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Parental Notice Statutes: Permissible State Regulation of a Minor's Abortion Decision

Patrick J. Foye

NOTES

PARENTAL NOTICE STATUTES: PERMISSIBLE STATE REGULATION OF A MINOR'S ABORTION DECISION

INTRODUCTION

The Supreme Court in *Roe v. Wade*[1] established that a woman's right to procure an abortion free from certain state interference[2] is a fundamental constitutional right,[3] emanating from the right of pri-

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1. 410 U.S. 113 (1973).

2. *Id.* at 153. *Roe v. Wade* and its progeny have spawned extensive scholarly commentary on the issue of abortion. *See* J. Noonan, A Private Choice: Abortion in America in the Seventies 5-32 (1979); Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807 (1973); Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920 (1973); Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159; Heymann & Barzelay, *The Forest and the Trees:* Roe v. Wade *and Its Critics*, 53 B.U.L. Rev. 765 (1973); 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); Regan, *Rewriting* Roe v. Wade. 77 Mich. L. Rev. 1569 (1979); Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1 (1973); Vieira, *Roe and Doe: Substantive Due Process and the Right of Abortion*, 25 Hastings L.J. 867 (1974); Note, *Implications of the Abortion Decisions: Post* Roe *and* Doe *Litigation and Legislation*, 74 Colum. L. Rev. 237 (1974) [hereinafter cited as *Implications*]; Note, *Roe! Doe! Where are You?: The Effect of the Supreme Court's Abortion Decisions*, 7 U. Cal. D.L. Rev. 432 (1974); Comment, *The Culmination of the Abortion Reform Movement*—Roe v. Wade *and* Doe v. Bolton, 8 U. Rich. L. Rev. 75 (1973); Note, Roe v. Wade *and* Doe v. Bolton: *The Compelling State Interest Test in Substantive Due Process*, 30 Wash. & Lee L. Rev. 628 (1973); 12 J. Fam. L. 459 (1972-73); 51 N.C.L. Rev. 1573 (1973); 27 U. Miami L. Rev. 481 (1973). These articles either praise or deride *Roe v. Wade*'s place as a landmark in constitutional law. For a review of pre-*Roe v. Wade* abortion case law, see Roe v. Wade, 410 U.S. 113, 154-55 (1973); Morgan, Roe v. Wade *and the Lesson of the Pre-*Roe *Case Law*, 77 Mich. L. Rev. 1724 (1979).

3. 410 U.S. at 153-55; *see* Doe v. Bolton, 410 U.S. 179 (1973). A right is fundamental when the Constitution, explicitly or implicitly, guarantees the right. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973); Colyar v. Third Judicial Dist. Ct., 469 F. Supp. 424, 430 (D. Utah 1979). Various implicit fundamental rights are protected including privacy rights. Carey v. Population Servs. Int'l, 431 U.S. 678, 693-95 (1977) (right of minors to contraceptives); Planned Parenthood v. Danforth, 428 U.S. 52, 67-75 (1976) (right to abort without third party consent); Roe v. Wade, 410 U.S. 113, 152-55 (1973) (right to abort); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (right to use contraceptives); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to procreate). Other implicit fundamental rights include the right to travel, Dunn v. Blumstein, 405 U.S. 330, 338 (1972); Shapiro v. Thompson, 394 U.S. 618, 630-31 (1969); the right to vote, Bullock v. Carter, 405 U.S. 134, 140-44 (1972); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Avery v. Midland County, 390 U.S. 474, 476 (1968); and the right to marry.

vacy.[4] Despite language in *Roe v. Wade* to the contrary,[5] however, various state interests may justify regulation of this right even in the first trimester of pregnancy.[6] In response to the new parameters de-

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Zablocki v. Redhail, 434 U.S. 374, 383 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967). Various implicit rights are not fundamental. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40, 54 (1973) (right to education); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-13 (1976) (right to government employment); Dandridge v. Williams, 397 U.S. 471, 484-86 (1970) (right to receive welfare).

4. 410 U.S. at 152-53; *see, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) (an overview of privacy rights); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (contraceptives); Stanley v. Georgia, 394 U.S. 557, 565 (1969) (possession of obscene material); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (contraceptives); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to procreate). Privacy rights were not always constitutionally protected. The constitutional right to privacy was first discussed and rejected in a fourth amendment context. *See* Olmstead v. United States, 277 U.S. 438, 476-79 (1928) (Brandeis, J., dissenting) (Bill of Rights includes the right of privacy), *overruled*, Katz v. United States, 389 U.S. 347, 352-53 (1967). Justice Brandeis in his *Olmstead* dissent argued that an individual had "the right to be let alone." 277 U.S. at 478 (Brandeis, J., dissenting). Griswold v. Connecticut, 381 U.S. 479 (1965), provided privacy with constitutional status and suggested its source was a penumbra emanating from the Bill of Rights. *Id.* at 484. Others have argued that the right of privacy is derived from other sources. Roe v. Wade, 410 U.S. 113, 153 (1973) (fourteenth amendment liberty interest); Griswold v. Connecticut, 381 U.S. 479, 487-93 (1965) (Goldberg, J., concurring) (ninth amendment). *See generally* Miller, *The Privacy Revolution: A Report from the Barricades*, 19 Washburn L.J. 1 (1979). *Roe v. Wade* and its successors, by protecting an implicit right, have given new vitality to the doctrine of substantive due process. Roe v. Wade, 410 U.S. 113, 167-69 (Stewart, J., concurring); *Developments in the Law—The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1162, 1167-68 (1980) [hereinafter cited as *Developments*].

5. 410 U.S. at 163-64. "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164. This language seems to create an absolute right to effectuate a first trimester abortion. *See* Friendship Medical Center, Ltd. v. Chicago Bd. of Health, 505 F.2d 1141, 1150 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); Mobile Women's Medical Clinic, Inc. v. Board of Comm'rs, 426 F. Supp. 331, 335 (S.D. Ala. 1977). Moreover, *Roe v. Wade* allowed regulation of abortion after the first trimester "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. at 165. One commentator read this language as granting the right to obtain an abortion on demand at any point during the pregnancy. J. Noonan, *supra* note 2, at 10-12.

6. The *Roe v. Wade* language that apparently forbids state regulation of first trimester abortions, *see* note 5 *supra*, has not been read literally. Sendak v. Arnold, 429 U.S. 968, 970, 972 (1976) (White, J., dissenting) (implicit rejection of a literal reading). Cases have recognized that some first trimester regulation is permissible. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 643-44 (1979) (Bellotti II) (judicial consent); Planned Parenthood v. Danforth, 428 U.S. 52, 65-67, 79-81 (1976) (woman's informed consent, recordkeeping); Connecticut v. Menillo, 423 U.S. 9, 11 (1975) (per curiam) (requirement that only licensed physicians perform abortions); Bossier City Medical Suite, Inc. v. City of Bossier City, 483 F. Supp. 633, 650 (W.D. La. 1980) (reason-

lineated in *Roe v. Wade*,[7] states have enacted numerous statutes regulating a woman's exercise of her abortion right.[8]

Parental notice statutes,[9] one form of state regulation, require prior notification to the parent(s) or guardian(s) of an unmarried, uneman-

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able zoning ordinances); West Side Women's Servs., Inc. v. City of Cleveland, 450 F. Supp. 796, 798 (N.D. Ohio) (same), *aff'd mem.*, 582 F.2d 1281 (6th Cir.), *cert. denied*, 439 U.S. 983 (1978). *See generally* Scheinberg v. Smith, 482 F. Supp. 529, 537 (S.D. Fla. 1979). This Note, in discussing parental notice statutes, focuses on the stricter constitutional standard for state regulation of first trimester abortions. Statutes requiring notice only for second and third trimester abortions would almost certainly be upheld. *See generally* Roe v. Wade, 410 U.S. 113, 163-64 (1973) (reviewing acceptable state regulation during each trimester); Note, *Due Process and Equal Protection: Constitutional Implications of Abortion Notice and Reporting Requirements*, 56 B.U.L. Rev. 522 (1976) (same) [hereinafter cited as *Notice and Reporting*].

7. The two most prominent state interests justifying state regulation set forth in *Roe v. Wade* are protection of both the pregnant woman's health and "the potentiality of human life." 410 U.S. at 154, 162. State regulation that protects maternal health or potential life has been upheld. Maternal health is protected by statutes requiring that only physicians perform abortions, Connecticut v. Menillo, 423 U.S. 9, 11 (1975) (per curiam); recordkeeping, Planned Parenthood v. Danforth, 428 U.S. 52, 79-81 (1976); Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1205 (N.D. Ohio 1979); and pathology reporting. Planned Parenthood Ass'n v. Ashcroft, 483 F. Supp. 679, 699-700 (W.D. Mo. 1980). The potential life represented by the fetus is protected by state statutes restricting the abortion right after the fetus has become viable. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 63-65 (1976) (acceptable definition of viability).

8. For a review of state regulation of abortion after *Roe v. Wade* and a discussion of its constitutionality, see Bryant, *State Legislation on Abortion after* Roe v. Wade: *Selected Constitutional Issues*, 2 Am. J.L. & Med. 101, 102-03, 130 (1976); *Notice and Reporting*, *supra* note 6; Note, *The Minor's Right of Privacy: Limitations on State Action after* Danforth *and* Carey, 77 Colum. L. Rev. 1216, 1224 (1977) [hereinafter cited as *Minor's Right of Privacy*]; *Implications*, *supra* note 2, at 245-47; Note, *Abortion Statutes After* Danforth: *An Examination*, 15 J. Fam. L. 537, 537, 556-58, 561-62, 564-66 (1976-77) [hereinafter cited as *Statutes After* Danforth].

9. Ten states currently have parental notice statutes. Ill. Ann. Stat. ch. 38, § 81-54 (Smith-Hurd Supp. 1980-1981) (held unconstitutional in Wynn v. Carey, 582 F.2d 1375, 1388-90 (7th Cir. 1978)); La. Rev. Stat. Ann. § 40:1299.35, 35.5 (West Supp. 1980) (held unconstitutional in Margaret S. v. Edwards, 488 F. Supp. 181, 205 (E.D. La. 1980)); 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. § 188.028 (Vernon Supp. 1980) (held unconstitutional in Planned Parenthood Ass'n v. Ashcroft, 483 F. Supp. 679, 697 (W.D. Mo. 1980)); Mont. Rev. Codes Ann. § 94-5-616 (Spec. Supp. 1977); Neb. Rev. Stat. § 28-333 (Supp. 1979) (held unconstitutional in Womens Servs. v. Thone, No. CV78-L-289, slip op. at 2-3 (D. Neb. Aug. 1, 1979)); N.D. Cent. Code § 14-02.1-03 (Interim Supp. 1979) (preliminarily enjoined in Leigh v. Olson, No. A3-79-78, slip op. at 5 (D.N.D. July 9, 1979)); Tenn. Code Ann. § 39-302 (Supp. 1979); Utah Code Ann. § 76-7-304 (1978). Certain municipalities also have enacted local regulations designed to regulate abortions. Akron, Ohio, for example, has an ordinance, No. 160-1978, § 1870.05(A) (Feb. 28, 1978), containing a parental notice requirement which was invalidated in Akron Center for Reproductive Health,

cipated minor who desires an abortion.[10] This notice typically must be provided before the abortion[11] by the minor's physician[12] and is

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Inc. v. City of Akron, 479 F. Supp. 1172, 1202, 1208-13 (N.D. Ohio 1979). Niagara County, New York also had a parental notice ordinance which was overturned by a federal district court on state preemption grounds. Susan B. v. Clifford, No. 78-823, slip op. at 9-10 (W.D.N.Y. May 23, 1979), *aff'd mem.*, 610 F.2d 807 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1836 (1980); *see* N.Y. Times, Sept. 20, 1980, § B, at 22, col. 6 (Westchester County, N.Y., Ordinance vetoed by County Executive); *id.*, Sept. 9, 1980, § B, at 2, col. 1 (Westchester County Ordinance passed). Other states have considered, but ultimately rejected, parental notice legislation. *See* N.Y. Times, Dec. 13, 1979, § B, at 7, col. 6; *id.*, Dec. 11, 1979, § B, at 11, col. 3 (New Jersey) (governor's veto); Governor's Commission to Review the New York Abortion Law, Final Report 4-5, 7 (1977) (on file with the *Fordham Law Review*) (New York) (governor's committee recommended against adoption). A Model Parental Notice Statute is set out in the Appendix. For another proposed model parental notice statute which arguably withstands constitutional scrutiny, see Note, *Parent, Child, and the Decision to Abort: A Critique of the Supreme Court's Statutory Proposal in* Bellotti v. Baird, 52 S. Cal. L. Rev. 1869, 1907-08 (1979) [hereinafter cited as *Parent, Child*]. These parental notice provisions apply regardless of the stage of the minor's pregnancy.

