

Tulsa Law Review

Volume 12 | Number 3

1977

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Recommended Citation

William F. Smith, *Minor's Consent to Medical Care: The Constitutional Issue in Oklahoma*, 12 *Tulsa L. J.* 512 (1977).

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NOTES & COMMENTS

MINOR'S CONSENT TO MEDICAL CARE: THE CONSTITUTIONAL ISSUE IN OKLAHOMA

The traditional rule that minors lack capacity to conduct their affairs has recently been reevaluated; an illustration of this reevaluation can be found in the area of medical treatment for minors.¹ The purpose of this comment is to examine the changes that have taken place in Oklahoma concerning a minor's capacity to authorize medical care for himself. To facilitate an examination of these changes, this comment will provide a brief review of the common law, a discussion of statutory changes in Oklahoma, an analysis of cases of constitutional significance and suggestions for an approach to the problem which is consistent with current constitutional requirements.

THE COMMON LAW

Minority, under the common law, generally persisted until the age of twenty-one.² Until that age was reached, a person lacked legal

1. See Baker, *Court Ordered Non-Emergency Medical Care for Infants*, 18 CLEV.-MAR. L. REV. 296 (1969) [hereinafter cited as Baker]; Paul, *Legal Rights of Minors to Sex-Related Medical Care*, 6 COLUM. HUMAN RIGHTS L. REV. 357 (1974-75) [hereinafter cited as Paul]; Pilpel, *Minor's Rights to Medical Care*, 36 ALB. L. REV. 462 (1972) [hereinafter cited as Pilpel]; Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL. L.J. 115 (1973) [hereinafter cited as Wadlington]; Comment, *Minors and Contraceptives: A Constitutional Issue*, 3 ECOLOGY L.Q. 843 (1973); Note, *Domestic Relations: Minors and Abortion—The Requirement of Parental Consent*, 29 OKLA. L. REV. 145 (1976) [hereinafter cited as *Minors and Abortion*]; Note, *The Minor's Right to Abortion and The Requirement of Parental Consent*, 60 VA. L. REV. 305 (1974) [hereinafter cited as *Minor's Right to Abortion*].

2. James, *The Age of Majority*, 4 AM. J. LEGAL HIST. 22 (1960). The selection of age twenty-one as the indicator of adulthood was linked to the tenure system of England. However, as James points out, lower ages for majority were also recognized.

capacity to consent to medical care,³ that authority being reserved to the parents or guardians.⁴ The requirement of parental consent was founded, in part, on the notion that the right of parents to control their children is in the nature of a property right.⁵ This right entitled the parents to the care, custody, services and earnings of their children.⁶ The requirement was also justified by the belief that the requirement of parental consent promoted family harmony, discipline and authority.⁷

Under the common law rule, a minor was subject to the possibility of increased injury or suffering in the event he needed medical care and his parents could not be found to consent to the treatment. Minors who were economically independent of their parents were also subject to similar risks, even though they functioned as adults. Besides hampering the minor's ability to obtain needed medical services in the absence of his parents' consent, the traditional conception of the parental right also led to extreme judicial reluctance to order medical care for a minor in opposition to a parent's express refusal to consent.⁸

3. See Paul, *supra* note 1, at 360; *Minors and Abortion*, *supra* note 1, at 145; *Minor's Right to Abortion*, *supra* note 1, at 309.

4. See, e.g., *Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941); *Younts v. St. Francis Hosp. & School of Nursing, Inc.*, 205 Kan. 292, 469 P.2d 330 (1970); *Zoski v. Gaines*, 271 Mich. 1, 260 N.W. 99 (1935); *Rogers v. Sells*, 178 Okla. 103, 61 P.2d 1018 (1936); *Moss v. Rishworth*, 222 S.W. 225 (Tex. Comm. App. 1920). The right of the parent or guardian to decide if medical care should be given to a child was justified by two arguments. First, "[t]he law assumed that a minor was not wise or mature enough to determine what his or her medical needs were." Paul, *supra* note 1, at 360. Second, "the parent, and especially the father, was vested with supreme control over the child." *School Bd. Dist. v. Thompson*, 24 Okla. 1, 4, 103 P. 578, 579 (1909). Comment, *Counseling the Counselors: Legal Implications of Counseling Minors Without Parental Consent*, 31 MD. L. REV. 332, 335-37 (1971) [hereinafter cited as *Counseling the Counselors*].

A parent's authority to control his children has been characterized as a property right. Paul, *supra* note 1, at 357; *Minors and Abortion*, *supra* note 1, at 145; *Minor's Right to Abortion*, *supra* note 1, at 309. However, along with this right came obligations, which limit the parent's power.

Each party to the parent-child relationship is possessed of rights and duties as a result of his position. . . . It is said that the parent has the right to custody, care and control of his child, as well as the child's services and earnings. The child is generally held to have a right to shelter, food, clothing, education, support, guidance and protection.

Commonwealth v. Brasher, 359 Mass. 550, 270 N.E.2d 389 (1971).

5. See note 4 *supra*.

6. *Counseling the Counselors*, *supra* note 4, at 335-36.

