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# Abortion and the Rights of Minors

*Harriet F. Pilpel*  
and  
*Ruth J. Zuckerman*

## I. INTRODUCTION

**D**URING THE PAST SEVERAL YEARS, lawyers, legislators, and social agencies have shown a remarkable upsurge of interest in the legal rights of minors — both in a general context and particularly in connection with the receiving of medical services without parental consent.

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At common law minors were said to lack the capacity to consent to medical treatment.<sup>1</sup> Thus, unless one of the exceptions to the common law was applicable, physicians who undertook the examination or treatment of minors without first obtaining parental consent were subject to civil liability on the theory that any touching by the physician of the minor was done without "legal" consent and thus technically constituted a battery.<sup>2</sup> Although the rule

was intended at least in part to protect minors, the practical result often was that the medical needs of minors were unmet. This was especially true in cases involving medical care or treatment connected with sexual activity, drug addiction, and alcoholism — medical problems which minors are often reluctant to reveal to a parent or guardian.

The question of permitting minors to obtain one particular type of medical treatment — abortion services — without parental consent has been brought into sharp focus by recent dramatic changes in the abortion laws of several states<sup>3</sup> and by a number of federal

<sup>1</sup> See, e.g., *Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941).

<sup>2</sup> *Id.*; *Zoski v. Gaines*, 271 Mich. 1, 260 N.W. 99 (1935); *Perry v. Hodgson*, 168 Ga. 678, 148 S.E. 659 (1929).

<sup>3</sup> See notes 14-22 *infra* & accompanying text.

and state court decisions recognizing a constitutional basis for the right of women to terminate unwanted pregnancies.<sup>4</sup> With respect to abortion, the problems caused by a requirement of parental consent are exacerbated by: (1) the relatively short period of time within which abortions can be safely performed; (2) the serious danger to the minor's health if she — unable to obtain a safe, legal abortion from a competent medical practitioner — resorts to the services of an unlicensed, incompetent abortionist or to the hazardous techniques of self-abortion; (3) the deleterious effect on the minor, the unwanted child, and society at large if she is forced to bear an unwanted child; and (4) the conflict between parent and child in values and beliefs which may be present where the medical treatment in question is abortion. Superimposed upon these related problems, and pervading every aspect of their resolution, are the philosophical-legal questions regarding the rights of the parent and the child vis-a-vis one another, and the state's role both as the arbiter of conflicts in those rights and as *parens patriae* or the guardian of the child's best interests.

The critical concern of this article is the right of a minor to obtain, without parental consent, an abortion in those states in which abortions are available to adult women as a result of liberalized legislation, therapeutic abortion provisions, or judicial mandate. Although the discussion is necessarily confined for the moment to those states, a Supreme Court decision as to a constitutional right to abortion is pending. At such time as that issue is decided in the affirmative by the United States Supreme Court, the question of the minor's rights will be of even greater significance.

The first portion of this article will explore general statutory and common law rules on parental consent to medical treatment in general and to abortion services in particular. It will then focus on the constitutional framework of the problem. Finally, it will propose a legislative reform which would permit a minor to obtain abortion services without parental consent in appropriate circumstances.

## II. THE STATE LAW FRAMEWORK

### A. *Parental Consent and Medical Treatment of Minors at Common Law*

As a general proposition no state has by statute specifically prohibited the medical treatment of minors without parental consent.

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<sup>4</sup> See notes 50-58 *infra* & accompanying text.

However, under the common law rule mentioned above, a physician who treated a minor without parental consent could be liable for damages, unless the facts brought the situation under an exception to the rule.<sup>5</sup> Liability did not rest on any actual harm to the minor — if such harm occurred it could be redressed in an action for malpractice or negligence. Rather, liability was grounded on the legal fiction that, because a minor was incapable of consenting to the treatment, the touching which occurred in the course of treatment was non-consensual and therefore constituted a technical battery.

There are, however, a number of exceptions to the common law rule requiring parental consent to a minor's medical treatment. The first of these exceptions, emancipation, focuses upon objective factors in the circumstances of the minor's life. The second, emergency, focuses upon the conditions requiring immediate treatment and the nature of that treatment. A third more recently recognized exception, the mature minor doctrine, involves consideration of both the nature of the treatment and subjective factors, such as the minor's capacity for understanding the nature and consequences of the treatment.

A minor who is legally emancipated may give effective consent to medical treatment provided the minor understands the nature of the treatment in question and has requested it.<sup>6</sup> The question of what constitutes emancipation at common law is answered differently from state to state. For example, one circumstance which has commonly resulted in a finding of emancipation is a minor's marriage.<sup>7</sup> In addition, a minor will generally be deemed emancipated if he or she is living apart from his or her parents, is self-supporting, and is generally in control of his or her own life.<sup>8</sup> Other bases

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<sup>5</sup> For a statement of the general rule on liability of physicians who treat minors without parental consent see *Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941) and *Younts v. St. Francis Hospital & School of Nursing, Inc.*, 205 Kan. 292, 469 P.2d 330 (1970).

<sup>6</sup> See, e.g., *Smith v. Selby*, 72 Wash. 2d 16, 21, 431 P.2d 719, 723 (1967).

<sup>7</sup> E.g., *Bach v. Long Island Jewish Hosp.*, 49 Misc. 2d 207, 267 N.Y.S.2d 289 (Sup. Ct. 1966). See also *In re Palumbo*, 172 Misc. 55, 14 N.Y.S.2d 329 (Dom. Rel. Ct. 1939).

<sup>8</sup> See, e.g., *Cohen v. Delaware Lackawanna & W. R.R.*, 150 Misc. 450, 269 N.Y.S. 667 (Sup. Ct. 1934). It is unclear whether financial dependence on parents would by itself totally undercut a claim of emancipation. See *Tremper v. Tremper*, 35 Misc. 2d 846, 848, 231 N.Y.S.2d 430, 433 (Sup. Ct. 1962). Case law also indicates that a minor, while in military service, is considered emancipated. *Swenson v. Swenson*, 241 Mo. App. 21, 25, 227 S.W.2d 103, 105 (1950). There is also case authority which indicates that a minor who is still living in the parental home may be considered emancipated if he or she pays living expenses to the parents and has full discretion with

for a finding of emancipation are judicial decree and parental consent, express or implied.<sup>9</sup> Finally, emancipation by operation of law can occur where the parent's conduct is inconsistent with his parental obligations.<sup>10</sup>

The rule with respect to emergency treatment<sup>11</sup> constitutes another common law exception to the requirement of parental consent. Courts have defined an emergency, within the meaning of this rule, as existing when impending danger to life and limb would occur if treatment were not to begin immediately.<sup>12</sup>

In addition to the emergency and emancipation exceptions, there is developing in the case law of a number of jurisdictions a "mature minor" exception to the common law rule. The judge-made exception, in any particular case, will be based on the maturity and intelligence of the minor as well as his or her age and the nature of the treatment — *i.e.*, is it a simple procedure and is it for the minor's benefit? The cases so far indicate that when the minor has sufficient mental capacity and maturity to understand the nature

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respect to the rest of his or her earnings. *See, e.g.*, *Crosby v. Crosby*, 230 App. Div. 651, 652, 246 N.Y.S. 384, 386 (1930); *Giovagnoli v. Fort Orange Construction Co.*, 148 App. Div. 489, 493, 133 N.Y.S. 92, 94 (1911).

<sup>9</sup> *See Tremper v. Tremper*, 35 Misc. 2d 846, 848, 231 N.Y.S.2d 430, 433 (Sup. Ct. 1962).

<sup>10</sup> *E.g.*, *Murphy v. Murphy*, 206 Misc. 228, 229, 133 N.Y.S.2d 796, 797 (Sup. Ct. 1954).

<sup>11</sup> *E.g.*, *Luka v. Lowrie*, 171 Mich. 122, 136 N.W. 1106 (1912); *Sullivan v. Montgomery*, 155 Misc. 488, 279 N.Y.S. 575 (N.Y. City Ct. 1935). In *Sullivan v. Montgomery*, a 20 year old boy had injured his ankle during a football game and after being taken to a physician for an examination, consented to being anaesthetized and to having his ankle set. Despite the fact that the physician had not obtained parental consent, the court denied recovery by the minor in an action for assault and stated:

[I]f a physician or surgeon is confronted with an emergency which endangers the life or health of the patient, it is his duty to do that which the occasion demands within the usual and customary practice among physicians and surgeons in the same locality. Many persons are injured daily in our city and emergency cases constantly arise. To hold that a physician or surgeon must wait until perhaps he may be able to secure the consent of the parents, who may not be available, before administering an anaesthetic or giving to the person injured the benefit of his skill and learning to the end that pain and suffering may be alleviated may result in the loss of many lives and pain and suffering which might otherwise be prevented. I do not believe that those who have devoted their lives to humanity will wantonly administer an anaesthetic where such consent may reasonably be obtained in view of the exigency; it would be altogether too harsh a rule to say that under the circumstances disclosed by the testimony in the instant case, the defendant should be held liable because he did not obtain the consent of the father to the administration of the anaesthetic; as the defendant was confronted with an emergency and as he obtained the consent of his patient, I hold that the consent of the father was not necessary. 155 Misc. at 449-50, 279 N.Y.S. at 577-78 (citation omitted).