10. Eleven million of the 21,000,000 people between the ages of 15-19 (over 52%) have had sexual intercourse. Alan Guttmacher Inst., 11 Million Teenagers 9 (1976). Each year over 1,030,000 adolescent females (about 10%) become pregnant. Approximately 30,000 are under the age of fifteen, and two-thirds (about 680,000) are unmarried. Godenne, *Pregnancy in Unwed Adolescents*, in Psychological Aspects of Gynecology and Obstetrics 109 (B. Wolman ed. 1978). According to statistics compiled by the Alan Guttmacher Institute, more than 400,000 abortions were performed on United States teenagers in 1978. Kent, *Teenage Sexuality and Adolescent Pregnancy*, in The Safety of Fertility Control 284-85 (L. Keith ed. 1980). In 1974, of the women who had legal abortions one-third were 25 years of age or older, one-third were 20-24 years of age, and one-third were teenagers. Center for Disease Control, U.S. Dep't of Health, Educ. and Welfare, Abortion Surveillance 1974, at 2 (1976). *See generally* Kent, *supra*, at 283-88. These statistics do not distinguish between married and unmarried women, and thus reflect a larger number of minors undergoing abortion than would be affected by parental notice statutes, which apply only to unmarried minors.

11. Most parental notice statutes do not set an explicit time that must elapse between notice and the abortion. Ill. Ann. Stat. ch. 38, § 81-54 (Smith-Hurd Supp. 1980-1981) (held unconstitutional in Wynn v. Carey, 582 F.2d 1375, 1388-90 (7th Cir. 1978)); Md. Ann. Code art. 43, § 135(d) (1980); Mo. Ann. Stat. § 188.028 (Vernon Supp. 1980) (held unconstitutional in Planned Parenthood Ass'n v. Ashcroft, 483 F. Supp. 679, 697 (W.D. Mo. 1980)); Mont. Rev. Codes Ann. § 94-5-616 (Spec. Supp. 1977); Neb. Rev. Stat. § 28-333 (Supp. 1979) (held unconstitutional in Womens Servs. v. Thone, No. CV78-L-289, slip op. at 2-3 (D. Neb. Aug. 1, 1979)); Utah Code Ann. § 76-7-304 (1978). Other provisions require a short time to elapse. La. Rev. Stat. Ann. § 40:1299.35.5 (West Supp. 1980) (24 hours actual notice or 72 hours constructive notice) (held unconstitutional in Margaret S. v. Edwards, 488 F. Supp. 181, 205 (E.D. La. 1980)); Me. Rev. Stat. Ann. tit. 22, § 1597 (1980) (24 hours) (preliminarily enjoined in Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 547-48 (D. Me. 1979)); N.D. Cent. Code § 14-02.1-03 (Interim Supp. 1979) (24 hours); Tenn. Code Ann. § 39-302 (Supp. 1979) (two days); Akron, Ohio Ordinance No. 160-1978 § 1870-05(A) (Feb. 28, 1978) (24 hours) (held unconstitutional in Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1202 (N.D. Ohio 1979)). A provision requiring 24 hours notice when possible, as

intended to insure informed consent and encourage parental consultation before the pregnant minor effectuates this important and irreversible decision.[13] Judicial response to these statutes, however, has varied. Seven parental notice statutes have been held unconstitutional as unduly restrictive[14] and some for the additional reason of over-

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provided in § 1 of the Model Parental Notice Statute in the Appendix, would allow time for parental consultation and be a minimum time which the minor could extend if she chose. *See* Utah Code Ann. § 76-7-304 (1978) (notice "if possible"). Time is of the essence in the context of abortion. Delay increases the risk to the pregnant woman's health. Bellotti v. Baird, 443 U.S. 622, 642 (1979) (Bellotti II). Doe v. Bolton, 410 U.S. 179, 198-99 (1973); Roe v. Wade, 410 U.S. 113, 149-50 (1973). Wynn v. Carey, 582 F.2d 1375, 1389 n.29 (7th Cir. 1978); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 551 (D. Me. 1979). Delay is especially detrimental in the case of a minor. Jones v. Smith, 474 F. Supp. 1160, 1167 (S.D. Fla. 1979); *see* Baird v. Bellotti, 393 F. Supp. 847, 853 (D. Mass. 1975), *rev'd on other grounds*, 428 U.S. 132 (1976) (Bellotti I); C. Tietze, Induced Abortion: 1979, at 83 (3d ed. 1979). There is precedent that a 24 hour waiting period is permissible. Wolfe v. Schroering, 541 F.2d 523, 526 (6th Cir. 1976) (24 hours); Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1204-05 (N.D. Ohio 1979) (24 hours). *But see* Wynn v. Carey, 599 F.2d 193, 196 (7th Cir. 1979) (invalidating a 48 hour waiting period); Planned Parenthood Ass'n v. Ashcroft, 483 F. Supp. 679, 696 (W.D. Mo. 1980) (same); Womens Servs., P.C. v. Thone, 483 F. Supp. 1022, 1050 (D. Neb. 1979) (same); Leigh v. Olson, No. A3-79-78, slip op. at 4 (D.N.D. July 9, 1979) (same). Although these cases do not distinguish expressly between waiting periods of 24 and 48 hours, it is arguable that even the short delay caused by waiting requirements markedly increases the burden.

12. Of these statutes, *see* note 9 *supra*, only Md. Ann. Code art. 43, § 135(d) (1980) allows the doctor to waive notice he believes would result in abuse of the pregnant minor. The Maryland provision has been implicitly incorporated into § 1(b) of the Model Parental Notice Statute in the Appendix. Each of the parental notice statutes requires the physician to notify the minor's parents except Neb. Rev. Stat. § 28-333 (Supp. 1979) (held unconstitutional in Womens Servs. v. Thone, No. CV78-L-289, slip op. at 2-3 (D. Neb. Aug. 1, 1979)) which requires the minor to sign a statement of consultation.

13. Parental notice statutes are enacted to protect certain state interests. Utah Code Ann. § 76-7-304 (1978), for instance, is found in Chapter 7 of the Criminal Code entitled "Offenses Against the Family," implying that notice statutes protect family rights. Moreover, the notice requirement is intended "[t]o enable the physician to exercise his best medical judgment." *Id.* The Montana notice statute is included in Part 6 of Chapter 5 of the Criminal Code, "Offenses Against the Family." Mont. Rev. Codes Ann. § 94-5-616 (Spec. Supp. 1977). Ill. Ann. Stat. ch. 38, § 81-51 (Smith-Hurd Supp. 1980-1981) provides: "It is the intent of the General Assembly of the State of Illinois that the rights and responsibilities of parents be respected, that the health and welfare of minors and their unborn children be protected, and that no minor child who has not married shall be allowed to undergo an abortion operation without the consultation and consent of her parents, or a court order as part of the informed consent of the minor child seeking the abortion."

14. Wynn v. Carey, 582 F.2d 1375, 1390 (7th Cir. 1978) (Ill. Ann. Stat. ch. 38, § 81-54 (Smith-Hurd Supp. 1980-1981)); Margaret S. v. Edwards, 488 F. Supp. 181, 203-05 (E.D. La. 1980) (La. Rev. Stat. Ann. § 40:1299.35 (West Supp. 1980)); Planned Parenthood Ass'n v. Ashcroft, 483 F. Supp. 679, 697 (W.D. Mo. 1980) (Mo. Ann. Stat. § 188.039 (Vernon Supp. 1980)); Womens Servs. v. Thone, No. CV78-L-

breadth;[15] the Supreme Court of Utah, in *H— L— v. Matheson*,[16] has upheld a parental notice statute;[17] the merits of three statutes have not been litigated.[18]

This Note analyzes the constitutionality of parental notice statutes. Three factors enter into this analysis: (1) the nature of the burden[19] on the abortion right;[20] (2) the nature of the state interest protected;[21] and (3) whether the statute is overbroad.[22] Generally, the

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289, slip op. at 2-3 (D. Neb. Aug. 1, 1979) (Neb. Rev. Stat. § 28-333 (Supp. 1979)); Leigh v. Olson, No. A3-79-78, slip op. at 5 (D.N.D. July 9, 1979) (N.D. Cent. Code § 14-02.1-03 (Interim Supp. 1979)); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 546, 548 (D. Me. 1979) (Me. Rev. Stat. Ann. tit. 22, § 1597 (1980)).

15. Wynn v. Carey, 582 F.2d 1375, 1388-90 (7th Cir. 1978) (Ill. Ann. Stat. ch. 38, § 81-54 (Smith-Hurd Supp. 1980-1981)); Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1202 (N.D. Ohio 1979) (Akron, Ohio Ordinance No. 160-1978 § 1870.05(A) (Feb. 28, 1978)); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 548, 552 (D. Me. 1979) (Me. Rev. Stat. Ann. tit. 22, § 1597 (1980)). *See generally* N.Y. Times, Feb. 26, 1980, § D, at 19, col. 1. Some parental notice statutes require more than mere notice, and a finding of unconstitutionality may result from the additional requirements. *See* notes 39, 44, 52, 54 *infra* and accompanying text.

16. 604 P.2d 907 (Utah 1979) (Utah Code Ann. § 76-7-304 (1978)), *prob. juris. noted*, 100 S. Ct. 1077 (1980).

17. 604 P.2d at 908. In *Matheson*, the Supreme Court will decide the merits of a simple parental notice requirement.

18. Md. Ann. Code art. 43, § 135(d) (1980); Mont. Rev. Codes Ann. § 94-5-616 (Spec. Supp. 1977); Tenn. Code Ann. § 39-302 (Supp. 1979). *See generally* N.Y. Times, Feb. 26, 1980, § D, at 19, col. 1.

19. A substantial amount of confusion results from the Court's use of the word "burden." Sometimes burden refers to the increased difficulty a woman encounters in exercising her fundamental right because of state regulation. *E.g.*, Bellotti v. Baird, 428 U.S. 132, 147, 151 (1976) (Bellotti I); Planned Parenthood v. Danforth, 428 U.S. 52, 66-67 (1976). Frequently, however, undue burden is the end result of weighing this increased difficulty against the state interest protected. If increased difficulty is justified by state interests, the burden is due; if increased difficulty is not justified by state interests, the burden is undue. *See* note 23 *infra*. For the purpose of analysis, this Note uses the word burden to mean the increased difficulty a woman encounters in exercising her abortion right because of state regulation.

20. The cases do not define exactly the various degrees of burden, except to label some burdens due, and some undue. *See* note 23 *infra* and accompanying text.

21. State interests are not precisely divided in terms of strength, though cases do discuss compelling or significant interests. Carey v. Population Servs. Int'l, 431 U.S. 678, 693-94 (1977) (significant); Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976) (same); Roe v. Wade, 410 U.S. 113, 155, 163 (1973) (compelling); Wynn v. Carey, 582 F.2d 1375, 1384, 1385 (7th Cir. 1978) (significant). A compelling state interest will justify even an undue burden of a fundamental right. Roe v. Wade, 410 U.S. 113, 155 (1973) (right to abort); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (right to travel); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (freedom of religion); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to procreate). A significant state interest justifies restriction of a minor's privacy rights. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 693-94 (1977); Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976); Wynn v. Carey, 582 F.2d 1375, 1384-85 (7th Cir. 1978). Therefore, a parental

burden imposed must be weighed against the interest protected to determine whether the statute is a permissible restriction.[23] This

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notice statute could unduly burden the abortion right if justified by a compelling state interest or simply burden the abortion right if justified by a significant state interest. *See* note 23 *infra* (three-tier analysis as to burden).

22. Roe v. Wade, 410 U.S. 113 (1973) required that state regulation be "narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155. The problem of overbreadth may also be analyzed in terms of a due process objection to an "irrebuttable presumption." *See* Malmed v. Thornburgh, 478 F. Supp. 998, 1013 n.8 (E.D. Pa. 1979). Irrebuttable presumptions violate due process by excluding certain persons from a given right or privilege even though those persons merit coverage. *E.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 641-48 (1974) (presumption that pregnant school teachers are physically unable to continue teaching held to violate due process clause); Vlandis v. Kline, 412 U.S. 441, 446, 452 (1973) (presumption that one was a nonresident for purposes of qualifying for reduced tuition rates for residents at state university held to violate due process clause); Stanley v. Illinois, 405 U.S. 645, 654-58 (1972) (irrebuttable presumption that unwed fathers are not competent fathers held to violate due process clause).

