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Abortion: Right of Minors to Abortion without Parental Consent

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NOTES

ABORTION: RIGHT OF MINORS TO ABORTION WITHOUT PARENTAL CONSENT—*State v. Koome*, 84 Wash.2d 901, 530 P.2d 260 (1975).

The Supreme Court of Washington recently has shed some light upon the murky legal area of the constitutional rights of minors. In *State v. Koome*,[1] the Court held that the state could not require an unmarried pregnant woman under the age of eighteen to obtain her parents' permission in order to have an abortion. This decision extended the now constitutionally protected right of privacy[2] with

1. 84 Wash. 2d 901, 530 P.2d 260 (1975). This issue appears to be headed toward a final resolution. The United States District Court for the District of Massachusetts held a Massachusetts statute, MASS. ANN. LAWS ch. 112, § 12P (1974), similar to WASH. REV. CODE ANN. § 9.02.070 (1975 Supp.), unconstitutional. That law made it a criminal offense to perform an abortion upon a minor without the consent of both the minor and her parents but permitting parental refusal to be overruled by the superior court for good cause shown. An appeal against this decision was filed in the Supreme Court on July 12, 1975. Bellotti v. Baird, 44 U.S.L.W. 3086(U.S. April 28, 1975). Also before the Court is an appeal from a contrary decision by the District Court for the Eastern District of Missouri which upheld the constitutionality of a Missouri House Bill, Abortion, H.C.S. House Bill No. 1211, § 3, MO. ANN. STAT. Appendix Pamphlet (Vernon 1975), which also closely resembles the Washington law. It requires the written consent of the minor and also that of a parent or other person acting *in loco parentis* before an abortion can be performed. Planned Parenthood of Central Missouri v. Danforth, 44 U.S.L.W. 3220 (U.S. Oct. 14, 1975).

2. This right, which does not appear anywhere in the Constitution, has evolved into one of the most important sources of protection for the individual against unjustifiable government interference. It was first promulgated by Warren and Brandeis in *The Right of Privacy*, 4 HARV. L. REV. 193 (1890), with the intention of creating a civil tort action for the invasion of privacy by private parties, especially newspapers. Primarily as a result of this article, causes of action were formulated in many states by statute or construction which for a time flourished. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1948); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931). These actions have since been severely restricted due to the collision with the first amendment right of freedom of the press in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), which requires that a plaintiff establish deliberate falsity or recklessness as to truth in order to recover.

The right of privacy as a constitutional shield has had greater success in recent years. The Supreme Court has never pinpointed just where the right lies but has inferred it from various amendments to the Constitution, singly or from two or more in conjunction with each other. These have included the first, fourth, fifth and ninth amendments; the *penumbras* of the Bill of Rights; and the concept of liberty guaranteed by the fourteenth amendment. Only rights that have been deemed to be "fundamental" by the Court have been given this protection. A wide variety of rights have been found to be "fundamental," but there has been an especially intense concentration of these in the areas of family, marital and sexual matters. A list of activities that have been ruled out of bounds for government regulation include: Prince v. Massachusetts, 321 U.S. 158 (1944) (family relationships); Loving v. Virginia, 388 U.S. 1 (1967)(marriage); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942)(procreation); Griswold v. Connecticut, 381 U.S. 479 (1965)(use of contraceptives by married couples); Eisenstadt v. Baird, 405 U.S. 438 (1972)(use of contraceptives by single persons). From the latter two cases, it did not require a large conceptual leap to reach the result in Roe v. Wade, 410 U.S. 113 (1973).

regard to abortion as set out for adults by the United States Supreme Court to all women, regardless of age, who are capable of childbirth.[3]

Prior to 1973, the right of women to have abortions was either partially or totally curtailed by state law. In that year the United States Supreme Court rendered obsolete nearly the entire statutory and case law on the subject in its decisions in *Roe v. Wade*[4] and *Doe v. Bolton*.[5] The right of adult women to obtain an abortion within twelve weeks of conception emerged from the legal wreckage while many new issues were engendered.[6] One of the questions expressly not decided was whether this right was, or ought to be, any different for females under eighteen.

