Minors and Contraceptives in Indiana

I. Introduction

A discussion of teenage sexuality tends to activate attitudes and fears not conducive to rational decision-making. The controversy surrounding sex education indicates that sex-related information is still viewed by many as a cultural taboo which should be kept hidden from inquiring young minds. Sexual ignorance does not, however, discourage sexual experimentation. Rather, it allows response to social and biological pressures to become sexually active without appreciation of the possible consequences of that activity. The purpose of this Note is to show that, because teenage sexuality realistically cannot be proscribed, an effort must be made to minimize the short and long term deleterious effects of such activity.

II. Effects of Sexual Activity Among Minors

In extending the right to consent to medical care necessary for the treatment of venereal disease to individuals below the age of twenty-one,[1] the Indiana General Assembly, in effect, recognized that unmarried minor individuals participate in sexual intercourse and that medical problems requiring legislative solution may result therefrom. This recognition was necessary in light of the incidence of venereal disease among young people. In 1973 alone, 4,087 cases of gonorrhea and syphilis were reported in Indiana in individuals below the age of twenty, which was 32.6 percent of all cases reported for that year.[2] The statute passed by

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[1] Any person under the age of twenty-one (21) years who has, suspects he or she has, or who has been exposed to any venereal disease, shall be competent to give consent for medical or hospital care or treatment of himself or herself.

Act of Feb. 20, 1969, ch. 43, § 1. Ind. Pub. L. No. 97, § 10 (April 24, 1973), deleted "under the age of twenty-one (21) years." Current language is codified at Ind. Code § 16-8-5-1 (Burns 1973).

[2] Table I

Incidence of Venereal Disease in Indiana—1973

Age Range	*Total Cases in Age Range (male & female)*	*Female Cases in Age Range*	*Female Cases in Range Compared to Total Cases in Range (%)*	*Female Cases in Range Compared to Total Cases (%)*	*Total Cases in Range Compared to Total Cases (%)*
Below 10	23	18	78.3	.1	.2
10-14	131	102	77.9	.8	1.0
15–19	3933	2141	54.4	17.1	31.4

the legislature encourages young individuals exposed to venereal disease to seek medical treatment without parental intervention.[3]

Venereal disease is not, of course, the only problem resulting from sexual intercourse among minors. Of the 83,882 total births in Indiana in 1973, 9,409 (11.2 percent) were illegitimate.[4] Of these illegitimate births, 4,167 were to women below the age of nineteen, amounting to 44.3 percent of the total illegitimate births for that year.[5] Although, in Indiana, abortion was not a legal alternative to pregnancy until May, 1973,[6] 621 or 36.7 percent of the 1,692 abortions reported in this state through December, 1973, were performed upon women below the age of twenty.[7] It

Below 20	4087	2261	55.3	18.0	32.6
Total Cases	12530	4927	39.3	39.3	100.0

From Semi-Annual Reports of Civilian Cases of Primary and Secondary Syphilis and Gonorrhea by Reporting Source, Color, Sex, and Age Group, June 30 & Dec. 31, 1973 (unpublished reports filed with Indiana State Board of Health, Division of Communicable Disease Control).

[3]The statute also encourages physicians to provide medical treatment. See text accompanying notes 39-53 *infra*.

[4]

Table II

Incidence of Illegitimacy in Indiana—1973

Age Range	*Illegitimate Births in Age Range*	*Illegitimate Births in Range Compared to Total Illegitimate Births (%)*	*Illegitimate Births in Range Compared to Total Births* (%)*
12	3	—	—
13	36	.4	.0
14	206	2.2	.2
15	562	6.0	.7
16	983	10.4	1.2
17	1156	12.3	1.4
18	1221	13.0	1.5
12–17	2946	31.3	3.5
12–18	4167	44.3	5.0
Total Illegitimate Births	9409	100.0	11.2

*Total Births = 83,882

From unpublished computer data available from Indiana State Board of Health, Division of Public Health Statistics.

[5]See Table II, *supra* note 4.

[6]Ind. Pub. L. No. 322 (April 24, 1973), *codified at* IND. CODE §§ 35-1-58.5-1 to -4 (IND. ANN. STAT. §§ 10-107 to -110, Burns Supp. 1974).