23. A woman's fundamental right to decide whether or not to terminate her pregnancy cannot be unduly restricted by the state. This terminology is an ambiguous compromise between two competing frameworks of analysis. The distinction between the two frameworks seems largely semantic and largely irrelevant for the purpose of identifying issues to analyze. "Undue burden" analysis focuses on whether the increased difficulty of procuring an abortion is justified by state interests. If so, the burden is due and the statute is valid; if not, the burden is undue and the statute is invalid. *Compare, e.g.*, Bellotti v. Baird, 443 U.S. 622, 649 (1979) (Bellotti II) (parental notice/judicial consent: undue burden) *and* Planned Parenthood v. Danforth, 428 U.S. 52, 67-75 (1976) (third party consent: undue burden) *and* Wynn v. Carey, 582 F.2d 1375, 1387-90 (7th Cir. 1978) (parental notice/judicial consent: undue burden) *and* Planned Parenthood Ass'n v. Ashcroft, 483 F. Supp. 679, 687-90, 695-97 (W.D. Mo. 1980) (judicial consent/ 48 hour waiting period/ parental notice: undue burden) *and* Womens Servs., P.C. v. Thone, 483 F. Supp. 1022, 1049-50 (D. Neb. 1979) (informed consent/ 48 hour waiting period: undue burden) *and* Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1201 (N.D. Ohio 1979) (parental consent/ parental notice: undue burden) *with, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52, 65-67, 79-81 (1976) (informed consent/ recordkeeping: acceptable burden) *and* Hodgson v. Lawson, 542 F.2d 1350, 1357-58 (8th Cir. 1976) (per curiam) (recordkeeping: acceptable burden) *and* Planned Parenthood Ass'n v. Ashcroft, 483 F. Supp. 679, 694-95, 699-700 (W.D. Mo. 1980) (informed consent/ pathology reporting/ recordkeeping: acceptable burden) *and* Womens Servs., P.C. v. Thone, 483 F. Supp. 1022, 1047-49 (D. Neb. 1979) (disclosure of abortion alternatives: acceptable burden) *and* Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1202, 1204-06 (N.D. Ohio 1979) (informed consent/ 24 hour waiting period/ recordkeeping/ reporting: acceptable burden) *and* H— L— v. Matheson, 604 P.2d 907, 912 (Utah 1979) (parental notice: acceptable burden), *prob. juris. noted*, 100 S. Ct. 1077 (1980).

"Three-tier" analysis analogizes the equal protection concept of intermediate review of the right to an intermediate review of the burden. *Compare* Bellotti v. Baird, 443 U.S. 622, 639-50 (1979) (Bellotti II) (intermediate review of burden) *with* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 355-61 (1978) (plurality opinion) (intermediate review of right). Certain burdens that are not undue and that further legitimate and important state interests merit some type of intermediate review. This

Note argues that the typical parental notice statute is constitutional because it places a minimal burden on the minor's abortion decision, protects important state interests, and can be narrowly drawn to protect only those interests. This Note concludes with a Model Statute which may be used as a guideline for avoiding the various constitutional pitfalls inherent in requiring parental notice.

I. THE BURDEN: LIMITATIONS ON THE ABORTION DECISION

The first step in the constitutional analysis is to explore the burden imposed by parental notice statutes. Courts closely examine restrictions placed on a minor's abortion decision because of the severe detriment suffered by a minor whose decision to abort is denied or significantly impaired.[24] "Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor."[25] The constitutional problem, however, arises when the right to decide and effectuate her decision is impaired; if a woman freely chooses to bear the child no constitutional right is implicated.[26]

A. *Burdens on the Abortion Decision*

Roe v. Wade and its progeny establish that certain state regulations clearly pose an undue burden on a woman's abortion right. Criminal sanctions, for example, cannot be imposed because they constitute an

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tier analysis is implicit in Bellotti v. Baird, 443 U.S. 622, 639-51 (1979) (Bellotti II); Maher v. Roe, 432 U.S. 464, 478-80 (1977) (equal protection analysis); Planned Parenthood v. Danforth, 428 U.S. 52, 65-67 (1976); and Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 545-46 (D. Me. 1979). Under three-tier analysis, a compelling state interest would justify an undue burden; a significant state interest would justify a burden; and a rationally-related state interest would justify statutes that impose no burden. Regardless of the approach, however, it is clear that the burden imposed by a state statute must be weighed against the state interest protected. *E.g.*, Maher v. Roe, 432 U.S. 464, 473 (1977) ("[T]he right in *Roe v. Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it."); Planned Parenthood v. Danforth, 428 U.S. 52, 61 (1976); Roe v. Wade, 410 U.S. 113, 155 (1973). Whether the analysis is a simple weighing, undue burden analysis, or a more formalized weighing, three-tier analysis, the issues to analyze are the same.

24. Bellotti v. Baird, 443 U.S. 622, 642-43 (1979) (Bellotti II); Roe v. Wade, 410 U.S. 113, 153 (1973); *see* McRae v. Califano, 491 F. Supp. 630, 680-86 (E.D.N.Y.), *rev'd sub nom.* Harris v. McRae, 100 S. Ct. 2671 (1980).

25. Bellotti v. Baird, 443 U.S. 622, 642 (1979) (Bellotti II). This possible detriment affects all pregnant women. Roe v. Wade, 410 U.S. 113, 153 (1973); J. Allen, Managing Teenage Pregnancy ix (1980); F. Furstenberg, Unplanned Parenthood 1, 217 (1976); Kent, *supra* note 10, at 283-88.

26. Planned Parenthood v. Danforth, 428 U.S. 52, 94-95 (1976) (White, J., concurring in part and dissenting in part); Roe v. Wade, 410 U.S. 113, 153-54, 164 (1973).

absolute obstacle to the exercise of this fundamental right.[27] Nor can a state impose unreasonable regulations restricting the woman's access to medical facilities or the physician's exercise of best medical judgment.[28] Similarly, the Court in *Planned Parenthood v. Danforth*[29] held that a state cannot delegate to a third party an "*absolute*, and possibly arbitrary, veto" over the woman's abortion decision by requiring prior written consent of the woman's parents or spouse.[30] Whether it resides in the state or a third person, a state imposed veto power is an undue burden.[31]

Certain incidental burdens placed on the exercise of the abortion right, however, are permissible. These include recordkeeping requirements,[32] waiting requirements,[33] informed consent require-

27. Roe v. Wade, 410 U.S. 113, 164-66 (1973).

28. Doe v. Bolton, 410 U.S. 179, 192-99, 201 (1973).

29. 428 U.S. 52 (1976). For commentary discussing *Danforth* and its implications, see *Minor's Right of Privacy*, *supra* note 8; Note, *Parental Consent Abortion Statutes: The Limits of State Power*, 52 Ind. L.J. 837 (1977); Note, *Third Party Consent to Abortions Before and After* Danforth: *A Theoretical Analysis*, 15 J. Fam. L. 508 (1977) [hereinafter cited as *Third Party Consent*]; *Statutes After* Danforth, *supra* note 8; Note, *The Illinois Abortion Parental Consent Act of 1977: A Far Cry From Permissible Consultation*, 12 J. Mar. J. Prac. & Proc. 135 (1978); Comment, *Abortion: An Unresolved Issue—Are Parental Consent Statutes Unconstitutional?*, 55 Neb. L. Rev. 256 (1976).

30. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (emphasis added); *see* Pilpel & Zuckerman, *Abortion and the Rights of Minors*, 23 Case W.L. Rev. 779 (1972); *Third Party Consent*, *supra* note 29; Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 Va. L. Rev. 305 (1974). The *Roe v. Wade* Court recognized that third party rights were involved when a woman aborted, but declined to comment on statutes giving third parties some role in the decision. 410 U.S. 113, 165 n.67 (1973).

31. Planned Parenthood v. Danforth, 428 U.S. 52, 69, 72-75 (1976); *see* Poe v. Gerstein, 517 F.2d 787, 794-96 (5th Cir. 1975), *aff'd sub nom.* Gerstein v. Coe, 428 U.S. 901 (1976); Wolfe v. Schroering, 388 F. Supp. 631, 636-37 (W.D. Ky. 1974), *aff'd in part and rev'd in part*, 541 F.2d 523 (6th Cir. 1976); Doe v. Rampton, 366 F. Supp. 189, 193 (D. Utah), *vacated*, 410 U.S. 950 (1973); Pilpel & Zuckerman, *supra* note 30, at 792-96, 804-05. The *Danforth* Court did not decide the constitutionality of less restrictive state statutory schemes giving parents a limited role in the abortion decision or providing for parental notice. 428 U.S. 52, 75 (1976); *see* Bellotti v. Baird, 443 U.S. 622, 639-40 (1979) (Bellotti II); Bellotti v. Baird, 428 U.S. 132, 146-50 (1976) (Bellotti I).

32. Planned Parenthood v. Danforth, 428 U.S. 52, 79-81 (1976); Hodgson v. Lawson, 542 F.2d 1350, 1357 (8th Cir. 1976) (per curiam); Womens Servs., P.C. v. Thone, 483 F. Supp. 1022, 1044-45 (D. Neb. 1979); Planned Parenthood Ass'n v. Ashcroft, 483 F. Supp. 679, 700 (W.D. Mo. 1980); Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1205 (N.D. Ohio 1979). *But see* Margaret S. v. Edwards, 488 F. Supp. 181, 213-14 (E.D. La. 1980) (recordkeeping requirement burdensome); Wynn v. Scott, 449 F. Supp. 1302, 1327-28 (N.D. Ill.) (same), *appeals dismissed per curiam on procedural grounds sub nom.* Carey v. Wynn, 439 U.S. 8 (1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979). *See generally* Note, *Restrictions on Women's Right to Abortion: Informed Consent, Spousal Consent, and Recordkeeping Provisions*, 5 Women's Rights L. Rep. 35, 46-51 (1978) [hereinafter cited as *Restrictions*].

33. *See* note 11 *supra*.

ments,[34] provisions requiring a licensed physician to perform the abortion,[35] and state regulation of abortions and abortion facilities conforming with regulation of other medical procedures and facilities.[36] These state restrictions of abortion are permissible even though a person may decide not to abort because of the restriction.[37]

In between the clarity of extremes fall numerous other state imposed burdens. For instance, the plurality in *Bellotti v. Baird (Bellotti II)*,[38] indicated that a judicial consent provision is acceptable if it

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34. Planned Parenthood v. Danforth, 428 U.S. 52, 65-67 (1976); Wolfe v. Schroering, 541 F.2d 523, 526 (6th Cir. 1976); Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1202 (N.D. Ohio 1979); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 548-50 (D. Me. 1979); Doe v. Deschamps, 461 F. Supp. 682, 685-86 (D. Mont. 1976); Wynn v. Scott, 449 F. Supp. 1302, 1316-17 (N.D. Ill.), *appeals dismissed per curiam on procedural grounds sub nom.* Carey v. Wynn, 439 U.S. 8 (1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979); Wynn v. Scott, 448 F. Supp. 997, 1006 (N.D. Ill.), *aff'd sub nom.* Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978). *See generally Restrictions, supra* note 32, at 35-41.

35. Connecticut v. Menillo, 423 U.S. 9, 11 (1975) (per curiam); Hodgson v. Lawson, 542 F.2d 1350, 1357 (8th Cir. 1976) (per curiam); Planned Parenthood Ass'n v. Ashcroft, 483 F. Supp. 679, 684-85 (W.D. Mo. 1980); Westchester Women's Health Org. v. Whalen, 475 F. Supp. 734, 739 (S.D.N.Y. 1979). These regulations, however, must be justified by medical needs, and not merely be a pretense for an undue burden of the abortion right. Neither purpose nor effect can unduly restrict the abortion decision. *See* Women's Medical Center of Providence, Inc. v. Cannon, 463 F. Supp. 531, 537-38 (D.R.I. 1978) (because of the ease of certain abortion procedures a state cannot require the performing physician to have hospital privileges).

36. Reasonable zoning ordinances applied to abortion facilities have been upheld. Bossier City Medical Suite, Inc. v. City of Bossier City, 483 F. Supp. 633, 650 (W.D. La. 1980); West Side Women's Servs., Inc. v. City of Cleveland, 450 F. Supp. 796 (N.D. Ohio), *aff'd mem.*, 582 F.2d 1281 (6th Cir.), *cert. denied*, 439 U.S. 983 (1978); *see* Note, *Abortion Clinic Zoning: The Right to Procreative Freedom and the Zoning Power*, 5 Women's Rights L. Rep. 283 (1979) (review of zoning ordinances restricting abortion clinics).

37. *See* Whalen v. Roe, 429 U.S. 589, 602 (1977). *Whalen* involved a New York statute requiring identification of patients taking certain dangerous drugs. *Id.* at 591-93. The Court recognized that "some individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention," *id.* at 602, but nevertheless upheld the statute as protecting a valid state interest. *Id.* at 603-04. *Whalen* stands for the proposition that a minimal regulation that protects an important state interest is usually permissible even though the regulation might lead someone to forego the exercise of a fundamental right. *Id.* at 602-03.

