Dispensing Birth Control in Public Schools: Do Parents Have A Right To Know?

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I. INTRODUCTION

With the rise of unwanted, adolescent pregnancies reaching epidemic proportions, some public high schools have reacted by sponsoring family planning clinics which dispense birth control devices to minors without notifying parents or obtaining their consent. Many parents are outraged with this practice. Traditionally, constitutional principles governing fundamental privacy rights guarantee parents the right to the care, custody and education of their minor children.[1] Thus, parents view the lack of notification or consent requirements as a usurpation of their traditional roles. Furthermore, constitutional rights of privacy have been extended to mature, emancipated minors in connection with their decisions to engage in sexual activity, to have an abortion, and to obtain contraceptives.[2] Family planning services provided by school sponsored clinics have received wide-spread attention. As of this writing, courts have not yet addressed the issue of whether this practice may be challenged by parents on the basis of a violation of their constitutional rights to the care and management of their children.

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[1] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972) ("recognizing that values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society"); Ginsberg v. New York, 390 U.S. 629, 639 (1968) (recognizing Constitutional protection of parents' rights "to direct the rearing of their children"); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (recognizing parents rights "to direct the upbringing and education of children"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing that fourteenth amendment guarantees the right "to marry, establish a home and bring up children"). For a discussion of these cases, see *infra* notes 40-53 and accompanying text.

[2] *See, e.g.*, City of Akron v. Akron Center for Reproduction Health, Inc., 462 U.S. 416, 439-40 (1983); Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft, 462 U.S. 476, 490-91 (1983); H.L. v. Matheson, 450 U.S. 398, 407-08 (1981); Bellotti v. Baird, 443 U.S. 622, 643-44 (1979); Carey v. Population Services Int'l, 431 U.S. 678, 693-94 (1977); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976) (all holding that minors have a right to demonstrate their maturity to make decisions with respect to obtaining abortions or contraceptives before the state imposes parental consent requirements). *See also infra* text accompanying notes 55-78 for a discussion of these cases.

In 1982 and 1983, several courts addressed a legal challenge to Title X,[3] an amendment to the Public Health Service Act.[4] In 1983, the Department of Health and Human Services implemented Title X by promulgating regulations requiring federally funded family planning clinics to notify parents or guardians of unemancipated minors when prescription contraceptive devices were distributed to their children.[5] Cases, however, such as *New York v. Schweiker*[6] and *Planned Parenthood Federation of America v. Schweiker*[7] (*Planned Parenthood*) rejected the argument that under Title X the federal government could mandate that federally funded family planning clinics notify parents or guardians of minor children to whom prescription birth control devices were distributed.

The clinics argued persuasively that the notification requirement would deter sexually active adolescents from seeking medically supervised services to obtain contraceptives.[8] Additionally, they argued that forcing disclosure of sensitive physician-patient information would breach the guarantee of confidentiality made to the minor recipients of the clinical services.[9] By declining to

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[3] Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1506 (codified as amended at 42 U.S.C. § 300 (1982)).

[4] Public Health Service Act of 1944, ch. 373, 58 Stat. 682 (codified as amended at 42 U.S.C. § 201 (1982)).

[5] 42 C.F.R. § 59.5(a)(12) (1983) (superseded 42 C.F.R. § 59.5 (1984)). The regulation provided that Title X clinics must:

> (12) Encourage, to the extent practical, family participation in the provision of the project's services to unemancipated minors. Notwithstanding any other requirement of this subpart, a project shall, . . .
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> . . . .
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> (ii) Where State law requires the notification or consent of a parent or guardian to the provision of family planning services to an individual who is an unemancipated minor under State law, provide such services only in the compliance with such law.

Id. Subsequent to court determinations rejecting the notice regulations, the Department of Health and Human Services issued a final rule removing subsection 12 in its entirety from governing requirements for family planning projects. *See* 42 C.F.R. § 59.5 (1984).

[6] 557 F. Supp. 354, 361 (S.D.N.Y. 1983).

[7] 559 F. Supp. 658, 668 (D.D.C.), *aff'd sub nom.* Planned Parenthood Federation of America, Inc. v. Heckler, 712 F.2d 650 (D.C. Cir. 1983).

[8] In *Planned Parenthood*, the clinics submitted studies and affidavits which clearly indicated that the regulations would deter minors from seeking services from the clinics and would result in an increase in unwanted pregnancies. 559 F. Supp. at 663-64. The clinic physicians in *Schweiker* presented the same argument and added that without the benefit of Title X services sexually transmitted diseases could not be prevented, detected or treated. 557 F. Supp. at 358-59.

[9] The family services clinics argued: "[C]onfidentiality is not only part of the professional responsibility of the health care professionals . . . . This duty has been

enforce the notification provision, a clinic risked forfeiting federal grants and consequent curtailment of its operations. The clinics maintained that the element of confidentiality was just as essential to their operation as federal funding, and without such privacy they could not function effectively.[10]

The clinics' arguments were compelling. The language of Title X evidences a congressional intent to encourage family planning and participation in Title X programs.[11] In devising such legislation, Congress presumably understood that privacy and confidentiality were essential to the success of these clinics. An unresolved issue was whether "family planning and participation" should be interpreted to include parents of unemancipated adolescents who seek the services of these clinics.

This article will explore the question of whether parents could wage a successful legal challenge against public schools which operate clinics that dispense birth control devices to children without notifying their parents. The issue will be addressed in light of amendments proposed in 1983 to the federal regulations implementing Title X of the Public Health Service Act and in the context of such cases as *Planned Parenthood* and *Schweiker* which struck down the notification requirement. Included in a discussion of case law will be a review of certain family privacy right cases which considered the practical consequences that might have resulted from imposing a notification requirement. Finally, the article will balance the competing interests of parents and children and conclude with arguments which may assist parents in implementing a notification requirement in the absence of specific legislation.

