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Abortion; Parental Consent; Minors' Rights to Due Process, Equal Protection and Privacy; State v. Koome

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CONSTITUTIONAL LAW

Abortion · Parental Consent · Minors' Rights to Due Process, Equal Protection and Privacy

State v. Koome, 84 Wash. 2d 901, 530 P.2d 260 (1975)

WHEN THE UNITED STATES Supreme Court, in 1973, broadly extended women's right to abortion in *Roe v. Wade*¹ and *Doe v. Bolton*,² the Court did not address itself to the constitutionality of state statutes requiring parental consent for a minor's abortion. But it is in the wake of *Roe* and *Doe* that the Washington Supreme Court in *State v. Koome*³ has stricken that state's consent statute.⁴

The Washington court had before it a physician appealing his conviction for performing an abortion on an unmarried 16-year-old woman, a ward of the King County Juvenile Court, which had given its consent to the abortion. However, the young woman's parents and the Catholic Children's Services, her temporary guardian, both opposed the abortion and were granted a stay of the abortion order pending review by the state supreme court. During the stay, Dr. Koome performed the abortion.⁵ The supreme court held that the Washington consent statute "too broadly encumbers the right of unmarried minor women to choose to terminate pregnancy, and unjustifiably discrimi-

¹410 U.S. 113 (1973). A pregnant single woman (whose age is not given in the opinion) brought this class action resulting in a declaratory judgment that the Texas criminal abortion law violated due process and the right to privacy. The law prohibited abortion at any stage of pregnancy except to save the mother's life. The Court decided that: (a) during approximately the first trimester the abortion decision should be made according to the attending physician's medical judgment; (b) during approximately the second trimester the state can regulate abortion procedure in the interests of the mother's health; and, (c) only subsequent to viability can the state proscribe abortion except to preserve the mother's life or health.

²410 U.S. 179 (1973). A pregnant married woman (aged 22) brought this class action resulting in a declaratory judgment that the Georgia criminal abortion law violated the fourteenth amendment. The law, patterned after the MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962), proscribed abortion except to preserve the mother's life or health, to abort a fetus likely to be born seriously defective, or to end a pregnancy resulting from rape. To be permitted, an abortion required in addition, *inter alia*, approval by a hospital abortion committee and confirmation of the attending physician's decision by two independent physicians.

³*State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1975).

⁴ WASH. REV. CODE ANN. § 9.02.070 (Supp. 1970), which provided:

A pregnancy of a woman not quick with child and not more than four lunar months after conception may be lawfully terminated . . . 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 prior consent of her husband or legal guardian, respectively. . . .

⁵ 84 Wash. 2d at 902, 530 P.2d at 262.

nates between similarly situated groups of women in terms of their right to obtain a legal abortion."⁶

It is important to consider that while Washington's statute was in effect before the *Roe* and *Doe* decisions, comparable legislation was introduced in other states following those decisions.⁷ Even the statutes styled after the American Law Institute's Model Penal Code⁸ require parental consent for an abortion on an unmarried minor. What these statutes reflect, and what any liberal law on abortion for minors must counter, is the firmly established common law support for the family institution in general,⁹ and in particular for the authority of parents over their children.¹⁰ The legal disabilities of minors that in turn result are thus viewed as "privileges . . . the object of the law being to secure infants from damaging themselves . . . by their own improvident acts or prevent them from being imposed on by others."¹¹

Courts have consequently seen fit to uphold a state's regulating the participation of minors in a variety of activities that are considered legal for adults.¹² That this distinction still thrives is clear in the *Koome* dissent,¹³ citing the recent case of *Ginsberg v. New York*,¹⁴ which upheld a law using a variable definition of obscenity as applied to materials sold to persons over and under age 17.

A further justification for requiring parental consent, the one on which the lower Washington court had heavily relied in convicting Dr. Koome, is "the assurance of an adequately reflective and informed decision on the part of the minor woman."¹⁵ This too is consistent with the common law requirement of the parent's consent for any medical treatment,¹⁶ a requirement designed to protect the minor because she is assumed unable to decide rationally.¹⁷ The parental consent theory ignores, or at least refuses to rely

⁶ *Id.* at 903, 530 P.2d at 262.