38. 443 U.S. 622 (1979). Chief Justice Burger and Justices Stewart and Rehnquist joined Justice Powell in the plurality decision. These four Justices alone ruled on the constitutionality of parental notice statutes and seemed to hold parental notice statutes unconstitutional. Four Justices declined to rule on the issue and Justice White dissented. Although not a plurality by definition, Justices Stewart, Rehnquist, Powell, and Chief Justice Burger will be referred to as a plurality for the sake of convenience, and because later opinions use this designation. *See generally* 18 J. Fam. L. 403 (1980); 31 S.C.L. Rev. 604 (1980); 14 Suffolk U.L. Rev. 48 (1980). In Bellotti v. Baird, 428 U.S. 132 (1976) (Bellotti I), the Court remanded the decision of a three-judge district court that held Mass. Ann. Laws ch. 112, § 12S (Michie/Law. Co-op 1980) (originally enacted as § 12P, here referred to as § 12S), unconstitutional. On

enables a pregnant minor to obtain an abortion after establishing either: (1) her maturity and ability to decide to abort without parental consultation; or (2) that an abortion would be in her best interests.[39] The judicial consent proceeding also must be conducted expeditiously and anonymously to avoid the "absolute, and possibly arbitrary, veto" proscribed in *Danforth*.[40]

Parental notice of these judicial proceedings, however, is constitutionally impermissible.[41] According to the plurality, a judicial consent statute must allow every minor to go directly to a court without first notifying or consulting her parents.[42] The Court reasoned that, in the judicial forum, the parents' superior resources and their position of authority over their children give them the ability to impair the minor's access to and probable success in court.[43]

B. *The Burden Imposed by Parental Notice Statutes*

Courts generally have found that parental notice statutes impose an undue burden on minors because of the pressure and control parents

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remand, the district court was to certify questions to the Supreme Judicial Court of Massachusetts to interpret § 12S. 428 U.S. at 151-52. Because § 12S could be construed to avoid the constitutional question, the Supreme Court abstained from ruling on its constitutionality. *Id.* at 146-47; *see* Harrison v. NAACP, 360 U.S. 167, 177-79 (1959) (hypothetical questions not appropriate for constitutional analysis). The Supreme Judicial Court of Massachusetts answered these certified questions in Baird v. Attorney General, 371 Mass. 741, 360 N.E.2d 288 (1977). The district court again found the statute unconstitutional. Baird v. Bellotti, 450 F. Supp. 997 (D. Mass. 1978), *aff'd*, 443 U.S. 622 (1979); *see* 33 U. Miami L. Rev. 705 (1979). The district court held that the statute imposed an undue burden and was overbroad. 450 F. Supp. at 1003-04.

39. Bellotti v. Baird, 443 U.S. 622, 643-44 (1979) (Bellotti II). A judicial consent statute requires the consent of a judge before a minor may obtain an abortion. Mass. Ann. Laws ch. 112, § 12S (Michie/Law. Co-op 1980) (held unconstitutional in Bellotti v. Baird, 443 U.S. 622, 651 (1979) (Bellotti II)) required that the minor first attempt to obtain parental consent. If parental consent was denied, the minor could obtain judicial consent. This statutory scheme required parental notice in every instance. Bellotti v. Baird, 443 U.S. 622, 646-48, 651 (1979) (Bellotti II); *see* Ill. Ann. Stat. ch. 38, § 81-54 (Smith-Hurd Supp. 1980-1981) (held unconstitutional in Wynn v. Carey, 582 F.2d 1375, 1388-90 (7th Cir. 1978)).

40. 443 U.S. at 643-44; *see* note 11 *supra* (time is of the essence in abortion cases).

41. 443 U.S. at 647-49. Massachusetts has amended § 12S to require parental consent or judicial consent. Now the statute does not require or result in parental notice. 1980 Mass. Adv. Legis. Serv. 48 (to be codified at Mass. Ann. Laws ch. 112, § 12S). The First Circuit has delayed the effective date of the statute. N.Y. Times, Sept. 14, 1980, § 1, at 15, col. 1.

42. 443 U.S. at 647-48, 651.

43. *Id.* at 647-49; *see* Wynn v. Carey, 582 F.2d 1375, 1390 (7th Cir. 1978).

may exert over their pregnant daughters.[44] This analysis is too simplistic; examining the burden imposed by parental notice statutes, through a comparison with other burdens, is necessary. *Bellotti II* does not control this issue despite the plurality's language to the contrary.[45] The four concurring justices in *Bellotti II*[46] held that the

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44. Wynn v. Carey, 582 F.2d 1375, 1388 n.24 (7th Cir. 1978); Margaret S. v. Edwards, 488 F. Supp. 181, 203-05 (E.D. La. 1980); Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1202 (N.D. Ohio 1979); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 547-48 (D. Me. 1979). Some courts have found undue burden for reasons peculiar to the state statutory scheme. *See* Wynn v. Carey, 582 F.2d at 1388-89; Wynn v. Scott, 448 F. Supp. 997, 1004-05 (N.D. Ill.) (holding unconstitutional Ill. Ann. Stat. ch. 38, § 81-54 (Smith-Hurd Supp. 1980-1981)), *appeals dismissed per curiam on procedural grounds sub nom.* Carey v. Wynn, 439 U.S. 8 (1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979). Section 81-54 requires judicial consent and parental notice, which is more burdensome than simple parental notice. *See* Planned Parenthood Ass'n v. Ashcroft, 483 F. Supp. 679, 688 (W.D. Mo. 1980) (holding unconstitutional Mo. Ann. Stat. § 188.028 (Vernon Supp. 1980)). Section 188.028 is also a judicial consent and parental notice statute. In Planned Parenthood Ass'n v. Ashcroft, 483 F. Supp. 679, 697 (W.D. Mo. 1980), the district court held Mo. Ann. Stat. § 188.039 (Vernon Supp. 1980) unconstitutional. The statute required simple parental notice but was deemed an undue burden because it made no provision for constructive notice to parents who could not be located, and failed to distinguish between emancipated and unemancipated minors. In some cases it is not at all clear that undue burden was present or even sought. Leigh v. Olson, No. A3-79-78, slip op. at 5 (D.N.D. July 9, 1979). In addition, the *Leigh* court failed to consider parental rights as a state interest and suggested that parental rights lacked constitutional status. *See id.* In H— L— v. Matheson, 604 P.2d 907 (Utah 1979), *prob. juris. noted*, 100 S. Ct. 1077 (1980), the Supreme Court of Utah unanimously concluded that the Utah parental notice statute, Utah Code Ann. § 76-7-304(2) (1978) ("To enable the physician to exercise his best medical judgment, he shall . . . [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."), was neither a veto of nor an undue burden on the abortion right, and found the statute constitutional. 604 P.2d at 912-13. The court found that "the statute does not per se impose any restriction on the minor as to her decision to terminate her pregnancy." *Id.* at 912; *cf.* Scheinberg v. Smith, 482 F. Supp. 529, 538-40 (S.D. Fla. 1979) (Florida's spousal consent provision, Fla. Stat. Ann. § 458.505(4)(b) (West 1979), held an undue burden). Utah § 76-7-304(2) (1978) also requires notice to the spouse of a married woman. The Utah spousal notice provision was not at issue in H— L— v. Matheson, 604 P.2d 907 (Utah 1979), *prob. juris. noted*, 100 S. Ct. 1077 (1980).

45. *See* Bellotti v. Baird, 443 U.S. 622, 643-44 (1979) (Bellotti II). "We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents." *Id.* at 647; *see Parent, Child, supra* note 9, at 1906. Justice Rehnquist voted with the plurality only to provide a consistent standard of review and avoid a "fragmented holding." 443 U.S. at 652 (Rehnquist, J., concurring). Justice Rehnquist referred to his partial dissent in Planned Parenthood v. Danforth, 428 U.S. 52, 92 (1976) (White, J., concurring in part and dissenting in part), to indicate his disagreement with the *Bellotti II* result and his support of parental involvement in a minor's abortion decision. 443 U.S. at 652 (Rehnquist, J., concurring); *see* note 38 *supra* and accompanying text.

46. Justices Stevens, Brennan, Marshall, and Blackmun concurred in the judgment in *Bellotti II*. 443 U.S. at 652.

Massachusetts statute provided an absolute parental or judicial veto in violation of *Danforth*, and pointedly reserved judgment on the constitutionality of parental notice statutes.[47] They felt that the plurality, in discussing parental notice statutes, had "address[ed] the constitutionality of an abortion statute that Massachusetts ha[d] not enacted,"[48] and therefore had issued an advisory opinion.[49] The conclusion of the concurrers and of three later courts is that neither *Danforth* nor *Bellotti II* would require a finding of undue burden in reviewing a parental notice statute.[50]

Furthermore, the *Bellotti II* plurality's objections to parental notice are in the context of a statute different from the usual parental notice statute.[51] The Massachusetts legislative scheme, invalidated in *Bellotti II*, required parental consent or judicial consent and parental notice, which is more burdensome than requiring simple parental notice or providing a choice between parental notice and judicial consent.[52] The plurality, moreover, would approve a qualified judicial consent requirement if consent were mandatory when the minor has the capacity to decide or when the abortion would be in her best interests.[53] Parental notice would seem less onerous than this type of judicial consent.[54]

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47. *Id.* at 652-56 (Stevens, J., concurring in the judgment).

48. *Id.* at 656 (Stevens, J., concurring in the judgment).

49. *Id.* at 654 n.1, 656 n.4 (Stevens, J., concurring in the judgment). Advisory opinions are contrary to well-founded, self-imposed judicial restraint and violate the "case and controversy" requirement of U.S. Const. art. III, § 2, cl. 1. *See* FCC v. Pacifica Foundation, 438 U.S. 726, 735 (1978); Herb v. Pitcairn, 324 U.S. 117, 126 (1945).

50. 443 U.S. at 654 n.1 (Stevens, J., concurring in the judgment), Doe v. Irwin, 615 F.2d 1162, 1167 (6th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3237 (U.S. Oct. 7, 1980) (No. 79-1811); H— L— v. Matheson, 604 P.2d 907, 912 (Utah 1979), *prob. juris. noted*, 100 S. Ct. 1077 (1980); *see* Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 547 (D. Me. 1979); 31 S.C.L. Rev. 604, 616 (1980); note 49 *supra* and accompanying text.

51. The *Bellotti II* plurality might have allowed parental notice in a statutory scheme that did not require judicial consent. 443 U.S. at 647-48, 651; *see* notes 44-45 *supra* and accompanying text.

52. 443 U.S. at 644-48. Ill. Ann. Stat. ch. 38, § 81-54 (Smith-Hurd Supp. 1980-1981) similarly requires notice to the parents of a minor seeking judicial authorization for an abortion when parental consent is "refused or cannot be obtained." This statute was held unconstitutional in Wynn v. Carey, 582 F.2d 1375, 1390 (7th Cir. 1978). Section 1 of the Model Parental Notice Statute in the Appendix does not require parental notice prior to a judicial determination. *See* Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329, 337, 394; note 51 *supra*.

53. 443 U.S. at 647-51.

54. H— L— v. Matheson, 604 P.2d 907, 912 (Utah 1979), *prob. juris. noted*, 100 S. Ct. 1077 (1980). Statutes that require parental notice prior to judicial consent would create more of a burden on the minor's abortion right. *See* Ill. Ann. Stat. ch. 38, § 81-54 (Smith-Hurd Supp. 1980-1981) (parental notice of judicial proceeding) (held unconstitutional in Wynn v. Carey, 582 F.2d 1375, 1388-90 (7th Cir. 1978));

Parental notice statutes encourage, but do not require, consultation.[55] Even when parents are consulted, the advice received is only one factor the minor would consider.[56] Although parents may object to an abortion, parental notice statutes provide no veto power; the minor retains the right to obtain an abortion regardless of parental reaction.[57] The only right impinged is the minor's right to an abortion without her parent's knowledge,[58] not the fundamental right to decide to abort.[59]

All restrictions characterized as undue burdens placed either a significant obstacle in the way of the woman's exercise of her abortion

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Mass. Laws Ann. ch. 112, § 12S (Michie/Law. Co-op Supp. 1980) (effective parental notice of judicial proceeding) (held unconstitutional in Bellotti v. Baird, 443 U.S. 622, 651 (1979)); Brief for Appellees at 5-7, H— L— v. Matheson, No. 79-5903 (U.S., filed Feb. 25, 1980); Burt, *supra* note 52, at 394 (arguing that a judicial consent statute is more burdensome than a parental notice statute); notes 53-54 *supra* and accompanying text.

55. A provision requiring notice 24 hours prior to the abortion would be a minimal burden that would enable, but not require, the minor to consult with her parents. *See* note 11 *supra* and accompanying text.

56. *See* note 37 *supra* and accompanying text. The approval of judicial consent in *Bellotti II* indicates that some third party involvement in a minor's abortion decision is beneficial and constitutional. *See* Bellotti v. Baird, 443 U.S. 622, 640-41 (1979) (Bellotti II); Brief for Appellees at 26, H— L— v. Matheson, No. 79-5903 (U.S., filed Feb. 25, 1980). Statutes requiring only parental notice do not constitute the absolute, and possibly arbitrary, veto proscribed in *Danforth*. *See* notes 31, 40, 41, 44 *supra* and accompanying text; § 3 of the Model Parental Notice Statute in the Appendix.

57. H— L— v. Matheson, 604 P.2d 907, 912 (Utah 1979), *prob. juris. noted*, 100 S. Ct. 1077 (1980); *see* note 37 *supra*. Parental notice statutes, *see* note 9 *supra*, are intended and structured to notify the minor's parents and encourage consultation between daughter and parents. *See* notes 12-13 *supra* and accompanying text.