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long recognized as inviolate by the clinics, particularly with respect to sensitive information such as a patient's decision about sexuality or contraceptives." *Planned Parenthood*, 559 F. Supp. at 666.

10 *See id.* at 665; *Schweiker*, 557 F. Supp. at 360.

11 42 U.S.C. § 300(a) (1982). Under the section governing grants for family planning services, subsection (a) provides:

> The Secretary is authorized to make grants to and enter into contracts with the public or non-profit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents). To the extent practical, entities which receive grants or contracts under this subsection shall encourage familiy (sic) participation in projects assisted under this subsection.

Id.

II. BACKGROUND OF TITLE X

On July 1, 1944, Congress enacted the Public Health Service Act to establish a system of funding for the research, prevention and treatment of, and education relating to physical and mental diseases.[12] In 1970, Congress amended the Public Health Service Act by adding Title X which established a nationwide family planning program. This amendment, entitled the Family Planning Services and Population Research Act (Title X), was promulgated to promote public health and welfare by coordinating and making available a comprehensive program of voluntary family planning services.[13] Under Title X, Congress expressly authorized the Department of Health, Education and Welfare and subsequently the Department of Health and Human Services (Agency)[14] "to make grants to and enter into contracts with public or non-profit private entities" that would provide a broad range of family planning services.[15]

Over the years, several amendments were added to Title X, one of which was the 1981 amendment which provided that "to

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[12] Public Health Service Act, ch. 373, § 301, 58 Stat. 682, 691-92 (1944) (codified as amended at 42 U.S.C. § 241(a) (1982)). More specifically, the Act provides:

> (a) The Secretary shall conduct in the Service, and encourage, cooperate with, and render assistance to other appropriate public authorities, scientific institutions, and scientists in the conduct of, and promote the coordination of, research, investigations, experiments, demonstrations, and studies relating to the causes, diagnosis, treatment, control, and prevention of physical and mental diseases and impairments of man. . . .

42 U.S.C. § 241(a) (1982). Under this subsection, the term "Secretary" refers to the Secretary of Health and Human Services. *Id.* § 201(c). In its original enactment, the Act delegated to the Surgeon General, under the supervision of the Federal Security Administrator, the authority to implement the Act. *See* ch. 373, §§ 201, 301, 58 Stat. 583, 691-92 (1944) (codified as amended at 42 U.S.C. § 202 (1982)). However, pursuant to President Lyndon B. Johnson's 1966 Reorganization Plan, functions performed by the Surgeon General were transferred to the Secretary of Health, Education and Welfare. Reorg. Plan No. 3 of 1966, 3 C.F.R. 191-92 (1966), *reprinted in* 42 U.S.C. app. at 46 (1982) *and* 80 Stat. 1610 (1966). A later amendment substituted the "Surgeon General" designation with "Secretary." Act of Nov. 9, 1978, Pub. L. 95-622, 92 Stat. 3434 (codified as amended at 42 U.S.C. 241 (1982)).

In 1979, the Department of Health, Education and Welfare was renamed the Department of Health and Human Services. Act of Oct. 17, 1979, Pub. L. No. 96-88, 93 Stat. 695 (codified as amended at 20 U.S.C. § 3508 (1982)). Thus, today, the Public Health Service Act is implemented by regulations of the Department of Health and Human Services.

[13] Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1506 (codified as amended at 42 U.S.C. § 300 (1982)).

[14] *See supra* note 12.

[15] 42 U.S.C. § 300(a) (1982).

the extent practical, entities which receive grants or contracts under this subsection *shall encourage familiy* (sic) *participation* in projects assisted under this subsection."[16] In 1982, the Agency proposed regulations to implement the 1981 amendment.[17] The proposed regulations provided that clinics receiving federal funding would be required to notify parents or guardians within ten days after dispensing contraceptive drugs or devices to unemancipated minors. The proposed regulations also purported to redefine the statutory phrase "low-income family" by removing the requirement that clinics evaluate the financial eligibility of a minor on the basis of a minor's own resources. Thus, "need" would be defined on the basis of *parents'* financial status. The Agency adopted the proposed regulations.[18] Shortly thereafter, this regulatory action became the subject of litigation. Clinics would argue that the required disclosure of parental resources was tantamount to a de facto notification requirement.

III. Litigation Challenging Title X Notification Requirements

The Agency's newly adopted regulations were challenged promptly in different federal district courts by Title X grantees in *Planned Parenthood* and *Schweiker*. Decided only days apart, these cases arose out of remarkably similar factual circumstances.[19] In both cases, the courts granted the respective plaintiffs' requests for injunctive relief.[20]

Planned Parenthood involved consolidated actions brought by Planned Parenthood Federation of America, Inc. and its member affiliates and The National Family Planning and Reproductive Health Association, Inc. against the Department of Health and Human Services and its then Secretary, Richard Schweiker.[21] In the United States District Court for the District of Columbia, the plaintiffs argued that the regulatory promulgations exceeded statutory authority and undermined "congressional intent of ar-

16 *See* Family Planning Services and Population Research Act of 1970 Pub. L. No. 91-572, § 6, 84 Stat. 1506.

17 42 C.F.R. § 59 (1983).

18 *Id.*

19 In *Planned Parenthood*, preliminary injunctive relief was granted on February 18, 1983 and a final order was handed down on March 2, 1983. 559 F. Supp. at 660. In *Schweiker* preliminary injunctive relief was granted on February 14, 1983. 557 F. Supp. at 356.

20 *See Planned Parenthood*, 559 F. Supp. at 669-70; *Schweiker*, 557 F. Supp. at 362-63.

