THE CONSTITUTION AND THE ANOMALY OF THE PREGNANT TEENAGER

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Several times over the last few years, the United States Supreme Court has had to resolve controversies concerning state power to restrict the decisions of young women not yet legally of age to abort their pregnancies.[1] Many state legislatures have enacted statutes making it more difficult for these girls than for adult women to terminate their pregnancies.[2] Most of these statutes restrain the liberty of young women by making their decisions subject in some way to their parents' consent, consultation, and/or notification.[3]

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1. *See* H.L. v. Matheson, 450 U.S. 398 (1981); Bellotti v. Baird, 443 U.S. 622 (1979) (*Bellotti II*); Bellotti v. Baird, 428 U.S.132 (1976) (*Bellotti I*); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). See generally Keiter, *Privacy, Children, and Their Parents: Reflections on and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. (1982), for an analysis of the issues raised by these cases that I believe is quite different from my own.

2. *See, e.g.*, ME. REV. STAT. ANN. tit. 22, § 1597 (Supp. 1980-81); MD. ANN. CODE art. 45, § 135(d) (Supp. 1980); NEB. REV. STAT. § 28-347 (1981); TENN. CODE ANN. § 39-302(f) (Supp. 1980); UTAH CODE ANN. § 76-7-304(2) (1978). These statutes may be exceptions to liberalizing consent statutes that are themselves exceptions to a general common law or statutory rule requiring parental consent to the medical treatment of minors. *See generally* Bennett, *Allocation of Child Medical Care Decisionmaking Authority: A Suggested Interest Analysis*, 62 VA. L. REV. 285 (1976). For example, in the *Bellotti* cases, the Massachusetts parental consent requirement at issue was an explicit exception to another statute providing for a minor's consent to any medical treatment if she is pregnant or believes herself to be pregnant. MASS. GEN. LAWS ANN. ch.112, § 12F (West 1974) (providing for consent to treatment of pregnancy) & § 12S (West 1977) (originally § 12P) (requirement of parental consent to abortion) (amended 1980) (referred to in *Bellotti I*, 428 U.S. 132, 148-49 (1976)). The Massachusetts Supreme Judicial Court also interpreted the Massachusetts consent statute as superseding the Massachusetts common law "mature minor rule" which provides for consent to medical treatment by minors who are determined mature by reference to the minor's ability to understand the consequences of the desired medical procedure. *Bellotti II*, 443 U.S. 622, 646-47 (1979).

3. For example, statutes requiring parental consent or that the minor seek a court determi-

Challenges to these statutes have forced the courts to address constitutional issues of exceeding complexity. The teenage abortion cases are more complex than other abortion cases because they require resolution of difficult conflicts among children, their parents, and the state.[4] They are more complex than other child, parent, and state cases because they require resolution of difficult questions about the application of the "right to privacy" to the abortion decisions of girls who are on the verge of adulthood.[5]

The United States Supreme Court, recognizing that teenage abortion presents unusual problems, has not dealt with the teenage abortion cases that have come before it quite so perfunctorily as it has dealt with other recent teenage autonomy cases.[6] Nevertheless, close analysis of the cases leads to the conclusion that despite the Court's expressed sensitivity to the problems, its approach to them leaves the way open to state statutes quite restrictive of the liberty of pregnant teenagers to choose abortion without any parental involvement.

Although I must admit that I am discouraged by this development, even those who applaud a more restrictive approach to the liberty interests of teenagers[7] must surely find the Court's recent opinions in this area unsatisfactory. The opinions fail to develop and adhere to a consistent method for dealing with the various elements comprising the special legal problem of teenage abortion. In this Article, I will first briefly set out the special problems of teenage pregnancy and the interests in conflict in the teenage abortion cases. I will then analyze the Court's attempts to deal with these problems and accommodate these interests in the hope of determining the reasons for the Court's failure to reach a workable resolution.

THE PECULIAR PROBLEMS OF THE PREGNANT TEENAGER

It is essential to keep in mind the factual situation that will invariably be present in a teenage abortion case. Such a case will always concern the interests of a woman who is pregnant and thus may not be confidently classified as a "child" in terms of her physical immaturity, but whose age

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nation either that an abortion is in her best interests or that she is mature enough to make the abortion decision by herself include: FLA. STAT. § 390.001(4)(a) (Supp. 1982); LA. REV. STAT. ANN. § 40:1299.35.5 (West Supp. 1982); MASS. GEN. LAWS ANN. ch. 112, § 12S (Supp. 1982) (amending § 12S at issue in *Bellotti I & II*); MO. REV. STAT. § 188.028 (Supp. 1981) (amending statute at issue in *Danforth*). Those requiring parental notification include: ILL. ANN. STAT. ch. 38, § 81-23.3 (Smith-Hurd Supp. 1981-82); ME. REV. STAT. tit. 22, § 1597 (1980); MD. ANN. CODE art. 43, § 135(d) (1980); MONT. REV. CODE ANN. § 50-20-107(b) (1981); NEB. REV. STAT. § 28-347 (1981); TENN. CODE ANN. § 39-302(f) (Supp. 1980).

4. *See infra* notes 24-49 and accompanying text.

5. *See infra* notes 69-79, 195-217 and accompanying text.

6. *Contrast* Parham v. J.R., 442 U.S. 584 (1979) (the due process rights of children being admitted against their will to state mental hospitals by their parents were adequately served by preadmission medical review) *with Bellotti II*, 443 U.S. 622 (1979) (Court struck down a parental consent to abortion statute which failed to provide procedures for a minor desiring to be excepted from the consent requirement).

7. *See, e.g.*, Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. REV. 605; 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 (1979).

may subject her to a statutory presumption of immaturity. A particular claimant may exhibit more or fewer of the physical, intellectual, and emotional indicia of childishness or adulthood. In any case, the basic facts of her pregnancy and of her youth make resolution of her legal status difficult and foreclose any easy reliance either on standard rules governing women interested in choosing abortion or on standard rules governing children. This juxtaposition of childish and adult characteristics is the primary problem in any teenage abortion case that calls for a sensitive and workable resolution.[8]

Of course, any person who is close to the arbitrary age line drawn to separate childhood from adulthood may not confidently be classified as either child or adult. Childhood, unlike some other forms of legal incompetence, is not static, and the inexorable progression toward adulthood is at its clearest during the teenage years. Increasingly, courts are being faced with the autonomy demands of young persons who may exhibit adult characteristics while retaining childish characteristics.[9] What sets the teenage abortion cases apart from other teenage autonomy cases is the unique nature of the abortion decision in terms of the perceived effects of abortion or childbirth on any woman and in terms of the impossibility of postponement of the decision to abort.[10] These aspects of the abortion decision gave rise to the second problem of the teenage abortion cases. On the one hand, reliance on an age-based standard for determining maturity may permanently foreclose the independent decision of an in-fact mature woman as to which set of consequences best suits her particular situation.[11]

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8. *See infra* notes 50-66 and accompanying text.

9. See *In re* Snyder, 85 Wash. 2d 182, 532 P.2d 278 (1975), in which the court had to deal with the demands of a teenager who refused to live at home and was not considered capable of living on her own, yet was neither "incorrigible" in the sense of being beyond control nor "dependent" in the sense of having no parents willing or able to care for her. The case is discussed in Hafen, *supra* note 7, at 607-09. See also the discussion of the Walter Polovchak case in Wisdom, *Freedom to Choose a Homeland: Minors' Rights, Parents' Rights and the Role of the State* (student paper on file at the College of Law, University of Arizona). Walter, a twelve-year-old Soviet citizen living in Chicago, refused to return to the Soviet Union with his parents when they became disenchanted with life in the United States. See also the discussions of the Polovchak case at 8 FAM. L. RPTR. 2157 (Dec. 30, 1981); 7 FAM. L. RPTR. 2028 (Nov. 11, 1980); 6 FAM. L. RPTR. 2765 (Aug. 19, 1980).

10. This is precisely the point that Justice Powell makes in his *Bellotti II* opinion, 443 U.S. 622, 642-44 (1979). See the various opinions in the cases cited *supra* note 1. *See also* Bracken, Klerman & Bracken, *Abortion, adoption, or motherhood: An empirical study of decision-making during pregnancy*, 130 AM. J. OBSTETRICS & GYNECOLOGY 251 (Feb. 1978); Card & Wise, *Teenage Mothers and Teenage Fathers: The Impact of Early Childbearing on the Parents' Personal and Professional Lives*, 10 FAM. PLAN. PERSP. 199 (July/Aug. 1978); Cates & Tietze, *Standardized Mortality Rates Associated With Legal Abortion: United States, 1972-75*, 10 FAM. PLAN. PERSP. 109 (Mar./Apr. 1978); Henshaw, Forrest, Sullivan & Tietze, *Abortion in the United States, 1978-79*, 13 FAM. PLAN. PERSP. 6 (Jan./Feb. 1981); Maine, *Does Abortion Affect Later Pregnancies*, 11 FAM. PLAN. PERSP. 98 (Mar./Apr. 1979); Moore, Hofferth, Caldwell, & Waite, *Teenage Motherhood, Social and Economic Consequences*, URB. INST. (Jan. 1979); Olsen, *Social and Psychological Correlates of Pregnancy Resolution Among Adolescent Women: A Review*, 50 AM. J. ORTHOPSYCHIATRY 432 (July 1980); Zelnik & Kantner, *First Pregnancies To Women Aged 15-19: 1976 and 1971*, 10 FAM. PLAN. PERSP. 11 (Jan./Feb. 1978).

11. *See Bellotti II*, 443 U.S. 622, 642-644 (1979) (particularly footnote 23). *See also* J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 100, 253-55 (1979) [hereinafter GFS II]; Bennett, *supra* note 2, at 305-06, 308-11; Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 661-64 (1977) (recommending in place of a determination of "maturity," reliance on pregnancy as an objective

On the other hand, a too hasty judicial (or legislative) declaration that pregnancy is conclusive evidence of maturity may leave the decision to a girl who is not intellectually and emotionally prepared to make an independent decision or to bear the potentially devastating consequences of a decision for abortion or for childbirth.[12] The teenage abortion problem is distinct from other teenage autonomy problems because the risks of a mistaken determination of either childishness or maturity are perceived to be serious—making the determination itself an unusually important one.[13]

A third problem is that the abortion cases also call for particularly close attention to the interests of pregnant teenagers who are concededly still children. Even given the incapacity of these girls to make completely independent decisions, the serious consequences of a decision to abort a pregnancy or to give birth do not allow for any simple resolution of the dual problem of *who* should make the decision and *what* the decision should be. Because few teenage autonomy cases involve claimants like the pregnant girls in abortion cases who so clearly cannot be arbitrarily classified as children, most of them never reach the issue of whether the particular claimant is or is not a child to be subjected to the restraints of childhood.[14] The whole focus of these cases is on the appropriate allocation of decisionmaking among children, their parents, and the state and on the appropriate decision to be made, assuming that the claimant still fits into the category of childishness.[15] Similarly, the autonomy demands of pregnant girls who cannot establish their maturity require answers to the questions of who should make their decisions and what standards should

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factor giving rise to emancipation for medical treatment decisions); *infra* notes 70-83 and accompanying text.

12. *See Bellotti II*, 443 U.S. 622, 643-44 (1979). *See also* Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1760, 1765-67 (1981) [hereinafter Garvey I]; Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 787-903 (1978) [hereinafter Garvey II].

13. The assumption is that the decision whether or not to become a parent is a major one for any individual. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973). It is the kind of decision that is protected by the adult's "right to privacy" in cases like Griswold v. Connecticut, 381 U.S. 479 (1965), and *Roe*. It is also the kind of decision that immature children are presumed to be incapable of making with complete independence. *See Bellotti II*, 443 U.S. 622, 642-44 (1979); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 91 (Stewart, J., concurring) (1976); *Id.* at 95 (White, J., dissenting); *Id.* at 102-04 (Stevens, J., dissenting). Given the potentially severe consequences of either abortion or motherhood, as illustrated by the literature cited in *supra* note 10, the determination whether or not a particular teenage woman has the capacity to make an independent decision takes on unusual importance. *See generally* Garvey I & Garvey II, *supra* note 12.

14. *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 505-14 (1969) (children have rights of free expression, regardless of their level of maturity [parents aligned with children against state officials; degree of *permissible* state interference unclear]); Ginsberg v. New York, 390 U.S. 629, 635-43 (1968) (state may legitimately define reading material which is not obscene for adults as obscene for children and bar its sale to all minors without reference to their level of maturity; yet parents remain free to provide the material to their children). *See* Carey v. Population Serv. Int'l., 431 U.S. 678, 691-99 (1977) (plurality opinion) (state may not restrict the access of minors to nonprescription contraceptives for the purpose of discouraging sexual activity among minors; the Court did not discuss issues dealing with the level of maturity; parental consent not provided for); Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321 (1979) [hereinafter Garvey III]. *See generally* R. MNOOKIN, CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW ch. 6 (1978).

15. *See* authorities cited *supra* note 14.

govern those decisions.[16]

Fourth, it is very striking that this decision that cannot be delayed and that may have such serious consequences no matter how it is made is a decision about the formation of a new family. The pregnant teenager who seeks autonomy wants to dissociate herself from her own parents in order to make an independent decision whether or not *she* should become associated with a child as its parent.[17] If she does become a parent, she will, at least with regard to her own child, be legally capable of acting independently of her parents.[18] On the other hand, if she aborts the pregnancy, whatever other serious consequences may result, she will not thereby acquire partial or complete emancipated status.[19] This aspect of the teenage abortion cases also contributes to their unique nature.

There is yet a fifth problematical element in the teenage abortion cases that contributes to their complexity. As in any other abortion situation, the moral issue of fetal life is always present—whether its presence is inchoate or openly admitted. Although, under current law, the fetus' independent right to life has no constitutional significance of its own,[20] the Supreme Court in *Roe v. Wade*[21] did recognize the important *state* interest in the preservation of fetal life.[22] Relying on that interest, states have continued to place restrictions on the abortion decisions of all women. Whether or not such restrictions are justified cannot logically or fairly depend on the level of maturity of the pregnant woman. Nevertheless, some

16. *See infra* notes 195-244 and accompanying text. *See generally* Garvey I & Garvey II, *supra* note 12.

17. This is the point that Professor Karst makes so well in Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 643-44 n.101 (1980). Given the emancipating effect of pregnancy and/or parenthood in many states, *see* statutes cited *infra* note 18, statutes requiring parental involvement in the abortion decision of a minor operate as a *state imposition* of parental involvement where otherwise there would not be any unless the minor so wished. Goldstein, Freud, & Solnit note in their first book that the cardinal rule for dealing with adolescents is that they must be the initiators of any breaks in their attachment to their parents. J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 34 (1973) [hereinafter GFS I]. When a pregnant teenager would be able to act independently of her parents but for the state's imposition of a parental involvement requirement, the message seems to be an incredibly conflicting one.

18. Justice Powell makes this point in *Bellotti II*, 443 U.S. 622, 642 (1979). *See* ILL. ANN. STAT. ch. 111, §§ 4501 & 4502 (Smith-Hurd 1978) (section 4501 allows a pregnant minor to consent to her own treatment; section 4502 allows a minor parent to consent to the treatment of his or her child; what is not provided is self consent for a minor parent); MD. ANN. CODE art. 43, § 135(a)(1) (1980) (minor who is a parent may consent to own medical treatment as though adult); N.Y. PUB. HEALTH LAW § 2504(1) (McKinney 1977) (condition of being a parent emancipates for medical treatment decisions for self and child).

19. "Emancipated status" refers to the condition of a child who is legally "released from the control and authority of his parent." H. CLARK, LAW OF DOMESTIC RELATIONS 240 (1968); *see* Katz, Schroeder & Sidman, *Emancipating Our Children—Coming of Legal Age in America*, 7 FAM. L.Q. 211 (1973).

20. Roe v. Wade, 410 U.S. 113, 158 (1973) (fetus is not a person within the fourteenth amendment). But see S. 2148, 97th Cong. 2d Sess. intro. (Mar. 1, 1982), for proposed legislation declaring that "the Congress hereby recognizes that for the purpose of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, each human life exists from conception . . .; and for this purpose 'person' includes all human beings." *Id.* at § 7. The Bill will not come to a vote in this session because of the successful filibuster led by opponents to it. Arizona Daily Star, Sept. 16, 1982, § A1, col. 1. See also proposed S.J. Res., 97th Cong., 1st Sess. intro. (Sept. 21, 1981), resolving to amend the Constitution so as *not* to protect a "right to abortion."

21. 410 U.S. 113 (1973).

22. *Id.* at 162-63.

of the special restraints on pregnant teenagers appear to be explicable ultimately only by reference to this special state interest in fetal life.[23] Isolation and clarification of the presence of this element in the teenage abortion cases is essential so that it can be either accepted as a restraint applicable to any pregnant woman or discarded as a restraint not uniquely applicable to pregnant teenagers.

THE INTERESTS IN CONFLICT

In the abortion context, because of the constitutional stature of the interest in choosing abortion,[24] resolution of the problems set out above must take into account the nature of the constitutional rights of teenage claimants and the nature of the interests poised against them. As in other areas,[25] the Supreme Court has made clear that women who are not legally adults *do* have constitutionally protected interests in the abortion decision. Thus, in its first teenage abortion opinion, the Court stated 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."[26] This language certainly indicates that children, like adults, can claim constitutional protection against some state action. Nevertheless, it leaves open the answers to several essential questions. Does it merely mean that some girls below the "state-defined age of majority" are actually adults in terms of their physical, intellectual, and emotional maturity and thus have the same rights as adult women? Or does it mean, as seems likely, that all children have constitutional rights? And if all children have constitutional rights against state action, are those rights the same as the rights of adults? And if they are the same, may the state nevertheless place restrictions on the rights of children that it could not place on adults?

The United States Supreme Court has in fact declared that the state has legitimate interests in restricting the right of a young girl to obtain an abortion that may result in her not being so free as an adult woman in her decision to abort.[27] The Court has said that the legitimacy of such special restrictions depends on the presence of "any significant state interest . . . not present in the case of an adult."[28] When one of these significant interests is present, then perhaps indeed "the constitutional rights of children cannot be equated with those of adults."[29] Nevertheless, as Justice Powell seemed to theorize in his 1979 opinion in *Bellotti v. Baird (Bellotti II)*, only the presence of one or more of the special state interests justifies re-

23. *See infra* notes 258-78, 368-69 and accompanying text.
24. Roe v. Wade, 410 U.S. 113, 153 (1973).
25. *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (first amendment in school context); *In re* Gault, 387 U.S. 1 (1967) (procedural due process in juvenile delinquency cases).
26. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976).
27. *See Bellotti II*, 443 U.S. 622, 633-39, 642-43 (1979). See also Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) in which the Court said that "the State has somewhat broader authority to regulate activities of children than of adults." *Id.* at 74.
28. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75 (1976).
29. *Bellotti II*, 443 U.S. 622, 634 (1979).

straining children's liberty more than that of adults.[30] These interests, as will be discussed at length later, basically have to do with the state's *parens patriae* interest in the protection of children who are as yet unable to protect themselves and the state's police power interest in making sure that its young citizens develop into productive adults.[31]

This notion of a requirement of a special interest not present in the case of an adult could lead to a conclusion that the teenage abortion cases should involve a search for one of those special interests and, in its absence, should be resolved without regard to the woman's status as a minor or as an adult. However, one problem with the most recent Supreme Court opinions in the teenage abortion cases is that they may be read as establishing a different kind of constitutional right for teenagers who have neither been defined by the state as adults nor have been able to convince a court that they are, despite their technical status as minors, emotionally and intellectually mature enough to be treated as adults for purposes of the abortion decision.[32] If this approach is indeed the one that the Court will follow, then even when the state cannot demonstrate that its special interests in children are in fact served by a restrictive statute, a pregnant teenager who cannot establish her maturity may only be able to demand judicial protection of those peculiar child-centered constitutional rights. For instance, Justice Powell's plurality opinion in *Bellotti II*[33] may have, despite his theorizing, provided only a constitutional right to be decided for well when the claimant is an immature minor, not a constitutional right to be treated like any other woman for purposes of the abortion decision in the absence of special state interests in children.[34] More seriously, even the "right to be decided for well" may offer little protection to a teenager

30. *Id.*

31. *Id.* at 634-39; *see infra* notes 39-49 and accompanying text.

32. *See* H.L. v. Matheson, 450 U.S. 398 (1981); *Bellotti II*, 443 U.S. 622 (1979). For a more complete discussion of the issues raised by an immature minor's decision to seek an abortion, see *infra* notes 195-288 and accompanying text.

33. 443 U.S. 622 (1979).

34. This is basically the point made by Professor Garvey in Garvey I and Garvey II, *supra* note 12. I believe that ultimately this notion of having good decisions made for one is what underlies Professor Garvey's analysis of the constitutional protections claimable by children and other incompetents.

Whether the protection consists of leaving the decisionmaking to the child because it will aid in developing his adult faculties, Garvey I, *supra* note 12, at 1768-78, or to his parents because they, rather than the state, are most likely to make a choice in his best interests and he has a protectible interest in that choice, *id.* at 1778-85, someone other than the child is going to be the ultimate decisionmaker, and the child's claim is only to the right decisionmaker, not to individual autonomy. A decision by state or parent or judge that children get to make some choices for themselves because the exercise of such choices will aid in their development leaves, as Professor Garvey notes, the door open to much state interference with individual liberty without any requirement that such interference is itself closely related to state interests in the protection and development of children. As a matter of fact, Professor Garvey does not appear to consider the exercise of individual choice whether or not to bear a child as one of that small group of instrumental freedoms that children can claim as against the state (and their parents?). Rather, he recognizes the claim of the mature minor to an individualized determination of her maturity as essential in the abortion situation and puts the minor determined mature into the adult category. *Id.* at 1765-67. Then, Professor Garvey states his disagreement with Justice Powell's implication in *Bellotti II* that even an immature child is entitled to a best interest review by a judge prior to any parental involvement because of the conflict between that kind of review and his notion that an immature child's constitutional claim is to a choice made by those closest to her, her parents.

because of the manner in which it can be manipulated in order to further family decisions rather than decisions by a neutral third party.[35]

Whether or not the constitutional rights of children are different in kind from those of adults, the teenage abortion cases have emphasized the arbitrariness of state definitions of adulthood. For instance, Justice Blackmun, in *Planned Parenthood of Central Missouri v. Danforth*,[36] referred to the "state defined age of majority." In *Bellotti II*, Justice Powell focused on the constitutional requirement of an opportunity for an individual determination of the maturity in fact of a pregnant teenager.[37] It appears that the Court has been concerned with making sure that a particular young woman is indeed appropriately subject to the restraints of childhood.

