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## H. L. v. Matheson: Can Parental Notification be Required for Minors Seeking Abortions?

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# H. L. v. MATHESON: CAN PARENTAL NOTIFICATION BE REQUIRED FOR MINORS SEEKING ABORTIONS?

## I. INTRODUCTION

The extent to which a state can constitutionally legislate concerning abortion has been debated and litigated since the Supreme Court rendered its controversial *Roe v. Wade*<sup>1</sup> decision which recognized that a woman's fundamental right to privacy under the Constitution encompasses the decision whether or not to terminate her pregnancy.<sup>2</sup> The constitutional questions become more complicated when the state regulates a minors access to abortion due to the unique status of female minors. Although such minor's are biologically capable of conception and childbirth, they are also potentially vulnerable and lack maturity in making informed choices regarding critical matters, such as whether or not to terminate a pregnancy. These factors are not present when an adult exercises her constitutional right to an abortion. However, such factors necessitate that parental rights and the state's important interest in safeguarding the welfare of minors both be considered when a minor seeks to terminate her pregnancy.

Until the recent *H. L. v. Matheson*<sup>3</sup> decision, the Court had spoken definitively regarding state regulation of a minor's access to abortion only to rule that there can be no absolute third party<sup>4</sup> veto over the minor's abortion decision.<sup>5</sup> *H. L. v. Matheson* moved a small step forward in de-

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1. 410 U.S. 113 (1973). Compare, e.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) with Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. Rev. 689 (1976).

2. The *Roe v. Wade* decision held that prior to the point where the legitimate state interests in protecting maternal health and the potential life of the fetus became compelling, which was found to be approximately at the end of the first trimester based on medical knowledge at that time, "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State." 410 U.S. at 163 (emphasis added).

However, the Court has upheld legislative regulations even during the first trimester by requiring the woman's written informed consent, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 80 (1976); by requiring that only a licensed physician perform the abortion, *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975) (per curiam); and by requiring that the procedure be deemed necessary by the physician in the exercise of his best clinical judgment in light of all attendant circumstances, *Doe v. Bolton*, 410 U.S. 179, 191 (1972).

3. 101 S. Ct. 1164 (1981).

4. The two parties necessarily involved are the minor and her physician.

5. See *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976). The first *Bellotti* case, *Bellotti v. Baird*, 428 U.S. 132 (1976), vacated the judgment of the lower court invalidating the Massachusetts

fining permissible state regulation by ruling that the state can require parental notification before an immature dependent minor can obtain an abortion. However, the case also appears to signal a warning to state legislatures that an exception should in some way be provided for minors who can demonstrate that they are capable of making an informed choice and for those minors whose best interests would not be served by parental notification.

This comment will review the current status of the constitutionality of state-mandated parental involvement in a minor's abortion decision. *H. L. v. Matheson* and the Court's earlier rulings on a minor's access to abortion will be analyzed in terms of the principles they employ to delineate the scope of the minor's right to privacy. The comment will conclude with an observation on the application of parental notification statutes to mature minors.

## II. BACKGROUND TO *H. L. v. Matheson*

In *Roe v. Wade*, the Supreme Court expressly reserved the question of a state's right to mandate parental involvement in a minor's abortion decision.<sup>6</sup> Three years later, in *Planned Parenthood of Central Missouri v. Danforth*,<sup>7</sup> the Court held that a blanket requirement for parental consent was unconstitutional. The Court recognized that although minors do have constitutional rights, the state has broader authority in regulating the conduct of minors than that of adults, thereby limiting those rights.<sup>8</sup> The test to be applied is "whether there is any significant state interest in conditioning an abortion on the consent of a parent or person *in loco parentis* that is not present in the case of an adult."<sup>9</sup> The Court found that the state's interests in safeguarding the family unit and parental authority were not likely to be enhanced by giving parents an absolute veto over their minor daughter's abortion decision.<sup>10</sup> Therefore, parental con-

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statute which the Court found susceptible to a constitutional interpretation. The case was remanded with instructions to certify questions to the Supreme Judicial Court of Massachusetts concerning the meaning of the statute. All references in this article are to *Bellotti II*.

6. 410 U.S. at 165 n.67.

7. 428 U.S. 52 (1976).

8. *Id.* at 74.

9. *Id.* at 75.

10. Although the *Danforth* test requires a "significant" state interest to justify infringement of the minor's right, the Court did not analyze the nature or weight of the state interests. The state interests proffered were: (1) assuring the welfare of minors and (2) safeguarding the family relationship, particularly parental authority. *Id.* at 72-73. The Court considered only the interest in promoting parental authority and found that the means selected did not further that end. Three dissenting justices criticized the failure to address both interests, contending that the "traditional way by which states have sought to protect children from their own immature and improvident decisions" is to require parental consultation and consent. *Id.* at 95. See also Perry, *Substantive Due Process Revisited: Reflections On (and Beyond) Recent Cases*, 71 Nw. U. L. Rev. 417, 455-59 (1976).

sent could not be made an absolute prerequisite to a minor's abortion.<sup>11</sup> The Court cautioned that the ruling did *not* mean "that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."<sup>12</sup>

The question of parental involvement in the abortion decision was next addressed by the Court in *Bellotti v. Baird*.<sup>13</sup> The Massachusetts statute under review in *Bellotti* required that a minor seeking an abortion obtain the consent of both her parents. If one or both parents refused consent, the statute allowed the minor to seek consent from a judge of a superior court "for good cause shown."<sup>14</sup> Parents would be notified of any judicial proceeding. Eight justices found the statute unconstitutional but were sharply divided in their reasoning. The result was two four-member plurality opinions and no clear consensus on the extent or manner in which parental involvement can be mandated in a minor's abortion decision.

