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The Distribution of Contraceptives to Unemancipated Minors: Does a Parent Have a Constitutional Right to Be Notified?

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THE DISTRIBUTION OF CONTRACEPTIVES TO UNEMANCIPATED MINORS: DOES A PARENT HAVE A CONSTITUTIONAL RIGHT TO BE NOTIFIED?

INTRODUCTION

Designed to cope with the increasing problem of out-of-wedlock pregnancies among minors,[1] state funded distribution of contraceptives to minors recently has been challenged in courts by parents asserting violations of their own constitutional rights.[2] Efforts to distribute contraceptives to minors emerged as a response to statistics indicating that, in the face of a declining overall birth rate in the 1970's, out-of-wedlock births continued to increase, especially among teenage mothers.[3] Due to these developments, various groups have taken the position that minors should have free access to contraceptives.[4] Others, however, strongly believe that to allow a minor access to contraceptives, particularly in the absence of parental notification, can only result in increased teenage promiscuity, contrary to a policy of discouraging sexual intercourse by unwed minors.[5]

The issue of whether a state may distribute contraceptives to unemancipated minors[6] without first notifying their

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[1] *See* Morris, *Estimating the Need for Family Planning Services Among Unwed Teenagers*, 6 FAM. PLAN. PERSPECTIVES 91, 92 (1974).

[2] *See* Doe v. Irwin, 615 F.2d 1162 (6th Cir. 1980), *cert. denied*, ___ U.S. ___, 101 S. Ct. 95 (1980).

[3] Paul, *Legal Rights of Minors to Sex-Related Medical Care*, 6 COLUM. HUMAN RIGHTS L. REV. 357, 358 (1975).

[4] These groups include social workers, physicians, attorneys, state legislators and others. For example, the American College of Obstetricians and Gynecologists has taken the official position that an "unmarried female of any age whose sexual behavior exposes her to possible conception should have access to the most effective methods of contraception." Pilpel & Wechsler, *Birth Control, Teenagers and the Law: A New Look*, 3 FAM. PLAN. PERSPECTIVES 37, 43 (1971).

[5] For arguments against providing minors with access to contraceptives, see Carey v. Population Services Int'l, 431 U.S. 678, 694 (1977).

[6] The term "minor" is defined as "[a]n infant or person who is under the age of legal competence." BLACK'S LAW DICTIONARY 899 (5th ed. 1979). An unemancipated minor is a minor who is still under the care of his parents. This usually means a minor who is still residing with his parents.

parents is made increasingly complex by the conflict among the interests of the state, the interests and rights of minors, and the interests and rights of the minors' parents.[7] Although the United States Supreme Court has not yet rendered a decision on the merits of this issue,[8] the Court of Appeals for the Sixth Circuit faced this complex question in *Doe v. Irwin.*[9] In *Irwin,* the parents of a sixteen-year-old girl who received contraceptives from a publicly operated family-planning center, along with parents of other teenage children who lived in the area served by the clinic, brought a class action against the administrators of the family-planning center and board members of the county health department.[10] The parents, who were not notified by the center of the distribution of contraceptives to their children, alleged that the defendants' policy deprived them of rights guaranteed by the United States Constitution.[11] The Sixth Circuit held that actions taken by the center did not infringe upon a constitutional right of the plaintiffs and that the center had no constitutional obligation to notify the plaintiffs before distributing contraceptives to their minor children.[12] The court limited its holding in that it failed to address the issue of whether the rights and interests of minors and the state should prevail over the rights and interests of parents of minors receiving contraceptives in cases where the rights of the parents are actually infringed to some degree.[13]

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[7] *See generally* Casenote, 56 J. URB. L. 268 (1978-79).

[8] The Court recently placed under review a case involving a Utah statute that requires a physician who is requested by a minor female to perform an abortion on her to notify the minor's parents prior to performing the abortion. H___ L___ v. Matheson, 604 P.2d 907 (Utah), *prob. juris. noted,* 445 U.S. 903, (1980). A decision in that case would have an important bearing upon the issue discussed in this comment.

[9] 615 F.2d 1162 (6th Cir. 1980), *cert. denied,* ___ U.S. ___, 101 S. Ct. 95 (1980).

[10] Specifically, the defendants were administrators of the Tri-County Planning Center and board members and administrators of the Ingham County, Michigan, Health Department. *Id.* at 1163.

