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The Illinois Parental Notice Abortion Act: Legal and Ethical Ramifications of a Physician's Decision to Give Parental Notification, 18 J. Marshall L. Rev. 475 (1985)

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THE ILLINOIS PARENTAL NOTICE ABORTION ACT: LEGAL AND ETHICAL RAMIFICATIONS OF A PHYSICIAN'S DECISION TO GIVE PARENTAL NOTIFICATION

On November 2, 1983, the Illinois General Assembly, overriding a gubernatorial veto, enacted into law the Illinois Parental Notice Abortion Act (Act).[1] The provisions of the Act require physicians to notify both parents or the legal guardian of unemancipated minor[2] patients of their intention to perform an abortion,[3] to delay the procedure for at least twenty-four hours after notice has been given,[4] or to delay the procedure until such time as a minor who objects to such notice has obtained a court order waiving the notice requirement.[5] After careful consideration of the Act in light

1. S. 521, 83rd General Assembly, P.A. 83-890, 1983 Ill. Legis. Serv. 5340 (West) (to be codified at ILL. REV. STAT. ch. 38, § 81-61 *et seq.* This Act repealed ILL. REV. STAT. ch. 38, § 81-23.3 [Parental Consultation]).

2. As used throughout this Act, "unemancipated minor" means any minor who is not now nor has ever been married nor has not by court order otherwise been freed from the care, custody and control of her parents. 1983 Ill. Legis. Serv. at 5341 (West) (to be codified at ILL. REV. STAT. ch. 38 § 81-63(b)).

3. For purposes of this Act, "abortion" is defined as "the use of any instrument, medicine, drug, or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant with intent other than to cause live birth." 1983 Ill. Legis. Serv. at 5341 (West) (to be codified at ILL. REV. STAT. ch. 38, § 81-63 (d)).

4. Section 4(a) provides in full:

> No person shall perform an abortion upon an unemancipated minor or upon an incompetent unless he or his agent has given at least 24 hours actual notice to both parents or to the legal guardian of the minor pregnant woman or incompetent of his intention to perform the abortion or unless he or his agent has received a written statement or oral communication by another physician, hereinafter called the "referring physician," certifying that the referring physician or his agent has given such notice.

1983 Ill. Legis. Serv. at 5341 (West) (to be codified at ILL. REV. STAT. ch. 38, § 81-64(a)).

5. "A minor or incompetent who objects to notice . . . may petition, on her own behalf or by next friend, the circuit of the county in which the minor resides or in which the abortion is to be performed for a waiver of the notice requirement . . . ." *Id.* (to be codified at ILL. REV. STAT. ch. 38, § 81-64(c)). Notice may be waived if the court finds that the minor is sufficiently mature and well-informed to make the abortion decision on her own or that notification would not be in the best interest of the minor. *Id.* at 5342 (to be codified at ILL. REV. STAT. ch. 38, § 81-65(d)(i)(ii)).

In addition to judicial waiver, there are several other exceptions to the notice requirement. Section 6 states that the notice requirement shall not apply "when, in the best medical judgment of the physician on the facts of the case before him, a medical emergency exists that so complicates the pregnancy as to

of recent United States Supreme Court decisions,[6] the United States District Court for the Northern District of Illinois found the twenty-four hour waiting period and the judicial alternative to parental notification sections of the Act constitutionally defective.[7]

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require an immediate abortion." *Id.* (to be codified at ILL. REV. STAT. ch. 38, § 81-66). Section 7(a) eliminates the 24-hour notice requirement when notice has been given and the parties to whom such notice is due accompany the minor or incompetent to the place where the abortion is to be performed or submit notarized statements indicating they have been properly notified. *Id.* at 5343 (to be codified at ILL. REV. STAT. ch. 38, § 81-67 (a)). Notice to a minor's father is also not necessary if the mother accompanies her and submits a notarized statement of notification and states orally to the physician that she has a reasonable belief that the father of the unborn child is the minor's father. *Id.* (to be codified at ILL. REV. STAT. ch 38, § 81-67(b)).

Section 5 delineates the procedure for waiver of notice. A minor or incompetent may participate on her own behalf in the proceeding. The court shall appoint a guardian ad litem for her and advise her that she has a right to court appointed counsel, available upon her request. Court proceedings shall be confidential and shall be given precedence to ensure a prompt decision. The circuit court is also required to rule within 48 hours of the application. *Id.* at 5342 (to be codified at ILL. REV. STAT. ch. 38, § 81-65(b)(c)).

Section 5(e) requires that a confidential record of the evidence be maintained. If a court denies waiver of notice, section 5(f) authorizes an expedited confidential appeal as provided by Illinois Supreme Court Rules. Section 5(g) respectfully requests the supreme court to promulgate rules and regulations necessary to ensure that proceedings are handled expeditiously and confidentially. *Id.* at 5341 (to be codified at ILL. REV. STAT. ch. 38, § 81-65(e)(f)(g)).

6. City of Akron v. Akron Center for Reproductive Health, Inc., 459 U.S. 814 (1983); Bellotti v. Baird, 443 U.S. 622 (1979).

7. Shortly before the Act was to take effect on January 31, 1984, a class action suit was filed. Zbaraz v. Hartigan, No. 84 C771 (N.D. Ill. filed Jan. 30, 1984). This action was brought on behalf of all duly licensed physicians, surgeons, and medical researchers presently performing or desiring to perform abortions in the State of Illinois, and on behalf of certain of their patients. *Id.* at 1454. The patients in the plaintiff case included: (1) unemancipated minors allegedly capable of giving informed consent to an abortion procedure and those unemancipated minors whose best interest would not be served by notice to both parents or to a legal guardian; and (2) adjudicated disabled persons for whom a guardian had been appointed, pursuant to ILL. REV. STAT. ch. 110 1/2 § 11a-3(a)(1) or § 11a-3(a)(3), whose disability allegedly did not impair ability to give informed consent or whose best interests would not be served by notice to the guardian. Zbaraz v. Hartigan, 584 F. Supp. 1452, 1454 n.1 (N.D. Ill. 1984).

The plaintiffs, requesting a preliminary injunction or, alternatively, a temporary restraining order, alleged that the 24-hour waiting period between notification and performance of an abortion unconstitutionally burdened the rights of such patients to obtain an abortion. *Id.* at 1454. The plaintiffs also alleged that the 24-hour period burdened the rights of physicians to perform abortions consistently with their best medical judgment. *Id.* at 1458. Plaintiffs contended that the procedure for obtaining judicial waiver was constitutionally inadequate because it failed to assure expedited resolution of an appeal from the trial court's ruling on such a petition, it failed to adequately guarantee that the petition proceedings would be completely anonymous, and it failed to provide for assistance to the minor in the filing of the petition for judicial waiver. *Id.* at 1460-62. The district court entered a temporary restraining order on January 26, 1984. *Id.* at 1454.

On May 14, 1984, the district court determined the constitutionality of the Act. The district court first addressed the 24-hour waiting period required by Section 4(a). *Zbaraz*, 584 F. Supp. at 1458. In reaching its conclusion, the dis-

Notwithstanding the constitutional debate surrounding the technical requirements of the Act,[8] an examination of the present Illinois statutory requirement of parental notice reveals the serious legal and ethical dilemma it poses for members of the medical profession. This dilemma arises from the drafters' failure to consider physicians' professional and legal obligation to preserve the confidentiality of information acquired within the physician-patient relationship.[9] As a result of this legislative oversight, a physician

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trict court relied on City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983), and Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson, 716 F.2d 1127 (7th Cir. 1983). In *Akron*, the Court found the 24-hour waiting period unduly burdened an adult woman's abortion choice by causing delay. 103 S. Ct. at 2503. Such delay increased the cost and scheduling problems of an abortion by requiring a woman to make two trips to the clinic, resulting in a delay of more than 24-hours. *Id.* In *Pearson*, the Seventh Circuit held that an abortion could not be delayed once notice had been effected upon a minor's parents. 716 F.2d at 1143. Although the considerations with respect to minors and adults are different, the district court concluded that the 24-hour waiting period was constitutionally defective. *Zbaraz*, 584 F. Supp. at 1459.

The district court next addressed the judicial alternative to notice issue. The court began its analysis by noting that "[t]he State's interest in protecting immature minors will sustain a requirement of a consent or notice substitute, either parental or judicial." *Id.* The state, however, must "assure that an adequate alternative procedure is available to create an 'opportunity for case-by-case evaluations of the maturity of pregnant minors.'" *Id.* (quoting *Akron*, 103 S. Ct. at 2499, quoting Bellotti v. Baird, 443 U.S. 622, 643 n.29). The alternative procedure must "assure that a resolution of the issue, and any appeals therefrom, will be completed with anonymity and sufficient expedition to provide for an effective opportunity for an abortion to be obtained." *Zbaraz*, 584 F. Supp. at 1459 (quoting *Bellotti*, 443 U.S. at 644).

In *Bellotti*, the Court construed a Massachusetts statute which required that a pregnant minor seeking an abortion obtain the consent of her parents. The Court held that the statute was constitutionally defective because "it requires parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interests." *Bellotti*, 443 U.S. at 651. Thus, "[i]f she satisfies the court that she is mature and well enough informed to intelligently make the abortion decision, the court may authorize her to act without parental consultation." *Id.* at 647. Although the Court's view of alternative procedures has been considered in the context of parental consent statutes, it is also applicable to parental notification provisions. *See Pearson*, 716 F.2d at 1131-32. Accordingly, the *Zbaraz* court found the alternative procedure to notification constitutionally defective. 585 F. Supp. at 1459-1462.

8. While the Act is silenced for the moment, the controversy will continue because an appeal of the district court's ruling is forthcoming. Notice of appeal was filed in the United States Court of Appeals for the Seventh Circuit on June 6, 1984. Even if the district court's decision is upheld, it is likely that the Act will be reenacted in an effort to comply with constitutional requirements. Judge Will, in his opinion in *Zbaraz*, discussed a number of other difficulties with the Act, although not raised explicitly by the parties, because of his belief that the Act would be redrafted by the Illinois legislature. *Zbaraz*, 584 F. Supp. at 1464-65.

9. A physician-patient relationship is established when a patient accepts professional services from a physician for the purposes of care and treatment. Thoren, *The Physician-Patient Privilege*, 1983 MED. TRIAL TECH. Q. 61, 64-65. Actual treatment is not required, however, to establish a patient-physician rela-

contemplating compliance with the Act will be forced to make some very sensitive decisions.

As a practical matter, most physicians will attempt to comply with the Act by advising their minor patient of the notification requirement before the abortion is performed. Although many minors may oppose parental notification and would strenuously object to such notification being given, most minors presumably will acquiesce to notice in order to obtain the abortion. Despite this involuntary consent to notice, a physician's compliance with the Act discloses personal information concerning the minor, and therefore, infringes upon the minor's right to privacy.[10] Moreover, physicians

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tionship. *Id.* The requisite physician-patient relationship exists if the patient consults a physician for "curative" treatment. *Id.* This situation must be distinguished from that where a physician is consulted only for examination. No physician-patient relationship exists between an examining physician and the party being examined. *See also* J. WIGMORE, EVIDENCE § 2382 (McNaughton rev. 1961) (physician-patient relationship established only if physician consulted for purposes of treatment or for diagnosis in anticipation of treatment); Note, *Confidential Relationships: Does the Law Require Silence Outside the Courtroom*, 6 UTAH L. REV. 380, 387-88 (1959) (subject matter must be communicated to the physician by the patient in the course of securing treatment and must be of such a nature as would have remained undisclosed except in the process of securing help). A minor who informs or communicates to a physician a request for an abortion discloses information necessary for the performance of the physician's duty. Accordingly, the requisite physician-patient relationship is established.

In order to make an informed diagnosis and to render proper treatment, a physician requires full and detailed information. Challenrer, *The Doctor-Patient Relationship and the Right to Privacy*, 11 U. PITT. L. REV. 624 (1950). When a patient seeks professional treatment and retains a physician, the patient must admit the most intimate and private details of his or her mind and body. Because a patient is unfamiliar with what information is relevant to his treatment, the patient must disclose all information to his physician. Aranoff & Hirsh, *Confidential Communications Between Physician and Patient in Judicial and Administrative Proceedings*, 1983 MED. TRIAL TECH. Q. 331, 333. This information is likely to be very personal, highly confidential, and potentially damaging or embarrassing if revealed elsewhere. Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965). Thus, some guarantee of confidentiality is required to ensure complete trust between patient and physician. Note, *Legal Protection of the Confidential Nature of the Physician-Patient Relationship*, 52 COLUM. L. REV. 383, 384 (1952).

