *Doe v. Bolton*, 410 U. S. [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible]

The majority's standing analysis rests on prudential concerns and not on the constitutional limitations set by Art. III. See *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99–100 (1979); *Warth* v. *Seldin*, 422 U. S. 490, 498–499, 517–518 (1975). For the Court does not question that appellant's injury due to the statute's requirement falls within the legally protected ambit of her privacy interest, and that the relief requested would remedy the harm. See *ante*, at 7–9 (opinion of THE CHIEF JUSTICE); *ante*, at 7–8 (opinion of POWELL, J.). The Court decides only that appellant cannot challenge the blanket nature of the statute because she neglected to allege that by her personal characteristics, she is a member of particular groups that undoubtedly deserve exemption from a parental notice requirement.[2] Thus, the Court seems to apply the familiar

[illegible] standing [illegible] when their conduct [illegible] within [illegible] e. g., *United States* v. *National Dairy Prod. Corp.*, 372 U. S. 29 (1963); *United States* v. *Harriss*, 347 U. S. 612 (1954); *Williams* v. *United States*, 341 U. S. 97 (1951). [illegible] *Doe* v. *Bolton*, 410 U. S. 179 (1973). [illegible] the First Amendment. [illegible] (1972); *Coates* v. *City of Cincinnati*, 402 U. S. 611 (1971); *United States* v. [illegible] (1967) [illegible] *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); [illegible] *New York*, [illegible] (1951). [illegible] *United States* v. *Reese*, 92 U. S. 214 (1876) [illegible] Fifteenth Amendment).

[2] Similarly, [illegible] The Court does not question [illegible] from [illegible] the custody or control of their parents [illegible], and for minors able to demonstrate their maturity for the purpose of deciding to have an abortion, *ante*, at 7–8 (opinion of THE CHIEF JUSTICE). See also *Bellotti II*,

prudential principle that an individual should not be heard to raise the rights of other persons. This principle, of course, has not precluded standing in other instances where, as here, the party has established the requisite and legally protected interest, capable of redress through the relief requested.[4] See, e. g., *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U. S. 59, 80–81 (1978); *Singleton* v. *Wulff*, 428 U. S. 106, 113–118 (1976) (BLACKMUN, J.) (plurality); *Doe* v. *Bolton*, 410 U. S., at 188–189; *Griswold* v. *Connecticut*, 381 U. S. 479, 481 (1965); *NAACP* v. *Alabama*, 357 U. S. 449, 459–460 (1958); *Barrows* v. *Jackson*, 346 U. S. 249, 259 (1953).

I do not believe that prudential considerations should bar standing here, for I am persuaded that appellant's complaint establishes a claim that notifying her parents would not be in her interests.[5] She alleged that she "believes that it is in her

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supra, at 651 (POWELL, J.); *id.*, at 653 (STEVENS, J.). Nor does the Court [illegible] from the view [illegible] MR. JUSTICE POWELL's opinion in *Bellotti II*, *supra*, at 651, that a State [illegible] parental notice when it would not be in the minor's best interests to do so. This [illegible] tion is not [illegible] by MR. JUSTICE POWELL [illegible] and [illegible] by the majority, which acknowledges [illegible] where parental notification [illegible] with emergency medical treatment [illegible] *Ibid.*, *ante*, at 5 [illegible] the possibility of relief where the [illegible] with her parents," *ante*, at 6. See also *L. R.* v. *Hansen*, Civil No. C80-0078 [illegible] (D. Utah, Oct. 21, 1980).

[4] It is especially noteworthy that we have not [illegible] in [illegible] principles, [illegible] with the personal risk of prosecution, standing to challenge abortion restrictions by asserting the rights of their patients. E. g., *Planned Parenthood of Missouri* v. *Danforth*, 428 U. S. 52, 62 (1976); *Doe* v. *Bolton*, *supra*; *Griswold* v. *Connecticut*, 381 U. S. 479 (1965).

[5] In the instant case application of the prudential rule [illegible] consideration of jurisdictional and merits issues. For here, the [illegible] do not [illegible] until appellant [illegible] State's interests, which themselves are asserted only [illegible] appeal at this

best interest that her parents not be informed of her [pregnant] condition." Complaint ¶6, Appendix (App.) 4, and that after consulting with her physician, attorney, and social worker, "she understands what is involved in her decision" to seek an abortion, *id.*, ¶10. This claim was further supported, albeit without detail, at the evidentiary hearing. There appellant testified she did not feel she could discuss the abortion decision with her parents even after she consulted a social worker on the issue. App. 26, Tr. 8-9. In my judg-

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[illegible] First, the appellant must [illegible] consulting her physician [illegible] statutes. Only [illegible] of the State's [illegible] interests, which here include promoting family autonomy and parental authority. And only [illegible] would appellant [illegible] employed by the State for the [illegible] abortion decision [illegible] mature [illegible] best interests call for an abortion without parental notice. Thus, in the [illegible] the majority's [illegible] analysis [illegible] of the [illegible].

[8] Appellant's consultation with three professionals [illegible] substantial [illegible] Powell's [illegible] "she desires not to explain [illegible] her parents either her wanting the abortion or her not wanting to notify her parents."

[9] This portion of the [illegible] n. 2 (opinion of Powell, J.).

Justice Powell correctly [illegible] *ante*, at [illegible] [illegible] Tr. 19-20, App. 25-26.

ment, appellant has adequately asserted that she has persistently held reasons for believing parental notice would not be in her best interests. This provides a sufficient basis for standing to raise the challenge in her complaint. Appellant seeks to challenge a state statute, construed definitively by the highest court of that State to permit no exception to the notice requirement on the basis of any reasons offered by the minor. 604 P. 2d 907, 913 (1979). As standing is a jurisdictional issue, separate and distinct from the merits, a court need not evaluate the persuasiveness of her reasons for opposing parental notice to conclude that appellant has a concrete interest in determining whether the parental notice statute is valid.*

Yet even if the Court's view of appellant's complaint is correct, and even if prudence calls for denying her standing to raise the overbreadth claim, the Court erroneously concludes that the class represented by appellant suffers the identical standing disability. In so doing the Court is apparently indifferent to the federalism or comity issues arising when this Court presumes to supervise the procedural determinations made by a state trial court under state law. Even if application of federal law governing class actions were appropriate in this case, the majority misapplies federal law by disturbing the class definition as approved by the trial court. The Court acknowledges, *ante*, at 2-3 (BURGER, C. J.); *ante*, at 6 n. 6 (POWELL, J.), that the trial court granted appellant's motion to represent a class, and it is undisputed that this class includes all "minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies but are unable to do so inasmuch as their physician will not