58. A pregnant minor remains free to obtain an abortion after notice to her parents. *See* notes 37, 56 *supra* and accompanying text. In addition, a statute such as the Model Parental Notice Statute in the Appendix, does not impinge the minor's right to a secret abortion because it provides an option, parental notice or judicial consent. *See* §§ 1, 3 of the Model Parental Notice Statute in the Appendix. Confidentiality is an element of the privacy right. *See* notes 4, 40-41 *supra* and accompanying text. The requirement of the *Bellotti II* plurality, "completed with anonymity," 443 U.S. at 644, however, refers to the Massachusetts statute that coupled parental consent with judicial consent. *See* notes 39-42 *supra* and accompanying text. A statute with a notice requirement alone, or with a judicial consent option to a notice requirement, would not violate this requirement. *See* Burt, *supra* note 52, at 337, 394. Parental notice would be a minimal privacy intrusion imposed only to vindicate significant state interests. H— L— v. Matheson, 604 P.2d 907, 912 (Utah 1979), *prob. juris. noted*, 100 S. Ct. 1077 (1980). Minors would still be entitled to anonymity from the general public and to confidential treatment of records. Further, even adults do not enjoy the absolute right to a totally secret abortion in light of recordkeeping requirements. *See* note 32 *supra* and accompanying text.

59. *See* notes 2, 3, 19-23, 26 *supra* and accompanying text.

right or on the physician's exercise of best medical judgment.[60] Parental notice statutes, on the other hand, place only a minimal burden on the minor's abortion right, and no burden on the doctor's exercise of best medical judgment. To determine the constitutionality of parental notice statutes, therefore, this minimal burden must be weighed against the state interests protected.[61]

II. FURTHERING STATE INTERESTS

A. *State Interests Defined*

Roe v. Wade began the process of defining valid state interests. The two compelling state interests identified in *Roe v. Wade* were protection of the pregnant woman's health and of the potential life represented by the fetus.[62] The state's interest in protecting maternal health was "compelling" at the end of the first trimester,[63] while the state's interest in protecting potential life became "compelling" at viability.[64] In addition, courts have found that various first trimester regulations that impose minimal burdens on the abortion right are

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60. Recordkeeping, informed consent provisions, and zoning ordinances have been consistently upheld, as have provisions requiring that abortions be performed by a licensed physician. *See* notes 32-36 *supra* and accompanying text. Post-*Roe v. Wade* provisions that have been overturned include spousal consent requirements, parental consent requirements, and parental or judicial consent provisions. *See* notes 30, 31, 39-41 *supra* and accompanying text. Restrictions on the exercise of the physician's best medical judgment have been invalidated. *See* note 28 *supra* and accompanying text; notes 101-02 *infra* and accompanying text.

61. For an examination of the standards of review in analyzing abortion regulation, see notes 19-23 *supra* and accompanying text.

62. 410 U.S. 113, 154 (1973) ("safeguarding health [and] maintaining medical standards"); *id.* ("protecting potential life"); *see* note 7 *supra* and accompanying text.

63. 410 U.S. at 163. The Court based this conclusion on the medical fact that first trimester mortality is less than mortality in normal childbirth. *Id.*

64. *Id.* The state interest in protecting potential life is compelling at viability because the fetus is capable of life outside the womb. State regulation protecting the fetus after viability is therefore legally and biologically justified. *Id.*; *see* Zbaraz v. Quern, 469 F. Supp. 1212, 1219 (N.D. Ill. 1979) (state has no interest in protecting a non-viable fetus if the woman medically needs an abortion), *vacated and remanded sub nom.* Williams v. Zbaraz, 100 S. Ct. 2694 (1980); Gorby, *The "Right" to an Abortion, the Scope of the Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement*, 1979 S. Ill. U.L.J. 1, 34-36; Note, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 Mich. L. Rev. 1647 (1979). In resolving the conflict between the abortion right and the state's interest in protecting potential life, one court has concluded that regardless of the stage of pregnancy, a state has no legitimate interest in protecting fetal life when a woman needs an abortion to protect her life or health. Reproductive Health Servs. v. Freeman, 614 F.2d 585, 598 (8th Cir. 1980).

justified because they protect valid state interests.[65] Similarly, parental notice statutes impose minimal burdens and further interrelated[66] state interests. In the terms of the *Bellotti II* plurality, a state can restrict a minor's constitutional and statutory rights[67] because of the minor's vulnerability, the minor's inability to decide, and the countervailing interests of parents.[68]

1. Compensating for a Minor's Incapacity: Furthering Informed Consent

The law has long recognized that minors lack capacity. At common law, for example, minors were legally unable to act for themselves.[69] Today this legal concept is reflected in many restrictions of minors' rights that further the significant state interest[70] of compensating for the minor's incapacity.[71] Minors may not contract freely,[72] marry

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65. *See* notes 5-6 *supra* and accompanying text. Recordkeeping requirements, informed consent requirements, licensing qualifications, zoning ordinances, and certain judicial consent requirements have been upheld as protecting valid state interests. *See* notes 6, 32-36 *supra* and accompanying text. These abortion regulations further several state interests, such as protection of maternal health and protection of fetal life. *See* notes 8, 62-64 *supra* and accompanying text.

66. The state interests of insuring informed consent and protecting parental rights are intertwined but are separately treated for analytical purposes.

67. *See* notes 69-85 *infra* and accompanying text. Minors' rights are usually decided on a case-by-case basis. Carey v. Population Servs. Int'l, 431 U.S. 678, 692 (1977) ("perhaps not susceptible of precise answer"); *see, e.g.*, Ginsberg v. New York, 390 U.S. 629, 636 (1968); *In re* Gault, 387 U.S. 1, 13 (1967); Poe v. Gerstein, 517 F.2d 787, 790 (5th Cir. 1975), *aff'd sub nom.* Gerstein v. Coe, 428 U.S. 901 (1976); *Parent, Child, supra* note 9, at 1872.

68. Bellotti v. Baird, 443 U.S. 622, 634 (1979) (Bellotti II).

69. Poe v. Gerstein, 517 F.2d 787, 789 (5th Cir. 1975), *aff'd sub nom.* Gerstein v. Coe, 428 U.S. 901 (1976); *see In re* Gault, 387 U.S. 1, 17 (1967); Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941); *Ex parte* Crouse, 4 Whart. 9, 11 (Sup. Ct. Pa. 1839); 1 W. Blackstone, Commentaries 181-83 (G. Chase ed. 1878); Pilpel & Zuckerman, *supra* note 30, at 779; Shears, *Legal Problems Peculiar to Children's Courts*, 48 A.B.A.J. 719, 720 (1962).

70. Bellotti v. Baird, 443 U.S. 622, 635-36 (1979) (Bellotti II); Wynn v. Carey, 582 F.2d 1375, 1385 (7th Cir. 1978).

71. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part); Ginsberg v. New York, 390 U.S. 629, 650 (1968) (Stewart, J., concurring); J. Calamari & J. Perillo, The Law of Contracts §§ 8-1, 8-4, at 230, 235 (2d ed. 1977); W. Prosser, Handbook on the Law of Torts §§ 18, 134, at 102, 996-99 (4th ed. 1971); *Parent, Child, supra* note 9, at 1871-72.

72. *E.g.*, Cal. Civ. Code §§ 34, 35 (West Cum. Supp. 1980); Mont. Rev. Codes Ann. §§ 64-106, 64-107 (1970); N.Y. Gen. Oblig. Law §§ 3-101, 3-105, 3-107 (McKinney 1978); S.D. Comp. Laws Ann. §§ 53-2-1, 53-2-2 (1967); *see* J. Calamari & J. Perillo, *supra* note 71, §§ 8-1, 8-4, at 230, 235.

without parental consent,[73] vote,[74] or work where and when they please.[75]

After initial doubts as to the extent of minors' constitutional rights,[76] the Court in *In re Gault* [77] indicated that minors are entitled to procedural due process.[78] Later decisions extended constitutional protection to other areas,[79] including the right to privacy.[80] The constitutional rights of minors, however, clearly are not co-

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73. *E.g.*, Cal. Civ. Code §§ 4101, 4201 (West Supp. 1980); Ill. Ann. Stat. ch. 40, §§ 203, 204, 208 (Smith-Hurd Supp. 1980-1981); N.Y. Dom. Rel. Law §§ 15, 15a (McKinney 1977); Mont. Rev. Codes Ann. §§ 48-306, 48-308 (Cum. Supp. 1976). S.D. Comp. Laws Ann. §§ 25-1-9, 25-1-11, 25-1-13 (1976).

74. *E.g.*, Cal. Const. art. 2, § 1; Cal. Elec. Code § 17 (West 1977); Ill. Const. art. 3, § 1; Mont. Const. art. IV, § 2; N.Y. Elec. Law § 5-102 (McKinney 1978); S.D. Const. art. VII, § 2, S.D. Comp. Laws Ann. § 12-3-1 (1975); *see* Hill v. Stone, 421 U.S. 289, 295 (1975) (constitutional standard of right to vote); Kramer v. Union Free School Dist., 395 U.S. 621, 625 (1969) (state has power to impose reasonable age restriction on right to vote); Gray v. Sanders, 372 U.S. 368, 380 (1963) (minors may be denied the right to vote).

75. Child labor laws are designed to protect minors from injury and exploitation in the work place. *E.g.*, Cal. Lab. Code §§ 1290, 1292-1294 (West 1971); Ill. Ann. Stat. ch. 48, §§ 31.1-31.3, 31.7 (Smith-Hurd Supp. 1980-1981); Mont. Rev. Codes Ann. §§ 10-201, 10-206 (1968); N.Y. Labor Law §§ 130-133 (McKinney Supp. 1979); S.D. Comp. Laws Ann. §§ 60-5-14, 60-12-2 to 60-12-4 (1978). *See generally* Planned Parenthood v. Danforth, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part); Prince v. Massachusetts, 321 U.S. 158, 168-70 (1944).

76. *See* Rule v. Geddes, 23 App. D.C. 31, 50 (1904); *Developments*, *supra* note 4, at 1358.

77. 387 U.S. 1 (1967).

78. *Id.* at 31-57 (minors and their parents entitled to adequate written notice of specific issues involved; child and parents must be advised of their right to be represented by counsel; privilege against self-incrimination attaches; minor entitled to right to confront adverse witnesses). Justice Fortas wrote that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Id.* at 13.

79. In *In re* Winship, 397 U.S. 358 (1970), the Court held that the prosecution must establish the guilt of minors beyond a reasonable doubt in juvenile delinquency proceedings. *Id.* at 367-68. The Court in Breed v. Jones, 421 U.S. 519, 529-30, 541 (1975), applied the double jeopardy clause to minors. Students are entitled to due process before being suspended from public school. Goss v. Lopez, 419 U.S. 565, 572, 576 (1975). Although public school students have a fourteenth amendment liberty right to be free from physical punishment without due process, Ingraham v. Wright, 430 U.S. 651, 674 (1977), minors can only seek a remedy under the available civil and criminal law. *Id.* at 678. Moreover, minors are not entitled to trial by jury in juvenile delinquency proceedings. McKeiver v. Pennsylvania, 403 U.S. 528, 545-51 (1971).

80. Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977) (minor's right of privacy includes freedom to make procreation decisions); Planned Parenthood v. Danforth, 428 U.S. 52, 73, 91 (1976) (minor's right to abortion without parental consent). The *Danforth* Court concluded that "[c]onstitutional 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." *Id.* at 74 (citations omitted); *see* Wynn v. Carey, 582 F.2d 1375, 1383-84 (7th Cir. 1978).

extensive with those of adults.[81] The Constitution itself recognizes attainment of a certain age as a prerequisite to the exercise of some rights.[82] A minor's first amendment rights may be abridged or limited in ways not permissible if the rights of adults were involved.[83] Restrictions on the right to marry and vote, permissible as to minors, would be unconstitutional if applied to adults.[84] Finally, the degree of permissible state regulation of a minor's privacy rights is considerably broader than its power over the privacy rights of an adult.[85] Parental notice statutes recognize a minor's frequent lack of capacity and attempt to insure that a minor's abortion decision be informed and rational.[86]

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81. *E.g.*, Bellotti v. Baird, 443 U.S. 622, 633-39 (1979) (Bellotti II); McKeiver v. Pennsylvania, 403 U.S. 528, 533-34 (1971); Ginsberg v. New York, 390 U.S. 629, 638-39 (1968); Prince v. Massachusetts, 321 U.S. 158, 167-68 (1944); *see* T. Emerson, The System of Freedom of Expression 496-97 (1970); *cf.* Parham v. J.R., 442 U.S. 584, 600-04 (1979) (parental control is preferable to state control).

82. U.S. Const. art. I, § 2, cl. 2 (age of 25 to be member of House of Representatives); U.S. Const. art. I, § 3, cl. 3 (age of 30 to be Senator); U.S. Const. art. II, § 1, cl. 5 (age of 35 to be President); *see* U.S. Const. amend. XXVI, § 1 (right to vote afforded those 18 or older).

83. *Compare* Ginsberg v. New York, 390 U.S. 629, 637-40, 645 (1968) (cannot sell to minors certain obscene materials which can be sold to adults) *with* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 512-14 (1969) (minor's first amendment right to wear black armbands to protest Vietnam War cannot be arbitrarily abridged). The *Tinker* Court emphasized that minors' first amendment rights may not be arbitrarily restricted. *Id.* at 505-07; *see* Rowan v. Post Office Dep't, 397 U.S. 728, 741 (1970) (Brennan, J., concurring).