To encourage both trust and uninhibited communication between patient and physician and to protect the patient from the embarrassment which an unauthorized disclosure might cause, the legal and medical professions recognize certain communications between patient and physician as privileged. *Hammonds*, 243 F. Supp. at 801. *See also* Comment, *The Physician-Patient Privilege*, 56 Nw. U.L. Rev. 263, 266-67 (1961) (fear of perjury by physician arising from conflict between ethical duty of silence and legal duty of disclosure and outrage and repugnance of physician acting against patient's interest render additional support for extending privilege of silence to the medical profession). Consequently, a physician is under a legal and professional obligation to keep communications acquired during the physician-patient relationship confidential. C. DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT 23 (1958).

10. Privacy cases involve at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters. The other is the

complying with this statutory requirement of parental notification

individual interest in making certain kinds of important decisions without interference. Whalen v. Roe, 429 U.S. 589, 599-600 (1977). In the context of parental notification requirements, involving the minor's parents against the minor's wishes effectively cancels her right to avoid disclosure of the fact that she is seeking an abortion. Besides revealing a confidential decision, parental notice requirements may limit "access to the means of effectuating that decision." Carey v. Population Servs. Int'l, 431 U.S. 678, 688 (1977).

One of the first explicit recognitions of the constitutional right of privacy came in Griswold v. Connecticut, 381 U.S. 479 (1965). In *Griswold*, the Supreme Court invalidated a Connecticut statute prohibiting married persons from using any drugs, medicinal articles or instruments for the purpose of preventing conception. *Id.* at 480. Although the Constitution does not explicitly mention a right of privacy, the Court recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, exists under the Constitution. *Id.* at 483. Accordingly, the Court concluded that the intimacies of the marital relationship and the right of contraceptive use were within a zone of privacy created by several fundamental constitutional guarantees. *Id.* at 485. In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Supreme Court invalidated a Massachusetts statute prohibiting distribution of contraceptives by licensed physicians or pharmacists to married persons. *Id.* at 453. The Court held that the right of access to contraceptives extended to single as well as married persons. *Id.* Finally, in Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court concluded that the right of privacy, grounded in the concept of liberty guaranteed by the constitution, was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. In *Roe*, the Court invalidated a Texas statute making abortions illegal except when necessary to preserve the life of the mother. *Id.* at 164. Even though the Court determined that a woman's right to terminate her pregnancy was fundamental, it rejected the notion that "the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." *Id.* at 153. The Supreme Court stressed that the woman's right must be balanced against the state's right to protect potential life and safeguard maternal and infant health. *Id.* at 154. In balancing these interests, the Court identified three stages of pregnancy and defined the limits of state power to regulate abortion during each of these stages:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
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> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. . . .
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> [This] decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.

Id. at 164-66.

In Doe v. Bolton, 410 U.S. 179 (1973), the companion case to *Roe*, the Court struck down provisions of a Georgia statute which required that abortions be given only in accredited hospitals, that hospital board of directors give approval

risk breaching their professional ethical responsibility, as stated in the Hippocratic Oath and Principles of Medical Ethics, which compels them to maintain confidentiality in the provision of medical services. Finally, the far-reaching legal consequence of a physician's decision to notify parents of his intention to perform an abortion is the potential liability for disclosure of this confidential medical information.

This comment examines the legal and ethical aspects of a physician's decision to give parental notification as required by the Illinois Parental Notice Abortion Act.[11] The comment begins by

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to any abortion, and that two physicians in addition to the attending doctor acquiesce in the abortion decision. *Id.* at 183-84. The Court held that these procedural requirements were constitutionally invalid because they failed to distinguish between the changing degree of state interests during the three trimesters of pregnancy and because they unduly burdened the patient's and physician's rights. *Id.* at 201-02.

Since *Roe*, the Court has applied the basic principle that a woman has a fundamental right to make the highly personal choice of whether or not to terminate her pregnancy to *minors*. The question of whether a minor has a fundamental constitutional right of privacy in the abortion context was first considered in Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976). In *Danforth*, the Court invalidated a provision of a Missouri statute imposing a flat parental consent requirement on abortion decisions of unmarried pregnant women under the age of 18 years. *Id.* at 72. The Court held that the minor's privacy right in an abortion decision outweighed the interests of parents and thus precluded the state from giving an arbitrary veto power to third parties. *Id.* at 74. The Court went on to note that "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Id.* Accordingly, the Court extended to minors the fundamental right to decide whether or not to bear a child. *Id.* at 75.

Although the *Danforth* court recognized that a right of privacy exists, it also recognized that this right is a qualified right. *Id.* at 74. The Court held that the minor's privacy right was not coextensive with that of an adult, but rather was a limited right. *Id.* The Court has "recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children, their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in childbearing." Bellotti v. Baird, 443 U.S. 622, 634 (1979).

In recognition of the state's interest in protecting minors and providing for their welfare, the *Danforth* court lowered the standard of review in analyzing minors' rights of privacy. Thus, any state interference with a minor's fundamental right need only be based on a "*significant state interest.*" *Danforth*, 428 U.S. at 75. This standard of judicial scrutiny is less rigorous than the "compelling state interest" test applied to restrictions on the privacy rights of adults. Although the Court has yet to articulate the precise scope of this test, a state attempting to burden a minor's fundamental privacy right presumably must justify the burden by more than a bare assertion that the burden is connected to the significant interest.

11. In addition to Illinois, other state legislatures have formulated or attempted to formulate similar parental notice statutes. The Indiana statute, IND. CODE ANN. § 35-1-58.5-2.5(a) (Burns 1979), requiring 24-hour actual notice for an unemancipated minor under 18 years of age, was found unconstitutional in Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson, 716 F.2d 1127 (7th Cir. 1983). The Louisiana statute, LA. REV. STAT. ANN. § 40:12.35, 35.5 (West Supp. 1980), requiring 24-hour actual notice or 72-hour constructive notice to

considering the fundamental legal issue created by the Act:

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parent or legal guardian of all unmarried women under 18 years of age, was found unconstitutional in Margaret S. v. Edwards, 488 F. Supp. 181, 205 (E.D. La. 1980). The Maine statute, ME. REV. STAT. ANN. tit. 22, § 1597.2 (1980), requiring 24-hour actual notice or 48-hour constructive notice to a parent or legal guardian of unemancipated women under 17 years of age, was enjoined in Women's Community Health Center Inc., v. Cohen, 477 F. Supp. 542, 546-48 (D. Me. 1979). The Maryland statute, MD. HEALTH GEN. CODE ANN. § 20-103 (1982), requires notice to a parent or the guardian of minor. The Minnesota statute, MINN. STAT. ANN. § 144.343.2(a) (West 1984), requires 48-hour written notice to parents of an unemancipated minor. The Missouri statute, MO. ANN. STAT. § 188.028 (Vernon Supp. 1983), requiring notice to parents of pregnant woman under 18 years of age, was held unconstitutional in Planned Parenthood Ass'n v. Ashcroft, 483 F. Supp. 679, 697 (W.D. Mo. 1980), *aff'd*, 664 F.2d 687 (8th Cir. 1981). The Montana statute, MONT. CODE ANN. § 50-20-107(b) (1983), requires written notice to parents for a minor under 18 years of age. The Nebraska statute, NEB. REV. STAT. § 28-333 (1981), requiring a written statement by minor under 18 years that she has consulted with parent or guardian concerning performance of her abortion, was held unconstitutional in Women's Serv. v. Thone, 690 F.2d 667 (8th Cir. 1979), *vacated*, 103 S. Ct. 3102 (1983). The North Dakota statute, N.D. CENT. CODE § 14.-02.1-03(1) (1979), requiring written certification by a physician to parents at least 24 hours prior to minor's consent to perform an abortion, was enjoined in Leigh v. Olson, 497 F. Supp. 1340 (D. N.D. 1980). The Tennessee statute, TENN. CODE. ANN. § 39-4-202(f) (1982), requires a physician performing an abortion upon a minor less than 18 years of age to inform her parents two days prior to the abortion. The Utah statute, UTAH CODE ANN. § 76-7-304 (1978), requires a physician to notify, if possible, parents of a minor of his intent to perform an abortion.

At the federal level, the Department of Health and Human Services (HHS) proposed similar parental notice requirements. In order to implement what it felt was the congressional intent behind a 1981 amendment to Title X of the Public Health Service Act, 42 U.S.C. §§ 300(a)-6a (1976 & Supp. V. 1981), HHS published final regulations articulating parental reporting requirements for federally-funded family planning projects. *See* 48 Fed. Reg. 3600 (1983) (to be codified at 42 C.F.R. § 59). These regulations required personnel of projects funded under the Public Health Service Act to notify the parent or guardian of an unemancipated minor, within ten days, of the initial distribution of any prescriptive contraceptive drugs or devices to the minor. *See* 48 Fed. Reg. 3600, 3607 (1983) (to be codified at 42 C.F.R. § 59.5(a)(12)(i)(A).

Personnel of family planning projects were required to inform a minor, prior to providing services, that notification was required. Additionally, a minor must be informed that the clinic would have to receive verification of that notification before additional prescription drugs or devices could be provided. *See* 48 Fed. Reg. 3607 (to be codified at 42 C.F.R. § 59.5(a)(12)(i)(A)). The only possible exception to the notification requirement would occur when the project director determined that notification would result in physical harm to the minor child by the parent or guardian. *Id.* (to be codified at 42 C.F.R. § 59.5(a)(12)(i)(B)).

In an effort to forestall implementation of these regulations, several organizations initiated actions in separate federal district courts. In New York v. Schweiker, 557 F. Supp. 354 (S.D.N.Y. 1983), the plaintiffs moved for a preliminary injunction enjoining the Secretary of Health and Human Services from enforcing the regulations. In addressing the validity of the regulations, the court looked to the standard for issuing a preliminary injunction: irreparable harm and likelihood of success on the merits. With respect to the first element, the court concluded that the plaintiffs would no doubt suffer irreparable harm. *Id.* at 359. The plaintiffs presented statistical and medical documentation that these regulations would deter adolescents from obtaining prescriptive contraceptives and other family planning services, adolescent pregnancies would in-

whether compliance with the statutory notice requirement will give rise to a cause of action against physicians for unauthorized disclosure of confidential medical information. The comment next considers whether compliance with the Act will cause physicians to breach their ethical obligation not to divulge the confidential com-

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crease and many maladies, such as venereal disease, would not be prevented, detected or treated. *Id.* The physician plaintiffs were also threatened with other irreparable injury, such as loss of reputation and trust among adolescent clientele. *Id.* at 360.

Turning to the likelihood of plaintiffs' success on the merits, the court concluded that the regulations constituted a blatant disregard for the purpose of Title X and therefore had to be invalidated. *Id.* After reviewing the statutory language of the 1981 amendment to Title X, its legislative history, and the structure of Title X, the court concluded that the parental notice requirement was inconsistent with the intent of Congress. *Id.* at 362. The court reasoned that although Congress believed minors should encourage family involvement in their decision to use contraceptives, nothing suggested that Congress intended to require family participation in such decisions. *Id.* at 360-61.

On appeal, the Second Circuit concluded that federal regulations requiring federally-funded family planning clinics to notify parents after prescribing contraceptives to unemancipated minors were inconsistent with the laws funding those clinics. New York v. Heckler, 719 F.2d 1191 (2d Cir. 1983). In order to implement the 1981 amendments to Title X, the Secretary of HHS had to choose one of four options. *Id.* at 1196. These alternatives included suggesting to minors that parents be involved, notifying parents of the minor's desire to use Title X contraceptive services, securing parental consent prior to distributing contraceptives to minors, and conferring with the minor and her family prior to dispensing contraceptives. *Id.* The Secretary argued that notification struck a balance between the congressional policy of encouraging family involvement and the policy of preventing unwanted teenage pregnancy. *Id.* The Second Circuit concluded that Congress did not intend to require parental involvement but rather to encourage it. *Id.* at 1197. This encouragement was to be directed at minors involving parents and not family-planning clinics directly involving parents. *Id.*

The second challenge to the federal "squeal rule" also sought injunctive relief. Four days after the *New York v. Heckler* decision, the court in Planned Parenthood Fed'n of Am. v. Schweiker, 559 F. Supp. 658 (D.D.C.), *aff'd*, Planned Parenthood of Am. v. Heckler, 712 F.2d 650 (D.C. Cir. 1983), reached the same conclusion. The court noted that the continuing success enjoyed by family planning clinics was directly attributable to the policy of confidentiality assured by the clients. *Id.* at 668. It was clear to the court then that a parental notification requirement would deter many minors from attending these clinics which would result in increased pregnancies. *Id.* Because one of the purposes of Title X was to reduce the number of unwanted pregnancies, the court concluded that Congress did not intend to reverse its longstanding assurance of confidentiality in the services provided under Title X. *Id.* at 668-71.

