Minors and Contraceptives: The Physician's Right to Assist Unmarried Minors in California

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The changing attitude of Americans towards voluntary population control has been recently reflected in the actions of legislatures and courts. Unfortunately, one short term product of their efforts is confusion. This note will examine a small area of the emerging law of voluntary population control: the right of physicians to provide unmarried minors in California with contraceptive assistance. To clarify both the problem and the law, an attempt has been made to indicate, first, the need to provide minors with contraceptive assistance, second, the changing attitude of legislatures and courts towards the distribution and use of contraceptives, and finally, the potential criminal penalties and civil liability faced by a physician in California who makes contraceptive services available to unmarried minors without first obtaining the consent of the minor's parent. It will be shown that, when the physician deems such assistance necessary, the potential for liability presently existing is insufficient to justify a denial of contraceptive assistance to minors.

The Need for Contraceptive Assistance

Because of the uncertainty as to the legal ramifications of providing unmarried minors with contraceptive services, many physicians are reluctant to render any assistance.¹ Those who do provide help may

¹. See, e.g., Holder, Minors and Contraception, 216 J.A.M.A. 2059 (1971); Howard, Comprehensive Service Programs for School-Age Pregnant Girls, 15 CHILDREN 193, 195 (1968); Russell, Law, Medicine and Minors, Part II, 278 NEW ENGLAND J. OF MEDICINE 265, 266 (1968). Any uncertainty as to the legal consequences of making contraceptives available to minors in California will be resolved if S. 433, 1972 Reg. Sess., is enacted. The bill would add the following language to the California Civil Code as section 34.8: “Notwithstanding any other provisions of the law, a minor who has been determined by a licensed physician or surgeon to be sexually active may give consent to the furnishing of medical care related to the use, fitting and dispensing of contraceptive devices or drugs, and such consent shall not be subject to disaffirmance because of minority. The consent of the parent or parents shall not be necessary in order to authorize such medical care.”

In 1970 a similar bill, S. 542, was passed by the California legislature but vetoed by Governor Reagan. His objection to the bill was that it “could be construed to permit a minor girl to consent to a sterilization operation without her parents' knowledge or consent. The bill involves matters that should properly be the concern of the parents of an unmarried minor girl.” 3 JOURNAL OF CALIFORNIA SENATE, 1970 Reg. Sess. 6043.
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require that the minor first obtain the consent of a parent or guardian. Because of the inability of many minors to discuss their contraceptive needs with their parents, only a small percentage of sexually active minors can actually obtain assistance in avoiding pregnancies. The consequence is too often the birth of unwanted children that aggravate population problems and inflict personal hardships.

Increased Population Pressures

The most obvious result of denying contraceptive services to minors is increased population pressures. Some writers suggest that the sheer number of Americans is already contributing to a pervasive deterioration in the quality of life. Yet, despite the apparent need to stabilize its growth, the population of the United States is increasing by 6,000 people per day—or over 2,000,000 per year. A significant fraction of this total represents the offspring of unwed minors. It is estimated that in 1970 unmarried minors gave birth to 350,000 children. An undetermined number of other children were conceived out of wedlock but born to parents subsequently married.

In California, as in the nation as a whole, the unplanned pregnancies of unmarried minors represent a substantial source of population pressure. In 1967, 41 percent of all illegitimate births in California were to women under twenty and 40 percent of all California

2. Gordis, Fasset, Finkelstein, Tayback, Adolescent Pregnancy: A Hospital-Based Program for Primary Prevention, 58 AM. J. OF PUB. HEALTH 849, 856 (1968) [hereinafter cited as Gordis].

3. See, e.g., Day, The Population Problem in the United States in The 99th Hour, reprinted in Hearings on Effects of Population Growth on Natural Resources and the Environment Before the House Subcomm. on Government Operations, 91st Cong., 1st Sess. 152 (1969). Day believes that "in combination with our high material levels of living population increase in this country has already necessitated greater restrictions on individual behavior, greater centralization in government, rising economic costs and taxes, crowded schools and recreation areas, vanishing countryside, air and water pollution, endless traffic jams, crowded court schedules, and a steady loss in time, solitude, quiet, beauty, and peace of mind. This deterioration we are experiencing right now. Yet, half of us can expect to live long enough to see in this country, if present rates continue, a population of nearly 400 million, and the difficulties attending population increased and magnified by the fact of two Americans for every one here now."