<sup>12</sup> *See, e.g.*, *Luka v. Lowrie*, 171 Mich. 122, 136 N.W. 1106 (1912).

and consequences of the medical procedure or treatment undertaken for his or her benefit, the minor's consent to treatment will be legally sufficient.<sup>13</sup>

## B. *The Statutory Approach to Parental Consent*

1. *Parental Consent and State Abortion Laws.*— At this writing, thirteen states have enacted liberalized abortion laws<sup>14</sup> somewhat along the lines of the abortion statute found in the ALI Model Penal Code, under which abortions are permitted not only to preserve a mother's life, but to protect her mental and physical health and to avert the birth of defective offspring or those conceived through rape or incest.<sup>15</sup> The statutes in nine of those states contain specific provisions with reference to parental consent for a minor's abortion.<sup>16</sup> More liberal than the ALI Model are the stat-

<sup>13</sup> See, e.g., *Younts v. St. Francis Hospital & School of Nursing, Inc.*, 205 Kan. 292, 301, 469 P.2d 330, 337 (1970); *Bakker v. Welsh*, 144 Mich. 632, 635-36, 108 N.W. 94, 96 (1906), *limited in Zoski v. Gaines*, 271 Mich. 1, 10, 260 N.W. 99, 103 (1935); *Gulf & S.I.R. Co. v. Sullivan*, 155 Miss. 1, 10, 119 So. 501, 502 (1928); *Bishop v. Shurly*, 237 Mich. 76, 78-79, 211 N.W. 75, 85-86 (1926); *Bach v. Long Island Jewish Hosp.*, 49 Misc. 2d 207, 267 N.Y.S.2d 289 (Sup. Ct. 1966); *Lacey v. Laird*, 166 Ohio St. 12, 21, 139 N.E.2d 25, 31 (1956) (Taft, J., concurring). See also RESTATEMENT OF TORTS § 59(a) (1934): "If a child . . . is capable of appreciating the nature, extent and consequences of the invasion . . . his assent prevents the invasion from creating liability, though the assent of the parent, guardian or other person is not obtained or is expressly refused."

<sup>14</sup> ARK. STAT. ANN. § 41-305 (Supp. 1969); CAL. HEALTH & SAFETY CODE § 25951 (West Supp. 1970); COLO. REV. STAT. ANN. § 40-6-101(3)(a) (1971); DEL. CODE ANN. tit. 24, § 1790(b)(3) (Supp. 1970); FLA. SESS. LAWS ch. 72-196 (1972); GA. CODE ANN. § 26-9923 (1971); KAN. GEN. STAT. ANN. § 21-3407 (Supp. 1971); MD. ANN. CODE art. 43, § 137(a) (1971); N.M. STAT. ANN. §§ 40A-5-1 to 3 (Supp. 1971); N.C. GEN. STAT. § 14-45.1 (Supp. 1971); ORE. REV. STAT. ANN. § 435.415 (1971); S.C. CODE ANN. § 16-87 (Supp. 1971); VA. CODE ANN. § 18.1-62.1(c)(1)(i) (Supp. 1971).

<sup>15</sup> See MODEL PENAL CODE § 230.3(2) (Proposed Official Draft, 1962). That section provides in pertinent part:

(2) *Justifiable Abortion.* A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse.

<sup>16</sup> Specific consent provisions are included in the statutes of Arkansas, Colorado, Delaware, Florida, New Mexico, North Carolina, Oregon, South Carolina, and Virginia. The statutes vary in their mechanics, and the statute of Virginia may be said to be the most complete in meeting all possibilities. It provides that if the woman "shall be an infant or incompetent as adjudicated by any court of competent jurisdiction . . . permission [must be] . . . given in writing by a parent, or if married, by her husband, guardian or person standing in loco parentis to such infant or incompetent." VA. CODE ANN. § 18.1-62.1(e) (Supp. 1971). The statute then goes on to state that: "For purposes of this section any married woman over the age of eighteen years shall be deemed competent to give her consent in the same manner as though she were

utes in four other states which now eliminate, up to a certain point during pregnancy, all restrictions on the grounds for abortion.<sup>17</sup> In two of those, Washington<sup>18</sup> and Alaska,<sup>19</sup> the statutes deal with the question of parental consent.

In Maryland, Georgia, Kansas and California,<sup>20</sup> the remaining four of those states which have also passed some variation of the Model Penal Code provision, the laws say nothing on parental consent.<sup>21</sup> Similarly, in New York and Hawaii, where the restrictions upon availability of abortions have been all but completely eliminated, the abortion law is silent on the question of parental consent.<sup>22</sup> In these six states the question may arise whether the gen-

twenty-one years of age or older notwithstanding the provisions of § 32-137 of the code of Virginia." *Id.*

In Delaware, parental consent is required if the woman is under 19 or mentally incompetent. DEL. CODE ANN. tit. 24, § 1790(b) (3) (Supp. 1970). Oregon requires parental consent if the woman is under 21 and unmarried. ORE. REV. STAT. § 435.415(1) (Supp. 1971-72). Colorado and New Mexico require the parent or guardian to concur in the request for an abortion if the woman is under 18. COLO. REV. STAT. ANN. § 40-2-50 (Supp. 1971); N.M. STAT. ANN. § 40A-5-1(c) (Supp. 1971). Arkansas, North Carolina, and South Carolina require the consent of the parent, guardian, or husband if the woman is under 21 or incompetent as adjudicated by a court. ARK. STAT. ANN. § 41-305 (Supp. 1969); N.C. GEN. STAT. § 14-45.1 (1969); S.C. CODE ANN. § 16-87 (Supp. 1971). Florida requires both parental consent and the woman's written consent if she is under the age of 18 and is unmarried. The provision does not apply, however, if the physician, with a corroborating medical opinion, determines that the continuation of the pregnancy would threaten the life of the woman. FLA. SESS. LAWS ch. 72-196 (1972).

The MODEL PENAL CODE § 230.31(2) (Proposed Official Draft, 1962) itself does not require parental consent for abortion; nor does the Uniform Abortion Act approved by the Commissioners on Uniform State laws, which statute was in turn adopted by the American Bar Association in 1972. The Uniform Abortion Act basically permits, up to a certain period of gestation, abortion without limitation as to the permissible grounds; after the specified gestational period, the grounds for abortion are more limited.

<sup>17</sup> See ALASKA STAT. § 11.15.060 (1970); HAWAII REV. LAWS § 453.16 (Supp. 1971); N.Y. PENAL LAW § 125.05 (McKinney Supp. 1971); WASH. REV. CODE ANN. § 9.02.060 (Supp. 1971).

<sup>18</sup> Washington provides that in addition to the woman's consent, the prior consent of a legal guardian is required if the woman is unmarried and under the age of 18. WASH. REV. CODE ANN. § 9.02.060 (Supp. 1971).

<sup>19</sup> Alaska requires parental consent "from the parent or guardian of an unmarried woman less than 18 years of age." ALASKA STAT. § 11.15.060 (1970).

<sup>20</sup> MD. ANN. CODE art. 43, § 137 (1971); GA. CODE ANN. § 26-9925 (Supp. 1971); KAN. STAT. ANN. § 21-3407 (Supp. 1971); CAL. HEALTH & SAFETY CODE § 25951 (West. Supp. 1970).

<sup>21</sup> Mississippi also "liberalized" its abortion law in 1966; however, the revised law, which now permits abortion in cases of rape as well as in those cases when it is deemed necessary to save the life of the woman, is not properly considered an ALI type bill. In any case, the Mississippi abortion statute is silent on the question of parental consent. MISS. CODE ANN. § 2223 (Supp. 1971).

<sup>22</sup> In such states it is therefore necessary to look to the general statutory, common law and administrative law framework as well as local rules. In New York City, for example, the Health and Hospitals corporation (which has responsibility for the opera-

eral common law rule which holds a minor incompetent to legally consent, absent an exception, is operative. Finally, none of the abortion laws of the 33 states which still retain the most restrictive abortion laws<sup>23</sup> contains any provision with respect to parental consent.

2. *Medical Treatment Statutes.*— Where there is no statute specifically prohibiting or permitting abortions without parental consent, frequently there will be statutory or common law rules regarding medical treatment in general, which can be applied to fill in the gaps in the abortion laws. Regarding the common law, many minors will fall under one of the exceptions mentioned above.<sup>24</sup> Although those exceptions to the common law rules on medical treatment without parental consent do in fact permit physicians to treat minors in a wide range of circumstances, as a practical matter the fear of civil litigation has been a deterrent to such treatment. This is so even though the reported cases fail to evidence a single instance in which a physician was successfully sued for battery after treating a minor 15 years of age or older without parental consent where the treatment was for the minor's benefit.<sup>25</sup>

The exceptions to the common law rule, although available as a defense in case of suit, have not provided reassurance to physicians sufficient for many of them to provide needed medical treatment to minors unwilling or unable to obtain parental consent. State legislators in the past several years have become increasingly alert to this problem and in many states statutory provisions have been enacted which specifically permit all or various kinds of medical treatment of minors without parental consent.<sup>26</sup> Although it is

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tion of the municipal hospitals) has adopted a policy with respect to minors and abortions which provides that only the patient's consent is required for abortion procedures on all females who are married, emancipated or at least 17 years of age. (An emancipated minor is defined as one "who is self supporting, or living away from home under such circumstances that she makes most of her own decisions.") In all other cases parental consent is required *except* when "in the opinion of the attending physician the seeking of parental consent would endanger the physical or mental health of the patient." City of New York, Interdepartmental Memorandum To Hospital Administrators from Robert A. Derzon Acting Commissioner, June 29, 1970.

<sup>23</sup> See generally George, *The Evolving Law of Abortion*, 23 CASE W. RES. L. REV. 708 (1972).

<sup>24</sup> See text accompanying notes 6-13 *supra*.

