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Parental Notification as a Prerequisite for Minors' Access to Contraceptives: A Behavioral and Legal Analysis

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PARENTAL NOTIFICATION AS A PREREQUISITE FOR MINORS' ACCESS TO CONTRACEPTIVES: A BEHAVIORAL AND LEGAL ANALYSIS

Minors have traditionally been assumed incapable of exercising complete control over their lives. The right to control minors' behavior has therefore been accorded to parents and to the state. As a consequence, the ability of minors to exercise constitutional and statutory rights has been limited.[1]

The regulation of minors' behavior by the state appreciably diminishes both minors' rights and parents' rights to control their children. Some state regulations, however, may unconstitutionally infringe on the rights of minors and parents. In determining whether a particular state regulation is constitutional, it is necessary to balance the asserted state interest against minors' and parents' rights both separately and in combination.

One recent development, the recognition of a constitutional "right of privacy" to make procreation-related decisions without state interference, reflects the special legal status of minors. Since *Griswold v. Connecticut*[2] the Supreme Court has relied on

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[1] The special legal status of minors reflects the natural development of human beings from total inability to care for themselves to physical and psychological maturity. The Anglo-American legal tradition classified "children before the years of discretion" with lunatics: "[T]hey do not possess the faculty of forming a judgment on their own interests; in other words. . .they are wanting in the first essential of an engagement by Contract." H. MAINE, ANCIENT LAW 164 (1st Amer. ed. 1870) (1st ed. London 1861). John Stuart Mill reflected the traditional view in a more general fashion:

> The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute . . . .
>
> It is, perhaps, hardly necessary to say that this doctrine is meant to apply to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury.

J.S. MILL, ON LIBERTY 9 (R. McCallum ed. 1946) (1st ed. London 1859).

Consequently, minors' rights have been limited in such familiar areas as the power to vote, drink, or enter contracts; minors have also been subjected to other provisions for their welfare such as compulsory education laws, child labor laws, and a separate judicial system.

[2] 381 U.S. 479 (1965) (a statute forbidding the use of contraceptives is unconstitutionally broad and thus impermissibly invades the area of protected freedoms).

the right of privacy to limit the ability of the state to interfere with adults' decisions to use contraceptives[3] or to obtain abortions.[4] The Court has also interpreted the right of privacy to provide some protection for minors' decisions even when the state regulation in question is intended to assist the exercise of parental authority.[5] The Court, however, has not yet determined the extent to which parental rights encroach on the state's power to increase the scope of privacy rights which minors themselves may freely exercise.

This article examines whether the constitutional right of parents to determine what is best for their children prevents the state from permitting minors access to contraceptives without notifying their parents.[6] Part I examines the effect of the presence or absence of a notice requirement upon the interests of parents, minors, and the state. Part II reviews the development of the

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[3] *Id.* at 484-86; Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (right of privacy inheres in the individual, not the marital relationship).

[4] Roe v. Wade, 410 U.S. 113 (1973) (right of privacy encompasses a woman's decision whether to have an abortion).

[5] Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (a state cannot impose a blanket requirement of parental consent as a condition for an unmarried minor's abortion during the first 12 weeks of pregnancy; the parental interest is "no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." *Id.* at 74-75).

[6] This issue arose in Doe v. Irwin, 428 F. Supp. 1198 (W.D. Mich.), *vacated and remanded mem.*, 559 F.2d 1219 (6th Cir.), *aff'd on remand*, 441 F. Supp. 1247 (W.D. Mich. 1977), *rev'd*, No. 78-1056 (6th Cir. Feb. 26, 1980).

Doe was a class action brought by parents of unemancipated minors against the Ingham County Michigan health board and the Ingham County Family Planning Center to enjoin the Center from providing minors with contraceptive devices and medications without prior parental notification and consent. The Center operated on funds provided by the county health department and by the State of Michigan under a contract which required the Center to provide services to Aid to Families With Dependent Children (AFDC) and Medicaid recipients pursuant to the provisions of the Social Security Act, 42 U.S.C. §§ 601-644 & 1396-1396i (1976). The Act provides for the availability of family planning services to program recipients, including sexually active minors. 42 U.S.C. §§ 602(a)(15), 1396a(a)(8), & 1396d(a)(4)(c) (1976).

The Ingham County Family Planning Center served minors who voluntarily sought its services on a confidential basis. The minors were required to attend a "rap session" before any further services were made available. After a discussion of aspects of sexual activity and methods and risks of birth control, minors made appointments for medical examinations. Contraceptives were furnished to the minors only if the examination showed no radical problems.

The district court held that the Center's procedures for the distribution of contraceptives violated the parents' fundamental "right of privacy in the care and control of their minor children and a right to the free exercise of their religion in the spiritual education of their children." 428 F. Supp. at 1206. The court concluded that the parents' interests in controlling their children and in the freedom of the family from state intrusion outweighed both any right of privacy of minors and any state interests served by confidential provision of contraceptives. Therefore, the state could not constitutionally exclude parents completely from the child's decision to use contraceptives. *Id.* at 1214-15. *See also* Doe v. Irwin, 441 F. Supp. 1247, 1261 (W.D. Mich. 1977).

For an account of the Sixth Circuit's reversal, see N.Y. Times, Feb. 27, 1980, at A12, col. 6.

constitutional right of privacy and the impact of parental rights and state interests on the extension of privacy rights to minors. Part III considers the manner in which the interests of minors, parents, and the state should be balanced. The article concludes that statutes requiring prior parental notification of minors' decisions to procure contraceptives do not effectively protect parental or state interests and unconstitutionally burden the minors' right of privacy.

I. INTERESTS AFFECTED BY STATE INVOLVEMENT

The rights of parents which are affected by the provision of contraceptives to minors are not absolute. In order to be vindicated, those rights must be weighed against the independent interests and rights of the state and minors which have been acknowledged by the Supreme Court.[7] The basis of the rights asserted in this area is a desire to affect — or control — the behavior of minors. The weights of the asserted rights in any confrontation are determined primarily by the degree to which the measures which are justified by any claim of right can influence the actual behavior of parents and minors. This section examines the relationships between individuals' sexual behavior, access to contraceptives, and the values and interests sought to be protected by parental notification requirements.

A. Parental and Familial Interests

The family occupies a central position in American society. As a mechanism for teaching social values, it serves as the primary means by which society maintains its cultural identity.[8] The performance of this social function requires that parents should bear certain responsibilities and be free to exercise a great discretion in decisions regarding their children's upbringing. The existence of family autonomy requires, *inter alia,* that parent-child disputes are decided by whatever procedures that individual families develop, rather than by socially determined procedures or institutions. Since parents and children are not social or legal equals, recognition of a sphere of family automony or privacy implies state support, generally through non-intervention, of parental control of their children's behavior. Despite the obvious

[7] *See, e.g.,* Roe v. Wade, 410 U.S. 113, 154 (1973); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). For a discussion of *Yoder,* see notes 95-97 and accompanying text *infra.*

[8] K. DEUTSCH, POLITICS AND GOVERNMENT 161 (1970); Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 BRIGHAM YOUNG L. REV. 605, 615-17 (1976).

parental domination of the family, children share the parents' interest in maintaining the family's independence from state supervision. This interest results in part from individuals' desire for autonomy and in part from the recognition that "law is incapable of effectively managing, except in a very gross sense, so delicate and complex a relationship as that between parent and child."[9]

For example, parental authority and autonomy over their children's religious education is a product of many factors. One factor is society's reliance on the family as the source of general moral education. Another is the protection afforded the exercise of religious beliefs. A third factor is resistance to the possibility that the state might "standardize" children by controlling certain aspects of their education under the guise of *parens patriae*.[10]

The provision of contraceptives to minors clearly affects these parental interests in controlling the religious education and the sexual and contraceptive choices of the child. The availability of contraceptives from an official source necessarily implies a degree of official approval of their use. Thus, such availability may be interpreted by minors as official approval of their sexual activities rather than as an officially neutral attitude or a recognition by the state that it cannot control minors' sexual activity. Parents may understandably believe that this type of state support undermines parental authority by inculcating values relating to marriage and sexual activity, particularly the use of contraceptives, which may conflict with the values preferred by the parents.