[7]

Table III

Incidence of Abortions Reported in Indiana—1973

Age Range	*Total Abortions in Age Range*	*Total Abortions in Range Compared to Total Abortions (%)*
Below 15	43	2.5
15-19	578	34.2
Below 20	621	36.7

is reasonable to assume that a large percentage of these young women were not married at the time. Since 4,788 young women were reported to have had either an illegitimate child or an abortion in 1973, and only 2,261 cases of venereal disease were reported for women below the age of twenty,[8] the need for legislative efforts to avoid teenage pregnancy, as well as teenage venereal disease, is evident. This conclusion is further strengthened by indications that sexual activity among teenagers has greatly increased in recent years,[9] calling into question the efficacy of current statutory schemes.

III. Legislative Proscription of Sexual Activity Among Minors

Prior Indiana statutory efforts to control teenage sexual activity, except for the venereal disease consent statute,[10] have largely been directed against the sexual act itself rather than against the problems which are caused by the sex act. Any preventive aspects of the statutes lie in their provisions for punishment of illicit sexual activity.

A. Rape Statutes

One of the traditional efforts to discourage sexual intercourse with young females is represented by the statutory rape clause of the general rape statute,[11] which provides strict liability for one having sexual intercourse with a female child below the age of sixteen.[12] The statute comprehends no consent defense, for neither force nor lack of consent are elements of this purely statutory offense.[13] The two to twenty-one year determinant sentence when the woman is between twelve and sixteen years old, and the life sentence when the woman is less than twelve years

Above 19	1071	63.3
Total Abortions	1692	100.0

From Reports of Induced Abortions by County and Age, Period Jan. 1, 1973, to Dec. 31, 1973 (unpublished chart filed with Indiana State Board of Health, Division of Vital Statistics).

[8]See Table I, *supra* note 2. These statistics are relied upon only for comparison. The stigma attached to venereal disease, abortion, and illegitimacy, as well as other factors, may result in inaccuracies in the figures due to unreported instances of these problems.

[9]Time, Nov. 25, 1974, at 91.

[10]Ind. Code § 16-8-5-1 (Burns 1973).

[11]*Id.* § 35-13-4-3 (Ind. Ann. Stat. § 10-4201, Burns Supp. 1974).

[12]"Whoever has carnal knowledge of . . . a female child under the age of sixteen [16] years . . . is guilty of rape . . . ." *Id.*

[13]Mann v. State, 205 Ind. 491, 186 N.E. 283 (1933). *See also* Kelly v. State, 258 Ind. 196, 280 N.E.2d 55 (1972); Caudill v. State, 224 Ind. 531, 69 N.E.2d 549 (1946); Eckert v. State, 197 Ind. 412, 147 N.E. 150 (1925).

old,[14] serve as a positive deterrent to a male wishing to have sexual intercourse with her.[15] The statute produces inequitable results if the victim manifested her consent to the sexual contact and reasonably appeared to her partner to be past the age of consent. But the legislature, in an attempt to protect the interests of the woman, has determined that women below the age of sixteen shall not be competent to give such consent.[16]

If the woman has reached the age of sixteen, the sexual contact, to constitute rape, must be "forcibly against her will."[17] The criminal assault and battery statute[18] also contains specific provisions against sexual contact amounting to assault and battery upon individuals below the age of seventeen,[19] but this statute requires not only an overt act, but also a specific intent to gratify sexual desires.[20] When this specific intent cannot be established, the State may rely upon the more general statute of assault and battery with intent to commit a felony.[21]

B. Juvenile Delinquency Statutes

The juvenile delinquency statute,[22] which allows minors who come within the provisions of the statute to be treated as misdemeanants, may be used against minors who participate in illicit sexual intercourse. As held in *Tullis v. Shaw*,[23] this activity constitutes indecent and immoral conduct as contemplated by the statute. It is a misdemeanor to knowingly contribute to or encourage such conduct[24] if the offender also has knowledge of the

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[14] IND. CODE § 35-13-4-3 (IND. ANN. STAT. § 10-4201, Burns Supp. 1974).

[15]
> The word "whoever" as used in this statute [defining the offense of rape of a female child under the age of sixteen years] includes every male person with sufficient age and development to perform sexual intercourse and sufficient mentality to entertain a criminal intent.

Caudill v. State, 224 Ind. 531, 535, 69 N.E.2d 549, 550-51 (1946).

[16] The proposed Indiana Penal Code would place "statutory rape" within "indecent liberties with a child," would extend its protection to include male and female individuals below the age of sixteen, and would restrict the reach of the statute to persons eighteen years or older. INDIANA CRIMINAL LAW STUDY COMM'N, INDIANA PENAL CODE § 35-12.1-4-3 (Proposed Final Draft, 1974).

[17] IND. CODE § 35-13-4-3 (IND. ANN. STAT. § 10-4201, Burns Supp. 1974).