On appeal, the Court of Appeals for the District of Columbia affirmed the lower court's decision. Planned Parenthood Fed'n of Am. v. Heckler, 712 F.2d 650 (D.C. Cir. 1983). The court concluded that regulations requiring grantees funded by HHS to notify parents or a guardian when prescribing contraceptives to unemancipated minors were inconsistent with Congressional intent and its purpose in enacting Title X and were thus beyond the limits of the Secretary's delegated authority. *Id.* at 665.

Although the federal regulations have not been subsequently reenacted, they pose the same legal and ethical problems for physicians contemplating the distribution of contraceptive drugs or devices to unempancipated minor patients. Accordingly, the analysis set forth herein with respect to the Illinois Parental Notice Abortion Act would also apply to these federal regulations.

munications of their patients. The comment then considers proposals for possible legislative changes in the Act and concludes with a Model Parental Notice Statute which may be used a a guideline to avoid the various legal and ethical pitfalls inherent in the present Illinois statute.

LEGAL RAMIFICATIONS OF NOTIFICATION: LIABILITY OF A PHYSICIAN FOR UNAUTHORIZED DISCLOSURE OF CONFIDENTIAL MEDICAL INFORMATION

No court has considered the liability of a physician who notifies parents of their minor daughter's decision to terminate a pregnancy. Courts have found physicians liable, however, for unauthorized disclosure of confidential medical information under other circumstances.[12] An examination of these decisions leads to the conclusion that physicians who comply with the statutory parental notice requirement may be legally culpable for disclosure of this personal and confidential treatment.

In 1917, the Supreme Court of Washington rendered one of the earliest decisions involving the liability of a physician for unauthorized disclosure of a patient's confidential medical information.[13] In *Smith v. Driscoll*, the court addressed the narrow issue of whether a physician who testified in a judicial proceeding and disclosed confidential information acquired by him in his professional capacity was liable for damages to the patient for so testifying.[14] The court held that the patient failed to overcome the presumption that the testimony was privileged.[15] The *Smith* court in broad dictum suggested, however, that a similar action could exist for out-of-court disclosure of personal medical history:

> Neither is it necessary to pursue at length the inquiry on whether a cause of action lies in favor of a patient against a physician for wrongfully divulging confidential communications. *For the purpose of what we shall say it will be assumed that, for so palpable a wrong, the law provides a remedy.*[16]

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12. *See infra* cases cited at notes 20, 35, and 48.

13. Smith v. Driscoll, 94 Wash. 441, 162 P. 572 (1917).

14. *Id.* at 442-43, 162 P. at 573.

15. The Supreme Court of Washington stated that it must be shown that the ordinary privilege given to a witness was abused. *Id.* at 443-45, 162 P. at 573. The court noted that all the testimony given by a witness in the course of a judicial proceeding was prima facie privileged. *Id.* Abuse of this privilege would thus depend on whether the testimony complained of was admissible, relevant, and pertinent to the issues. *Id.* If it is not, the physician would be liable. *Id.* Accordingly, the complaint was dismissed because it failed to set forth the nature of the action in which the testimony was given and because it failed to allege that the statements complained of were admissible. *Id. See infra* note 53 for a discussion of the physician-patient privilege.

16. *Smith*, 94 Wash. at 442, 162 P. at 572.

Since *Smith*, courts have developed three theories to hold a physician liable for unauthorized extrajudicial disclosure of information acquired during the physician-patient relationship. These theories include breach of a contractual relationship containing an implied term of confidentiality, invasion of privacy, and breach of a legally recognized confidential or privileged relationship between physician and patient.[17]

Breach of Contract

Courts traditionally view the physician-patient relationship as a contract of employment.[18] The physician agrees to provide care and treatment while the patient agrees to compensate him for these professional services.[19] Accordingly, a number of jurisdictions recognize a cause of action in contract against a physician for the unauthorized disclosure of a patient's medical history.[20] Jurisdictions recognizing the contract theory as a basis of liability make it clear, however, that the action lies only for disclosing information relating either to the patient's mental or physical condition or to the physician's diagnosis or treatment.[21]

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17. *See infra* cases cited at notes 20, 35, and 48.

18. *See, e.g.*, McNamara v. Emmons, 36 Cal. App. 2d 199, 204-05, 97 P.2d 503, 507 (1939) (physician-patient relationship, in its inception, created by express or implied contract); Ahnert v. Wildman, 176 Ind. App. 630, 376 N.E.2d 1182, 1183 (1978) (relationship between physician and patient may result from express or implied contract and rights and liabilities of parties governed by general contract law); Lyons v. Grether, 218 Va. 630, 633 239 S.E.2d 103, 105 (1977) (physician-patient relationship springs from consensual transactions, that is, an express or implied contract).

19. *See* Comment, *Physicians and Surgeons: Civil Liability For a Physician Who Discloses Medical Information Obtained Within the Doctor-Patient Relationship in a Nonlitigation Setting*, 28 OKLA. L. REV. 658, 662 (1975) [hereinafter cited as *Physicians and Surgeons*].

20. *See, e.g.*, Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965) (action against insurance company for inducing physician to divulge confidential information gained through physician-patient relationship on pretext that patient was contemplating malpractice suit); Horne v. Patton, 291 Ala. 701, 710-11, 287 So. 2d 824, 831-32 (1974) (action against physician for damages suffered by physician's disclosure to patient's employer of information acquired during patient's treatment); Geisberger v. Willuhn, 72 Ill. App. 3d 435, 439, 390 N.E.2d 945, 948 (1979) (action against physician for physician's employee's disclosure of patient's name to police); Doe v. Roe, 93 Misc. 2d 201, 204, 400 N.Y.S.2d 668, 674 (1977) (action against physician and her husband for unlawfully publishing a book containing patient's explicit thoughts, feelings, emotions and fantasies); Clayman v. Bernstein, 38 Pa. D.& C. 543, 548 (1940) (action by patient's husband against physician for threatened disclosure of medical information concerning his wife); Quarles v. Sutherland, 215 Tenn. 651, 389 S.W.2d 249, 252 (1965) (dictum) (action against physician retained by department store for wrongfully disclosing medical report to store's attorney pertaining to plaintiff's alleged injuries).

21. *See* Geisberger v. Willuhn, 72 Ill. App. 3d 435, 439, 390 N.E.2d 945, 948 (1979). The *Geisberger* court noted that those disclosures which violated the statutory physician-patient privilege would define what would be actionable under a contract theory. *Id.* Under the Illinois physician-patient privilege, a

A physician and patient entering into a contractual relationship rarely expressly agree that the physician will keep confidential all personal information given to him by the patient. For the most part, courts imply an obligation to preserve confidentiality from the nature of the physician-patient relationship. Implied contractual terms arise from the conduct of the parties at the time of contracting and from the common usages, practices, and understandings in the community.[22] For instance, in *Hammonds v. Aetna Casualty and Surety Company*,[23] a federal district court held that a physician impliedly warrants at the time of contracting that confidential information gained through the relationship will not be released without the patient's permission.[24] The court reasoned that the public's general knowledge of the medical profession's ethical obligation contained in the Hippocratic Oath to maintain secrecy gives every patient the right to rely upon this constructive warranty of silence.[25] Consequently, a physician who breaches this duty of confidentiality violates his contractual obligation. Following the reasoning of the *Hammonds* court, a physician who complies with a parental notification requirement risks breaching this implied warranty of confidentiality.

A practical limitation of a contract cause of action lies in establishing compensable damages.[26] The general rule of contract damages is that only those items of damages reasonably foreseeable by the parties as a direct result of the breach are compensable.[27] Fur-

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physician is precluded from disclosing information necessary to treat the patient. ILL. REV. STAT. ch. 110, § 8-802 (1983). Because the disclosure involved in *Geisberger* was only the name of the plaintiff, the disclosure was not within the scope of the privilege. 72 Ill. App. 3d at 438, 390 N.E.2d at 947. *See infra* note 53 for a discussion of the physician-patient privilege.

22. *See* E. FARNSWORTH, CONTRACTS § 12.8 (1982). *See also infra* note 25 and accompanying text.

23. 243 F. Supp. 793 (N.D. Ohio 1965).

24. *Id.* at 801.

25. *Id.* The *Hammonds* position has generally been adopted in subsequent cases which have attempted to fashion a remedy based on the contractual nature of physician-patient relationship. *See, e.g.*, Horne v. Patton, 291 Ala. 701, 711, 287 So. 2d 824, 832 (1973) (widespread acquaintance with Hippocratic Oath's secrecy provision or AMA's Principles of Ethics sufficiently justifies patient's reasonable expectations of confidentiality); Geisberg v. Willuhn, 72 Ill. App. 3d 435, 438-39, 390 N.E.2d 945, 948 (1979) (physician-patient testimonial privilege, Hippocratic Oath, and canons of medical ethics support existence of implied contract not to disclose confidential medical information).

26. 5 A. CORBIN, CONTRACTS § 1019, at 113-15 (1964); RESTATEMENT (SECOND) OF CONTRACTS § 353 (1965).

27. *See* Hadley v. Baxendale, 156 Eng. Rep. 145 (1854). Under the *Hadley* rule, the injured party may recover damages for loss that "may fairly and reasonably be considered [as] arising naturally, i.e., according to the usual course of things, from such breach of contract itself." *Id.* at 151. The principle of *Hadley* also limits contractual damages to those which "may reasonably be supposed to have been in the contemplation of both parties, at the time they have made the contract, as the probable result of the breach of it." *Id.*

thermore, damages for mental distress are not granted for breach of contract in the absence of aggravating circumstances.[28]

When a physician notifies parents of their minor daughter's request for an abortion, the minor primarily suffers mental distress. Yet, the majority of courts would deny recovery because mental distress is not a compensable item of contractual damages.[29] Despite this general rule, commentators suggest that recovery for mental distress should be allowed in contracts involving a personal and intimate relationship because the breaching party can reasonably foresee some type of mental suffering.[30]

This is particularly true in the case of parental notification requirements. Minors may not want their parents to be notified of their request for an abortion because of the strong and painful parental reaction which may follow.[31] This parental reaction is likely to cause tension between parent and minor, and thereby create an

28. *See* 5 A. CORBIN, CONTRACTS § 1076, at 426 (1964) (damages for mental suffering frequently awarded where suffering accompanies bodily injury or where suffering caused in wanton, reckless or intentional manner); RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981) (recovery for emotional disturbance not allowable unless breach causes bodily harm or breach is of such nature that serious emotional disturbance will result).

29. *E.g.*, MacDonald v. Clinger, 84 A.D.2d 482, 486, 446 N.Y.S.2d 801, 804 (1982) (recovery for breach of contract limited to economic loss flowing directly from the breach, thus precluding recovery for mental distress, loss of employment, and deterioration of marriage). *See also* Archer v. Continental Assurance Co., 107 F. Supp. 145 (W.D. Ky. 1952) (action for damages to business reputation resulting from defendant's refusal to issue life insurance policy to third party after authorizing its agent to instruct plaintiff insurance broker that said policy would be accepted); McClean v. University Club, 327 Mass. 68, 97 N.E.2d 174 (1951) (action for personal injuries allegedly sustained when plaintiff was evicted from private club).

30. *See* Note, *Action for Breach of Medical Secrecy Outside the Courtroom*, 36 U. CIN. L. REV. 103 (1967) [hereinafter referred to as *Medical Secrecy*]. The author relies on Corbin's liberal view that there is little difference, theoretically, between contract and tort damages. Both theories should include damages for mental suffering. Yet, the utility of a contract cause of action is somewhat questionable because of the nonrecognition of damages for emotional distress. However, the RESTATEMENT OF (SECOND) CONTRACTS may add support to Corbin's liberal view. If the contract is "*of such a kind that serious emotional disturbance was a particular likely result*" the RESTATEMENT would allow recovery. RESTATEMENT (SECOND) OF CONTRACTS § 353, comment a (1965) (emphasis added). Contracts of carriers with passengers or guests are examples of contracts likely to cause serious emotional disturbance. *Id.* Arguably, breach of contract between physician and patient is just as likely to cause serious emotional disturbance as breach of a contract between carrier and passenger because of the similar type of duty imposed on the carrier and physician. Therefore, acceptance of both the Corbin and RESTATEMENT position may result in an effective cause of action under a contract theory for this medical disclosure.

