Winter 1981

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Recommended Citation

Phyllis A. Ewer, Court Upholds Parental Notice Requirement before Allowing Abortions on Minors, 72 J. Crim. L. & Criminology 1461 (1981)

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COURT UPHOLDS PARENTAL NOTICE REQUIREMENT BEFORE ALLOWING ABORTIONS ON MINORS

H.L. etc. v. Matheson, 101 S. Ct. 1164 (1981).

H.L. brought an action in state court to have a Utah statute¹ requiring parental notice as a prerequisite to the performance of an abortion on a minor declared unconstitutional and to enjoin its enforcement.² Utah law required the physician to notify the parents of an unmarried minor "if possible"³ before performing an abortion. In this action, H.L. claimed to represent the class of unmarried minor women prohibited from terminating their pregnancies because of their physicians' insistence on complying with the parental notification requirement.⁴ The trial court found the statute constitutionally valid and dismissed the complaint.⁵ H.L. appealed to the Supreme Court of Utah which affirmed the decision of the lower court.⁶

Last term, with Chief Justice Burger writing the opinion of the Court, the United States Supreme Court affirmed the Supreme Court of Utah. First, the Court held that H.L. lacked standing to challenge the Utah statute as being unconstitutional on its face on the ground of overbreadth.⁷ Second, as the statute applied to an unemancipated minor girl living with and dependent upon her parents, and making no claim

¹ Section 76-7-304 of the Utah Code provides:

To enable the physician to exercise his best medical judgment [in considering a possible abortion], he shall:

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

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

(b) Her age,

(c) Her familial situation.

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

UTAH CODE ANN. § 76-7-304 (1953).

² 101 S. Ct. 1164, 1167 (1981).

³ The phrase, "if possible," was interpreted by the Utah courts to mean "if under the circumstances, in the exercise of reasonable diligence, [the physician] . . . can ascertain [the parents'] . . . identity and location and it is feasible or practicable to give them notification." H.L. v. Matheson, 604 P.2d 907, 913 (Utah 1979) (footnote omitted).

⁴ 101 S. Ct. at 1167 (referring to the unpublished opinion of the trial court).

⁵ *Id.* at 1168.

⁶ *Id.* (citing H.L. v. Matheson, 604 P.2d 907 (Utah 1979)).

⁷ 101 S. Ct. at 1169.

or showing as to her maturity or as to her relations with her parents, the Court found that the statute was narrowly drawn to protect only valid state interests and did not violate any guarantees of the Constitution.⁸

I. BACKGROUND

H.L. was an unmarried 15-year-old girl who was living with and dependent on her parents for support.⁹ Discovering that she was pregnant, she consulted a counselor and a physician.¹⁰ The counselor concurred in H.L.'s judgment that it would not be in her best interests to notify her parents of her decision to have an abortion.¹¹ The physician advised her that an abortion would be in her best medical interest.¹² However, because of the Utah statute, the physician refused to perform the abortion without first notifying H.L.'s parents.¹³ H.L. consulted an attorney, and then instituted an action to declare the statute unconstitutional and to enjoin its enforcement.

H.L. was the only witness at the hearing held by the trial judge.¹⁴ Her testimony consisted of brief answers to her attorney's leading questions which merely paraphrased her allegations.¹⁵ There was no direct testimony concerning H.L.'s reasons for not wishing to notify her par-

⁸ *Id.* at 1173.

⁹ *Id.* at 1166.

¹⁰ *Id.*

¹¹ *Id.* at 1167.

¹² *Id.* at 1166.

¹³ *Id.*

¹⁴ *Id.* at 1167.

¹⁵ H.L.'s testimony in response to her counsel's questions was as follows:

Q. At the time that the Complaint in this matter was signed, you were pregnant?

A. Yes.

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

A. Yeah.

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

A. Yes.

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

A. Right.

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

A. Right.

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

A. Right.

Q. And they shouldn't be notified?

A. Right.

Q. After talking the matter over with a counselor, the counselor concurred in your decision that your parents should not be notified?

A. Right.

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

A. Yes.

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

A. Right.

ents. Since the statute applied to minors regardless of their reasons for not wishing to notify their parents,¹⁶ the trial court ruled that such reasons were irrelevant to the constitutional issue H.L. raised.¹⁷

H.L. claimed to represent the class including all minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies, but are unable to do so inasmuch as their physician will not perform an abortion upon them without compliance with the parental notice provision.¹⁸ The trial judge found that H.L. was "an appropriate representative to represent the class she purports to represent."¹⁹ He held that a minor's right to obtain an abortion or to enter into a doctor-patient relationship was not unconstitutionally restricted by the Utah statute.²⁰

The statute was unanimously upheld on appeal to the Supreme Court of Utah²¹ which concluded that it served significant state interests which are present with respect to minors but absent in the case of adult women.²² The court found that notifying the parents of a minor seeking an abortion was substantially and logically related to the factors identified in *Doe v. Bolton*²³ as relevant to exercise of a physician's best medical

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

A. Yes.

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

A. Right.

Q. Now at the time that you signed the Complaint and spoke with the counselor and spoke with me, you were in the first trimester of pregnancy, within your first twelve weeks of pregnancy?

A. Yes.

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

A. Yes.

Q. Are you living at home?

A. Yes.

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

A. Right.

Id. at 1167 n.6.

¹⁶ *Id.* at 1182 n.7 (Marshall, J., dissenting).

¹⁷ *Id.* at 1168. The ruling came in response to objections by H.L.'s counsel to state attempts to inquire into her reasons on cross-examination.

¹⁸ *Id.* at 1182.

¹⁹ *Id.* at 1168.

²⁰ *Id.*

²¹ *H.L. v. Matheson*, 604 P.2d 907 (Utah 1980).

²² *Id.* at 912.

²³ 410 U.S. 179 (1973). The Utah Supreme Court rested its determination on the statement in *Doe v. Bolton* that the physician's "medical judgment may be exercised in the light of all factors physical, emotional, psychological, familial and the woman's age—relevant to the well-being of the patient." 604 P.2d at 909 (citing *Doe v. Bolton*, 410 U.S. 179, 191-92 (1972)).

judgment in making an abortion decision because parents ordinarily possess information relevant to the physician's medical judgment.²⁴ The court also found that encouraging an unmarried pregnant minor to seek the advice of her parents in making a decision whether to bear a child promoted a significant state interest in supporting the important role of parents in child-rearing.²⁵

II. THE OPINIONS

In his brief opinion for the Court, Chief Justice Burger failed to reach the issue which H.L. presented, *i.e.*, whether the Utah statute was, on overbreadth grounds, unconstitutional on its face. Instead, the majority found that since neither H.L. nor any member of her class alleged or demonstrated that they were affected by the overbreadth of the statute, they do not have standing to advance that argument.²⁶

After eliminating the issue of overbreadth, the Court was left only with the narrow issue of the "facial constitutionality" of the requirement that a physician notify parents "if possible," before performing an abortion on their minor daughter.²⁷ The Court further narrowed the issue to the facts by considering only the case of the unmarried girl who is living with and dependent upon her parents and who has made no claim or showing as to either her maturity or her relations with her parents.²⁸ The Court found that as applied to such minors, the statute serves the state's interests in family integrity and adolescent protection.²⁹

The Court also found that for the narrowed class, the statute serves a "significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician."³⁰ Without citing any authority, the Court stated that "[a]n adequate medical and psychological case history is important."³¹ "Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data."³²

²⁴ 604 P.2d at 909-10.