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* I also doubt the wisdom in placing a minor's success in challenging a [illegible] parental notice requirement [illegible] of her particular [illegible] in the case [illegible]. Cf. *Bellotti* v. *Baird*, 443 U. S., at 633–634 [illegible].

perform an abortion upon them without compliance with the provisions of Section 76-7-304 (2).'" Complaint ¶ 10, App. 4. This class by definition includes *all* minor women, self-supporting or dependent, sophisticated or naive, as long as the Utah statute interferes with the ability of these women to decide with their physicians to obtain abortions. If the Court is correct that appellant cannot raise challenges based on the interest of emancipated or mature minors, or others whose best interests call for avoiding parental notification, the proper disposition under federal law would be a remand. This remand would protect such class members by permitting the trial court to determine whether appellant is a proper and adequate class representative, and whether her claims are sufficiently similar to the class to warrant the class action.[7] Since the trial court enjoys considerable latitude in approving class actions, such a remand is appropriate only on those rare occasions where the reviewing Court discerns an abuse of discretion.[8] But where an abuse of discretion

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[7] As this Court observed in *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 176 (1974), the federal class action procedures "were intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit." The binding effect of the class action's disposition poses serious due process concerns when the interests of class members are not properly presented. 7A Wright & Miller, *supra*, § 1785.

Where review of the [illegible] is impeded by an obvious lack of homogeneity in the class approved by the trial court, the reviewing court must remand "for reconsideration of the class definition," *Kremens* v. *Bartley*, 431 U. S. 119, 134-135 (1977), and for a determination whether the named plaintiff is a proper representative of the class. *Martin* v. *Thompson Tractor Co.*, 486 F. 2d 510, 511 (CA5 1973).

[8] *E. g.*, *Boggs* v. *Alto* [illegible] *& Rental Assn.*, 582 F. 2d 277 (CA3 1978); *Dellums* v. *Powell*, — U. S. App. D. C. —, 566 F. 2d 167 (1977), cert. denied, 438 U. S. 916 (1978); *Bennett* v. *W. T. Grant Co.*, 518 F. 2d 542 (CA4 1975); *Arkansas Educ. Assn.* v. *Board of Educ. of the Portland, Arkansas School Dist.*, 446 F. 2d 763 (CA8 1971); [illegible] *Stores Co.* v. [illegible], 436 F. 2d 791 (CA10 1970).

It is difficult to conclude that the trial judge below in fact abused his

is clear from the record, remand should ensue, and could result in redefinition or dismissal of the class, addition of other named plaintiffs to represent interests appellant cannot advance, or creation of subclasses with additional representative parties.[16] In contrast, it is improper to assume appellant adequately represents the entire class as defined by the trial court, but redefine the class appellant is deemed to represent, and deny relief on that basis.[17] Nonetheless, that is exactly the course selected by the majority today.

I instead assume that appellant adequately represents the

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discretion in approving the class. Other courts have approved similar classes represented by similar named plaintiffs. E. g., Gary-Northwest Indiana Women's Services v. Bowen, 421 F. Supp. 734 (ND Ind. 1976), aff'd, 429 U. S. 1067 (1977) (unmarried pregnant [illegible] proper representative for class of unmarried pregnant minors under 18 seeking abortion services). Further, within the class members, as the [illegible] likely, [illegible] any person in the class appellant represents would have an interest in seeing [illegible] alleged [illegible] upheld. Sosna v. Iowa, 419 U. S. 393, 403, n. 13 (1975).

[16] A class may need to be redefined, e. g., [illegible] v. [illegible], [illegible] F. Supp. 3[illegible]7, 371 (SDNY 1971) (three-judge court), divided into subclasses, e. g., Francis v. Davidson, 340 F. Supp. 351 (Md. 1972) (three-judge court), or otherwise modified to adequately protect its members' interests. See generally 7 Wright & Miller, Federal Practice and Procedure §§ 1758, 1771 (Supp. 1979).

[17] See ante, at 3 (opinion of STEVENS, J.). JUSTICE POWELL asserts, ante, at 9, n. [illegible], that the class [illegible] because the record fails to disclose that [illegible]. In my view, the record [illegible] [illegible] Aug. [illegible] [illegible] the trial judge [illegible] In so approving, the trial court [illegible] allegations would adequately [illegible] of the class members, who would be bound by the judgment. [illegible] the claims that can be asserted by the named plaintiff [illegible] for reconsideration of the adequacy of the named plaintiff as class representative.

close which the trial judge concluded she represents—all minor women seeking an abortion but finding the parental notice requirement an obstacle. I then would find that their rights and interests can be raised here by appellant in support of a facial challenge to the Utah statute, and conduct the appropriate review of appellant's claims.

II

Because the Court's treatment is so cursory, I review appellant's claims with due attention to our precedents.

Our cases have established that a pregnant woman has a fundamental right to choose whether to obtain an abortion or carry the pregnancy to term. *Roe* v. *Wade*, 410 U. S. 113 (1973); *Doe* v. *Bolton*, *supra*.[5] Her choice, like the closely intimate decisions to marry,[6] to procreate,[7] and to use contraceptives,[8] is guarded from unwarranted state intervention by the right to privacy.[9] Grounded in the Due Process Clause of the Fourteenth Amendment, the right to privacy[10]

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[5] *See also Carey* v. *Population Services International*, 431 U. S. 678, 684–685 (1977); *Griswold* v. *Connecticut*, 381 U. S., at 482–485.

[6] *Zablocki* v. *Redhail*, 434 U. S. 374, 384–386 (1978); *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967).

[7] *Skinner* v. *State of Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942). *See also Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632 (1974).

[8] *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972). *Griswold* v. *Connecticut*, *supra*; *Carey* v. *Population Services International*, *supra*; *Poe* v. *Ullman*, 367 U. S. 497, 550 (1961) (Harlan, J., dissenting) (ban on contraception is "unsupportable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life").

[9] *See also Union Pacific Railway Co.* v. *Botsford*, 141 U. S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his person, free from all restraint or interference of others, unless by clear and unquestionable authority of law").

[10] "The right has often been termed 'the right to be let alone.' *See Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting) (quoted with approval in *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969), and *Eisenstadt* v. *Baird*, 405 U. S., at 453–454, n. 10). Defining

protects both the woman's "interest in independence in making certain kinds of important decisions" and her "individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U. S. 589, 599-600 (1977).

