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COMMENTS

TO BE YOUNG, POOR, SEXUALLY ACTIVE, AND IN NEED OF BIRTH CONTROL: INDIGENT MINORS' ACCESS TO CONTRACEPTIVES

I. INTRODUCTION

In many states, minors\(^1\) may be unable to obtain prescription contraceptives unless they either obtain the consent of their parents or notify\(^2\) them that they are seeking contraceptive services. This mandatory parental involvement, rooted in the common law rule that minors lack the capacity to consent to their own medical treatment, has been reinforced by Supreme Court decisions. These cases hold that parents have a fundamental right to control the upbringing of their children. A real possibility exists that courts in many jurisdictions, recognizing this parental right, will continue to allow parents to control, or at least become involved in, their children's decisions to obtain prescription contraceptives.

Mandatory parental involvement in the form of consent or notification requirements seriously impairs the minor's access to prescription contraceptives; while consent requirements give parents a veto over the minor's decision to obtain contraceptives. Notification requirements often discourage minors from even attempting to obtain contraceptive services.\(^3\) Although such parental

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1. Throughout this article, the term "minor" will refer to any person who is below the age of legal majority.
2. Parental notification requirements ensure that parents will be informed of the decision of the minor to obtain medical treatment, but do not give them the power to directly prevent the desired treatment. See State v. Koome, 84 Wash. 2d 901, 530 P.2d 260 (1975); Comment, The Validity of Parental Consent Statutes after Planned Parenthood, 54 J. URB. L. 127 (1976); Note, Abortion—Possible Alternatives to Unconstitutional Spousal and Parental Consent Provisions of Missouri's Abortion Law, 42 Mo. L. Rev. 291, 295-96 (1977).
3. Mandatory parental involvement in the decision-making of sexually active minors, even in the form of parental notification requirements, has a chilling effect on the minor's desire to seek needed contraception. Although studies have established that many teenagers (55%) who use family planning clinics involve their parents in the decision to seek contraception, many teenagers who visit clinics on their own have indicated that they would not use such services if their parents were notified. One study reveals that 20% would discontinue clinic attendance altogether and would use less effective non-medical methods of contraception, 12%
involvement impairs the ability of all young people to obtain contraceptives, the burden falls disproportionately on indigent minors who experience greater difficulties both gaining access to contraceptives and dealing with an unwanted pregnancy. Initially, indigent minors are at a disadvantage because they must depend on publicly funded family planning programs rather than private physicians. These programs, which involve state action, may be constitutionally required to involve parents in their minor child's decision to seek contraceptives. Since private physicians are not agents of the state, they cannot be similarly restricted. Consequently, those who cannot afford a private physician may face a greater risk of an unwanted pregnancy.

Once an unwanted pregnancy occurs, the indigent young woman is less likely to be able to obtain an abortion than her more affluent peer. Recent Supreme Court decisions have held that

would continue having sex using no method, and only 4% would stop having sexual intercourse altogether. Torres, Does Your Mother Know... ?, 10 Fam. Plan. Perspectives 280, 281 (1978). These figures indicate that any kind of mandatory parental involvement in the minor's decision discourages the use of the most effective methods of contraception and could lead to a significant difference in the numbers of illegitimate children and teenage abortions. Id. at 282.

The chilling effect of mandatory parental involvement on the minor's decision to obtain contraception may be greater for indigents than for those from higher income families. It has been suggested that the "lower class family is, if anything, even more puritanical and prudish about sexual matters than families with higher incomes." Furstenberg, The Social Consequences of Teenage Parenthood, 8 Fam. Plan. Perspectives 148, 151 (1976). This implies that the indigent minor might be even less willing to obtain contraceptives if she knows her parents will find out.


The unavailability of clinics that provide contraceptive services puts the indigent minor at an additional disadvantage. The majority of large cities in the United States have some special programs for the pregnant teenager. More than 40% of these programs, however, do not provide contraceptive services for teenagers. U.S. Cities Shortchange Most Pregnant Teens, 10 Fam. Plan. Perspectives 167 (1978). "[A]lthough contraception... should be given high priority for sexually active teenagers, 10 other services (counseling, special education, family life education, nutrition, special health classes, sex education, social service, home visiting, inter-disciplinary staff, and vocational assistance) were provided more frequently than contraception..." Goldstein & Wallace, Services For & Needs of Pregnant Teenagers in Large Cities of the United States, 1976, 93 Pub. Health Rep. 46, 49 (1978). In addition, in 1975, 592 countries provided no contraceptive services to meet the needs of some 160,000 15- to 19-year-olds. Dryfoos & Heisler, Contraceptive Services for Adolescents: An Overview, 10 Fam. Plan. Perspectives 223, 229 (1978).

5. See notes 117-22 infra and accompanying text.
states are not required under federal law to fund abortions under their medicaid programs. Therefore, unless the state offers free abortion services, the indigent woman must either procure a dangerous illegal abortion or bear the child. If she chooses the latter, the indigent young mother is likely to experience the great social and economic difficulties of adolescent childbearing. Because of the limited alternatives available to indigent minors to prevent pregnancy, coupled with the special severity of problems that they must face when they become pregnant, their need for access to contraceptives is in many ways more urgent than that of their wealthier counterparts.

This article examines the sources, extent, and constitutionality of mandatory parental involvement in the minor's decision to seek prescription contraceptives. It focuses on the importance to indigent minors of access to contraceptives through publicly funded family planning programs. The article attempts to outline the means by which adequate access to contraceptives can be promoted. In so doing the competing interests of parents and minors will be analyzed to determine the extent to which parental involvement should be permitted in order to best promote the minor's welfare while at the same time limiting infringement on parental rights.

II. SOURCES AND EXTENT OF PARENTAL INVOLVEMENT REQUIREMENT

Under common law principles, physicians had to obtain parental consent before providing medical treatment to minors. This requirement was based on the assumption that minors did not possess the knowledge, intelligence, or maturity to comprehend the risks of medical treatment. Absent parental consent, the attending physician risked tort liability for battery. The threat of such liabil-


7. See notes 31-40 infra and accompanying text.


9. See Note, supra note 8, at 309; Parental Consent Requirements, supra note 4, at 1001; Comment, Sexual Privacy: Access of a Minor to Contraceptives, Abortion,
ity understandably made physicians reluctant to treat a minor without first obtaining parental consent.

Many courts and legislatures, recognizing that it is often beneficial to permit minors to consent for their own medical treatment, have developed exceptions to the common law doctrine. For example, physicians need not obtain parental consent in an emergency situation in which the life or health of a child is seriously threatened. The "emancipated minor," by virtue of marriage or independence from her parents, is also often deemed capable of consenting for her own treatment. Finally, "mature minors," teenagers with adequately developed moral and intellectual maturity, have been granted the power of consent, as increasingly "the courts have focused on the fact of maturity, rather than the fiction of infancy." Despite these exceptions, the common law doctrine of parental consent, as it applies to prescription contraceptive services, is still the law in many jurisdictions. It therefore remains a


11. The emancipated minor may give effective consent for her own treatment by virtue of a marriage, the failure of parents to meet their legal responsibilities, the fact that the minor is living apart from her natural parents, or the fact that the minor is otherwise self-supporting. Parental Consent Requirements, supra note 4, at 1002. See Pilpel, supra note 8, at 465. See Bach v. Long Island Jewish Hosp., 49 Misc. 2d 207, 267 N.Y.S.2d 289 (Sup. Ct. Nassau County 1966); Smith v. Seibly, 72 Wash. 2d 16, 431 P.2d 719 (1967).