[11] Doe v. Irwin, 428 F. Supp. 1198 (W.D. Mich. 1977), *vacated and remanded,* 559 F.2d 1219 (6th Cir. 1977), *reaff'd,* 441 F. Supp. 1247 (W.D. Mich. 1977), *rev'd,* 615 F.2d 1162 (6th Cir. 1980), *cert. denied,* ___ U.S. ___, 101 S. Ct. 95 (1980). The plaintiffs originally asserted constitutional rights and privileges guaranteed them by the first, fifth, ninth and fourteenth amendments.

[12] 615 F.2d at 1169.

[13] See text accompanying notes 70-82 *infra* for a more complete explanation of

This comment will consider the development of the right to use contraceptives, particularly as applied to use by minors, and will then discuss this right in relation to the rights and interests of both parents and the state. It will further propose that, in balancing these rights and interests, the Sixth Circuit and other courts faced with this issue should deny parents the relief they seek, due to compelling state interests and the increasing recognition of the privacy rights of minors.

I. DEVELOPMENT OF THE RIGHT TO PRIVACY IN MATTERS RELATING TO SEX, CHILDBEARING, CONTRACEPTION AND FAMILY AFFAIRS

A. *Constitutional Sources for the Right of Privacy*

Although the United States Constitution does not specifically state that a person has the right to make personal decisions in matters relating to sex, childbirth, and family affairs, free from unwarranted state interference, the United States Supreme Court has interpreted the Constitution to include this right.[14] The Court has focused on various sources for this fundamental right, including the fourteenth amendment,[15] the ninth amendment,[16] and a "penumbra" which surrounds the Bill of Rights.[17] By interpreting the Constitution in this flexible manner, the Court has laid a foundation upon which per-

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the context in which this issue would arise.

[14] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptives); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (child rearing and education). The right of privacy was first articulated in Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890-91).

[15] Meyer v. Nebraska, 262 U.S. 390 (1923). The Court specifically stated that the word liberty denotes:

> not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399.

[16] Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring).

[17] The *Griswold* Court stated that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484.

sonal rights can be based. Thus, the Court has used several amendments to the Constitution and the cases interpreting these amendments to limit state interference into matters of personal privacy, including sexual relations, childbearing, abortion and the use of contraceptives.

B. Griswold v. Connecticut: *The Right of Privacy Interpreted to Include the Right to Use Contraceptives*

Changing social values and problems such as poverty, hunger, overcrowding, pollution and inflation led to increased use of contraceptives in the United States throughout the 1950's, 1960's and 1970's.[18] This trend, however, conflicted with several state statutes then in effect forbidding the use of contraceptives by any person.[19] *Griswold v. Connecticut*[20] involved a challenge to a Connecticut statute forbidding the use of contraceptives.[21] The Court held that the case involved a relationship (marriage) within the "zone of privacy created by several fundamental constitutional guarantees," and that the invasion of this relationship was unconstitutional.[22]

Although *Griswold* expanded the right of privacy to include the use of contraceptives by married persons, it re-

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[18] *See generally* J. REED, FROM PRIVATE VICE TO PUBLIC VIRTUE 376 (1978). This trend is not limited to the United States. Within the past 20 years, scholars and social workers have noted "a radical change in governmental and other institutional attitudes toward the practice of contraception, a shift from historical positions of overt or covert hostility to the present general advocacy, support and sponsorship of family planning programs." Nortman, *Demographic-Social and Family Planning Aspects of Contraceptive Sterilization in Countries Other Than the United States, Puerto Rico and India*, BEHAVIORAL-SOCIAL ASPECTS OF CONTRACEPTIVE STERILIZATION 63 (S. Newman & Z. Klein eds. 1978).

[19] *E.g.*, CONN. GEN. STAT. ANN. § 53-32 (West 1958) (repealed 1969). The statute provided that "[a]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." *Id.*

[20] 381 U.S. 479 (1965).

[21] See note 19 *supra* for the text of the statute.

