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Zero Privacy: Schools Are Violating Students' Fourteenth Amendment Right of Privacy under the Guise of Enforcing Zero Tolerance Policies

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ZERO PRIVACY: SCHOOLS ARE VIOLATING STUDENTS' FOURTEENTH AMENDMENT RIGHT OF PRIVACY UNDER THE GUISE OF ENFORCING ZERO TOLERANCE POLICIES

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Abstract: The Fourteenth Amendment to the United States Constitution provides a right of privacy that protects against unwarranted governmental interference with an individual's contraceptive choices. This privacy right protects minors as well as adults. School officials serve as government actors for the purpose of Fourteenth Amendment analysis. Zero tolerance drug policies are school disciplinary policies that mandate predetermined and frequently severe consequences for specific offenses, often including the possession of legally prescribed or legally obtained over-the-counter medication. Zero tolerance drug policies have resulted in the often very public discipline of students for possessing a wide array of otherwise legal medication, including birth control pills, without parental permission. This Comment argues that schools may not enforce their discipline policies in ways that violate a minor's right of privacy with regard to contraceptive choices. Zero tolerance policies as applied to minors in possession of legally obtained contraceptives must not force students to notify their parents of their procreative choices in order to comply with the policy. At a minimum, such policies must include a bypass option that enables students to avoid acquiring parental consent in order for those students to possess contraceptives at school. In addition, zero tolerance policies may not violate a minor's constitutional right to be free from state dissemination of their private affairs—a natural consequence of disciplining students in possession of contraceptives in violation of the zero tolerance policy.

Erin is a typical high school junior.[1] She has never been in trouble at school. One afternoon, a teacher sees Erin put a package of pills in her pocket. The teacher reports this to the school administration and Erin is called into the principal's office. Erin readily acknowledges that she is in possession of birth control pills, which she obtained legally at a local health clinic. The principal informs Erin that possession of medication without parental permission violates the school's "zero tolerance" policy,[2] and that the school is required to suspend her under that policy.

1. Hypothetical scenario created by the author for illustrative purposes.

2. The zero tolerance policy of the School Board of the City of Virginia Beach is a representative example:

> [N]o student may have in his/her possession any medication or prescription drugs, even if recommended or prescribed for the student's use. All such items will be taken to the principal's office by the parent(s), legal guardian(s) or other responsible adult, or office designated by the principal, at the start of the school day for safekeeping. . . . Medication will mean any drug or other substances used in treating diseases, healing, or relieving pain, including all over-the-counter drugs such as aspirin, cough syrups, gargles, caffeine pills and the like.

Erin has not told her parents that she is taking birth control pills, a fact that her parents necessarily become aware of when informed of her suspension by the school. Erin's school community and the local media also become aware of the fact that the school suspended her for possessing birth control pills.[3] Furthermore, the district tells Erin that her permanent high school record will reflect that she was disciplined for illegal possession of a drug.[4]

Schools first implemented zero tolerance drug policies in the 1980s.[5] These policies often ban the possession of prescription and over-the-counter medication,[6] thereby including medical contraceptives such as birth control pills, hormonal patches, and the "morning after" pill.[7] Many of these policies allow students to bring legally prescribed or over-the-counter medication to school only if the student's parent or guardian first approves the student's possession of the medication.[8] A student who violates such a zero tolerance policy is subject to mandatory, predetermined, and often severe consequences.[9]

A minor's right of privacy regarding contraceptive choices is a fundamental right protected by the Fourteenth Amendment to the U.S.

School Board of the City of Virginia Beach, Va., Regulation 5-45.1, *available at* http://www.vbschools.com/policies/5-45_1r.asp (last visited Mar. 28, 2006).

3. The media are often alerted to zero tolerance policy violations. *See, e.g.*, John Grogan, *Zero Tolerance Running Amok*, PHILA. INQUIRER, Feb. 1, 2005, at B01 (reporting a student's suspension for taking Aleve, to relieve menstrual cramps, in violation of a zero tolerance policy); Editorial, *Zero Tolerance Plan Embarrasses District*, ALBUQUERQUE TRIB., Jan. 13, 2004, at C2 (reporting a student's five-day suspension for possessing heartburn-relief medication in violation of a zero tolerance policy).

4. Zero tolerance policy violations may appear on school records. *See, e.g.*, Sarah Kahne, *District Reduces Girl's Suspension*, DAILY OKLAHOMAN, Dec. 18, 2004, at 8A (reporting the district's statement that a student's suspension for possession of birth control pills would be reflected in her permanent record).

5. *See* Phillip Terzian, Commentary, *Annals of Zero Tolerance*, PROVIDENCE J. (R.I.), Oct. 17, 2004, at I9. As of 1997, at least 88% of schools nationwide had some form of zero tolerance policy addressing a range of drug infractions. SHELIA HEAVISIDE ET AL., U.S. DEP'T OF EDUC., VIOLENCE AND DISCIPLINARY PROBLEMS IN U.S. PUBLIC SCHOOLS: 1996–97, at 18 (1998).

6. *See, e.g.*, Challen Stephens, *Students with Pills Face Discipline Ills*, HUNTSVILLE TIMES, July 25, 2004 (on file with author) (quoting a school district official stating that possession of over-the-counter or prescription medication would be a violation of the school's zero tolerance policy).

7. *See* Kahne, *supra* note 4.

8. *See, e.g.*, School Board of the City of Virginia Beach, Va., Regulation 5-45.1, *available at* http://www.vbschools.com/policies/5-45_1r.asp (last visited Mar. 28, 2006).

9. *See* Robert C. Cloud, *Due Process and Zero Tolerance: An Uneasy Alliance*, 178 EDUC. L. REP. 1, 1 (2003).

Constitution.[10] State interference with this right is constitutional only where it advances a significant state interest in regulating the behavior of minors that is not present in the case of adults.[11] In addition, a state regulation requiring parental consent or notification of a minor's procreative choices is unconstitutional unless it grants the minor access to an alternative procedure whereby she may avoid parental involvement.[12] Moreover, where a minor's private choices involve the decision "whether to bear or beget a child,"[13] certain safeguards must be in place to protect the confidentiality of the minor's decision-making.[14]

This Comment argues that a school may not threaten to or actually

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10. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977); *see also id.* at 693 (plurality opinion) (reiterating that because minors, as well as adults, have a right of privacy related to procreative and thus contraceptive choices, the test is less rigorous than the strict scrutiny analysis applied to adults' privacy rights, requiring the state to show only a "significant" state interest); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 60, 74–75 (1976) (holding that the Fourteenth Amendment's right of privacy identified in *Roe v. Wade* protects minors' decisions related to termination of pregnancy in the absence of a significant state interest not present in the case of an adult).

11. *See Carey*, 431 U.S. at 686; *see also id.* at 693 (plurality opinion) (stating that the test applied to state infringement of a minor's procreative decision-making is less rigorous than the strict scrutiny analysis applied to adults' privacy rights, requiring the state to show only a "significant" state interest); *Danforth*, 428 U.S. at 60, 74–75 (holding that a state many not infringe upon minors' decision-making related to termination of pregnancy in the absence of a significant state interest not present in the case of an adult). School districts and school boards are considered state actors for the purpose of Fourteenth Amendment protections. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 336 (1985); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

12. *See, e.g.*, Bellotti v. Baird (*Bellotti II*), 443 U.S. 622, 643 (1979) (plurality opinion); *see also id.* at 654–56 (Stevens, J., concurring) (indicating that he would go further and not require a minor to obtain permission by way of the courts because "[i]t is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties"); *Danforth*, 428 U.S. at 74–75 (holding that the State does not have the authority to impose a blanket provision to give a third party an absolute veto over the minor's decision to have an abortion, but referencing Bellotti v. Baird (*Bellotti I*), 428 U.S. 132 (1976) as suggesting that not every minor may have the maturity to consent independently to an abortion); *Bellotti I*, 428 U.S. at 147–48 (holding that the district court should have refrained from deciding that the statute created an unconstitutional 'parental veto' over minors' abortion decision-making and should have certified to the state supreme court for statutory interpretation, because the statute could be interpreted as permitting a minor to bypass parental consent by obtaining a court order).

13. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

14. *See, e.g.*, Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 512–13 (1990) (holding that while complete anonymity is not critical, judicial bypass statutes such as the one here that "take reasonable steps to prevent the public from learning of the minor's identity" survive a facial constitutional challenge); *Bellotti II*, 443 U.S. at 643–44 (plurality opinion) (concluding that a judicial bypass procedure and any appeals that follow it "will be completed with anonymity and sufficient expedition").

discipline students for possession of medical contraceptives in a manner that violates a student's constitutional right of privacy. As such, a school may not require mandatory parental consent in order for a student to "legally" possess medical contraceptives at school. Further, a school may not effectively force a student to notify her parents of her contraceptive choices in order for the student to "legally" possess medical contraceptives at school. Finally, a school may not discipline a student for possession of medical contraception in such a way that violates the student's constitutional privacy right.

Part I of this Comment discusses the Fourteenth Amendment's protection of privacy surrounding a minor's contraceptive choices. Part II examines parental consent and notification requirements in regards to private procreative choices. Part III discusses the Fourteenth Amendment's protection of one's private affairs from state dissemination to the public, including the constitutional requirement that proceedings impacting a minor's contraceptive choices be confidential. Part IV describes zero tolerance policies and their impact on students who have been disciplined for possessing otherwise legal medication, and sets forth the rationale that proponents of zero tolerance have offered to justify such policies. Finally, Part V argues that when zero tolerance policies are applied to minors in possession of contraceptives in a manner that effectively results in mandatory parental consent or notification, or that disseminates information about the minor's private affairs to the public, they violate the constitutional protections afforded to minors by the Fourteenth Amendment.

I. THE FOURTEENTH AMENDMENT PROTECTS A MINOR'S PRIVACY RELATED TO CONTRACEPTIVE CHOICES

The right of privacy protected by the liberty guarantee of the Fourteenth Amendment's Due Process Clause forbids a state from interfering in certain areas or zones of personal privacy.[15] One recognized privacy right relates to contraceptive choices.[16] This particular right extends to minors as well as adults.[17] Furthermore, the Fourteenth Amendment right of privacy protects a minor against school

15. *See Carey*, 431 U.S. at 684 (quoting Roe v. Wade, 410 U.S. 113, 152 (1973)). The state may interfere, however, with a protected privacy right if it has a compelling interest in regulating the matter and has narrowly tailored its regulation to affect only that interest. *Id.* at 685–86.

16. *See id.* at 685–86.

17. *See id.* at 693–94 (plurality opinion) (citing *Danforth*, 428 U.S. at 74–75).

interference with her contraceptive decision-making,[18] barring a significant state interest specific to minors.[19]

A. The Fourteenth Amendment Precludes a State from Interfering with an Individual's Contraceptive Choices

The Fourteenth Amendment to the U.S. Constitution provides that "[n]o State shall . . . deprive any person of . . . liberty . . . without due process of law."[20] The U.S. Supreme Court has long recognized this provision of the Due Process Clause—also known as the liberty guarantee[21]—as protecting individuals against unjustified government interference with several kinds of private choices.[22] Among these protected private choices are decisions related to procreation.[23]

In particular, the Fourteenth Amendment's liberty guarantee protects against unjustified government interference with an individual's personal decision whether to use contraceptives.[24] In *Carey v. Population Services International*,[25] the Supreme Court struck down a statute that criminalized distributing contraceptives to minors and forbade the distribution of contraceptives to adults except by a licensed pharmacist.[26] In doing so, the Court held that the Fourteenth Amendment

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18. A school or school district serves as a state actor for Fourteenth Amendment protection purposes. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 336 (1985); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

19. *See Danforth*, 428 U.S. at 74–75.

20. U.S. CONST. amend. XIV, §1.

21. *See, e.g.*, Kelley v. Johnson, 425 U.S. 238, 248 (1975).

22. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (holding that the Fourteenth Amendment protects individuals' decisions concerning the intimacies of their physical relationships, be they heterosexual or homosexual); Cruzan v. Missouri, 497 U.S. 261, 281 (1990) (holding that the Fourteenth Amendment protects an interest in refusing life-sustaining treatment); Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that the constitutional right of privacy encompasses a woman's decision to terminate her pregnancy); Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that the Fourteenth and First amendments forbid a state from making private possession of obscene material a crime); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (finding that various constitutional provisions, including the Fourteenth Amendment, create a zone of privacy that bars a state from forbidding the use of contraceptives by married persons).

23. *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 598–600 & n.26 (1977).

24. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977).

25. 431 U.S. 678 (1977).

26. *See id.* at 681–82. A majority of the Court, while agreeing that the provision related to the distribution of contraceptives to minors was unconstitutional, could not agree on the reasoning for the constitutional infirmity. Thus, the opinion's reasoning related to that provision is dicta. *See id.* at 691–99 (plurality opinion) (noting that although an undisturbed state law allowed a physician to provide a patient younger than sixteen with contraceptives as the physician "deemed proper," the

shields both married and unmarried people from unwarranted governmental intrusion into their contraceptive choices.[27] The Court further held that government regulations affecting a person's contraceptive decisions must withstand strict scrutiny and will survive only where justified by "compelling state interests" and "narrowly drawn to express only those interests."[28]

B. *Interference with a Minor's Contraceptive Choices Is Constitutional Only When Justified by a Significant State Interest Unique to the Protection of Minors*

The state has a greater interest in regulating the behavior of minors than adults.[29] Because of this heightened interest, the Supreme Court held in *Carey* that a regulation that interferes with a minor's contraceptive choices is subject to lesser scrutiny than a regulation affecting an adult's contraceptive choices.[30] The test articulated by a

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effect of both laws read together was to empower the physician with unconstitutional discretion over the privacy rights of minors); *id.* at 702–03 (White, J., concurring in the result) (concurring on the grounds that the state failed to demonstrate that prohibiting the distribution of contraceptives to minors advanced the state's purported justification for the statute: deterring minors from sexual activity); *id.* at 707–08 (Powell, J., concurring in part and concurring in the judgment) (concurring on the grounds that the statute infringed upon the privacy rights of married females between the ages of fourteen and sixteen, and prohibited parents from distributing contraceptives to their children); *id.* at 712–16 (Stevens, J., concurring in part and concurring in the judgment) (concurring for the reasons discussed by Justice Powell and because although Justice Stevens believed that the state does have a significant interest in discouraging minors from engaging in sexual activity, "an attempt to persuade by inflicting harm on the listener is an unacceptable means of conveying a message that is otherwise legitimate").

27. *See id.* at 684–86. The Court stated: "'If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" *Id.* at 685 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)). In *Griswold*, the Court had held that the Constitution creates a "zone of privacy" that forbids a state from banning the use of contraceptives by married people. *Griswold*, 381 U.S. at 485–86. In *Eisenstadt*, the Court extended that holding, using the Equal Protection Clause of the Fourteenth Amendment to strike down a statute that banned distribution of contraceptives to unmarried adults. *See Eisenstadt*, 405 U.S. at 443.

28. *Carey*, 431 U.S. at 686.

29. *See, e.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 60, 74–75 (1976); Prince v. Massachusetts, 321 U.S. 158, 168 (1944).