In the abortion context, we have held that the right to privacy shields the woman from undue state intrusion in and external scrutiny of her very personal choice. Thus, in *Roe v. Wade*, 410 U. S., at 164, we held that during the first trimester of the pregnancy, the State's interests in protecting maternal health or the potential life of the fetus could not override the right of the pregnant woman and the attending physician to make the abortion decision through private, unfettered consultation. We further emphasized the restricted scope of permissible state action in this area when, in *Doe v. Bolton*, 410 U. S., at 198-200, we struck down state-imposed procedural requirements that subjected the woman's private decision with her physician to review by other physicians and a hospital committee.

It is also settled that the right to privacy, like many constitutional rights,[1] extends to minors. *Planned Parenthood*

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the "place" within which the government may not act without sufficient justification, the notion of privacy emanates from the very law of the constitutional scheme under which we live." *Poe v. Ullman*, 367 U. S. 497, 521 (1961) (Douglas, J., dissenting).

[1] "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. *See, e. g., Breed v. Jones*, 421 U. S. 519 (1975); *Goss v. Lopez*, 419 U. S. 565 (1975); *Tinker v. Des Moines School Dist.*, 393 U. S. 503 (1969); *In re Gault*, 387 U. S. 1 (1967). The Court also has long ago recognized that the State has somewhat broader authority to regulate the activities of children than of adults. *Prince v. Massachusetts*, 321 U. S., at 170; *Ginsberg v. New York*, 390 U. S. 629 (1968)." *Planned Parenthood of Central Missouri v. Danforth*, 428 U. S. 52, 74-75 (1976). *See also Brown v. Board of Education*, 347 U. S. 483 (1954) (children entitled to Equal Protection in schools).

The privacy right does not necessarily guarantee that "every minor, regardless of age or maturity, may give effective consent for termination of

of Central Missouri v. *Danforth*, 428 U. S. 52 (1976); *Bellotti* v. *Baird*, 443 U. S. 622, 639 (1979) (POWELL, J.) (*Bellotti II*); *id.*, at 653 (STEVENS, J.); *T. H.* v. *Jones*, 425 F. Supp. 873, 881 (Utah 1975), aff'd on other grounds, 425 U. S. 986 (1976). Indeed, because an unwanted pregnancy is probably more of a crisis for a minor than for an adult, because the abortion decision cannot be postponed until her majority, "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." *Bellotti II*, 443 U. S., at 642 (POWELL, J.).[20] Thus, for both the adult and the minor woman, state-imposed burdens on the abortion decision can be justified only upon a showing that the restrictions advance "important state interests." *Roe* v. *Wade*, 410 U. S., at 154; accord, *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S., at 61. Before examining the state interests asserted here, it is necessary first to consider Utah's claim that its statute does not "impinge[] on a woman's decision to have an abortion" or "place[] obstacles in the path of effectuating such a decision." Brief for Appellee 9. This requires an

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her pregnancy." *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S., at 75. [illegible] woman of any age who seeks pregnancy-related medical care. Utah Code Ann. § 78-14-5(4)(f), subject to the State's informed consent requirements, see Utah Code Ann. § 76-7-305 (1978); § 78-14-5 (1977). The [illegible]

[20] In striking down a related Utah prohibition against family planning assistance for minors absent parental consent, a federal district court reasoned that the "financial, psychological and social problems arising from teenage pregnancy and motherhood argue for our recognition of the right of minors to privacy as being equal to that of adults." *T. H.* v. *Jones*, 425 F. Supp. 873, 881 (Utah 1975), aff'd on other grounds, 425 U. S. 986 (1976).

examination of whether the parental notice requirement of the Utah statute imposes any burdens in the abortion decision.

The ideal of a supportive family so pervades our culture that it may seem incongruous to examine "burdens" imposed by a statute requiring parental notice of a minor daughter's decision to terminate her pregnancy.[5] This Court has long deferred to the bonds which join family members for mutual sustenance. *See Pierce v. Society of Sisters*, 268 U. S. 510, 534–535 (1925); *May v. Anderson*, 345 U. S. 528, 533 (1953); *Griswold v. Connecticut*, 381 U. S. 479, 486 (1965); *Stanley v. Illinois*, 405 U. S. 645, 651 (1972); *Moore v. East Cleveland*, 431 U. S. 494, 504–505 (1977) (POWELL, J., plurality). Especially in times of adversity, the relationships within a family can offer the security of constant caring and aid. *See Moore v. East Cleveland*, *id.*, at 505. Ideally, a minor facing an important decision will naturally seek advice and support from her parents, and they in turn will respond with comfort and wisdom.[6] If the pregnant minor herself confides in her family, she plainly relinquishes her right to avoid telling or involving them. For a minor in that circumstance, the statutory requirement of parental notice hardly imposes a burden.

Realistically, however, many families do not conform to this ideal. Many minors, like appellant, oppose parental notice and seek instead to preserve the fundamental, personal right to privacy. It is for these minors that the parental notification requirement creates a problem. In this context,

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[5] Appellee also argues that "[i]t is difficult to contemplate a relationship where the right of privacy as formulated in the abortion context could be less relevant than in the confines of the medical family." Brief for Appellee 22. This view, however, was expressly rejected in *Planned Parenthood of Central Missouri v. Danforth*, 428 U. S., at 75.

[6] Realization of this ideal, however, must depend on the quality of emotional attachments within the family, and not on legal patterns imposed by the State. *See Quilloin v. Walcott*, 434 U. S. 246, 255 (1978); *Moore v. East Cleveland*, 431 U. S., at 506.

involving the minor's parents against her wishes[30] effectively cancels her right to avoid disclosure of her personal choice. See *Whalen* v. *Roe*, 429 U. S., at 599-600. Moreover, the absolute notice requirement publicizes her private consultation with her doctor and interjects additional parties in the very conference held confidential in *Roe* v. *Wade*, *supra*, 410 U. S., at 164. Besides revealing a confidential decision, the parental notice requirement may limit "access to the means of effectuating that decision." *Carey* v. *Population Services International*, 431 U. S. 678, 688 (1977). Many minor women will encounter interference from their parents after the state-imposed notification.[31] In addition to parental dis-

[30] Nothing prevents the physician from encouraging the minor to consult her parents; only the minor who strenuously objects will remain burdened by the notice requirement.

[31] The record is relatively indefinite about appellant's situation because the trial judge excluded any such evidence as irrelevant to her facial challenge to the mandatory notice requirement. In light of her claim that the notice requirement would chill the exercise of her right to choose an abortion, however, we may surmise that appellant expects family conflict over the abortion. [illegible] Indeed, the transcript of the evidentiary hearing, quoted *ante*, at 3-4, n. 2 [illegible], demonstrates that consultation with her social worker, her physician, and her lawyer did not alter appellant's steadfast belief that she could not discuss the decision with her parents.