4. COMM. ON POPULATION GROWTH & AMERICAN FUTURE, INTERIM COMMITTEE REPORT ON POPULATION GROWTH AND AMERICA'S FUTURE, 7 (1971).


7. CALIFORNIA DEP'T OF PUBLIC HEALTH, ILLEGITIMATE BIRTHS IN CALIFORNIA 1966-1967, 16 (1971) (14,687 of 34,640 illegitimate children were born to minors).
women who married before their twentieth birthday were pregnant at the time the ceremony was performed. If these percentages have held constant, as many as 35,500 of the 364,000 children born in 1970 in California were conceived by unmarried women under twenty. These figures clearly indicate that unmarried minors must be considered a significant source of population pressures.

Personal Consequences of Pregnancy

Perhaps more important than the general exacerbation of population pressures is the personal hardship that so often characterizes the pregnancy of an unmarried minor. The adolescent who discovers she is pregnant may pursue several courses of conduct. Often, however, the choice is only among competing tragedies.

If the minor chooses a legal “therapeutic” abortion, as did 25,000 California minors in 1970, she must convince a medical committee that there is a substantial risk that the continuance of her pregnancy will gravely impair her physical or mental health, or that the pregnancy resulted from rape or incest. If she chooses an illegal abortion, she faces criminal penalties and a substantially increased risk to her health. In either case she is likely to experience feelings of guilt or other adverse psychological reactions and incur social disapproval of her decision.


10. Estimate based on statistics in notes 7 & 8 supra.

11. Id.


13. See CAL. PEN. CODE § 275 (West 1970): “Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, except as provided in the Therapeutic Abortion Act . . . is punishable by imprisonment in the state prison not less than one nor more than five years.”

14. See Tietze, Mortality with Contraception and Induced Abortion, STUDIES IN FAMILY PLANNING 6 (Sept. 1969). Based on current statistics from eastern European countries, Dr. Tietze estimates that the mortality rate associated with legal abortions performed in a hospital, at an early stage of gestation, is 3 deaths per 100,000. The mortality rate associated with illegal abortions induced out of hospitals by persons without medical training is 100 deaths per 100,000 abortions. Dr. Tietze considers this latter figure to be “a very rough estimate, and, almost certainly conservative, since it is lower than the maternal mortality rate, excluding abortion, per 100,000 live births for white women in the United States 25 years ago.” Id.

If the unmarried minor chooses to give birth, she is confronted with other difficulties. The younger she is, the greater is the risk of harm to her health and that of her child, and even if they both survive, her youthfulness may prevent the formation of an adequate mother-child relationship. A marriage to "legitimize" the child may serve only to complicate and aggravate her difficulties. Nevertheless, if she does not marry there is a strong statistical likelihood that she will have additional illegitimate children.

Formal education is also frequently terminated by a minor's pregnancy. Dr. Beasley, director of the Center for Population and Family Studies at Tulane University, asserts that pregnancy is the single largest cause of school dropouts among teenagers in the lower socio-economic classes. This in turn limits employment opportunities and in many cases results in permanent dependence on public assistance.

Certainly not all pregnancies of unmarried minors could be prevented merely by recognizing the right of physicians to render birth control assistance. However, available data does suggest that such pregnancies are not primarily the function of "any patterns of sexual promiscuity or cultural value supporting pregnancy outside of marriage." Rather, the failure to practice birth control stems more from limited knowledge of birth control methods and a lack of availability of the necessary materials. This strongly suggests that increasing access to contraceptives and birth control information is an effective way of preventing pregnancies. Unfortunately, while the effectiveness of this approach appears unquestionable, the right of the physician to employ it is much less certain. The problem, therefore, is to determine the extent to which the physician in California can legally make contraceptives available to unmarried minors.

Changing Attitudes Toward Contraceptives

For the past century the distribution of contraceptives in the United States has been either stringently limited or entirely prohibited by federal and state laws. As early as 1873 Congress passed an antisemenity measure that banned both the importation and the shipment of

17. Gordis, supra note 2, at 849.
18. Id. at 855.
20. Gordis, supra note 2, at 855.
21. Furstenberg, supra note 6, at 42.
22. Id.
contraceptives through the mail. In 1905 Congress extended the scope of this ban to the interstate shipment of contraceptives by any common carrier whatsoever.