21 *Planned Parenthood*, 559 F. Supp. at 661.

resting the epidemic of teenage pregnancies."[22] To this end, Title X required its grantees to respect their patients' confidentiality. In addition, the plaintiffs alleged that the notification requirements were arbitrary and capricious. Lastly, the plaintiffs argued that the regulations violated minors' constitutional rights to receive Title X family planning services.[23]

In *Schweiker*, an action was brought against Secretary Schweiker by the State of New York, the New York State Department of Health, the Medical and Health Research Association of New York City, Inc. (MHRA), and private physicians who were authorized to implement Title X services. Appearing before the United States District Court for the Southern District of New York, the plaintiffs in *Schweiker* challenged the constitutionality of the Agency's regulatory provisions. Specifically, they alleged that the parental notification requirements contravened Congress' intent to ensure the availability of Title X services to adolescents.[24] Furthermore, these requirements would force Title X grantees to breach their duty of patient confidentiality. Moreover, the plaintiffs challenged the regulations as constitutionally violative of minors' rights to privacy and equal protection.[25]

In defense of the government's proposed regulations in both actions, Secretary Schweiker challenged the plaintiffs' contentions that implementation of the proposed regulations was contrary to the congressional intent of encouraging use of family service clinics because it would deter sexually active minors from using such clinics and obtaining contraceptive devices. In *Planned Parenthood*, the Secretary argued that the notification requirement would not necessarily deter minors from going to these clinics.[26] He also argued that to the extent that it did, minors could nonetheless obtain prescription devices elsewhere, use non-prescription methods of birth control or abstain from sexual activity. Moreover, in *Schweiker*, the Secretary maintained that use of the word "encourage" in the legislation mandating that clinics "shall encourage family participation" in Title X pro-

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22 *Id.* at 668 (citing 124 CONG. REC. 37,044 (1978)).

23 *Id.* at 669.

24 *Schweiker*, 557 F. Supp. at 357.

25 *Id.*

26 *Planned Parenthood*, 559 F. Supp. at 663. The Secretary's argument was made in the context of his challenge to the standing of the minors to bring the action. The Secretary argued that the injury was speculative, as minors might not be deterred or could seek alternative sources of birth control. Thus, he concluded that the regulations would not cause an increase in unwanted teenage pregnancies and therefore the minors were without sufficient injury to establish standing. *Id.*

grams reflected Congressional intent that participants involve their families in decisions concerning the use of contraceptive devices.[27] The Secretary argued that the amendment would be a "nullity" if its language was not construed to impose a parental notice requirement, and further, encouraging parental participation was impossible without a parental notice requirement. Furthermore, the Secretary argued that "the notice requirement [did] not mandate family involvement, it just facilitat[ed] it."[28]

Additionally, Secretary Schweiker asserted that a minor's confidentiality would not be compromised by the proposed regulations. Quite simply, the Secretary argued that minors would waive that privilege as a condition of services. Therefore, Secretary Schweiker concluded that there was "no guarantee of confidentiality to be breached."[29]

The response of the federal courts was sharp and unequivocal. The *Planned Parenthood* and *Schweiker* courts each concluded that the congressional intent behind Title X's 1981 amendment did not mandate a parental notice requirement.[30] In both courts' view, the Agency was not authorized to impose parental notification as a condition to receiving Title X services.

In response to the Secretary's contention that notification need not be characterized as a breach of confidentiality, the *Planned Parenthood* court stated that disclosure of sensitive physician-patient information pursuant to a waiver, certain to have been obtained under coercive circumstances, would inherently violate the recipient's right of confidentiality.[31] Additionally, the court rejected the Secretary's claim that the phrase "shall encourage family participation" mandated parental notification. The court stated that "[t]he Secretary attempt[ed] to avoid the plain language of the statute by engaging in a process of statutory construction by selective underlining."[32]

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27 *See Schweiker*, 557 F. Supp. at 361 (citing Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504 (codified as amended at 42 U.S.C. § 300 (1982)).

28 *Id.* (emphasis deleted) These notice regulations were reasonable, the Secretary argued, because they limited the parental notification requirement to the use of prescription contraceptives in an area "where parental involvement is most needed because of the documented side effects" related to their use. *Id.*

29 *Planned Parenthood*, 559 F. Supp. at 666.

30 *See Planned Parenthood*, 559 F. Supp. at 667-68; *Schweiker*, 557 F. Supp. at 361-62.

31 *Planned Parenthood*, 559 F. Supp. at 666.

32 *Id.* at 667. The Secretary maintained that the Act imposed a "non-discretionary duty" on the clinics to notify the parents of their minors' decision to seek Title X services. *Id.* at 667-68. The district court responded:

In a similar vein, the *Schweiker* court rejected the Secretary's contention that parental notification was consistent with Title X's 1981 amendment which provided that program grantees "shall encourage family participation."[33] Characterizing the Secretary's argument as "nothing more than an exercise in mere sophistry," the court ruled that the legislative history of the 1981 amendment did not mandate parental or family participation, but rather required that Title X grantees "encourage their clients to include their families" in family planning decisionmaking.[34] The court postulated that had Congress intended to depart from this position, it would have done so expressly, either through Title X or in its legislative history.

Finally, having decided that the parental notification requirement was invalid, the *Planned Parenthood* and *Schweiker* courts also determined that the regulation redefining a low income family, which required that a minor's eligibility for services be based upon the parents' income rather than a minor's own financial resources, must also fail.[35] The courts reasoned that a provision requiring a minor to furnish parental financial information to establish her own eligibility would be inconsistent with the Act's confidentiality provisions and itself tantamount to a notification provision.

The *Schweiker* court also struck down this "parental notification requirement" as illegal because it would require the minor seeking Title X services to obtain parental financial support.[36] The *Planned Parenthood* court characterized the regulation as creating a "*de facto* parental notification requirement" and stated further that parents could prevent a minor from obtaining Title X

> This court finds the Secretary's reading of the statute unpersuasive. The word "shall" remains an auxiliary verb in that sentence, and is auxiliary to the non-mandatory word "encourage." Thus grantees are required to encourage family participation, but they cannot take definitive, irrevocable steps that will invariably result in family participation in a minor's family planning decision.

