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## Sexual Privacy: Access of a Minor to Contraceptives, Abortion, and Sterilization Without Parental Consent

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## SEXUAL PRIVACY: ACCESS OF A MINOR TO CONTRACEPTIVES, ABORTION, AND STERILIZATION WITHOUT PARENTAL CONSENT

Until recently, a minor's access to ordinary medical treatment and to such services as contraception, abortion, and sterilization has been severely limited by the legal prerequisite of parental consent. While purporting to act in the minor's best interest, the law has hindered making such medical care available to minors who need and desire it. However, the law has been changing; relying on privacy rights as protected by the Constitution, courts and legislatures have granted independent access—in a selective and piecemeal fashion—to medical services concerning reproductive capacity and sexual activity.

This article includes an examination of the problems facing a minor who desires contraceptives, an abortion, or sterilization. The analysis includes: first, the historical requirement of prior parental consent and its effect on the availability of medical treatment to minors; second, the recent recognition of the federal constitutional right to privacy and its ramifications for those seeking medical services relating to childbearing; and third, the present state of the law concerning a minor's access to contraceptive devices, abortion, and sterilization without parental consent. The focus is upon the extension of privacy rights of minors and the accompanying dilution of parental authority and subordination of the interests of the state.

### I. THE AVAILABILITY OF MEDICAL TREATMENT TO MINORS.

The law of torts protects minors as well as adults from unauthorized invasions of their bodies. The administration of medical treatment without the patient's consent constitutes a "technical battery"<sup>1</sup> and exposes the attending physician to civil liability.<sup>2</sup> To be effective, the consent must be an informed one,<sup>3</sup> and "it must be given by a person with the requisite legal capacity."<sup>4</sup> As a rule, persons below the age of legal majority<sup>5</sup> are deemed

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1. *Younts v. St. Francis Hosp. & School of Nursing, Inc.*, 205 Kan. 292, 469 P.2d 330, 336 (1970).

2. Even such indirect contact as a prescription of medication later used by the patient constitutes a battery if no legal consent is given. See Bennett, *Allocation of Child Medical Care Decision-Making Authority: A Suggested Interest Analysis*, 62 VA. L. REV. 285, 286 (1976) [hereinafter cited as Bennett].

3. Informed consent must be based on adequate information about the therapy, the available alternatives, and the collateral risks. Waltz and Scheuneman, *Informed Consent to Therapy*, 64 Nw. U.L. REV. 628, 629 (1969).

4. Wadlington, *Minors & Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115 (1973) [hereinafter cited as Wadlington].

5. The legal age of majority was fixed by common law at twenty-one.

to be incapable of giving informed consent; therefore, the law demands consent by the parents prior to medical treatment of a minor.<sup>6</sup>

Both common and statutory law have devised exceptions to this doctrine of parental consent.<sup>7</sup> Under the common law, when a physician in his professional judgment deems that immediate steps are necessary to save the life of a child, he may administer treatment without liability for battery, notwithstanding his patient's inability to give consent or the lack of parental consent.<sup>8</sup> Although this emergency exception is construed narrowly,<sup>9</sup> the "willingness of courts to find an emergency appears to increase as the age of the conscious and consenting child increases."<sup>10</sup>

Another exception is the "mature minor" rule.<sup>11</sup> Subjective factors such as intelligence, maturity, and ability to comprehend the medical procedures and alternatives involved are considered by the courts in determining whether or not the minor is capable of appreciating the importance of the decision to consent to treatment.<sup>12</sup>

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6. *Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941); *Zoski v. Gaines*, 271 Mich. 1, 260 N.W. 99, 102 (1935); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 102-03 (4th ed. 1971). Because the parent possesses the authority to consent to the treatment of a minor child, the mere touching of the child without this consent constitutes a technical battery. *Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941); *Zoski v. Gaines*, 271 Mich. 1, 260 N.W. 99, 102 (1935). This parental consent requirement has been justified on at least two theories: 1) the often-criticized, feudal notion that children are the property of their parents, *In re Clark*, 21 Ohio Op. 2d 86, 88, 185 N.E.2d 128, 131 (1962); and 2) the common law assumption that "a minor lacks sufficient intelligence, knowledge, and maturity to assess adequately the potential hazards of medical treatment and to reach a decision in his own best interest." Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305, 309 (1974) [hereinafter cited as *The Minor's Right to Abortion*]; see *Dixon v. United States*, 197 F. Supp. 798, 803 (W.D.S.C. 1961).

7. See generally *Dunn, The Availability of Abortion, Sterilization, and Other Medical Treatment for Minor Patients*, 44 U. MO. KANSAS CITY L. REV. 1, 2, 7 (1975) [hereinafter cited as *Dunn*]; *Wadlington, supra* note 4; *The Minor's Right to Abortion, supra* note 6.

8. *Luka v. Lowrie*, 171 Mich. 122, 136 N.W. 1106, 1110 (1912); *Dunn, supra* note 7, at 3; *Wadlington, supra* note 4, at 116.

9. In absence of statutes to the contrary, two conditions must exist simultaneously to enable a physician to successfully raise the defense of an emergency: (1) the patient must be unable to give consent, and (2) an immediate medical need must exist which necessitates treatment in order to maintain the life or health of the child. *Dunn, supra* note 7, at 3.

10. *Bennett, supra* note 2, at 289. A few states have codified this exception to the common law rule. See, e.g., KAN. STAT. § 65-2891(b) (1972); MASS. ANN. LAWS ch. 112 § 12F (Cum. Supp. 1975); N.C. GEN. STAT. §§ 90-21.1 to 90-21.4 (Repl. Vol. 1975).

11. *Younts v. St. Francis Hosp. & School of Nursing, Inc.*, 205 Kan. 292, 301, 469 P.2d 330, 337 (1970); *Bakker v. Welsh*, 144 Mich. 632, 108 N.W. 94, 96 (1906); *Lacey v. Laird*, 166 Ohio St. 12, 139 N.E.2d 25, 34 (1956) (Taft, J., concurring).

12. *The Minor's Right to Abortion, supra* note 6, at 310. Professor *Wadlington's* research into the "mature minor" rule reveals several common elements in the cases in which the rule was applied, *Wadlington, supra* note 4, at 119: (1) the treatment was undertaken for the

The emancipation of a minor<sup>13</sup> by parents<sup>14</sup> or by statute<sup>15</sup> is a third exception to the common law rule requiring parental consent. Indicia of emancipation include marriage, economic independence, separate residency, and service in the armed forces.<sup>16</sup> Emphasis is placed more on the acts of release by the parents and the child's actual independence rather than on the child's judgment or appearance of maturity.<sup>17</sup>

These judicially created exceptions have not significantly altered the availability of medical services to minors without parental consent; rather, they have provided physicians with possible defenses to tort actions.<sup>18</sup> These exceptions alone do not provide an adequate solution for the minor seeking medical services such as contraceptives, abortion or sterilization.

The legislative response to this problem has helped to mitigate the severe applications of the parental consent rule. Statutes permitting minors to give consent to specified treatment and health care have been enacted in virtually every state.<sup>19</sup>

benefit of the minor rather than a third party, *see* *Bonner v. Moran*, 126 F.2d 121, 123 (D.C. Cir. 1941); (2) the particular minor was near majority (or at least in the range of fifteen years upward), and was considered to have sufficient mental capacity to understand fully the nature and importance of the medical steps proposed, *see* *Younts v. St. Francis Hosp. & School of Nursing, Inc.*, 205 Kan. 292, 469 P.2d 330 (1970); and (3) the medical procedure could be characterized by the courts as something less than "major or serious in nature," *see* *Lacey v. Laird*, 166 Ohio St. 12, 139 N.E.2d 2531 (1956) (Taft, J., concurring).

13. This concept is derived from Roman law whereby a minor is extended essentially all the legal capacity of persons over the age of majority. Bennett, *supra* note 2, at 290.

14. *See* Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001, 1002-03 n.10 (1975) [hereinafter cited as *The Contraceptive Controversy*], which states that in some instances, where emancipation occurs with parental consent, it is not an exception to the requirement but merely another form of parental consent.

15. *See* Pilpel, *Minor's Rights to Medical Care*, 36 ALB. L. REV. 462, 472-87 (1971) [hereinafter cited as *Pipel*], for a state-by-state analysis of emancipation statutes as of September 1971, allowing minors to consent to medical treatment in limited circumstances. *See, e.g.*, VA. CODE ANN. § 32-137(9)(Cum. Supp. 1977) which provides:

Any person under eighteen years of age who is or has been married shall be deemed as an adult for the purpose of giving consent to surgical and medical treatment and the consent of his or her parent or guardian to surgical or medical treatment for such person shall not be required except that in the case of sexual sterilization the consent of his or her parent or guardian or an order of the juvenile court of the jurisdiction in which such person resides approving such operation.