The legislature of Washington answered this in the affirmative when it revised the state's abortion statute[7] in order to conform to the Supreme Court rulings. The law specifically incorporated the Court's analysis of permissible state regulation according to the

3. The Supreme Court, in *Roe v. Wade*, expressly left open the issue of whether greater restrictions should be placed upon the exercise of this right by minors. Roe v. Wade, 410 U.S. at 165 n.67.

4. *Id.* The Court found the Texas abortion statute unconstitutional as an invasion of the right of privacy, a right founded upon the fourteenth amendment's concept of personal liberty and restrictions on state action. It was also held to be violative of the amendment's due process clause. The Court divided the pregnancy term into approximate thirds and described the permissible limits of regulation during each period. During the first trimester, the decision is to be left to the woman and her physician with no state interference allowed whatever. During the second trimester, the states may make rules for the protection of the health of the mother, such as fixing the qualifications of practitioners and licensing of facilities. After viability of the fetus, the state may regulate the procedure even to the point of forbidding abortions unless the health of the mother would be seriously endangered.

5. 410 U.S. 179 (1973). In *Doe v. Bolton*, a companion case decided the same day, sections of the more modern Georgia abortion statute, based on the American Law Institute Model, were also held void. These were mainly procedural requirements that were found to be unduly restrictive of the physician's right to practice medicine based on his independent judgment. They were also found deficient as they bore no rational relationship to the state's legitimate interest in protecting the health of the mother.

6. Among the more important issues are: What are the rights of hospitals and their employees who oppose abortion on moral grounds? What constitutes viability in light of the medical ability to sustain fetal life outside the mother at progressively earlier stages of pregnancy? If a woman's right of privacy includes the right to choose to terminate a pregnancy, does she have the right, if she is financially unable, to have this decision implemented by having the state or federal government pay for it? What rights, if any, does the natural father have?

7. WASH. REV. CODE ANN. §§ 9.02.060-9.02.090 (1975 Supp.). *See also* MASS. ANN. LAWS ch. 112, § 12P (1974); and Abortion, H.L.S. House Bill No. 1211, § 3, Mo. ANN. STAT. Appendix Pamphlet (Vernon 1975). Under the present law of Ohio, there are no criminal sanctions against physicians who perform abortions. However, the Ohio Public Health Council is empowered under OHIO REV. CODE ANN. § 3701.341 (Page 1974), to adopt rules relating to abortion, violation of which is grounds for disciplinary action by the State Medical Board under OHIO REV. CODE ANN. § 4731.22(G)(Page 1974).

trimester of pregnancy but then added two caveats. The section in question[8] provided in part:

> A pregnancy of a woman not quick with child and not more than four lunar months after conception may be lawfully terminated under RCW 9.02.070 through 9.02.090 only: (a) with her prior consent and, if married and residing with her husband or unmarried and under the age of eighteen years, with the consent of her husband or legal guardian, respectively. . . .

Dr. A. Franz Koome was convicted under this statute of performing an abortion on a sixteen-year-old unmarried minor without her parents' consent. His only defense was that the parental consent provision was unconstitutional. This was rejected by the trial court; nevertheless, his conviction was reversed by the Washington Supreme Court which held that a minor's right of privacy regarding the abortion decision is co-equal with that of adult women.[9]

The court began its analysis by extending to minors the due process protection established by the Supreme Court in *Roe v. Wade* as applicable to adult women. The Supreme Court had held that the right to abortion was *fundamental* and that any state statute which interfered with that right was of necessity inadequately justified and thus violative of due process. The Washington court went further and held that such rights were *fundamental* to minors in the absence of compelling reasons for state intervention:

> Prima facie, the constitutional rights of minors, including the right of privacy, are coextensive with those of adults. Where minors' rights have been held subject to curtailment by the state in excess of that permissible in the case of adults it has been because some peculiar state interest existed in the regulation and protection of children not because the rights themselves are of some inferior kind.[10]

The court rejected an argument by the state that the burden of the consent provision would be lessened by the statutory power of intervention on the minor's behalf by the juvenile court. The expense, publicity and delay of public hearings as well as limits on

8. WASH. REV. CODE ANN. 9.02.070 (1975 Supp.).

9. Dr. Koome was previously found guilty of contempt of court. The minor had petitioned the King County Juvenile Court for an order permitting an abortion. The petition was opposed by her parents and her temporary guardian, Catholic Children's Social Services, who had refused consent. The petition was granted but the parents immediately petitioned the Washington Supreme Court for a writ of certiorari and a temporary stay was granted pending a hearing on this. Despite the stay, the doctor performed the abortion. He was convicted of contempt and fined $300. In re Koome, 82 Wash. 2d 816, 514 P.2d 520 (1973).

10. State v. Koome, 84 Wash. 2d at 904, 530 P.2d at 263.

the juvenile court's jurisdiction to intercede were found to render this avenue of relief impractical.

The court had conceded that there are still areas of behavior for which minors could be treated differently from adults; it remained for the court to determine if there was sufficient state interest in this area to treat it as an exception.

The state urged that there were two compelling interests served by the consent provision: first, to assure an adequately reflective and informed decision on the part of the minor; second, to support the family unit and parental authority. Both arguments were rejected.

The court immediately dismissed the idea that the state could join with parents to coerce a minor into bearing a child:

> In the circumstances envisioned by this statute there seems to be little parental control left for the State to help salvage. An unmarried minor has become pregnant and her determination to get an abortion is unalterably opposed by her parents. Reestablishment of parental control by resort to the pure force of the criminal law seems both futile and manifestly unwise in such a situation.[11]

The state's interest in the quality of the abortion decision was held to be insufficient. This is because the statute provided for an absolute veto power and not for consultation on the subject with the presumably more knowledgeable parent. The court pointed out that the facts of this particular case showed that the refusal by the girl's parents was actually vindictive and against her best interests. It also noted that there were less drastic means available to insure a reflective decision, such as consultation with a physician and the common law requirement that physicians make a subjective inquiry into a minor's capacity to consent to medical treatment.

The court concluded its discussion of the due process issue by pointing out that it would be anomalous to hold that a state which has no power under most circumstances to prohibit abortion can grant such power to parents to forbid it.

While the court simply could have rested its decision on this line of reasoning, as the Supreme Court had done in *Roe v. Wade*, it chose to go a step further and found that the statute violated the equal protection clause of the fourteenth amendment and the Washington State Constitution.[12] This conclusion was based on three dis-

11. 84 Wash. 2d at 906, 530 P.2d at 265.

12. WASH. CONST. art. I, §12 (1889): "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

criminations made by the statute: "(1) between unmarried adult women seeking abortions and similarly situated minors; (2) between married and unmarried minors; and (3) between unmarried minors seeking abortions, and others seeking other types of medical care."[13]

The first distinction was deemed unjustifiable as it is impossible to establish a fixed statutory age at which a minor becomes competent to consent to abortion due to differing rates of mental and emotional maturity. The court recognized that some arbitrary age limits, such as those provided for voting or obtaining a driver's license, are permissible due to the impossibility of making subjective determinations of competency on a case by case basis. The court reasoned that no need for such a fixed limit existed here as the age of fertility provided a feasible age of consent.

The second distinction was ruled invalid, mainly as there is no reason to believe that married minors are necessarily more mature than unmarried ones. *Eisenstadt v. Baird*,[14] which established that the availability of contraceptives could not be based on marital status, was cited as the principal authority on the issue.