7. *Commonwealth v. Brasher*, 359 Mass. 550, 270 N.E.2d 389 (1971); *Roe v. Doe*, 29 N.Y.2d 188, 272 N.E.2d 567, 324 N.Y.S.2d 71 (1971); *Counseling the Counselors*, *supra* note 4, at 335-37.

8. See *People v. Turner*, 55 Ill. 280 (1870); *Commonwealth v. Brasher*, 359 Mass. 550, 270 N.E.2d 389 (1971); *State v. Perricone*, 37 N.J. 463, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962); *Roe v. Doe*, 29 N.Y.2d 188, 272 N.E.2d 567, 324 N.Y.S.2d 71 (1971); *In re Hudson*, 13 Wash. 2d 673, 126 P.2d 765 (1942).

The potential for harsh results under the common law rule led to the creation of exceptions which still are recognized. When a minor's condition presents a medical emergency, medical care can be rendered without the consent of the parents or guardian.⁹ The partial or complete¹⁰ emancipation¹¹ of a minor is another firmly established exception.¹² Under a more recent exception, with a possible constitutional foundation,¹³ a "mature minor" may authorize medical care for himself.¹⁴ A "mature minor" is "one who is sufficiently intelligent and mature to understand the nature and consequences of the medical treatment being sought."¹⁵ In determining whether the minor is sufficiently mature to validly consent to the proposed care, relevant factors

9. See, e.g., *Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941); *Jackovach v. Yocom*, 212 Iowa 914, 237 N.W. 444 (1931); *Younts v. St. Francis Hosp. & School of Nursing, Inc.*, 205 Kan. 292, 469 P.2d 330 (1970); *Tabor v. Scobee*, 254 S.W.2d 474 (Ky. 1952); *Wells v. McGehee*, 39 So. 2d 196 (La. Ct. App. 1949); *Luka v. Lowrie*, 171 Mich. 122, 136 N.W. 1106 (1912); *Sullivan v. Montgomery*, 155 Misc. 448, 279 N.Y.S. 575 (N.Y. City Ct. 1935); *Rogers v. Sells*, 178 Okla. 103, 61 P.2d 1018 (1936). For a discussion of what constitutes an emergency, see Paul, *supra* note 1, at 361; Pilpel, *supra* note 1, at 464; *Minors and Abortion*, *supra* note 1, at 146; Note, *Torts—Medical Treatment of Minors*, 8 WAKE FOREST L. REV. 148, 150-51 (1971).

10. The partial-complete dichotomy distinguishes minors that are emancipated only for certain purposes, e.g., consenting to medical care, from minors that are emancipated for all purposes. Paul, *supra* note 1, at 362. See *Bach v. Long Island Jewish Hosp.*, 49 Misc. 2d 207, 267 N.Y.S.2d 289 (Sup. Ct. 1966).

11. "‘Emancipation’ of a child is the relinquishment by the parent of control and authority over the child, conferring on him the right to his earnings and terminating the parent's legal duty to support the child." *Swenson v. Swenson*, 241 Mo. App. 21, —, 227 S.W.2d 103, 105 (1950). See *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E.2d 753 (1965).

12. Emancipation can be effectuated by, *inter alia*: *marriage*, *Crook v. Crook*, 80 Ariz. 275, 296 P.2d 951 (1956); *Bach v. Long Island Jewish Hosp.*, 49 Misc. 2d 207, 267 N.Y.S.2d 289 (Sup. Ct. 1966); *Daubert v. Mosley*, 487 P.2d 353 (Okla. 1971); *Smith v. Seibly*, 72 Wash. 2d 16, 431 P.2d 719 (1967); *military service*, *Swenson v. Swenson*, 241 Mo. App. 21, 227 S.W.2d 103 (1950); *economic independence*, *Smith v. Seibly*, 72 Wash. 2d 16, 431 P.2d 719 (1967); *parental consent*, *Crosby v. Crosby*, 230 App. Div. 651, 246 N.Y.S. 384 (Sup. Ct. 1930); and "by conduct of the parent inconsistent with the performance of his parental obligations or by the assumption by the infant of a status inconsistent with subjection to control by his parent." *Murphy v. Murphy*, 206 Misc. 228, —, 133 N.Y.S.2d 796, 797 (Sup. Ct. 1954). See *Roe v. Doe*, 29 N.Y.2d 188, 272 N.E.2d 567, 324 N.Y.S.2d 71 (1971).

In Oklahoma, marriage, *inter alia*, is a statutory ground for emancipation. OKLA. STAT. tit. 10, § 10 (1971). Also OKLA. STAT. tit. 10, §§ 91-93 (Supp. 1976) authorizes courts to confer majority rights on minors in relation to contracts and the conduct of business. See *Hardesty v. Gordon*, 189 Okla. 677, 119 P.2d 70 (1941) (discussing predecessor to current codification).