16. *Pipel*, *supra* note 15, at 465.

17. Bennett, *supra* note 2, at 291; *see* *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E.2d 753, 757 (1965); *Smith v. Seibly*, 72 Wash. 2d 16, 21, 431 P.2d 719, 723 (1967).

18. *The Minor's Right to Abortion*, *supra* note 6, at 310.

19. *Id.* at 311, *citing* Pilpel & Wechsler, *Birth Control, Teenagers and the Law*, FAM. PLANNING PERSPECTUS 29 (1969). Some legislatures have codified common law exceptions

The issue becomes one of determining the amount of discretion to be placed with the minor patient and the medical profession.<sup>20</sup> The courts and legislatures must balance the end of providing adequate medical treatment against the important consideration of shifting discretionary power from the parent to the child and the doctor.<sup>21</sup> On balance, the benefits which would come from allowing greater access by minors to medical care have tipped the scales in favor of abolishing or limiting restrictions to medical care which are based on age where a minor's right to sexual privacy is involved.

## II. THE RIGHT TO SEXUAL PRIVACY.

The Supreme Court has proceeded cautiously in its recognition of those adult activities which are encompassed within the right of privacy since their decision in *Griswold v. Connecticut*.<sup>22</sup> The extension of the privacy

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such as the emergency exception with regard to minors, the "mature minor" rule, and limited emancipation of minors for the purpose of consenting to medical treatment. Wadlington, *supra* note 4, at 120-21. In addition, some state statutes permit minors to consent to treatment for specified health purposes such as venereal disease, drug addiction and rehabilitation, pregnancy, birth control, or family planning. See, e.g., VA. CODE ANN. § 32-137(6), (7) (Cum. Supp. 1977). Many legislatures have recognized that there may be no communication between parent and child on sensitive subjects and that reluctance to seek parental consent may prevent a minor from obtaining medical care related to drug use or sexual activity. Wadlington, *supra* note 4, at 122. Legislation enabling minors to obtain medical care without approval of their parents acknowledges not only that unhampered access may be in the minor's best interests but also that it serves the public interest by providing adequate health care for all persons, limiting the spread of disease, and preventing unwanted pregnancies. Ballard v. Anderson, 4 Cal. 3d 873, 880, 484 P.2d 1345, 1350, 95 Cal. Rptr. 1, 6 (1971); *The Minor's Right to Abortion*, *supra* note 6, at 312.

20. Wadlington, *supra* note 4, at 125. See Bennett, *supra* note 2, at 311 which states that "[a]n individual's interest in a medical care decision diminishes as the medical considerations dominate and provide a clear answer. On the other hand, as the decision becomes medically or personally controversial, the individual's interest in making it for himself increases."

21. Wadlington, *supra* note 4, at 124.

22. 381 U.S. 479 (1965). In *Griswold* the Supreme Court first granted constitutional recognition to the right of marital privacy by striking down a state statute which imposed an absolute ban on the use of contraceptives. The right to privacy within the marital relationship was found to emanate from the "penumbras" of the "specific guarantees in the Bill of Rights." *Id.* at 484-86. Although holding that a state could not prohibit the use of contraceptives by married persons, the Court left open the question of whether a statute regulating the manufacture and sale of contraceptives would be constitutional. *Id.* at 485.

The right to privacy does not merely extend to married persons. The Court in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), held that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike." The *Eisenstadt* Court declared that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental

rights of adults to minors has involved an even more painstaking analysis by the Court. The central issues confronting the Court have been: first, what constitutional rights should be enjoyed by any person regardless of age, and second, what differences and important interests are sufficient to justify the restriction of these rights upon the basis of age.

The courts have not evenly resolved the degree to which minors enjoy the rights of adults—including their privacy rights as decided by the Supreme Court. As one commentator noted, “[n]either the law nor society as a whole has ever regarded children as fully the equals of their elders; the conduct, legal rights, and social relationships of minors traditionally are subject to regulation both by state and by their parents or legal guardian.”<sup>23</sup> Thus the Court has refused “to conclude that minors must be accorded the full panoply of constitutional rights, coextensive in kind and degree with those accorded an adult.”<sup>24</sup> However, the Court has also stated that “neither the Fourteenth Amendment nor the Bill of Rights is for

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intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child” *Id.* (emphasis original). The Court viewed the statutory ban on distribution of contraceptives to anyone other than a married person as a prohibition against contraceptives *per se.* *Id.* at 443. By providing dissimilar treatment for married and single persons who were similarly situated, the statute also violated the equal protection clause. *Id.* at 454-55. *Contra, Doe v. Planned Parenthood*, 29 Utah 2d 356, 510 P.2d 75, *appeal dismissed for want of jurisdiction & cert. denied*, 414 U.S. 805 (1973). Again in *Eisenstadt*, the Court refused to decide whether statutes regulating the distribution of contraceptives to married or single persons would be constitutionally permissible. See the concurring opinion of Mr. Justice White and the dissenting opinion of Mr. Chief Justice Burger where they maintain that precautionary health measures might justify a restriction on the distribution of contraceptives. *Eisenstadt v. Baird*, 405 U.S. 438, 463, 466 (1972).

In *Roe v. Wade*, 410 U.S. 113 (1973), the fourteenth amendment’s concept of personal liberty was held to protect against state action the right to privacy which included an adult woman’s qualified right to abortion. *Id.* at 153-54. The Court thereby pinpointed the constitutional source of the privacy right which it had vaguely defined in *Griswold. The Minor’s Right to Abortion*, *supra* note 6, at 317 n. 82. This right was held to extend to the activities of marriage, procreation, contraception, family relationships, and child rearing and education. 410 U.S. at 152-53. The companion case of *Doe v. Bolton*, 410 U.S. 179 (1973), reiterated the Court’s holding in *Roe* by striking down portions of a statute which imposed procedural conditions upon the right to obtain an abortion within the state.

Recently the Court in *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976), held that a state could not condition abortion on the prior consent of the spouse. The Court also invalidated a statute requiring parental consent before a minor could obtain an abortion during the first twelve weeks of pregnancy. *Id.* at 75. Although realizing the invalidation of spousal consent requirements might result in a unilateral decision by the wife, the Court reasoned that, since it is the woman who is “more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.” *Id.* at 71.

23. *The Minor’s Right to Abortion*, *supra* note 6, at 314.

24. *Id.* at 315.

adults alone."<sup>25</sup> Consequently, the Court has expanded the rights of minors in the educational system<sup>26</sup> and in juvenile court proceedings.<sup>27</sup>

In contrast to the Supreme Court's reluctance, until recently,<sup>28</sup> to hold that a right of privacy is applicable to minors, lower courts<sup>29</sup> began to recognize the privacy rights of minors shortly after *Roe v. Wade*.<sup>30</sup> Still, a mere recognition of a right of minors to privacy is only the first step; even fundamental rights are not absolute and can be restricted by a compelling state interest. Substantial and persuasive parental and state interests militate against the minor's right of privacy.

Traditionally, parents' rights to care for and control their children "have been granted a status approaching, if not achieving, fundamentality."<sup>31</sup> The power to direct the child's education and religious training has been upheld against unreasonable interference by the state.<sup>32</sup> In addition, the reach of parental authority has been extended to the inculcation and development of moral standards.<sup>33</sup> In spite of its breadth, parental dominion and

25. *In re Gault*, 387 U.S. 1, 13 (1967).

26. *Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

27. *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966); *Gallegos v. Colorado*, 370 U.S. 49 (1962).

28. See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Carey v. Population Services Int'l*, 97 S. Ct. 2010 (1977).

29. See *Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973), where the court held that a questionnaire administered by school officials to identify junior high students who had a propensity for drug abuse was an unconstitutional invasion of a minor's right to privacy. "The fact that the students [were] juveniles does not in any way invalidate their right to assert their Constitutional right to privacy." *Id.* at 918. The right to privacy was found to be "on an equal or possibly more elevated pedestal than some other individual constitutional rights and should be treated with as much deference as free speech." *Id.* at 918. In *State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1975), the court held that the parental consent requirements of an abortion statute unduly infringed upon a minor's right to privacy and denied her equal protection of the law.

30. 410 U.S. 113 (1973).

31. 1976 B.Y.U.L. Rev. 296, 300.

32. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

33. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Doe v. Planned Parenthood Assoc.*, 29 Utah 2d 356, 510 P.2d 75, *appeal dismissed for want of jurisdiction & cert. denied*, 414 U.S. 805 (1973). *The Minor's Right to Abortion*, *supra* note 6, at 320. The author of that article points out that in cases where a child's constitutional rights were recognized, there was an apparent unity of interest between parent and child. Therefore, she rejects the premise that the *Meyer - Pierce - Yoder* line of cases can "be regarded as controlling when the constitutional rights of a child are in conflict with those of the parent." *Id.* at 321.

control over minors has limits; the state possesses the police power<sup>34</sup> and *parens patriae*<sup>35</sup> power to override parental rights and decisions and to act in the best interests of the child. Concomitantly, the state wields the power to limit a minor's constitutional rights if their exercise would contravene a defined public policy.<sup>36</sup>

To be successful, a minor's assertion of privacy rights must overcome both the interests of his parents and the interests of the state. Since the common law and statutory history entrusts these parties with the authority and responsibility for crucial decisions affecting a minor's welfare,<sup>37</sup> a minor faces formidable barriers to securing the privacy rights accorded to adults.

### III. THE MINOR'S ACCESS TO CONTRACEPTIVE DEVICES AND INFORMATION ABSENT PARENTAL CONSENT.

State regulation in furtherance of policies against promiscuous sexual relations among minors has not resulted in a consistent pattern of legislation. Although many states<sup>38</sup> appear to be neutral on the issue of whether minors are able to obtain access to contraceptives, these same states are not neutral as to who makes the choice.<sup>39</sup> Parental consent requirements make the state appearance of neutrality illusory.

34. Police and *parens patriae* powers are two justifications of state authority which were approved by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968) and *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). The state's police power has provided a basis for the compulsory vaccination and fluoridation cases. The state can compel some of its citizens to act in particular ways or to submit to treatment in order to protect the best interests of all citizens. *Dunn*, *supra* note 7, at 4.

35. The *parens patriae* power has served to protect the child's interest in receiving necessary medical care when parental consent was arbitrarily withheld. *In re Sampson*, 65 Misc. 2d 658, 317 N.Y.S.2d 641 (1970), *aff'd*, 37 App. Div. 2d 668, 323 N.Y.S.2d 253 (1971), *aff'd*, 29 N.Y.2d 900, 328 N.Y.S.2d 686 (1972) (*per curiam*). In addition this power can be used when a minor, who has been separated from the custody of his parents or whose parents' whereabouts are unknown, requires consent to obtain necessary medical or surgical treatment. For the Virginia legislature's approach, see VA. CODE ANN. § 32-137(1)-(6), (8)(Cum. Supp. 1977).

36. Various public policy interests include limiting child labor, *Prince v. Massachusetts*, 321 U.S. 158 (1944), and upholding parental authority or shielding the child from exposure to morally questionable material, *Ginsberg v. New York*, 390 U.S. 629 (1968); *The Minor's Right to Abortion*, *supra* note 6, at 326.

37. *The Minor's Right to Abortion*, *supra* note 6, at 319-31.

38. Virginia is one of a minority of states which allows physicians to provide birth control services to minors without parental consent. VA. CODE ANN. § 32-137(7)(Cum. Supp. 1977). While this statutory section allows a minor to give effective consent to medical or health services required in the case of pregnancy, it explicitly excludes abortion and surgical sterilization procedures from this category.

39. *The Contraceptive Controversy*, *supra* note 14, at 1013.



Divergent judicial opinions concerning access to contraceptives have arisen in the lower courts. In denying minors the right of access to contraceptives without parental consent, the Utah Supreme Court<sup>40</sup> reasoned that such access would deprive parents of the right to teach and instill morality in their children.<sup>41</sup> In addition, the absence of a parental consent requirement would increase the likelihood that a child of immature judgment would break the law prohibiting fornication and would contract venereal disease.<sup>42</sup> The Utah Court did not address the issue of a minor's right to privacy.<sup>43</sup>

In contrast to the Utah Court's approach, a three-judge panel in *T\_\_\_\_\_ H\_\_\_\_\_ v. Jones*,<sup>44</sup> stated that because no "developmental differences" exist

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40. *Doe v. Planned Parenthood Assoc. of Utah*, 29 Utah 2d 356, 510 P.2d 75, *appeal dismissed for want of jurisdiction & cert. denied*, 414 U.S. 805 (1973). A sixteen-year-old single girl brought a class action suit seeking injunctive relief against Planned Parenthood to make contraceptive services available to minors without notifying their parents or obtaining parental consent. She alleged that these prerequisites constituted deprivation of the class of minor's rights to privacy and equal protection of the laws. The trial court granted the injunction, but the Utah Supreme Court reversed in a terse opinion.

41. The Utah Supreme Court's majority felt that the lower court's decision ignored "entirely the question of the morals of children and of the duty of parents to teach and instruct them and to watch over them so as to promote morality, health, and happiness." *Doe v. Planned Parenthood Assoc.*, 29 Utah 356, 510 P.2d 75, 76, *appeal dismissed for want of jurisdiction & cert. denied*, 414 U.S. 805 (1973); see *The Minor's Right to Abortion*, *supra* note 6.

42. *Doe v. Planned Parenthood Assoc.*, 29 Utah 2d 356, 510 P.2d 75, 76, *appeal dismissed for want of jurisdiction & cert. denied*, 414 U.S. 805 (1973). This conclusion is based on the questionable assumption that fear of pregnancy deters teenage sex. Comment, 1974 UTAH L. REV. 433, 439.

43. The court summarily dispensed with the equal protection argument by stating that the fornication statute "has never been considered to deny the equal protection of the law to single people who may want to satisfy their lusts on each other." 510 P.2d at 77. Refusing contraceptive services to minors absent parental consent was not a denial of equal protection, as the court held that single minors are not in the same class as married people. *Id.* The court assumed that because minors are different from adults, then access to contraceptives should be restricted. However, the court accomplished this without elaborating on the connection between those conceded differences and the object of the law.

See *The Contraceptive Controversy*, *supra* note 14, at 1012 n.73. Although the Harvard Law Review commentator felt that the Utah court used faulty equal protection analysis, that contention is incorrect. The court implicitly, though not explicitly, decided that the right of access by minors to contraceptives was not fundamental; it therefore applied the rational relationship standard of review. This approach is consistent with good equal protection analysis. The commentator's finding of "fault" in the opinion appears to be the court's failure to hold this right as fundamental, rather than the equal protection analysis itself.

44. Civil No. C74-276 (D. Utah, July 23, 1975). The *Jones* case is an unreported decision which is discussed in Case Notes, 1976 B.Y.U.L. REV. 296. Since a copy of the decision was unavailable, any criticism of the case is based upon this article. In *Jones*, a three-judge federal court struck down the state's attempt, through the administration of federally funded

between adults and minors,<sup>45</sup> the right of access to contraceptives could not be restricted by the requirement of parental consent.<sup>46</sup> Relying on the *Roe*<sup>47</sup> decision, the court reasoned that since the fourteenth amendment protects a woman's right to abortion, it must also protect her right to take precautions against pregnancy.<sup>48</sup> While recognizing that parental rights are "entitled to considerable legal deference,"<sup>49</sup> the court required that they be subordinated to valid state interests. At the same time, a state's interest in enforcing parental decisions may be inferior to the "fundamental right of minors" to free access to contraceptives, information and devices.<sup>50</sup>

These conflicting approaches have in part been resolved by the Supreme Court's recent decision in *Carey v. Population Services International*.<sup>51</sup> The Court held that "a blanket prohibition of the distribution of [non-prescriptive] contraceptives to minors is a *fortiori* foreclosed"<sup>52</sup> by the Court's prior decision in *Planned Parenthood v. Danforth*.<sup>53</sup> Of "particular

family planning services, to impose parental consent requirements on the availability of contraceptive services to minors. Since the state thereby "engrafted a condition of eligibility not required by the governing federal statutes and regulations," *id.* at 308, the court held that clause conflicted with the supremacy clause and was therefore void. *Id.* at 297.

45. *Id.* at 309; see *State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1975).

46. Case Notes, *supra* note 44, at 297.

47. 410 U.S. 119 (1973).

48. Case Notes, *supra* note 44, at 309.

49. *Id.* at 309-10.

50. *Id.* (emphasis added). The Supreme Court granted *certiorari* to the *Jones* case and affirmed the lower court's decision that the parental consent requirements were void. The Court did not decide the constitutional issue; it merely affirmed the judgment on the grounds that the parental consent regulation of the state was inconsistent with the Social Security Act, 96 S. Ct. 2195 (1976). A reasonable explanation for the Court's action in *Jones* is provided by the jurisdictional mandates of 28 U.S.C. § 1253. This statute provides for a direct appeal from a three-judge federal court to the Supreme Court. While jurisdiction pursuant to § 1253 is mandatory, the Court summarily disposes of many federal court judgments by affirmance. P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 80 (1975).