In the teenage abortion cases, as in other situations in which children demand autonomy, the interests of parents in their children must be considered along with both the state interests in the protection and development of children and the child's interests in deciding independently or in being decided for well. In *Danforth*, Justice Blackmun declared that "[a]ny *independent* interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."[38]

The term "independent interest" used in *Danforth* may refer only to the interest a parent has in what happens to his child as it affects the parent's own religious or moral views and his interest in imposing those views on his child's activities.[39] The term may also refer to the parent's independent interest in his child's decisions as they affect the child's own emotional and physical well-being.[40] Parents are interested in their chil-

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Id. at 1783-85 n.130. Professor Garvey's *result* is not so different from the *result* reached by commentators like Goldstein, Freud, & Solnit in GFS I, *supra* note 17, and GFS II, *supra* note 11.

The problem is that by viewing the immature child as having no constitutional interest in autonomy unless someone (his parent? the state? the Supreme Court?) has decided that a particular exercise of autonomy would aid in his development, Professor Garvey has made it quite easy for the state (and the parents) to forego even consideration of the child's choices. Lack of such consideration may cause no problem when the child is an infant or even preadolescent. It may cause a serious problem when the child is in the midst of adolescence and in the anomalous position of being half-child and half-adult. Maybe she will not exhibit enough adult traits to be considered mature enough to make the abortion decision, but it may be equally inappropriate to place all decisionmaking about her in the hands of her parents. Preferable would be an analysis that leaves decisionmaking to the "family"—the dynamics of the family. The state's power would not be involved "either to enforce parental authority or to weaken it." Karst, *supra* note 17, at 643. *See also* H.L. v. Matheson, 450 U.S. 398, 425-54 (1981) (Marshall, J., dissenting).

35. *See infra* notes 235-57 and accompanying text.

36. 428 U.S. 52 (1976). *See supra* text accompanying note 26.

37. 443 U.S. 622, 643-51 (1979).

38. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75 (1976) (emphasis added).

39. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

40. For many centuries, given the child's very existence as essentially the result of his parent's choice and given his dependence on his parents as caretakers, the law treated him as legally subordinate in all ways to his parents' will and as dependent on their good will for his care. 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 446-54, *reprinted in* R. MNOOKIN, *supra* note 14, at 157-62; Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 181-82 (1916). Parents were and are seen as having a right—even a constitutional right—to the control and custody of their children. Stanley v. Illinois, 405 U.S. 645 (1971); Meyer v. Nebraska,

dren's decisions both because those decisions may reflect on and affect parents personally and because those decisions may affect the child's own life. From time to time, both of these aspects of a parent's interest in his children have been recognized by the Court as worthy of constitutional protection.[41] Furthermore, the relatively slight weight given to the parent's interest in *Danforth* may only apply when it is in conflict with the right to privacy of a competent and mature minor. Given the distinction made in the later cases between the individual interests of mature and immature

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262 U.S. 390 (1923); H. CLARK, *supra* note 19, at § 17.5; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 902-05, 985-90 (1978). Cases like *Meyer* and Pierce v. Society of Sisters, 268 U.S. 510 (1925) depend heavily on this notion of an independent parental right of control of children for their rationale. *Meyer* and *Pierce* are always cited in modern privacy cases as early examples of the constitutional protection to be given to the family. What they protect is the right of parents to be with and to control their children in the face of state attempts to control children. And underlying these cases is the recognition of the necessity that *someone* must take care of children and the belief that parents are the natural and best persons to perform that function. H. CLARK, *supra* note 19, at § 17.5.

More recently, the law has had to come to grips with our society's growing unease with such absolute parental power. Prince v. Massachusetts, 321 U.S. 158 (1944); H. CLARK, *supra* note 19, at § 6.2; Foster & Freed, *A Bill of Rights for Children, reprinted in* THE YOUNGEST MINORITY I 318 (Katz ed. 1974); Pound, *supra* (development of parent's moral duty to support into a legally enforceable obligation to support); Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487 (1973). This development should not be confused with the development, to be discussed at length in the text, of a concern with children as autonomous individuals, as exemplified in such opinions as Justice Douglas' dissent in Wisconsin v. Yoder, 406 U.S. 205, 241-49 (1972).

Meyer and *Pierce* also represent an attempt to reconcile the continuing notion of parental control with this sense of unease. Thus, parents have the "*right*, coupled with the high *duty*, to prepare their children for additional obligations." Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). The notion of children as incapable beings dependent on others for the necessities of life has evolved into the notion of children as helpless creatures who *should* be cared for. *See generally* Foster & Freed, *supra*; Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB. 226 (Summer 1975); Pound, *supra*; Rodham, *supra*. This concept of children as creatures who should be cared for has led to two important legal developments. One is the grounding of the parental right of control in the parental duty to care for the child. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); H. CLARK, *supra* note 19, at § 17.2; *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1198-1242, 1351-58 (1980) [hereinafter *Developments*]. As *Developments* points out, the parent's right to control and custody of his child is a unique one in that it does involve power over another human being. *Id.* at 1352-53. This mix of rights and duties reflects that unique quality. *Id.* at 1353-54. The other development is the notion of the state's own interest in child protection and child development, an interest so strong that it oftentimes justifies state displacement of parental control of the child—for the child's own sake. This is the notion of the state's *parens patriae* power to protect children, as reflected in state dependency and neglect laws. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 8-201, -241 (1981). It is also reflected in the compulsory education and child labor laws at issue in cases like *Meyer*, *Yoder*, and *Prince*. But it also includes the notion of the state's interest in the development of children into useful citizens, an interest not really attributable to an interest in the protection of children *per se*, but more closely related to a police power interest in the citizenry. *See generally Developments*, *supra*, at 1198-1242.

Recent judicial and scholarly commentary on the legal relationships between children and their families has most often focused on this notion of the obligation of parents (and/or the state) to care for the child. *See generally* Foster & Freed, *supra*; *Developments*, *supra*, at 1198-1242. Some commentators seem to have turned the state's obligation of care into a kind of enforceable constitutional right of the child and, as pointed out above, portions of the Court's most recent opinions in the teenage abortion cases can be read to support this approach. *See generally* Garvey I & Garvey II, *supra* note 12. Others have placed the importance of parental (whether biological or otherwise) care so high in terms of a child's needs that they would make state intrusion into an ongoing parent/child relationship nearly impossible. *See generally* GFS I, *supra* note 17; GFS II, *supra* note 11.

41. *See supra* note 40.

minors,[42] the parent's independent interest may thus have more weight as against the individual interest of an immature and incompetent girl.[43]

Aside from any independent parental interest, the Court has recognized that the state itself has an interest in parental involvement in the abortion decisions of minors.[44] In fact, the "importance of the parental role in childrearing" is one of the special state justifications for restraint of the liberty of children that Justice Powell set out in *Bellotti II*.[45] Justice Powell made clear that this state interest in parental decisionmaking[46] justifies state restraints only because and only when reinforcement of parental authority furthers the state's more general interests in the protection and development of children.[47] Thus, "[t]he state protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors."[48] Because the teenage abortion cases have arisen in the context of challenges to state statutes mandating parental involvement in the abortion decisions of young girls, the parent's independent interest has theoretically not been at issue. Various Justices, however, have tended to rely on the traditional protection given to a parent's interest in his child as support for the state's attempts in the parental consent/notification statutes to reinforce the parent/child relationship against the will of the child.[49]

Resolution of the problems set out in the preceding section and accommodation of the interests set out above have been the task of the Court in the teenage abortion cases. How the Court has set about that task is the subject of the next three sections.

THE INITIAL CASES

The first teenage abortion case to reach the United States Supreme Court was *Planned Parenthood of Central Missouri v. Danforth*.[50] In *Danforth*, the Court, in an opinion by Justice Blackmun, decided that a Missouri statute which imposed a flat parental consent requirement on the abortion decision of any unmarried pregnant woman under the age of eighteen impermissibly infringed on "the right of privacy of the competent

42. *See infra* notes 58-60, 67-77, 196-202, 206-17 and accompanying text.
43. *Id.*
44. H.L. v. Matheson, 450 U.S. 398, 409-11 (1981); *Bellotti II*, 443 U.S. 622, 637-39 (1979).
45. *Bellotti II*, 443 U.S. at 634.
46. The statute at issue in the *Bellotti* cases required parental consent to the abortion of an unmarried woman below the age of 18. *Id.* at 625-26, *quoting* MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1977). The same requirement in Missouri law was struck down in *Danforth*, 428 U.S. 52, 74 (1976), *quoting* 1974 Mo. Laws § 3(4). The Massachusetts statute, however, provided an exception for "good cause shown," language that Justice Blackmun in *Bellotti I* found could be interpreted so as to avoid the unconstitutionality of a flat parental consent requirement. 428 U.S. 132, 144-51 (1976). See *infra* notes 129-34, 289-303 and accompanying text for a discussion of Utah's "mere notice" requirement. *See also* statutes cited *supra* notes 2 & 3.
47. *Bellotti II*, 443 U.S. 622, 637-39 (1979).
48. *Id.* at 637.
49. *See* H.L. v. Matheson, 450 U.S. 398, 410 (1981). This reliance on the parent's individual interest in a situation involving a child's claim against a *state's* intrusion on his interests reached its height in Parham v. J.R., 442 U.S. 584, 601-05 (1979). *See* Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329.
50. 428 U.S. 52 (1976).

minor mature enough to have become pregnant."[51] Justice Blackmun was careful to point out that the decision did not stand for the proposition that *any* girl under the age of eighteen was capable of giving "effective consent" to an abortion.[52] In fact, in the 1976 *Bellotti v. Baird (Bellotti I)*[53] case, decided the same day, the Court refused to rule on the constitutionality of a Massachusetts statute which mandated parental consent to the abortions of minors because the statute also provided an exception "for good cause."[54] The Court remanded the case because the Massachusetts courts had had no opportunity to construe the "good cause" provision.[55] After *Danforth* and *Bellotti I*, it was clear that parental consent statutes applicable across the board to all unmarried pregnant minors were not constitutional. It was also clear that action by the state to involve parents in the abortion decisions of at least some minors would be constitutional. Certainly, the very condition of being pregnant made arbitrary line drawing by age between the status of child and the status of adult constitutionally inappropriate. However, the condition of being pregnant in and of itself did not automatically confer adult status for purposes of making a completely independent decision to terminate a pregnancy.[56] Further, as noted above, as to "competent" minors, at least, the state could not rely on the "independent" interests of parents as a justification for the consent statute.[57]

Justice Stewart, concurring in *Danforth*, gave a hint of things to come. He stated that in most circumstances the state, by means of legislation, could "encourage" a pregnant unwed minor to seek her parents' "help and advice" in the abortion decision.[58] In such a statute, the state would have to provide a way for the girl to establish that she is indeed mature enough to act independently of her parents and to give an informed consent for her own abortion without "parental concurrence"; *or* a procedure for judicial resolution of a dispute between her and her parents, if she is not mature enough to decide independently; *or* a means for her, even though she is immature, to convince a judge that abortion without parental involvement is in her "best interest."[59] In *Bellotti I*, Justice Blackmun noted that the Massachusetts "good cause" language *could* be construed to provide for at least two possible exceptions to the parental consent requirement: (1) one for the "mature" minor capable of giving consent; and (2) one for the "immature" minor incapable of giving an informed consent but for whom abortion would be in her "best interest."[60]

After *Danforth* and *Bellotti I*, therefore, it was clear only that in the abortion context states would have to make an accommodation for the

51. *Id.* at 75.
52. *Id.*
53. 428 U.S. 132 (1976).
54. *Id.* at 146-51.
55. *Id.* at 148.
56. Danforth v. Planned Parenthood of Central Missouri, 428 U.S. 52, 75 (1976); *Bellotti I*, 428 U.S. 132, 147 (1976).
57. *Danforth*, 428 U.S. at 75.
58. *Id.* at 91.
59. *Id.*
60. *Bellotti I*, 428 U.S. 132, 143-45 (1976).

constitutional interests of teenagers. Thus, a state interest in the "safeguarding of the family unit" was not adequate to justify a statute requiring parental consent to the abortions of all teenagers,[61] but that same state interest might be adequate to justify other, more carefully confined, restraints.[62] Further, while a state interest in reinforcing "parental author-

61. Danforth v. Planned Parenthood of Central Missouri, 428 U.S. 52, 75 (1976).

62. *Id.* at 91 (Stewart, J., concurring); *see infra* notes 195-217, 243-57 and accompanying text. Because all of the Supreme Court cases dealing with restrictions on the abortion rights of minors have involved state statutes mandating parental involvement in the abortion decision, understanding the nature of this kind of restraint is of special importance in these cases. The special attention paid to the parental role in these cases represents yet another aspect of the law's attempt to deal with our society's constantly changing concept of that unique association we call the family, the proper role of individuals within the family, and the proper role of the state in its dealings with the family. State action in family matters may at the same time infringe upon the associational interests of the family as a unit and upon the autonomous decisionmaking of individual family members, as when the state forbids the use of contraceptives by married couples. *See generally* Karst, *supra* note 17, 639-47.

In Griswold v. Connecticut, 381 U.S. 479 (1965), the individual decisions of the husband and wife not to become parents coincided with their joint decision as a couple not to become parents. That *Griswold* protected the individual interest in choosing not to become a parent as well as the associational interests of a married couple was made clear in Eisenstadt v. Baird, 405 U.S. 438 (1972), in which 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." 405 U.S. at 453 (*dicta*) (equal protection case). The state may also promote the individual interests of one family member at the expense of the associational interests of the rest of the family, as when the state allows the dissolution of a marriage at the instance of only one spouse. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 25-312, -316 (1973) (only substantive requirement for dissolution is a finding of irretrievable breakdown of the marriage; denial of irretrievable breakdown by one spouse results only in delay, not denial of petition; "irretrievable breakdown" means that there is "no reasonable prospect of reconciliation"); *see generally* C. FOOTE, R. LEVY, & F. SANDER, CASES AND MATERIALS ON FAMILY LAW ch. 8 (1976). When what are perceived as the interests of "the family" come into irreconcilable conflict with individual interests, it is all too often the state that determines which interests will prevail.

Many, if not most, of the constitutional challenges to such state action have been made under the rubric of the same "right to privacy" that was declared in *Roe* to be the source of a woman's right to choose to terminate her pregnancy. Professor Karst has drawn from the opinions resolving these conflicts the elements of a "freedom of intimate association" that includes the individual's freedom to choose to associate in a family-like way with any other person or persons, to be protected as a member of the resulting intimate association against state interference with it, and to choose as an individual to dissociate himself from that particular association, either for purposes of one particular decision or permanently. Karst, *supra* note 17, at 637-47. This concept of a "freedom of intimate association," whether or not it extends to individuals within associations beyond traditional heterosexual relationships or beyond traditional parent/child relationships, *Id.* at 682-92, goes far to explain some seeming contradictions in the procreative choice cases.

The decision in *Roe* itself can be viewed as the vindication of a woman's independent interest in choosing not to become associated in a parent/child relationship. Karst, *supra* note 17, at 640-42. But some of the later abortion cases have demonstrated a conflict that may be present in any of the procreational choice cases: the coexistence and conflict of the different intimate association interests present in the relationship between a man and a woman and in the relationship between a parent and a child. When couples decide within the intimacy of their relationship to become or not to become parents, all of these intimate association interests coincide. Thus, the couple in *Griswold* were united in their associational interest to decide jointly not to become the parents of a child. The state confronted an array of united interests. And, given the importance of the freedom of intimate association, it was not difficult to protect the association against the state's interference. But in the abortion cases involving state interference that enforces either a joint decision by both potential parents or an independent decision by the pregnant woman herself, the problem is more complex because the interests do not coincide. State imposition of a spousal consent requirement on the abortions of married women involves both state coercive intrusion into a marital relationship and state imposition of another person's acquiescence on a *woman's* decision not to bear a child. Because Professor Karst's resolution of the problem of interspousal conflict is for the state to remain aloof, Karst, *supra* note 17, at 639, and because he places so much weight on a

ity" was not adequate to justify such a statute,[63] that same interest might justify a state restraint short of flat parental veto power or a state restraint giving parents veto power over the abortions of "incompetent" minors.[64] Finally, the "independent interest" of a parent in his daughter's abortion was declared to be no stronger than the interest of a "competent" minor in choosing abortion,[65] but a parental interest in the well-being of his child might have more weight—at least if the minor seeking abortion is "incompetent," rather than "competent."[66] *Danforth* and *Bellotti I*, then, can be viewed as the Court's announcement that in the teenage abortion context, there are conflicting, legitimate interests that must be accommodated. The cases cannot be viewed as an authoritative resolution of the conflict.

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woman's interest in deciding not to bear a child, *id.* at 641, the state's interests in promoting joint decisionmaking by spouses and in protecting a husband's interest in being a parent receive little consideration in his analysis of the conflicts present in situations involving abortion choices by married women. And indeed, Justice Blackmun's treatment of the spousal consent statute in *Danforth*, 428 U.S. 52, 67-72 (1976), is easily reconcilable with Professor Karst's notions.

State attempts to restrict the procreative choices of minors by interjecting parental involvement into them are analogous to state attempts to interject spousal involvement into the procreative decisions of married women, but state restrictions on such girls differ in ways that have been declared to be of constitutional significance by the Supreme Court. The differences result from distinctions in the intimate association interests of the two groups of women. The unwed pregnant teenager, like any other pregnant woman seeking abortion, has an independent interest in carrying out her choice *not* to become associated with a child in a parent/child relationship. This interest has been declared to be of constitutional stature by the Court. *See, e.g.*, *Danforth*, 428 U.S. 52 (1976). Her interest may conflict with the intimate association interests of the putative father of the fetus in making a joint decision with her or in becoming the father of a child. But most importantly and most significantly, the unwed pregnant minor seeking abortion has interests which may conflict with the intimate association interests of her parents in being involved with *her* and her decisions, Karst, *supra* note 17, at 642-47, and with the state's interest in reinforcing her association with her family.

The unwed pregnant teenager seeking abortion is interested in not entering into a parent/child relationship with her unborn child and in dissociating herself from the parent/child relationship she has with her own parents in order to make that decision. Her parents are interested in remaining associated with her for purposes of that decision and perhaps are interested in that decision for family reasons other than their interest in her. Just as the principles of the freedom of intimate association call for state nonintervention into similar conflicts within the marital relationship, so do they support state nonintervention into these parent/child conflicts. H.L. v. Matheson, 450 U.S. 398, 448 (1981) (dissenting opinion) (Justice Marshall's comment that state intervention to coerce parental involvement actually invades the privacy of the family); Burt, *supra* note 49, at 353-95 (advocating state intervention for the purpose of moderating the dispute, rather than resolving it); Karst, *supra* note 17, at 643.

The problem is, as Professor Karst points out, that notions of parental control of children are much more pervasive today than notions of husbands' control of their wives. *Karst, supra* note 17, at 642. The state's intrusion into the family—either to confer capacity on a child who would not otherwise yet have it or to extend the incapacity of a child who could otherwise act independently—does affect the traditional workings of the family. However, unless state law or constitutional law has already mandated release of a child from some of the traditional broad legal disabilities attaching to the status of childhood, the normal result of leaving the family alone would be subordination of the minor's individual interests in dissociating herself from her parents. It is the presence of some other affirmative act by a legislature or court undoing some of the traditional rules maintaining such subordination that provides the occasion for using the principle that families ought to be left alone in support of an argument for greater freedom for minors.

63. Danforth v. Planned Parenthood of Central Missouri, 428 U.S. 52, 75 (1976).

64. *See supra* note 62.

65. Danforth v. Planned Parenthood of Central Missouri, 428 U.S. 52, 75 (1976). Although the parent's interest is described as "no more weighty than" the interest of the minor, rather than "less weighty," the minor's interest prevails over the parent's interest in this context. *Id.*

66. *See supra* notes 40 & 62.

The Massachusetts statute, complete with a definitive state judicial construction of the meaning of its "good cause" exception, came before the Court again in *Bellotti II*. Justice Stevens, writing for himself and three other justices, merely declared the statute, as construed by the Massachusetts Supreme Judicial Court, to be unconstitutional because it provided for a judicial "best interests" review of the abortion decision of a minor *who had been found capable of making an informed decision and of giving effective consent to terminate her pregnancy*.[67] Justice Powell, announcing the judgment of the Court and writing an opinion joined by only three other justices, reached the same conclusion as to the impermissible effect of the Massachusetts statute on the liberty interests of capable teenagers. He went on to propose a hypothetical statute that would accommodate both the interests of mature teenagers and the interests of minors not found mature enough to make an independent abortion decision.[68]

Justice Powell identified three special justifications for state restraint of the liberty of children: their "peculiar vulnerability; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing."[69] Despite these state interests in children, Justice Powell pointed out that the abortion decision is one that cannot be delayed and that the effects of making or not making it will inevitably be serious and irreversible.[70] He noted also that the generally acceptable arbitrary age divisions between childhood and adulthood are not acceptable in situations involving the abortion decision because of the very brief period of time in which the decision can be made and because of its serious consequences. These situations require provision for an individual determination of maturity.[71] The teenage girl who has already displayed the physical, emotional, and intellectual maturity necessary to conceive a child and to decide to terminate the resulting pregnancy regardless of her parents' wishes and without consultation with them just cannot be readily identified as an incompetent and vulnerable child without a closer look at her *actual* level of maturity.[72] The administrative convenience of drawing arbitrary age lines may be justified for most activities when the only harm to the individual is delay.[73] Making a pregnant girl wait to carry out her abortion decision, however, will effectively eliminate any opportunity to choose termination at all.[74] The harm is not a matter

67. *Bellotti II*, 443 U.S. 622, 653-56 (1979) (Stevens, J., concurring) (emphasis added).

