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Abortion, Parental and Spousal Consent, Requirements; Right to Privacy; Planned Parenthood of Central Missouri v. Danforth

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CONSTITUTIONAL LAW

Abortion • Parental and Spousal Consent Requirements • Right to Privacy

Planned Parenthood of Central Missouri v. Danforth, 96 S.Ct. 2831 (1976).

TWO MISSOURI-LICENSED physicians and Planned Parenthood of Central Missouri, a nonprofit corporation, originally brought this suit in U.S. District Court for the Eastern District of Missouri to challenge the constitutionality of the Missouri abortion statute¹ (hereinafter referred to as the Act).

Striking as "overbroad" only that portion of the Act which would have required physicians to attempt to save an aborted fetus' life at any stage of pregnancy,² the district court upheld the sections of the statute which required that during the first 12 weeks of pregnancy, a married woman seeking an abortion must have the consent of her spouse,³ and that an unmarried woman under 18 must have the written consent of a parent or person in loco parentis in order to obtain an abortion, unless a licensed physician certified that the procedure was necessary to save her life.⁴

Also upheld by the district court were sections of the Act requiring a woman's consent in writing and certified as "informed, freely given and not the result of coercion";⁵ declaring the survivor of an attempted abortion an abandoned ward of the state;⁶ prohibiting saline abortions after the first trimester,⁷ and sections prescribing certain record-keeping procedures.⁸ In addition, the court upheld that section defining viability as a point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid," and is presumably capable of "meaningful life outside the mother's womb" as being constitutional.⁹

On July 1, 1976, the United States Supreme Court, hearing the case on appeal, reversed the district court's decision in part, declaring that blanket provisions requiring parental consent for minors and spousal consent

¹ Planned Parenthood v. Danforth, 392 F. Supp. 1362 (E.D. Mo. 1975).

² 1974 Mo. Laws 809 §6(1) (Amended House Bill No. 1211).

³ *Id.* §3(3).

⁴ *Id.* §3(4).

⁵ *Id.* §3(2).

⁶ *Id.* §7.

⁷ *Id.* §9.

⁸ *Id.* §§10, 11.

⁹ *Id.* §2(2).

for married women seeking abortions are unconstitutional.¹⁰ In so doing, the Court through Justice Blackmun spoke to questions it had specifically reserved in its earlier decisions of *Doe v. Bolton*¹¹ and *Roe v. Wade*,¹² in which the woman's freedom to undergo an abortion during the first trimester of pregnancy was upheld as against any state interests.¹³ Also declared unconstitutional was the prohibition against saline abortions.¹⁴ In other areas, the district court decision was affirmed.¹⁵

The primary focus of this note deals only with the Court's reversal of those sections requiring spousal and parental consent for abortion. The Court's rejection of spousal and parental vetoes accords with its strong feeling of protection of the privacy of the mother, as advocated in *Roe*. By its action, the Court, although recognizing a valid interest on the part of the husband in his wife's pregnancy and in the growth and development of the fetus she is carrying, declined to allow the state to delegate to a spouse a veto power which the state itself is absolutely denied during the first trimester of pregnancy.¹⁶ In also declaring unconstitutional that section of the Act requiring parental consent to an abortion,¹⁷ the Court held the pregnant woman's right of privacy to be the paramount concern in the abortion decision.¹⁸

The plaintiffs who brought this action on their own behalf and purportedly on behalf of all Missouri patients desiring abortions, and all physicians who were performing or who desired to perform abortions within the state, sought declaratory relief and asked that enforcement of the Act be enjoined. Among the grounds for relief advanced were that certain provisions of the Act deprived patients of various constitutional rights, including the female patient's right to life which is affected by the risk inherent in childbirth or in medical procedures alternative to abortion, and the patient's rights under the Eighth Amendment to be free from cruel and unusual punishment by forcing and coercing her to bear each child she conceives.¹⁹

The Court, having concluded in *Roe v. Wade* that the right of privacy is broad enough to encompass a woman's decision whether or not to term-

¹⁰ *Planned Parenthood v. Danforth*, 96 S.Ct. 2831 (1976).

¹¹ 410 U.S. 179 (1973).

¹² 410 U.S. 113, 165 n. 67 (1973).

¹³ *Id.* at 153.

¹⁴ 96 S.Ct. at 2844-45.

¹⁵ *Id.* at 2846, 2848.

¹⁶ *Id.* at 2841.

¹⁷ 1974 Mo. Laws 809 §3(4) (1974).

¹⁸ 96 S.Ct. at 2844.