51. 97 S. Ct. 2010 (1977). The Supreme Court affirmed a three-judge district court's decision in *Population Services Int'l v. Wilson*, 398 F. Supp. 321 (S.D.N.Y. 1975) that had held unconstitutional, under the first and fourteenth amendments, a New York law which made it a crime for any person to sell or distribute nonprescription contraceptives to a minor under the age of sixteen. The law also made it a crime for anyone other than a licensed pharmacist to distribute contraceptives to persons over sixteen and for anyone, including licensed pharmacists, to advertise or display contraceptives. The decision of the district court holding unconstitutional these portions was affirmed by the Supreme Court; however, these specific aspects of the case are beyond the scope of this article.

52. 97 S. Ct. at 2021.

53. The Court stated that *Danforth* prevents the state from imposing "a blanket prohibition or even a blanket requirement of parental consent on the choice of a minor to terminate her pregnancy . . ." *Id.* at 2021. Such state interests as protection of the health of the mother or of potential life, are more implicated in the abortion decision and thus are less supportive of regulations restricting the decision to use non-hazardous contraceptives. *Id.*

significance” to the Court’s decision in *Carey* was their reasoning that the “right to privacy in connection with decisions affecting procreation extends to minors as well as to adults.”<sup>54</sup> The Court reiterated the holdings of previous decisions recognizing the constitutional rights of minors and concluded that “state restrictions inhibiting privacy rights of minors are valid only if they serve any *significant* state interest . . . that is not present in the case of an adult.”<sup>55</sup>

The state argued that the free availability of contraceptives to minors, would lead to increased sexual activity among the young, in contravention of the state’s policy to discourage such behavior.<sup>56</sup> This reasoning was found insufficient to support a total ban on distribution of nonprescriptive contraceptives to minors. The argument that minors’ sexual activity may be deterred by increasing the attendant hazards was not taken seriously by the Court.<sup>57</sup> Moreover, there was no evidence that promiscuity was substantially related to the availability of contraceptives.<sup>58</sup>

It is now clear that any state regulation which imposes a blanket restriction upon a minor’s decision to procreate must be in furtherance of a significant state interest and must be a reasonable means of pursuing that interest. But the opinion is limited in its impact for several reasons.

First, the Court is not willing to extend this type of careful scrutiny to a state regulation whenever it implicates sexual freedom; “only when it

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54. *Id.*

55. *Id.* (emphasis added). The Court’s opinion reflects the use of a standard of review intermediate between minimum rationality and the compelling state interest test, which is closely akin to “minimum rationality with bite.” The Court required more than a rational relationship between the statute and the state’s interest; it required a significant state interest to justify the restriction on matters affecting childbearing in minors. Despite the Court’s apparent recognition that privacy rights of minors approach fundamental status, the Court implied that burdens placed upon these rights might be justified if they are based upon supporting evidence and are “more than a bare assertion . . . .” *Id.* at 2022. The majority opinion is unclear as to the exact level of review in cases where state laws restrict minors in sexual matters. Justice Powell in his concurring opinion believes (and perhaps accurately) that “the relevant question in any case where state laws impinge on the freedom of action of young people in sexual matters is whether the restriction rationally serves valid state interests.” *Id.* at 2028.

56. *Id.* at 2020. Judicial notice was taken of the fact that sexual activity among minors is high with or without access to contraceptives and that the consequences of such activity are frequently devastating. *Id.* at 2022.

57. *Id.* at 2021. The Court’s reasoning was taken from *Eisenstadt v. Baird*, 405 U.S. 438 (1972), “[i]t would be plainly unreasonable to assume that (the state) has proscribed pregnancy and the birth of an unwanted child (or the physical and psychological dangers of an abortion) as punishment for fornication.” 97 S. Ct. at 2022. No such “scheme of values” was attributed to the state by the Court. *Id.*

58. 97 S. Ct. at 2021-22.

burden[s] an individual's right to decide to prevent contraception or terminate pregnancy by substantially limiting access to the means of effectuating that decision"<sup>59</sup> will greater scrutiny be required. The Court held that while there is no "independent fundamental 'right of access to contraceptives,'" access is an essential element of the constitutionally protected right of being free from unjustified intrusion by the state in decisions involving matters of childbearing.<sup>60</sup>

Second, the Court did not specifically address whether or not a state might require parental consent or parental consultation as a prerequisite to access to nonprescriptive contraceptives. It is unclear if such a requirement would be a "substantial limitation" upon a minor's "decision to bear or beget a child." Justice Powell in a concurring opinion, points out that "there [may] be considerably more room for state regulation in this area than would be permissible under the Court's opinion."<sup>61</sup> Powell believes that a state might constitutionally require a minor to seek "parental guidance" before engaging in sexual intercourse<sup>62</sup> (and impliedly before obtaining contraceptives). Powell reasoned that the Court's prior invalidation of the requirement of parental consent as a prerequisite to a minor obtaining an abortion<sup>63</sup> would *not necessarily* require an invalidation of such a requirement as a prerequisite to minors engaging in sexual intercourse.<sup>64</sup> In the abortion decision, the minor was necessarily required to consult with a physician, and thus parental consultation and consent was unnecessary. But because minors do not necessarily consult with anyone prior to their decision to engage in sexual relations, the requirement of parental consultation might be constitutionally permissible.

Finally, the Supreme Court was not faced with a minor's access to pre-

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59. *Id.* at 2018, n. 5.

60. *Id.* at 2018. The majority emphasized that the underlying holding in *Griswold*, *Eisenstadt* and *Roe* was that the right of personal privacy includes the protected right of independence in the "decision whether to bear or beget a child." *Id.* at 2018. "The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices." *Id.* at 2016.

61. *Id.* at 2029.

62. *Id.* Powell considers a requirement that minors seek parental guidance would be consistent with the Court's prior cases. Powell states that *Danforth* "explicitly suggested that a materially different constitutional issue would be presented with respect to a statute assuring in most instances consultation between the parent and child." *Id.* Great importance is placed upon the relationship of parent and child by Powell; he states that the law was invalid because it "prohibits parents from distributing contraceptives to their children, a restriction that unjustifiably interferes with parental interests in rearing their children." *Id.* at 2028. The statute would allow the state to punish the exercise of parental responsibility. *Id.* at 2029.

63. The Court so held in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

64. 97 S. Ct. at 2029.

scriptive contraceptive devices.<sup>65</sup> Quite possibly, some states may attempt to place restrictions upon a minor's access to prescriptive contraceptives. It would appear, however, that parental consent requirements would be impermissible; like the decision to have an abortion, the decision to procure a prescriptive contraceptive necessarily requires consultation with a physician, and parental consent and consultation would be unnecessary.

#### IV. THE MINOR'S ACCESS TO ABORTION ABSENT PARENTAL CONSENT.

##### A. *The Adult's Right to Abortion.*

Judicial recognition<sup>66</sup> of a woman's prerogative to decide whether or not to bear a child culminated in the *Roe v. Wade*<sup>67</sup> and *Doe v. Bolton*<sup>68</sup> decisions of the Supreme Court, which greatly increased the availability<sup>69</sup> of

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65. It should be noted "[t]hat the constitutionally protected right of privacy extends to an individual's liberty to make choices regarding contraception does not, however, automatically invalidate every state regulation in this area. The business of manufacturing and selling contraceptives may be regulated in ways that do not infringe protected individual choices." *Id.* at 2017.

66. *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970). In *Belous* the court stated that

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

458 P.2d at 199-200 (citations omitted).

67. 410 U.S. 113 (1973). See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 920-21 (1973), for a concise outline of the Supreme Court's decision.

68. 410 U.S. 179 (1973). The *Doe* case reiterates *Roe* in holding that the abortion decision rests with the pregnant woman and her physician and also "extends *Roe* by warning that just as states may not prevent abortions by making their performance a crime, they may not make abortions unreasonably difficult to obtain by prescribing elaborate procedural barriers." *Implications of the Abortion Decisions: Post Roe and Doe Litigation and Legislation*, 74 COLUM. L. REV. 237, 240 (1974) [hereinafter cited as *Implications of the Abortion Decisions*], see *Nyberg v. City of Virginia*, 495 F.2d 1342 (8th Cir. 1974) and *Doe v. Hale Hosp.*, 500 F.2d 144 (1st Cir. 1974), where the courts held that municipal hospitals could not refuse to make its facilities available for abortions. See also *Hathaway v. Worchester City Hospital*, 475 F.2d 701 (1st Cir. 1973), where the court held that a hospital could not refuse to allow voluntary sterilization operations when it allowed other comparable surgical procedures with similar medical risks.