²⁵ 101 S. Ct. at 1169 (citing 604 P.2d at 912).

²⁶ 101 S. Ct. at 1169.

²⁷ *Id.* at 1170.

²⁸ *Id.*

²⁹ *Id.* at 1172.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* The Court's undocumented and oversimplified digression on the importance of an adequate medical and psychological history to the physician about to perform an abortion illustrates the opinion's uncritical reliance on slogans and conventional wisdom. The importance of a medical history is taken as an article of faith without even a citation to the *opinion* of an authority let alone to any empirical evidence. There is no indication of what sequelae to abortion might be avoided by obtaining medical history information from the parents.

Rejecting H.L.'s argument that the constitutionality of the parental notice requirement was undermined because Utah allowed a pregnant minor to consent, without parental notice,³³ to other medical procedures related to pregnancy or childbirth, Chief Justice Burger attempt to distinguish between the state's interests in full term pregnancies and in abortion.³⁴ Again, citing no authority, the opinion asserted that the "medical decisions to be made [in connection with a full term pregnancy] entail few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort."³⁵

In Chief Justice Burger's view, the fact that the notice requirement may inhibit some minors from seeking abortions does not provide a

The Court's view of possible detrimental consequences of abortion seems not to comprehend that post-abortion problems may result not just from the physical abortion itself but also from the way in which parents and others react to the abortion. Thus, even granting the abstract importance of medical history, the physician must still decide whether the detrimental medical and psychological consequences *avoided* by parental notification will outweigh the detrimental medical and psychological consequences which will *result* from notifying parents when a minor does not wish them notified. Evaluating such tradeoffs is the essence of medical judgment. The decision in *Matheson* substitutes a legislative for a medical judgment. Whether or not the legislature should decide the question, it is perverse to rationalize a decision which prevents the exercise of medical judgment on the grounds that it enhances its exercise.

³³ *Id.* at 1173.

³⁴ *Id.*

³⁵ *Id.* (emphasis in original). Here the Chief Justice asserted an undocumented medical "fact" to justify the state requirement of parental notice for abortion and not for pregnancy. Evidently this statement is based on an early study (cited by Chief Justice Burger elsewhere in his opinion) of the emotional consequences of abortion in a sample of young unmarried patients. (The footnote states, "The emotional and psychological effects of the . . . abortion experience are markedly more severe in girls under 18 than in adults. J. Wallerstein, *et al.*, *Psychosocial Sequelae of Therapeutic Abortion in Young Unmarried Women*, 27 ARCH. GEN. PSYCHIATRY 828 (1972). . . ." 101 S. Ct. at 1172 n.20). The assertion that abortion effects are more severe among adolescents is wholly unsupported by the study cited and no such claim is made by its authors. An elementary knowledge of research designed would indicate that at a minimum such a conclusion would require a *comparison* between younger and older women having abortions, which this study did not have.

Neither will the study support the Chief Justice's broader generalization quoted in the text above. The Wallerstein study is based on a convenience sample of 22 middle and late adolescents who obtained abortions in California in the winter of 1969-70 and were willing to be interviewed. Recognizing the limits of their sample size and possible biases in its selection, the authors make no claims that their results can be generalized to any larger population. J. Wallerstein, *et al.*, *supra*, at 828. Moreover, if such generalizations were possible, the population would be limited to women who obtained abortions under early California law which permitted abortion when "there is substantial risk that [the pregnancy's] . . . continuation would gravely impair the physical or mental health of the mother." *Id.* To the extent that women have to qualify for abortion by having psychological difficulties, patients who abort may be expected to demonstrate psychological difficulties after the abortion. Whether women who have abortions have more psychological difficulties than they would have if they were to give birth is effectively unascertainable. Where women choose whether or not to abort a pregnancy, satisfactory comparisons addressed to this question cannot be made between the emotional reactions of women delivering and women aborting unless one makes the

valid basis for voiding the statute relative to the narrowed class. Citing *Harris v. McRae*³⁶ for the proposition that state action "encouraging childbirth except in the most *urgent* circumstances"³⁷ is "rationally related to the legitimate government objective of protecting potential

dubious assumption that women who bear a child willingly react to pregnancy in the same fashion as those who do not want the child.

One medical authority has summarized the literature on the psychological consequences of abortion as follows:

The psychological aftereffects of [demand abortions] . . . are usually favorable—emotional relief, indifference, and satisfaction. Depression, self-reproach, guilt, and/or impaired mental health are rare. It must, however, be noted that on some occasions severe guilt has been reported as a result of moral and religious background of the patients. . . . It is thought that termination of pregnancy has little effect on the course of many psychiatric conditions, and both remissions and exacerbations have been reported. Manabe, *Risks in Therapeutic Abortions*, in *RISKS IN THE PRACTICE OF MODERN OBSTETRICS* 271 (S. Alajem ed. 1975) (citations omitted).

Chief Justice Burger puts the issue unfairly when he requires the legislature to balance only between the emotional and psychological consequences of the medical decisions surrounding pregnancy and delivery against all of the possible consequences of abortion. If the determination is to be grounded in empirical evidence as the Chief Justice impliedly concedes when he turns to such sources, then the favorable and unfavorable medical, social, economic and emotional consequences of both abortion and childbirth in minors should be weighed in the balance. Otherwise, the legislative outcomes are especially likely to be irrational. All childbirth consequences must be considered because some unfavorable consequences of childbirth may be avoided by abortion. For example, the well documented long term economic consequences of early childbearing appear to be effects of having a child to raise. Card & Wise, *Teenage Mothers and Teenager Fathers: The Impact of Early Childbearing on the Parents' Personal and Professional Lives*, 10 *FAM. PLAN. PERSPECTIVES* 199 (1978); Hofferth & Moore, *Early Childbearing and Later Economic Well-Being*, 44 *AM. SOC. REV.* 784 (1979). Presumably such effects may be avoided by abortion.