[18] *Id.* § 35-1-54-4 (IND. ANN. STAT. § 10-403).

[19] *Id.*

[20] *See, e.g.*, Markiton v. State, 236 Ind. 232, 139 N.E.2d 440 (1957) (applying statutory intent requirement unchanged in the statute's present form).

[21] IND. CODE § 35-1-54-3 (IND. ANN. STAT. § 10-401, Burns Supp. 1974).

[22] *Id.* § 31-5-4-1 (Burns 1973).

[23] 169 Ind. 662, 83 N.E. 376 (1908).

[24] IND. CODE § 31-5-4-2 (Burns 1973).

victim's minority.[25] Thus, the State may reach and punish both the minor and the one encouraging the conduct, but with less harsh penalties than are prescribed for the felonies of rape and assault and battery with intent to gratify sexual desires.

C. Other Statutes

Other statutes are used in an attempt to discourage illicit sexual intercourse. An anti-fornication statute may reach this result, usually by making such activity a misdemeanor. The Indiana statute[26] is deficient for these purposes since it is directed against cohabitation and does not include occasional acts of sexual intercourse.[27] An unmarried female[28] or her father or guardian[29] may sue for damages under the civil seduction recovery statute if she has not reached eighteen.[30] The statute thus subjects a male having sexual intercourse with a female below the age of eighteen to possible civil as well as criminal liability.

D. Efficacy of Statutory Proscription

The venereal disease[31] and illegitimate pregnancy[32] statistics indicate that the provision of penalties for illicit sexual activity is insufficient as a deterrent to such activity. Despite the possible legal implications of her actions, a minor woman who has become sexually active may be as fertile as an adult woman, but may be far less financially and emotionally able to cope with pregnancy, childbirth, and motherhood. Because of her physical immaturity,[33] she may expose herself to increased risks of pregnancy complications and expose her child to increased risks of infant mortality. She may be required by school policy to leave school

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[25]Davidson v. State, 249 Ind. 419, 233 N.E.2d 173 (1968).

[26]IND. CODE § 35-1-82-2 (IND. ANN. STAT. § 10-4207, Burns 1956).

[27]The proposed Indiana Penal Code makes no reference to an anti-fornication statute. Rather, it would rely upon other proposed codifications to discourage nonconsensual sexual contacts. INDIANA CRIMINAL LAW STUDY COMM'N, INDIANA PENAL CODE §§ 35-12.1-4-1 (rape), -2 (deviate sexual conduct), -3 (indecent liberties with a child).

[28]IND. CODE § 34-1-1-5 (Burns 1973).

[29]*Id.* § 34-1-1-6.

[30]*Id.* § 34-4-4-1 (Burns Supp. 1974) (abolishes cause of action for seduction of females eighteen and over).

[31]See Table I, *supra* note 2.

[32]See Table II, *supra* note 4.

[33]*See* Menken, *Teenage Childbearing: Its Medical Aspects and Implications for the United States Population*, in 1 UNITED STATES COMM'N ON POPULATION GROWTH AND THE AMERICAN FUTURE, RESEARCH REPORTS 331, 335 (C. Westoff & R. Parke, Jr., eds. 1972).

during her pregnancy,[34] or it may be necessary for her to leave school in order to support her child. She may choose to give up the child for adoption or be forced by social pressures to marry before she would otherwise have chosen to do so. Her family may assume the added burden of support, or the State may force the putative father to fulfil his legal support obligations.[35] Whatever the woman's decision may be, it will unalterably affect her future opportunities.[36]

IV. Contraceptive Information, Treatment, and Devices

A. Liability of the Physician

Contraception allows the woman to avoid the far-reaching consequences of pregnancy and the necessity of resorting to abortion, itself a source of great controversy. By increasing the availability to minors of contraceptive information, treatment, and devices, a decrease in teenage pregnancy and venereal disease should logically follow. However, the more effective impermanent contraceptive methods for women, such as the oral contraceptive, the diaphragm, and the intra-uterine device, require individual medical attention. A physician, rather than a legislator or a judge, is in the position to ascertain the contraceptive needs of the woman and to advise her as to the methods best suited for those needs. Medical training is necessary to weigh the relative risks of the oral contraceptive against its protective value,[37] to determine the advisability of an intra-uterine device or a diaphragm, or to decide whether the condom would be preferable to methods which require more medical attention.[38]

However, a physician may be prevented from providing contraceptive treatment to a minor by basic tort law which seeks to protect individuals from unauthorized invasions of the body by requiring that such contacts be validly consented to by the re-

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[34] A 1968 study of school systems with 12,000 or more students was conducted by the Educational Research Service. One-third of the 154 systems queried required girls to leave school as soon as it was known that they were pregnant. An additional one-fifth forced them to leave well before the end of pregnancy.