<sup>25</sup> Nor is there any reported case in which a physician was held liable for providing a minor with medical examination and treatment for family planning services. For a review of state statutory provisions on medical treatment of minors which emphasizes the availability of contraceptive services see Pilpel & Wechsler, *Birth Control, Teenagers and the Law: A New Look*, 1971, 3 FAMILY PLANNING PERSPECTIVES 37 (No. 3, 1971). See also Pilpel & Wechsler, *Birth Control, Teenagers and the Law*, 1 FAMILY PLANNING PERSPECTIVES 29 (No. 1, 1969).

<sup>26</sup> See generally Pilpel & Wechsler, *supra* note 25 (two articles).



beyond the scope of this article to analyze the statutory provisions of each of the states on medical treatment of minors, it will be useful here to review the general kinds of statutes which have been enacted, particularly as these statutes relate to the availability of abortion services to minors.

Only two states, New Hampshire and Wisconsin, presently lack any statutes specifically covering the medical treatment of minors. As to the other states, statutory coverage varies widely. At least 44 states and the District of Columbia have statutes which specifically authorize medical treatment of minors, without parental consent, for venereal disease.<sup>27</sup> These statutes vary somewhat from state to state. A few, for example, are applicable only to minors over a certain age.<sup>28</sup> In addition, a number of them permit or require notification of parents in some or all situations.<sup>29</sup> In some states, there are statutes which provide that minors who are over a certain age, or who are emancipated, or who meet certain qualifica-

As an example of current provisions, the California Civil Code, in addition to specifically dealing with venereal disease and pregnancy, provides:

[A] minor 15 years of age or older who is living separate and apart from his parents or legal guardian, whether with or without the consent of a parent or guardian and regardless of the duration of such separate residence, and who is managing his own financial affairs, regardless of the source of his income, may give consent to hospital care . . . or medical or surgical diagnosis or treatment to be rendered by a physician and surgeon licensed under the provision of the State Medical Practice Act. . . . Such consent shall not be subject to disaffirmance because of minority. CAL. CIVIL CODE § 34.6 (West. Supp. 1971).

A similar statutory framework exists in Minnesota, except that Minnesota's statute does not contain as low an age limit as California's does. See MINN. STAT. ANN. § 144.341 (Minn. Session Law Service 1971). In addition, in Minnesota a minor who has borne a child may give effective consent to medical treatment for the child and for herself. *Id.* § 144.342.

<sup>27</sup> The states which at the time of this writing, appear to have no special statute covering venereal disease treatment for minors are: West Virginia, Wyoming, Vermont, Tennessee, New Hampshire, and Wisconsin.

<sup>28</sup> See CAL. CIV. CODE ANN. § 34.7 (West Supp. 1971) (12 years or older); DEL. CODE ANN. tit. 13, § 708(a) & (b) (Supp. 1970) (12 years or older); HAWAII REV. LAWS §§ 577A-1, 577A-2 (Supp. 1971); ILL. ANN. STAT. ch 91, § 18-1 (Supp. 1972) (12 years or older); IOWA CODE ANN. § 140.9 (Supp. 1972) (16 years or older); N.D. CENT. CODE § 14-10-17 (1971) (14 years or older); ORE. REV. STAT. § 109.105 (1971-72) (14 years or older); WASH. REV. CODE ANN. § 70.24.110 (Supp. 1971) (14 years or older).

<sup>29</sup> For statutes in which parental notification is permitted see GA. CODE ANN. § 17-104.3 (Supp. 1971); ILL. ANN. STAT. ch. 91, § 18-1 (Supp. 1971); LA. REV. STAT. ANN. § 1065.1 (Supp. 1971); MD. ANN. CODE art. 43, § 135 (Supp. 1971); MO. ANN. STAT. § 431.062 (Supp. 1971). Parental notification is required in: HAWAII REV. LAWS §§ 577A-1, 577A-3 (Supp. 1971) (if minor is under 18); IOWA CODE ANN. § 140.9 (Supp. 1972) (if it appears that minor may communicate disease to members of his family); NEB. REV. STAT. § 71-1120 (1969) (if minor is under 16 or if minor is unemancipated and over 16).

tions, may consent to medical treatment of all kinds without parental consent.<sup>30</sup>

At least 13 states have passed statutes which specifically permit minors to consent to medical care and/or treatment related to pregnancy.<sup>31</sup> In only two of these states, Missouri and Hawaii, is abortion specifically excluded from the coverage of the special statute.<sup>32</sup> In the remaining 11 states, it seems clear that abortion for minors without parental consent is permitted (subject to the provisions of the abortion statutes which in some states deal specifically with parental consent). Thus far, however, only the courts of California have considered the question whether the "care related to pregnancy" statute<sup>33</sup> includes abortion services within its purview. In *Ballard v. Anderson*,<sup>34</sup> the Supreme Court of California specifically held that the California medical treatment statute emancipates unmarried pregnant minors for the purpose of obtaining therapeutic abortions without parental consent.<sup>35</sup> In the absence of contrary indications in the legislative histories of the treatment statutes or in the abortion statutes themselves in the other 10 states, it is likely that if this question were to arise it would be resolved as it was in *Ballard*.

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<sup>30</sup> See, e.g., CAL. CIV. CODE ANN. § 34.6 (West Supp. 1971) (Minors 15 and over who meet certain minimal qualifications); ILL. ANN. STAT. ch. 91, § 18.1 (Supp. 1972) (married, or pregnant minors or persons 18 or older); MD. ANN. CODE, art. 43, § 135 (Supp. 1971) (18 or over or married or the parent of a child); MISS. CODE ANN. §§ 7129-81, 7129-82 (Supp. 1971) (married — common law as well as unmarried or emancipated or of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment); MONT. REV. CODE ANN. § 69-6101 (1970) (is or professes to be married or pregnant); NEV. REV. STAT. § 129.030 (1969) (emancipated or married); N.M. STAT. ANN. § 12-12-1 (1968) (married or emancipated); N.C. GEN. STAT. § 90-21.5 (Supp. 1971) (18 years or older or emancipated); PA. STAT. ANN. tit. 35, § 10103 (Supp. 1971) (18 years or older or graduated from high school or who has been pregnant or who has married); WASH. REV. CODE ANN. § 26.28.010 (Supp. 1971) (18 years or older).

<sup>31</sup> ALA. ACT 2281 (1972); CAL. CIV. CODE ANN. § 25.6 (West Supp. 1971), § 34.5 (West 1954); DEL. CODE ANN. tit. 13, § 708 (Supp. 1970) (12 years or older); GA. CODE ANN. § 88-2904(f) (1971); HAWAII REV. STAT. §§ 577A, 577A-2 (Supp. 1971) (but physician must inform spouse, parent, custodian or guardian of any minor actually found to be pregnant); KAN. STAT. ANN. § 38-123 (Supp. 1971) (where no parent or guardian is available); MD. CODE ANN. art. 43, § 135 (Supp. 1971) (notification of parent permitted by physician); MINN. STAT. ANN. § 144.343 (Minn. Sess. Laws Service 1971); MISS. CODE ANN. § 7129-81(i) (Supp. 1971); MO. ANN. STAT. § 431.062 (Supp. 1971); N.J. REV. STAT. § 9:17A-1 (Supp. 1971-72); PA. STAT. ANN. tit. 35, § 10103 (Supp. 1971); VA. CODE ANN. § 32-137 (Supp. 1971).

<sup>32</sup> HAWAII REV. STAT. §§ 577A, 577A-2 (Supp. 1971); MO. ANN. STAT. § 431.062 (Supp. 1971).

<sup>33</sup> CAL. CIV. CODE ANN. § 25.6 (West Supp. 1971), § 34.5 (West 1954).

<sup>34</sup> 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971).

<sup>35</sup> 4 Cal. 3d at 884, 484 P.2d at 1353, 95 Cal. Rptr. at 9.

A number of states have avoided some of the problems associated with the abortion of minors by lowering the age of majority from the usual 21 years of age. That approach effectively eliminates as to all medical treatment application of parental consent requirements for those over the specified age.<sup>36</sup>

3. *Analogous Non-Medical Rules of Law.*— Where state law is unclear there may be state or local rules in related areas which furnish considerable support for the view that, irrespective of the laws on medical treatment, some or all minors should be deemed capable of consenting to abortion without parental consent, and that a requirement of parental consent is both inconsistent with such other laws and is contrary to public policy. For example, in most states a female minor above a specified age may marry without parental consent.<sup>37</sup> The laws on statutory rape also recognize, first, that unmarried minors above the age specified in the statutes do engage in sexual activity and, second, that they are able to consent to such sexual activity prior to the time when they are technically adults for all purposes.

In many states, by statute and administrative regulation, those under 21 may have access to contraceptive services without parental consent.<sup>38</sup> Thus, if a minor is legally able to obtain medical treatment to avoid an unwanted pregnancy, it makes little sense (and is legally inconsistent as well) to negate her implicit right of choice by denying her an abortion where contraception was unavailable or unsuccessful. Similarly, in many jurisdictions where a minor may consent to surrender her child for adoption,<sup>39</sup> it would not seem unreasonable to conclude that she should also have the right to terminate the pregnancy which could otherwise result in the birth of the child.

Clearly the laws in these related areas are not dispositive of the question of whether a minor should be able to obtain an abortion without parental consent. They do, however, demonstrate that the law in many areas relating to sexual conduct deals with the realities of maturity and consent and that the legal fiction of infancy should be dispensed with where it is contrary to the best interests

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<sup>36</sup> See, e.g., HAWAII REV. LAWS § 577-1 (1968) (age 20); NEV. REV. STAT. § 129.010 (1969) (age 18 females, age 21 males); MICH. COMP. LAWS § 722.52 (Supp. 1972) (age 18).