69. Abortions were formerly statutorily restricted in a majority of states to circumstances where the abortion was necessary to save the life of the mother. George, *The Evolving Law of Abortion*, 23 CASE W. RES. L. REV. 708, 716-17 nn.46 & 47 (1972). The severity of this requirement was lessened as legislatures (*Id.* at 740 and n. 173) and courts (*People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970); *In re P.J.*, 12 CRIM. L. REP. 2549 (1973)) recognized the grave physical and psychological harm to a woman's health that might result from an unwanted childbirth.

abortion to *adult women*. The Supreme Court in *Roe*<sup>70</sup> held that a Texas abortion statute unconstitutionally restricted a woman's right of privacy in the abortion decision. Although the right of privacy<sup>71</sup> was by no means a new concept, the exact basis of this right eluded the Court.<sup>72</sup> Whatever the basis, the justices concluded that the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>73</sup>

Despite implicitly holding that this right was fundamental,<sup>74</sup> the Court made it clear that it was not an absolute right, but rather a qualified right which could be limited during the later stages of pregnancy by compelling state interests.<sup>75</sup> Applying the compelling state interest test to the statutes in *Roe* and *Doe*, the Court found the state's interests in maternal health and in potential life of the fetus to be insufficient to override the right of a woman and her physician to decide to terminate a pregnancy during the first trimester.<sup>76</sup>

#### B. *The Minor's Right to Abortion.*

The Court in those cases declined to decide<sup>77</sup> whether a state could constitutionally deny abortions to minors in the absence of parental consent.<sup>78</sup> Nonetheless, some lower courts (through statutory interpretation)<sup>79</sup>

70. 410 U.S. 113 (1973).

71. The right of privacy has been characterized as the "right to be let alone" and has been recognized as the "most comprehensive rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). See also *Union Pacific Railroad v. Botsford*, 141 U.S. 250 (1891).

72. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) for the differing Justices' views on the basis of the right to privacy.

73. 410 U.S. 113, 153 (1973).

74. The Court looked to "the need for the right and the dire consequences of its denial." Note, 24 KAN. L. REV. 446, 449 (1976), quoting *Poe v. Gerstein*, 517 F.2d 787, 791 (5th Cir. 1975).

75. 410 U.S. 113, 154 (1973).

76. *Id.* at 163-64. The pregnant woman's privacy right merely allows her to decide whether to seek an abortion; "the attending physician, in consultation with his patient, must bear the primary responsibility for the ultimate decision and its effectuation, and must decide in his medical judgment the patient's pregnancy should be terminated." *The Minor's Right to Abortion*, *supra* note 6, at 314.

77. One commentator concluded that *Roe* and *Doe* left unanswered as many questions as they settled. Critical issues which remain to be resolved and which are beyond the scope of this article are discussed in depth in *Implications of the Abortion Decisions*, *supra* note 68.

78. 410 U.S. 113, 165 n. 67 (1973).

79. *Ballard v. Anderson*, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971). In *Ballard* the court held that a California statute allowing a minor to consent to medical care "related to pregnancy" included the right of a minor to obtain an abortion absent parental consent.

have allowed minors to independently obtain abortions, and other lower courts have held parental consent requirements to be unconstitutional.<sup>80</sup>

In these cases, demanding parental consent before a minor can obtain an abortion has been held to exacerbate several problems: first, the danger that the operation will be delayed and thereby be made more hazardous; second, the risk that a minor will resort to the techniques of an unlicensed abortionist or self-abortion; third, the damaging consequences that an unwanted child has on the minor and society, as well as the child; and fourth, the potential conflict which the abortion decision creates between the minor and her parents.<sup>81</sup>

An analysis of several state interests typically advanced to counter the minor's claims was made in *Poe v. Gerstein*.<sup>82</sup> The court followed the *Roe* approach<sup>83</sup> in analyzing "the need for the right and dire consequences of its denial"<sup>84</sup> and found no differences between minors and adults that would justify a denial of this right to minors. After establishing the minor's tentative right to an abortion, the court examined the interests asserted by the state to determine whether they were sufficiently compelling to override the minor's asserted rights.

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See also *In re Smith*, 16 Md. App. 209, 295 A.2d 238 (1972), where the court interpreted a statute similar to the one in *Ballard*; the *Smith* court held that the statute prevented a mother from compelling her daughter to have an abortion against the daughter's wishes.

The Virginia statute specifically excludes abortion from the medical matters in which minors are competent to give consent. VA. CODE ANN. § 32-137(7)(Cum. Supp. 1977).

80. *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975); *Doe v. Zimmerman*, 405 F. Supp. 534 (M.D. Pa. 1975); *Planned Parenthood v. Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975); *Foe v. Vanderhoof*, 389 F. Supp. 947 (D. Colo. 1975); *Wolfe v. Schroering*, 388 F. Supp. 631 (W.D. Ky. 1974); *State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1975). *Contra*, *Planned Parenthood v. Danforth*, 392 F. Supp. 1362 (E.D. Mo. 1975).

81. Pilpel and Zuckerman, *Abortion and the Rights of Minors*, 23 CASE W. RES. L. REV. 779, 780 (1972).

82. 517 F.2d 787 (5th Cir. 1975), *aff'd sub nom.*, *Gerstein v. Coe*, 96 S. Ct. 3202 (1976). The *Poe* court held that the fundamental right to abortion applies to minors as well as adults. The state interests advanced to counter the minor's claims were: first, the prevention of illicit sex among minors; second, the protection of minors from their own improvidence; third, the fostering of parental control; and fourth, support for the family as a social unit. Note 24 KAN. L. REV. 446, 450 (1976). Since these interests are not merely related to maternal health or potential life, but rather to legitimate concerns not considered in *Roe v. Wade*, that case may not be controlling; "it is possible that a state's interest in limiting a minor's right to an abortion would be compelling at any stage of pregnancy." *Id.*

83. 517 F.2d at 790. The *Poe* court rejected the alternative approaches used by other courts in analyzing the scope of minors' rights, either: "(1) all fundamental rights apply to minors, but the state may sometimes assert an interest sufficient to justify the state action; or (2) minors do not necessarily have all the fundamental rights of adults." *Id.*

84. *Id.* at 791.

The *Poe* court found that the parental consent statute was not necessary to deter illicit sex among minors since the state could enact legislation which directly provided criminal sanctions for illicit sexual conduct.<sup>85</sup> The interest in protecting minors from their own improvidence was found to be a legitimate goal, but the *Poe* court held that the statute was not drawn with sufficient precision to effect only the state interests at stake.<sup>86</sup> The court acknowledged that fostering "parental control",<sup>87</sup> which is important to the stability of society, is a justifiable state interest, but stated that this interest was not compelling; the pregnant minor's having sought an abortion contrary to her parents' wishes indicated that "whatever control the parent once had over the minor had diminished, if not evaporated entirely."<sup>88</sup> The final interest asserted by the state, maintaining the family as a social unit, was held not sufficiently compelling, as pregnancy might have already "fractured" the family structure, and the parental consent

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85. *Id.* at 792. Further, the court questioned whether deterring illicit sex was the statute's purpose, since the goal of deterring sexual conduct of minors was undermined by another state law which allowed unmarried minors to have access to contraceptives. *Id.* See VA. CODE ANN. § 32-137(7) (Cum. Supp. 1977), which allows minors access to contraceptives without parental consent. See note 38, *supra*. Rather than discouraging illicit sex, therefore, the statute encouraged the use of contraceptives and punished only those sexually active minors who failed to use contraceptives; it exacted a "penalty" by compelling the pregnant minor to give birth to an unwanted child, unless her parents gave consent to the abortion. Note, 24 KAN. L. REV. 446, 450-51 (1976).

86. The state's interest in improving the quality of the decision whether to have an abortion could more narrowly be achieved by the requirement of parental "consultation" rather than permission prior to the abortion. 517 F.2d at 793. The court clearly stated at note 11 that it was not intimating that such an example of a statute would necessarily pass constitutional muster. Moreover, the *Poe* court questioned the necessity of a third person's opinion in the decision, since the physician is prepared to counsel the minor about the physical and mental consequences of the abortion. *Id.* "Even if a third opinion is deemed desirable, a requirement of psychological counselling before the abortion is a better alternative than requiring parental consent. In this way, the quality of the decision could be improved by the addition of a *neutral* party to the decisionmaking process. Note, 24 Kan. L. Rev. 446, 457 n.35 (1976).

Other courts have recognized that the requirement of parental consent for a minor's abortion provides parents with a "veto power" which might be exercised for the purpose of punishment or for no reason at all. *Wolf v. Schroering*, 388 F. Supp. 631 (W.D. Ky. 1974); *State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1975).

87. 517 F.2d at 793. The *Poe* court defined parental control as "the continuing ability of the parent to direct the maturing minor's decisions."