12. The mature minor doctrine "provides that a minor effectively can consent to medical treatment for himself if he understands the nature of the treatment and it is for his benefit." FAMILY PLANNING, supra note 10, at 72 (footnote omitted). This exception recognizes that minors should be able to give consent for their own medical treatment regardless of age, contingent only on their capacity to make an informed, reasoned decision. See Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941); Younts v. St. Francis Hosp., 205 Kan. 292, 469 P.2d 330 (1970); Bishop v. Shurly, 237 Mich. 76, 211 N.W. 75 (1926); Lacey v. Laird, 166 Ohio St. 12, 139 N.E.2d 25 (1956); Smith v. Seibly, 72 Wash. 2d 16, 431 P.2d 719 (1967).


14. Parental consent requirements have been repealed in a number of jurisdictions. See note 48 infra and accompanying text. Jurisdictions which have not re-
Theoretical obstacle to a minor's access, even though today, as a practical matter, physicians do not face a real risk of liability.\textsuperscript{15}

The modern rationale for requiring mandatory parental involvement focuses on the positive rights of the parents to rear their child rather than the common law notion of the incapacity of minors. The Supreme Court's recognition of and emphasis on the fundamental rights of parents, along with its failure to expand the magnitude of the minor's right to obtain contraception, has aided in perpetuating the requirements of parental involvement.\textsuperscript{16} Even where the competing constitutional rights of parents have not supported the constitutionality of parental consent requirements, parental involvement in the form of parental notification requirements is still constitutionally permissible.\textsuperscript{17}

III. THE NEED FOR CONTRACEPTIVES AND THE EXTENT OF ACCESS

A. The Need

A growing segment of the teenage population engages in sexual intercourse.\textsuperscript{18} A 1971 study estimated that "nearly 2.4 million

pealed the common law impliedly retain the requirement of parental consent. See, e.g., \textit{Mass. Gen. Laws}

15. "There appear to be no reported cases holding a physician civilly liable for damages" for providing minors over 15 with medical care absent parental consent, where the treatment granted was for the benefit of the minor and with the minor's consent. Zuckerman, \textit{supra} note 13, at 115. Further, no state currently has statutes which impose criminal sanctions for the distribution of contraceptives to minors without the consent of their parents. Internal Memorandum, Planned Parenthood Federation of America, Inc., April 20, 1978, at 12 [hereinafter cited as Memorandum]. See \textit{Family Planning}, \textit{supra} note 10.

16. The strength of the parents' constitutional right to rear their children may force the continued acceptance of mandatory parental involvement. See notes 117-22 \textit{infra} and accompanying text.

17. No statutes explicitly permit minors to receive prescription contraceptives absent parental notification. Furthermore, the Supreme Court has indicated that even where parental consent may not be constitutionally permissible, parental notification may pass constitutional scrutiny. See \textit{Carey v. Population Servs. Int'l}, 431 U.S. 678 (1977).

18. "[I]t is clear from the rising rates of teenage illegitimacy and venereal disease and the large number of abortions among teenagers that a considerable number of young people are sexually active." \textit{House & Goldsmith, Planned Parenthood Services for the Young Teenager}, 4 \textit{Fam. Plan. Perspectives} 27 (1972). Studies show that these young teenagers "are not deterred by the fear of pregnancy or the absence of contraception." Settlage, Baroff, & Cooper, \textit{Sexual Experience of Younger Teenage Girls Seeking Contraceptive Assistance for the First Time}, 5 \textit{Fam. Plan. Perspectives} 223 (1973).
(or 28%) never-married young women in the United States aged 15-19 . . . have had some coital experience.” 19 A 1976 follow-up study indicated that the age at which sexual intercourse is first experienced is decreasing while the extent of teenage intercourse is increasing. 20 This study shows that the number of sexually active never-married women increased by thirty percent from 1971-1976. 21 The study concluded that fifty-five percent of all never-married women in the United States in 1976 had engaged in sexual intercourse by the time they were nineteen. 22

This extensive teenage sexual activity leads to approximately 780,000 premarital teenage pregnancies per year, most of them unwanted. 23 An unwanted pregnancy is a difficult situation for a woman at any age. The problems associated with an unintended pregnancy are intensified, however, when the expectant woman is a teenager. 24 Greater medical risks are involved in a teenage pregnancy, including “increased frequency of anemia, hypertension, eclampsia and maternal mortality as well as the risk of stillbirth, prematurity, perinatal and infant mortality and brain injury to the child born.” 25 These risks are especially prevalent for those younger than fifteen. 26

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21. Id. This study notes that the increase has occurred at all ages and among all races. However, the incidence of intercourse among blacks at age 19 (83.6%) is much greater than that of whites (48.7%). Id. at 56.
22. Id.
24. Teenage mothers are much more likely to drop out of school, be poor, and depend on welfare. Goldstein & Wallace, supra note 4, at 47. See Furstenberg, supra note 3; Menken, The Health and Social Consequences of Teenage Childbearing, 4 FAM. PLAN. PERSPECTIVES 45 (1972). See generally Paul, Pilpel, & Wechsler, Pregnancy, Teenagers and the Law, 1974, 6 FAM. PLAN. PERSPECTIVES 142 (1974); Adolescent Fertility—Risks and Consequences, POPULATION REP. Series J, No. 10, at J-157 (July 1976) [hereinafter cited as Adolescent Fertility].
26. There were approximately 30,000 pregnancies experienced by women 14 and younger in 1974. This reflects a general increase in fertility among this group.
If the minor resorts to abortion in an attempt to terminate the pregnancy, she faces additional medical risks inherent in the procedure.27 Many teenagers are exposed to this potential danger, as nearly three out of ten teenage pregnancies end in induced abortion.28 The risks associated with abortion may run even higher to the poor who cannot afford to obtain a legal abortion29 and must resort to more hazardous alternatives.

In addition to the medical risks involved in an unwanted teenage pregnancy, serious social and psychological consequences and economic hardships often accompany the pregnancy and subsequent birth of the child. Studies have recognized that "bearing a first child while in her teens is likely to be a critical turning point in a young woman's life."30 The result has been that teenage mothers have "consistently experienced greater difficulty in realizing life plans" than their peers.31

One immediate consequence of an unwanted pregnancy is frequently the disruption of the minor's education both before and

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Pregnancy among such young people is clearly associated with an extremely high risk of health, social and economic problems, because the youngsters are unprepared, biologically and psychologically, for the responsibilities of parenthood and have had only limited education. Whatever index is used—from dropping out of school to dying on the delivery table or losing one's baby—the adolescent under 15 is at the greatest risk of adverse consequences.


28. Jaffe & Dryfoos, supra note 26, at 172. The ratio of abortions to live births has been steadily increasing. Among 15- to 19-year-olds, there were 181 abortions per 1,000 live births in 1971 as opposed to 389 per 1,000 live births in 1974.

29. See note 16 supra.

30. Menken, supra note 24, at 45 (footnote omitted). Parents who bear children while in their teens "are more likely to be disadvantaged in the socioeconomic sense . . . than those . . . who postpone childbearing at least until the mother is in her early twenties." Id. at 52. See Furstenberg, supra note 3, at 160, 161; Johnson, supra note 25, at 398-99.

High birthrates among young mothers also perpetuate a low economic status by the addition of dependents. "[T]he number of children a woman has borne is inversely related to her education and to other socioeconomic variables." Menken, supra note 24, at 52. See Card & Wise, Teenage Mothers and Teenage Fathers: The Impact of Early Childbearing on the Parents' Personal and Professional Lives, 10 Fam. Plan. Perspectives 199, 202-03 (1978); Trussell & Menken, Early Childbearing and Subsequent Fertility, 10 Fam. Plan. Perspectives 209 (1978).