Following the lead of the federal government, every state except New Mexico enacted its own obscenity legislation. While some of these laws made no specific reference to contraceptives, all contained language which could be interpreted as barring their distribution or use. One of the harshest of the morality measures was Connecticut's. In that state it was a crime for anyone to use "any drug, medicinal article, or instrument for the purpose of preventing conception . . . ." The Supreme Court of Errors of Connecticut interpreted this language as prohibiting the use of contraceptives even by a married woman who, because of an illness, might die or suffer serious physical harm in the event of a pregnancy. Moreover, any physician who supplied contraceptives to such a patient was also guilty of a crime under the state's accessory law.

In more recent years, however, the attitude of legislatures and courts towards the dissemination of contraceptives has shifted dramatically. In 1971 Congress removed most of the sanctions against importing and transporting contraceptives in interstate commerce. At present, federal criminal penalties attach only to the unsolicited mailing of contraceptives and contraceptive advertisements to people outside the health professions.

In addition to eradicating the most onerous of the old prohibitions against the distribution of contraceptives, Congress has also taken affirmative steps to increase their availability. In 1970 Congress passed the Family Service and Population Research Act, having as one of its

27. Tileston v. Ullman, 129 Conn. 84, 26 A.2d 582 (1942), appeal dismissed per curiam, 318 U.S. 44 (1943).
30. Id.
stated purposes to "assist in making comprehensive voluntary family planning services readily available to all persons desiring such services,"32 The act also created the Office of Population Affairs, an agency responsible for population research and family planning programs. Thus, in the space of two years, Congress not only abandoned its position as an opponent of contraceptives, it became an active proponent of their distribution.

The first major case which indicated the changing attitude of the courts towards contraceptives is *Griswold v. Connecticut*33 in which the United States Supreme Court considered the constitutionality of Connecticut's anticontraceptive statute. Justice Douglas, in the opinion for the Court, found that a state statute attaching criminal penalties to the use of contraceptives by married persons was "repulsive to the notions of privacy surrounding the marriage relationship"34 and violative of the Fourteenth Amendment.35 In holding the statute unconstitutional, the Court quoted the language of *NAACP v. Alabama:*

[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.37

Six years after the cloak of constitutional protection was drawn around the use of contraceptives in marriage, a federal court of appeals, in *Baird v. Eisenstadt*38 considered the right of unmarried adults to obtain and use contraceptives. The court was confronted with the issue when Baird filed a petition for writ of habeas corpus alleging that Massachusetts's anticontraceptive statute was unconstitutional.39 While the statute allowed the distribution of contraceptives

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32. *Id.* § 2(1).
33. 381 U.S. 479 (1964).
34. *Id.* at 486.
35. *Id.* at 481-86.
37. 381 U.S. at 485.
39. MASS. GEN. LAWS ANN. ch. 272, §§ 21, 21A (1970). Section 21, originally enacted in 1879, provides that anyone who "sells, lends, gives away, exhibits or offers to sell, lend or give away ... any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion ... shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

Section 21A was enacted in 1966—after the decision in *Griswold v. Connecticut*—and provides, in part, as follows: "A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician . . . ."
by physicians and pharmacists to married persons, it specifically prohibited any distribution to unmarried persons. 40 Baird violated this law when, after lecturing on family planning to a college audience, he gave an unmarried adult woman a package of vaginal foam, a “publically advertised contraceptive.” 41 In challenging the statute's constitutionality, Baird argued that it bore no real and substantial relation to the public health or morals. 42

The court of appeals was wholly unimpressed by the attempt of Massachusetts to show that the statute barring distribution to single persons bore a rational relation to public health. Instead, the court found that

If the prohibition . . . is to be taken to mean that the same physician who can prescribe for married patients does not have sufficient skill to protect the health of patients who lack a marriage certificate, or who may be currently divorced, it is illogical to the point of irrationality. . . . [W]e do not believe that health is the legislative purpose, but if it is, we hold the statute is arbitrary, and by the same token, grossly discriminatory. 43

Massachusetts met with no greater success when it asserted that the statute was protecting public morals by denying unmarried persons access to contraceptives. In declaring the statute unconstitutional, the Baird court held that the statute was merely an attempt to declare contraceptives themselves immoral: 44

To say that contraceptives are immoral as such, and are to be 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 demonstrated harm, we hold it is beyond the competency of the state. 45

On appeal the United States Supreme Court agreed that the Massachusetts statute could not be upheld as either a health measure or as a deterrent to premarital sexual relations. 46 In affirming the decision discharging Baird, the Court specifically declined to decide whether legislation denying access to those contraceptives not constituting a health hazard conflicted with fundamental human rights. While the court of appeals had concluded that such legislation was "beyond the com-

40. Id.
41. 429 F.2d at 1399.
42. Id. at 1400.
43. Id. at 1401.
44. Id. at 1401-02.
45. Id. at 1402.
46. 92 S. Ct. 1029, 1039 (1972).
petency of the state,” the Supreme Court found the statute constitutionally offensive on more narrow equal protection grounds. “[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.” Finding no rational basis for distinguishing between married and unmarried individuals, the Court held that a statute conditioning access to contraceptives upon marital status was underinclusive and invidious.