68. *Id.* at 639-51. Justice Powell used the terms "mature" and "immature" throughout his opinion, rather than "competent" and "incompetent." As I will discuss later, I believe Justice Powell's notion of "maturity" encompasses more than competence to consent. *See infra* notes 88-119 and accompanying text.

69. 443 U.S. at 634.

70. *Id.* at 642-43.

71. *Id.* at 643 n.23. "[T]he peculiar nature of the abortion decision requires the opportunity for case by case evaluations of the maturity of pregnant minors." *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 642-43. It may be constitutionally permissible for a state to prevent all persons under the age of sixteen from driving cars, because of the state's interest in keeping immature children off the highways and because *delay* is the only effect on the interests of those fourteen-

of delayed liberty, but of canceled liberty. These girls must be given the opportunity to establish their maturity and, once maturity is established, to make the decision to abort without any parental consultation or consent.[75]

Justice Powell's requirement of an individual maturity determination and his declaration that girls found mature must be allowed to make independent abortion decisions were responsive to some of the problems of the teenage abortion cases. The fact of pregnancy undercuts a conclusive statutory presumption that all girls under a certain age are still incompetent children.[76] A requirement of an individual determination of maturity lessens the possibility that the decision of an in-fact mature woman will be subordinated to someone else's review. Justice Powell's careful limitation of his requirements to the abortion context[77] was reflective of his awareness of the timing problems inherent in the abortion decision. Once she is declared mature, a pregnant teenager's right to choose abortion prevails over any state or parental interests in her *as a child*. But given the careful limitation of this right as belonging only to girls who are mature enough to give "effective" consent to their abortions, closer attention must be paid to this notion of "maturity."

Before further discussion of "mature" teenagers capable of giving "effective consent" to abortions, it is important to note that the mere fact of a girl's minority does allow the state to place at least one very important restriction on her. The state may constitutionally presume the inability of any unwed pregnant minor to give an effective consent to an abortion. The state, however, just may not make that presumption conclusive. Neither *Danforth* nor the *Bellotti* opinions established the principle that the state may never require parental consultation—or even consent—for the abortion of any minor girl. They merely established the principle that the state may not preclude a pregnant teenager from demonstrating that, as to her, parental involvement in her decision is inappropriate because

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year-olds who in fact have the skills and judgment necessary for driving. In two years, they, along with all other sixteen-year olds, will be able to drive. Further, not being able to drive for a couple of years does not appear to carry with it irrevocable, life-altering consequences, while driving too soon may have serious consequences for the driver and for those who have to share the highways with him. In contrast, the abortion decision is incapable of postponement, as Justice Powell pointed out in *Bellotti II*. It must be made within a very short period of time or not at all. Furthermore, the personal consequences of *not* making the decision are irrevocable and life-altering for the pregnant girl and for the child who will perforce be born. The social consequences of *not* making the decision potentially may be extremely serious as well. If the decision to abort is made and effectuated, the potential negative consequences may be as severe, although the literature appears to support the conclusion that the probability of negative consequences of early abortion is less than the probability of negative consequences of early motherhood. *See* authorities cited *supra* note 10. The negative social consequence that does certainly result from teenage abortion is fetal death—the irreversible subordination of the state's interest in preserving fetal life. The difficulty with the abortion decision, then, is that no matter how or whether it is made, there will be serious consequences for some individual and for society. This conclusion is true even if the consequences to the girl's parents are eliminated from consideration. And postponement of the decision is impossible.

75. 443 U.S. at 643-44, 650.

76. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75 (1976) (referring to the interests of the "competent minor mature enough to have become pregnant"); *see* Bennett, *supra* note 2, at 325-26; Goldstein, *supra* note 11, at 661-64.

77. *Bellotti II*, 443 U.S. 622, 642-44, 643 n.23 (1979).

she is not in fact a child.[78] Thus, it was apparent, after *Bellotti II*, that the state's interest in assuring parental involvement in the abortion decisions of immature girls was strong enough to justify a limitation on the rights of mature girls that consisted of requiring them to come forward affirmatively to establish to a court why they should not be subject to a state's parental consultation or consent statute.[79]

Nevertheless, after *Bellotti II*, if an unwed pregnant minor is able to convince a judge that she is mature enough to give effective consent to an abortion, it appears that a state may not require her to involve her parents in the decision to terminate. *Bellotti II* established the further rule that a state also may not subordinate her decision to a state judge's determination of her best interests.[80] Thus, for a girl who falls into this category of mi-

78. As Justice Powell points out, the difficulty of determining "maturity" makes this procedure a problematic one for both the girl who is trying to prove maturity and the judge who has to determine it. *Id.* at 643 n.23. *See also* Goldstein, *supra* note 11, at 662-64. Professor Goldstein, recognizing this problem, would advocate *either* a flat parental consent requirement *or* reliance on an objective factor—for example, the fact of pregnancy itself—as emancipating a teenager for purposes of making the abortion decision. *See also* IJA/ABA, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO RIGHTS OF MINORS, Standard 4.8 & commentary (Approved Draft 1980) [hereinafter RIGHTS OF MINORS]. The problem is that as soon as legal capacity to act independently depends on some state official's determination of such an amorphous state as maturity, the door is open to all kinds of capricious decisions. See *infra* notes 219-34 and accompanying text for a discussion of similar difficulties with the "best interests" determination that is required for immature girls. The Court, seemingly unwilling to go one way or the other, has opted for imposing the inherently difficult task of determining individual maturity on some state official, apparently because of its unwillingness to let slip by the independent decisions of pregnant girls who are not in fact mature.

79. *See supra* note 78. It would certainly be simpler if the law could continue to treat all children as subjects of parental and state concern while ignoring how action resulting from that concern results in interference with any individual constitutional interests of children; and traditionally little attention has been paid to such interests. *See supra* note 40. However, *In re* Gault, 387 U.S. 1 (1967), laid to rest any lingering idea that children do not possess fourteenth amendment liberties of their own. *Id.* at 41, 55. The opinions in the teenage abortion cases also have recognized the existence of an independent constitutional interest belonging to teenagers, tempered though it may be by state and/or parental interests. *See supra* notes 24-27 and accompanying text. This recognition seems to reflect a growing awareness of the impossibility of accurately drawing a line between the incapacities of childhood and the capacities of adulthood, and a corresponding awareness that some of the "children" who are the involuntary recipients of the state's or their parents' concern actually have the capacity to make and bear the brunt of their own decisions. Nowhere is this awareness more apparent than in the teenage abortion cases because the anomalous situation of the pregnant teenager belies the validity of any assumption that the girl seeking autonomy is so incapable of adult behavior that her individual interests can be ignored. As noted above, she has an interest in making the abortion decision free from interference—in Karst's terms, an interest in deciding independently to dissociate herself from the potential parent/child relationship between her and the unborn child and an interest in dissociating herself from her own parents for purposes of making the decisions. Karst, *supra* note 17; *see supra* note 62. If she is in fact an adult, regardless of her chronological age, then the urgency of these decisions requires an immediate recognition of her maturity.

Nevertheless, she may still need protection and time to develop. The associational interests of her parents in deciding for her may still have validity. Even more, the state's interests in a *good* decision for her may still justify interference with her autonomous decisionmaking. Whatever decision is made for her cannot simply focus on her relationship with her own parents. It must also accommodate the fact of her potential association with her unborn child. Reliance on traditional notions of the child/parent association, as in *Meyer* or *Pierce*, does not lead to a satisfactory resolution of what to do about a child who will become a parent herself without the interjection of an immediate decision. This child will then be charged with the "high duty" of care for her own child. This child will then be the parent to whom the state will defer because of the presumption that she can best protect and prepare her own child. *See supra* note 62.

80. *See Bellotti II*, 443 U.S. 622, 649-51 (Powell, J.), 653-56 (Stevens, J., concurring) (1979).

nors, parental or state determinations of her best interests may not constitutionally interfere with her abortion decision. Justice Powell, in his *Bellotti II* opinion, seems to have placed her interests on a constitutional plane very close to that occupied by the privacy interests of an adult woman seeking an abortion. The justifications for state action and limitations on state action are not, as in the case of an immature minor, to be measured by some kind of best interest standard. The right of the mature minor is not to be decided for well, but rather to be free to decide independently.

After *Bellotti II*, the mature girl's right to privacy—her right to choose both not to be associated with a child as its parent *and* not to be associated with *her* parents in that choice—at the least extends to the right to make the decision without her parents' consent, without even consulting them, and without a judge's concurrence that abortion is good for her.[81] Justice Stevens had dissented from the *Danforth* opinion and could not approve Justice Powell's formulation of a permissible statute in *Bellotti II*. Nevertheless, he agreed that the Massachusetts statute at issue in *Bellotti II* must be struck down under *Danforth* principles because its effect was that "no minor in Massachusetts, no matter how mature and capable of informed decisionmaking, may receive an abortion without the consent of either both her parents or a superior court judge."[82] For the *Bellotti II* situation, at least, we have the prospect, for mature and informed minors, of individual autonomy in the abortion decision—once the task of establishing maturity to the satisfaction of a judge has been accomplished.[83]

Ultimately, the abortion decision may be one that is left to individual women because its social and personal implications are so complex as to be incapable of resolution by anyone but the particular woman involved.[84] The Court's opinions in *Danforth* and the *Bellotti* cases reflect this sense of the propriety of leaving such a decision to the individual. The requirement of a maturity determination for girls who request it is certainly an attempt to assure that the decision will be left to a woman whose only difference from other pregnant women is her age. On the other hand, *Danforth* and the *Bellotti* cases reflect the Court's equal concern with not leaving the abortion decision to girls whose only similarity to adult pregnant

81. *But see* Baird v. Attorney General, 371 Mass. 741, 360 N.E.2d 288 (1977). The Massachusetts Supreme Court found that a judge could override the decision of a mature and competent minor to seek an abortion if the judge found it was in her best interests to do so. *Id.* at 293. In *Bellotti II*, Justice Powell found, however, that this interpretation made the statute unconstitutional in that it permitted "judicial disregard of the abortion decision of a minor who has been determined to be mature and fully competent to assess the implications of the choice she has made." 443 U.S. at 650.

82. 443 U.S. at 653-54 (Stevens, J., concurring).

83. *Id.* at 651 (Powell, J), 653-54 (Stevens, J., concurring). But note the possible distinction between parental consent statutes and parental notification statutes. *See infra* notes 289-303 and accompanying text.

84. This notion appears to be the basis for Professor Tribe's support of the *Roe* decision, at least as of the writing of his hornbook. L. TRIBE, *supra* note 40, at 933. There is plainly no other situation involving a conflict between two such basic principles—the liberty of the woman to choose not to bear a child and the life, whether potential or actual, of the unborn fetus—which similarly precludes any accommodation between the principles, *Cf.* Ares, Book Review, 18 ARIZ. L. REV. 482, 484-87 (1976).

women is the fact of their pregnancy.[85] If the use of age *per se* is not an acceptable distinguishing factor, and the use of pregnancy *per se* is not appropriate, how is a girl supposed to establish that she is mature enough to be treated like an adult woman for purposes of making the abortion decision? Justice Powell did not really give us much help here. He did state that a girl must be allowed to show that she is "mature *and well-informed enough to make intelligently* the abortion decision on her own."[86] He also noted that a minor who is free from state restrictions is one who has established her maturity and her competence "to assess the implications of the choice she has made."[87] I would assume, given Justice Powell's elaborate presentation of the state interests in protecting ignorant and vulnerable children,[88] that the information implicit in a state of being "well-informed" and "competent" would include the girl's knowledge of the possible consequences of abortion and an appreciation of their probable effect on her.

Nevertheless, we still are in the quandary of determining what maturity is and what being well-informed is. We know that the consequences of the abortion decision are many and varied and that the consequences for any one girl depend on her particular characteristics. If the standard "well-informed" and "fully competent to assess the consequences" requires judicial determination of the consequences in any one situation, then the problems with a maturity determination may be very similar to those inherent in a "best interest" determination.[89] Determination of the actual consequences, however, does not appear to be part of the decision-maker's task in a maturity determination. Rather, a judge faced with making such a determination must decide, not the consequences themselves, but the girl's ability to recognize and appreciate the consequences. The judge must judge the standards that she will use to make her own decision.[90]

The few commentators who have addressed this problem of determining maturity have advocated objective standards.[91] They tend to conclude that if she is pregnant, she is mature enough to make her own abortion decision.[92] The difficulty of determining maturity is also reflected in stat-

85. *Bellotti II*, 443 U.S. 622, 633-39, 640, 643-44 (1979) (only necessarily independent minor is girl found mature); *Bellotti I*, 428 U.S. 132, 145 (1976) (parental consultation and consent requirement may be valid, so long as exception provided for "good cause," including maturity and best interests in "good cause"); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75 (1976) (opinion "does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy").

86. *Bellotti II*, 443 U.S. at 647, 643 (emphasis added).

87. *Id.* at 650.

88. *Id.* at 634-37.

89. *See* Mnookin, *supra* note 40. See also *infra* notes 218-32 and accompanying text for a discussion of the indeterminacy of a "best interest" standard.

90. *See supra* note 78. The maturity determination itself may involve the judge in the perilous task of deciding whether the girl is "wise" enough to make the decision on her own. *But see* Wald, *Children's Rights: A Framework for Analysis*, 12 U.C.D. L. REV. 255, 270-81 (1979) (proposing search for objective standards) [hereinafter Wald III].

91. *See* GFS II, *supra* note 11, at 126-29; Goldstein, *supra* note 11, at 661-64; Wald III, *supra* note 90, at 270-81.

92. *See supra* note 78.

utes providing that if a child is pregnant, has venereal disease, or has a drug problem, she may make most medical treatment decisions independently.[93] Commentators and legislators appear to have advocated or provided for self-consent as much because of their concern that some pregnant girls, regardless of their level of maturity, would not seek medical treatment at all if they had to involve their parents or some state official as because of their belief that pregnancy *per se* is sufficient evidence of maturity.[94] It is probably this concern that lies behind the statutes that many states have passed allowing pregnant minors to consent to any treatment associated with their pregnancies.[95] Such statutes change the general common law requirement of parental consent to medical treatment of any minor.[96] The statutes at issue in the *Bellotti* cases[97] and *H.L. v. Matheson*[98] were *exceptions* to liberalizing consent law.[99] Obviously, the legislatures did not equate pregnancy with actual maturity, and the Court has been careful in all of the teenage abortion cases to make clear that pregnancy *per se* does not establish maturity or competence for purposes of making the abortion decision.[100] Further, the Court has also not focused at all on

93. *See, e.g.*, ALASKA STAT. § 09.65.100 (Supp. 1980) (permits minor to consent to medical care related to pregnancy and venereal disease); COLO. REV. STAT. §§ 13-22-102 (minor may consent to medical care related to birth control) & 13-22-105 (1980) (minors may consent to drug therapy); MONT. REV. CODE ANN. § 41-1-402(C) (1981) (minor may consent to medical care for pregnancy, venereal disease or substance abuse). The Montana statute requires any physician treating a self consenting minor under § 41-1-402(C) to provide the minor with counseling. *See* Pilpel, *Minors' Rights to Medical Care*, 36 ALB. L. REV. 462 (1972).

94. Bennett, *supra* note 2, at 325; Katz, Schroeder & Sidman, *supra* note 19, at 238; RIGHTS OF MINORS, *supra* note 78, Standard 4.8 & commentary.

95. *See, e.g.*, statutes cited *supra* note 93; Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115, 122 (1973).

96. *See generally* Bennett, *supra* note 2; Goldstein, *supra* note 11; Wadlington, *supra* note 95.

97. MASS. GEN. LAWS ANN. ch. 112, §§ 12F (1975) (any minor may consent to her medical care if she is pregnant; abortion excepted) & 12S (1977) (provision for parental consent to minor's abortion; exception for "good cause"). This statute has been amended to reflect the *Bellotti II* holding. MASS. GEN. LAWS ANN. ch. 112, § 12S (1980).

98. UTAH CODE ANN. §§ 78-14-5(4)(f) (1977) (woman of any age can consent to medical care related to pregnancy) & 76-7-0304(2) (1978) (physician performing abortion on minor shall notify her parents).

99. *See supra* notes 97 & 98. *But see* CAL. CIV. CODE § 34.5 (West 1982) (statute providing for minor's consent to medical and surgical care related to treatment *or prevention* of pregnancy); Ballard v. Andersen, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971) (statute interpreted to extend to consent to abortion); CAL. WELF. & INST. CODE § 16145 (West 1980) (legislative policy to facilitate for minors "effective freedom of choice between an abortion and carrying pregnancy to term").

100. *See supra* notes 51-60, 78-85 and accompanying text. As both Wadlington, *supra* note 95, at 120-22, and Bennett, *supra* note 2, at 288-94, point out, the statutes and decisional law empowering minors to consent to various medical treatment procedures may take one of two courses. They may flatly lower the age of consent for certain procedures, or they may empower minors to consent under certain specific circumstances such as pregnancy, drug addiction, and venereal disease. On the other hand, they may empower minors to consent only upon a determination by a physician, judge, or some other state officer that the minor is capable of giving an informed consent. As Professor Bennett implies, the second approach involves a case-by-case determination of maturity or competence or whatever term is used. Bennett, *supra* note 2, at 289-90, 325. As Professor Goldstein points out, this "mature minor" approach involves an intensely subjective determination of a particular girl's "wisdom." Goldstein, *supra* note 11, at 662-63. That is why he prefers the use of some objective criterion like pregnancy as an indicator of sufficient maturity to consent to all pregnancy-related health care, including abortion. The Court has clearly not followed this approach. Furthermore, as shall be discussed later, the Court has, at least for parental notification purposes, apparently moved away from the "mature minor" approach of trying to determine the "wisdom" of a particular girl. Instead, the Court has moved closer to an approach

the need to assure that pregnant minors seek treatment as the *sine qua non* of the "best interests" of immature pregnant girls.[101]

Other authorities have proposed or established standards that would base capacity to consent to abortion on a finding that a girl (or a woman) knows and understands the medical consequences of her decision.[102]

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in which "maturity," for purposes of being free from parental notification requirements, is more like traditional emancipation in that the standard "places more emphasis on acts of release of the child by his parents and the child's actual independence than on the child's judgment or appearance of maturity." Bennett, *supra* note 2, at 291; *see infra* notes 150-94 and accompanying text.

So here are the possibilities: (1) A commentator, legislature or court may decide that pregnancy *per se* is enough of an indication of actual maturity that pregnant teenagers should be partially emancipated for purposes of consent to any medical care associated with their pregnancies, including abortion. Goldstein, *supra* note 11. (2) A commentator, legislature or court may conclude that pregnancy is enough of an indication of maturity that someone, whether a doctor, court, or welfare official, should look into the girl's level of maturity *in the sense of reviewing her judgment or competence*. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). (3) A commentator, legislature or court may conclude that pregnancy is enough of an indication of maturity that someone should look into the girl's status in the sense of reviewing her competence *and her level of independence*. *Bellotti II*, 443 U.S. 622 (1979) (Powell, J.). (4) A commentator, legislature, or court may conclude that pregnancy is enough of an indication of adult status that someone should look into the girl's status in the sense of reviewing her level of independence. H.L. v. Matheson, 450 U.S. 398 (1981) (at least as to parental notification requirement). (5) The importance of treatment is so great that a girl should be allowed to consent independently to any treatment associated with her pregnancy, without regard to her actual "maturity" because the need for treatment prevails over any other consideration. RIGHTS OF MINORS, *supra* note 78, Standard 4.8 & commentary). (6) The potential emotional and physical trauma associated with pregnancy is so great that parents should be involved in all decisions related to it. Bennett, *supra* note 2, at 324-25 (Professor Bennett implies parental involvement for younger pregnant minors and suggests the possibility of autonomy for older ones).

Any particular statute or decisional rule or proposal is not readily pegged as resulting from adherence to any single one of these possibilities. For example, one cannot confidently assert that a statute empowering pregnant minors to consent independently to all treatment associated with pregnancy, except for abortion, is solely based on a legislative conclusion that pregnant teenagers choosing delivery are somehow so mature and/or in such special need of treatment—*as contrasted to teenagers choosing abortion*—that their parents need not be involved in their decisions, either for consent purposes or merely for notification purposes. *But see* H.L. v. Matheson, 450 U.S. 398, 412 (1981) (medical decisions associated with delivery do not involve such serious consequences as those associated with abortion). On the other hand, the California legislature, along with a liberal abortion statute, has also declared by statute that "pregnancy among unmarried persons under 21 years of age constitutes an increasing social problem" and that "in order to have effective freedom of choice between an abortion and carrying pregnancy to term, the assistance of the state in addition to medical service is required." CAL. WELF. & INST. CODE § 16145 (West 1980).

101. *See, e.g.*, H.L. v. Matheson, 450 U.S. 398, 411-12 (Burger, C.J.), 415-20 (Powell, J., concurring) (1981); *Bellotti II*, 443 U.S. 622, 642-43, 648 (1979).

102. See, e.g., UTAH CODE ANN. § 76-7305 (1974) which requires a doctor to make sure that the consent given by any woman is an informed consent. Application of such a statute to a pregnant minor would supposedly entail a doctor's judgment as to her capacity to make an informed consent. See also Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), in which the Court struck down a parental consent statute because it infringed on the rights of *competent* teenagers, but made clear that not *all* teenagers could consent. *See* Wald III, *supra* note 90, at 273-81; *cf.* Pilpel & Zuckerman, *Abortion and the Rights of Minors*, 23 CASE W. RES. L. REV. 779, 807-09 (1972).

Informed consent as a legal concept can be dated from Judge Cardozo's opinion in Schelendorf v. Society of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914). It has become of major importance as a concept in medical malpractice law since the 1950's beginning with Salgo v. Leland Standford Jr. Univ., 54 Cal. App. 2d 560, 312 P.2d 170 (1957). Generally in order for there to be informed consent to a medical procedure a doctor must: (1) inform the patient of alternative treatments; (2) inform the patient of reasonably foreseeable risks of each alternative; and (3) inform the patient of the risks of refusing any treatment at all. Holt v. Nelson, 11 Wash. App. 230, 234-35, 523 P.2d 211, 215-16 (1974). For further discussion of this rather complex legal-medical concept, see Meisel, *The "Exceptions" to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decision Making*, 79 WIS. L. REV. 413 (1979).