[22] 381 U.S. at 485. Referring to the statute's prohibiting the *use* of contraceptives, rather than merely regulating their sale or manufacture, the Court stated that "[s]uch a law cannot stand in light of the familiar principle, so often applied by this Court," that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Id.*

mained unclear whether this right extended to unmarried individuals.[23] The Supreme Court answered affirmatively in *Eisenstadt v. Baird*,[24] which held that individuals, married or single, have a right of privacy in deciding whether they should or should not use contraceptives.[25]

Although the decisions in *Griswold* and *Eisenstadt* expounded on the right of privacy as applied to the use of contraceptives, the decisions left unanswered the questions whether the right would be extended to unmarried minors[26] and the extent to which a state could *regulate* the use of contraceptives without violating the United States Constitution.[27]

II. THE DISTRIBUTION OF CONTRACEPTIVES TO UNEMANCIPATED MINORS

A. *Judicial Extension of the Right of Privacy to Minors:* Carey v. Population Services International

The combination of the trend toward acceptance of contraceptives in modern society,[28] the overwhelming problems associated with teenage pregnancy[29] and the expansion of pri-

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[23] The *Griswold* Court's emphasis on the sanctity and "sacred" nature of the *marital* relationship contributed strongly to this uncertainty. *Id.* at 486.

[24] 405 U.S. 438 (1972).

[25] The Court specifically stated that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453. *Accord*, Baird v. Lynch, 390 F. Supp. 740 (W.D. Wis. 1974) (Wisconsin statute forbidding the sale of contraceptives to unmarried persons held unconstitutional).

[26] The question of minors' rights to use contraceptives is made especially critical by minors' particularly acute need to avoid conception. *See generally* Pilpel & Wechsler, *supra* note 4, at 37.

[27] For a discussion of the historical development of adults' rights of privacy and an evaluation of minors' rights of access to contraceptives, see Note, *Juvenile Privacy: A Minor's Right of Access to Contraceptives*, 6 FORDHAM URB. L.J. 371, 372 (1978).

[28] *See generally* REED, *supra* note 18.

[29] Over one million teenagers become pregnant each year in the United States. HOUSE SELECT COMM. ON POPULATION, 95TH CONG., 2D SESS., REPORT ON FERTILITY AND CONTRACEPTION IN THE UNITED STATES 86 (Comm. Print 1978). These resulting problems are both medical and social in nature. "The medical disadvantages of teenage pregnancies include high risks of toxemia and low infant birth weight, resulting in higher rates of infant mortality, mental retardation and birth defects among children of adolescent mothers than among children of adult mothers." *Id.* The social

vacy rights by the United States Supreme Court[30] resulted in a movement to provide minors with birth control methods.[31] This movement, however, conflicted with several state statutes forbidding distribution of contraceptives to minors.[32]

A New York statute[33] forbidding the sale or distribution of contraceptives to minors was challenged in *Carey v. Population Services International.*[34] In holding that the law unconstitutionally infringed upon the rights of minors,[35] the Su-

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problems include psychological effects on the unwed mother, including the "stigma of unwed motherhood" and the overall "distress, for all concerned, associated with the unwanted child." Roe v. Wade, 410 U.S. 113, 153 (1973). Furthermore, pregnancy is the single largest cause of school dropouts among minors in lower socioeconomic classes. Comment, *The Law and the Legal Impact of Contraceptive Use by Minors in North Carolina,* 6 N.C. CENT. L.J. 304, 312 n.38 (1974-75). *See also* E. BOULDING, CHILDREN'S RIGHTS AND THE WHEEL OF LIFE 27 (1979).

[30] *E.g.,* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

[31] A 1972 Gallup poll found that 75% of Americans believed that birth control information services and counseling should be made available to sexually active unmarried teenagers. Paul, Pilpel & Wechsler, *Pregnancy, Teenagers and the Law,* 6 FAM. PLAN. PERSPECTIVES 142, 144 (1974).

This movement, however, has been extremely controversial. Its opponents have argued that by introducing minors to contraceptives the state is helping to establish sexual intercourse among unmarried teenagers as culturally acceptable or even desirable. T. LITTLEWOOD, THE POLITICS OF POPULATION CONTROL 135-37 (1977). In spite of this opposition, physicians and family planning clinics nationwide have begun to educate sexually active minors as to the various methods of birth control. *See generally* REPORT ON FERTILITY AND CONTRACEPTION IN THE UNITED STATES, *supra* note 29, at 79.

[32] *E.g.,* N.Y. EDUC. LAW § 6811 (8) (McKinney 1972). The statute made it a Class A misdemeanor for "[a]ny person to sell or distribute" any contraceptive of any kind to a minor under 16 years of age.

[33] *Id.*

[34] 431 U.S. 678 (1977). See note 32 *supra* for a description of the statute.

