Constitutional Law—Blanket Parental Consent Requirement for Minor's Abortion Decision Is Unconstitutional. *Planned Parenthood v. Danforth,* 96 S. Ct. 2831 (1976).

Three days after the passage of the Missouri Abortion Act, the plaintiffs instituted an action against the Attorney General of Missouri and the Circuit Attorney of St. Louis to obtain declaratory relief and to enjoin enforcement of the Act.[1] The plaintiffs contended that certain of its provisions deprived them and their patients of various constitutional rights. The plaintiffs alleged, among other things,[2] that section 3(4) of the Act,[3] which prohibited performance of an abortion on an unmarried woman under the age of eighteen except with the written consent of one parent or person *in loco parentis* of the woman, violated certain constitutional safeguards enunciated in recent Supreme Court decisions.[4] The case was heard before a three-judge district court[5] that upheld the parental

1. Planned Parenthood v. Danforth, 96 S. Ct. 2831 (1976). The plaintiffs were: (1) Planned Parenthood, a non-profit organization that maintains facilities for abortions, (2) Dr. David Hall, a licensed physician and supervisor of abortions at Planned Parenthood, (3) Dr. Michael Frieman, a licensed physician who has performed abortions in St. Louis. The Supreme Court denied Planned Parenthood standing to sue. Plaintiffs also purported to represent the entire class of physicians and surgeons in Missouri who presently perform abortions and also the entire class of patients in Missouri desiring to have abortions performed upon them. Defendants represented the class of all prosecuting attorneys in the State of Missouri. *Id.* at 2835.

2. The issues under attack that will not be discussed in this note were: (1) The Court ruled that the Act's definition of viability was consistent with Roe v. Wade, 410 U.S. 113, 160, 163 (1973). (2) The Court held the provision that required the woman's prior written consent to an abortion was constitutional. (3) The spousal consent requirement was held unconstitutional. (4) The prohibition of the saline amniocentesis method was held to be unconstitutional. (5) The Court upheld the constitutionality of the reporting and recordkeeping requirements as not interfering with the abortion decision. (6) The provision requiring the physician to preserve the fetus' life and health at every stage of pregnancy was ruled unconstitutional. Planned Parenthood v. Danforth, 96 S. Ct. 2831, 2836 (1976).

3. Missouri H.C.S. House Bill No. 1211 [hereinafter cited as the Act]. Section 3(4) of the Act is as follows:

> No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except with the written consent of one parent or person *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.

4. Planned Parenthood v. Danforth, 96 S. Ct. 2831, 2841 (1976). Although the plaintiffs' argument against section 3(4) is not clearly enunciated, they apparently made the same arguments against that section as they did against section 3(3). To section 3(3), plaintiffs argued that the requirement of the husband's consent acted as a unilateral veto to his wife's abortion decision. Plaintiffs also argued that the husband's consent may not always be obtainable because of the inability to locate him.

5. *Id.* at 2836. The three-judge district court was convened pursuant to 28 U.S.C. §§ 2281, 2284 (1970).

consent provision on the basis that the state had a compelling interest in protecting the authority of the family relationship.[6] The Supreme Court reversed the district court's judgment on section 3(4) and held that a compelling state interest did not exist to override the minor's constitutional right of privacy.[7]

The primary issue faced by the Court in *Planned Parenthood v. Danforth* was whether the state could impose a blanket provision, as in section 3(4), requiring the consent of a parent or person *in loco parentis* as a condition precedent for abortions of all unmarried minors during the first twelve weeks of pregnancy.[8] The defendants argued that this provision should be upheld because the State of Missouri has recognized through various other statutes that minors cannot, or often do not act within their best interests or the public's interest.[9] Therefore the state could impose more stringent limitations on minors than are permissible for adults. The defendants also contended that the state had an interest in safeguarding the family unit and parental authority. They claimed that parental discretion should be and, in fact, has been safeguarded from unwarranted interference by section 3(4).[10]

The plaintiffs contended that section 3(4) was both unconstitutional as an unwarranted invasion of privacy and unreasonable in light of other Missouri statutes. The plaintiffs first argued the consent statute was an unwarranted invasion of a patient's abortion decision in consultation with a doctor. Plaintiffs also contended the deprivation of the pregnant minor's power to make an abortion decision was unreasonable in light of other medical treatment an unmarried minor could obtain by consent under Missouri laws. In addition, if this minor was married with parental consent, she could legally terminate her pregnancy without the approval of her parents.[11]

In reaching its decision, the Court accepted the defendant's argument that the state could exert more stringent limitations on

6. Planned Parenthood v. Danforth, 392 F. Supp. 1362 (E.D. Mo. 1975), *aff'd in part, rev'd in part*, 96 S. Ct. 2831 (1976).