13. See notes 73-79 *infra* and accompanying text.

14. Paul, *supra* note 1, at 362.

15. *Id.* See *Younts v. St. Francis Hosp. and School of Nursing, Inc.*, 205 Kan. 292, 469 P.2d 330 (1970); *Bishop v. Shurly*, 237 Mich. 76, 211 N.W. 75 (1926); *Bakker v. Welsh*, 144 Mich. 632, 108 N.W. 94 (1906); *Gulf & Ship Island R., Co. v. Sullivan*, 155 Miss. 1, 119 So. 501 (1928); *Smith v. Seibly*, 72 Wash. 2d 16, 431 P.2d 719 (1967). See also *Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941); *Zoski v. Gaines*, 271 Mich.

to be considered include the "age, intelligence, maturity, training, experience, economic independence, . . . general conduct as an adult and freedom from the control of parents,"¹⁶ the risk involved in the particular procedure,¹⁷ and "whether the proposed [treatment] . . . is for the benefit of the child and is done with a purpose of saving his life or limb."¹⁸ While there is authority for the proposition that courts, absent statutory authority, lack the power to order medical treatment for minors even though the parents refuse to consent,¹⁹ the modern trend and better reasoned approach is that courts can, under the *parens patriae* doctrine,²⁰ intervene within the family unit in order to protect the child's interests.²¹

1, 260 N.W. 99 (1935); *Lacey v. Laird*, 166 Ohio St. 12, 139 N.E.2d 25 (1956).

While the situation of the "mature minor" has not been presented to the Oklahoma courts, in *In re Hickory's Guardianship*, 75 Okla. 79, 182 P. 233 (1919), it was stated: "Theoretically speaking, a minor has no capacity at all to judge what is best for him or his estate; but, properly speaking, when the minor is of an age approaching majority . . . she may suggest facts and views of policy worthy of consideration by the court . . ." *Id.* at 83, 182 P. at 236. Furthermore, Oklahoma, by statute, allows a minor capable of giving an effective consent to authorize medical care without parental consent in certain limited situations. See notes 38-41, 83-85 *infra* and accompanying text.

16. 72 Wash. 2d at —, 431 P.2d at 723.

17. Paul, *supra* note 1, at 362; Wadlington, *supra* note 1, at 119; *Minor's Right to Abortion*, *supra* note 1, at 310.

18. *Bonner v. Moran*, 126 F.2d 121, 123 (D.C. Cir. 1941). See *Younts v. St. Francis Hosp. and School of Nursing, Inc.*, 205 Kan. 292, —, 469 P.2d 330, 337-38 (1970); Wadlington, *supra* note 1, at 119.

The "mature minor" exception has been characterized as an extension of the rule "requiring that physicians obtain 'informed consent' from all patients before undertaking treatment." Paul, *supra* note 1, at 362. See *Younts v. St. Francis Hosp. and School of Nursing, Inc.*, 205 Kan. 292, 469 P.2d 330 (1970).

An additional reason is often advanced in support of a parent's broad authority over his or her children: The law presumes that it is in the best interest of the child "to be under the nurture and care of its natural protector." *Heinemann's Appeal*, 96 Pa. 112, 114 (1880). See *In re Hudson*, 13 Wash. 2d 673, —, 126 P.2d 765, 775-76 (1942).

19. See *People v. Pierson*, 176 N.Y. 201, 68 N.E. 243 (1903); *In re Vasko*, 238 App. Div. 128, 263 N.Y.S. 552 (Sup. Ct. 1933); *In re Rotkowitz*, 175 Misc. 948, 25 N.Y.S.2d 624 (Dom. Rel. Ct. 1941); *Baker*, *supra* note 1, at 296.

20. "The power of the State, known as *parens patriae*, springs from its power to protect those subjects who cannot protect themselves, and from its interests in the proper upbringing of future citizens." *Counseling the Counselors*, *supra* note 4, at 338 (footnote omitted). See *People v. Labrenz*, 411 Ill. 618, —, 104 N.E.2d 769, 773, *cert. denied*, 344 U.S. 824 (1952); *State v. Perricone*, 37 N.J. 463, —, 181 A.2d 751, 758, *cert. denied*, 371 U.S. 890 (1962); *In re Hudson*, 13 Wash. 2d 673, —, 126 P.2d 765, 777 (1942).

21. See, e.g., *People v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952); *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969) (dictum); *Raleigh Fitkin-Paul Mem. Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964); *State v. Perricone*, 37 N.J. 463, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962); *Muhlenberg Hosp. v. Patterson*, 128 N.J. Super. 498, 320 A.2d 518 (1974); *In re Clark*, 21 Ohio App. 2d 86, 185 N.E.2d 128 (Ct. C.P. 1962); *Heinemann's Appeal*, 96 Pa. 112 (1880); *In re Hudson*, 13 Wash. 2d 673, 126 P.2d 765 (1942); *Counseling the Counselors*, *supra* note 4, at 338.

Despite the recognition of exceptions, the common law proved inadequate in insuring that a minor had access to necessary medical care. Exceptions to the rule of parental consent failed to serve the minor's interest because their principle purpose was to provide physicians with a defense against liability should a minor be treated without obtaining the consent of the parent.²² Judicial reversal of a parent's decision usually requires that the life of the minor be endangered without medical attention.²³ In response to these problems, state legislatures have begun to increase the number of instances where minors can obtain medical care without parental consent. Furthermore, statutory authorization to order treatment in certain instances has been given to the courts.²⁴ Oklahoma has followed this trend.

