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Juvenile Privacy: A Minor's Right of Access to Contraceptives

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JUVENILE PRIVACY: A MINOR'S RIGHT OF ACCESS TO CONTRACEPTIVES

I. Introduction

Although the Constitution does not specifically grant any right to privacy, the Supreme Court, through a process of judicial interpretation, has carefully guarded some individual rights in this area.[1] The Court has made it clear that the right to privacy prevents unjustified governmental interference with an individual's ability to make certain personal decisions.[2]

The Supreme Court specifically acknowledged a minor's right to privacy in *Planned Parenthood of Central Missouri v. Danforth*,[3] where the Court held that this right made it unnecessary to obtain parental consent for an abortion decision.[4] The Court expanded a minor's right to privacy to include access to contraceptives in *Carey v. Population Services International*,[5] holding unconstitutional[6] a New York statute which prohibited the sale of contraceptives to minors.[7]

This note will trace briefly the historical development of an adult's right to privacy, explore and evaluate the minor's right of

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1. *See* Carey v. Population Services International, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

2. *E.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (contraception); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (procreation); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (child rearing and education).

3. 428 U.S. 52 (1976).

4. *Id.* at 74-75.

5. 431 U.S. 678 (1977).

6. *Id.* at 693-700.

7. N.Y. EDUC. LAW § 6811(8)(McKinney 1972) (repealed 1977). The law provided that:

   It shall be a class A misdemeanor for:

   8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of conception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy is hereby prohibited . . . .

Id.

The *Carey* Court held all three of the subsections of this statute to be unconstitutional. 431 U.S. at 681-702.

It must be noted that this statute was concerned only with a class of minors, those under *sixteen* years of age.

access to contraceptives, and focus on parental involvement in a minor's personal decisions regarding abortion and contraceptives.

II. Development of the Adult's Right to Privacy

Justice Brandeis, in his dissenting opinion in *Olmstead v. United States,*[8] was the first Supreme Court Justice to recognize the right to privacy.[9] Brandeis' recognition is based on the underlying philosophy that an individual should lead his life as free from governmental interference as possible.[10] The Supreme Court established a personal marital right to privacy in *Griswold v. Connecticut,*[11] which held a statute prohibiting the *use* of contraceptives by married adults[12] to be unconstitutional and violative of marital privacy.[13]

Justice Douglas' majority opinion in *Griswold* developed a constitutional right to privacy premised upon the existence of certain "peripheral rights" not actually mentioned in the Bill of Rights which help make the specific rights more secure.[14] He pointed out

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8. 277 U.S. 438 (1928).

9. *Id.* at 478. Justice Brandeis stated:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . [t]hey sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most conprehensive of rights and the right most valued by civilized men.

Id.

10. *Id.* (Brandeis, J., dissenting).

11. 381 U.S. 479 (1965). The Court began to recognize a right to privacy in several cases before *Griswold. See* Prince v. Massachusetts, 321 U.S. 158 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923). In addition, the Court has recognized a right to *associational* privacy. NAACP v. Alabama, 357 U.S. 449 (1958).

12. CONN. GEN. STAT. §§ 53-32, 54-196 (1958)(repealed 1969).

13. 381 U.S. at 485-86.

14. *Id.* at 482-83. For example, the right of freedom of speech and press not only includes the right to utter or print, but also the rights to distribute, receive, and read. *See* Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

The majority opinion's theory was that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484.

In addition to the majority opinion, three other Justices posited theories regarding protection for the right to privacy.

Justice Harlan, who concurred in the judgment, contended that the right to privacy is not dependent on any of the Bill of Rights provisions, rather that the Due Process Clause implicitly protects this right. *Id.* at 500.

Justice Goldberg, with whom Chief Justice Warren and Justice Brennan joined, used the ninth amendment to protect the right to privacy. Justice Goldberg asserted that the ninth amendment was intended to protect personal rights not specifically listed in the first eight

that the various guarantees, such as those in the first, third, fourth, fifth and ninth amendments create "zones of privacy."[15] He explained that the marriage relationship lay within the "zone of privacy" created by several fundamental constitutional guarantees.[16] "[F]orbidding the *use* of contraceptives . . .," he stated, has "a maximum destructive impact upon that relationship."[17]

Griswold's importance lies in its protection of a married couple's right to privacy and their use of contraceptives. Moreover, *Griswold* is also significant because it gave broad recognition to the right to privacy, without basing the right on any specific constitutional privilege. *Griswold* resulted in a body of rights whose content was suggested by specific constitutional provisions but not restricted in scope and content by the enumerated rights. Thus, it opened the door for further protection of privacy.