¹⁹ *Id.* at 2835-36.

inate her pregnancy,²⁰ declined to hold this right absolute. Instead, the *Roe* Court stated that the right must be considered against important state interests in regulation,²¹ and the permissibility of state regulation varies over the three stages of pregnancy, the first stage being pertinent to the present decision. During this stage, prior to the end of the first trimester,²² the abortion decision and its effectuation must be left to the judgment of the pregnant woman and her attending physician without interference from the state.²³

The Court has held that regulations limiting "fundamental rights" may be justified only by a "compelling state interest",²⁴ and that enactments must be narrowly expressed to protect only legitimate state interests at stake.²⁵ A legitimate state interest in this instance is the protection of the mother's health, which becomes compelling subsequent to the first trimester. A second legitimate state interest, the protection of potential life, occurs only at the point of viability. Although the state has legitimate interests to protect which grow substantially during a woman's pregnancy, these do not become "compelling" until a time after the first trimester.²⁶

To justify a mandatory parental consent requirement during the first trimester, the Court, to be consistent with *Roe*, would have had to find a compelling state interest in preserving either the family unit or the integrity of parental authority itself, which would be achieved through a parental consent requirement. Likewise, to justify a spousal consent requirement, the Court would have been forced to find (1) that the state had a compelling interest in preserving the husband's interest during those early months, *i.e.*, interest in the fetus and the procreative potential of the marriage, and (2) that the interest would be preserved through required spousal consent. Because, as indicated, the compelling state interest does not appear until after the first trimester, in neither instance was the requisite state interest found. Since the Court found that the state lacked veto power over abortions

²⁰ 410 U.S. at 153.

²¹ 410 U.S. at 154.

²² A trimester is approximately three months.

²³ 410 U.S. at 164. After the first trimester, the State may if it chooses, reasonably regulate the abortion procedure to preserve and protect maternal health. Finally, for the stage subsequent to viability, a point purposefully left flexible for professional determination, and dependent upon developing medical skill and technical ability, the state may regulate an abortion to protect the life of the fetus and even may proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

²⁴ *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Korematsu v. U.S.* 323 U.S. 214, 216 (1944).

²⁵ *Eisenstadt v. Baird*, 405 U.S. 438, 460 (1972); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940). See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

during the first trimester, it was therefore powerless to delegate veto power to the spouse or the parents of the abortion candidate.²⁷

The Court's ruling in *Danforth* on parental consent poses a number of immediate practical problems, particularly in states like Ohio, where consensual abortion statutes similar to the one ruled unconstitutional in *Danforth* are still in effect. Although spousal consent for abortion is not required in Ohio, and direct statutory complications are thereby avoided, the *Danforth* ruling on spousal consent presents an interesting framework for analyzing the Court's willingness to balance the rights of husband and wife.

SPOUSAL CONSENT

The Supreme Court has recognized that a right of personal privacy or a guarantee of certain areas or zones of privacy does exist under the Constitution.²⁸ Personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included within this guarantee of personal liberty.²⁹ It is within this zone that the Court has placed one's right to an abortion recognized in *Roe*, and the right of procreation first recognized in *Skinner v. Oklahoma*.³⁰

Thus, a purported interest of the spouse to be protected in granting him the right to veto an abortion is his procreative right. However, in *Skinner* the Court did not guarantee the individual a procreative opportunity; it merely safeguarded his procreative potential from state infringement. In contrast to this protection of procreative potential, the right of abortion established by the Supreme Court in *Roe* is a very personal right exercised by the woman as an individual. Therefore, protection of her partner's procreative right does not permit state infringement upon the woman's fundamental right to abortion.³¹

Although a man's procreative right cannot be held superior to a woman's right to abort in a marriage relationship, an alternative could be made available to insure a man his procreative potential. The Fifth Circuit Court

²⁷ 96 S.Ct. at 2841; 392 F. Supp. at 1375.

²⁸ 410 U.S. at 152.

²⁹ *Id.*

³⁰ 316 U.S. 535 (1942). A statute of Oklahoma provided for the sterilization by vasectomy or salpingectomy of "habitual criminals" defined therein. As applied to one who was convicted once of stealing chickens and twice of robbery, the Court held that the statute violated the Equal Protection Clause of the Fourteenth Amendment. In their decision, the Court recognized that marriage and procreation are fundamental to the very existence and survival of the race. *Id.* at 541. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Cf. *Buck v. Bell*, 274 U.S. 200 (1927), where the Court found a Virginia statute providing for sexual sterilization of inmates of institutions supported by the state, who shall be found to be afflicted with an hereditary form of insanity or imbecility, to be within the power of the state.

³¹ *Poe v. Gerstein*, 517 F.2d 787, 796 (5th Cir. 1975).

of Appeals has suggested that by making unconsented abortion a ground for divorce,³² a man could have available a willing partner. By entering into a new marriage relationship, the man could protect his procreative interests without infringing upon the former wife's right to abortion,³³ there being no viable alternative to secure the right of abortion.

A proposed second right of the spouse to be protected is his interest in the unborn child. However, the common law recognized no recovery at all for tortious injury to a fetus.³⁴ Both the criminal law and tort law have been reluctant to show a concern for protecting the father's interest in the fetus.³⁵ In *Kausz v. Ryan*,³⁶ an action for the death of an unborn child, the husband was denied recovery because the Court held both the existence of any injury to the fetus and damages ensuing from such an injury to be too speculative.

Basing the husband's interest in the fetus on his ultimate status as father of the child, the Supreme Court has found that the husband may establish a greater right than that of his wife to custody of the children upon dissolution of marriage.³⁷ However, his rights depend upon the existence of a family relationship, and since the fetus is not a person,³⁸ neither is it a child.³⁹ Consequently, the father's interest in the fetus is not equal to his interest in children with whom he has a familial relationship, and therefore his interest in the fetus, besides being difficult to evaluate, is not of sufficient magnitude to override the woman's decision to abort.