84. Planned Parenthood v. Danforth, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part); *see* Carey v. Population Servs. Int'l, 431 U.S. 678, 692-93 n.15 (1977) (Brennan, J.) ("The question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer." *Id.* at 692.); Planned Parenthood v. Danforth, 428 U.S. 52, 74-75 (1976); Wynn v. Carey, 582 F.2d 1375, 1384 (7th Cir. 1978); Minor's Right of Privacy, *supra* note 8, at 1232.

85. The state need only show a "significant state interest" to restrict a minor's privacy rights rather than the "compelling state interest" required in Roe v. Wade, 410 U.S. 113, 155 (1973). *See* notes 6, 21, 84 *supra* and accompanying text.

86. Bellotti v. Baird, 443 U.S. 622, 640-41 (1979) (Bellotti II); Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976); *id.* at 91 (Stewart, J., concurring) (state furthers a constitutionally permissible interest by encouraging parental consultation with a pregnant minor deciding whether to abort); Wynn v. Carey, 582 F.2d 1375, 1385 (7th Cir. 1978); H— L— v. Matheson, 604 P.2d 907, 909 (Utah 1979), *prob. juris. noted*, 100 S. Ct. 1077 (1980). Roe v. Wade, 410 U.S. 113 (1973), indicated that the abortion right involved the right of a woman to *decide* to abort. *Id.* at 153-54, 164. The right to decide requires capacity, even in the context of abortion. Planned Parenthood v. Danforth, 428 U.S. 52, 94-95 (1976) (White, J., concurring in part and dissenting in part); *see* Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring in result); notes 68-85 *supra* and accompanying text. The importance of an informed and intelligent decision to abort is further indicated by decisions upholding informed consent requirements. *See* note 34 *supra* and accompanying text. *See generally Minor's Right of Privacy, supra* note 8, at 1222-23.

Because many minors lack the capacity to make intelligent, informed decisions,[87] the minor may not be able to give effective consent.[88] The right to decide presupposes capacity to decide,[89] and absent capacity, the right to decide is meaningless, and perhaps harmful.[90] The requirement of informed consent in minors' abortions flows from, and is analogous to, the common law rule requiring parental consent before unemancipated minors receive non-emergency medical care.[91] Informed consent and intelligent decision-making is essential when a pregnant minor is faced with the abortion deci-

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87. Bellotti v. Baird, 443 U.S. 622, 635-36 (1979) (Bellotti II); *see* Planned Parenthood v. Danforth, 428 U.S. 52, 74-75 (1976).

88. Bellotti v. Baird, 443 U.S. 622, 635-36 (1979) (Bellotti II). The traditional age of consent to medical procedures is usually 16, though often 17 and older. *Parent, Child, supra* note 9, at 1910 n.258; *see* Planned Parenthood v. Danforth, 428 U.S. 52, 74-75 (1976); notes 91-98 *infra*. *Bellotti I* and *Bellotti II* also recognized that not all minors would be capable of giving informed consent to an abortion. Bellotti v. Baird, 443 U.S. 622, 635-36 (1979) (Bellotti II); Bellotti v. Baird, 428 U.S. 132, 147 (1976) (Bellotti I). *See generally* 31 Rec. A. Bar City N.Y. 694 (1976) (medical treatment of minors under New York law).

89. Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring in the result) ("I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." (footnote omitted)); *see* Bellotti v. Baird, 443 U.S. 622, 635-36 (1979) (Bellotti II); Wynn v. Carey, 582 F.2d 1375, 1385 (7th Cir. 1978).

90. For instance, an immature minor allowed to contract freely or marry at will could easily find herself making decisions beyond her capacity. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 102-03 (1976) (Stevens, J., concurring in part and dissenting in part). Most limitations on minors are protective. Child labor laws protect minors from injury and exploitation in the workplace. *See* note 75 *supra* and accompanying text. Contract law provides minors with the defense of disaffirmance to enable them to escape from certain contracts. *See* notes 72 *supra* and accompanying text.

91. J. Noonan, *supra* note 2, at 92; W. Prosser, *supra* note 71, § 18 (4th ed. 1971); *see, e.g.*, Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941); Jackovach v. Yocom, 212 Iowa 914, 924-25, 237 N.W. 444, 449 (1931); Zoski v. Gaines, 271 Mich. 1, 9-10, 260 N.W. 99, 102-03 (1935); Rogers v. Sells, 178 Okla. 103, 104-05, 61 P.2d 1018, 1019-20 (1936); Moss v. Rishworth, 222 S.W. 225, 226 (Tex. Civ. App. 1920). *But see* Ballard v. Anderson, 4 Cal. 3d 873, 884, 484 P.2d 1345, 1353, 95 Cal. Rptr. 1, 9 (1971) (en banc) (minor may obtain therapeutic abortion without parental consent; pre-*Roe v. Wade*). *See generally* Wall v. Brim, 138 F.2d 478, 481 (5th Cir. 1943), *aff'd*, 145 F.2d 492, 493 (5th Cir. 1944), *cert. denied*, 324 U.S. 857 (1945); Tabor v. Scobee, 254 S.W.2d 474, 475-76 (Ky. 1952); Franklyn v. Peabody, 249 Mich. 363, 366-68, 228 N.W. 681, 682-83 (1930); Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 129-30, 105 N.E. 92, 93-94 (1914), *overruled on other grounds*, Bing v. Thunig, 2 N.Y.2d 656, 665, 143 N.E.2d 3, 8, 163 N.Y.S. 2d 3, 10 (1957); Rolater v. Strain, 39 Okla. 572, 575-76, 137 P. 96, 97-98 (1913); Grannum v. Berard, 70 Wash. 2d 304, 306-07, 422 P.2d 812, 814 (1967).

sion.[92] Youth and the incapacity it implies is unquestionably a concern.[93] Clinics provide abortions to girls not yet teenagers.[94] A pregnant minor is likely to be confused and frightened.[95] Unfortunately, absent parental consultation following parental notice, the pregnant minor is not likely to encounter concerned advice. Abortion clinics are unlikely to discourage the minor's decision to abort or in other ways act contrary to their financial interest.[96] The patient-doctor conference and decision-making process articulated in *Roe v. Wade*[97] is regrettably no more than an ideal. The reality is often a short group counselling session conducted by nonphysicians in an unfamiliar and anxiety-ridden environment.[98] Parental notice statutes would lessen the impersonal nature of this system.

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92. The Supreme Court has recognized the difficulties minors face when confronted with medical care decisions. "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment." Parham v. J.R., 442 U.S. 584, 603 (1979). The importance of capacity to decide in the abortion context has been established. Bellotti v. Baird, 443 U.S. 622, 640-41 (1979) (Bellotti II); Planned Parenthood v. Danforth, 428 U.S. 52, 67, 75 (1976). For instance, *Danforth* upheld the requirement of the woman's written consent while invalidating third-party consent requirements. *Id.* at 65-67.

93. Chernesky, *Abortion Patients and Abortion Counseling Today* in Counseling in Abortion Services 45-46 (1973).

94. Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1181 (N.D. Ohio 1979); *see* notes 92-93 *supra* and accompanying text; notes 95-96 *infra* and accompanying text.

95. Planned Parenthood v. Danforth, 428 U.S. 52, 91 (1976) (Stewart, J., concurring). "The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Id.* at 67 (opinion of the court).

96. *Proposed Constitutional Amendments: Hearing on S.J. Res. 119 and S.J. Res. 130 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 93rd Cong., 2d Sess. pt. 2, at 468-72 (1974) [hereinafter cited as *Hearing*]; Wood & Durham, *Counseling, Consulting and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U.L. Rev. 783, 784; *Parent, Child, supra* note 9, at 1905 n.241 ("Abortion clinics do not profit by decisions not to abort, so little incentive exists for discouraging abortions."); *see* Bus. Week, Dec. 10, 1979, at 68-73 (efforts of abortion clinic owners to diversify "helps them turn a tidy profit and protects them against financial disaster"). For a description of the operation of a typical abortion clinic, see Planned Parenthood v. Danforth, 428 U.S. 52, 91 n.2 (1976) (Stewart, J., concurring).

97. 410 U.S. 113, 153, 164 (1973).

98. Bellotti v. Baird, 443 U.S. 622, 641 n.21 (1979) (Bellotti II); Planned Parenthood v. Danforth, 428 U.S. 52, 91 n.2 (1976) (Stewart, J., concurring); *see* Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1181-82 (N.D. Ohio 1979); *Hearing, supra* note 96, at 468-69 (patient-doctor relationship often limited to actual operating procedure); Wood & Durham, *supra* note 96, at 784 (same).

A corollary informed consent interest furthered by the notice statutes is better informed decision-making by the doctor.[99] A physician who is provided with information about a patient's "physical, emotional, psychological, [and] familial" well-being, as well as her age, would have a better basis for a medical judgment.[100] *Roe v. Wade* and the cases following it have emphasized that the abortion decision is to be made by the pregnant woman and her physician.[101] Later cases have invalidated restrictions that limit the exercise of the physician's best medical judgment.[102] Notifying the minor's parents would further this interest by giving the physician access to information concerning the minor's capacity to decide, best interests, and medical history.[103]

2. Protecting Parental Rights

The second significant state interest furthered by parental notice statutes is the preservation and protection of parental authority over a child's development.[104] The extent of parental rights, and the corresponding power of states to protect those rights, however, is

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99. *See* Parham v. J.R., 442 U.S. 584, 603 (1979); Utah Code Ann. § 76-7-304 (1978). Parental authority includes a " 'high duty' to recognize symptoms of illnesses and to seek and follow medical advice." 442 U.S. at 602.

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

101. *Id.* at 198-99; Roe v. Wade, 410 U.S. 113, 153, 164 (1973).

102. In Singleton v. Wulff, 428 U.S. 106, 117-18 (1976), the Court recognized that physicians had standing to assert the constitutional rights of women patients against unconstitutional regulation of the abortion right. *See* Colautti v. Franklin, 439 U.S. 379, 383 n.3 (1979). Statutes burdening the physician's exercise of best medical judgment have been held constitutional. Planned Parenthood v. Danforth, 428 U.S. 52, 83-84 (1976) (Missouri statute set standard of care requiring physician to preserve life of fetus). *Danforth* upheld Missouri's definition of viability because it was flexible enough to allow the physician to determine "whether a particular fetus is viable." *Id.* at 64. "State regulation that impinges upon [the physician's] determination [of viability], if it is to be constitutional, must allow the attending physician 'the room he needs to make his best medical judgment.' " Colautti v. Franklin, 439 U.S. 379, 397 (1979) (quoting Doe v. Bolton, 410 U.S. 179, 192 (1973)).

103. Most parents would be in an excellent position to provide the doctor with valuable information concerning the minor's illnesses, allergies, and possible adverse reactions to anesthetics. H— L— v. Matheson, 604 P.2d 907, 912 (Utah 1979), *prob. juris. noted*, 100 S. Ct. 1077 (1980); *see* notes 99-100 *supra*.

104. Bellotti v. Baird, 443 U.S. 622, 637-38 (1979) (Bellotti II); Wynn v. Carey, 582 F.2d 1375, 1385 (7th Cir. 1978). This constitutional right of parents to raise, educate, and guide their children does not affirmatively require the state to provide notice but rather is a valid and significant state interest that the state may protect through appropriate legislation. *Cf.* Doe v. Irwin, 615 F.2d 1162, 1168 (6th Cir. 1980) (no constitutional obligation on state to provide parental notice of contraceptives provided minor children; whether state can require notice left undecided), *cert. denied*, 49 U.S.L.W. 3237 (U.S. Oct. 7, 1980) (No. 79-1811); Note, *Parental Notification as a Prerequisite for Minors' Access to Contraceptives: A Behavioral and Legal Analysis*, 13 U. Mich. J.L. Ref. 196 (1979).

evaluated on a case by case basis.[105] Thus, it is appropriate to analyze parents' rights when their children seek an abortion.

Parents have long been given extensive authority[106] to fulfill their duties to protect, maintain, and educate their children.[107] These rights first achieved constitutional status, in dicta, in *Meyer v. Nebraska*.[108] In *Pierce v. Society of Sisters*,[109] the Court in fact protected parental rights when it held that Oregon could not require parents or guardians to send their children to public school.[110] The Court reasoned that the state requirement

> unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[111]

The Court has also upheld a parent's right to educate his child at home despite a statute requiring compulsory public school attendance.[112]

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105. The Supreme Court's recognition of parental rights has not determined the issue of where to draw the line if and when the rights of minors and parents clash. *See* Wald, *Children's Rights: A Framework for Analysis*, 12 U. Cal. D.L. Rev. 255 (1979). Few cases discuss this clash; conflict between the constitutional rights of parents and their minor children is rare. *Developments*, *supra* note 4, at 1377-79.

106. 1 W. Blackstone, *supra* note 69, at 167. "He may lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child under age . . . is [now] absolutely *necessary* . . . . And this also is another means, which the law has put into the parent's hands, in order the better to discharge his duty . . . ." *Id.* (emphasis in original).

107. *Id.* at 167. Parental authority over their children is recognized by American common law. 2 J. Kent, Commentaries on American Law 188-233 (11th ed. 1867).

108. 262 U.S. 390 (1923). Although *Meyer* protected a teacher's right to teach German, the Court stated that the fourteenth amendment liberty rights included "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 399 (citations omitted); *see* Bartels v. Iowa, 262 U.S. 404 (1923).