Id. at 668 (footnote omitted).

[33] *Schweiker*, 557 F. Supp. at 361. *See supra* note 26 and accompanying text (discussing the Secretary's arguments).

[34] *Schweiker*, 557 F. Supp. at 361.

[35] *Planned Parenthood*, 559 F. Supp. at 669; *Schweiker*, 557 F. Supp. at 362. In *Schweiker* the Secretary argued that under the prior regulations, most teenagers could utilize Title X services regardless of family income, and consequently the regulations discriminated against those who were genuinely in financial need. Thus, the Secretary argued, the new regulations were merely intended to correct the prior inequity. *Schweiker*, 557 F. Supp. at 362.

[36] *Schweiker*, 557 F. Supp. at 362.

services merely by withholding payment for them.[37]

Accordingly, both the District Court for the District of Columbia in *Planned Parenthood* and the District Court for the Southern District of New York in *Schweiker* granted plaintiffs' request for injunctive relief and enjoined enforcement of the notice regulations.[38] In its final order, the *Planned Parenthood* court ruled that the regulations exceeded the authority conferred upon the Agency by Title X and struck down the parental notification requirement as invalid. On appeal, the District of Columbia Circuit affirmed the *Planned Parenthood* court's construction of the 1981 amendment as reflective of congressional intent.[39]

IV. Development of Family Privacy Rights

The United States Supreme Court has addressed issues relating to marriage, procreation, family relationships, contraception, child rearing and education, all of which fall under the rubric of family privacy rights decisions. A broad spectrum of Supreme Court decisions is indicative of an attempt to establish

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[37] *Planned Parenthood*, 559 F. Supp. at 669.

[38] *See supra* notes 19-20.

[39] Planned Parenthood Federation of America, Inc. v. Heckler, 712 F.2d 650, 655-56 (D.C. Cir. 1983). The circuit court stated:

> [T]here are indeed "compelling indications" that the Secretary had misconstrued Congress' intent in enacting the 1981 amendment to Title X. Our own careful review of the language of the statute and its legislative history makes it clear that these regulations not only violate Congress' specific intent as to the issue of parental notification, but also undermine the fundamental purposes of the Title X program.

Id. at 655-56. In affirming the district court's interpretation of the Act, the court of appeals stated:

> Certainly the use of the word "shall" presumptively implies some type of mandatory obligation on grantees. But the nature of that obligation is defined by the word "encourage." As the District Court noted, Congress' choice of this permissive and non-obligatory term is in itself revealing. Had Congress intended to mandate parental involvement, it could easily have done so with more appropriate and less ambiguous language such as "shall *require* family participation" or "shall *notify* the family."
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> Indeed, the very concept of encouragement is further weakened by the use of a qualifier "to the extent practical." While no specific content may be given that phrase from the face of the statute, its use indicates Congress' intent that the goal of encouraging family participation may well have to give way to other, more practical considerations. Contrary to appellant's assertions, then, the express language of the statute certainly does not lend support to the Secretary's interpretation of the amendment as "reasonably contemplat[ing]" a parental notification requirement.

Id. (footnotes omitted).

the parameters of parental rights with respect to parental involvement and discretion in child-rearing. A brief survey of landmark cases illustrates a judicial deference to parental authority in the care and management of children, particularly in the area of moral and educational upbringing.

For example, as early as the 1920's, the Supreme Court in *Meyer v. Nebraska*[40] referred to the fourteenth amendment's protection of an individual's right "to marry, establish a home and bring up children."[41] In *Meyer*, the state of Nebraska passed a law forbidding the instruction of foreign language in any school in the state unless the student had completed the eighth grade. The Supreme Court held this law to be unconstitutional as a violation of the fourteenth amendment's due process clause because it not only deprived teachers of the liberty to teach, but it also removed from parents the liberty to select teachers to instruct their children.[42]

Similarly, in *Pierce v. Society of Sisters*,[43] the Court attempted to extend the fourteenth amendment's protection to parental rights by imposing limitations on the ability of the state to interfere with child-rearing practices. The Court struck down an Oregon compulsory education statute which effectively would have prohibited parents from sending their children to private or religious schools. The Court stated that "[t]he child is not the mere creature of the [s]tate; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[44] Forty-seven years later, the Supreme Court characterized the *Pierce* decision as a "charter of the rights of parents to direct the religious upbringing of their children."[45]

In *Ginsberg v. New York*,[46] the Supreme Court upheld a New York statute prohibiting the sale of pornographic magazines to minors under age seventeen.[47] In addition to identifying an "independent [state] interest in the well-being of its youth," the *Ginsberg* Court further justified the statutory restriction on grounds that "constitutional interpretation has consistently rec-

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40 262 U.S. 390 (1923).
41 *Id.* at 399.
42 *See id.* at 400.
43 268 U.S. 510 (1925).
44 *Id.* at 535.
45 Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).
46 390 U.S. 629 (1968).
47 *Id.* at 633.

ognized 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."[48] Thus, rather than disposing of *Ginsberg* solely on the strength of its state interest rationale, the Court took the opportunity to specifically recognize parental authority as a concept distinct from the parens patriae role of the state in directing and protecting the upbringing of minor children.[49]

In 1972, in *Wisconsin v. Yoder*,[50] the Supreme Court refused to enforce the state's compulsory school attendance law against a group of Amish parents. At issue in *Yoder* was the state's interest in uniform compulsory formal secondary education, and its alleged encroachment on the rights of the Amish parents and their children to practice their religious beliefs by avoiding exposure to the outside world. In its opinion, the Supreme Court acknowledged that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[51] The Court, however, took great pains to note that its decision, in its application, was limited to the Amish whose "deep religious conviction . . . [was] intimately related to daily living."[52] Since the Court was not faced with the issue of an Amish minor's desire to attend a public high school, it did not address the competing interests of parents, their minor children and the state.[53]

This brief survey of the constitutional commitment to parental authority highlights judicial recognition and protection of parents' claims to authority in the upbringing of their children. Although the arguments concerning parental notification upon dispensing birth control devices to minor children have not been premised solely upon parental rights, a successful challenge might be brought on that basis.