These authorities appear to be concerned with establishing some kind of standard for a determination of maturity for purposes only of making the abortion decision or other medical decisions. Their proposals are not, by any means, standards for a determination of "emancipation," for that term implies adult status for all purposes.[103] In other contexts, such rules set out by the legislature or established by case law have come to be referred to as "mature minor" rules.[104] Thus, by decisional law in Massachusetts, the mature minor rule "calls for an analysis of the nature of the operation, its likely benefit, and the capacity of the particular minor to understand fully what the medical procedure involves . . . ."[105] In Massachusetts, at least, it is the doctor who makes this determination.[106]

Danforth and *Bellotti I*, and even *Bellotti II*, could be read as the Court's endorsement of a kind of mature minor rule as the constitutional standard for the abortion decisions of minors. In *Danforth*, Justice Blackmun referred to the *competent* minor capable of giving an *effective* consent to an abortion.[107] In *Bellotti I*, he referred to the possible application of the Massachusetts mature minor rule.[108] In *Bellotti II*, Justice Powell noted the Massachusetts Supreme Judicial Court's treatment of the common law mature minor rule as having been superseded by the statutory requirement of parental consent to the abortions of minors.[109] Given the Massachusetts court's construction of the parental consent statute as *not* providing an exception for mature minors under the common law rule,[110] *Bellotti II*'s rejection of that construction could also be read as an endorsement of the standard inherent in the mature minor rule to be applied by a judge in a maturity determination. If that were the case, then presumably a girl could establish her maturity by demonstrating the fact of her pregnancy and by convincing a court that she had sufficient information and capacity to understand "fully what the medical procedure involves."[111]

Such a reading of *Bellotti II* does not follow, however, upon closer analysis of the opinion. For one thing, Justice Powell's hypothetical statute established a procedure whereby a girl could show that she is "mature enough *and* well enough informed" to make her own abortion decision.[112]

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103. A standard that uses an emancipation approach to consent to medical treatment focuses on the actual independence of the minor, rather than on her judgment. Bennett, *supra* note 2, at 289-91; Pilpel & Zuckerman, *supra* note 102, at 781-82; RIGHTS OF MINORS, *supra* note 78, at Standard 4.4 & commentary and Standard 4.6 & commentary. Also, as shall be discussed later, emancipation seems to be the actual focus of the *H.L.* decision, at least as to notification statutes. *See infra* notes 150-94 and accompanying text.

104. *See* MISS. CODE ANN. § 41-41-3(h) (1966); R. MNOOKIN, *supra* note 14, at 376; Bennett, *supra* note 2, at 289; Pilpel, *supra* note 93, at 466; Pilpel & Zuckerman, *supra* note 102, at 782-83; Wadlington, *supra* note 95, at 117-20; RIGHTS OF MINORS, *supra* note 78, at Standard 4.6 & commentary.

105. *Bellotti II*, 443 U.S. 622, 646-47 n.27 (1979), *quoting* Baird v. Attorney General, 371 Mass. 741, 752, 360 N.E.2d 288, 295 (1977).

106. *Id.*

107. *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75 (1976).

108. *See Bellotti I*, 428 U.S. 132, 144 (1976).

109. *See Bellotti II*, 443 U.S. 622, 646-47 n.27 (1979); *see also* Baird v. Attorney General, 371 Mass. 741, 752-55, 360 N.E.2d 288, 296-97 (1977).

110. *See* cases cited *supra* note 109.

111. 443 U.S. at 646-47 n.27.

112. *Id.* at 643, 647, 651 (emphasis added).

This conjunctive use of maturity and information implies that maturity as a constitutional standard requires more than information. And if it meant only the ability to understand the information acquired, why not say so? I believe that the concept of "maturity" for constitutional purposes is better comprehended by reference to the legitimate reasons Justice Powell listed for the state's (and the Court's) greater restraint of children's liberty. To be sure, he referred to children's lack of capacity for informed decision-making.[113] Proof of such capacity by means of a mature minor rule would certainly appear to eliminate one of the special state justifications for restraint of children's liberty. Justice Powell, however, also talked about the state's (and the Court's) concern with the vulnerability of children in terms of their inability to bear the consequences of their decisions.[114] A girl may be able to demonstrate that she knows the possible consequences of abortion and that she understands them, but she may still not be able to bear the consequences of an independent decision. As a constitutional limitation on the power of the state to interfere with the abortion decisions of minors, the maturity exception may be limited to situations where a girl can show that she is capable both of understanding the consequences of her abortion decision and of bearing them.

After *Bellotti II*, then, it was certainly clear that a state could not provide for review of the abortion decision of a mature girl by either her parents or some state official.[115] This rule would prevail even when the review was directed at a determination of the girl's best interests.[116] Justice Powell's opinion further gave us the rule that states could not conclusively presume the immaturity of girls under a certain age for purposes of restricting *abortion* decisions, and would have to give such girls an opportunity to establish their maturity.[117] Neither Justice Powell nor Justice Stevens let us know what "maturity," for constitutional purposes, is. Pregnancy alone clearly was not the determinant.[118] Knowledge and understanding of the procedure and consequences of abortion were implicitly not the sole determinant.[119] The lack of any guidance as to the substantive standard for a maturity determination left the way open for a great deal of state court discretion. It was clear that a state must provide the opportunity for a pregnant teenager to demonstrate that in fact she is mature enough to be treated like any other pregnant woman for purposes of making the abortion decision, but there were no standards to use in that determination.

In *H.L. v. Matheson*,[120] the Supreme Court's latest pronouncement on teenage abortion, not one of the opinions established any standard for de-

113. *Id.* at 634, 635-37.
114. *Id.* at 634-35.
115. *Id.* at 651 (Powell, J.), 655-56 (Stevens, J., concurring).
116. *Id.* at 649-50 (Powell, J.). The Massachusetts' court's construction of the statute so as to allow for best interests review of the abortion decisions of girls found capable of informed decisions, of course, was a major factor in the opinions of Justices Powell and Stevens. *Id.* at 653 (Powell, J.), 655-56 (Stevens, J., concurring).
117. *Id.* at 643-44, 651.
118. *See supra* notes 67-85 and accompanying text.
119. *See supra* notes 112-15 and accompanying text.
120. 450 U.S. 398 (1981).

termining maturity. The opinions making up the majority avoided the problem by finding that the plaintiff had no standing to raise the interests of an in-fact mature minor.[121] Justice Stevens distinguished between the effect of a parental notification statute like Utah's and the consent statutes at issue in *Danforth* and the *Bellotti* cases.[122] Justice Marshall, in dissent, focused on the effect of the statute on any teenager, regardless of her level of maturity.[123]

In *H.L.*, the Court focused on the abortion request of an actual pregnant teenager. The plaintiff was a fifteen-year-old unmarried girl who was in the first trimester of her pregnancy when she sought an abortion and when she filed her complaint.[124] She was living at home and dependent on her parents for support and therefore was not an emancipated minor in the sense of being independent of her parents.[125] She had obtained medical advice from a doctor and had received counseling from a social worker before making the decision to abort her pregnancy.[126] The doctor concluded that abortion would be in her "best medical interest."[127] The social worker, according to the plaintiff, agreed that she should proceed with the abortion without consulting her parents.[128]

In Utah, the state where the plaintiff sought her abortion, several statutes apply to the abortion decisions of unmarried women under the age of eighteen. One statute provides that any woman, regardless of her age, may consent to "any health care not prohibited by law" having to do with "her pregnancy or childbirth."[129] The opinions of the Utah Supreme Court and of the United States Supreme Court proceeded on the basis that this power to consent to pregnancy-related health care extends to surgical terminations of pregnancies.[130] In the abortion context, however, Utah statutes require that any woman's consent to the procedure must be "voluntary and informed" as well as in writing.[131] "Voluntary and informed" means that, in addition to the traditional indicia of informed consent, the physician has given certain additional information to the woman seeking an abortion.[132] Further, Utah requires that a physician, when exercising his "best medical judgment" whether or not to terminate the pregnancy of a woman who has made such an informed, voluntary, and written consent, must "[c]onsider all factors relevant to [her] well-being . . . including but not limited to . . .

121. *Id.* at 405-07 (Burger, C.J.), 414-18 (Powell, J., concurring).
122. *Id.* at 421-25 (Stevens, J., concurring).
123. *Id.* at 425-54 (Marshall, J., dissenting).
124. *Id.* at 400-01.
125. *Id.* at 400. *See generally* H. CLARK, *supra* note 19, at § 8.3; Katz, Schroeder & Sidman, *supra* note 19; *see* authority cited *supra* note 103.
126. 450 U.S. at 400-01.
127. *Id.* at 400.
128. *Id.* at 401.
129. UTAH CODE ANN. § 78-14-5(4)(f) (1977).
130. *See* 450 U.S. at 445-46 (Marshall, J., dissenting); H.L. v. Matheson, 604 P.2d 907, 912-13 (Utah 1979); *Amicus Curiae* Brief for the Coalition for the Medical Rights of Women, Chinatown—North Beach Family Planning Services, Inc., and Juvenile Law Section of the National Legal Aid and Defender Association, in support of Appellants at 25; *Amicus Curiae* Brief for the Americans United for Life, in support of Appellees at 8-10.
131. UTAH CODE ANN. § 76-7-305(1) (1978).
132. *Id.* § 76-7-305(2).

[h]er physical, emotional and psychological health and safety, . . . her age, . . . [and] her familial situation."[133] Finally, Utah statutes require that a physician, "in order to exercise his best medical judgment," shall "notify, if possible, the parents" of the woman if she is under eighteen.[134]

It was this last requirement that proved to be an insurmountable obstacle to the plaintiff in *H.L.* Because of the statute, her physician, while concluding that abortion would be in her best medical interest, refused to perform the abortion without notifying her parents.[135] The plaintiff then initiated the state court action that culminated in the United States Supreme Court's opinion in *H.L.*[136] In so doing, she claimed to represent not only herself but also "a class consisting of unmarried 'minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies but may not do so because of their physicians' insistence on complying with section 76-7-304(2).' "[137] The trial court found that the plaintiff was a proper person to represent the named class and found that the notice statute was not unconstitutional under applicable United States Supreme Court opinions.[138] The Utah Supreme Court did not disturb the trial court's certification of the class.[139]

In an opinion by Chief Justice Burger, the United States Supreme Court held that the plaintiff had standing to challenge the constitutionality of the statute only as it affects a girl who is "living with and dependent upon her parents, . . . not emancipated by marriage or otherwise, and . . . has made no claim or showing as to her maturity or as to her relations with her parents."[140] H.L. was the only witness at the trial court's hearing on her challenge and declined to elaborate on her reasons for not wanting to notify her parents of her abortion.[141] Her attorney insisted that her desire for an abortion without any parental involvement and her doctor's medical approval precluded any state barriers to her request for an abortion.[142] Because, according to Chief Justice Burger, H.L. neither alleged nor offered any evidence that she or any member of her class was mature, emancipated, or in need of any special treatment, she was an inappropriate person to challenge the constitutionality of the statute as it might affect the interests of young women who were mature, emancipated, or in need of special treatment.[143]

Justice Powell, joined by Justice Stewart, concurred in the Chief Justice's analysis on the explicit understanding that it did not apply to girls who were mature or whose best interests would not be served by parental notice.[144] He stated that H.L. "did not claim to be mature, and made no

133. *Id.* § 76-7-304(1).
134. *Id.* § 76-7-304(2).
135. H.L. v. Matheson, 450 U.S. 398, 400 (1981).
136. *Id.* at 401.
137. *Id.*
138. *Id.* at 404.
139. *Id.* at 404 n.10.
140. *Id.* at 407.
141. *Id.* at 401-04.
142. *Id.* at 403-04.
143. *Id.* at 406.
144. *Id.* at 414.

allegations with respect to her relationship with her parents."[145] For Justice Powell, then, the Utah notice statute would be treated very much like the Massachusetts consent statute at issue in the *Bellotti* cases. If a person were an appropriate plaintiff to represent the interests of a mature minor or of a minor whose interests required non-notification, then application of the notice statute to that teenager might not withstand constitutional attack. Justice Powell stated flatly that the rationale of his plurality opinion in *Bellotti II* would require that a procedure must be provided in which a pregnant minor could try to convince a neutral decisionmaker that she is either mature enough to make the abortion decision without the parental involvement implicated by notice or that her best interests would not be served by such notice.[146]

Justice Marshall, in a dissenting opinion joined by Justices Brennan and Blackmun, took issue with Chief Justice Burger's standing analysis.[147] He felt that the plaintiff adequately represented *all* minor women in Utah seeking abortion who object to the parental notice requirement—either because she adequately alleged her own interests or because the lower courts allowed her to litigate the claims of others regardless of her own status.[148] Justice Marshall then proceeded to an analysis of the constitutionality of the Utah statute as applied across-the-board to any pregnant minor.[149]

Because the Chief Justice and Justice Powell were careful to limit their opinions in *H.L.* to situations in which the interests of girls claiming maturity were not at issue, the case can be viewed as having little significance for the development of the standards to be used in a maturity determination. After all, another plaintiff in another case would surely not make the same strategic errors in pleading and proof. Nevertheless, the opinions do not bode well for the further development of that aspect of the earlier teenage abortion cases that seemed to carve out a special constitutional niche for the abortion decisions of pregnant minors who concededly are not completely emancipated, yet who are mature enough to make an independent abortion decision.

Perhaps the problem is merely that, as Justice Marshall opined, the Chief Justice and Justice Powell failed to conform to the methods developed in analogous standing cases in their analysis of H.L.'s standing.[150] Justice Marshall disagreed with that analysis in terms of earlier cases having to do with the adequacy of class representation[151] and in terms of H.L.'s own allegations as to her interests.[152] The focus of disagreement between Justice Marshall and the Chief Justice as to the second point was whether H.L. made a sufficient showing or allegation that her *best interest would not be served by parental notification*.[153] When Justice Marshall dis-

145. *Id.* at 415.
146. *Id.* at 420.
147. *Id.* at 426-33.
148. *Id.* at 429-30, 431-33.
149. *Id.* at 434-54.
150. *Id.* at 428-30.
151. *Id.* at 431-33.
152. *Id.* at 429-30.
153. *Id.*

cussed H.L.'s own status, then, he apparently did not dissent from the Chief Justice's view that H.L. had made no allegation or showing of her own *maturity*.[154] When the Chief Justice did discuss H.L.'s standing to represent the claims of mature pregnant teenagers on the basis of her own maturity, he emphasized that she was in fact not emancipated and that she neither alleged nor proffered evidence of her maturity.[155] Justice Powell emphasized the failure of H.L. to allege maturity in her complaint and to enlarge upon those allegations at the evidentiary hearing.[156]

H.L. did, however, either claim or make a showing that she understood the medical procedure.[157] She also either claimed or made a showing that she had, without any parental involvement whatsoever, gone through the intricate process mandated by Utah statutes to obtain the medical judgment of a doctor that abortion was appropriate for her,[158] had sought out counseling from a social worker who concurred in her abortion decision,[159] had sought out legal advice,[160] had proceeded with a legal action in order to avoid notifying her parents,[161] and had been able to engage in all of this activity without turning to her parents for either financial or emotional assistance.[162] None of these facts was enough to establish H.L.'s standing to challenge the statute as a mature minor. It is true that the Chief Justice and Justice Powell stopped short of equating maturity, for constitutional purposes, with emancipation.[163] It is also true that they did distinguish between a claim that notification would not be in a girl's best interests and a claim that the statute unconstitutionally infringed upon the right to privacy of a mature minor.[164] Nevertheless, the failure even to consider the facts alleged by H.L. as relevant to her maturity for constitutional purposes is a strong indication that the maturity exception to state parental involvement statutes is an extremely narrow one.

It is certainly true that in most circumstances a teenager's attempts to act independently of her family meet with legitimate state-created barriers.[165] As Justice Powell pointed out in *Bellotti II*, arbitrary age lines may

154. Justice Marshall did refer to H.L.'s allegation that she "understands what is involved in her decision." *Id.* at 429.

155. *Id.* at 405-06.

156. *Id.* at 414-17.

157. *See id.* at 415, *quoting* from the Complaint para. 6.

158. *Id.* at 400. Justice Powell noted that the physician might accede to a demand for abortion without conforming to his statutory burden to exercise his best medical judgment. *Id.* at 420 n.8.

159. *Id.* at 400-01.

160. *See id.* at 401.

161. This conclusion derives from the fact of her having brought suit to avoid application of the statute.

162. This conclusion is an inference from her unwillingness to be subjected to the parental notification statute.

163. H.L. v. Matheson, 450 U.S. 398, 407 (Burger, C.J.), 414 (Powell, J., concurring).

164. *Id.* Chief Justice Burger focused on H.L.'s failure to answer questions about her "reasons" for seeking an abortion. *Id.* at 402-03. That failure, however, seems irrelevant to a determination of "maturity" if maturity requires only a determination of capacity and ability to bear the consequences. *See supra* notes 89-90 and accompanying text. Justice Powell focused on the same failure. 450 U.S. at 414-18. Justice Marshall pointed out that the trial judge's basis for sustaining H.L.'s counsel's objections to questions about H.L.'s reasons for an abortion was the judge's own ruling that the statute would apply *regardless of her reasons for objecting to it*. *Id.* at 430 n.7.

165. *See supra* notes 67-77 and accompanying text.

be drawn by the state for most activities because most persons under the specified age are still incapable of independent decisionmaking and because the only harm to the particular person is delay of liberty.[166] But Justice Powell made that point in the process of declaring that the abortion decision is different, that there can be no delay of it, that it must be made at once or never, and that a pregnant teenager must be given the opportunity to demonstrate that she is in fact mature for purposes of making an independent decision not to become associated with a child as its parent.[167] If H.L.'s attempt to dissociate from her parents failed merely because she neglected formally to allege or put into evidence *as proof of maturity* the very facts of her situation that were actually before the Court, then Chief Justice Burger's and Justice Powell's opinions were insensitive. If, on the other hand, those opinions stand for the proposition that the characteristics that were in fact before the court in *H.L.* are not enough, if proven, to establish maturity to make an independent abortion decision, then it seems unlikely that any teenager who is not in fact emancipated—or at least not living at home—will ever manage to demonstrate her maturity.[168]

It is difficult to reconcile this narrow constitutional standard for maturity determinations with the concerns expressed in *Danforth* and the *Bellotti* cases. Those cases seemed to reflect an uneasiness with statutes that treat a pregnant woman like an incompetent and vulnerable child just because she happens not to have attained the age set for achievement of adult status.[169] That uneasiness seemed to focus on the unique nature of the abortion situation with its timing problems and with the perceived seriousness of the consequences of a decision either to abort the pregnancy or to allow it to proceed to term.[170] The constitutional protection for the independent abortion decisions of mature girls established by those cases was limited to the abortion decision itself, but this protection, limited though it might be, did seem to extend to girls who would not be able to satisfy the criteria for a common law declaration of emancipation for all purposes.[171] Even though the cases explicitly rejected pregnancy as conclusive evidence of maturity,[172] and even though they implicitly rejected knowledge and understanding of the consequences as conclusive evidence of maturity,[173] they still seemed to afford constitutional protection to the independent decisions of some girls who are not emancipated.[174]

166. *See* 443 U.S. 642, 643 n.23 (1979).

167. *Id. See supra* notes 67-77 and accompanying text.

168. It may be that Chief Justice Burger and Justice Powell confused the elements of a maturity determination with those of a best interests determination. A maturity determination, even when it is not based on some external circumstance like the bare fact of pregnancy, is a determination of a girl's understanding of the procedures and of their consequences, not of her "reasons" for wanting the abortion. Even if the maturity determination, as suggested at *supra* notes 112-15 and accompanying text, requires a determination that a girl can *bear* the consequences of her decision, proof would seem to require analysis of externals bearing on her ability to pay for the abortion, to seek counseling, and to provide for other such consequences of her decision.

169. *See supra* notes 50-85 and accompanying text.

170. *Id.*

171. *Id.*

172. *See supra* text accompanying note 100.

173. *See supra* notes 112-15 and accompanying text.

174. *See supra* notes 50-85 and accompanying text.

If my analysis of the implications of Justice Powell's *Bellotti II* opinion is correct,[175] an unemancipated minor ought to receive constitutional protection against state-enforced parental involvement in her abortion decision if she can demonstrate that she understands the consequences of the decision and is able to bear them. Determination of her capacity should not depend on a judge's evaluation of her subjective reasons for seeking to carry out her decision independently because such an evaluation veers too close to a consideration of her best interest,[176] a consideration distinct from a maturity determination.[177] The maturity determination should involve a search for objective factors that tend to indicate ability to understand and bear the consequences of the decision.

The characteristics that H.L. exhibited do evidence maturity in one sense. Maturity, in terms of capacity to consent to an abortion without parental consent, or perhaps even knowledge, has been addressed in recent scholarly articles on psychology and law.[178] For example, in an article by Thomas Grisso and Linda Vierling, the authors first defined "legal consent" as consent made knowingly, intelligently, and voluntarily, to be judged in terms of whether a person is "aware of the information relevant to the consent" and whether the person's consent is "something more than mere acquiescence."[179] After a review of various psychological studies, Grisso and Vierling concluded that the average adolescent is more likely than not to possess the intellectual capacity to understand the present and potential implications of medical treatment and therefore to be able to consent intelligently to such treatment.[180] According to Grisso and Vierling, minors above the age of fifteen more likely than not are able to consent voluntarily to medical treatment, in the sense of making an independent decision to undergo the treatment.[181] The time at which these capacities emerge in any one person varies of course, and, as in any adult group, there will always be a variety of capacities present. But Grisso and Vierling concluded overall that capacity to consent to treatment, in terms of intelligence and voluntariness, may be the norm, rather than the exception, in adolescents over the age of fifteen.[182]

H.L. was fifteen at the time she sought an abortion. Based on the conclusions of scholars like Grisso and Vierling, her age could be considered as evidence of her ability to understand the consequences of her abortion decision. But H.L. did not just establish her age and her pregnancy.

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175. *See supra* notes 67-119 and accompanying text.