109. 268 U.S. 510 (1925).

110. *Id.* at 534-35.

111. *Id.*

112. Wisconsin v. Yoder, 406 U.S. 205, 234-35 (1972). The *Yoder* Court noted that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* at 232.

The common law right to raise, guide, and educate children is now firmly established as a fourteenth amendment liberty interest.[113] Parents have the right to inculcate their children with "moral standards, religious beliefs, and elements of good citizenship," without conforming to state prescribed procedures.[114] Parental rights are consistent "with our tradition of individual liberty;" they are a basic presupposition of that liberty.[115]

Parental authority, however, is limited;[116] it is to be neither tyrannical nor authoritarian. Redress for abuse of parental authority can be achieved under child abuse laws,[117] and even traditional tort con-

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113. Bellotti v. Baird, 443 U.S. 622, 638-39 & n.18 (1979) (Bellotti II); Parham v. J.R., 442 U.S. 584, 602-03 (1979); Quillon v. Walcott, 434 U.S. 246, 255 (1978); Ginsberg v. New York, 390 U.S. 629, 639 (1968); Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The parental rights cases discussed here, *see* notes 106-12 *supra* and accompanying text, and in *Bellotti II*, 443 U.S. at 639 n.18, did not decide the rights of parents against the right of their minor children. Rather, in these cases the parents and minors generally had similar interests. *See* Wynn v. Carey, 582 F.2d 1375, 1385 n.18 (7th Cir. 1978); Poe v. Gerstein, 517 F.2d 787, 791 (5th Cir. 1975), *aff'd sub nom.* Gerstein v. Coe, 428 U.S. 901 (1976). In Ginsberg v. New York, 390 U.S. 629 (1968), the Court recognized that "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." *Id.* at 639. Protecting these parental rights is a significant state interest, Wynn v. Carey, 582 F.2d 1375, 1385 (7th Cir. 1978), that warrants upholding parental notice statutes. *See* Parham v. J.R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."); Doe v. Irwin, 615 F.2d 1162, 1167 (6th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3237 (U.S. Oct. 7, 1980) (No. 79-1811); Heyman & Barzelay, *supra* note 2, at 772 ("family has historically been a fundamental unit of our society for such purposes as socialization and nurture"). The fact that the family antedates the state and the traditional importance attached to the family has played an important part in constitutional examination of the family and its members. *Developments*, *supra* note 4, at 1117-78, 1352; *see* Rehnquist, *We Are Family, Lawyers Stay Away*, Nat'l L.J., July 28, 1980, at 15, col. 1 ("the family is an institution of extraordinary virtue—well worth preserving").

114. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

115. Bellotti v. Baird, 443 U.S. 622, 638-39 (1979) (Bellotti II); Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U.L. Rev. 605, 615-17.

116. In Prince v. Massachusetts, 321 U.S. 158 (1944), the Court upheld a state statute prohibiting minors from selling newspapers and periodicals on the street noting that "[i]t 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 166 (citation omitted). Despite these parental rights, however, the Court found state regulation appropriate. *Id.* at 170.

117. States have statutes to protect against child abuse including deprivation of custody. *See* Cal. Civ. Code §§ 232, 232.1, 238 (West Supp. 1980); Ill. Ann. Stat. ch. 23, § 2055, ch. 37, §§ 701-2, 703-1, 705-2, 705-7 (Smith-Hurd 1980-1981); Mont. Rev. Codes Ann. §§ 10-1309, 10-1310, 10-1311, 10-1314 (Cum. Supp. 1977); N.Y. Fam. Ct. Act (29A) §§ 611, 614, 631 (McKinney Supp. 1978); S.D. Comp. Laws Ann.

cepts.[118] These limitations, however, are on the exercise of the right; the appropriateness of the constitutional protection of that right is undisputed.[119] A state cannot unduly restrict, but can choose to protect these parental rights with parental notice statutes.[120] The legitimacy of statutes and case law giving parents control over their children,[121] the right to consent to medical care on behalf of their children,[122] and the right to raise their children and inculcate them with certain values[123] are well established[124] and indicate that parental rights are worthy of protection absent "a powerful countervailing interest."[125]

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§§ 26-8-19.1, 26-8-22.10, 26-8-23.1, 26-8-36 (Supp. 1979); Note, *Termination of Parental Rights and the Lesser Restrictive Alternative Doctrine*, 12 Tulsa L.J. 528 (1977) [hereinafter cited as *Termination*].

118. W. Prosser, *supra* note 71, § 122, at 864-67; *see* Gelbman v. Gelbman, 23 N.Y.2d 434, 439, 245 N.E.2d 192, 194, 297 N.Y.S.2d 529, 532 (1969) (abrogation of defense of intrafamilial immunity).

119. Abuse of parental authority does not necessarily undermine parental authority, but rather creates a need for review and termination in cases of abuse. Parham v. J.R., 442 U.S. 584, 602-03 (1979); *see* Bartley v. Kremens, 402 F. Supp. 1039, 1047-49 (E.D. Pa. 1975), *vacated and remanded*, 431 U.S. 119 (1977).

120. *See* note 104 *supra*.

121. *See* notes 104-13 *supra* and accompanying text.

122. *See* Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941); note 91 *supra* and accompanying text.

123. *See* notes 107-13 *supra* and accompanying text.

124. *See* Bellotti v. Baird, 442 U.S. 622, 637-38, 639 n.18 (1979) (Bellotti II); notes 113-15 *supra* and accompanying text.

125. Stanley v. Illinois, 405 U.S. 645, 651 (1972). One countervailing state interest justifying interference in the parent-child relationship is protection of the child's life and health. In Custody of a Minor, 78 Mass. Adv. Sh. 2002, 379 N.E. 2d 1053 (1978), the Supreme Judicial Court of Massachusetts removed a child from the legal custody of parents who refused the child medical care. Chemotherapy would have given the child a good chance to survive leukemia. *Id.* at 2036-37, 379 N.E.2d at 1066-67. Other courts have ordered medical treatment for children over parental objection. *See* Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488, 501-05 (W.D. Wash. 1967) (per curiam), *aff'd per curiam*, 390 U.S. 598 (1968); People *ex rel.* Wallace v. Labrenza, 411 Ill. 618, 625-26, 104 N.E.2d 769, 774, *cert. denied*, 344 U.S. 824 (1952); Custody of a Minor, 78 Mass. Adv. Sh. 2002, 2035-37, 379 N.E.2d 1053, 1066-67 (1978); Morrison v. State, 252 S.W.2d 97, 103 (Mo. Ct. App. 1952); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 582-84, 279 A.2d 670, 673-74 (1971); State v. Perricone, 37 N.J. 463, 477, 181 A.2d 751, 759-60, *cert. denied*, 371 U.S. 890 (1962); *In re* Vasko, 238 A.D. 128, 131, 263 N.Y.S. 552, 555-56 (2d Dep't 1933); *In re* Clark, 21 Ohio Op. 2d 86, 89-90, 185 N.E.2d 128, 131-32 (Ct. C.P. 1962); Heinemann's Appeal, 96 Pa. 112, 115 (1880); Mitchell v. Davis, 205 S.W.2d 812, 814-15 (Tex. Civ. App. 1947); Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 Stan. L. Rev. 1383, 1399-1401 (1974). Whether medical care should be provided over parental objection depends on the minor's capacity to decide and chance of survival. *See* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977). *In re* Hofbauer, 47

The fourteenth amendment liberty rights that parents have in raising and guiding their children find protection in parental notice statutes.[126] These statutes vindicate parents' right to participate in their child's abortion decision.[127] Some courts, however, have found protection of parental rights inadequate justification for parental notice statutes because of the assumption that parents will oppose the minor's abortion decision irrespective of the minor's best interests.[128] In essence, it is assumed that parental notice will not compensate for a minor's incapacity, nor reinforce meaningful parental consultation. Implicit, if not presumed, in the common law and constitutional protection afforded parental rights, however, is that parental involvement will usually benefit the child.[129] In addition, experience demonstrates that the vast majority of parents are supportive and will act in their daughter's best interests.[130] Admittedly, in an extreme case, the parents' reaction might compromise the minor's best interests or lead the minor to forego an abortion solely on the basis of parental opposition.[131] The minor, however, would be free

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N.Y.2d 648, 393 N.E.2d 1009, 419 N.Y.S.2d 936 (1979), indicates that parents must provide "an acceptable course of medical treatment for their child in light of all the surrounding circumstances." *Id.* at 656, 393 N.E.2d at 1014, 419 N.Y.S.2d at 941; *see* J. Goldstein, A. Freud & A. Solnit, Before the Best Interests of the Child 91-95 (1979); Goldstein, *Medical Care for the Child at Risk: On State Supervision of Parental Autonomy*, 86 Yale L.J. 645 (1977).

126. *See* notes 13, 104-14 *supra* and accompanying text. Ginsberg v. New York, 390 U.S. 629 (1968), establishes the right of a state to protect minors. Bellotti v. Baird, 443 U.S. 622, 633-36, 638-39 (1979) (Bellotti II); Wynn v. Carey, 582 F.2d 1375, 1385 (7th Cir. 1978). These cases indicate that certain parental rights cannot be unduly restricted by the state. Although parental rights may clash with minor's rights, this does not invalidate the case law establishing parental rights. Parham v. J.R., 442 U.S. 584, 603 (1979); *see* notes 116, 119 *supra* and accompanying text.

127. In *Bellotti I*, for example, the minor's parents were not notified of their daughter's pregnancy and her abortion decision. The parents were thus unable to consult with their daughter. Baird v. Bellotti, 393 F. Supp. 847, 862 (D.Mass. 1975) (Julian, J., dissenting), *vacated and remanded*, 428 U.S. 132 (1976) (Bellotti I).

128. *See Parent, Child*, *supra* note 9, at 1878; note 14 *supra*; notes 129-30 *infra* and accompanying text; *cf.* Parham v. J.R., 442 U.S. 584, 602-04 (1970) (mental health institutionalization). Additionally, contrary to the fears of courts which have struck down parental notice statutes that parents will universally force their children to bear the child, there is evidence that many teenagers undergo abortions after strong pressure to abort from their parents. *See Parent, Child*, *supra* note 9, at 1909 n. 257.

129. Parham v. J.R., 442 U.S. 584, 604 (1979).

130. Bellotti v. Baird, 443 U.S. 622, 648-49 (Bellotti II); Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976); Wynn v. Carey, 582 F.2d 1375, 1387-88 (7th Cir. 1978); Akron Center for Reproductive Health, Inc., v. City of Akron, 479 F. Supp. 1172, 1202 (N.D. Ohio 1979). Furthermore, there is a presumption that parents will act in their children's best interest. Parham v. J.R., 442 U.S. 584, 604 (1979).

131. *See* note 14 *supra*.

to disregard this arbitrary and perhaps illegal parental opposition,[132] obtain an abortion, and seek the usual redress under child abuse or child protection statutes.[133]

B. *Equal Protection: Overbreadth*

State statutes regulating abortion, in addition to imposing only burdens justified by state interests, must be "narrowly drawn" to restrict fundamental rights only by furthering valid state interests.[134] A statute is unconstitutionally overbroad if it significantly restricts the rights of persons to whom the statute should not apply.[135] Arguably, parental notice statutes are overbroad because they require notice to parents of minors mature enough to give informed consent,[136] and therefore, as to those minors, would not further significant state interests.

To determine whether parental notice statutes are overbroad as to mature minors, as with any analysis of abortion regulation, it is necessary to examine the extent of the burden on the abortion right and the nature of the state interests protected.[137] In effect, the overbreadth analysis is whether parental notice statutes unduly restrict a mature minor's abortion rights. The burden placed on the abortion rights of mature minors is even less than the minimal burden placed on the abortion rights of immature minors. Compared with an immature minor, a mature minor is in a better position to disregard arbitrary parental opposition because of her increased resources, education, and maturity.[138] Moreover, significant state interests are still

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132. H— L— v. Matheson, 604 P.2d 907, 912-13 (Utah 1979), *prob. juris. noted*, 100 S. Ct. 1077 (1980); *see* note 37 *supra* and accompanying text.

133. *See* notes 140-41 *supra* and accompanying text. *See generally* Parham v. J.R., 442 U.S. 584, 603 (1979); *Termination*, *supra* note 117, at 529-34.

134. Roe v. Wade, 410 U.S. 113, 155 (1973); *see* Griswold v. Connecticut, 381 U.S. 479, 485 (1965); NAACP v. Button, 377 U.S. 288, 307 (1964). In *Bellotti II*, the plurality expressly refused to examine the Massachusetts statute on equal protection grounds. Bellotti v. Baird, 443 U.S. 622, 650 n.30 (1979) (Bellotti II). In proposing an acceptable parental notice/judicial consent statute, the plurality indicated that not all minors' parents should be notified. *Id.* at 643-44, 647-48. Section 1 of the Model Parental Notice Statute in the Appendix provides for judicial consent without mandatory parental notice.

135. L. Tribe, American Constitutional Law § 12-25, at 712 (1978); *see* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("[T]he overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."). Although *Broadrick* is a first amendment case, it establishes the standard for overbreadth. *See* L. Tribe, *supra*, § 12-25, at 712.

