

1984

Spousal Notification: An Unconstitutional Limitation on a Woman's Right to Privacy in the Abortion Decision

Helaine F. Lobman

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlr>

 Part of the [Law Commons](#)

Recommended Citation

Lobman, Helaine F. (1984) "Spousal Notification: An Unconstitutional Limitation on a Woman's Right to Privacy in the Abortion Decision," *Hofstra Law Review*: Vol. 12: Iss. 2, Article 8.

Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol12/iss2/8>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

SPOUSAL NOTIFICATION: AN UNCONSTITUTIONAL LIMITATION ON A WOMAN'S RIGHT TO PRIVACY IN THE ABORTION DECISION

Subsequent to the Supreme Court's establishment of a woman's constitutional right to obtain an abortion in *Roe v. Wade*¹ and *Doe v. Bolton*,² several states have attempted to restrict this right in a variety of ways.³ For example, state abortion statutes requiring spousal notification represent efforts by state legislatures to limit a woman's right to decide whether or not to have an abortion.⁴ Although the Supreme Court has never addressed the issue of spousal notification, it has held that statutes requiring either spousal or parental *consent*

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

2. 410 U.S. 179 (1973).

3. See *infra* notes 8-46 and accompanying text.

4. The following states have enacted statutes requiring spousal notification: FLA. STAT. ANN. § 390.001(4)(b) (West Supp. 1983) (corresponds to former § 458.505(4)(b) (statute declared unconstitutional in *Scheinberg v. Smith*, 482 F. Supp. 529 (S.D. Fla. 1979), *aff'd in part, vacated in part and remanded*, 659 F.2d 476 (5th Cir. 1981), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982)); ILL. ANN. STAT. ch. 38, § 81-23.4 (Smith-Hurd Supp. 1983-1984); KY. REV. STAT. § 311.735 (1983) (statute challenged in *Eubanks v. Brown*, No. 82-0360L(A) (D. Ky. filed June 23, 1982)); MONT. CODE ANN. § 50-20-107 (1983) (corresponds to former § 94-5-616) (statute declared unconstitutional in *Doe v. Deschamps*, 461 F. Supp. 682 (D. Mont. 1976)); NEV. REV. STAT. § 442.254 (1981) (statute challenged in *Glick v. Bryan*, No. CB-R-81-150 (D. Nev. filed June 25, 1981)); R.I. GEN. LAWS §§ 23-4.8-2 to 23-4.8-4 (Supp. 1983) (statute challenged in *Planned Parenthood v. Bd. of Medical Review*, No. 82-0391P (D. R.I. filed June 18, 1982)); UTAH CODE ANN. § 76-7-304(2) (1978).

Both the Florida and Montana notification statutes have been challenged and found invalid. In Florida, the court found that since abortion poses less than a *de minimis* risk to the procreative capabilities of women, the notification statute was unconstitutional. See *Scheinberg*, 550 F. Supp. at 1123. The Montana statute was declared unconstitutional in *Doe*, 461 F. Supp. 682, where the district court stated:

In the absence of a provision specifying a conclusive and uncontrovertible method of giving notice, neither the pregnant woman nor the doctor could be certain that in a post-abortive action the fact that notice had been given would not be attacked and a criminal liability established. . . . [T]he statute is unduly restrictive and does not afford adequate protection for either the physician or the pregnant woman seeking an abortion.

Id. at 686.

Unless otherwise specified in the text, all textual references to spousal notification statutes refer to those statutes cited, *supra*, and any similar statutes which may be subsequently enacted.

prior to obtaining an abortion are unconstitutional.⁵ More recently, however, in *H.L. v. Matheson*,⁶ the Supreme Court ruled that an abortion statute requiring *parental* notification for immature and dependent minors was constitutionally valid.⁷ Thus, in light of these and other judicial rulings, the requirement of spousal notification in the abortion decision has become the focal point of a growing national controversy.

After briefly reviewing the development of a woman's right to privacy in the abortion decision, this note analyzes the constitutionality of statutes requiring spousal notification prior to obtaining an abortion. An examination of the effect of these statutes on a woman's right to an abortion, and an analysis of the state interests in promoting marital harmony, protecting the procreative potential of the marriage, and protecting the husband's interest in the fetus, demonstrate that these interests are not sufficiently compelling to protect these statutes from constitutional attack. In addition, the note briefly explores alternative constitutional challenges to the validity of these statutes. Finally, possible solutions to the inherent problems in spousal notification laws are proposed.

I. THE SCOPE OF A WOMAN'S RIGHT TO PRIVACY IN THE ABORTION DECISION

The Supreme Court has established that a woman's right to decide whether to terminate her pregnancy is encompassed within the constitutional right of privacy.⁸ Although the right of privacy is not explicitly mentioned in the Constitution, the Supreme Court has recognized that specific constitutional guarantees create a right of personal privacy or "zones of privacy."⁹ The Court has limited the right of privacy to those rights which are "fundamental" or "implicit in the concept of ordered liberty."¹⁰ Activities relating to marriage, procreation, and contraception have been held to be fundamental¹¹

5. *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); see *infra* text accompanying notes 19-27.

6. 450 U.S. 398 (1981); see *infra* notes 143-55 and accompanying text.

7. *Id.* at 411-13; see *infra* notes 45-46 and accompanying text.

8. *Roe v. Wade*, 410 U.S. 113 (1973).

9. *Id.* at 152. The Court and individual justices have found the sources of these zones of privacy "in the First Amendment . . . ; in the Fourth and Fifth Amendments . . . ; in the penumbras of the Bill of Rights . . . ; [and] in the concept of liberty guaranteed by the first section of the Fourteenth Amendment." *Id.* (citations omitted).

10. *Id.* (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

11. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-86 (1977) (contraception); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage); *Griswold v. Connecticut*, 381 U.S. 479

and are, therefore, included in these zones of privacy.

The development of the woman's right to privacy in the abortion decision will be analyzed through a chronological review of the pertinent Supreme Court cases. Although the Court has determined that a woman's right to decide whether to have an abortion is a fundamental right encompassed within the right of privacy, it is not an absolute right.¹² Rather, the right may be overcome by a compelling state interest.¹³ As explained in *Roe v. Wade*,¹⁴ the state's interest in protecting maternal health becomes compelling at approximately the end of the first trimester.¹⁵ Prior to that point, the attending physician, in consultation with the patient, is free to determine, without state interference, whether the patient's pregnancy should be terminated.¹⁶ Similarly, the state interest in the potential life of the fetus becomes compelling after the fetus becomes viable, i.e., in the third trimester, and thereafter the state may regulate and even proscribe abortion.¹⁷

The decision in *Roe* left the states free to place restrictions on the abortion decision within the established guidelines.¹⁸ Several states enacted abortion statutes¹⁹ requiring spousal consent before a married woman could obtain an abortion.²⁰ Similarly, if a minor wanted to have an abortion, parental consent was made a prerequisite in certain statutes.²¹ The Supreme Court addressed these issues

(1965) (contraception); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942) (procreation-sterilization of habitual criminals).

12. *Roe v. Wade*, 410 U.S. 113, 153-55 (1973).

13. *Id.*

14. 410 U.S. 113 (1973).

15. *Id.* at 163, 164.

16. *Id.*

17. *See id.* at 160, 163-64. In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the Court noted:

[I]t is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.

Id. at 64-65.

18. *Roe*, 410 U.S. at 164-65.

19. *E.g.*, MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983); Act of June 14, 1974, 1974 Mo. Laws 809 (codified as amended at MO. ANN. STAT. §§ 188.010-.085 (Vernon 1983)).

20. *E.g.*, Act of June 14, 1974, 1974 Mo. Laws 809 (codified as amended at MO. ANN. STAT. §§ 188.010-.085 (Vernon 1983)) (spousal consent provision, inter alia, declared unconstitutional in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)).

21. *E.g.*, MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983) (parental consent require-

in *Planned Parenthood v. Danforth*,²² where it held that a state may not delegate to a spouse or to parents “‘a veto power which the state itself is absolutely and totally prohibited from exercising.’”²³ In *Bellotti v. Baird (Bellotti II)*,²⁴ the Court focused on parental consent requirements and found that because the decision of whether or not to bear a child would have such a far-reaching effect on the minor’s life, her participation in the decision was essential.²⁵ Therefore, the Court held that “if the State decides to require a pregnant minor to obtain one or both parents’ consent to an abortion, it also must provide an alternative procedure, whereby authorization for the abortion can be obtained.”²⁶ A pregnant minor is thus entitled to a judicial proceeding where she may show “either: (1) that she is mature enough . . . to make her abortion decision . . . independently of her parents’ wishes; or (2) that . . . the desired abortion would be in her best interests.”²⁷

In *Maher v. Roe*,²⁸ yet another limitation on the woman’s right to privacy in the abortion decision was imposed. In that case, which involved Medicaid funding, the challenged regulation provided that a woman who sought a nontherapeutic abortion would not be reimbursed for her medical expenses.²⁹ A woman incurring medical expenses incident to childbirth would be reimbursed.³⁰ The Court found that this regulation placed no impediments on the woman’s right to obtain an abortion.³¹ Although the state made childbirth a more attractive alternative by providing funding, it imposed no restrictions on a woman’s access to abortion.³² The Court concluded that the state’s action was not a direct interference with a protected activity, but rather, “state encouragement of an alternative activity

ment declared unconstitutional in *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); Act of June 14, 1974, 1974 Mo. Laws 809 (codified as amended at MO. ANN. STAT. §§ 188.010-085 (Vernon 1983)) (parental consent provision, inter alia, declared unconstitutional in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)).

22. 428 U.S. 52 (1976).

23. *Id.* at 69 (quoting *Planned Parenthood v. Danforth*, 392 F. Supp. 1362 (E.D. Mo. 1975) (Webster, J., concurring in part and dissenting in part), *aff’d in part, rev’d in part and remanded*, 428 U.S. 52 (1976)); see *id.* at 74 (concerning parental consent provision).