If *Griswold* is interpreted to mean that a state cannot prohibit the distribution of contraceptives, *Baird* assures that distribution cannot be prohibited to unmarried persons. Unfortunately, the scope of the holding in *Griswold* is unclear. Interpreted narrowly, *Griswold* held only that a state statute forbidding the use of contraceptives by married persons unnecessarily invaded a protected area of marital privacy. It did not consider the constitutionality of laws banning distribution. While both the Massachusetts legislature and the court of appeals in *Baird* apparently interpreted *Griswold* as controlling in this latter situation as well, the Supreme Court expressly left open this interpretation.

Because of this uncertainty as to the scope of the *Griswold* holding, it cannot be said at present that adults have a constitutionally protected right of access to contraceptives. Even if future litigation does establish the existence of such a right, it will not necessarily follow that minors have a similar right. It has traditionally been recognized that the “state’s authority over children’s activities is [more broad] than that over like actions of adults.” For present purposes, the significance of *Griswold* and *Baird* is not that they provide definitive answers but that they indicate an increasing disenchantment with the notion that state regulation of contraceptives is an appropriate means of influencing the morality of individuals. Just as the Family Service and Population Research Act illustrates the changing attitudes of the legislatures, *Griswold* and *Baird* indicate the changing attitudes of the courts.

Of course, a mere change in attitude towards the distribution of contraceptives does not necessarily mean that a physician may make birth control materials available to minors without incurring liability. The existence of liability can only be determined by examining the law at its present stage of development. The remainder of this note will consider the law of California to determine the actual risks of liability a California physician presently faces when he chooses in the

47. *Id.* at 1038.
48. *Id.*
49. *Id.*
51. See note 31 *supra.*
exercise of sound professional discretion to make contraceptive services available to an unmarried minor without the consent of the minor's parent.

Sources of Potential Criminal Sanctions

In any given case there may be a multiplicity of moral, social, and religious reasons to justify a physician in declining an unmarried minor's request for birth control assistance. Yet the magnitude of the need—and the social and personal consequences of neglect—suggest that any restrictions on meeting the contraceptive needs of a large number of unmarried minors should be based upon something more substantial than a physician's possibly unwarranted or exaggerated fear of incurring legal sanctions.

Any fear of incurring criminal sanctions by meeting the contraceptive needs of sexually active minors is virtually unwarranted under California's laws. In examining the potential sources of sanctions, two classes of statutes will be considered: (a) Those which may directly affect the distribution of contraceptives, and (b) those designed to protect the morals of minors.

Statutes Affecting the Distribution of Contraceptives

Although California has no laws which specifically limit the distribution or use of contraceptives,52 sections 4300 through 4325 of the Business and Professions Code do regulate the distribution of prophylactics. Prophylactics include any "device, appliance or medicinal agent used in the prevention of venereal disease."53 The distribution of those which both prevent disease and also have contraceptive attributes (prophylactic contraceptives) will be controlled by these sections.54 The specific section applicable to physicians provides that they may dispense prophylactics in the "regular practice of their profession and to their patients, in the manner specified for a licensee."55 Until 1970 licensees who made prophylactics available to persons under eighteen years of age committed a misdemeanor.56

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52. The only California statute specifically limiting the distribution of contraceptives or contraceptive information in California is Business and Professions Code section 601. This section makes it a felony to advertise contraceptives or contraceptive services. It exempts from its coverage the dissemination of contraceptive information for purposes of public health education by one not interested in the sale of contraceptives.


55. CAL. BUS. & PROF. CODE § 4304 (West 1962).

56. Violation of any of the provisions of the article concerning prophylactics
limiting section has been amended, however, so that there is currently no minimum age requirement.\textsuperscript{57}

Thus, the statutes regulating the distribution of prophylactic contraceptives do not prevent a licensee or a physician from dispensing them to minors of any age. This interpretation is consistent with a provision of the California Administrative Code that requires physicians to instruct all patients suspected of having a venereal disease in "precautionary measures for preventing the spread of disease."\textsuperscript{58} It would be useless for a physician to instruct a minor in precautionary measures if he could not make prophylactics available.