30. *See Carey*, 431 U.S. at 693; *see also id.* at 713 (Stevens, J., concurring). Although a plurality decision, a majority of the Court agreed that the appropriate inquiry when evaluating a state regulation that impacts a minor's contraceptive choices is whether the state has a "significant" interest justifying the impact. *Id.* at 693 (plurality opinion); *see also id.* at 713 (Stevens, J., concurring) (implicitly accepting application of the "significant" interest test but disagreeing that the interests of the state and a minor's parents do not rise to a significant interest justifying the interference).

majority of the justices requires that a regulation affecting a minor's contraceptive choices advance a significant state interest that is not present in the case of an adult.[31] Regulations that fail to advance such a significant state interest are unconstitutional.[32]

In the school discipline context, whether the circumstances surrounding a certain policy justify infringement upon a student's constitutionally protected right depends on the nature of the interest of the student involved and the nature of the governmental concern at issue.[33] For example, in holding that the Fourth Amendment right to be free from unreasonable searches[34] was not violated by a school policy that required the drug-testing of athletes,[35] the Court emphasized that by voluntarily participating in school athletics students consented to lessened privacy expectations and greater school regulations.[36] The policy was "reasonable" because it targeted those students who voluntarily participated in the closely regulated arena of student athletics,[37] and the test at issue screened only for specific illegal drugs,[38] "not for whether the student is, for example, . . . pregnant."[39] The Court noted that the policy's requirement that students, prior to being tested, identify prescription medications that they are taking "raises some cause for concern,"[40] but held that so long as the student was permitted to provide the information about the prescription medication "in a

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31. *Id.* at 693 (plurality opinion); *see also Danforth*, 428 U.S. at 75 (holding infringement on a minor's abortion-related decision-making is only valid where there is a significant state interest in requiring a third person's approval that is not present in the case of an adult).

32. *Carey*, 431 U.S. at 693 (plurality opinion); *Danforth*, 428 U.S. at 75.

33. *See* Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 654 (1995). In *Vernonia*, the Court announced that when evaluating the constitutional validity of a school drug-testing policy, the first factor to consider is the nature of the privacy interest upon which the search intrudes. *See id.* The Court explained that this was because "the Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as legitimate." *See id.* (internal quotations omitted).

34. *See* U.S. CONST. amend. IV, § 1 ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . . shall not be violated . . . .").

35. *Vernonia*, 515 U.S. at 660, 665.

36. *See id.* at 657.

37. *Id.*

38. *Id.* at 650–51.

39. *Id.* at 658; *see also* Gruenke v. Seip, 225 F.3d 290, 303 (3d Cir. 2000) (holding that the behavior of a school swim coach who required that a student take a pregnancy test and then reported the results of that test to, among others, the student's parents, violated constitutional protections of even the presumably limited expectation of privacy that a student-athlete enjoys).

40. *Vernonia*, 515 U.S. at 659.

confidential manner,"[41] the invasion of the student's privacy was not significant.[42]

In evaluating the nature of the governmental interest in the statute at issue in *Eisenstadt v. Baird*,[43] which banned the distribution of contraceptives to unmarried persons,[44] the Court rejected the state's argument that the statute promoted the state's legitimate interest in protecting the health of its citizenry.[45] Applying an equal protection analysis,[46] the Court held that the health protection justification was unconstitutionally discriminatory and overbroad, and failed to present even a rational basis[47] justifying state interference.[48] Further, in rejecting the argument that the statute's rational objective was to discourage premarital sexual intercourse, the Court held that it would be "plainly unreasonable" to assume that the state had prescribed pregnancy and the birth of an unwanted child as the punishment for fornication.[49]

C. *Schools and School Districts Are State Actors*

Students do not "shed their constitutional rights . . . at the schoolhouse gate."[50] Thus, students have the right to be free from unconstitutional state interference even while at school.[51] Under the

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41. *Id.* at 660 (offering the example of enabling a student to deliver the information in a sealed envelope to the testing lab as one way to protect confidentiality); *see also id.* at 684 n.2 (O'Connor, J., dissenting) (stating that because the policy allows for confinement of the disclosure of highly personal prescription medication information to the testing lab, the policy's disclosure requirement is not one of its flaws). Under this testing regime, a student's parents are not notified of a positive test unless the student twice tests positive for one of the specified drugs. *See id.* at 651 (majority opinion).

42. *See id.* at 660.

43. 405 U.S. 438 (1972).

44. *See id.* at 440–42.

45. *See id.* at 451–52.

46. In a prior opinion, the Court had held that the Constitution forbade banning the distribution of contraceptives to married people. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

47. The "rational basis" test is the most lenient level of constitutional scrutiny that courts apply. *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 555 (1989) (Blackmun, J., concurring in part and dissenting in part). In the equal protection context the test requires that the government regulation be related to a valid public purpose that justifies the different treatment of two groups of people. *Eisenstadt*, 405 U.S. at 447.

48. *Eisenstadt*, 405 U.S. at 451.

49. *Id.* at 448.

50. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969).

51. *Id.*; *see also* Goss v. Lopez, 419 U.S. 565, 581–82 (1975) (holding that the Fourteenth Amendment's Due Process Clause requires that a student facing suspension from school for ten

Fourteenth Amendment, state interference includes actions by school districts, school boards, and school officials.[52] Furthermore, the Supreme Court has emphasized the particular importance of holding schools accountable for constitutional violations.[53]

In sum, the Fourteenth Amendment's liberty guarantee forbids state interference with a minor's contraceptive choices unless the interference advances a significant state interest unique to the protection of minors. A minor does not give up this constitutional protection when at school. A school district stands in the shoes of the state for the purposes of Fourteenth Amendment protection and is thus forbidden from interfering with a minor's contraceptive choices in the absence of a significant state interest.

II. THE RIGHT OF PRIVACY ESTABLISHES CERTAIN SAFEGUARDS TO PROTECT MINORS' CONFIDENTIALITY

Regulations that inhibit a minor's decision whether to have an abortion by requiring parental consent or notification are unconstitutional unless they provide for a bypass option that would allow a minor to avoid such parental involvement.[54] Though the Supreme Court has not yet addressed this issue in the contraceptive context, the Fourteenth Amendment's protection of privacy in procreative decision-making extends to both abortion and contraceptive choices.[55] In addition, constitutional parameters identified in abortion cases simultaneously define parameters in contraceptive cases.[56]

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days or less must be informed of the charges and given an opportunity to defend against them); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that compelled flag salutation in schools unconstitutionally "invade[d] the sphere of intellect and spirit" protected by the First Amendment).

52. *See Goss*, 419 U.S. at 581 (holding that school officials are subject to the Due Process Clause of the Fourteenth Amendment); *see also* New Jersey v. T.L.O., 469 U.S. 325, 336–37 (1985) (stating that school officials carrying out disciplinary functions pursuant to school policies act as representatives of the state); *Barnette*, 319 U.S. at 637 ("The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.").

53. *See Barnette*, 319 U.S. at 637 (stating that a school board's role in "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual").

54. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 643, 651 (1979) (plurality opinion); *id.* at 654–56 (Stevens, J., concurring); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976).

55. *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 598–600 & nn.23, 26 (1977).

56. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 694 (1977) (plurality opinion) ("Since the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is *a fortiori* foreclosed.").

Moreover, the state has less of an interest in regulating contraceptive choices than abortion choices.[57]

The Fourteenth Amendment also protects against government disclosure of one's private affairs to the public.[58] This protection applies to reporting and recordkeeping that impacts procreative decision-making.[59] The confidentiality requirement applies to minors' reproductive choices as well as those of adults.[60] A school that fails to take appropriate steps to keep a student's procreation-related choices private violates the student's right of privacy.[61]

A. Regulations Requiring Parental Consent to or Notification of a Minor's Procreative Decision-Making Must Include a Judicial Bypass Option

Because mandatory parental consent or notification may effectively grant a third-party veto power over a minor's right to choose to have an abortion,[62] courts have approved the creation of what they call a "judicial bypass option."[63] This option allows a minor who either cannot obtain parental consent or does not wish to involve her parents in her decision[64] to obtain an abortion if an authorized fact-finder[65] determines that either the minor is mature enough to make the abortion decision without parental consent or the abortion would be in the minor's best interest.[66] A statute that provides either a parent or another person with the power to withhold consent to a minor's decision to have an abortion is unconstitutional in the absence of a judicial bypass option.[67]

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57. *Id.*

58. *See Whalen*, 429 U.S. at 598–99 & n.24.

59. *See, e.g.*, Thornburgh v. Am. Coll. of Obsts. & Gyns., 476 U.S. 747, 766–68 (1986).

60. *See, e.g.*, Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 510–13 (1990); Planned Parenthood Ass'n v. Matheson, 582 F. Supp. 1001, 1009 (D. Utah 1983).