24. 443 U.S. 622 (1979) (*Bellotti II*).

25. See *id.* at 642-44.

26. *Id.* at 643 (footnote omitted).

27. *Id.* at 643-44 (footnote omitted).

28. 432 U.S. 464 (1977).

29. *Id.* at 466.

30. See *id.* at 469-70.

31. *Id.* at 474.

32. *Id.*

consonant with legislative policy.”³³ Therefore, the Court determined that the regulation was constitutional.³⁴

Additional limitations on abortions, requiring “informed consent” and/or establishing waiting periods, have been enacted and challenged.³⁵ Although some restrictions may flow from the *Danforth* conclusion that a state may make efforts to ensure that the woman is aware of the importance and significance of the abortion decision by requiring her prior written consent,³⁶ the Supreme Court recently determined that waiting periods and detailed informed consent requirements were unconstitutional.³⁷ The Court, in *City of Akron v. Akron Center for Reproductive Health*,³⁸ explained that “*Danforth’s* recognition of the State’s interest in ensuring that [appropriate] information be given will not justify abortion regulations designed to influence the woman’s informed choice between abortion or childbirth.”³⁹ In *Akron*, the Supreme Court found that regulations requiring waiting periods and detailed informed consent unrea-

33. *Id.* at 475.

34. *Id.* at 480-81.

35. *See, e.g.*, MO. STAT. ANN. §§ 188.039.2 (information necessary to provide “informed consent”), 188.039.1 (waiting period) (Vernon 1983) (portions declared unconstitutional in *Planned Parenthood Ass’n v. Ashcroft*, 483 F. Supp. 679, 694-99 (W.D. Mo. 1980), *aff’d in part, rev’d and remanded*, 655 F.2d 848, 866-69 (8th Cir. 1981) (district court holding regarding informed consent and waiting period upheld), *aff’d in part, rev’d in part*, 103 S. Ct. 2517 (1983)); AKRON, OHIO, CODIFIED ORDINANCES ch. 1870, §§ 1870.06 (informed consent), 1870.07 (waiting period) (1978) (portions of informed consent provision declared unconstitutional in *City of Akron v. Akron Center for Reproductive Health*, 479 F. Supp. 1172, 1202-04 (N.D. Ohio 1979), *aff’d in part, rev’d in part*, 651 F.2d 1198, 1206-07, 1208 (6th Cir. 1981) (waiting period requirement also held unconstitutional), *aff’d in part, rev’d in part*, 103 S. Ct. 2481 (1983) (Court upheld unconstitutionality of both the waiting period and the required information for “informed consent”).

Prior to these decisions, there was a split of authority in the federal courts. The majority of courts had held that regulations requiring informed consent were unconstitutional because requiring a physician to make certain disclosures to the patient impermissibly interfered with the woman’s right to consult with a physician free from interference. Similarly, the majority of courts had found that mandatory waiting periods imposed an unconstitutional burden on the woman’s right to privacy in the abortion decision. Waiting periods caused a delay in the abortion process which increased the risks to the health of the pregnant woman and placed financial and emotional burdens on her decision. *See, e.g.*, *Planned Parenthood League v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981); *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980); *Leigh v. Olson*, 497 F. Supp. 1340 (D.N.D. 1980); *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D. La. 1980); *Women’s Servs. P.C. v. Thone*, 483 F. Supp. 1022 (D. Neb. 1979), *aff’d*, 636 F.2d 206 (8th Cir. 1980). *But see* *Planned Parenthood Ass’n v. Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975) (informed consent held constitutional).

36. *Danforth*, 428 U.S. at 65-67.

37. *City of Akron v. Akron Center for Reproductive Health*, 103 S. Ct. 2481 (1983).

38. 103 S. Ct. 2481 (1983).

39. *Id.* at 2500 (footnote omitted).

sonably burdened a woman's right to an abortion both by increasing the cost of the abortion and by creating new difficulties which complicated the woman's ability to act upon and effectuate her decision to have an abortion.⁴⁰

Although the Supreme Court has precluded states from vesting in any third party an absolute right to veto the woman's abortion decision,⁴¹ and has prohibited unreasonable burdens which influence the woman's decision,⁴² the possibility of more limited restrictions, short of an absolute veto, remains an open question. This was evidenced by the enactment of statutes requiring parental⁴³ and spousal notification.⁴⁴ Recently, the Supreme Court upheld a statute that required parental notification where an unemancipated, immature minor seeks an abortion.⁴⁵ One rationale for upholding these notification provisions is that the minor's parents will be able to provide her physician with important medical information which would otherwise be unavailable.⁴⁶ The constitutionality of state abortion statutes requiring spousal notification is, however, still an open question.

II. ANALYSIS OF THE CONSTITUTIONALITY OF STATE STATUTES REQUIRING SPOUSAL NOTIFICATION

A constitutional challenge to those state abortion statutes that require spousal notification may be maintained by establishing that the statute in question unjustifiably burdens or directly interferes with the pregnancy termination decision.⁴⁷ "If the interference [in the abortion decision] is sufficiently substantial and not de minimis, the State has to show . . . that the burden is not 'undue' or unjustifiable."⁴⁸ To justify this burden, the state must establish that the regulation is based upon a "compelling" state interest.⁴⁹ What consti-

40. *See id.* at 2499-500, 2502, 2503.

41. *Danforth*, 428 U.S. at 69-70.

42. *See Roe v. Wade*, 410 U.S. 113, 153 (1973).

43. UTAH CODE ANN. § 76-7-304 (1978); *see infra* text accompanying notes 168-71.

44. *See supra* note 4.

45. *H.L. v. Matheson*, 450 U.S. 398, 407-13 (1981); *see id.* at 418-20 (Powell, J., concurring); *see infra* notes 143-55 and accompanying text.

46. *H.L. v. Matheson*, 450 U.S. 398, 411 (1981). The Court focused on other rationales including "important considerations of family integrity and protecting adolescents." *Id.* at 411 (footnotes omitted).

47. *Cf. Bellotti v. Baird*, 443 U.S. 622, 640 (1979) (*Bellotti II*); *Bellotti v. Baird*, 428 U.S. 132, 147 (1976) (*Bellotti I*) (constitutional challenges to parental consent statute); *Roe v. Wade*, 410 U.S. 113, 152-55 (1973) (constitutional challenge to Texas criminal abortion statute).

48. *Charles v. Carey*, 627 F.2d 772, 777 (7th Cir. 1980).

49. *See Roe v. Wade*, 410 U.S. 113, 155 (1973).

tutes a compelling state interest is often problematic. Consequently, the courts have carefully scrutinized both the legitimacy of the state interest being furthered by the statute and the relationship between the asserted state interest and the effect of the statute.⁵⁰ The focus of this analysis is the statutory requirement that a married woman who is seeking an abortion must notify her husband,⁵¹ giving him an opportunity to consult with her, except where the couple is separated or in the event of an emergency.⁵²

A. *Does Requiring Spousal Notification Unduly Burden a Woman's Ability to Decide Whether to Terminate Her Pregnancy?*

A state abortion regulation will be unconstitutional if it unduly burdens the woman's right to seek an abortion.⁵³ In fact, "[i]f the challenged regulation does not impinge upon a woman's decision to have a first trimester abortion and does not place obstacles in the

50. Whether a state interest may be deemed to be compelling, thereby justifying an incursion on one's fundamental rights, is determined by examining both the legitimacy of the asserted state interest and the existence of a rational relationship between this interest and the means chosen to advance it. *See, e.g., Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977); *id.* at 696 (this portion of the opinion, while not the opinion of the Court, expressed the views of Justices Brennan, Stewart, Marshall and Blackmun).

51. FLA. STAT. ANN. § 390.001(4)(b) (West Supp. 1983) (corresponds to former § 458.505(4)(b)) (statute declared unconstitutional in *Scheinberg v. Smith*, 482 F. Supp. 529 (S.D. Fla. 1979), *aff'd in part, vacated in part and remanded*, 659 F.2d 476 (5th Cir. 1981), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982)); ILL. ANN. STAT. ch. 38, § 81-23.4 (Smith-Hurd Supp. 1983-1984); KY. REV. STAT. § 311.735 (1983) statute challenged in *Eubanks v. Brown*, No. 82-0360L(A) (D. Ky. filed June 23, 1982); MONT. CODE ANN. § 50-20-107 (1983) (corresponds to former § 94-5-b16) (statute declared unconstitutional in *Doe v. Deschamps*, 461 F. Supp. 682 (D. Mont. 1976)); NEV. REV. STAT. § 442.254 (1981) (statute challenged in *Glick v. Bryan*, No. CB-R-81-150 (D. Nev. filed June 25, 1981)); R.I. GEN. LAWS §§ 23-4.8-2 to 23-4.8-4 (Supp. 1983) (statute challenged in *Planned Parenthood v. Bd. of Medical Review*, No. 82-0391P (D.R.I. filed June 18, 1982)); UTAH CODE ANN. § 76-7-304(2) (1978).

52. A statement of separation or estrangement will waive the notice requirements in Florida, FLA. STAT. ANN. § 390.001(4)(b) (West Supp. 1983), Illinois, ILL. ANN. STAT. ch. 38, § 81-23.4(B)(1) (Smith-Hurd Supp. 1983-1984), and Rhode Island, R.I. GEN. LAWS § 23-4.8-3(b) (Supp. 1983). A medical emergency is another exception to the notice requirement in Florida, FLA. STAT. ANN. § 390.001(4)(c) (West Supp. 1983), Illinois, ILL. ANN. STAT. ch. 38, § 81-23.4(B)(2) (Smith-Hurd Supp. 1983-1984), Kentucky, KY. REV. STAT. § 311.735(2)(b) (1983), Rhode Island, R.I. GEN. LAWS § 23-4.8-3(d) (Supp. 1983), and Utah, UTAH CODE ANN. § 76-7-315 (1978). Illinois and Kentucky, however, require that notice be given after the abortion; in Illinois, within seven days, ILL. ANN. STAT. ch. 38, § 81-23.4(B) (Smith-Hurd Supp. 1983-1984), and in Kentucky, within 30 days if "reasonably possible," KY. REV. STAT. § 311.735 (1983).