Parental values in the sensitive areas of premarital sexual activity and contraception may be closely related to those parental values associated with religious beliefs. For example, parents who disapprove of their children's sexual activity may oppose their use of contraceptives on the basis of a general opposition to contraceptives or a belief that the minors are more likely to refrain from sexual activity if contraceptives are unavailable. Other parents may be equally condemnatory of their children's sexual activities but may take the view that, ultimately, they have no opportunity for immediate input into or control over the children's decision to have sex and that the wisest course is to minimize any further dangers by providing contraceptives to sexually active minors.

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[9] J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 8 (1973).

[10] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (Amish parents could withdraw their children from public schools at age fourteen, despite a state law requiring children's attendance until age sixteen); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (state could not prevent parents from sending their children to private schools).

All four groups of parents would nonetheless share an interest in protecting the health of their children by participating in the choice of a particular method of birth control. The different methods of birth control vary in effectiveness, ease of use, and associated medical consequences.[11] The contraceptive pill, the most effective and popular method,[12] has been reported to increase the risk of a variety of medical problems. In addition, the long-term effects of using the pill during adolescence before the establishment of a regular menstrual cycle are unknown.[14] The necessary weighing of the medical risks and benefits of the alternative methods of treatment is precisely the sort of decision that parents have traditionally had the right to make for their minor children.[15]

Thus, the state's providing contraceptives on a confidential basis to minors threatens parental authority and control and the parent-child relationship in a more pervasive manner than merely contradicting parental preferences about sex and contraceptives.[16] The state's implicit questioning of the value of parental guidance in the sensitive area of sexual mores challenges parental authority as based on inadequate knowledge or on archaic values. A minor might infer from the state's position that parents who disagree with the minor's wishes have chosen their position on a basis other than the minor's best interests. Furthermore, confidential distribution of contraceptives implies that deception of one's parents is sometime justifiable. A state program such as the one attacked in *Doe v. Irwin*[17] relies on a state agent, who has

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[11] The effectiveness of different contraceptive methods may vary widely due to proper or improper use, and may therefore be especially dependent on the quality of the medical advice received by the user.

[12] Over 85% of the patients receiving contraceptives from family planning clinics in Michigan from January to June 1974 used the pill. R. CARTER & C. NELL, FAMILY PLANNING SERVICES PROVIDED TO AFDC RECIPIENTS IN MICHIGAN 72 (Studies in Welfare Policy No. 6 1975).

[13] Possible side effects of the pill include nausea, vaginal discharges, depression, inflammation of veins, and blood clotting. Other methods involve different risks. Intra-uterine devices (IUDs) may cause irregular bleeding, pelvic pain, and infection or perforation of the uterus. H. KATCHADOURIAN & D. LUNDE, FUNDAMENTALS OF HUMAN SEXUALITY 151-67 (2d ed. 1975).

[14] *See generally* H. KATCHADOURIAN & D. LUNDE, *supra* note 13, at 151-56.

[15] W. PROSSER, HANDBOOK OF THE LAW OF TORTS 102-03 (4th ed. 1971). *See generally* Goldstein, *Medical Care for the Child at Risk of State Supervention of Parental Autonomy*, 86 YALE L.J. 645 (1977); Pilpel, *Minors' Rights to Medical Care*, 36 ALB. L. REV. 462 (1972); Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001 (1975).

[16] From the parents' viewpoint, the involvement of the state may be more threatening than the actions of a private individual or organization lacking the authoritative image of the state.

[17] *See* note 6 *supra*.

only a brief acquaintance with a minor, to replace to some extent the minor's parents as a source of values and counsel. Parents, however, are generally far more familiar with their children's level of maturity and background than is anyone else. It is doubtful that these challenges to parental authority can be limited in practice to the medical aspects of the minor's contraceptive decision. Religious values are necessarily involved in decisions about sex and contraception, but if parents are not notified prior to the decision they may have no opportunity to counsel the child about the intricacies of an actual sexual relationship. While the decision to involve the parents would ultimately be the child's, the offer of a state-supported alternative decreases the likelihood that a minor will turn to his or her parents for assistance. An expert has testified that "young people who come for contraceptives may come for other reasons, also. That is, they really want help. They want emotional help. They want help with other problems, and that their sex relations that they are having are simply symptomatic of rather deep-seated, sometimes, emotional problems."[18] The connection between sexual activities and a wide range of other concerns suggests that it is difficult for minors to separate the decision whether to use contraceptives from the decision whether to engage in sex, or to separate medical concerns from the religious and moral issues involved.

B. Minors' Interests

The interests of minors in obtaining contraceptives must be examined within the overall context of their sexual activity. Although both male and female minors engage in sexual relations and are affected by the consequences of their behavior, the practical impact of minors' sexual activity is much greater on females than on males.[19]

Approximately 1,000,000 females between the ages of fifteen and nineteen become pregnant each year.[20] Those females constitute about ten percent of all women, and twenty-five percent of the sexually active women, in that age group. Another 30,000 females under the age of fifteen become pregnant each year.[21] Of

[18] Doe v. Irwin, 428 F. Supp. 1198, 1204 (W.D. Mich.), *vacated and remanded mem.*, 559 F.2d 1219 (6th Cir.), *aff'd on remand*, 441 F. Supp. 1247 (W.D. Mich. 1977), *rev'd*, No. 78-1056 (6th Cir. Feb. 26, 1980).

[19] Card & Wise, *Teenage Mothers and Teenage Fathers: The Impact of Early Childbearing on the Parents' Personal and Professional Lives*, 10 FAM. PLAN. PERSPECTIVES 199 (1978).

[20] Jaffe & Dryfoos, *Fertility Control Services for Adolescents: Access and Utilization*, 8 FAM. PLAN. PERSPECTIVES 167, 167 (1976).

[21] *Id.*

those pregnancies in teenagers between the ages of fifteen and nineteen, two-thirds are unintended, and about sixty percent result in live births.[22] One-third of the children born to minor women are illegitimate.[23] It is estimated that approximately 2,000,000 sexually active teenaged females do not use any reliable method of contraception.[24] Pregnancy, childbirth, and the use of medical contraceptives present risks to every woman's health. The fatality rate associated with pregnancy and childbirth among minors, however, is approximately five times that associated with the use of contraceptives and legal, first-trimester abortions.[25]

The births of illegitimate children often have a severe impact on teenage mothers. In addition to the possibility of social stigma attaching to both mother and child, possible consequences include early and unstable marriages and subsequent pregnancies,[26] emotional difficulties, financial problems, and interruption or cessation of the mother's education.[27] The difficulties which unwed mothers face in attempting to support themselves and their children are reflected by their disproportionate claim on social service payments.[28]

In light of the scope of these repercussions, minors who attempt to avoid teenage pregnancy and its problems cannot be said to act irresponsibly. On the contrary, those sexually active minors who seek birth control information act more responsibly than those

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[22] *Id.* *See also* Zelnick & Kantner, *First Pregnancies to Women Aged 15-19: 1976 and 1971*, 10 FAM. PLAN. PERSPECTIVES 11, 13 (1978).