61. *See, e.g.*, Gruenke v. Seip, 225 F.3d 290, 303 (3d Cir. 2000).

62. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).

63. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992); Bellotti v. Baird, 443 U.S. 622, 643–44 (1979) (plurality opinion).

64. *See, e.g., Casey*, 505 U.S. at 844.

65. *See Bellotti II*, 443 U.S. at 643 n.22 (plurality opinion) (noting that the statute at issue provided for state superior court involvement in minors' abortion choices, but stating that the Court did not mean to suggest that a state could not delegate the alternative procedure to a juvenile court or administrative agency or officer).

66. *See, e.g., Casey*, 505 U.S. at 899 (plurality opinion); *Bellotti II*, 443 U.S. at 643–44 (plurality opinion).

67. *See, e.g., Bellotti II*, 443 U.S. at 643–44 (plurality opinion); *see also id.* at 654–56 (Stevens,

The Supreme Court has not yet addressed the judicial bypass option requirement in the context of regulations inhibiting a minor's contraceptive choices, but constitutional parameters that apply to abortion cases inherently apply to contraceptive cases.[68] In addition, a federal district court has held that the bypass requirement applies in the contraceptive context.[69] In *Planned Parenthood Ass'n of Utah v. Matheson*,[70] the U.S. District Court for the District of Utah addressed state legislation mandating parental notification when a minor requested contraceptives.[71] The state argued that the notification requirement did not burden any constitutionally protected right of privacy, or alternatively, that if it did, it properly balanced those rights with parents' right to be involved in their children's contraceptive decision-making.[72] The district court rejected both arguments.[73] Relying on Supreme Court precedent regarding parental consent, vis-à-vis a minor's abortion and contraceptive choices, the court held that the legislation was unconstitutional because it failed to provide a judicial bypass option.[74]

B. *The Protection Afforded a Minor's Contraceptive Choices Is Distinct from and Stronger than that Relating to Abortion Choices*

While the liberty guarantee of the Fourteenth Amendment protects both abortion choices and contraceptive choices,[75] the Supreme Court

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J., concurring); *Danforth*, 428 U.S. at 74–75; *cf. Casey*, 505 U.S. at 844, 899–900 (upholding a parental consent provision where the statute contained a bypass option).

68. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 694 (1977) (plurality opinion) ("Since the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is *a fortiori* foreclosed.").

69. *See* Planned Parenthood Ass'n of Utah v. Matheson, 582 F. Supp. 1001, 1009 (D. Utah 1983).

70. 582 F. Supp. 1001 (D. Utah 1983).

71. *Id.* at 1002.

72. *Id.* at 1003.

73. *Id.* at 1009.

74. *See id.*

75. *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 598–600 & n.23 (1977) (stating that "privacy cases" have addressed at least two different kinds of interests—the interest in autonomy in certain kinds of decision-making as addressed in cases such as *Roe* and *Griswold*, and the interest in "avoiding disclosure of personal matters"); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 688–89 (1977) (stating in dicta that there is no independent fundamental right of access to contraceptives, but that "such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird*, and *Roe v. Wade*").

expressly distinguished contraceptive issues from abortion issues in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[76] This distinction is significant because in *Casey*, the plurality decision purported to revise the test in the abortion line of privacy cases from a sliding scale balancing the interests of the woman against the interests of the government at different times in a woman's pregnancy,[77] to inquiring whether the regulation imposes an "undue burden" on a woman's ability to make the decision to have an abortion.[78] However unclear the test for abortion privacy cases may be after *Casey*, the Court did not revisit the strict scrutiny test applied to regulations that interfere with a person's contraceptive decision-making.[79] Instead, a majority of the Court stated that contraception is "protected independently under *Griswold* and later cases"[80] and explicitly affirmed the contraceptive line of cases.[81] This distinct treatment of privacy rights related to contraceptive choices is logically in line with the plurality's assertion in *Carey*: that the state has less of an interest in regulating access to contraception than it does in regulating access to abortion.[82]

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76. 505 U.S. 833 (1992).

77. *See* Roe v. Wade, 410 U.S. 113, 164 (1973).

78. *See Casey*, 505 U.S. at 871, 874 (plurality opinion). A plurality of the *Casey* Court also purported to overrule the portion of *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759–65 (1986), that found statutory provisions requiring "the giving of truthful, nonmisleading information about the nature of the [abortion] procedure" to be unconstitutional, stating that such a holding is "inconsistent with *Roe*'s acknowledgment of an important interest in potential life." *Casey*, 505 U.S. at 882.

79. *See Casey*, 505 U.S. at 852–53, 859.

80. *Id.* at 859.

81. *See id.* at 852–53 (citing Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965)). That those privacy cases addressing abortion and those addressing contraceptives are distinct is further evidenced by the fact that the Court, when listing those personal decisions afforded protection by the Fourteenth Amendment, consistently lists "procreation" and "contraception" separately. *See, e.g.*, *Carey*, 431 U.S. at 685; *see also Casey*, 506 U.S. at 851.

82. *See Carey*, 431 U.S. at 694 (plurality opinion). Limited regulation of abortion is justified by the state interest in preserving and protecting the health of a pregnant woman and, after a certain point in the pregnancy, the state interest in protecting the potential of life in the fetus. *See, e.g.*, *Casey*, 505 U.S. at 859 (stating that the scope of abortion rights, first defined in *Roe*, is confined by the state's interest in "*postconception* potential life") (emphasis in original); *Roe*, 410 U.S. at 162–64 (establishing the stages of a woman's pregnancy during which the state's interest in her health and safety and the potential life of the fetus become "compelling" interests that may then justify some state regulation); *see also* Webster v. Reprod. Health Servs., 492 U.S. 490, 520 (1989) (evidencing the difference between the *Griswold* and *Roe* lines of privacy cases by explaining that unlike *Roe*'s trimester framework, the *Griswold* line "did not purport to adopt a whole framework . . . to govern the cases in which the asserted liberty interest would apply").

C. *States Are Required to Protect the Confidentiality of Private Procreative Choices*

The Fourteenth Amendment protects individuals from government disclosure of personal matters to the public.[83] This particular protection has been dubbed "informational privacy" protection by the federal courts and has often been applied to protect against state dissemination of medical information and other highly sensitive personal information.[84] The Supreme Court recognized this protection in *Whalen v. Roe*,[85] where it considered the constitutionality of a statute that required that doctors prescribing highly addictive drugs report the recipients to the Department of Health.[86] Although declining to strike down the statute,[87] the Court emphasized that when health information is collected for public purposes, the privacy of that information is typically protected as it was in the instant case—namely, in a statutory or regulatory fashion.[88] Additionally, where dissemination of information would interfere with a fundamental constitutional right, the protection against public dissemination of that information is constitutionally rooted.[89]

Regulations that require reporting or recordkeeping related to an individual's procreative choices must protect informational privacy.[90] The Court outlined the constitutional limits of such reporting and recordkeeping requirements in *Planned Parenthood of Central Missouri v. Danforth*.[91] There, the Court upheld requirements that facilities and physicians providing abortions report certain "maternal health and life data" to the state.[92] In its opinion, the Court emphasized that the

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83. Whalen v. Roe, 429 U.S. 589, 598–600 (1977).

84. *See, e.g.*, Planned Parenthood of S. Ariz. v. Lawall, 307 F.3d 783, 790 (9th Cir. 2002); *see also* Gruenke v. Seip, 225 F.3d 290 (3rd Cir. 2000); Aid for Women v. Foulston, 327 F. Supp. 2d 1273, 1285 (D. Kan. 2004).

85. 429 U.S. 589 (1977).

86. *See id.* at 591–92, 594–95.

87. *Id.* at 605–06.

88. *See id.* at 605. The statute included specific security provisions to safeguard confidentiality, including a criminal penalty applicable to anyone who made a patient's identity public. *See id.* at 594–95.

89. *See id.* at 605 (stating that in some circumstances a state's duty to avoid unwarranted disclosures of an individual's personal information is constitutionally rooted).