53. *See Bellotti v. Baird*, 428 U.S. 132, 147 (1976) (*Bellotti D*); *cf. Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (constitutional challenges to parental consent statutes).

path of effectuating that decision, the state need only demonstrate a rational relationship to a legitimate purpose."⁵⁴ Recent psychological studies⁵⁵ and testimony accepted by a federal district court⁵⁶ indicate that spousal notification requirements directly interfere with a woman's autonomy in making the abortion decision.

In *Scheinberg v. Smith*,⁵⁷ experts testified that "the requirement of compulsory [spousal] notification and consultation will, at the least, produce anxiety and stress for the woman and her marriage."⁵⁸ In fact, such a requirement may result in the woman choosing "less desirable alternatives. She may delay seeking an abortion, self-abort, or secure an illegal abortion, thereby risking serious, perhaps irreversible consequences."⁵⁹

There are several situations where significant reasons exist which make spousal notification an undesirable burden on the abortion decision:

[I]n a substantial number of marriages, a pregnant wife is unwilling, even unable, to discuss the abortion decision with her husband. . . . [T]here may be any number of reasons for this reluctance. Often a wife fears that her husband will respond with physical or emotional abuse. In other cases, she fears that the marriage itself may be jeopardized.

Specific instances where a woman might desire or choose not to communicate with her husband concerning an impending termination of pregnancy include:

- 1) where the husband is not the father of the fetus; for

54. *Scheinberg v. Smith*, 482 F. Supp. 529, 537 (S.D. Fla. 1979) (citing *Maier v. Roe*, 432 U.S. 464, 478-80 (1977)), *aff'd in part, vacated in part and remanded*, 659 F.2d 476 (5th Cir. 1981), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982).

In *Roe v. Wade*, 410 U.S. 113 (1973), the Court did not declare an unqualified constitutional right to an abortion. *See id.* at 153-55. The right declared in *Roe* "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Maier v. Roe*, 432 U.S. 464, 473-74 (1977).

55. *See Pittman & Flomenhaft, Treating the Doll's House Marriage*, in *PROGRESS IN GROUP AND FAMILY THERAPY* 509-20 (C.J. Sager & H.S. Kaplan eds. 1972).

56. *Scheinberg v. Smith*, 482 F. Supp. 529, 538 (S.D. Fla. 1979) (footnotes omitted), *aff'd in part, vacated in part and remanded*, 659 F.2d 476 (5th Cir. 1981), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982); *see infra* text accompanying notes 60-64.

57. 482 F. Supp. 529 (S.D. Fla. 1979) (statute declared unconstitutional), *aff'd in part, vacated in part and remanded*, 659 F.2d 476 (5th Cir. 1981) (if abortion presents more than a de minimis risk to the procreative capabilities of women, the spousal notification statute is not unconstitutional), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982) (since abortion poses less than a de minimis risk to the procreative capabilities of women the statute is, therefore, unconstitutional).

58. 482 F. Supp. at 538.

59. *Id.*

instance, where the fetus is the product of an extramarital affair;

2) where the wife has been a rape victim, has not disclosed the incident to her husband, and has subsequently become pregnant;

3) where the husband, because of strong religious or moral precepts, would strenuously object;

4) where the husband is seriously ill or emotionally unstable and is unable to participate in any abortion decision; and

5) where the woman is a 'battered wife' and fears that discussion concerning an abortion may precipitate physical violence.⁶⁰

In these instances, spousal notification would not promote marital harmony. For example, where the husband is not the father of the fetus, notification might lead to the dissolution of the marriage or cause unnecessary pressure on an already deteriorating relationship.⁶¹ Likewise, in situations where the woman anticipates moral or religious objections from her husband, notifying her spouse may create conflicts and engender resentment possibly leading to the ultimate dissolution of the marriage. Furthermore, where the woman is a battered wife, spousal notification may provide her spouse with yet another opportunity to victimize her by subjecting her to further violence.

In addition, there are marriages that may be termed "skewed

60. *Id.* (footnotes omitted). In its opinion, the court summarized the testimony of two physicians, a clinical psychologist, and a counselor as well as two anonymous witnesses regarding the issue of a wife's discussion of an abortion decision with her husband. These witnesses were: "Dr. Haber, a practicing clinical psychologist, [who] was designated an expert by the Court, based upon her education (Ph.D.) and clinical experience," *id.* at 538 n.43; Dr. Good, "one of four doctors in the United States qualified to practice in both Obstetrics/Gynecology and Psychiatry," *id.* at 538 n.44; Dr. Seiden, "a practicing Psychiatrist affiliated with Cook County General Hospital in Chicago, Illinois," *id.* at 538 n.45; Ms. Radziwill, a counselor, who was "affiliated with the University of Miami Medical School and its Department of Obstetrics/Gynecology/Family Services" and who consulted with "approximately one thousand patients per year who [were] considering terminating their pregnancies," *id.* at 538 n.46; and two anonymous witnesses who testified regarding certain instances where a woman would choose not to discuss an abortion with her husband, *see id.* at 538 & n.7, 538 & n.8.

61. The spousal notification statutes of Nevada and Rhode Island create an exception to the notification requirement where the husband is not the father of the fetus. NEV. REV. STAT. § 442.254 (1981); R.I. GEN. LAWS § 23-4.8-3 (Supp. 1983). *See infra* note 139. When considering those states that do not have this exception to the spousal notification requirement, it should be noted that "the state interest in deterring illicit sexual conduct among adults would not justify restricting the right of abortion." *Poe v. Gerstein*, 517 F.2d 787, 792 (5th Cir. 1975), *aff'g* *Coe v. Gerstein*, 376 F. Supp. 695 (S.D. Fla. 1973).

relationships."⁶² In *Scheinberg*, testimony revealed that these "skewed relationships," which may be common in many marriages, are relationships where "the power of the husband is so overwhelming that he will, if consulted, obstruct, or altogether prevent, a woman from freely deciding to secure an abortion."⁶³ In this type of relationship, notice to the husband will, in effect, give the husband veto power which the Supreme Court has found to be unconstitutional.⁶⁴ Therefore, the *Scheinberg* district court concluded that mandatory spousal notice and consultation "*places an undue burden* on the right of a substantial number of pregnant women to decide to terminate their pregnancies."⁶⁵

B. *Is the State Interest Compelling?*

Once a plaintiff, who is challenging the constitutionality of a spousal notification statute, establishes that it is a "direct interference" with the abortion decision or imposes restrictions that did not already exist,⁶⁶ the state must demonstrate that a compelling state interest is furthered by the statute if the law is to be upheld.⁶⁷ In *Scheinberg*, the state enunciated two purported compelling interests that it believed would be furthered by the spousal notification and consultation requirements: (1) the promotion of marital harmony; and (2) "the husband's interest in the procreative potential of the marriage."⁶⁸ In addition, the spousal notification requirement may further the husband's interest in the potential life of the fetus.⁶⁹ Close analysis, however, demonstrates that these asserted state interests are not compelling.

1. *Promoting Marital Harmony*.—A succession of recent Supreme Court rulings casts doubt upon the proposition that promotion of marital harmony is a legitimate state interest. In 1965, the Su-

62. *Scheinberg*, 482 F. Supp. at 538. The battered wife syndrome is merely one example of a "skewed relationship." In many of these relationships, the dominant party can and does exercise ultimate control over all decisions without resorting to the use of violence.

63. *Id.*

64. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 69-71 (1976).

65. *Scheinberg*, 482 F. Supp. at 538 (emphasis in original) (footnote omitted).

66. *Scheinberg*, 659 F.2d at 482 (quoting *Charles v. Carey*, 627 F.2d 772, 777 (7th Cir. 1980)).

67. *Id.*

68. 482 F. Supp. at 538.

69. *Cf. Scheinberg*, 659 F.2d at 486. Although the state did not raise this argument, the court of appeals noted that the state interest "encompasses more than merely the husband's interest in a particular fetus." *Id.* (citation omitted).

preme Court, in the landmark decision of *Griswold v. Connecticut*,⁷⁰ held that the marital relationship is constitutionally protected within the right of privacy found in the "penumbral emanations"⁷¹ of the Bill of Rights.⁷² Justice Douglas, writing for the Court, found that "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."⁷³ In *Poe v. Ullman*,⁷⁴ Justice Douglas had previously advocated that the relationship between a husband and a wife is protected within the right of privacy.⁷⁵ Therefore, he concluded that any regulation that "reaches into the intimacies of the marriage relationship" is an invasion of privacy and is unconstitutional.⁷⁶

Subsequently, in *Loving v. Virginia*,⁷⁷ the marriage relationship was afforded the status of a fundamental right which entitled it to protection under the constitutional guarantee of privacy.⁷⁸ In fact, the right of privacy encompassed the personal intimacies of marriage to the extent that a married couple could not be found guilty of violating a state statute which prescribed criminal penalties for sodomy.⁷⁹ Thus, in *Lovisi v. Slayton*,⁸⁰ the constitutional guarantee of privacy would have protected a husband and a wife from criminal liability under state statutes for their acts of consensual sodomy. The Fourth Circuit, however, refused to extend this guarantee when a married couple permitted a third party to observe their acts of sexual intimacy, thereby destroying their marital privacy.⁸¹

Similarly, matters relating to procreation are also constitution-

70. 381 U.S. 479 (1965).

71. *Id.* at 484-85.

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees . . . [such as the] right of association [which is] contained in the penumbra of the First Amendment [, the] Fifth Amendment [which] enables the citizen to create a zone of privacy which the government may not force him to surrender to his detriment [, and] . . . the Fourth Amendment [which] creat[es] a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.'

Id. (citations omitted); see generally J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 626 (1978) (discussing the right of privacy and *Griswold*).

72. 381 U.S. at 484-86.

73. *Id.* at 486.