In *Eisenstadt v. Baird,*[18] a physician was convicted for dispensing contraceptives to an unmarried woman in violation of Massachusetts law, which allowed only married persons to obtain contraceptives.[19] The Supreme Court declared that unmarried adults possessed the same rights as married adults regarding the *use* of contraceptives.[20] But the *Eisenstadt* Court neither endorsed nor rejected further application of the right to privacy rationale stated in *Griswold.* In fact, the *Eisenstadt* Court left *Griswold* open to two possible interpretations concerning *access* to contraceptives.[21] First, a plurality of the Court stated, "[i]f under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible."[22] The plurality's other interpretation was that "if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection

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amendments. *Id.* at 492.

The dissenting opinion of Justice Black, with whom Justice Stewart joined, argued simply that there is no constitutional right to privacy since it is not listed in any specific provision of the Constitution. *Id.* at 509-10.

15. *Id.* at 484.
16. *Id.* at 485.
17. *Id.*
18. 405 U.S. 438 (1972).
19. *Id.* at 440-41.
20. *Id.* at 453.
21. *Id.*
22. *Id.*

Clause, outlaw distribution to unmarried but not to married persons."[23]

Despite the Court's refusal to adopt either of these interpretations, the *Eisenstadt* decision means that whatever rights an individual has to acquire contraceptives, the equal protection clause guarantees that these rights be the same for married and unmarried adults. The Court nevertheless, explicitly granted unmarried adults the right to *use* contraceptives.[24] The rationale of *Griswold* and *Eisenstadt* was extended in *Roe v. Wade*[25] to establish as fundamental a woman's right to have an abortion.[26] The *Wade* Court recognized that the due process clause of the fourteenth amendment[27] protected an individual's right to privacy.[28] While the Court recognized that the right to privacy included the abortion decision, it also asserted that "this right is not unqualified and must be considered against important state interests in regulation."[29]

Traditionally, the Supreme Court has utilized four different tests to determine the constitutionality of state regulations or classifications.[30] Because the Supreme Court has concluded that the right to

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23. *Id.* at 454.

24. *Id.* at 453.

25. 410 U.S. 113 (1973).

26. At the foundation of the Court's reasoning was an enlargement of the right to privacy which, as Justice Blackmun stated in the majority opinion, is "founded in the Fourteenth Amendment's concept of personal liberty [and] is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

27. U.S. CONST. amend. XIV, § 1.

28. 410 U.S. at 152.

29. *Id.* at 154.

30. The first test, the rational basis test, is inapplicable since it deals primarily with business or economic regulations. The Supreme Court established the rational basis test in Nebbia v. New York, 291 U.S. 502, 525 (1934), which held that the state may regulate business or economic matters unless the regulation is palpably unreasonable or arbitrary.

The second test, the rational justification test, is somewhat more restrictive. This test requires the state to show a reasonable justification for its regulation or classification. *Compare* Jimenez v. Weinberger, 417 U.S. 628 (1974) *with* Dandridge v. Williams, 397 U.S. 471 (1970).

The most rigid test the Supreme Court has established is the compelling state interest standard. Under this test when various classifications regarded as "suspect" are involved, the Court will require that the state demonstrate an utmost need in order to use a "suspect" classification. *See*, Graham v. Richardson, 403 U.S. 365 (1971)(alienage); Loving v. Virginia, 388 U.S. 1 (1967)(race); Oyama v. California, 332 U.S. 633 (1948)(national origin).

But other cases have established classifications which are not suspect. *See*, Matthews v. Lucas, 427 U.S. 495 (1976) (illegitimacy); Massachusetts Bd. of Retirement v. Murgia, 427

privacy is a fundamental right, the state must show a compelling state interest before it may regulate this right.[31] With this test as the applicable standard, the Supreme Court, in *Carey v. Population Services International*,[32] held that adults possessed a constitutional right of *access* to contraceptives.[33] It reasoned that *Griswold* "may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives."[34] It also correctly interpreted *Eisenstadt* as holding that the protected right is the

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U.S. 307 (1976)(age); San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973) (wealth or poverty).

In addition, the Supreme Court will require the compelling state interest standard in order to infringe upon certain rights deemed "fundamental". A fundamental right is any right based on principles of justice that are "rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), and which "lie at the base of all our civil and political institutions . . . ." Herbert v. Louisiana, 272 U.S. 312, 316 (1926).