31. Furstenberg, supra note 3, at 162. In contrast to their classmates who became premaritally pregnant, those who did not had a better record of attaining their immediate objectives in life. Id.
after the birth of the child. A young mother will often be prevented from completing her high school education and subsequently hindered in pursuing further education. This is especially true for indigent minors who cannot rely on their families to support and care for the child while they finish their schooling. Lack of education will usually prevent the young mother from obtaining satisfactory employment, thereby perpetuating her financial hardships. In addition, the disruption of a young mother’s education is likely to sever important peer group relationships which “undoubtedly inhibits normal growth and development,” damaging the young mother psychologically as well as socially and economically.

Marital stability often eludes couples whose marriage results from an unintended pregnancy. In an attempt to secure adequate care for herself and her child, the young mother may be compelled to marry someone she might not otherwise have chosen. Marriage to a father who is uneducated and possesses limited marketable skills perpetuates poverty in the family contributing to marital discord. For the indigent young woman already suffering economic hardship, the added pressures of such a pregnancy increase the chances that the marriage will quickly dissolve.

32. “Early childrearing undoubtedly decreases the amount of time, money, and physical and psychic energy the teenager, especially from a low-income background, might normally be able to invest in educational pursuits.” Johnson, supra note 25, at 398.

33. Card & Wise, supra note 30, at 200-01. Many women are required to leave school because of their pregnancy and a majority of these women have trouble returning because of the necessity to care for the child. Menken, supra note 24, at 51. See Furstenberg, supra note 3, at 159-60. Young fathers are also likely to give up their education to join the labor force to support the new family. Card & Wise, supra note 30, at 201.

34. See Card & Wise, supra note 30, at 201-02.

35. Johnson, supra note 25, at 398.

36. Studies have shown that the divorce rate for teenage marriages is generally very high. Card & Wise, supra note 30, at 202; Menken, supra note 24, at 51. One such study showed that three out of five such marriages are destined to dissolve after six years. Furstenberg, supra note 3, at 156.

37. Of course the fathers of unintended children face many of the same problems that burden the young mother. Furstenberg, supra note 3, at 156. Most fathers entering into sudden marriages have low income-earning potential even before they wed, and will probably face limited prospects for economic advancement if they are also forced to terminate their education in order to find a job. Card & Wise, supra note 30, at 201.

38. See Card & Wise, supra note 30, at 202. See also Adolescent Fertility, supra note 24, at J-163-64.
An indigent young mother, without a family that can help absorb the costs of childbearing, must often resort to state welfare programs in order to survive. When this occurs, taxpayers must absorb the costs of an unintended pregnancy and an unwanted child. Since the costs of preventing conception are less than the subsequent support costs for children born to indigent mothers, it is in the state’s economic interest to promote the use of contraceptives by sexually active minors. To adequately protect both young people and society from the effects of unintended pregnancies, programs must be maintained which can best achieve the goal of limiting unwanted teenage pregnancies.

B. The Inadequate Response

A response to the problem of unintended births can take three different approaches. These are: (1) preventing intercourse, (2) preventing conception, and (3) terminating the pregnancy. Preventing intercourse among teenagers is not a feasible alternative. Such a measure would require a massive change in values on the part of our nation’s youth or the twenty-four hour per day supervision of their activities. Terminating the pregnancy, although feasible where resources and moral values allow, is not the most desirable method of preventing teenage parenthood due to the inherent physical and psychological risks of abortion. The remaining choice, preventing conception, is the simplest, cheapest, safest, and most effective alternative. It has been estimated that at least

39. The young mother is much more likely to be a welfare dependent than her peers. Furstenberg, supra note 3, at 160.
40. See note 52 infra.
41. Johnson, supra note 25, at 400.
42. The availability of relatively safe and effective methods of contraception makes the use of even a legal abortion as an alternative means of birth control seem unreasonable and certainly ill-advised. “From a medical, sociological and legal point of view, it makes no sense that abortion become a more viable solution to unwanted pregnancy than contraception.” A Minor’s Right, supra note 4, at 275.
43. Recognition of the need to prevent conception rather than to resort to abortion is reflected in a recent report to Governor Carey, prepared by the New York Department of Social Services. This report emphasizes the need to make more funds available for the prevention of unwanted teenage conception and childbearing. This contrasts with the present policy of the state, which is to spend the majority of its state and federal funds for welfare assistance to already pregnant adolescents and young mothers. N.Y. State Report: Prevention Key to Reducing Teenage Pregnancy; Governor Asks $1 Million, 10 Fam. Plan. Perspectives 293 (1978).

One study has criticized the Carter administration’s response to help prevent unwanted pregnancy claiming it emphasizes and funds alternatives to abortion rather than alternatives to pregnancies. This approach is not viewed as being an effective
313,000 teenage pregnancies could be prevented each year through regular use of contraceptives. This figure demonstrates that unrestricted access to contraceptives is a practical means to reduce by as much as forty percent the number of premarital teenage pregnancies.

In view of these statistics, states increasingly have recognized the importance of granting minors the right to consent for prescription contraceptives in particular, as well as medical treatment generally. By October 1976, thirty states and the District of Columbia had explicitly provided persons under eighteen the right to...

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44. Zelnick & Kantner, supra note 23, at 142. Statistics for 1976 show that 780,000 of the more than 1,000,000 pregnancies of 15- to 19-year-olds occurred premaritally. It is estimated that an additional 680,000 (or 1,460,000 total) premarital pregnancies would have resulted had not any of these sexually active teenagers used contraceptives. It is further estimated that if all the teenagers who did not intend to give birth had been consistent users of contraception there would have been about 467,000 premarital pregnancies (half of them intended)—313,000 or 40 percent, fewer than the 780,000 premarital pregnancies that actually occurred. In other words, the difference between no use of contraception and always-use (by those who do not want to conceive) is about one million pregnancies. Id. These calculations suggest the approximate number of unintended pregnancies that could be avoided if the regular and effective use of contraceptives among sexually active teenagers could be increased. Id. The new report by the Department of Health, Education and Welfare's National Center for Health Statistics showed that the rate of teenage out-of-wedlock childbearing fell for the first time since 1962, probably due in large part to the increased availability of contraceptives. Available Contraception Lowers Teen Birthrates, 10 Fam. Plan. Perspectives 160 (1978). The efficacy of contraceptives is further demonstrated by statistics showing that a sexually active woman who never uses a method of contraception runs a 58% chance of an unwanted pregnancy. Alternatively, a sexually active woman who regularly uses a contraceptive runs only an 11% risk of an unwanted pregnancy, and only a 6% risk if she uses a medical contraceptive. Zelnik & Kantner, supra note 23, at 141.


46. Increasingly, the federal government and the states are recognizing the right of minors to make their own decisions involving access to medical care. FAMILY PLANNING, supra note 10, at 70. See generally Paul, Pilpel, & Wechsler, supra note 24.

obtain contraceptives without parental consent. Although these provisions prevent parental veto over the minor's decision to use contraceptives, parental notification requirements and the accompanying impairment of access may still be permitted.

Congress has also recognized the importance of the availability of contraceptive services to minors through provisions of the Social Security Act. The 1972 amendments to the medicaid provisions of Title XIX now provide that family planning services must be furnished "to individuals of child-bearing age (including minors who can be considered to be sexually active) who are eligible under the State plan and who desire such services and supplies." Similarly, the 1972 amendments to the social services provisions of Title IV A of the Act require that states promptly furnish family planning services to all individuals (specifically including sexually active minors) requesting those services. The enactment of these provisions reveal Congressional concern with preventing an increase of those dependent on federal funds.

The intent behind Titles XIX and IV A was implicitly recognized by the Supreme Court when it decided Jones v. T.H. There, the Court affirmed the district court holding that access to contraceptives as provided for by these provisions could not be restricted by a Utah statute requiring written parental consent.