74. 367 U.S. 497 (1961).

75. *Id.* at 519-22 (Douglas, J., dissenting).

76. *Id.*

77. 388 U.S. 1 (1967).

78. *Id.* at 12, noted in *Roe v. Wade*, 410 U.S. 113, 152 (1973).

79. *Lovisi v. Slayton*, 539 F.2d 349, 351 (4th Cir. 1976).

80. 539 F.2d 349 (4th Cir. 1976).

81. *Id.* at 351-52.

ally protected. In *Eisenstadt v. Baird*,⁸² the Supreme Court held that statutes which allowed the distribution of contraceptives to married persons while preventing single persons from obtaining contraceptives to prevent pregnancy were unconstitutional violations of the Equal Protection Clause. In dicta, the Court stated: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁸³

In *Roe v. Wade*,⁸⁴ the Court held that a woman's decision whether to terminate her pregnancy warrants constitutional protection.⁸⁵ The Court distinguished permissible state interference, such as regulations that protect maternal health by requiring that abortion procedures conform to licensing requirements⁸⁶ and those which protect a viable fetus by proscribing abortions during the third trimester,⁸⁷ from state regulations that intrude into the intimacies of marriage.⁸⁸ Statutes requiring spousal notification neither protect maternal health, nor viable human life. The Supreme Court established that the state may legislate to protect the life of the fetus only after the fetus has become viable,⁸⁹ usually in the third trimester.⁹⁰ Statutes requiring spousal notification, however, operate in the first and second trimesters, *before* the fetus has attained viability. By enacting notification statutes, the state is, in effect, unconstitutionally intruding into the intimacies of marriage by legislating a requirement of marital honesty.

The ability of a state to legislate honesty within the marital relationship not only violates the concept of privacy in the abortion decision, but is also "repulsive to the notions of privacy surrounding

82. 405 U.S. 438 (1972).

83. *Id.* at 453 (citations omitted).

84. 410 U.S. 113 (1973).

85. *See id.* at 153.

86. *See, e.g.*, GA. CODE ANN. § 16-12-141(b) (1982) (After the first trimester an abortion may only be performed "in a licensed hospital or in a health facility licensed as an abortion facility by the Department of Human Resources."); MONT. CODE ANN. § 50-20-109(1)(a) (1983) (only a licensed physician may perform an abortion).

87. *See, e.g.*, GA. CODE ANN. § 16-12-141(c) (1982) (abortion proscribed after second trimester unless physicians certify that it is necessary to preserve mother's life or health); MONT. CODE ANN. § 50-20-104(1)(c)-(3) (1983) (abortions proscribed after "viability," except when necessary to preserve mother's life or health).

88. *Roe*, 410 U.S. at 159.

89. *See supra* note 17.

90. *Roe*, 410 U.S. at 164-65.

the marriage relationship."⁹¹ Similarly, coercing a wife to notify her husband of her decision to have an abortion is also repulsive to both of these notions of privacy.

It is well recognized that marriage has always been subject to certain control by the state.⁹² The state may prescribe procedures whereby a marriage is created⁹³ and may specify those acts which constitute grounds for its dissolution.⁹⁴ For example, many states have statutes that require blood tests before a couple can obtain a marriage license.⁹⁵ Nonetheless, there is a fundamental distinction between legislation that may require blood tests as a health precaution prior to marriage and legislation that compels honesty as an effort to promote marital harmony. Whereas the former may be merely a condition precedent to the issuance of a marriage license and is motivated by a health related purpose (i.e., the discovery of venereal disease),⁹⁶ the latter reaches into the intimate relationship between the husband and wife and seeks to dictate what a wife should say to her spouse. Consequently, it is extremely doubtful that the promotion of marital harmony is a legitimate state interest.

Even if state intrusion into the intimacies of marriage were permissible, the means chosen to implement this interest, spousal notification statutes, must, in fact, promote marital harmony.⁹⁷ Marital harmony, however, cannot be created by state legislatures; rather, it can only be created by the parties involved in the relationship.⁹⁸ As the Supreme Court stated in *Planned Parenthood v. Danforth*,⁹⁹ "it

91. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (notion of marital privacy).

92. See *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971).

93. See, e.g., CAL. CIVIL CODE § 4300 (West 1983); N.Y. DOM. REL. LAW § 13-a (McKinney Supp. 1983-1984) (statutes requiring blood tests as requirement for obtaining marriage license).

94. See, e.g., N.Y. DOM. REL. LAW § 170 (McKinney Supp. 1983-1984); OR. REV. STAT. § 107.025 (1981) (statutes specifying grounds for divorce).

95. E.g., CAL. CIVIL CODE § 4300 (West 1983); MASS. GEN. LAWS ANN. ch. 207, § 28A (West Supp. 1983-1984); N.Y. DOM. REL. LAW § 13-a (McKinney Supp. 1983-1984); see N.M. STAT. ANN. § 40-1-11 (1983).

96. "[N]o application for a marriage license shall be accepted . . . unless accompanied by . . . a statement or statements . . . that each applicant has been given . . . a standard serological test, as may be necessary for the discovery of syphilis . . ." N.Y. DOM. REL. LAW § 13-a(1) (McKinney Supp. 1983-1984).

97. See *supra* notes 50, 54 and accompanying text.

98. See generally E. FROMM, *THE ART OF LOVING* 18-21, 87-112 (1956) (Fromm's assertion that giving is an essential element in love relationships, one can infer that coerced honesty and openness would not result in a productive relationship, if, indeed, any relationship at all.).

99. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power.¹⁰⁰ Likewise, forcing a woman to notify her husband of her decision to have an abortion is not a means of promoting marital harmony. The woman's decision to have an abortion is paramount; even if her husband wants the child, he is powerless to prevent the abortion.¹⁰¹ Requiring a woman to notify her spouse that she has decided to have an abortion will not promote dialogue and communal decision-making unless the woman *voluntarily* seeks her husband's counsel before making the decision.¹⁰² Once the woman has made her decision, a statute that requires notification of the spouse fulfills only a ceremonial purpose creating an illusion of harmony while, in fact, engendering resentment.¹⁰³ Furthermore, honesty in a relationship can only result through the voluntary participation of both parties.¹⁰⁴ If honesty is coerced by state imposition of statutory penalties for dishonesty, the value of this coerced honesty, as a means of creating a good and open marital relationship, is severely diminished, if not rendered completely ineffective.¹⁰⁵

Thus, in those situations where substantial reasons exist that make spousal notification undesirable,¹⁰⁶ spousal notification provi-

100. *Id.* at 71.

101. *See id.* at 69-71.

102. *See generally* E. FROMM, *supra* note 98, at 18-21, 87-89, 93 (stressing the important and beneficial nature of giving and sharing in a relationship; rejecting the usefulness of imposed discipline); *see also supra* note 98.

103. Consider the following hypothetical which illustrates the effect spousal notification may have upon a woman once she has decided to have an abortion. The wife notifies her husband that she plans to have an abortion. The husband and wife discuss the situation. Both parties express their interests: the husband opposes the abortion and the wife wants the abortion. Then the wife has the abortion regardless of the lack of support from her husband, thereby engendering the husband's resentment.

104. *See generally* E. FROMM, *supra* note 98, at 18-21, 87-112. Domination and the use of power are the reverse of faith, which is an essential element of a successful relationship. Furthermore, of those elements which are essential to a successful relationship, Fromm states that: "[they] should not be practiced like a rule imposed on oneself from the outside, but . . . [as] an expression of *one's own will* . . ." *Id.* at 93 (emphasis added); *see also supra* notes 98 and 102.

105. *Cf.* E. FROMM, *supra* note 98, at 18-21, 87-112 (Analogously, after stressing the importance of "rational faith" in achieving a true ability to love, Fromm states that: "While irrational faith is the acceptance of something as true only *because* an authority or the majority say so, rational faith is rooted in an independent conviction based upon one's own productive observing and thinking . . ." *Id.* at 103 (emphasis in original)); *see also supra* notes 98, 102, and 104.

106. *See supra* notes 60-64 and accompanying text.

sions may result in marital disharmony,¹⁰⁷ perhaps even leading to the dissolution of the relationship. In addition, the transformation of spousal notification into a veto power by virtue of the internal power structure of the marriage cannot be ignored.¹⁰⁸ Therefore, since these statutes do not, and cannot, promote marital harmony, they must be declared unconstitutional.

2. *Protecting the Procreative Potential of the Marriage.*—A second asserted state interest is that of protecting the husband's interest in the procreative potential of his marriage.¹⁰⁹ This interest is closely related to the notion that the primary purpose of marriage is procreation.¹¹⁰ In 1942, a New Jersey court in *Kreyling v. Kreyling*,¹¹¹ declared that childbearing is "the controlling purpose" of marriage.¹¹² The court noted that "[i]t has never been held nor has it ever been suggested that either party may enter into a contract of marriage merely to legalize the performance of an act which without the marital status would be illegal. Such a construction would be tantamount to the establishment of legalized fornication."¹¹³ Society's present view of the purpose of marriage, however, may not be consistent with that of the *Kreyling* court. Nonmarital sexual relationships and single parenting are more prevalent and more easily accepted by contemporary society.¹¹⁴ In addition, statistics provided by the United States Census Bureau indicate that the number of women choosing to remain childless is increasing.¹¹⁵ Furthermore,

107. *Scheinberg v. Smith*, 482 F. Supp. 529, 538 (S.D. Fla. 1979), *aff'd in part, vacated in part and remanded*, 659 F.2d 476 (5th Cir. 1981); *cf. Margaret S. v. Edwards*, 488 F. Supp. 181, 204 (E.D. La. 1980) (statute requiring parental notification may cause family disharmony).

108. *See supra* notes 62-64 and accompanying text.

109. *Scheinberg v. Smith*, 482 F. Supp. 529, 539-40 (S.D. Fla. 1979), *aff'd in part, vacated in part and remanded*, 659 F.2d 476, 483-87 (5th Cir. 1981), *on remand*, 550 F. Supp. 1112, 1114-23 (S.D. Fla. 1982).