The records in other cases are also instructive as to the interference posed by some parents to the exercise of some minors' privacy rights. See *L. R.* v. *Hansen*, Civil No. C-80-0078J (D. Utah, Feb. 21, 1980) (preliminary injunction awarded to minor alleging parents expelled from home another sister who disclosed facts of pregnancy and abortion); see *Women's Community Health Center, Inc.* v. *Cohen*, 477 F. Supp. 542, 548 (Maine 1979) (expert testified that some parents "will prevent the minor, using physical coercion, duress and otherwise disrupting the family relationship"); *Baird* v. *Bellotti*, 450 F. Supp. 997, 1001 (Mass. 1978) (uncontested evidence some parents "would insist on an undesired marriage, or on continuance of the pregnancy as punishment" or even physically harm [illegible]); *Wynn* v. *Carey*, 582 F. 2d 1375, 1388, n. 24 (CA7 1978) [illegible]; *In re Diane*, 318 A. 2d 629, 630 (Del. Ch. 1974) (father opposes minor's abortion on religious grounds); *State* v. *Koome*, 84 Wash. 2d

appointment and disapproval, the minor may confront physical or emotional abuse, withdrawal of financial support, or actual obstruction of the abortion decision. Furthermore, the threat of parental notice may cause some minor women to delay past the first trimester of pregnancy, after which the health risks increase significantly.[23] Other pregnant

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601, 608, 530 P. 2d 260, 263 (1975) (father thinks forcing daughter to bear child will deter her future pregnancies). See *Margaret S.* v. *Edwards*, 488 F. Supp. 181 (ED La. 1980). Parents [illegible] oppose [illegible] [illegible] to abort. E. g., *In re Smith*, 295 A. 2d 238 (Md. 1972). See generally F. Furstenberg, Unplanned Parenthood: The Social Consequences of Teenage Childbearing 54 (1976); Jolly, Young Female and Outside the Law, in Teenage Women in the Juvenile Justice System: Changing Values, at 102 (1979) ("When a young girl becomes pregnant, many families refuse to allow her back into their home"); [illegible] and [illegible], Teenage Pregnancy: Psychosocial Considerations, 21 Clinical Obst. & Gynec. 1161, 1164–1165 (1978). See also J. Bolton, Teenage Pregnancy 123, 124 (1980) (large majority of sampled pregnant minors predict parental opposition to their abortions).

[23] *Women's Community Health Center, Inc.* v. *Cohen*, supra (affidavits showing parental notice [illegible] cause [illegible] to delay seeking assistance with her pregnancy, increasing the hazardousness of an abortion should [illegible] [illegible] [illegible] [illegible] [illegible] Abortion in the United States, [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] 24 Am. J. [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] for Adolescent Medicine [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] 12 [illegible] (October 1976) [illegible] [illegible] [illegible] (1976).

If she decides to abort after the first trimester of pregnancy, the minor faces more severe health risks. *Roe* v. *Wade*, 410 U. S., at 163; Benditt, Second-Trimester Abortion in the United States, 11 Fam. Plan. Perspectives 358 (1979); Cates, Schulz, Grimes & Tyler, The Effect of Delay and Method Choice on the Risk of Abortion Morbidity, 9 Fam. Plan. Perspectives 266 (1977). If she decides to bear the child, her health risks are also greater than if she had a first trimester abortion. [illegible] [illegible] 21; [illegible] & Tietze, [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] Legal Abortion [illegible] [illegible] [illegible] 1972–1975, [illegible] [illegible] Perspectives [illegible] (1978) [illegible] [illegible] [illegible] [illegible] of pregnancy [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

minors may attempt to self-abort or to obtain an illegal abortion rather than risk parental notification.[26] Still others may foresake an abortion and bear an unwanted child, which, given the minor's "probable education, employment skills, financial resources and emotional resources, . . . may be exceptionally burdensome." *Bellotti II*, 443 U. S., at 642 (POWELL, J.). The possibility that such problems may not occur in particular cases does not alter the hardship created by the notice requirement on its face.[27] And that hardship

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Abortion, 10 Fam. Plan. Perspectives 251 (1978). See also Zackler, Andelman & Bauer, The Young Adolescent as an Obstetric Risk, 103 Am. J. Obst. & Gyn. 305 (1969) [illegible].

[26] *Women's Community Health Center, Inc.* v. *Cohen*, 477 F. Supp., at 551 (affidavits that minors may turn to illegal abortion rather than have parents notified). See also Kahan, Baker & Freeman, The Effect of Legalized Abortion on Morbidity Resulting from Criminal Abortion, 121 Am. J. Obst. & Gyne. 114 (1975) (illegal abortion rate drops when legal abortion available). The minor may also seek to abort herself, *Alice* v. *Dept. of Social Welfare*, 55 Cal. App. 3d 1039, 1041, 128 Cal. Rptr. 374, 377 (App. 1976); A. Holder, Legal Issues in Pediatrics and Adolescent Medicine 285 (1977), or even commit suicide, see Teicher, A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide, in Current Issues in Adolescent Psychiatry 129, 136 (J. Schoolar ed. 1973) (study showing that approximately one-fourth of female minors who attempt suicide do so because they are or believe they are pregnant).

[27] It is the presence of the notice requirement, and not merely its implementation in a particular case, that creates the intrusion. Cf. *Planned Parenthood of Central Missouri* v. *Danforth*, supra (availability of veto, not exercise of veto, found unconstitutional).

[28] Despite the Court's suggestion today that we leave [illegible] quite [illegible] with parental notice, see [illegible] 34 n. 12 (opinion of POWELL, J.), in *Bellotti II*, the Court rejected a statute authorizing judicial review of a minor's abortion decision as an alternative to parental consent—precisely because a parent notified of the court action might interfere. Thus, JUSTICE POWELL wrote for four members of the Court, "[a]s the District Court recognized, 'there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court.' . . . There is no reason to believe that this would be so in the

is not a mere disincentive created by the State,[27] but is instead an actual state-imposed obstacle to the exercise of the minor woman's free choice.[28] For the class of pregnant minors represented by appellant, this obstacle is so onerous as to bar the desired abortions.[29] Significantly, the interference sanctioned by the statute does not operate in a neutral fashion. No notice is required for other pregnancy-related medical care,[30] so only the minor women who wish to abort encounter the burden imposed by the notification statute. Because the Utah requirement of mandatory parental notice unquestionably burdens the minor's privacy

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majority of cases where consent is withheld. But many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court.'" 443 U. S., at 647.