[23] Jaffe & Dryfoos, *supra* note 20.

[24] *Id.* at 172 (table 10).

[25] Tietze, *New Estimates of Mortality Associated with Fertility Control*, 9 FAM. PLAN. PERSPECTIVES 74, 75-76 (1977).

[26] Approximately 60% of marriages resulting from such pregnancies end within six years. Furthermore, about 50% of teenaged mothers have a second pregnancy within thirty-six months of their first delivery. Furstenberg, *The Social Consequences of Teenage Parenthood*, 8 FAM. PLAN. PERSPECTIVES 148, 155-58 (1976). *See also* McCarthy & Menken, *Marriage, Remarriage, Marital Disruption and Age at First Birth*, 11 FAM. PLAN. PERSPECTIVES 21 (1979).

[27] These consequences are also likely to be interdependent. Card & Wise, *supra* note 19; Furstenberg, *supra* note 26; Moore & Waite, *Early Childbearing and Educational Attainment*, 9 FAM. PLAN. PERSPECTIVES 220 (1977); Trussell, *Economic Consequences of Teenage Childbearing*, 8 FAM. PLAN. PERSPECTIVES 184 (1976).

[28] Households including a woman who bore her first child as a teenage mother received $4.65 billion of the $9.4 billion distributed by the Aid to Families with Dependent Children program (AFDC) in 1975. Further, 61% of the women in AFDC households between the ages of fourteen and thirty bore their first child while still in their teens. This compares with a rate of 35% in non-AFDC households. Sixty percent of illegitimate children are supported by welfare payments. Moore, *Teenage Childbirth and Welfare Dependency*, 10 FAM. PLAN. PERSPECTIVES 233, 234 (1978); Moore & Caldwell, *The Effect of Government Policies on Out-of-Wedlock Sex and Pregnancy*, 9 FAM. PLAN. PERSPECTIVES 164, 165 (1977).

who do not.[29] But the imposition of a notice requirement on the distribution of contraceptives would not induce minors who are not receiving birth control services to seek them.[30] The converse is more likely true. Although a notice requirement may not formally give parents the right to determine whether minors receive contraceptives, it may deter minors from seeking contraceptives or allow parents to bring other pressures to bear in order to control their children's sexual or contraceptive decisions.

A sexually active minor has a clear interest in obtaining accurate information on the medical aspects of contraception and effective means of preventing pregnancy. Insofar as this decision depends on medical expertise, a knowledgeable medically-trained advisor is a preferable source of information. Few parents possess comparable expertise. The minor therefore is medically better off with access to advice and contraceptives which is unobstructed by the intervention of non-medical values.[30]

The minor's desire for confidentiality is motivated by his or her natural inclination toward personal autonomy and the shared interest in maintaining family relationships with minimal government intervention. The problems caused by a minor's sexual behavior arise at a time when the development of her separate identity subjects parent-child relations to numerous strains.[31] A notice requirement may force minors to discuss sexual matters with their parents at a time and in a context neither desired nor prepared for by parents or children.

These tensions and communication difficulties exist in "good" parent-child relationships as well as in relationships where lack

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[29] A survey of minors' use of contraceptives in 1975 found that of an estimated four million sexually active teenage women, 1.2 million received contraceptive services from family planning clinics, and estimated that an approximately equal number were served by private sources. Dryfoos & Heisler, *Contraceptive Services for Adolescents: An Overview*, 10 FAM. PLAN. PERSPECTIVES 223, 223, 229 (1978). Another study found that more than 80% of teenage women seeking contraceptive services from clinics had been sexually active for more than one year before they first sought a clinic's services. Akpom, Akpom & Davis, *Prior Sexual Behavior of Teenagers Attending Rap Sessions for the First Time*, 8 FAM. PLAN. PERSPECTIVES 203, 204 (1976).

[30] Parents' general lack of medical expertise does not, of course, mean that their advice to children on related medical and non-medical issues is worthless. In some instances, parents may have knowledge of the child's relevant medical history which the child lacks. To the extent that a medical decision involves non-medical considerations, parents may be as competent and able to advise their children objectively as a medical expert who lacks their familiarity with the child's particular characteristics and general maturity. Parents, however, may lack the objectivity and ability to consider alternatives which a less emotionally-involved counselor may possess. Opportunities for confidential medical examinations and counseling, as part of a clinic's program, may also yield additional benefits in related areas, such as veneral disease prevention and treatment.

[31] *See* L. STONE & J. CHURCH, CHILDHOOD & ADOLESCENCE 432-38, 460, 481-86 (3d ed. 1973).

of rapport and trust deter minors from confiding in their parents. The closeness and overall strength of the parent-child bond may cause a sexually active minor to believe she has failed her parents and betrayed their trust, just as her parents might believe the child's sexual activity or pregnancy indicates that they have failed her. Sexual matters are often difficult to discuss, regardless of the quality of the relationship between the speaker and listener. Any of these factors may cause a child who is otherwise open with her parents to avoid discussing her sexual activity with them especially if she is uncertain how they would react.

The individual autonomy desired by a minor includes the rights to develop moral and religious values and control of sexual behavior. Values are derived from many sources, including one's parents, but the choice of a belief by a person of any age must ultimately be that person's to make. The interest in determining which sources may influence a minor's choice of values belongs to the minor as well as the parents. But the consequences of the minor's sexual activity fall primarily on the minor, not on the parents. In addition, the minor's choice of sexual values, as distinguished from values relating to contraception, will affect the minor's behavior in a way that is almost uniformly uncontrolled (although not uninfluenced) by parents. Although parents may have expended much time and energy attempting to teach a child to behave in certain ways, when sexual values are actually implemented, the capacity to choose is solely the minor's. The indirect nature of parental control of children's sexual activity raises the question of whether and to what extent parental notice or control of access to contraceptives actually aids parental control of minors' sexual values and conduct.

Parental notice and consent requirements and flat prohibitions on access to contraceptives share certain functional characteristics. If parental notice or consent is required, minors who are unwilling to confront their parents with their activities are essentially faced with the same choice posed by a ban on access — to discontinue their sexual activities, to rely on non-medical contraceptive methods, or to assume the risk of pregnancy. Minors who do consult with their parents pursuant to a notice or consent law may face effective parental opposition or supervision through formal withholding of consent or more informal pressure. A notice requirement is more permissive than a consent requirement only with regard to minors who are both willing to inform their parents and to risk disapproval and coercion in order to obtain contraceptives. It is likely that most teenagers would not seek contraceptives from a source which notified parents of that fact unless the adolescents were already willing to discuss their sexual activity

and contraception with their parents. In those cases, the notice requirement is likely to be superfluous. In cases where the minor and parents disagree, a notice requirement would increase potential parental control over subsequent behavior only if the minor were willing to risk parental disapproval to obtain contraceptives or if the minor is deterred from sexual activity by the unavailability of contraceptives.

The observed relationship between adolescent sexual activity and use of contraceptives supports the proposition that a notice requirement would do little to aid parental control of sexual behavior. The availability of contraceptives does not appear to affect the overall frequency of sexual activity among minors.[32] The decision to use contraceptives generally does not precede but rather follows by a considerable period a minor's initial sexual experience.[33] In most instances, therefore, a minor recognizes the need for contraceptives well after the optimal period for parental involvement and guidance.

The only study this author has found which has attempted to assess the impact of a parental notice requirement indicates that a notice requirement would not significantly affect minors' sexual activity or increase parental knowledge or control.[34] The study found that the parents of fifty-five percent of the minors surveyed knew of the minor's use of the services of family planning clinics. An additional nine percent of the respondents said that if a notice requirement were imposed they would continue to attend the clinics and inform their parents. Four percent said a notice requirement would cause them to cease their sexual activities rather than inform their parents. Twenty percent would stop using the clinic's services, but would use a non-prescription contraceptive, and twelve percent said they would continue their activities but cease using contraceptives.