110. *See Kreyling v. Kreyling*, 20 N.J. Misc. 52, 23 A.2d 800 (N.J. Ch. 1942) (divorce granted where one spouse persistently refused intercourse without contraception; court found spouse's action to be for purpose of preventing the birth of children in the marriage).

111. 20 N.J. Misc. 52, 23 A.2d 800 (N.J. Ch. 1942).

112. *Id.* at 57-58, 23 A.2d at 803-04 (citations omitted).

113. *Id.* at 58, 23 A.2d at 804 (citation omitted).

114. *See Marvin v. Marvin*, 18 Cal. 3d 660, 683-84, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1976).

115. Blake, *Is Zero Preferred? American Attitudes Toward Childlessness in the 1970s*, 41 J. MARR. & FAM. 245 (1979), *cited in Note, Spousal-Notification Requirement Is Constitutionally Permissible Burden on Woman's Right to Privacy in Abortion Decision: Scheinberg v. Smith*, 13 TEX. TECH. L. REV. 1495, 1508 n.99 (1982) (Although that Note ultimately concludes that spousal notification laws are unconstitutional, since it focuses solely on the *Scheinberg* decision and was written before the final decision was reached it has only limited

raising children may no longer be the primary purpose of many marriages.¹¹⁶

In *Skinner v. Oklahoma*,¹¹⁷ the Court declared that procreative rights are fundamental,¹¹⁸ and that, therefore, state interference with one's ability to procreate is unconstitutional unless justified by a compelling state interest.¹¹⁹ This inability to interfere with the exercise of one's procreative rights is not, however, an absolute bar to a state's ability to pass legislation concerning procreative rights. In fact, this limitation neither imposes the responsibility for facilitation of those rights on the state,¹²⁰ nor precludes the state from adopting a policy which does not encourage the exercise of those rights.¹²¹ Thus, on its face, the asserted state interest is a legitimate exercise of power by the state.

Although the asserted state interest is protection of the procreative potential of the marriage, close analysis of state action in the area of sterilization reveals that such claims may be fallacious; in fact, state sterilization procedures are inconsistent with the professed goals. In most states, a husband may obtain a vasectomy without notifying his wife and a wife may likewise obtain a tubal ligation without notifying her husband.¹²² Voluntary sterilization procedures, however, differ dramatically from abortions. Vasectomies and tubal ligations are surgical procedures "employed to incapacitate the human reproduction functions of a male or female."¹²³ An abortion,

usefulness to this discussion.)

116. See Note, *supra* note 115, at 1507-08.

117. 316 U.S. 535 (1942).

118. *Id.* at 541, noted in *Roe v. Wade*, 410 U.S. 113, 152 (1973).

119. See *Roe v. Wade*, 410 U.S. 113, 152, 155 (1973).

120. See *Maher v. Roe*, 432 U.S. 464, 474-75 (1977) (state policy of reimbursing women for medical expenses incurred in childbirth, but not for those incurred for nontherapeutic abortions, upheld).

121. See *id.*; see *supra* notes 32-34 and accompanying text.

122. See Ass'n for Voluntary Sterilization (AVS), AVS Information Sheet—Spousal Consent (n.d.) ("[T]here is no liability for a physician or hospital who performs voluntary sterilization on a competent adult without the consent of that adult's spouse.") (available from AVS, New York, New York); Ass'n for Voluntary Sterilization, Restrictions on Permanent Birth Control, Publication No. 1-4 (Jan. 1983) (available from AVS); *cf.* CAL. HEALTH & SAFETY CODE § 1258 (West 1979) (health facilities may not require patients upon whom sterilization is to be performed "to meet any special nonmedical qualifications" which are not required of patients undergoing other operations); GA. CODE ANN. § 31-20-2 (1982) (sterilization may be performed *without* a spouse's "request in writing" if the spouse cannot "be found after reasonable effort").

123. Warren, *The Law of Human Reproduction: An Overview*, 3 J. LEGAL MED. 1, 13 (1982).

Male sterilization usually is achieved by a vasectomy, the severing of the ducts from

on the other hand, is the "removal of [a fetus¹²⁴] from the womb other than for the principal purpose of producing a live birth or removing a dead fetus."¹²⁵

Abortions have only a temporary effect on one's ability to bear children.¹²⁶ Sterilization, on the other hand, incapacitates the human reproductive system and is usually irreversible.¹²⁷ Since sterilization has a more drastic and far-reaching effect on the procreative potential of a marriage than abortion, sterilization—and not abortion—necessitates spousal notification provisions. State statutes regulating voluntary sterilization of adults do not, however, always require notification,¹²⁸ whereas some state statutes regulating abortion do.¹²⁹

the two gonads which transmit sperm into the genitourinary tract. It is a relatively simple procedure done under local anesthetic. The operation does not require hospitalization and serious complications are not common.

For a female there are two common procedures for sterilization: salpingectomy or hysterectomy. The . . . salpingectomy or tubal ligation, [is] the interruption of the Fallopian tubes which lead from the ovaries to the uterus. Interruption of the tubes is accomplished by one of several methods: severing the tubes; clamping them closed with a clip; or, destroying their continuity by electrocautery. This procedure can be performed via abdominal surgery or by laparoscopic techniques through a small incision or two near the navel. Salpingectomy does not usually have associated complications and can be performed under a local or general anesthetic.

Id.

124. BLACK'S LAW DICTIONARY 559 (5th ed. 1979).

125. *Id.* at 7. See also Warren, *supra* note 123, at 27.

This procedure can only be performed on a woman; there is no comparable procedure for males, nor need there be. The Supreme Court has declared that in order to establish a claim grounded on sex-based discrimination, it must be shown that the classification is a "mere [pre-text] designed to effect an invidious discrimination against the members of one sex or the other." *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). Abortion is a procedure that can only be performed on a woman; therefore, a state abortion statute that affects only women can not be considered to be sex-based discrimination. Consequently, although the statutes requiring spousal notification protect only a husband's interest in the procreative potential of the marriage, they may not be declared unconstitutional as sex-based discrimination. See *Scheinberg v. Smith*, 659 F.2d 476, 486 (5th Cir. 1981). A court "may not demand that a legislature address each manner of furthering a specific state interest when it legislates on one, discrete matter." *Id.*

126. See *Scheinberg v. Smith*, 550 F. Supp. 1112, 1122-23 (S.D. Fla. 1982). In *Scheinberg*, the district court found on remand that the abortion procedure does *not* pose a greater than de minimis risk to a married woman's future ability to bear children. *Id.* at 1123.

127. Warren, *supra* note 123, at 13, 21.

128. See statutes cited *supra* note 122.

129. FLA. STAT. ANN. § 390.001(4)(b) (West Supp. 1983); ILL. ANN. STAT. ch. 38, § 81-23.4 (Smith-Hurd Supp. 1983-1984); KY. REV. STAT. § 311.735 (1983) ("if reasonably possible"); MONT. CODE ANN. § 50-20-107 (1983); NEV. REV. STAT. § 442.254 (1981); R.I. GEN. LAWS §§ 23-4.8-2, 23-4.8-3 ("if reasonably possible") (Supp. 1983); UTAH CODE ANN. § 76-7-304 (1978) ("if possible").

If a state is motivated by the desire to protect the procreative potential of a marriage by promoting cooperative decision-making, it should focus its legislation on those procedures that have the greatest adverse effect on the reproductive potential of the marriage. Spousal notification statutes in theory, and only in theory, protect this procreative potential.¹³⁰ By failing, however, to impose similar or more stringent requirements on sterilization procedures, which have the most significant impact on the procreative potential, the states are demonstrating that they are not, in reality, protecting the procreative potential of the marriage. Thus, the articulation of this interest in support of spousal notification statutes is merely the manipulation of rhetoric to express a seemingly benign motive while concealing the state's probable purpose—namely, reducing the overall number of abortions. It is clear, however, that such an interest in reducing the number of abortions is not only constitutionally invalid, but contrary to Supreme Court decisions.¹³¹

By imposing restrictions on a woman's ability to obtain an abortion, these states are pursuing a policy whereby abortion is made an unattractive option. Such policies have the effect of promoting fetal life over the woman's right to privacy in the abortion decision.¹³² In *Roe v. Wade*,¹³³ the Supreme Court specified that the state may regulate the abortion decision to protect its interest in the potential human life only after the fetus has become viable, i.e., only in the third trimester.¹³⁴ These statutes requiring spousal notification, however, regulate all abortions—first, second, and third trimester—equally. Thus, it can only be concluded that these statutes are furthering the broad state interest of discouraging abortions. In *Roe*, this interest was insufficient to justify the state's restrictions on the woman's right to decide whether to terminate her pregnancy, and the statute was declared unconstitutional as an unjustifiable intrusion into the woman's right of privacy in the abortion decision.¹³⁵

130. See *Scheinberg v. Smith*, 482 F. Supp. 529, 539-40 (S.D. Fla. 1979), *aff'd in part, vacated in part and remanded*, 659 F.2d 476, 485 (5th Cir. 1981), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982).

131. Under a *Roe v. Wade* analysis, this is not a permissible state interest. See *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

132. Cf. *Reproductive Health Servs. v. Freeman*, 614 F.2d 585, 599 (8th Cir. 1980) (discussing the state's interest in promoting fetal life as balanced against the health of the mother).

133. 410 U.S. 113 (1973).

134. See *id.* at 160, 163-64, 164-65.

135. See *id.* at 147-52, 154, 164; *supra* notes 8-17 and accompanying text.

Therefore, based on the foregoing analysis, the spousal notification statutes should be deemed unconstitutional.