The deliberate act of the legislature in deleting any age requirement from the code section controlling the distribution of prophylactics may fairly be interpreted as allowing physicians to provide sexually active minors, regardless of age, with prophylactics that incidentally possess contraceptive properties. However, the section does not authorize the distribution to minors of contraceptives that are not also prophylactics. It therefore will not shelter a physician from any risk of incurring criminal penalties if he dispenses a contraceptive, such as an oral contraceptive or intrauterine device (IUD) that lacks prophylactic attributes. Accordingly, the physician dispensing such contraceptives must consider the possibility of incurring criminal penalties under other statutes. The only other statutes having possible application are those designed to protect the morals of minors.

Statutes Protecting the Morals of Minors

Like other states, California recognizes "the deficiencies of minors in respect of their mental and moral faculties and [has] thrown around them the protection which their immature years demand."\textsuperscript{59} Two of the California statutes designed to protect minors may limit a physician's right to provide birth control services to unmarried minor patients. These prohibit respectively the distribution of harmful matter to minors, and any conduct which may contribute to a minor's delinquency.

\textit{Distributing Harmful Matter}

In California it is a misdemeanor to distribute or exhibit harmful matter to a minor.\textsuperscript{60} For purposes of this statute, harmful matter is a misdemeanor. \textit{Id.} § 4325. A misdemeanor is punishable by "imprisonment in the county jail not exceeding six months, or by fine not exceeding five hundred dollars, or by both." CAL. PEN. CODE § 19 (West 1970).  
\textsuperscript{57} CAL. BUS. & PROF. CODE § 4319 (West Supp. 1971).  
\textsuperscript{58} 17 CAL. ADM. CODE § 2636(g) (1961).  
\textsuperscript{60} CAL. PEN. CODE § 313.1 (West Supp. 1971).
is "matter which taken as a whole . . . is utterly without redeeming social importance for minors," and whose primary appeal is to a "prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion . . . ." 61 Obviously, neither pregnancy prevention literature nor contraceptives themselves fall within the proscription of this statute. Contraceptives are not designed to appeal to prurient interests, and the prevention of unwanted pregnancies seems to be of some "redeeming social importance for minors." Even if contraceptives were found to have a prurient appeal, however, it is a defense in any prosecution that the distribution or exhibition was for "educational purposes." 62

**Contributing to the Delinquency of a Minor**

California Penal Code section 272 makes it a misdemeanor to perform any act which causes or tends to cause any person under twenty-one years to come within the jurisdiction of the juvenile court. 63 A minor comes within the juvenile court's jurisdiction when he is "in danger of leading an idle, dissolute, lewd, or immoral life." 64 A single

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61. Id. § 313 (West 1970).
62. Id. § 313.3.
63. CAL. PEN. CODE § 272 (West 1970), referring to CAL. WELF. & INST'NS CODE §§ 600-02 (West 1966). In 1971 the legislature lowered the age of majority for most purposes from twenty-one to eighteen years. Cal. Stat. 1971, ch. 1748, §§ 1-78, at 354-400. The legislature did not amend section 272 of the Penal Code, however. For the purposes of this section, a minor continues to be defined as any person under twenty-one years of age. This creates something of an anomaly. The offense proscribed by section 272 is that of causing a minor to come or remain within the provisions of sections 600, 601, and 602 of the Welfare and Institutions Code. These sections describe minors who are within the jurisdiction of the juvenile court. As amended, the sections are applicable only to persons under eighteen years of age. Cal. Stats. 1971, Ch. 1748, §§ 64-66, at 392-93. If the more expansive definition of "minor" found in Penal Code section 272 is to be harmonized with the Welfare and Institutions Code provisions, section 272 must be interpreted as proscribing those acts which would cause a person between the age of eighteen and twenty-one to come within the jurisdiction of the juvenile court if that person were under eighteen. Alternatively, the failure to amend section 272 of the Penal Code may have been legislative oversight. A reduction in the age of majority from twenty-one to eighteen for purposes of this section would, of course, eliminate any risk of liability under this section that might attach to the act of providing persons over eighteen with contraceptives.