Id. at 348.

[35] Ind. Code §§ 31-4-1-1 to -33 (Burns 1973).

[36] *See* Menken, *supra* note 33, at 335.

[37] *See* Berman & Dolan, *The Oral Contraceptive: An Interest Analysis*, 21 Kan. L. Rev. 493 (1973).

[38] *See* David, *Unwanted Pregnancies: Costs and Alternatives*, in 1 United States Comm'n on Population Growth and the American Future, Research Reports 439 (C. Westoff & R. Parke, Jr., eds. 1972).

cipient.[39] Medical treatment, such as the pelvic examination required in the process of prescribing contraceptives to women, would constitute an invasion of the body. Not only must consent to the treatment be obtained so that the treatment will not amount to a technical battery[40] but, as well, the consent must be voluntary and informed and made by a person capable of consenting.[41]

It is this "capacity to consent" requirement which causes most of the problems in the area of medical treatment for minors. A child is considered to be incapable of exercising the requisite informed consent; the parent or guardian of the child must provide this consent.[42] A physician treating a minor without such consent would be open to a possible suit by the parents for assault and battery.[43] Although the damages recoverable by the parents would apparently be limited to medical expenses and loss of the child's services,[44] the threat of litigation may discourage the physician from providing the services he considers necessary.[45] Research reveals no successful prosecution of a physician for contraceptive treatment of a minor without parental consent, though present attempts by various parent groups to recover for such unauthorized treatment[46] would indicate that a physician's fear of liability is not completely without basis.

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[39]"A person of full capacity who freely and without fraud or mistake manifests to another assent to the conduct of the other is not entitled to maintain an action of tort for harm resulting from such conduct." RESTATEMENT OF TORTS § 892 (1939).

[40]"[A] surgical operation is a technical battery, regardless of its results, and is excusable only when there is express or implied consent by the patient; . . . the surgeon is liable in damages if the operation is unauthorized." Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941).

[41]*See* Rozovsky, *Consent to Treatment*, 11 OSGOODE HALL L.J. 103, 107 (1973).

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> The manifestation of assent by a person so young or so mentally defective that he does not understand the nature or effect of an act done is not a defense to an action for such act. The assent of a parent or guardian or of a person standing in like relation to such a person, however, is a defense to an action by such person, if the parent or guardian had power to require him to submit to the act.

RESTATEMENT OF TORTS § 892, comment *e* (1939). *See* Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115 (1973).

[43]IND. CODE § 34-1-1-8 (Burns 1973) (parent's action for injury to or death of child).

[44]*See generally* 59 AM. JUR. 2d *Parent and Child* §§ 112, 118 (1971).

[45]*See* Pilpel & Ames, *Legal Obstacles to Freedom of Choice in the Areas of Contraception, Abortion, and Voluntary Sterilization in the United States*, in 6 UNITED STATES COMM'N ON POPULATION GROWTH AND THE AMERICAN FUTURE, RESEARCH REPORTS 55, 62 (C. Westoff & R. Parke, Jr., eds. 1972).

[46]*See, e.g.*, Sarkkinen v. Planned Parenthood Ass'n, Cause No. 74-132 (Starke County Cir. Ct., Ind., venued Mar. 20, 1974).

B. Exceptions to Physicians' Liability

Various common law exceptions to the requirement of parental consent have been recognized to allow a physician to escape the technical battery liability. A physician may provide treatment under circumstances constituting an emergency. If the minor is emancipated, or if the parents are so remote that obtaining their consent is impracticable, the physician may likewise treat the minor.[47] It has also been recognized that the consent of a minor of sufficient age and maturity may be valid if she is able "to understand and comprehend the nature of the . . . procedure, the risks involved and the probability of attaining the desired results in light of the circumstances which attend."[48] This is the so-called "mature minor rule" which removes the minor's incapacity to consent to bodily invasions. Consent to medical treatment by such a minor thus provides a valid defense to technical battery.[49]

In Indiana, as in most states, the age of majority for medical consent purposes is statutory, as are the various exceptions to the incompetency of those below majority. An individual must be at least eighteen to be competent to consent to medical or surgical treatment.[50] If a minor is unmarried and unemancipated, consent must be provided by a parent, by a legal guardian, or by the agency having legal control over the minor.[51] If the minor is emancipated or married,[52] he may consent to medical treatment. Methods of consent otherwise lawful are not excluded by the statutes, and no consent is required in an emergency.[53]

Like Indiana, all jurisdictions except Wisconsin allow individuals below the age of eighteen to consent to treatment for venereal disease.[54] Unlike Indiana, however, twenty-three jurisdictions have extended the consent capacity for contraception to

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[47]Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941).