⁷ *E.g.*, IND. STAT. ANN. § 35-1-58.5.2(a)(2) (Supp. 1973); NEV. LAWS 1973 ch. 766 (May 3, 1973); S.D. COMP. LAWS ANN. § 34-23A-7 (Supp. 1973); UTAH CODE ANN. § 76-7-304(4) (Supp. 1973). *See Analysis: Nearly 200 Abortion Bills Introduced in 1973*, 2 FAM. PLANNING/POP. REP. 54 (1973).

⁸ MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962).

⁹ *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927).

¹⁰ *In re Agur-Ellis*, 10 Ch. D. 49, 71-72 (1878); 2 KENT, COMMENTARIES 203, *cited in*, J. MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS 446 (1931).

¹¹ *Dixon v. United States*, 197 F. Supp. 798, 803 (W.D.S.C. 1961).

¹² *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

¹³ 84 Wash. 2d at 918, 530 P.2d at 271.

¹⁴ *Ginsberg v. New York*, 390 U.S. 629 (1968).

¹⁵ 84 Wash. 2d at 906-07, 530 P.2d at 264.

¹⁶ *Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941).

¹⁷ The consent requirement is also technically designed to protect the physician from tort liability. *Id.* at 121, 122. *But see* *Ballard v. Anderson*, 4 Cal. 3d 873, 880, 484 P.2d 1345, 1350, 95 Cal. Rptr. 1, 6 (1971). The *Koome* court also notes that a competent physician

upon, the physician's legal duty to ascertain that any patient gives informed consent to any medical treatment.¹⁸

In striking down Washington's restrictive legislation, the *Koome* court followed liberal trends in two areas of litigation—sexual freedom for adults and the extension of minors' rights—as well as enlightened social policy. The recent liberal holdings on sexual freedom, including but not restricted to abortion, have relied on three constitutional principles: due process, privacy, and equal protection.

In both *Roe* and *Doe* the fourteenth amendment was controlling. The *Roe* decision held:

A state criminal abortion statute . . . that excepts from criminality only a *life saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.¹⁹

The *Doe* decision, handed down the same day as *Roe*, held "that the . . . requirements as to approval by the hospital abortion committee [and] as to confirmation by two independent physicians . . . are . . . violative of the Fourteenth Amendment."²⁰ From these two statements the Washington court broadly concluded: "The *Roe* and *Doe* decisions held that state statutes which denied or conditioned the right of adult women to choose abortion were inadequately justified, and consequently violative of due process."²¹ Again citing *Roe*,²² the court also addressed the essential question "whether the statute's abridgment of fundamental rights is justified by some 'compelling state interest' which it furthers. If it is not its impact constitutes a violation of due process."²³

The "fundamental right" at issue is privacy; the strongly worded, but not very detailed, references to due process may be included to shore up what some consider an unsettled right. The dissent in *Koome* reflects this

performing most types of surgery on a consenting minor in fact runs little risk of civil liability for lack of a parent's consent. 84 Wash. 2d at 913, 530 P.2d at 268, *citing*, *Pilpel, Minors' Rights to Medical Care*, 36 ALBANY L. REV. 462, 466 (1972) [hereinafter cited as *Pilpel*].

¹⁸ *Ballard v. Anderson*, 4 Cal. 3d 873, 883, 484 P.2d 1345, 1350, 95 Cal. Rptr. 1, 8 (1971); Note, *Minors and Contraceptives: The Physician's Right to Assist Unmarried Minors in California*, 23 HAST. L.J. 1486, 1501-02 (1972).

¹⁹ 410 U.S. at 164.

²⁰ 410 U.S. at 201.

²¹ 84 Wash. 2d at 903-04, 530 P.2d at 263.

²² 410 U.S. at 155.