[27] Thus, the notice requirement produces not only predictable disincentives to choose to abort, *Harris* v. *McRae*, 48 U. S. L. W. 4941, 4952 (June 30, 1980) (Marshall, J., dissenting); *id.*, at 4950 (June 30, 1980) (Brennan, J., dissenting), but also "direct state interference with the protected activity," *Harris* v. *McRae*, 48 U. S. L. W. 4941, 4945 (June 30, 1980) (quoting with approval *Maher* v. *Roe*, 432 U. S. 464 (1977)).

[28] See *Doe* v. *Bolton*, *supra* (1973) (invalidating procedural restrictions on availability of abortion); *Carey* v. *Population Services International*, 431 U. S., at 687-689 (partial restrictions on access to contraceptives subject to constitutional challenge). Regardless of the personal views each of us may hold, the privacy right by definition secures freedom of choice for the pregnant minor, without State approval of one decision over another. Thus, Justice Stevens improperly asserts the relevance of our decisions when he reiterates his previous view that the importance of the abortion decision points to a "'State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative.'" *Ante*, at 3 (opinion of Stevens, J.) (emphasis added).

[29] See text accompanying nn. 8 and ... nn. 20, 24, 25, *supra*.

[30] Utah permits pregnant minors to consent to any medical procedure in connection with pregnancy and childbirth, but requires parental notice only before an abortion. Compare Utah Code Ann. § 78-14-5 (4)(f) with Utah Code Ann. § 76-7-304 (2).

right. The proper analysis turns next to the State's proffered justifications for the infringements posed by the statute.

III

As established by this Court in *Planned Parenthood of Central Missouri v. Danforth*, *supra*, the statute cannot survive appellant's challenge unless it is justified by a "significant state interest."[2] Further, the State must demonstrate that the means it selected are closely tailored to serve that interest.[3] Where regulations burden the rights of pregnant adults, we have held that the state legitimately may be concerned with "protection of health, medical standards, and pre-natal life." *Roe* v. *Wade*, 410 U. S., at 155. We concluded, however, that during the first trimester of pregnancy none of these interests sufficiently justifies state interference with the decision reached by the pregnant woman and her physician. *Id.*, at 162–163. Nonetheless, Utah asserts here that the parental notice requirement advances additional state interests not implicated by a pregnant adult's decision to abort. Specifically, Utah contends that the notice requirement improves the physician's medical judgment about a pregnant minor in two ways: it permits the parents to provide additional information to the physician, and it encourages consultation between the parents and the minor woman.

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[2] 428 U. S., at 75. Cf. *Zobel* v. *Williams*, 457 U. S., at 288 (1978); *NAACP* v. *Button*, 371 U. S. 415, 438 (1963). In *Roe* v. *Wade*, *supra*, the Court concluded that the woman's privacy right may be interpreted by "important state interests," 410 U. S., at 154, but the Court ultimately applied the "compelling state interest" test commonly used in reviewing state burdens on fundamental rights. *Id.*, at 155. Although it is [illegible] that [illegible] may be overcome by [illegible] because it may be overcome by a "compelling state interest," the more sensible view is that state interests insufficient to justify [illegible] burdening the minor's right. *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S., at 74–75.

[3] E. g., *Roe* v. *Wade*, 410 U. S., at 155; *Griswold* v. *Connecticut*, 381 U. S., at 485.

Utah also advances an independent state interest in preserving parental rights and family autonomy. I consider each of these asserted interests in turn.[14]

A

In upholding the statute, the Utah Supreme Court concluded that the notification provision might encourage parental transmission of "additional information which might prove invaluable to the physician in exercising his 'best medical judgment.'"[15] Yet neither the Utah courts nor the statute itself specifies the kind of information contemplated for this purpose, nor why it is available to the parents but not to the minor woman herself. Most parents lack the medical expertise necessary to supplement the physician's medical judgment, and at best could provide facts about the patient's medical history. It seems doubtful that a minor mature enough to become pregnant and to seek medical advice on her own initiative would be unable or unwilling to provide her physician with information crucial to the abortion decision. In addition by law the physician already is obligated to obtain all information necessary to form his best medical judgment,[16] and nothing bars consultation with the parents should the physician find it necessary.

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[14] Utah also argues that the notice requirement furthers legitimate state interests in enforcing its criminal laws against statutory rape, fornication, adultery, and incest. Brief for Appellee 28-30. These interests were not asserted below, and are too tenuous to be entertained seriously here.

[15] 724 P. 2d, at 909-910.

[16] Section 76-7-304 (1) requires the physician to

"[c]onsider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,

"(a) Her physical, emotional and psychological health and safety,

"(b) Her age,

"(c) Her familial situation."

Violations of this requirement are punishable by a year imprisonment and $1,000 fine. Utah Code Ann. §§ 76-3-204 (2), 76-3-301 (3), 76-7-314 (3). Criminal sanctions also apply if the physician neglects to obtain

Even if mandatory parental notice serves a substantial state purpose in this regard, the Utah statute fails to implement it. Simply put, the statute on its face does not require or even encourage the transfer of information; it does not even call for a conversation between the physician and the parents. A letter from the physician to the parents would satisfy the statute, as would a brief telephone call made moments before the abortion.[7] Moreover, the statute is patently underinclusive if its aim is the transfer of information known to the parents but unavailable from the minor woman herself. The statute specifically excludes married minors from the parental notice requirement: only her husband need be told of the planned abortion. Utah Code Ann. § 76–7–304 (2), and Utah makes no claim that he possesses any information valuable to the physician's judgment but unavailable from the pregnant woman. Furthermore, no notice is required for other pregnancy-related care sought by the minor. See Utah Code Ann. § 78-14-5 (4)(f) (au-

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the minor's informed written consent and such consent can be secured only after the physician has notified the parent:

"(a) Of the names and addresses of two licensed adoption agencies in the state of Utah and the services that can be performed by these agencies and pregnancy adoption may be legally arranged; and

"(b) Of the details of development of unborn children and abortion procedures, including any foreseeable complications, risks, and the nature of the post-operative recuperation period; and

"(c) Of any other factors he deems relevant to a voluntary and informed consent." Utah Code Ann. § 76–7–305 (2).

The risk of malpractice suits also ensures that the physician will acquire whatever information he finds necessary before performing the abortion. See Utah Code Ann. § 78–14–5.

Moreover, "[i]f a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this professional capacity and deficiencies of his license are available remedies." *Doe* v. *Bolton*, 410 U. S., at 199.