Justice Powell announced the judgment of the Court and was joined in his opinion by Chief Justice Burger and Justices Stewart and Rehnquist.<sup>15</sup> Powell recognized that the constitutional rights of minors could not be equated with those of adults<sup>16</sup> because of the unique status of mi-

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11. Since the Missouri statute required parental consent only with respect to the first 12 weeks of pregnancy, the Court's ruling is actually limited to first trimester pregnancies. "Abortions after 12 weeks of gestation are more dangerous, emotionally disruptive and ethically troubling than those performed earlier. The risk of complications and death increases with each succeeding week of pregnancy; overall, second trimester abortions are about 10 times as dangerous as earlier procedures." Benditt, *Second Trimester Abortion in the United States*, 11 FAM. PLAN. PERSPECTIVES 358 (1979). Thus during the second trimester the state's interest in protecting the welfare of the minor would markedly increase in significance, as would the parents' right to safeguard the health of their child. It appears that parental consent could be validly mandated for that stage of pregnancy where abortion becomes a greater medical risk than childbirth. *Contra*, Note, *The Minor's Right of Privacy: Limitations on State Action After Danforth and Carey*, 77 COLUM. L. REV. 1216, 1227 n.61 (1977).

12. 428 U.S. at 75. The obvious implication is that the statute may be constitutional if restricted to immature minors. See note 20 *infra*.

13. 443 U.S. 622 (1979).

14. MASS. GEN. LAWS ANN. ch. 112, § 12S (West Supp. 1979), *quoted at* 433 U.S. at 625.

15. Justice Rehnquist wrote a very brief concurring opinion, 433 U.S. at 651-52, indicating that he joined Justice Powell's opinion because he felt that until the Court was willing to reconsider its decision in *Danforth*, the lower courts should be given some guidance.

16. The Court began to give greater recognition to the constitutional rights of minors after *In re Gault* unequivocally held that "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." 387 U.S. 1, 13 (1967) (recognizing that many of the procedural safeguards for adults tried for crimes are equally applicable to juveniles). Delineation of the scope of the minor's constitutional rights has continued on an *ad hoc* basis. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (right to privacy prevents blanket prohibition of distribution of contraceptives to minors); *Ingraham v. Wright*, 430 U.S. 651 (1977) (corporal punishment may implicate constitutionally protected liberty interest); *Breed v. Jones*, 421 U.S. 519 (1975) (rights to notice, counsel, confrontation, cross examination and protection from self-incrimination); *Goss v. Lopez*, 419

nors, due to their peculiar vulnerability, "their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child rearing."<sup>17</sup> Although parental notice and consent are permissible limitations for the state to impose on the right of a minor to make many important decisions,<sup>18</sup> the abortion decision is unique because of the impossibility of postponement and the exceptionally burdensome consequences of pregnancy and motherhood for a young girl.<sup>19</sup>

Powell found two reasons why the statute constituted an undue burden on a minor's constitutional right to privacy. First, the statute permitted the court to refuse an abortion to a *mature* minor if it found the procedure not to be in her best interests. Secondly, the statute required parental notification in *every* instance.<sup>20</sup> Powell contended that notice should not be required either (1) where a minor shows she is mature and informed enough to make an independent decision; or (2) where without a showing of maturity, she nevertheless demonstrates to the Court that an abortion would be in her best interests.<sup>21</sup> In making this latter determination, the Court must consider the importance of encouraging a familial rather than a judicial resolution, bearing in mind that parents naturally take an interest in the welfare of their children.<sup>22</sup>

Justice Stevens, joined by Justices Brennan, Marshall and Blackmun, concurred in the judgment that the Massachusetts statute was unconstitutional but based this conclusion squarely on *Danforth*. Since the Mas-

U.S. 565 (1975) (extending procedural due process rights to the civil context by requiring notice and opportunity to be heard before school suspension); *In re Winship*, 397 U.S. 358 (1970) (protection against double jeopardy); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (students may exercise freedom of expression so long as it does not interfere significantly with the functioning of the school).

For rulings limiting the constitutional rights of minors, see *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (no right to jury trial in juvenile proceedings); *Ginsberg v. New York*, 390 U.S. 629 (1968) (obscenity law concerning minors upheld because state can ban certain materials from minors which it could not ban from adults).

17. 443 U.S. at 634.

18. In the area of "fundamental" rights, the most obvious permissible parental consent requirement is for marriage. Other rights typically limited by parental consent requirements include the right to view certain movies or purchase certain literature, *Ginsberg v. New York*, 390 U.S. 629 (1968), and the right to purchase firearms and the right to procure many medical services. See *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. at 72-73.

19. 443 U.S. at 642.

20. Justice Powell cautioned: "We are not persuaded that, as a general rule, the requirement of obtaining both parents' consent unconstitutionally burdens a minor's right to seek an abortion." *Id.* at 649. The parental consent requirement is not unduly burdensome where an opportunity is provided for the minor to obtain, without parental notice, a judicial determination that she is capable of giving informed consent or that an abortion would be in her best interests. *Id.* See note 12 *supra* and accompanying text.

21. 443 U.S. at 647-48.

22. *Id.* at 648. See also *Parham v. J.R.*, 442 U.S. 584 (1979) (formal adversary hearings are not required for parents to commit their children to state mental institutions).

sachusetts statute required that a minor obtain either parental or judicial consent in order to obtain an abortion, it was clearly contrary to the *Danforth* decision which held that the state does not have constitutional authority to give a third party an absolute and possibly arbitrary veto over the abortion decision.<sup>23</sup> Comparing it to the Missouri parental consent statute struck down in *Danforth*, Stevens contended that the Massachusetts statute was, if anything, more restrictive of the two privacy interests protected by the constitutional right to make the abortion decision, namely "the individual interest in avoiding disclosure of personal matters . . . and . . . the interest in independence in making certain kinds of important decisions."<sup>24</sup>

[T]he need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of a parent. Moreover, once this burden is met, the only standard provided for the judge's decision is the best interest of the minor. That standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor—particularly when contrary to her own informed and reasonable decision—is fundamentally at odds with privacy interests underlying the constitutional protection afforded to her decision.<sup>25</sup>

Stevens noted that "[n]either *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."<sup>26</sup> He labelled Powell's opinion as advisory only in this regard.<sup>27</sup>

The net effect of the *Bellotti* decision is that a parental consent statute cannot be saved by allowing judicial consent to override the parent's veto when an abortion is found to be in the minor's best interests. The decision cast some doubt on the constitutionality of blanket parental notification statutes but, lacking a majority, Justice Powell's opinion could only be considered persuasive authority for lower courts.