In light of the speculative nature of the husband's injury if the abortion is allowed, and the substantial nature of the wife's injury if the abortion is

³² *Id.* The court referred to *Kreyling v. Kreyling*, 20 N.J. Misc. 52, 23 A.2d 800 (1942). In that case a woman was granted a divorce on the grounds that her husband's refusal to participate in uncontracepted intercourse was constructive desertion. The court found that the husband's conduct frustrates one of the major purposes of marriage.

³³ *Id.* at 797.

³⁴ *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884); *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567 (1921); *Magnolia Coca-Cola Bottling Co. v. Jordan*, 124 Tex. 347, 78 S.W.2d 944 (1935). *Contra*, *Stidam v. Ashmore*, 109 Ohio App. 431, 167 N.E.2d 106 (1959) (admitted being minority view); *Cooper v. Blanck*, 39 So. 2d 352 (La. App. 1923) (decided under civil law); *Verkennes v. Cornelia*, 38 N.W.2d 838 (Minn. 1949) (admitted being minority view).

³⁵ See Note, *Abortion: The Father's Rights*, 42 CIN. L. REV. 441, 442-44 (1973).

³⁶ 51 Iowa 232, 1 N.W. 485 (1879).

³⁷ *Stanley v. Illinois*, 405 U.S. 645 (1972).

³⁸ *Roe v. Wade*, 410 U.S. at 157, 158 (1973). In *Roe* the Court found that the Constitution does not define "person" as such, however, its references are such that its use has application only postnatally, with no assurances that it has any pre-natal application. By the Constitutional references to "person" and also through the Court's recognition that throughout the major part of the 19th century prevailing abortion practices were far freer than today, the Court was persuaded that the word "person" as used in the Fourteenth Amendment, did not include the unborn.

prohibited, such a consent requirement could operate to bar some women from *any* opportunity to terminate a pregnancy unless the mother's health is endangered. This could in essence operate as an interference on some women comparable to those restrictions which anti-abortion statutes placed on all women.⁴⁰

The Court found in *Roe* that maternity or additional offspring may force upon the woman a distressful life and future. Psychological harm may be impending, as well as the fact that mental and physical health may be taxed by child care.⁴¹ A persuasive objection to interfering with a mother's right to an abortion involves also the impact on the mental and physical health of the child.⁴² Research indicates a link between unwanted pregnancies and child abuse,⁴³ and also reveals that children of unwilling mothers have a higher incidence of criminal and antisocial behavior.⁴⁴ Since in our society, care and continuing welfare of children usually are entrusted to the mother,⁴⁵ enforcement of spousal consent requirements, resulting in the birth of children unwanted by the woman charged with their care, would not only deprive the mother of her fundamental right of privacy, but could also have detrimental effects upon the child.

In spite of the fact that the decision whether to forego an abortion may have profound effects on the marital relationship as well as the mother/child relationship, the Court still found the woman's interests to predominate.⁴⁶ It again relied on the basic argument against state or spousal interference with abortion during the first trimester of pregnancy.⁴⁷

Although the Court recognized that the decision to terminate a pregnancy should be concurred in by both the wife and her husband, it found difficulty in believing that the goal of fostering mutuality and trust in a marriage or of strengthening the marriage relations would be achieved by giving the husband a veto power exercisable for any reason or for no reason at all.⁴⁸ Concentrating solely on the state's interest, the Court acknowledged

⁴⁰ See *Poe v. Menghini*, 339 F. Supp. 986 (D. Kan. 1972); *United States v. Vutich*, 305 F. Supp. 1032 (D.D.C. 1969).

⁴¹ 410 U.S. at 153.

⁴² Comment, *Consent Provisions In Abortion Statutes*, 1 FLA. ST. L. REV. 645, 658 n.102 (1973).

⁴³ See Beck, *Abortion: The Mental Health Consequences of Unwantedness*, 2 SEMINARS IN PSYCHIATRY (1970); R. GARDNER, *ABORTION: THE PERSONAL DILEMMA* 227 (1972); Hardin, *Abortion or Compulsory Pregnancy?* 30 J. MARRIAGE & FAM. NO. 2 (1968); Comment, *Consent Provisions in Abortion Statutes*, 1 FLA. ST. L. REV. 645, 638 n.102 (1973).

⁴⁴ D. SCHULDER & F. KENNEDY, *ABORTION RAP* 130-39 (1971). See Beck, *Abortion: The Mental Health Consequences of Unwantedness*, 2 SEMINARS IN PSYCHIATRY (1970).

⁴⁵ *Doe v. Doe*, 314 N.E.2d 128, 139 (Mass. 1974).

⁴⁶ 96 S.Ct. at 2841.

⁴⁷ *Id.* at 2842.

the state's interest in preserving the rights of the father but felt by allowing spousal consent requirements, the husband would be given a unilateral right to prevent or veto an abortion, whether or not he was the father of the fetus. Although the effect of a woman's option to secure an abortion without her husband's consent can also be considered a unilateral decision, the Court recognized the physical impact that childbearing has on her life.⁴⁹ Therefore, when the husband and wife disagree on the abortion decision, and no compromise is available, the immediate effect which a pregnancy has upon the wife justifies her right as the one who can in effect act unilaterally.⁵⁰

Justice Stewart's dissent in this case criticizes the Court's cursory treatment of Section 3 (3) of the Act, which requires spousal consent, and argues that the state is not delegating to the spouse the power to vindicate its interest, but recognizes the husband's own interests which should not be extinguished by the unilateral decision of the wife.⁵¹ A father's interest in having a child—perhaps his only child—may be unmatched by any other interest in his life.⁵² Recognizing marriage as an institution, any major change in family status should be a decision made jointly by the marriage partners. These are matters not to be decided by a federal judge but which the couple should be free to decide.