88. *Id.* at 793-94. The state's enforcement of a parental decision at a time when the minor was probably near legal majority was not deemed likely to restore parental control. *Id. Contra, Planned Parenthood v. Danforth*, 392 F. Supp. 1362, 1370-71 (E.D. Mo. 1975), *aff'd in part, rev'd in part*, 428 U.S. 52 (1976). The district court referred to the state's interest in "safeguarding the authority of the family relationship" and held that *Roe* and *Doe* did not intend to preclude the consideration of *fundamental* state interest other than protection of maternal health and fetal life. *Id.* at 1370-71. The court required only a rational relationship between the state interest and the statute. Note, 24 KAN. L. REV. 446, 454 (1976).



requirement "cannot reasonably be expected to restore the family's viability as a unit."<sup>89</sup>

Despite the Supreme Court's former reluctance to decide the issue, in *Planned Parenthood v. Danforth*<sup>90</sup> it held that the parental consent requirements of a Missouri abortion statute<sup>91</sup> were unconstitutional. The Court first acknowledged that minors have a right to privacy. While recognizing that the state has broader authority to regulate the activities of minors than of adults,<sup>92</sup> the Court reiterated its position that minors "are protected by the Constitution and possess constitutional rights."<sup>93</sup> The Court then addressed the question of "whether there is any significant state interest in conditioning an abortion on the consent of a parent or person *in loco parentis* that is not present in the case of an adult."<sup>94</sup>

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89. 517 F.2d at 794.

90. 428 U.S. 52 (1976). The Supreme Court reversed a three-judge federal district court, 392 F. Supp. 1362 (E.D. Mo. 1975), which upheld the validity of a Missouri statute. The statute required an unmarried minor to obtain the consent of a parent or person *in loco parentis* to an abortion during the first twelve weeks of pregnancy; this consent was required unless the abortion was certified by a licensed physician to be necessary to preserve the life of the mother. See VA. CODE ANN. § 18.2-74.1 and § 18.2-76 (Repl. Vol. 1975). The Virginia statute allows for an abortion (during all three trimesters of pregnancy) on any woman if it is necessary, in the opinion of the physician, to save her life. The statute is unclear as to whether the parental consent requirements of section 18.2-76 apply to this situation. "The state's interest in safeguarding the authority in the family relationship" was viewed by the district court as a "compelling basis for allowing regulation of a minor's freedom to consent to an abortion." 392 F. Supp. at 1370. Because the "state has a duty to support parents in the discharge of their responsibility for the care of their children," the parents are entitled to the support of laws designed to achieve that goal. *Id.*

The district court believed that minors were incapable of giving legal consent and that the *Roe* decision was not intended to emancipate children in that respect. 392 F. Supp. at 1371. *Roe* and *Doe* did not preclude the consideration of fundamental state interests other than protection of maternal health and fetal life. The parental consent requirement of the abortion law was "justified by such other compelling interests." *Id.*

91. See VA. CODE ANN. § 18.2-76 (Repl. Vol. 1975). The Virginia statute requires parental consent for a minor's abortion during all three trimesters of pregnancy. As the Missouri statute's parental consent requirement for a minor's abortion during the first trimester of pregnancy was invalidated, it is clear that section 18.2-76 is unconstitutional at least as to the requirement of parental consent during the first trimester.

92. 428 U.S. 52, 72 (1976); see *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944). See also *Ginsberg v. New York*, 390 U.S. 629 (1968).

93. 428 U.S. 52, 74 (1976); see, e.g., *Breed v. Jones*, 421 U.S. 519 (1975); *Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). Constitutional rights "do not mature and come into being magically only when one attains the state-defined age of majority." 428 U.S. 52, 74 (1976). The dissenting judge in *Planned Parenthood v. Danforth*, 392 F. Supp. 1362, 1376 (E.D. Mo. 1975) (Webster, J., dissenting), had difficulty in discerning why a minor, sufficiently mature to comprehend the abortion procedure and to make an intelligent decision with the advice of her doctor, would not be entitled to the same right of self-determination that is accorded to adult women.

94. *Id.* at 75.

As in *Poe v. Gerstein*,<sup>95</sup> the state advanced the interest in safeguarding the family unit and the interest of parental control. The Court in *Danforth* found it difficult to conclude that the family unit would be strengthened by providing a parent with the power to overrule a decision by a minor patient and her doctor to terminate the pregnancy. Such veto power would not be likely to "enhance parental authority or control where the minor and nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure."<sup>96</sup> The Court held that the state possesses no authority to delegate to a third person a veto power which the state is prohibited from exercising during the first trimester of pregnancy.<sup>97</sup> Any independent interest which a parent had in the abortion decision was "no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."<sup>98</sup>

In striking down the blanket consent provision of the Missouri statute, the Court emphasized that this "does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."<sup>99</sup> The constitutional infirmity of the statute was the imposition of a special consent provision, exercisable by one other than the minor and her physician, as a prerequisite to the minor's abortion.<sup>100</sup> The statute did so without sufficient justifications for the restriction and thus violated the strictures of *Roe* and *Doe*.<sup>101</sup>

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95. 517 F.2d 787 (5th Cir. 1975).

96. 428 U.S. 52, 75 (1976).

97. *Id.* at 69. The Court agreed with the dissenting judge's language in the lower court decision regarding spousal consent requirements. See 392 F. Supp. 1362, 1375 (E.D. Mo. 1975) for the lower court opinion. Much of what was said by the Supreme Court regarding the statute's spousal consent requirements applied with equal force to the statute's parental consent requirements. 428 U.S. 52, 74 (1976).

98. 428 U.S. 52, 75 (1976). It appears that the Court is confusing and equating physiological maturity with psychological maturity. *State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1975); *Ballard v. Anderson*, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971).

99. 428 U.S. 52, 75 (1976).

100. *Id.* Justice Stewart's concurring opinion, in which Justice Powell joined, stated that the Court's opinion in *Bellotti v. Baird*, 428 U.S. 132 (1976), suggests that

a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child.

*Id.* at 90-91.

101. *Id.* Four justices strongly dissented on the issue of parental consent. Justices White, Burger and Rehnquist maintained that the purpose of the requirement was not merely to

At first blush the high Court appears to have finally settled the controversial issue in which lower courts have been embattled since *Roe* and *Doe*, i.e., whether a minor has a constitutional right to abortion which cannot be restricted by the requirements of parental consent. A closer reading of the *Danforth* decision demonstrates otherwise. The invalidated Missouri statute required parental consent to a minor's abortion during the first twelve weeks of pregnancy. The validity of these requirements during the later stage of pregnancy was not an issue before the Court, and thus their constitutional status is uncertain.<sup>102</sup> Since the state's interest in maternal health and fetal life increases after the first trimester, the Court could analogize a concomitant increase in parental interests according to the three stages enumerated in *Roe*.<sup>103</sup> At the very least the *Danforth* decision on the availability of abortions to minors indicates that "whatever basis there may be for a general requirement of parental consent for [other] medical treatment of minors, the requirement is not appropriate in the abortion context."<sup>104</sup>

#### V. THE MINOR'S ACCESS TO STERILIZATION OPERATIONS ABSENT PARENTAL CONSENT.

Over thirty years ago the Supreme Court declared that procreation is a

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vindicate any parental or state interest but to also "vindicate the very right created in *Roe v. Wade*—the right of the pregnant woman to decide whether or not to terminate her pregnancy." *Id.* at 94-95 (emphasis original). The dissenters felt that the state was entitled to protect the minor from making the decision to undergo an abortion, a decision which might not be in her best interests. The requirement of parental consent was deemed by the dissenters to be a traditional and valid method of achieving the state's goal. *Id.* at 95.

Justice Stevens wrote a separate dissent on this issue. To his mind the state's interest in the welfare of its youth is sufficient to support the parental consent requirement. The overriding consideration, according to Stevens, is that the abortion decision be exercised as wisely as possible, and a legislative determination that this decision will be made more wisely with parental advice "is surely not irrational." *Id.* at 103.

102. See VA. CODE ANN. § 18.2-76 (Repl. Vol. 1975). As the Virginia statute requires parental consent to a minor's abortion during all three trimesters, this requirement during the first trimester is clearly open to constitutional attack. The Virginia Legislature will probably delete the presumably invalid portion of section 18.2-76 through the use of the severability clause in section 18.2-76.2 (Repl. Vol. 1975). The validity of the remaining portion requiring parental consent during the second and third trimesters will remain effective and unresolved unless it is challenged.

103. The Court's *caveat*—that not every minor regardless of age or maturity may give effective consent to abortion—may reduce the *Danforth* decision to a constitutional recognition of a mature minor rule as applied to abortion. However, the importance of the Court's action in striking down parental consent requirements for abortion during the first trimester of pregnancy cannot be overestimated.

104. Note, 24 KAN. L. REV. 446, 457 (1976).

fundamental constitutional right.<sup>105</sup> Recent court decisions<sup>106</sup> on contraception and abortion may mean that, conversely, the right not to procreate may be similarly fundamental. Even so, the judiciary and legislatures have been less inclined to accept voluntary sterilization<sup>107</sup> than either contraception or abortion.