7. Planned Parenthood v. Danforth, 96 S. Ct. 2831, 2843 (1976).

8. *Id.* at 2843.

9. Statutes prohibiting the sale of firearms and deadly weapons to minors without their parents' consent; restricting the type of literature available to minors; prohibiting the purchase of property by pawnbrokers from minors; and statutes proscribing the sale of cigarettes and alcohol to minors. *Id.* at 2842.

10. *Id.* at 2843.

11. *Id.* Although this contention seems to raise the question of equal protection, it was not discussed by the Court in that context.

minors than are permissible with adults; however, the Court pointed out that minors, like adults, have fundamental constitutional rights that can only be invaded if a compelling state interest exists.[12] The Court was unable to find a state interest sufficient to sustain a parent's absolute veto power over an abortion decision made by a minor woman and her physician. The Court concluded that this veto power would not enhance the family unit or improve the parents' authority, but rather would actually have the converse effect.[13] The Court noted, however, that not every minor, regardless of age and maturity, may give effective consent to an abortion.[14] Finally, the Court held that the state, absent a compelling state interest, could not give a parent an absolute veto over the joint abortion decision of a minor and her physician, regardless of the reason the parents have for withholding their consent.[15]

The dissent in *Danforth* took the position that the majority opinion misunderstood the actual purpose of the parental consent requirement.[16] The dissent believed that the purpose of this requirement was to assist the pregnant minor in making a decision she might be ill-equipped to make.[17] The State of Missouri had decided that the most appropriate way to achieve this purpose would be through parental consent and consultation. As a result, the dissenting Justices concluded that this requirement of parental consent in the abortion decision for minors was within the power of the State.[18]

The Court's decision in *Danforth* was preceded, three years earlier, by another major decision on abortion. In *Roe v. Wade*,[19] the Supreme Court concluded that the abortion decision of a female is protected by the penumbral right of privacy.[20] The Court noted,

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12. *Id.*

13. *Id.* at 2844.

14. *Id.*

15. *Id.*

16. The dissenting opinion was written by Justice White. His opinion was joined by Chief Justice Burger and Justice Rehnquist. *Id.* at 2851-55 (dissenting opinion). In a separate opinion, Justice Stevens dissented on the ground that the abortion decision was so important the State was justified in attempting to direct the pregnant minor into the best possible and most knowledgeable decision. *Id.* at 2856-57.

17. *Id.* at 2853. (White, J., dissenting).

18. *Id.* In a concurring opinion, Justices Stewart and Powell expressed their concern that many minors may be unable to make an intelligent abortion decision without some guidance and advice from parents or others. They also cautioned that abortion clinics do not give the quality of counseling deemed necessary. *Id.* at 2850, 2851 (concurring opinion) (Stewart & Powell, JJ., concurring).

19. 410 U.S. 113 (1973).

20. *Id.* at 152-53. A penumbral right is a right that is derived from several express

however, that this right to abort is not absolute. Rather, the right to terminate one's pregnancy must be weighed against compelling state interests.[21] Two such interests found by the Court in *Roe* were the protection of the pregnant woman's health and the protection of potential life.[22]

The Court in *Roe* considered the right of an adult female to an abortion. When the issue is the abortion decision of a minor, the courts must also contend with the additional interest of the parents.[23] In *Danforth,* the state advanced the parents' interest in raising their children as they see fit as a compelling state interest to justify the parental consent provision.[24] These parental consent requirement statutes, however, have not met with favorable receptions in other courts. In fact, the decisions of several courts have cast considerable doubt on their validity.[25]

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provisions of the Constitution. *Id.* The importance of this right was enunciated by the Supreme Court in Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

> If the right of privacy means anything it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusions into matters as fundamentally affecting a person as the decision whether to bear or beget a child.

See also Skinner v. Oklahoma, 316 U.S. 535 (1942).