The plaintiffs in the district court were Population Planning Associates, Inc., Population Services International, Rev. James Hagen, three physicians and an adult New York resident. The court granted standing to Population Planning Associates, Inc. in its own right and on behalf of its potential clients (minors). *Id.* at 683, *citing* Craig v. Boren, 429 U.S. 190 (1976). The defendants were various New York State officials. For a discussion of the implications of the *Carey* case, see Comment, *Carey, Kids and Contraceptives: Privacy's Problem Child,* 32 U. MIAMI L. REV. 750 (1978).

[35] 431 U.S. at 684. The Court focused on the due process clause of the fourteenth amendment as the source for this right, stating that "[a]lthough '[t]he Constitution does not explicitly mention any right of privacy,' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy.' "*Id.* (quoting Roe v. Wade, 410 U.S. 113, 152 (1973)).

preme Court stated that decisions relating to marriage,[36] procreation,[37] contraception,[38] family relationships[39] and the rearing and education of children[40] are "among the decisions that an individual may make without unjustified government interference."[41] The Court further concluded that "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices."[42]

As to whether this constitutionally protected choice extends to minors, the *Carey* Court concluded that, in light of its decision in *Planned Parenthood of Central Missouri v. Danforth*,[43] the right of privacy in connection with decisions affecting procreation extends to minors as well as to adults.[44] The Court further noted that the state had failed to meet the burden of showing a "significant state interest . . . that is not present in the case of an adult,"[45] and that therefore the interference was unconstitutional.[46]

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[36] *See* Loving v. Virginia, 388 U.S. 1 (1967).

[37] *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

[38] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

[39] *See* Prince v. Massachusetts, 321 U.S. 158 (1944).

[40] *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[41] 431 U.S. at 685.

[42] *Id.*

[43] 428 U.S. 52 (1976).

[44] 431 U.S. at 693.

[45] *Id.* (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976)). The Court based this conclusion in part on the state's failure to demonstrate that the prohibition against distribution of contraceptives to minors measurably contributed to the *deterrent* purpose that the state advanced as a justification for the restriction. *Id.* at 695. It further stated that it would be unreasonable to assume that the state had prescribed pregnancy and the birth of an unwanted child (or the physical and psychological dangers of an abortion) as punishment for fornication. *Id.* (citing Eisenstadt v. Baird, 405 U.S. 438, 448 (1972)).

[46] *Id.* at 696. The decision left unanswered the question to what extent a state could legitimately regulate the distribution of contraceptives to minors. Justice Powell's concurring opinion, however, specifically states that "a requirement of prior parental consultation is merely one illustration of permissible regulation in this area." *Id.* at 710 (Powell, J., concurring). The majority, however, did not so indicate.

B. *Parental Consent as a Means of Regulating the Distribution of Contraceptives to Minors*

State statutes imposing a parental consent requirement prior to the distribution of contraceptives to minors[47] remained in question following the *Carey* decision. Although the Supreme Court has not ruled on a parental consent requirement in connection with the distribution of contraceptives, a three-judge district court has held that Utah state regulations prohibiting the distribution of contraceptives to minors absent parental consent violate a minor's right of privacy and are unconstitutional.[48] The court also found the Utah regulations to be in conflict with the provisions and regulations accompanying the Social Security Act.[49] In analyzing the constitutional issues,[50] the court saw "no developmental differences between minors and adults that may affect the gravity of the right asserted by sexually active minors to family planning services and materials."[51]

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[47] *See, e.g.*, COLO. REV. STAT. § 40-2-50(4)(a)(i) (Supp. 1967).

[48] T___ H___ v. Jones, 425 F. Supp. 873, 877 (D. Utah 1975). *Contra*, Doe v. Planned Parenthood Ass'n, 510 P.2d 75 (Utah 1973), *appeal dismissed, cert. denied*, 414 U.S. 805 (1973). In *Doe v. Planned Parenthood Ass'n*, the Utah Supreme Court denied a sixteen-year-old girl the right to obtain contraceptives without parental consent. The court stated that "[t]he name of the defendant indicates that its service should be available to those couples who desire to control the size of their family. It is not intended to make strumpets or streetwalkers out of minor girls." *Id.* at 75. The opinion also emphasized parents' rights to rear their children as they choose. *Id.* at 76. For a discussion of *Doe v. Planned Parenthood Ass'n*, see Comment, Doe v. Planned Parenthood Ass'n of Utah—*The Constitutional Right of Minors to Obtain Contraceptives Without Parental Consent*, 1974 UTAH L. REV. 433.