Even though he addressed the wrong issue, the Chief Justice's assertion makes it worth noting some of the recent studies suggesting the detrimental psychological and emotional effects of the medical decisions made at delivery. See M. KLAUS & J. KENNEL, *MATERNAL-INFANT BONDING* (1976); Affonso & Stichler, *Exploratory Study of Women's Reactions to Having a Cesarean Birth*, 5 *BIRTH & FAM. J.* 88 (1978); Doering & Enthwisle, *Preparation During Pregnancy and Ability to Cope with Labor and Delivery*, 45 *AM. J. ORTHOPSYCHIATRY* 825 (1975); Kontos, *A Study of the Effects of Extended Mother-Infant Contact on Maternal Behavior at One and Three Months*, 5 *BIRTH & FAM. J.* 133 (1978). That mothers and families have strong reactions to the medical decisions made during pregnancy and delivery is suggested by the popularity of Lamaze childbirth, the interest in nurse midwifery and the growth of a consumer demand for less medical intervention and greater maternal control and awareness at delivery. This movement emphasizes both the medical and psychological benefits of a more family oriented and "natural" approach to childbirth. Particularly, the movement has focused on the benefits to maternal-child bonding which accrue from maternal awareness and close contact between mother and child immediately after delivery. Such contact is often prevented by obstetrical technique, hospital architecture and medical routine. Such contact is especially unlikely when the child is sick or of low birth weight and requires placement in special facilities for treatment. Kennell & Klaus, *Caring for Parents of a Premature or Sick Infant*, in *MATERNAL-INFANT BONDING* 99 (M. Klaus & J. Kennell eds. 1976). This is significant in view of the fact that teenagers have higher rates of prematurity than older women. Menken, *The Health and Social Consequences of Teenage Childbearing*, 4 *FAM. PLAN. PERSPECTIVES* 45, 49-51 (1972).

³⁶ 448 U.S. 297 (1980).

³⁷ 101 S. Ct. at 1173. (quoting *Harris v. McRae*, 448 U.S. at 325). Possibly, when a minor is pregnant, the situation is *urgent* given the medical risks and the social and economic conse-

life,"³⁸ Chief Justice Burger concluded that a state need not fine-tune its statutes so as to encourage or facilitate abortions.³⁹

In his concurring opinion joined by Justice Stewart, Justice Powell accepted the Court's view that the Utah statute did not unconstitutionally burden H.L.'s right to an abortion.⁴⁰ Justice Powell's opinion emphasized his understanding that the opinion of the Court left open the question of whether the statute unconstitutionally burdened the rights of a mature minor or a minor whose best interests were not served by parental notice.⁴¹

Justice Powell joined in the determination that H.L. had standing "only to claim that [the Utah statute] . . . is an unconstitutional burden upon an unemancipated minor who desires an abortion without parental notification but also desires not to explain to anyone her reasons ei-

quences associated with adolescent pregnancy. *See, e.g.,* Hofferth & Moore, *supra* note 35; Menken, *supra* note 35.

³⁸ 101 S. Ct. at 1173. This reasoning amounts to an admission that the minor's access to abortion is limited by parental notice. Utah did not concede this point and did not claim that it required parental notice for the purpose of protecting fetuses. Utah claimed, first, that notice to parents did not interfere with a minor's right to obtain an abortion, Brief for Appellee at 6, and, second, that even if parental notice did burden ever so slightly, the right to abortion it did not do so *unduly*, Brief for Appellee at 7. Utah never claimed that it required parental notice for the purpose of protecting potential life but rather that it was supporting the interests of parents in being involved in a decision concerning a major surgical decision to be performed on their daughter. Brief for Appellee at 13.

Consequently, Chief Justice Burger reached beyond the necessary logical underpinnings for the Court's holding when he recognizes that Utah's action may not be neutral with respect to abortion. In effect, the opinion permits a state to take actions intended to interfere with obtaining an abortion during the first trimester of pregnancy. *See, e.g.,* Roe v. Wade, 410 U.S. 113 (1973). (During the first trimester "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." *Id.* at 163). As authority for the acceptability of non-neutral state intervention, the Chief Justice cites *Harris v. McRae*, 448 U.S. at 324-25, which decided that the state's interest in fetal life during the first trimester was sufficient to permit the *absence* of state action (medicaid funding) to facilitate abortion. Since the holding in *Harris v. McRae* rests on the determination that the state need not provide *incentives* for abortion, use of that case here to provide authority for state *interference* in the process of obtaining an abortion is specious. For a discussion of the distinction between governmentally imposed "burdens" and "benefits" in *Harris v. McRae*, see Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 Nw. U. L. REV. 978, 1008-17 (1981). This issue is discussed as it applies to *Maier v. Roe*, 432 U.S. 464 (1977), in Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 1011-24 (1978).

³⁹ 101 S. Ct. at 1173 (emphasis added).

⁴⁰ *Id.* at 1173 (Powell, J., concurring).

⁴¹ *Id.* at 1173-74. Justice Marshall concluded that Justice Powell's emphasis constituted a signal that a future party with standing to represent either the interests of mature minor or of minors whose best interests are not served by parental notification could successfully challenge the Utah statute. *Id.* at 1179-80 n.1. (Marshall, J., dissenting). But see text accompanying and following note 123 *infra*, as to whether this invitation survives Justice Stewart's resignation.

ther for wanting the abortion or for not wanting to notify her parents."⁴² Thus, a majority of the Court specifically rejected the view taken by H.L. and the trial court that the minor's circumstances are irrelevant to the issue of whether her right to an abortion was unconstitutionally burdened by the Utah statute.⁴³

Justice Powell found that numerous and significant interests compete when a minor decides whether or not to terminate her pregnancy. On the one hand, the minor has a right both to make and effectuate a decision to abort, and these rights may not be unconstitutionally burdened.⁴⁴ Opposing the minor's rights are the state's interests in encouraging childbirth rather than abortion and in fostering consultation which will assist the minor in making her decision.⁴⁵ Justice Powell also recognized a state interest in fostering the family and supporting parents in the assumption of responsibility for the rearing and welfare of their immature children.⁴⁶ "Particularly when a minor becomes pregnant and considers an abortion, the relevant circumstance may vary widely depending upon her age, maturity, mental and physical condition, the stability of her home if she is not emancipated, her relationship with her parents, and the like."⁴⁷ In Justice Powell's view, such circumstances materially affect the right of a minor to make an abortion decision.⁴⁸ Thus, a minor has no absolute right to make an abortion decision. Nor does the state have an absolute right to require parental notice 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 interest."⁴⁹ Because she was perceived as claiming an absolute right to make an abortion decision, H.L. lost under this formulation.