90. *See* Thornburgh v. Am. Coll. of Obsts. & Gyns., 476 U.S. 747, 766–67 (1986); *see also* Planned Parenthood of S. Ariz. v. Lawall, 307 F.3d 783, 790 (9th Cir. 2002).

91. 428 U.S. 52 (1976).

92. *Id.* at 79.

particular information gathered was reasonably related to the preservation of maternal health and the state would keep it confidential and use it only for statistical purposes.[93] However, the Court cautioned that the requirements would be unconstitutional if the state did not adequately protect confidentiality or if the information were used for purposes other than compiling statistical data.[94]

The Court held that an abortion statute overreached these constitutional limits in *Thornburgh v. American College of Obstetricians & Gynecologists*,[95] where the statute included a clause requiring that a provider report each abortion performed in the state.[96] The statute required each report to include information such as the patient's political subdivision, state of residence, age, race, and marital status, and made the reports available to the public for inspection and copying purposes.[97] Although the report would not include the patient's name, the Court found that the information contained in the report would be so detailed that identification was likely.[98] The Court thus held that the reporting requirement was an unconstitutional violation of privacy, "pos[ing] an unacceptable danger of deterring the exercise" of a woman's private right to have an abortion.[99] Further, "the scope of the information required and its availability to the public belie any assertions . . . that it is advancing any legitimate interest."[100]

The Fourteenth Amendment informational privacy protection applies when minors, as well as adults, exercise the right to make procreative-related decisions.[101] In *Ohio v. Akron Center for Reproductive Health*,[102]

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93. *Id.* at 80.

94. *Id.* at 79, 81; *see also Thornburgh*, 476 U.S. at 765–67.

95. 476 U.S. 747 (1986).

96. *See id.* at 765.

97. *Id.*

98. *Id.* at 766–67.

99. *Id.* at 767–68. The *Thornburgh* Court described efforts to protect confidentiality as an "inherent" requirement to sustain the constitutionality of regulations affecting the abortion decision. *Id.* at 766 (quoting Bellotti v. Baird, 443 U.S. 622, 655 (1979) (Stevens, J. concurring in the judgment)). The Court feared that the reporting requirements at issue would subject an individual exercising a constitutionally protected right to public exposure and possible harassment. *Id.* at 767. In deciding that this result would be unacceptable, the Court analogized to several First Amendment decisions, reiterating that the government may not "chill the exercise" of a fundamental constitutional right by requiring the disclosure of protected activities, no matter how unpopular. *Id.* at 767.

100. *Id.* at 765.

101. *See, e.g.*, Planned Parenthood of S. Ariz. v. Lawall, 307 F.3d 783, 790 (9th Cir. 2002) (stating that it is undisputed that the information a court receives during a judicial bypass

the Court held that in order for an abortion statute's parental consent requirement to pass constitutional muster, the state must make an effort to "insure the minor's anonymity."[103] Although the Court stated that complete anonymity is not critical, reasonable steps must be taken to protect the minor's identity from being revealed to the public.[104]

D. Schools Have a Duty to Protect Minors' Constitutionally Protected Decision-Making from Public Dissemination

The U.S. Court of Appeals for the Third Circuit (the first federal circuit court to address the question) made it clear in *Gruenke v. Seip*[105] that schools have a duty to protect the confidentiality of minors' private medical affairs.[106] There, the court considered whether a high school coach violated a student's informational privacy right by requiring the student to take a pregnancy test and eventually informing her teammates, their parents, and the student's mother of the student's pregnancy.[107] In reversing the lower court's grant of summary judgment to the school, the Third Circuit held that information about a student's pregnancy status clearly implicates medical information, entitled to protection from public disclosure under *Whalen*.[108] The court remanded the case, stating that if the plaintiff proved her allegations, the coach's failure to take appropriate steps to keep the information about the pregnancy test confidential could infringe upon the student's Fourteenth Amendment

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proceeding is worthy of constitutional protection as "informational privacy," discussed by the Supreme Court in *Whalen*); Gruenke v. Seip, 225 F.3d 290, 302–03 (3d Cir. 2000) (holding that a high school student who alleged that her swim coach told her family and teammates about her pregnancy had a right to be free from disclosure of personal matters as recognized by the Supreme Court in *Whalen*); *see also* Aid for Women v. Foulston, 327 F. Supp. 2d 1273, 1285 (D. Kan. 2004) (citing *Whalen* for the proposition that there is a right to informational privacy).

102. 497 U.S. 502 (1990).

103. *Id.* at 512.

104. *Id.*; *see also Lawall*, 307 F.3d at 788 (finding the statute at issue to have taken "reasonable steps" to meet the anonymity requirement because that statute contained statements that: (1) all judicial bypass proceedings are confidential and "shall" not be made public; (2) members of the public are not to have access to information about the proceedings; (3) the court is to order that all records related to the proceeding be confidentially maintained; and (4) the pregnant minor is allowed to use a fictitious name during the proceedings).

105. 225 F.3d 290 (3d Cir. 2000).

106. *See id.* at 302–03. The U.S. Supreme Court has never addressed this issue.

107. *See id.* at 296–97, 302–03.

108. *Id.* at 302–03; *see also* Whalen v. Roe, 429 U.S. 589, 598–600 (1977).

informational privacy right.[109]

In sum, the Fourteenth Amendment protects both minors' privacy in the procreative decision-making context and their right to be free from state dissemination of their private affairs to the public. Specifically, any regulation regarding contraceptive choices that includes parental notification or consent requirements must also provide a bypass option whereby a minor may avoid parental involvement. Confidentiality is an inherent requirement in abortion statutes, and bypass procedures must include reasonable steps to shield a minor's identity from the public. Further, the right of informational privacy also applies to choices related to procreation, and school officials, as state actors, must take reasonable steps to protect a minor's informational privacy rights.

IV. MANY ZERO TOLERANCE POLICIES REQUIRE PARENTAL CONSENT AND FAIL TO PROTECT PRIVATE AFFAIRS

Schools have broadly applied zero tolerance drug policies to a wide range of prescription and non-prescription medication, including items not traditionally considered "medication," such as vitamins and birth control pills.[110] Many zero tolerance drug policies subject a student to discipline, normally without exception,[111] if the school catches her in possession of any kind of medication at school, unless the student previously obtained parental permission to possess that medication.[112] The consequence of that discipline has included the notification of the student's parents and the general public.[113] Nevertheless, the proponents of these policies argue that zero tolerance policies are in the students'

109. *See id.*

110. *See, e.g.*, Bertens v. Stewart, 453 So. 2d 92, 93–94 (Fla. Dist. Ct. App. 1984) (reviewing a school board's expulsion of a fifth grader for possessing and distributing a nonprescription vitamin pill in violation of a policy that prohibited "medicine"); Kahne, *supra* note 4 (reporting on a student disciplined for possessing birth control pills in violation of school's zero tolerance policy).

111. These policies often mandate predetermined and severe punishment for specific offenses, regardless of the severity of those offenses or the background of the student. *See* Cherry Henault, *Zero Tolerance in Schools*, 30 J.L. & EDUC. 547, 547 (2001). Although due process requires that school districts retain some discretion to modify the punishment, they often do not do so. *See* Joan M. Wasser, Note, *Zeroing In On Zero Tolerance*, 15 J.L. & POL. 747, 760, 769–772 (1999).

112. *See, e.g.*, School Board of the City of Virginia Beach, Va., Regulation 5-45.1, *available at* http://www.vbschools.com/policies/5-45_1r.asp (last visited Mar. 28, 2006).