31. *See* Planned Parenthood Fed. of Am. v. Schweiker, 559 F. Supp. 658, 664 (D.D.C.), *aff'd*, Planned Parenthood Fed. of Am. v. Heckler, 712 F.2d 650 (D.C. Cir. 1983) (minor affidavit stating, "I absolutely do not want my mother to know about my sexual activities because I am sure that she would have a strong and painful reaction if she found out").

adverse effect on the family relationship.[32] In addition to parental disappointment and disapproval, the minor may confront physical or emotional abuse, withdrawal of financial support, or actual obstruction of the abortion decision, items of damages clearly foreseeable when notice is given.[33] Upon these facts, a viable cause of action in contract should exist for a physician's disclosure of this confidential information even though mental distress is not a generally recognized element of contractual damages.

Invasion of Privacy

Courts and commentators recognize invasion of privacy[34] as a proper basis for a cause of action for a plaintiff seeking redress for his physician's unauthorized disclosure of confidential medical information.[35] In *Hammonds v. Aetna Casualty and Surety Com-*

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32. *See* Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 548 (D. Me. 1979) (expert affidavits that some parents "will pressure the minor, causing great emotional distress and otherwise disrupting the family relationship"); Hoffman, *Consent and Confidentiality and Their Legal and Ethical Implications for Adolescent Medicine*, in MEDICAL CARE OF THE ADOLESCENT 42, 52 (J. Gallagher, F. Heald & J. Garrell, 3d ed. 1976) (minors "might well be talked into terminating the pregnancy in violation of their inner feelings and beliefs, and suffer guilt and emotional distress the rest of their lives").

33. H.L. v. Matheson, 450 U.S. 398, 439 (1981). *See also* Baird v. Bellotti, 450 F. Supp. 997, 1001 (D. Mass. 1978) (uncontested evidence that some parents "would insist on an undesired marriage, or on continuance of the pregnancy as punishment" or even physically harm the minor), *aff'd*, 443 U.S. 622 (1979).

The Secretary of Health and Human Services pointed out that those opposed to the federal parental notice regulations contended that family relationships would be negatively affected. *See* 48 Fed. Reg. at 3605 (1983). For example, parents would feel hurt that the child did not confide in them or they may become angry upon learning that their child was sexually active. *Id.* As a consequence, parents may restrict or punish the child or deny the child food and shelter. *Id.* Moreover, some critics speculated that communication between parent and minor would end. *Id.* This could result in teenagers resorting to rash measures, such as running away. *Id.*

34. Invasion of privacy comprises four distinct kinds of torts: publication of embarrassing private facts; publicity unreasonably placing an individual in a false light before the public; unreasonable intrusion upon physical solitude or seclusion; and commercial appropriation of one's name or likeness. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117 (4th ed. 1971). At the very least, a physician's disclosure to a minor's parents of the minor's decision regarding pregnancy termination constitutes publication of embarrassing private facts. For a general discussion of the tort of invasion of privacy see Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890). *See also* Comment, *Privacy in Illinois: Torts Without Remedies*, 17 J. MAR. L. REV. 799 (1984) (discussing privacy law in Illinois).

35. *See, e.g.*, Mikel v. Abrams, 541 F. Supp. 591 (W.D. Mo. 1982) (action against physician for discussing with plaintiff's wife during telephone conversation plaintiff's medical condition), *aff'd*, 716 F.2d 907 (8th Cir. 1983); Geisberger v. Willuhn, 72 Ill. App. 3d 435, 390 N.E.2d 945 (1979) (action against physician for disclosing plaintiff's name to police); Wenninger v. Muesing, 307 Minn. 405, 240 N.W.2d 333 (1976) (dictum) (petition for writ of prohibition restraining court from ordering physicians, to whom plaintiff was referred for further

pany,[36] the court indicated that an action for damages could lie for a physician's tortious conduct of revealing medical information or a confidential communication given in the course of treatment without authorization.[37] The *Hammonds* court concluded that such an action existed because a physician not only had an ethical duty to preserve a patient's privacy but a legal duty as well.[38]

The Supreme Court of Alabama in *Horne v. Patton*[39] subsequently adopted the *Hammonds* position. In *Horne*, the patient alleged that his physician's release of his medical record to his employer constituted an invasion of privacy.[40] The court recognized that a person has a right to be free from unwarranted publication of his private affairs which are not the legitimate concern of the public.[41] Applying the *Hammonds* reasoning to the physician-patient relationship, the *Horne* court concluded that an unauthorized disclosure of intimate details of a patient's medical condition could also amount to an unwarranted publication of his private affairs.[42] Under the *Horne* rationale, however, the patient must prove that the disclosure would cause mental suffering, shame, or humiliation in an ordinary reasonable person.[43]

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treatment, to appear for private interviews with defendant). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117 at 809-10 (3d ed. 1964); Note, *Medical Practice and the Right to Privacy*, 43 MINN. L. REV. 943, 946-52 (1959) [hereinafter cited as *Medical Practice*] (discussing patient's right to privacy of confidential information physician acquired during physician-patient relationship).

36. 243 F. Supp. 793 (N.D. Ohio 1965).

37. *Id.* The *Hammonds* court indicated that:

> If a doctor should reveal any of these confidences, he surely effects an invasion of privacy of his patient. We are of the opinion that the preservation of the patient's privacy is no mere ethical duty upon the part of the doctor; there is a legal duty as well. The unauthorized revelation of medical secrets, or *any* confidential communication given in the course of treatment, is tortious conduct which may be the basis for an action in damages.

Id. at 801 (emphasis added).

38. *Id.*

39. 291 Ala. 701, 287 So. 2d 824 (1973).

40. The case arose out of the physician's disclosure to the plaintiff's employer of certain information acquired during the physician-patient relationship. It is worth noting that the disclosure was made contrary to the plaintiff's express instructions. 291 Ala. at 704, 287 So. 2d at 825.

41. The *Horne* court concluded that an employer was not a person who had a legitimate interest in knowing every detail of an employee's health. 291 Ala. at 709-10, 287 So. 2d at 830-36. The court noted that a patient consults a physician for a wide-variety of reasons. 291 Ala. at 710, 287 So. 2d at 830. Moreover, many of the reasons about which a patient might consult his physician would have no effect on the patient's employment. *Id.*, 287 So. 2d at 831. Accordingly, the court held that the trial court erred in sustaining the demurrer to the privacy claim. *Id.*, 287 So. 2d at 830-31.

42. *Id.*, 287 So. 2d at 830.

43. *Id. See, e.g.*, Brown v. American Broadcasting Co., 704 F.2d 1296 (4th Cir. 1983) (emotional distress and embarrassment are key elements of action for

Parental notification requirements disclose the minor's private consultation with her doctor and interject her parents into the very conference held confidential. Notwithstanding this disclosure, most authorities contend that a disclosure of private facts to a single individual, or even a small group, fails to amount to a public disclosure.[44] Therefore, because a physician's disclosure is only to the parents or guardian of an unemancipated minor, a physician who complies with the Act apparently would not be liable for invasion of privacy.

Despite the presumption that parental notification is not a public disclosure, the delicacy of the physician-patient relationship should permit a minor to recover for invasion of privacy even when the disclosure is limited.[45] This conclusion is logical when one considers the highly sensitive and personal character of the informa-

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public disclosure of private facts). *See also* RESTATEMENT (SECOND) OF TORTS § 652D (1977). Section 652D provides:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

Id. The rule stated by this section gives protection then only when the publicity given to a person is such that a reasonable person would feel justified in feeling seriously aggrieved by it. *See id.* comment c.

44. *See, e.g.*, Pennison v. Provident Life & Accident Ins. Co., 154 So. 2d 617 (La. App. 1963) (husband had right to full report of wife's medical records by virtue of being head of the household); Beaumont v. Brown, 65 Mich. App. 455, 237 N.W.2d 501 (1975) (invasion of privacy must be accompanied by publicity in sense of communication to public in general or to large number of persons as distinguished from one individual or a few), *rev'd*, 401 Mich. 80, 257 N.W.2d 522 (1977); Curry v. Corn, 52 Misc. 2d 1035, 277 N.Y.S.2d 470 (1966) (suit against physician for disclosure of medical records dismissed because information was given only to plaintiff's husband). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 810 (4th ed. 1971) (publicity in the sense of a disclosure to general public or disclosure likely to reach general public); RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977) (not invasion of privacy to communicate a fact of plaintiff's life to single person or small group of persons).

The *Restatement of Torts* distinguishes between "publicity" and "publication." Publication includes only communication by a defendant to a third party. Publicity, in contrast, means that the matter in question was made public by either communicating it to the public at large or to so many people that the matter would be regarded as substantially certain to become public knowledge. The form of the invasion of the right of privacy covered in section 652D depends upon *publicity* given to the individual's private life. RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977) (emphasis added).

45. *See Medical Practice, supra* note 35, at 947. *See also Physicians and Surgeons, supra* note 19, at 109 (disclosing information obtained through the unique physician-patient relationship may be so outrageous that the publication requirement should be excluded). One commentator proposes to hold a physician liable in tort through the development of a fifth class of privacy tort. *Medical Secrecy, supra* note 30, at 109. This class, which would be called "breach of confidence," would be a recognition of the special characteristic of secrecy in the patient-physician relationship. This type of action would not only avoid the problem of damages inherent in the contract theory, but would avoid the publicity requirement as well. *Id.*

tion which the physician discloses to the minor's parents. Every minor woman has certain aspects of her life which she may prefer to keep confidential. Sexual activity is an example of such an entirely personal matter.[46] Critics of parental notification contend that, despite the limited publication, when a physician reveals intimate details of a minor's sexual activity to the minor's parents, the physician has acted in a manner which would be highly offensive to an ordinary reasonable person.[47] Therefore a privacy action should exist despite the limited publication of the disclosure.

Breach of Confidential Relationship

A number of jurisdictions permit a cause of action against a physician for disclosure of confidential information on the theory that such disclosure constitutes a breach of the privileged relationship existing between physician and patient.[48] Jurisdictions adher-

46. *See* RESTATEMENT (SECOND) OF TORTS § 652D comment b (1977).

47. A minor's need for confidentiality is at its greatest level when intimate issues such as sexuality are involved. This confidentiality need has been recognized by many states through their enactment of statutes providing for confidential treatment of venereal disease. *See* Note, *The Right of Minor to Confidential Access to Contraceptives*, 47 ALB. L. REV. 214, 220 n.35 (1982). Building on this desire for confidentiality in intimate sexual matters, it would be inapposite to prohibit a physician to violate confidentiality in venereal disease treatment, but to encourage it by notifying parents of the minor's medical decision regarding pregnancy termination. *See also* Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426 (1982). The author asserts:

> The more intimate or embarrassing the information, the more damaging the disclosure probably will be. The wronged party may suffer ridicule, loss of business or professional reputation, or deterioration of personal relationships. Though injury often flows from widespread publication of disclosed information, the *greatest injury may well be caused by disclosure to a single person, such as an employer or a spouse [or a parent].*

Id. at 1435 (emphasis added).

48. *See, e.g.*, Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. 793, 795-802 (N.D. Ohio 1965) (action against insurance company for inducing physician to divulge confidential information gained through physician-patient relationship); Geisberger v. Willuhn, 72 Ill. App. 3d 435, 390 N.E.2d 945 (1979) (action against physician for disclosing patient's name to police); Hannaway v. Cole, 2 Mass. App. 847, 311 N.E.2d 924, 925 (1974) (dictum) (action against psychiatrist for revealing to third persons confidential information acquired during physician-patient relationship); Wenninger v. Muesing, 307 Minn. 405, 411, 240 N.W.2d 333, 337 (1976) (dictum) (physician who discloses confidential information about his patient to a third person during a private interview may be subject to tort liability); MacDonald v. Clinger, 84 A.D. 2d 482, 487, 446 N.Y.S.2d 801, 802-805 (1982) (psychiatrist's disclosure, without consent and without justification, of personal information to plaintiff's wife violated fiduciary responsibility implicit in physician-patient relationship); Felis v. Greenberg, 51 Misc. 2d 881, 883, 273 N.Y.S.2d 288, 290 (1966) (furnishing of information by physician to insurance company without patient's authorization was in violation of privileged and confidential relationship of physician and patient); Alexander v. Knight, 197 Pa. Super. 79, 177 A.2d 142, 146 (1962) (dictum) (physician who submitted a report on a patient to a doctor employed by patient's adversary in litigation breached confidentiality of physician-patient relationship); Schaffer v. Spicer, 215 N.W.2d 134, 136-38 (S.D. 1974) (psychiatrist who breaches physician-

ing to this theory recognize that the confidential nature of the physician-patient relationship itself gives rise to a cause of action.[49] These courts conclude that there are certain legal obligations inherent in the physician-patient relationship. One such legal obligation on the physician's part is the duty to preserve the confidentiality of disclosures made by a patient.[50]

This legal duty of confidentiality derives from three sources. First, the Hippocratic Oath and many modern ethical codes adopted by the medical profession formally acknowledge secrecy as an obligation of the physician to the patient.[51] Second, state medical licensing statutes, which provide for revocation of a physician's license if he engages in unprofessional conduct, often define such conduct to include betrayal of professional secrets.[52] The third source of this

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patient privilege by making unauthorized disclosures of confidential medical information may be liable for breach of that duty); Berry v. Moench, 8 Utah 2d 191, 196, 331 P.2d 814, 817 (1958) (dictum) (physician who published derogatory matter concerning his patient may be liable for breach of obligation not to reveal information obtained in confidence during physician-patient relationship). *But see* Mikel v. Abrams, 541 F. Supp. 591 (W.D. Mo. 1982) (Missouri does not recognize cause of action for breach of duties inherent in physician-patient relationship), *aff'd*, 716 F.2d 907 (1983); Logan v. District of Columbia, 447 F. Supp. 1328 (D.D.C. 1978) (privileged or confidential physician-patient relationship does not give rise to cause of action under law of District of Columbia); Collins v. Howard, 156 F. Supp. 322 (D. Ga. 1957) (absence of physician-patient privilege statute precluded patient's recovery for physician's disclosure of results of a blood test); Quarles v. Sutherland, 215 Tenn. 651, 389 S.W.2d 249 (1965) (absence of physician-patient privileged communications statute failed to impose duty upon physician to treat medical report as confidential).