Finally, the singling out of abortion from all other forms of medical treatment was found to be unrelated to any legitimate state concern. Since under Washington law a minor could consent to other major medical treatment such as sterilization, there was no reason why she would need any more guidance to decide whether or not she would undergo an abortion as both procedures are simply different forms of birth control.

Judge Finley in a concurring opinion, explored possible areas of constitutionally permissible prohibition of abortion for minors and found two. These are situations in which a physical ailment made abortion more dangerous than childbirth, and situations where there was a greater probability of serious emotional instability resulting to the particular minor from an abortion rather than from childbirth. Even to do this, there would have to be procedural safeguards and the burden of proving the existence of either of the two stated conditions would be on the parent or guardian wishing to prevent the abortion.

Judge Stafford dissented, emphasizing other situations in which minors are legally prohibited from exercising rights enjoyed by adults. It was argued that the state had a compelling interest in a minor's decision on abortion due to concern for the minor's mental health and in an informed and objective decision. He considered

13. 84 Wash. 2d at 907, 530 P.2d at 266.
14. 405 U.S. 438 (1972).

access to the juvenile court to seek judicial consent a sufficient safeguard against arbitrary refusal of consent by parents.

No serious attempt has been made in this decision to provide an affirmative rationale for expanding minors' rights in the area of abortion. The court simply could not find any reason why such a crucial right should be denied to them. The court apparently did not take the state's arguments too seriously, considering some of its assertions in response to them. It is questionable that a girl can be conclusively presumed to be capable of giving meaningful consent because she is physiologically capable of childbirth. Nor does it follow that parents automatically lose control over a daughter when she becomes pregnant. Despite this, the court had adequate reason for its ruling if for no other reason than the prevailing weight of authority. The majority opinion cited two federal and two lower state court decisions to support its position. The dissent could not find any cases to the contrary. The principal significance of this case is that it is the first consideration of this issue by a state supreme court and as such it should be very influential.

While *State v. Koome* should go a long way toward settling the abortion question for minors, other issues persist concerning juveniles, mainly regarding their rights within the criminal process and freedom of expression issues, that will require clarification. *State v. Koome* arose primarily as a result of the increased interest in the area of minors' rights generated by the United States Supreme Court decision in the case of *In re Gault*,[15] which held that juvenile court proceedings must meet basic due process requirements although they do not have to provide all of the trappings of a normal criminal court.[16]

The ambiguity that has resulted concerning due process requirements for children is also present in the area of first amendment freedoms. A state can interfere with a minor's practice of his religion[17] but cannot authorize the recitation of prayer in public schools even when pupils are not required to participate.[18] A minor

15. 387 U.S. 1 (1967).

16. Some of these basic requirements include a notice of charges; the right to counsel, provided by the state if necessary; the right to confront and cross-examine witnesses; and the privilege aginst self-incrimination. Since *Gault*, other facets of the adult criminal process have been held to be indispensible to meeting due process requirements, while some have not. McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (minor does not have right to trial by jury); In re Winship, 397 U.S. 528 (1970) (minor cannot be convicted of a crime unless his guilt has been established beyond a reasonable doubt).

17. Prince v. Massachusetts, 321 U.S. 158 (1944).

18. Engel v. Vitale, 370 U.S. 421 (1962).

can be involved in political protest[19] but can be prohibited from seeing an X-rated movie.[20]

The instances cited above demonstrate an illogical differentiation between the rights and the restrictions of minors. For example, a minor is considered too immature, under the law, to view pornography while mature enough to decide to terminate a pregnancy. *State v. Koome* departs from the pattern of general vagueness in the area of constitutional rights of minors. *Koome* takes the issue of abortion, analyzes the opposing viewpoints, and finds the differentiation between adults and minors irrational. The court's pragmatic analysis in the area of abortion may have a salutary effect when the time comes to clear away more of the legal fog that has left minors in a constitutional twilight zone.

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19. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).
20. Ginsberg v. New York, 390 U.S. 629 (1968).