Although the Supreme Court has recognized several rights as fundamental, it has not explicitly defined a fundamental right. It is possible that the Court has done so intentionally so as not to restrict their future determinations. Among the rights the Court has deemed fundamental are: Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969)(right to vote); Shapiro v. Thompson, 394 U.S. 618, 634 (1969)(right to travel); Sherbert v. Verner, 374 U.S. 398, 406 (1963)(right to the free exercise of religion).

The final test, the fair and substantial justification test, may be characterized as a midpoint standard. It is more restrictive than the rational justification test, and less demanding than the compelling interest standard. This test requires the state to offer detailed proof that its regulation or classification is substantially related to the achievement of important governmental objectives. *Compare* Frontiero v. Richardson, 411 U.S. 677 (1973) *and* Reed v. Reed, 404 U.S. 71 (1971) *with* Schlesinger v. Ballard, 419 U.S. 498 (1975) *and* Kahn v. Shevin, 416 U.S. 351 (1974).

It is essential to determine whether or not the right to privacy is a fundamental right. If it is a fundamental right then any restriction on the right must meet the rigid scrutiny of the compelling state interest standard; if privacy is not a fundamental right any regulation of the right to privacy need only satisfy one of the less demanding tests.

31. The status of the right to privacy as a fundamental right remained uncertain even after *Eisenstadt*. The *Eisenstadt* Court indicated that if a fundamental freedom was involved the state must show a compelling interest. 405 U.S. at 447 n.7. However, the Court chose to apply a rational justification standard in holding the state regulation unconstitutional. *Id.* at 447.

However, *Roe v. Wade* established the right to privacy as a fundamental right. The Court accomplished this by requiring the state to meet the compelling state interest test before it could regulate a woman's abortion decision. 410 U.S. at 155-56. The right to privacy encompasses the abortion decision, and since the compelling interest standard is applied only to fundamental rights, one can conclude that the right to privacy is a fundamental right.

32. 431 U.S. 678 (1977).

33. *Id.* at 686-91. The Court used a different test to determine a minor's right of access to contraceptives. *See* notes 54-56 *infra*.

34. *Id.* at 687.

"*decision* whether to bear or beget a child."[35] Similarly, in *Wade* the Court held that the Constitution protected "a woman's *decision* whether or not to terminate her pregnancy."[36]

Thus, the *Carey* Court concluded that, when read in the light of *Eisenstadt* and *Wade,* the *Griswold* holding stands for the proposition that the Constitution protects from unjustified governmental intrusion an individual's decisions with respect to childbearing.[37]

Although *Carey* held that the Constitution protected these decisions, state regulation of access to contraceptives would still be upheld if a sufficiently compelling state interest existed. The *Carey* Court required a compelling state interest, not because there existed a fundamental right[38] of access to contraceptives, but rather because such access was interconnected with the exercise of the constitutionally protected decision in regard to childbearing that underlies *Griswold, Eisenstadt,* and *Wade.*[39]

The *Carey* Court then concluded that the interests the state advanced did not satisfy the compelling interest standard. First, the state advanced an interest in protecting potential life.[40] This interest might not be valid in light of the *Wade* decision. If *Wade* failed to recognize this state interest during the first trimester of pregnancy,[41] then certainly the same must be true before conception. Second, the state contended that there is an interest in protecting health.[42] However, as *Eisenstadt* indicated, it is difficult to understand how a statute which involves a nonhazardous contraceptive could bear a relation to the state's interest in protecting health.[43] Thus, since the state had failed to meet the necessary standard, the *Carey* Court concluded that a state may not regulate access to contraceptives to persons over sixteen years of age.[44]

These Supreme Court decisions establish broad protection for an adult's right to privacy. This right includes a woman's abortion

35. 405 U.S. at 453. (emphasis added).
36. 410 U.S. at 153. (emphasis added).
37. 431 U.S. at 687.
38. *See* note 30 *supra.*
39. 431 U.S. at 688-89.
40. *Id.* at 690.
41. 410 U.S. at 163.
42. 431 U.S. at 690.
43. 405 U.S. at 450-52.
44. 431 U.S. at 690-91.

decision[45] and the use of[46] and access to[47] contraceptives. However, these cases have left open the question of application of this constitutional protection to minors.

III. Development of a Minor's Constitutional Rights

The Supreme Court decision in *In re Gault*[48] established that minors as well as adults possessed constitutional rights.[49] The Court stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[50] However, the *Gault* holding was limited to four procedural rights in a delinquency proceeding[51] and neither recognized nor discussed any juvenile right to privacy.