STATUTORY APPROACH IN OKLAHOMA

To a large extent, statutory treatment of minors and their medical care in Oklahoma can be characterized as a reaffirmation of common law principles. For example, the general presumption that a minor is without capacity to consent is preserved.²⁵ Moreover, in recognition of the right to control their offspring, parents are entitled to the care, custody, services and earnings of their minor unemancipated children.²⁶ Finally, two common law exceptions to parental consent, emergency and emancipation, are retained.²⁷

Oklahoma has departed from the common law in some respects. In keeping with the national trend, the Oklahoma legislature has re-

22. *Minor's Right to Abortion*, *supra* note 1, at 310.

23. *Id.* at 311.

24. *See* Pilpel, *supra* note 1.

25. *See* OKLA. STAT. tit. 15, § 12 (1971). *See also* *Minors and Abortion*, *supra* note 1, at 153.

26. OKLA. STAT. tit. 10, § 5 (Supp. 1976). It can be argued, however, that a change in perception of the parent's rights has occurred. While the Supreme Court, in *School Bd. Dist. v. Thompson*, 24 Okla. 1, 103 P. 578 (1909), declared that parents at common law had "supreme control" over their children, a slightly different position was taken in *Carignan v. State*, 469 P.2d 656 (Okla. 1970). There the court stated:

The state, through its legislature, has wide power with respect to the rights of the parents over their children, which affect the welfare of the children. A parent's right to a child is *not a property right* in the general sense, but more in the nature of a trust which is subject to control and regulation by the state. The parental rights to the child must yield when the welfare of the child demands.

Id. at 659 (citation omitted) (emphasis added).

27. *See* OKLA. STAT. tit. 59, § 518 (1971); OKLA. STAT. tit. 63, § 2602(7) (Supp. 1976); OKLA. STAT. tit. 76, § 5 (Supp. 1976). Parents may also authorize other adults, to whom care of the minor has been entrusted, to consent to medical care for their child. OKLA. STAT. tit. 10, § 170.1 (Supp. 1976).

duced the age of majority for males for most purposes, including consent to medical care, from the common law age of twenty-one to eighteen.²⁸ In addition, the legislature has made it a misdemeanor for a parent to willfully fail to provide necessary medical care for his child.²⁹ However, the statute offers little protection since, in addition to the requirement of intent,³⁰ it provides a defense for the parent who "in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease or remedial care of . . . [his] child."³¹ The effect of the statute is to limit the discretion of the parent, in certain instances, to a standard of reasonableness. Thus the parent must furnish that amount of medical care that "an ordinarily prudent person, solicitous for the welfare of his child and anxious to promote its recovery, would provide."³²

The statute does not, however, affirmatively provide the minor with a means to secure medical care independent of the parent's wishes. While the requirement of intent and the religious defense are, no doubt, factors contributing to its ineffectiveness, the statute's main defect is that it is not designed to afford the minor any rights to medical care. Rather it punishes "the guilty parent only after the harm, which . . . [is] often irreparable . . . has befallen the unfortunate child."³³ Perhaps in recognition of its inadequacy, the statute contains the proviso that "nothing contained herein shall prevent a court from immediately assuming custody of a child and ordering whatever action may be necessary, including medical treatment, to protect his health or welfare."³⁴

28. OKLA. STAT. tit. 15 § 13 (Supp. 1976); OKLA. STAT. tit. 63, § 2601(a) (Supp. 1976). Previously, the age of majority was eighteen years for females and twenty-one years for males. *Bassett v. Bassett*, 521 P.2d 434 (Okla. Ct. App. 1974).

29. OKLA. STAT. tit. 21, § 852 (Supp. 1976). Additionally, it is a felony if the parent "leaves the state with intent to avoid providing" his child with necessary medical care. *Id.*

30. *See Lamb v. State*, 293 P.2d 624 (Okla. Crim. App. 1956).

31. OKLA. STAT. tit. 21, § 852 (Supp. 1976). Before this provision was amended, it was held that the defendant's religious belief was not a defense to the statutory offense. *Owens v. State*, 6 Okla. Crim. 110, 116 P 345 (1911).

32. 6 Okla. Crim. at 113, 116 P. at 346.

33. *Baker*, supra note 1, at 298.

34. OKLA. STAT. tit. 21 § 852 (Supp. 1976). A Washington statute authorizing state courts to order medical care for minors has been held valid over the religious claims of parents that judicial action under the statute ordering blood transfusions for their children was a violation of their constitutional rights. *Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd per curiam*, 390 U.S. 598 (1968).

By civil legislation, the courts of Oklahoma are authorized by statute to order medical treatment for a minor upon the filing of a dependency petition.³⁵ Yet, while a dependent child includes a minor "who is in need of special care and treatment because of his physical or mental condition, and his parents . . . [are] unable to provide it,"³⁶ parental rights cannot be terminated if the lack of care is required by the parents' religious beliefs.³⁷ As under the criminal provision, the state may not interfere until the minor suffers some degree of harm as a result of the lack of treatment.