21. Roe v. Wade, 410 U.S. 113, 154 (1973).

22. *Id.* at 162.

23. This parental interest may reach constitutional dimensions when it concerns the right of parents to raise their children as they see fit. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

24. The original foundation for parental-consent abortion provisions came from the common law doctrine of parental consent that concerned minors and their medical treatment. According to this doctrine, if a physician failed to obtain parental consent, any touching that occurred constituted a technical battery. This result was based not only on the rule that minors could not be held liable on their personal contracts, but also on the belief that most minors were unable to make intelligent decisions. Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941). To this general rule that parental consent was necessary for a minor to receive medical treatment, the courts developed three exceptions. These exceptions are most commonly known as: (1) the emergency exception, Luka v. Lowrie, 171 Mich. 122, 136 N.W. 1106 (1912), (2) the emancipated minor exception, Smith v. Seibly, 72 Wash. 2d 16, 21, 431 P.2d 719, 723 (1967), and (3) the mature minor exception, Younts v. St. Francis Hosp. & School of Nursing, Inc., 205 Kan. 292, 301, 469 P.2d 330, 337 (1970). *See also* 29 OKLA. L. REV. 145-48 (1976). The mature minor exception is the most recent one to be developed by the courts, and probably the most relevant to the Court's decision in *Danforth.* Under this exception, the court examines various elements surrounding the case, and if it concludes that the minor had the requisite maturity to consent to the medical treatment, no battery will result. *See generally* Note, *The Minor's Right to Abortion and the Requirement of Parental Consent,* 60 VA. L. REV. 305, 309 (1974) [hereinafter cited as *Minor's Right to Abortion*].

25. Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975); Doe v. Zimmerman, 405 F. Supp. 534 (M.D. Pa. 1975); Planned Parenthood v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975); Foe v. Vanderhoof, 389 F. Supp. 947 (D. Colo. 1975); Wolfe v. Schroering, 388 F. Supp. 631 (W.D.

In *Poe v. Gerstein,*[26] the Fifth Circuit struck down a Florida parental-consent abortion provision on the ground that no compelling state interest existed for the restriction. The *Poe* court stressed that it is the minor, not the parents, who would be legally responsible for the newborn child and that it should be the minor's decision whether to bear such a responsibility.[27] The court in *Poe* recognized that minors, as compared to adults, may be subject to more stringent limitations on their rights in general. But the court concluded that what must be emphasized in the determination of the availability of rights to minors is the nature of the right itself.[28] From an examination of *Roe,* the *Poe* court determined that a woman's right of privacy includes a right to an abortion. The *Poe* court further pointed out that "the need for the right and the dire consequences of its denial—would certainly dictate the availability of the right to minors."[29] Some of the dire consequences of the denial of this fundamental right, the court stated, include the stigma of unwed motherhood, the unfavorable physiological as well as psychological effects upon the minor-mother and her child, and the need to drop out of school.[30]

In *State v. Koome,*[31] the Washington Supreme Court followed the rationale of the *Poe* court to invalidate a Washington state parental consent for abortion provision on the grounds that it violated the due process and equal protection clauses of the fourteenth amendment. The *Koome* court noted that under the parental consent provision, the state improperly allowed parents to withhold consent on the basis of their personal religious belief, whim, or even hostility toward their child's best interests.[32] In addition, the court reasoned that the statute unduly discriminated between married and unmarried minors.[33] The court also concluded that the age of fertility represented a "practical minimum age requirement for consent to abortion."[34] The court further pointed out that the abortion decision would in fact be the pregnant minor's first parental deci-

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Ky. 1974); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973); State v. Koome, 84 Wash. 2d 901, 530 P.2d 260 (1975).

26. 517 F.2d 787, 794 (5th Cir. 1975).
27. *Id.* at 793.
28. *Id.* at 790.
29. *Id.* at 791.
30. *Id.*
31. 84 Wash. 2d 901, 530 P.2d 260 (1975).
32. *Id.* at ___, 530 P.2d at 265.
33. *Id.* at ___, 530 P.2d at 266.
34. *Id.* at ___, 530 P.2d at 267.

sion, and that therefore the consent of her parents was not necessary.[35] The *Koome* court nevertheless indicated that a provision allowing parents to prevent an abortion in the best interests of their daughter might be sustainable.[36]