176. *See supra* notes 89-90 and accompanying text. But see Chief Justice Burger's reference to the fact that the trial transcript shows that the state *unsuccessfully* argued that it should be allowed to inquire into the plaintiff's level of maturity. 450 U.S. at 406 n.13.

177. *See infra* notes 195-202 and accompanying text.

178. *See* Grisso & Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 PROF. PSYCHOLOGY 412 (1978); Waltz & Scheuneman, *Informed Consent to Therapy*, 64 NW. U.L. REV. 628-50 (1970).

179. Grisso & Vierling, *supra* note 178, at 415 (Grisso & Vierling draw upon Waltz & Scheuneman, *supra* note 178, in making this conclusion).

180. *Id.* at 420-21.

181. *Id.* at 423.

182. *Id.* at 424. *See also* Melton, *Children's Participation in Treatment Planning: Psychological and Legal Issues*, 12 PROF. PSYCHOLOGY 246 (1981).

She also stated that a doctor had agreed that abortion was in her best medical interest. In Utah, a physician is under a statutory obligation to consider a patient's age, family situation, and physical, psychological, and emotional health and safety when exercising his medical judgment to perform or not to perform an abortion.[183] He also is obliged to obtain a written, informed consent to abortion from his patient.[184] Surely the physician's determination that abortion was in H.L.'s medical interests is evidence that the physician, in the exercise of his medical judgment, had considered H.L.'s ability to understand the consequences of her decision. His presumed obtaining of H.L.'s written consent is further evidence that he had considered H.L.'s capacity to make a valid consent. His conclusion in favor of H.L.'s capacity can be added to H.L.'s age and condition of pregnancy as evidence of maturity.[185] H.L. also talked to a social worker who, according to H.L.'s testimony, agreed that it would be best for H.L. to proceed with her abortion without involving her parents. The mere fact that H.L. discussed her situation with a social worker is more evidence that she was acting maturely in making the decision not to involve her parents.

These facts do go toward establishing maturity more in terms of knowledge and understanding than in terms of ability to bear the consequences. H.L. apparently made no claim on her parents or the state for the cost of the abortion,[186] and that fact is some evidence of her ability to bear the financial consequences of her decision. Furthermore, the facts that H.L. discussed her situation with a doctor, a social worker, and her lawyer and that they all agreed with her decision are evidence that she considered her situation and the personal consequences of an abortion decision without parental involvement. On the other hand, none of these facts is conclusive evidence of her ability to bear the consequences of her decision. The difficulty is that unless this kind of evidence is acceptable for proof of ability to bear the consequences, maturity determinations will devolve into subjective judgments by some state official as to whether a particular girl can "take it."

I believe that this difficulty is reflected in the definite narrowing of the maturity exception in *H.L.* Perhaps a girl who does not live at home, even though she might not satisfy the criteria for complete emancipation, has taken on enough responsibility for her life that she may be presumed able to bear the consequences of an independent abortion decision. Short of that, unemancipated minors, no matter how intellectually capable of informed decisionmaking, may be presumed in need of state-imposed protection—at least when that protection takes the form of parental involvement.

This narrowing of the maturity exception, responsive though it may

183. UTAH CODE ANN. § 76-7-304(1) (1974) (noted by the Chief Justice in H.L. v. Matheson, 450 U.S. 398, 400 (1981), and Justice Marshall in his dissenting opinion, *id.* at 443).

184. UTAH CODE ANN. § 76-7-305(2) (1978).

185. Justice Powell seemed to imply that *some* physicians might not comply with the strictures of these statutes. H.L. v. Matheson, 450 U.S. 398, 420 n.8 (1981).

186. Chief Justice Burger noted that the question of liability of parents was not addressed in the record. 450 U.S. at 400 n.1.

be to the difficulties of proving individual maturity, is not at all responsive to the concerns expressed by various justices in the *Danforth* and *Bellotti* opinions.[187] Judicial solicitude for the constitutional interests of pregnant teenagers who are presumed to be children just because of their age appears to have given way to judicial solicitude for the problems of state officials required to make difficult determinations of maturity. In *Danforth*, the Court appeared to recognize the anomaly of the pregnant teenager who has irrefutable attributes of adulthood and who cannot be readily classified as a child.[188] After *Bellotti II* and *H.L.*, that recognition has devolved into a very narrow maturity exception that requires a girl to come forward with proof not only that she is capable of an informed decision, but also that she somehow can bear the consequences of her decision.[189] In light of H.L.'s situation, which did not come close enough to a maturity claim to allow her to raise the interests of mature girls, a girl who is still living at home may never be able to prove her ability to bear the consequences of a completely independent abortion decision.[190]

The first two problems with teenage pregnancy that I mentioned earlier[191] basically have to do with the mixture of childish and adult characteristics in a pregnant teenager and the danger that an erroneous determination of immaturity may result in the curtailment of the liberty of a girl who is actually a woman for purposes of this most serious of all personal decisions.[192] The Court's present approach to the possibility of finding that a pregnant teenager is in fact a woman seems to me to do almost nothing toward resolution of these problems.

Although the Court's approach certainly makes it unlikely that an immature teenager will erroneously be declared mature, it also makes it likely that once again a young woman who is condemned by her age to a state of dependence on others, even in a matter so serious as the decision whether or not to bear a child, will not have a meaningful opportunity to prove that her state of dependence is inappropriate. She will likely be precluded from showing that she is in fact as capable of making the decision as any other adult woman and is as able to carry out that decision and endure its consequences. Those state-defined dividing lines that *Danforth* denounced as arbitrary and those state presumptions of the value of paren-

187. *See supra* notes 50-77 and accompanying text. The point really is that the *H.L.* opinions come much closer to an emancipation standard. *See* Bennett, *supra* note 2, at 290-91. But mature minor rules and emancipation rules have always been different, the one focusing on capacity to consent and the other focusing on actual independence. *Id. See also* authority cited *supra* notes 19 & 103.

188. *See supra* notes 50-77 and accompanying text.

189. *See supra* notes 112-85 and accompanying text.

190. *Id.* I do not believe that complete independence, in the sense of not living at home, is necessarily the only way to establish lack of vulnerability. Even though a showing of such independence is closer to traditional emancipation standards, *see, e.g.*, Katz, Schroeder, & Sidman, *supra* note 19, at 216, it is possible to focus on the independence necessary to make and carry out the *abortion* decision only. After all, the very reason for requiring an individual maturity determination is not to determine maturity, whatever it is, for all purposes *but only for purposes of making the abortion decision*.

191. *See supra* notes 8-13 and accompanying text.

192. It is important to remember that the determination is of maturity *for purposes of making and carrying out the abortion decision only*. *See supra* note 190.

tal involvement that *Danforth* declared to be inappropriate for "competent" teenagers are once again the norm.[193] The judicial nod to the possibility of a finding of maturity is no barrier at all to drafters of restrictive legislation who are perceptive enough to recognize the great latitude that states have in establishing the standards to be applied in such a determination.[194]

THE IMMATURE MINOR

A minor who is in fact capable of an informed decision whether or not to bear a child may indeed find it impossible to escape the strictures of a parental involvement statute via a determination that she must be treated like any other adult woman for purposes of the abortion decision. Immature minors, however, also have a constitutionally protected interest in making an independent abortion decision.[195] This section is directed at the situation of the girl who cannot successfully establish her maturity, but who still wants to carry out her abortion decision without her parents' consent or even knowledge. *Danforth* and *Bellotti II* established that she has a constitutionally protected interest in deciding independently of her parents or the state to terminate her pregnancy.[196] However, *Danforth* also established that the state may restrict her independence if its restrictions serve "significant state interest[s] . . . that [are] not present in the case of an adult."[197] *Danforth* implied that a state requirement of parental involvement would be constitutionally permissible only if it did actually serve one of those special interests.[198] And in *Bellotti II*, Justice Powell declared that the valid state interest served by imposing parental involvement on the abortion decisions of teenagers is the parent's essential role in the protection and development of vulnerable and incompetent children, a role that furthers the state's own interest in the protection and development of its young citizens.[199]

The *Danforth* focus on a "significant state interest" and Justice Blackmun's perfunctory dismissal of Missouri's contention that its requirement of parental consent did in fact serve its interest in preserving families could have led to a method of review of such restraints that would have required a defending state to prove the existence of important state interests and a

193. *See supra* notes 50-66 and accompanying text.

194. For example, see the notification statute recently adopted by the Arizona legislature, ARIZ. REV. STAT. ANN. § 36-2152 (1982), which is discussed further at *infra* notes 364-69 and accompanying text. Also, recall that even though Justice Powell in *H.L.* and *Bellotti II* seemed to equate parental notification and consent statutes in terms of the requirements for individual maturity and best interests determinations, H.L. v. Matheson, 450 U.S. at 420; *Bellotti II*, 443 U.S. at 646-47, Justice Stevens carefully distinguished notification from consent, H.L. v. Matheson, 450 U.S. at 421-25; *Bellotti II*, 443 U.S. at 654 n.1, and Chief Justice Burger spoke in terms of "mere notice." *See infra* notes 289-303 and accompanying text.

195. *See supra* notes 24-37 and accompanying text.

196. *See Bellotti II*, 443 U.S. 622, 639-42 (1979); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74-75 (1976).

197. 428 U.S. at 75.

198. *Id. See* Carey v. Population Servs. Int'l, 431 U.S. 678 (plurality opinion) (focusing on the requirement of an actual relationship between the regulation and the state interest allegedly served by it).

199. 443 U.S. at 637-39.

more than conjectural relationship between those interests and a particular restraint being challenged.[200] However, it is critical to an understanding of this series of opinions to recall that *Danforth* was addressed to a statute that made no distinction between "competent" (mature) minors and "incompetent" (immature) minors. Justice Stewart's concurrence in *Danforth* and Justice Blackmun's opinion in *Bellotti I* gave ample warning that review of a statute that made such a distinction might be quite different.[201] When Justice Powell outlined his notion of an acceptable statute in *Bellotti II*, he carefully distinguished between mature and immature pregnant girls and equally carefully distinguished between the state restrictions that could be placed on them and the accommodations that a state must make to their interests. The immature pregnant minor need only be given the opportunity to establish that an abortion without the state-imposed burden of parental consent or consultation would be in her "best interests."[202]

By setting up the state's obligation in this way, Justice Powell implicitly did several things. First of all, the girl herself must come forward with evidence that it would be in her best interest *not* to be subjected to the state requirement of parental involvement. If she fails, the state's restraint will apply to her. Secondly, she need not be given an opportunity to show that the state's requirement of parental involvement does not *in fact* serve the state's significant interest in allowing parents to perform their function of protection and development. Rather, she must show that her own best interests would be better served otherwise.[203] When applied to an immature pregnant teenager, it appears that a state's parental involvement statute gets the benefit of a presumption of validity, at least in terms of its relationship to the state interest in furthering parental involvement with their children. Third, the abortion decision of an immature girl may always be subjected to someone else's review. If not her parents, then the judge will decide what is best for her. Her constitutional interest in choosing abortion is adequately protected by the assurance that any decision made for her will be a good one.

The significance of Justice Powell's opinion in *Bellotti II*, then, was not that it represented some kind of victory for the autonomy rights of children. The only real autonomy interest recognized in *Bellotti II* is the autonomy of a girl, *who is no longer a child for purposes of making the abortion decision*, to make her own decision whether or not to terminate her pregnancy.[204] All other unwed pregnant minors still must subject their decisions to someone else's review.[205] The constitutional significance of *Bellotti II* for all of these other girls is that it seems, at least in the abortion

200. *See supra* note 198.

201. Planned parenthood of Central Missouri v. Danforth, 428 U.S. 52, 90-91 (Stewart, J., concurring) (1976); *see Bellotti I*, 428 U.S. 132, 146-51 (1976).

202. *Bellotti II*, 443 U.S. 622, 643-44, 647-48, 651 (1979); *see supra* notes 50-66 and accompanying text.

203. 443 U.S. at 643-44, 647-48, 651. The immature teenager may show only her best interests, not that the regulation itself is not substantially or even actually related to the state's purposes. *See supra* note 198.

204. *See supra* notes 67-77 and accompanying text.

205. This is the effect of giving her only a best interest review.

context, to have elevated their claim for a decision in their "best interest" to the constitutional level.[206] Justice Powell declared that a state may *not* subordinate the abortion decision of an unwed pregnant minor *who is immature* to her parents' consent or even to their consultation unless she has an opportunity to establish before a judge that the abortion itself is in her best interest and/or that parental involvement in the decision would not be in her best interest. Justice Powell's opinion in *Bellotti II*, whether intentionally or not, does seem to support the theory that children have a constitutional claim to be protected and cared for well.[207]

Recognition of such a right in immature children follows naturally upon the development of a legal theory that focuses state interests in children on their protection and good development and bases parental rights in the custody and control of children on the parental function of protection and development of helpless and incapable children.[208] Indeed, writers for years have included a child's right to be cared for well—which surely encompasses the right to be decided for well—in catalogues of children's rights.[209] But traditionally, the call for protection of a child's interest in being taken care of well has arisen in the context of a conflict between parents and the state over control of a child who is presumed unable to decide or act independently.[210] Advocates use it either to justify

206. *See infra* note 209 and accompanying text.

207. *Id.* I believe this is Garvey's basic conclusion, although he would leave the decision to the parents.

208. *See supra* notes 40 & 62 and accompanying text.

209. *See, e.g.*, Foster & Freed, *supra* note 40. *See generally* Wald III, *supra* note 90, at 260-65. Professor Garvey's work is the most interesting in this area. *See* Garvey I & Garvey II, *supra* note 12; Garvey III, *supra* note 14. It is really Professor Garvey who first recognized this notion of an immature child's *constitutional* right to be decided for well. See, *e.g.*, Garvey II, *supra* note 12, at 790, where Professor Garvey said "the right of privacy, which before had only protected the individual's interest in *autonomous* decisionmaking has been extended to embrace the incompetent individual's interest in *having* decisions made in his own best interests." Professor Garvey, like other commentators, would leave the decision in most instances to the child's parents. *Id.* at 798-804. However, his unique contribution is that for those children for whom the state's presumption of immaturity is appropriate, Garvey I, *supra* note 12, at 1766, constitutional freedom, in the sense of "choice" of certain ways of behavior or expression or whatever, is of a different nature from the freedom of adults because of the child's status as an incompetent in terms of incapacity for free choice. *Id.* at 1757-62. The constitutional freedoms of children depend on the relationship between the particular freedom requested and the child's incapacity. If the freedom will "assist the [child's] development into a healthy adult capable of exercising choice in an unrestricted fashion," then it is to be protected for its instrumental value, rather than for any intrinsic value in it as freedom for freedom's sake. *Id.* at 1777. If the freedom to choose will not serve such instrumental values or if the attendant dangers outweigh those values, then the child's constitutional claim against the state ought to be for a choice in her interests by her parents—the "freedom to follow surrogate choices." *Id.* 1778-85. This is the area into which, in Garvey's view, the choice of abortion or delivery should fall—for the *immature* girl. *Id.* at 1782 n.121. In that footnote, Professor Garvey states his view that a constitutional claim to a *state* determination of a child's best interests in the abortion context is inappropriate because of the inability of the state to determine what those best interests are. *Id. Cf.* GFS I, *supra* note 17; GFS II, *supra* note 11; Mnookin, *supra* note 40; Wald III, *supra* note 90. In a subsequent footnote, Professor Garvey states that constitutional protection for a girl's interest in a state determination of her best interest—that is, Justice Powell's view in *Bellotti II*—actually interferes with her freedom to be chosen for by the adults closest to her. *Id.* at 1784-85 n.130. Only if a child does not have parents on whose surrogate choice her constitutional freedom can depend does the child's constitutional claim to a decision in her best interest become a claim to a *state* decision in her best interest. *Id.* at 1785-93.

210. For example, the distinction Professor Garvey makes between the child's interests in a surrogate choice by her parents and in a good choice by the state acting as *parens patriae*. Garvey

state intrusion into a family[211] or to dispute such intrusion.[212] Justice Powell mandated state consideration of a child's "best interest" as a constitutional requirement in the context of a child's claim *not* for someone else's consideration of her "best interest," but for the freedom to decide for herself what her "best interest" is.

Furthermore, consideration of a child's "best interest" satisfies her constitutional claim against a state statute mandating parental consent to or consultation in her abortion decision not only in situations in which parents and their children have come before the court for resolution of family conflicts, but also in situations in which a pregnant girl would successfully avoid all parental involvement but for the application of the state statute. Without state interference, her dissociation from her family would be the natural result of leaving the family to its own devices.[213] For those who advocate minimal state interference with the dynamics of intimate associations like families, a presumption that precisely such an interference is valid and the concomitant burden placed on a member of that association to prove that her already achieved dissociation is appropriate must surely be a peculiar vehicle for vindication of an interest in intimate association.[214]

Despite the limited opportunities available to an immature pregnant teenager challenging a state requirement of parental involvement, her opportunities, it must be recalled, are at least potentially greater than those of most teenagers who seek to separate themselves from their families in the face of state enforcement of parental control.[215] Even given the operation of some kind of presumption in favor of the state statute, the immature teenager seeking an abortion without parental involvement must be provided with an individual hearing in which she can try to overcome the

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I, *supra* note 12, at 1778-83. Professor Garvey draws the line between provision of food, clothing, shelter, and medical care and provision of appropriate education, and moral and emotional care. *Id.* at 1780. The state should interfere between parent and child when the parent fails to act in the child's "best interests" in the former areas, but not in the latter areas *because the state is ill-prepared to decide what is best for a child as to morals and emotional care*. Goldstein, Freud & Solnit place the child's need for psychologically committed caretakers so high that only the most egregious examples of parental misconduct justify any state interference with parental autonomy. *See generally* GFS I, *supra* note 17; GFS II, *supra* note 11. Goldstein, Freud & Solnit make clear that their principle would prevent a state determination of a child's best interest even when the child herself was seeking the determination. GFS II, *supra* note 11, at 123-28, 97-101; *see generally* Wald, *Thinking about Public Policy Toward Abuse and Neglect of Children: A Review of Before the Best Interests of the Child*, 78 MICH. L. REV. 645 (1980) [hereinafter Wald IV]; Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removing Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 625 (1976) [hereinafter Wald II]; Wald, *State Intervention on Behalf of Neglected Children: A Search for Realistic Standards*, 27 STAN. L. REV. 895 (1975) [hereinafter Wald I]; IJA/ABA, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ABUSE AND NEGLECT, Standard 2.1 & commentary (1981) [hereinafter ABUSE AND NEGLECT]. It is important to emphasize again that we are talking about the request of a concededly immature child.

211. *See generally* Foster & Freed, *supra* note 40.

212. *See generally* GFS I, *supra* note 17; GFS II, *supra* note 11; Garvey I, *supra* note 12; Wald I & Wald II, *supra* note 210.

213. H.L. v. Matheson, 450 U.S. 398, 448 (1981) (Marshall, J., dissenting).

214. *See* Karst, supra note 17, at 643-44 n.101.

215. *See supra* notes 196-202 and accompanying text. The *Bellotti II* discussion, *supra* notes 67-79 and accompanying text, as to the *unique* situation of the pregnant teenager underlay Justice Powell's requirement of special rules for the immature teenager as well as for the mature teenager.

presumption.[216] And the requirement that a hearing be made available before any parental involvement has occurred gives more protection to her individual interests than the very limited protection given to the interests of children committed by their parents to mental institutions.[217] The greater protection given does reflect the Court's awareness that, even though a teenager has not succeeded in establishing that she is mature, the abortion decision is different from all others in that a mistaken decision *cannot ever be remedied after the fact*. The erroneously institutionalized child can be released later. The child who is erroneously denied the right to abort her pregnancy without parental involvement may have to live with the effects of that mistake forever. The *Bellotti II* plurality's requirement of review prior to any parental involvement at least mitigates potential error and does reflect the Court's attempt to deal with the unique problems of teenage pregnancy.

There is still the problem, however, of determining what the best interests of the immature teenager are. As Professor Robert Mnookin has so clearly demonstrated, a "best interest" standard for judicial decisionmaking is inherently indeterminate.[218] In the context of the hearing required by *Bellotti II*, a judge charged with deciding a child's "best interests" would be faced with several possible choices, each with several possible outcomes of varying degrees of probability.[219]

The judge can decide to allow the abortion with no parental consultation whatsoever.[220] He can decide not to allow the abortion—leaving to the girl the option of complying with the statute.[221] He can require parental consultation as a precondition to his deciding whether abortion is in the girl's best interest.[222] And, after such consultation, he can then decide to allow the abortion or not to allow it.[223] Choice of any one or a combination of these alternatives may have any number of possible outcomes. The girl, if not allowed to obtain an abortion without parental involvement, may return to her parents and find them sympathetic and supportive.[224] She may, on the other hand, seek out an illegal abortion[225] or simply do nothing about her pregnancy until the visible signs of her condition make concealment of it impossible.[226] The judge's choice of any other alterna-

216. *Bellotti II*, 443 U.S. 622, 644, 647-48, 651. See also the opinions of Chief Justice Burger and Justice Powell in H.L. v. Matheson, 450 U.S. 398 (1981). Justice Powell's opinion in *Bellotti II*, it must be recalled, was only a plurality opinion. In particular, his proposals for treatment of immature minors were not considered by Justice Stevens and the three justices who joined in Justice Stevens' opinion.

217. *See* Parham v. J.R., 442 U.S. 534 (1979). See also Burt, *supra* note 49, for a good discussion of the *Parham* case and its implications.

218. Mnookin, *supra* note 40, at 257-65.

219. *Id.*

220. This is one of the possibilities suggested by Justice Powell in *Bellotti II*, 443 U.S. 622, 648 (1979).

221. *Id.*

222. *Id.*

223. *Id.*

224. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 103 (1976) (Stevens, J., dissenting).