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48 *Id.* at 639-40.

49 *See also* Stanley v. Illinois, 405 U.S. 645 (1972). In *Stanley*, where the Supreme Court struck down an Illinois statute that discriminated against fathers of illegitimate children, the Court issued one of its strongest statements promoting parental interests in the "companionship, care, custody and management, of [their] children." *Id.* at 651. Justice White stated that a parent's private interest in his child "undeniably warrants deference, and, absent a powerful countervailing interest, protection." *Id.*

50 406 U.S. 205 (1972).

51 *Id.* at 232.

52 *Id.* at 216.

53 *Id.* at 231. Rather, the Court noted that their decision in *Yoder* "involve[d] the fundamental interest of parents, as contrasted with that of the [s]tate, to guide the religious future and education of their children." *Id.* at 232.

V. RIGHTS OF MINORS

In decisions affecting procreation, the Supreme Court also has recognized that minors as well as adults possess a constitutional right to privacy.[54] In *Planned Parenthood of Central Missouri v. Danforth*,[55] the United States Supreme Court in a plurality decision struck down a state statute which imposed a parental consent provision as a pre-requisite to the choice of an unmarried minor to have an abortion. Justice Blackmun wrote that:

> the [s]tate may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy. . . . [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, regardless of the reason for withholding the consent.[56]

Having extended a constitutional right of privacy to minors, the plurality recognized that the state might possess a broad power to regulate the activities of minors, but when this authority extended to imposing parental consent provisions, it stood without sufficient justification.[57] According to Justice Blackmun, the state's interest in preserving the family unit and parental authority was not possible with "such veto power" because the decisions of "the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure."[58] More importantly, the plurality dismissed any independent parental interest in the decision to terminate the child's pregnancy as "no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."[59] The plurality qualified its decision by emphasizing that every minor might not be capable of giving effective consent to an abortion. Nonetheless, the blanket imposition of parental consent as a condition to the minor's

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54 *See* Hartigan v. Zbaraz, 108 S. Ct. 479 (1987) (per curiam); City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 476 (1983); Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft, 462 U.S. 461 (1983); H.L. v. Matheson, 450 U.S. 398 (1981); Bellotti v. Baird, 443 U.S. 622 (1979); Carey v. Population Serv. Int'l, 431 U.S. 678 (1977); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). *See infra* text accompanying notes 55-78 for a discussion of these cases.

55 428 U.S. 52 (1976).

56 *Id.* at 74 (Blackmun, J., plurality).

57 *Id.*

58 *Id.* at 75 (Blackmun, J., plurality).

59 *Id.*

decision to terminate her pregnancy exceeded the state's authority, and served no significant state interest.[60]

Less than a year later, in *Carey v. Population Services International*,[61] the Supreme Court invalidated a New York State statute which prohibited the distribution or sale of contraceptives to minors under sixteen years of age. In a plurality opinion, Justice Brennan stated that since *Danforth* invalidated a blanket prohibition on a minor's right to choose to have an abortion, "the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is *a fortiori* foreclosed."[62] The State of New York argued that minors accessibility to contraceptives would contribute to an increase in sexual activity among minors, and would therefore contravene the state's policy of discouraging this behavior. Justice Brennan dismissed the state's argument as insignificant, adding that the deterrent effect of the state's policy was virtually non-existent.[63]

In 1979, in *Bellotti v. Baird*,[64] the Supreme Court in a plurality decision struck down a Massachusetts statute which prohibited a physician from performing an abortion on a minor under the age of eighteen without parental consent or, alternatively, where parental consent is refused, by a court order. Reiterating the axioms of the *Danforth*, *Ginsberg* and *Pierce* decisions, a plurality of the Court held that the existing state regulation imposed an undue burden upon a minor's right to decide to have an abortion. In *Bellotti*, Justice Powell recognized the state's interest in protecting immature minors but concluded that in the presence of this type of statute, the state must also provide an alternative proceeding whereby a minor can either demonstrate her maturity to make an informed decision as to whether to have an abortion, or despite her immaturity show that an abortion would be in her best interest.[65]

Two years later in *H.L. v. Matheson*,[66] the Supreme Court upheld a Utah statute which imposed a conditional parental notifica-

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60 *See id.*

61 431 U.S. 678 (1977).

62 *Id.* at 694 (Brennan, J., plurality).

63 *Id.* at 695 (Brennan, J., plurality). The plurality rejected the state's argument as never having been taken seriously by any court or commentator. *Id.* at 694 (citing Roe v. Wade, 410 U.S. 113, 148 (1973)) (Brennan, J., plurality). Justice Brennan explained that: "It 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 an abortion] as punishment for fornication." *Id.* (Brennan, J., plurality) (quoting Eisenstadt v. Baird, 405 U.S. 438, 448 (1971).

64 443 U.S. 622 (1979).

65 *Id.* at 643-44, 647-48 (Powell, J., plurality).