136. *See* note 15 *supra*.

137. *See* notes 19-23 *supra* and accompanying text.

138. Mature minors would be able to more easily disregard arbitrary parental opposition. Less mature minors who lacked the capacity to grant informed consent would be more susceptible to parental opposition, although they too could obtain an abortion despite such opposition. *See* notes 132-33 *supra* and accompanying text.

protected. Although, as a matter of definition, a mature minor is capable of informed consent, certain other informed consent interests of the mature minor are protected by parental notice statutes. Parental consultation would enhance the quality of the mature minor's decision in the majority of the cases,[139] and the physician would have access to information from parents permitting better medical judgment.[140] The second state interest, protecting parental rights, applies throughout the child's minority.[141] Although parental rights to guide and educate a mature minor may be less extensive than their rights as to an immature minor, parents retain a right to participate in the important decisions of their unmarried, unemancipated children.[142] Thus, because the burden on a mature minor[143] is minimal and the state

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139. Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1202 (N.D. Ohio 1979); *see* Bellotti v. Baird, 443 U.S. 622, 640 (1979) (Bellotti II); Planned Parenthood v. Danforth, 428 U.S. 52, 91 (1976) (Stewart, J., concurring); Wynn v. Carey, 582 F.2d 1375, 1388 (7th Cir. 1978); Baird v. Bellotti, 450 F. Supp. 997, 1012 nn.6-9 (D. Mass. 1978) (Julian, J., dissenting), *aff'd*, 443 U.S. 622 (1979) (Bellotti II); Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554, 567 (E.D. Pa. 1975), *aff'd sub nom.* Colautti v. Franklin, 439 U.S. 379 (1979); H— L— v. Matheson, 604 P.2d 907, 912 (Utah 1979), *prob. juris. noted*, 100 S. Ct. 1077 (1980).

140. *See* note 103 *supra* and accompanying text.

141. *See* notes 104-33 *supra*. At some point, however, parental authority ends. Independence increases with maturity.

142. Parental rights and parental authority arose because of minors' incapacity and inability to provide and make decisions for themselves. As minors become more mature and capable, it would seem that parental authority over them diminishes.

143. The mature minor rule exempts from a parental consent requirement those minors found to be mature enough to provide informed consent. The Restatement of Torts contains an implicit mature minor exception. "If the child . . . is capable of appreciating the nature, extent and consequences of the invasion, his assent prevents the invasion from creating liability . . . ." Restatement of Torts § 59, Comment a (1934); *see* W. Prosser, *supra* note 71, § 18, at 103; Restatement (Second) of Torts § 892A, Comment b (1979); *id.* § 59 (1965); Bennett, *Allocation of Child Medical Care Decision-Making Authority: A Suggested Interest Analysis*, 62 Va. L. Rev. 285, 289-90 (1976); Pilpel & Zuckerman, *supra* note 30, at 782-83; note 86 *supra* and accompanying text. A good faith declaration by the minor's physician that the minor is capable of giving informed consent would protect the rights of mature minors. Moreover, the physician would remain subject to the traditional common law remedies for battery if he performed an abortion on a minor found not capable of giving consent. *See* Bonner v. Moran, 126 F.2d 121, 122-23 (D.C. Cir. 1941). The mature minor exception is well established in cases of non-emergency medical treatment. *See, e.g.*, Younts v. St. Francis Hosp. & School of Nursing, 205 Kan. 292, 298-301, 469 P.2d 330, 336-38 (1970); Bishop v. Shurly, 237 Mich. 76, 85, 211 N.W. 75, 78 (1926); Gulf & S.I.R. Co. v. Sullivan, 155 Miss. 1, 9-10, 119 So. 501, 502 (1928); Lacey v. Laird, 166 Ohio St. 12, 14, 139 N.E.2d 25, 27 (1956); Bach v. Long Island Jewish Hosp., 49 Misc. 2d 207, 208, 267 N.Y.S.2d 289, 290-91 (Sup. Ct. 1966); Sullivan v. Montgomery, 155 Misc. 448, 449-50, 279 N.Y.S. 575, 577 (City Ct. 1935); Smith v. Seibly, 72 Wash. 2d 16, 20-21, 431 P.2d 719, 723 (1967). One court has held that "[t]he mature minor rule calls for an analysis of the nature of the

interests protected are significant, parental notice statutes should apply with equal force to mature and immature minors.[144] A mature minor should be treated differently, however, when she seeks judicial consent.[145] If capable of informed consent, the decision to abort should be hers alone, and judicial recognition of her capacity to decide should be required.[146]

CONCLUSION

Many strive to eliminate the abortion decision as a right; many strive to assure that the right is not eroded. But whether termed

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operation, its likely benefit, and the capacity of the particular minor to understand fully what the medical procedure involves." Baird v. Attorney General, 371 Mass. 741, 752, 360 N.E.2d 288, 295 (1977).

144. There are two additional reasons why the mature minor exception should not be read into parental notice statutes. First, incorporation of the mature minor exception might frustrate valid state interests, and would probably be contrary to legislative intent. None of the ten parental notice statutes makes a mature minor exception. *See* note 19 *supra*. Notice under each statute is required if the pregnant woman has not reached the age of consent. *See* Baird v. Attorney General, 371 Mass. 741, 749-55, 360 N.E.2d 288, 294-97 (1977) (court declined to incorporate mature minor exception into Massachusetts abortion statute). The second reason for utilizing the somewhat arbitrary age classification of parental notice statutes, rather than incorporation of the mature minor exception, is to avoid an adversarial posture between parents and child. "Though a child who is not fully mature in all respects may be able to make mature decisions concerning certain activities, the parent-child relationship cannot be separated by subject matter into component parts. Litigation over the child's capacity to make the decision may endanger that relationship. . . . The psychological costs of litigation may even justify recourse to arbitrary line drawing by age, sacrificing the interests of the unusually precocious child at an age at which the availability to his contemporaries of individualized inquiry would only serve as a forum for immature aggression." *Developments, supra* note 4, at 1380 (footnotes omitted); *see* Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. Cal. L. Rev. 769 (1978); Hafen, *supra* note 115; Tribe, *Childhood, Suspect Classifications and Conclusive Presumptions: Three Linked Riddles*, 39 Law & Contemp. Prob. 8 (1975). *See generally* Wynn v. Carey, 582 F.2d 1375, 1388-89 (7th Cir. 1978); Baird v. Bellotti, 450 F. Supp. 997, 1002 (D. Mass. 1978), *aff'd*, 443 U.S. 622 (1979) (Bellotti II). In Parham v. J.R., 442 U.S. 584 (1979), the Court objected to an adversarial posture between parent and child. *Id.* at 610; Rehnquist, *The Adversary Society: Keynote Address of the Third Annual Baron de Hirsch Meyer Lecture Series*, 33 U. Miami L. Rev. 1, 9 (1978). Furthermore, the "law is incapable of effectively managing . . . so delicate and complex a relationship as that between parent and child." J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 8 (1979).

145. *Bellotti II* mandates that a state which requires minors to obtain judicial consent to their abortion must not withhold consent from minors mature enough to decide. Bellotti v. Baird, 443 U.S. 622, 643-44, 647, 651 (1979) (Bellotti II).

146. See § 1 of the Model Parental Notice Statute in the Appendix which explicitly incorporates the mature minor exception in judicial proceedings. Granting mature minors judicial consent would satisfy constitutional requirements. Bellotti v. Baird, 443 U.S. 622, 643-44, 647, 651 (1979) (Bellotti II).

destruction of potential human life or protection of the integrity of a woman's body, the experience of procuring an abortion is haunting. This is especially true for the confused and inexperienced teenage girls who now seek abortions. Parental notice statutes protect the physical and mental health of these girls by enabling parents to help their children through the pains of growth. Surely the Constitution does not require that teenage girls should face the abortion decision alone. The welfare of these girls should not be compromised in the wake of abortion debates.

APPENDIX

MODEL PARENTAL NOTICE STATUTE [147]

§ 1. No abortion shall be performed on any unmarried, unemancipated woman under the age of eighteen unless:

(a) her physician at least twenty-four, but not more than forty-eight, hours before the abortion makes a good faith attempt to provide actual notice to at least one of the minor's parents or guardians, or if actual notice is unsuccessful, her physician must provide the minor's parents or guardians with twenty-four hours constructive notice.[148] In deciding which parent or guardian to notify the physician may consider the request of the minor; [149] or, [150]

(b) the minor obtains judicial consent for the abortion from a judge of the appropriate court.[151] Such consent must be granted if:

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147. This proposed parental notice statute is intended to serve as a guideline for protecting parental rights and insuring informed consent within constitutional limitations. Certain terms in the proposed statute are left undefined. The statute is proposed only with the caveat that each state's laws will have individual provisions, definitions, and case law that will affect the statute in various ways. These intricacies are not explored and consequently this Model Statute serves merely as a point of departure.

148. A 24 hour to 48 hour notice requirement will constitute a minimal burden on the woman's abortion right but will be sufficient to allow consultation with her parents. *See* note 11 *supra* and accompanying text.

149. The physician should exercise best medical judgment in choosing the parent to notify. Notice to a parent who is abusive, has had sexual relations with the minor, or will arbitrarily oppose the minor's abortion decision can thus be avoided.

150. The Model Parental Notice Statute provides the minor with an alternative, parental notice or judicial consent. The Model Statute thereby lessens the burden on a minor unwilling to face her parents. *Bellotti II* indicated that certain judicial consent statutes would be acceptable. Bellotti v. Baird, 443 U.S. 622, 647-50 (1979) (Bellotti II). Consequently, the Model Statute would protect important state interests without substantially burdening the minor's abortion right.

151. Jurisdiction for providing this judicial consent should probably reside in Family Court rather than a court of general jurisdiction. Judges in Family Court are more likely to be attuned to the needs of minors, and will be able to provide support services less likely to be found in a court of general jurisdiction. *See* N.Y. Fam. Ct. Act (29A), §§ 251, 253 (McKinney 1975 & Supp. 1978). Additionally, Family Court is

(1) an abortion is found to be in the minor's best interests, or
(2) the minor is found to be emancipated or mature enough to give informed consent to the abortion.[152]

The judicial proceeding at which this consent is obtained must be held within forty-eight hours of the minor's written request on a form specified by the court.[153] The hearing, decision, and appeal, if any, are to be conducted expeditiously and anonymously.[154] A minor who obtains judicial consent to an abortion will not be bound by any other waiting period required before an abortion may be obtained. No notice of the judicial proceeding is to be provided to the minor's parents or guardians. The judge may order notice of the minor's pregnancy and state of health to a parent or guardian if the judge finds such notice to be in the minor's best interests.[155] A minor's parents or guardians will not have standing nor be joined as parties to the judicial consent proceeding.[156]

§ 2. If a licensed physician certifies that delay caused by parental notice or judicial consent required under § 1 would seriously endanger the physical health or life of the minor, the physician may perform an abortion without notice or consent as required under § 1. In such a case the physician must provide actual or constructive notice of the abortion and the minor's health to at least one of the minor's parents or guardians within forty-eight hours after the abortion is completed.[157]

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more likely to have a flexible calendar, confidential treatment of records, and streamlined procedures. *See* N.Y. Fam. Ct. Act (29A), §§ 161-168 (McKinney 1975 & Supp. 1978).

152. By explicitly incorporating a mature minor exception in a judicial consent provision, a parental notice statute would satisfy the requirements of *Bellotti II*. Bellotti v. Baird, 443 U.S. 622, 643-44 (1979) (Bellotti II); *see* notes 144-46 *supra* and accompanying text.

153. Time is of the essence in effectuation of a woman's abortion decision. Delay raises both legal and medical problems. *See* note 11 *supra* and accompanying text.

154. *See* Bellotti v. Baird, 443 U.S. 622, 644 (1979) (Bellotti II); notes 39-40 *supra* and accompanying text.

155. The judge should be granted the discretion whether to notify the minor's parents and/or the appropriate child welfare agencies in cases of incest. Granting this discretion to the trial judge would avoid the possible undue burdens of a mandatory notice provision, *see* notes 14, 39-44 *supra* and accompanying text, as well as further the state interests of parental consultation and informed consent. This provision would prevent unbridled use of the judicial consent option by minors solely to keep the abortion secret from their parents.

156. By not allowing parents or guardians to become parties to the judicial proceeding at which their daughter seeks judicial consent, the statute avoids burdening the minors' initial access to court and her chance of obtaining judicial consent. *See* notes 39, 44, 52, 54 *supra* and accompanying text.

157. Notice to the parents after an abortion is performed would not burden the abortion right in any way. Furthermore, state interests would be protected because notice would inform the parents of a significant, serious, and often traumatic event in their daughter's life. This notice would better enable parents to guide and raise their child. *See* notes 104-27 *supra* and accompanying text.

§ 3. Nothing in this statute gives parents or guardians the right to deny an abortion desired by an unmarried minor.[158]

Patrick J. Foye

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158. Section 3 is designed to prevent any possible misconstruction of this notice statute to allow a parental veto in violation of *Danforth*. *See* notes 29-31 *supra* and accompanying text.