[49] *Id.* at 877-78. 42 U.S.C. § 602(a)(15)(A) (1974) provides for state plans for the administration of aid to families with dependent children. It requires states to develop programs for the prevention of out-of-wedlock births by assuring that in *all* appropriate cases (including cases involving minors who can be considered to be sexually active) family planning services are offered to *all* individuals voluntarily requesting such services.

This conflict between the Utah regulations and the Social Security Act was a persuasive factor in the Court's decision in *T___ H___ v. Jones*. The district court in *Irwin*, however, apparently did not find such a conflict to be conclusive in a case involving notice. 428 F. Supp. 1198, 1214 (W.D. Mich. 1977).

[50] For an analysis of the constitutional issues involved in parental consent requirements, see Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001 (1975).

[51] 425 F. Supp. at 881.

Decisions of lower federal courts[52] and of the United States Supreme Court[53] declaring unconstitutional parental consent requirements prior to the performance of an abortion on a minor[54] provide a basis for determining the constitutionality of a requirement of parental consent before minors may receive contraceptives. These decisions support the conclusion of the district court in Utah.[55] In *Planned Parenthood of Central Missouri v. Danforth,*[56] the Supreme Court held that the state may not constitutionally impose a blanket parental consent requirement as a condition for an abortion performed on an unmarried minor during the first twelve weeks of her pregnancy.[57] In scrutinizing the interference with the minor's right of privacy, the Court stated that a determination must be made as to whether there is any significant state interest in conditioning an abortion on the consent of a parent that is not present in the case of an adult.[58] The Court concluded that the interest of safeguarding parental authority is insufficient to meet this test.[59]

Following *Danforth,* the Supreme Court clarified its position on the constitutionality of parental consent requirements for abortions.[60] In *Bellotti v. Baird,*[61] the Court struck down a Massachusetts statute[62] that required parental consent prior

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[52] *See, e.g.,* Noe v. True, 507 F.2d 9 (6th Cir. 1974); Wolfe v. Schroering, 388 F. Supp. 631 (W.D. Ky. 1974), *aff'd in part, rev'd in part,* 541 F.2d 523 (6th Cir. 1976).

[53] Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

[54] *E.g.,* KY. REV. STAT. § 214.185 (1974) [hereinafter cited as KRS].

[55] *See generally* Casenote, *supra* note 7.

[56] 428 U.S. 52 (1976).

[57] *Id.* at 75. The Court cited Roe v. Wade, 410 U.S. 113, 164 (1973), as precedent for the decision to leave the abortion decision and its effectuation to the medical judgment of the woman's attending physician.

[58] 428 U.S. at 75. Some commentators have approved of this test as an effective mechanism for taking into consideration the special legal status of minors while simultaneously affording an opportunity for minors to secure fundamental rights. *See, e.g.,* Comment, *Closing the Curtain on Comstockery,* 44 BROOKLYN L. REV. 565, 585 (1978).

[59] 428 U.S. at 75.

[60] Bellotti v. Baird, 443 U.S. 622 (1979).

[61] *Id.*

[62] MASS. ANN. LAWS, ch. 112, § 12S (Law. Co-op Supp. 1980). The statute provided that

> [i]f the mother is less than eighteen years of age and has not married,

to the performance of an abortion on a minor female.[63] The statute was less restrictive than the statute involved in *Danforth*[64] because it provided for judicial consent in the event that parental consent could not be obtained.[65] Nevertheless, the Court determined that since the statute required parental consultation or notification in every instance,[66] without affording the pregnant minor an opportunity to receive an independent judicial determination that she was mature enough to consent or that the abortion was in her best interests, it was in fact an absolute limitation and therefore unconstitutional under *Danforth*.[67]

Although *Danforth* and *Bellotti* did not involve contraceptives, those decisions indicate that the Supreme Court would declare a parental consent requirement prior to the distribution of contraceptives unconstitutional as well.[68] State statutes also have begun to reflect the expanding recognition of privacy rights of minors as applied to the acquisition of family-planning services.[69] As a result of this recent merger of

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> the consent of both the mother and her parents is required. If one or both of the mother's parents refuses such consent, consent may be obtained by order of a judge of the superior court, for good cause shown, after such hearing as he deems necessary.

Id.

[63] Bellotti v. Baird, 443 U.S. 622, 627 (1979).

[64] H.C.S. House Bill No. 1211, an Act relating to abortion with penalty provisions and emergency clause, *reprinted in* Planned Parenthood v. Danforth, 428 U.S. 52, 84 app. (1976).

[65] MASS. ANN. LAWS, ch. 112, § 12S (Law Co-op Supp. 1980).