[48]Younts v. St. Francis Hosp. & School of Nursing, Inc., 205 Kan. 292, 300, 469 P.2d 330, 337 (1970).

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> If the child . . . , though under guardianship, is capable of appreciating the nature, extent and consequences of the invasion, his assent prevents the invasion from creating liability, though the assent of the parent, guardian or other person is not obtained or is expressly refused.

RESTATEMENT OF TORTS § 59, comment *a* (1934).

[50]IND. CODE § 16-8-3-1 (Burns 1973).

[51]*Id.* § 16-8-3-1(a).

[52]*Id.* § 16-8-4-1.

[53]*Id.* § 16-8-3-2.

[54]Paul, Pilpel & Wechsler, *Pregnancy, Teenagers and the Law, 1974*, 6 FAMILY PLANNING PERSPECTIVES 142, 143 (1974).

individuals below eighteen,[55] and sixteen jurisdictions currently allow minors to consent to abortion.[56] This effort to deal with the illegitimate pregnancy problem of teenage sexual activity has been accomplished by various devices. Statutes after the Colorado model provide a specified group of individuals, including physicians, clergymen, state agencies, and family planning clinics, who may refer the minor for birth control procedures.[57] Mississippi is illustrative of the few jurisdictions which have both followed the Colorado model for birth control procedures[58] and codified the "mature minor rule."[59] Other approaches have included provisions that a minor has the same capacity to consent as does an adult for certain medical treatment, including contraception and pregnancy-related care,[60] that "any person without regard to age" may give consent to certain treatment,[61] or that consent of the minor shall be sufficient for the purposes of the specified treatment.[62] Several states allow the physician to inform the minor's parents of the treatment without the minor's consent,[63] although this might have the effect of discouraging the minor from seeking necessary treatment. Some states also remove financial responsibility for the treatment from the parents when the minor has provided the consent.[64] Such a provision would be beneficial in states in which minors' contracts are void or voidable, as they are in Indiana.[65]

C. Sources of Contraceptive Policy

These various state efforts to extend to minors the power of consent for sex-related medical treatment have received encouragement from several sources. The United States Commission on Population Growth and the American Future recommended that "states adopt affirmative legislation which will permit minors to receive contraceptive and prophylactic information and services in

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[55]*Id.* Indiana would have achieved this result if Ind. H.R. 1148, 98th Gen. Assembly, 2d Sess. (1974), had passed last term. However, it was defeated by a vote of nineteen to seventy-six on January 17, 1974. *See* 1974 IND. HOUSE J. 187.

[56]Paul, Pilpel & Wechsler, *supra* note 54, at 143.

[57]COLO. REV. STAT. ANN. § 91-1-38 (Supp. 1971). *See also* ILL. ANN. STAT. ch. 91, § 18.7 (Smith-Hurd Supp. 1974); TENN. CODE ANN. § 53-4607 (Supp. 1974).

[58]MISS. CODE ANN. § 41-42-7 (Supp. 1974).

[59]*Id.* § 41-41-3(h) (1973).

[60]MD. ANN. CODE art. 43, § 135(a)(3) (Supp. 1974).

[61]ORE. REV. STAT. § 109.640 (1973).

[62]KY. REV. STAT. ANN. § 214-185(1) (Supp. 1974).

[63]*See, e.g., id.* § 214-185(5).

[64]*Id.* § 214.185(6).

[65]IND. CODE § 29-1-18-41 (Burns 1972).

appropriate settings sensitive to their needs and concerns."[66] The mandatory Medicaid coverage now directs that family planning services and supplies be furnished "to individuals of child bearing age (including minors who can be considered to be sexually active) who are eligible under the State plan and who desire such services and supplies."[67] Congress has also declared, as one purpose of the Family Planning Services and Population Research Act of 1970,[68] its desire "to assist in making comprehensive family planning services readily available to all persons desiring such services,"[69] which impliedly includes minors.[70] Moreover, Congress has provided additional means to improve the availability of contraceptives by amending provisions[71] which had formerly included devices for "preventing conception" as obscene matter which could not be mailed, imported into the United States, or transported in interstate commerce under penalty of criminal sanctions.[72] However, contraceptive availability is nonetheless hindered by provisions that unsolicited contraceptive materials are generally "nonmailable."[73] The American Medical Association, the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, the American Academy of Family Physicians, the American College Health Association, the Association of Planned Parenthood Physicians, and the American Public Health Association have endorsed the right of physicians to provide contraceptive care for the best interests of their minor patients.[74] The National Association of Children's Hospitals and Related Institutions has endorsed a Medical Bill of Rights for Minors which would allow them to receive medically accepted con-