64. CAL. WELF. & INST'NS CODE § 601 (West 1966). The language quoted was found by a three judge district court to be "too vague to serve as a constitutionally permissible standard on which to base an arrest or an adjudication of a juvenile as a ward of a court." Gonzalez v. Mailliard, — F. Supp. —, Civ. No. 50424 (N.D. Cal. Feb. 9, 1971), appeal filed, 40 U.S.L.W. 3019 (U.S. Feb. 9, 1971). Presumably the language may also be too vague to serve as a standard on which to base an arrest of an adult for contributing to the delinquency of a minor. If the United States Supreme Court affirms the decision on appeal, it can be anticipated that the substance of the provision will be reenacted in a constitutionally acceptable form. Thus, while
act tending to produce such a result or which tends to cause a minor to remain delinquent is sufficient for a conviction under this section; it is not necessary that the act be otherwise illegal that the actor intend to encourage juvenile delinquency, or that the juvenile actually become delinquent. All that is required is that the act have a reasonable tendency to bring about such a result.

Thus if one result of making contraceptives available to minors is an increase in promiscuity, it is arguable that providing contraceptives to minors does contribute to their delinquency within the meaning of the statute. However, the available data does not support this premise. No relationship has been established between the amount of sexual activity and the availability of contraceptives. An adaptation of a report of the Council of the Section of Family Law of the American Bar Association stated that

In view of the impulsiveness of adolescence as well as the lack of foresight and trust to luck against pregnancy observed among sexually mature teen-agers . . . the availability of birth-control cannot be thought to be the determinant of whether or not they engaged in sexual relations. The development of a youthful standard of sexual morality is a matter for the home, the church, and the community: it cannot be maintained through ignorance of the availability of birth-control.

Even assuming that access to contraceptives does encourage sexual activity among minors, it must be noted that some relatively effective prophylactic contraceptives are already available to the knowledgeable minor without the assistance of a physician. If the physician makes oral contraceptives or an IUD available, he is not providing a contraceptive service that would otherwise be wholly unavailable; he is only increasing the degree of contraceptive protection

the constitutionality of the quoted language is questionable, it will still be valuable to consider whether the act of providing a minor with contraceptive assistance can be found to contribute to the minor's delinquency.

70. Id.
71. Gordis, supra note 2, at 857.
73. See text accompanying note 45 supra.
already obtainable. To convict a physician of contributing to a minor's delinquency, it would therefore be necessary to prove that it was the extra increment of birth prevention protection that encouraged the minor to become sexually active.

When all the possible sources of criminal liability are considered, it becomes clear that the California physician need have little fear of incurring criminal sanctions by meeting the contraceptive needs of unmarried minors. When he dispenses prophylactic contraceptives, he may rely on an authorization implied in the legislature's repeal of the minimum age requirement previously restricting distribution. When he provides minors with contraceptives that lack prophylactic attributes, however, the physician acts without the shelter of an authorizing statute and therefore faces a theoretical risk of violating a statute designed to protect the morals of minors. But, as has been shown, access to contraceptives does not determine the extent of sexual activity among minors. Further, since prophylactic contraceptives are already available, the physician is simply increasing the degree of protection already at the minor's disposal. Where the minor has already decided to be sexually active and the physician determines that a pregnancy will jeopardize her physical or mental well-being, it is highly unlikely that his assistance in helping her avoid a health-endangering pregnancy can be considered as contributing to her delinquency.

Potential Civil Liability

Although a physician incurs little risk of criminal sanctions in making contraceptives available to minors, the possibility of civil liability remains. A determination of the actual risk of liability necessitates a consideration of the minor's ability to consent effectively to medical contraceptive services. Therefore the basic inquiry is whether or not the minor's consent is sufficient to insulate the physician from tort liability.

Consent

The traditional rule is that the parent is the proper person to give consent to the medical or surgical treatment of a minor. Under normal circumstances surgical treatment undertaken without valid consent constitutes a battery. Since a battery requires only that the actor in-


75. See, e.g., Rainer v. Buena Community Memorial Hosp., 18 Cal. App. 3d 240,
tentionally and without consent set in motion a force which ultimately produces a contact,\textsuperscript{76} it is possible that any unauthorized medical treatment will also be held to constitute a battery.\textsuperscript{77} The physician might therefore commit a battery merely by prescribing a drug for a minor without the consent of the minor's parent. Even if the physician performed skillfully, such a battery would render the physician liable for all harm proximately resulting from the treatment.\textsuperscript{78}

The last few years have seen a steady erosion in California of the traditional rule requiring parental consent. The risk of a civil battery involved in providing minors with contraceptives has been correspondingly reduced. By statute married minors\textsuperscript{79} and minors on active duty with the armed forces\textsuperscript{80} can now consent to necessary hospital, medical, and surgical care. Another statute provides that a minor who is at least 15 years old, living apart from his parents or guardians, and managing his own financial affairs is similarly competent to consent to any needed hospital, medical, or surgical care.\textsuperscript{81}

These three classes of minors, therefore, have a statutorily recog-
nized ability to consent to medical care. There can be little doubt that this includes the ability to consent to medical contraceptive services. Accordingly, a physician who makes contraceptives available to minors who are on active military duty, married or emancipated need not worry about parental consent.