Although the results of this survey are not conclusive, they challenge the basic premise of a notice requirement, that minors will not discuss their sexual activities with their parents unless forced to do so by the state. The survey also indicates that the efficacy of a notice requirement is limited as an incentive to

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[32] Akpom, Akpom & Davis, *supra* note 29, at 206.

[33] *See, e.g.*, Akpom, Akpom & Davis, *supra* note 29; Cutwright, *Illegitimacy: Myths, Causes and Cures*, 3 FAM. PLAN. PERSPECTIVES 25 (1971); Jaffe & Dryfoos, *supra* note 20; Moore & Caldwell, *supra* note 28; Settlage, Baroff & Cooper, *Sexual Experience of Younger Teenage Girls Seeking Contraceptive Assistance for the First Time*, 5 FAM. PLAN. PERSPECTIVES 223 (1973).

[34] Akpom, Akpom & Davis, *supra* note 29; Settlage, Baroff & Cooper, *supra* note 33; Zelnick & Kantner, *Sexual and Contraceptive Experience of Young Unmarried Women in the United States, 1976 and 1971*, 9 FAM. PLAN PERSPECTIVES 55 (1977).

greater intrafamily communication. Of the forty-five percent of the minors who it was reported had not informed their parents, only nine percent believed they would begin discussing their sexual behavior with their parents. That potential gain should be balanced against the greater number (twelve percent) who responded that they would simply stop using contraceptives.[35]

C. *The State's Interests*

The state has two interests which are affected by minors' access to contraceptives. The first is the reconciliation and protection of the individual and familial interests of minors and parents. The second is the maintenance of desired social attitudes toward sexual behavior and the minimization of the social costs of adolescent sexual activity.

The state interests that might favor imposition of a parental notice requirement are primarily, although not exclusively, based on the same considerations which lead the state to place primary responsibility for child-rearing with parents. To fulfill that responsibility, the state must act to support rather than to undercut the actions and authority of its chosen agents. Such support may also protect the state's interest in maintaining the family as a fundamental social unit. Furthermore, since limitations on minors' rights are based on the presumption of their lesser capacity to make informed, mature decisions, the involvement of parents in the decision-making process may increase the probability of those preferable choices.

The state may also desire to foster certain values regarding sexual behavior and to deter premarital and/or promiscuous sexual activity among minors through a notice requirement. The achievement of these goals would depend on the nature and strength of any causal relationships between minors' sexual activity, the availability of contraceptives, and parental knowledge and oversight of minors' behavior. Regardless of whether a notice requirement is justified on the basis of parental rights alone or in

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[35] Torres, *Does Your Mother Know. . .?*, 10 FAM. PLAN. PERSPECTIVES 280 (1978). The survey covered the responses of 1,442 single females under the age of eighteen attending fifty-three family planning clinics in Arizona, California, Illinois, Missouri, New York, Pennsylvania, South Carolina, Tennessee, Texas and Washington.

The Ingham County Family Planning Center, one of the defendants in Doe v. Irwin, estimates that during the period of approximately three months in 1975 in which the district court's injunction requiring parental notice was in effect before the stay pending appeal, clinic attendance by minors dropped to between 10% to 20% of its former level. Telephone conversation with Ms. Ann Olesak, Family Planning Educator, Ingham County Family Planning Center, Michigan.

combination with the state's interests, the requirement would affect minors in the same manner.

If the state is willing to distribute contraceptives to minors, it may be neutral as to whether or not a minor receives and uses them. The state cannot, however, be neutral as to who has the right to make the final decision whether or not to use contraceptives. If minors have that right then the procedures by which they exercise it should not be set up in a manner which unnecesssarily deters sexually active minors from receiving contraceptives without by the same token increasing parental abilities to protect minors, or achieving other important social goals. Such procedures would undermine the effectiveness of the state's policy without furthering its goal of protecting minors and society from undesired consequences of their actions; the available evidence indicates that the state's policies with respect to contraceptives and abortion affect only the rates of adolescent pregnancies and childbirth but do not affect overall sexual activity.[36]

The costs to the state of sexual activity of minors include the costs to the minors — illegitimate births, venereal disease, the loss of social productivity by individuals forced to interrupt or forego education — and the costs of supporting those young mothers and their children who receive welfare payments. The financial expense of the delivery and care of an AFDC recipient for one year is approximately fourteen times the cost of the family planning services needed to avert one birth.[37] The state's interest in the welfare of minors and in protecting society as a whole against such burdens are advanced by maximizing the voluntary use of contraceptives by sexually active minors.

The impact of a notice requirement on family relationships depends on the use of family planning services by minors who are willing to allow the state to notify parents of their actions although not willing to confront their parents directly. Regardless of what minors' rights to engage in sex or to use contraceptives are, minors generally are able to keep their sexual activities secret from their parents. The absence of a notice requirement would

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[36] Moore & Caldwell, *supra* note 18 at 165, 168.

[37] R. CARTER & C. NELL, *supra* note 12, at 45. Another source has estimated the annual cost of providing effective contraceptive services at $66 per client. Moore, *supra* note 28. One study concluded that the $584 million invested from 1970 to 1975 by the federal government in family planning programs resulted in short-term savings to government health and welfare services of $1.1 billion. Eighty percent of the savings were derived from the costs of pregnancy-related medical care, and twenty percent represented savings from the costs of public assistance. Long-term savings and benefits were not included in the study. Jaffe & Cutright, *Short-Term Benefits and Costs of U.S. Family Planning Programs*, 1970-75, 9 FAM. PLAN. PERSPECTIVES 77, 80 (1977).

not prevent either parents or minors from discussing sexual or contraceptive issues within the family. Since the availability of confidential treatment generally does not have a causal relation to minors' sexual activities, a notice requirement would rarely support parental authority or control in an effective manner. However, given the strong probability of a deterrent effect of a notice requirement, the state's interests in minimizing undesirable consequences of minors' sexual activities with minimal interference in family affairs indicates that a policy of confidentiality best serves those state interests.

II. THE RIGHTS OF PARENTS AND MINORS

The recognition of a constitutional right of privacy which protects individual decisions regarding procreation implies some extension of that right to minors. The extent of minors' privacy rights has thus far been only partially defined by the United States Supreme Court. The hesitation to extend to minors the same privacy right accorded adults reflects both the gradual development of the right of privacy itself and the traditional view that state regulations may limit minors' rights to a greater degree than adults' rights. Minors' rights have also been viewed as necessarily limited by the authority of parents to control their children, although parental rights have usually been considered in the context of parent-state competition for control of minors rather than in direct parent-child conflicts.