The Supreme Court recognized a juvenile's right to privacy in terms of an abortion decision in *Planned Parenthood of Central Missouri v. Danforth.*[52] The Court held unconstitutional a state requirement that a minor obtain her parents' written consent to have an abortion during the first twelve weeks of pregnancy.[53]

Danforth established the test to determine whether the state may restrict a minor's right to privacy. In contrast to the compelling state interest test,[54] state regulations restricting the privacy rights of minors are valid only if they serve a "significant state interest."[55] This test is clearly less demanding than the compelling interest standard.

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45. *See* notes 25-29 and accompanying text *supra*.

46. *See* notes 11-24 and accompanying text *supra*.

47. *See* notes 32-44 and accompanying text *supra*.

48. 387 U.S. 1 (1967).

49. The Court in Kent v. United States, 383 U.S. 541 (1966), ruled for the first time on a case that exclusively involved constitutional rights of a child. *Kent* emphasized the need for juvenile court proceedings to satisfy "the basic requirements of due process and fairness." *Id.* at 553.

50. 387 U.S. at 13.

51. The four procedural rights protected were: the right to notice of the charges, *id.* at 31-34, the right to counsel, *id.* at 34-42, the right to confront and cross-examine the witness, *id.* at 42-56, and the privilege against self-incrimination, *id.* at 56-57.

The Supreme Court has recognized various other procedural rights of minors. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975)(due process in civil contexts); *In re* Winship, 397 U.S. 358 (1970)(requirement of proof beyond a reasonable doubt).

In addition, the Court has extended certain first amendment rights to minors. *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969)(freedom of speech).

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

53. *Id.* at 72-75.

54. *See* note 30 and accompanying text *supra*.

55. 428 U.S. at 75.

The *Danforth* Court was correct when it established a less rigorous standard for state regulation of a minor's conduct. This less rigid test is appropriate as the state must have greater latitude to regulate the conduct of minors.[56] That minors are generally less capable of making important decisions clearly justifies this less demanding standard.

IV. A Minor's Right of Access to Contraceptives

The Supreme Court in *Carey v. Population Services International*[57] sought to determine if a minor's right to privacy encompassed the right of access to contraceptives in light of the "significant state interest test." Mr. Justice Brennan writing for a plurality of the Court concluded that the state may not restrict access to contraceptives to persons under sixteen years of age.[58] Although *Carey* furthered the rights of minors with respect to this particular right to privacy, it was a plurality decision and its strength may be limited. The Supreme Court Justices in *Carey* reached three distinct conclusions on the issue of a minor's access to contraceptives.[59]

A. Unrestricted Right

The plurality recognized and reiterated the *Danforth* view that the significant interest standard was applicable, since the state attempted to regulate a minor's right.[60] Justice Brennan set out three reasons why restricting a minor's access to contraceptives did not satisfy the significant interest test.

The first reason was premised upon an analogy between the deci-

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56. The Supreme Court has recognized the need for broader authority over minors in a variety of contexts. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944)(the Court denied minors the right to distribute religious literature on public streets); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970)(the Court allowed parents to reject mail that was sent to their minor children).

57. 431 U.S. 678 (1977).

58. *Id.* at 691-99. The Court did not specifically decide the extent to which the state may safeguard any rights parents may have in such a matter.

59. Justice Brennan delivered the opinion of the Court, in which Justices Stewart, Marshall, and Blackmun joined. These four Justices espoused an unrestricted right of access to contraceptives. *Id.* Justices White, Powell, and Stevens acknowledged the right but not as unrestricted. *Id.* at 702-17. Two Justices failed to recognize this right. Chief Justice Burger dissented in *Carey* without opinion. *Id.* at 702. Justice Rehnquist filed a dissenting opinion in which he rejected a minor's right of access to contraceptives. *Id.* at 717-19.

60. *Id.* at 693.

sion to use contraceptives and an abortion decision. As *Danforth* indicated, the state may not impose an absolute parental veto over a minor's abortion decision.[61] The plurality noted the *Danforth* holding and reasoned that it should similarly decide the constitutionality of a blanket prohibition against the distribution of contraceptives to minors.[62] The *Carey* plurality reached the proper conclusion, for as Justice Brennan stated, "[t]he State's interests in the protection . . . of the pregnant minor . . . are clearly more implicated in the abortion decision than by the decision to use a nonhazardous contraceptive."[63]

Justice Brennan used the *Danforth* abortion decision as the basis of extending the right to privacy to include access to contraceptives. However, the plurality in *Carey* went further than the *Danforth* Court. The *Carey* plurality viewed the right as unrestricted while the *Danforth* Court contended that not every minor was capable of making these personal decisions without assistance.[64] An unrestricted right of access to contraceptives appears to be inconsistent with the view that minors are less capable of making important decisions, a view which the *Carey* plurality itself accepted.[65] Nonetheless, Justice Brennan concluded that the absolute state restriction did not satisfy the significant interest standard.