Another statute of a more limited nature provides that a minor of any age may obtain, without parental consent, any hospital, medical, or surgical care related to her pregnancy. In Ballard v. Anderson the California Supreme Court interpreted this provision to include surgery terminating a pregnancy. Even if a minor is living with her parents and dependent upon them for support, she may obtain a therapeutic abortion over their active objection, provided she meets the other requirements. While this section is unlikely to be construed as encompassing pregnancy prevention care as well as pregnancy termination, it does indicate legislative confidence in the ability of even young minors to consent to medical procedures far more serious than the swallowing of an oral contraceptive or the implanting of an IUD.

The Welfare Reform Act, which became law in 1971, goes substantially beyond merely indicating legislative confidence in the ability of minors to consent to contraceptive assistance. A section of that act provides family planning services to all former, current, or potential welfare recipients between the ages of fifteen and forty-four. These services are provided without regard to marital status or parenthood. In addition, since the act specifically provides that the only consent required is that of the recipient, there is no danger that minority alone will render consent ineffective. Available medical contraceptive services include, among others, diagnosis, treatment, supplies and follow-up. Thus, California not only specifically approves of certain economic classes of minors receiving contraceptives without parental consent, it actually distributes contraceptives to them.

As noted above, the Welfare Reform Act authorized the state to

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82. Id. § 34.5 (West 1954).
83. 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971).
84. Id. For therapeutic abortion requirements see Cal. Health & S. Code §§ 25951, 25954 (West Supp. 1971).
85. 4 Cal. 3d at 882, 484 P.2d at 1351, 95 Cal. Rptr. at 7.
87. Id.
88. "Potential recipients" are defined as "all persons in a family where current social, economic and health conditions of the family indicate that the family would likely become a recipient of financial assistance within the next five years." Id. The expansive nature of this definition is some indication of the legislature's intent to make contraceptives available to a broad group of minors.
89. Id.
provide contraceptives and ancillary medical care only to those who can qualify as past, present, or potential welfare recipients. However, information and referral services are to be made available to "all other families and children." The existence of a referral service seems to indicate a legislative intention to make contraceptives available to all minors at least 15 years old, with or without parental consent. Nothing would be accomplished by providing minors with referrals to private physicians and clinics if the physicians and clinics could not render assistance.

Even if the statute did not provide for referrals, however, it could not be reasonably argued that the ability of a minor to consent to contraceptive services is a function of parental income. If the child of a welfare recipient is capable of consenting, there is no logical basis for contending that the child of a parent not receiving welfare is somehow incapable of consenting. Rather, it is far more reasonable to interpret the Welfare Reform Act as recognizing the ability of all minors over fifteen years of age to consent to contraceptive assistance.

It would also be unreasonable to contend that the statute, by authorizing state contraceptive assistance to those over fifteen years, impliedly forbids assistance to those under that age. Not only may a minor of any age purchase prophylactic contraceptives, she may obtain a therapeutic abortion or offer her child for adoption—all without parental consent.

Seemingly, therefore, minors in California can effectively consent to receive medical contraceptive services. For a minor over fifteen years of age, there is a declared policy of the legislature to make birth control assistance available whether or not the minor has obtained parental consent. If a physician aids a fifteen year old adolescent in avoiding a pregnancy, he is doing nothing more than discharging the policy of the legislature. For minors under fifteen, there is no express legislative authorization. There are, however, other statutes clearly indicating the ability of even young minors to render effective consent in matters of substantially greater import.

Informed Consent

A physician who provides a minor with contraceptive assistance has little cause to fear that his patient's age alone will render the patient's consent ineffective. As is true with adults, however, to be

90. Id.
91. See text accompanying note 41 supra.
94. See Ballard v. Anderson, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971). In Ballard the court held that minors could obtain therapeutic abortions
effective, consent given by a minor must be informed.\textsuperscript{95}

The requirement that consent be informed places three distinct obligations on the physician. The first is that he must determine if his patient has the maturity and understanding to reasonably comprehend the medical consequences of the proposed care.\textsuperscript{96} If the minor lacks the ability to understand the health ramifications of using contraceptives, she is clearly incapable of giving knowledgeable or informed consent.