In *H. L. v. Matheson*,<sup>28</sup> a challenge was brought to Utah's parental notification statute.<sup>29</sup> The Utah Supreme Court took note of the *Bellotti* decision and found it significant that a majority of the Supreme Court had refused to join in Powell's opinion. The Court upheld the statute because they could not "discern a clear constitutional doctrine inhibiting

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23. 443 U.S. at 654.

24. *Id.* at 655 (quoting *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)).

25. 443 U.S. at 655-56.

26. *Id.* at 654 n.1.

27. *Id.* at 656 n.4.

28. 604 P.2d 907 (Utah 1979).

29. UTAH CODE ANN. § 76-7-304(2) (1978). See note 31 *infra*.

the State from enacting such a statute."<sup>30</sup> The case was appealed to the United States Supreme Court, giving the Court an opportunity to definitively rule on the question Powell had addressed in his plurality opinion in *Bellotti*: can a state constitutionally mandate parental notification for a minor seeking an abortion?

### III. FACTS AND DECISION OF *H. L. v. Matheson*

H. L. was a fifteen year old unmarried girl in the first trimester of pregnancy, living with and financially dependent upon her parents. After consulting with her social worker and a physician, she decided to have an abortion but did not wish to inform her parents of her pregnancy, believing that it would not be in her best interest to do so. Pleadings filed on her behalf did not allege any details of her relationship with her parents or expound any reason why she felt that notifying her parents would not serve her best interests. When her physician advised her that, under Utah law,<sup>31</sup> he could not perform the abortion without first notifying her parents, she brought a class action suit<sup>32</sup> to have the statute declared unconstitutional and to enjoin its enforcement.

The trial court declined to issue either a temporary restraining order or

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30. *Id.* at 912. Other courts have found Justice Powell's opinion more persuasive and have as a consequence declared parental notification statutes unconstitutional. *See, e.g.*, *Women's Services, P.C. v. Thone*, 636 F.2d 206 (8th Cir. 1980); *Leigh v. Olson*, 497 F. Supp. 1340 (D.N.D. 1980); *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D. La. 1980); *Akron Center for Reproductive Health v. City of Akron*, 479 F. Supp. 1172 (N.D. Ohio 1979). *See also* *Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1978) (parental notification statute found unconstitutional prior to *Bellotti* but by same reasoning); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 483 F. Supp. 679 (W.D. Mo. 1980) (parental notification statute found unconstitutional but no reference to *Bellotti*); *Women's Community Health Center, Inc. v. Cohen*, 477 F. Supp. 542 (D. Me. 1979) (statute requiring parental notification for unemancipated minors under 17 showed sufficient likelihood of unconstitutionality to support preliminary injunction restraining enforcement, thus emphasizing persuasive authority of Justice Powell's opinion in *Bellotti*).

31. UTAH CODE ANN. § 76-7-304 (1978) 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.

32. H.L. "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 physician's insistence on complying with § 76-7-304(2)." *H.L. v. Matheson*, 101 S. Ct. at 1167. The trial court found her to be an appropriate representative of that class.

a preliminary injunction because the plaintiff had made no showing of any detriment that might be suffered if her parents were notified. Interpreting the requirement that a physician "notify, if possible,"<sup>33</sup> the parents of a minor seeking an abortion, the court held that compliance was mandated if the physician was physically able to locate and notify the parents. After a hearing on the merits, the trial court dismissed the complaint. It held that the statute did not unconstitutionally invade the privacy right of a minor either to secure an abortion or to enter into a doctor-patient relationship.

The Supreme Court of Utah unanimously upheld the constitutionality of the statute.<sup>34</sup> Applying the *Danforth* test,<sup>35</sup> the court concluded that the statute served significant state interests not present in the case of an adult. First, the parents would frequently possess valuable information about factors a physician should consider in exercising his best clinical judgment.<sup>36</sup> Furthermore, the state has a special interest in encouraging a minor to consult with her parents in making a decision as important as whether or not to bear a child. Of greater significance, the statute did not allow for any veto; parental involvement was strictly limited to notification and thus did not constitute an undue burden on the constitutional right of the minor to choose an abortion.<sup>37</sup> The court agreed with the trial court's interpretation of "notify, if possible," and rejected the appellant's contention that it should be construed to leave parental notification to the discretion of the physician "to determine if medically, socially, psychologically, and physically, it would be appropriate to notify the minor's parents."<sup>38</sup>

On appeal to the United States Supreme Court, H.L. challenged the constitutionality of the statute on the grounds that: (1) it is overbroad in its application to unmarried girls who are mature and/or emancipated; (2) it violates the constitutional right to privacy as recognized and delineated in earlier Supreme Court cases; and (3) the state allows pregnant minors to consent to any other medical procedures related to their pregnancy

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33. See § 76-7-304(2) at note 31 *supra*.

34. 604 P.2d 907 (Utah 1979).

35. See note 9 *supra* and accompanying text.

36. The statute incorporates the factors which the Supreme Court enumerated as proper considerations for a physician assessing the advisability of an abortion:

[T]he 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 relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

*Doe v. Bolton*, 410 U.S. 179, 192 (1973).

37. 604 P.2d at 912. The court thus found that the statute served significant state interests (*i.e.*, satisfied the *Danforth* test) and that the means selected were narrowly drawn to protect only those interests.