[7] The parties conceded as much at oral argument. Tr. of Oral Arg. 18–19, 29, 48.

thorizing woman of any age to consent to pregnancy-related medical care). The minor woman may consent to surgical removal and analysis of amniotic fluid, caesarian delivery, and other medical care related to pregnancy. The physician's decisions concerning such procedures would be enhanced by parental information as much as would the abortion decision, yet only the abortion decision triggers the parental notice requirement. This result is especially anomolous given the comparatively lesser health risks associated with abortion as contrasted with other pregnatory-related medical care.[31] Thus, the statute not only fails to promote the transfer of information as is claimed, it does not apply to other closely related contexts in which such exchange of information would be no less important. The goal of promoting consultation

[31] I am baffled by the majority's statement today that "[i]f the pregnant girl elects to carry her child to term, the medical decisions to be made entail few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort." *Ante*, at 11 (opinion of Burger, C. J.). Choosing to participate in diagnostic tests involves risks to both mother and child and also may burden the pregnant woman with knowledge that the child will be handicapped. See Prevention of Embryonic, Fetal and Perinatal Disease 347-362 (R. Brent & M. Harris, ed. 1976); Risks in the Practice of Modern Obstetrics 70-81, 355-370 (S. Aladjem, ed. 1975). The decision to undergo surgery to save the child's life may likewise carry as serious "emotional [and] psychological consequences" for the pregnant adolescent as does the decision to abort. In both instances, the minor confronts the task of calculating not only medical risks but also all the issues involved in giving birth to a child. See Risks in the Practice of Modern Obstetrics, *supra*, at 70-81. For an unwed adolescent, these issues include her future educational and job opportunities, as well as the more immediate problems of finding financial and emotional support for offspring dependent entirely on her. *Michael M. v. Sonoma County Superior Court*, — U. S. — (1981) (Blackmun, J., concurring) (slip op., at 5). When surgery to save the child's life poses greater risks to the mother's life, the emotional and ethical dimensions of the medical care decision assume crisis proportion. Of course, for minors, the mere fact of pregnancy and the experience of childbirth can produce psychological upheaval.

between the physician and the parents of the pregnant minor cannot sustain a statute that is so ill-fitted to serve it.[39]

B

The State also claims the statute serves the legitimate purpose of improving the minor's decision by encouraging consultation between the minor woman and her parents. The State does not dispute that it cannot legally or practically require such consultation.[40] Nor does the State contest the fact that the decision is ultimately the minor's to make.[41] Nonetheless, the state seeks through the notice requirement to give parents the opportunity to contribute to the minor woman's abortion decision.

Ideally, facilitation of supportive conversation would assist the pregnant minor during an undoubtedly difficult experience. Again, however, when measured against the rationality of the means employed, the Utah statute simply fails to advance this asserted goal. The statute imposes no requirement that the notice be sufficiently timely to permit any discussion between the pregnant minor and the parents. Moreover, appellant's claims require us to examine the statute's

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[39] More flexible regulations which defer to the physician's judgment but provide for parental notice in emergencies have been proposed. *E. g.*, IJA-ABA, Juvenile Justice Standards Project, Standards Relating to Rights of Minors §§ 4.2, 4.6, 4.8 (1980) (minor can consent to pregnancy-related medical care; physician should seek to obtain minor's permission to notify parent, and notify parent over minor's objection only if failure to inform "would seriously jeopardize the health of the minor").

[40] See 604 P. 2d, at 912 ("the State has a special interest in encouraging (but not requiring) an unmarried pregnant minor to seek the advice of her parents in making the important decision as to whether or not to bear a child").

[41] *Ibid.* (notification statute "does not per se impose any restriction on the minor as to her decision to terminate her pregnancy"). Cf. Utah Code Ann. § 78-14-5 (4)(f) (woman of any age can consent to any medical care related to pregnancy). See generally *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S., at 74 (State may not delegate absolute veto authority to parents of pregnant minor seeking abortion).

purpose in relation to the parents who the minor believes are likely to respond with hostility or opposition. In this light, the statute is plainly overbroad. Parental consultation hardly seems a legitimate state purpose where the minor's pregnancy resulted from incest, where a hostile or abusive parental response is assured, or where the minor's fears of such a response deter her from the abortion she desires. The absolute nature of the statutory requirement, with exception permitted only if the parents are physically unavailable, violates the requirement that regulations in this fundamentally personal area be carefully tailored to serve a significant state interest.[42] "The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter." *Bellotti II*, 443 U. S., at 642 (Powell, J.). Because Utah's absolute notice requirement demonstrates no such sensitivity, I cannot approve its interference with the minor's private consultation with the physician during the first trimester of her pregnancy.

C

Finally, the state asserts an interest in protecting parental authority and family integrity.[43] This Court, of course, has

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[42] State sponsored counseling services, in contrast, could promote family dialogue and also improve the minor's decisionmaking process. Appellant H. L., for example, consulted with a counselor who supported her decision. The role of counselors can be significant in facilitating the pregnant woman's adjustment to decisions related to her pregnancy. See Smith, A Follow-Up Study of Women who Request Abortion, 43 Am. J. Orthopsychiatry 574, 583–585 (1973).

[43] This interest, although not discussed by the state courts below, was the subject of the State's most vigorous argument before this Court. The challenged provision does fall within the "Offenses Against the Family" chapter of the Utah Criminal Code, and, at least opinion of Burton, C. J.) which also provides criminal sanctions for bigamy, Utah Code Ann. §76–

recognized that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin* v. *Yoder*, 406 U. S. 205, 232 (1972). See *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923). Indeed, "those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce* v. *Society of Sisters*, 268 U. S., at 535 (1924). Similarly, our decisions "have respected the private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U. S., at 166. See also *Moore* v. *East Cleveland*, 431 U. S., at 499.

The critical thrust of these decisions has been to protect the privacy of individual families from unwarranted state intrusion.[1] Ironically, Utah invokes these decisions in seeking to justify state interference in the normal functioning of the family. Through its notice requirement, the State in fact enters the private realm of the family rather than leaving unaltered the pattern of interactions chosen by the family. Whatever its motive, state intervention is hardly likely to resurrect parental authority that the parents themselves are unable to preserve.[2] In rejecting a statute permitting parental veto of the minor woman's abortion decision in *Planned*

7-101, incest, § 76-7-102, adultery, § 76-7-103, fornication, § 76-7-104, and non-support and desertion of children, §§ 76-7-201 to 76-7-220.

[1] Penn v. Carey, 552 F. 2d, at 1356–1358. See, The Minor's Right of Privacy: Limitations on State Action after *Danforth* and *Carey*, 27 Cath. U. L. Rev. 1216, 1221 (1977).