<sup>37</sup> See, e.g., N.Y. DOM. REL. §§ 2, 7 (McKinney 1964).

<sup>38</sup> See generally Pilpel & Wechsler, *supra* note 25 (two articles). See also George, *supra* note 23, at 723 n.89.

<sup>39</sup> See, e.g., N.Y. DOM. REL. § 111 (McKinney Supp. 1971-72).

of the minor and where it is inconsistent with the general fabric of the law.

### C. *The Law on Parental Neglect*

There are in a great many states statutory provisions which authorize the state to intervene on behalf of a minor child and to take custody of the minor as *parens patriae* when the parent has failed to provide adequate medical care.<sup>40</sup> Having taken custody of the child, the courts may then order medical treatment of both an emergency<sup>41</sup> and nonemergency<sup>42</sup> nature notwithstanding the absence of parental consent. These statutes manifest the state's judgment that the overriding consideration is the health and welfare of the child and that, where necessary, the parent's authority can and must be subordinated. Moreover, the fact that the parental objection is based on religious principles presents no impediment to the courts intervening when necessary.<sup>43</sup>

The clearest and most frequent cases of court intervention against parental opposition are those in which the treatment in question is of an emergency nature. This situation has occurred in a number of cases involving parental objection, based on religious beliefs, to blood transfusions where the threat to the child's life is direct and immediate. Where, however, the courts are faced with situations in which the "emergency" is not as clearly defined, or in which it is clear that the withholding of treatment would not be fatal, the decisions of the courts have involved both interpretation of the language of the statute giving them authority to act and an evaluation of the factual circumstances of each particular case as a prelude to *parens patriae*. For example, in *In re Seiferth*,<sup>44</sup> the New York Court of Appeals considered the propriety of an order declaring a 14-year-old boy to be a neglected child and temporarily transferring custody to the Commissioner of Social Welfare

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<sup>40</sup> See, e.g., ILL. ANN. STAT. ch. 37, §§ 701-1, -2, 702-4(1)(a), 703-1, -7 (Smith-Hurd Supp. 1972); N.J. REV. STAT. §§ 9:2-9 to -11 (1960); N.Y. FAMILY CT. ACT § 232 (McKinney 1963).

<sup>41</sup> See, e.g., *State v. Perricone*, 37 N.J. 463, 181 A.2d 751, cert. denied, 371 U.S. 890 (1962).

<sup>42</sup> See, e.g., *In re Carstairs*, 115 N.Y.S.2d 314 (Dom. Rel. Ct. 1952) (psychiatric observation for possible emotional instability); *In re Sampson*, 65 Misc. 2d 658, 317 N.Y.S.2d 641 (Dom. Rel. Ct. 1970) (blood transfusion during corrective surgery on child's deformed face).

<sup>43</sup> See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1904); *State v. Perricone*, 37 N.J. 463, 181 A.2d 751, cert. denied, 371 U.S. 890 (1962).

<sup>44</sup> 309 N.Y. 80, 127 N.E.2d 820 (1955).

so that the Commissioner could consent to the performance of an operation to correct a cleft palate. In reversing the transfer of custody, the court of appeals noted that the child as well as his father was opposed to the surgery and that the child's cooperation was needed for post-surgery therapy. Since the court found that there was no emergency and that time was not of the essence, the state's interest in the health and welfare of the minor was subordinated to the private interest of the parent *and the minor*. It should be noted that in *Seifert* the child and parent stood unified against the state while in the abortion situation discussed here, it is assumed that the minor's wishes are contrary to the position of the parent.

No unified stand by parent and child appears to have been present in another New York case involving the consent issue in a non-emergency context. In *In re Rotkowitz*,<sup>45</sup> a child's mother consented, but the father refused consent, to an operation to correct a serious deformity of the child's leg. The hospital refused to proceed without a court order. In ordering that the child be declared neglected and that the operation be performed, the court observed that:

There are parents . . . who because of ignorance or prejudice or neglect or even sometimes viciousness, are either incapable or unwilling to do things necessary for the protection of their own offspring. There are parents who will by act do that which is harmful to the child and sometimes will fail to do that which is necessary to permit a child to live a normal life in the community.<sup>46</sup>

It should be noted that neglect has been even more broadly defined in some cases. One court has stated:

[Neglect is] not only a failure to provide the necessities of life — sustenance, clothing, shelter, food and warmth — but a failure to care, to look after, to guide, to supervise and . . . to direct the activities of a child . . . . [W]hen a parent is apprised of the conduct of the child just as if a parent were apprised of the physical ailments of the child and does nothing about correcting the conduct or correcting the condition which produced the physical ailment, that would constitute neglect . . . .<sup>47</sup>

Given such a broad view of neglect, one could rationally argue that parental inattentiveness to the sexual conduct which produced the pregnancy could constitute neglect, thus warranting a judicial order

<sup>45</sup> 175 Misc. 948, 25 N.Y.S.2d 624 (Dom. Rel. Ct. 1941).

<sup>46</sup> *Id.* at 949, 25 N.Y.S.2d at 626. See also *In re Vasko*, 238 App. Div. 128, 263 N.Y.S. 552 (1933).

<sup>47</sup> *In re Carstairs*, 115 N.Y.S.2d 314, 316 (Dom. Rel. Ct. 1952).

of temporary custody and treatment, where the minor is in favor of an abortion over the parents' opposition.<sup>48</sup>

In many cases, however, the best interests of the minor would make it undesirable for the parents to learn of the pregnancy at all. If the minor could obtain an abortion only by going through a court proceeding on the grounds of neglect, she might, rather than risk having her parents learn of her predicament, seek an unsafe illegal abortion, try to abort herself, or run away. In such circumstances, formal neglect proceedings which have as their very purpose the protection of the minor's best interests may actually be inimical to those interests. Thus, while in some instances neglect proceedings will provide an alternative to parental consent, in most cases — particularly those in which the minor is unwilling to have her parents learn of her pregnancy — these proceedings may not provide a realistic solution to the problem. But what is significant about neglect proceedings is that they demonstrate the state's awareness of the fact that at times it is necessary to override parental wishes and that they may provide a means in some cases for providing a minor with abortion services in the face of parental opposition.

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<sup>48</sup>The consequences of such unwanted pregnancies and births have been well documented. See, e.g., GIL, *VIOLENCE AGAINST CHILDREN — PHYSICAL CHILD ABUSE IN THE UNITED STATES* (1970); Campbell, *The Role of Family Planning in the Reduction of Poverty*, 30 J. MARRIAGE & FAMILY 236, 245 (1968); BERNSTEIN & HERZOG, *HEALTH SERVICES FOR THE UNMARRIED MOTHER*, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, WELFARE ADMINISTRATION (Children's Bureau) (1964); Anderson, Jess, Mosher & Richter, *The Medical, Social and Educational Implications of the Increase in Out of Wedlock Births*, 56 AM. J. PUB. HEALTH, 1868, 1869 (1966); Newcombe & Tavendale, *Maternal Age & Birth Order Correlations*, I MUTATION RESEARCH 446, 452 (1964); Perkin, *Assessment of Reproductive Risk in Non-Pregnant Women*, 101 AM. J. OBSTETRICS & GYNECOLOGY 709, 710 (1968). It is also clear that a very significant number of out-of-wedlock births occur to minors. The distribution by age of the illegitimate births in 1968 was as follows:

Under 15 years -----	7,700
15 - 17 years -----	77,900
18 - 19 years -----	80,100
20 - 24 years -----	107,900
25 - 29 years -----	35,200
30 - 34 years -----	17,200
35 - 39 years -----	9,700
40 years and over -----	3,300

U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, DIVISION OF VITAL STATISTICS, PUBLIC HEALTH SERVICE, MONTHLY VITAL STATISTICS REPORT — 10: "Estimated Number of Illegitimate Live Births and Ratios by Age of Mother and Color — United States [Based on a 50 percent sample of births]" (1968). See also Yurdin, *Recent Trends in Illegitimacy — Implications for Practice*, 49 CHILD WELFARE 373, 373-75 (1970).

### III. THE CONSTITUTIONAL QUESTIONS

If the right to obtain an abortion is manifest in state statutes, or if it is determined to be a constitutional right, significant constitutional questions arise concerning the requirement of parental consent in the case of minors. If it were established by the United States Supreme Court, as it has been decided in several federal cases, that a woman has a constitutionally protected right to terminate an unwanted pregnancy the constitutionality of parental consent requirements is likely to be questioned on the ground that allowing a state to enforce a parental veto over a minor's abortion amounts to a denial of the recognized constitutional right. Even disregarding any assumed constitutional right to abortion, parental consent requirements are still open to constitutional attack in those states having liberalized abortion statutes which recognize a right to abortion. Moreover, if the statutes of a particular state were silent on the question of parental consent, or included a provision which allowed the performing of an abortion upon a female "with her consent,"<sup>49</sup> application of common law principles regarding a minor's consent could be constitutionally questioned. It is the purpose of this section to examine these constitutional questions; first on the basis of an assumed constitutional right to abortion, and second on the basis of the existing liberalized abortion laws.

#### A. *A Minor's Constitutional Right to an Abortion*

1. *Abortion as a Constitutional Right.*— In addition to statutory developments mentioned above, changes in the law surrounding abortions have come with judicial recognition of the woman's right to determine whether or not to bear a child.<sup>50</sup> Although the United States Supreme Court has not at the time of this writing ruled on the question of whether a woman has a fundamental constitutional right to terminate an unwanted pregnancy,<sup>51</sup> many state and federal courts have specifically held that laws which restrict or limit the availability and permissibility of abortions are unconstitu-

<sup>49</sup> N.Y. PENAL LAW § 125.05 (McKinney Supp. 1971).