38. *Id.* at 912-13.



without any requirement of parental notification.<sup>39</sup>

Chief Justice Burger, joined by Justices Stewart, White, Powell and Rehnquist, delivered the opinion of the Court which upheld the constitutionality of the statute on a limited basis. The Court refused to rule on the constitutionality of the statute as applied to mature or emancipated minors, holding that H.L. did not have standing to make the overbreadth challenge because she "did not allege or proffer any evidence that she or any member of her class is mature or emancipated."<sup>40</sup> The Court noted that the United States District Court for Utah had held that the statute could not constitutionally apply to emancipated minors.<sup>41</sup> That ruling had not been appealed and was therefore binding on the State of Utah. In like manner, Chief Justice Burger noted, "[w]e cannot assume that the statute, when challenged in a proper case, will not be construed also to exempt demonstrably mature minors."<sup>42</sup> Therefore, the Court's ruling is strictly limited to the statute's application to unemancipated<sup>43</sup> minor girls who have made neither a claim or showing of maturity nor any allegation as to their relationship with their parents.<sup>44</sup>

The Court reviewed the conclusions reached in the *Danforth* and *Bel-lotti* cases and reaffirmed the principle that a state may reasonably conclude that parental consultation is desirable and in the best interests of a minor who lacks the ability and maturity to make an informed choice in important decisions. Encouraging such consultation is a constitutionally permissible end.<sup>45</sup> Furthermore, constitutional interpretation has consistently recognized the important rights of parents in directing the up-

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39. 101 S. Ct. at 1169-72.

40. *Id.* at 1169. The dissent strongly disagreed with the majority's analysis of the standing issue and based its finding of unconstitutionality on the statute as applied to *all* minors. *Id.* at 1179-84. Justice Stevens, concurred in the judgment but did not join the majority opinion. He also decided the broad issue which he believed was the duty of the Court despite the particular fact situation presented by appellant's case. *Id.* at 1177.

41. *L.R. v. Hansen*, Civil No. C-80-0078J (Feb. 8, 1980), *cited in* *H.L. v. Matheson*, 101 S. Ct. at 1169.

42. 101 S. Ct. at 1169. Chief Justice Burger also held that there was no basis for assuming that the statute would apply to minors in need of an emergency procedure or to minors with hostile home situations. *Id.* at 1170 n.14.

43. An unemancipated girl is a minor girl who is living with and financially dependent upon her parents. *Id.* at 1170.

44. *Id.* This last exception is apparently intended to leave open the possibility of exempting from the statute girls who can demonstrate that notifying their parents of their pregnancy and intended abortion would clearly be against their best interests because of a "hostile" home environment. *See* note 42 *supra*. *See, e.g.,* *L.R. v. Hansen*, Civil No. C80-0078 (Oct. 24, 1980) (C. D. Utah) (minor girl alleged that her minor sister had been expelled from home when she informed their parents of her pregnancy and abortion), *cited in* *H.L. v. Matheson*, 101 S. Ct. at 1186 n.24; *State v. Koome*, 84 Wash.2d 901, 530 P.2d 260 (1975) (father testified that he believed forcing his daughter to bear the child would deter future pregnancies).

45. 101 S. Ct. at 1171.

bringing of their children.<sup>46</sup>

The Court then considered the interests of the state served by Utah's parental notification statute and balanced those interests against the burden imposed on the minor, noting that the statute did not provide for any veto over the minor's ultimate decision. Chief Justice Burger identified both family integrity,<sup>47</sup> with particular regard for preserving parental authority, and the protection of adolescents as *important* state interests served by the statute. He found the statute reasonably calculated to protect immature, dependent minors "by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences."<sup>48</sup> The statute was found to serve a *significant* state interest by providing an opportunity for parents to supply essential medical information to the physician. The Court rejected H.L.'s argument that the statute did not rationally pursue this end because it provided for no mandatory delay period,<sup>49</sup> pointing out that time is of the essence in the abortion decision. Finally, the statute promoted the *legitimate* state interest in protecting potential life.

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46. *Id.* at 1171-72. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (right of parents to withdraw their children from compulsory school attendance to further their upbringing in the Amish religion); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right of parents to educate their children in private schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to have children taught a foreign language). *But cf.* *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C.), *aff'd mem.*, 423 U.S. 907 (1975) (state's right to use corporal punishment to maintain order in schools overrides parental right to determine how child is to be disciplined); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor law overrides parental right to enlist child's assistance in distributing religious literature). The above cases all address a conflict between rights of the state and those of the parents, not a conflict between parent and child. *But see Parham v. J.R.*, 442 U.S. 584 (1979) (parents may commit minor children to a mental institution without formal adversary hearings).

47. Justice Marshall disputed this in his dissenting opinion: "Rather than respecting the private realm of family life, the statute invokes the criminal machinery of the State in an attempt to influence the interactions within the family." 101 S. Ct. at 1195.

48. 101 S. Ct. at 1172-73. The dissent claimed that the statute does not advance the goal of encouraging parental consultation because the statute provides for no mandatory delay between the time the parents are notified and the abortion is performed. Furthermore, although parental consultation would ideally serve the interest of protecting the minor, such would certainly not be the case if the pregnancy resulted from incest or if a hostile home environment assured an abusive response. Thus the statute is not narrowly tailored to serve this state interest. *Id.* at 1186.

49. Since the statute provided for no mandatory delay between the time of notification and the time of abortion, H.L. contended that the statute did not promote the stated interest because there was no real opportunity for parents to bring medical information to the attention of the physician. The dissent did not find the time element troublesome, see note 48 *supra*, but it did criticize the statute for failing to require or encourage the transfer of information. Justice Marshall found it unlikely that the parents could provide much information unknown to the minor herself; however, if this was the purpose of the statute, then it was "patently underinclusive" because it specifically excluded married minors from the parental notice requirement. 101 S. Ct. at 1189.