Although allowing sterilization does not violate defined public policy,<sup>108</sup> only a small minority of states<sup>109</sup> have enacted legislation which permits such operations. The absence of statutory standards has sanctioned the imposing of restrictions on voluntary sterilization<sup>110</sup> by powerful public and private organizations.<sup>111</sup> In essence, the existence of a constitutional protection for access to sterilization procedures is determined by whether the medical facility is either public or private.<sup>112</sup> The response of physicians and hospitals includes limiting sterilization to married persons and refusing to perform sterilizations at all.<sup>113</sup>

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105. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

106. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

107. Voluntary contraceptive sterilization refers to a sterilization operation which is performed as a method of birth control upon a patient who knowingly and willingly requests this treatment. It must be contrasted with eugenic sterilization which is performed on the mentally retarded in order to control the passing on of certain genetic traits. Eugenic sterilization and the controversy surrounding forced sterilization is beyond the scope of this article.

108. *Shaheen v. Knight*, 11 Pa. D. & C.2d 41 (1957).

109. See VA. CODE ANN. §§ 32-423 to -427 (Cum. Supp. 1977).

110. Comment, *A Constitutional Evaluation of Statutory and Administrative Impediments to Voluntary Sterilization*, 14 J. FAM. L. 67, 68-69 (1975) [hereinafter cited as *Impediments to Voluntary Sterilization*].

111. The Department of Health, Education and Welfare, the Joint Commission on Accreditation of Hospitals and the American College of Obstetricians and Gynecologists have extensively regulated sterilization operations. *Id.* at 70-71.

112. Public and private medical facilities are not bound by the same standards. Private medical facilities may determine their own policies and the circumstances under which they will perform or refuse to perform sterilizations. *Watkins v. Mercy Medical Center*, 364 F. Supp. 799 (D. Idaho 1973); *Allen v. Sisters of Saint Joseph*, 361 F. Supp. 1212 (N.D. Tex. 1973). Public facilities may not. A medical facility was held to be public when it appeared that at least some of its staff members were paid from public funds and that the hospital was owned by the community and supported by public funds. *McCabe v. Nassau County Medical Center*, 453 F.2d 698 (2d Cir. 1971).

Categorizing an institution as public or private may not be so easy. "The exact extent of governmental funding and control necessary to make a hospital's conduct 'state action' for judicial review purposes" is unclear. *Impediments to Voluntary Sterilization*, *supra* note 110, at 82. Therefore, the availability of sterilizations in a purportedly private medical facility which prohibits their performance must be litigated through the courts.

113. *Impediments to Voluntary Sterilization*, *supra* note 110, at 71-72. In *Hathaway v. Worcester City Hosp.*, 475 F.2d 701 (1st Cir. 1973), the First Circuit Court of Appeals confronted the issue of a public hospital's restriction on sterilization and reversed the lower

### A. Spousal Consent Requirements for Sterilization Operations

Where the performance of sterilization operations is regulated, but not prohibited, the constitutional ramifications become more complex. Some hospital regulations base the availability of sterilization on the age of the woman and the number of her living children.<sup>114</sup> Other regulations call for the patient, if married, to obtain the consent of his or her spouse.<sup>115</sup>

The constitutionality of spousal consent requirements has been considered by several lower courts,<sup>116</sup> which have found them to be invalid. In

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court. The lower court held that a married woman had no constitutional right to a sterilization operation performed in a city hospital where there was no state statute compelling the hospital to allow performance of the operation and where sterilization was of doubtful legality in the state. *Hathaway v. Worcester City Hosp.*, 341 F. Supp. 1385 (D. Mass. 1972).

A complete ban on voluntary sterilization within the hospital was held unconstitutional by the Court of Appeals. Since the hospital performed other surgery involving greater medical risk to a patient and greater demand on hospital facilities, the ban was deemed to violate the equal protection clause of the fourteenth amendment. 475 F.2d at 706. The "decision to terminate the possibility of any future pregnancy" was found "to embrace all of the factors deemed important by the [Supreme] Court in *Roe* in finding a fundamental interest. . . ." *Id.* at 705. The state interests recognized in *Roe* were held to be far less compelling against sterilization than they were against abortions. After the state had undertaken to provide general short-term hospital care, the *Hathaway* court held that the state could not "constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights." *Id.* at 706.

114. The "age-parity formula," as this criterion is termed, involves a multiplication of the woman's age by the number of her living children. Only when the multiplication product equalled 120 could a woman be sterilized. Comment, *Contraceptive Sterilization: The Need for Regulation*, 6 GOLDEN GATE U.L. REV. 79, 82 (1975) [hereinafter cited as *The Need for Regulation*]. In *McCabe v. Nassau County Medical Center*, 453 F.2d 698 (2d Cir. 1971), the age-parity formula was attacked as an arbitrary classification which denied equal protection and which invaded the right to privacy in the marital relationship. One commentator suggests that the age-parity formula can be attacked as a violation of due process as "the formula sets up an irrebuttable presumption as to the individual's qualification for sterilization." *Impediments to Voluntary Sterilization*, *supra* note 110, at 80-81. A hearing (before the sterilization operation was denied) based on the medical factors unique to an individual's case was suggested as a means of complying with due process standards. *Id.* at 81.

115. The established policy of the Virginia Commonwealth University Medical College of Virginia (MCV) in Richmond, Virginia, is to deny all requests for sterilization unless it is accompanied by the written consent of the spouse. *Doe v. Temple*, 409 F. Supp. 899, 903 (E.D. Va. 1976). Through spousal consent requirements physicians "seek to protect themselves against potential civil liability which might arise at the behest of the nonconsenting spouse." *Ponter v. Ponter*, 135 N.J. Super. 50, 342 A.2d 574, 575 (1975).

116. *Id.*; *Murray v. Vandevander*, 522 P.2d 302 (Okla. Ct. App. 1974); *Doe v. North Ottawa Community Hosp. Authority*, Civ. No. 2706 (Ottawa, Mich. Cir. Ct., May 15, 1973), cited in *Impediments to Voluntary Sterilization*, *supra* note 110, at 79 n. 68.

In *Murray* the Oklahoma court found that the right of a competent person to control his or her body was paramount to the desires of the spouse. In the court's view, a married woman's right to her health could not be qualified by the requirement of spousal consent.

contrast, the court in *Doe v. Temple*,<sup>117</sup> avoided reaching the constitutionality of the Virginia statute<sup>118</sup> which was alleged to require spousal consent. The *Temple* court reasoned that the statutes merely provided a means by which doctors who perform sterilization operations could gain immunity from possible civil and criminal liability,<sup>119</sup> and hence the statutes did not

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522 P.2d at 304. In *Ponter*, the New Jersey court concluded that the right to sterilization without spousal consent was a "natural and logical corollary" to a woman's right to procure an abortion or other operation without her husband's consent. 342 A.2d at 578.

117. Civ. No. 76-006-R (E.D. Va. Aug. 19, 1976). A married woman who had been separated from her husband for less than a year challenged Virginia's sterilization statute which both she and the defendant, Medical College of Virginia (MCV), believed to prohibit sterilization of married persons without spousal consent. The defendants' assumption of the necessity of spousal consent coupled with their fear of civil and criminal liability resulted in an established policy of denying all requests for sterilization unless accompanied by the written consent of the spouse. When the MCV physician refused to perform the sterilization without the husband's consent, the plaintiff filed suit alleging a deprivation of the right of privacy on matters of procreation under the first, fourth, fifth, ninth, and fourteenth amendments.

Through statutory interpretation of the two Virginia sterilization statutes at issue, the three-judge federal court found "that together they grant civil and criminal immunity to doctors who perform sterilizations when all conditions of the statute are met." *Id.* at 3. Although a statutory grant of immunity under certain conditions might encourage a physician to comply with those conditions before performing a sterilization, the *Temple* court held that the statute did not prohibit the operation when those conditions were not met. *Id.* at 4. As the court was of the opinion that sterilization without spousal consent was not prohibited by law there was no infringement of the plaintiff's right to privacy. *Id.* at 5.

118. VA. CODE ANN. § 32-423 (Cum. Supp. 1976) provided:

It shall be lawful for any physician or surgeon licensed by this State, when so requested by any person who has attained the age of twenty-one years, to perform, upon such person a vasectomy, or salpingectomy, or other surgical sexual sterilization procedure, as the case may be, provided a request in writing is made by such person and by his spouse, if there be one, prior to the performance of such surgical operation and provided further, that prior to or at the time of such request a full and reasonable medical explanation is given by such physician or surgeon to such person as to the meaning and consequences of such operation. No such request shall be necessary for the spouse of the person requesting such surgical operation if the person requesting such operation shall, at the time of the request, state in writing under oath that they have lived separate and apart without any cohabitation and without interruption for a period of one year or more immediately prior to such sworn statement and request or if the person requesting such operation exhibits an executed separation agreement signed by both spouses or a certified copy of a decree of divorce from bed and board. Provided, however, that no such surgical operation shall be performed pursuant to the provisions of this section prior to thirty days from the date of consent or request therefor on any person who has not theretofore become the parent of a child.