[66] UNITED STATES COMM'N ON POPULATION GROWTH AND THE AMERICAN FUTURE, POPULATION AND THE AMERICAN FUTURE 100 (C. Westoff & R. Parke, Jr., eds. 1972).

[67] 42 U.S.C. § 1396d (a)(4)(C) (Supp. III, 1973).

[68] 42 U.S.C. § 300 (1970).

[69] *Id.*

[70] *See* P. PIOTROW, WORLD POPULATION CRISIS 230-31 (1973).

[71] 18 U.S.C. §§ 1461-62 (1970), *as amended by* Act of Jan. 8, 1971, Pub. L. No. 91-662, 84 Stat. 1973.

[72] Indiana still has a statute which makes illegal the printing or publishing of an advertisement for drugs or instruments to be used exclusively by females in preventing conception. IND. CODE § 35-1-84-1 (IND. ANN. STAT. § 10-2806, Burns 1956). There is no record of a prosecution under this statute, but an Attorney General opinion construing the statute was provided in 1923. [1923-1924] IND. ATT'Y GEN. REP. 375. However, this statute is of highly questionable constitutional validity. *See* Associated Students for the Univ. v. Attorney General of the United States, 368 F. Supp. 11 (C.D. Cal. 1973).

[73] 39 U.S.C. § 3001(e) (1970). This statute has been criticized as providing "an additional obstacle to freedom of choice in the area of contraception." Pilpel & Ames, *supra* note 45, at 60.

[74] Paul, Pilpel & Wechsler, *supra* note 54, at 144.

traceptive information and devices in doctor-patient confidentiality.[75] Public opinion also apparently favors minor's access to sex-related treatment, as evidenced by a June, 1972, Gallup Poll which revealed that three out of four people agreed with the proposition that "professional birth control information, services and counseling should be made available to unmarried teenagers who are sexually active."[76]

V. Constitutional Rights of Sexually Active Minors

A. In General

The move towards recognition of minors' rights in the area of sexual activity may be supported on constitutional grounds.[77] The courts have already extended various constitutional rights to minors. As stated for the Supreme Court by Justice Fortas, "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[78] The fourteenth amendment and the Bill of Rights may, however, afford less protection to the interests of minors than to the interests of adults. In juvenile delinquency proceedings, minors have the rights to notice of charges, to counsel, and to confrontation and cross-examination of witnesses, and the privilege against self-incrimination;[79] minors do not, however, have the constitutional right to trial by jury in those proceedings.[80] The Court has encouraged greater limitations on minors' access to possibly obscene materials than upon adults' access by allowing the states to apply a broader definition of obscenity to matters concerning minors[81] and by recognizing "that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of . . . exposure to juveniles."[82]

Although high school students have fundamental constitutional rights of speech and expression,[83] school officials may regu-

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[75]3 Family Planning/Population Rep. 72 (1974).

[76]1 Family Planning/Population Rep. 11 (1972).

[77]Note, *Minors and Contraceptives: A Constitutional Issue*, 3 Ecology L.Q. 843 (1973).

[78]In re Gault, 387 U.S. 1, 13 (1967).

[79]In re Gault, 387 U.S. 1 (1967).

[80]McKeiver v. Pennsylvania, 403 U.S. 528 (1971). *Accord*, Bible v. State, 253 Ind. 373, 254 N.E.2d 319 (1970). *But see* 3 Ind. Legal F. 547 (1970) (criticizing the rule).

[81]Ginsberg v. New York, 390 U.S. 629 (1968).