Against these state interests, the Court balanced only the fact that some minors may be inhibited from seeking abortions.<sup>50</sup> Chief Justice Burger concluded that this could not tip the scale in favor of the minor because the "Constitution does not compel a State to fine tune its statutes to encourage or facilitate abortions."<sup>51</sup>

The Court found sufficient justification for the state to distinguish medical treatment for a full-term pregnancy from abortion by imposing no qualifications on the minor's right to consent to the former.<sup>52</sup> The different state interest involved in full-term pregnancies and the relative absence of emotional and psychological consequences from medical decisions in pregnancies warranted this distinction.<sup>53</sup> Chief Justice Burger

50. The dissent, on the other hand, carefully examined the burdens imposed by the statute:

[I]nvolving the minor's parents against her wishes effectively cancels her right to avoid disclosure of her personal choice. . . . Besides revealing a confidential decision, the parental notice requirement may limit 'access to the means of effectuating that decision.' Many minor women will encounter interference from their parents after the state imposed notification. In addition to parental 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 minors may attempt to self-abort or to obtain an illegal abortion rather than risk parental notification. Still others may forsake 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.'

*Id.* at 1186-87 (citations omitted).

The results of a 1978 nationwide survey by the Alan Guttmacher Institute support Justice Marshall's analysis:

In 1978, 184,000 teenagers aged 17 and younger obtained abortions. Applying the survey findings to this group, we find that about 103,000 of these teenagers did so with their parents' knowledge. Based on these findings, if parental notification requirements were adopted by all abortion providers, an additional 39,000 young people might be expected to inform their parents about their decision to have an abortion. An even higher number, however—42,000—would not obtain a legal abortion. Some 19,000 of these could be expected to attempt to obtain an illegal abortion or to induce the abortion themselves—both, desperate and dangerous alternatives. Another 18,000 would have an unwanted birth and . . . another 5,000 would run away from home, presumably to have an unwanted birth or to obtain an illegal abortion.

Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 *FAM. PLAN. PERSPECTIVES* 284 (1980).

51. 101 S. Ct. at 1173. Conversely, state action encouraging childbirth except in the most urgent circumstances is rationally related to the legitimate government objective of protecting potential life. *Harris v. McRae*, 100 S. Ct. 2671, 2692 (1980).

52. UTAH CODE ANN. § 78-14-5(4)(f) (1977).

53. Justice Marshall disagreed:

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. . . . The decision to undergo surgery to save the child's life certainly carries as serious 'emotional and psychological consequences' for the pregnant adoles-

concluded that "the statute plainly serves important state interests, is narrowly drawn to protect only those interests, and does not violate any of the guarantees of the Constitution."<sup>54</sup>

Justice Powell, joined by Justice Stewart, wrote a separate opinion emphasizing that he concurred in the majority opinion only because the ruling left open the question of the constitutionality of the statute as applied to mature minors and to minors whose best interests would not be served by parental notification.<sup>55</sup> Justice Stevens concurred in the judgment of the Court but did not join with the majority because he found the Utah statute constitutionally valid as applied to all members of the class of unmarried minor women suffering unwanted pregnancies.<sup>56</sup>

#### IV. SCOPE OF THE CONSTITUTIONAL PRIVACY RIGHTS OF A MINOR

When the state regulates the activities of minors, the question of whether constitutional rights have been violated is complicated by the additional concerns of safeguarding parental rights<sup>57</sup> and protecting the minor from his own immaturity and vulnerability which might limit a meaningful exercise of those constitutional rights. The Court has unambiguously stated that although constitutional rights are not instantly bestowed at the statutory age of majority,<sup>58</sup> the scope of a minor's right

cent as does the decision to abort.

101 S. Ct. at 1190 n.38 (citations omitted).

54. *Id.* at 1173.

55. *Id.* at 1173-74. Justice Powell's constitutional analysis balanced the competing interests of the minor, the state and the parents, none of which were absolute. If the statute was found to be an invalid burden *per se* on the right of the minor to make the abortion decision, the minor's wishes would become virtually absolute and all other interests would be disregarded. Justice Powell therefore contended that the state cannot require notice to parents in all cases, or in none. The individual's age, maturity, mental and physical condition, the stability of her home and her relationship with her parents are all circumstances relevant to evaluating the minor's ability to make the abortion decision independently. In accord with his *Bellotti* opinion, Justice Powell concluded that an independent decisionmaker should be provided in order to give the minor an opportunity to show that she is mature enough to make the decision independently or that notification would not be in her best interests. *Id.* at 1176-77.

56. *Id.* at 1179. Justice Stevens found the state interests substantial and fundamental, thus outweighing any negative impact on the minor. The constitutional protection afforded the abortion decision merely emphasized its importance and created a special justification for reasonable state efforts to ensure that it was wisely made. *Id.* at 1178. In Stevens' opinion, the statute was not fatally defective even though some minors may be "sufficiently mature to make a well-reasoned abortion decision" or despite the fact that some parents may not respond receptively. *Id.* at 1179. This conclusion indicates that Justice Stevens did not require the statute to be closely tailored to the achievement of the state's interests. See text accompanying note 54 *supra*.

57. "[T]he guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors." *Bellotti v. Baird*, 443 U.S. at 637. See also note 46 *supra*.

58. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. at 74.

under the Constitution is not equivalent to that of an adult.<sup>59</sup> The Court has not, however, clearly indicated what method of analysis should be employed to delineate the scope of a minor's constitutional rights. Should the actual analysis be different than that employed for adults, either because of the minor's unique status, or perhaps because a minor's right is deemed less fundamental or important than that of an adult? Or, should the same analysis be applied as when the constitutional rights of an adult are burdened with the result possibly altered because of the additional state interests involved? The decisions and dicta of the Court seem to have moved toward the latter conclusion at least in the area of privacy rights.

The question of what analysis is to be used to delineate the scope of a minor's constitutional right surfaced in the abortion context when the *Danforth* majority required a "significant state interest" not present in the case of an adult to justify interference with a minor's right to an abortion.<sup>60</sup> The *Danforth* decision never actually referred to the right of the minor as "fundamental" but found that since the articulated state interests were not enhanced by the parental consent requirement,<sup>61</sup> the statute restricted the minor's right without sufficient justification. This appeared to be a downgrading of the strict scrutiny or "compelling state interest" test which must be satisfied under *Roe v. Wade* to justify burdening the "fundamental" right to an abortion.