A. The Right of Privacy

The freedom of individuals to decide whether to conceive or bear children has been increasingly protected against state regulation since 1965 by the recognition of a fundamental constitutional right of privacy. *Griswold v. Connecticut*[38] began this process by invalidating a state statute which prohibited the use of contraceptives, as the statute applied to suppliers of contraceptives who were convicted as accessories. The Supreme Court emphasized the social importance of the marital relationship and the unacceptability of intrusion into "the sacred precincts of the marital bedroom" to enforce the prohibition.[39] The source of constitutional protection for the right of privacy was identified by the Court as the "penumbras" of the specific protections embodied

[38] 381 U.S. 479 (1965).
[39] *Id.* at 485-86.

in the First, Third, Fourth, Fifth, and Ninth Amendments.[40]

The equal protection clause of the Fourteenth Amendment was used by the Court in *Eisenstadt v. Baird*[41] to extend to single adults the same right of access to contraceptives as married persons have. The Court identified the right of privacy as an individual rather than a relational right:

> [W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike. . . . It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity . . . but an association of two individuals . . . . If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[42]

The fundamental nature of the right of privacy was emphasized by the Court in *Roe v. Wade.*[43] The Court clarified the source of the right as the Fourteenth Amendment's concept of personal liberty and noted that it extends to decisions about marital and family relationships, procreation, contraception, child rearing, and education.[44] *Roe* struck down a Texas statute which outlawed abortions other than those necessary to save the mother's life. The Court stated that the right of privacy included the woman's decision whether or not to terminate her pregnancy.[45] Thus, it concluded that any state regulations limiting the exercise of that discretion must be narrowly drawn and justified by a compelling state interest.[46]

The opinion identified three important state interests: protecting the mother's health, maintaining medical standards, and protecting potential life.[47] The state interests involved were balanced

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[40] *Id.* at 484. The concurring opinions cited other constitutional sources of the privacy right, *e.g.*, the Ninth Amendment as protective of a fundamental right of privacy, *id.* at 498-99 (Goldberg, J., concurring), and the due process clause of the Fourteenth Amendment, *id.* at 499 (Harlan, J., concurring in judgment) & 502 (White, J., concurring in judgment).

[41] 405 U.S. 438 (1972).

[42] *Id.* at 453 (citations omitted).

[43] 410 U.S. 113 (1973).

[44] *Id.* at 152-53.

[45] *Id.* at 153.

[46] *Id.* at 153-55.

[47] *Id.* at 154.

against the relative dangers to the mother from abortion and childbirth. The Court found that the state's interest in the mother's health does not become compelling until the risks of childbirth are at least equal to the risks of abortion, while its interest in protecting potential life becomes compelling only when the fetus "presumably has the capacity for meaningful life outside the mother's womb."[48] The Court's reliance on then-current medical knowledge to balance and define those risks and interests[49] implies that the extent of the individual's privacy right and the state's ability to regulate the abortion decision may change as developments in medical science alter the relative risks of abortion and childbirth. The Court also held, however, that the state did not have a legitimate interest in imposing a moral view upon women through regulation of the abortion decision.[50]

Eisenstadt and *Roe* clearly establish that adults possess a fundamental right of privacy protecting their choices whether to conceive and bear children. Furthermore, any regulations limiting that right must take into acount the medical risks involved in order not to intrude upon the protected area.[51]

B. The Rights of Minors

The law has traditionally restricted minors' rights and activities more than those of adults. Such restrictions have been justified by a belief that minors lack the maturity necessary to understand the consequences of their actions.[52] The restrictions placed on their activities represent both attempts to protect minors from themselves, *e.g.*, limits on minors' ability to contract, drink, or drive, and to prepare minors to function effectively as adult citizens, *e.g.*, compulsory education.[53]

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[48] *Id.* at 163-64.

[49] *Id.*

[50] "[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." *Id.* at 162. The state, however, need not be neutral, according to the Court. In Maher v. Roe, 432 U.S. 464 (1977), the Court held that a state's refusal to fund elective abortions for indigent women through Medicaid did not violate equal protection. Roe v. Wade was interpreted by the Court to have "implie[d] no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." 432 U.S. at 474.

[51] "[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." NAACP v. Alabama, 377 U.S. 288, 307 (1963), *quoted in* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[52] *See* note 1 *supra.*

[53] *See generally* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973); Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 BRIG. YOUNG L. REV. 605 (1976);

The constitutional rights of minors can only be discerned by balancing the express language of the constitution, which does not distinguish between adults and minors, and the common law tradition of according limited rights to minors. The Supreme Court has been most active in defining and extending the due process rights of minors. It has also been active in judging minors' First Amendment claims, holding that minors' lack of the "full capacity for individual choice" justifies restrictions on their First Amendment rights.[55] It has not, however, interpreted the due process clause as providing protections to minors equal to those which it provides to adults. The Court recently summarized its ruling on minors' rights as having "recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing."[56]

The Court has, furthermore, dealt with minors' rights of access to abortions and contraceptives in the recent cases of *Planned Parenthood v. Danforth*[57] and *Carey v. Population Services International.*[58] In *Roe v. Wade,* the Court had expressly refused

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Kleinfeld, *The Balance of Power Among Infants, their Parents, and the State* (pts. I-III), 4 FAM. L.Q. 320, 410 (1970), 5 FAM. L.Q. 64 (1971); Note, *State Instrusion Into Family Affairs: Justifications and Limitations,* 26 STAN. L. REV. 1383 (1974).

[54] *See, e.g.,* Goss v. Lopez, 419 U.S. 565 (1975) (requiring notice and hearing before temporary disciplinary suspension from school); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (denying constitutional right to jury trial in the adjudicative phase of state juvenile court proceedings); In re Winship, 397 U.S. 358 (1970) (setting reasonable doubt standard for conviction of a juvenile in a criminal prosecution); In re Gault, 387 U.S. 1 (1967) (providing right to written notice, counsel, confrontation, cross-examination, and privilege against self-incrimination in juvenile court adjudications). The court noted in In re Gault, however, that juvenile delinquency hearings need not " 'conform with all the requirements of a criminal trial or even of the usual administrative hearing.' " *Id.* at 30 (footnote omitted).

[55] Ginsberg v. New York, 390 U.S. 629, 650 (1968) (Stewart, J., concurring in result). *Ginsberg* upheld a New York statute barring the sale to minors of sexually-oriented literature that concededly was not obscene with respect to adults. The Court rejected the argument that the statute unconstitutionally defined obscenity and, therefore, the scope of minors' freedom of expression on the basis of the buyer's age. The statute's restrictions of minors' rights were held justified by the state's power to regulate minors to a greater extent than adults, its interest in supporting parental authority, and the state's independent interest in minors' welfare. *Id.* at 638-40. *But see* Tinker v. Des Moines School District, 393 U.S. 503 (1969) (upholding students' right of free speech under the First and Fourteenth Amendments if such expression does not materially and substantially interfere with the school's operation).

[56] Bellotti v. Baird, 99 S. Ct. 3035, 3043 (1979). For a discussion of *Bellotti,* see notes 70-79 and accompanying text *infra.*

[57] 428 US. 52 (1976).

[58] 431 U.S. 678 (1977).

to consider the extent of unmarried minors' rights in an abortion decision.[59] *Danforth* concerned the constitutionality of a statute prohibiting abortions, other than those necessary to save the mother's life, from being performed on women under the age of eighteen during the first trimester of pregnancy without the parents' written consent. The Court recognized that the state's interest in protecting parental authority and family stability might provide a basis for greater regulation of minors' abortions than the regulation rejected for adults in *Roe*. Nevertheless, the Court found fault with the statute's delegation to parents of an "absolute, and possibly arbitrary, veto" power that the state itself, under *Roe*, did not possess.[60] It further found that "significant state interest" in maintaining the family and parental authority did not justify the statute's restrictions on minors. The Court was not convinced that parental control of the abortion decision could effectively protect that interest: "Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure."[61] The Court rejected the argument that parental interests might support the statute's requirements: "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."[62] The Court refused, however, to hold that the privacy right of minors is equal to that of adults: "We emphasize that our holding . . . does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."[63]

In the companion case of *Bellotti v. Baird*[64] the lower court had invalidated a Massachusetts statute requiring parental consent or an order from the state superior court before a minor could obtain an abortion.[65] The Supreme Court indicated that it was willing to accept as constitutional some state-mandated parental involvement in the minor's abortion decision. It also indicated, however, than an absolute parental notice or consultation requirement might not be upheld. The court observed that the

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[59] 410 U.S. 113, 165 n.67.