²³ 84 Wash. 2d at 906, 530 P.2d at 264.

view when it notes that "the Supreme Court has been less than precise in search of a basis for an individual's 'right of privacy.'" ²⁴

In principle, the right to privacy is not new. It was articulated long ago by Mr. Justice Brandeis: "The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." ²⁵ By the time of *Roe* and *Doe*, with *Griswold v. Connecticut* ²⁶ as the stepping stone, the right to privacy had received fourteenth amendment sanction: "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." ²⁷ The Court had already extended *Griswold* to unmarried adults: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." ²⁸

The *Koome* court was not even the first to extend abortion rights to minors without parental consent on privacy grounds. The Florida consent statute had already been struck down in the same year as *Roe* and *Doe* in the case of *Coe v. Gerstein*, ²⁹ which held "that a pregnant woman under 18 years of age cannot, under the law, be distinguished from one over 18 years of age in reference to 'fundamental,' 'personal,' constitutional rights." ³⁰ The *Koome* court relied heavily on *Coe* when it concluded that: "A demand for parental consent, backed by the power of the criminal law of the state, is not necessary and cannot be constitutionally justified." ³¹ This echoes the language used in *Coe*:

Certainly . . . parents ought to advise and guide their unmarried, minor daughters in a decision of such import. But a state which has no power to regulate abortions in certain areas simply cannot constitutionally grant power to . . . parents to regulate in those areas. Therefore . . . parents cannot look to the state to prosecute and punish the physician (or other participants) who performs an abortion against the wishes of the . . . parents. ³²

²⁴ *Id.* at 919, 530 P.2d at 271.

²⁵ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion). See also Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195, 198 (1890).

²⁶ *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965) (the right to privacy as applied to contraception).

²⁷ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

²⁸ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

²⁹ 376 F. Supp. 695 (S.D. Fla. 1973), *appeal dismissed*, 417 U.S. 279 (1974); *accord*, *Doe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973); *Jones v. Smith*, 278 So. 2d 339 (Fla. App. 1973), *cert. denied*, 415 U.S. 958 (1974); *In re P.J.*, 2 *Fam. Planning/Pop. Rep.* 57 (D.C. Super. Ct. Fam. Div. 1973).

³⁰ 376 F. Supp. at 698.

³¹ 84 Wash. 2d at 909, 530 P.2d at 266.

³² 376 F. Supp. at 699.

The third constitutional principle often relied upon in extending sexual rights is equal protection. When the *Koome* court held "that the distinctions drawn between different classes of pregnant women in [Washington's consent statute] violate the equal protection clause of the Fourteenth Amendment,"³³ it specifically cited *Eisenstadt v. Baird*,³⁴ which struck down analogous marital status distinctions. The *Koome* court found in the Washington statute

. . . three discriminations: (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. None of these legal lines trace the contours of the asserted state justifications closely enough to withstand equal protection scrutiny.³⁵

In addition to the liberal trend in areas of sexual freedom, the broadened abortion rights for minors also stem from the extension of minors' rights generally. "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"³⁶ said the Supreme Court in the landmark case, *In re Gault*, increasing due process safeguards in the juvenile courts. The Court had, over 20 years earlier, acknowledged minors' first amendment rights by upholding a child's right to keep silent during the pledge of allegiance.³⁷ Today the leading case on freedom of expression under both the first and fourteenth amendments is *Tinker v. Des Moines*,³⁸ allowing students to wear black armbands to protest United States participation in the war in Vietnam. However, although these cases have begun the trend of broadening minors' rights, they are not privacy cases, not even medical cases.

On the other hand, there have long been recognized exceptions to the common law consent doctrine for medical treatment in general, such as emergencies, emancipation or marriage of the minor, judicial decrees,³⁹ and a rule adopted by some courts excepting "mature" minors even if they are not emancipated."⁴⁰ Many states now have statutes relaxing the parental consent doctrine, but whether or not they extend such language as "care related to pregnancy" to include abortion is often ambiguous.⁴¹ Ultimately,

³³ 84 Wash. 2d at 909-10, 530 P.2d at 266.

³⁴ 405 U.S. at 447, 450-51. See also Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 26-30 (1972).

³⁵ 84 Wash. 2d at 910, 530 P.2d at 266.

³⁶ *In re Gault*, 387 U.S. 1, 13 (1967).

³⁷ *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

³⁸ 393 U.S. 503 (1969).

³⁹ Pilpel, *supra* note 17, at 464-65.

⁴⁰ *Id.* at 466. See also MISS. CODE ANN. § 7129-81 (Supp. 1971). See generally the table of statutes on treating minors without parental consent in Pilpel, *supra* note 17, at 472-87.