113. The media are often alerted to zero tolerance policy violations. *See, e.g.*, Grogan, *supra* note 3 (reporting a student's suspension for taking Aleve, to relieve menstrual cramps, in violation of a zero tolerance policy); Editorial, *supra* note 3 (reporting a student's five-day suspension for possessing heartburn-relief medication in violation of a zero tolerance policy).

best interests.[114]

A. *Zero Tolerance Drug Policies Often Require that a Student Obtain Parental Consent to Possess Contraceptives or Risk Being Punished for That Possession*

Generally, zero tolerance drug policies that cover prescription and over-the-counter medication allow students to bring legally prescribed or over-the-counter medication to school only if the student provides the school with a doctor's note, parental approval, or both.[115] A representative Ohio school district policy provides that "[a] student shall not knowingly *possess*[,] . . . consume, use, handle, give, store, [or] conceal . . . any . . . non-prescription or prescription drug (except when under the direction of a physician/parent and within school procedure . . .)."[116] Violation of this policy results in a ten-day suspension and a chemical dependency evaluation.[117] Often, zero tolerance policies do not define "prescription drug," but where definitions are included they can be broad, such as the City of Virginia Beach policy that defines prohibited "medication" as "any drug or other substances used in treating disease, healing, or relieving pain, including all over-the-counter drugs such as aspirin, cough syrups, gargles, caffeine pills and the like."[118] Many zero tolerance policies further forbid students from self-administering or personally possessing medication

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114. *See, e.g.*, Mike Cronin, *Zero Tolerance has Zero Sense to Some*, SALT LAKE TRIB., May 1, 2005, at A1 (reporting that in the post-Columbine world, some proponents of zero tolerance policies argue that the "failure to consistently enforce strict policies can ultimately result in calamities such as . . . Red Lake and . . . Columbine").

115. *See, e.g.*, School Board of the City of Virginia Beach, Va., Regulation 5-45.1, *available at* http://www.vbschools.com/policies/5-45_1r.asp (last visited Mar. 28, 2006) (requiring that a parent, legal guardian, or other responsible adult bring any medication, "even if recommended or prescribed for the student's use" to the office at the start of the school day for safekeeping, in order to comply with the school's policy).

116. Smartt v. Clifton, No. C-3-96-389, 1997 WL 1774874, at *8 (S.D. Ohio Feb. 10, 1997) (internal quotations and citations omitted) (emphasis and third alteration in original).

117. *Id.*

118. School Board of the City of Virginia Beach, Va., Regulation 5-45.1, *available at* http://www.vbschools.com/policies/5-45_1r.asp (last visited Mar. 28, 2006). While it may be argued that a phrase such as "used in treating disease, healing, or relieving pain" is a limiting phrase that would restrict the application of a policy to only those substances that fit that definition, schools have tended to interpret zero tolerance drug policies broadly to include even substances that arguably are not drugs or medicine at all. *See, e.g.*, Bertens v. Stewart, 453 So. 2d 92, 93–94 (Fla. Dist. Ct. App. 1984) (reviewing a school board's expulsion of a fifth grader for possessing and distributing a nonprescription vitamin pill in violation of a policy that prohibited "medicine").

while on school grounds, requiring that the student leave parentally approved medication for safekeeping with the school nurse.[119]

B. *Many Zero Tolerance Drug Policies Mandate the Discipline of Students and the Notification of Students' Parents for Possession of Otherwise Legal Prescription and Over-the-Counter Medication*

Pursuant to zero tolerance drug policies, schools across the country have punished students for possession and use of a variety of substances that, but for the application of zero tolerance policies, would be perfectly legal.[120] For example, schools have severely disciplined students for taking ibuprofen for menstrual cramps,[121] possessing heartburn-relief medicine to control intestinal gas,[122] and sharing zinc cough drops without first clearing the cough drops with the school office.[123] In one particularly egregious example, a school expelled a fourteen-year-old for eighty days for taking Midol for severe menstrual pain[124] and giving Midol to another student.[125] That school's zero tolerance policy provided that "student[s] shall not knowingly *possess*[,] . . . consume, use, handle, give, store, [or] conceal . . . any . . . non-prescription or prescription drug (except when under the direction of a physician/parent and within school procedure . . .)."[126] District officials later told the punished student that if she and her parent agreed to have her undergo a substance abuse evaluation, the district would remove the expulsion from her school

119. *See, e.g.*, School Board of the City of Virginia Beach, Va., Regulation 5-45.1, *available at* http://www.vbschools.com/policies/5-45_1r.asp (last visited Mar. 28, 2006); *see also* Molly Ball, *Schools Working to Distinguish Misbehaving from Criminal Acts*, LAS VEGAS SUN, Jan. 23, 2005, at D1 (describing a policy that requires even over-the-counter medication like Tylenol be dispersed to students by the nurse's office).

120. *See, e.g.*, *Bertens*, 453 So. 2d at 93–94 (reviewing a school board's expulsion of a fifth grader for possessing and distributing a nonprescription vitamin pill in violation of a policy that prohibited "medicine").

121. *See Voir Dire: Suit Over Pill*, NAT'L L.J., at 15 (May 24, 2004); *see also* Stephanie L. Arnold, *Student Sorry About Violation: Haverford High Suspended Her a Half-Day for Taking a Pain Reliever*, PHILA. INQUIRER, Jan. 29, 2005, at B02; Grogan, *supra* note 3, at B01.

122. *See* Elaine D. Briseno, *Heartburn Drug Leads to School Suspension*, ALBUQUERQUE TRIB., Jan. 9, 2004, at A1; Editorial, *supra* note 3.

123. *See* Henault, *supra* note 111, at 548.

124. *See* Smartt v. Clifton, No. C-3-96-389, 1997 WL 1774874, at * 1, *20 (S.D. Ohio Feb. 10, 1997).

125. *Id.* at *10.

126. *Id.* at *8 (internal quotations and citations omitted) (emphasis and third alteration in original).

record.[127]

An Oklahoma school district demonstrated that some school administrators include prescription contraception within the scope of zero tolerance drug policies when it suspended a fourteen-year-old for prescription hormone pills found in her purse.[128] Administrators claimed that a district-wide "zero tolerance policy" mandated a one-year suspension for student possession of any "illegal" substance, including cough drops or legally prescribed medication.[129] After the student obtained legal representation, the district agreed to reduce the suspension to five days if the student attended drug counseling and underwent urinalysis.[130] However, the district told the student that her suspension for this possession of an "illegal substance" would remain on her permanent record.[131] The student appealed the decision and eventually, after the involvement of lawyers, a settlement with the district was reached expunging her record.[132]

C. *Proponents of Zero Tolerance Policies Justify Such Policies as Appropriate Measures to Protect Students*

Supporters of zero tolerance policies claim that the purpose of such policies is to protect students.[133] Proponents specifically argue that the

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127. *Id.* at *11.

128. *See* Kahne, *supra* note 4.

129. *Id.*; *see also* POLICIES AND PROCEDURES FOR MUSTANG PUBLIC SCHOOLS, POLICY #5080, *available at* http://www.mustangps.org/filemgmt/uploads/pandp%2012-20-05.pdf (last visited Mar. 28, 2006) (defining "illicit drug" to include any prescription or non-prescription drug along with "any substance which is represented to be a prescription or non-prescription drug"). Use or possession of any illicit drug while on school property "will result in suspension." *Id.* The policy mandates, for a first offense, suspension for the current and succeeding semester. *Id.* That suspension may be reduced to ten days if the student agrees to undergo urinalysis and chemical dependency counseling. *Id.*

130. Kahne, *supra* note 4.

131. *Id.*

132. *See* Sarah Kahne, *Settlement Reached with Student*, DAILY OKLAHOMAN, Jan. 12, 2005, at 1A. Ironically, after settlement, the school board announced that it did not in fact have a zero tolerance policy in place, as school administrators had "discretion" under the policy. *Id.* However, under that definition of "zero tolerance," no school would ever have a true zero tolerance policy, because constitutional due process requires that school boards retain the power to modify punishment on a case-to-case basis. *See, e.g.*, Wasser, *supra* note 111, at 760, 769–72 (stating that while due process requires that school boards retain the power to modify punishment on a case-to-case basis, many do not do so either because they do not realize that the policy allows such modification, they are concerned about uniformity in punishment, or they fear litigation).