47. Memorandum, supra note 15, at 2. This position is reflected in the official policy of Planned Parenthood Federation of America, Inc., which is to furnish minors with contraceptives without the requirement of parental consent or notification. Id. at 1.

48. See note 17 supra.


52. The policy of providing the indigent with access to contraceptives reflects the tremendous costs to society that result from birth to mothers receiving AFDC benefits. In 1975, $9.4 billion was distributed through the AFDC program, of which $4.65 billion went to households including women who had their first child as teenagers. These amounts do not include administrative costs, expenditures for medicaid programs, food stamps, etc. Moore, *Teenage Childbirth and Welfare Dependency*, 10 FAM. PLAN. PERSPECTIVES 233, 234 (1978). In contrast, the cost of providing effective contraceptive services is only about $66 per client per year. Therefore it is estimated that it would cost the government only $112 million per year to provide modern birth control services to all of the 1.6 million sexually active teenagers at risk of an unwanted pregnancy but not currently receiving services. Id. at 235.


54. Id. at 878. The Supreme Court here affirmed the decision of the Utah dis-
Apart from the invalidation of the Utah statute, however, the *Jones* decision has limited impact in providing minors with unrestricted access to contraceptives. First, the court left open the question of whether a restriction less onerous than the Utah statute's consent requirement might be permissible under the Act. Second, the impact of this decision is limited to those indigent minors who are eligible for Medicaid or AFDC benefits. Low income minors not involved in these programs may still be faced with parental consent requirements restricting their access to contraceptives. Third, and most significant, the Supreme Court's order did not embrace the district court's holding which found the minor's right to contraception to be fundamental. The court's failure to consider this issue, leaves the constitutional status of the minor's right to obtain prescription contraceptives subject to interpretation by the lower courts. Moreover, it leaves the way clear for Congress to alter the underlying legislative policy of these provisions by permitting mandatory parental involvement.

The district court which had invalidated Utah regulations requiring the prior written consent of the parents. *T. H. v. Jones*, 425 F. Supp. 873 (C.D. Utah 1975). The district court found these regulations to be inconsistent with the language of the Social Security Act, which explicitly calls for the participating states to furnish such services to sexually active minors who voluntarily request them.

The legislative history of the 1972 amendments bears out Congress' concern that AFDC and Medicaid family planning services be provided to sexually active minors who desire them on a confidential basis; in this way Congress has sought to stem the rising number of births out of wedlock and the consequent increase in the numbers of welfare recipients.

Id. at 878 (footnote omitted).


56. Under 45 C.F.R. § 220.21 (1976), parental consent may be permitted to restrict access to contraceptives under the federal provisions where existing state law stipulates a specific age of consent for other medically related services. Since Utah did not have a law specifically requiring similar provisions, they could not enact a limitation addressed solely to contraception. *T. H. v. Jones*, 425 F. Supp. 873, 879 n.4 (C.D. Utah 1975).

57. All state plans for medical assistance must make such assistance available to those eligible under IV A. 42 U.S.C.A. § 1396a(a)(10)(A) (1974). See also 45 C.F.R. § 249.10(a)(9).

58. The district court determined that the minor's right to contraceptives was fundamental and could only be limited by a compelling state interest. See note 108 infra and accompanying text.

59. The Court also did not expressly confront the competing constitutional claims of parents and the impact that they might have on the validity of the federal legislation. See notes 109-22 infra and accompanying text. An analysis of the Supreme Court's subsequent opinions suggests that the Court is not ready to free the minor's decision to obtain contraceptives from parental notice requirements. See notes 79-102 infra and accompanying text.

60. For example, an amendment to Title X of the Public Health Service Act has
The failure of the courts and legislatures to eliminate parental involvement from the minor's decision to obtain contraceptives could impair the ability of family planning programs to reduce unwanted pregnancies among teenagers. There has been a tremendous growth of family planning programs in the United States in recent years. The establishment of these programs on both the state and federal level has been extremely important in enabling minors to obtain contraceptive services. The poor have been the primary beneficiaries of these programs. Nine out of ten, or 3.6

been proposed to the Senate. This would alter Title X of the Public Health Act to require all United States family planning clinics funded under the Act to notify parents before furnishing contraceptives to their children.

61. Torres, supra note 3, at 280. Organized family planning programs have increased approximately four times since their inception in 1968 and have served an estimated 4.1 million women in 1976. Torres, Organized Family Planning Services in the United States, 1968-1976, 10 FAM. PLAN. PERSPECTIVES 83 (1978).

62. Final natality statistics for 1976, as reported by the Department of Health, Education & Welfare's National Center for Health Statistics, showed a decline in adolescent fertility and illegitimacy for the first time since 1962. The sharpest decline occurred among black teenagers. Available Contraception Lowers Teen Birthrates, supra note 44, at 160. Studies have concluded that "organized (mostly publicly supported) family planning clinics were highly effective in preventing unwanted and mistimed pregnancies." Okada & Gillespie, The Impact of Family Planning Programs on Unplanned Pregnancies, 9 FAM. PLAN. PERSPECTIVES 173, 176 (1977).

Organized family planning programs have grown during a period of overall U.S. fertility decline. Most of the decline has been attributable to a reduction in unwanted and mistimed births, due to more consistent use of contraceptives, greater use of the more effective contraceptive methods, and improved efficacy in their use.


63. Statistics show that the greatest decline of unwanted pregnancies was among the disadvantaged minorities and low income groups served by family planning programs. Cutright & Jaffe, supra note 62, at 101.

"Typically, the clients of such programs are poor . . . . It is unlikely that all or even most of these clinic clients could go to private physicians or effectively use nonmedical contraceptives in the absence of organized family resources." Okada & Gillespie, supra note 62, at 176.

Out of an estimated 2.2 million never-married 15- to 19-year-olds in need of family planning services, only about 200,000 higher income teenagers were estimated to be using private physicians to obtain the needed care, while some 2 million would be in need of organized family planning programs. Morris, Estimating the Need for Family Planning Services Among Unwed Teenagers, FAM. PLAN. PERSPECTIVES 91, 96 (1974).

"While the proportion [of sexually active teenagers] obtaining contraceptive care from private physicians may have increased during this period, (post 1969) the most dynamic aspects of the situation have clearly been the increasing number of legal abortions and the rapid growth of adolescent utilization of clinic based contraceptive services." Jaffee & Dryfoos, supra note 26, at 172.
million, clinic patients had low or marginal incomes in 1976. The special value of these programs to minors is apparent from the increase in the use of these programs by teenagers. The extent to which the benefits of publicly sponsored family planning programs are conferred on indigent minors will depend on the degree to which unrestricted access to contraceptive services is protected by courts and legislatures.

The following sections will examine the present strength of the minor's constitutional right to contraceptives and the competing constitutional right of parents to control the upbringing of their children. An analysis of these rights will demonstrate how the constitutional right of minors to obtain contraceptives can be promoted without unduly infringing on parental rights.

IV. THE MINOR'S CONSTITUTIONAL RIGHT TO OBTAIN CONTRACEPTIVES

The constitutional protection granted minors for access to contraceptives springs from the right of privacy. This right, first articulated half a century ago in Justice Brandeis' dissent in *Olmstead v. United States*, has undergone a slow but constant expansion over the years. This right of privacy seeks to protect individuals from unreasonable state interference with their personal activities. Its origin lies in the penumbras of the first, fourth, fifth, ninth and fourteenth amendments to the Constitution. The protection,

64. Torres, supra note 61, at 84. The need for contraceptives is further demonstrated by the general trend of sharply increasing illegitimacy among the poor. In 1977, the New York City Department of Health reported that between 1956 and 1976 the rate of illegitimacy rose 1.7% among whites, 11.2% among Puerto Ricans, and an alarming 24% among non-whites. 1979 RPTR. H.L.B. V-A-3 (Legal-Medical Studies, Inc.).