[82]Miller v. California, 413 U.S. 15, 18-19 (1973). *See also* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

[83]Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969).

late those rights upon "a specific showing of constitutionally valid reasons" for doing so.[84] Students facing temporary suspension from public schools are entitled to due process protection in the form of notice of charges and an opportunity for hearing,[85] but students "whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school."[86] Federal courts are split on the question of whether high school dress codes against long hair violate a student's constitutional rights.[87] Although at least one district court would allow students to "have the same rights and enjoy the same privileges [under the Constitution] as adults,"[88] the Supreme Court has declined to settle the area.[89]

The United States District Court for the Eastern District of Pennsylvania ostensibly recognized a fundamental right of privacy in students[90] but may have been more concerned with protecting the privacy of the relationship between parent and child.[91] This concern is indicative of the judicial attitude which has discouraged more rapid extension of constitutional rights to minors. The Supreme Court has recognized that "the custody, care and nurture of the child reside first in the parents,"[92] and that there is a "private realm of family life which the state cannot enter."[93] However, the state as parens patriae "has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . . ."[94]

The constitutional rights of the child may more properly be viewed as a balance struck between the parents' rights of control and the state's power over public welfare. The minor as an individual has few constitutional rights which preponderate against both the state and his parents. For example, the due process rights of minors in delinquency proceedings are designed to protect the rights of parents as well,[95] and the right of expression granted minors is apparently not intended to conflict with the interests of

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[84]*Id.* at 511.

[85]Goss v. Lopez, 95 S. Ct. 729 (1975).

[86]*Id.* at 740.

[87]*Compare* Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *and* Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970), *with* Ferrell v. Dallas Independent School Dist., 392 F.2d 697 (5th Cir. 1968), *and* Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970).

[88]Miller v. Gillis, 315 F. Supp. 94, 99 (N.D. Ill. 1969).

[89]Olff v. East Side Union High School Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied,* 404 U.S. 1042 (1972) (Douglas, J., dissenting).

[90]Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973).

[91]*Id.* at 918.

[92]Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[93]*Id.*

[94]*Id.* at 167.

[95]In re Gault, 387 U.S. 1, 33-34 (1967).

parents.[96] Parents have a genuine and valid interest in the activities of their children which is generally necessary to the performance of their parental obligations. However, there is increasing recognition that the privacy rights of minors are equivalent to those of adults in the related areas of contraception and abortion and deserve like constitutional protection.

B. Contraception

The Supreme Court has not yet recognized the constitutional right of minors to receive contraceptive or abortion treatment. This non-recognition is a product of the relatively recent development of such constitutional rights in adults. The right to contraception was not affirmatively upheld for married couples until 1965 when the Court, in *Griswold v. Connecticut,*[97] extended the right of privacy penumbrae of the Bill of Rights and the fourteenth amendment[98] to protect the use of contraceptives in the marital relationship.[99] Seven years after *Griswold,* the Court further extended this privacy right to unmarried adults in *Eisenstadt v. Baird.*[100] The Court, per Justice Brennan, found that different treatment for married and unmarried individuals could not be justified constitutionally; the Massachusetts statute which provided unequal treatment was therefore violative of the equal protection clause of the fourteenth amendment.[101] The statute had made unlawful the delivery of any drug or article for the prevention of contraception except by a registered pharmacist to married people. The statute was defended as a legitimate effort under the state's police powers to protect health. The First Circuit had rejected this argument because it could find no difference between the medical skills necessary to treat unmarried or married individuals,[102] and because the state had "made no attempt to distinguish . . . between dangerous or possibly dangerous articles, and those which are medically harmless."[103] The First Circuit had also rejected the arguments that the statute was a valid attempt to protect morals[104] and that it was intended to discourage

[96]Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 504 (1969) (students and their parents had agreed to the expressive conduct).

[97]381 U.S. 479 (1965).

[98]*Id.* at 484.

[99]Just four years prior to the *Griswold* decision, the Court had failed to find such a right. Poe v. Ullman, 367 U.S. 497 (1961).

[100]405 U.S. 438 (1972).

[101]*Id.* at 443.

[102]Baird v. Eisenstadt, 429 F.2d 1398, 1401 (1st Cir. 1970).

[103]*Id.*

[104]

> To say that contraceptives are immoral as such, and are to be

fornication.[105] The Supreme Court affirmed the First Circuit's ruling against the anti-fornication[106] and health[107] justifications for the statute but did not reach, as the First Circuit did, the question of whether the statute interfered with fundamental human rights, "because, whatever the rights of the individual to access to contraceptives may be, the right must be the same for the unmarried and the married alike."[108]

Though the *Eisenstadt* case concerned the delivery of a contraceptive device by a non-druggist to an unmarried adult woman, the Court's language could reasonably be taken to extend the privacy-based contraceptive right to minors. Justice Brennan did not discourage this inference when he stated: "If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[109] However, efforts to gain an extension of these rights to minors have met with mixed success. The Utah Supreme Court rejected an equal protection or privacy basis for such a right.[110] More recently, the United States District Court for the Southern District of New York determined that a statute prohibiting sale of nonprescription contraceptives to persons under sixteen raised "a not insubstantial question . . . as to whether this provision unconstitutionally infringes the right to

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forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of a demonstrated harm, we hold it is beyond the competency of the state.