The state contended that there was a significant interest in restricting access to contraceptives because "free availability to minors of contraceptives would lead to increased sexual activity among the young . . . ."[66] The plurality agreed that the state has an interest "to protect the welfare of children," and to see that they are "safeguarded from abuses" which could inhibit their "growth into free and independent well-developed men [women] and citizens."[67] It refused to accept the state's reasoning that prohibiting access to

61. 428 U.S. at 74-75.

62. 431 U.S. at 694. Justice Stevens, however, distinguished a minor's decision to abort her pregnancy from her decision to use contraceptives, and contended that the Constitution did not afford these decisions the same protection. Justice Stevens reasoned that "[t]he former must bear a child unless she aborts; but persons in the latter category can and generally will avoid childbearing by abstention." *Id.* at 713.

63. *Id.* at 694.

64. 428 U.S. at 75.

65. 431 U.S. at 692.

66. *Id.* at 694.

67. Prince v. Massachusetts, 321 U.S. at 165.

contraceptives would increase the hazards of sexual activity for minors, and thus deter such conduct.[68] In fact, Mr. Justice Brennan found significant evidence that indicated no such deterrent effect.[69]

The high incidence of teenage sexuality[70] would seem to strengthen, rather than weaken, the merits of the plurality's argument. The current prevalence of promiscuity among minors strongly suggests that minors have a need for access to contraceptives. Moreover, a large part of this sexually active teenage group is not only unaware of the risks of pregnancy[71] but often fails to use any method of birth control.[72]

The principal harms of sexual activity among the young are venereal disease, premarital pregnancy, and their accompanying physical and psychological effects.[73] These problems may be avoided by abstention; but practically speaking, access to contraceptives for minors greatly reduces the minor's exposure to disease and unwanted pregnancy.[74]

Although a plurality of the Supreme Court took judicial notice of this information and these statistics,[75] it utilized a more legal basis for its decision. Justice Brennan stated:

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68. 431 U.S. at 694-95.

69. *Id.* The most recent study on teenage sexual activity revealed that prohibiting access to contraceptives did not deter a minor's sexual conduct. *See* Zelnick and Kantner, *Sexual and Contraceptive Experience of Young Women in the United States, 1976 and 1971*, 9(2) FAMILY PLANNING PERSPECTIVES 55 (1977). The Zelnick and Kantner study revealed that, of the girls surveyed, 75% of those under 14 were sexually active before seeking their first use of contraceptives. Sixty percent of all 14 year olds, 50% of all 15 year olds, and approximately 46% of all 16 year olds were sexually active before seeking their first use of contraceptives. Zelnick and Kantner at 68.

70. The Zelnick and Kantner study indicated that, as of 1976, approximately 34.9% of all single women between the ages of 15 and 19 engaged in sexual intercourse. *Id.* at 56.

71. *Id.* at 58. The study revealed that only 40.6% of teenage girls between the ages of 15 and 19 knew their period of greatest fertility. In fact, only 29.5% of 15 year olds and 33.5% of 16 year olds correctly identified this period. *Id.*

72. *Id.* at 56. The study determined that, of the 15 year olds surveyed, 38.0% never used contraceptives, 32.5% sometimes used them, and 29.5% always used them; of the 16 year olds, 30.9% never used contraceptives, 38.7% sometimes used them, and 30.5% always used them. *Id.* at 62.

73. An unwanted pregnancy and teenage motherhood can create serious personal problems. Some of these problems include the stigma of unwed motherhood, the need to drop out of school, early marriage (which frequently ends in divorce), death due to pregnancy, and even suicide. Pilpel and Wechsler, *Birth Control, Teenagers and the Law*, 1 (1) FAMILY PLANNING PERSPECTIVES 29 (1969).

74. Justice Stevens pointed this out in his concurring opinion in *Carey*. 431 U.S. at 714 (Stevens, J., concurring in part and concurring in the judgment).

75. *Id.* at 695-96.

> It is enough that we again confirm the principle that when a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.[76]

Basically this statement of the *Carey* plurality asserts that the state cannot meet the significant interest standard with assertions that lack sufficiently supportive evidence.