In light of the Missouri Act, the Court could have found support for the husband's consent claim in those "privacy" cases which have declared as fundamental the right to marry,⁵³ to establish a home and bring up children,⁵⁴ to procreate,⁵⁵ and most recently the private interest of the man in the children he has sired.⁵⁶ Instead, the Court refused to recognize these fundamental rights as being superior to that of the woman's to secure an abortion, with the consent of her physician during the first trimester of pregnancy.⁵⁷ Under the Missouri Act, a woman must secure consent from the man who is her husband at the time she desires the abortion, there being no requirement that the woman be married at the time of conception, and if married, to the same man whose consent is later required for the abortion. There is no requirement that the husband even be the father of the fetus, thereby basing the husband's interest in his marriage to the woman rather than in the paternity of the fetus. Another problematic aspect of

⁴⁹ *Id.*

⁵⁰ *Id.*, citing 410 U.S. at 153.

⁵¹ 405 U.S. at 651.

⁵² 96 S.Ct. at 2842.

⁵³ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

⁵⁴ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

⁵⁵ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

⁵⁶ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

spousal consent is that the husband's consent might be unobtainable because he cannot be located, forcing an undue burden upon the mother.⁵⁸

PARENTAL CONSENT PROVISION

In analyzing the Court's stance on abortions for minors without parental consent, it must first be noted that the Missouri provision under scrutiny was an absolute one,⁵⁹ which stated that no abortion could be performed on a minor during the first trimester without parental consent. Only therapeutic abortions were excepted. The Court referred to it as a "blanket" parental consent requirement,⁶⁰ one which amounted to a "veto power",⁶¹ and stated that "[t]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient. . . ."⁶²

The Court, then, explicitly extended to unmarried minors the proposition expounded earlier in *Roe*, that a woman with her doctor has a fundamental right during the first trimester of pregnancy to make an abortion decision without state interference. No compelling state interest toward unmarried minors, such as preservation of the family unit, was found sufficient to enable the state to interfere with that fundamental right. Still, the Court upheld the Missouri statutory requirement that a woman herself must give an informed consent in writing. The Court stressed that striking the parental consent provision "does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."⁶³ Rather, the Court appears to be moving toward a sort of "mature-minors" rule similar to that enacted for medical consent in Mississippi.⁶⁴

⁵⁸ *Id.*

⁵⁹ 1974 Mo. Laws 809, §3, reads in part:

No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except: . . . (4) With the written consent of one parent in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

⁶⁰ 96 S.Ct. at 2834 (1976) (syllabus 5).

⁶¹ *Id.* at 2844.

⁶² *Id.* at 2843 .

⁶³ 96 S.Ct. at 2844. Indeed, the record in the case at trial indicates that the executive director of Reproductive Health Services, the major medical facility performing abortions in St. Louis, Mo., would weigh a number of personal factors in determining a minor's informed consent. Judith Widdicombe testified that a girl's maturity, the level of her decision-making, her ability to carry through with the abortion procedure, "extenuating circumstances," and education and intelligence would all be considered in deciding whether a minor's consent to abortion were sufficiently informed. Record at 152-53, as reported in Brief for Appellant as Amicus Curiae (U.S. Catholic Conference), at 21-22.

⁶⁴ Miss. CODE ANN. ch. 41, §41-3(h) (Lawyers Co-op. 1972) provides that any "unemancipated minor of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment or procedure may consent to such for himself." For discussion of how mature minors provisions have become the most recent expansion of

To evaluate the decision's precedential value for determining the constitutionality of other less absolute abortion statutes dealing with parental consent, it is necessary to examine the Court's opinion in *Danforth's* companion case, *Bellotti v. Baird*.⁶⁵

In that opinion, growing out of a class action against the Massachusetts Attorney General by an abortion counseling organization and several unmarried pregnant women, the Supreme Court ruled that a 1974 Massachusetts statute dealing with parental consent for abortions of unmarried minors had been erroneously held unconstitutional by a three-judge district court.⁶⁶ The Supreme Court stated that the statute, providing for alternatives in cases where consent is refused,⁶⁷ was a proper subject for abstention.⁶⁸ Instead of ruling on constitutionality, the Court indicated that the district court judges should have certified appropriate questions to the Massachusetts Supreme Judicial Court for interpretation concerning the statute's meaning and attendant procedures so that a constitutional question could possibly be avoided.⁶⁹

Exactly what might constitute a constitutional procedure for obtaining parental consent for abortions was not specified, but the Supreme Court indicated that a federal constitutional challenge might be "avoided or substantially modified"⁷⁰ if, as the appellants had indicated in their arguments, the statute were interpreted by the state as one

. . . that prefers parental consultation and consent, but permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent

no-consent medical provisions for minors, see Pilpel, *Minors' Rights to Medical Care*, 36 ALB. L. REV. 462 (1972); Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001 (1975).

⁶⁵ 96 S.Ct. 2857 (1976).