66 450 U.S. 398 (1981).

tion requirement upon a physician prior to performing an abortion on an unmarried minor. In *Matheson*, an unmarried, unemancipated fifteen year old challenged the constitutionality of the statute asserting that it was overbroad in its application "to all unmarried minor girls, including those who are mature and emancipated."[67] Declaring that she had failed to adequately demonstrate her maturity, the Court refused to confer upon her the standing necessary to advance her arguments.[68] Instead, the Court turned to a narrow issue:

> the facial constitutionality of a statute requiring a physician to give notice to parents, "if possible," prior to performing an abortion on their minor daughter, (a) when the girl is living with and dependent upon her parents, (b) when she is not emancipated by marriage or otherwise, and (c) when she has made no claim or showing as to her maturity or as to her relations with her parents.[69]

The Supreme Court upheld the statute in its application to this particular class of minors because it served a significant state interest. In the Court's view, the statute did not give parents a blanket veto power over their minor's decision to have an abortion. Due regard, however, was given to the immature minor's inability to make an informed decision, as well as to the parents' appropriate "guiding role" in counseling their children on important decisions.[70] Accordingly, the Court ruled that "a statute setting out a 'mere requirement of parental notice' does not violate the constitutional rights of an immature, dependent minor."[71]

In 1983, the Supreme Court in two companion cases, *City of Akron v. Akron Center for Reproductive Health, Inc.* [72] and *Planned Parenthood Association v. Ashcroft*,[73] addressed the constitutionality of statutory regulations requiring a minor to procure parental consent before obtaining an abortion. In *Akron*, the plurality invalidated the city ordinance on the grounds that it failed to provide the minor with an alternative procedure for demonstrating her maturity as advanced by the *Bellotti* plurality.[74] In *Ashcroft*, however, a plurality of the

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67 *Id.* at 405.

68 *Id.* at 406.

69 *Id.* at 407.

70 *Id.* at 410 (citing Bellotti v. Baird, 443 U.S. 622, 633-39 (1979)) (Powell, J., plurality)).

71 *Id.* at 409 (footnote omitted).

72 462 U.S. 416 (1983).

73 462 U.S. 476 (1983).

74 *Akron*, 462 U.S. at 439-42 (Powell, J., plurality) (citing Bellotti v. Baird, 443 U.S. 622, 643-44 (1979) (Powell, J., plurality)). *See supra* text accompanying note 65.

Court upheld the state statute because it comported with the legal standards established in *Bellotti* and *Akron*.[75] In a case of more recent vintage, *Hartigan v. Zbaraz*,[76] the Supreme Court in a per curiam decision affirmed the Seventh Circuit's decision to enjoin the enforcement of a state statute where the circuit court relied on the well-settled principles concerning "parental consultation and notification" as set forth in *Danforth*, *Bellotti*, *Matheson*, *Akron* and *Ashcroft*.[77]

The Supreme Court has ruled, on more than one recent occasion, that although minors as well as adults have certain fundamental, constitutionally-protected civil rights, their ability to exercise them is not unlimited. For example, in *Danforth*, the plurality recognized that not every minor is capable of giving an effective consent for the termination of her pregnancy and thus may require parental consultation in the decision. Yet it is also clear from the *Danforth* decision that to the extent the minors *can* exercise them, fundamental privacy rights must be protected. The unresolved issue, however, concerns the strength of a minor's right of access to contraception. If this right is "fundamental," the state must demonstrate a compelling interest to justify interference with reasonable exercise of that right. Thus the issue is twofold: first, whether this right is considered "fundamental" and second, if so, whether parental notification would violate the essential nature of that right. A fair interpretation of *Danforth* compels one to concede that, with respect to adults, privacy in the contraception decision is fundamental. Nevertheless, courts have limited minors' ability to exercise other fundamental rights such as the right to vote. In the same light, it is arguable that even if a minor has a fundamental right to obtain con-

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[75] *Ashcroft*, 462 U.S. at 490-93 (Powell, J., plurality) (citing *Bellotti*, 443 U.S. 640-44 (Powell, J., plurality)); *Akron*, 462 U.S. at 439-40 (Powell, J., plurality). The Missouri statute required minors under 18 to have parental or judicial consent prior to having an abortion. *Ashcroft*, 462 U.S. at 479. Judicial consent, however, may be obtained by a showing of emancipation, maturity or in "the best interests of the minor." *Id.* at 479-80 n.4, 492 (Powell, J., plurality) (citing MO. REV. STAT. § 188.028.2 (Supp. 1982)). Justice Powell noted that in satisfying the *Bellotti* and *Akron* requirements "[a] [s]tate's interest in protecting immature minors will sustain a requirement of a consent substitute either parental or judicial." *Id.* at 490-91 (Powell, J., plurality).

[76] Hartigan v. Zbaraz, 108 S. Ct. 479 (1987) (per curiam) *aff'g*, 763 F.2d 1532 (7th Cir. 1985).

[77] *Zbaraz*, 763 F.2d at 1539-44. The Seventh Circuit enjoined the state statute and did not determine whether the notification alternatives were constitutional until the Illinois Supreme Court promulgated rules governing appeals and assuring the minor's confidentiality. *Id.* The Seventh Circuit recognized, however, that parental notification promoted a significant state interest so long as the state provided an alternative for mature minors and immature minors whose best interests necessitated obtaining an abortion. *Id.* at 1537-38.

traceptives, the state, pursuant to a compelling interest, may impose reasonable limitations.[78] Thus resolution of the competing interests depends on whether parental notification is a reasonable limitation on a minor's freedom to exercise this fundamental right.

VI. PARENTAL RIGHTS

Parental rights have been recognized and upheld as fundamental in relation to a state's practice of dispensing prescription contraceptives without mandating parental notification or consent. For example, in *Doe v. Irwin*[79] the United States District Court for the Western District of Michigan, both initially (*Irwin I*) and on remand (*Irwin II*), held that the state's distribution of prescription contraceptive devices to minors without the knowledge or consent of their parents violated the *parents'* constitutionally protected rights of privacy (as well as their rights of free exercise of religion) in the care, control and education of their minor children.[80] The district court's holding was reversed on appeal,[81] and ultimately was denied review by the United States Supreme Court.[82] Upon closer examination, however, the district court's decision is particularly noteworthy because it raises several valid concerns in relation to parental rights which the United States Court of Appeals for the Sixth Circuit left untouched and unresolved.