49. *See, e.g.*, Hales v. Pittman, 18 Ariz. 305, 576 P.2d 493 (1978) (relationship between physician and patient is one of trust and confidence which obligates physician to exercise utmost good faith); Cannell v. Medical & Surgical Clinics, S.C., 21 Ill. App. 3d 373, 315 N.E.2d 278 (1974) (responsibility of physicians and hospitals to protect patient's medical facts from extrajudicial disclosures springs from confidential nature of physician-patient relationship); Alexander v. Knight, 197 Pa. Super. 79, 177 A.2d 142 (1962) (members of medical profession stand in confidential or fiduciary capacity as to their patients).

50. *See, e.g.*, Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. at 799; Horne v. Patton, 291 Ala. at 701, 287 So. 2d at 829-30; Hague v. Williams, 37 N.J. at 336, 181 A.2d at 348-49.

51. See *infra* note 86 and accompanying text for a discussion of the Hippocratic Oath.

52. *See, e.g.*, CAL. BUS. & PROF. CODE § 2263 (West. Supp. 1984) (willful, unauthorized violation of professional confidence constitutes unprofessional conduct); LA. REV. STAT. ANN. § 37:1285(13) (West. Supp. 1979) (unprofessional conduct); Rules of the Board of Regents, N.Y. ADMIN. CODE. tit. VIII, § 29.1(b)(8) (1979) (professional conduct includes "revealing personally identifiable facts, data, or information obtained in a professional capacity without the prior consent of the patient or client"); OHIO REV. CODE ANN. § 4731.22(A)(4) (Page 1977) (wilfully betraying a professional secret).

In Clark v. Geraci, 29 Misc. 2d 791, 208 N.Y.S.2d 564 (1960), the physician licensing statute provided that revealing information obtained in a professional capacity relating to the patient or his record, without first obtaining the patient's consent, would constitute unprofessional conduct in the practice of medicine. In seeking a source of duty of secrecy, the court considered the licensing statute along with the testimonial privilege statute and concluded that

duty is derived from testimonial privilege statutes.[53] Courts have

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disclosure of medical information was plainly reprehensible and thus gave the patient a cause of action against the physician. 29 Misc. 2d at 792-93, 208 N.Y.S.2d. at 567.

In Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920), a statute provided that a physician's license to practice medicine could be revoked if the physician was found guilty of unprofessional or dishonorable conduct. The statute listed betrayal of a professional secret to the detriment of a patient as misconduct. The court thus held that unauthorized disclosure of confidential information by a physician would give rise to an action for damages. 104 Neb. at 227-28, 177 N.W. at 832. *But see* Quarles v. Sutherland, 215 Tenn. 651, 389 S.W.2d 249 (1965) (medical licensing statute held to be merely administrative provision concerning physician licensing which gave no right to recovery for wrongful disclosure of medical reports).

53. Unlike the attorney-client privilege, it was generally accepted at common law that a patient had no privilege to keep a physician from disclosing information obtained in the course of the physician-patient relationship. 8 J. WIGMORE, EVIDENCE 5230 (McNaughton rev. ed. 1961). Such was the common law rule regardless of whether the disclosure was made in court or out of court. Alabama Section, *Tort-Confidential Communication—A Physician Is Under General Duty Not To Disclose Information Obtained in the Course of a Doctor-Patient Relationship*, 26 ALA. L. REV. 485, 486 (1974).

The rationale underlying the common law rule was that a physician testifying in the courtroom should be compelled to disclose information in order for justice to be obtained. The most widely cited common law case supporting this rationale was The Duchess of Kingston's Trial, 20 How. St. Tr. 573 (1776), *discussed in* C. MCCORMICK, THE LAW OF EVIDENCE, § 98, at 2128 n.2 (2d ed. 1972). That case involved a bigamy action in which Lord Mansfield faced the question of whether a physician must breach his honor and disclose the marital status of the plaintiff and defendant which he had learned through treatment of the parties. When asked if he knew of the marriage between the defendant and her alleged husband, the physician stated, "I do not know how far anything that has come before me in a confidential trust in my profession should be disclosed, consistent with my professional honor." *Id.* Lord Mansfield noted that, if a surgeon voluntarily reveals these secrets, he would be guilty of a breach of honor and great indiscretion. However, "to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever." *Id.*

Despite disavowance at common law, many jurisdictions subsequently enacted statutory provisions which protected from disclosure certain information acquired by a physician within the physician-patient relationship. *See* 8 J. WIGMORE, EVIDENCE § 2380 n.5 (McNaughton rev. ed. 1961), for a compilation of jurisdictions having physician-patient privileged communication statutes. This statutory physician-patient privilege, which was first introduced in New York in 1829, was a rule of evidence which prevented a physician from being compelled to testify in a judicial proceeding about confidential communications obtained during the physician-patient relationship. The statute, reprinted in C. MCCORMICK, THE LAW OF EVIDENCE § 101 (2d ed. 1972) provided:

> No person authorized to practice physic or surgery shall be allowed [while testifying in court] to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.

Id., *quoting* REV. STAT. 1829, vol. II, part III, c.7, tit. 2, art. eight, § 73. The purpose of the statutory privilege was "to promote health, not truth. It encouraged free disclosure in the sickroom by preventing disclosure in the courtroom." C. MCCORMICK, THE LAW OF EVIDENCE, § 102, at 218 (2d ed. 1972).

The requirements for a testimonial physician-patient privilege are that the information be (1) a confidential communication, (2) with a physician in his

broadly interpreted the medical professions' code of ethics, the state medical licensing statutes, and the testimonial privilege statutes as an expression of public policy favoring a general duty to prevent extrajudicial disclosure of information acquired in the course of the physician-patient relationship.[54]

A minor's strongest theory for recovery appears to be an action for breach of confidence because of the potential limitations associated with the causes of action based on breach of contract and invasion of privacy. The physician-patient relationship contemplates a legal duty of nondisclosure on the part of the physician. Accordingly, a breach of this legal duty is actionable in tort.[55] The advan-

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professional capacity, and (3) necessary for obtaining the benefits of the professional relationship. 8 J. WIGMORE, EVIDENCE, §§ 2381-84 (McNaughton rev. ed. 1961). Another commentator contends that four conditions must be met before the privilege can be asserted: (a) the person sought to be silenced by assertion of the privilege must have been a physician at the time he acquired the information; (b) the information must have been gained in the course of a physician-patient relationship; (c) the disclosure must relate to "communication" or "information" as used in the privilege statute; and (d) the communication of information must have been "necessary" to treatment of the patient. Note, *Legal Protection of the Confidential Nature of the Physician-Patient Relationship*, 52 COLUM. L. REV. 383, 390-91 (1952).

Although the privilege is generally confined to information concerning the patient's medical condition or the physician's diagnosis and treatment, the scope of the privilege in a particular jurisdiction depends on the express words of the statute. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2235 (1956) (all communications between physician and patient privileged); CAL. EVID. CODE § 992 (West) (1966) (any information obtained by examination of the patient); IDAHO CODE § 9-203 (1980) (information gathered by physician through his examination or observation of the patient); ILL. REV. STAT. ch. 110, § 8-802 (1983) (any information acquired in attending patient in a professional character); VA. CODE § 8.08-399 (1950) (any information acquired in attending, examining, or treating patient in a professional capacity). Because the physician-patient privilege is a personal right of the patient, it may be asserted or waived only by the patient. Chaffee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607, 614 (1942).

54. A recent decision illustrative of this broad interpretation of testimonial privilege statutes is Doe v. Roe, 93 Misc. 2d 201, 400 N.Y.S.2d 668 (1979). In *Doe*, the plaintiff, a former patient of the defendant psychiatrist, brought suit against the psychiatrist and her husband. The plaintiff alleged that defendants invaded her privacy by publishing a book which revealed the plaintiff's most intimate feelings, emotions, and fantasies. 93 Misc. 2d at 204-05, 400 N.Y.S.2d at 671. The court held that a physician who enters into a physician-patient relationship impliedly covenants to keep confidential all disclosures made during this relationship. *Id.* at 210, 400 N.Y.S.2d at 674. In reaching this holding, the court relied on public policy. The court engaged in an extensive look at the state licensing and disciplinary statute as well as the testimonial privilege statute. *Id.* at 208-09, 400 N.Y.S.2d at 673. The court concluded that the legislature intended those statutory and regulatory schemes to go beyond judicial proceedings. *Id.* The court thus reasoned that the testimonial statute should have a broad and liberal construction to carry out the intended public policy. *Id.* This policy was prohibiting physicians from disclosing without authorization information acquired during the physician-patient relationship. *Id.*, 400 N.Y.S.2d at 672-73.

55. One commentator has suggested that cases dealing with liability for breach of confidence, under the guise of various legal theories, suggest the emergence of a new tort of breach of confidence. Note, *Breach of Confidence:*

tage of the breach of confidence tort theory is that a successful minor will be able to recover damages for mental distress, humiliation, loss of reputation and possibly deterioration of the family relationship.[56]

The preceding discussions indicate that a prima facie case can be established for imposing liability on a physician who, with or without the minor's authorization, discloses confidential information obtained in the course of the physician-patient relationship. The Supreme Court of New Jersey, in *Hague v. Williams*,[57] recognized, however, that certain "exceptions prompted by the supervening interest of society"[58] limit a patient's right against such disclosure. Because a physician's obligation of confidentiality is not absolute, disclosure is permitted under compelling circumstances.[59] An application of the *Hague* doctrine to parental notification requirements results in the conclusion that a physician who notifies parents of their minor daughter's medical decision regarding abortion will be liable for giving such notice only if it was given without justification.[60] A physician can justify his disclosure of confidential medical information by alleging patient consent or waiver, a general public health and welfare interest, or legal compulsion.[61]

An Emerging Tort, 82 COLUM. L. REV. 1426, 1450 (1982). The tort is defined as "the unconsented, unprivileged, disclosure to a third party of non-public information that the defendant has learned within a confidential relationship." *Id.* at 1455. Although traditional theories of liability offer legal redress for disclosures in breach of confidence, the author contends that they fail to recognize the distinct interests present in a confidential relationship and that the doctrinal limits make them ill-suited to enforcement of confidences. *Id.* at 1426.

56. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12 (4th ed. 1971).

57. 37 N.J. 328, 181 A.2d 345 (1962).

58. *Id.* 37 N.J. at 336, 181 A.2d at 349. In *Hague*, the parents of an infant brought suit against a physician for unauthorized disclosure to an insurance company. The parents had applied for life insurance on the infant because of a congenital heart defect. The conflict arose when the physician disclosed the medical history of the deceased infant patient to the patient's life insurers. The court held that the parents lost the right to their confidentiality by the act of filing a claim with their insurer involving the patient's health. The court reasoned that when the physical condition of a patient is made an element of a claim, "the public interest in a honest and just result assumes dominance over the individual's right of nondisclosure." *Id.*

59. *See Medical Practice*, *supra* note 35, at 954.

60. Before one can justify wrongful acts, a wrong must have been committed. Despite the authority supporting a cause of action against a physician, a patient will prevail only if he can plead and prove compensable damages. For purpose of this comment, it has been assumed that a minor can meet this burden. Various items of damages a minor could plead and conceivably recover include loss of reputation, emotional disturbance, and loss of family relationship.