65. Teenagers comprised some 40% of the new clientele of family planning programs in 1975 and accounted for 28% of all patients served in 1976. Torres, supra note 61, at 85. Of these new patients, 2/3 had used no previous methods of birth control or less effective methods. Id. at 85.

66. 277 U.S. 438 (1928) (Holmes, J., dissenting). Justice Brandeis characterized privacy as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Id. at 478.


under a privacy theory of individual decisions involving procrea-
tion, emerged in *Griswold v. Connecticut.*69 There, the Court held
that the right to obtain contraceptives is included in the fundamen-
tal right of marital privacy. The Court reasoned that the marital
relationship should be protected because it lies "within the zone of
privacy created by several fundamental constitutional guaran-
tees."70 In *Eisenstadt v. Baird,*71 the Court extended the right to
obtain contraceptives to single persons as well as married persons.
The *Eisenstadt* Court determined that if the privacy right is to
have significance it must mean "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."72 Later, in *Roe v. Wade,*73 the Court
ruled that the woman's right to obtain an abortion is protected by
the right to privacy, and established guidelines granting women the
right to an abortion within the first twelve weeks of pregnancy.74
The Court found that during this period a woman's fundamental
right to privacy insulated her decision to terminate her pregnancy
from state interference.

These decisions establish that the constitutional right to pri-
vacy encompasses access to both contraceptives and abortion. They
do not, however, clearly define the class of persons protected by
this constitutional right. Although these decisions explicitly recog-
nize that adults should receive full constitutional protection, the
Court has indicated subsequently that minors, thought of as lacking
the necessary maturity to exercise these rights wisely, are not neces-
sarily entitled to the same protection.75 The Court is still defining
the extent of a minor's privacy rights to obtain contraceptives and
abortions and determining whether restrictions on these rights, in
the form of parental involvement, are constitutionally permissible.

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69. 381 U.S. 479 (1965). The Court invalidated a statute prohibiting the use of
contraceptives.
70. Id. at 485.
71. 405 U.S. 438 (1972). The Court struck down a Massachusetts statute on
equal protection grounds, claiming that single as well as married persons must have
the same right of privacy.
72. Id. at 453.
73. 410 U.S. 113 (1973).
74. Id. at 163. See *Doe v. Bolton,* 410 U.S. 179 (1973), which struck down
statutory provisions conditioning the right to obtain an abortion in contravention of
the guidelines established in *Roe.*
The Supreme Court examined the constitutionality of parental consent provisions in the abortion context when it decided *Planned Parenthood v. Danforth.* There, the Court invalidated a statute which granted parents veto power over their daughter’s decision to obtain an abortion. The Court determined that the privacy right of the competent minor must take precedence over the state’s interest in safeguarding both parental authority and the family unit. It indicated, however, that the child’s privacy right, unlike that of adults, was not fundamental in nature. Therefore, the consent provisions did not have to pass a compelling state interest test to be held constitutional. Instead, the Court determined that the state has broad authority to regulate the activities of children and employed the less stringent significant state interest test. Even employing this lesser standard, the Court found that the state interest in safeguarding the family unit and preserving parental authority was not significant enough to justify infringing on the child’s right of privacy. Nevertheless, the use of this test by the Court implied that the minor’s right to privacy could be restricted by provisions which grant parents less than absolute veto power.

After Danforth, the Court in *Bellotti v. Baird,* determined that parental notification requirements might be imposed on the minor’s right to obtain an abortion. The Bellotti Court considered a Massachusetts statute which provided that parental consent was necessary before a minor could obtain an abortion, or, if consent was refused by the parents, authorization could be given by the order of a superior court judge for good cause shown. The Supreme Court refused to invalidate this statute despite the apparent

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76. 428 U.S. 52 (1976).
77. "[T]he state does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy." *Id.* at 74.
78. *Id.* at 75.
79. The Court did, however, recognize that minors are protected by the Constitution. 428 U.S. at 74. *But see* State v. Koome, 84 Wash. 2d 901, 530 P.2d 260 (1975).
80. *Id.* at 75.
82. The use of any provisions which make parental involvement mandatory would still intolerably impair the rights of minors where such restrictions are sufficient to deter minors from seeking contraceptive services. *See* note 3 *supra.* *See also* *Planned Parenthood,* 428 U.S. at 79–81; *Poe v. Gerstein,* 517 F.2d 787, 793 n.11 (5th Cir. 1975); *Baird v. Bellotti,* 393 F. Supp. 847 (D. Mass. 1975); 6 FAM. PLAN. POPULATION REP. 69, 75 (Oct. 1977).
limitations that it imposed on the minor's right to obtain an abortion. Indicating that it might uphold the constitutionality of the statute provided that it did not "impose undue burdens on a minor capable of giving an informed consent," the Court remanded the case for a determination of the legislative intent and the actual extent of the burdens placed on the pregnant minor. The district court subsequently determined that mandatory notification impermissibly burdens the minor's constitutional right to privacy and invalidated the statute. The United States Supreme Court has granted certiorari and once again will review the case.

The constitutionality of parental consent restrictions on a minor's right to obtain over-the-counter contraceptives was considered in *Carey v. Population Services International*. Justice Brennan, writing for a plurality of the Court, determined that any such restriction on the minor's right to obtain non-prescription contraceptives unconstitutionally burdens the minor's privacy right. Applying the rationale of *Planned Parenthood v. Danforth*, 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. The State's interest in protection of the mental and physical health of the pregnant minor, and in protection of potential life are clearly more implicated by the abortion decision than by the decision to use a nonhazardous contraceptive.

This language suggests that a plurality of the Court considered the state's interest in regulating a minor's right to non-prescription contraceptives to be less than the interest in regulating abortion. Despite this distinction, the *Carey* Court used the same significant

84. 428 U.S. at 147.
85. *Id.* at 152.
87. *Bellotti v. Baird*, 47 U.S.L.W. 3292 (Oct. 31, 1978). The Supreme Court granted review to determine, among other things, if "*M ASS. GEN. LAWS ch. 112, § 125, as inserted by St. 1974, ch. 706, § 1 and renumbered by St. 1977, ch. 397, violate[s] constitutional rights of minors . . . under the Fourteenth Amendment by prohibiting physicians from performing abortions on minors without first obtaining parental consent or judicial authorization." *Id.*
88. 431 U.S. 678 (1977). Here, the Supreme Court invalidated a New York statute which prohibited the sale of contraceptives to persons under the age of 16.
89. *Id.* at 691-96.
90. *Id.* at 694
state interest test employed in *Danforth* to determine the unconstitutionality of blanket parental consent requirements. As in the abortion decision, the Court stopped short of recognizing a minor's privacy right to access to contraceptives free of all parental involvement.