In *Irwin I*, parents of minor, unemancipated children brought suit against a state funded family planning center and county board of health, alleging that the center's practice of distributing contraceptives to minors without parental knowledge and consent constituted a deprivation of their constitutional rights and privileges as parents to the care and control of their children.[83] Among the clinic's arguments were that the parental rights did not extend to vetoing a minor's decision to obtain contraceptives; that the minor's right to obtain contraceptives and family planning program services was constitutionally protected

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78 *See* Prince v. Massachusetts, 321 U.S. 158, 170 (1944) ("the power of the state to control the conduct of children reaches beyond the scope of its authority over adults".).

79 428 F. Supp. 1198 (W.D. Mich.), *vacated and remanded mem.*, 559 F.2d 1219 (6th Cir.), *on remand*, 441 F. Supp. 1247 (W.D. Mich. 1977), *rev'd*, 615 F.2d 1162 (6th Cir. 1980), *cert. denied*, 449 U.S. 829 (1980).

80 *See Irwin I*, 428 F. Supp. at 1215; *Irwin II*, 441 F. Supp. at 1261.

81 615 F.2d at 1162.

82 449 U.S. at 829.

83 *Irwin I*, 428 F. Supp. at 1200.

by *Danforth*; and that the state had a compelling interest in providing the family planning services to minors.[84] The district court characterized the case as "one of first impression [which] presents a classic confrontation between rights of parents, the rights of their minor, unemancipated children, the rights of the family, and the interests of the [s]tate."[85]

The court, however, rejected all of the defendants' arguments and concluded that parents had a constitutional right to participate in their minor children's decisions to either engage in sexual activity or to assume the medical risks associated with certain contraceptives. Accordingly, the court held that there was no compelling state interest present, and therefore state regulation could not exclude the parents from participating in "such a momentous decision."[86] The court added that even if the minor has a fundamental right to obtain contraceptives without parental *consent*, this right did not mandate the total exclusion of the parents from receiving notification of the decision. In concluding that the clinic's practices did not withstand constitutional scrutiny, the court stated that although the state's goal in protecting the public health and safety may have been well-intended, it was "not warranted in insinuating [its] way into the delicate relationship between parent and child."[87]

The federal court of appeals, in an unpublished opinion, vacated and remanded the *Irwin I* decision for reconsideration in light of *Carey*.[88] On remand, the district court in *Irwin II* reaffirmed and readopted its earlier opinion in *Irwin I* and held that *Carey* fully supported that decision.[89] In its opinion, the district court examined the *Carey* decision in its entirety and noted that there were several factors which distinguished *Irwin I* from *Carey* and which, upon a closer examination, also provided additional support for the *Irwin I* holding. In the district court's view, *Carey* was a plurality opinion, and therefore not binding as an authoritative decision. Secondly, the statute at issue in *Carey* prohibited the distribution of non-prescription as well as prescription contraceptives to minors, while the services in *Irwin I* extended only to prescription contraceptives. The court reasoned that *Irwin I* did not totally prohibit unemancipated minors from exercising a

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84 *Id.*
85 *Id.* at 1200 (footnote omitted).
86 *Id.* at 1209-10.
87 *Id.*
88 559 F.2d at 1219.
89 *Irwin II*, 441 F. Supp. at 1261.

right to obtain contraceptives—all that would be required was "prior parental notification and the opportunity for consultation before that civil right, which surely implicates the capacity of the minor, is exercised."[90] Finally, the most important distinction between *Carey* and *Irwin I* lay in the "unusual" nature of *Irwin I* where parents, not minors, sought to vindicate their constitutionally recognized rights of privacy in the upbringing of their children, against interference by a publicly operated family planning clinic. In sum, the district court stated: "Parental authority is plenary. It prevails over the claims of the state, other outsiders, and the children themselves. There must be some compelling justification for interference."[91]

The United States Court of Appeals for the Sixth Circuit reversed the district court's ruling in *Irwin II*, and held that the clinic's practice of not notifying the parents of their minor children's decisions to obtain contraceptives did not deprive the parents of their liberty rights.[92] Limiting its review to a recognition of the rights of the parents, the minors, and the state, the court examined the traditional principles governing the respective rights and noted that in constitutional precedents involving the competing interests, the state had either required or prohibited a particular activity. This "one fundamental difference" led the court to note that in the *Irwin* case, there was no compulsory notification requirement or prohibition on parents' participation which might have impacted on any parental rights.[93]

Indeed, the state "merely established a voluntary birth control clinic."[94] The Sixth Circuit concluded that the district court had erroneously interpreted the *Carey* plurality as creating a parent's constitutional right to notification by clinics distributing contraceptives to minors. The court concluded that since there was no unconstitutional interference with parental rights of privacy, there was no need to address the question of a competing state interest or to weigh the parents' rights against those of minors. Having framed the issue in terms of whether the Constitution required parental knowledge or consent as a condition to a minor's right to obtain contraceptives, the court, implying a negative response, held that "[i]n the absence of a constitutional requirement for notice to parents, it is clearly a matter for the state

90 *Id.* at 1260.
91 *Id.* at 1249.
92 615 F.2d at 1169.
93 *Id.* at 1168.
94 *Id.*

to determine whether such a requirement is necessary or desirable . . . . There is no basis for a federal court to impose conditions in the absence of an overriding constitutional requirement."[95] The United States Supreme Court denied the petition for writ of certiorari.[96]

The final *Irwin* adjudication leaves several issues unresolved. For example, the federal court of appeals acknowledged the parents' desire to be informed of their minor children's activities, yet it failed to address a practical concern noted in the *Irwin II* opinion: under state law, parents are responsible for the physical well-being of their children and therefore are required to provide for care such as medical treatment when necessary.[97] If the state, without parental notice or consent, supplies a minor child with contraception and the child suffers any of numerous complications associated with use and misuse including, for example, venereal disease, infection, blood clots, etc., parents are responsible for the care and expense of medical treatment. Similarly, if pregnancy results, it is ultimately the parents who are responsible for the medical costs of an abortion or carrying a pregnancy to term, regardless of whether the state played a role in the pregnancy.