61. *See Physicians and Surgeons*, *supra* note 19, at 669-71 (discussing affirmative defenses available to defendant physicians).

Patient Consent or Waiver

A patient may consent to a physician notifying her parents of her abortion decision. A patient may also waive her right to confidentiality. Accordingly, a valid consent or knowing waiver will defeat a cause of action based on improper disclosure of confidential information.[62] However, a patient must fully understand all the relevant circumstances before a valid consent or knowing waiver will be an affirmative defense.[63] The Illinois Parental Notice Abortion Act requires a minor to be advised of the notification requirement before abortion services are initially provided.[64] A minor can then decide either to accept medical treatment subject to parental notification or to refuse the treatment entirely. Thus, by accepting services prior to any medical treatment, the minor, arguably, consents to notice.[65]

The argument that acceptance of clinical services effectuates valid consent to parental notice is not persuasive. In *Planned Parenthood Federation of America v. Schweiker*,[66] a federal district court reasoned that in making consent to notification a condition of medical services, a minor's consent is essentially coerced.[67] The court concluded that the threatened breach of a physician's obligation to ensure confidentiality would still exist whether or not consent was forcibly extracted prior to providing services.[68] This reasoning is persuasive when one considers that most minors will not want their parents to be notified of their abortion decision. Nonetheless, because the minor still wants to secure an abortion, she will acquiesce to notice. If a minor truly wants an abortion, she is, in effect, coerced into consenting to the notification. Therefore, a

62. 8 J. WIGMORE, EVIDENCE §§ 2386-88 (McNaughton rev. ed. 1961).

63. *See Medical Practice*, *supra* note 35, at 952.

64. *See supra* note 4.

65. *See* 48 Fed. Reg. at 3603.

66. 559 F. Supp. 658 (D.D.C. 1983), *aff'd sub nom.* Planned Parenthood Fed'n of Am. v. Heckler, 712 F.2d 650 (D.C. Cir. 1983).

67. *Planned Parenthood*, 559 F. Supp. at 666. The *Planned Parenthood* court noted that a family planning clinic's duty of confidentiality to participants had long been recognized as sacred. *Id.* This was particularly the case when sensitive information, such as medical decisions about birth control, was involved. Because of this long-standing obligation to ensure confidentiality, the court concluded that:

> the essentially coercive circumstances under which a minor makes her "choice" does not act to vitiate the breach of confidentiality that notification entails. Confidentiality in the patient-physician context encompasses the private and privileged nature of all information conveyed in a health care transaction, including the knowledge that such a transaction is taking place. The threatened breach of a physician's obligation to ensure confidentiality exists *whether or not a waiver can be forcibly extracted prior to providing services.*

Id. (emphasis added).

68. *Id.*

minor's involuntary consent to parental notification probably would be insufficient to insulate the physician from liability.

A minor may also waive her right to confidential treatment. To constitute a valid waiver, however, there must be a knowing, intentional and voluntary relinquishment or abandonment of some known right or privilege.[69] Under this definition, any waiver of confidentiality which is made a condition of receiving medical treatment would not be a knowing and voluntary waiver. Therefore, unless a minor voluntarily and willingly waives this right to confidential medical treatment, a physician should be precluded from asserting waiver as an affirmative defense.

Disclosure in Public Interest

A second ground for justifying a physician's disclosure is the general public health and welfare interest.[70] Where the public interest or the private interest of a patient so demands, disclosure may be made to a person having a legitimate interest in the patient's health.[71] Courts generally favor disclosure either when the public health is threatened or when the patient himself is threatened.[72] To escape liability for disclosure, a physician attempting to justify parental notification might show that notice was given because certain competing interests outweighed the minor's interest in confidentiality.[73] Thus, the question which arises is whether there is a countervailing interest to which the minor's interest must

69. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *See also* BALLANTINE'S LAW DICTIONARY 1356 (3d ed. 1969) (voluntary and intentional relinquishment of a known and existing right or such conduct warranting an inference of relinquishment of such right).

70. Three overriding interests may justify violating the patient's confidence: (1) when others are endangered by the patient's condition, (2) when various societal interests are involved, and (3) when the patient's health is in question. *Medical Practice, supra* note 35, at 954-61.

71. *See, e.g.*, Tarasoff v. Regents of Univ. of Calif., 13 Cal. 3d 177, 118 Cal. Rptr. 129, 137, 529 P.2d 553, 561 (1974) (protective privilege ends where public peril begins) *subsequent op. on reh.*, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976); MacDonald v. Clinger, 84 A.D. 2d 482, 487, 446 N.Y.S.2d 801, 805 (1981) (physician required to disclose to extent needed to protect threatened interest); Berry v. Moench, 8 Utah 2d 191, 196-97, 331 P.2d 814, 817-18 (justification or excuse depends upon a showing of circumstances and competing interests supporting need for disclosure).

72. *See, e.g.*, Iverson v. Franksen, 237 F.2d 898 (10th Cir. 1956) (psychologist's disclosure of child's I.Q. test results to child's school guidance counselor); Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920) (physician's disclosure to hotel owner that the guest, the patient, had a contagious disease); Clark v. Geraci, 29 Misc. 2d 791, 207 N.Y.S.2d 564 (Sup. Ct. 1960) (physician's disclosure to government of an employee's alcoholism); Berry v. Moench, 8 Utah 2d 191, 194-95, 331 P.2d 814, 820 (1958) (physician's disclosure to parents of daughter contemplating marriage with physician's former patient of the patient's trouble in school, trouble with authorities, and difficulty in handling finances).

73. *See Medical Practice, supra* note 35, at 954-55.

yield. This question must be resolved by balancing the conflicting interests involved. In applying a balancing test to the statutory requirement of notice, the physician's primary concern is whether the duty to notify parents, in the interest of public and private health, is greater than the duty to maintain confidential professional communication.

Proponents of parental notification contend that the notice requirement furthers the state's interest in ensuring that parents are given the opportunity to participate in an important and potentially traumatic decision in the life of their minor daughter, thus promoting family dialogue and harmony.[74] The Illinois General Assembly, as one of its findings, concluded that parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child.[75] Parents who were aware that their minor daughter was seeking an abortion would be better able to ensure that she received adequate medical treatment.

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74. One author asserts that the family unit has long been recognized as the social backbone of our society. *See* Comment, *Minor's Right of Privacy: Access to Contraceptives Without Parental Notification*, 7 J. JUV. LAW 99, 103 (1983). Until a minor reaches the age of maturity, the parents are the ones who are morally, legally and financially responsible for their minor children. Moreover, one of the essential components of a well-functioning family is trust. When a family member breaches that trust, however, the entire family structure is undermined. Thus, the author contends that when a parent is not involved in a minor's decision "to bear or beget," trust is destroyed, family solidarity is weakened, and parental control is undermined or severely threatened. *Id.* at 104.

Parents and interest groups have reacted to this threat by challenging the right of minor children to obtain abortions and contraceptive services without at least parental notification. *See* H.L. v. Matheson, 450 U.S. 398 (1981) (challenge by minor to Utah statute requiring physician to notify, if possible, the parent or guardian of any minor upon whom an abortion is to be performed); Doe v. Irwin, 428 F. Supp. 1198 (W.D. Mich.), *vacated and remanded*, 559 F.2d 1219 (6th Cir. 1977), *aff'd on remand*, 441 F. Supp. 1247 (W.D. Mich. 1977), *rev'd*, 615 F.2d 1162 (6th Cir.), *cert. denied*, 449 U.S. 829 (1980) (challenge by parents against administrators of publically operated family planning centers and health department to prevent distribution of contraceptive devices and medications without prior parental notification).

75. The Illinois General Assembly found that:

> 1) immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, 2) the medical, emotional and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature, 3) the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related, 4) parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the children, and 5) parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after her abortion. The legislature further finds that parental consultation is usually desirable and in the best interests of the minor.

1983 Ill. Legis. Serv. at 5340 (West) (to be codified at ILL. REV. STAT. ch. 38, § 81-62(b)(1)-(5)).

Parental notification of a minor's abortion decision, however, may have exactly the opposite effect. In many cases, the notice requirement will cause family disharmony because it will inform parents who may oppose their daughter's decision to obtain an abortion.[76] Yet, those parents are legally powerless to prevent their daughter from obtaining an abortion.[77] This fear of parental notification may thus cause some minor women to delay the abortion past the first trimester, significantly increasing the health risks.[78] Other pregnant minors may attempt to self-abort or to obtain an illegal abortion rather than risk parental notification.[79] Still others

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76. *See supra* notes 31, 32 and 33.

77. In Planned Parenthood of Cent. Mo. v. Danforth, 427 U.S. at 75, the Supreme Court held unconstitutional a Missouri parental consent requirement for all unmarried minors under the age of 18. Because the constitutional analysis applicable to parental consent statutes is similarly applicable to parental notification provisions, as a practical matter a notification requirement has the same effect as a parental consent statute; a third party cannot legally prevent a pregnant minor woman from obtaining an abortion.

78. *See* Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 548 (Me. 1979) (affidavits showing parental notice "may cause an adolescent to delay seeking assistance with her pregnancy, increasing the hazardousness of an abortion should she choose one"); Bracken & Kasl, *Delay in Seeking Induced Abortion: A Review and Theoretical Analysis*, 121 AM. J. OBSTET. & GYNECOL. 1008, 1013 (1975) (second trimester abortions demand techniques which have a higher risk of complications than first trimester techniques); Hoffman, *Consent and Confidentiality and Their Legal and Ethical Implications for Adolescent Medicine*, in MEDICAL CARE OF THE ADOLESCENT 42, 51 (J. Gallagher, F. Heald & J. Garrell 3d ed. 1976) (pregnancy increases risks to minor's emotional and physical health).

A minor who decides to *abort* after the first trimester of pregnancy faces more serious health risks than if she had aborted during the first trimester. Roe v. Wade, 410 U.S. 113, 163 (1973); Benditt, *Second-Trimester Abortion in the United States*, 11 FAM. PLAN. PERSPS. 358 (1979) ("abortions after 12 weeks of gestation are more dangerous, emotionally disruptive and ethically troubling than those performed earlier"); Cates, Schultz, Crimes & Taylor, *Abortion Methods: Morbidity, Costs & Emotional Imput: The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 FAM. PLAN. PERSPS. 266, 267 (1979) (after 12 weeks gestation, the suction curettage, dilation and evacuation, saline instillation, and PG instillation methods of abortion have more total and major complications than any period in the first 12 weeks).

A minor who decides to *bear* the child after the first trimester faces greater health risks than if she had a first trimester abortion. Cates & Tietze, *Standardized Mortality Rates Associated with Legal Abortion: United States 1972-1975*, 10 FAM. PLAN. PERSPS. 109 (1978) (abortion within first 16 weeks of pregnancy safer than carrying pregnancy to term); Zackler, Andelman & Baver, *The Young Adolescent as an Obstetric Risk*, 103 AM. J. OBSTET. & GYNECOL. 305, 311 (1969) ("teenage girls do not behave as well obstetrically even with good care as do adult women do").

79. Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 548 (Me. 1979) (affidavits that minor may turn to illegal abortion rather than have parents notified); Alice v. Department of Social Welfare, 55 Cal. App. 3d 1039, 1044, 128 Cal. Rptr. 374, 377 (1976) (affidavit that minor may seek to abort herself); A. HOLDER, LEGAL ISSUES IN PEDIATRICS AND ADOLESCENT MEDICINE 285 (1977) ("consequences of refusal to perform an abortion on a minor may be very serious, since a girl intent on abortion is quite likely, if denied one by a physician, to turn to an illegal abortion or attempt to abort herself"); Kahin,

may forego an abortion and bear an unwanted child, which may be extremely burdensome given the minor's education, employment skills, financial resources, and emotional maturity.[80] Because most minors will not want their parents to be notified of their abortion decision, there is a high probability that such adverse health consequences could develop. Accordingly, the minor's interest in maintaining confidentiality in childbearing decisions should override the state's interest in obtaining parental involvement in these situations.

Duty to Disclose Under Compulsion of Law

Under certain circumstances, a physician may have a duty imposed by law to disclose confidential information about his patient.[81] If a statute requires a physician to disclose medical information otherwise confidential, the physician should not be held accountable for such disclosure.[82] In short, a presumption of justification for disclosure exists. Under the Illinois Parental Notice Abortion Act, a physician must notify parents of a minor's abortion decision before additional medical services will be provided.[83] As a result, a minor cannot assert a breach of confidentiality against

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Baker, & Freeman, *The Effect of Legalized Abortion on Morbidity Resulting from Criminal Abortion*, 121 AM. J. OBSTET. & GYNECOL. 114 (1975) (illegal abortion rates drop when legal abortion available). *See also* Teicher, *A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide*, in CURRENT ISSUES IN ADOLESCENT PSYCHIATRY 129, 136 (J. Schoolar ed. 1973) (approximately one-fourth of female minors who commit suicide do so because they either are or believe they are pregnant).