The failure to include prescription contraceptives within the plurality's rejection of blanket consent provisions limits the impact of the decision. The Court thereby left open the question of whether minors possess a constitutional privacy right to obtain the most effective means of birth control. In addition, the split among the justices as to the validity of restricting a minor's right to contraceptives considerably weakens the force of the *Carey* decision. Only three justices joined with Justice Brennan in his rejection of parental consent requirements. None of the Justices indicated that notification provisions are unconstitutional. Rather, they explicitly recognized that some type of mandatory parental notice or consent provision, which would enable parents to be in-

91. *Id.*
92. *See* note 14 *supra*, which indicates that medical contraceptives are much more effective in preventing pregnancy than non-medical contraceptives. In order to reach a meaningful evaluation of the potential danger of contraceptive use among teenagers, the alternative risk of uncontrolled fertility must be balanced against that danger. It has been determined that for women under 40, "all common methods of contraception, including the pill, encompass fewer risks than do pregnancy and childbirth." *Health: The Family Planning Factor*, POPULATION REP., Series J, No. 14, at J-253, J-257 (1977).
93. Justice Brennan was joined by Justices Stewart, Marshall, and Blackmun in the plurality opinion.
94. Justices White, Stevens, and Powell concurred in the decision of the Court to strike down the New York statute preventing minors access to contraceptives, but did so for different reasons. Justice White agreed that the statute should be invalidated "primarily because the State has not demonstrated that the prohibition against the distribution of contraceptives to minors measurably contributes to the deterrent purposes which the State advances as justification for the restriction." *Id.* at 702. Justice Powell found the statute defective because it violated the rights of other groups; violating both the privacy rights of married females aged 14-16, and parents who may wish their children to have contraceptives. *Id.* at 707-08. Justice Stevens concurred in the result, but not in the use of the significant state interest standard. He did not believe that the holding of *Planned Parenthood* was dispositive as to this case, which involved contraception rather than abortion, because minors not yet pregnant have the choice of abstention. He considered the minor's right to contraception deserved of less than constitutional protection. *Id.* at 713. Stevens felt that the state does have a significant interest in discouraging sexual activity of minors under 16, but found that the statute in question did not reasonably further that purpose by providing an unwanted pregnancy as a punishment. "It is as though a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets." *Id.* at 715.
cluded in the decision-making process, is constitutionally compatible with the minor's right to obtain contraceptives. Therefore, it appears that a majority of the Supreme Court would uphold the validity of any restriction unless it "entirely frustrates or heavily burdens the exercise of constitutional rights in this area." Carey leaves the validity of parental notification and consent restrictions on a minor's right to prescription contraceptives subject to state and lower court interpretation.

Despite the Supreme Court's failure to make the right of minors to obtain prescription contraceptives co-extensive with that of adults, the groundwork for establishing such a right has been recognized by the Court itself, lower courts, and commentators. The recognition of minors' rights is a relatively recent development in the law. Rooted in notions of individual liberty, the growth of these rights has been encouraged by the civil rights movements of the sixties and seventies seeking to end discrimination based on race and sex. Acknowledging the need to treat

95. Justice White agreed with Justice Stevens who described "as 'frivolous' appellees' argument that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State." Id. at 113. Justice Powell expressed his views clearly on the matter as he stated "that the State would further a constitutionally permissible end if it encouraged adolescents to seek the advice and guidance of their parents before deciding whether to engage in sexual intercourse." Id. at 709 (citing Planned Parenthood, 428 U.S. at 91 (Stewart, J., concurring)).

Both Justice Rehnquist and Chief Justice Burger dissented in toto. Justice Rehnquist pointed out that the New York legislature has the police power necessary to enact such legislation. Id. at 718. He indicated further that he would give support to parental consent provisions which sought to discourage the sexual activity of minors aged 14 through 16. Id. at 718-19.

96. Id. at 705 (Powell, J., concurring). Powell suggested that this is the only time when a compelling state interest standard may be used.

97. There are problems inherent in extending constitutional rights to minors. The difficulty lies with the fact that minors may have a limited mental capacity or maturity which could seriously hamper their ability to properly exercise an unrestricted right. Hafen, Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights," 76 B.Y.U.L. Rev. 605, 611-13 (1976). "Precisely because of their lack of capacity, minors should enjoy legally protected rights to special treatment (including some protection against their own immaturity) that will optimize their opportunities for the development of mature capabilities that are in their best interest." Id. at 650. Minimum age requirements have been established because of the recognition that "the development of the capacity for responsible choice selection is an educational process in which growth can be smothered and stunted if unlimited freedom and unlimited responsibility are thrust too soon upon the young." Id.

98. "The liberation movements of the past hundred or more years have succeeded in establishing the principle, earlier proclaimed in our Declaration of Inde-
minors as individuals has spawned the concept of children as "persons" within the meaning of the Constitution and has established the basis for minor's rights.

The Court's recognition of minor's rights emerged in In re Gault, where it determined that "neither the fourteenth amendment nor the Bill of Rights is for adults alone." This decision, however, went no further than to provide minors with certain procedural due process safeguards in juvenile court proceedings. The Court has also granted minors limited constitutional rights in the educational setting, holding that students have a first amendment right to express their beliefs and procedural due process rights when faced with disciplinary action. Although these decisions afford minors constitutional rights equal to those of adults in only limited circumstances, they suggest that the constitutional rights of minors can be expanded into other areas where their interests demand.

Advocates of a minor's right to contraception stress the physical and emotional well-being of the child as a basis for such a right.

100. 387 U.S. 1 (1967).
101. Id. at 13.
102. The Court has subsequently refused to extend these protections to include the right to a jury trial in juvenile proceedings. The Court determined that the establishment of such a right would impair the desired favorable treatment that a minor accused of criminal activity should receive. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).
103. In Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), the Court held that the first amendment rights of minors were violated when they were suspended from school for wearing black armbands in protest of the Vietnam War. The Court used sweeping language in support of the constitutional rights of minors stating that students "are possessed of fundamental rights which the State must respect," but limited its holding to the facts of the case. Id. at 511.
104. Goss v. Lopez, 419 U.S. 565 (1975), provides students with due process protections whenever they are confronted with disciplinary suspensions from school.
106. Commentators have called for the abolition of parental involvement restrictions when they interfere with the minor's right to contraception. "A single minor should have the legally protected right in every state to access to contraceptives without her parents' consent." A Minor's Right, supra note 4, at 270. It has further been suggested that the importance of the minor's right of access to contraceptives should prevent the state from reinforcing parental choices. "Therefore, requirements that minors obtain parental consent before obtaining contraceptives..."
Support for this right rests on the premise that "children are people; they are entitled to assert individual interests in their own right, to have a fair consideration given to their claims, and to have their best interests judged in terms of pragmatic consequences."107

Lower courts have recognized the arguments of scholars advocating a highly protected constitutional right to contraception for minors. For example, the Utah district court in T——H—— v. Jones108 determined that minors as well as adults have a fundamental right to contraceptives.109 The court found that the minor’s right to privacy was equal to that of adults when dealing with rights that affect the decision to bear children. In doing so the court struck down the mandatory parental consent provisions because there was no showing of a compelling state interest being served by consent requirements. The court indicated, however, that mandatory parental notification might still be constitutionally compatible with the minor’s fundamental right to obtain contraceptives. Therefore, in order for minors to be granted unrestricted access to contraceptives, the social realities compelling such access must be emphasized to establish priority over the competing constitutional claims of parents.

V. LIMITING PARENTAL INVOLVEMENT

Parents have a long-standing right to control the rearing of their children. The common law has "long recognized parental rights as a key concept, not only for the specific purposes of do-

107. Foster & Freed, supra note 98, at 346. This premise has led to the creation of a bill of rights for children which includes a provision calling for children to have a legal right "(t)o seek and obtain medical care..." Id. at 347.


109. The district court held that minors have a fundamental right to contraceptives based on the constitutional right to privacy. The court found that "[t]he financial, psychological and social problems arising from teenage pregnancy and motherhood argue for our recognition of the right of minors to privacy as being equal to that of adults." Id. at 881. The court also determined that the statute could be invalidated on equal protection grounds because it burdens only indigent minors in that there is no similar law prohibiting private physicians from prescribing contraceptives to their wealthier patients. Id. at 881-82.
mestic relations law, but as a fundamental cultural assumption about the family as a basic social, economical, and political unit.\footnote{110} This recognition of the importance of parental rights suggests that parental power must prevail over the competing claims of outsiders, and those of the children themselves absent compelling reasons for limiting that power.\footnote{111}

Using early common law concepts of parental control, the Supreme Court has expanded the constitutional rights of parents to rear their children while, at the same time, placing constitutional limits on state interference in this area.\footnote{112} The Court first established the strong policy for promoting parental rights in \textit{Meyer v. Nebraska}.\footnote{113} In \textit{Meyer}, the Court concluded that an individual's liberty interest under the due process clause of the fourteenth amendment included the right to establish a home and bring up children.\footnote{114} Subsequently, in \textit{Pierce v. Society of Sisters},\footnote{115} the Supreme Court struck down an Oregon compulsory education statute which prevented children from attending private schools because it interfered with parents' right to direct the upbringing of their children.\footnote{116} In many decisions, using a similar approach, the Court has established a constitutional basis for the recognition of parental rights.\footnote{117} These decisions establish that parents have a constitutional right to privacy which gives them control over the rearing of their children. Moreover, due to the fundamental nature


\footnote{112} Hafen, \textit{supra} note 97, at 619.