225. H.L. v. Matheson, 450 U.S. 398, 437-40 (1981) (Marshall, J., dissenting). Justice Marshall suggests several possibilities and cites studies suggesting the various possibilities. *Id.*

226. *Id.*

tive raises the possibility of any number of other outcomes. Knowledge of the possible outcomes of any decision requires careful information gathering by the judge, both as to the facts of the particular case before him and as to outcomes of situations involving similar facts.[227] Prediction of the probability of any one possible outcome of any one alternative requires even more detailed information gathering.[228] What is the emotional and physical condition of the girl seeking the abortion? What are the details of her family relationship? What are her moral values? What are her real reasons for seeking an abortion? Are they accurate reflections of her situation? What have been the most common outcomes in cases involving girls like her? Does the judge need the help of professionals—doctors, psychologists, social workers, and so forth? Can the judge possibly obtain the information he needs without parental involvement? Although the literature is replete with studies of the consequences of early motherhood, the literature is not very helpful when the problem involves a choice between early motherhood or early abortion.[229] And, as Professor Mnookin points out, given the immense variety of human responses, the probabilities in any one situation are difficult to predict even with good information.[230] Finally, the judge must consider the possible and probable outcomes of any one alternative against some kind of value scheme.[231] What is best for a particular girl has no meaning whatsoever unless there is some way to define "best" as a standard.

Partially because of the same kind of indeterminacy in other situations in which judges are called upon to make "best interest" decisions, Professor Mnookin and others have advocated a strong presumption in favor of parental control of children.[232] For these scholars, deference to parents or parent substitutes should replace a "best interest" standard unless the parents themselves are in conflict or there are no parents.[233] State displacement of parental control in other situations is justifiable only upon proof that positive harm has been done or will certainly be done to the child by deferring to parental control.[234] In the absence of such harm, the family should be left alone.

In *Bellotti II*, even in the process of setting up a "best interest" standard, Justice Powell seemed to be taking account of the problems with

227. *Cf.* Mnookin, *supra* note 40, at 257-58.

228. *Cf. id.* at 258-60.

229. *See generally* Moore, Hofferth, Caldwell & Waite, *supra* note 10; Olsen, *supra* note 10. A study focusing on the consequences of either choice to girls of similar background and in similar circumstances would be useful.

230. *See* Mnookin, *supra* note 40, at 259.

231. *Id.* at 260-61.

232. *Id.* at 266; *see* authorities cited *supra* notes 209 & 210.

233. *See* Mnookin, *supra* note 40, at 266; authorities cited *supra* notes 209 & 210. The differences among these scholars reflect their differences as to what constitutes "harm." *See, e.g.*, Wald IV, supra note 210 (discussing the differences between his view and that of Goldstein, Freud, & Solnit). Nevertheless, all of these scholars start with a preference for parental control, advocate the application of narrow and specific substantive standards for interference with that control, and advocate the application of strict procedural requirements to make sure that the substantive conditions for interference are met. *See* especially ABUSE AND NEGLECT, *supra* note 210, Standards 1.1, 2.1, 5.3 & commentary.

234. *See supra* note 233.

such a standard and resolving those problems by giving special weight to parental control. The judge may give value to "the important state interest in encouraging a family rather than a judicial resolution of a minor's abortion decision."[235] The judge may also give value to parents' natural "interest in the welfare of their children—an interest that is particularly strong where a normal family relationship exists and where the child is living with one or both parents."[236] It appears that a judge making a "best interest" determination in the abortion context would be able to—might even have to—require parental involvement in the absence of a showing or proof of some kind of abnormality in the family. Although a distinction between "normal" and "abnormal" immediately raises the specter of the same kind of indeterminacy inherent in a "best interest" standard, such a distinction may be closer to the distinction between "harm" and "absence of harm" outlined above. Certainly, Justice Powell's brief discussion of what factors a judge could consider in making a "best interest" determination in the abortion context were not so far afield from the theories of the scholars advocating deference to parental decisionmaking.[237]

The problem with this deference in the teenage abortion context is that the scholars were talking about situations in which the *state* attempts to interfere with parental control.[238] The *Bellotti II* "best interest" determination will be made in a situation in which the state is attempting to enforce parental control against the independent interests of the child. When a state attempts to intrude into an ongoing family, it acts against the united associational interests of parents and children.[239] Association with parents is so important to a child that a presumption that such association is in a child's "best interest" is appropriate against state efforts to end it.[240] However, when a state attempts to enforce family involvement in the abortion decisions of teenagers, it acts in derogation of the individual interest of a girl who has successfully dissociated herself from her family, but for the state action. The state action forces association with her family upon her. That association may very well be in her "best interest," but a *presumption* that it is is surely inappropriate when the presumption underlies the very state action she is trying to challenge. Even though the indeterminacy of the "best interest" of a girl seeking abortion independently of her family is as evident as the indeterminacy of the "best interest" of a child who is the subject of a state dependency proceeding, use of a presumption in favor of parental control in a teenage abortion case utterly defeats the interest of the pregnant girl in her own independent decision or at least in the decision of a neutral figure that it is better for her not to be involved

235. *Bellotti II*, 443 U.S. 622, 648 (1979).

236. *Id.*

237. *See* authorities cited *supra* note 210.

238. Professor Garvey implies in his discussion that recognition of a constitutional right to a best interests decision *against* her parents derogates from any notion of a constitutional right to a decision *by* her parents. Garvey I, *supra* note 12, at 784-85 n.130.

239. *See supra* notes 40 & 62.

240. *See* authorities cited *supra* notes 209 & 210; Mnookin, *Foster Care—In Whose Best Interests*, 43 HARV. EDUC. REV. 599 (1973); *see also supra* notes 40 & 62.

with her family for purposes of the abortion decision.[241]

Furthermore, this use of deference to parents as a weighty factor occurs in a situation in which the claimant already has to contend with a presumption in favor of the validity of a statute mandating parental control. The immature pregnant teenager not only has to come forward with evidence that a presumptively valid statute does not serve her individual best interest, but she also has to cope with a best interest standard that gives great weight to parental involvement. If she tries to challenge the application of the state requirement of parental involvement on the ground that its restriction of her individual interest can only be justified if the restriction is demonstrably related to the state's interest in family decisionmaking, she is met with a presumption in favor of the statute's validity. Because of the unique problems of teenage pregnant girls, she is given a chance to show that, as applied to her, the general rule of parental involvement is not appropriate. But in order to make that showing, she must show not that it would be better to allow her to carry out her abortion decision without parental involvement, but that there is something wrong with her parents or her relationship with them.

If the "right" of the immature girl is, as I believe Justice Powell's *Bellotti II* opinion implied, only the right to have someone decide in her best interests, and if the state is free to presume that parental decisions do serve the best interests of children, and if a challenge to that presumption is met by a further presumption that family decisions by "normal" parents serve the best interests of children, a girl who is unable to show abnormality will gain little from demanding the hearing that Justice Powell declared her entitled to. Given the establishment of a method whereby a girl who is in fact mature enough to act independently can establish her maturity, those girls who are not mature—and are therefore presumptively incapable of acting in total independence—may be relegated to their parents' control, in the absence of some affirmative showing that there is something abnormal about their situation.

In a situation in which parents are already involved and when the controversy is really between the parents and other potential decisionmakers, such an approach seems to be an appropriate one in light of the difficulty inherent in a "best interest" determination. Newspaper reports of a recent Oklahoma case pose an example of the use of such an approach in an abortion situation.[242] A twelve-year-old girl was pregnant and also infected with venereal disease. Doctors had determined that delivery would cause serious medical problems for her. Her mother, for religious reasons, refused to consent to abortion. In the face of certain physical harm from delivery, the Oklahoma court displaced the mother's decision. The court did not have to talk about best interests to displace the mother's decision. Harm was imminent and certain to occur if the parent's decision were allowed to prevail. But in that situation, the girl's independent interest in her own autonomous decision was not even at issue.

241. Clearly my view is quite different from Professor Garvey's. *See supra* note 209.
242. Arizona Daily Star, Sept. 27, 1981, at 7, col. 1.

But Justice Powell was not establishing a method for resolution of conflict between parents and other third parties over the relative value of abortion or delivery for a particular child. Rather, he was establishing an opportunity for a pregnant child to convince a judge that abortion without any parental involvement whatsoever would be appropriate. Her case does not present a battle between state and parents for control. She is trying to controvert a state decision to involve her parents in her abortion decision. Justice Powell's handling of the problem of the immature pregnant girl may indeed have avoided the indeterminacy of an open-ended "best interest" determination, but it did so by retaining almost all of the preexisting restraints on the liberty of an immature pregnant girl.

Chief Justice Burger's handling of the "best interest" standard in *H.L.* reflected this analysis.[243] Because H.L. refused to offer any evidence about her relationship with her parents, the Chief Justice, as well as Justice Powell, concluded that she did not present a claim as an immature teenager for whom abortion without parental notification would be best.[244] With no showing to the contrary, the ordinary presumptions of the benign influence of normal parents and the legitimacy of state deference to such influence prevailed.[245] In such circumstances, the Chief Justice could fall back on the significant state interests in "family integrity" and in "protecting adolescents."[246] Chief Justice Burger also stated that a significant state inter-

243. 450 U.S. 398, 407-13 (1981).

244. *Id.* at 407 (Burger, C.J.), 417 (Powell, J., concurring). Chief Justice Burger never really stated that H.L. had no standing to raise the interests of a teenager whose best interests would be served by not notifying her parents. Justice Powell joined the Chief Justice's opinion on the explicit understanding that it did not foreclose the possible future claims of girls who *either* sufficiently alleged maturity or their best interests. Chief Justice Burger did explicitly state that the issue before the Court was "the facial constitutionality of a statute requiring . . . notice to parents . . . (a) when the girl is living with and dependent upon her parents, (b) when she is not emancipated by marriage or otherwise, and (c) when she has made no claim or showing as to her maturity or as to her relations with her parents." *Id.* at 407. Chief Justice Burger, then, seemed to equate the "best interests" analysis with analysis of the minor's home situation. He appeared to leave open the possibility of a different construction for minors "with hostile home situations." *Id.* at 407 n.14.

245. 450 U.S. at 407-10. Chief Justice Burger first stated that there is no logical relationship between the mere fact of pregnancy and a capacity for mature judgment. *Id.* at 408. Given that conclusion, the Chief Justice could cite language from *Bellotti II* as to the reasonableness of a state's requirement of parental notice (and consent as well), the parental role in the upbringing of children, and the Court's recurring theme that parental authority is basic to that role and to the structure of our society. *Id.* at 409-10.

246. *Id.* at 411. Chief Justice Burger used *Bellotti II's* catalogue of state interests justifying curtailment of minors' liberty as authority for these assertions. 450 U.S. at 411 n.18 & n.19. The section of *Bellotti II* that he relied on for his statement of a state interest in "family integrity" was the section discussing the state's interest in reinforcing parental involvement with children. *Bellotti II*, 443 U.S. at 637-39. It is important to recall that Justice Powell in that section supported that interest by referring to the parental function of protecting children against state action and against the consequences of their own immature decisions and to the parental function of developing children into capable adults. *Id.* Both of these functions are related to the state's own basic interests in protecting and developing children. By relying on "family integrity" as an important state interest, without any analysis of how "family integrity" serves the functions of protection and development in this instance, Chief Justice Burger presumes that the parents of immature and dependent teenagers *will* perform the functions *that they are supposed to perform*. I do not believe that the import of Justice Powell's *Bellotti II* opinion was exactly the same.

The state's interest in "protecting adolescents" by way of state restraints is supported by reference to Justice Powell's sections on the vulnerability of children and their inability to make sound decisions. 443 U.S. at 634-37. But of course what is at issue in *H.L.* is a *parental* notification

est in assuring that the physician has important medical information about the child is served by requiring parental notification.[247] The Chief Justice found that the Utah statute plainly served these state interests.[248]

The Utah statute neither provides any indication of the kind of information that parents must give to doctors nor even requires that the doctor have any direct communication with the parents at all.[249] The Chief Justice responded to this fact by saying that "neither logic, experience, nor [prior] decisions" support "the notion that the statute must itemize information to be supplied by parents."[250] But, of course, if a presumption of validity rests on some relationship between a statute's commands and an asserted state interest, more than conjecture would seem to be called for. Also, as Justice Marshall pointed out, the Utah statutory scheme requires the physician to obtain all the information necessary for an exercise of his best medical judgment before he agrees to perform any abortion.[251] If the acquisition of such information requires consultation with the minor's parents, then presumably he must communicate with them.[252] It is difficult to see how the notification statute is related to the need for making sure that the attending physician has adequate medical information. Use of presumptions that preclude consideration of such incongruence between means and ends does not seem to deal adequately with the unique problems of teenage pregnancy.

The statute also fails to provide for any period of delay between notification and performance of the abortion.[253] It is difficult to see how such a statute can be justified as truly promoting the involvement of parents in the abortion decisions of immature minors.[254] Notification also would seem more likely to lead to an even greater rift between the informed, but helpless, parents and their daughter. Chief Justice Burger responded to this argument by saying that "time is likely to be of the essence in an abortion decision."[255] He seems to have been saying that there cannot be a waiting period between parental notification and the performance of the abortion because such a period might cause the abortion decision to be delayed beyond the time during which it can be made freely. But if that is so, *what purpose does the notification statute serve*? How can it be said to be

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statute. The point is whether the state is justified in involving *parents* in the abortion decisions of minors, and reference to Justice Powell's section on parents would, of course, be more appropriate. I believe that Justice Powell's intent was to demonstrate that the state has an interest in reinforcing family authority because family authority advances the interests of the state in children.

247. H.L. v. Matheson, 450 U.S. 398, 411 (1981). Chief Justice Burger does not explain why this is an important state interest. Obviously he *could* once again refer to Justice Powell's elaboration of the state interests in the protection of vulnerable children from the consequences of decisions made by them (and their doctors) without the benefit of all the medical information that a "mature" person could give to the physician.

248. *Id.*

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

250. 450 U.S. at 412.

251. *Id.* at 443 (Marshall, J., dissenting); UTAH CODE ANN. § 76-7-304 (1978).

252. 450 U.S. at 443.

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

254. 450 U.S. at 446 (Marshall, J., dissenting).

255. *Id.* at 412.

related at all to the encouragement of parental involvement in a girl's abortion decision? In Justice Marshall's words, "the Utah statute simply fails to advance the asserted goal."[256] But of course if parental involvement of any kind whatsoever is presumptively of value, then there is no need for any special showing of a correlation between a particular statutory scheme for parental notification and a child's well-being. The trouble is that that approach seems to cut away from *Bellotti II's* recognition that the situation of pregnant teenagers seeking autonomy in their abortion decisions is so different from the situations of other autonomy-seeking teenagers as to call for special rules.[257] The *H.L.* majority opinions make it clear that those special rules are of little import, at least when the state restraint takes the form of parental notification or when the parents being informed are somehow "normal."

But even assuming that the correlation between the Utah notification statute and state interests in protection of minors, encouragement of family involvement, and transmittal of medical information is adequate, why does the statute only apply to pregnant minors who choose abortion? In Utah any pregnant woman, regardless of her age, can consent to any treatment associated with childbirth—from withdrawal of amniotic fluid to a caesarean delivery—*without any parental involvement whatsoever*.[258] A doctor performing such procedures is under no statutory obligation to notify the parents of a girl before he undertakes the procedure.[259] The state interests set out in *Bellotti II* as justifications for state restraint of minors and the individual interests of minors that were posited against those state interests seemed to allow for no *per se* distinction between pregnant minors who choose abortion and pregnant minors who choose childbirth.[260] After all, the individual interest is really the same—it is the interest in choosing independently whether *or not* to terminate one's pregnancy. It would appear that the potential medical problems in childbirth would call for parental notification as much, if not more than, the potential medical problems in abortion.

The Chief Justice responded to this contention with the following statement:

> But a state's interests in full-term pregnancies are sufficiently different to justify the line drawn by the statutes [between girls choosing delivery and girls choosing abortion]. . . . If the pregnant girl elects to carry her child to term, the *medical* decisions to be made entail few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort.[261]

256. *Id.* at 446.

257. 443 U.S. 622, 642-44 (1979). *See supra* notes 67-77, 195-217 and accompanying text.

258. UTAH CODE ANN. § 78-14-5(4)(f) (1977); H.L. v. Matheson, 450 U.S. 398, 444 (1981) (Marshall, J., dissenting).

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

260. 443 U.S. 622, 634-39, 642-43 (1979). Even conceding the potentially traumatic consequences of abortion, surely childbirth—particularly complicated childbirth—raises the possibility of equally traumatic consequences.

261. H.L. v. Matheson, 450 U.S. 398, 412-13, *citing* Maher v. Roe, 432 U.S. 464 (1977), for the first proposition.

The Chief Justice cited no authority for this statement.

Justice Marshall, however, cited much authority for a precisely opposite conclusion.[262] Even if one considers only the medical problems involved with abortion as opposed to childbirth, or only the problems of teenage pregnant girls as opposed to adult pregnant women, the overwhelming weight of authority supports the conclusion that childbirth for young girls is at least as medically risky as is abortion.[263] In fact, it is probably more so.[264] Further, as Justice Marshall so forcefully pointed out, the personal and societal consequences of early motherhood range all the way from the immediate problem of support for the new baby to the long-term problems of the education and employment opportunities of the young mother herself.[265] The girl who has a baby will be, whether she likes it or not and whether she is ready for it or not, involved in the intimate association of parent and child—with all the responsibilities that that entails.[266] In many states, she will be legally emancipated for many or all purposes.[267] Statistics indicate that she will achieve a lower level of education than her contemporaries,[268] will be more likely to marry early,[269] will acquire a lower-paying job,[270] and will be more likely to have medical problems associated with childbirth than older women.[271] Finally, if the Chief Justice's statement is limited to the emotional and psychological consequences of the medical decision, surely there are potentially grave emotional and psychological consequences of a medical decision to give birth when childbirth will pose serious risks to the mother's health or when the child is known to be mentally or physically defective.

All of this is not intended to refute a conclusion that immature teenagers who seek abortions are in need of special consideration. Rather, it is intended to refute a conclusion that immature teenagers who choose childbirth do *not* need the same kind of special consideration. A distinction between the two groups of girls is not justified by such a conclusion. The gross underinclusiveness of the Utah notification statute then remains unexplained by the Chief Justice's grounds for distinction and does not support his conclusion that the statute, as applied to minors who have made no showing as to their maturity or best interests, "plainly serves important

262. 450 U.S. at 444 n.38 (Marshall, J., dissenting).

263. *See* materials cited *supra* note 10. *See also* 450 U.S. at 444 n.38 (Marshall, J., dissenting).

264. *See* materials cited *supra* note 10. *See also* 450 U.S. at 444 n.38 (Marshall, J., dissenting).

265. 450 U.S. at 444 n.38.

266. See discussion of Professor Karst's views in *supra* notes 40 & 62. *See* Karst, *supra* note 17. This statement is drawn from Professor Karst's approach.

267. *See, e.g.*, ALASKA STAT. § 09.65.100(3) (Supp. 1980); KAN. STAT. § 38-122 (1981); NEV. REV. STAT. § 129.030(c) (1981).

268. *See* Moore, Hofferth, Caldwell, & Waite, *supra* note 10, at 5-9. *See also* Card & Wise, *supra* note 10, at 200-01 (Card & Wise indicate that teenage fathers are also negatively affected by their early parenthood); Moore & Waite, *Early Childbearing and Educational Attainment*, 9 FAM. PLAN. PERSP. 220 (Sept./Oct. 1977).

269. *See* Card & Wise, *supra* note 10, at 202; Moore, Hofferth, Caldwell & Waite, *supra* note 10, at 15.

270. *See* Card & Wise, *supra* note 10, at 201; Moore, Hofferth, Caldwell & Waite, *supra* note 10, at 21-26.

271. R. BENSON, CURRENT OBSTETRICS AND GYNECOLOGIC DIAGNOSIS AND TREATMENT 576-77 (1980); Stepto, Keith & Keith, *Obstetrical and Medical Problems of Teenage Pregnancy*, in THE TEENAGE PREGNANT GIRL 83 (J. Zackler & W. Brandstadt eds. 1975).

state interests" and "is *narrowly* drawn to protect only those interests."[272]

The Chief Justice's treatment of the distinction was consistent, however, with an approach to state requirements of parental involvement that presumes the value of such involvement. If parental involvement is presumed a good thing for children, a challenge to the requirement cannot rest on a showing that the parental involvement is not required in the decisions of other children. That would have nothing to do with the value of parental involvement for the challenging child. The relative freedom of other children is relevant only under a method of analysis that is much more suspicious of the value of parental involvement than is the method used by Chief Justice Burger in *H.L.* Justice Marshall's complaints, then, should really have been addressed to the method itself and not to the way Chief Justice Burger applied it to H.L. An announcement of judicial concern for the difficult problems of teenage pregnant girls offers faint hope for an actual pregnant teenager who discovers that she cannot establish her maturity without presenting evidence that she is so nearly independent of her parents as to be close to emancipation and that she cannot establish that her best interest would be served by an abortion without parental involvement unless she presents evidence that something is "abnormal" about her parents or her relationship with them. Furthermore, any differences between her treatment and the treatment of other pregnant teenagers who do not seek abortion are subjected to no special review. Even though the factors that call for special consideration of pregnant teenagers, the very factors that Justice Powell focused on in *Bellotti II*, are present in the situations both of teenagers who choose abortion and of teenagers who choose delivery, a method of review that gives great deference to parental involvement legitimates a state requirement of involvement even when it is not required for other similarly situated children. After all, "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all."[273]

Aside from his unsupported statement that the *medical* decisions to be made by a girl choosing delivery involve few of the "potentially grave emotional and psychological consequences of the decision to abort,"[274] the Chief Justice also justified the Utah statute's differential treatment by reference to the state's important interest in full-term pregnancies.[275] A few lines later, in response to a claim that the Utah statute might inhibit some teenagers from obtaining abortions, he referred to the principle enunciated in *Harris v. McRae*[276] and *Maher v. Roe*[277] that a state does not have to facilitate abortion, that it in fact may act to encourage childbirth because of its legitimate interest in "protecting potential life."[278] Having provided for a very relaxed standard of review of state statutes mandating parental

272. H.L. v. Matheson, 450 U.S. 398, 413 (1981).
273. Railway Express Agency v. New York, 336 U.S. 106, 110 (1949), *citing* Central Lumber Co. v. South Dakota, 226 U.S. 157, 160 (1912).
274. 450 U.S. at 412-13.
275. *Id.* at 412.
276. 448 U.S. 297, 325 (1980).
277. 432 U.S. 464, 473-74 (1977).
278. 450 U.S. at 413, *citing* Harris v. McRae, 448 U.S. 297, 323-24 (1980).

involvement in the abortion decisions of immature teenagers whose relationship with their parents is "normal," the Chief Justice could then rely on that legitimate state interest in "fetal life" as a justification for the restrictive and discriminatory effect of the statute. When the presumptions in favor of parental involvement are applicable, the state is free to manipulate its requirement of that involvement to further its interest in fetal life. It surely seems that it is ultimately the state's interest in the protection of fetal life that underlies Utah's version of a parental notification statute.