⁶⁶ *Bellotti v. Baird*, 393 F.Supp. 847 (D.C. Mass. 1975).

⁶⁷ MASS. GEN. LAWS ANN. ch. 112, §12(P) (West Supp. 1974) is applicable to non-emergency abortions and provides in pertinent part: (1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient.

⁶⁸ 96 S.Ct. at 2866.

⁶⁹ *Id.* at 2867.

⁷⁰ 96 S.Ct. at 2866. Published by IdeaExchange@UAKron, 1977

to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests.⁷¹

Later in the *Bellotti* opinion, the Court noted that with minors, ". . . there are unquestionably greater risks of inability to give informed consent."⁷² The clear implication is that a statute which provides for a hearing before minors are allowed abortions without parental consent would probably be upheld as constitutional, provided that the state court's interpretation indicated that hearing procedures did not unduly burden minors in exercising a fundamental right.

It does not appear likely that the *Danforth* decision signals a wholesale change in the Court's historical attitude toward parental consent or that it renders statutory consent provisions in other areas constitutionally suspect.⁷³ The Court has consistently upheld the proposition that minors have certain Constitutional rights.⁷⁴ Earlier Court decisions, cited by appellee amici briefs,⁷⁵ which stressed the right of parents to exercise control over their minor children, did not examine situations, such as abortion, in which emotional conflicts between parents and children are likely. Rather, the Court examined the power of the state in relation to desires apparently shared by parents and their children.⁷⁶

Not all the Justices shared the view that the Court's historical attitude toward parental consent has remained consistent in *Danforth*. Chief Justice Burger, along with Justices Rehnquist and White, in an opinion concurring in part and dissenting in part, suggested that Missouri is entitled to protect a minor from making a decision not in her own best interests. In so doing they pointed to examples, also offered by Justice Stevens in his dissenting

⁷¹ *Id.* at 2865.

⁷² *Id.* at 2866.

⁷³ Dr. Eugene Diamond and Americans United for Life submitted an amicus curiae brief for Appellant in which it is argued that if the Court strikes the Missouri parental consent requirement, then other legislation to "protect the minor from the possible effects of her immaturity" will become constitutionally suspect. Included in their predictions of jeopardized legislation are laws requiring parental consent for marriage, forbidding distribution of obscene material to minors, prohibiting sale of liquor and tobacco, and making minors' contracts voidable. Brief for *Danforth* Appellant at 94 (amicus curiae).

⁷⁴ See, e.g., *Breed v. Jones*, 421 U.S. 519 (1975) (right against double jeopardy is asserted); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (confirming First and Fourteenth Amendment rights for juveniles); *In Re Gault*, 387 U.S. 1 (1967) (involving due process rights in juvenile proceedings).

⁷⁵ Amici briefs cited: *Ginsberg v. New York*, 390 U.S. 629 (1968); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *In re Appeal in Maricopa County*, 111 Ariz. 588, 536 P.2d 197 (1975); *Doe v. Planned Parenthood*, 29 Utah 356, 410 P.2d 75 (1973), *cert. denied* 414 U.S. 805 (1973).

⁷⁶ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish children gave no indication they resisted parents' restrictions on formal schooling beyond eighth grade); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) Oregon (statute requiring public school attendance was struck down with no demonstrated resistance by minors involved).

opinion,⁷⁷ of states protecting minors by not allowing them to make enforceable bargains, to marry without their parents' consent, to work or travel wherever they please, or attend exhibitions of constitutionally protected adult motion pictures.⁷⁸

Additionally, Justice Stevens argued that a parental consent requirement such as Missouri's would have the healthy effect of necessarily involving parents in an important decision-making process. He noted:

It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will exercise his or her veto arbitrarily to further a selfish interest rather than the child's interest.⁷⁹

Justices Stewart and Powell concurred in the majority opinion on all issues. Concerning parental consent, Justice Stewart wrote that the Missouri law's "primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion."⁸⁰

In support of the majority's reasoning, it should be noted that Supreme Court cases cited by appellees, which indicate that states have broader authority to protect children than adults,⁸¹ are not necessarily inconsistent with the opinion in *Danforth*. Because of the physical and emotional trauma attributed to unwanted teen-age pregnancy,⁸² it can be argued that in relaxing consent requirements for abortion, the Supreme Court has allowed the states once again the authority to protect minors—this time from arbitrary parental vetoes.

PRACTICAL PROBLEMS IN OHIO

The implications of the ruling with respect to criminal and civil liability

⁷⁷ 96 S.Ct. at 2856.

⁷⁸ However, the Court notes Appellants' argument that the Missouri statute does not require parental consent for other medical services including care for pregnancy (excepting abortion), venereal disease and drug abuse. Likewise, married minors need not obtain parental consent to abort under Missouri law. 96 S.Ct. at 2843.

⁷⁹ 96 S.Ct. at 2857.

⁸⁰ *Id.* at 2851.

⁸¹ See, e.g., *Ginsberg v. N.Y.*, 390 U.S. 629, 636 (1968) (upholding statute forbidding distribution of obscene literature to minors, in which the Court expressly declined to extend the holding to the "totality of the relationship of the minor and the state"); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding right of state to prohibit literature distribution by minors even where parents consented).