[2] "The fact that the minor became pregnant and sought an abortion contrary to the parents' wishes indicates that whatever control the parent once had over the minor has diminished, if not evaporated entirely. And we believe that conferring a single, albeit important, parental decision—at a time when the minor is near to majority status—by an instrument as blunt as a state statute is extremely unlikely to restore parental control." *Poe* v. *Gerstein*, 517 F. 2d 787, 791–795 (CA5 1975), summarily aff'd, 428 U. S. 901 (1976).

Parenthood of Central Missouri v. *Danforth*, 428 U. S., at 75, we found it difficult to conclude that

> "providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure"

More recently, in *Bellotti* v. *Baird II*, 443 U. S., at 638, Justice Powell observed that efforts to guide the social and moral development of young people are "in large part . . . beyond the competence of impersonal political institutions."

Utah maintains, however, that its statute "merely safeguards a reserved right which parents have to know of the important activities of their children by attempting to prevent a denial of the parental rights through deception." Brief for Appellee 3. Casting its purpose this way does not salvage the statute. For when the threat to parental authority originates not from the State but from the minor child, invocation of "reserved" rights of parents cannot sustain blanket state intrusion into family life such as that mandated by the Utah statute. Such a result not only runs counter to the private domain of the family which the State may not breach; it also conflicts with the limits traditionally placed on parental authority. Parental authority is never absolute and has been denied legal protection when its exercise threatens the health or safety of the minor children. *E. g.*, *Prince* v. *Massachusetts*, 321 U. S., at 169–170. Indeed, legal protection for parental rights is frequently tempered if not replaced by concern for the child's interest.[15]

[15] Thus, in *Prince* v. *Massachusetts*, *supra*, this Court held that even parents' rights protected by the First Amendment could be limited by the State's interest in prohibiting child labor. *See Wisconsin* v. *Yoder*,

Whatever its importance elsewhere, parental authority deserves de minimus legal reinforcement where the minor's exercise of a fundamental right is burdened.

To decide this case, there is no need to determine whether parental rights never deserve legal protection when their assertion conflicts with the minor's rights and interests.[47] I conclude that this statute cannot be defended as a mere reinforcement of existing parental rights, for the statute reaches beyond the legal limits of those rights. The statute applies, without exception, to emancipated minors,[48] mature minors,[49]

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406 U. S., at 233-234 (discussing *Prince*). The State traditionally exercises a *parens patriae* function in protecting those who cannot take care of themselves. See *Ginsberg* v. *New York*, 390 U. S. 629, 641 (1968). Some of the earliest applications of *parens patriae* protected children against their "objectionable" parents. E. g., *Wellesley* v. *Wellesley*, 4 Eng. Rep. 1078, 1082 (H. L. 1828). See generally Kleinfeld, The Balance of Power Among Infants, Their Parents and the State, Part III, 5 Family L. Q. 64, 65-72 (1971). Every State has enacted legislation to defend children from parental abuse. Walters, Child Abuse Laws: Past, Present, and Future, 21 J. Forensic Sci. 71, 72 (1976).

[47] The contexts in which the issue may arise are too varied to suggest any general rule. Appellee cites our recent decision in *Parham* v. *J. R.*, 442 U. S. 584 (1979), to support its claim that parents should be presumed competent to be involved in their minor daughter's abortion decision. That decision is inapposite to this case in several respects. First, the minor child in *Parham* who was committed to a mental hospital was presumed incompetent to make the commitment decision himself. *Id.*, at 623 (STEWART, J., concurring). In contrast, appellant by statute is presumed competent to make the decision about whether to complete or abort her pregnancy. Furthermore, in *Parham*, the Court placed critical reliance on the ultimate independent and periodic review of the commitment decision by medical experts. Here, the physician's independent medical judgment—that an abortion was in appellant's best medical interests—not only was not relied on; it was defeated by the notice requirement. Finally, as JUSTICE STEWART emphasized in his concurring opinion in *Parham*, the pregnant minor has a "personal substantive right" to decide on an abortion. *Id.*, at 623-624, n. 6.

[48] Most States through their legislatures or courts have adopted the emancipation principle [illegible]

[*Footnote 49 is on p. 26*]

and minors with emergency health care needs,[29] all of whom, as Utah recognizes, by law have long been entitled to medical care unencumbered by parental involvement. Most relevant

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of that status—and at the same time release his parents from their parental obligations—prior to the actual date of his majority. Certain acts, in and of themselves, may occasion emancipation. *See, e. g.*, Cal. Civ. Code § 62 (Supp. 1979) (emancipation upon marriage or entry as armed services); Utah Code Ann. § 15-2-1 (emancipation upon marriage); *Crook v. Crook*, 80 Ariz. 295, 296 P. 2d 953 (1956) (same). A minor may become partially emancipated if he is partially self-supporting, but still entitled to some parental assistance. *See* Katz, Schroeder & Sidman, Emancipating Our Children—Coming of Legal Age in America, 7 Fam. L. Q. 211, 215 (1973). Several States by statute permit emancipation for a specific purpose, such as obtaining medical care without parental consent, *e. g.*, Cal. Civ. Code § 34.6; Mont. Code Ann. § 69-6102 (1979) (woman of any age may consent to pregnancy-related medical care); Utah Code Ann. § 78-14-5 (4) (5) (same); Utah Code Ann. § 26-2-30.1 (minor can consent to medical treatment for venereal disease); Tex. Ann. Stat. art. 4447 (Vernon 1976) (person at least 16 years old may consent to medical treatment for drug dependency). *See* Pipel, Minors' Rights to Medical Care, 33 Albany L. Rev. 462 (1972). Several States provide for emancipation once the individual becomes a parent. *E. g.*, Ky. Rev. Stat. Ann. § 214.185 (2) (1977). In Utah, minors who become parents are authorized to make all medical care decisions for their offspring. Utah Code Ann. § 78-14-5 (a). *See generally Cohen v. Delaware, L. & W. R. Co.*, 150 Misc. 450, 453–457, 269 N. Y. S. 667, 671–676 (Sup. Ct. 1934); *L. R. v. Hansen*, No. C-80-0078J (Feb. 8, 1980) (CD Utah) (self-supporting minor seeking abortion is emancipated and mature); Goldstein, Medical Care for the Child at Risk: On State Supervention of Parental Authority, 86 Yale L. J. 645, 663 (1977) (recommending objective criteria to avoid case-by-case determination of emancipation).