<sup>50</sup> See, e.g., *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

<sup>51</sup> The Supreme Court has heard oral argument in two cases in which restrictive state statutes were held to be unconstitutional. See *Roe v. Wade*, 314 F. Supp. 1217 1221-23 (N.D. Tex. 1970) (per curiam), *jurisdiction postponed*, 402 U.S. 941 (1971) (No. 808, 1970 Term; renumbered No. 70-18, 1971 Term); *Doe v. Bolton*, 319 F. Supp. 1048, 1054-55 (N.D. Ga. 1970) (per curiam), *jurisdiction postponed*, 402 U.S. 941 (No. 971, 1970 Term; renumbered 70-40, 1971 Term), *restored to calendar for reargument*, 40 U.S.L.W. 3617 (U.S. June 27, 1972).

tional as violations of the woman's fundamental rights under the 9th and 14th amendments.

The first case recognizing the fundamental nature of the right to have an abortion is *People v. Belous*.<sup>52</sup> That case declared unconstitutional a California statute previously in effect which limited legal abortions to those which were necessary in order to preserve the woman's life. The Supreme Court of California explicitly recognized a fundamental right to choose whether or not to bear a child, stating:

The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a "right of privacy" or "liberty" in matters related to marriage, family, and sex. . . . That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right.<sup>53</sup>

Decisions in a number of federal and state courts have followed the *Belous* decision in holding that abortion is a fundamental right. In six recent decisions,<sup>54</sup> three-judge federal courts held that the pertinent state law restrictions on abortion were unconstitutional because they interfered with a woman's right to choose whether or not to bear a child — a right the courts held to be secured by the 9th and 14th amendments. The question as to whether this right of privacy applies after as well as before conception, and thus includes abortion, has turned upon judicial analysis of the state's interest in the rights or welfare of the unborn. Once a court has concluded that the right to choose not to bear a child, including the right to

<sup>52</sup> 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970). The court grounded its holding on the fundamental right of privacy as laid down in *Griswold v. Connecticut*, 381 U.S. 479 (1969).

It should be noted that the decision actually effected no change in the California law on abortion, since the statute on which the defendant's conviction was based and which was declared unconstitutional in *Belous*, had previously been repealed by the legislature. The statute in effect since 1967 allows abortion when necessary to prevent grave impairment of the woman's physical or mental health, or when the pregnancy is the result of rape or incest, or when the woman is under the age of 15. CAL. HEALTH & SAFETY CODE §§ 25951, 25952(C) (Supp. 1972).

<sup>53</sup> 71 Cal. 2d at 963, 458 P.2d at 199, 80 Cal. Rptr. at 359.

<sup>54</sup> *Abele v. Markle*, \_\_\_ F. Supp. \_\_\_ (D. Conn. April 18, 1972); *Young Women's Christian Ass'n v. Kugler*, 10 Crim. L. Rptr. 2469 (D.N.J. Feb. 29, 1972); *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971), *appeals docketed sub. noms.* *Hanrahan v. Doe and Heffernan v. Doe*, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (Nos. 1522, 1523, 1970 Term; renumbered Nos. 70-105, 70-106, 1971 Term); *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970) (per curiam), *appeal granted*, 402 U.S. 941 (1971) (No. 971, 1970 Term; renumbered No. 70-40, 1971 Term); *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam) *appeal granted*, 402 U.S. 941 (1971) (No. 808, 1970 Term, renumbered 70-18, 1971 Term); *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis.) (per curiam), *appeal dismissed*, 400 U.S. 1 (1970) (per curiam).



terminate an unwanted pregnancy, is a fundamental right, the court has then usually asked whether the state has shown that the abortion statute's restrictions on this fundamental personal liberty are necessary in order to promote a compelling state interest.<sup>55</sup> The only asserted interest that has been seriously considered by courts in these cases has been the state's interest in protecting the fetus.<sup>56</sup> The six federal panels which struck down restrictive abortion laws explicitly held that this asserted interest was insufficient to overcome the woman's constitutional right.<sup>57</sup> Furthermore, the numerous state court cases which have declared restrictive abortion statutes unconstitutional have also rejected fetal interests as compelling.<sup>58</sup>

Those federal courts which have upheld restrictive abortion laws have either rejected the constitutional basis for a right to abortion,<sup>59</sup> or have determined that the extent to which the fetus should be protected is a question for appropriate resolution by the legislature.<sup>60</sup>

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<sup>55</sup> See generally cases cited note 54 *supra*. On the question of the state's compelling interest burden, see *Bates v. Little Rock*, 361 U.S. 516, 527 (1960).

<sup>56</sup> There are three other hypothetical state interests that could conceivably be put forward to support statutory limitations on the permissible grounds for the performance of abortions. They are the state's interest in: (1) enforcing morals; (2) increasing population; and (3) protecting the health of the pregnant woman. As to enforcing morals through anti-abortion statutes, it should be noted that the statutes in restricting abortions draw no distinctions between married and unmarried women, and are thus overbroad if their purpose is the deterrence of sexual misconduct. In any case, "to prescribe . . . [an unwanted pregnancy] as punishment for illicit intercourse would be a monstrous thing." *State v. Baird*, 50 N.J. 376, 383, 235 A.2d 673, 677 (1967) (concurring opinion Weintraub C.J.). See also *Eisenstadt v. Baird*, 429 F.2d 1398, 1402 (1st Cir. 1970), *aff'd*, 40 U.S.L.W. 4303 (1972). As to increasing population, given the present concern with problems of overpopulation, the assertion of this interest is extremely improbable and would in fact be ludicrous. Finally, as to protecting health interests of pregnant women, laws restricting the grounds for abortion serve no such purpose; instead they disregard health by defining the availability of abortion narrowly so that many women whose health is threatened by pregnancy and childbirth are unable to terminate pregnancy. Alternatively, women who for health or other reasons are unwilling to bear an unwanted child may seek the services of an unskilled, quack abortionist or resort to dangerous techniques of self-abortion and may thus cause serious, permanent injury to their health or even death.

<sup>57</sup> See cases cited note 54 *supra*.

<sup>58</sup> See, e.g., *State v. Walsingham*, 250 So.2d 857 (Fla. 1971); *People v. Barksdale*, 18 Cal. App. 3rd 948, 96 Cal. Rptr. 265, *appeal docketed*, No. 1 Crim. 9526 (Cal. Dist. Ct., July 22, 1971); *Shively v. Board of Medical Examiners*, Calif. Super. Ct., Dkt. No. 59033 (San Francisco Co., Sept. 24, 1968); *Commonwealth v. Page*, 6 Center Co. Legal J. 285 (Pa. C.P. July 23, 1970); *State v. Munson*, Dkt. No. 24949 (S. Dak. 7th Cir. Ct., Pennington Co., April 6, 1970); *State v. Ketchum* (Mich. Dist. Ct., March 30, 1970).

<sup>59</sup> See *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970).

<sup>60</sup> See *Doe v. Rampton*, Civil No. 324-70 (D. Utah, filed Sept. 29, 1971); *Corkey v. Edwards*, 322 F. Supp. 1248, 1251 (W.D.N.C. 1971), *appeal docketed*, 40 U.S.L.W. 3048 (U.S. July 17, 1971) (No. 71-92); *Steinberg v. Brown*, 321 F. Supp. 741, 746 (N.D. Ohio 1970); *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp.

The result in these courts is, of course, the denial of any general constitutional right to an abortion. Although the Supreme Court has not yet spoken to the issue, the argument in favor of a constitutional right to an abortion is cogent and convincing. For purposes of the following discussion of whether a minor also has a constitutional right to an abortion, the reader should assume that the question will be finally resolved in the affirmative, that is, in favor of a woman's constitutional right to an abortion.

2. *The Constitutional Rights of Minors.*— Assuming that the right to obtain an abortion is constitutionally protected, the logical next question is whether that right should also extend to minors. In a relatively recent line of cases, the United States Supreme Court has firmly established the principle that the protections of the Bill of Rights extend to minors. The decisions and their lower court interpretations make it clear that minors are indeed "persons" in the constitutional sense: thus the state must show a compelling reason to justify a limitation on the constitutional rights of a minor. For example, in the landmark case of *In re Gault*, the Supreme Court specifically rejected the notion that any alleged societal benefits resulting from informal juvenile court procedures constituted a valid basis for depriving a minor of the right to procedural due process. In affirming those rights the majority in *Gault* simply declared: "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."<sup>61</sup> That a minor is a "person" to whom basic constitutional guarantees are extended is seen in a variety of other situations involving the exercise by minors of constitutionally protected rights. In the case of *In re Winship*,<sup>62</sup> the Court held that the due process clause of the 14th amendment applies in juvenile court proceedings so as to guarantee the safeguard of the "proof beyond a reasonable doubt" standard. In a number of cases, the Supreme Court has recognized that minors enjoy the first amendment guarantee of freedom of expression,<sup>63</sup> and the proscription against laws "respecting an establishment of religion."<sup>64</sup> The Court has

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1217, 1225 (E.D. La. 1970), *appeal docketed*, 39 U.S.L.W. 3247 (U.S. No. 27, 1970) (No. 1010, 1970 Term; renumbered No. 70-42, 1971 Term).

<sup>61</sup> 387 U.S. 1, 13 (1967).

<sup>62</sup> 397 U.S. 358 (1970).

<sup>63</sup> See, e.g., *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (right to freedom of expression extended to wearing black arm bands as protest against Vietnam war); *Board of Education v. Barnette*, 319 U.S. 624 (1943) (state regulation compelling students to salute the flag held unconstitutional).