In his concurring opinion, Justice Stevens took as his point of departure the holding of the Utah Supreme Court that the statute could validly be applied to all members of the class including 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 . . . [the parental notice requirement] of the Utah Code."⁵⁰ Breaking with the opinion of the Court and with

⁴² 101 S. Ct. at 1175.

⁴³ *Id.* at 1176.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 1177.

⁵⁰ *Id.* at 1177 (Stevens, J., concurring) (quoting from the majority's opinion, *id.* at 1167).

Justices Powell and Stewart on the standing question, Justice Stevens felt the Court had the duty to answer the question decided by the Utah Supreme Court.⁵¹

Justice Stevens reaffirmed his position taken in *Planned Parenthood of Central Missouri v. Danforth*⁵² that the state has a fundamental and substantial interest in the welfare of its young citizens which justifies a variety of protective measures which if applied to adults would be unconstitutional.⁵³ In Justice Stevens' view, appropriate state action dealing with abortion includes steps to ensure that the abortion decision is wisely made by requiring consultation with a licensed physician or, as here, by assuring the receipt of parental advice.⁵⁴ Justice Stevens found that the Utah statute was constitutional without any exceptions for mature minors or those whose best interests are not served by parental notice even though it may have "some impact upon a minor's exercise of his or her rights."⁵⁵

Justice Marshall, joined by Justices Brennan and Blackmun, dissented from the Court's holding.⁵⁶ On the standing issue, the dissenters agreed with Justice Stevens that the Court should answer the question decided by the Utah Supreme Court.⁵⁷ The dissenters found, however, that the Utah parental notice requirement unconstitutionally burdened a teenager's right to an abortion.⁵⁸

On the standing issue, the dissent took the position that H.L. adequately asserted her reasons for believing that parental notice would not be in her best interests and, hence, did have standing to challenge the statute as overbroad.⁵⁹ Since a state court acting under state law determined that H.L. represented the class of all "minor women who are suffering unwanted pregnancies,"⁶⁰ Justice Marshall argued that principles of comity and federalism required the Court to defer to that decision.⁶¹ Even if the federal law governing class actions were being applied, Justice Marshall found that the majority misapplied the law when it disturbed the class definition approved by the trial court.⁶² In the dissent's view, when the Court determines that the trial court has

⁵¹ *Id.* at 1177.

⁵² 428 U.S. 52, 101-05 (1976).

⁵³ 101 S. Ct. 1177-78 (Stevens, J., concurring) (quoting 428 U.S. at 101-05).

⁵⁴ *Id.* at 1178.

⁵⁵ *Id.* at 1177.

⁵⁶ *Id.* at 1179 (Marshall, J., dissenting).

⁵⁷ *Id.* at 1184.

⁵⁸ *Id.* at 1195.

⁵⁹ *Id.* at 1181-82.

⁶⁰ *Id.* at 1167.

⁶¹ *Id.* at 1182.

⁶² *Id.*

abused its discretion in approving the class, the appropriate action is to remand the case to permit the trial court to reconsider whether the party is a proper and adequate class representative.⁶³

Justice Marshall next considered H.L.'s claim in light of his interpretation of the Court's precedents and concluded that in view of the constitutionally protected character of the abortion decision, the state may burden the abortion decision only upon a showing that the restrictions advance "important state interests."⁶⁴ Utah argued that the parental notice requirement did not hinder a minor's decision to abort an unwanted pregnancy.⁶⁵ In support of his belief that the state's claim was false, Justice Marshall cited several cases where parents have not responded constructively and supportively when confronted with the fact of a minor's pregnancy or her decision to abort.⁶⁶

The dissent next addressed the interests which Utah offered to justify the parental notice requirement, namely that: (1) it permits the parents to provide additional information to the physician; (2) it encourages consultation between the parents and the minor; and (3) it preserves parental rights and family autonomy.⁶⁷ Examining these claims, the dissent noted that the most a parent is likely to be able to contribute in the way of "additional information" would be facts about the patient's medical history.⁶⁸ Justice Marshall found it unlikely that a minor mature enough to become pregnant and to seek medical advice on her own initiative would be unable or unwilling to provide her physician with the background information requisite to an abortion decision.⁶⁹ Moreover, the opinion noted that nothing bars a physician from

⁶³ *Id.* at 1182-83.

⁶⁴ *Id.* at 1185 (quoting *Roe v. Wade*, 410 U.S. at 154).

⁶⁵ 101 S. Ct. at 1185 (citing Brief for Appellee at 9.)

⁶⁶ 101 S. Ct. at 1186. Justice Marshall would have the Court acknowledge that many families are less than ideal and would not respond constructively to the information that their daughter was going to obtain an abortion. *Id.* at 1187. The Court failed to deal with the possibility that parents may react to the minor's decision with abuse, by withdrawing financial support or by obstructing her decision to have an abortion. Presumably, in the majority's view, such actions would be irrelevant since they would not constitute state action. Amicus Brief No. 4 at 10-14 (argues this position for Utah). Also, the Court, ignoring the distinction between action inhibiting abortion and action facilitating abortion reasoned that Utah need not "fine-tune" its statutes to facilitate abortion. See note 38 & accompanying text *supra*.

⁶⁷ 101 S. Ct. at 1189-94 (Marshall, J., dissenting).

⁶⁸ *Id.* at 1189.

⁶⁹ *Id.* No information was presented to the Court concerning either what facts the parents were expected to provide or what the physician needed to know about a patient's medical history before performing an abortion. Thus, it is possible that Utah has imposed a parental notice requirement which burdens the minor's abortion decision without achieving any significant increase in the information available to the physician. This possibility does not trouble the majority. *Id.* at 1172.

consulting with the parents when he finds such consultation necessary.⁷⁰

Additionally, Justice Marshall argued that the Utah statute requiring mere notice to the parents before the abortion may not achieve any of the state's purposes. Such a requirement could be fulfilled merely by a phone call from the physician moments before the abortion, precluding any parental involvement in the decision itself. The statute does not require parental involvement in the decision, nor does it demand consultation between the parents and the minor or parents and the physician. Thus, the dissent found the statute underinclusive to the extent that its aim is the transfer of information known to the parents and not available to the minor.⁷¹

The state's claim that the parental notice requirement places no burden on a minor's right to abortion was, in the dissent's view, inconsistent with permitting a minor to consent, as Utah does, for other pregnancy-related medical care.⁷² In Justice Marshall's view, medical procedures associated with completed pregnancy and delivery have potential consequences at least as serious as the consequences of an abortion.⁷³

Finally, Justice Marshall rejected the state's claim that the notice requirement protects parental authority and family integrity in a manner which is consistent with Court holdings in the area. The dissent noted the incongruity in using as precedent decisions protecting the privacy of individual families from unwarranted state intrusion to justify, in the case of abortion, state intervention to "resurrect parental authority that the parents themselves are unable to preserve."⁷⁴ Assuming that the statute applies to emancipated minors, mature minors, minors with emergency health care needs, and minors whose best interest (as evaluated by their physicians) indicate the advisability of an abortion, the dissenters found the statute unnecessary to assure parents their traditional child-rearing role and burdensome to a minor's right to choose with her physician whether to terminate her pregnancy.⁷⁵

III. DISCUSSION

In *Matheson*, Chief Justice Burger, writing for the Court, provided none of the analysis which characterized the Court's earlier abortion

⁷⁰ *Id.* at 1189.