B. Limited Right of Access to Contraceptives

Justices Stevens, White, and Powell disagreed with Mr. Justice Brennan's approach allowing minors an *unrestricted* constitutional right to put contraceptives to their intended use.[77] Justices Stevens and White described as "frivolous" the argument that minors have this unrestricted right.[78] Justice Powell expressed a similar reason for disagreement with the plurality's opinion. He asserted that "there is considerably more room for state regulation in this area than would be permissible under the plurality's opinion."[79]

This less permissive approach is consistent with both the recognition of a minor's right to privacy and the generally accepted view that the minor has a lesser capability for making decisions.[80] The approach allows a minor access to contraceptives, but permits state intervention when the minor is incapable of making these important personal decisions.

The three Justices applied two different standards to determine the validity of the state regulation in *Carey*. Justice Powell incorrectly utilized a rational basis test.[81] The Court has often used this test in relation to business regulations.[82] In applying this test Justice Powell concluded that the state could regulate a minor's access to

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76. *Id.* at 696.

77. *Id.* at 702-16.

78. *Id.* at 713 (Stevens, J., concurring in part and concurring in the judgment). Justice White, in his concurring opinion, accepted Justice Stevens' description of an unrestricted right of access to contraceptives as "frivolous." *Id.* at 702-03 (White, J., concurring in part and concurring in the result in part).

79. *Id.* at 709 (Powell, J., concurring in part and concurring in the judgment).

80. *See* notes 54-56 *supra*.

81. 431 U.S. at 708 (Powell, J., concurring in part and concurring in the judgment).

82. *See* note 30 *supra*.

contraceptives, but that this particular restriction was invalid.[83]

Justices White and Stevens correctly applied the significant interest test to the state's regulation of a minor's access to contraceptives. In applying this standard, both Justices reached the same conclusion as the plurality. Justice White reasoned that the regulation was invalid because the state had failed to show that it curtailed sexual activity among minors.[84] He asserted, "the State has not demonstrated that the prohibition against distribution of contraceptives to minors measurably contributes to the deterrent purposes which the State advances as justification for the restriction."[85]

Justice Stevens appropriately criticized the state's motive regulating access to contraceptives. He asserted that statutes prohibiting a minor's access to contraceptives do not necessarily regulate behavior; rather, "the statute has the important *symbolic* effect of communicating disapproval of sexual activity by minors [and] is defended as a form of propaganda, rather than a regulation of behavior."[86] Justice Stevens' assertion reflects the *Wade* Court's view that legislators should not enact laws for the purpose of discouraging illicit sexual conduct.[87] Justice Stevens, however, concluded that nothing was wrong with the state serving a teaching function.[88] Nonetheless, since the result of the state's attempt to persuade might be harmful to the minors it is trying to protect, Justice Stevens concluded that the restriction on access to contraceptives did not satisfy the significant interest standard.[89]

C. No Right of Access to Contraceptives

Justice Rehnquist, in his dissenting opinion in *Carey*, clearly disagreed that regulating a minor's access to contraceptives did not serve a significant state interest.[90] However, he pointed to no actual

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83. 431 U.S. at 707-08 (Powell, J., concurring in part and concurring in the judgment). The Justice contended that the state regulation "infringes the privacy interests of married females between the ages of 14 and 16" and was, therefore, invalid. *Id.* at 707.

84. *Id.* at 702 (White, J., concurring in part and concurring in the result in part).

85. *Id.*

86. *Id.* at 715 (Stevens, J., concurring in part and concurring in the judgment).

87. 410 U.S. at 147-48.

88. 431 U.S. at 715 (Stevens, J., concurring in part and concurring in the judgment).

89. *Id.* at 715-16. Justice Stevens contended that "the propaganda technique used in this case significantly increases the risk of unwanted pregnancy and venereal disease." He analogized the situation to a state deciding to dramatize its disapproval of motorcycles by prohibiting the use of safety helmets. *Id.* at 715.