[66] *See also, e.g.*, Planned Parenthood Ass'n v. Ashcroft, 483 F. Supp. 679 (W.D. Mo. 1980); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542 (D. Me. 1979). *But see* H___ L___ v. Matheson, 604 P.2d 907 (Utah), *prob. juris. noted*, 445 U.S. 903 (1980).

[67] 443 U.S. at 643-45. The Court referred to what is commonly described as the "mature minor" exception. *See generally* Paul, *supra* note 3, at 362.

[68] *See* Comment, *supra* note 58, at 584. Furthermore, the decisions in Carey v. Population Services Int'l, 431 U.S. 678 (1977), and T___ H___ v. Jones, 425 F. Supp. 873 (D. Utah 1975), provide some authority for this conclusion. *But cf.* Petitioners Brief for Certiorari at 14, Doe v. Irwin, 615 F.2d 1162 (6th Cir. 1980) (petitioners argued that the abortion question is unique and therefore distinguishable from contraceptive decisions).

[69] See, *e.g.*, ALASKA STAT. § 90.65.100(a) (Supp. 1978); GA. CODE ANN. § 88-2904(f) (Supp. 1978); KRS § 214.185 (1974). *See also* U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, FAMILY PLANNING, CONTRACEPTION, VOLUNTARY STERILIZATION AND ABORTION: AN ANALYSIS OF LAWS AND POLICIES IN THE UNITED STATES, EACH

the interests of the state and of minors who seek contraceptives without parental notification, some parents have alleged state interference in family matters and have instituted court challenges to statutes or regulations providing minors free access to contraceptives.

III. NOTICE TO PARENTS OF THE DISTRIBUTION OF CONTRACEPTIVES TO THEIR MINOR CHILDREN: A BALANCING OF RIGHTS AND INTERESTS

A. Doe v. Irwin: *The Sixth Circuit's View on Notice Requirements*

Doe v. Irwin[70] presented the next issue surrounding the distribution of contraceptives to minors: whether parents have a constitutional right to receive notice from state funded family planning clinics prior to the distribution of contraceptives to their minor children.[71] In *Irwin*, the suing parents alleged that the distribution of contraceptives to their unemancipated minor children without the parents' consent or knowledge violated their constitutional right to rear and educate their children as they chose.[72] The Sixth Circuit held that there is no constitutional requirement of notice to parents prior to the distribution of contraceptives to their children and that no unconstitutional interference with the plaintiffs' rights as parents occurred.[73] In so holding, the court distinguished cases

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STATE AND JURISDICTION (1978).

[70] 615 F.2d 1162 (6th Cir. 1980), *cert. denied*, ___ U.S. ___, 101 S. Ct. 95 (1980).

[71] *See* Casenote, *supra* note 7, at 273.

[72] Doe v. Irwin, 428 F. Supp. 1198, 1200 (W.D. Mich. 1977), *vacated and remanded*, 559 F.2d 1219 (6th Cir. 1977), *reaff'd*, 441 F. Supp. 1247 (W.D. Mich. 1977), *rev'd*, 615 F.2d 1162 (6th Cir. 1980), *cert. denied*, ___ U.S. ___, 101 S. Ct. 95 (1980). Minors were permitted to come to the center with or without parental consent, and contraceptives were prescribed and distributed to minors with or without parental consent or knowledge. The center served no minor until he or she had attended a "rap session" at which birth control methods, the responsibilities of being sexually active and the desirability of communicating with parents concerning sex and birth control were discussed. Those who desired contraceptives after the "rap session" were given a physical examination. If no medical problems were indicated, the patient was given a supply of birth control pills. The decision whether a particular individual would receive contraceptives was made in every case by a physician. 615 F.2d at 1163.

[73] *Id.* at 1169.

such as *Meyer v. Nebraska*,[74] *Pierce v. Society of Sisters*[75] and *Wisconsin v. Yoder*,[76] which established parents' rights to rear and educate their children, by noting that in each of those cases the state either required or prohibited some activity, whereas in *Irwin* the state imposed no compulsory requirements or prohibitions that affected rights of the plaintiffs.[77] The court supported this conclusion by pointing out that the state had merely established a voluntary birth control clinic and that there was no prohibition against the plaintiffs' participating in decisions of their minor children on issues of sexual activity and birth control.[78] From these findings, the court concluded there was no need to consider whether a compelling state interest was involved or whether parental rights outweighed the rights of their minor children.[79]

The court's decision in *Irwin* left unanswered a crucial question: whether the privacy rights of minors and any compelling state interests outweigh parental rights and interests in cases involving distribution of contraceptives to minors without parental notice. The court did identify a minor's right of personal privacy,[80] a parent's right to the care, custody and nurture of his or her children,[81] and a legitimate state interest in protecting minor females from the physical and emotional hazards of unwanted pregnancies,[82] but it failed to balance these various rights and interests and to provide a complete resolution of the issues. Although parental notification is a complex and delicate issue, it is one which must be resolved in order to establish a rule of law that more clearly defines the extent of the rights and interests of parents, minors and the state.