⁷¹ *Id.* Of course, a statute which required parental participation in the decision would be even more intrusive than Utah's statute.

⁷² *Id.* at 1189-90.

⁷³ *Id.* Justice Marshall notes that these procedures may include amniocentesis, caesarian section and other medical care related to pregnancy.

⁷⁴ *Id.* at 1191 (footnote omitted).

⁷⁵ *Id.* at 1194.

cases.⁷⁶ The departure in *Matheson* from both the analytical framework and the substantive holding of *Roe v. Wade* is complete and fundamental.⁷⁷ A minor's right to decide to obtain an abortion was accorded no special constitutional significance. Without meeting any articulated tests for either importance or rationality, the interests put forward by the state appear to outweigh H.L.'s personal interest in deciding to have an abortion. The majority opinion made no attempt to enunciate the calculus involved in identifying or weighing the competing interests at stake.

A. H.L.'S STANDING

The question of standing is central to the result in *Matheson*. H.L. was not permitted to challenge the Utah statute on the grounds of overbreadth because neither she nor any members of her class had claimed or offered proof that they were affected by the statute because of its overbreadth.⁷⁸ As authority for H.L.'s lack of standing to allege overbreadth, the Chief Justice quoted out of context from *Harris v. McRae*,⁷⁹ where certain appellants were found not to be affected by the challenged statute at all and, hence, to lack standing.⁸⁰ The Court inappropriately applied *Harris* to *Matheson*, where undeniably H.L. and the members of her class are affected by the Utah statute.

In his dissent, Justice Marshall noted that the Court had found criminal defendants to lack standing to challenge statutes on the grounds of overbreadth when their activity falls in the statute's legitimate core.⁸¹ In first amendment cases, however, the Court's concern that the exercise of fundamental freedoms not be chilled has led to permitting facial challenges to the constitutionality of statutes on the grounds of overbreadth without any proof that the party falls within the alleged overbreadth.⁸² In *Roe v. Wade* the Court limited state interference with first trimester abortions without requiring any proof that the plaintiff was the first trimester of her pregnancy at any time during the pendency of her law suit. This treatment indicated the Court's earlier

⁷⁶ See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 924-26 (1978).

⁷⁷ The Chief Justice's citations to prior abortion cases serve the primary purpose of demonstrating that the Court has never decided this precise factual question before. There is no recognizable attempt to follow the reasoning of the Court's major abortion cases.

⁷⁸ 101 S. Ct. at 1169.

⁷⁹ 448 U.S. 297 (1980).

⁸⁰ 101 S. Ct. at 1169.

⁸¹ 101 S. Ct. at 1180 n.2.

⁸² *Id.* Professor Tribe has noted an increased skepticism on the part of the Burger Court about the reality of such chilling effects in first amendment cases. See L. TRIBE, *supra* note 76, at 713.

willingness to treat abortion like first amendment rights in this respect.⁸³ *Matheson* suggests that cases involving abortion statutes should be treated more like cases involving criminal statutes.

B. H.L.'S INTEREST IN ABORTION

Chief Justice Burger's opinion failed to analyze H.L.'s situation.⁸⁴ Conventionally, the Court examines the privacy interests at stake in a given controversy to determine whether they have any special constitutional significance and whether they are burdened by the state action at issue.⁸⁵ Then, the state interests are examined to determine whether they are sufficiently weighty and rational to justify the burden placed on individual interests. The outcome of this weighting and balancing is expressed in verbal formulations such as those found in *Roe v. Wade*.⁸⁶ There, the Court determined that in the first trimester of pregnancy a woman's right to an abortion was fundamental and could be impinged only by a compelling state interest.⁸⁷

The opinion of Chief Justice Burger gave no consideration or special weight to any interest which H.L. or any minor she represented might have in obtaining an abortion without parental notification. The opinion merely noted that "[a]ppellant believed 'for [her] own reasons' that she should proceed with the abortion without notifying her parents."⁸⁸ In effect, H.L. was treated as a petulant teenager and her desire for privacy vis-a-vis her family in connection with obtaining an abortion was trivialized.

C. THE STATE'S INTEREST IN PARENTAL NOTICE

The Court's solicitous treatment of the state's interest was also not analytical.⁸⁹ The Court never considered whether the state's purported interests were genuine, nor did the Court examine whether the state had chosen rational means to accomplish its purposes. Moreover, it refused to permit H.L. to challenge the statute's purported purposes on the grounds that it is overbroad.

⁸³ Justice Rehnquist's dissent in *Roe v. Wade* was in part based on such a standing argument. 410 U.S. at 171 (Rehnquist, J., dissenting).

⁸⁴ 101 S. Ct. at 1170-72.

⁸⁵ See generally *Bellotti v. Baird*, 443 U.S. 622, 639 (1979) (*Bellotti II*); *Roe v. Wade*, 410 U.S. 113, 152-56.

⁸⁶ 410 U.S. 113 (1973).

⁸⁷ *Id.* at 163.

⁸⁸ 101 S. Ct. at 1167.

⁸⁹ In one merciful exception to its solicitous attitude toward the interests advanced by the state, the Court ignored the state's contention that the statute furthers its legitimate interest in enforcing criminal laws regarding sexual behavior. Brief for Appellee at 28, cited in 101 S. Ct. at 1164.

The members of the majority, writing separately, engaged in customary legal reasoning and appear not to have abandoned the Court's abortion precedents.⁹⁰ However, the opinions by Justices Stewart and Stevens are also characterized by a superficial acceptance of the interests advanced by the state.