Recent legislation grants minors the capacity to consent to medical treatment, regardless of the parents' wishes, in instances going beyond the common law exceptions of emergency care and emancipation.³⁸ Under the new legislation, a minor may consent to the "prevention, diagnosis and treatment" of past or present pregnancies, communicable diseases and abuse of drugs, including alcohol.³⁹ In addition, care may be given to a minor who is physically or mentally incapable of consenting and has no known relatives or guardian, if two physicians agree on the proposed care.⁴⁰ A two-physician rule is also imposed in nonemergency cases when the needed care involves "major surgery, general anesthesia, or a life-threatening procedure," irrespective of the minor's physical and mental capacity to consent.⁴¹ One significant limitation of the statute is the express exclusion of abortions and sterilizations from the permissible health services which can be rendered to the consenting minor.⁴²

Two reasons can be offered in support of the limitations on the scope of the Oklahoma statute.⁴³ First, the legislature may have be-

35. OKLA. STAT. tit. 10, § 1103 (Supp. 1976); OKLA. STAT. tit. 10, § 1120(b) (1971).

36. OKLA. STAT. tit. 10, § 1101(d) (Supp. 1976).

37. OKLA. STAT. tit. 10, § 1130(B) (Supp. 1976). In common with the criminal statute previously discussed, see note 34 *supra* and accompanying text, this statute provides that "nothing contained herein shall prevent a court from immediately assuming custody of a child and ordering whatever action may be necessary, including medical treatment, to protect his health or welfare."

38. OKLA. STAT. tit. 63, §§ 2601-2606 (Supp. 1976).

39. OKLA. STAT. tit. 63, § 2602(3) (Supp. 1976). OKLA. STAT. tit. 63, § 1-532.1 (1971). provides: "Any person, regardless of age, has the capacity to consent to examination and treatment by a licensed physician for any venereal disease."

40. OKLA. STAT. tit. 63, § 2602(6) (Supp. 1976).

41. See OKLA. STAT. tit. 63, § 2604 (Supp. 1976).

42. OKLA. STAT. tit. 63, § 2601(c) (Supp. 1976).

43. Since OKLA. STAT. tit. 63, § 2602(6) requires the agreement of two physicians before treatment can be rendered to a minor who is physically or mentally incompetent to consent, see note 40 *supra* and accompanying text, implicit in the statute is the understanding that only a "mature minor" can give a valid consent. See note 11 *supra* and accompanying text.

lieved that minors are not sufficiently mature to allow them to consent to medical care which carries life or death consequences.⁴⁴ Second, in areas not covered by the statute, it may have been determined that parental control should be maintained except in certain cases, such as those involving drug abuse and communicable diseases, where the health and welfare of the public demands that access to medical care be readily available to minors who may be reluctant to disclose their afflictions to their parents.⁴⁵

Despite the modifications to the common law that have occurred in Oklahoma, the minor still lacks the ability, in most instances, to obtain medical care independent of his parents' wishes. Whether the state can validly restrict minors' access to medical care is considered in the next section.

A CONSTITUTIONAL ANALYSIS

The Development of Constitutional Rights for Minors

Express recognition of certain constitutional rights in minors is a relatively recent development. One of the first cases to deal with the issue was *West Virginia State Board of Education v. Barnette*.⁴⁶ The Supreme Court invalidated a resolution of the state board of education which required participation by pupils and teachers in flag salute and pledge of allegiance ceremonies conducted on a regular basis in West Virginia public schools. In the course of its opinion, the Court declared: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."⁴⁷ The principle of *Barnette* was reaffirmed in *Tinker v. Des Moines Independent Community School District*.⁴⁸ In limiting the power of school officials to restrict the use of symbols by students to express their opposition to the government's policy in Vietnam, the Court declared: "School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State

44. See *Minor's Right to Abortion*, *supra* note 1, at 309.

45. See Paul, *supra* note 1, at 373; Comment, *Abortion: An Unresolved Issue—Are Parental Consent Statutes Unconstitutional?*, 55 NEB. L. REV. 256, 269 (1976).

46. 319 U.S. 624 (1943).

47. *Id.* at 637.

48. 393 U.S. 503 (1969).

must respect, just as they themselves must respect their obligations to the State."⁴⁹ In addition to substantive rights, minors have also been afforded procedural protections.⁵⁰

Barnette, Tinker and other cases⁵¹ establish constitutional protection for minors against state interference in areas involving fundamental rights. However, the protection afforded minors is not coextensive with that enjoyed by adults.⁵² One reason that the state is allowed more authority over children is society's interest in making sure "that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."⁵³ Implicit in the state's broader authority is the justification, relied on at common law, that minors lack sufficient wisdom and capacity to function without the aid of third parties.⁵⁴

The primary obligation, however, for the protection of society's children lies with the parents or guardians and not the state. In cases involving conflicts between parental rights and state action restricting those rights, it has been recognized that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."⁵⁵ Thus, in *Wisconsin v. Yoder*,⁵⁶ the right of Amish parents to raise and educate their children in accordance with their religious beliefs justified the exemption of the children from the state's compulsory school attendance law.⁵⁷ In addition to restricting the state's au-

49. *Id.* at 511.