A three-judge federal district court in *Wolfe v. Schroering*[37] invalidated a Kentucky parental-consent abortion statute on the ground that it did not have the daughter's best interests in mind. The *Wolfe* court pointed out that this provision allowed a parent to withhold consent for any reason at all, even one unrelated to the health of the mother or fetus.[38] The court in *Wolfe* stated that it adopted the conclusion of the court in *Doe v. Rampton,*[39] that the woman's right to an abortion cannot be subject to the consent of others.[40] The *Rampton* decision, cited in *Wolfe,* had struck down a Utah parental-consent abortion provision.[41] In a concurring opinion in *Rampton,* it was noted that family advice and counseling might be more important than the pure medical diagnosis of the physician. The concurring judge concluded, however, that the Supreme Court in *Roe* made it clear that the woman's right to an abortion, whether she be an adult or a minor, was fundamental. Therefore, the right could not be abridged except by a compelling state interest.[42]

Planned Parenthood v. Danforth[43] is basically an adoption of the reasoning of the preceding decisions as the correct law by the Supreme Court. The Court in *Danforth* also recognized that it was not within the State's power, absent a compelling interest, to override a minor's fundamental right to an abortion. The Court's reasoning, however, is difficult to find. The *Danforth* Court states that it

35. *Id.* at ____, 530 P.2d at 265.

36. The court in *Koome* indicated that a statute requiring a pregnant minor to consult with her parents prior to the abortion would probably be permissible. The *Koome* court also noted that it might sustain a statute allowing the parents to prevent their daughter from procuring an abortion if the parents were able to show that it would not be within the best interests of the daughter to have the abortion. *Id.* at ____, 530 P.2d at 268.

37. 388 F. Supp. 631, 636-37 (W.D. Ky. 1974).

38. *Id.*

39. 366 F. Supp. 189 (D. Utah 1973); Wolfe v. Schroering, 388 F. Supp. 631, 636-37 (W.D. Ky. 1974).

40. Doe v. Rampton, 366 F. Supp. 189, 193 (D. Utah 1973).

41. *Id.*

42. *Id.* at 203. The opinions in *Rampton* and *Wolfe* are quite interesting in that both discuss the abortion parental consent issue in a very limited fashion. The *Wolfe* court nevertheless explicitly stated that it adopted the reasoning of the *Rampton* court. A reading of *Rampton,* however, indicates that only a concurring judge set forth any reasoning at all to support the court's holding.

43. 96 S. Ct. 2831 (1976).

agrees with the rationale of the courts in *Poe, Koome, Wolfe,* and *Rampton* in holding that a State does not have the power to statutorily impose a blanket parental consent provision.[44] Yet the Court fails to expand on this rationale or give its reasons for supporting it; therefore, the Court's reasoning and rationale can only be derived from the above named cases.

On the basis of those four cases, it appears that the Court in *Danforth* reasoned that the right to an abortion must be extended, at least to mentally mature minors,[45] because of the dire consequences of a denial of the right.[46] The Court apparently was of the opinion that the minor's right to an abortion was fundamental and that no state interest was put forth that was sufficiently compelling to override this fundamental right. It appears, however, that the Court's holding is very limited. The *Danforth* Court has given itself much leeway for future decisions in emphasizing in its opinion that it strikes down only what the Court calls a "blanket" parental consent provision.[47] This kind of language may indicate that the Court has opened the way for state legislatures to draft parental consent requirements that would assert a "sufficient justification"[48] for such a requirement. Exactly what justification would be "sufficient," however, is not explained.

The *Danforth* opinion directly confronts the parental consent issue yet fails to answer a number of important questions. For example, the Court's statement that not every minor, regardless of age or maturity, may give effective consent to abortion would seem to indicate that an immature minor might still be legally subjected to a parental consent requirement. This, in turn, raises the question of who will make the determination whether a minor is mature and capable of making an intelligent, informed decision.[49] Some have suggested that the physician should be the one to assess the minor's

44. *Id.* at 2843.

45. See note 14 *supra* and accompanying text.

46. See note 28 *supra* and accompanying text.

47. Planned Parenthood v. Danforth, 96 S. Ct. 2831, 2843 (1976).

48. *Id.* at 2844.