⁸² For discussion of high-risk pregnancies among teen-agers, see Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305, 307-8 (1974), in which toxemia, maternal and infant mortality and infant brain damage are discussed, as well as social problems of the pregnant school dropout and the resulting poverty cycle.

of physicians and medical facilities performing abortions would appear to be an issue more serious than any philosophical shift by the Court.

In Ohio and a number of other states, the Court's decisions in *Roe* and *Doe* meant not only the repeal of criminal abortion statutes but also the hasty enactment of legislation to control abortion decisions and procedures within the new parameters set by the Court.⁸³ Even before the *Danforth* decision, lower courts had struck down as unconstitutional new statutes requiring parental consent for abortion in a number of states.⁸⁴

Ohio's consensual abortion statute,⁸⁵ similar to the Missouri statute considered in *Danforth*, has been ruled unconstitutional by a three-judge panel of the Northern District Court in Cleveland as a result of a suit filed by the American Civil Liberties Union on behalf of two 17 year olds whose parents refused to permit an abortion.⁸⁶ Noting that the Ohio statute is "inconsistent with the standards set forth in *Danforth*," the panel permanently enjoined its enforcement.⁸⁷ Like the Missouri statute, Ohio's extended an absolute veto power to parents, and its repeal appears inevitable. Unless it is replaced with a statute constitutionally acceptable within the framework of the *Bellotti* decision, Ohio doctors and medical facilities are without guidelines in determining whether the substantial number of their abortion candidates, who are minors,⁸⁸ have given an informed consent.

At least until new legislation is drafted, there are a number of factors which might pressure doctors and medical facilities in Ohio toward a finding

⁸³ Within 21 months after the *Roe* decision, 31 state legislatures had enacted 57 new laws related to abortion and its regulation. Twelve states—Indiana, Kentucky, Louisiana, Massachusetts, Missouri, Montana, Nebraska, Nevada, Ohio, Pennsylvania, South Carolina and South Dakota—enacted legislation requiring some form of parental consent for minors. 3 FAM. PLANNING/POP. REP. No. 5 at 90 (Oct. 1974).

⁸⁴ *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975); *Doe v. Zimmerman*, 405 F. Supp. 534 (M.D. Pa. 1975); *Foe v. Vanderhoof*, 389 F. Supp. 947 (D. Colo. 1975); *Doe v. Rampton*, 366 F. Supp. 189 (D.C. Utah 1973); *Ballard v. Anderson*, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971); *In re Diane*, 318 A.2d 629 (Del. Ch. 1974); *Wolfe v. Schroering*, 388 F. Supp. 631 (W.D. Ky. 1974).

In an interesting switch, the Court of Special Appeals for Maryland ruled in *Matter of Smith*, 16 Md. App. 209, 295 A.2d 238 (1972) that a 16 year old could not be compelled to have an abortion because her mother wanted her to have one.

⁸⁵ OHIO REVISED CODE ANN. §2929.12 (Page Supp. 1975) states: (A) No person shall perform or induce an abortion without the informed consent of the pregnant woman. (B) If the pregnant woman is an unmarried minor, the pregnant woman's consent must be accompanied by the informed consent of one of her parents or of her custodian or guardian. (C) Whoever violates this section is guilty of consensual abortion, a misdemeanor of the first degree and for subsequent offenses, a felony of the fourth degree; and is liable to the pregnant woman for civil compensatory and exemplary damages.

⁸⁶ *Hoe v. Brown*, Civil No. 76-185 (N.D. Ohio, filed Aug. 31, 1976).

⁸⁷ *Id.* at 2.

⁸⁸ Brief for Appellant at 96-97 indicated unmarried minors constituted 16.2 percent of all abortions in New York City in 1971; 32.3 percent of California abortions in 1973; and approximately 29 percent of all abortions performed in the combined states of Alaska, Colorado, Delaware, Georgia, Hawaii, New York, Oregon and South Carolina during 1972.

that a minor's consent to an elective abortion is not sufficiently "informed" to proceed with the abortion, absent parental consent. The questionable consensual abortion statute currently provides, as did the Court in *Danforth*, that "informed" consent is required of any pregnant woman before an abortion can be performed. That provision is constitutional by *Danforth* standards. The doctor who does not receive informed consent can be found guilty under the statute of a first-degree misdemeanor.⁸⁹

Without any pre-abortion procedure, such as a court hearing, to determine whether a minor's consent is informed, the Ohio doctor must rely on a court later in a possible criminal action to determine that his finding that the minor's consent was informed was a reasonable one. Historically, doctors faced with possible liability, have been found to "err toward conservatism."⁹⁰

Besides being faced with possible criminal action, the Ohio doctor who performs an abortion on a minor without parental consent under present law may never be paid for his services. Contracts entered by minors in Ohio are voidable and may be disaffirmed under both statute⁹¹ and common law⁹² unless they are for items which a court rules to be "necessary"⁹³ or are entered fraudulently by misrepresentation of age.⁹⁴ Ohio laws allowing treat-

⁸⁹ OHIO REV. CODE ANN. §2929.12(c) (Page Supp. 1975). Interestingly, physicians who might seek to verify their finding of informed consent by a minor abortion candidate will not find an easy solution in a book of legal forms. Although the American Medical Association has issued suggested consent forms for the performance of an operation (15 AM. JUR. 2d LEGAL FORMS, *Physicians and Surgeons* §202:145 (1973)) and for the performance of a therapeutic abortion (15 AM. JUR. 2d LEGAL FORMS, *Physicians and Surgeons* §202:129 (1973)) no consent form for a non-therapeutic abortion is offered.