A year later, in *Carey v. Population Services International*,<sup>62</sup> the "significant state interest" test was again applied. In a plurality opinion, Justice Brennan noted:

[The] test is apparently less rigorous than the 'compelling state interest' test applied to restrictions on the privacy rights of adults. Such lesser scrutiny is appropriate both because of the States' greater latitude to regulate the conduct of children . . . and because the right of privacy implicated here is 'the interest in independence in making certain kinds of important decisions' . . . and the law has generally regarded minors as having a lesser capability for making important decisions.<sup>63</sup>

Brennan emphasized that this lesser degree of scrutiny did not mean total deference to the state:

[W]e again confirm the principle that when a State, as here, burdens the exercise of a *fundamental* right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion . . . that the burden is connected to such

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59. See note 16 *supra* and accompanying text.

60. 428 U.S. at 75.

61. See note 10 *supra*.

62. 431 U.S. 678 (1977) (New York statute prohibiting sale of contraceptives to minors found unconstitutional).

63. *Id.* at 693 n.15 (citations omitted).

a policy.<sup>64</sup>

Justice Powell stated in *Carey* that the Court's precedents make clear that the compelling state interest is to be invoked:

only when the state regulation entirely frustrates or heavily burdens the exercise of constitutional rights in this area. This is not to say that other state regulation is free from judicial review. But a test so severe that legislation rarely can meet it should be imposed by courts with deliberate restraint in view of the respect that properly should be accorded legislative judgments.<sup>65</sup>

Consequently, Powell's subsequent opinion in *Bellotti* avoided both the "compelling state interest" test and the "significant state interest" test as well as any discussion of "fundamental" rights: the *Bellotti* opinion focused instead on whether the minor's rights were "unduly burdened" by the statute.<sup>66</sup> Whether an undue burden exists is apparently determined by balancing the state interests served by the statute against the intrusion into the minor's privacy right.

In *H. L. v. Matheson*, the majority did not directly address which method of analysis should be applied in evaluating the scope of a minor's constitutional right or in determining the validity of any statutory infringement of that right. Only the dissent expressly used the label "fundamental" to describe the minor's right.<sup>67</sup> However, the majority, concurring,<sup>68</sup> and dissenting opinions all engaged in some balancing of the state interests advanced by the statute against the burdens imposed on the minor's right to privacy. Chief Justice Burger enumerated the state interests and labelled them important, significant and legitimate.<sup>69</sup> These labels appear to be more of an attempt to assign weights to the interests for purposes of balancing them against the burdens to the minor rather than an application of any particular test or level of scrutiny. Since the statute

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64. *Id.* at 696 (emphasis added).

65. *Id.* at 705. Justice Powell's assertion was in reference to constitutional rights in the area of sexual freedom and abortion in general and not specifically to the rights of minors.

66. 443 U.S. at 640.

67. 101 S. Ct. at 1192, 1194.

68. In his concurring opinion, Justice Powell purportedly focused on whether the constitutional right of the minor was unduly burdened after giving consideration to the competing interests of the individual minor, the parents and the state. However, he failed to identify any burden and merely concluded that to hold the statute unconstitutional would essentially ignore any interests other than those of the minor. 101 S. Ct. at 1176-77. See note 55 *supra*.

Justice Stevens declared that the first task was to identify the statute's impact on the exercise of a constitutional right and then to evaluate that impact in light of the state interests underlying the statute. He proceeded to evaluate the state's interests which he found to be "fundamental" and "substantial". However, he failed to assess the impact on the minor other than to declare that the fact that some parents may react negatively to the notification did not diminish the legitimacy of the state's effort. *Id.* at 1177-79. See note 56 *supra*.

69. *Id.* at 1172-73. See text accompanying notes 47 & 48 *supra*.

did not allow for a veto of the minor's decision, the Court found that privacy rights were not so substantially burdened as to outweigh the state's interests.

The most disciplined constitutional analysis in *H. L. v. Matheson* is found in the dissent. Justice Marshall reiterated the "significant state interest" test of *Danforth* and the *Roe v. Wade* requirement that the state demonstrate that the means selected be closely tailored to the state interest being promoted.<sup>70</sup> He stated that "[a]lthough it may seem that the minor's privacy right is somehow less fundamental because it may be overcome by a 'significant state interest,' the more sensible view is that the state interests inapplicable to adults may justify burdening the minor's right."<sup>71</sup> After carefully assessing the burdens imposed on the minor<sup>72</sup> and the interest asserted by the State of Utah, Justice Marshall found that each state interest was ill-fitted to serve their purpose and hence insufficient justification for the intrusion on the minor's right.<sup>73</sup>

The Court has apparently avoided labelling the minor's right to privacy as "fundamental" because of that label's association with automatically invoking strict scrutiny and the compelling state interest test which is almost always fatal to state legislation.<sup>74</sup> To avoid this result in the area of minor's rights, the Court initially rephrased the test to require only a "significant" state interest to justify burdening the right. However, there is no logical basis for permitting a *lesser* state interest to justify burdening rights of minors than would justify burdening those of adults. The actual reason for permitting a greater burden on minor's rights is because the state has *greater* interests where minors are concerned. A far more sensible and consistent approach of balancing the articulated state interests against the burdens on the individual has evolved and was employed in *Matheson*, although it is unfortunate that it has not been openly embraced and employed in a more disciplined manner.

The pattern culminating in *Matheson* seems to indicate that the Court has shifted away from the fundamental right—strict scrutiny analysis of *Roe v. Wade* to a flexible due process balancing scheme such as that proposed years ago by Justice Harlan. He outlined four considerations for determining whether a state regulation has unduly burdened a constitutional right: "First, what is the constitutional source and nature of the right relied upon? Second, what is the extent of the interference with that right? Third, what governmental interests are served by [the statutory] requirements? Fourth, how should the balance of the competing

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70. 101 S. Ct. at 1188. See notes 55 & 56 *supra*.