[60] 428 U.S. 52, 74 (1976).

[61] *Id.* at 75.

[62] *Id.*

[63] *Id.*

[64] 428 U.S. 132 (1976).

[65] Baird v. Bellotti, 393 F. Supp. 847 (D. Mass. 1975), *vacated and remanded*, 428 U.S. 52 (1976).

interpretation advanced by the State of Massachusetts was that the statute

> prefers parental consultation and consent, but . . . permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests. The statute, as thus read would be fundamentally different from a statute that creates a "parental veto".[66]

Since the Court found the statute open to varying constructions, it remanded the case to the district court with instructions to refer the issues of construction to the Massachusetts Supreme Judicial Court.[67]

That court construed the statute to require parental notice of all proceedings instituted by minors seeking judicial consent to abortions.[68] The district court again invalidated the statute, holding in part that the absolute notice requirement impermissibly burdened minors' rights by prohibiting judicial consent to abortions without parental notification even when the court found that parental involvement would not be in the minor's best interests.[69]

In *Bellotti v. Baird,*[70] the Supreme Court affirmed that judgment. Justice Powell's plurality opinion noted the reasons for the greater latitude allowed to state regulation of minors' rights[71] and recognized the frequent requirement of parental involvement or consent in important decisions by minors as an appropriate method of protecting minors from their own immaturity.[72] However, the differences between other choices made by minors subject to state regulation, *e.g.,* the decision to marry, and the constitutional status of the right involved in *Baird* "require a State to act with particular sensitivity when it legislates to foster parental

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[66] 428 U.S. at 145 (footnote omitted).

[67] *Id.* at 146-52.

[68] Baird v. Attorney General, ___ Mass. ___, 360 N.E.2d 288, 294 (1977).

[69] Baird v. Bellotti, 450 F. Supp. 997, 1002 (D. Mass. 1978), *aff'd,* 99 S. Ct. 3035 (1979).

[70] Bellotti v. Baird, 99 S. Ct. 3035 (1979). Justice Powell announced the Court's judgment in an opinion joined by Chief Justice Burger and Justices Stewart and Rehnquist. Justice Stevens concurred in the judgment and was joined by Justices Brennan, Marshall, and Blackmun. Justice White was the sole dissenter.

[71] *See* text accompanying note 56 *supra.*

[72] 99 S. Ct. 3035, 3045 & 3047 (1979).

involvement in this matter."[73] *Danforth*'s prohibition of any absolute third party veto over the abortion decision led Justice Powell to the conclusion that when a state requires minors to obtain parental consent to abortions, it must also provide an alternate authorization procedure through which minors may procure abortions.[74]

Justice Powell found the judicial proceeding provided by the Massachusetts statute unsatisfactory in two respects. One aspect found defective by both Justice Powell's and Justice Stevens' plurality opinions was the authority given to the superior court to deny consent for an abortion on the grounds that the abortion would not be in the minor's best interests even if the judge determined that the minor was mature and was capable of making and had made a reasonable and informed choice. Both pluralities say that this potential judicial disregard of a mature minor's decision provides a third party with the kind of absolute and possibly arbitrary veto which *Danforth* had declared unconstitutional.[75] The requirement that the court base its decision solely on the minor's best interests did not save the statute. That standard was considered to provide insufficient guidance to the judge, causing the decision to "necessarily reflect personal and societal values and mores whose enforcement upon the minor — particularly when contrary to her own informed and reasonable decision — is fundamentally at odds with privacy interests underlying the constitutional protection afforded to her decisions."[76] More precisely, the district court had held unconstitutional the statute's requirement that parents receive notice of all judicial proceedings instituted by minors to obtain abortions.[77] The two Supreme Court pluralities diverged in their response to this issue. Justice Stevens wrote that because the case involved an absolute third party veto and was governed by *Danforth*, "[n]either *Danforth* nor this case determines the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto."[78]

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[73] *Id.* at 3047.

[74] *Id.* at 3048.

[75] *Id.* at 3052 (Powell, J., plurality opinion) & 3053 (Stevens, J., concurring in the judgment).

[76] *Id.* at 3054 (Stevens, J., concurring in the judgment). This defect, however, appears to be more theoretical than practical. A judge who decides that an abortion is not in a minor's best interests would be unlikely to conclude that the minor is mature and has made a reasonable decision, especially in the absence of an objective standard by which the minor's maturity can be determined.

[77] Baird v. Bellotti, 450 F. Supp. 997, 1002 (D. Mass. 1978), *aff'd*, 99 S. Ct. 3035 (1979).

[78] Bellotti v. Baird, 99 S. Ct. at 3053 n.1 (Stevens, J., concurring in the judgment).

Justice Powell, however, agreed with the district court that the uniform notice requirement unconstitutionally burdened minors' rights. The opinion recognized that pregnant minors, particularly those living at home, would be vulnerable to parental efforts to prevent an abortion or access to a court in pursuit of an abortion. This potential obstruction led Justice Powell to the conclusion that state regulation similar to that of Massachusetts must allow minors to obtain judicial consent to an abortion and to act on that authorization without prior parental notice.[79]

In *Carey v. Population Services International,*[80] the validity of a New York statute that, in part, prohibited all distribution or sale of contraceptives to minors under the age of sixteen was challenged. In a plurality opinion, Justices Brennan, Stewart, Marshall, and Blackmun, with Justices White, Powell and Stevens concurring in the result, held the statute unconstitutional. The plurality opinion, written by Justice Brennan, noted that "the right of privacy in connection with decisions affecting procreation extends to minors as well as adults."[81] The opinion found two flaws in the statute — the absolute nature of the ban, and the lack of any evidence supporting the state's assertion that the ban furthered the goal of deterring sexual activity among minors. In dealing with the absolute prohibition Justice Brennan reasoned: "Since the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is *a fortiori* foreclosed."[82] The statute was also found to be both an ineffective and improper means of furthering the asserted state interest. Although the opinion did not pass on the question of whether and to what extent the state may regulate private sexual activity, it rejected the argument that the state may discourage such activity by increasing the risks involved, especially in light of "a conceded complete absence of supporting evidence" that the regulation in fact deterred any sexual activity.[83]

The plurality opinion, citing *Danforth,* stated that restrictions

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[79] *Id.* at 3050 (Powell, J., plurality opinion).

[80] 431 U.S. 678 (1977).

[81] *Id.* at 693.

[82] *Id.* at 694. Justice Powell concurred in the result on the grounds that the statute violated the rights of married women aged fourteen to sixteen, and also violated the rights of parents to provide their minor children with contraceptives. *Id.* at 707-08 (Powell, J., concurring in result).

[83] *Id.* at 696. Justice Stevens noted, "It is as though a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets. One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse." *Id.* at 715 (Stevens, J., concurring in the judgment).

on minors' privacy rights need to be justified only by a showing of a "significant state interest" rather than a "compelling state interest."[84] The less demanding test was found appropriate because of the state's traditionally greater latitude in regulating minors' activities and the status of minors' capacity in decisions regarding abortion and contraceptives.[85] The meaning of the "significant state interest" test is unclear, but it apparently is a functional equivalent of the stricter standard.[86]

Another way to view the relationship between minors' fundamental rights and the regulatory latitude of the state is to recognize that the state possesses certain interests which are "compelling" only with respect to minors. The significant state interest test implies that minors' fundamental rights are qualitatively inferior to those of adults. Maintenance of the compelling state interest test would focus on the relationship between the minor's maturity and the exercise of the restricted right as well as the impact of the relationship on the asserted state interest. The emphasis on the minor's capacity would be appropriate, since it is the minor's presumed lack of capacity that justifies all limits on the rights of minors *qua* minors.[87]

This analysis also turns on the nature of the asserted right. One commentator has generally classed the fundamental rights involved in minors' rights cases as "protection" and "choice"

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[84] *Id.* at 693 & 693 n.15.