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[74] 262 U.S. 390 (1923).
[75] 268 U.S. 510 (1925).
[76] 406 U.S. 205 (1972).
[77] 615 F.2d at 1168.
[78] *Id.*
[79] *Id.* at 1169.
[80] *Id.* at 1167.
[81] *Id.*
[82] *Id.*

B. *The State's Interest in a Minor's Unrestricted Access to Contraceptives*

There are several legitimate state interests involved in the state's unrestricted distribution of contraceptives to minors. First, the state has a legitimate interest in solving the problem of out-of-wedlock teenage pregnancy, along with the emotional, physical and financial burdens that it causes the would-be mothers.[83] The distribution of contraceptives is a legitimate means to that end. Second, the state has an interest in alleviating the financial burden placed upon taxpayers in the event that a minor's pregnancy results in an unwanted and unaffordable child.[84] Finally, the state has an interest in protecting the privacy rights of minors[85] as recognized by recent United States Supreme Court decisions.[86]

C. *The Interests and Rights of Minors*

The Supreme Court has recognized that under the Constitution, minors are persons "possessed with fundamental rights which the state must respect."[87] Decisions such as *Tinker v. Des Moines School District*[88] and *In re Gault*[89] extended specific fundamental rights to minors without differentiating between minors and adults; however, only with the Court's decision in *Planned Parenthood of Central Missouri v. Danforth*[90] were these privacy rights interpreted to include matters of sexual preference.[91] Not only do minors have an

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[83] For a discussion of the consequences of unwanted teenage pregnancies, see Paul, *supra* note 3, at 358-59.

[84] *See generally* REPORT ON FERTILITY AND CONTRACEPTION IN THE UNITED STATES, *supra* note 27, at 79.

[85] *See* Casenote, 25 WAYNE L. REV. 1135, 1144 (1979).

[86] *E.g.*, Bellotti v. Baird, 443 U.S. 622 (1979); Carey v. Population Services Int'l, 431 U.S. 678 (1977); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

[87] Tinker v. Des Moines School Dist., 393 U.S. 503, 511 (1969). *See also* Note, *supra* note 50, at 1008.

[88] 393 U.S. 503 (1969) (first amendment right to protest Vietnam War applicable to minors).

[89] 387 U.S. 1 (1967) (procedural due process guaranteed to minors as well as to adults). *See also* Goss v. Lopez, 419 U.S. 565 (1975).

[90] 428 U.S. 52 (1976).

[91] The Court stated that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as

interest in protecting these fundamental rights, but they also have the practical interest of being able to not bear or beget a child and yet remain sexually active.

Although various constitutional rights, including privacy rights, have been held applicable to minors, these rights have not been interpreted as absolute. The Supreme Court has explicitly stated that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."[92] Application of this rule is difficult in cases like *Irwin*, however, since the state's interests in *Irwin* coincided with and supported the rights and interests of minors; there was no state attempt to limit minors' rights and interests.[93]

D. *Parental Rights and Interests*

In holding that parents do have a constitutional right to notice prior to the distribution of contraceptives to their children, the district court in *Irwin* described parental authority as "plenary."[94] The court stated that "parental authority . . . prevails over the claims of the state, other outsiders and the children themselves. There must be some compelling justification for interference."[95]

Parental rights have indeed been traditionally recognized by the Supreme Court. Parents' rights to the custody, care and religious and moral education of their children are well-established.[96] In *Wisconsin v. Yoder*,[97] a 1972 Supreme Court

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well as adults, are protected by the Constitution and possess constitutional rights." *Id.* at 74. Carey v. Population Services Int'l, 431 U.S. 678 (1977), expanded the right of privacy to include the right to use contraceptives.

[92] Ginsberg v. New York, 390 U.S. 629, 638 (1968), (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)). *See also* Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

[93] *Cf.* Casenote, *supra* note 7, at 273.