Furthermore, these statutes cannot withstand constitutional scrutiny because they are based on an incorrect factual premise. As was noted on remand by the district court in *Scheinberg v. Smith*,¹³⁶ the abortion procedure poses no more than a de minimis risk to the procreative potential of the marriage.¹³⁷ Consequently, the spousal notification statutes do not enhance the procreative potential of the marriage and must be declared unconstitutional under the guidelines established by the *Scheinberg* court of appeals.¹³⁸

3. *Protecting the Husband's Interest in the Potential Life of the Fetus.*—The husband's interest in the potential life of the fetus may be asserted as a state interest which, if compelling, will justify an intrusion into the woman's right to decide whether to terminate her pregnancy.¹³⁹ While state statutes requiring spousal notification ostensibly protect the husband's interest in the potential life of the fetus,¹⁴⁰ such interests are overshadowed by the woman's right to

136. 550 F. Supp. 1112 (S.D. Fla. 1982).

137. *Id.* at 1123.

138. *See id.* (citing *Scheinberg v. Smith*, 659 F.2d 476 (5th Cir. 1981)).

139. The state interest in protecting the husband's interest in the potential life of the fetus is reflected in the Nevada and Rhode Island statutes, NEV. REV. STAT. § 442.254(2) (1981) (statute challenged in *Glick v. Bryan*, No. CB-R-81-150 (D. Nev. filed June 25, 1981)); R.I. GEN. LAWS § 23-4.8-3(9) (Supp. 1983) (statute challenged in *Planned Parenthood v. Bd. of Medical Review*, No. 82-0391P (D. R.I. filed June 18, 1982)), which provide that if the fetus is not fathered by the woman's husband, the physician shall not be required to notify her spouse. By requiring a finding of paternity to trigger the notification requirements, Nevada and Rhode Island are protecting only those husbands who are also fathers and therefore, related to the fetus. Florida, Illinois, Kentucky, Montana, and Utah, however, do not require that the husband have any connection to the fetus. FLA. STAT. ANN. § 390.001(4)(b) (West Supp. 1983) (declared unconstitutional in *Scheinberg v. Smith*, 482 F. Supp. 529 (S.D. Fla. 1979), *aff'd in part, vacated in part and remanded*, 659 F.2d 476 (5th Cir. 1981), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982)); ILL. ANN. STAT. ch. 38, § 81-23.4 (Smith-Hurd Supp. 1983-1984); KY. REV. STAT. § 311.735 (1983) (statute challenged in *Eubanks v. Brown*, No. 82-0360L(A) (D. Ky. filed June 23, 1982)); MONT. CODE ANN. § 50-20-107 (1983) (corresponds to former § 94-5-616) (statute declared unconstitutional in *Doe v. Deschamps*, 461 F. Supp. 682 (D. Mont. 1976)); UTAH CODE ANN. § 76-7-304(2) (1978). The statutes thus undercut the state's ability to justify the intrusions upon the woman's right to privacy in the abortion decision as a means of protecting the husband's interest in the potential life of the fetus.

140. These statutes enable the husband to consult with and perhaps persuade his wife to change her mind regarding the abortion. In this discussion regarding the husband's interest in the potential life of the fetus, it is assumed that any persuasion that occurs is noncoercive. Noncoercive persuasion is the only kind of protection the statute could afford. To recognize, and therefore legitimize, a husband's coercive "persuasion" of his wife would make spousal notification indistinguishable from spousal consent. *See supra* notes 62-64 and accompanying text. In such a situation, under the principles enunciated in *Bellotti v. Baird*, 443 U.S. 622,

privacy, as previously discussed.¹⁴¹ Even if the husband's interest is recognized as legitimate, it will not justify the burden imposed on the woman's privacy rights by spousal notification, since the husband's interest is not protected by this requirement. In fact, these statutes do little more than provide the husband with an opportunity to discuss the abortion with his wife, which will be of questionable value if his wife has already decided to obtain an abortion.

Not all notification statutes are, however, unconstitutional.¹⁴² In *H.L. v. Matheson*,¹⁴³ the Supreme Court upheld a statute requiring that the parent or guardian of an immature and dependent minor receive notification of her intention to obtain an abortion. In *Matheson*, the Court focused on the special relationship between parents and children.¹⁴⁴ Several state interests are involved in the parental notification requirement. For example, one state interest furthered by requiring parental notification is that "parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child."¹⁴⁵ Unlike the relationship existing between parents and minors, there is nothing to suggest that the husband would have more complete information regarding his wife's medical history or greater access to these other sources than his wife. Furthermore, the Court recognized that minors are unique and that "enhancing the potential for parental consultation concerning [the abortion] decision" will aid in protecting minors.¹⁴⁶

"Traditionally, minors have not been afforded the full panoply of rights guaranteed to adults under the Constitution."¹⁴⁷ Thus, in *Bellotti v. Baird (Bellotti II)*,¹⁴⁸ the Court found that "the constitutional rights of [minors] cannot be equated with those of adults"¹⁴⁹ for three reasons: (1) "the peculiar vulnerability of children";¹⁵⁰ (2)

643-44 (1979) (*Bellotti II*) (specifically regarding "blanket" parental consent) and *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the statutes would be invalid. See *supra* notes 17-27 and accompanying text.

141. See *supra* notes 8-46 and accompanying text.

142. See, e.g., IND. CODE ANN. § 35-1-58.5-2.5 (West Supp. 1983-1984); UTAH CODE ANN. § 76-7-304 (1978).

143. *H.L. v. Matheson*, 450 U.S. 398 (1981).

144. *Id.* at 405, 409-11.

145. *Id.* at 405 (citation omitted). "Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data." *Id.* at 411.

146. See *id.* at 412.

147. *Foe v. Vanderhoof*, 389 F. Supp. 947, 953 (D. Colo. 1975).

148. 443 U.S. 622 (1979) (*Bellotti II*).

149. *Id.* at 634.

150. *Id.*

“minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them”;¹⁵¹ and (3) “the guiding role of parents in the upbringing of their children.”¹⁵² Parental notification focuses on the parents’ interest in the health and well being of the minor.¹⁵³ The women who are affected by spousal notification statutes are, however, *adults*, and are not in the unique position of minors. Generally, an adult woman has significant life experience and possesses the perspective and judgment to enable her to evaluate her options rationally to reach a decision that is both well-reasoned and in her best interests.¹⁵⁴ Furthermore, an adult woman is generally capable of protecting her health and well being without the guiding role of an authority figure.¹⁵⁵ Consequently, those factors that work to make a requirement of parental notification constitutional—the unique characteristics of minors—are not present when an adult woman is faced with the decision of whether or not to terminate her pregnancy.

*Planned Parenthood v. Danforth*¹⁵⁶ suggests that the husband’s interest in the potential life of the fetus is not compelling.¹⁵⁷ Although the *Danforth* decision enabled the woman to act unilaterally, the court reasoned that: “Inasmuch as it is the woman who physically bears the child and who is . . . more directly and immediately affected by the pregnancy, as between the [husband and wife] the balance weighs in her favor.”¹⁵⁸ The key factor in this reasoning is that the woman must care for the fetus for nine months.¹⁵⁹ Moreover, the wife’s right to decide whether to have an abortion is based on many factors, including physical, psychological, and emotional

151. *Id.* at 635 (footnote omitted).

152. *Id.* at 637.

153. *See supra* text accompanying notes 143-52.

154. *Cf. Bellotti v. Baird*, 443 U.S. 622, 635-37 (1979) (*Bellotti II*) (The Supreme Court emphasizes the minors’ lack of “experience, perspective, and judgment” and discusses limitations on minors’ freedom to choose for themselves in the making of important affirmative choices with potentially serious consequences. From this discussion, it may be inferred that adults have the “experience, perspective, and judgment” that minors lack.).

155. *Cf. id.* at 637-39 (In its discussion of legal restrictions on minors that support the guiding and authoritative role played by parents in enhancing the child’s chances for growth and maturity, the Court implies that the unique need for this guidance no longer exists when the minor attains “full growth and maturity,” which legally occurs when the minor attains her majority. Consequently, an adult woman is generally not in need of the guidance and advice an authority figure such as a parent would provide.).

156. 428 U.S. 52 (1976).

157. *See id.*

158. *Id.* at 71.

159. *See Poe v. Gerstein*, 517 F.2d 787, 796 n.19 (5th Cir. 1975).

considerations involved in raising the child.¹⁶⁰

Although it is arguable that the husband's ability to actively participate in decisions relating to his wife's pregnancy should not be foreclosed,¹⁶¹ spousal notification statutes do not further the husband's interest in this regard. Rather, these statutes merely require that the woman notify her husband, while the husband remains constitutionally unable to affect her decision by either withholding his approval or voicing an objection.¹⁶² Thus, the requirement of spousal notification is, at best, superfluous and, at worst, materially detrimental to the woman's constitutional rights. In a marriage built on a foundation of mutual trust and honesty, the discussion initiated by the spousal notification requirement would probably have already occurred; the formality of the requirement would be unnecessary. Con-

160. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

Science may have found a way to equalize the interests of the husband and the wife. *See generally* Elliot, *Finally: Some Details on In Vitro Fertilization*, 241 J. A.M.A. 868 (1979) (procedures now exist for human ova fertilization outside of the body, with subsequent reimplantation in a uterus). Medical techniques have been developed whereby an egg is removed from the mother's ovary and the father's sperm is then used to fertilize the egg. *See* Hill, *Obstetrics and Gynecology*, 247 J. A.M.A. 2966, 2966-67 (1982); Walters, *Biomedical Ethics*, 247 J. A.M.A. 2942, 2943-44 (1982). The fertilized egg is then reimplanted in the uterus. If the fertilized egg is not transplanted to the "donor-mother," but rather, to a surrogate mother, Ranii, *The Newest Way to Have Children*, Nat'l L.J., March 26, 1984, at 24, col. 1, the dilemma of the husband who wants a child that is both his and his wife's, when his wife does not want to be pregnant, would be solved. (For ethical objections to in vitro fertilization and embryo transfer, see Tiefel, *Human In Vitro Fertilization: A Conservative View*, 247 J. A.M.A. 3235-42 (1982)). Moreover, a procedure whereby an embryo may be transplanted from one woman's womb to another is presently being perfected. *See* Brotman, *Human Embryo Transplants*, N.Y. Times, Jan. 8, 1984, § 6 (Magazine) at 42. Even if science can equalize the physical differences, it cannot, however, balance the emotional considerations. In addition to the intrusion of the medical procedure to remove the ovum, the woman will be subjected to the psychological and emotional effects of having her fetus grow in another's womb, which may be more stressful than either the pregnancy or the abortion. *See generally* *Roe*, 410 U.S. at 153 (psychological effects of unwanted offspring discussed). A woman may experience conflicting emotions: guilt for not fulfilling her traditional role as mother; resentment towards the surrogate mother and/or her husband; confusion due to the conflicting feelings of not wanting a child and what has been termed her "maternal instinct." Furthermore, the responsibilities involved in raising the child will not be changed significantly, if at all, by this procedure.