The potential health implications which may arise because of parental notification is dramatically seen in an abortion survey taken by the Alan Guttmacher Institute. In 1978, 184,000 teenagers under the age of 17 obtained an abortion. The survey indicated that:

> If parental notification requirements were adopted by all abortion providers, an additional 39,000 young people might be expected to inform their parents about their decision to have an abortion. An even higher number, however—42,000—would not obtain a legal abortion. Some 19,000 of these could be expected to attempt to obtain an illegal abortion or to induce the abortion themselves—both, desparate and dangerous alternatives. Another 18,000 would have an unwanted birth and, based on the teenagers' reports in this survey, another 5,000 would run away from home, presumably to have an unwanted birth or to obtain an illegal abortion.

Torres, Forest, and Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 FAM. PLAN. PERSPS. 284, 291 (Nov.-Dec. 1980).

80. Bellotti v. Baird, 443 U.S. 622, 642 (1979) (Bellotti II). *See also* Note, *Due Process and Equal Protection: Constitutional Implications of Abortion Notice and Reporting Requirements*, 56 B.U.L. REV. 522, 531 (1976) (abortion notice statute may subject women to "draconian choice" by forcing them either to bear an unwanted child and suffer the accompanying physical and psychological harm or to endure the stigma and trauma inherent in notification).

81. *See Medical Secrecy, supra* note 30, at 114.

82. *See Physicians and Surgeons, supra* note 19, at 670.

83. *See supra* note 4.

a physician for merely complying with a statutory duty. However, this presumption of justification under compulsion of law can be rebutted.

It has been suggested, for example, that statutes of questionable societal value, such as a law requiring disclosure of nonmarital pregnancies, raise serious questions as to whether the obligation of disclosure would supersede the duty of confidentiality.[84] In light of the previous analysis that a minor's interest in confidentiality may outweigh any public health interest in notification, the societal value of the Illinois statute is questionable. The physician's defense of compliance with a statutory duty may also fail because Illinois' parental reporting requirements do not impose a mandatory duty on the physician. Because a physician is only required to notify a parent if he subsequently decides to perform an abortion, parental notice requirements are distinguishable from other reporting regulations. For example, physicians coming in contact with an abused or neglected child or a person suffering from injury caused by a violent wound are required to report to the proper authority.[85] This duty is absolute regardless of whether the reporting physician renders further treatment or assistance. Because there is no such affirmative duty with respect to the Illinois statutory provision, it is unclear as to whether the justification of compulsion under law will protect a physician who complies with this parental notice requirement.

ETHICAL IMPLICATIONS OF NOTIFICATION: BREACH OF PROFESSIONAL RESPONSIBILITY TO MAINTAIN CONFIDENTIALITY?

Physicians are not only confronted with possible legal liability for giving parental notice, but they also face the conflict that parental notification may require physicians to breach applicable codes of medical ethics. Each physician upon entering the medical profession takes the Hippocratic Oath. The Hippocratic Oath, which has long stood as the ethical guide of the medical profession, provides that "[w]hatever in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all

84. *See Medical Secrecy, supra* note 30, at 114.

85. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3620 (1978) (sexual molestation, death, abuse, physical neglect); CAL. WELF. & INST. CODE § 18960 (West Supp. 1984) (child abuse); ILL. REV. STAT. ch. 23, § 2054 (1983) (abused or neglected child); MINN. STAT. ANN. § 626.556 (West 1984) (physical abuse, neglect, sexual abuse); TENN. CODE ANN. § 37-1-403 (1984) (wound, injury, disability or physical and mental condition caused by abuse, neglect or brutality).

such should be kept secret."[86] This pledge has been affirmed in the Principles of Medical Ethics promulgated by the American Medical Association. Principle Nine provides:

> A physician may not reveal the confidence entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of patients, unless he is required to do so by law or unless it becomes necessary or in order to protect the welfare of the individual or of the community.[87]

The Hippocratic Oath and Section Nine of the Principles of Medical Ethics indicate that the physician's pledge of confidentiality to the patient is qualified by exceptions for compulsory disclosure and the protection of society or the individual. These exceptions thus pose serious ethical considerations for the physician who must exercise judgment and discretion in deciding whether they apply to parental notification legislation.[88]

Many physicians consider their professional responsibility to the minor to entail not only pregnancy treatment, including an abortion, but also the preservation of confidentiality. Critics of mandatory disclosure contend that laws and policies requiring parental notification have little benefit to teenagers or society, but serve instead to intensify the existing problems presently associated with teenage pregnancy and childbirth.[89] Although it is preferable that physicians persuade a minor herself to inform her parents, thereby satisfying the requisite notice, where this is unlikely and it appears that without the physician's promise not to notify her parents the minor will delay the abortion beyond the first trimester, the medical welfare of the minor must be paramount.[90] Conse-

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86. Oath of Hippocrates 400 B.C., *cited in* Hague v. Williams, 37 N.J. 328, 332, 181 A.2d 345, 347 (1982). *See also* L. EDELSTEIN, THE HIPPOCRATIC OATH (1943).

87. PRINCIPLES OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASS'N, § 9 (1957), *cited in* Hague v. Williams, 37 N.J. 328, 181 A.2d at 347.

88. Cooper, *The Physician's Dilemma: Protection of the Patient's Right to Privacy*, 22 ST. LOUIS U.L.J. 397, 411 (1978).

89. *See* 48 Fed. Reg. at 3605-614. *See also* note 32 *supra* (discussing emotional distress caused by parental notification).

90. This ethical consideration is analagous to a similar concern involving a physician's liability for treating venereal disease without parental consent. The AMA declared in the American Medical Association (AMA) News of April 17, 1967:

> The inability to obtain parental consent to treat a minor for venereal disease should not cause a physician to withhold treatment if, in his professional judgment, treatment is immediately required. . . . It is, of course, better if the physician can persuade the minor to inform his parents and thereby provide the necessary consent. But where this is impossible and it appears that without the physician's promise of confidentiality the youth will probably delay seeking treatment, the youth's health is paramount to any other considerations.

AMA NEWS, April 17, 1967, at 4, *cited in* Holder, *Treating A Minor For Venereal Disease*, 214 J. AM. MED. A. 1949 (1970). Under the AMA's reasoning, where minors would delay an abortion, attempt to self-abort, or obtain an ille-

quently, the ethics of the medical profession, as well as a physician's own conscience, may compel a physician to refrain from notifying a minor's parents if he believes notice will not be in the minor's best interest. Thus, when notice has the effect of either postponing or effectively denying altogether a minor's access to an abortion, a physician's disclosure may not be morally or ethically justified.[91] Yet, failure to comply with the Act would subject a physician to threats of criminal sanctions, including fines, imprisonment, and loss of license.[92]

RESOLVING THE PHYSICIAN'S DILEMMA

Under the parental notification statute drafted by the Illinois General Assembly, physicians who perform an abortion upon a minor will face a legal and ethical dilemma. While physicians may recognize a need to perform an abortion upon a minor, they may choose not to do so out of a concern for their legal liability. Even though they may not consider the legal consequences in making their decisions, physicians still face a conflict in balancing the moral

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gal abortion rather than risk parental notification, the primary obligation of the physician is to his patient. In this type of "emergency situation," physicians would be compelled to maintain confidentiality.

91. This argument of moral "conscientiousness" over legal obligation has some merit if it is looked at through a balancing of interests approach. For example, a state attempting to restrict a minor's confidential access to an abortion will assert a number of interests it seeks to protect. One interest is to protect the minor's health by decreasing the risk that a physician will administer medical services without considering past medical history. A second interest is to reduce uninformed decisions due to a lack of parental involvement. Finally, the state attempts to prevent a negative impact on a minor's moral welfare. Note, *Minor's Right to Confidential Access to Contraceptives*, 47 ALB. L. REV. 214, 218 (1982). The state will then balance these interests with other asserted interests and conclude that parental involvement through consent or notice should be exercised. However, the interests the state asserts are geared purportedly to the minor's best interests. Similarly, so is the physician's interest. Therefore, if a physician, truly acting in the minor's best interests, feels that notice should not be given, the minor's "best interests" should outweigh the state's interest in parental notice.

92. Section 8 of the Act provides:

> Any person who intentionally performs an abortion with knowledge that, or with reckless disregard as to whether the person upon whom the abortion is to be performed is an unemancipated minor or an incompetent, and who intentionally, knowingly, or recklessly fails to conform to any requirement of this Act, is guilty of a Class A misdemeanor.
>
> Failure to provide persons with information pursuant to the requirements of this act is prima facie evidence of failure to obtain informed consent and of interference with family relations in appropriate civil actions. The law of this State shall not be construed to preclude the award of exemplary damages in any appropriate civil action relevant to violations of this Act. Nothing in this Act shall be construed to limit the common law rights of parents.

1983 Ill. Legis. Serv. at 5343 (West) (to be codified at ILL. REV. STAT. ch. 38, § 81-68).

and ethical implications of the minor's privacy right to receive confidential medical treatment with the right of the parents to supervise their minor children and the interest of the state in promoting the parental nurturing role.[93] The fundamental importance of the role of physicians as providers of adolescent medical health care demands that this dilemma be resolved.

For the most part, physicians are unable to resolve the dilemma by themselves. Under the existing parental notification requirement, physicians are forced to make their decision in an area in which they cannot safely rely on their own discretion. The most practical approach for resolving the dilemma would be to address the problem directly by legislation. A case-by-case analysis would do little in terms of offering guidelines for future conduct. There are several possible legislative solutions which may eliminate the physician's conflicting duties with regard to parental notification.

Legislative immunity is a viable and straightforward solution. The Illinois Parental Notice Abortion Act, unlike other reporting statutes, does not insulate the physician with an immunity for properly notifying parents. Most other states, however, have statutes which qualify the confidentiality of the physician-patient relationship by imposing an affirmative duty on a physician to disclose or report cases of communicable disease,[94] wounds caused by violence,[95] or child abuse or neglect.[96] Under these reporting statutes, communications between physician and patient are no longer privileged matters secured against disclosure.[97] Illinois has similar re-

93. *See infra* notes 104 and 105 (discussing parental, minor, and state interests involved in the abortion decision).

94. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-621 (1974) (epidemic, infections, contagious disease); MASS. GEN. LAWS ANN. ch. 111, § 119 (1975) (venereal disease); MICH. STAT. ANN. § 14.564(54) (Callaghan 1980) (critical health problems, including lead poisoning and Roue's Syndrome); MO. ANN. STAT. § 292.340 (Vernon 1965) (disease or illness from physician's examination of employees carrying on any process, manufacture, or labor of zinc, copper, lead or other poisonous chemicals); N.J. STAT. ANN. 26:4-38 (West 1964) (venereal disease); VA. CODE § 32.1-35 (1950) (disease caused by exposure to toxic substances).

95. *See, e.g.*, CAL. PENAL CODE § 11160 (West 1982) (wound or injury inflicted by knife, gun, pistol, or other deadly weapon); ILL. REV. STAT. ch. 38, § 206-3.2 (1983) (injury resulting from discharge of firearms or injury sustained in commission of or as a victim of a criminal offense); MASS. GEN. LAWS ANN. ch. 112, § 12A (1975) (bullet wound, gunshot wound, powder burn, or wound or injury caused by a knife or sharp or pointed instrument if, in the physician's opinion, a criminal act was involved); VA. CODE § 54-276.10 (1982) (wound inflicted by pistol, revolver, knife, razor, blackjack).

96. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3620 (Supp. 1984) (sexual molestation, death, abuse, physical neglect); CAL. WELF. & INST. CODE § 18960 (West Supp. 1984) (child abuse); ILL. REV. STAT. ch. 23, § 2054 (1983) (abused or neglected child); MINN. STAT. ANN. § 626.556 (West Supp. 1984) (physical abuse, neglect, sexual abuse); TENN. CODE ANN. § 37-1-403 (1984) (wound, injury, disability or physical and mental condition caused by abuse, neglect or brutality).