[29] The "mature minor" doctrine permits a child to consent to medical treatment if he is capable of appreciating its nature and consequences. *E. g.*, *L. R. v. Hansen*, No. C-80-0078J (Feb. 8, 1980) (CD Utah) (the mature minor "is capable of understanding her condition and making an informed decision which she has done after carefully considering the alternatives available to her and consulting the persons with whom she felt she should consult" prior to abortion decision); Ark. Stat. Ann. § 82-363 (g) (1979). *See Lacey v. Laird*, 166 Ohio St. 12, 139 N. E. 2d 25 (App. 1956) (physician not liable for battery after acting with minor's

[*Footnote 29 is on p. 37*]

to appellant's own claim, the statutory restriction applies even where the minor's best interests—as evaluated by her physician—call for an abortion. The Utah trial court found

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consent); *Smith v. Seibly*, 72 Wash. 2d 16, 21–22, 431 P. 2d 720, 723 (1967); *Tucula v. St. Francis Hosp. & School of Nursing, Inc.*, 205 Kan. 232, 300–301, 469 P. 2d 330, 337 (1970).

Four Members of this Court endorsed the "mature minor" concept in striking down a statute requiring parental notice and consent to a minor's abortion, regardless of her own maturity. *Bellotti II*, 443 U. S., at 643–644, and nn. 22 and 23. In *Bellotti II*, Justice Powell's opinion for four Members of this Court suggested that a statute could withstand facial constitutional attack if it permitted case-by-case administrative or judicial determination of a pregnant minor's capacity to make an abortion decision with her physician and independent of her parents. 443 U. S., at 643–644, and nn. 22 & 23. Because this view was expressed in a case not involving such a statute, and because it would expose the minor to the arduous and public rigors of administrative or judicial process, four other Members of this Court rejected it as advisory and at odds with the privacy interest at stake. *Id.*, at 654–656, and 656, n. 4 (Stevens, J.). Nonetheless, even under Justice Powell's reasoning in *Bellotti II*, the instant statute is unconstitutional. Not only does it preclude case-by-case consideration of the maturity of the minor, it also prevents individualized review to determine whether parental notice would be harmful to the minor.

[20] *E. g.*, Ky. Rev. Stat. § 214.185 (3) (1977); Utah Code Ann. § 26-31-8; Utah Laws ch. 86-7 (1979). The need for emergency medical care may even overcome the religious objections of the parents. *E. g., In re Clark*, 21 Ohio Op. 2d 80, 88–90, 183 N. E. 2d 128, 131–132 (C. P. Lucas County 1962); *In re Sampson*, 65 Misc. 2d 658, 317 N. Y. S. 2d 641 (Family Ct.), aff'd, 37 App. Div. 2d 668, 4 Sup. Ct. (1970); Mass. Gen. Laws Ann. ch. 112, § 12F (Supp. 1979). Miss. Code Ann. § 41-41-7 (1972). Delay in treating nonemergency health needs may, of course, produce an emergency, and for that reason, this Court found statutory provision of emergency but not nonemergency care illogical. *Memorial Hospital v. Maricopa County*, 415 U. S. 250, 261, 265 (1974). In asserting that the Utah statute would not apply to minors with emergency health care needs, the Court fails to point to anything in the statute, the record, or Utah case law to the contrary. The Supreme Court of Utah addressed only one kind of emergency, where the pregnant minor cannot be physically located in sufficient time to permit performance of the abortion. 606 P. 2d at 315. The court rejected any other emergency situation as an exception to the statute when it declined to afford a broad

as a fact that appellant's physician "believed along with her that she should be aborted and that he felt it was in her best medical interest to do so but he could not and would not perform an abortion upon her without informing her parents prior to aborting her because it was required of him by that statute and he was unwilling to perform an abortion upon her without complying with the provisions of the statute even though he believed it was best to do so." Civ. No. C-78-270 (Dec. 26, 1978) (Findings of Fact ¶ 7). Even if further review by adults other than her physician, counselor and attorney were necessary to assess the minor's best interests, see *Bellotti II*, *supra* (opinion of POWELL, J.), Utah's rejection of any exception to the notice requirement for a pregnant minor is plainly overboard. In *Bellotti II*, we were unwilling to cut a pregnant minor off from any avenue to obtain help beyond her parents, and yet the Utah statute does just that.

In this area, I believe this Court must join the state courts and legislatures which have acknowledged the undoubted social reality: some minors, in some circumstances, have the capacity and need to determine their health care needs without involving their parents. As we recognized in *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U. S., 75, "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." Utah itself

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interpretation of the phrase, "if possible," which modifies the notice requirement. Even where the emergency is ample that the parents cannot be notified, the statute applies the physician subject to prosecution merely for having attempted an abortion before that he even notifies available diligent effort in attempting to locate and notify the parents. *Ibid.*

"As one medical authority observed: '[o]ne can well argue that an adolescent old enough to make the decision to be sexually active . . ., and who is then responsible enough to seek professional assistance for his or her problem, is ipso facto mature enough to consent to his own health

has allocated pregnancy-related health care decisions entirely to the pregnant minor.[33] Where the physician has cause to doubt the minor's actual ability to understand and consent, by law he must pursue the requisites of the State's informed consent procedures.[34] The State cannot have a legitimate interest in adding to this scheme mandatory parental notice of the minor's abortion decision. This conclusion does not affect parents' traditional responsibility to guide their children's development, especially in personal and moral concerns. I am persuaded that the Utah notice requirement is not necessary to assure parents this traditional child-rearing role and that it burdens the minor's fundamental right to choose with her physician whether to terminate her pregnancy.[35]

IV

The challenged statute infringes upon the constitutional right to privacy attached to a minor woman's decision whether to complete or terminate her pregnancy. None of the reasons offered by the State justifies this intrusion, for the statute is not tailored to serve them. Rather than serving to enhance the physician's judgment, in cases such as appellant's, the statute prevents implementation of the physician's medical recommendation. Rather than promoting the transfer of information held by parents to the minor's physician, the statute neglects to require anything more than a communication from the physician moments before the abortion. Rather than respecting the private realm of family life,

care." Hofmann, Consent and Confidentiality and Their Legal and Ethical Implications for Adolescent Medicine, in Medical Care of the Adolescent 42, 51 [illegible] [illegible] [illegible] Yale L. J. [illegible] (1977).

[33] Utah Code Ann. § 78-14-5 (4)(f).

[34] Utah Code Ann. § 76-7-305 requires voluntary and informed written consent. See n. 30, supra.

[35] Cf. Wynn v. Carey, 582 F. 2d, at 1388.

the statute invokes the criminal machinery of the State in an attempt to influence the interactions within the family. Accordingly, I would reverse the judgment of the Supreme Court of Utah insofar as it upheld the statute against constitutional attack.

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
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