90. *Id.* at 717-19 (Rehnquist, J., dissenting).

state interest other than to discourage unmarried minors from having sexual intercourse.[91] Justice Rehnquist in effect advocates the imposition of public morality on minors. Although he may be correct in wanting to impose public morality on minors or in stating that their sexual activity was a proper concern of the state, he failed to specify any harmful effects of access to contraceptives or to see the harmful effects these restrictions have on minors.[92] Justice Rehnquist has apparently concluded that the state must be allowed to determine the best interests of minors. However, making contraceptives more readily available instead of limiting a minor's access to them would seem to best protect the minor's interest.[93]

V. Parental Involvement in a Minor's Personal Decisions

Although the state, based on the *Carey* decision, cannot interfere with a minor's access to contraceptives,[94] the same may not be said of the minor's parents. The Supreme Court has not explained in detail the relationship between parents' rights and the rights of their minor children.[95]

The *Danforth* Court found objectionable a statute that gave parents an *absolute* veto over the abortion decisions of their minor children.[96] It concluded that the state requirement of parental consent for a minor's abortion decision did not satisfy the significant interest standard.[97]

An examination of the state interests advanced in *Danforth* indicates that the Court reached the proper result. The two reasons suggested were safeguarding the family unit[98] and preserving paren-

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91. *Id.* at 718-19.

92. *See* notes 69-73 *supra*.

93. *Id.*

94. 431 U.S. at 681-82.

95. The court noted this in Doe v. Irwin, 428 F. Supp. 1198 (W.D. Mich. 1977), when it dealt with the issue of whether the distribution of contraceptives to minors without parental consent was violative of the parents' constitutional rights. *Id.* at 1200.

The *Irwin* court held that parents had a constitutional right to help and advise their minor children to make decisions regarding the use of contraceptives. *Id.* at 1214-15.

It is interesting to note that the same United States District Court reheard Doe v. Irwin several months after the *Carey* decision. The *Irwin* court concluded that *Carey* did not require a contrary result to its initial determination. 441 F. Supp. 1247 (W.D. Mich. 1977).

96. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. at 74-75.

97. *Id.*

98. Planned Parenthood v. Danforth, 392 F. Supp. 1362, 1370 (1975).

tal authority.[99] The imposition of an absolute parental veto over the minor's and her physician's decision might not protect these two valid interests. As the *Danforth* Court reasoned, "[i]t is difficult . . . to conclude that providing a parent with absolute power to overrule this determination . . . will serve to strengthen the family unit."[100] Similarly, it is doubtful that this veto power could preserve parental authority "where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure."[101]

Thus, the ultimate reason for the Court's decision was that the state requirement of parental consent conferred to a third party an absolute veto over the minor's decision to terminate her pregnancy, without a sufficient justification for that restriction.

Many of the lower court cases which held an absolute parental veto to be unconstitutional recognized that a less restrictive statute might be acceptable.[102] Moreover, a majority of the Supreme Court would probably refuse to foreclose forever parental participation in their minor children's decision to use contraceptives.[103]

Justice White agreed[104] with Justice Stevens' belief that minors do not have a constitutional right to use contraceptives, "notwithstanding the combined objection of both parents and the State."[105] Thus, these two Justices favor parental involvement in the minor's decision to use contraceptives.

Justice Powell is an even stronger advocate of parental involvement in a minor's abortion and contraceptive decisions. The Justice rejected the statute in *Carey* not because it infringed upon the minor's right but because it "prohibits parents from distributing contraceptives to their children, a restriction that unjustifiably interferes with parental interests in rearing their children."[106]

Although Chief Justice Burger and Justice Rehnquest concluded

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99. *Id.*

100. 428 U.S. at 75.

101. *Id.*

102. *See* Doe v. Exon, 416 F. Supp. 716, 719 (D. Neb. 1975); Doe v. Zimmerman, 405 F. Supp. 534, 538 (M.D. Pa. 1975); Planned Parenthood v. Fitzpatrick, 401 F. Supp. 554, 567 (E.D. Pa. 1975).

103. 431 U.S. at 702-19.

104. *Id.* at 702-03 (White, J., concurring in part and concurring in the result in part).

105. *Id.* at 713 (Stevens, J., concurring in part and concurring in the judgment).

106. *Id.* at 708 (Powell, J., concurring in part and concurring in the judgment).

that minors had no right of access to contraceptives,[107] both Justices would probably favor a parental consent or consultation requirement. Justice Rehnquist's sole concern was the deterrence of promiscuous sexual activity among minors.[108] Parental involvement in a minor's contraceptive decision would at least have some impact on the sexual activity of minors. Therefore, one can conclude that both Justices would prefer parental involvement to the unrestricted right the *Carey* plurality currently gives minors. Thus, five Justices, or a majority of the Supreme Court would support parental consent or consultation in a minor's contraceptive decision.