⁴¹ Such legislation is analyzed in Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305, 311-13 (1974).

it appears that the constitutional principles expand more rapidly by case law than by legislation.⁴²

A further reason the courts have responded more and more favorably to women's—including minor women's—pleas for liberal abortion laws is the evidence piling up on judges' desks of the physical, psychological, and social problems that are exacerbated by restrictive abortion laws.⁴³ There is evidence in the *Roe* and *Doe* opinions that at least some justices pay attention to such documentation.⁴⁴ The *Koome* court also shows awareness of these problems.⁴⁵

The statistics on the physical dangers of childbearing differ somewhat depending on the study,⁴⁶ but it is easy to conclude from them that abortion in early pregnancy is safer than childbirth.⁴⁷ The teenager's pregnancy and childbirth are especially risky at nearly all stages, for both mother and child.⁴⁸ If the unmarried teenage mother and her child do survive the birth physically intact, the social and psychological problems of both produce a dismal narrative, often beginning with the mother dropping out of school and ending with a neglected or abused child.⁴⁹

⁴² Even before relaxing the law on abortion, Washington had allowed a minor to be permanently sterilized without parental consent. *Smith v. Seibly*, 72 Wash. 2d 16, 431 P.2d 719 (1967). Since the effects of that operation on the patient are likely to be far more radical than those of an abortion, it is at least possible to speculate about a subsequent line of cases allowing other types of medical treatment not essential to preserve life, such as cosmetic surgery, orthodontic treatment, and a wide variety of other both surgical and non-surgical procedures.

⁴³ *E.g.*, see the heavily documented briefs *amicus curiae* favoring legalized abortion submitted to the Supreme Court in *Roe and Doe*, in 4 LAW REPRINTS, No. 3 (Criminal Law Series, 1972/1973 Term).

⁴⁴ *E.g.*, 410 U.S. at 153; 410 U.S. at 216-17.

⁴⁵ 84 Wash. 2d at 905, 530 P.2d at 263.

⁴⁶ The maternal death rate from legal abortion in New York after legalization in 1971 was 3.7 per 100,000 abortions, less than half of the death rate for live deliveries. PLANNED PARENTHOOD FED'N OF AMERICA, THE NEW YORK ABORTION STORY 22 (1972). Hawaii had no reported maternal deaths from any of the 3,643 legal abortions performed the first year after liberalized abortion legislation. UNIV. OF HAWAII, REPORT TO THE LEGISLATURE: ABORTION IN HAWAII: THE FIRST YEAR 7 (1971). The New York infant mortality rate in 1971 was the lowest ever recorded in that state, 18.7 per 1,000 live births. NEW YORK STATE DEP'T OF HEALTH, REPORT ON INDUCED ABORTIONS RECORDED IN NEW YORK STATE JANUARY-DECEMBER, 1971 1-2 (Aug. 1972).

⁴⁷ Tietze, *Mortality with Contraception and Induced Abortion*, 45 STUD. IN FAM. PLANNING 6 (1969) (giving maternal mortality rate for therapeutic abortion of three per 100,000 in contrast to the maternal mortality rate for pregnancy and childbirth at 20 per 100,000).

⁴⁸ Anderson, Jense, Mosher & Richter, *The Medical, Social and Educational Implications of the Increase in Out of Wedlock Births*, 56 AM. J. PUB. HEALTH 1868, 1869 (1966).

⁴⁹ Beck, *Abortion: The Mental Health Consequences of Unwantedness*, in ABORTION—CHANGING VIEWS AND PRACTICE 53, 57-62 (R. Sloane ed. 1971); M. LaBarre, *The Triple Crisis: Adolescence, Early Marriage and Parenthood, Part I—Motherhood*, in NAT'L COUNCIL ON ILLEGITIMACY, THE DOUBLE JEOPARDY, THE TRIPLE CRISIS—ILLE-

There is a further point to consider. Many a young unwed but pregnant woman *will* get an abortion rather than have that narrative tell her life story, whether the law gives her permission or not. Without the medical safeguards that legal abortion provides, the dangers of self-induced and illegally obtained abortions are staggering;⁵⁰ not only is the mortality rate much higher than for legal abortions,⁵¹ but so also is the rate of adverse side effects, including both serious disease⁵² and permanent sterility.⁵³