Indeed, the form book authors comment, "Due to recent court decisions, the law regarding abortions is not subject to coherent generalization, except that more restrictive statutes appear for the present at least, to be of questionable validity. Due to this state of flux in the law, the practitioner would be well advised to consult the most recent statutory enactments and court decisions in all cases." (15 AM. JUR. 2d LEGAL FORMS, *Physicians and Surgeons* §202:123 (1973)).

⁹⁰ Stern, *Medical Treatment and the Teenager: The Need For Parental Consent*, 7 CLEARINGHOUSE REV. 1, 4-5 (May 1973).

⁹¹ OHIO REV. CODE ANN. §3109.01 (Page Supp. 1975).

⁹² For discussion on reason for common law requirement of parental consent to surgical operations on minors, see Justice Hart's concurring opinion in *Lacey v. Laird*, 166 Ohio St. 12, 16-19 139 N.E.2d 25 (1956). In that case, the Ohio Supreme Court awarded nominal damages to a minor patient who had plastic surgery without her parents' consent.

⁹³ See, e.g., *Mestetzko v. Elf Motor Co.*, 119 Ohio St. 575, 165 N.E. 93 (1929) (auto sales contracts entered by a minor fell within the rule for non-necessaries but were not subject to voidability if the affirmative defense of fraud was successfully advanced); *Lemmon v. Beeman*, 45 Ohio St. 505, 15 N.E. 476 (1888) (title to a stock of drugs, though subject to the general voidability rule of minors' contracts for unnecessary items, was considered restored to the vendor's estate when the minor-vendee disaffirmed the sales contract); *Morton v. Lutchin*, 88 Ohio App. 75, 96 N.E.2d 784 (1950) (a contract for a new car, not established as a "necessary," was considered subject to disaffirmance).

⁹⁴ In *Haydocy Pontiac Inc. v. Lee*, 19 Ohio App. 2d 717, 250 N.E.2d 898 (1969), a car dealer, faced with default by a minor purchaser, was allowed to recover fair property value because the minor had misrepresented his age.

ment for minors without parental consent for drug abuse⁹⁵ and venereal disease⁹⁶ both specially stipulate that a minor cannot later disaffirm his personal consent on account of minority. They also indicate that his parent, parents, or guardian may not be held liable for medical diagnosis or treatment if they did not consent. The implication is that medical contracts entered into by minors without their parents' consent must be statutorily protected or the contracts will be voidable.

Similarly, it is questionable whether a married woman of majority may hold her husband to any financial obligations she has incurred in having an abortion performed without his consent. Although she may not personally disaffirm the contract, as may a minor, her husband under Ohio law is only liable for "necessaries for her support."⁹⁷ An elective abortion is arguably not a necessary. In situations where the woman is not able to pay for her own abortion, a doctor may not be able to collect from her unconsenting spouse.

An additional complication, possible withholding of Medicaid benefits, could mean that doctors and medical facilities in Ohio would encounter even greater financial difficulties than those in other states. Although most states allow the expenditure of Medicaid funds for abortions by eligible patients,⁹⁸ and have extended that eligibility to minors,⁹⁹ Ohio currently has a statutory prohibition against spending such funds for an abortion unless it is "necessary to preserve the life or physical or mental health of the pregnant woman."¹⁰⁰ Although the statute is currently not being enforced, pending a decision on its constitutionality,¹⁰¹ it is possible that Ohio women who desire elective

⁹⁵ OHIO REV. CODE ANN. §3719.012 (Page Supp. 1975).

⁹⁶ OHIO REV. CODE ANN. §3709.241 (Page Supp. 1975).

⁹⁷ OHIO REV. CODE ANN. §3103.03 (Page Supp. 1975) states in pertinent part: "The husband must support himself, his wife, and his minor children out of his property or by his labor. If he is unable to do so, the wife must assist him so far as she is able If he neglects to support his wife, any other person, in good faith, may supply her with necessaries for her support, and recover the reasonable value thereof from the husband unless she abandons him without cause."

⁹⁸ Analysis, *Medicaid Pays for Abortion in Most States*, 5 FAM. PLANNING/POP. REP. NO. 1 at 11 (Feb. 1976).

⁹⁹ Title XIX, SOCIAL SECURITY ACT §1905(a)(4) was amended in 1972 to require states to make family planning services available to minors of childbearing age. Department of Health, Education, and Welfare. FAMILY PLANNING, CONTRACEPTION AND VOLUNTARY STERILIZATION: AN ANALYSIS OF LAWS AND POLICIES IN THE U.S., EACH STATE AND JURISDICTION 70 (Pub. No. (HSA) 74-16001, 1974).

¹⁰⁰ OHIO REV. CODE ANN. §5101.55(c) (Page Supp. 1975).