161. *Coe v. Gerstein*, 376 F. Supp. 695, 698 (S.D. Fla. 1973), *aff'd sub nom.* *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975).

This section of the analysis assumes that the husband is the father of the fetus, *see supra* note 139, and that the mandatory notification requirements will not rise to the level of a veto by the husband, *see supra* text accompanying notes 62-64.

162. *See Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *cf. Bellotti II*, 443 U.S. 622, 643-44 (1979) (states requiring parental consent for pregnant minors to obtain an abortion must also provide an alternative procedure for obtaining authorization, in order that the parental consent requirement does not equal the "veto" power held improper in *Danforth*).

versely, in a marriage which may be labelled a "skewed relationship,"¹⁶³ a requirement of spousal notification would become a de facto spousal consent requirement.¹⁶⁴ If the husband's power is, in fact, overwhelming, and he does not want his wife to have an abortion, he may be able to prevent the abortion.¹⁶⁵ In *Danforth*, the Supreme Court found that state abortion statutes which required spousal consent were unconstitutional. "[T]he State cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising'"¹⁶⁶ This reasoning alone would not lead to a finding that statutes requiring spousal notification are unconstitutional. However, in marriages that may be classified as "skewed relationships," this reasoning is applicable and the statute should be deemed unconstitutional.

Ideally, a woman facing an important decision, such as whether to have an abortion, will seek support and comfort from her spouse.¹⁶⁷ Realistically, however, there are circumstances where a married woman feels that she is unable to notify her husband of her intention to have an abortion.¹⁶⁸ In these situations, spousal notification diminishes the integrity and dignity of the family, unjustifiably burdening the woman's decision to have an abortion.

III. ALTERNATIVE CONSTITUTIONAL CHALLENGES—THE DOCTOR-PATIENT RELATIONSHIP

Notification statutes may also be challenged on other grounds. Most of the statutes requiring spousal notification impose a burden on the physician by providing that the physician or his or her agent notify the husband.¹⁶⁹ Failure to comply with these provisions may

163. See *supra* note 62.

164. See *supra* notes 62-64 and accompanying text.

165. See *supra* note 63.

166. 428 U.S. at 69 (quoting *Planned Parenthood v. Danforth*, 392 F. Supp. 1362, 1365 (E.D. Mo. 1975) (Webster, J., concurring in part and dissenting in part), *aff'd in part, rev'd in part and remanded*, 428 U.S. 52 (1976)).

167. It should also be noted that even without spousal notification laws "experts from the disciplines of psychiatry, gynecology, psychology and obstetrics, as well as counselors and social workers, uniformly encourage married couples to consult [with each other] on particularly important decisions such as whether to terminate a pregnancy." *Scheinberg v. Smith*, 482 F. Supp. 529, 537 (S.D. Fla. 1979), *aff'd in part, vacated in part and remanded*, 659 F.2d 476 (5th Cir. 1981).

168. See *supra* notes 60-64 and accompanying text.

169. ILL. ANN. STAT. ch. 38, § 81-23.4 (Smith-Hurd Supp. 1983-1984); KY. REV. STAT. § 311.735 (1983); NEV. REV. STAT. § 442.254 (1981); R.I. GEN. LAWS § 23-4.8-2 (Supp. 1983); UTAH CODE ANN. § 76-7-304(2) (1978).

expose the physician to either criminal or civil liability.¹⁷⁰ Such requirements have the effect of interfering with the doctor-patient relationship.¹⁷¹ They are, therefore, analogous to similar burdens placed on this relationship by statutes that require the patient's informed consent before permitting an abortion.¹⁷² These informed consent requirements, however, have recently been declared unconstitutional.

Moreover, statutes obligating the physician to notify the husband of his wife's decision to have an abortion impose an additional harmful burden on the doctor-patient relationship. For example, a married, pregnant woman who wants to obtain an abortion may go to a new physician and tell the doctor that she is single. The relationship between a physician and a patient is arguably facilitated by complete disclosure and honesty.¹⁷³ It is likely that the patient's marital status has little effect, if any, on the physician's ability to care for the physical well-being of the patient. Nonetheless, a patient's reluctance to confide in her physician may affect the physician's ability to counsel the patient effectively. If a woman feels that she cannot trust her physician with the knowledge that she is married, then she may conclude that she is unable to trust her physician with more intimate confidences that may have a greater effect on the physician's ability to treat the patient. This fear of disclosure and resulting distrust of the physician may have a deleterious effect on the doctor-patient relationship which, in turn, may negatively impact on the patient's health.

Furthermore, where a patient does, in fact, lie regarding her marital status, her physician will be unable to comply with the provisions of state statutes requiring spousal notification. Where noncompliance with these statutes implies a private right of action on behalf of the unnotified husband against the physician, the burden imposed upon the physician by these statutes becomes intolerable. In order to minimize their exposure to civil liability,¹⁷⁴ while protecting their

170. ILL. ANN. STAT. ch. 38, § 81-23.4(c) (Smith-Hurd Supp. 1983-1984) (misdemeanor or civil liability); KY. REV. STAT. § 311.735(3) (1983) (civil liability); NEV. REV. STAT. § 442.257 (1981) (misdemeanor); UTAH CODE ANN. § 76-7-314 (1978) (misdemeanor, unless notice excused due to medical emergency, *id.* 76-7-315).

171. *Cf.* City of Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481, 2491 (1983) (noting the importance of physician-patient "decision-making process" in abortions); *id.* at 2500-01 (city's informed consent requirements impermissibly interfered with physician's discretion).

172. *Id.*; see *supra* notes 36-40 and accompanying text.

173. City of Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481 (1983).

174. Compare this threat of criminal and civil liability to that presented by a medical malpractice suit. A physician who is defending himself in an action for damages due to mal-

ability to practice medicine,¹⁷⁶ physicians may refuse to perform abortions. Thus, by exposing physicians to threats of civil and criminal liability, these statutes may effectively deter doctors from performing a legal medical procedure. Hence, these statutes unduly burden the woman's right to obtain an abortion and should be considered unconstitutional.

IV. POSSIBLE SOLUTIONS

Statutory requirements of spousal notification may withstand judicial scrutiny if these statutes are drafted to include provisions enabling the woman to obtain a waiver of the notice requirement. Prior Supreme Court decisions indicate a willingness to uphold such statutes.¹⁷⁶ In *Bellotti v. Baird (Bellotti II)*,¹⁷⁷ the Supreme Court held that a minor may obtain a waiver of parental consent requirements if she can demonstrate either that: she is "mature enough . . . to make her abortion decision . . . independently of her parents' wishes; or . . . the desired abortion would be in her best interests."¹⁷⁸ Likewise, in *H.L. v. Matheson*,¹⁷⁹ the availability of alternative means of obtaining permission, which could result in the waiver of the parental notification requirements, was discussed by the Court.¹⁸⁰ If similar provisions are enacted and the statutes requiring

practice may demonstrate that he or she exercised the degree of skill and learning ordinarily possessed and exercised, under similar circumstances, by members of his profession. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32 at 161-66 (4th ed. 1971).

It is not, however, part of a doctor's professional responsibility to act as a private investigator inquiring into the private lives of his or her patients where such information has no effect on the patients' health. Under statutes requiring spousal notification, the physician may have to demonstrate that he or she adequately investigated the woman's background in order to determine whether she is married or single. What constitutes adequate investigation is unclear, thereby placing the validity of such statutes in question. Cf. *Doe v. Deschamps*, 461 F. Supp. 682, 686 (D. Mont. 1976) (Montana spousal notification statute held unconstitutional, as it did not provide for a method of notice or constructive notice, thereby failing to provide either the physician or the mother with sufficient safeguards against lack of notice or challenges to claims that notice was properly provided).

175. A physician's license may be revoked or suspended if he or she is convicted of a misdemeanor. E.g., NEV. REV. STAT. § 630.352 (1983); UTAH CODE ANN. § 58-12-35 (Supp. 1983).

176. See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *H.L. v. Matheson*, 450 U.S. 398 (1981).

177. 443 U.S. 622 (1979).

178. *Bellotti II*, 443 U.S. at 643-44 (footnote omitted). "[I]f the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." *Id.* at 643 (footnote omitted).

179. 450 U.S. 398 (1981).

180. *Id.* at 408. The state statute requiring parental notification was found to be consti-

spousal notification are amended to provide a method for obtaining such a waiver, these abortion statutes may be constitutional.

This solution is, however, inadequate. In the situation involving minors, a minor who wants to have an abortion without notifying her parents may be able to have the requirements waived if she can demonstrate that she is mature or that the abortion is in her best interest.¹⁸¹ Ironically, even if the state has provided the minor with a judicial hearing as an alternative, it is unlikely that she will be able to meet her burden of proof.¹⁸² For example, if a minor asserts that her parents will evict her from their home after receiving notification, this assertion, in and of itself, is arguably insufficient to demonstrate that an abortion is in her best interests. It is likely that a judge involved in such a proceeding would want to hear testimony from the parents. Once testimony from the parents is sought, the question of whether a parental notification requirement should be waived becomes moot. Similarly, if a comparable procedure is established so that a married woman who wants to have an abortion can avoid notifying her husband, the same evidentiary problems would arise. Although a woman, who is pregnant with a child whose father is someone other than her husband, can produce evidence concerning the child's paternity,¹⁸³ a woman who is involved in a "skewed relationship"¹⁸⁴ will be faced with the difficult task of proving that her husband wields an inordinate amount of power and could prevent her from obtaining an abortion.