50. See, e.g., *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966). Cf. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (jury not required in adjudicatory aspect of juvenile hearing).

51. See, e.g., *Levy v. Louisiana*, 391 U.S. 68 (1968); *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963); *Brown v. Board of Educ.*, 347 U.S. 483 (1954), noted in Comment, *Minors and Contraceptives: A Constitutional Issue*, 3 *ECOLOGY L.Q.* 843, 853-54 (1973).

52. See *Ginsberg v. New York*, 390 U.S. 629, 638 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 169 (1944).

53. 321 U.S. at 165.

54. See note 4 *supra*. However, the common law presumption that minors lack the necessary attributes of competency until the age of twenty-one has been rejected by the Supreme Court. See *Planned Parenthood v. Danforth*, 96 S. Ct. 2831, 2843 (1976).

55. 321 U.S. at 166. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd per curiam*, 390 U.S. 598 (1968).

56. 406 U.S. 205 (1972).

57. See also *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1942) (invalidating provision requiring flag salute and pledge of allegiance by school students as contrary to parents' religious belief); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidating state law generally requiring attendance at public schools); *Meyer v. Nebraska*

thority over minors, the doctrine of parental rights has restricted the exercise of constitutional rights by the children themselves.⁵⁸

As in the situation involving the power of the state over a minor, the ability of the parent or guardian to control the minor is subject to limitation. In *Prince v. Massachusetts*,⁵⁹ the Supreme Court upheld the validity of a state statute prohibiting parents or guardians from allowing or compelling their minor children to sell, *inter alia*, magazines on the public streets. The statute was upheld over the guardian's claim that it violated the First Amendment's guarantee of freedom of religion. In response to this claim, the Court observed:

The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.

. . . .

. . . Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.⁶⁰

Similar reasoning led to a decision upholding the validity of a state statute which allowed the state courts of Washington to order blood transfusions for minors in certain instances, over the religious objections of the parents.⁶¹

It is within the limitations on state and parental power that the minor's constitutional rights exist. The scope of those rights has not been well defined; few cases have presented the problem. Usually, the rights of minors have arisen in cases involving conflicts between the power of the state and the power of the parents. As a result, the task of the Court has been primarily to define the relationship between the state and parents; any definition of the rights of minors is incidental to the process.⁶² In instances where the rights of minors were directly before the Court, the conflict has involved the limitations of state

262 U.S. 390 (1923) (invalidating statute forbidding the teaching of German in the state public schools).

58. See notes 38-42 *supra* and accompanying text.

59. 321 U.S. 158 (1944).

60. *Id.* at 166-67, 170.

61. *Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd per curiam*, 390 U.S. 598 (1968). Thus, the Oklahoma statutes allowing courts to order medical treatment for minors, see notes 33-37 *supra* and accompanying text, would not appear to be subject to constitutional attack on the same or similar grounds.

62. See *Minor's Right to Abortion*, *supra* note 1, at 321.

power over the minor's constitutional rights.⁶³ Until recently, therefore, the relationship between the parental right of control and the minor's exercise of constitutional rights had not been considered.⁶⁴ However, in 1976, the Court was directly faced with the question in *Planned Parenthood v. Danforth*,⁶⁵ a decision which established the minor's right of privacy.

Planned Parenthood v. Danforth: Right of Privacy and Mature Minors

In *Danforth*, a Missouri statutory scheme required, prior to the performance of an abortion, the patient's execution of a form affirming "that her consent is informed and freely given and is not the result of coercion,"⁶⁶ written consent of the woman's husband to the abortion and written consent of a parent if the patient was under eighteen years of age. The issue before the Court was whether any of these requirements violated the woman's right of privacy, as established by *Roe v. Wade*,⁶⁷ by impermissibly interfering with her decision to terminate her pregnancy. The Court held that the requirement of the woman's consent was valid. In upholding this aspect of the statute, it relied on the notion that:

The decision to abort . . . is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.⁶⁸

The spousal and parental consent provisions of the statute, however, were invalidated by the Court. With respect to spousal consent, the Court recognized the interest of the husband, but nevertheless held that "since the State cannot regulate or proscribe abortion during the first stage [of pregnancy, under *Roe*], when the physician and his patient make that decision, the State cannot delegate authority to any particular

63. See notes 46-54 *supra* and accompanying text.

64. "[T]he Court did not need to consider the child's rights in contrast to those of the parents, since in each case there was an apparent unity of interest." *Minor's Right to Abortion*, *supra* note 1, at 321. While there also was no need to consider the problem in *Prince*, since the controversy involved a state-parent conflict, the Court recognized that the interest of the child may not always be compatible with that of the parents. See text accompanying note 60 *supra*.

65. 96 S. Ct. 2831 (1976).

66. *Id.* at 2839.

67. 410 U.S. 113 (1973).