¹⁰¹ Briefs and stipulations have been filed but as yet no decision has been reached by a three-judge panel convened by the U.S. District Court for Southern Ohio, to consider the statute's constitutionality. The Southern District had originally found the statute invalid as conflicting with the Social Security Act and ordered payments made. *Roe v. Ferguson*, 389 F. Supp. 387 (S.D. Ohio 1974). The Sixth Circuit, on appeal, found the laws consistent but remanded the constitutional question to the three-judge panel where it is now pending. 14

abortions and are economically eligible for Medicaid benefits will face a funds cut-off.¹⁰² In such case, Ohio minors would be in the difficult position of neither being able to contract privately for abortion services without their parents' consent nor to rely on public funding.

CONCLUSION

While not a radical departure from other U.S. and lower court decisions dealing with parental and spousal consent issues, the *Danforth* decision may present problems in the future.

The consequences of this decision beyond the single pregnancy if the wife chooses to abort without her husband's consent could be to effectively prevent her husband from having any children. An alternative could be to allow the unconsented abortion, but assure the husband of an evidentiary basis for divorce.¹⁰³ In addition, if a wife chooses to exercise her right to an abortion against her husband's will, and is unable to pay the expenses involved, her husband may become liable for the costs incurred. Although in Ohio, the husband is only liable for "necessaries for her support", one might argue that such an abortion could in some instances be found to be such a necessary. If not so found, and the wife is unable to pay, the doctor cannot collect from her spouse, and may be unable to recover for his services.

In the instant case, the Court has limited its decision to that stage of the pregnancy where the fetus is not viable, thus permitting speculation that a different ruling could be forthcoming for the spouse during the second trimester. However, because the state has no interest to protect during the first trimester and therefore none to delegate to the spouse,¹⁰⁴ those states with spousal consent statutes will be forced to declare them invalid and attempt to protect the spouse's interest in another manner.

Planned Parenthood v. Danforth and its companion case, *Bellotti v. Baird* present perhaps their greatest challenge to legislatures in states like

Roe v. Ferguson, 515 F.2d 279 (6th Cir. 1975). Currently in effect is a temporary restraining order to continue Medicaid payments pending the panel's decision. *Roe v. Ferguson*, No. 74-315 (S.D. Ohio July 14, 1975). At least two states have appealed similar orders, which mandated public fund expenditure for elective abortions, to the U.S. Supreme Court. *Maher v. Roe*, No. 75-1440, 44 U.S.L.W. 3761 (appeal filed April 4, 1976), 45 U.S.L.W. 3062 (prob. juris. noted July 6, 1976) (appealing order of U.S. District Court for Connecticut that welfare recipients be reimbursed for elective abortions); *Toia v. Klein*, No. 75-1749, 45 U.S.L.W. 3069 (appeal filed June 2, 1976) (appealing order of U.S. District Court for Eastern New York that indigents receive Medicaid funds for elective abortions).

¹⁰² Neither must a corporation provide insurance coverage for pregnancy-related disabilities. *General Electric v. Gilbert*, 45 U.S.L.W. 4031 (Dec. 7, 1976).

¹⁰³ *Poe v. Gerstein*, 517 F.2d 787, 796 (5th Cir. 1975).

Ohio, where existing parental consent abortion statutes have been clearly outlawed by their holdings. The Court in *Bellotti* indicates that certain guidelines, such as a court hearing, for determining a minor's informed consent may be acceptable, so long as they are not unduly burdensome. It appears clearly that they should be adopted so as to maximize the freedom with which doctors can proceed without threat of criminal liability.

Similarly, in Ohio, a newly-enacted statute dealing with abortions should contain provisions similar to those now effective in venereal and drug abuse statutes, to prevent a minor from disaffirming his informed consent and voiding his contract. Until these steps are taken, in Ohio, at least, the parental veto on minors who seek abortions without their parental consent may be replaced with an equally burdensome economic veto. If this is so, the spirit of the *Danforth* decision will not have been achieved.

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DOMESTIC RELATIONS

*Divorce and Alimony • Separation Agreements • Jurisdiction of Court
to Modify • Impairment of Contract • Statutory Provisions*

Wolfe v. Wolfe, 46 Ohio St. 2d 399, 350 N.E.2d 413 (1976).

WITH THE decision of *Wolfe v. Wolfe*¹ the Ohio Supreme Court joins the majority of American jurisdictions² which hold that where a court has the general power to modify a decree for alimony or support³ the exercise

¹ 46 Ohio St. 2d 399, 350 N.E.2d 413 (1976).

² See, e.g., *Levitt v. Levitt*, 62 Cal. 2d 477, 399 P.2d 33, 42 Cal. Rptr. 577 (1965); *Bowman v. Bowman*, 11 Ill. App. 3d 719, 298 N.E.2d 339 (1973); *Heinmuller v. Heinmuller*, 257 Md. 672, 264 A.2d 847 (1970); *Lytle v. Lytle*, 357 Mich. 676, 99 N.W.2d 377 (1959); *Berkowitz v. Berkowitz*, 55 N.J. 564, 264 A.2d 49 (1970); *Goldman v. Goldman*, 282 N.Y. 296, 26 N.E.2d 265 (1940); *Kinne v. Kinne*, 82 Wash. 2d 360, 510 P.2d 814 (1973).

³ For the purposes of modification, the Court in *Wolfe* drew the distinction between alimony as an award for the support of the spouse and the property settlement, the latter remaining beyond the power of the Court to modify. 46 Ohio St. 2d at 418, 350 N.E.2d at 425. See note 18 *infra*. The Court noted that although the legislature has failed to give a clear definition