Another solution would require the legislature to redraft the statutes and create certain exceptions to the spousal notification requirement. The statutes could be rewritten so that a woman who

tutional as applied to an unemancipated minor girl "living with and dependent upon her parents," and making "no claim or showing as to her maturity or as to her relations with her parents." *Id.* at 407.

181. See *id.* at 408-09 (discussing *Bellotti II*).

182. See *Bellotti II*, 443 U.S. at 654-56 (Stevens, J., concurring).

183. Serological tests are 99% accurate in determining nonpaternity in any given case. See generally Dykes, DeFurio & Polesky, *Isoelectric Focusing for Transferrin (TF) Subtypes in Parentage Testing*, 79 AM. J. CLINICAL PATHOLOGY, 725-27 (1983 & photo. reprint 1983) (report on use of TF subtyping in determining paternity); Keith & Polesky, *Requisites for Introduction of Genetic Test Results in Paternity Trials*, reprinted from AM. ASS'N. BLOOD BANKS, *Probability of Inclusion in Paternity Testing: A Technical Workshop* 93-102 (reprint 1982) (procedure for introducing genetic test results as evidence of paternity); Polesky, *Blood Banking: New Concepts in Paternity Testing*, DIAGNOSTIC MED. (Oct. 1981, Special Issue & photo. reprint 1981) (accuracy of blood tests as indication of paternity or nonpaternity); Lauter, *Paternity: The Final Word*, Nat'l L.J., Sept. 12, 1983, at 1, col. 1 (use of more sophisticated blood tests to determine paternity has been accepted by almost every state).

184. See *supra* notes 62-64 and accompanying text.

falls within the "established exceptions"¹⁸⁵ would be able to have an abortion without notifying her husband. Such a redrafted statute could provide for waiver of the spousal notification requirement: (1) where the husband is not the father of the child; (2) where the husband would strenuously object out of religious or moral feelings; (3) where the husband is seriously ill or emotionally unstable and is unable to participate in any abortion decision; and (4) where the woman is a "battered wife" and fears that discussion concerning an abortion may precipitate physical violence.¹⁸⁶ Nonetheless, even such a redrafted statute would be subject to attack under the equal protection clause as being either under-inclusive¹⁸⁷ or over-inclusive.¹⁸⁸ Married women who ought not fall within the exceptions may be able to abuse them, while married women who should fall within the exceptions, but do not, will be harmed. Thus, although the statutory inclusion of these exceptions from the requirement of spousal notification appears to cure the defects in the statute, closer examination reveals the creation of new defects.

For example, this statute may be attacked as violating the equal protection clause because it is under-inclusive. Consider a married woman who has a successful business career in a major corporation and becomes pregnant. Although her husband would like to have a child, she does not want to endanger her career. Instead, she chooses to have an abortion. To do that, she claims that her husband would object to an abortion on religious grounds, and she falls within exception (2) and is able to obtain an abortion without notifying her spouse. Yet, this is the kind of situation in which the legislature intended to promote marital dialogue. These exceptions were not enacted to enable a woman arbitrarily to preclude her husband from having a role in deciding the fate of this pregnancy. Rather, they were designed to enable a woman to avoid notifying her spouse of her intention to have an abortion where such notification would harm the marriage (exceptions (1) and (2)), harm the woman (exception

185. See *supra* notes 60-63 and accompanying text.

186. *Id.*

187. "Underinclusive classifications do not include all who are similarly situated . . . , and thereby burden [or benefit] less than would be logical to achieve the intended government end." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 997 (1978); see Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 348-51 (1949).

188. Over-inclusive classifications impose "a burden [or benefit] upon a wider range of individuals than are included in the class . . . at which the law aims." Tussman & tenBroek, *supra* note 187, at 351. In other words, "overinclusive classifications . . . burden some who are not similarly situated with respect to the purposes of a rule." L. TRIBE, *supra* note 187, at 999.

(4)), or would not result in communal decision-making (exception (3)). Under these hypothetical facts, the pregnant woman is using the exceptions to protect her career, which is not consistent with the purpose of these exceptions.

Another challenge to this proposed statute may be raised on the ground that it is over-inclusive. Consider the predicament of a married pregnant woman who believes her marriage is near dissolution. She fears that this pregnancy will add to the strain of her marriage and wants to obtain an abortion without informing her husband. Although she does not fall within any of the exceptions, the policies underlying the exceptions would dictate that she should not be required to notify her husband. In this hypothetical, the motivation for seeking an exception to the spousal notification requirement is the preservation of the marriage, which, unlike the previous situation, is consistent with the rationale underlying these proposed exemptions. Since this statute does not include this woman in these exemptions, it may be constitutionally defective as being over-inclusive.¹⁸⁹ Although the obvious solution to the over-inclusive problems presented by this hypothetical is to expand the exceptions, such an expansion might make the amount of exceptions so unmanageable that virtually no one would fall within the notification requirement. This would result in rendering notification statutes practically useless.

Consequently, due to the evidentiary problems and potential under and over-inclusive claims that the foregoing alternatives would create, a statute based upon an enumeration of exceptions is unworkable. Permitting the statutes to remain as written, however, is equally unacceptable, because it would burden the woman's right to an abortion without promoting a compelling state interest.¹⁹⁰

One last statutory alternative, which has yet to be explored, was suggested by the court of appeals in *Poe v. Gerstein*.¹⁹¹ In *Poe*, the Fifth Circuit proposed that the state could protect the husband's interests in the potential child by treating a wife's failure to notify or consult with her husband prior to obtaining an abortion as grounds

189. It should be noted that the courts have been reluctant to invalidate statutes because they are under-inclusive, *see* Tussman & tenBroek, *supra* note 187, at 348-49, and have held that "the legislature may attack a general problem in a piecemeal fashion." *Id.* at 348. Consequently, it is not clear that a challenge to this statute based on under-inclusiveness would be successful.

190. "[T]he state must show that the interference created by the statute is necessary in order to meet the compelling state interest." Commentary, *Marital Secrets: The Emerging Issue of Spousal Notification Laws*, 3 J. LEGAL MED. 461, 473 (1982).

191. 517 F.2d 787 (5th Cir. 1975).

for divorce.¹⁹² This solution not only allows the woman to evaluate her intimate marital relationship without state interference, but also enables her to decide voluntarily whether or not to seek her husband's advice. Arguably, a woman's decision not to discuss her decision to have an abortion with her husband is symptomatic of a breakdown in, or even destruction of, the marital relationship.¹⁹³ The suggested statute would provide the husband with the opportunity to terminate the marital relationship. Similarly, if the wife's decision to have an abortion without notifying her husband is repugnant to the husband, he may legally extricate himself from the relationship. One may argue that other avenues for obtaining a divorce on the same facts exist.¹⁹⁴ Nonetheless, creating an additional ground for divorce serves two important purposes: (1) the state has clearly proclaimed its interest in spousal notification and, therefore, all are on notice and may, in fact, be encouraged to notify their spouse *voluntarily*; and (2) the state has furthered this interest without intruding into the "sacred" marital relationship.¹⁹⁵ Furthermore, a wife's inability to discuss her decision of whether to have an abortion with her spouse indicates that the marital relationship is fundamentally flawed; in such a case, perhaps, the state should facilitate the dissolution of the marriage. For these reasons, it appears that this may be the best alternative available to the state for pursuing its asserted interest.

V. CONCLUSION

The United States Supreme Court has established that a woman has a constitutional right to decide whether to have an abortion¹⁹⁶ and that a state may restrict, and consequently burden, that right only where it can demonstrate a sufficiently compelling interest.¹⁹⁷ Spousal notification statutes unduly burden the woman's right to an abortion by interfering with her autonomy in making the abor-

192. *See id.* at 797.

193. Coercing the woman to notify her spouse in such a situation will not "cure" the defects in the relationship. *See supra* notes 96-103 and accompanying text.

194. *See, e.g.,* OR. REV. STAT. § 107.025 (1981) ("dissolution of marriage . . . may be decreed when irreconcilable differences between the parties have caused the irremediable breakdown of the marriage").

195. "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

196. *See supra* notes 13-46 and accompanying text.

197. *See supra* note 50 and text accompanying notes 13, 47-50.

tion decision.¹⁹⁸ For example, the requirement of notification may: produce anxiety and stress;¹⁹⁹ cause delay in seeking an abortion which may result in increasing the medical risks involved in the abortion procedure;²⁰⁰ lead to the dissolution of the marriage;²⁰¹ result in physical injuries;²⁰² or give the husband a veto power by elevating notification to consent in "skewed relationships."²⁰³ These statutes have been premised on state interests of promoting marital harmony,²⁰⁴ protecting the procreative potential of the marriage,²⁰⁵ and protecting the husband's interest in the potential life of the fetus.²⁰⁶ Such interests, however, are not compelling, and thus are not sufficient to override the woman's constitutional right to privacy in making the decision of whether to have an abortion. Even if the asserted interests were found to be compelling, these notification statutes would have to be stricken because they fail to achieve their purported goal. Based on this analysis, the burdensome intrusion upon the woman's right to privacy in the abortion decision is unjustifiable, and state abortion statutes requiring spousal notification must therefore be deemed unconstitutional.

Helaine F. Lobman

198. *See supra* notes 53-65 and accompanying text.

199. *See supra* notes 57-58 and accompanying text.

200. *See supra* text accompanying note 59.

201. *See supra* notes 60-61 and accompanying text.

202. *Id.*

203. *See supra* notes 62-64 and accompanying text.

204. *See supra* notes 68, 70-108 and accompanying text.

205. *See supra* notes 68, 109-38 and accompanying text.

206. *See supra* notes 68, 139-67 and accompanying text.