<sup>64</sup> See, e.g., *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

similarly made it clear that the guarantees of the 14th amendment equal protection clause apply to minors.<sup>65</sup> The decisions thus make it clear that minors are "persons" entitled to at least some constitutional rights. What has not been decided as yet is the significant question whether a state, by vesting a parent with authority to deny certain rights of minors, and enforcing that parental veto through direct or indirect means, violates the constitutional rights of the minor. In those cases in which minors' constitutional rights have been considered, either there has been an express or implied unity of interest between the parent and child, or the fact of disparate interests was not at issue. There is evidence, however, that when the question is considered the Supreme Court is not likely to accept the notion that constitutional rights of minors are so easily subject to nullification by the acts of parents.<sup>66</sup>

3. *Parental Control v. Constitutional Rights.*— Although the Supreme Court has made it clear that minors are "persons" entitled to the full enjoyment of constitutional rights, the Court has yet to consider the question whether states are free to enforce parental control over the exercise of some of those rights. Some insight into the issue can be gained by examining the extent to which courts have permitted parents to act in relation to the rights of their minor children in the absence of state legislation.

It has been established that parents have a constitutionally protected right to raise their children without unreasonable state interference,<sup>67</sup> and are empowered to discipline their children for disobeying reasonable commands.<sup>68</sup> Interpretations of the rights to raise and discipline children have included the right to allow the search of a child's room by police acting without a warrant and over the objections of the minor.<sup>69</sup> Despite the fact that courts in many instances have been unwilling to interfere in the relationship

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<sup>65</sup> See *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (school children protected from racial discrimination and unequal education); *Levy v. Louisiana*, 391 U.S. 68 (1968) (statute discriminating against illegitimate children held unconstitutional).

<sup>66</sup> *Wisconsin v. Yoder*, 40 U.S.L.W. 4476 (U.S. May 16, 1972).

<sup>67</sup> See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>68</sup> See, e.g., *Commonwealth v. Brasker*, \_\_\_ Mass. \_\_\_, 270 N.E.2d 389 (Mass. 1971) (statute punishing "stubborn children" held not unconstitutionally vague).

<sup>69</sup> *Vandenberg v. Superior Court*, 8 Cal. App. 3d 1048, 87 Cal. Rptr. 876 (1970). See also *In re Donaldson*, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (Ct. App. 1969) (holding that a school acting in loco parentis has the right to search a student's locker without a warrant).

between parent and child,<sup>70</sup> parental authority is neither absolute nor constitutionally insulated from some state regulation. As the Supreme Court declared in *Prince v. Massachusetts*:<sup>71</sup> "Acting to guard the general interest in youths well being, the state, as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."<sup>72</sup>

There is no indication, however, that states may enforce unlimited parental authority to nullify the exercise of constitutional rights by minors especially where the public interest is not well defined, as in the case of a mature or emancipated minor. A case somewhat on point is *Rowan v. U.S. Post Office Dep't.*<sup>73</sup> The case arose under a federal statute which permitted an addressee to direct the Postmaster General to issue an order prohibiting further mailings of certain types of matter to the addressee or any of the addressee's "minor children who have not attained their nineteenth birthday and who reside with the addressee."<sup>74</sup> Although the portion of the statute dealing with minor children was not specifically challenged, Mr. Justice Brennan offered the following caveat:

In light of the broad interpretation which the Court assigns to § 4009, . . . the possibility exists that parents could prevent their children, even if they are 18 years old, from receiving political, religious or other materials which the parents find offensive. In my view, a statute so construed and applied is not without constitutional difficulties. . . . [I] understand the Court to leave open the question of the right of older children to receive materials through the mail without governmental interference and also the more specific question whether [the statute] may constitutionally be applied with respect to all materials and to all children under 19.<sup>75</sup>

Thus, Justice Brennan at least would have the courts be wary of permitting the state to enforce the parent's right to control, when that control would affect a constitutionally protected right otherwise enjoyed by the minor.

<sup>70</sup> See, e.g., *Roe v. Doe*, 29 N.Y.2d 188, 324 N.Y.S. 2d 71, 272 N.E.2d 567 (1971) where the New York Court of Appeals declared:

It is the natural right, as well as the legal duty, of a parent to care for, control and protect his child from potential harm, whatever the source, and absent a clear showing of misfeasance, abuse or neglect, courts should not interfere with that delicate responsibility. *Id.* at 193, 272 N.E.2d at 570, 324 N.Y.S. 2d at 75.

<sup>71</sup> 321 U.S. 158 (1944).

<sup>72</sup> *Id.* at 166.

<sup>73</sup> 397 U.S. 728 (1970).

<sup>74</sup> 39 U.S.C. § 4009(g) (1970).

<sup>75</sup> 397 U.S. at 741.

Also pertinent to the question whether all minors may be subjected to parental authority in the exercise of constitutional rights is the question whether minors may effectively *wave* constitutional rights without parental involvement. Precedent makes it clear that a parent's right to speak for a minor is not exclusive. The Supreme Court of California, in *People v. Lara*,<sup>76</sup> rejected the contention that every minor is incompetent as a matter of law to waive constitutional rights to remain silent and to have an attorney unless the waiver is consented to by an attorney, a parent, or a guardian who has himself been advised of the rights. Instead, the court applied a totality of circumstances rule and declared that the validity of a waiver by a minor of the right to counsel and the right to remain silent "depends not on his age alone, but on a combination of that factor with such other circumstances as his intelligence, education, and ability to comprehend the meaning and the effect of his statement."<sup>77</sup> Thus, the question of the competence of a minor to waive his or her rights is one of fact, and while the age of the juvenile defendant is entitled to serious consideration, age per se is not conclusive.<sup>78</sup> When questions of waiver in the juvenile court setting have arisen, courts have considered age, education and information available to the defendant juvenile as well as other pertinent facts.

When a court speaks of the competence to waive constitutional rights, it is clear that it is actually speaking of a *competence to decide* whether to waive or *assert* those rights, thus presuming an attendant competence to assert rights. If a mature minor is competent to waive his rights to counsel and his privilege against self-incrimination, such a minor should also be held to be competent to assert fundamental rights guaranteed by the Constitution, and should not be deprived of those rights by a state's delegating to the parent the decisional function.

While the courts have only infrequently considered the question of the parent's power to waive the child's rights, the few cases indicate that the interests of the child are paramount. In *Shioutaken v. District of Columbia*,<sup>79</sup> a case involving waiver of rights in a juvenile proceeding, the federal appellate court observed that "[t]he court would be well advised to consult the child's parents or guard-

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<sup>76</sup> 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967).

<sup>77</sup> *Id.* at 383, 432 P.2d at 215, 62 Cal. Rptr. at 599.

<sup>78</sup> See *Williams v. Huff*, 142 F.2d 91 (D.C. Cir. 1944); *In re Dennis M.*, 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969).

<sup>79</sup> 236 F.2d 666 (D.C. Cir. 1956).

ian *where their interests are not adverse.*"<sup>80</sup> That limitation was more fully developed in the later case of *McBride v. Jacobs*.<sup>81</sup> The court was willing to assume *arguendo* that the mother had been advised of the juvenile's right to counsel and that she had made an intelligent and competent waiver. In the absence of advice to and waiver by the minor in the circumstances of this case, however the court held that the waiver by the mother was insufficient. The court observed:

Obviously not all minors are capable of making a waiver. Where the court finds for any reason the minor is not capable of a waiver the parent may so waive *provided the court also finds there is no conflict of interest between them.* . . .<sup>82</sup>

This reasoning, coupled with the preceding analysis of the minor's competence to waive his constitutional rights, suggests that a parent should be permitted to waive the rights of a minor only when the minor is shown to be incapable of making an independent decision to waive or assert his rights, and in no case when the interest of the parent is adverse to that of the child. Extending that reasoning to the abortion question, a parent should not be able to block an independent choice by a minor to obtain an abortion where the minor is competent to make such a choice or where the interests of the parent and child are adverse.

Assuming that a constitutional right to an abortion does in fact exist, and that a state imposed parental consent requirement exists which must be fulfilled if the minor is to exercise that right, the consent requirement must satisfy not only a legitimate, but a compelling state interest<sup>83</sup> and must be narrowly drawn.<sup>84</sup> Obviously, the state's consent requirement cannot be based upon state concern with the interest of the fetus in the case of minors when such an interest is not present in the case of adults. However, arguably there exist some other interests which might be asserted in support of the consent requirement. For example, a possible argument upon which the state might rely is that a rule requiring parental consent to abortion protects a minor from her own improvidence. There are two basic flaws in this rationale. First, the law in a variety of circumstances acknowledges that unmarried minors may

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<sup>80</sup> *Id.* at 670 n.26 (emphasis added).

<sup>81</sup> 247 F.2d 595 (D.C. Cir. 1957).

<sup>82</sup> *Id.* at 596 (emphasis added).

<sup>83</sup> *Cf. Bates v. Little Rock*, 361 U.S. 516 (1960).

<sup>84</sup> *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 485 (1969), *citing NAACP v. Alabama*, 377 U.S. 288, 307 (1963).

consent to receive medical treatment and has legitimized such consent.<sup>85</sup> The extent to which state law does this varies, of course, from state to state. What is noteworthy here is that the "interest" of the state in protecting minors from improvidently consenting to medical treatment is not consistently asserted and appears not to be present in a variety of health situations (*e.g.*, venereal disease)<sup>86</sup> in most states. Second, in states other than those which have eliminated all restrictions on permissible grounds for abortion, informed medical authorities have concluded that a therapeutic abortion should be available where there is substantial risk of grave impairment to the physical and mental health or life of any female, especially a minor.<sup>87</sup> It is well known that the adverse consequences of childbirth to the minor's health and welfare increase as the minor's age decreases.<sup>88</sup> Moreover, even if in a given set of circumstances a minor's parents might agree, if asked, to consent to an abortion, the requirement of parental consent may adversely affect the mental or physical health and welfare of the minor, or perhaps drive her to an underground abortionist or self-abortion. Given these considerations the requirement can hardly be rationalized as a means of protecting the minor from her own improvidence.