The physician's second obligation is to disclose the medical facts necessary to form an intelligent judgment as to the advisability of undertaking the particular procedure.\textsuperscript{97} In the case of contraceptive services, this at least necessitates mention of the various kinds of contraceptives available, the effectiveness of each in preventing pregnancies, and the possible health hazards involved in the use of each type of contraceptive as compared to the health hazards inherent in pregnancies.

This, of course, does not mean that the physician must reveal every imaginable health hazard to every patient. Excessively detailed horror stories may unduly alarm an apprehensive patient and thereby hinder her attempt to make an intelligent choice.

[T]he patient's mental and emotional condition is important and in certain cases may be crucial, and . . . in discussing the element of risk a certain amount of discretion must be employed consistent with the full disclosure of facts necessary to an informed consent.\textsuperscript{98}

Finally, the physician is obliged to determine whether or not the patient has actually understood the nature of the proposed care and its potential hazards.\textsuperscript{99} If the patient does understand, her consent will be informed and effective. But if she does not, her consent will be vitiated. Failure to obtain consent that is informed, therefore, may result in a technical battery rendering the physician liable for all damages proximately resulting from the use of the contraceptives, irrespective of the degree of skill exercised.\textsuperscript{100}

\textsuperscript{95} Id.
\textsuperscript{96} Id.
The risk of liability that stems from a failure to obtain informed consent is not something unique to the act of providing minors with contraceptives. The physician faces the same risk—and must meet the same requirements to avoid liability—whenever he provides any of his patients with contraceptive assistance. Against this risk of liability the physician can readily protect himself by the exercise of a professional standard of care.\footnote{101}

Conclusion

A great need exists among unmarried minors for contraceptive assistance. It has been shown that the traditional barriers preventing the distribution and use of contraceptives are rapidly deteriorating. Under current California law, the physician runs little risk of incurring criminal sanctions in meeting the contraceptive needs of unmarried minors. No laws explicitly forbid the distribution of contraceptives to minors. On the contrary, the distribution of prophylactic contraceptives has been impliedly permitted by the legislature. And while no similar recognition exists for the distribution of other contraceptives, the fact that some contraceptives are permitted indicates that the act of providing minors with contraceptives should not be considered as contributing to their delinquency. The reasonableness of this conclusion is strengthened by the legislature's decision to put the state of California in the business of providing past, present, and potential welfare recipients at least fifteen years of age with contraceptives. It is unlikely that the same legislature which made it a crime to contribute to a minor's delinquency would pass an act which it considered violative of its own law.

Traditionally, there has also been some danger that a physician who undertook treatment of a minor without the consent of the minor's parent might in so doing commit a technical battery and thereby become liable for any harm resulting from such treatment. But in recent years the California legislature has greatly reduced this danger by repeatedly expressing confidence in the judgment of minors. It has, for example, required the state to distribute contraceptives to unmarried "welfare" minors at least fifteen years old, irrespective of parental consent.

\footnote{101. Assuming the physician does obtain effective consent, other risks of liability will persist. If the physician fails to adequately warn of the risk of failure, a subsequent pregnancy may give rise to an action for negligence. If the physician states that all danger of pregnancy is removed, a subsequent pregnancy may give rise to an action for negligent or intentional misrepresentation, or even breach of contract. See Custodio v. Bauer, 251 Cal. App. 2d 303, 312-313, 59 Cal. Rptr. 463, 469-71 (1967).}
The legislature has also expressed its confidence in the judgment of even minors under fifteen by providing that they may, without parental consent, obtain prophylactics and medical care for venereal diseases, undergo therapeutic abortions, or place their children with adoption agencies. That minors under fifteen can consent to abortions or adoptions strongly suggests that they are also capable of consenting to pregnancy prevention care. So long as the minor's consent is informed, it should be effective to eliminate any risk of battery involved in contraceptive services.

Accordingly, when an unmarried minor in California seeks contraceptive services, she should be treated no differently than any other patient. The physician's first concern is his patient's health. If he determines the use of contraceptives will promote his patient's physical and mental health, and his patient understands the medical consequences of employing contraceptives, the physician should feel free to make them available. Any risk of criminal penalties or civil liability is insufficient to justify denial of assistance to a sexually active minor.

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