71. 101 S. Ct. at 1188 n.32.

72. See note 50 *supra*.

73. 101 S. Ct. at 1189-94.

74. See text accompanying note 64 *supra*.

considerations be struck?"<sup>75</sup> Where a minor's rights are concerned, the balance is weighted from the start in favor of the state due to its special interest in protecting minors and promoting family integrity. Minors thus have the same fundamental privacy rights under the Constitution as adults but the additional state interests involved where minors are concerned give the state substantial latitude in regulating and in burdening those rights.

#### V. IMPLICATIONS OF *H. L. v. Matheson*

The ruling in *H. L. v. Matheson* is very narrow and is significant primarily because it indicates that states may permissibly mandate some minimal level of parental involvement in the abortion decision of a minor child. However, when viewed in conjunction with the individual justices' positions in *Bellotti*, *Matheson* is a good indicator of just how limited that parental involvement may be.

Only Justice Stevens found that the Utah statute was constitutional as applied to all minors. The majority opinion in *Matheson* intimated that the statute would be unconstitutional when applied to emancipated or demonstrably mature minors or to those who could show that, because of a hostile home environment, parental notification would not be in their best interests.<sup>76</sup> Justice Powell's concurring opinion, joined by Justice Stewart, emphasized that he joined the opinion of the Court only with the understanding that the ruling did not apply to mature minors or to those whose best interests would not be served by notification.<sup>77</sup> Both justices maintain the opinion Powell expressed in *Bellotti*, that application of the statute to those classes of minors would be unconstitutional. Notably, Chief Justice Burger and Justice Rehnquist, part of the *Matheson* majority, had also joined in Powell's *Bellotti* opinion. The dissenters in *Matheson*, Justices Marshall, Brennan and Blackmun, expressly found the Utah statute overbroad as applied to mature minors as well as an intrusion upon the constitutional rights of all minors.<sup>78</sup> Thus, it is clear that absent a future change in position, a majority of the present Court, including Justices Burger, Powell, Stewart,<sup>79</sup> Marshall, Brennan and

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75. *Shapiro v. Thompson*, 394 U.S. 618, 663 (1969) (Harlan, J., dissenting). Justice Stewart expressly embraced Harlan's balancing scheme in *Zablocki v. Redhail*, 434 U.S. 374, 396 (1978) (Stewart, J., concurring). See generally *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1193-97 (1980).

76. 101 S. Ct. at 1169-70.

77. *Id.* at 1173-74.

78. *Id.* at 1195.

79. Justice Stewart has now been replaced on the Court by Justice Sandra Day O'Connor whose confirmation hearings concentrated on her stand against criminal abortion laws during her tenure as a state legislator. Camper, *O'Connor's Senate Trial*, NEWSWEEK, Sept. 21, 1981, at 73. Any prediction as to her position on parental notification would be purely speculative.



Blackmun,<sup>80</sup> holds that a parental notification statute cannot constitutionally be applied to mature minors nor to those immature minors who can demonstrate that notification would be clearly against their best interests because of their particular home situation.<sup>81</sup>

Aside from failing to clearly indicate the Court's method of analysis for determining the scope of a minor's constitutional rights, the main flaw in *Matheson's* limited holding and its implications concerning mature minors is that the holding does not provide any guidance to state legislatures on constructing a constitutional statute.<sup>82</sup> Justice Powell outlined a parental consent statute in *Bellotti* which he considered to be carefully drawn to protect only the valid state interests at stake and yet preserve the minor's constitutional right to privacy.<sup>83</sup> In *Matheson*, Powell embraced the same concept, holding that a parental notification statute will be constitutional as long as provisions are made for a minor to obtain judicial exemption from the statute by showing her maturity or, alternatively, by demonstrating that the notification would not be in her best interests.<sup>84</sup> However, a majority of the Court did not join in Justice Powell's opinion in *Bellotti* in which he first articulated his scheme of re-

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80. Justice Rehnquist may also be in accord. However, his position is less predictable since he concurred in Powell's *Bellotti* opinion only because he felt the lower courts needed some guidance until the Court was willing to overrule *Danforth*. Justice White joined the majority in *Matheson* but perhaps only because the statute was not invalidated. He was the sole dissenter in *Bellotti* and he also dissented in *Danforth*. However, it may be significant that he chose not to join Justice Stevens who concurred in the judgment upholding the Utah statute but also expressly found the statute constitutional as applied to all minors.

81. Since *Matheson*, the Court has vacated the judgment of the Eighth Circuit Court of Appeals which upheld the grant of summary judgment in favor of a constitutional challenge to Nebraska's parental consultation provision. *Women's Services, P.C. v. Thone*, 483 F. Supp. 1022 (D. Neb. 1979), *aff'd*, 636 F.2d 206 (8th Cir. 1980), *vacated and remanded*, 49 U.S.L.W. 3911 (1981). The Court remanded the case for reconsideration in light of *H.L. v. Matheson*, with Justices Brennan, Blackmun and Marshall dissenting and voting to affirm. The statute in question, NEB. REV. STAT. § 28-333 (Supp. 1979), required a written statement from any minor under the age of 18 to the effect that she has consulted with her parents concerning her abortion decision. It further provided that no information in the statement, including the woman's identity, may be disclosed without her written authorization.

82. In addition to Utah, seven states presently have parental notification statutes. See ILL. ANN. STAT. ch. 38, § 81-54 (Smith-Hurd 1981) (held unconstitutional in *Wynn v. Carey*, 582 F.2d 1375, 1388-90 (7th Cir. 1978)); ME. REV. STAT. ANN. tit. 22, § 1597 (1980) (preliminarily enjoined in *Women's Community Health Center, Inc. v. Cohen*, 477 F. Supp. 542, 547-48 (D. Me. 1979)); MD. ANN. CODE art. 43, § 135(d) (1980); MO. ANN. STAT. § 188.039 (Vernon Supp. 1981) (held unconstitutional in *Planned Parenthood Ass'n v. Ashcroft*, 483 F. Supp. 679, 697 (W.D. Mo. 1980)); MONT. REV. CODE ANN. § 50-20-107 (1979); NEB. REV. STAT. § 28-333 (Supp. 1979); TENN. CODE ANN. § 39-302(f) (Supp. 1980).