49. Another related problem is what elements should be considered to determine one's maturity. Obviously age is one factor to consider. Other possible factors to consider are intelligence, education, training, experience, past decision making ability, economic well-being, economic dependence or independence, and freedom from control of parents. Smith v. Seibly, 72 Wash. 2d 16, 21, 431 P.2d 719, 723 (1967). After scanning these factors though, it appears that many of them would have to be evaluated by someone who has had substantial contact with the young female.

maturity.[50] It is questionable, however, whether a physician could honestly make this decision if he were to see a particular patient only once or twice a year and then only for a very short time period. In addition, many physicians simply do not have the required training to give such advise and counseling.[51] Further, a minor's failure to obtain one physician's consent to an abortion does not preclude her from persuading some other physician of her maturity and need for an abortion. As a corollary, with today's prevalent malpractice suits, it is foreseeable that all doctors may shun away from performing legal abortions if their evaluation of the minor's maturity may subject them to civil liability for malpractice at a later time.[52] It would seem possible, therefore, that placing the physician in the role of "maturity determinator" might ultimately result in forcing pregnant minors into risky illegal abortions.

Others have suggested that the determination whether a minor had the requisite maturity and intelligence to make an informed decision on abortion could be made through judicial intervention.[53] This method, however, appears to be an even less appealing alternative than a decision by the physician. Here, the minor would be faced with the delays and costs of litigation as well as the publicity and anxiety of a court confrontation with her parents.[54]

Although the Court's statement that not every minor is mature enough to give effective consent would seem to require a determination on maturity, the holding of the Court was simply that the Missouri parental consent requirement was unconstitutional. As a result, in Missouri at least, an abortion may be had on the basis of the minor's decision and the consent of the physician who performs the operation. Therefore, other than the possible determination of maturity previously discussed, the Court apparently concluded that no evaluation of the propriety of the abortion decision should be made by anyone other than the minor and her physician.

Ideally, a pregnant unwed minor should seek the advice and consent of her parents if she is considering an abortion. Such con-

50. State v. Koome, 84 Wash. 2d 901, 530 P.2d 260, 265 (1975); *see, e.g., Minor's Right to Abortion, supra* note 22, at 332; *cf.* Pilpel & Zuckerman, *Abortion and the Rights of Minors*, 23 CASE W. RES. L. REV. 779, 807 (1972).

51. Doe v. Rampton, 366 F. Supp. 189, 203 (D. Utah 1973).

52. State v. Koome, 84 Wash. 2d 901, 530 P.2d 260, 265 (1975). *See generally* 9 SUFFOLK L. REV. 841, 868-69 (1975).

53. The state made this contention in *Koome*, referring to WASH. REV. CODE ANN. § 13.04.010(12) (1962). State v. Koome, 84 Wash. 2d 901, 530 P.2d 260, 264 (1975).

54. *Id.*

sultation, however, may not always be forthcoming in many daughter-parent relationships because of the emotional, moral, and religious repercussions involved in such a decision. It is within this sensitive area that the abortion parental consent requirements are subject to the most controversy. The *Danforth* Court tried to deal with this difficult area by attempting to ascertain whether the interests of the parents and the state presented a compelling state interest sufficient to overcome the minor's right of privacy to make the abortion decision. In reaching its holding that blanket parental consent provisions such as section 3(4) are unconstitutional, the Court gave very little guidance to the lower courts and state legislatures on what standards to apply in fashioning a valid statute. Quite possibly the Court felt that it was forced into such an imprecise holding because of its own uncertainty on the issue. Apparently the Court in *Planned Parenthood v. Danforth*[55] took a wait and see approach about what standards could be developed by the lower courts and state legislatures. Because states such as Missouri will probably try to redraft their parental-consent abortion statutes to conform with the Court's opinion, the issue is not fully resolved.[56] Rather, it is an issue that undoubtedly the Supreme Court will be faced with again.

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55. 96 S. Ct. 2831 (1976).

56. In Texas, see TEX. FAM. CODE ANN. § 35.03(a)(4) (1974), which provides that an unmarried pregnant minor may consent to hospital, medical, or surgical treatment, other than abortion, related to her pregnancy. *See generally* 5 TEX. TECH L. REV. 506-08 (1974). The Court's decision in Planned Parenthood v. Danforth, 96 S. Ct. 2831 (1976), sounds a clear warning to the Texas state legislature and courts that the exception presently contained in § 35.03(a)(4) is constitutionally invalid.