A second possible argument for a compelling interest of the state is that the denial of abortions and other forms of medical care to unmarried minors is necessary for the preservation of parental control. But the state has disregarded this parental interest in a variety of circumstances where the minor's health needs or the health interests of the community or both would be disserved by requiring parental consent. Under many state laws, broad groups of minors may give effective consent to receive *all* kinds of medical treatment if they meet certain requirements.<sup>89</sup> Moreover, in a great many states minors can also receive care related to pregnancy,<sup>90</sup> and it is difficult to see why, if that care may be provided without parental consent, abortion services cannot be. Where an unwanted teenage pregnancy occurs, a general interest of the state in assuring parents' control of their children does not appear compelling. Moreover, since the minor has become pregnant, it would appear that parental con-

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<sup>85</sup> See notes 27-31 *supra* & accompanying text.

<sup>86</sup> Cf. note 27 *supra* & accompanying text.

<sup>87</sup> See generally authorities cited note 48 *supra*.

<sup>88</sup> Cf. Pilpel & Wechsler (1971), *supra* note 25, at 37 n.3.

<sup>89</sup> See generally statutes cited note 30 *supra*.

<sup>90</sup> See statutes cited note 31 *supra*.

trol has already been diminished,<sup>91</sup> and surely the state cannot intend the law to bolster parental control for punitive purposes.

B. *Alternative Constitutional Attacks on Parental Consent Requirements*

A ruling that the requirement of parental consent to a minor's abortion is unconstitutional — whether such requirement is imposed by statute or by state regulation or whether it is imposed by the practicalities of a physician's and/or hospital's fear of civil liability — need not necessarily rest upon the broad determination that there is a constitutional right to abortion as such. Alternative constitutional attacks on the parental consent requirement could be made under (1) the equal protection clause; (2) the constitutional right to life and health, and the physician's correlative right to practice medicine in accordance with the best medical standards; and (3) the prohibition against laws respecting an establishment of religion.

1. *The Equal Protection Clause.*— Under the equal protection clause, states are free to legislate by classification among citizens so long as the classifications utilized rest upon some difference which bears a reasonable relation to the purpose of the statute which creates it.<sup>92</sup> If under the statute of a particular state, some or all minors are deprived of the right to obtain an abortion without getting parental consent, it could be argued that minors who are for that reason unable to obtain abortions are deprived of the equal protection of the law by virtue of an unreasonable classification. The precise manner in which such a claim could be raised would, of course, depend on the specific statutory and/or common law framework of a particular state; or, in the absence of a controlling state statute, upon whether the abortion services were denied by a private physician or a public or quasi-public facility which refused to perform an abortion for fear of civil liability.

In some states,<sup>93</sup> there are specific statutory prohibitions against the providing of abortion services to minors under a certain age without parental or spousal consent. In these states it is clear that the statutory framework divides women into at least three classes:

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<sup>91</sup> Cf. text accompanying notes 47-48 *supra*.

<sup>92</sup> See *McLaughlin v. Florida*, 379 U.S. 184 (1964); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Developments in the Law, Equal Protection*, 82 HARV. L. REV. 1065 (1969).

<sup>93</sup> See notes 16, 18, 19 *supra* & accompanying text.



(1) those who qualify for therapeutic abortions and for whom no consent other than their own is needed; (2) those who qualify for therapeutic abortions and who have been willing and able to obtain the required parental or spousal consent; and (3) those who qualify for therapeutic abortions but cannot obtain them because they are unwilling or unable to obtain the necessary parental or spousal consent. In other states the inability of some minors to obtain abortion services might rest upon a statutory provision which excludes abortion from the medical services for which a minor may consent.<sup>94</sup> In such states it could be argued that the statutory provision unreasonably discriminates against minors in need of a particular kind of medical care, namely an abortion. Finally when abortions for minors are not singled out by any exclusionary statute, but are rather unavailable because of the general statutory medical care framework, two classes are created — adults and minors. The above examples of possible statutory frameworks, and the equal protection attacks thereunder indicate that the definition of offensive classifications will necessarily vary from state to state. It is clear, however, that where state laws regarding consent to medical treatment interfere in some manner with the rights of some women to obtain abortions otherwise permitted by state law, a classification is created which arguably offends the equal protection clause.

As indicated above, a statutory classification, to withstand attack under the equal protection clause, must at the very least be rationally related to a valid purpose of the statute creating it.<sup>95</sup> As the Supreme Court has recently declared, classifications "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."<sup>96</sup> However, where the particular statutory classification impinges upon the exercise of fundamental constitutional rights, a more stringent test of equal protection is applied as opposed to the simple rational relationship test. In these situations, the statutory classification must "be not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state in-

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<sup>94</sup> See, e.g., HAWAII REV. STAT. §§ 577A, 577A-2 (Supp. 1971); MO. REV. STAT. § 431.062 (Supp. 1971).

<sup>95</sup> The rational relationship test will be applicable if the right in question is deemed not to be a "fundamental" right. See *Dandridge v. Williams*, 397 U.S. 471 (1970).

<sup>96</sup> *Reed v. Reed*, 404 U.S. 71 (1971), quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

terest."<sup>97</sup> Assuming an affirmative answer to the question of whether there exists a constitutional right to abortion,<sup>98</sup> a classification limiting the exercise of that right by minors would necessarily be subject to the stricter compelling interest standard in order to survive scrutiny under the equal protection clause. As the discussion in an earlier portion of this article pointed out,<sup>99</sup> states would have considerable difficulty demonstrating that compelling interest. But the instant analysis is concerned with an alternative to the argument that there is a fundamental right to an abortion. Indeed it is arguable that, in determining whether statutory parental consent requirements violate the equal protection clause, it is not necessary to reach the question of whether abortion is a constitutional right since, in the writers' view, even the more lenient rational basis test cannot be met.

Reviewing the possible purposes for the state imposition of parental consent requirements upon the availability of abortions to minors,<sup>100</sup> it is reasonable to conclude that just as there is no compelling interest justifying the existence of such requirements, so too there is no rational relationship between the classification and the purpose of the statute creating it. For example, so far as any purpose to protect a minor from her own improvidence is concerned, arbitrarily restricting the right of a pregnant woman after the fact to obtain an abortion bears but little relation to the accomplishment of that goal. Similarly, any claimed purpose of assuring parental control bears little rational relationship to the statute: presumably the fact of sexual conduct leading to pregnancy would indicate that the parent had lost control of the child, and to enforce renewed control by means of a compelled continuation of pregnancy is both arbitrary and inhumane.<sup>101</sup>

One difficulty with the above argument becomes apparent after consideration of judicial interpretation of the "rational relationship" concept. The Supreme Court has made it quite clear that rational relationship should be interpreted to mean that if any state of facts which would sustain the classification can be reasonably conceived,

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<sup>97</sup> *Eisenstadt v. Baird*, 40 U.S.L.W. 4303, 4306 n.7, *citing* *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>98</sup> See text accompanying notes 49-60 *supra*.

<sup>99</sup> See text accompanying notes 55-58 *supra*.

<sup>100</sup> See text accompanying notes 85-91 *supra*.

<sup>101</sup> *Cf. State v. Baird*, 50 N.J. 376, 383, 235 A.2d 673, 677 (1967), where Chief Judge Weintraub, concurring, states that "to prescribe . . . [an unwanted pregnancy] . . . as a punishment for illicit intercourse would be a monstrous thing."

the classification should be allowed to stand.<sup>102</sup> Thus, only when there is a gross lack of correspondence between the classification and the purpose will the courts intervene under the equal protection clause. Yet, at the same time, the Court has declared that a gross lack of correspondence would be present when a classification drawn is *unreasonable* in light of its purpose.<sup>103</sup> It is the contention here that the restriction imposed upon the availability of abortions by consent requirements is indeed unreasonable in the equal protection sense.

2. *The Right of a Minor to Life and Health.*— The minor's right to obtain needed medical services and more broadly, her right to life and health, arguably are also impinged upon by state laws which directly or indirectly condition the availability of abortion services upon parental consent.<sup>104</sup> The right to life is, of course, self-evident under the Constitution,<sup>105</sup> and the right to protect health appears to be equally fundamental.<sup>106</sup> Carrying the analysis one step further, freedom to obtain medical services for safeguarding health must be deemed an aspect of life and liberty if the 5th and 14th amendments are to have meaning. Given our constitutional framework, there can hardly be a more basic attribute of freedom than the right of the individual to be secure from physical or emotional harm. With that in mind the question whether and how

<sup>102</sup> See *McLaughlin v. Florida*, 379 U.S. 184 (1964).

<sup>103</sup> 379 U.S. at 191.

<sup>104</sup> To a degree the right to life and health overlaps with the right to abortion. However, if the Supreme Court were ultimately to reject the separate constitutional basis of the right to abortion, the right of life and health would still provide the basis not only for attack on the old restrictive abortion statutes but also on the laws preventing minors from obtaining abortions without parental consent. In the case of adults this ground might not be as all-inclusive as the privacy ground discussed above. However, so far as minors are concerned — particularly those who are very young — the dangers to life and health of pregnancy are more readily apparent. See note 48 *supra*.