In summary, we are dealing with a parental notification statute requiring a woman's physician to notify her parents prior to carrying out an abortion of her pregnancy if she is an unmarried minor. The general notification requirement is justified by reference to the state's significant interests in protecting young people, in encouraging family involvement in their decisions, and in assuring that appropriate medical information about them is available to their doctors. The state, in other words, has special interests in children that justify its treating them differently from adult women. When the state's scheme for furthering its special interests in children consists of mandating parental involvement, presumptions in favor of parental involvement operate to relieve the state from the difficult task of showing a real correlation between its scheme and its special interests in children. Furthermore, the Utah scheme does not place the same restraints on all pregnant children. The distinction between groups of children is plainly not justifiable by a difference in their needs. If one group needs protection, family involvement, and availability of medical information, *so does the other*. The only real distinction between them is that one group will produce live children and the other will not. The general restraint is justifiable by reference to the special interests of the state in children, but nonapplication of that restraint to one group of children is justifiable *because of the state's apparently more important interest in preserving fetal life*.

The majority opinion in *H.L.* did not imply that a notification statute like Utah's could be applied to adult women.[279] Only the special condition of being a child justifies such a statute. The statute makes little provision for positive parental involvement and does not even apply to pregnant teenagers who choose childbirth. Ultimately, the statute serves the state interest in promoting fetal life in a way that is possible only because the women subject to the statute happen to be below the age of majority. Even though such incongruities are consistent with a method of review that places such great value on parental involvement that state action enforcing

279. *See* Scheinberg v. Smith, 659 F.2d 476 (5th Cir. 1981) (compelling state interests in furthering the integrity of marriage, including promotion of the marital relationship and protection of the husband's interest in fathering children within the marriage, justify imposition of spousal notice requirement; case was remanded for consideration of impact on pregnancies not the product of the marital union). Given the Supreme Court's ready acceptance of the Utah parental notice requirement in *H.L.*, it is not at all out of the way to suggest that the Court might defer to a legislative requirement of spousal notice. If, as I believe, the state's interest in promoting live birth has taken on a greater significance, even though inchoate, *see supra* notes 275-78 and accompanying text, that interest may well justify the imposition of a "mere notice" requirement on married women.

it may be invalidated only in extreme circumstances, the method of review itself is defective in its inappropriate use of presumptions in favor of parental involvement and in its failure to take account of the incongruities. In all of the teenage abortion cases up to *H.L. v. Matheson*, recognition of the unique nature of the abortion decision has underlain various justices' approaches to the constitutional interests of immature pregnant teenagers in making that decision independently. In contrast to its disposition of other cases in which children have challenged the validity of state statutes deferring to parental involvement and/or control,[280] in the abortion cases the Court seemed to be reluctant to uphold such statutes merely on the strength of presumptions that parental involvement *per se* would further state interests in the protection and development of children[281] or that, in the absence of abnormality, parental involvement in any particular situation would further state interests in the protection and development of a particular child.[282]

Analysis of Justice Powell's *Bellotti II* opinion and Chief Justice Burger's *H.L.* opinion reveals, however, that both of these presumptions are in actuality very much evident in the Court's current treatment of state parental involvement statutes, at least when those statutes are directed only at notification of the parents of a girl who has chosen to abort her pregnancy.[283] In *H.L.*, Chief Justice Burger used a presumption of the inherent value of parental involvement and thereby avoided a closer look at the actual relationship between Utah's parental notification statute and the state's interests in the protection and development of children.[284] In *Bellotti II*, Justice Powell used a presumption of the value of the involvement by "normal" parents in order to avoid the indeterminacy of a "best interest" determination.[285] The application of these presumptions means that parental notification statutes at least[286] will not be open to challenges of facial invalidity and will be held inapplicable to any particular plaintiff *only* on a showing that her parents are somehow "abnormal." The effect of the use of these two presumptions is that the challenges of immature teenagers to parental involvement statutes stand no better chance of success than do their challenges to any other statutes that restrict the liberty of children by reinforcing parental control of them. The stated need for special treatment of the interests of immature teenagers *in the abortion context* is just not met.

Furthermore, because the use of these presumptions of the value of parental involvement relieves the state from the burden of specially justifying its restrictions, the state may also impose such restrictions selectively

280. *See, e.g.*, Parham v. J.R., 442 U.S. 584 (1979).

281. *See Bellotti II*, 443 U.S. 623, 642-44 (1979); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74-75 (1976). *See also supra* notes 66-77, 195-200 and accompanying text.

282. *See* cases cited *supra* note 281; *see also supra* notes 66-77, 195-200 & 204-17 and accompanying text.

283. *See supra* notes 201-03, 235-73 and accompanying text.

284. *See supra* notes 243-57 and accompanying text.

285. *See supra* notes 235-37 and accompanying text.

286. Given the distinction made between parental notice and parental consent, a consent statute might be more strictly reviewed. *See infra* notes 289-303 and accompanying text.

with the explicit purpose of preserving fetal life.[287] Thus, the state of Utah is free to require parental notification or not depending on whether it perceives such notification as a way of furthering its interest in live births. Therefore, teenagers are subjected to special restrictions that would be impermissible if applied to adults and that are ultimately justified not by reliance on any real distinction between the needs of children and adults but by reliance on the state's interest in preserving fetal life. The reality is that the special dependent state of children makes them fair game for the efforts of those who would like to, but cannot, restrict the rights of all women to choose to terminate their pregnancies.[288]

"MERE NOTICE"

The foregoing analysis has treated the opinions in *Bellotti II* and *H.L.* as though they were addressing state restraints on an individual interest clearly within the scope of the "right to privacy" recognized in *Roe v. Wade*.[289] A notice requirement, however, may not actually infringe on that right. The problem is that current notions of privacy include at least two concepts. One is the right to make certain intimate decisions and carry on certain intimate activities without state interference and the other is the right to make such decisions and carry on such activities in seclusion.[290] Professor Karst included both of these concepts in his "freedom of inti-

287. *See supra* notes 274-78 and accompanying text.

288. *See infra* notes 368-69 and accompanying text.

289. 410 U.S. 113 (1972).

290. The problem with the use of the term "privacy" to identify the interest at issue in cases involving such personal choices as the use of contraceptives (*Griswold*) and the termination of a pregnancy (*Roe*) is that "privacy" more commonly connotes notions of a withholding of oneself from others, in one way or another, rather than notions of independent (autonomous, if you will) action. *See generally* Benn, *Privacy, Freedom, and Respect for Persons*, in NOMOS XIII, PRIVACY 1 (R. Pennock & J. Chapman eds. 1971) [hereinafter PRIVACY]; Gross, *Privacy and Autonomy*, in PRIVACY, *supra*, at 169; Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980); Henkin, *Privacy and Autonomy*, 74 COL. L. REV. 1410 (1974); Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173.

Alan Westin defined privacy in this traditional sense as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." A. WESTIN, PRIVACY AND FREEDOM 7 (1967). Professor Westin further refined this definition by saying that in terms of man in relation to society, "privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small group intimacy or, when among larger groups, in a condition of anonymity or reserve." *Id.* It is certainly true that Westin's definitions, generally accepted as working definitions of privacy, do not directly include the kind of autonomy protected in cases like *Roe* and *Griswold*. *See, e.g.*, Posner, *supra*, at 192-200.

What the definitions do implicate are a couple of concepts which, while they may not be an actual part of privacy *per se*, are so closely associated with it that the confusion of concepts is understandable. One is the concept of personal autonomy which Professor Westin defines as the human need and desire "to avoid being manipulated or dominated wholly by others." A. WESTIN, *supra*, at 33. This need is a function of privacy in that some form of withdrawal from the larger society "is often required to carry it out." The constitutional "right of privacy," then, includes some forms of autonomy ("private acts" if you will) that require some form of isolation from society at large. *See* Henkin, *supra*, at 1419. But the question is not whether they can be carried out in total seclusion, for "privacy" does involve more than individual isolation; the question is rather whether they involve some form of physical or psychological withdrawal from society at large. And the choice of abortion, although, as Justice Rehnquist points out in his *Roe* dissent, it clearly cannot be effectuated in isolation, is a private act in the sense of requiring withdrawal from society at large. So Professor Henkin points out that the question involved in such

mate association." Intimate association includes not only the right to enter into or leave an intimate relationship, but also includes the right to do so privately.[291] The notion of seclusion may be closer to the original understanding of privacy.[292] But the language in some of the teenage abortion opinions can be read as defining the "right to privacy" as only a right to autonomous decisionmaking, rather than as a right to make autonomous decisions without disclosure.

For example, Justice Stevens concurred in the judgment of the Court in *H.L.*, but not in the Chief Justice's opinion, because he believed that the parental notice required by the Utah statute could constitutionally be applied against all unmarried minors, regardless of their actual maturity.[293] Justice Stevens' opinion distinguished between the Utah requirement of "mere notice"[294] to parents and a statute requiring parental or judicial consent to a teenager's abortion.[295] From this perspective the Utah statute is constitutional because it does not place an undue burden on the right to privacy of *any* unmarried pregnant minor; and given the Utah court's

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claims for autonomy is not whether the claim involves privacy *per se*, but whether the public good requires subordination of the individual claim. Henkin, *supra*, at 1429.

The other concept involved in the privacy cases that is not specifically part of any of Westin's states of privacy is the concept of freedom to enter into or not enter into or exit from any of his states of privacy. This concept is not a function of individual privacy, but rather its necessary antecedent. In order to be "private" and ultimately to "act privately," one must be able freely to enter into a state of privacy, either in the sense of solitude or in the sense of some kind of association less than incorporation into the general society. This concept is what Kenneth Karst is talking about when he posits a "freedom of intimate association." *See generally* Karst, *supra* note 17. As a constitutional interest, the freedom of intimate association operates against government attempts to impose association or nonassociation on individuals and is countered, once again, by considerations of the public good—or perhaps, in terms of the subject of this Article, considerations of the individual's own welfare. Professor Karst's focus is on the voluntariness of intimate association in the sense of its not being controlled externally, *see* Boonin, *Man and Society: An Examination of Three Models*, in NOMOS XI, VOLUNTARY ASSOCIATIONS 69 (R. Pennock & J. Chapman eds. 1969) [hereinafter ASSOCIATIONS], rather than in the sense of the internal workings of the association. *See* Fuller, *Two Principles of Human Association*, in ASSOCIATIONS, *supra*, at 1. It is this freedom to enter into, remain in, or exit from an intimate association without external control that is encompassed within the "right of privacy" as recognized by the Supreme Court that I have incorporated into this Article. It is the basic interest in the autonomous decision to be or not to be the member of a group.

But incorporation of the functions or antecedents of privacy *per se* into the constitutional right of privacy must not be allowed to obliterate the essential interest in privacy itself, in being in a state of some form of seclusion from the general society. That interest remains, either because some state of privacy is required to carry out the particular autonomous act at issue, *see* Boonin, *supra*, at 204-26, or because privacy in the sense of withholding information about oneself is necessary in order for one to maintain the particular state of association or non-association he has chosen. See A. WESTIN, *supra*, at 34-39, on the other functions served by privacy. See also Whalen v. Roe, 429 U.S. 589 (1977), in which Justice Stevens in his opinion for the Court forthrightly declared that "privacy," as developed in the Court's opinions, protects both an interest in independent decisionmaking *and* an interest in "avoiding disclosure of personal matters." *Id.* at 599. Thus, whether the interest served by or necessary to privacy is an interest in voluntary intimate association or in freedom of action, the interest in privacy itself remains.

At this point perhaps it is appropriate to refer to Paul Freund's admonition in his contribution to PRIVACY, *supra*. " 'Seek simplicity and distrust it' is the maxim of any science." Freund, *Privacy: One Concept or Many*, in PRIVACY, *supra*, at 182, 190.

291. Karst, *supra* note 17, at 633-35.

292. *See* supra note 290.

293. 450 U.S. 398, 420-25 (1981).

294. *Id.* at 421-25, *citing Bellotti II*, 443 U.S. 622, 654 n.1 (1979).

295. *Id.*

grant of standing to H.L. to represent all unmarried pregnant minors seeking abortions, Justice Stevens would have declared the statute constitutional as applied to all minors.[296] For Justice Stevens, when the invasion of privacy consists only in preventing the effectuation of a girl's abortion decision without disclosure to her parents, the state's significant interests in protecting young women from unwise decisions prevail.[297]

None of the other *H.L.* opinions focused on Justice Steven's distinction between the interest in autonomous decisionmaking and the interest in seclusion. Chief Justice Burger, however, was careful to distinguish between the Utah parental notice statute and parental consent statutes like the ones at issue in *Bellotti II* and in *Danforth*.[298] The Chief Justice's use of the phrase a "mere requirement of parental notice" implied that parental notice is not the same kind of serious intrusion into the liberty interest of a pregnant minor that a parental consent requirement would be.[299] The Chief Justice does not appear to have considered the notice requirement as a direct burden on the seclusion aspect of a woman's right to privacy, but rather only as a possible burden on her right to privacy in terms of her independent decisionmaking. Thus, he stated: "That the requirement of notice to parents may inhibit some minors from seeking abortions is not a valid basis to void the statute as applied to appellant and the class properly before us."[300] Chief Justice Burger certainly does not appear to have considered an interest in seclusion as an independent part of the right affected by the Utah statute, but only as related in some way to the interest in independent decisionmaking. Given his limitation of the class represented by H.L. to unwed pregnant girls who have made no showing of maturity or their best interests, the burden imposed by the notification statute was, in his view, minimal.

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296. *Id.* at 425.

297. Id. at 422-25. In his *Bellotti II* opinion, Justice Stevens focused on his *Whalen* opinion. 443 U.S. 622, 655 (1979). He pointed out that Massachusetts' requirement of a judicial best interest review of the abortion decision of any minor, "no matter how mature and capable of informed decisionmaking," infringed upon both the interest in independent decisionmaking *and on the interest in avoiding public scrutiny of such an intimate decision as whether or not to bear a child. Id.* But the threatened disclosure in *Bellotti II* was to a state official of some kind and not to the girl's parents. Apparently, for Justice Stevens, the mature minor's interest in seclusion is of varying weight, depending on to whom the disclosure is to be made.

298. H.L. v. Matheson, 450 U.S. 398, 408-10 (1981). Justice Powell's opinion in *Bellotti II*, when read in context, does not actually appear to make the distinction between parental notification and consent implied by Chief Justice Burger. See, for example, *Bellotti II*, where Justice Powell states that if a girl is found to be "mature and well-informed enough to make intelligently the abortion decision on her own, the court must authorize her to act *without parental consultation or consent*." 443 U.S. 622, 647 (1979) (emphasis added). And in his *H.L.* concurrence, Justice Powell emphasized that, just as in the *Bellotti II* situation, a "state may not validly require notice to parents in all cases, without providing an independent decisionmaker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently or that notification otherwise would not be in her best interests." 450 U.S. at 420. The gist of Justice Powell's opinion appears to be that H.L. failed to establish standing to represent the interests of mature girls or those for whom abortion without parental notification would be best. If this reading of Justice Powell's opinion is correct, then it may well be that parental consent statutes may be applied against girls who fail to establish their maturity or best interests in the terms of *H.L.*

299. H.L. v. Matheson, 450 U.S. 398, 409 (1981).

300. *Id.* at 413.

Justice Marshall, who would have found H.L. a proper representative of a class including both mature teenagers and those whose best interests would *not* be served by a parental notification requirement, found the Utah statute unconstitutional both because of its violation of such a girl's "right to avoid disclosure of her personal choice"[301] and because of its possible limitation on her ability to effectuate her autonomous decision to abort her pregnancy.[302] And, in reality, how can the notice statute be looked at in any other way? It seems rather disingenuous to speak in terms of "mere notice" when one considers the possible differences in effect between disclosure to the girl's parents of her decision to abort and nondisclosure. Nevertheless, it may be that the cavalier treatment of the minor's interests by the majority and concurring opinions in *H.L.* will not be controlling in a situation involving application of a statute mandating not only parental notification, but also parental consultation or consent.[303]

CONCLUSION

Governmental entities have not been slow in responding to the message of *H.L.* For example, a new rule proposed by the Federal Department of Health and Human Services (DHHS) would require parental notification within ten working days after the provision of prescription drugs or devices to any "unemancipated minor" by a family planning agency receiving federal funds.[304] The proposed rule defines "unemancipated minor," for purposes of the federal notification requirement, as any minor under eighteen unless she is emancipated by state law because of a circumstance *other* than age.[305] Thus, a sixteen-year-old girl who is allowed *by state law* to seek medical treatment independently and without parental involvement would still be subject to the notification requirement in the absence of any other state law recognized indicator of emancipation.[306]

This notification requirement, of course, affects the provision of birth control substances and devices and must be distinguished from notification requirements affecting the performance of abortions. On the one hand, a teenager's use of birth control measures would seem not to involve the same degree of potential harm that her choice of abortion may involve and thus might not justify the intrusion caused by parental notification.[307] On

301. *Id.* at 437 (Marshall, J., dissenting).

302. *Id.* at 438, *citing* Carey v. Population Servs. Int'l, 431 U.S. 678, 688 (1977).

303. But compare *id.* at 425 n.2, in which Justice Stevens stated that a woman "intelligently and emotionally capable of making important decisions without parental assistance also should be capable of ignoring any parental disapproval." I suppose that Justice Stevens may be correct, although it seems equally as likely that a woman faced with the threat of parental (or spousal) notification might forego legal abortion.

304. For text of the proposed amendment to Department of Health and Human Services, Requirements Applicable to Projects for Family Planning Services, see 47 Fed. Reg. 7699 (1982) (to be codified at 42 CFR pt. 59) [hereinafter Proposed Rule].

305. 47 Fed. Reg. 7699, 7701 (1982) (to be codified at 42 C.F.R. § 59.5(a)(12)(i)(D)).

306. 47 Fed. Reg. 7699, 7701 (1982) (to be codified at 42 C.F.R. pt. 59) (supplementary information section to the proposed rule).

307. *See supra* notes 9-16, 195-273 and accompanying text. *See also* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

the other hand, the privacy interest implicated by the use of contraceptives might be perceived not to involve the same timing problems that the abortion decision involves—that is, it must be made now or never—and thus might be more readily categorized with other personal decisions that are legitimately restricted along arbitrary age lines.[308]

Justice Brennan's plurality opinion, in *Carey v. Population Services International*,[309] declared a method of review of state restrictions on minor's access to contraceptives requiring "more than a bare assertion, based on a conceded complete absence of supporting evidence," that the restrictions serve some significant state policy.[310] But that method of review was declared in a plurality opinion[311] and was employed in a situation where the asserted state interest was the discouragement of sexual activity by minors.[312] Further, the restriction took the form of a ban—not a parental consent or notification requirement[313]—and applied solely to nonprescription birth control substances and devices.[314] The proposed rule would more likely be judged by the method of review employed in *H.L.*[315] The proposed rule is preceded by extensive discussion which includes such statements as "implicit in [the statutory language about family involvement] is an assumption that these individuals [adolescents] will generally benefit from the exercise of a parent's mature judgment on their behalf in matters that may affect their physical well-being."[316] The federal interest claimed to be served by the proposed rule is much closer to the state interests in family involvement declared valid in *H.L.*[317] than it is to the state interest in discouraging sexual activity among adolescents that was asserted in *Carey*. Further, given Chief Justice Burger's analysis in *H.L.*, it is quite likely that the same presumptions of the benefit of parental involvement would be used in any challenge to the proposed rule.[318] The proposed rule does not *bar* the provision of birth control substances and devices. It merely imposes a parental notification requirement on such provision. Finally, the proposed rule applies to *prescription* substances and devices which may be viewed as posing more of a health danger than the nonprescription devices barred by the statute at issue in *Carey*.

The proposed rule might possibly run into some difficulty because of its use of the term "unemancipated minor." If access to prescription birth control substances and devices is viewed as of the same importance as ac-

308. *See supra* notes 67-77 and accompanying text.
309. 431 U.S. 678 (1977).
310. *Id.* at 696.
311. *Id.* at 691 n.12.
312. *Id.* at 692.
313. *Id.* at 691-92, 697-98.
314. *Id.* at 691.
315. *See supra* notes 243-73 and accompanying text. The proposed rule would also, of course, be judged in terms of its conformity to the federal statute which supposedly allows it. Title X of the Public Health Service Act, 42 U.S.C. §§ 300 *et seq.* (1976). Specifically, 42 U.S.C. § 1001(a) (1981) mandates family planning services to adolescents *and*, via a 1981 amendment, mandates "encouragement" of "family participation in projects assisted under this subsection." *Id.*
316. *See* 47 Fed. Reg. 7699, 7699-7700 (1982) (to be codified at 42 C.F.R. pt. 59) (supplementary information section to proposed rule).
317. *See supra* notes 243-48 and accompanying text.
318. *See supra* notes 249-73 and accompanying text.

cess to abortion, then it is conceivable that the Court might require some kind of method for determining maturity and best interests in accord with *Bellotti II* and *H.L.*[319] The proposed rule does, however, provide an exception for adolescents whose parents might cause them *physical* harm if they were notified.[320] Given the presumptions that parental involvement is beneficial and that only "abnormal" parents must be kept from such involvement,[321] the exception for parents who might physically harm their children may satisfy the best interests requirement. Given the implicit narrowing of the maturity exception in *H.L.*, the proposed rule's use of the term "unemancipated minor" might withstand a challenge as well, if "unemancipated" were interpreted not as requiring some kind of affirmative act by parents, but rather as referring to teenagers in an actual state of independence.[322] At any rate, the girls (and boys) who could challenge the rule on the basis of their "maturity" and/or best interests would be few in number.[323]

The proposed rule, of course, is an invasion of the privacy interests of a teenager. Its effect would be that a girl who decides to use contraceptives so as not to become pregnant could not obtain those contraceptives from a federally funded agency without her parents' being informed. That procreational choice is among those included in the constitutional right to privacy recognized by Justice Blackmun in *Roe*.[324] The ability to make that choice in seclusion is surely part of the right involved.[325] At the least, the inhibiting effect of parental notification burdens the choice itself.[326] Nevertheless, under current Supreme Court doctrine, the government's interest in reinforcing parental involvement with children because parents help protect and develop children means that any such restriction on a minor will be reviewed differently from a similar restriction on an adult woman.[327] Further, even though the decision to use prescription birth control may not pose such a danger to a teenager as the decision to abort a pregnancy and thus may not appear to call for parental invovlement to the same degree,[328] the decision to use birth control more likely would be per-

319. *See supra* notes 67-288 and accompanying text.