133. *See, e.g.*, Arnold, *supra* note 121 (quoting a high school principal's rationale for a zero tolerance policy that resulted in the suspension of a student for taking a generic version of Aleve for

policies keep schools safe[134] and have the general support of parents and school officials.[135] In attempting to identify the school's rationale for a policy that resulted in a fourteen-year-old's suspension for giving a friend Midol, a federal district court found that the school's justification for the policy was "the need to protect students who may have adverse reactions to non-prescription medication; the need to control the flow of all substances, legal and illegal, in the public schools; and the need to ensure that even non-prescription drugs are not used in a harmful manner by students."[136] These rationalizations encompass the primary justifications put forth on behalf of zero tolerance proponents.[137]

In sum, schools have broadly applied zero tolerance drug policies to a wide range of medication, including prescription contraceptives. Under such policies, students must obtain parental permission to possess otherwise legal medical contraceptives. Schools have severely disciplined students even for minor violations of these policies—including possession of otherwise legal substances. The effect of such discipline has included notification of students' parents and the general public. Nevertheless, the proponents of zero tolerance policies argue that such policies are in students' best interests.

V. MANY ZERO TOLERANCE DRUG POLICIES VIOLATE MINORS' CONSTITUTIONAL RIGHT OF PRIVACY

Requiring that a student obtain parental consent in order to "legally" possess medical contraceptives at school amounts to a blanket parental consent requirement of the type that the Supreme Court has held to be an unconstitutional violation of a minor's Fourteenth Amendment right of privacy.[138] Also, when a school disciplines a minor under a zero

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menstrual cramps).

134. *See* Cronin, *supra* note 114.

135. *See* Henault, *supra* note 111, at 548.

136. Smartt v. Clifton, No. C-3-96-389, 1997 WL 1774874, at *21 (S.D. Ohio Feb. 10, 1997).

137. *See, e.g.*, Nathan L. Essex, *Zero Tolerance and Student Dress Codes*, PRINCIPAL MAG., Sept./Oct. 2004, at 54, *available at* http://www.naesp.org/ContentLoad.do?contentId=1318 (explaining that zero tolerance polices are a means of reducing and preventing violence and that school policies are considered reasonable by the courts when they are "necessary to maintain proper order, decorum, and a peaceful school environment").

138. *See, e.g.*, *Bellotti II*, 443 U.S. 622, 643–44, 651 (1979) (plurality opinion); *id.* at 654–56 (Stevens, J., concurring); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74–75 (1976) (holding a statute that required parental consent in order for a minor to obtain an abortion amounted to an unconstitutional third party veto over a minor's right of privacy related to procreative decision-making); *see also* Planned Parenthood Ass'n of Utah v. Matheson, 582 F. Supp. 1001,

tolerance policy for possessing contraceptives, the discipline unavoidably and unconstitutionally results in parental notification of her contraceptive choices.[139] Disciplining a student for possessing contraceptives also often results in unconstitutional dissemination of the student's private affairs to the public.[140] Moreover, none of the rationalizations proffered in support of such policies amount to a significant state interest justifying interference in a minor's procreative decision-making.[141]

A. Zero Tolerance Policies Requiring Parental Consent for Student Possession of Contraceptives Are Unconstitutional in the Absence of a Judicial Bypass Procedure or Its Equivalent

School policies that forbid students from possessing contraceptives without parental consent effectively compel students to obtain third-party consent in order to exercise their constitutionally protected right to make contraceptive choices.[142] If a minor is required to obtain parental consent in order to avoid violating such a policy, the parent may choose to withhold consent, resulting in an unconstitutional arbitrary veto.[143] In the alternative, a student who does not wish to risk violating the policy, but also does not wish to inform her parents of her contraceptive choices, may instead choose to stop using contraceptives,[144] despite her constitutional right to choose to do so.[145]

Even if a student avoids parental consent by choosing to risk violating a zero tolerance policy, disciplining a student caught with medical

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1009 (D. Utah 1983).

139. *Cf., e.g.*, Briseno, *supra* note 122 (reporting a student's suspension for carrying Gas-X in violation of a policy that required that the school nurse dispense all over-the-counter and prescription medication). The student's mother was called and the student was threatened by the principal with police involvement. *Id.*

140. *See, e.g., id.*

141. *See Danforth*, 428 U.S. at 74–75.

142. *See, e.g.*, School Board of the City of Virginia Beach, Va., Regulation 5-45.1, *available at* http://www.vbschools.com/policies/5-45_1r.asp (last visited Mar. 28, 2006) (requiring that a parent, legal guardian, or other responsible adult bring any medication, "even if recommended or prescribed for the student's use" to the office at the start of the school day for safekeeping, in order to comply with the school's policy).

143. *Cf., e.g., Danforth*, 428 U.S. at 74.

144. *See, e.g.*, Planned Parenthood Ass'n of Utah v. Matheson, 582 F. Supp. 1001, 1009 (D. Utah 1983).

145. *See* Carey v. Population Servs Int'l, 431 U.S. 678, 693 (1977) (plurality opinion); *Danforth*, 428 U.S. at 74–75.

contraceptives in violation of a zero tolerance policy has the impermissible result of notifying the minor's parents of her contraceptive choices.[146] This unavoidable parental notification unconstitutionally interferes with a minor's Fourteenth Amendment right of privacy.[147] Notification, or the threat thereof, is likely to result in severe infringement of students' contraceptive-related decision-making.[148] Such notification through punishment is also at odds with the Court's holding regarding recordkeeping and reporting in *Danforth*.[149] Thus, in order to ensure the constitutionality of zero tolerance drug policies, schools must provide a bypass option allowing violators to remain anonymous under certain circumstances.[150]

B. *Disciplining a Minor for Possessing Contraceptives Results in Unconstitutional Public Dissemination of the Minor's Private Decision to Use Contraceptives*

When a school disciplines a student for violating its zero tolerance policy, the likelihood of the community discovering the minor's identity and the reason for the suspension is great.[151] This likelihood creates an "unacceptable danger" of violating the minor's constitutional right of privacy when contraceptives are involved.[152] The Supreme Court was unwilling to risk this danger when it dealt with abortion-reporting statutes, which provided less information about a woman's identity than is often obtained by a community regarding a minor who violates a zero tolerance policy.[153] In addition, the Court has held that the protection

146. *See, e.g.*, Briseno, *supra* note 122.

147. *See, e.g.*, Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1460 (8th Cir. 1995) (requiring the state to provide a method to determine whether a minor was capable of making an informed choice about abortion before allowing a parental notification requirement), *cert. denied sub nom.*, Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174 (1996).

148. *See, e.g.*, *Matheson*, 582 F. Supp. at 1009.

149. *See Danforth*, 428 U.S. at 81 (finding that reporting requirements that impact decisions protected by the right of privacy were not to be applied "in such a way as to accomplish . . . what we have held to be an otherwise unconstitutional restriction"—specifically, unconstitutionally mandating parental consent).

150. *See, e.g.*, School Board of the City of Virginia Beach, Va., Regulation 5-45.1, *available at* http://www.vbschools.com/policies/5-45_1r.asp (last visited Mar. 28, 2006).

151. *See, e.g.*, Arnold, *supra* note 121; Briseno, *supra* note 122; Mike Cronin, *Parents Say Jordan Drug Policy is Excessive*, SALT LAKE TRIB., May 29, 2004, at A1; Cronin, *supra* note 114; Grogan, *supra* note 3; Kahne, *supra* note 4.

152. *Cf., e.g.*, Thornburgh v. Am. Coll. of Obsts. & Gyns., 476 U.S. 747, 767–68 (1986).

153. *See id.* at 765–67. In *Thornburgh*, the Court noted that "although the statute does not

from dissemination of one's private affairs is essential when the information at issue relates to the personal decision of whether to bear or beget a child.[154] Furthermore, like the student's pregnancy at issue in *Gruenke,* a student's choice to use contraceptives is medical information protected from compelled disclosure by the Fourteenth Amendment.[155] Accordingly, when a school disciplines a student under a zero tolerance drug policy for possessing contraceptives, the discipline often results in the reporting of the student's private affairs to the school community and to the public at large—a violation of the Fourteenth Amendment's informational privacy right.[156]

C. *Zero Tolerance Drug Policies Do Not Advance a Significant State Interest Justifying Interference with a Minor's Contraceptive Privacy Rights*

Zero tolerance advocates proffer several rationalizations for such policies,[157] none of which justify infringement upon a minor's

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specifically require the reporting of the woman's name, the amount of information about her and the circumstances under which she had an abortion are so detailed that identification is likely." *Id.* at 766–67. When a community learns of a student's suspension, the community learns of the student's name; unlike the issue in *Thornburgh*, such discipline results in direct, rather than circumstantial reporting of a woman's identity.

154. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); *see, e.g.*, *Thornburgh*, 476 U.S. at 766–68 (holding that a statute that required reporting certain demographic information about women who had abortions necessarily would result in chilling the exercise of a woman's right of privacy in making procreative decisions and noting "that the Court consistently has refused to allow government to chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular, activities.").

155. Gruenke v. Seip, 225 F.3d 290, 302–03 (3rd Cir. 2000); *see also* Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 658–60 (1995) (implying that a school policy that invaded a student's right of privacy related to medical information without enabling the student to keep that information confidential would be a significant invasion of the student's privacy right); Whalen v. Roe 429 U.S. 589, 600 (1977) (acknowledging the existence of a privacy right in nondisclosure of medical information).

156. *See, e.g.*, *Whalen*, 429 U.S. at 598–99; *see also* Planned Parenthood of S. Ariz. v. Lawall, 307 F.3d 783, 790 (9th Cir. 2002) (stating that it is undisputed that the information a court receives during a judicial bypass proceeding is worthy of constitutional protection as "informational privacy," discussed by the Supreme Court in *Whalen*); *Gruenke*, 225 F.3d at 303 (holding that a high school student who alleged that her swim coach told her family and teammates about her pregnancy had a right to be free from disclosure of personal matters as recognized by the Supreme Court in *Whalen*); Aid for Women v. Foulston, 327 F. Supp. 2d 1273, 1285 (D. Kan. 2004) (citing *Whalen* for the proposition that there is a right to informational privacy).

157. *Cf., e.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74–75 (1976) (addressing Missouri's justifications for its restrictions on minors' abortions).

fundamental constitutional right of privacy.[158] Proponents of zero tolerance have defended the policies by arguing that they protect students' health,[159] keep schools safe,[160] and have the general support of parents and school officials.[161] However, none of these rationalizations amount to a significant state interest not present in the case of an adult.[162] First, the argument that regulations infringing upon the decision to use contraceptives are justified if they serve to protect health[163] was rejected by the Supreme Court in *Eisenstadt*.[164] While the desire to protect students allergic to certain medications is a laudable one, where such an attempt at protection sweeps up all prescription and over-the-counter medication in its path, including medical contraception, the policy is, like the statute at issue in *Eisenstadt*, overbroad and thus cannot justify the privacy infringement.

In addition, because the Court has held that a minor's privacy right outweighs the parental interest in notification,[165] infringing upon a minor's contraceptive choices by enforcing zero tolerance drug policies cannot be justified simply by parental support for the policies.[166] There is no significant state interest giving the state the constitutional authority to bestow a third party, parent or otherwise, with "an absolute, and possibly arbitrary, veto"[167] over a minor's decision to exercise her constitutionally protected right.[168] Further, "safeguarding of the family unit and of parental authority" is not a significant state interest sufficient to overcome a minor's privacy right.[169] The same concerns in the

158. *Cf. Eisenstadt*, 405 U.S. at 453 (raising and dismissing several of the proffered justifications for the differential treatment of married and unmarried persons).

159. *See, e.g.*, Arnold, *supra* note 121.

160. *See* Cronin, *supra* note 114.

161. *See* Henault, *supra* note 111, at 548.

162. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977) (plurality opinion); *Danforth*, 428 U.S. at 74–75.

163. *See, e.g.*, Smartt v. Clifton, No. C-3-96-389, 1997 WL 1774874, at *24 (S.D. Ohio Feb. 10, 1997) (finding that one of the school's rationales for its zero tolerance drug policy was "to protect students who may have adverse reactions to non-prescription medication").

164. *See* Eisenstadt v. Baird, 405 U.S. 438, 451–52 (1972).

165. *See, e.g.*, *Bellotti II*, 443 U.S. 622, 643–44, 651 (1979) (plurality opinion); *id.* at 654–56 (Stevens, J., concurring); *Danforth*, 428 U.S. at 74–75.

166. *See* Henault, *supra* note 111, at 548.

167. *Danforth*, 428 U.S. at 74.

168. *See id.* at 74–75; Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977) (plurality opinion).

169. *Danforth*, 428 U.S. at 75; *see also* Planned Parenthood Ass'n of Utah v. Matheson, 582 F. Supp. 1001, 1008 (D. Utah 1983) (stating that a majority of the Supreme Court has indicated that

abortion context that led the Court to require judicial bypass options make it evident that the arena of procreative-related decision-making is one where a minor's interests at times trump those of the parents.[170] Contraception is a topic on which "many parents hold strong views,"[171] and a minor's procreative decision-making should be based upon "the best interests of [the minor]."[172] Thus, the concern that a parent or third party might exercise a "possibly arbitrary"[173] veto over a minor's constitutionally protected private decision leads courts to invalidate parental consent requirements without judicial bypass options, putting the privacy interests of the minor before her parents' interests.[174]

For the same reasons, a safety-based justification of zero tolerance policies[175] must be rejected. A school could not constitutionally exercise what is effectively a third-party veto over a minor's procreative choices when the Court has held that the Constitution forecloses the minor's parents or other third party from doing just that.[176] In addition, although the Court held in *Vernonia School District v. Acton*[177] that infringement of student privacy rights may be justified by certain safety concerns related to drugs in schools,[178] such policies are troublesome where they are conducted without confidentiality safeguards and they inquire into students' private medical affairs.[179]

In sum, when a school district applies a zero tolerance policy to minors in possession of legally obtained contraceptives, the school cannot force a student to notify her parents of her procreative choices in

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both state and parental interests "must give way to the constitutional right of a mature minor or of an immature minor whose best interests are contrary to parental involvement").

170. *Cf., e.g., Bellotti II*, 443 U.S. at 643–44, 651 (plurality opinion); *Danforth*, 428 U.S. at 74–75.

171. *Bellotti II*, 443 U.S. at 647 (plurality opinion).

172. *Id.* at 649.

173. *Danforth*, 428 U.S. at 74.

174. *See id.* at 74–75.

175. *See, e.g.*, Cronin, *supra* note 114.

176. *Cf., e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 691–99 (1977) (plurality opinion) (noting that although an undisturbed state law allowed a physician to provide a patient younger than sixteen with contraceptives as the physician "deemed proper," the effect of both laws read together was to empower the physician with unconstitutional discretion over the privacy rights of minors); *Danforth*, 428 U.S. at 74–75.

177. 515 U.S. 646 (1995).

178. *Id.* at 662.

179. *Id.* at 658–60 (implying that a school policy that invaded a student's right of privacy related to medical information without enabling the student to keep that information confidential would be a significant invasion of that student's privacy right).

order to comply with the policy. Such policies must include a bypass option that enables the student to avoid acquiring parental consent in order for the student to possess contraceptives at school. In addition, zero tolerance policies may not violate minors' constitutional right to be free from state dissemination of their private affairs—a natural consequence of disciplining students in possession of contraceptives in violation of the zero tolerance policy.

VI. CONCLUSION

Schools violate their students' Fourteenth Amendment right of privacy when they apply zero tolerance drug policies to possession of medical contraceptives and require parental consent for a student to possess medical contraceptives and not run afoul of the policy. The constitutional right of privacy protecting an individual's procreative-related decision-making applies to minors as well as adults and does not disappear in the school setting. Unless a zero tolerance policy provides for an option (analogous to the "judicial bypass" of the abortion context) by which a student may avoid obtaining parental consent in order to "legally" possess medical contraceptives without first acquiring parental permission, the policy amounts to an unconstitutional mandatory parental consent requirement. In addition, a zero tolerance policy may not constitutionally compel a minor to notify a parent of the minor's private procreative decisions. Furthermore, because zero tolerance policies may not violate minors' constitutional right to be free from state dissemination of their private affairs, schools must take reasonable steps to insure that minors' procreative-related decisions will remain confidential.