\footnote{113} 262 U.S. 390 (1923). The Court held that the right of parents to have their children taught a foreign language was sufficient to invalidate a state statute which prohibited such instruction.

\footnote{114} \textit{Id.} at 399.

\footnote{115} 268 U.S. 510 (1925).

\footnote{116} \textit{Id.} at 534-35.

\footnote{117} The Court has made it clear that there is a private realm of family life which the state cannot enter. Prince v. Massachusetts, 321 U.S. 158, 166 (1944). This realm specifically includes the care, custody, management, and companionship of one's children. May v. Anderson, 345 U.S. 528, 533 (1953). The Court has 'recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.' Ginsberg v. New York, 390 U.S. 629, 639 (1968). See Wisconsin v. Yoder, 406 U.S. 205 (1972).
of this right, it can only be subject to state interference where a compelling state interest exists.

The traditional protection afforded parental rights has provided parents with a strong argument against allowing state-funded family planning programs to distribute, without parental knowledge or consent, contraceptives to their children. The permissible extent of this parental involvement has been determined by lower courts without the benefit of strong Supreme Court guidance in this area.

A recent Michigan federal district court case, Doe v. Irwin, illustrates the type of decision that can arise when the Supreme Court fails to delineate the minor's right to contraceptives vis-a-vis the parents' right to rear their child. In this case, a group of parents of minor, unemancipated children brought an action for declaratory and injunctive relief against a state-funded family planning clinic which dispensed contraceptives to the minors without requiring parental knowledge or consent. The parents alleged that the defendant clinic, operating under color of state law, was unconstitutionally depriving them of their fundamental right to rear their children. The court agreed with the parent's contention finding

118. Several jurisdictions have confronted the question of the validity of parental consent provisions with varying responses. In 1973, a 16-year-old, unmarried girl brought a class action suit against Planned Parenthood to compel the availability of contraceptives to minors without their parents' knowledge or consent. Doe v. Planned Parenthood Ass'n of Utah, 29 Utah 2d 356, 510 P.2d 75, appeal dismissed for want of jurisdiction and cert. denied, 414 U.S. 805 (1973). The Utah Supreme Court reversed the trial court's injunction claiming that granting minors access to contraceptives without requiring parental involvement deprives the parents of the right to rear their children. Doe, Id. at 358, 510 P.2d at 76.

In Minnesota, the district court dismissed a suit brought against Planned Parenthood of Minnesota by parents who sought an injunction to prevent the distribution of contraceptives to minors without requiring parental consent. Maley v. Planned Parenthood, Minn. Dist. Ct., 3d Dist. No. 37769 (1975). The court also held, however, that those parents who specifically notified Planned Parenthood of Minnesota that they did not wish their children to receive such services were entitled to receive notice. Maley, Id. See also M.S. Wermers, 409 F. Supp. 312 (D.S.D. 1976), vacated and remanded, 557 F.2d 170 (8th Cir. 1977). This decision held that a guardian must be appointed to protect the interests of a 15-year-old girl seeking contraceptives. The district court judge indicated that such a step was necessary to ensure that informed consent was established.

These decisions indicate a general unwillingness of the courts to eliminate parental involvement in the minors' decision to use contraceptives. Where these decisions impair family planning programs in their attempts to furnish contraceptives to minors, the rights of indigent minors are seriously infringed upon. See note 126-30 supra and accompanying text.

that "even if there is a fundamental civil right among minors to obtain prescriptive contraceptives, that right need not exist to the total exclusion of the child's parents."\(^{120}\) In holding that the family planning center could not distribute contraceptives without parental knowledge or consent, the court observed that the plurality of the \textit{Carey} court required only that the significant state interest test be satisfied in order to justify restrictions on the privacy rights of minors.\(^{121}\) The court found that the potential harm to incompetent minors who are incapable of making decisions as to contraceptive use, the importance of preserving parental control over the rearing of their children, and the maintenance of family autonomy were sufficient state interests.\(^{122}\) The Court in \textit{Irwin} viewed parental rights as extremely important and suggested that where state-sponsored family planning programs dispense contraceptives to minors, parental involvement is not only permitted under the constitution but is compelled by it.\(^{123}\)

\(^{120}\) Id. at 1254.

\(^{121}\) Id. at 1258. For adults, a regulation burdening the right to bear or beget a child must be subject to the compelling state interest test, which requires narrowly drawn statutes with strong justifications. \textit{Id.}

\(^{122}\) The Court based its decision on three factors.

First, the fact that parental privacy and religious beliefs are implicated. Second, the decisions undertaken here by minors who may lack the capacity to make decisions in this area (and who have had only brief consultation with state officials) are within the sphere of decisions which parents are uniquely positioned to evaluate from the standpoint of the maturity and capacity of their offspring and to provide the necessary guidance. Finally, and most importantly, these actions are carried out in an atmosphere of secrecy which fails to put parents on notice as to the state's actions relative to their children and has the practical result of depriving parents of alternatives to counteract such actions, if they so desire. \textit{Id.} at 1253.

\(^{123}\) The court's rational in this case rests on assumptions of questionable validity. The court insisted that the actions of the state-funded clinic deprives parents of their right to rear their children because it forces them "to anticipate in advance the multitude of situations which may act upon their children and prepare them in advance to deal with any moral question that may arise in the course of that child's young life. . . ." \textit{Id.} at 1253. The court felt that this was especially true where the state-run clinic "facilitate(s) a situation inimical to the values the parents are attempting to teach their children." \textit{Id.} It is clear that the court views the clinic's actions as directly undermining the rights of the parents.

The validity of this view is in doubt because of the nature of the state action involved here. By providing minors with contraceptives absent parental knowledge or consent, the court is merely facilitating a right of the child, in the interests of the child. As a practical matter, the action of the clinic is neutral with respect to the rights of the parents to rear their children. The clinic's policy does not prevent parents from instilling their moral beliefs in their children. Once the minor decides to
The *Irwin* decision illustrates the problems generated by recognizing strong parental rights. By emphasizing the importance of competing parental claims, the significance of the minor’s right is proportionately reduced. If distributing contraceptives to minors by state-sponsored family planning programs unconstitutionally infringes on parental rights, the source of contraceptives for all minors who depend on such programs will be jeopardized. In order to prevent a serious reduction in the number of minors who seek contraception and a concomitant rise in the number of unwanted pregnancies, courts must be willing to re-examine the priority they have accorded parental privacy rights.