68. 96 S. Ct. at 2840.

person, even the spouse, to prevent abortion during that same period.”⁶⁹ As in the case of spousal consent, the Court found that the parental consent provision was an unconstitutional delegation of a veto power to third persons over the minor’s decision to abort.⁷⁰

The impact of *Danforth* on the minor’s ability to consent to medical care is significant. First, the minor’s right of privacy is given express recognition in a case which attempted to restrict the minor’s access to medical care. Also significant is the Court’s treatment of the interests asserted in support of the statute’s validity. Two justifications, discipline and maintaining and promoting family unity, were offered for restricting minors’ rights. While the Court ultimately concluded that the state’s interest in promoting family unity and discipline did not outweigh the privacy interest involved, it first questioned whether the two interests were served at all by the statute. The Court stated:

It is difficult . . . to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient’s pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control 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.⁷¹

Thus, two of the traditional interests generally asserted in support of the requirement of parental consent to medical care of a minor⁷² received only summary treatment by the Court in evaluating the statute before it. This treatment suggests insignificance of these interests in light of the privacy interest involved.

Finally, the Court emphasized that the *Danforth* decision did not mean that every minor, “regardless of age or maturity, may give effective consent for termination of her pregnancy.”⁷³ Implicit in the passage is a recognition that only mature minors may exercise constitutional rights; that is, minors “who [are] sufficiently intelligent and mature to understand the nature and consequences of the medical treatment being sought.”⁷⁴ Thus, it appears unconstitutional to limit

69. *Id.* at 2841.

70. *Id.* at 2843.

71. *Id.* at 2844.

72. See note 17 *supra* and accompanying text.

73. 96 S. Ct. at 2844.

74. Paul, *supra* note 1, at 362. See *Wisconsin v. Yoder*, 406 U.S. 205, 242 (1972) (“Where the child is mature enough to express potentially conflicting desires, it would

the mature minor's exercise of constitutional rights in a manner which differs from limitations imposed on adults.⁷⁵

Further support for these conclusions is supplied by *Bellotti v. Baird*,⁷⁶ decided the same day as *Danforth*. In *Baird*, the Court was confronted with an abortion statute which required the consent of both parents of a pregnant woman less than eighteen years of age. The statute differed from the one in *Danforth* in that parental refusal could be overruled by a judicial order on a showing of sufficient cause. The Court held the lower federal court in error for not abstaining, thereby giving the state supreme court the opportunity to interpret the new statute in a manner which could avoid constitutional infirmity. In finding the statute susceptible to a construction "which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem,"⁷⁷ thus making abstention appropriate, the Court found the interpretation of the statute offered by state officials charged with enforcement of its provisions an important consideration.

The picture thus painted by the . . . appellants is of a statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation. . . . The statute, as thus read, would be fundamentally different from a statute that creates a "parental veto."

. . . [W]e are concerned with a statute directed toward minors, as to whom there are unquestionably greater risks of inability to give an informed consent.⁷⁸

In light of the above position, coupled with the validation in *Danforth* of the statutory provision requiring execution of a consent form by the pregnant adult, it appears that the state may impose restrictions on the minor's consent to medical treatment as long as the restrictions do not unduly burden the individual's right of privacy⁷⁹ and insure that the minor possesses sufficient mental capacity and awareness to give an in-

be an invasion of the child's rights to permit . . . an imposition [of the parents' wishes and religious beliefs] without canvassing his views") (Douglas, J., dissenting).

75. Like other constitutional protections, the right of privacy is not absolute; the exercise of individual fundamental rights, notwithstanding the age of the person involved, is limited by the existence of compelling state interests. See *Roe v. Wade*, 410 U.S. 113, 153-54 (1973).

76. 96 S. Ct. 2857 (1976).

77. *Id.* at 2866.

78. *Id.* at 2865-66.

79. *Id.* at 2866.

formed consent. An impermissible intrusion by third parties results when parents are given the power to completely negate their mature minor's reasoned choice.

From *Danforth* and *Bellotti* the following principle can be drawn: When fundamental rights are recognized for adults, these same rights must not be denied the "mature minor." Since adults have the right, under the doctrine of informed consent,⁸⁰ to control the medical care they receive, the "mature minor" must be afforded the same right. This conclusion is further supported by the holding in *Danforth*. While *Danforth* involved only the minor's right under the privacy rationale to secure an abortion and not the right to obtain medical care in general, this difference should not affect the applicability of the principles involved. As in the abortion situation, the decision to seek medical care in general is a matter affecting the bodily integrity and health of the individual. Therefore, the decision is no less a matter involving a personal right, " 'fundamental' or 'implicit in the concept of ordered liberty,' "⁸¹ than is the decision to abort; as a result, it is a matter protected by the right of privacy from undue interference by third parties.⁸²

Validity of the Oklahoma Statute Regarding a Minor's Right to Consent to Medical Care

As previously noted,⁸³ Oklahoma has granted the minor the right to obtain medical care and services without parental consent which extends beyond the rights available to the minor at common law. However, the scope of the statute is narrow, since the right to consent is limited to situations involving care for pregnancy, drug abuse and communicable diseases⁸⁴ and expressly excludes abortions and steriliza-

80. See, e.g., *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972); *Nishi v. Hartwell*, 52 Hawaii 188, 473 P.2d 116 (1970); *Natanson v. Kline*, 186 Kan. 393, 350 P.2d 1093, rehearing denied, 187 Kan. 186, 354 P.2d 670 (1960); *Wilkinson v. Vesey*, 295 A.2d 676 (R.I. 1972); *Wilson v. Scott*, 412 S.W.2d 299 (Tex. 1967); *ZeBarth v. Swedish Hosp.*, 81 Wash. 2d 12, 499 P.2d 1 (1972); *Trogun v. Fruchtman*, 58 Wis. 2d 596, 207 N.W.2d 297 (1973). The doctrine of informed consent protects the same interests as the right of privacy since it insures to "[e]very human being of adult years and sound mind . . . [the] right to determine what shall be done with his own body" *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914). See 464 F.2d at 780.

81. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

82. *Id.* at 152-53.

83. See notes 38-45 *supra* and accompanying text.

84. OKLA. STAT. tit. 63, § 2602(3) (Supp. 1976). See note 39 *supra* and accompanying text.

tions.⁸⁵ In areas outside the scope of the statute, the rule of parental consent applies.⁸⁶ An issue arises as to whether the state impermissibly infringes upon the minor's right of privacy by requiring parental consent in all cases except those exempted by the statute.⁸⁷

Under the *Danforth* rationale,⁸⁸ the Oklahoma statute is unconstitutional. Its defect is the same as that of the parental consent provision of the Missouri statute in *Danforth*; it permits parental veto over minors' decisions in an area of intimate personal concern.⁸⁹ Since *Danforth* found the interests of family unity and discipline insufficient to allow intrusion into the minor's zone of privacy in this manner,⁹⁰ the only interest left to consider is that of insuring an informed and intelligent consent. This interest is not served by the statute, since it cannot be assumed that minors are sufficiently mature to give an effective consent to matters within the statute but not mature enough to consent to medical procedures outside the scope of the statute.⁹¹ Furthermore, a parental veto provision is not a permissible way of insuring the intelligence and competency of the minor's consent.⁹²

To increase the chances of the Oklahoma statute withstanding a constitutional attack, the exemptions from parental veto of a minor's consent must be broadened to include all areas of medical care. Restrictions can be maintained in order to limit the right of self-determination to "mature minors" and procedures may be imposed for the purpose of ascertaining if the particular minor can give an informed and intelligent consent to the proposed medical care. However, the limitations created to serve these purposes must not unduly interfere with the minor's privacy right. "Where . . . 'fundamental rights' are involved . . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."⁹³

85. OKLA. STAT. tit. 63, § 2601(c) (Supp. 1976). See note 42 *supra* and accompanying text.

86. See note 45 *supra* and accompanying text.

87. While other situations where consent of the minor is specified by statute exist, the constitutional problems are best illustrated by the situations presented.

88. See notes 66-75 *supra* and accompanying text.

89. The statute specifically provides that "[the minor's] self-consent only applies to . . . those conditions specified [in the statute]." OKLA. STAT. tit. 63, § 2602(3) (Supp. 1976).

90. See note 71 *supra* and accompanying text.

91. Implicit in the statute is the limitation that only minors who are sufficiently mature can give an operative consent to the care and procedures specified therein. See note 43 *supra*.

92. See 96 S. Ct. at 2864-65.

93. *Roe v. Wade*, 410 U.S. 113, 155 (1973) (citations omitted). One suggested solution is to allow the attending physician to determine whether the particular minor

CONCLUSION

"Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."⁹⁴ Underlying this statement is the notion that some minors should not be treated differently than adults. In the area of medical care, the right of privacy demands that the minor who possesses the intelligence and capacity to consent must be freed from the extreme intrusion created by the requirement of parental consent. While the state may create procedures designed to insure that the minor is competent to consent, it cannot give third parties, such as parents, the absolute power to negate the implementation of an informed decision by the "mature minor." The days when parents were given "the power of life and death . . . over their children"⁹⁵ have ended. Their power to adversely affect their children's health should also be denied. Abolishing parental consent as a condition precedent to the medical treatment of "mature minors" is a step in that direction.

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can give an effective and informed consent to the necessary care. See Comment, *Abortion: An Unresolved Issue—Are Parental Consent Statutes Unconstitutional?*, 55 NEB. L. REV. 256, 277-79 (1969). As noted earlier, the Oklahoma statute under consideration requires at least two physicians to agree on the proposed course of care when the minor is incapable of expressing consent. See notes 40-41 *supra* and accompanying text. It would be relatively easy to alter this provision to provide that the physicians be required to determine only whether the minor is competent, physically and mentally, to consent. Such a change in the role of physicians under the statute would be more compatible with their traditional role of advising "the patient of the state of his closest physical, mental and social associate—his own body." Delgado, *Euthanasia Reconsidered—The Choice of Death as an Aspect of the Right of Privacy*, 17 ARIZ. L. REV. 474, 478 (1975). Furthermore, giving the physician a consulting function avoids the charge that the statute grants the physician a veto power over a "mature minor's" decision, since care may be rendered to the minor without his consent if he is considered incapable of making an informed decision. See 96 S. Ct. at 2865-66.

94. 96 S. Ct. at 2843.

95. *People v. Turner*, 55 Ill. 280, 285 (1870).