[85] *Id.* at 693 n.15.

[86] *Id.* at 706 (Powell, J., concurring in result): "Until today, I would not have thought it was . . . necessary to review state regulation of this sort under a standard that for all practical purposes approaches the 'compelling state interest' standard."

[87] In Ginsberg v. New York, 390 U.S. 629 (1968), Justice Stewart expressed the view that

> [t]he Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose . . . . I think a State may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.

Id. at 649-50 (Stewart, J., concurring in result) (footnotes omitted); *accord,* Planned Parenthood v. Danforth, 428 U.S. 75, 104-05 (1976) (Stevens, J., concurring in part and dissenting in part).

Justice Stewart's analysis suggests that the crucial issue in determining the rights of minors is what type and level of capacity constitutes the capacity presupposed by constitutional guarantees. In the context of access to contraceptives, the capacity to conceive a child is clearly relevant. Arguments that additional qualities of emotional or psychological maturity should be considered critical appear to be aimed at controlling sexual behavior rather than contraceptive choices alone and presuppose a causal link between the availability of contraceptives and sexual activity. As noted previously, however, there is no evidence supporting that assumption with respect to minors in general. *See* note 33 and accompanying text *supra.*

rights.[88] "Protection rights," generally, are those which shield an individual from undue harm or interference by the state or other individuals. "Choice rights" protect the individual's ability to make affirmative choices of "binding consequences," such as rights to vote, to contract, or to marry.[89]

The Supreme Court's decisions regarding minors' rights in juvenile court and school disciplinary proceedings[90] show the influence of these considerations. Due process concerns protect individuals from abuses of state power and improve the fairness of adversary adjudications. Thus, due process rights are of relatively constant value regardless of the individual party's maturity. The value of restrictions placed on choice rights, however, obviously does vary directly with levels of maturity.

Minors' rights of access to contraceptives and abortions combine qualities of both choice and protection rights. To the extent that the availability of contraceptives or abortions influences minors' decisions about sexual activity, the relevant privacy right functions as a choice right. Insofar as minors' sexual activities are not precipitated by access to contraceptives or abortions, the right of access serves to protect minors from themselves in an area in which they are uniquely capable of minimizing the consequences of possibly immature and incorrect choices. When one recognizes the general lack of causality between minors' sexual activity and access to contraceptives,[91] and the significant dangers of deterring minors from using contraceptives without also deterring their sexual activities, it appears especially unreasonable to subject only those minors who act responsibly by seeking contraceptives to a uniform parental notification requirement. Minors who do not use contraceptives or rely on non-medical means would be unaffected by the requirement—they would not be induced to consult their parents or to change their sexual behavior or contraceptive choices. With respect to those sexually active minors who do use contraceptives, the right of access serves a definite prophylactic function against the undesirable consequences to the minors and society in general. The dominance of the protective aspects of the privacy right suggests that capacity requirements be minimized and that limitations on minors' access to contraceptives be justified by clear evidence that the limitations would achieve their intended goals significantly more fre-

[88] Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 BRIG. YOUNG L. REV. 605, 644 (1976).

[89] *Id.* at 644.

[90] *See* cases cited in notes 54-55 *supra.*

[91] *See* note 33 *supra.*

quently than they would increase the risks of irreparable harm to minors and society.

C. *Parental Rights and the Limitation of Minors' Rights*

The rights of parents to control their children must be weighed against the privacy rights of minors.[92] In cases where parental rights have conflicted with state regulations, the Supreme Court has usually favored parental rights. In these cases, where the Court has affirmed the fundamental nature of parental rights, the state had completely pre-empted parental authority. In *Pierce v. Society of Sisters,*[93] the Court invalidated a state law requiring parents to send their children to public schools. The Court found that the state had no power to "standardize" children in that fashion: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[94] In *Wisconsin v. Yoder,*[95] the Court upheld the rights of Amish parents to refuse to send their children to high school in defiance of a state law requiring minors to attend school until age sixteen. *Pierce* was interpreted by the Court in *Yoder* to stand "as a charter of the rights of parents to direct the religious upbringing of their children."[96] The cultural foundation of parental rights was explicitly recognized: "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[97]

The source of parental rights recognized by the Court in these cases, however, is ill-defined. The rights could be derived from the right of the family as a unit to be free from undue state interference. Alternatively, parents could have certain rights to control their children that are independent of minors' rights and exist apart from the authority delegated to parents by the state to safeguard the social interest in minors' welfare. The ambiguity results in part from the presumed identity of interests between parents and children in these cases and the consequent lack of consideration of minors' rights as independent checks on parental

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[92] Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976).
[93] 268 U.S. 510 (1925).
[94] *Id.* at 535.
[95] 406 U.S. 205 (1972).
[96] *Id.* at 233.
[97] *Id.* at 232.

rights,[98] and in part from the extent of the contested regulatory interference with the rights of both parents and minors. It is interesting to note that both *Pierce* and an earlier case, *Meyer v. Nebraska*,[99] rested on due process grounds rather than free exercise of religion claims. *Meyer* stated that the due process clause protected the parents' right to hire a foreign language instructor for their children and the teacher's right to teach as within the "liberty" protected by the fourteenth amendment, while *Pierce* stated that the inability of the state to require that all minors attend public schools exclusively was due to limits placed on the state by "[t]he fundamental theory of liberty upon which all governments in this Union repose."[100]

The Court has since made it clear, however, that the family and parental authority are not completely free from state regulation. In *Prince v. Massachusetts*,[101] the Court upheld a statute prohibiting minors from selling newspapers or magazines in the streets and adults from giving minors articles to sell, as it applied to a Jehovah's Witness who was enthusiastically accompanied by her ward-niece while she sold religious literature on the streets. The Court rejected the argument that the law unconstitutionally limited the free exercise and expression rights of both the adult and the minor and the guardian's right of control and education. Although the Court acknowledged the primary role of parents in childrearing, it noted that "the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. . . . [A]nd neither rights or religion nor rights of parenthood are beyond limitation."[102] In *Yoder*, the Court observed that state regulation of parental power and free exercise interests could meet the compelling state interest test "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."[103]

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[98] In *Yoder*, the Court rejected Justice Douglas' argument that the case involved the rights of Amish minors apart from their parents' rights, on the basis that (1) the children were not parties to the litigation, (2) Wisconsin had not argued that the parents were preventing children who wanted to attend high school from doing so, and (3) Wisconsin was attempting to enforce penalties against the parents without regard to the children's wishes. The Court recognized that, had Wisconsin asserted an interest in protecting Amish minors who wished to attend public school, "[r]ecognition of the claim of the State in such a proceeding would . . . call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions." 406 U.S. at 231.

[99] 262 U.S. 390 (1923) (invalidating a state statute prohibiting instruction in foreign languages to anyone not yet graduated from the eighth grade).

[100] Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

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

[102] *Id.* at 166.

[103] 406 U.S. at 233-34.

III. BALANCING RIGHTS AND INTERESTS

The Supreme Court has clearly accepted the propositions that minors possess a fundamental right of privacy and that that right includes both the decision to prevent pregnancy and the decision to terminate pregnancy.[104] It has also, however, recognized that minors' rights of access to contraceptives may be limited by the state in furthering its own "significant" or "compelling" interests, or in protecting superior parental rights. The state could decide instead, however, that the general welfare would be benefited more if contraceptives were available to minors on the same basis as to adults.