Justice Powell and the other advocates of a parental consent statute contend that requiring minors to seek parental guidance in the area of contraception would be consistent with *Planned Parenthood of Central Missouri v. Danforth*[109] and *Bellotti v. Baird*.[110] In fact, they argue that *Danforth* explicitly suggested a statute which would assure consultation between parent and child.[111] Justice Stewart, in his concurring opinion in *Danforth*, believed that the state might further a constitutionally acceptable end if it encouraged minors to seek the counseling and understanding of their parents before making the decision to use contraceptives.[112]

Proponents of this type of statute believe that requiring parental consent or consultation would best serve the state's interest in protecting minors from making improvident or immature decisions.[113] Most parents, they would contend, are interested in their children's welfare and would not automatically veto the minor's decision.[114] Giving parents the right to consent might be the proper method of fostering the minor's welfare.[115]

Any constitutionally protected juvenile right to privacy must be balanced with the constitutionally protected "parents' claim to authority in their own household to direct the rearing of their children

107. *See* notes 90-92 and accompanying text *supra*.
108. 431 U.S. at 718-19 (Rehnquist, J., dissenting).
109. 428 U.S. 52 (1976).
110. 428 U.S. 132 (1976).
111. 431 U.S. at 709-10 (Powell, J., concurring in part and concurring in the judgment).
112. 428 U.S. at 91 (Stewart, J., concurring).
113. *Id.* at 94 (White, J., dissenting).
114. *Id.* at 103 (Stevens, J., dissenting).
115. *Id.*

. . . ."[116] A statute which requires parental consent, however, predetermines that the parents' rights to "the custody, care and nurture of the child . . ."[117] are superior to the right of the minor to decide whether or not to use contraceptives. This predetermination may be premised on two principles:[118] first, that the family unit is important to our society and must be legally preserved,[119] and second, that the use of contraceptives by minors without parental consent disrupts the family unit.[120]

The Supreme Court has expressed the view that the rights of the family are at times superior to those of the state.[121] The rights and responsibilities to build, maintain and guide the family "reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[122] The Supreme Court has indicated that parental authority in determining the upbringing of children "is basic in the structure of our society."[123] The integrity of the family, therefore, is constitutionally protected.

Proponents of a parental consent statute urge that exclusion of parents from the knowledge that their children use contraceptives would disrupt and destroy the family unit.[124] They contend that to exclude parents from this decision would prematurely free children from the advantages of the advice and guidance of their parents.[125] Conversely, a parental consent statute makes no exception for minors who are supporting themselves, are mature, emancipated or receiving guidance elsewhere. Moreover, there is nothing to indicate that the family structure will be destroyed if minors are allowed to make decisions regarding contraceptives for themselves.[126]

In this situation a minor's right to privacy may conflict with

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116. Ginsberg v. New York, 390 U.S. 629, 639 (1968).

117. Prince v. Massachusetts, 321 U.S. at 166.

118. *See* Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 Harv. L. Rev. 1001, 1014-15 (1975).

119. *Id.* at 1015.

120. *Id.*

121. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923).

122. 321 U.S. at 166.

123. Ginsberg v. New York, 390 U.S. at 639.

124. Doe v. Irwin, 428 F. Supp. at 1211.

125. *Id.*

126. *See* 88 Harv. L. Rev. at 1017-18.

parents' rights to care for and guide their children. To give minors access to contraceptives without parental consent undermines parental authority; to require parental consent before giving minors access to contraceptives denies the minor's right to privacy. Although these two important interests are constitutionally protected, a majority of the Supreme Court would appear to favor parental consent rather than unrestricted use of contraceptives by minors.[128]

VI. Conclusion

The right to privacy of adults is an important right that the courts and legislatures must carefully guard. Similarly, a minor's right to privacy is of fundamental importance. The highest Court has asserted that minors are no longer considered totally lacking in legal competence.[129] In general, a minor's right to privacy may deserve the same constitutional protection as an adult's right. *Carey* ensures this right to privacy by allowing minors to make personal decisions regarding contraceptives without *governmental* intrusion.

The Supreme Court has yet to decide, however, if *parents* have a right to intervene in the minor's decision to use contraceptives. The best approach might be that neither the courts nor the legislatures are the proper judges of this matter, since each parent-child relationship is special and dynamic. Nonetheless, until the Court does decide the question of parental involvement *Carey* gives minors the right to decide whether or not to use contraceptives without state intervention.

Victor J. D'Ammora

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127. *See* notes 57-76 and 105-126 and accompanying text *supra*.

128. *See* notes 104-108 and accompanying text *supra*.

129. *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Goss v. Lopez, 419 U.S. 565 (1975). The Court's previous view was that, in the eyes of the law, minors were like the mentally incompetent, having a right to custody and not liberty. 387 U.S. at 17.