Parents’ rights do not always merit priority over the rights of their children and may be limited in appropriate circumstances. Where parents are acting in their children’s interests there is no reason for limiting their right to control the decisions of their children. But, where the particular minor’s interest is in conflict with parental rights, the state may intervene to protect the welfare of the minor child. The Supreme Court has also recognized that parental rights can be limited in certain situations despite its granting parents fundamental rights to control many of the activities of their children. A basis for subordinating the rights of parents to those of their children, in the interests of promoting the latter’s welfare, was suggested by the Supreme Court in *Wisconsin v. Yoder*. The *Yoder* Court permitted the first amendment rights of parents to outweigh the competing interests of the state and, arguably, that of their children to continue a compulsory education. The Court, however, also recognized that parental rights might be outweighed where there is a danger that an unrestricted exercise of

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124. The state has assumed the prerogative, through its police power and parens patriae power, to take custody of children from their parents when the child has been abused, abandoned, or neglected. *See* Prince *v.* Massachusetts, 321 U.S. 158, 166 (1944); S. Katz, *When Parents Fail* (1971). The state may generally act to take the necessary steps to promote the best interests of the child.

those rights "will jeopardize the health or safety of the child, or have a potential for significant social burdens."126

The minor's need for unrestricted access to contraception satisfies both the conditions set forth in Yoder. As alluded to earlier, contraception is vital to the protection of the minor's health and welfare.127 Additionally, when contraceptives are readily available, the number of unwanted children born to those least able to afford them decreases dramatically, relieving a major burden on strained social resources.128 Under this analysis, the minor's right to contraception can be viewed as more important than parental rights. This view demands that the state be constitutionally permitted to provide contraceptive programs and services that enable minors to freely exercise their right to decide whether to bear children.129

From the parents' point of view, two basic arguments support mandatory parental involvement requirements and cut against the minor's unrestricted access to prescription contraceptives. First, parents may fear that their children will be exposed to the medical dangers inherent in the use of prescription contraceptives. In addition, they may be concerned with the moral implications involved in the unrestricted availability of contraceptives.

Legal reform allowing minors access to prescription contraceptives should include protections to limit the medical risks involved. State and federally funded family planning programs should maintain minimum procedures which provide the minor client with a maximum of freedom of choice while safeguarding her health and

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126. Id. at 233-34; Prince v. Massachusetts, 321 U.S. 138, 166-67 (1944). This has also been reflected in state decisions. "[W]here a child's well-being is placed in issue, 'it is not the rights of parents that are chiefly to be considered. The first and paramount duty is to consult the welfare of the child.' " Custody of a Minor, 1978 Mass. Adv. Sh. 2002, 2025-26 (citing Purinton v. Jamrock, 195 Mass. 187, 199 (1907)). This case held that the courts do have the power to override the rights of parents to rear their children in ordering certain medical treatment which could possibly save the child's life. Although the minor's very existence is not necessarily threatened by the failure to provide contraceptives, the ramifications are potentially damaging to the minor's welfare.

127. See notes 18-29 supra and accompanying text.

128. See note 52 supra and accompanying text.

129. In certain situations, mandatory parental involvement may only aggravate existing conflicts and, in the long run, contribute to the detriment of the minor. "Pregnancy [and] contraceptive information . . . are among the sensitive problems where a rule requiring parental consent for treatment may be counter-productive." Foster & Freed, supra note 98, at 359. "[T]he welfare of minors and of the community concur and take precedence over parental authority, for to hold otherwise is to vindicate an ineffe ctual power at the expense of a social reality." Id. at 360. See A Minor's Right, supra note 4; Parental Consent Requirements, supra note 4.
safety. For instance, procedures should be established by which program staff members can determine whether the minor has sufficient capacity to understand the inherent risks and benefits of particular contraceptive devices. This will ensure that the minor is in fact giving an informed consent to contraceptive services. Family planning programs should also require that attending physicians obtain and review the medical records of their minor client. In this way, sound recommendations can be made, increasing the chances that the minor will receive proper treatment and reducing the risks of serious physical harm. Additionally, follow-up care for minor clients should be made mandatory for all family planning programs to help protect minors from unforeseen and harmful consequences resulting from the use of unfamiliar contraceptives. These suggested procedures, not meant to be all inclusive, represent a practical means for reducing the risks of furnishing minors prescription contraceptives.

The contention, advanced by those who support parental involvement, that state action in supplying contraceptives morally condones and encourages sexual activity among minors is unfounded. In fact, reliable studies indicate that minors will continue to engage in sexual intercourse despite the unavailability of contraceptives. It is unlikely that parents who understand the alternatives would rather that their children experience unwanted pregnancies than obtain contraception without their knowledge or consent. In any event, it is probably safe to conclude that the

130. These procedures are based in part on suggestions made by the American Medical Association as set forth in A Minor's Right, supra note 4, at 290-91.
132. See 45 C.F.R. § 220.21 (1976), which provides that publicly funded family planning services include diagnosis, treatment, supplies (choice of method), and follow-up care.
134. Such an attitude is implied from popular opinion. In a survey taken of four cities, 74-88% of the respondents agreed that sexually active teenagers should have access to contraceptives on request. Pomeroy & Landman, Public Opinion Trends: Elective Abortion and Birth Control Services to Teenagers, 4 Fam. Plan. Perspectives 44, 51 (1972). Another study, representing the views of middle class Americans, revealed that an overwhelming majority believe that birth control services should be made available to unwed teenagers. Middle-Class Americans Frown on
Supreme Court would not support statutes, decisions, or regulations which prescribe an unwanted pregnancy as "punishment" for sexual activity thought by parents to be immoral.\(^{135}\)

VI. CONCLUSION

The minor's right to obtain prescription contraception remains subject to constitutionally permissible parental involvement requirements. Although some jurisdictions limit the extent of these restrictions, a real danger exists that such requirements, perpetuated by successful constitutional challenges to the actions of state-sponsored programs, will continue to discourage minors from seeking prescription contraceptives.

To insure that family planning programs continue to provide needed services to sexually active indigent minors, the courts and legislatures must recognize the extreme importance of access to contraceptives. Therefore, the minor's constitutional right to obtain contraception, recognized in *Carey*, must be expanded to include the right to obtain prescription contraceptives unrestricted by parental involvement. To accomplish this objective it may be necessary to treat this right as fundamental.\(^{136}\) Alternatively, mandatory parental involvement may be eliminated without the courts expressing the minor's right to obtain contraceptives in fundamental terms. For instance, when faced with statutory provisions requiring parental involvement, the courts should adopt a *Danforth* type analysis and determine that the state's interest in safeguarding the family unit and preserving parental authority are not "significant" enough to justify infringing on the child's right to privacy. Similarly, when faced with direct challenges to the practice of publicly funded clinics in dispensing prescription contraceptives without parental involvement, as in *Irwin*, courts should consider the excep-

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\(^{135}\) The *Carey* Court, in reaching its holding, dispelled the argument that the availability of contraceptives necessarily promotes premarital sexual activity among minors. Using language from *Eisenstadt*, the Court reasoned that "[i]t would be plainly unreasonable to assume that (the state) has prescribed pregnancy and the birth of an unwanted child (or the physical and psychological dangers of abortion) as punishment for fornication." 431 U.S. at 695 (quoting *Eisenstadt*, 405 U.S. at 448).

\(^{136}\) The minor's right to contraception, as a fundamental right, should demand that the compelling state interest test be used rather than the less stringent significant state interest test. Balanced against the parents fundamental right to rear their children, the minor's right to contraceptives could prevail against inhibitory restrictions.
tions to parental authority recognized in *Yoder* to embrace unrestricted access to contraceptives for minors.

Both the courts and legislatures should recognize that granting minors unrestricted access to contraceptives is not an endorsement or sanctioning of teenage sexual activity. It is, rather, a necessary step of dealing with a serious social problem. The purpose is to provide sexually active teenagers with a meaningful choice of whether or not to bear children. In order to make this choice, low income minors need the aid of family planning programs which alone can provide them with free or inexpensive contraceptive services. Without responsive family planning programs, this segment of the population is left with the alternatives of abstention from sex, illegal abortion, or an unintended family. With such programs, free from the requirements of parental involvement there is hope that the incidence of untimely and unwanted pregnancies can be significantly reduced.

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