97. The Arizona statute, which is reflective of most reporting statutes, provides:

porting statutes. For example, the Department of Public Aid compels a physician having reasonable cause to believe a child known to him in his professional capacity to be an abused or neglected child to report the case.[98] Accordingly, the statutory provision expressly provides for immunity to the physician for proper disclosure.[99] In addition to providing immunity in the child abuse area, Illinois also grants a statutory immunity to a physician for good faith disclosure of communicable diseases.[100]

The reporting statutes are significant because a physician acting in good faith has no fear of a civil suit for unauthorized disclosure. In view of the legislature's desire to protect a physician who is required to make certain types of disclosures, it is unclear why the legislature failed to attach a similar provision to the Illinois Parental Notice Abortion Act. Therefore, the rational method for eliminating the physician's legal dilemma is to amend the Act to include a provision expressly granting immunity to a physician who properly notifies a minor's parents of their minor daughter's decision to terminate pregnancy.

> [T]he physician-patient privilege . . . [as it relates] to the competency of the witness and to the exclusion of confidential communications, shall not pertain in any civil or criminal litigation in which a child's neglect, dependency, abuse or abandonment is an issue nor in any judicial proceeding resulting from a report submitted pursuant to this section.

ARIZ. REV. STAT. ANN. § 13-3620(D) (Supp. 1984).

98. *See* ILL. REV. STAT. ch. 23, § 2054 (1983). This section further provides that "[t]he privileged quality of communication between any professional person required to report and his patient or client *shall not apply* to situations involving abused or neglected children and *shall not* constitute grounds for failure to report as required by this Act." *Id.* (emphasis added). For an excellent discussion of the Illinois statute, see Note, *Privileged Communications—Abrogation of the Physician-Patient Privilege to Protect the Battered Child*, 15 DE PAUL L. REV. 453 (1966).

99. *See* ILL. REV. STAT. ch. 23, § 2059 (1983). This statutory provision reads:

> Any person, institution or agency, under this Act, participating in good faith in the making of a report, or in the investigation of such a report or in the taking of photographs and x-rays or in the retaining a child in temporary protective custody shall have immunity from any liability, civil, criminal or that otherwise might result by reason of such actions. For the purpose of any proceedings, civil or criminal, the good faith of any persons required to report, or permitted to report, cases of suspected child abuse or neglect under this Act, shall be presumed.

Id. (emphasis added).

100. *See* ILL. REV. STAT. ch. 126, § 21 (1983). This statutory provision provides:

> Whenever any statute of this State or any ordinance or resolution of a municipal corporation or political subdivision enacted pursuant to statute or any rule of an administrative agency adopted pursuant to statute requires medical practitioners or other persons to report cases of communicable diseases, including venereal diseases, to any governmental agency or officer, such reports shall be confidential, and any medical practitioner or other person *making such report in good faith shall be immune from suit for slander or libel based upon any statements contained in such report.*

Id. (emphasis added).

While legislative immunity may resolve the problem of liability for notifying parents, physicians still encounter a number of ethical and professional considerations. One reasonable approach to eliminate this ethical dilemma is to grant the physician limited discretion to refuse to notify parents. This approach could be patterned after a similar Illinois statutory provision relating to the treatment of minors for chemical abuse or venereal disease.[101] This statutory provision gives physicians providing diagnosis or treatment to minor patients who come into contact with venereal disease or who suffer from drug or alcohol abuse discretion to inform the minor's parents or guardian of any treatment given.[102] This provision further indicates that with the minor's consent a physician shall make a reasonable attempt to involve the family in the minor's treatment if the physician believes family involvement will not be detrimental to the progress and care of the minor.[103]

MODEL PARENTAL NOTICE STATUTE

The drafters of the Illinois Parental Notice Abortion Act have dealt with the confidentiality issue inherent in parental notification requirements by balancing the interests of the state[104] and the par-

101. ILL. REV. STAT. ch. 111, § 4505 (1983) provides:

> Any physician who provides diagnosis or treatment or any licensed clinical psychologist or professionally trained social worker with a master's degree or any addiction aid or addiction specialist employed by the Dangerous Drugs Commission or by units of local government or by agencies or organizations operating drug abuse programs funded or licensed by the Federal Government or the State of Illinois or any qualified person employed by or associated with any public or private alcoholism program licensed by the State of Illinois who provides counseling to a minor patient who has come into contact with any venereal disease or suffers from the use of any drug or narcotic or from alcohol consumption referred to in Section 4 of this Act *may, but shall not be obligated to, inform* the parent, parents, or guardians of any minor as to the treatment given or needed.
>
> Any such person shall, upon the minor's consent, make reasonable efforts to involve the family of such minor in his or her treatment, if the person furnishing such treatment believes that the involvement of the family will not be detrimental to the progress and care of such minor. Reasonable effort shall be extended to assist the minor in accepting the involvement of his or her family in the care and treatment being given.
>
> However, in any instance in which a minor above the age of 12 years is being treated for alcohol use the person furnishing such treatment shall notify the parent or guardian of such minor following the second treatment of such alcohol use unless in that person's professional judgment such notification would jeopardize the course of treatment being pursued. In no case, however, shall a period of more than three months elapse without the parent or guardian of said minor being notified of the treatment afforded.

Id. (emphasis added).

102. *Id.*

103. *Id.*

104. The state has four primary interests. The first is the societal interest in developing the minor into a useful citizen. Comment, *Constitutional Law: Minors' Access to Contraceptives—Freed From Future Restraints*, 24 U. FLA. L.

ents[105] against the minor's right of privacy. The present Act is deficient, however, because of its failure to consider the physician's obligations in connection with this confidentiality issue. In order to

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REV. 1019, 1020 (1977). The second interest is protecting the minor. The state attempts to ensure that the decision whether "to bear or beget" is an informed one, thus protecting the minor from the physical and emotional hazards of unwanted pregnancies. *Id.* The third interest is in preserving the family as a viable and stable unit in society. Because the family is the primary unit through which social values and moral precepts are transmitted to the young, the state has an interest in not undermining that unit. Comment, *Minor's Right of Privacy: Access to Contraceptives Without Parental Notification*, 7 J. JUV. LAW 111-12 (1983). Finally, the state has an interest in protecting prenatal life and safeguarding maternal health. Roe v. Wade, 410 U.S. 113, 162-63 (1973). *See also* Comment, *The Maine Abortion Statutes of 1979: Testing the Constitutional Limits*, 32 ME. L. REV. 315 (1980). The author articulates additional state interests when a minor is making a major emotional decision, such as the decision to terminate a pregnancy. These interests include encouraging familial rather than judicial resolution of a minor's abortion decision, insuring the minor's best interests, increasing the probability for a fully informed decision, maintaining parental control, and preserving a family harmony. *Id.* at 344-45.

Section 2 of the Illinois Parental Notice Abortion Act declares the legislative intent in enacting the parental notice provisions: to further the compelling state interests of (1) protecting minors against their own immaturity, (2) fostering the family structure and preserving it as a viable social unit, and (3) protecting the rights of parents to rear children who are members of their household. 1983 Ill. Legis. Serv. at 5340 (West) (to be codified at ILL. REV. STAT. ch. 38, § 81-62).

105. In choosing to enact legislation restricting or burdening a minor's right to have confidential access to abortions or contraceptives, the state or federal government has concluded that the child's interest in confidentiality is weaker than the parents' interest in guiding and controlling their child. One commentator points out that there are two decisions implicit in a state's choice that parental interests should prevail over a minor's privacy interest in obtaining abortions or contraceptives. *See* Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001 (1975). First, the state must have decided that the family is an important social unit which deserves to be maintained. There are a number of strong state and parental interests in maintaining the family. The family is the basic institution in which the socialization and education of the child occur. The family unit also provides its members with support, guidance, respect, love and affection. Second, the state must have concluded that the family structure would be undermined by permitting minors to decide for themselves whether to terminate pregnancy or to engage in contraceptive use. *Id.* at 1015. *See also* Comment, *Parental Notification as a Prerequisite for Minors' Access to Contraceptives: A Behavioral And Legal Analysis*, 13 U. MICH. J.L. REF. 196 (1979) (discussing manner in which interest of minors, parents, and the state should be balanced).

Parents have the primary responsibility for guiding their child's upbringing. This has resulted in a strong parental interest in maintaining the family structure. Accordingly, the rights of parents to supervise and direct the rearing of their children free from governmental influence has been firmly established by the Supreme Court. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1964) (parents' authority to direct the rearing of their children in their own household is basic in the structure of American society); Prince v. Massachusetts, 321 U.S. 158 (1944) (right of parents to the custody, care, and nurture of their children is a liberty interest protected by the Fourteenth Amendment); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state attempt to bar all private education violated the freedom of parents to direct the raising of their children); Meyer v. Nebraska, 262 U.S. 390 (1923) (parents have the principal responsibility for the care and supervision of their children).

take into account the physician's professional and legal obligation to preserve the confidentiality of information acquired within the physician-patient relationship, this comment proposes a flexible standard which defers to the physician's good-faith judgment but provides for notice in emergencies. Section 4(a) of the Illinois Parental Notice Abortion Act should thus be amended as follows:

§ 4(a): Where medical services are for the treatment of contraception and pregnancy, including abortion, the physician should seek and obtain the minor's permission to notify her parents of such treatment.

1. If the minor-patient objects to notification, the physician should not notify the parents that treatment will be provided unless he or she concludes that failing to inform the parents could seriously jeopardize the health of the minor, taking into consideration:

a. The impact that such notification could have on the course of treatment;

b. The medical considerations which require such notification;

c. The nature, basis, and strength of the minor's objections; and

d. The extent to which parental involvement in the course of treatment is required or desired.

2. A physician who concludes that notification of the parent is medically required should:

a. Indicate the medical justifications in the minor-patient's file; and

b. Inform the parent only after making all reasonable efforts to persuade the minor to consent to notification of the parent.

3. If a physician, acting in good faith, concludes that notification of the parent is medically required, the physician shall have immunity from liability, civil or criminal or otherwise that might result by reason of notification.[106]

Under this approach to parental notification, physicians would have reasonable discretion to decide when, if ever, state and paren-

106. Subsections (1) and (2) of the Model Parental Notice Statute are patterned after provisions of the Standards Relating to Rights of Minors portion of the Institute of Judicial Administration/American Bar Association Juvenile Justice Standards Project (Standards). The drafters of the Standards concluded that the importance of the privacy interests of teenagers and the social importance of making contraceptive services and pregnancy treatment, including abortion, readily available to teenagers mandates allowing treatment without notification. Standards 4.2, 4.8 and commentary. The Notification Provisions of Standards 4.2 and 4.8 have been proposed by commentators as a solution for balancing the competing interest in this area. One commentator contends that:

> The [standards] approach to parental notification accepts as a general rule that parental involvement with medical treatment of children is appropriate. However, in certain areas—such as treatment for pregnancy and contraceptive services—the child's interest in needed treatment and society's interest in treatment outweigh any state or parental interest in family involvement. This is true only if the child objects to notification and if the treating physician concludes that lack of notification does not pose a threat of serious harm to the health of the child. If parental notification is medically necessary, the physician may notify over the objections of the [non]-consenting child. Otherwise, the child's wishes will be respected.

Buchanan, *The Constitution and the Anamoly of the Pregnant Teenager*, 24 ARIZ. L. REV. 553, 608 (1982).

tal interests in favor of notice outweigh their patient's interest in confidentiality. If it is the physician's good-faith belief that the minor's best interest would be served by notifying the minor's parents of any medical treatment to be given, then the physician may, without fear of legal or ethical ramifications, make this fact known to the parents. But, if the physician, in the exercise of his or her best medical judgment believes it is not in the minor's best interest that her parents be notified, then the physician should not have any ethical or moral misgivings about refusing to give notice.

CONCLUSION

The Illinois Parental Notice Abortion Act places a heavy burden on the medical profession. Not only does the Act limit the protection of confidentiality between physician and patient, but it fails to afford adequate protection for physicians. With the public policy reflected in privileged communication, physician licensing statutes, and the medical profession's code of ethics on the obligation of confidentiality, a physician who complies with the requirement of giving notice may be subjected to a lawsuit. Similarly, in situations where protection of confidential medical information outweighs societal interests in disclosure, parental notification may compel physicians to breach their ethical and moral obligation to preserve confidentiality in administering medical treatment. A physician who attempts to comply with parental notice regulations is thus in an unenviable position of uncertainty. To eliminate such uncertainty, the Illinois Parental Notice Abortion Act should be amended to expressly grant immunity to a physician for his or her disclosure of this confidential medical information. To eliminate any ethical qualms, this immunity should also be combined with a physician's right to exercise good-faith discretion in deciding whether to notify parents. The legislative directions set forth herein will not only protect the patient's right of confidentiality, but they will also minimize a physician's potential liability for disclosure. Moreover, this legislation would be consistent with applicable medical ethics codes which recognize that protection of confidential medical information should be balanced against societal interests in disclosure.

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