This statute has been amended. See VA. CODE ANN. § 32-423 (Cum. Supp. 1977).

119. VA. CODE ANN. § 32-426 (Repl. Vol. 1973), provided:

Subject to the rules of law applicable generally to negligence, no physician or surgeon licensed by this State shall be liable either civilly or criminally by reason of having performed a vasectomy, salpingectomy, or other surgical sexual sterilization procedure authorized by the provisions of this chapter upon any person in this State.

actually prohibit sterilization when spousal consent was absent.

The *Temple* court's statutory interpretation is tenuous. The defendant hospital's regulation prohibited sterilization without spousal consent; the effect is the same whether prohibited by the state or the hospital. In view of the public character of the defendant, a challenge to the hospital's regulation requiring spousal consent prior to sterilization should succeed. If the Court's decision in *Planned Parenthood v. Danforth*<sup>120</sup> concerning spousal consent requirements for abortion is logically extended, consent requirements for sterilization may also be unconstitutional.

### B. Parental Consent Requirements for Sterilization Operations

As a practical matter, not many minors desire to end their reproductive capacity. However, for those minors who do, sterilization operations are severely circumscribed.<sup>121</sup> Because it is irreversible, a sterilization is not likely to be performed with the minor's consent alone.<sup>122</sup> Litigation on steri-

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120. 428 U.S. 52 (1976).

121. The few states which have enacted legislation permitting such operations impose much more restrictive barriers on a minor than an adult seeking sterilization. See, e.g., VA. CODE ANN. § 32-424 (Cum. Supp. 1976), which provides:

Any such physician or surgeon may perform a vasectomy, salpingectomy, or other surgical sexual sterilization procedure upon any person under the age of twenty-one years, provided that the circuit court of the county or city wherein such minor resides, upon petition of the parent or parents, if they be living, or the committee, guardian, or next friend of such minor, shall determine that the operation is in the best interest of such minor and society; and further that said minor is afflicted with any hereditary form of mental illness that is recurrent, or with mental retardation, or that the health of such minor would be endangered by a pregnancy, and shall enter an order authorizing the physician or surgeon to perform such operation as such order has become final. In any such proceeding, the minor shall be made a party defendant and served with process, a discreet and competent attorney-at-law shall be appointed as guardian ad litem for such minor to faithfully represent and protect its interest, and to otherwise comply with the provisions of § 8-88 of the Code of Virginia. The judge of the court in which the petition is filed may, at his discretion, waive all fees and court costs in connection with such court proceeding.

122. Even though at least one state supreme court decision, *Smith v. Seibly*, 72 Wash. 2d 16, 431 P.2d 719 (1967), has held that a minor may give effective consent to a vasectomy, the decision was based on the "emancipated minor" exception to the requirement of parental consent. The minor in *Smith* was eighteen years old (at a time when the age of majority was twenty-one years of age), self supporting, and independent of his parents. The court held that he could give a valid consent to the surgery, provided that a full disclosure of the consequence of the surgery was made in comprehensible terms by the physician. *Id.* at 723. The *Smith* case appears to be authority for giving a minor, emancipated upon marriage, the legal capacity to consent to sterilization. However, in those states which emancipate minors for the treatment of pregnancy, the performance of a sterilization operation may be excluded from the services for which a minor may give effective consent. VA. CODE ANN. § 32-137(7)(Cum.

lization has been far less extensive than on either abortion or contraception. The litigation which does exist is centered around the granting of federal family planning assistance<sup>123</sup> with the proviso that competent persons below the age of eighteen can give effective consent to sterilization operations.<sup>124</sup>

The enforcement of that proviso was permanently enjoined by the federal district court in *Relf v. Weinberger*<sup>125</sup> because the Secretary of Health, Education and Welfare had no statutory authority to "fund the sterilization of any person incompetent under state law to consent to such an operation, whether because of minority or of mental deficiency."<sup>126</sup> When the Secretary proposed a modification to the regulation which barred all sterilization of persons under twenty-one years of age and persons mentally incompetent under state law, the court in *Relf v. Mathews*<sup>127</sup> ruled that the new regulation would provide for sterilizations contrary to state law. The present regulations reflect the *Mathews* decision as they provide that services cannot be provided in contravention of applicable state laws.

Although the Supreme Court has not accorded fundamental status to the right to sterilization, lower courts have indicated that this would be an appropriate and logical extension of the right of privacy in obtaining

Supp. 1977). Where states lack legislation other than "mature minor" statutes and also lack judicial decisions concerning sterilization, it appears that a sterilization operation could not be performed without parental consent. Dunn, *supra* note 7, at 12.

123. Public Health Service Act, § 1007, 42 U.S.C.A. § 300a-5 (1970); Social Security Act §§ 402(a)(15), 508(a), 1905(a)(4), 42 U.S.C.A. §§ 602(a)(15), 708(a), 1396d(a)(4) (1970).

124. The minor's decision to be sterilized was reviewed by a special committee which determined whether the sterilization was in the best interest of the minor, but parental consent was not required. 42 C.F.R. § 50.206(a)(b)(1, 2) (1974); 45 C.F.R. § 205.35(a)(4)(i)(A, B) (1974); 42 C.F.R. § 50.203(c) (1974); 45 C.F.R. § 205.35(a)(5)(ii) (1974). These regulations have since been revised. See note 127 and accompanying text *infra*.

125. 372 F. Supp. 1196 (D.D.C. 1974). The court noted that there was uncontroverted evidence in the record that minors, incompetents, and poor people had been improperly coerced into submitting to an involuntary sterilization operation under threats that federal welfare benefits would be withdrawn if they refused the sterilization. *Id.* at 1199.

126. *Id.* at 1201. The Secretary could not demonstrate to the *Weinberger* court's satisfaction that Congress deemed minors capable of voluntarily consenting to an "irreversible operation involving the basic human right to procreate." *Id.* at 1202.

127. 403 F. Supp. 1235 (D.D.C. 1975). The court considered the proposed federal standard of voluntariness and rejected it. The *Mathews* court was unwilling to enter an order which would authorize the sterilization of minors contrary to state law; such an order would purport to affect the rights of minors to later challenge "the intrusion upon their person on the ground it was conducted in a manner inconsistent with applicable state law." *Id.* at 1239. The *Mathews* court also felt the regulation should be considered through the rule-making process, after publication in the *Federal Register*, so that it will be structured with due regard for the views of the states.



abortions which was recognized in *Roe* and *Doe*.<sup>128</sup> In addition, the privacy right in using contraceptives, which was articulated in *Griswold*, could be extended to support the inclusion of contraceptive sterilization into that fundamental right.<sup>129</sup> As the "distinction between the use of contraceptives and the particular method chosen is not great,"<sup>130</sup> the right of privacy may be deemed to include the right to select the desired method of contraception.

In view of the Supreme Court's decisions reflecting the existence of a right to decide matters affecting childbearing, the right to sterilization presents a direct conflict which must be resolved by the legislatures and the courts. The abuses of inadequate safeguards have been well documented.<sup>131</sup> It is clear that if the federal government or the state is to promulgate regulations protecting either right, the regulations must express a balance between those interests.<sup>132</sup>

### CONCLUSION

The recognition of a minor's constitutional right to privacy has greatly increased the minor's access to medical services concerning reproductive capacity and sexual activity. Courts and legislatures will continue their attempts to define the limits in the extension of adult rights to minors. Yet no unalterable lines can be drawn. For as Justice Brennan so aptly stated, "[t]he question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible to precise answer."<sup>133</sup>

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128. *Hathaway v. Worchester City Hosp.*, 341 F. Supp. 1385 (D. Mass. 1972), *aff'd*, 475 F.2d 701 (1st Cir. 1973); *Doe v. North Ottawa Community Hosp. Authority*, Civ. No. 2706 (Ottawa, Mich. Cir. Ct., May 15, 1973); *Ponter v. Ponter*, 135 N.J. Super. 50, 342 A.2d 574 (1975); *Murray v. Vandevander*, 522 P.2d 302 (Okla. Ct. App. 1974); *see note 22 supra*.

129. *The Need for Regulation*, *supra* note 114, at 89; *see note 22 supra*.

130. *Id.*

131. *See generally Id.*

132. *Id.* at 92.

133. *Carey v. Population Services Int'l*, 97 S. Ct. 2010, 2020 (1977).