320. 47 Fed. Reg. 7699, 7701 (1982) (to be codified at 42 C.F.R. § 59.5(a)(12)(i)(B)). It is interesting that the "Supplementary Information" section defines physical harm as *not* including ordinary parental discipline. I suppose "normal" parents administer physical discipline to their children.

321. *See supra* notes 202-07, 235-40 and accompanying text.

322. *See supra* notes 150-94 and accompanying text.

323. Most challengers would presumably have the same difficulties that H.L. had in challenging the Utah parental notification statute. *See supra* notes 120-46 and accompanying text. It is possible that the proposed rule might also have difficulty because it may be more restrictive than the rules of some states. The effect of the rule seems to be that even if a state allows teenagers of any age short of 18 to obtain prescription contraceptives without parental notification *for no reason other than the fact that they have attained a certain age*, the federal rule of notification would apply. But then I assume that the statute under which the proposed rule is to be adopted is a funding statute, and the federal government is free to condition funding in any way that does not violate some other constitutional limitation. *See* L. TRIBE, *supra* note 40, at 247-50.

324. 410 U.S. 113, 153 (1972).

325. *See supra* notes 289-303 and accompanying text.

326. *Id.* H.L. v. Matheson, 450 U.S. 398, 436-41 (Marshall, J., dissenting) (1981).

327. *See supra* notes 44-49, 67-79 and accompanying text.

328. *See, e.g.*, Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 91 n.2 (1976)

ceived as not so critical or so incapable of postponement as the decision to abort a pregnancy.[329] It might well be a decision readily subordinated to the government's interest in family involvement—at least to the extent of parental notification.[330] The Court might well also conclude that parental notification is not an invasion of the privacy interest in seclusion of a teenager in that family involvement for a child is not like public scrutiny of an intimate decision.[331]

Even if the decision to use contraceptives were to be treated like the decision to terminate a pregnancy, the presumptions of the value of "normal" parental involvement would still operate.[332] Thus, if a teenager tried to show that his "best interests" would not be served by notification, he would be met first by the general presumption that notification is valid and second by the presumption that only if his relationship with his parents is "abnormal" would his best interests not be served by notification.[333] The proposed rule's exception for parents who are likely to abuse their children physically[334] might very well take care of the "best interests" exception. After all, "normal" parents might be expected to "punish" their children who decide to use birth control because use of birth control indicates sexual activity. Finally, given the deference with which the Utah notification statute was treated in *H.L.*,[335] the Court might well treat the term "unemancipated minor" as the equivalent of "immature minor"—at least for notification purposes. Perhaps a teenager not living at home and not legally emancipated *might* be able to challenge the rule's application to him, but his interests would provide a very narrow exception to the strictures of the rule.

Opponents of measures like the proposed rule threaten dire consequences from their imposition. They warn that many teenagers who might use birth control will be deterred by a parental notification requirement.[336] They warn further that these teenagers will *not* thereby be deterred from sexual activity.[337] Their underlying fear is that more teenage pregnancies

(Stewart, J., concurring) (describing the perfunctory procedures followed at one abortion clinic). *See also* H.L. v. Matheson, 450 U.S. 348, 411 n.20, 412-13 (1981) (Chief Justice Burger's focus on the medical problems of abortion). Also, according to received wisdom, the destruction of potential life is not at issue in the contraception decision in the same way as in the abortion decision. The added factor of the state's interest in potential life would not weigh against the girl's interests. *Id.* at 412. *See supra* note 307.

329. *See Bellotti II*, 443 U.S. 622, 642-44 (Powell, J.). *See* supra notes 67-77 and accompanying text. Of course, it seems rather surrealistic to allow a greater restriction of the contraceptive decision because it is not so critical when failure to make it is likely to lead directly to the condition (pregnancy) that requires the immediate decision whether or not to bear a child.

330. *See supra* note 329.

331. H.L. v. Matheson, 450 U.S. 398, 421-25 (1981) (Stevens, J., concurring); *Bellotti II*, 441 U.S. 622, 655 (1979) (Stevens, J., concurring) Justice Stevens plainly distinguishes family scrutiny from public scrutiny. *See also supra* notes 289-304 and accompanying text.

332. *See supra* notes 202-07, 235-42 and accompanying text.

333. *Id.*

334. 47 Fed. Reg. 7699, 7701 (1982) (to be codified at 42 C.F.R. § 59.5(a)(12)(i)(B)).

335. 450 U.S. 398 (1981).

336. *See, e.g.*, Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 FAM. PLAN. PERSP. 284 (Nov./Dec. 1980); Alan Guttmacher Institute, Issues in Brief (Jan. 1982).

337. See *supra* note 336.

will result with all of the trauma associated with such pregnancies.[338] Proponents of measures like the proposed rule point to the need for family involvement with the decisions of young people to use birth control and, implicitly, with the decisions of young people to engage in sexual activity.[339] If, as discussed above, the Court's review of the proposed rule would focus on this encouragement of parental involvement and traditional deference to such involvement, then it makes little difference what the actual effect of the rule is. Whether it results in more teenage pregnancy or less teenage sexual activity, it will result in more parental involvement.

Regardless of the probability that the Court will find a regulation like the proposed rule constitutional, there are other ways to accommodate the competing interests affected by such a rule that do not so restrict the interests of competent teenagers. There are also alternatives that would better serve society's interest in decreasing the incidence of teenage motherhood, while still taking account of society's interest in encouraging parental involvement in the decisions of immature teenagers. The drafters of the Standards Relating to Rights of Minors portion of the Institute of Judicial Administration/American Bar Association Juvenile Justice Standards Project (Standards)[340] considered all of these interests in the course of their work.[341] Their conclusion was that the importance of the privacy interests of teenagers and the social importance of making contraceptive services and pregnancy treatment, including abortion, readily available to teenagers mandate allowing any minor to consent to such treatment—regardless of anyone's determination of her maturity or her best interests.[342] That consent standard, given the implications of *Bellotti II* and *H.L.*, is probably less restrictive of a teenager's liberty than is constitutionally required.[343] It is likely that a state could impose a parental consent requirement on the abortions of all minors, so long as it provided exceptions for mature teenagers and those whose best interests would not be served by such consent.[344] Clearly, the drafters of the Standards have given more weight to the social interest in preventing pregnancy and early motherhood and in assuring treatment than to the social interest in assur-

338. *Id.*

339. *See* 47 Fed. Reg. 7699, 7699-7700 (1982) (to be codified at 42 C.F.R. pt. 59) (supplementary information); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 694-96 (1977) (state interest in discouraging sexual activity does not justify flat ban on access to contraceptives; no holding that such a state interest is *per se* impermissible).

340. RIGHTS OF MINORS, *supra* note 78.

341. *Id.* at Standards 4.1, 4.2, 4.8 & commentary.

342. *Id.* at Standard 4.8 & commentary.

343. *See supra* notes 67-288 and accompanying text.

344. Two cases presently pending before the Supreme Court present some of the issues that have been left open by the Court's opinions regarding state restrictions on the abortions of minors. 51 U.S.L.W. 3038 (Aug. 3, 1982). One involves a challenge to an Akron city ordinance. Akron Center for Reproduction Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1210 (N.D. Ohio 1979), *aff'd in part, rev'd in part*, 651 F.2d 1198 (6th Cir. 1981). *See* AKRON, OHIO, CITY ORD. §§ 1870.01 *et seq.* (1978). The ordinance, among other things, provides that no physician shall perform an abortion upon an unmarried woman under 18 without first having given at least 24 hours notice to one of her parents or her legal guardian. *Id.* § 1870.05(A) (1978). The ordinance also provides that no physician shall perform an abortion upon a girl under 15 without first having obtained the consent of one of her parents or her legal guardian or "an order from a court . . . that the abor-

ing parental involvement with teenagers. Equally clearly, many legisla-

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tion be performed." *Id.* § 1870.05(B); Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198 (6th Cir. 1981).

The other case involves a challenge to a Missouri parental consent statute enacted subsequently to the Supreme Court's opinion in *Danforth*. Planned Parenthood of Kansas City v. Ashcroft, 655 F.2d 848 (7th Cir. 1981). The Missouri statute provides for parental consent to the abortions of women under 18 with an elaborate procedure whereby a girl may petition a court for an exception. MO. STAT. ANN. § 188.028.2(4) (1979). The court shall, "for good cause":

(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion . . .; or

(c) Deny the petition, setting forth the grounds on which the petition is denied.

Id.

The Missouri procedure provides for notice to the parents of any girl filing a petition and therefore effectively provides for parental notification in every situation in which a minor tries to avoid the parental consent requirement.

Plaintiffs in the Akron case were clinics and a physician some of whose patients were under 18, including some girls under 15. Given the physician's standing to represent the interests of his minor patients, the district court held that the parental consent section was unconstitutional in that it did not provide a procedure whereby a minor under 15 could demonstrate "that her decision is, in fact, informed." Akron Center for Reproduction Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1201 (N.D. Ohio 1979). The Sixth Circuit agreed that the consent requirement provided for third party veto of the abortion decision of a mature minor and was thus unconstitutional. 651 F.2d at 1205. As to the notification provision, the Sixth Circuit, in reversing the district court, applied the principles of *H.L.* to conclude that, as no allegations of the maturity or best interests of the physician's patients were made, that provision was not invalid in the context of the challenge. *Id.* at 1205-06.

In the Missouri case, the district court had construed the Missouri statute so as to allow a judge to veto an abortion, regardless of the maturity of a petitioner. Planned Parenthood of Kansas City v. Ashcroft, 483 F. Supp. 679, 689 (W.D. Mo. 1980), *rev'd*, 655 F.2d 848 (8th Cir. 1981). The Eighth Circuit, reversing, construed the statute so as to require a judge to grant the petition of either a girl found mature enough to consent on her own or of a girl whose best interests required an abortion. 655 F.2d at 858. The Court of Appeals also found that the plaintiffs were representing the interests of both mature minors and those whose best interests mandated no parental involvement and held that the Missouri procedure effectively notifying the parents of all petitioning minors was invalid under the implications of *H.L. Id.* at 858-59.

If it decides these cases, the United States Supreme Court could clarify its position on the distinctions or lack thereof between parental consent and notification requirements. In the Akron case, it could conclude that parental consent, like notification, is an appropriate restriction to place on the abortion decisions of immature girls whose best interests do not require an exception. Given the absence of plaintiffs alleging maturity, it could then uphold the Akron ordinance as to consent. I believe that the Chief Justice's opinion in *H.L.* and Justice Powell's opinions in *Bellotti II* and *H.L.* would support such a holding. In the alternative, the Court could find that the phrasing of the Akron exception (minor women can obtain a court order that the abortion be performed in the absence of parental consent) could be construed so as to provide for the independent consent of minors found mature. AKRON, OHIO, CITY ORD., *supra*, § 1870.05(B)(2). The second route would leave unanswered the questions about the distinction between consent and notification. A third possibility is that the Court could affirm the Sixth Circuit's holding as to standing and as to invalidity of the consent requirement, relying on a distinction between the relationship of individual and state interests in a consent provision and the relationship of interests in a notification provision. Such an approach would be close to Justice Stevens' opinions in *Bellotti II* and *H.L.* The bias of this Article is toward the first approach. It is to be hoped, for institutional reasons, that a majority of the court settles on either the first or the third approach.

As to the Missouri case, if the United States Supreme Court accepts the standing determination of the Eighth Circuit, I believe that the Court of Appeals opinion is likely to be affirmed. It is possible that the Court, in accord with certain aspects of the Chief Justice's opinion in *H.L.* and with Justice Stevens' *H.L.* opinion, might hold that the notification effect of the Missouri statute is valid even as applied to girls alleging maturity and special circumstances because of the difference between state and individual interests in parental notification and the state and individual interests in parental consent. Once again, the bias of this Article is toward the former conclusion.

tures will give more weight to parental involvement.[345] The Court seems inclined toward leaving the states with a great deal of leeway in this area.

We do not yet know with certainty what the Court might do with a carefully drafted parental consent statute. We do know, however, what the Court will do with a parental notification statute—at least when mature minors and those for whom parental notification would not be in their best interests may avoid such notification.[346] Therefore, the Standards' approach to notification is of particular interest. As with consent, the general rule of parental notification is excepted to for medical services having to do with obtaining contraceptives and pregnancy treatment, including abortion.[347] The underlying premise of the drafters was that parents ought to be aware of medical services provided their children because of the parents' strong interest in knowing about the medical condition of their children.[348] Nevertheless, just as parental consent is not required when a child's need for treatment is great, so also is parental notification not required when a child objects to notification and when the treatment need is great, even though non-notification may well have an adverse impact on family relations.[349] The Standards accommodate the interest in family integrity, the interest in assuring that immature minors receive necessary family support, and the interest that necessary medical information be provided a physician in a much more flexible way than the Utah statute with its flat parental notification statute and its lack of any real coherence between the statute and the purposes supposedly served by it.[350]

Standard 4.8B provides that:

> If the minor objects to notification of the parent, the person or agency providing treatment under this Standard should notify the parent of such treatment only if he or she concludes that failing to inform the parent would seriously jeopardize the health of the minor, and complies with the provisions of Standard 4.2.[351]

Standard 4.2 provides that:

> A. Where prior parental consent is not required to provide medical services or treatment to a minor, the provider should promptly notify the parent or responsible custodian of such treatment and obtain his or her consent to further treatment, except as hereinafter specified.

Either conclusion, if reached by a majority of the Court, would give states some welcome certainty in the area.

I must point out the possibility that the Akron consent requirement's limitation to girls under 15, whether theoretically relevant or not, might make a difference in the Court's approach. It may be valid conclusively to presume the incapacity of a girl under 15. Also, the Missouri statute provides for notification in the context of a court proceeding. The Court could find that, under those circumstances, factors like parental retaliation that militate *against* notification are mitigated by the protective environment of a court procedure.

345. *See supra* note 344.

346. *See supra* notes 120-94, 243-88 and accompanying text.

347. *See* RIGHTS OF MINORS, *supra* note 78, at Standards 4.8, 4.2 & commentary.

348. *Id.* at Standard 4.2 & commentary.

349. *Id.*

350. *Id.* at Standard 4.2. *See supra* notes 243-72 and accompanying text.

351. RIGHTS OF MINORS, *supra* note 78, at Standard 4.8.

B. Where the medical services provided are for the treatment of chemical dependency, standard 4.7, or venereal disease, contraception, and pregnancy, standard 4.8, the physician should first seek and obtain the minor's permission to notify the parent of such treatments.

1. If the minor-patient objects to notification of the parent, the physician should not notify the patient that treatment was or is being provided unless he or she concludes that failing to inform the parent could seriously jeopardize the health of the minor, taking into consideration:

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

b. the medical considerations which require such notification;

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

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

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

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

b. inform the parent only after making all reasonable efforts to persuade the minor to consent to notification of the parent.[352]

This approach to parental notification accepts as a general rule that parental involvement with medical treatment of children is appropriate. However, in certain areas—such as treatment for pregnancy and contraceptive services—the child's interest in needed treatment and society's interest in treatment outweigh any state or parental interest in family involvement. This is true only if the child objects to notification and if the treating physician concludes that lack of notification does not pose a threat of serious harm to the health of the child. If parental notification is medically necessary, the physician may notify over the objections of the consenting child. Otherwise, the child's wishes will be respected. Family "integrity" is not forced on a family which has already demonstrated a lack of it by virtue of a girl's independently seeking treatment and objecting to parental involvement.[353] If notice is medically required, then the physician may notify the parents. That approach seems to be a realistic and workable way of serving the interest in the transmittal of necessary medical information.[354] Given the Standards' emphasis on the individual and social need for treatment of adolescents as primary, any interest in the "protection of adolescents" must be subsumed in the interest in treatment.[355] Further, the notification requirement and exceptions to it apply alike to girls choosing delivery and abortion. If the medical needs of any girl require parental notice, it can be made despite her objections. There is no danger that a girl choosing delivery will not receive the necessary aid of

352. *Id.* at Standard 4.2.

353. *See* H.L. v. Matheson, 450 U.S. 398, 448 (Marshall, J., dissenting) (1981). The Chief Justice views "family integrity" as an important state interest. *Id.* at 411.

354. *Id.* at 411.

355. *Id.*

her parents, and there is no danger that the state's interest in saving fetuses will be the actual motivation behind a state statute patterned after the Standards.[356]

It seems to me that the notification provisions of Standards 4.2 and 4.8 come much closer to an ideal balance among the competing interests in this area. They seem to conform to the views expressed by Justice Marshall in his *H.L.* dissent.[357] "Family integrity," when threatened by the independent act of a teenager, is not a goal attainable by state force.[358] "Transmittal of medical information" and "protection of adolescents" are goals achievable by much narrower restrictions than a flat parental notification requirement.[359] But given the Court's approval of much broader restrictions that are at least rationally related to state interests in promoting family integrity and protecting adolescents, many governmental bodies like the Utah legislature and DHHS are likely to employ such broad measures because of their concomitant effect on abortions *per se*[360] and on sexual activity among teenagers[361]—even though those goals might not be permissible ones if they were the *only* goals of the particular legislation.

The recent enactment of a parental notification statute by the Arizona legislature illustrates this probability.[362] The statute generally provides that notification must be received by one parent at least twenty-four hours prior to performance of an abortion.[363] Exceptions are made for parents who cannot be located or contacted[364] and for a teenager who obtains a "judicial order that she is mature enough to make the abortion decision or that her best interests would be served, even if she is immature, by obtaining an abortion without parental notification."[365] The Arizona statute, certainly designedly, tracks the Utah statute at issue in *H.L.* It also includes the exceptions that would have been required of the Utah statute had *H.L.* established her standing to challenge the statute as a mature minor or one whose best interests would not be served by parental notification. Further, the Arizona statute provides for a waiting period that makes its requirement more reasonably related to a state goal of encouraging family involvement, although the statute does not seem to provide for actual contact between parents and their child before performance of the abortion. So long as Arizona courts give girls a hearing as to their maturity and/or best interests, the statute may constitutionally be applied. After *H.L.*, it presents no novel constitutional issues.

What *is* interesting about the statute is the progress it took through the Arizona Senate. The Senate Committee charged with considering the bill as it came from the House of Representatives, before its consideration by

356. *See supra* notes 274-78 and accompanying text.
357. 450 U.S. at 434-54.
358. *Id.* at 448. *See* Karst, *supra* note 17, at 642-47.
359. 450 U.S. at 443 (Marshall, J., dissenting). *See supra* notes 243-73 and accompanying text.
360. *See* 450 U.S. at 412.
361. *See supra* notes 274-79 and accompanying text.
362. 1982 Ariz. Sess. Laws. ch. 184, § 2 (adding ARIZ. REV. STAT. ANN. § 36-2152).
363. *Id.* (adding ARIZ. REV. STAT. ANN. § 36-2152(A)).
364. *Id.* (adding ARIZ. REV. STAT. ANN. § 36-2152(B)(1)).
365. *Id.* (adding ARIZ. REV. STAT. ANN. § 36-2152(B)(2)).

the whole Senate, proposed a version of the bill that provided an exception for minors determined mature enough by their physicians to make the decision without parental notification and also provided a definition of maturity as follows: " 'Mature minor' means a minor who is able to comprehend the alternatives and risks related to the abortion procedure and give informed medical consent in the opinion of the treating physician."[366] If that version of the Bill had been enacted, of course, Arizona's statute would have been closer to the Standards in its sensitivity to the privacy interests of teenagers and the social interest in assuring treatment. The treating physician would still have been required to contact parents if he determined that the girl was too immature to act without their involvement.

The response to the Committee's version was completely predictable. Senators opposed to it stated that it "killed the whole bill" because "abortion clinic doctors" would be able to say any child was mature enough to make the decision.[367] A self-styled "mother of 11" told the Committee, "If you don't care about babies, we do, and we will do everything we can to get senators who are pro-life into office."[368] The Committee's version was not accepted by the Senate, which ultimately adopted the version which was signed by the Governor on April 22, 1982. The Arizona legislature does appear to have been motivated by its perception of the paramount value of parental involvement. The legislature seems to have paid heed to the impact on the interests of girls who cannot communicate with their parents and who will not, even if the result is no abortion, illegal abortion, or the tragedy of self-induced abortion. Further, the potent influence of the anti-abortion movement on state legislators is clear from the testimony reported in the newspaper accounts after consideration of the Committee's version of the Bill.

Some commentators have noted that the liberalized consent statutes of the 1970's for the treatment of venereal disease, pregnancy, and chemical dependency resulted from a legislative awareness of the social interest in assuring that treatment was provided.[369] *Danforth*—and *Roe* itself—may well have been the Court's response to the same kind of awareness. The increasing tendency of legislatures to restrict the liberty of teenagers to consent to such treatment may reflect a new legislative sensitivity both to a social interest in family decisionmaking and a social interest in restricting abortion in general and teenage sexual activity in particular. It may well be that only a marked increase in teenage pregnancy and the problems associated with it will cause legislatures to place more weight on the need to assure treatment and prevent pregnancy than on the need for parental control of children, preservation of fetal life, and proscription of teenage sexual activity. It is a modern tragedy that this cycle must repeat itself.

366. Proposed amendment of Senate Committee to H.B. 3270, *supra* note 362, Apr. 5, 1982.
367. Arizona Daily Star, Apr. 6, 1982, at B1, col. 1.
368. *Id.*
369. *See supra* notes 93-100 and accompanying text.