D. IMPROPER STATE PURPOSE

In *Matheson*, for inarticulated reasons, the Court chose not to apply the formula from *Roe v. Wade* that requires the state to assert a compelling interest before taking action inhibiting a first trimester abortion.⁹¹ Even if the fundamental nature of abortion fails to trigger some level of skeptical analysis of the state's purposes, there is a strong argument that the historical and political context of the enactment of Utah's abortion statute requires a critical inquiry into the motives of the Utah legislature.⁹² When evidence of a motive to burden the exercise of a fundamental right is found, it may not render a statute automatically unconstitutional, but it should trigger more than a cursory examination of the purposes advanced by the state.⁹³

Utah's previous abortion statute contained provisions requiring parental and spousal consent to an abortion. In declaring that statute unconstitutional a federal district court stated:

It is clear, and the Court finds, that the overriding purpose and dominant effect of these statutes is the wholly improper one of making the obtaining or performing of an abortion in Utah extremely burdensome or impossible in every case. Each and every challenged part of these statutes was intended to and does contribute, when each statute is read as a whole, to that improper purpose and effect.⁹⁴

Even with this historical background, the *Matheson* Court accepted the

⁹⁰ Writing for himself and Justice Stewart, Justice Powell acknowledged that the right to make an abortion decision may not be unconstitutionally burdened and proceeds to balance the individual and state interests involved in the case. 101 S. Ct. at 1173 (Powell, J., concurring). Justice Stevens' opinion was similarly forthright in its acknowledgement that the Utah statute may have some impact on a minor's exercise of her right to an abortion but found that the state is advancing an interest that is "fundamental and substantial." 101 S. Ct. at 1177 (Stevens, J., concurring).

⁹¹ 410 U.S. at 154.

⁹² The Court has found unconstitutional legislative motivation in equal protection cases. See *Griffin v. Prince Edward County School Board*, 377 U.S. 218, 231 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960). Brest argues that the Court has also inquired into legislative motivation in Establishment Clause cases. Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 S. CT. REV. 95, 100. Professor Clark argues for application of the paradigm to fundamental rights cases. Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978).

⁹³ Brest argues that it would be inappropriate to hold that motivation invalidated a rule but only that suspect motivation triggers a demand for extraordinary justification. Brest, *supra* note 92, at 118.

⁹⁴ *Doe v. Rampton*, 366 F. Supp. 189, 193-94 (1973).

state's purported purposes at face value. The Court conducted no serious inquiry to determine whether Utah's purposes explain the provisions of the abortion statute.

If Utah's purpose was to assure that parents have an opportunity to provide the physician with all relevant medical history to assist his medical judgment, as the statute claims on its face, it would not give the option of spousal notice for married minors. Rather, it would require parental notice in all cases since parents are more likely than spouses to have relevant medical history information. The purpose of making medical history available to the physician, therefore, cannot explain the statute's substitution of the husband for parents of a married minor.

If the statute were genuinely aimed at insuring the wisdom of a minor's decision whether to bear a child by increasing the probability that the parents are involved in that decision, the statute would require notice whenever a minor receives pregnancy related care. This would permit parents in appropriate cases to encourage a daughter to obtain an abortion. The present statute, however, reveals Utah's bias because it only brings in parents where there is a possibility they will influence a daughter away from abortion.

Utah's bias against abortion also surfaces in special provisions making it a felony of the third degree to "intimidate or coerce in any way any person to obtain an abortion."⁹⁵ Were Utah's purpose to insure the wisdom and voluntariness of the decision whether to bear a child, it would be equally concerned about coercion and intimidation to prevent an abortion. Yet, there is no such offense.

Utah's purpose of supporting family integrity may not account for its statutory pattern. If family integrity is enhanced by notifying the parents or spouse of a minor who decides to obtain an abortion, then family integrity should likewise be enhanced by notifying the parents and spouse of a minor about to obtain pregnancy related care. Yet, Utah permits minors to consent to pregnancy related care without parental notice.⁹⁶

Utah fails to indicate the meaning of family integrity which its statute is designed to enhance.⁹⁷ The state may conceive of family integrity in terms of parental authority, as the state's brief suggests,⁹⁸ or in terms

⁹⁵ UTAH CODE ANN. §§ 76-7-312 and 76-7-314 (1953).

⁹⁶ *Id.* § 78-14-5(4)(f) (1953).

⁹⁷ See 101 S. Ct. at 1172. The Court's willingness to support family integrity without clarifying what that might mean provides another example of the uncritical analysis in *Matheson*.

⁹⁸ Brief for Appellee at 23-26. To speak of preserving the family as a decision-making unit in society may amount to the same thing as preserving parental authority to the extent that family decisions are ultimately made by the parents.

of family unity and harmony or both. When the whole of the Utah statute is examined, the purpose of furthering parental authority is inconsistent with the statute's substitution of spousal notice in the case of the married minor, since a spouse does not stand in the same position of authority regarding a married minor as parents stand relative to a child.⁹⁹ While the state might have an interest in reinforcing parental authority, it would not have a comparable interest in reinforcing the authority of the husband vis a vis the wife.

If Utah means that the statute is intended to increase family unity and harmony, it becomes relevant to consider whether, in fact, this is likely to result from the statute. It is unlikely that notifying either a minor's parents or her husband that she intends to obtain an abortion will on balance increase family harmony if the minor did not wish them to be informed. Since no studies directly on point could be identified, we are left with Justice Marshall's collection of cases in which parents did not respond to a daughter's pregnancy in ways which promoted family unity and harmony.¹⁰⁰ That Utah's statute is based on an unsupported belief that informing parents will increase family harmony, suggests an ulterior motive.

The state also speaks of maintaining parents' right to know of significant happenings in the lives of their children.¹⁰¹ If this were Utah's purpose, the spousal notice provision becomes incomprehensible since the state does not have a comparable interest in exposing the secrets of one spouse to the other.

The sincerity of Utah's motives might also be indicated by its contention that the statute promotes the state's interest in the enforcement

⁹⁹ The authority of parents over children is given legal recognition in a variety of contexts including naming, consenting to medical care, determining religious education and domicile, and the use of discipline. See generally 59 AM. JUR. 2d, *Parent and Child* §§ 8-24 (1981). Compare 41 AM. JUR. 2d, *Husband and Wife* § 11 (1981). A husband generally has no authority over the wife and no legal right to chastise her physically.

¹⁰⁰ Justice Marshall's footnote reads, in part, as follows:

See *L.R. v. Hansen*, Civil No. C80-0078 (Oct. 24, 1980) (CD Utah) (. . . minor alleging parent expelled from home minor sister who disclosed facts of pregnancy and abortion); see *Women's Community Health Center, Inc. v. Cohen*, 477 F. Supp. 542, 548 (Maine 1979) (expect affidavits that some parents "will pressure the minor, causing great emotional distress and otherwise disrupting the family relationship"); *Baird v. Bellotti*, 450 F. Supp. 997, 1001 (Mass. 1978) (uncontested evidence some parents "would insist on an undesired marriage, or on continuance of the pregnancy as punishment" or even physically harm the minor); *Wynn v. Carey*, 582 F.2d 1375, 1388, n.24 (CA7 1978) (suggesting same problems); *In re Diane*, 318 A.2d 629, 630 (Del. Ct. Ch. 1974) (father opposes minor's abortion on religious grounds); *State v. Koome*, 84 Wash. 2d 901, 908, 530 P.2d 260, 265 (1975) (parent thinks forcing daughter to bear child will deter her future pregnancies). See *Margaret S. v. Edwards*, 488 F. Supp. 181 (ED La. 1980).