<sup>105</sup> Thus, in *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) *cert. denied*, 397 U.S. 915 (1970), the Supreme Court of California, in considering the constitutionality of that state's restrictive anti-abortion statute, specifically found that if the law (which in that case permitted abortions only where necessary to preserve the life of the woman) was read to require "certainty of death," the statute "would work an invalid abridgment of the woman's constitutional rights. The rights involved . . . are the woman's right to life and to choose whether to bear children. The woman's right to life is involved, because childbirth involves risk of death." *Id.* at 963, 458 P.2d at 199, 80 Cal. Rptr. at 359 (footnotes omitted).

<sup>106</sup> Cf. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). See also *United States v. Vuitch*, 402 U.S. 62 (1971) in which the Supreme Court acknowledged that health includes all aspects of physical and mental well-being. While the Supreme Court in *Vuitch* was construing the District of Columbia statute against a claim that it was unconstitutionally vague, a fair implication from that construction is that the Court recognized that people must be free to safeguard health as broadly defined in that case.

health should be protected is one uniquely suited to solution by the individual and his physician.

The extent to which state laws on abortion or on medical treatment for minors arguably interfere with the minor's constitutional right to life and health again vary with the particular state law framework. In the states which require parental or spousal consent to abortion where minors are below a certain age,<sup>107</sup> it is uncertain whether the common law emergency exception would apply or whether a neglect proceeding would be available for the minor's protection. The statutes of some of these states permit abortion only in certain situations. By foreclosing abortion (as they appear to do on their face) even in these limited circumstances in the absence of parental consent, they seem to ignore the health interest of minors. It is conceivable that a situation could arise in which a minor who is otherwise eligible for an abortion on the ground, for example, that pregnancy is a threat to her life or health, would nonetheless be forced to risk injury to life and health — possibly of a permanent nature — in the event that she is unwilling or unable to obtain parental consent to the procedure.

In those states in which parental consent to abortion is not expressly required,<sup>108</sup> the common law and/or statutory framework might permit abortions without parental consent depending upon the particular circumstances. However, the uncertainty of the law, and the consequent reluctance of the medical profession to act in the face of such uncertainty, may effectively prevent the minor from obtaining abortion services — and thus foreclose her from enjoying her constitutional rights to life and health. Arguably, the state should at least be required to show a compelling state interest to justify this arbitrary interference with the minor's constitutional rights.<sup>109</sup>

Also involved here is the physician's right to evaluate the health needs of the pregnant minor who is his patient. Where parental consent to abortion is required, the health needs of the minor are relegated to secondary importance and the physician who provides abortion services without parental consent may in some instances run the risk of civil liability or criminal penalties,<sup>110</sup> despite the fact that he has made a professional determination that: (1) the

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<sup>107</sup> See notes 16, 18, 19 *supra* & accompanying text.

<sup>108</sup> See notes 20-22 *supra*.

<sup>109</sup> See note 97 *supra* & accompanying text.

<sup>110</sup> See statutes cited note 16 *supra*.

minor should have an abortion; (2) the seeking of parental consent would be harmful to the minor; or (3) parental consent cannot be obtained.

3. *The Prohibition Against Laws Respecting An Establishment of Religion.*— In some cases, parental refusal to consent to abortion may be based upon the parent's conviction that a fetus is a human being and that abortion is equivalent to murder.<sup>111</sup> Such a conviction is often based upon religious beliefs, particularly of the Roman Catholic Church.<sup>112</sup> In these circumstances a third constitutional attack is available to the minor who seeks abortion services but is unable to obtain parental consent.

Where the minor wishes to have an abortion a fortiori she does not subscribe to theological beliefs which would prohibit abortion. Where the grounds for parental objection are religious, the state, in enforcing it by means of criminal or civil sanctions, arguably interferes with the minor's rights in favor of the parents' religious beliefs. That such a course may violate the first and 14th amendments could follow from the Supreme Court's decisions in *Epperson v. Arkansas*,<sup>113</sup> and *Abington School District v. Schempp*.<sup>114</sup> While those landmark decisions regarding the teaching of religious beliefs in public schools did not involve any question of parental consent, the basic mandate of the Court that states must refrain from the support of religious ideas could logically be extended to the context of minors' rights to obtain abortions. Thus, it could be argued that by enforcing the requirement of parental consent in cases where that consent is withheld by reason of the parents' religious beliefs, the state is not being "neutral in matters of religious theory, doctrine and practice."<sup>115</sup>

<sup>111</sup> See Tinnelly, *Abortion and Penal Law*, 5 CATHOLIC LAW, 187, 190 (1959).

<sup>112</sup> The official Catholic position opposes any direct interruption of the reproductive process at any time before or after conception. This position (*Humane Vitae*) was stated by Pope Paul VI as follows:

[W]e must once again declare that the direct interruption of the generative process already begun, and, above all, directly willed and procured abortion, even if for therapeutic reasons, are to be absolutely excluded as a licit means of regulating birth. The 7th Encyclical of Pope Paul VI (as made public by the Vatican, July 29, 1968, in translation from the Latin).

Even if these beliefs are not grounded upon an established religion but are rather based on conscientious scruples held by a parent, the same basic objection could be made, namely that the parents' freedom of conscience is being implemented at the expense of the minor's equally cogent claim to freedom of conscience.

<sup>113</sup> 393 U.S. 97 (1968).

<sup>114</sup> 374 U.S. 203 (1965).

<sup>115</sup> 393 U.S. at 103-04.

#### IV. LEGISLATIVE PROPOSALS FOR ABORTION AND PARENTAL CONSENT

The principle that the best interests of the minor are paramount should be kept foremost in mind when considering the question of what the law should be with respect to a minor's ability to consent for herself to the performance of an abortion. It was at least in part to protect these interests that the common law rules on parental consent to medical treatment were originally developed. Unfortunately, it is often the case that the interests of parent and child do not coincide and, in fact, collide.

Where a minor seeks abortion services and indicates to a physician that she is unwilling or unable to seek parental consent, the physician should discuss the matter fully with the minor. If the physician is satisfied that the minor wants an abortion, and that the minor is unwilling or unable to obtain parental consent, and if he believes that it will be in the minor's best interest to terminate the unwanted pregnancy, he should be free to perform the abortion without the threat of civil or criminal penalty. The physician should, of course, carefully explain the nature and consequences of the abortion procedure to the patient and should take special pains with young minors to make his explanations clear. Social service and contraceptive counselling should also be provided to the minor, as well as other medical and psychiatric or psychological treatment where needed.

While in an ideal family parent and child would have the kind of relationship which would encourage the pregnant minor to take her parents into her confidence and seek their help, the real life situation of many minors may not permit such confidences. For example, the minor may have become pregnant through an act of incest and be unwilling to have this known to her mother. Or the minor may have reasonable grounds for believing that knowledge of her pregnancy would result in severe punitive sanctions by her family. The minor may know that her parents, on religious grounds, will refuse to consent to abortion. A minor may be living away from her parents or may have been abandoned by her parents and thus be unable to obtain parental consent. There are many other situations in which the seeking of parental consent would be at best futile and at worst harmful. Faced with an absolute requirement of parental consent, many minors, rather than risk parental knowledge of and adverse reaction to the pregnancy, will either run away from home, try to abort themselves, or find a quack abor-

tionist who is willing to perform a nonmedical, unsafe abortion without parental consent. No state law should encourage that result.

The choice between permitting safe, legal abortions by physicians without parental consent and forcing a minor to either bear an unwanted child or undertake to have an unsafe illegal abortion seems to be one that can only be satisfactorily resolved by permitting abortions without parental consent. Since the rights of the minor — her privacy, her health and safety, and indeed her very life — may depend upon her ability to consent for herself to the performance of abortion, the law should permit her to do so. Unless it does, both the minor and the physician, who would, but for the negative effect of the law (whether such negative effect stems from ambiguity or outright prohibition) be able to provide the needed services, are placed in an impossible dilemma under the present laws in many states. The elimination of laws negating the rights of the minor as to abortion seems dictated by constitutional considerations as well as considerations of humanitarianism and public well-being.

It may be that some variation of the Illinois statute on birth control services would be appropriate for providing abortion services.<sup>116</sup> Such a statute would provide that abortion services may be provided to any minor: (1) who is married, is a parent, or has had a prior pregnancy; (2) who has the consent of her parent or legal guardian; (3) who has graduated from high school; (4) who is living away from home under such circumstances that she makes most of her own decisions; (5) as to whom the failure to provide such services would create a serious health hazard; or (6) who is referred for such services by a physician, clergyman, social worker or family planning agency. Adoption of this type of statute in the abortion area might help to assuage the fear sometimes expressed that a very young minor may act precipitously in relation to abortion

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<sup>116</sup> The Illinois birth control statute provides as follows:

Birth control services and information may be rendered by doctors licensed in Illinois to practice medicine in all of its branches to any minor:

1. who is married; or
2. who is a parent; or
3. who is pregnant; or
4. who has the consent of his parent or legal guardian; or
5. as to whom the failure to provide such services would create a serious health hazard; or
6. who is referred for such services by a physician, clergyman or a planned parenthood agency. ILL. ANN. STAT. 91, § 18.7 (1969).

if she is neither relatively independent nor has had the benefit of adult advice in relation to the decision-making process.

Although a great many minors can now obtain abortions in a variety of states under a number of different laws and legal theories, it is contended that the best interests of the minor would be served by a statutory provision which makes crystal clear the availability of abortion services without parental knowledge or consent, and which includes protection for the servicing physician and/or health facility from criminal or civil liability where such liability would be based solely on the absence of parental consent.