[94] Doe v. Irwin, 441 F. Supp. 1247, 1249 (W.D. Mich. 1977), *rev'd*, 615 F.2d 1162 (6th Cir. 1980), ___ U.S. ___, 101 S. Ct. 95 (1980). In taking this position the district court relied heavily on Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their Rights*, 1976 B.Y.U.L. REV. 605.

[95] 441 F. Supp. at 1249.

[96] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). *But see* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (rights of

decision involving parents asserting state interference with their constitutional rights to rear their children, the Court stated that parents have a fundamental interest that prevails over that of the state in guiding the religious future and education of their children.[98]

E. *Balancing the Interests*

In order to provide all interested parties with an adequate answer to the question of whether notice to parents is constitutionally required prior to distribution of contraceptives to unwed minors, the various rights and interests described above must be balanced. When one considers all relevant factors and focuses upon constitutional considerations and social policy, the conclusion emerges that the compelling interests of the state and the increasingly recognized rights of minors outweigh parents' rights and interests in prior notice.

Irwin presents a unique situation in that the state is aligned with minors against parents. This alignment has an effect on the application of past Supreme Court decisions to this case and to similar situations. The parental rights cases[99] are distinguishable in that the state in those cases had required the interference with parental rights. In *Irwin,* minors voluntarily received contraceptives distributed by a state-funded clinic.[100] Even without such a distinction, application of the parental rights cases would not necessarily tip the scales in favor of parental rights and interests against those of the state and minors. The Supreme Court made it clear in *Prince v. Massachusetts* that parental rights are not unlimited.[101]

Parents' rights should be limited in cases such as *Irwin* for several reasons. First, the state has a compelling interest

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parenthood are not beyond limitation).

[97] 406 U.S. 205 (1972). The case involved a challenge by Amish parents to a Wisconsin statute which, contrary to the parents' beliefs, required school attendance up to a certain age. The Court declared the law unconstitutional. *Id.* at 234.

[98] *Id.* at 232.

[99] See note 96 *supra* for citations to decisions concerning parental rights.

[100] Doe v. Irwin, 615 F.2d 1162, 1168 (6th Cir. 1980), *cert. denied,* ___ U.S. ___, 101 S. Ct. 95 (1980).

[101] 321 U.S. 158, 166 (1944).

in solving the problems associated with teenage pregnancies, and the distribution of contraceptives to minors is a valid means of achieving that end. Although at least one member of the Court has taken the position that parental notification requirements might be a legitimate regulation of the distribution of contraceptives to minors,[102] the practical effect of such a requirement would likely be that minors would simply stop using the services offered by family-planning centers.[103] Second, the Supreme Court has specifically recognized minors' rights of privacy in *Danforth, Carey* and *Bellotti.* These cases imply that parental notification would impermissably infringe upon the rights of minors. The best interests[104] of sexually active minors would be served by allowing them access to contraceptives without notification of their parents.[105]

CONCLUSION

Although the Sixth Circuit's decision in *Doe v. Irwin* reached a correct result, the court failed to provide an answer to the critical question whether compelling state interests and extended privacy rights of minors outweigh parents' rights to rear and educate their children. The issue surrounding the requirement of parental notice prior to the distribution of contraceptives should be finally resolved by the Supreme Court. The task will be difficult in light of the sincere and valid interests of the interested parties. Nevertheless, the Court

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[102] Carey v. Population Services Int'l, 431 U.S. 678, 710 (1977) (Powell, J., concurring).

[103] For a similar conclusion, see Comment, *Parental Notification as a Prerequisite for Minors' Access to Contraceptives: A Behavioral and Legal Analysis,* 13 U. MICH. J.L. REF. 196, 205 (1979).

Since it appears that at least some children would cease using contraceptives rather than have their parents notified, it is difficult to propose a compromise requirement similar to the requirement of a judicial hearing in order to determine whether the minor is mature enough to obtain an abortion. The centers must attempt to induce sexually active minors to make use of their services by providing a free access system. Anything less will inhibit the effectiveness of their programs.

[104] This standard is often used in child custody cases. *See, e.g.,* In re Camm, 294 So. 2d 318 (Fla. 1974), *cert. denied,* 419 U.S. 866 (1974).

[105] For an excellent analysis of state intrusion into family affairs, see Note, *State Intrusion into Family Affairs: Justifications and Limitations,* 26 STAN. L. REV. 1383 (1974-75).

should extend the privacy decisions one step further to include a minor's right to free access to safe methods of birth control.

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