¹⁰¹ 101 S. Ct. at 1186 n.24.

¹⁰¹ Brief for Appellee at 9-14.

of its statutes regarding sexual behavior.¹⁰² Since Utah has the same interest in enforcing its criminal laws regarding sexual behavior whether the pregnancy is carried to term or aborted, such a purpose would not explain parental notice in the case of abortion only.¹⁰³ Moreover, when the minor is married, there would seem to be little enforcement value in notifying her husband that, in effect, she has had intercourse. That the state should put forth such an obviously insincere purpose to justify its abortion statute, reinforces the need to examine skeptically its other purposes.

The overbreadth of Utah's abortion statute also bears on the state's purposes.¹⁰⁴ Whether the state has an interest in reinforcing ties of family unity and authority where such ties, as in the case of emancipated minors, have already been severed must also be considered.¹⁰⁵ Assuming the state has no interest in reinforcing the ties to their families of emancipated minors, the overbroad statute cannot express such a state purpose. Burdening abortion seems to best explain the state's inclusion of the broadest possible class of minors.¹⁰⁶

The sincerity of Utah's motives might also be indicated by its contention that the statute did not "impinge[] on a woman's decision to have an abortion" or "place[] obstacles in the path of effectuating such a decision."¹⁰⁷ Utah's failure to require parental notice for a minor to receive pregnancy related care¹⁰⁸ or treatment for venereal disease¹⁰⁹ is tacit recognition that such notice might delay or deter a minor from receiving important medical care. Accordingly, state knowledge that parental notice might place obstacles in the path of obtaining an abortion may be assumed, making disingenuous the state's assertions to the contrary.

When Utah's purposes are seriously examined, it must be concluded that the explanation for Utah's parental notice requirement is

¹⁰² Brief for Appellee at 28-30.

¹⁰³ That Utah also permits a minor to consent to medical treatment for venereal disease with no parental or spousal notice requirement also suggests its insincerity on this issue. UTAH CODE ANN. § 26-6-39.1 (1953).

¹⁰⁴ Had the issue been properly presented, a majority of the numbers of the Court evidently would have found Utah's statute overbroad. *See* text accompanying note 123 *infra*.

¹⁰⁵ That the *Matheson* Court did not question the necessity of exceptions from a parental notice requirement for emancipated minors suggests that such a purpose would not be legitimate. *See* 101 S. Ct. at 1181 n.3 (Marshall, J., dissenting); *Id.* at 1169 (citing *L.R. v. Hansen*, Civil No. C-80-0078J (D. Utah, Feb. 8, 1980) (held Utah statute challenged in *Matheson* unconstitutional if applied to emancipated minors)).

¹⁰⁶ A similar argument can be developed for the other category of alleged overbreadth, minors for whom parental notice is not in their best interest.

¹⁰⁷ Brief for Appellee, *H.L. v. Matheson*, 101 S. Ct. 1164 (1981), at 9.

¹⁰⁸ UTAH CODE ANN. § 78-14-5(4)(f) (1953).

¹⁰⁹ *Id.* § 26-6-39.1 (1953).

that it was enacted for the purpose of restricting minors' access to abortion. The credible political reality is that Utah, with its large anti-abortion Mormon population,¹¹⁰ enacted the parental notice requirement in order to burden a minor's right to abortion rather than to accomplish the worthy purposes advanced in the state's brief. If Utah had adopted its abortion statute for the purpose of promoting family authority and autonomy in protecting and advising minor children, the decision in *H.L.* might be the right one. When the entire statute is examined in the context of Utah's statutes on related matters, however,¹¹¹ it becomes unbelievable that the Utah legislature sought to promote family integrity. Rather, the Utah statute seeks to accomplish indirectly through the family what it may not accomplish through direct state intervention in the minor's abortion decision. If the Utah legislature believed that parental notice would increase the number of abortions to minors, the parental notice statute would not have been passed.¹¹²

The decision in *Matheson* makes the possibility more remote than it already was that the Court will ever address the problem of improper legislative intent in the enactment of abortion statutes.¹¹³ Such an analysis requires an examination of a statute in its total context, taking account of past legislation and the whole statutory scheme. The standing holding in *Matheson* creates barriers to such analysis because it signals the Court's unwillingness to look beyond the specific provisions affecting the movant. An adequate motive analysis requires examination of repealed statutes which no longer affect any parties before the court and simultaneous examination of statutory provisions which do not affect the same individual or the same class.¹¹⁴ When the Court refused to

¹¹⁰ It has been estimated that approximately 70 percent of Utah's population is Mormon. See *Nix to MX*, TIME, May 18, 1981, at 28.

¹¹¹ See generally UTAH CODE ANN. §§ 26-6-39.1, 76-7-312, 76-7-314 & 78-14-5(4)(f) (1953).

¹¹² Brest suggests that the ultimate issue involves a *but for* test: "The ultimate question for the court is whether an official body (for example, a zoning board) would have made a particular decision (for example, refusing to rezone for multiple-family use) at the time that it did, *but for* an unconstitutional motive (to keep blacks out)." Brest, *Reflections on Motive Review*, 15 SAN DIEGO L. REV. 1141, 1142-43 (1978).

¹¹³ The Court's use of this paradigm generally is discussed in Brest, note 92 *supra*.

¹¹⁴ When *H.L.* was not permitted to challenge the statute on the grounds of overbreadth, she was in effect prohibited from making a certain kind of challenge to the state's purposes. Such a challenge may relate to several different theories under which the state action might be invalidated. Here we are focusing on demonstrating that the state's "real" purpose is to burden a minor's right to obtain an abortion. That the statute is overbroad relative to the state's stated purposes might be one indication that the state's statement of purposes is insincere. That the state's purported purposes cannot explain the statute's application both to unmarried and to married minors might be another indication of insincerity, especially if the alternative purpose can do so. Following its standing holding, however, the Court can refuse to look at the statute's application to, for example, married minors because they are not before the Court. Were the class composed of both married and unmarried minors, the Court could find that they are not affected by the same provisions, and, hence, that the class lacks

permit H.L. to allege overbreadth, it committed itself to looking at each of the provisions and effects of a statute in isolation from the others and in isolation from other statutes. It becomes difficult to challenge legislative intent, since one individual or class may not be able to challenge simultaneously all provisions which together reveal the state's unconstitutional purpose. The natural result of the Court's narrow approach to standing is evident in Chief Justice Burger's opinion when he accepted (and, at times, created) one ad hoc state purpose¹¹⁵ after another, without examining either the state's consistency or rationality in purpose across statutes or provisions.¹¹⁶ This approach transformed the Court into the proverbial blind man "seeing" the elephant but missing the picture plainly available to anyone who sees the whole.