The right of minors to obtain contraceptives should be accorded the same weight against competing state interests as the corresponding adult right of access. As Justice Powell noted in *Bellotti,* the dangers of sexual activity without contraception are at least as great to minors as to unmarried adults, and the individual's interest in controlling the decision to conceive a child is not totally dependent on the individual's age or maturity.[105] Although the contraception decision involves capacity to make medical decisions, the state's requirement of medical consultation and prescription as a condition of access to potentially harmful methods minimizes the significance of the user's lack of capacity in the exercise of this aspect of the privacy right.

The interests of the state may be thought to be best protected by recognition of minors' right of access without parental notice. The extension of minors' rights would effectively further state interests in minimizing the social costs of teenagers' sexual activity. The lack of any evidence indicating that the availability of contraceptives causes any increase in the overall rate of minors' sexual activity leads to the conclusion that morally neutral, utilitarian principles about contraception support a state's position favoring minors' rights over parental rights in this context.[106]

The source of parental rights may influence the weight they are to be given when balanced against minors' rights or the state's perception of its own interests. To the extent that parental rights are based on a delegation of authority by the state, parental rights are less persuasive against state limitation based on determinations of general welfare. Some aspects of parental rights are clearly subordinate to such legislative decisions concerning what

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[104] Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977); *Danforth,* 428 U.S. at 74. *Accord,* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[105] Bellotti v. Baird, 99 S. Ct. 3035, 3048 (1979).

[106] *See* note 33 *supra.*

the public interest requires. For example, legislation lowering the age of majority from twenty-one to eighteen is within the constitutional power of the state, although such legislation completely eliminates parental rights over certain children. Insofar as parental rights are derived from rights protected from state interference, such as due process rights or "a right of privacy older than the Bill of Rights,"[107] however, those rights must be given priority over at least some arguments based on general welfare determinations.

Parental rights and those state interests asserted to justify a notice requirement must also be valued in light of the efficacy of the chosen means and other foreseeable effects. Regardless of the level of interest the state may ultimately be required to show, regulations concerning notification must still employ means which are necessary to, and capable of, achieving their goal.[108] Therefore, whether the state is attempting to further its goals, or to protect parents' interests, the means used must be reasonably related to the goal sought without unduly burdening minors' privacy rights.

Since the available evidence indicates that the availability of contraceptives does not affect most minors' decisions about their sexual activities, a notice requirement would be essentially a method of propaganda. It would be merely an expression of social disapproval of minors' sexual activity and of support of parental authority.[109] It would communicate that disapproval without controlling minors' behavior, since the choice to consult with parents would still remain exclusively with minors. The requirement would not do anything directly to alter parent-child relationships in ways that might encourage greater communication. With the variety of options available to minors,[110] the incentive for minors to consult with parents would be extremely weak. Such an effort to communicate disapproval must be justified by a compelling or significant state interest if its result is substantially to burden or deter the exercise of minors' right of access to contraceptives, thereby randomly increasing the risks of pregnancy to minors.[111]

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[107] Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

[108] *Carey*, 431 U.S. at 686; *Danforth*, 428 U.S. at 75. *See also* Doe v. Bolton, 410 U.S. 179 (1973) (invalidating abortion procedure requirements beyond the attending physician's approval).

[109] *See* text accompanying notes 33-35 *supra*.

[110] *See* text accompanying note 35 *supra*.

[111] *Carey*, 431 U.S. at 694 (majority opinion) & 715 (1977) (Stevens, J., concurring); Eisenstadt v. Baird, 405 U.S. 438, 448 (1972). With respect to the standard of review involved, the *Carey* Court said:

> [T]he same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially

It appears likely that a significant number of minors would rather take the risks of unprotected intercourse than confront their parents with their sexual activities.[112] State legislatures have already recognized the strength of minors' desires for privacy and the potential of parental involvement for counterproductive deterrence in sex-related matters by permitting minors by statute to consent to treatment for venereal disease.[113] These provisions implicitly recognize that too many minors, knowing they have a venereal disease and cognizant of its dangers, will not ask their parents for assistance. The dangers of not using contraceptives are less certain and more avoidable than those of venereal disease. Even though a notice provision is superficially not as strong a barrier to access to contraceptives as a consent requirement is to venereal disease treatment, minors may be more willing to forego contraceptives than medical treatment. From the minor's viewpoint, parents would be more likely to react favorably to a request for venereal disease treatment than to notice of the minor's sexual activities.

A notice requirement is equally unlikely to protect state and parental interests in the quality and stability of family relationships or parents' moral authority. The lack of a notice requirement would not prevent parents or children from raising any issues for family discussion. With respect to a minor's sex life, the choice whether to involve the parents in any way remains within the minor's control despite any parental notice requirements.

The limitations on minors' rights are justified by a desire to minimize the possibility of harm to minors in certain situations. The limitations are implemented through either a state-mandated choice or by delegation of the right of choice to parents. The interest in a correct medical choice involved in the contraceptive decision is best served by the assistance of a physician; it is doubtful that parental advice would improve such a medical decision. The value of parental involvement is further weakened by the relatively small medical risks to the minor posed by contraceptives and the reversibility of the decision. The function of

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limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely. Both types of regulation "may be justified only by a 'compelling state interest' . . . and . . . must be narrowly drawn to express only the legitimate state interests at stake."

431 U.S. at 688 (citation omitted).

[112] Torres, *supra* note 35.

[113] *See, e.g.*, ARIZ. REV. STAT. § 44-132.01 (1978-79 Supp.); ARK. STAT. ANN. §§ 82-629, 82-630 & 82-631 (1976); CAL. CIV. CODE § 34.7 (West Supp. 1979); COLO. REV. STAT. § 25-4-402 (1973); CONN. GEN. STAT. ANN. § 19-89a (West 1977); DEL. CODE ANN. Tit. 13 § 708 (1974). *See also* Paul, Pilpel & Wechsler, *Pregnancy, Teenagers and the Law, 1976*, 8 FAM. PLAN. PERSPECTIVES 16 (1976).

the minor's privacy right as a protection against the undesired consequences of sexual activity and the possibility of negative parental reactions support the minimization of any capacity requirement and for allowing parental involvement to be the result of the natural development of parent-child relations. The only reasonable level of capacity required to make a contraceptive decision in consultation with a physician is the capacity to expose oneself to the risks guarded against by contraception. There is no reason to believe that state-mandated parental involvement in the minor's contraceptive decision will enhance parental authority or the parent-child relationship if the minor does not already trust the parents enough to confide voluntarily in them. Thus, the minor's interest in avoiding pregnancy, venereal disease or other, adverse consequences, should outweigh the state's and parents' interests in the minor's use of contraceptives and the speculative benefits expected from parental involvement in the contraceptive decision.[114]

CONCLUSION

A requirement that parents be notified of their minor children's use of or desire to use contraceptives fails to serve any significant state interest in deterring the sexual activity of minors and fails to protect the interests of parents and the state in the minor's welfare, parental authority, or family stability. A notice requirement — and any other more restrictive regulations — rather only would increase the risks to minors of pregnancy and venereal disease, with their consequent personal and social costs. It is understandable and laudable that parents would want to be involved in guiding their children's decisions about sex and contraceptives. Parents, however, should look to themselves to establish sufficiently strong relationships with their children to make state intervention unnecessary. The state has less burdensome methods available to protect its interests, such as sex education programs in public schools. The privacy rights of minors to prevent conception should be protected against state or parental infringement through such an empty symbolic measure as a notification requirement.

—Michael N. Finger

[114] *Cf. Danforth*, 428 U.S. at 75: "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."