83. 443 U.S. at 647-48. At least two states, both of which had parental notification statutes, have now revised them according to Justice Powell's suggestions in *Bellotti*. See LA. REV. STAT. ANN. § 40:1299.35.5 (West Supp. 1981); N.D. CENT. CODE § 14-02.1-03.1 (Interim Supp. 1981).

84. 101 S. Ct. at 1176-77.

course to an independent decisionmaker.<sup>85</sup> Justice Stevens in particular finds recourse to the judiciary more intrusive on the privacy of the minor than parental notification.<sup>86</sup>

A minor who is determined to withhold knowledge of her pregnancy from her parents will probably find the alternative of a court appearance a more frightening and embarrassing experience than a confrontation with her parents.<sup>87</sup> The necessary time delay is also an important consideration. Aside from the obvious delay involved in obtaining and possibly appealing a judicial determination, a minor's attempt to choose between two undesirable alternatives could also result in a delay of a considerable length of time. Such a delay in the abortion decision could be critical.<sup>88</sup>

A possible alternative to judicial intervention would be simple reliance on the mature minor rule which, in many jurisdictions, exists as a statutory<sup>89</sup> or judicial<sup>90</sup> exception to parental consent requirements for medical treatment. The rule permits a physician to give medical treatment to a consenting minor who demonstrates an understanding of the nature and consequences of the medical procedure.<sup>91</sup> The justification for exempting mature minors from the abortion parental notification statutes is that a mature minor is capable of making an independent informed choice which takes into account the immediate and long-range consequences of her decision. Thus, the state interest in protecting the mature minor from improvident choices is not applicable.

A physician should be better qualified than the judiciary to determine whether his patient is capable of giving informed consent. In *Doe v. Bolton*, the Court recognized the capacity of the physician to consider "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient"<sup>92</sup> in making a medical judgment regarding the advisability of abortion. Since the physician is

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85. Powell's opinion was joined by only three other justices.

86. See text accompanying note 25 *supra*.

87. See Comment, *The Maine Abortion Statutes of 1979: Testing the Constitutional Limits*, 32 ME. L. REV. 315, 350-51 (1980).

88. Mortality rates for abortion increase by almost 40 percent with each week of gestation. C. TETZ, *INDUCED ABORTION* 83 (3d ed. 1979).

89. See, e.g., ARK. STAT. ANN. § 82-363(g) (1981); MISS. CODE ANN. § 41-41-3(h) (1973). The statutes typically provide that any "minor of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment or procedures" may consent independently to treatment.

90. As a judicial exception, the rule has been invoked primarily as a defense by the physician to tort actions brought by the minor's parents. Courts generally will not apply the exception unless the minor is at least 15 years old and the treatment is not serious in nature. Brown & Truitt, *The Right of Minors to Medical Treatment*, 28 DE PAUL L. REV. 289 (1979).

91. See generally Wilkins, *Children's Rights: Removing the Parental Consent Barrier to Medical Treatment of Minors*, 1975 ARIZ. ST. L.J. 31, 37-39, 49-57.

92. 410 U.S. 179, 192 (1973).

subject to traditional common law remedies for operating on a minor who is not capable of giving informed consent,<sup>93</sup> he has a vested interest in making a good faith determination of maturity. However, the risk involved in an erroneous determination is one that many physicians would be unwilling to take and thus a mature minor may find that her access to abortion is very limited unless she involves her parents. For this reason, the mature minor rule is not likely to provide a feasible solution to exempting mature minors from parental notification statutes unless the physician is insulated from liability, absent a clear abuse of discretion. In the case of immature minors who claim that parental notification would not serve their best interests, judicial recourse would be the only option since a physician is not qualified to make that determination. Only the minor from the hostile home environment who is fearful of an extremely negative parental response would be likely to find resort to the judiciary a less intimidating experience than a confrontation with her parents.

## VI. CONCLUSION

*H. L. v. Matheson* held that the state can require parental notification before an immature, dependent minor is permitted to obtain an abortion. However, because the case implied that mature minors and minors from a hostile home environment cannot constitutionally be subject to the same requirement, the end result may in essence be that parental notification cannot constitutionally be mandated.

Recourse to the judiciary as a means of exempting mature minors from the statutory requirement should be found to be as burdensome as parental notification and hence unconstitutional unless the Courts retreats from its *Roe v. Wade* pronouncement that the abortion decision is encompassed in a fundamental right to privacy.<sup>94</sup> The only other option, reliance on the physician's determination of his patient's capacity to give informed consent, necessitates a statutory provision to protect the physician from liability absent a clear abuse of discretion. In this event, abortions would essentially become available to all but the clearly incompetent minor without the requirement for parental notice. Hence the exception appears likely to swallow the rule.<sup>95</sup>

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93. *E.g. Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941). See generally W. PROSSER, *THE LAW OF TORTS* § 18, at 102-03 (4th ed. 1971).

94. See text accompanying notes 24 & 25 *supra*.

95. The better course would be to apply the same standard for minors seeking abortion that is applied in many jurisdictions for minors seeking treatment for venereal disease or drug abuse. The physician should request permission from the minor to notify her parents. If she objects, then he should only insist on notifying the parents before performing the abortion if the minor is judged incapable of giving informed consent or if he concludes that the health of the girl may be seriously endangered. See IJA-ABA JUVENILE JUSTICE STAN-

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DARDS, *THE RIGHTS OF MINORS*, Standard 4.2 (1981). For a statutory proposal and a review of state-mandated, parental involvement statutes, see Lozano, *Abortions for Minors After Bellotti II: An Analysis of State Law and a Proposal*, 11 *ST. MARY'S L.J.* 946 (1980).