E. SUPPORTING FAMILY INTEGRITY AS A STATE PURPOSE

The issue which H.L. presented to the Court is a concrete instance of a fundamental societal tension between individual rights and the integrity of the traditional family. As embodied in the law, elements of the traditional family system include the vesting of primary authority in family matters to the husband and the exclusion of illegitimates from lines of paternal inheritance.¹¹⁷

The Court has rarely intervened in this conflict on the side of supporting traditional family patterns. Rather, the Court has generally found for the individual seeking rights at the expense of customary family patterns. Abortion has been one arena for this conflict.¹¹⁸ The Court has placed the ultimate decision whether to bear a child with the woman rather than with her husband.¹¹⁹ Similarly, Court decisions concerning the rights of illegitimate children have tended to favor individuals over traditional family patterns excluding illegitimates from paternal inheritance.¹²⁰

sufficient homogeneity. The effect of such reasoning, as Justice Marshall notes, mixes jurisdictional and merits issues, 101 S. Ct. at 1181 n.5, in a manner which makes it particularly difficult to challenge the purposes the state puts forth.

¹¹⁵ 101 S. Ct. 1172-73.

¹¹⁶ See notes 31-39 *supra*.

¹¹⁷ Although it is doubtful that the Court understands the conflict in such terms, legitimacy is an important element of family integrity in certain family systems. The blurring of distinctions between the family rights of legitimates and illegitimates represents a breakdown in such a family system. See generally Goode, *Family Disorganization*, in CONTEMPORARY SOCIAL PROBLEMS at 513 (R. Merton & R. Nisbet eds. 4th ed. 1976).

¹¹⁸ See *Roe v. Wade*, 410 U.S. 179 (1972).

¹¹⁹ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 69 (1976) (The state may not "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.") (quoting the language of the District Court in 392 F. Supp. at 1375).

¹²⁰ *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968). Even where the Court has held for the exclusion of illegitimates from pater-

In clashes between the individual and the family, family integrity has not been invoked by the Court to justify striking down the claims of individual family members. In contrast, where the Court has promoted family integrity and parental authority, it has been to protect the privacy of families from state intervention.¹²¹ In *Matheson*, the Court mixed the reasoning of these two lines of cases by using family integrity to justify state intervention into the family, thereby limiting the rights of certain family members vis-a-vis others. The better view is that a privacy right accorded the family to protect it from state intervention cannot justify state intervention in support of the family at the expense of its individual members. In *Matheson*, the Court took what was fashioned as a defensive weapon and turned it into an offensive one to be used by parents to restrain the behavior of their daughters.

F. CONSEQUENCES

Matheson clearly established that non-emancipated minors have no right to an abortion without parental notice.¹²² Whatever the merits of that holding, the opinion's greatest difficulty is that it casts a pall over the right to abortion without parental notice even for emancipated minors and those whose best interests are not served by parental notice. Justices Powell and Stewart attempted to make it clear that a case involving either of these groups would succeed on the merits.¹²³ However, Justice Stewart's resignation makes it uncertain that such a challenge would succeed. Justice Stevens has already indicated that he would find the Utah statute constitutional when applied to all minors.¹²⁴ The Chief Justice and Justices White and Rehnquist were silent on the point, but their denigration in the right to abortion and their solicitude toward state interests in this context suggest that they would find such a statute constitutional even when applied to those minors excluded from *Matheson's* narrow holding.¹²⁵ Justices Brennan, Marshall and Blackmun clearly would find as they did in *Matheson* the application of a parental notice statute to emancipated minors unconstitutional.¹²⁶ Consequently, the outcome would depend on the position taken by Justice O'Connor.

nal inheritance, it has rejected the opportunity to base its holding on a state purpose of encouraging legitimate family relationships. *Lalli v. Lalli*, 439 U.S. 259 (1978).

¹²¹ 101 S. Ct. at 1191 (Marshall, J., dissenting) (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944)).

¹²² 101 S. Ct. at 1173.

¹²³ *Id.* at 1173-74 (Powell, J., concurring).

¹²⁴ *Id.* at 1179.

¹²⁵ *Id.* at 1169.

¹²⁶ See generally 101 S. Ct. 1179-95.

Given this uncertainty, states are free to legislate¹²⁷ parental notice requirements for all minors seeking abortion. Anyone relying on the Court's announced willingness to hold such requirements unconstitutional as applied, for example, to emancipated minors takes the risk that Justice O'Connor will not agree.

With such uncertainty concerning criminal penalties, counsel will tend to advise conservatively individuals and institutions providing abortions. Hence, parental notice statutes will be complied with.¹²⁸ Consequently, to the extent that parental notice requirements constitute a barrier to abortion services for minors,¹²⁹ the realistic effect of *Matheson* is to give the states maximum opportunity to erect that barrier regardless of the minor's maturity or personal situation.

PHYLLIS A. EWER

¹²⁷ At least four states have parental notification requirements. *See* MD. ANN. CODE art. 43, § 135 (1957); MONT. REV. CODES ANN. § 94-5-616 (Supp. 1977); TENN. CODE ANN. § 39-302 (Supp. 1979); UTAH CODE ANN. § 76-7-304 (Supp. 1974).

¹²⁸ A national survey of abortion facilities conducted between October 1979 and March 1980 found that 44 percent required parental notice for patients age 15 or less, 33 percent for those age 16, and 30 percent for those age 17. Torres, *et al.*, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 FAM. PLAN. PERSPECTIVES 284, 285-86 (1980). In a related survey of minor abortion patients, 55 percent reported that their parents knew they were obtaining an abortion. The younger the patient, the more likely her parents were to know. Three-fourths of the parents of minors age 15 or less knew about the abortion in advance. *Id.* at 287, 289.

¹²⁹ Twenty-one percent of abortion patients, in the survey cited in note 128 *supra*, indicated that they would still come to the clinic for an abortion even if their parents were notified. Twenty-three percent said that they would not come to the clinic if their parents were notified. *Id.* at 287-89. The relationship between actual behavior and hypothetical responses can not be determined. However, the percentages suggest the potential impact of Court decisions legitimating parental notice requirements.