Id. at 1402.

[105] [I]f the legislature is truly concerned with deterring fornication, it may increase the statutory penalty to mark the measure of its concern. It may not do so, however, by making the penalty a personally, and socially, undesired pregnancy.

Id.

[106] 405 U.S. at 449-50.

[107] *Id.* at 451. The Court noted that, although the appellant insisted that the unmarried have no right to engage in sexual intercourse and thus no health interest to be served in contraception, devices were available without controls so long as their purpose was the prevention of disease. "It is inconceivable that the need for health controls varies with the purpose for which the contraceptive is to be used when the physical act in all cases is one and the same." *Id.* at 451 n.8.

[108] *Id.* at 453.

[109] *Id.* (emphasis in original).

[110] Doe v. Planned Parenthood Ass'n, 29 Utah 2d 356, 510 P.2d 75, *cert. denied,* 414 U.S. 805 (1973).

privacy of [those] under the age of sixteen"[111] and therefore granted a motion to convene a three-judge district court on the question.[112] If the three-judge district court establishes that such a constitutional right does not exist for minors, the language of *Eisenstadt* will clearly be applicable to minors as well as to adults.

C. Abortion

In 1973, the Supreme Court, in *Roe v. Wade*[113] and *Doe v. Bolton*,[114] further extended the fundamental privacy right to include abortion and established that the decision to terminate pregnancy should lie exclusively with the woman and her physician during the first trimester without state interference.[115] It has been argued that the privacy interests of a minor woman should also be compelling in the first trimester, and that the state should not place added restrictions upon minors seeking abortions,[116] but the Court expressly declined to rule on the constitutionality of state statutes requiring parental consent for abortions on unmarried minors.[117]

The Washington Supreme Court recently determined that an unmarried minor woman has the same right of privacy as does an adult woman in the abortion decision, and that a state statute which required parental consent for abortion upon a minor woman offended the equal protection clause of the fourteenth amendment.[118] A three-judge district court has also found the requirement of parental consent unconstitutional.[119] Such state and district court action should encourage the removal of the statutory parental consent requirement such as the one found in Indiana.[120] More importantly, this increasing trend toward a recognition of constitutional rights in minors should result in a final determination by the Supreme Court that the Constitution protects the use of contraceptives by minors.

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[111]Population Services Int'l v. Wilson, 383 F. Supp. 543, 549 (S.D.N.Y. 1974).

[112]*Id.* at 550.

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

[114]410 U.S. 179 (1973).

[115]410 U.S. at 163.

[116]*See, e.g.*, Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305 (1974).

[117]410 U.S. at 165 n.67.

[118]State v. Koome, 530 P.2d 260 (Wash. 1975). The court also suggested that "[t]he age of fertility provides a practical minimum age requirement for consent to abortion, reducing the need for a legal one." *Id.* at 267.

[119]Coe v. Gerstein, 376 F. Supp. 695 (S.D. Fla. 1973), *appeal dismissed*, 417 U.S. 279 (1974).

[120]IND. CODE § 35-1-58.5-2 (a) (2) (IND. ANN. STAT. § 10-108, Burns Supp. 1974).

VI. Conclusion

The need for prompt action, as demonstrated by the incidence of teenage pregnancy, would suggest that a statute allowing minors to consent to contraceptive treatment, similar to the statute allowing consent to treatment of venereal disease, is in order. It might be argued that such a move would be to condone premarital sexual intercourse, but it could more reasonably be viewed as an attempt to discourage premarital conception. The decision to become sexually active does not depend upon the availability of contraceptives—as is indicated by the teenage pregnancy statistics. Perhaps more importantly, many sexually active young women do not use even nonprescription contraceptive methods, or do so only infrequently,[121] raising the need for accurate and widespread dissemination of information, supported actively by the state. In view of the state's interests in protecting the rights of minor individuals and in solving the problems resulting directly from teenage sexual activity, a statutory effort which would place the contraception decision in the physician and his patient, while eliminating extraordinary liabilities, is justified and highly desirable.

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[121] *See* Zelnik & Kanter, *Sexuality, Contraception and Pregnancy Among Young Unwed Females in the United States*, in 1 United States Comm'n on Population Growth and the American Future, Research Reports 355, 366 (C. Westoff & R. Parke, Jr., eds. 1972).