The *Koome* court, although not the first to do so, has taken a major step to ameliorate this more than dismal situation. The remaining question, of course, is whether *Koome* will serve to induce other states to strike remaining restrictive legislation, or whether, in spite of its liberal holding, the opinion will provide other states with a method for saving such legislation. Not only does *Koome* indicate that carefully drafted legislation can enable efficient juvenile courts to intervene when parents capriciously refuse consent to a pregnant minor in serious physical need of an abortion,⁵⁴ but the majority also implicitly recommends keeping the legislation but softening it to require only parental consultation rather than consent.⁵⁵ Further, in support of this proposition, the court cites *Coe v. Gerstein*,⁵⁶ the Florida case removing a consent provision.

What the consultation scheme ignores, however, is that the unmarried pregnant teenager is likely to have strong reasons not to tell her parents of her pregnancy in the first place. If this is so, forcing her to consult them before obtaining an abortion invades her privacy scarcely less than forcing her to obtain their consent; it is also just as likely to lead her to criminal abortion or the exacerbated dangers of childbearing. Her best interests would often be better served by encouraging her to consult a physician pursuant to an abortion involving the physician's professional judgment and the patient's informed consent.⁵⁷

GITIMACY TODAY 11 (1969); Schwartz, *Abortion on Request*, in ABORTION, SOCIETY & THE LAW 139, 158 (F. Walbert & J. Butler eds. 1973).

⁵⁰ N. LEE, THE SEARCH FOR AN ABORTIONIST 78-102 (1969).

⁵¹ Hall, *Commentary*, in ABORTION AND THE LAW 228 (D. Smith ed. 1967).

⁵² Reid, *Assessment and Management of the Seriously Ill Patient Following Abortion*, 199 J.A.M.A. 805 (1967).

⁵³ ROMMER, STERILITY: ITS CAUSE AND ITS TREATMENTS 59 (1952).

⁵⁴ 84 Wash. 2d at 905-06, 530 P.2d at 264 (and stressed by the dissent).

⁵⁵ *Id.* at 909-10, 530 P.2d at 266, 268.

⁵⁶ 376 F. Supp. at 699.

⁵⁷ Nowhere does the *Koome* court distinguish between the 16-year-old who gave rise to the case and younger females. A court wanting to make that distinction in order to retain the parental consent requirement for a younger female could point out that the MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962) defines felonious intercourse as "illicit intercourse with a girl below the age of 16." In § 213.6(1) (Proposed Official Draft, 1962) reasonable mistake as to age is given as a specific defense to the charge of

If other states recognize that both the minor's and the community's best interests would be served by relaxing parental control,⁵⁸ especially in a situation which inherently suggests that the parents have already lost control, other courts can look to *Koome* to sustain the propositions that "parental prerogatives . . . are not absolute and must yield to fundamental rights of the child or important interests of the State"⁵⁹ and that "the State's interest in restricting minors' access to abortions [is] inadequate to satisfy the requirements of due process under *Roe* and *Doe*."⁶⁰

Ultimately, since the right to privacy is not yet consistently applied to minors, the courts will forge ahead on more solid ground if they strike down the restrictive consent statutes for violations of due process and equal protection; however, these very violations are more amenable to further corrective legislation than are violations of the right to privacy. The former violations have more to do with procedural matters of implementation while the latter are substantive, going to the essential purpose of the statutes. Consequently, it is possible that if conservative legislatures learn from *Koome* and other similar cases to correct the due process and equal protection violations, the trend may reverse. With only their unsettled privacy right to protect them, minors could easily lose the stronghold ostensibly won in *Koome*.

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rape except when the female is under 10. However, if coitus would be dangerous to such a young child, presumably child-bearing would be even more so.

⁵⁸*Ballard v. Anderson*, 4 Cal. 3d 873, 880, 484 P.2d 1345, 1350, 95 Cal. Rptr. 1, 6 (1971).

⁵⁹ 84 Wash. 2d at 907, 530 P.2d at 264.

⁶⁰ *Id.* at 909, 530 P.2d at 266.