VII. A Balance of Interests

Parents seeking to challenge the rights of minors to obtain access to contraceptive devices without notification undoubtedly face an uphill battle. Arguably, the most critical invasion of parental privacy rights suffered in cases such as *Irwin* is the parents' loss of involvement in their children's upbringing with respect to the minor's decision to engage in sexual activity. When a state agency undertakes to provide minor children with contraceptive devices, it assumes a parens patriae posture and, at least implicitly, sanctions sexual activity, usually in derogation of parental approval. The fact that a publicly operated clinic provides some counseling prior to dispensing birth control devices fails to mitigate the fact that a minor's primary caretaker and guardian is effectively denied knowledge and authority in that all-important aspect of his or her child's upbringing and guidance.

Clinics can argue that a parent seeking involvement in his or her child's decisions to initiate sexual activity nevertheless will

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95 *Id.* at 1169.
96 449 U.S. 829 (1980).
97 *See Irwin II*, 441 F. Supp. at 1252.

continue to have the opportunity to influence the child with the same moral and ethical values that would be triggered if the parent were notified. The district court in *Irwin II* categorically rejected this argument and commented that "[t]he fact that the defendant surreptitiously interacts with the child and secretly provides the child with prescriptive, potentially hazardous, contraceptives has the practical result of restricting parents' alternatives both in the exercise of authority in their own households and of responsibility to direct the rearing of their children."[98] In short, the *Irwin II* court noted that while the absence of notification or consent requirements did not prohibit parents from inculcating their moral values upon their children, sole reliance on such parental initiative unduly burdened the parents in the exercise of their privacy rights. Indeed, a lack of parental notification and consent requirements unfairly forces the parent to anticipate a plethora of situations and moral questions which may arise during the course of the child's formative years.

Furthermore, even to the extent that parents should be aware that their children will be confronting the decision about sexual involvement, it may be impossible for them to anticipate exactly when in their children's lives the time is ripe for discussion. For some children it may be as soon as the early teens; for others the issues are not meaningful at all during their minority. This, of course, does not undermine parents' ongoing obligation to provide general guidance and direction as they see fit. Nevertheless, the actions of these clinics in covertly interacting with children and thereby making it possible for minors to circumvent parental involvement deprives parents of the opportunity to interact or counteract the clinics' advice at the time that the decisions are made.[99]

Finally, the state's involvement may encourage some parents to avoid confronting the entire issue which they might otherwise recognize as their responsibility. Parents often have difficulty discussing sexual activity with their children on a practical and meaningful level. This does not indicate their lack of desire to communicate or respond to their children's questions in a positive or constructive manner. Moreover, children themselves may

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98 *Id.* at 1253.

99 *See id.* Chief Judge Fox asserted that "so long as [a Title X clinic] continues to treat children in a manner whereby the parents of those children cannot become aware of the contact and continues to prescribe potentially hazardous medication to such children in the absence of notification to their parents, the parental rights . . . will continue to be invaded." *Id.*

desire parental involvement but may be unable to approach their parents. Thus, by interfering in this delicate relationship, the state may be depriving both parents and their children of potentially meaningful interactions by encouraging minors to exclude their parents in their initial decision to engage in sexual activity.

The Supreme Court's rationale in *Bellotti*,[100] which was subsequently adopted by the Seventh Circuit in *Hartigan*,[101] is especially persuasive to the extent that it clearly recognizes the state's interest in promoting parental consultation with a minor who is considering having an abortion. Deference to the state's interest in a minor's abortion decision is premised on the minor's presumed inability to make such critical decisions. The state's interest is no less legitimate where a minor decides to engage in sexual activity. Considerable weight should be given to the fact that the minor's decision to obtain contraceptives is often the result of peer pressure from youths who arguably are no more qualified than the minor to make this momentous decision. When these circumstances are coupled with the reality of serious medical risks associated with the use of contraceptives, the value of parental notification is understated. Ostensibly, parental notification might deter minors from obtaining family planning services, thus increasing the risk of unwanted pregnancies. The need to consider a deterrence factor, however, is obviated by the parents' interest in receiving notification and by the constitutionally recognized state interest in promoting parental consultation.

VIII. CONCLUSION

The previously discussed judicial opinions reflect the complexity of the issues as well as the numerous interests involved in a state's attempt to regulate the distribution of contraceptives to minors. Since sexually transmitted diseases and unwanted teenage pregnancies continue to exist in the forefront of public concerns, it is realistic to expect the state to respond to these exigencies. States have assumed the responsibility of mandating sexual education as an integral part of school curricula; some have opted to take it one step further by allowing public high schools to sponsor clinics that offer counseling and dispense contraceptives to minors without notifying parents of obtaining their consent.

There are undoubtedly a number of minors who would be

100 *See supra* notes 64-65 and accompanying text.
101 *See supra* notes 76-77 and accompanying text.

better served and counseled by a state funded clinic than by their own parents. It seems inimical to the principles of parental authority, however, to render these services without the knowledge or consent of those who have a genuine interest in their minors' sexual health and development. Yet parents, who desire to protect their interest in preserving family integrity, are at odds with overwhelming judicial deference to state action in the area of public health, safety and welfare.

It is clear that the constitution provides that certain family privacy rights are fundamental. Since the constitution does not mandate parental notification or consent, it is incumbent upon the state to promulgate legislation which accommodates the competing rights and interests of the parents, minor children and the state. While this legislation should consider the mature, emancipated minor's right to privacy, it should also reflect the judicially recognized state interest in promoting parental consultation as well as safeguard the parents' constitutional rights in the care, custody and education of their immature, unemancipated minor children.